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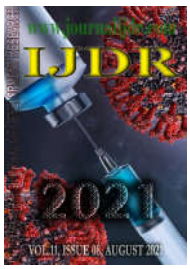

RESEARCH ARTICLE OPEN ACCESS

AMICUS CURIAE AND THE ENVIRONMENT

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ABSTRACT

This study seeks to analyze the institute of the *amicus curiae* within the scope of the Brazilian class action and the principle of popular participation. The question is whether the *amicus curiae* is an adequate instrument to foster participation and popular control in the environmental class actions. This study takes advantage of the legal-theoretical approach and deductive reasoning, along with a bibliographic research technique. At the end of the study we were able to show that the *amicus curiae* present themselves as a partially democratic instrument, one that is necessary for the development and improvement of a new democratic agent that more fittingly allows for better and more aligned participation and popular control over environmental demands.

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INTRODUCTION

From the mid-1970s onwards, the adaptation of the environment into a healthy one for the quality of life has become one of the most frequent guidelines within the international community. The concern with environmental protection considers the search for mechanisms capable of, at least, trying to lead humanity towards new ways of spreading the protection of environmental assets for present and future generations.

In Brazil, since 1988, the right to a balanced environment favorable to a healthy quality of life has been elevated to the status of a fundamental right, with the listing of environmental protection under the responsibilities of the state, as well as the entire community. This determination presents itself to the community and the state as a duty/right, considering that everyone is granted the right to a healthy environment while bearing with the duty of protecting it. Along this path, public participation in the promotion and protection of a balanced environment favorable to a healthy quality of life becomes both an unavoidable premise and a necessary and indispensable achievement.

The Democratic Rule of Law allows the whole of society to deliberately participate in decisions made by the Executive, Legislative, and Judiciary branches of the government. Concerning the bias of popular participation, this article aims to study the *amicus curiae* institute and its developments within the Brazilian scenario, especially regarding the investigation of its possible intervention in collective class actions. The (ir)relevance of the *amicus curiae*'s contribution to the democratic legitimacy will be investigated from the perspective of the Public Civil Action (*Ação Civil Pública* – ACP) and the Class Action (*Ação Popular* – AP), to enable a judicial debate in favor of a fair and equitable decision. We expect to answer the question: is the *amicus curiae* a legitimate instrument of democratic participation and control within the context of environmental class actions?. The research is justified insofar as it is essential for the academic environment and for society to understand the *amicus curiae* institute in a more precise and appropriate way, especially concerning its use in the area of environmental class actions. We want to propose more effective forms of social participation in civil environmental processes and to suggest judicial public policies that foster democracy. This article thus relies on the legal-theoretical approach and deductive reasoning, along with a bibliographic research technique, to elucidate the investigation. We start with a brief overview of the *amicus curiae*'s historical background and its developments within the Brazilian and international realms. Thus, a comparison of some aspects of the *amicus curiae* inside the North American system will be performed up to the concept's appearance in the Brazilian legal system. The following section covers the nuances and developments of the *amicus curiae* within the sphere of the 2015 Brazilian Code of Civil Procedure (*Código de Processo Civil* – CPC/2015).

The third section features exposes the environmental ACP and its specificities regarding the Brazilian legal scenario, its requirements, and discussions on its application; including the analysis of the subject of this study. Section four comprises a study on the environmental AP as a means to raise meaningful discussions on this constitutional remedy of a strictly democratic scope that allows citizens to inspect the Public Services and protect the environment. Finally, the fifth section summarizes the previous subjects to unveil whether or not the *amicus curiae* can be considered a tool of democratic substantiation and manifestation within the scope of environmental class action as an institute that enables the intervention by a third party interested in environmental law.

AMICUS CURIAE HISTORICAL BACKGROUND AND DEVELOPMENTS

Most legal scholars state that the *amicus curiae* originated from international law. There is no consensus, however, as to where this procedural figure was born, and most jurists admit that its genesis took place in Roman law: "the institute of the *amicus curiae* has its origin within the Roman law, having developed particularly within English medieval law" (CAMBI; DAMASCENO, 2015, p. 657, our translation). Other theorists point out that the institute has its birthplace in Rome: "from the analysis of the figure of the *amici curiae* we have it that their origin is uncertain: an initial theory indicates that they first appeared in Rome" (SILVA, 2018, p. 660). The *amicus curiae*'s background is, therefore, noticeably controversial among legal scholars. In Roman law, there was the Roman *consilliarius* – a person summoned by the magistrates to formulate a position concerning a specific case. This figure was similar to the *amicus curiae*, which in Roman law emerged in the process as a mere collaborator of the magistrate on demands that required knowledge beyond the legal realm. On the other hand, in English law "[…] from its beginning, the *amicus curiae* could appear spontaneously before the court and provide elements according to their belief, without the obligation of impartiality" (FIGUEIREDO, 2017, p. 241, our translation). Although there is some degree of controversy as to the origin of the *amicus curiae*; there seem to be no major contradictions regarding their development and improvement: "[…] regardless of clarity and accuracy as to their background, it is widely agreed that it was within North American law that the institute developed, improved, and reached visibility in the international scenario" (MATTOS, 2011, p. 15, our translation). Given these considerations, we can argue the existence of a scholarly consensus as to the fact that the development and improvement of the *amicus curiae* occurred within the scope of North American law, when their intervention was made possible in 1812 due to the trial of the case: *The Schooner Exchange vs. Mc Fadden*.[1] It is wise to consider that the *amicus curiae* achieved greater acceptance and development in the United States of America (USA) due to the country's legal system; that is, the *stare decisis*, a model where strength and respect for legal precedents arising from certain established cases, and which have binding force for subsequent analogous cases, prevail. In the same sense, Cabral states that: "the *amicus curiae*, or 'friend of the court', is an institute developed predominantly under *common law* due to the binding force of legal precedents […]" (CABRAL, 2016, p.330, our translation). We should clarify that the common law system is one that adopts customs as its main source of law via precedents established by the courts. Reversely, there is the civil law system, in which the laws were, and still are, its main source. The first evidence of the existence of the *amicus curiae* in Brazil dates from 1978, with the enactment of Law No. 6,616/78, that pushed article. 31 into Law No. 6,385/76, which provided for the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* – CVM).[2]

Through the provision, it is clear that the nomenclature *amicus curiae* was not expressly adopted by the legal provision. However, the act of enabling the subpoena of the CVM to offer its opinion, in the context of legal proceedings in cases within its competence, expresses the same idea that is characteristic of the *amicus curiae*. Subsequently, Law No. 8,197/91, in its article 2, also provided for the intervention of the Federal Union as a third party. This provision was subsequently amended by Law No. 9,469/97, article 5, which allowed for the Union to intervene in some situations.[3] Once again, we must highlight that the legal precept did not expressly provide for the nomenclature *amicus curiae* but evidenced premises related to the figure of the institute by allowing the intervention of the Federal Union in those cases. In its article 89, Law No. 8,884/94, granted the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* – CADE) with rights of intervention, as an assistant, in demands that included any arguments involving the application of the mentioned law.[4] Once again, the legal provision did not mention the expression *amicus curiae.* In Cabral's point of view, the figure of the *amicus curiae* was also contemplated at the administrative level. Thus, the author states that: "the institute is also present in administrative processes" (CABRAL, 2003, p.116, our translation). According to the author, in its articles 31 and 32, Law No. 9,784/99, responsible for regulating the federal administrative procedure, enabled the intervention of *amicus curiae* in relevant debates, by providing that: "[…] the competent body may admit the intervention of *amicus* and even hold a public hearing to allow broader debates on the matter discussed within the process" (CABRAL, 2003, p. 116).
The *amicus curiae* was also included in the scope of the Federal Special Courts, according to the rule of art. 14, § 7, of Law No. 10,259/01, which in its final part regulates that: "[…] even if not parties to the process, any interested parties may manifest within thirty days" (BRASIL, 2001, our translation). However, in spite of all historical development pointed out to date, doctrine emphasizes that the peak of the *amicus curiae* in the Brazilian law took place with the enactment of Law No. 9,868/99, which regulated the processes of the

[1] For further information see: KRISLOV *apud* BUENO, 2012, p. 116.
[2] Art. 31. In law proceedings whose objective is a matter that falls within the competence of the Securities and Exchange Commission, the latter shall always be summoned, if willing, to provide opinion or clarifications, within fifteen days of the summons (BRASIL, 1976, our translation).
[3] "Art. 5 of Law No. 9,469/97: The Union will be allowed to intervene in cases in which autarchies, public foundations, mixed-capital companies, and federal public companies appear as plaintiffs or defendants" (BRASIL, 1997, our translation).
[4] Art. 89. CADE must be summoned in legal proceedings discussing the application of this law to, if willing, intervene as an assistant in the case (BRASIL, 1994, our translation).

Ação Direta de Inconstitucionalidade (ADI) and the *Ação Declaratória de Constitucionalidade* (ADC) in front of the Supreme Federal Court (*Supremo Tribunal Federal* – STF). In this sense, Costa teaches that "[…] the institute of the *amicus curiae* started being discussed more emphatically" (COSTA, 2013, p. 357) with Law No. 9,868/1999. Shortly afterward, in its article 6, § 2, Law No. 9,882/99 – which came to regulate the Proceedings of Non-Compliance with Fundamental Precepts (*Arguição de Descumprimento de Preceito Fundamental* – ADPF) –, in line with Law No. 9,868/99, authorized oral submissions and the collection of testimonies upon request of the relevant parties, at the discretion of the rapporteur. From this historical analysis of the *amicus curiae* institute, it was possible to demonstrate that its insertion within the Brazilian legal system took place gradually until it was expressly introduced within the scope of the Brazilian civil procedure, as shall be explained below.

AMICUS CURIAE WITHIN THE SYSTEM OF THE CODE OF CIVIL PROCEDURE 2015: The Brazilian Code of Civil Procedure inaugurated a new vision of the procedural system in the whole country, making way for a true epistemological advance concerning the implementation of constitutional precepts and principles that tend to permeate and allow improved and adequate social participation with the clear objective of delivering greater legitimacy to the jurisdictional function. In fact, CPC/2015 confirmed and adapted the civil procedural system to the fundamental rights and guarantees expressed in the 1988 Federal Constitution (CF/88). CPC/2015 strongly overrides the procedural technique as a legal relationship where Chiovenda, when discussing the bases of the science of civil procedural law, presented the following concept: "the civil procedure encompasses a legal relationship. It is the idea already inherent in Roman law and the definition it attributed to our medieval processors: the judge thanked three people, *iudicis, acioris et rei*" (CHIOVENDA, 1922, p. 109, our translation)[5].

In this aspect, procedural science moves towards the constitutional democratic process, precisely because it has its elementary bases rooted in the core of the fundamental guarantees expressed in CF/88. It is, therefore, a procedural technique with a view to constitutionalizing the process and that aims to ensure the implementation of fundamental rights and guarantees through the participatory construction of the final provision, where the parties are called to participate in the process and produce the final decision. Thus, CPC/2015 clearly tries to make processes more democratic, accessible, and sensitive to social manifestations in compliance with constitutional guarantees, where the parties are called at all times to self-composition through conciliation and mediation, in honor to the legal paradigm of dialectical deliberative discourse. Contrariwise, CPC/2015 has noticeably led to an approximation between the systems of civil and common law, establishing the precedents' binding force in Brazilian law. The shift towards a system of standardization of the law by the valuation of precedents can be noticed with the inauguration of a discourse for the enforcement of legal precedents, that is, a model of binding precedents. Along this path, two succinct conclusions can be anticipated: the first is that CPC/2015 seeks to deliver nuclear democratic bases into a civil procedure committed to the principles and rules issued by CF/88 and capable of governing the due legal process (contradictory; broad defense; isonomy; reasoning of decisions). Secondly, the new civil procedural rule expands the strength of the precedents as a means to authorize a greater standardization of law through decisions made in the context of repetitive appeals with a tendency to steer the legal proceedings to their maximum. In view of this situation, to attribute greater legitimacy to the authorities of the judiciary branch who are now responsible for issuing binding decisions, the *amicus curiae* institute arises as a typical figure for the accomplishment of social participation in the formation of precedents.

[5] Translation from the original: "*El proceso civil contiene una relación jurídica. Es la idea ya inherente al judío romano: y la definición dada por él por nuestros procesadores medievales: el Juez agradeció a tres personas, iudicis, acioris et rei*".

The *amicus curiae* seems to provide greater room for dialog on the formation of legal precedents, where the analysis of the reasons and counter-arguments put into discussion in their wake can be deliberated cooperative and mutually between the judge; the parties; and the society, given that social participation is a fundamental governing principle in the Democratic State of Law, which is characterized by the respect for civil liberties, human rights, and the deference to the fundamental rights and guarantees enshrined in the Constitution. *Amicus curiae* is regulated in article 138 of CPC/2015. This article brings some changes to the institute regarding the sparse norms that previously disciplined it in Brazil. The first issue solved by CPC/2015 concerns the nature of the *amicus curiae*, considering that most scholarly opinions lacked a consensus as to its legal nature. Such institute had been regarded as a hypothesis of intervention by third parties, an atypical intervention by third parties, a special third party, an assistant, and even auxiliary of justice (MATTOS, 2011). To remedy the discussions raised so far, the CPC/2015 managed to discipline the figure of the *amicus curiae* as an intervention by third parties. Article 138 of the regulation brings some news and expressions that demand better understanding. The judge and the rapporteur will be able to decide on the possible intervention by the *amicus curiae*, which infers that the institute may be accepted in all instances of the Judiciary and not only in the Higher Courts as it was previously.

Another relevant matter lies within the fact that the device allows for the participation of a natural or legal person, body, or specialized entity with adequate representation. The novelty enables the intervention of a natural person in the core of the case, something previously unthinkable. Jurists understand this possibility as beneficial to the Democratic Rule of Law under the following terms: "with the effect of CPC/2015, the issue became clearer, since the regulation expressly authorizes the participation of natural persons as *amicus curiae*" (FIGUEIREDO, 2017, p. 253, our translation). Likewise, the doctrine stresses that it is not a question of admitting, within the scope of the process, any natural or legal person as an *amicus curiae*; on the contrary, "it is necessary that the third party (either natural or legal) is given adequate representation, as provided for in art. 138" (FIGUEIREDO, 2017, p. 253, our translation). The opening of the channel for the participation of natural and legal persons is in keeping with the constitutional dictates that assert the need for democratic access to the process to legitimize jurisdictional action. We must note that constitutional precepts must be subject to the whole community interpretation, as Häberle argues: "in the process of constitutional interpretation, all State bodies, all public powers, all citizens and groups are potentially linked […]" (HÄBERLE, 2015, p. 27, our translation). The intervention of the *amicus curiae* must be limited to the scope of the matter. In other words, the person or entity called or authorized to intervene in the demand must be profoundly aware of the content discussed in the specific case, as the third party may contribute to the clarification of the demand. Therefore, it is not admissible that anyone offers clarifications on any subject beyond their understanding. Another unavoidable requirement for the authorization of the *amicus curiae* intervention is their adequate representation, which derives from an imperative need for the relevant party to effectively demonstrate the reason for their intervention, and how their institutional interest relates to the dispute (BUENO, 2015, p.158). Some digressions are in order regarding the requirements provided for in article 138, *caput*, which are: 'relevance of the matter'; 'subject specificity' and 'social impacts'. Such requirements seem to unfold alongside each other to build a network of concrete situations subject to intervention by the *amicus curiae*. These situations especifically substantiate those sensitive cases that embody greater domestic excitability. It appears that the demands related to fundamental rights and guarantees are, to some extent, the *amicus curiae*'s main object of discussion. Demands concerning the access to education, health, a balanced environment, assistance, and social security are some examples of the ones that call for the participation of the *amicus curiae* due to its nature as a fundamental right. As the doctrine prescribes, some private demands may carry fundamental precepts that involve the rights of society as a whole.

Thus, the concept of uniquely private interest in the process is gradually being removed to give way to a collective conception of demand, which should allow the participation of the whole society in the case discussed. We should thus note that an *amicus curiae* will be authorized to intervene in each and all demands of relevant nature for the community. The subject specificity and the overall impact of the dispute may authorize the intervention of the *amicus curiae* insofar as the modulation of the effects of the decision will result in implications and applications for society. Therefore, we cannot speak of an exhaustive list of demands that may or may not admit the intervention of the *amicus curiae* when, in truth, it will be up to the judge or the rapporteur to decide whether there is room for said intervention in the face of a specific case. Cabral (2016, p. 336) states that the intervention of *amicus curiae* in certain demands is essential for the concrete social reach of the process, such as in social issues related to health, education, administration of public funds and participatory budgeting, to which it is possible to add questions about the balanced environment favorable to a healthy quality of life.

However, it is also up to the judge and the rapporteur to outline the specific powers of the *amicus curiae* in the demand since these two, after analyzing the arguments and counter-arguments that the specific case involves, and after hearing the parties, will deliberate on the extension of said powers. Note that the intervention of the *amicus curiae* does not have the power to alter the competence to judge the demand as provided for in article 138, § 1 of CPC/2015. The possibility of an appeal is another sensitive point regarding the institute's codification. As a general rule, *amicus curiae* are not authorized to file appeals, except in the event of embargoes of declarations and decisions that rule over the resolution of repetitive demands. In short, we can consider that the codification of the *amicus curiae* was beneficial to civil proceedings as it regulated, within the scope of civil jurisdiction, a typically democratic institute able to substantiate the social participation and control over any jurisdictional provision involving rights sensitive to society.

ENVIRONMENTAL PUBLIC CIVIL ACTION: When working with ACP, we must bear in mind that this is a 'constitutional remedy', although not expressly listed under art. 5 of the CF/88. Although not provisioned by said regulation, such remedy is properly provisioned for in Law No. 7,347/85, which regulates the ACP of responsibility for damages to the environment, consumer, goods and rights of artistic, aesthetic, historic, or scenic value, and any other diffuse or collective interest; for breach of the economic or urban order; against the honor and dignity of racial, ethnic, or religious groups; and to public and social heritage (BRASIL, 1985, our translation). In this same sense, it is Rodrigues's teaching: "[…] the public civil action is part of the daily lives of the Brazilian people, who already recognize it as the typical instrument for the judicial protection of collective interests (in a broad sense)" (RODRIGUES, 2007, p. 248, our translation). Yet, it appears that the concrete regulation of the ACP took place in the sphere of Law No. 7,347/85 and later in the constitutional scope in 1988, when the CF/88, by disciplining the institutional functions of the Prosecution Office (*Ministério Público* – MP) through art. 129, item III, entrusted the agency with the mission of promoting the public civil action for the protection of public and social assets, the environment, and other diffuse and collective interests.

Thus, the importance of this unique instrument for the protection of diffuse rights. As stipulated by Law No. 7,347/85, art. 1, item I, the promotion of the protection and accountability for the damages caused to the environment is one of the objectives of the ACP; that is because to provide people with a balanced environment favorable to their healthy quality of life is a fundamental right inscribed in art. 225 of CF/88 that must be guaranteed and protected by all, including on behalf of, and by present and future generations. It is important to consider that throughout its edition, the ACP Law has undergone changes to its original text; Law No. 8,078/90, which governs the Consumer Protection Code (*Código de Defesa do Consumidor* – CDC) is a sample of those changes. These changes did not compromise the object and functionality of the ACP. Contrariwise, they promoted a real approximation of concepts for the development of the so-called collective procedural system. In Rodrigues' words: "The symbiosis between the two systems (LACP, art. 21; and CDC, arts. 90 and 117) form the collective procedural system" (RODRIGUES, 2007, p. 281, our translation). The legitimate assets are listed in Law No. 7,347/85, art. 5, and in art. 82 of the CDC. In this specific point, the doctrine asserts that there was an absorption of art. 5 by art. 82, on two grounds: the first is that art. 82 relies on a more complete list, including a larger and more qualified number of legitimates. The second is the fact that art. 82 surpassed art. 5 due to being more recent. Highlighting the precepts of Law No. 7,347/85, Moreira points out who are ACP's legitimate assets: "[…] The Prosecution Office, the Union, States and Municipalities, autarchies, public companies, foundations, mixed-capital companies, and civil associations established for more than a year […] (MOREIRA, 1995, p.50, our translation). It appears that the extensive list of legitimate assets for the proposition of the ACP gives rise and enables greater and more qualified access to the protection of those transindividual interests, which are understood as the rights that go beyond the sphere of the individual. They are called diffuse rights, collective rights, and homogeneous individual rights. The diffuse right presents itself as a right of transindividual nature, which encompasses an indivisible object of undetermined ownership, related by factual circumstances. These are rights that concern everyone and no one at the same time.
Collective rights, on the other hand, are transindividual rights of indivisible nature concerning a certain class of individuals bound together by a legal relationship. In collective rights, the rights holders are identifiable. Fiorillo points out that: "[…] due to the nature of the collective law, these holders (who are bound by a legal relationship among themselves or with the opposite party) are identifiable" (FIORILLO, 2013, p. 45, our translation). Homogeneous individual rights are those arising from the same cause, where the subjects are invariably more than one, and determined or determinable.

A recent trend, which built up more emphasis from the 1970s, draws attention to the need for tutelage aimed at the collective instead of only individual interests. A series of economic and social factors led the process to be concerned with safeguarding and protecting collective rights, in addition to merely individual protection. As Cappelletti and Garth defend: "diffuse interests are fragmented or collective interests, such as the right to a healthy environment, or consumer protection" (CAPPELLETTI; GARTH, 1988, p. 26, our translation). In some demands, the polluter or supplier may prove technically and economically stronger than the mere individual, which explains why it is necessary to balance the forces between the prosecutors and defendants, providing the defendants with organs and entities with greater power and representation than those accessible by singular individuals. On this matter, Cappelletti and Garth quote Galanter, affirming that: "Professor Galanter developed a distinction between what he calls "casual" and "habitual" litigants, based on the frequency of their encounters with the legal system" (CAPPELLETTI; GARTH, 1988, p. 25/26)[6]. This approach points to the consideration that the legitimation of organizational litigants aims to deliver greater strength to plaintiffs who seek to protect the diffuse and collective rights valued by the community, such as a healthy environment. Concerning legitimate liabilities for the ACP, there seem to be difficulties within the doctrine regarding their definition, especially because of the very meta-individual nature of the legal rights.

[6] He suggested that this distinction corresponds, on a large scale, to that found among individuals who usually have isolated and infrequent contacts with the legal system and developed entities with more extensive judicial experience. According to Galanter, the advantages to the "usuals" are numerous: 1) greater experience with the law allows them to better plan their litigation; 2) the usual litigant saves money on scale because they deal with more cases; 3) the regular litigant has opportunities to develop informal relationships with members of the decision-making body; 4) they are able to mitigate the risks of the demand for more cases; 5) they can test strategies within certain cases to guarantee a more favorable expectation regarding future cases. It seems that, due to these advantages, organizational litigants are undoubtedly more efficient than individual litigants (CAPPELLETTI; GARTH, 1988, p. 25/26).

In another thought, Mancuso highlights the possibility of using the system adopted in the USA, that is, the "defendant class action". Thus, Mancuso states that: "In the North American system, there is, by rule 23 (a) (3) of the Federal Rules of Civil Procedure, the possibility of a collective action being brought against or in front of a class (the so-called defendant class action), […]" (MANCUSO, 2014, p. 200, our translation). We must stress that this possibility is not a mere use of an alien method indifferent to the Brazilian reality, given that the collective process microsystem adopted in Brazil, especially the ACP, was reproduced, with due regard for the factual reality of each country and each legal system, starting from the North American system. Rodrigues, thus, confirms: "a quick look at Rule 23 of the American Federal Civil Procedural Legislation will accurately denounce the source of the Brazilian legislator" (RODRIGUES, 2007, p. 256, our translation). Class action is provided for by Rule 23 of the North American Federal Rules of Civil Procedure, which can be understood as an equivalent to the Brazilian CPC/2015: "we had initially mirrored their first two existing models in the North American class action (Rule 23, B (1) and B (2)), which, roughly, would correspond to the protection of diffuse and collective rights" (RODRIGUES, 2007, p. 256, our translation). The central purpose of the class action is to allow one or more members of a particular group or class to sue and be sued as representatives of that class or group regarding cross-individual interests. Therefore, an individual, or several individuals, may request, through a single demand, the repair of certain environmental damage, for example. Including, permission for this class to figure as defendants, which will give rise to the possibility of a passive ACP (defendant class action).

However, such an assertion in the Brazilian national scenario still asks for further outlining, studies, and discussions, considering that the legal and social scenario (factual reality) in Brazil and the USA are still remarkably different. From the standpoint of passive legitimacy, it is acceptable to consider that all those people who have contributed negatively to the opportunity for harm that may have motivated the proposition of the ACP may join it. In this sphere, Meirelles highlights that: "the passive legitimation extends to all those responsible for the situations or facts giving rise to the lawsuit […]" (MEIRELLES, 2009, p. 204). Therefore, it is important to assert that the ACP is a true procedural mechanism that tends to consolidate the protection of diffuse and collective rights and interests, especially those concerning the protection and responsibility for damage caused to the environment, an asset which stands as everyone's fundamental right, including future generations. Further on, this study will stick to the concepts and precepts of the PA, which unlike the ACP, rewards the individual participation of the population in the defense of social rights.

THE ENVIRONMENTAL CLASS ACTION

The PA stands as a constitutional remedy listed under the art. 5 of the CF/88, which could not be accepted differently, given that it is shown as an action aimed at promoting the popular participation and control of conducts that are threatening to public assets, the administrative morality, the environment, and historical and cultural heritage. It is a true instrument of deliberative democracy, which makes it possible for any person to participate and demand the proper functioning of the public administration and the proper protection of the balanced environment aimed to provide a healthy quality of life. Here, a short explanatory digression on deliberative democracy is appropriate. Deliberative democracy presupposes a greater engagement of individuals, through the theory of discourse designed and developed by Jürgen Habermas, according to which:

The production of legitimate law through a deliberative policy, therefore, constitutes a process designed to solve problems and that works with knowledge, at the same time it deals with it, in order to program the regulation of conflicts and the pursuit of collective ends (HABERMAS, 2011, p. 45, our translation). According to this perspective, deliberative democracy admits that different social discourses are heard on the most diverse stages, making it clear, therefore, that it must permeate the entire Democratic State of Law, to enable the discourse among all parties involved. It is necessary to assert that the congregations of the rights inherent to the PA are condensed into true deliberative mechanisms of the popular will, while they are portrayed as a fundamental guarantee of procedural conduct leading to the providence of access to social, economic, and environmental justice, as far as: "The understanding that each individual citizen is at least capable of deciding what is good for himself is a characteristic of democracy, as a guarantee for political equality" (SILVA; SANTOS; BARCELOS, 2017, p. 261). On the other hand, we must consider that the emergence of the PA dates back to mid-1934, that is, before the concrete institutionalization of the Democratic Rule of Law in Brazil, which only happened in 1988 with the enactment of the CF/88. On this subject, Oliveira explains that: "the class action found, for the first time, a constitutional seat in Brazil through the Constitutional Charter of 1934, with emphasis on articles 1 and 6" […] (OLIVEIRA, 2011, p. 38, our translation). The comprehensiveness of the text of the Charter of 1946 prompted the drafting of Law No. 4,717/65, which sought to discipline the PA in a complete and detailed manner, which is in force until today as the constitutive basis of democratic participation through popular action. The 1967 Constitution later maintained the institute in its text, also due to its background within the national scene. The AP gained prominence following the enactment of the CF/88, being elevated to the position of fundamental guarantee and emphatically listed among the constitutional remedies under art. 5 of the CF.

After the useful historical digression in the context of the PA, it is necessary to emphasize that it was Barbosa Moreira, the first to highlight the importance of the same to protect rights and diffuse interests. Grinover points out that: "with the emergence of these new trends, the constitutional class action has been used to protect certain diffuse interests. Barbosa Moreira was the first to give constitutional action this approach […]" (GRINOVER, 1984, p. 297, our translation). In Moreira's words: "Law No. 4,717, of June 29th, 1965, which regulated the process of class action, provided our organization with a means capable of serving, to a large extent, the judicial protection of collective and diffuse interests" […] (MOREIRA, 1995, p. 194, our translation). Thus, it is possible to demonstrate that the main purpose of the PA is to provide individuals with real and legitimate powers to, through the legal process, devote efforts in favor of the protection of the fundamental right to an ecologically healthy and balanced environment. The doctrine agrees with our argument: "under current Brazilian law, direct participation in the defense of the environment through the judicial process is made possible by popular action, the only procedural institute to strictly admit, among us, individual legal initiatives in the matter" (MIRRA, 2011, p. 230, our translation).

Unlike the ACP, which does not allow the citizen (individual–individual) to figure as the prosecutor, as previously said, the PA sees the citizen as the legitimate active part in the lawsuit. Law No. 4,717/65, art. 1, any citizen will be a legitimate party to demand the annulment or declaration of nullity of acts harmful to the assets of the Union, the Federal District, the states and the municipalities (BRASIL, 1965). Both the Law and the CF/88 adhere to the use of the word "citizen" as the identifier of the individual entitled with rights to file a class action. At this point, a reflection regarding the fact that only a citizen in the exercise of their political rights, that is, only a native who is able to vote and to be voted, would be legitimate to propose the PA, seems to permeate the doctrine. Unsurprisingly, considering that § 3, art. 1 of Law No. 4,717/65 provides that: "§ 3 The proof of citizenship to appear in front of the court will be made through the voter registration card, or document equivalent" (BRASIL, 1965, our translation). To call attention to the point, Mirra says: "Traditionally, the one perceived as a citizen, that is, a legitimate subject to the filing of popular demands, is the national individual who in full exercise of their political rights" (MIRRA, 2011, p. 231, our translation). However, most of the doctrine does not agree with this statement. Regarding the protection of the environment, we understand that the concept of citizen cannot be restricted to those individuals who have been exerting their political rights, as enshrined in CF/88, art. 5 through the list of fundamental

rights and guarantees inherent to the individual (human person), regardless of whether or not they pursue political rights. The right to a balanced environment favorable to the healthy quality of life, as provided for in art. 225 of CF/88, affirm the fundamental right to a healthy environment that is in every way similar to the right to live and, therefore, must be protected and preserved by all individuals and by the state. That means their protection cannot be mitigated to the proof of political rights, under penalty of regression to the protectionist sphere of the diffuse good. In the wake of this understanding, Fiorillo states: "[…] nothing more logical than not only the voter in good terms with the Electoral Justice, but all Brazilians and foreigners residing within the country, can be labeled citizens for the purposes of bringing environmental class actions to court" (FIORILLO, 2013, p.473, our translation). Another important aspect that deserves attention is the fact that the alleged prosecutor of the AP will be exempt from procedural costs and from the burden of collateral, as expressed in the final lines of art. 5, LXXIII, of CF/88. This exemption from costs brings down one of the barriers to the access to justice, as pointed out by Cappelletti and Garth: "An examination of these impediments, as it turns out, revealed a pattern: the obstacles imposed by our legal systems are more pronounced for small causes and individual authors, especially the poor […]" (CAPPELLETTI; GARTH, 1988, p. 28, our translation).

The constitutional rule that ensures the exemption to the financial costs arising from filing an AP seeks to provide the first solution to facilitate the access to justice, which Cappelletti and Garth describe as the first 'wave' of access to justice: "the first major efforts to increase access to justice in western countries have focused, quite adequately, on providing legal services to the poor" (CAPPELLETTI; GARTH, 1988, p. 31-32, our translation)[7]. From the same perspective, Stephen and Sunstein emphasize that:

Giving citizens access to courts and other adjudicative forums is not like giving them access to natural harbors and navigable waters, because the government must not only brush aside hindrances to access, but must actually create the institutions to which access is being granted (STEPHEN; SUNSTEIN, 1999, p. 54).Therefore, in view of the advance promoted by CF/88, which culminated with the overcoming of one of the barriers to access to justice, we can understand that the citizen (person) has been granted full power to act in favor of the environment to promote, within the legal realm, the AP aimed at answering to the rights, as well as diffuse and collective interests.

AMICUS CURIAE: AN INSTRUMENT FOR PARTICIPATION AND CONTROL OF ENVIRONMENTAL CLASS ACTION?

So far, this study has managed to present a brief historical background on the *amicus curiae*. It has also highlighted the advances achieved with the codification of the referred institute within the scope of CPC/2015. Subsequently, the ACP and its developments, as well as the AP and its nuances, were briefly brought to expose two of the most deliberated instruments in the field of environmental action. From an academic and methodological point of view, a brief incursion into these institutes was necessary since all the institutes previously worked on will be condensed in this chapter to try to unveil and achieve a proper answer to the question raised in this paper without, however, any claim to exhaust the discussion. First, the fact that the course of constitutional law has gained new contours and new allegories to be developed deserves to be highlighted. Postmodernity is embodied in a new constitutional paradigm aimed at the greater commitment and the development of the constitutional law, tending, in good measure, to carry out the concrete implementation of fundamental rights and guarantees.

The new democratic constitutionalism, also known as democratic neoconstitutionalism, has been gaining many followers within the national scene by promoting a reinterpretation of the legal system through the lenses of the CF/88, which disseminates its normative force. In these terms, Barroso teaches:

In short: neoconstitutionalism or new constitutional law, in the sense presented, identifies a wide range of transformations that have taken place in the country and constitutional law, from which can be mentioned, (i) as a *historical landmark*, the development of the rule of law and the constitutional state, whose consolidation took place during the final decades of the 20th century; (ii) as a *philosophical landmark*, the post-positivism, with the centrality of fundamental rights and the reconnection of Law and ethics; and (iii) as a *theoretical framework*, the set of changes that include the normative force of the Constitution, the expansion of constitutional jurisdiction, and the development of a new dogmatic of constitutional interpretation. This set of phenomena resulted in an extensive and deep process of constitutionalization of the Law (BARROSO, 2006, p. 29, our translation).

In this context, the normative force of CF/88 intends to undertake a greater reach of constitutional norms to enable an expansive application and interpretation of its text. The CF/88, therefore, assumes a central role in the legal system with its unique presentation of the vigor of normativity. Thus, Hesse explains that the legal Constitution has its own meaning: "its claim to effectiveness presents itself as an autonomous element in the field of forces from which emerges the reality of the state. The Constitution acquires normative force insofar as it succeeds in idealizing this claim for effectiveness" (HESSE, 1991, p. 15/16, our translation). Along with the advances arising from the new constitutionalism and, above all, from the need to respond to the new rights that emerged in postmodern society, procedural law is gradually abandoning its individualist approach to give way to collective procedural law. Cambi and Damasceno explain that: "such alignment adopts a particular principled feature and calls for the experimentation of less formalistic concepts that are different from those imposed by the CPC, to the solution of conflicts of individual interests" (CAMBI; DAMASCENO, 2015, p. 656, our translation).

Amid the changes that affected the national procedural law, the *amicus curiae* achieve greater relevance in the context of collective procedural law, especially after CPC/2015 focused on its codification. Even so, when inaugurating new rules typical of the common law in the Brazilian legal system – regulations that express the standardization of law by the binding force of precedents –, CPC/2015 now depends on the adequate legitimacy of those decisions. In that light, the *amicus curiae* presents itself as an institute capable of giving greater legitimacy to the Judiciary, which now examines decisions that bind the entirety of the legal system. This is because, within the Democratic Rule of Law, all power emanates from the people, as corroborated by the doctrine: "[…] in the modern stage of doctrinal evolution, all power is unified in the state and emanates from the people, with functions only being distributed among the different organs of the Executive, Legislative, and Judiciary" (ZANETI JR, 2013, p. 48, our translation). The legitimacy resulting from the *amicus curiae* is based on the principle of democratic participation, an unavoidable premise to the establishment of precedents. Moreover, due legal process based on isonomy, broad defense, the paradoxical, and the reasoning of decisions, is an unavoidable premise for the formulation of all precedents, and CPC/2015, as stated above, brought the procedural rule closer to the precepts concerning democratic proceduralism. Within class actions of an environmental nature, it is understood that the developments made possible by the *amicus curiae* partially accomplish the constitutional precept provided for in art. 225 of CF/88. In other words, the right to a balanced environment favorable to a healthy quality of life is embodied within a fundamental right of intra and intergenerational character, and the community has a duty/right to protect and preserve it for present and future generations.

[7] Cappelletti and Garth point out three waves of solutions to improve access to justice: The first wave focuses on providing free legal aid. The second, on providing legal representation for diffuse interests, especially in matters of environmental and consumer protection. The third wave is fixed on the approach to the access to justice (CAPPELLETTI; GARTH, 1988, p. 31).

Gomes and Ferreira point out that, "to this end, the community, civic organizations, and governments must act to promote mechanisms that can protect the environment as a means to ensure a healthy life for the present and future generations" (GOMES; FERREIRA, 2017, p. 98, our translation). Therefore, it is very appropriate that the community may be called upon to participate and supervise the course of the process in those collective demands of an environmental nature as, given the precedents binding nature, any decision taken based on repetitive appeal will produce effects for a whole group of individuals and perhaps for the legal order. Thus, the *amicus curiae* emerge as an instrument partially suitable to provide social intervention and control on collective environmental processes. This is because an epistemological and theoretical advance of the *amicus curiae* institute must take place before they can emerge as an integrally suitable instrument of social intervention and control over class actions. In other words, the *amicus curiae*, as disciplined in art. 138 of CPC/2015, is regarded as an appropriate instrument to provide the judge of the demand with technical support, that is why the doctrine systematically refers to them as 'friends of the court'. In that sense, the institute's usefulness is better equipped to provide technical support to empower the judge, than to make way for democratic participation in the demand. Thus, social participation within the scope of the *amicus curiae* is a practical consequence of the technical intervention necessary for the solution of complex demands. The *amicus curiae* are a partially democratic instrument, as its participation is welcomed to supply the judge with technical content, so much so that they will be deemed a 'friend of the court'. It is not a purely democratic institute. While analyzing the *amicus curiae* as a democratic figure, the would be best to name them '*friends of democracy*'[8]. However, justice must be done to the institute, because despite being called upon to intervene in demands merely to provide technical support for the resolution of the cause, it also promotes the community participation and control of the claim, even if only partial and accessory.

Community participation within the Democratic Rule of Law must be made possible through its own mechanism, and not simply admitted as an accessory aspect of the technical agent. Democratic participation must not be relegated to a secondary role, on the contrary, the democratic debate must be made possible through a mechanism of its own and committed to democratic legitimacy. This essay intends to suggest the development of a democratic (non-State) agent, a stakeholder for the collectivity (a *democratic amicus curiae* – with proper representation: *pro natura* and *pro societatis*), for the realization of social participation through the democratic debate. A democratic agent committed solely and exclusively to social participation in the formation of legal precedents in environmental matters, '*a friend of democracy*'. Given that, in the current development of the matter regarding the environment and democratic participation, the doctrine has been advancing in the sense that the fundamental right to participation is not exclusively linked to the idea of a representative democracy effected through universal suffrage. Contrariwise, the epistemological advance of the matter points to the so-called participatory democracy, an actual participation to allow and demand full approximation of the civil society with the political decisions inherent to it. Thus, "in the intersubjective conformation of the contents of fundamental rights and duties, the whole of society must be involved through direct democratic participation, whenever feasible" (MARCO; MEZZAROBA, 2017, p. 335, our translation).

The evolution of participatory democracy is diametrically linked to the advance of fundamental rights and their dimensions. Sarlet and Fensterseifer confirm that "the [exercise of the] democracy, therefore, does not end with voting. Democracy is a legal concept, but more than that, it is a political-legal praxis in constant improvement and consolidation" (SARLET; FENSTERSEIFER, 2015, p. 711, our translation). Likewise, Bonavides says: "There is no constitutional theory of participatory democracy that is not, at the same time, a material theory of the Constitution" (BONAVIDES, 2001, p. 25, our translation).

That is to say that participatory democracy must also be given opportunities within the scope of the collective environmental process, given that the community must have access to concrete opportunities to cooperate, collaborate, share, and be involved in environmental demands, since it is a diffuse property belonging to all individuals. It is wise to consider that, within the participatory democracy mindset, the elaboration of *democratic amicus curiae* – with adequate representation: *pro natura* and *pro societatis* arises as a suitable instrument for the promotion of community participation in the collective environmental process. On the other hand, as previously said, when providing for the *amicus curiae*, art. 138 of CPC/2015 established requirements for the intervention to be deemed admissible, which will be addressed with the purpose of condensing the research. Art. 138, *caput*, asserts that it is up to the judge or rapporteur, considering the relevance of the matter, the specificity of the subject matter of the case, or the social impact of the controversy, to admit the participation of a natural or legal person, specialized agency or entity with adequate representation, on their will or at request of the parties or of those who intend to speak. That it is up to the 'judge or rapporteur' to decide on the intervention indicates that the *amicus curiae* will be enabled to act in any instances of the Judiciary, which is positive, especially in the case of an environmental class action, as participation must occur throughout the procedure so that the appropriate reasons are brought to the attention of the judge, regardless of their technical or purely democratic nature.

As for the relevance of the subject matter, the specificity of the subject, and general impact of the matter, they indicate that the *amicus curiae* will not be allowed to intervene in every demand since their participation asks for a more collective bias, which may produce effects for a particular group or class of society. This does not mean, however, that an individual demand does not allow for the intervention of the *amicus curiae*, as in some cases an individual demand may result in changes that affect an entire community. Given that all environmental demands are relevant, there seems to be no further questioning within the collective environmental process on any specific object with meaningful social impact.

Regarding the possibility of intervention under the request of the parties or the judge/rapporteur, both options are viable and accepted, given that an *amicus curiae* intervention may be admitted at the request of the judge or rapporteur, the parties, or whoever has an interest in intervening. This requirement proves quite broad and aims at the real democratization of the demand, given that both those who are composing the demand (within the demand), and outsiders with an interest in it, are authorized to require intervention. The admitting of the participation of a natural or legal person, specialized organ or entity with suitable representation is a true legitimizing requirement of participatory democracy or deliberative democracy, since it enables individuals, even those taking part in the litigation, to intervene provided they have adequate representation. Bueno highlights that:

It is asked from the *amicus curiae*, which may be a natural or legal person, specialized agency or entity, a "suitable representativity", that is, to satisfactorily demonstrate the reason for their intervention and in what way their "*institutional interest*" – which is the distinctive trait of this interventionist modality, which is not to be confused with the "*legal interest*" of the other interventionist modalities – is related to the process (BUENO, 2015, p. 158, our translation).

On these grounds, the *amicus curiae* must not be admitted to act in their cause; quite the contrary, it must be admitted to act on behalf of a community to supervise and collaborate with the determination of the final provision to make the decision fully democratic, hence the need for the intervention of a democratic *amicus curiae – friend of democracy*. "*Participation builds the credibility and legitimacy of policies, plans, and decisions in the eyes of the community, and ensures greater ownership and compliance*" (PRANEETHA, 2013, p. 96, our translation). It seems that the admission of the democratic *amicus curiae* will provide a more decentralized discussion of the demand, so that the various manifestations may contribute to the production of a more just, equitable, and democratic decision since in the environmental field such premise is unswerving and consistent with the idea of deliberative democracy.

[8] From Latin: *Amicum ex democratia*.

FINAL CONSIDERATIONS

At the end of this study, it was possible to consider that in recent years the law has advanced towards finding new ways to overcome the challenges inherent to modern societies. More aware of their rights, the population seeks the concrete enforcement of their interests on a daily basis, including those of a diffuse nature, which would impact a whole community. As a result, procedural law was adapted to the new social aspects, gradually abandoning its old individual bases to bring a new civil procedure to life. A civil procedure aimed at conveying the will of the community is gradually gaining ground within national and international spheres. At the national level, the CF/88 inaugurated a new democratic scenario in which the legal system surrenders to the normative force of constitutional precepts and constitutional principles become the heart of the legal system and build a solid base directed at radiating norms that guide all branches of law. From this perspective, takes place the so-called new constitutionalism, or neoconstitutionalism, understood as a system concerned with the enforcement of fundamental rights and guarantees without, however, distancing itself from the premise that all power emanates from the people, who exercise it through deliberative democracy. The civil procedure, also permeated by the normative force of CF/88 and by neoconstitutionalism restructures its bases on democratic proceduralism, to the detriment of the theories that understand the lawsuit as a mere legal interaction.

This epistemological advance has been more perfectly observed since the enactment of CPC/2015, which, among other benefits, brought to light a new civil procedure destined and open to a new kind of proceduralism, honoring the legal paradigm of dialectical discourse and enhancing the due legal process, equality, the paradoxical, the broad defense, and the reasoning of decisions. The process is codified as a constitutionalized institution. CPC/2015 also provided the Brazilian legal system with regulations and theories of affection typical of the common law's legal system. In particular, the CPC/2015 imported the *stare decisis* theory from the American into the Brazilian legal system, where judicial precedents support similar future cases, aiming at the subjective process. Now the Judiciary examines decisions that link the entire legal system, being indispensable to the creation of adequate spaces for community manifestation to provide greater legitimacy to legal precedents. This is where the *amicus curiae* arises as an instrument capable of carrying out this dichotomy and delivering greater legitimacy to legal precedents, as the community is called upon to participate and control the final provision that will bind the entire legal system. The environmental class action presents a similar problem, as CF/88 clearly and forcefully determines that it is the duty and right of all society and the state to promote the protection and conservation of the environment to promote a healthy quality of life. The participation of the people in demands that deal with the healthy environment is essential, since it is a diffuse right inherent to the entire community.

At the beginning of the search for the solution of the question under analysis, it was said that in the Democratic State of Law, where participatory democracy must be deeply conducted and enabled, the *amicus curiae* presents itself as a partially democratic instrument, aiming to provide an adequate participation and control of legal decisions made within the scope of the collective environmental process. Although it does not intend to exhaust this vast and intriguing subject, bearing in mind that protecting the *amicus curiae*; the democracy; and a balanced environment are undeniably a mission to be unveiled by scholars on the subject, as it is based on the premise that the promotion of a balanced environment favorable to a healthy quality of life depends on a serious and committed social participation. This effective social participation will only take place in full with the nuclear development of deliberative democracy, where the existing mechanisms are suitably made available to society. The search suggests a more effective form of social participation in the environmental class action, in addition to the traditional *amicus curiae*, namely the elaboration of appropriate public policies to allow and evidence the intervention of a democratic (non-state) agent, a third party sharing the interests of the collectivity (the *democratic amicus curiae* – with adequate representation: *pro natura* and *pro societatis*) who is a friend of democracy, for effective social participation in the defense of the environment, in order to foster democratic debate. Thus, a theoretical advance is necessary regarding the traditional and technicist *amicus curiae* to allow the inauguration of a new democratic space (*democratic amicus curiae democratic – friend of democracy*) and permeate the Democratic State of Law and its Executive, Legislative and Judiciary powers with full democratic legitimacy through the implementation of institutional dialog. While, for the time being, the *amicus curiae* expressed within the scope of CPC/2015 partly fulfills the mission of providing the whole society with a sincere and nuclear debate on demands that deal with their fundamental right to a balanced environment, which is a quintessential diffuse and collective right. The advance in the elaboration and development of a strictly participative figure, as suggested in the present study, that is, the institute of the *democratic amicus curiae – a friend of democracy*, is an unsurpassed premise of conformation of participatory and deliberative democracy in favor of the defense of a balanced environment to a healthy quality of life.

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