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NOTES ON COLLECTIVE LITIGATION

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Abstract: This essay sketches a few features of collective litigation, emphasizing the elusive character of a multifaceted phenomenon and a few critical aspects of the different models of collective litigation provided by the law in force in a variety of legal systems.

Keywords: class actions; representative actions; aggregate procedures; access to justice; private and public enforcement.

1 COLLECTIVE LITIGATION: GENERAL REMARKS

The notion of collective litigation defies attempts at offering a specific and generally accepted definition. Intuitively, it is clear that one can talk of collective litigation whenever a large number of individuals or entities join together and institute a single lawsuit aimed at obtaining redress for the harm they all suffered as a consequence of the unlawful actions perpetrated by the same wrongdoer. Needless to say, this is neither a precise nor a legally appropriate definition of collective litigation, even though it captures a few highlights of a type of litigation that in recent decades has become popular but equally controversial around the world. The very expression 'collective litigation' is not without competitors, which include 'group procedure' (or 'group action'), 'col-

lective redress mechanism', 'representative actions', 'aggregate procedure' and – last but not least – 'class action': a variety of expressions that are not necessarily synonyms and that, to the contrary, point out the multifarious features one can distinguish when looking at the forms of collective litigation that exist in different jurisdictions.

For a long time, scholars, legislators and the public at large were inclined to identify collective litigation with U.S. class actions, often presented (even in popular literature and cinematography) as the quintessential procedural tool for the judicial enforcement of rights belonging to a vast number of individuals who, for a variety of reasons, would not or could not bring their individual claims to court. In praise of class actions it has been said that

> a class action serves not only the convenience of the parties but also prompts efficient judicial administration … in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would be begging for justice without the class action … The class action is one of the few legal remedies the small claimant has against those who command the status quo.[1]

The undisputed positive features of class actions are often overshadowed by the realization that they have a high potential for abuse since the class action 'at its worst, … skews outcomes, takes legal power out of the hands of litigants, and extracts meritless settlements from business'.[2] This is likely the reason why on the other side of the Atlantic Ocean U.S. class actions have, over time, gained quite a bad reputation, to the point of deserving to be qualified by European Union regulators as a 'toxic cocktail' that Member States should avoid,[3] raising the specter of a new frontier of the so-called 'litigation culture' so popular in the United States. The rhetoric against U.S. class actions is somehow reflected by a specific linguistic choice, since all the official documents released (in English) by EU regulators on the issue of group litigation talk about 'collective redress' as a form of judicial redress that 'must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in "class actions" as known in the United States. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them.'[4]

1 Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting in part).

2 Roger H. Trangrud, 'Aggregate Litigation Reconsidered' (2011) 79 Geo. Wash. L. Rev. 293.

3 The definition of class actions as a 'toxic cocktail' has become quite popular in the academic literature addressing the subject of the European Union views on the American experience: the definition was first used in 2007 by Ms. Megleva Kuneva (the then Commissioner for Consumer Protection) at a conference on collective redress held in Lisbon. At that time, the Commissioner did not offer any hints regarding alternative models of group actions deemed less dangerous for the proper functioning of the European Union area of justice: Elisabetta Silvestri, 'The Difficult Art of Legal Transplants: The Case of Class Actions' (2010) 35 RePro-Revista de Processo 99.

4 As an example of the diligent attempt at devising an expression, such as collective redress, suitable to emphasize distance from class actions, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", Strasbourg, 11.6.2013 COM(2013) 401 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0401&from=EN> p. 3.

Despite the criticism raised against U.S. class actions in Europe, and around the world, the contemporary trend shows a constant spreading of newly devised procedures for group litigation borrowing selectively from the American experience. While it is not surprising that jurisdictions such as Australia and Canada followed the American example due to their background in the common law tradition, it is certainly worth investigating the reasons that brought other countries to adopt class actions with major or minor adaptations of the original model. In fact, it is estimated that the laws in force in the majority of the twenty-five largest economies in the world provides for class actions,[5] regardless of the official denomination given to the procedural tool that can be resorted to with a view to instituting group litigation. What is somewhat puzzling, though, is the fact that experiments with class actions are multiplying in many countries at the same time as class actions in the United States are witnessing a notable retrenchment imposed by legislation and the courts.[6]

Be that as it may, the contemporary landscape of collective litigation includes not only class actions, but also other types of representative actions, as well as proceedings that are alternatives to class actions: this, to be true to the initial statement according to which collective litigation is a multifaceted phenomenon.

2 COLLECTIVE LITIGATION: A VARIETY OF MODELS (AND THEIR ALTERNATIVES)

As mentioned at the outset of this essay, 'collective litigation' is a generic expression concealing different procedural schemes. As a disclaimer, it seems necessary to emphasize that, at least from a theoretical point of view, it is possible to classify these procedural schemes according to different criteria, which may cause a certain degree of confusion and uncertainty, making it difficult to picture an intelligible and reliable landscape of collective litigation around the world. In this complex scenario, though, one needs to rely on a basic assumption, from which any further analysis can proceed. Therefore, one may subscribe to the statement according to which, 'A wide range of different mechanisms exist but all of them involve trying to process multiple individual claims by imposing some simplifications, such as by selecting common issues or illustrative lead cases that can be determined first, and the decisions applied to all the other cases.'[7]

Following this lead, and looking for the ways pursued to attain 'some simplifications' in the procedural treatment of identical or similar multiple claims, it seems use-

5 Deborah Hensler, 'Foreword – The Global Expansion of Class Actions: Power, Politics and Procedural Evolution', in Brian T. Fitzpatrick and Randall S. Thomas (eds), *The Cambridge Handbook of Class Actions – An International Survey*, (CUP 2021) xviii.

6 See, e.g., Richard Marcus, 'Bending in the Breeze: American Class Actions in the Twenty-First Century' (2016) 65 De Paul L. Rev. 497; Brian T. Fitzpatrick, 'The End of Class Actions?' (2015) 57 Ariz. L. Rev. 161; Linda S. Mullenix, 'Ending Class Actions as We Know Them: Rethinking the American Class Action' (2014) 64 Emory L.J. 399.

7 Christopher Hodges, 'Evaluating Collective Redress: Models, Evidence, Outcomes and Policy', in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 30.

ful to introduce a widely endorsed classification, making reference to representative actions, on the one hand, and aggregate procedures, on the other. In the background, one must always keep in mind that collective litigation is an 'elusive target'[8] from many points of view, including any efforts to elaborate on it in an accurate way and, most of all, in a way that is acceptable from every angle.

As far as representative actions are concerned, U.S. class actions are the paradigm example of this model of group litigation: a named plaintiff commences litigation as the representative of a putative class, that is, a group of individuals similarly situated or, more simply, a group of people who have suffered a common injury by the same defendant. In principle, the outcome of litigation binds all of the class members even though they have not played any active role in the development of the proceeding.

Another type of action sharing some similarities with true representative actions is the action that is commonly referred to as a 'collective action', which is a lawsuit filed by some 'qualified entities' (such as consumer associations, public bodies and administrative agencies) on behalf of specific groups of individuals – consumers, users, workers, investors, for instance – adversely affected by the conduct of the same defendant. From the point of view of standing, in these actions the power to institute litigation is not granted to an individual (that is to say, to a single member of the affected group on behalf of all the other members), but to an entity (for instance, a consumer organization, a union and the like), on the assumption that the entity itself is the bearer of certain 'collective' rights or interests, shared by an indefinite number of persons, who are unnamed and unidentifiable. For a long time, collective actions were the only type of group litigation known to the Member States of the European Union. In fact, the majority of collective actions became part of the domestic law in European jurisdictions via the implementation of EU directives in well-defined areas such as consumer protection and antitrust law.

A common feature of these collective actions is that the remedy sought can only be a declaratory judgment or injunctive relief. Both remedies are likely to have positive effects and their intrinsic value cannot be overlooked, but certainly the fact that collective actions cannot be brought with a view to either receiving financial compensation or recovering damages detract from the effectiveness of the remedy afforded to the group of individuals on whose behalf the action is commenced.

Curiously enough, the recent EU Directive 2020/1828 on the protection of the collective interests of consumers provides for an action officially named 'representative', with standing granted to 'qualified entities' designated by the authorities of Member States.[9] Differently from the typical collective actions known to EU legislation, the re-

8 Alan Uzelac and Stefaan Voet, 'Collectivization of European Civil Procedure: Are We Finally Close to a (Negative) Utopia?', in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 4.

9 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

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medies available under Directive 2020/1828 are both injunctive measures and redress measures, including 'compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid':[10] the remedial scheme of the Directive combined with other questionable and obscure rules make it difficult to decipher whether EU regulators aimed at providing for a new, European-flavored version of class action (meaning, a true representative action) or an odd hybrid.

Aggregate litigation can be defined as 'litigation that undertakes some manners of unified resolution with regard to related civil claims held by multiple persons'.[11] Generally speaking, aggregate procedures allow courts to adjudicate large numbers of claims all at once. Different techniques can be put in place with a view to aggregating multiple claims: for example, mass joinder of parties and mass consolidation of separate cases can be conducive to aggregate litigation. But within a broad concept of aggregate litigation two specific patterns of group proceedings stand out .. They are the American multi-district litigation (often referred to as MDL) and the English group litigation order (known as GLO).

As an alternative to judicial procedures for the management of group litigation, a few legal systems have devised administrative schemes for the compensation of the victims of mass injuries. In this field, too, a variety of models exist and operate with different rates of success. Last but not least, one must not overlook the paramount role played by settlement of mass claims (whether reached while litigation is pending or resorting to ADR procedures).

3 QUESTIONS ARISING FROM COLLECTIVE LITIGATION

'In the popular image of civil litigation, two parties face off against each other in a courtroom, a judge sits on high overseeing the process, and a jury decides who wins and who loses. Virtually nothing about this image is accurate today. …. And increasingly, especially in complex and high-stakes cases, rather than one party suing another, hundreds or more plaintiffs seek a remedy from multiple defendants.'[12]

This statement by an American legal scholar holds true also in legal systems where the typical adjudication still involves the traditional 'paraphernalia' of a dispute resolution system centered on public courts. Even jurisdiction still handling huge numbers of individual claims must face a new challenge, that is, how to vindicate the rights of large numbers of individuals who demand redress for the injuries they suffered as a consequence of the harmful behavior of one or more defendants. The rise of mass

10 Article 9, sec. 1 of Directive 2020/1828.

11 For this definition, based on the ALI Principles of Aggregate Litigation, see Richard A. Nagareda, 'Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism' (2009) 62 Vanderbilt L. Rev. 1, 3.

12 Deborah R. Hensler, 'Justice for the Masses? Aggregate Litigation & Its Alternatives' (2014) 143 Daedalus 73.

litigation is an extremely complex phenomenon, and it is one which this introductory chapter should not attempt to elaborate upon. Suffice it to say that the development of the global economy as well as the influence of the mass media on the way people at large perceive their rights have increased the number of disputes involving vast groups of unnamed individuals often located in different countries. Recent events such as the so-called 'Volkswagen Dieselgate' or world-wide scandals associated with the use of various pharmaceutical products provide good examples of what mass claims and the ensuing mass litigation are all about.

The traditional, well-established institutes of civil procedure were essentially conceived for one-to-one litigation, most of all in the jurisdiction where these institutes are governed by written rules collected in codes of civil procedure. These very codes provide for different forms of joinder of parties and joinder of claims, but any type of joinder would turn out to be unmanageable when the parties or the claims to be assembled number in the hundreds or thousands. Accordingly, new procedural schemes for the management of a large number of identical or similar claims must be devised. And therein lies the crux of the matter: Which types of procedural schemes are suitable for mass litigation? How is it possible to perform an exercise in procedural creativity without disrupting the whole system of civil justice? How can the traditional categories of civil procedure, such as standing and *res judicata*, be adapted to the specific features of mass litigation? Or, in light of the unconventional nature of disputes involving many parties and many claims, should these very categories be set aside, and should new ones be embraced?

These questions have certainly affected the choices made by a few EU legal systems when they resolved to lay down rules on collective litigation. For the European Union, regulators attempting to devise a uniform pattern of collective redress for Member States had to face a different question, one having to do with a policy choice fraught with consequences. Collective litigation and especially class actions play a pivotal role in a system of private enforcement of law. To extend private judicial enforcement mechanisms would alter the European approach in favor of public enforcement procedures. As a matter of fact, to follow a model of collective redress shaped on U.S. class actions would imply accepting what comes with them and, in particular, a significant degree of the well-known 'adversarial legalism',[13] meaning the use of litigation (individual litigation, but most of all group litigation) as a regulatory tool, and not exclusively as the formal structure laid down by the legal system to resolve disputes.

This concern, although well founded, should not be overestimated and, in any event, it should not be a pretext used to undermine the value of collective litigation vis-à-vis its main goals. In this regard, too, legal scholars have different ideas. A very basic list of the goals of collective litigation identifies them in improving access to justice, fostering judicial economy and efficiency, and inducing deterrence of future wrongful conduct perpetrated by a wrongdoer. A more sophisticated analysis distinguishes be-

13 Robert A. Kagan, *Adversarial Legalism. The American Way of Law* (Harvard U. Press 2003).

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tween 'efficiency goals' and 'representation goals'.[14] These goals, in their turn, can be further divided considering whether their target is the interest of the plaintiffs or the interest of the public at large. 'This results in a taxonomy of four goals: The two efficiency goals are increasing compensation to plaintiffs and increasing monetary deterrence against misbehavior; the two representation goals are providing access to justice to plaintiffs and shaping laws and norms against misbehavior.'[15]

If this taxonomy holds true, one can argue that collective litigation serves both private functions and public functions: not without reason, the literature on class actions often mentions the role played by the 'private attorney general', meaning the individual (or the lawyer) who is allowed to institute a representative action with a view to providing 'a necessary supplement to government enforcement because government attorneys lack certain attributes'[16] and are not able to ensure the effective enforcement of a variety of rights.

4 COMMON ISSUES IN COLLECTIVE LITIGATION: SOME EXAMPLES

All schemes of collective litigation share a number of technical problems that affect their procedural development to various degrees and are addressed by national legislators in different ways.

The issue of jurisdiction can be extremely complicated, most of all when collective litigation acquires a transnational dimension, which can have a further bearing on the recognition and enforcement of the judgment. The rules governing standing and their connection with the discipline of *lis pendens* and *res judicata* affect representative actions and influence the choice whether collective litigation should have an inclusive character as to the individuals who can benefit from a favorable judgment. Funding is a fundamental issue in collective litigation, and the national rules providing for legal financing, establishing how lawyers are paid and whether third-party funding is allowed, are likely to affect the fate of group actions in a given jurisdiction. The judicial approach to collective litigation can be influenced by the structure of the national judiciary and the rules establishing whether collective litigation falls within the jurisdiction of ordinary courts or specialized panels. Effective case management powers are essential for an expedited development of collective litigation, and so are procedural schemes flexible enough to disregard rules that were conceived for individual lawsuits.

14 Andrew Faisman, 'The Goals of Class Actions' (2021) 121 Columbia L. Rev. 2157.

15 ibid 2170. The author specifies that his theory concerns class actions for monetary relief, since declaratory and injunctive class actions are not equally problematic. From the standpoint of other jurisdictions, and certainly in the framework of the debate in the European Union regarding collective redress, compensatory group litigation is the most controversial form of collective redress. For this reason, the author's analysis seems applicable beyond the boundaries of U.S. class actions for monetary relief.

16 William B. Rubenstein, 'On What a "Private Attorney General" Is – And Why It Matters' (2004) 57 Vanderbilt L. Rev. 2129, 2149.

5 FINAL REMARKS

Collective litigation is a fascinating subject, as the latitude of the academic writing on the different schemes adopted by the law in force in a multitude of legal systems demonstrates. It is also a subject that is likely to witness a never-ending evolution, in light of the fact that contemporary societies are faced with new challenges requiring effective responses for the community at large: only the future will tell whether collective redress will be able to shape its forms according to pressing social needs and public purposes.[17]

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17 Alan Uzelac and Stefaan Voet, 'Collectivization of European Civil Procedure: Are We Finally Close to a (Negative) Utopia?', *supra* note 8, 11.