

# SOME REMARKS ON GROUP LITIGATION IN COMPARATIVE PERSPECTIVE

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## I. INTRODUCTION

When one looks at the group litigation situation in modern common law and civil law systems, one discovers a huge amount of data, in addition to a number of problems, discussions, and trends of development. In the 1960s, the landscape of group litigation was almost completely bare, with the only significant example being the U.S. class action regulated by Rule 23 of the Federal Rules of Civil Procedure. This situation has changed over the years and is now much more interesting, but also much more complicated.

The U.S. class action underwent important changes in practice and in its regulation because of several amendments to Rule 23.<sup>1</sup> In some countries—even in civil law jurisdictions—the problem of group litigation (or, as it is sometimes defined, the problem of the judicial protection of collective, diffuse, and super-individual interests and rights) has been dealt with in several ways: new statutory regulations, developments in case law, theoretical debates, and projects for reform.<sup>2</sup> Much of the complexity of the present situation is due to the

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1. For a general view of Rule 23, see Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Remarks at Debates Over Group Litigation in Comparative Perspective (July 21-22, 2000) <<http://www.law.duke.edu/grouplit/papers/classactionalexander.pdf>>. See also 7A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 23 (2nd ed. 1986). For a discussion of the 1966 amendment to Rule 23, see Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Actions and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001). See also ANDREA GIUSSANI, *STUDI SULLE "CLASS ACTIONS"* (2000); DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000); 7A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 41 (2nd ed. 1986); Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5. For a discussion of other proposed amendments, see Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996).

2. Much information has been supplied by the papers submitted in this symposium, and by the oral discussion. See Harald Koch, *Non-Class Group Litigation under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355 (2001); Roberth Nordh, *Group Actions in Sweden: Re-*

fact that such problems have been—and still are—approached from very different perspectives and with different strategies. The class action lawsuit in the U.S. system has evolved significantly and has been adopted, with significant changes and adaptations, in other countries, including those with civil law systems.<sup>3</sup> However, many other countries, mainly in continental Europe, did not follow the class action model and have adopted different approaches to the problem of group litigation. Most of these countries do not conceive of this problem in general terms and take into consideration only particular instances of collective interests, such as those involved in consumer and environmental protection.<sup>4</sup> Moreover, the use of group litigation is usually not permitted for the compensation of damages suffered by individuals. Some countries are still at the point of mere discussion and preparation of projects for possible reforms.<sup>5</sup> In many other countries, there is no sensitivity to the problems involved in the effective protection of super-individual rights.

Therefore, although it is impossible to give a complete account of group litigation situations—and probably futile to attempt to draw general conclusions in just a few pages—some preliminary remarks can be made.

## II. PURPOSES OF GROUP LITIGATION

A very general and fundamental distinction can be drawn when considering the purposes that may be pursued by means of group or class litigation. In practice, these purposes can be combined in various degrees and in several ways, but theoretically, they may be kept separate for the sake of simplicity.

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*flections on the Purpose of Civil Litigation, the Need for Reforms and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381 (2001); Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L L. 369 (2001); Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001). In the literature concerning civil law systems, see GROUP ACTIONS AND CONSUMER PROTECTION—L'ACTION COLLECTIVE ET LA DÉFENSE DES CONSOMMATEURS (Thierry Bourgoignie ed., 1992); GIUSSANI, *supra* note 1, at 321-348; PUBLIC INTEREST LITIGATION BEFORE EUROPEAN COURTS (Hans-W. Macklitz & Norbert Reich eds., 1996); Per Henrik Lindblom, *Group Actions and the Role of the Courts: A European Perspective*, 23 FORUM INTERNATIONALE 3 (1996).

3. The reference is to Canada (Quebec) and Brazil. See GIUSSANI, *supra* note 1, at 338-344. See also Watson, *supra* note 2.

4. See GROUP ACTIONS AND CONSUMER PROTECTION—L'ACTION COLLECTIVE ET LA DÉFENSE DES CONSOMMATEURS *passim* (Thierry Bourgoignie ed., 1992).

5. See Lindblom, *supra* note 2; Nordh, *supra* note 2. See also Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805 (1997).

### A. Compensation of Individual Harms

The first important purpose is to compensate individual harms. In many cases, it may be said that litigation is *damage oriented*, since it is aimed at achieving a judgment granting damages to a class or a group of injured or harmed people and charging the wrongdoer with the obligation to pay compensation.<sup>6</sup> The ultimate goal is to indemnify each member of the group for the harm suffered. Here, we are mainly—although not exclusively—in the domain of torts, and the most important situation is that of mass tort litigation. There is no need to emphasize that this category of damage oriented actions includes a wide range of subject matters—examples include the classic case of a plane crash, the well-known cases of Agent Orange or asbestos exposure, the use of defective products or harmful pharmaceuticals, and tobacco addiction.<sup>7</sup> These kinds of cases may be distinguished from each other in many ways (nature of the injury or loss suffered, type of causation, number of people involved, size of compensatory or punitive damages granted, etc.). However, they share the fundamental aim of providing relief in terms of monetary compensation for the individual harms, injuries, or losses that have been suffered by (more or less numerous) classes or groups of people because of the same unlawful actions.

### B. Achievement of Changes

The second purpose is to achieve changes in the practice of some subjects, in the regulation of legal transactions, or in legally relevant behavior. Since, generally speaking, actions of this kind are brought in order to obtain new regulation of matters or behaviors according to particular values and standards considered preferable for the protec-

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6. See GIUSSANI, *supra* note 1, at 53, 253; Harry Kalven Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

7. Amongst the vast literature on mass tort cases, see JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995); 7B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 71 (2nd ed. 1986); John Fleming, *Mass Torts*, 42 AM. J. COMP. L. 507 (1994); Hensler, *supra* note 2; Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993); Patrick D. McTernan, Comments, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383 (1977); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984); Walter, *supra* note 2. In the European literature on the topic, see also Harald Koch, *Mass Torts in German Law*, in GERMAN NATIONAL REPORTS IN CIVIL LAW MATTERS FOR THE XIV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 67 (Erik Jayme ed., 1994); Andrea Giussani, *Le "Mass Torts Class Action" negli Stati Uniti*, RIV. CRIT. DIR. PRIV. 331 (1989).

tion of the subjects involved, they may also be said to be *policy oriented*. This category of actions is extremely broad and internally differentiated. For instance, one may bring such an action to affect changes in commercial practices (contractual clauses, fair competition, advertising, labeling of products, etc.) with the aim of protecting consumers. Alternatively, an action might be brought with the aim of enforcing civil rights and changing the functioning—or even the structure—of private or public institutions (i.e., banks for financial and commercial practice, schools in cases of racial desegregation, and prisons and hospitals in cases of structural or institutional injunctions).<sup>8</sup> The regulatory changes that are pursued by means of this kind of litigation may concern private or public regulations. For instance, private regulations are the objective of consumers' actions aimed at eliminating or modifying illegal contract clauses imposed by big companies on individual consumers or users. Public regulations that may be changed as a consequence of group litigation can be administrative (as in the case of prisons, hospitals, and schools) or even statutory or legislative (as in laws that are amended or statutes that are enacted in order to cope with the problems raised by a group or class action). Of course, this is not a direct effect of a judgment delivered in a group or class action lawsuit. However, it may be a practical consequence of such litigation, when the issues raised and the policy reasons advanced are taken into consideration by those with political power. This may be the case when funds are created, sometimes by statute, in order to compensate the damages suffered by a class of people, or it may be the case when there is projected "administrativization," as in the asbestos cases.<sup>9</sup> Such litigation may also result in the enactment of statutory rules governing the validity of special clauses in consumer contracts.<sup>10</sup> Something similar may happen when a statute provides for environmental protection and includes rules concerning the condition of people living in polluted areas.

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8. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); WRIGHT ET AL., *supra* note 1, at 492, 496.

9. See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 *CARDOZO L. REV.* 1819 (1992); and the accompanying essays collected in the same issue of *CARDOZO L. REV.* 1891-2040.

10. For instance, the 1996 Italian statute introducing into the Civil Code art. 1469 *bis* with the provision on new types of illegal clauses. See *Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità Europee* (Provisions for the implementation of duties deriving from the membership of Italy in the European Communities), Legge 6 Feb. 1996, No. 52 (Italy). See also GIORGIO DE NOVA, *LE CLAUSOLE VESSATORIE* (1996).

It is easy to observe that these (and many other) situations are extremely varied and may occur in a number of different areas within modern legal systems. However, they have a fundamental character in common: litigation is used as a means to protect and enforce collective rights and interests by setting aside illegal practices and behavior and by achieving directly—or provoking indirectly—the adoption of new standards or rules.

### III. SHIFTS IN THE PURPOSES OF GROUP LITIGATION

This distinction between *damage oriented* and *policy oriented* group litigation is very general, but can be used as a key to understanding the dynamics of significant changes occurring in many legal systems. Such dynamics are very different in common law systems (especially in the United States) and in civil law systems (especially in continental Europe). Both systems seem to have moved from their starting points, but these changes are oriented in almost opposite directions.

With regard to the classic example of U.S. class actions, the main function of this remedy when it was created in 1938 was to provide compensation for many relatively small harms or injuries by opening access to justice to groups of people who were presumably not able or not inclined to seek redress by means of individual actions. The main rationale of Rule 23 was, in fact, to provide compensation for individual harms that otherwise would have found no other kind of relief.<sup>11</sup>

In the following decades, mainly in the 1960s and 1970s, things changed substantially. The purpose of compensating harms suffered by groups or classes of people persisted, of course, but the relatively new experience of gigantic mass torts went far beyond the original model of class actions.<sup>12</sup> The basic purpose of compensating individual harms is still present in mass tort class actions, but the dimension of the classes involved and the amount of damages granted have significant consequences. One consequence is that when fluid recovery leads to the creation of a fund as a means to handle the money in order to compensate the individual members of the class, an organizational and *lato sensu* administrative activity by the court is required, including the appointment of special officers, controls, regulations. Another consequence (as was proposed in order to cope with the

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11. See Kalven & Rosenfield, *supra* note 6.

12. See generally WEINSTEIN, *supra* note 7; Fleming, *supra* note 7; Hensler & Peterson, *supra* note 7; Rosenberg, *supra* note 7.

hundreds of thousands of asbestos cases) may be a sort of “administrativization” of the problem, by means of agencies or other public institutions charged with managing these cases. This is a clear attempt to resort to regulation or legislation in order to find answers to issues raised by mass tort cases.<sup>13</sup> A third consequence is the massive use of punitive damages in these cases. In line with the asserted fundamental function of punitive damages (to deter the wrongdoers from continuing or repeating their illegal behavior), it may be said that mass tort class judgments also perform a regulatory function in reshaping the patterns of the wrongdoers’ behavior (and also the attitudes of other potential wrongdoers).

Thus, the scope of class actions has broadened substantially and progressively to include new and different types of cases, characterized by purposes that can be defined as *regulatory* or *policy oriented*. Correspondingly, the repertoire of devices provided by Rule 23 has become much more sophisticated. The introduction of the class injunctive remedy is a clear example of this expansion of class actions far beyond the original goal of compensating individual injuries or losses.<sup>14</sup> The broader scope includes a large variety of *new* conflicts concerning civil rights and the fundamental interests of citizens in modern societies. The legal language itself has changed in order to indicate the new functions performed by class litigation. Well-known phrases, such as “public law litigation,”<sup>15</sup> “structural,” or “institutional injunction,”<sup>16</sup> illustrate the way in which litigation is oriented toward enforcing new collective and general values, and to achieving or provoking substantial changes in a number of private and public standards of practice and regulation.

The plurality and variety of the contexts in which class actions perform this function have an obvious feedback effect upon the device itself. The general class action splits into several sub-types, each of them oriented toward the achievement of specific purposes, and each having—as a further consequence—different procedural features and practical results.<sup>17</sup>

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13. See DE NOVA, *supra* note 10.

14. See GIUSSANI, *supra* note 1, at 253-260; WRIGHT ET AL., *supra* note 1, at 447; *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1321, 1332, 1576 (1976); Angelo Dondi, *Funzione “remedial” delle “Injunctive class actions,”* 42 RIV. TRIM. DIR. PROC. CIV. 245 (1988).

15. Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

16. See FISS, *supra* note 8.

17. See, e.g., Janet Cooper Alexander, *supra* note 1, at 3.

In civil law systems the situation is completely different. First of all, it should be noted that attention to the judicial protection of so-called collective, diffuse, or fragmented interests and concerns about the access to courts of people vested with such interests only began to slowly emerge in the late 1960s and throughout the 1970s.<sup>18</sup> Some important improvements in this area occurred in a few countries during this period,<sup>19</sup> while in many countries things began to change much later. Some significant, but isolated, reforms date back to as recently as the late nineties,<sup>20</sup> and not surprisingly, these problems remain unresolved in various legal systems.

Moreover, the starting point of this complex, uncertain, and laborious movement is not the perceived need to provide compensation for harms or injuries individually suffered by the members of groups or classes of people similarly situated. Instead, the goal pursued by most of the (few) European legislators when enacting statutes in this area is to provide for new regulations, or to change the existing ones, with regard to specific and relatively narrow areas of the legal system. The most significant examples are the German *Verbandsklage* (an action aimed at obtaining the judicial nullification of illegal clauses in mass contracts), and similar devices introduced in other countries

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18. See, e.g., LE AZIONI A TUTELA DI INTERESSI COLLETTIVI (Vittorio Denti ed., 1976); Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, in III ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES, 513-564 (Mauro Cappelletti & Bryant Garth eds., 1979); LA TUTELA DEGLI INTERESSI DIFFUSI NEL DIRITTO COMPARATO (Antonio Gambaro ed., 1976); VINCENZO VIGORITI, INTERESSI COLLETTIVI E PROCESSO: LA LEGITTIMAZIONE AD AGIRE (1979); Mauro Cappelletti, *Formazioni sociali e interessi di gruppo davanti alla giustizia civile*, 30 RIV. DIR. PROC. 361 (1975); J.A. Jolowicz, *Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law*, 42 CAMBRIDGE L.J. 222 (1983); Michele Taruffo, *I limiti soggettivi del giudicato e le "class action"*, 24 RIV. DIR. PROC. 618 (1969).

19. See, e.g., in Germany, the so-called *Verbandsklage* and collective action in the domain of unfair competition. About the German equivalents of class actions, see GIUSSANI, *supra* note 1, at 329; HARALD KOCH, *PROZESSFÜHRUNG IM ÖFFENTLICHEN INTERESSE* (1983); Nicolò Trocker, *La Tutela Giurisdizionale Degli Interessi Diffusi Con Particolare Riguardo Alla Protezione Dei Consumatori Contro Atti Di Concorrenza Sleale: Analisi Comparativa Dell'esperienza Tedesca*, in LA TUTELA DEGLI INTERESSI DIFFUSI NEL DIRITTO COMPARATO 447-488 (Antonio Gambaro ed., 1976); Giorgio De Nova, *La legge tedesca sulle condizioni generali di contratto*, RIV. CRIT. DIR. PRIV. 134 (1978); Peter Gottwald, *Class Actions auf Leistung von Schadensersatz nach amerikanischem Vorbild im deutschen Zivilprozess?*, 91 ZZP 1 (1978) (on file with *Duke Journal of Comparative & International Law*); Harald Koch, *Class and Public Interest Actions in German Law*, 5 CIVIL J. Q. 66 (1986); Walter, *supra* note 2.

20. See, e.g., *supra* note 10, the Italian Act of 1996, introducing a kind of *Verbandsklage* against unlawful contractual clauses, with the new art. 1469 *sexies* of the Civil Code (stating that "the associations representing consumers and producers. . . may sue the producer or the association of producers that make use of general contractual clauses, and ask the court for an injunction prohibiting the use of unfair conditions. . .").

(e.g., Italy) to protect consumers against the use—imposed by large companies—of illegal, unconscionable, or unfair clauses in contracts.<sup>21</sup> This very specialized type of action is not aimed at compensating the “weak party” (presumably the consumer) for a contract including unfair terms, but at eliminating the illegal clauses from standard form contracts and therefore from general commercial practice. This is a regulatory goal that is pursued by means of a policy oriented judicial remedy, not a compensatory goal pursued by means of an action for individual damages. This model is also followed to a substantial extent in other areas, such as the protection of fair competition, and is frequently adopted by European Union directives in the area of consumer protection and by national statutes in the same domain.

In the last couple of decades, the movement toward the protection of collective and diffuse interests—and therefore in favor of group or class litigation—has accelerated and, in some systems, has produced relevant outcomes. Probably the most advanced achievement is the Brazilian Consumer Code that introduced a U.S.-type form of class action in 1990, with interesting and original procedural adaptations.<sup>22</sup> Other countries have adopted some forms of group litigation (e.g., the Netherlands and Portugal), and still other countries are on the way to introducing similar reforms (e.g., Sweden and Norway).<sup>23</sup>

Within these complex and differentiated trends, various models and strategies are taken into consideration by the proponents of reforms and by national legislators. In some cases, for instance in Brazil, the dominant model is the U.S. class action, but it has been adapted to a civil law context (without jury trial and punitive damages). Such experiences are very interesting because they show concretely that the U.S. class action can be used in flexible ways as a model for transplants into different legal cultures, without any need to transfer all of its typical (but unnecessary) U.S. features.

However, the prevailing European trend seems to be toward not following the class action model. Continental legislators seem to prefer the narrow and carefully restricted use of special procedural devices aimed only at controlling or regulating practices in specific legal areas. There are, however, some European legal commentators who

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21. See generally *supra* notes 19–20.

22. Consider, however, that beginning in 1985 other Brazilian statutes introduced several forms of collective actions.

23. See, e.g., Nordh, *supra* note 2.

favor a broader and more modern approach and who have suggested the introduction of U.S.-type class actions.<sup>24</sup>

Even when the problem of damages cannot be set aside completely because compensation must be granted (as happens with harms caused by water or air pollution), the compensatory purpose is usually defined in such a way as to exclude the redress of individual harms or losses. For instance, in a 1986 Italian statute concerning environmental protection, the “environmental damages” (i.e., the amount of money corresponding to the damage caused to the environment) are considered “public damages.”<sup>25</sup> As a consequence, the State is the only subject entitled to recover financial compensation for such damages. The single subjects that have been harmed by pollution may recover their own personal damages only by means of individual litigation.<sup>26</sup>

In fact, in many civil law systems, there is still widespread and strong resistance toward the acceptance of any full-fledged form of group or class litigation. Statements such as “we don’t need any class action” and “these are strange American things—better not to import them” are rather frequent in European legal discourse.

#### IV. RESISTANCE AGAINST GROUP LITIGATION

Such resistance results in exceedingly cautious and restrictive approaches for group litigation. One of the consequences of such an approach is that in many cases the access to justice for large groups or classes of people is denied, although modern European constitutional systems claim to guarantee every person his or her own right of action.<sup>27</sup> It seems that a wide gap exists in many legal systems between the formal guarantee of access to justice for all and the effective possibility of every person being able to seek judicial protection of his or her rights. This gap is particularly broad when the rights in need of protection belong to large groups of people.<sup>28</sup> This is a relevant

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24. See, e.g., GUISSANI, *supra* note 1; Lindblom, *supra* notes 2, 5.

25. See Istituzione del Ministero dell’Ambiente e norme in materia di danno ambientale (Institution of the Ministry of the Environment and provisions concerning environmental damages), Legge 8 July 1986, No. 349 (Italy).

26. See the essays collected in *Il danno all’ambiente*, special issue of RIV. CRIT. DIR. PRIV. 429-707 (1987).

27. See, e.g., COSTITUZIONE DELLA REPUBBLICA ITALIANA tit. I, art. 24 (Italy); CONSTITUCION ESPAÑOLA tit. II, art. 24 (Spain).

28. For a broad overview of the access to justice problems in several countries, see ACCESS TO JUSTICE I-IV (M. Cappelletti et al. eds., 1978-79).

problem of constitutional implementation that, unfortunately, is beyond the scope of this discussion.

Instead, it is worth identifying (although not to justify) some of the sources of the resistance to developed forms of group litigation. Without any claims of completeness, at least three main tentative explanations may be advanced.

#### A. Ignorance and Negative Propaganda

The reality of the devices existing in some developed legal systems for the protection of group or class interests is simply not known in a number of procedural cultures. Incredible as it may seem at the dawn of the twenty-first century, comparative legal studies in the area of civil justice are still in the hands of a minority of legal scholars around the world. This is especially true with regard to the problems discussed here. Many lawyers and scholars—even in so-called “advanced” countries—are still quite content with their cultural parochialism and their substantial ignorance of what is going on beyond their national borders. With specific reference to U.S. class actions, it may be said, quoting the title of a well-known essay written by Arthur Miller in 1979, that the “Frankenstein monster” was—and still is—made much more visible than the “knight with the shining armour.”<sup>29</sup> Correspondingly, the European rejection of class actions—essentially based upon ignorance—has usually been justified by the necessity of preventing such a monster from penetrating the quiet European legal gardens.

#### B. Distorted Perspectives

A significant aspect of this general attitude of rejection is that the problem of class actions (erroneously perceived to be the only possible kind of group litigation) has been mixed up with other things that may appear particularly strange and disturbing to a European lawyer. One of these things is the practice of awarding huge punitive damages, especially in jury-tried mass tort cases. Civil law systems do not allow punitive damages and have no juries in civil proceedings. Since the practice of class actions is commonly associated (in the naïve European conception of the U.S. system of litigation) with immense punitive damages, the rejection of the latter entails the rejection of the former. Of course, punitive damages may also be awarded in in-

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29. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979).

dividual actions, and class actions do not necessarily result in high punitive damage awards. However, this distinction seems too subtle for most European lawyers to perceive.

The second thing that seems unacceptable to Europeans is the U.S. system of contingent fees and particularly the practice of proportioned fees, in which the plaintiff's lawyer gets a percentage of the amount recovered. Contingent and proportioned fees are illegal, for various traditional reasons, in many civil law systems. Thus, the class action model is rejected because proportioned fees are common in this type of action.<sup>30</sup> Of course one may observe that proportioned fees (when they are admitted) also exist in individual litigation and that a class action may be filed even without considering proportioned fees; however—once again—many civil lawyers seem unable to grasp such an obvious distinction.

### C. Continuing Force of Traditional Concepts

An important source of the resistance to change, specifically to the class action model, is the force of inertia exerted by a group of traditional concepts customarily used to define the *size* of the archetypal litigation from a subjective and objective point of view. A full discussion of all these concepts is not necessary here, but a couple of examples may suffice to illustrate the point.

One example is the standard that is commonly used to determine who has standing to sue in civil litigation. The traditional perception is that only *individuals* are vested with a right of action for the protection of their own individual substantive rights.<sup>31</sup> The typical plaintiff is an individual who files a claim concerning an allegedly violated single and specific right of his or her own and seeks an individual remedy against an individual defendant. Sometimes, it may happen that one of the parties is a *public subject*, such as the State, the government, or an administrative agency, but from a procedural point of view, it makes no difference. It may even happen that a public party files a claim with the purpose of protecting super-individual interests, but it normally occurs when *public* or *general* interests are at stake and when the public subject is vested with the right or obligation to represent these interests. Take, for instance, the case of a public prosecutor who acts as a plaintiff in a civil case representing a *public interest* that is connected with or affected by a *private* legal situation.

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30. See, e.g., GIUSSANI, *supra* note 1, at 398.

31. See *id.* at 376.

There is, then, a correspondence between private rights and private subjects on the one hand, and between public interests and public subjects on the other.<sup>32</sup> However, no matter whether private or public, the fundamental model of litigation is still that of individuals pursuing the protection of individual rights against other individuals.

In this context, an *association* representing collective or diffuse interests is something strange and unusual—it does not fit well with traditional ideas of how civil litigation is pursued, and therefore is not easily acknowledged as a procedural party. Associations are usually allowed to litigate with the aim of protecting their own *institutional* rights or interests (in other words, as single subjects), but—as a rule and with a few specific exceptions—they are not allowed to litigate on behalf of their members, let alone act as *representatives* of larger or even undetermined groups or classes of people (e.g., consumers, workers, or people living in polluted areas).<sup>33</sup> To open the way to such a broad function of associations, specific statutory rules are usually required, but these rules are normally intended as exceptions to the traditional stable principles governing the issue of individual standing to sue. In fact, such rules are relatively infrequent, and in most cases, they cover only a narrow range of specific situations.

The second example, theoretically connected to the first, is illustrated by the principles governing the *res judicata* effects of a civil judgment. These principles are based on a strict conception of claim preclusion, according to which the precluding effect deals exclusively with the main substantive issue that has been decided. Moreover, there is no *res judicata* effect in favor of or against any subject that was not a party to the proceeding (except the parties' privies). In other words, there is no issue preclusion (or collateral estoppel) with regards to nonparties. The extension of *res judicata* effects beyond the parties—which is typical of representative actions and is the core of their function—is, in principle, excluded. It seems that insofar as these traditional standards are retained as valid and binding, there is

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32. For some comparative overviews, see Mauro Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, in II ACCESS TO JUSTICE: PROMISING INSTITUTIONS 769 (M. Cappelletti & J. Weisner eds., 1979); Bryant Garth, *Group Actions in Civil Procedure: Class Actions, Public Actions, Parens Patriae and Organization Actiona*, in *Rapports Généraux XIII Congrès International* 205, 231 (1992) (on file with *Duke Journal of Comparative & International Law*).

33. See, e.g., LOUIS BORÉ, *LA DÉFENSE DES INTÉRÊTS COLLECTIFS PAR LES ASSOCIATIONS DEVANT LE JURIDICTIONS ADMINISTRATIVES ET JUDICIAIRES* (1997); GROUP ACTIONS AND CONSUMER PROTECTION—L'ACTION COLLECTIVE ET LA DEFENSE DES CONSOMMATEURS (Thierry Bourgoignie ed., 1992).

no room for procedural mechanisms based on the assumption that a judgment may affect a group or a class of individuals that were not actually parties to the proceeding. Even other solutions, such as the effect of *res judicata secundum eventum litis* (i.e., only *in favor* of non-parties) that is allowed in the Brazilian version of class actions, are hardly compatible with those principles (and, in fact, the issue preclusion *secundum eventum* is admitted by *ad hoc* statutory rules only in exceptional and very limited cases).<sup>34</sup>

All these concepts are the product of a historical tradition deeply embedded in European procedural culture. Therefore, at least to some extent, one may understand that setting them aside requires a very difficult and complex cultural change. A slow evolution over a long period of time is probably necessary to adapt these concepts to the new and different situations emerging in the administration of civil justice. However, the pressure to achieve effective protection of super-individual rights and interests is rapidly increasing. Under such pressure, at least some of the traditional deadweights still existing in many procedural cultures may be set aside, and perhaps ways for significant improvements can be found.

## V. TWO TYPES OF INDIVIDUALISM

In an effort to interpret the differences just outlined, it is possible to think of two different kinds of individualism. On the one hand, we find a sort of *altruistic individualism* by looking at social and legal contexts in which single individuals are active (and litigate) not only for their own personal advantage, but also to protect or enforce the rights or interests of others similarly situated because they are involved in the same legal situation. Here, the individual feels responsible for what happens to other individuals and is inclined to engage in activities aimed at protecting collective or public interests. In the context of such an ethical orientation, one may speak of the single citizen as a *private attorney general*—an altruistic private subject who also acts on behalf of groups or classes of other subjects.<sup>35</sup>

This brand of altruistic individualism is sometimes active in broader spheres concerning collective or general interests. Within these spheres, it may trigger a dynamic and dialectical relationship

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34. See, e.g., ANTONIO GIDI, *COISA JULGADA E LITISPENDENCIA EM AÇÕES COLECTIVAS* 57-185 (1995); Taruffo, *supra* note 18; Michele Taruffo, “*Collateral estoppel*” e *giudicato sulle questioni (I)*, 26 RIV. DIR. PROC. 651 (1971); Michele Taruffo, “*Collateral estoppel*” e *giudicato sulle questioni (II)*, 27 RIV. DIR. PROC. 272 (1972).

35. See, e.g., Cappelletti, *supra* note 32, at 773.

between litigation, legislation, and government for the protection of these interests. Where legislation and government are inefficient, incapable of acting, or insensitive to general policy problems, litigation managed by altruistic individuals can be (given the necessary legal conditions) a useful substitute and may spur the political power and the administration to change the existing situation. It is by means of litigation that altruistic individuals may achieve compensation for harms inflicted to classes of people or fight for new private or public regulations concerning large numbers of subjects. Roughly speaking, group litigation is complementary to legislation and government in a double sense—when the public powers are ineffective, litigation performs its function as a means both to protect and directly enforce rights and interests in a collective fashion and as a force of pressure on legislation and government for substantive protection of these rights and interests.

The second type of individualism is typically *egoistic*, since it emerges when individuals are active in starting and prosecuting cases, but with the exclusive aim of pursuing their personal self-interest. Super-individual and collective interests are beyond the scope of litigation managed by egoistic individuals who are not inclined to pursue or achieve anything but their own personal advantage. They are not willing to spend time and money in order to protect the rights of other people. In these cases, litigation is strictly selfish—it serves nothing except the purposes of single private subjects involved in individual cases.

This egoistic approach leaves out of the range of litigation every concern that may be related to the protection of collective interests, the enforcement of diffuse rights or the development and implementation of policies aimed at ameliorating the conditions of groups or classes. These issues exist and raise relevant problems in all developed societies, but the egoistic individualist displaces them far beyond the borders of civil litigation (and of his or her own concern).

Correspondingly, things such as collective interests, diffuse rights, and general or public policies are ascribed to non-private and non-individual entities, and primarily to the State (viewed as an abstract concept) or to the government (viewed as an administrative organization for the management of non-individual and then non-private interests). This traditional orientation to ascribe the task of dealing with super-individual problems to “someone else”—at any rate not to single private individuals—has undergone interesting developments in the last few decades. One of these developments is the

emergence and the growing importance of supranational organizations that are also active in the area of collective and diffuse rights. For instance, the European Union is engaged in consumer protection. It is on the basis of a directive from the EU that several countries (including Italy and Germany) recently enacted statutes providing some forms of group action.<sup>36</sup>

The other development is the birth and growth of a number of associations pursuing super-individual goals such as environmental and consumer protection.<sup>37</sup> They are usually private institutions created on a voluntary basis with the aim of pursuing collective or general purposes on behalf of large groups of people. There is, however, an important reason to exclude any similarity between these associations and private individuals, at least in the European context and from the point of view of group litigation. In most cases, associations are allowed to sue for the protection of collective interests *only* when they have particular characteristics defined by the law (concerning charters, number of members, organization, and so forth). Moreover, the existence of these conditions is normally checked by an official entity (usually a ministry), and then the approved association is included on an official list.<sup>38</sup> Thus, there is strict bureaucratic control exercised by the government, and only a few officially authorized associations may actually have a role in litigation concerning group or class interests. In a sense, then, associations are private, but perform a sort of quasi-public function under public control, almost as if they were branches of the government.

All these phenomena, especially the emergence of public or quasi-public subjects in the domain of collective or general interests, deserve careful consideration. In this context we are left with some important but unsolved problems. What happens if—as frequently occurs—the State or the government is inefficient, or does not have enough money to spend for the protection of those interests? On the other hand, why should the State (in other words, taxpayers) be charged with the compensation of damages caused by private wrongdoers, and then only in cases where many people are harmed and the amount of compensatory damages is particularly high? What hap-

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36. *See, e.g., supra* note 20. *See also* Koch, *supra* note 2.

37. There are dozens of such associations in various European countries, including workers' unions, consumer and environmental associations, and other associations protecting a wide range of super-individual interests.

38. *See, e.g.,* the Italian Act of 1986 *supra* note 25, providing for a list of environmental associations that has to be kept by the Ministry of Industry.

pens when associations are too small or too weak, or when they are just self-serving (i.e., acting just in order to collect money or to get new members), or make the wrong choices and do not adequately protect all the collective interests they claim to represent?

In an optimal and ideal system, such gaps could be filled by private group or class litigation, but—as we have seen above—this can only happen when the dominant attitude is altruistic individualism, and when altruistic individuals are able to avail themselves of adequate legal procedures. This does not happen in societies where the dominant value is egoism, where individuals are moved only by selfish interests and are inclined to leave to some “big brother” the protection of super-individual interests and the implementation of general policies. At any rate, it could not happen in legal systems that do not provide the necessary procedural mechanisms for group litigation. In fact, even assuming that in a given society some altruistic individuals exist, they could not be active on behalf of other people if the legal system does not supply them with suitable and viable legal devices.

## VI. BROADER CONTEXTS

All the differences and disputed issues sketched out above make it clear that in the area of group litigation we are faced not only with interesting developments that are still in progress, but also with a complex and multi-faceted clash of different cultures, ethical and social attitudes, legal and political values, and even different psychological approaches to the themes of collective rights and their protection. Correspondingly, in order to understand the problematic nature of modern group litigation, we must take into consideration a very broad spectrum, including a variety of different legal institutions and cultures.

At this point one may wonder whether the only worthwhile thing to do is to take note of all these variations and just pause to contemplate the complexity of reality, or whether we should look for alternative and more fruitful ways of addressing the problems discussed thus far. The correct approach seems to be the latter, especially because there are still more, relatively new factors deserving thorough consideration. These factors may be identified by looking at some of the many legal consequences stemming from the immensely complex phenomenon of economic, financial, and commercial globalization. These consequences cannot be discussed here at length, but a general remark may suffice. In a globalizing world, a growing number of legal relationships and situations cannot be interpreted any longer solely

within the frameworks of nation-states or national legal systems. Many legal issues and transactions that used to be typically nationwide in the past, or even much smaller in scale, now frequently turn into transnational and sometimes worldwide legal problems. Just to take a few examples: environmental pollution is no longer a national problem (as Chernobyl and other cases unfortunately show); using harmful products or dangerous pharmaceuticals is no longer a local problem; and race or gender discrimination in labor relations is no longer a problem of some specific areas, since the transnational organization of industrial production allows big companies to exploit and underpay workers in underdeveloped countries.

Correspondingly, the classes of people exposed to harms and injuries that should be prevented and compensated are also tending to expand far beyond the customary size of relatively small groups existing within the national borders of single countries. Smokers addicted to U.S. cigarettes do not live only in the United States; people eating meat infected with mad cow disease do not live only in England. These consumers may number thousands or billions all around the world. The same may be said of many other situations—one thinks of consumers of any kind of product sold on a mass scale in a transnational market, or users of financial services in the worldwide economy, for transactions made in online markets, and so on.

This way of considering some of the trends that are quickly developing in the globalizing world opens immense spaces—the extent of which are still difficult to imagine—and this may be a frightening sensation if one perceives correctly the dimension of the problems that still have to be solved in order to afford effective protection of individual rights in the globalized world. It is clear, at any rate, that our traditional culture does not supply us with any ready-made solutions for these problems. Yet it is also clear that they cannot simply be ignored or denied, since their transnational dimension is *in re ipsa*. What we can reasonably do is acknowledge that these are the main challenges facing us in the future, and that to some extent they are already present in modern societies all around the world. Our primary task is to find ways to cope with these challenges in order to preserve and improve the concrete realization of the value of real access to justice for all and the effective judicial protection of every person's rights.