IRRECONCILABLE COLLECTIVE ACTION PARADIGMS: *SÃO PAULO PUBLIC MINISTRY V. NOTRE DAME ASSOCIATION* AND *DUKES V. WAL-MART*

COMMENT

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INTRODUCTION

COLLECTIVE ACTION MECHANISMS EXIST IN BOTH THE BRAZILIAN CIVIL LAW system and U.S. Common Law system. However, these mechanisms differ in both their legal foundation and breadth. The Brazilian collective action mechanism finds its legal foundation in the Federal Constitution and Consumer Code. Article 129 of the Brazilian Constitution expressly requires the Public Ministry, an independent governmental body composed of public prosecutors, "to conduct civil inquiries and file public civil actions to protect public and social property, the environment, as well as other diffuse and collective interests."[1] The Brazilian Consumer Code "expands and consolidates the [Public] Ministry's duty to defend such interests;"[2] it stipulates that:

> The defense shall operate collectively when the following interests or rights are at stake:

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1 CONSTITUIÇÃO FEDERAL art. 129(III) (Braz.).

2 São Paulo Pub. Min. v. Notre Dame Ass'n, RE-163231 (Plenum) (Sup. Ct.) (Braz.) (1997), translated and reprinted in ÁNGEL OQUENDO, LATIN AMERICAN LAW 751-60 (2011).

> (I) diffuse interests or rights, which are trans-individual, as well as indivisible, and pertain to an indeterminate group of people linked by common issues of fact;
> (II) collective interests or rights, which are trans-individual, as well as indivisible, and pertain to an indeterminate group, category, or class of people linked to each other or to the opposing party by virtue of a legal relationship;
> (III) homogeneous individual interests or rights, which stem from a common origin.[3]

The legal foundation for collective or class actions in the U.S. stems from rule 23 of the Federal Rules of Civil Procedure. Class actions are controlled by the instructions provided in said rule and corresponding case law. Rule 23(a) states that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.[4]

I. FUNDAMENTAL DIFFERENCES BETWEEN THE BRAZILIAN AND U.S. COLLECTIVE ACTION MECHANISMS

From the outset, one can observe notable differences between the Brazilian and U.S. collective actions mechanisms. First, the Brazilian collective action mechanism holds constitutional rank, while the U.S. mechanism stems from a statute. Second, rule 23 provides the mechanism for private parties to pursue class actions. In Brazil, the Public Ministry is designated as proper body to pursue collective actions, even if what they intend to uphold are strictly private interests. Notwithstanding, one could argue that the U.S. Attorney General and government agencies, in many cases, defend the collective interests of U.S. citizenry. Third, the Brazilian system imposes a positive obligation on the Public Ministry to pursue collective actions; rule 23 merely permits the pursuit of class actions. Furthermore, rule 23 utilizes a restrictive language in its authorization of class actions ("*only if*"). As we will see in the next section, corresponding U.S. case law has advanced a restrictive approach to class action suits. On the other hand, Brazilian case law has expanded the reach of collective action mechanisms.

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3 Consumer Cd., L. 8078 (Braz.) (1990), Art. 81(1).

4 FED. R. CIV. P. 23(a).

II. *SÃO PAULO PUBLIC MINISTRY V. NOTRE DAME ASSOCIATION* AND *DUKES V. WAL-MART*: CLASH OF PARADIGMS?

Comparing *Notre Dame*[5] and *Dukes*[6] gives us the opportunity to distinguish two different paths taken in relation to collective actions. The comparison evinces that the U.S. Supreme Court has adopted a restrictive approach, considered by some even as hostile posture, towards class actions,[7] while the Supreme Federal Court of Brazil has adopted an expansive interpretation of the legal foundations for collective actions and, therefore, a much more permissive stance.

A. São Paulo Public Ministry v. Notre Dame Association

In *Notre Dame*, the Public Ministry brought suit against the Notre Dame Association for Education and Culture for charging excessive educational fees in contravention to the standards established by the State Education Council. The Public Ministry brought the suit in representation of the students' parents' interests. Although the main controversy revolved around the Public Ministry's legal standing to represent the parents, the Supreme Federal Court of Brazil, in particular justice Maurício Corrêa, seized the opportunity to make comprehensive expressions regarding the Brazilian class action paradigm. Justice Corrêa discussed the three types of collective interests present in the Brazilian legal system: diffuse interests, collective interests, and homogenous interests. He distinguished diffuse interests, where "*indeterminacy* is the fundamental characteristic, and collective interests, where interests pertain to a determinate group of people who share a legal relationship."[8] Furthermore, Corrêa asserted that "homogenous interests actually do not constitute a third category, but rather a peculiar modality that would fit within the contours of either diffuse or collective interests."[9] Finally, the Supreme Federal Court concluded that the Public Ministry was entitled (*i.e.,* had standing) "to litigate on behalf of . . . inalienable diffuse, collective, and individual interests."[10]

B. Dukes v. Wal-Mart

In *Dukes*, a group of low-level female employees filed a class-action suit against employer Wal-Mart alleging that the company violated their civil rights by instituting nationwide policies that discriminated against women by paying

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5 *Notre Dame*, RE-163231.

6 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

7 *See* Jenna C. Smith, *"Carving At The Joints": Using Issue Classes To Reframe Consumer Class Actions*, 88 WASH. L. REV. 1187 (2013).

8 *Notre Dame*, RE-163231, translated and reprinted in OQUENDO 849.

9 *Id.*

10 *Id.*

them lower wages and delaying their promotions, in comparison to men. The District Court for the Northern District of California determined that the plaintiffs fulfilled the statutory requirements of rule 23(a) (numerosity, commonality, typicality and adequacy requirements) and rule 23(b)(2) and,[11] therefore, certified a class composed of 1.5 million women, the largest in U.S. history. The U.S. Court of Appeals for the Ninth Circuit upheld the certification.

The Supreme Court reversed the lower court's ruling concluding that: 1) plaintiffs' evidence was insufficient to satisfy the rule 23(a) commonality requirement, and 2) that certification of plaintiffs' class under rule 23(b)(2) was inappropriate because plaintiffs sought monetary relief as part of their claim. The Court upheld a stringent interpretation of the commonality requirement (*heightened commonality requirement*). The Court affirmed that the commonality requirement is not met by merely alleging that class members "have all suffered a violation of the same provision of law."[12] The claims "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor."[13] Furthermore, the common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[14] The Court determined that plaintiffs did not meet the heightened commonality requirement (*i.e.*, they did not establish the existence of a common question), because they "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy."[15]

C. Comparison

The differences in these cases are obvious. In Notre Dame, plaintiffs were afforded the right to litigate as a class and, moreover, be represented by the Public Ministry. In contrast, in Dukes, plaintiffs were denied the possibility of litigating as a class. This has drastic effects when facing an economic powerhouse. The prospect of having to individually litigate versus an economic behemoth such Wal-Mart surely dissuades reclamation of employee rights.

This leads us to the following question: would the Supreme Federal Court of Brazil have resolved *Dukes* in the same way? Basing my analysis solely on the Court's opinion in *Notre Dame*, I believe not. I believe that, at worst, *Dukes'* plaintiffs' class interests would have been classified as homogenous individual interests or rights since these stem from a common origin—Wal-Mart's alleged

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11 Rule 23(b)(2) requires that plaintiff establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

12 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

13 *Id.*

14 *Id.*

15 *Id.* at 2556.

discriminatory practices. It should be noted that, as was education in *Notre Dame*, protection against sex discrimination is constitutionally guaranteed in the U.S. pursuant to the equal protection clause of the Fourteenth Amendment,[16] and statutorily guaranteed pursuant to Title VII of the Civil Rights Act of 1964.[17]

CONCLUSION

In the U.S., as evinced in *Dukes*, the pursuit of class actions has been encumbered by implementation of a heightened commonality requirement. On the other hand, collective actions in Brazil may be pursued for a wide variety of interests. Brazilian statutory provisions and jurisprudence promote flexibility for the pursuit of class actions. This has the effect of ensuring access to justice for millions of Brazilian citizens.

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16 U.S. CONST. amend. XIV, § 6.

17 Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012).