

**PART X**

**COLLECTIVE LITIGATION**

**CHAPTER SIX**

**CONCLUSIONS**

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## 1 FUTURE PERSPECTIVE ON COLLECTIVE LITIGATION\*

### 1.1 General Remarks

- 1 In these concluding remarks, we embark on the future of collective litigation: class actions and aggregate litigation tools. Based on the reflections that were made in the previous chapters, we look into the future. Although these reflections are meant to be global, a closer look is taken at the situation in Brazil and Latin America.
- 2 Tools of collective litigation are being created in an increasing number of jurisdictions. It is interesting to notice that, in the last two decades, the number of countries that have adopted representative litigation by private actors has multiplied and there does not seem to be any reason for this to change in the near future.<sup>1</sup>
- 3 Changes in the world, such as the growth of industrial societies, causing injury to a large number of individuals, or changes in the law such as the creation of new rights (eg, fundamental rights), have led to this development.
- 4 At this point, one should recall that the terminology here adopted is *collective litigation*, a genre encompassing representative class actions (American model), and forms of aggregate litigation (such as the German *Musterverfahren*).

### 1.2 Class Actions and Aggregate Litigation Tools

- 5 Class actions, and collective litigation in general, have the potential to generate social, economic and political changes. This potential, as we will see, is getting much more visible in the last decades.
- 6 The importance of class actions is growing for two main reasons. The first being that the potential of causing harm or injury is ever greater, increasingly affecting communities worldwide. Secondly, a new generation of rights can be perceived, such as all the rights connected to technology, data protection, artificial intelligence, ie, rights that are not adequately and efficiently protected by traditional civil procedural tools.
- 7 Since there are several concerns, referred to in the previous chapters, mainly in the introductory chapter, over class actions, some jurisdictions prefer aggregative methods.

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\* Written by Teresa Arruda Alvim. I want to thank my colleagues, brilliant Brazilian lawyers and spectacular scholars Caio Victor Ribeiro dos Santos and Sérgio Cruz Arenhart for the exchange of ideas on this topic and the recommendation of appropriate literature on several topics.

<sup>1</sup> D R Hensler, 'The globalization of class actions: an overview' (2009) 622 *The Annals of the American Academy*, 7: 'In less than a decade, the number of countries that permit representative litigation by private actors has multiplied dramatically. A minority of these procedures share all the features of the American class action for money damages. But there is a trend toward permitting private individuals and organizations to come forward on behalf of absent parties to obtain injunctive or declaratory relief of monetary compensation in some or all circumstances'.

These permit judges to deal individually with the claims but bundle them for reasons of efficiency.

- 8 As mentioned in Chapter 4, there are several models of aggregative litigation tools: group litigation order, the German capital markets model proceeding, the United States multidistrict litigation procedure and others.
- 9 In order to accept aggregate litigation tools at a theoretical level, we do not need to abandon the underlying fundamental principles of civil procedure, concerning individual suits, mainly those related to standing and *res judicata*.<sup>2</sup> There are fewer due process concerns because those who are affected by the decision have the opportunity to participate in person, although such participation may be limited until a settlement is offered (when such occurs) when each litigant must agree to release their claim in exchange for compensation
- 10 By contrast, in a class action, the fundamental principles of civil procedure, all of them related to individual suits, have to be abandoned and concepts of *res judicata* and standing must be revisited. It is a new world.
- 11 It is important to underline that a significant number of jurisdictions have both mechanisms: representative class actions and aggregative procedures. Both of them can address mass claims.

### 1.3 New Role of Class Actions

- 12 In any case, it seems to me that we can already perceive an outline of what the future holds for the role that will be played by collective litigation, mainly by class actions. Aggregate litigation tools will continue to solve consumer disputes and similar ones, but class actions are bound to play a really important role, in their representative model.

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<sup>2</sup> Part V Introductory Chapter, para 86-107.

- 13 In my opinion, an important aspect of the future prospects of collective litigation is the rise of its *strategic*<sup>3</sup> use. *Strategic litigation* may be *structural*<sup>4</sup> or *regulatory*<sup>5</sup>.
- 14 *Strategic* litigation is not limited to class actions or to any tool of collective litigation. An individual lawsuit could also play this role. Naturally, there is a greater probability that individual lawsuits will play that strategic role when there are innumerable similar claims against the same defendant, or even when they are brought together through aggregate litigation tools.
- 15 Nevertheless, it is natural that class actions play this role more frequently than individual ones.<sup>6</sup> Strategic litigation commonly involves climate change, fundamental rights, etc: rights that are more efficiently protected by class actions.<sup>7</sup> Another reason is that the court's decision, even if it is not the case of these intrinsically collective rights, always involves a group of people who, broadly speaking, find themselves in the same situation (in the situation involving individual homogeneous rights referred to in the Introductory Chapter, para 59).
- 16 A lawsuit may play a *strategic* role when the plaintiff aims to achieve *more than a favourable award*. Actions with a strategic role may have either structural or regulatory aims. In both cases, political, social or legal changes may be produced.
- 17 When a lawsuit deals with complex cases, normally involving matters of public interest, such as for example overcrowded prisons, it may play a *structural* role.
- 18 It is impossible to solve the overcrowding problem of prisons without giving rise to some structural changes. It is, indeed, a complex and difficult issue that involves a matter of

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<sup>3</sup> B Hess, 'Strategic Litigation: A New Phenomenon in Dispute Resolution' (2022) 3, MPILux Research Paper, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4107384](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4107384) accessed 12 February 2024.

<sup>4</sup> S C Arenhart, G Osna and M F Jobim, *Curso de processo estrutural* (Thomson Reuters Brasil, 2021).

<sup>5</sup> D Rosemberg, 'The Regulatory Advantage of Class Action,' in W K Viscusi (ed), *Regulation through litigation* (AEI-Brookings Joint Center for Regulatory Studies, 2002), 244-304. Arguing that in the same way administrative regulation deems it efficient to focus on the establishment of broad regulatory standards for certain products, it is also more efficient to make the legal system broach all the issues related to a certain product in a single lawsuit, instead of doing so in a series of individual proceedings, thus enabling the courts to adopt, when rendering a decision, a holistic and, therefore, clearer perspective of the market. It should be emphasized that Rosemberg nevertheless focuses on the superiority of compensatory class actions in relation to individual actions, rather than on the superiority of compensatory class actions in relation to administrative regulation.

<sup>6</sup> S I Strong, 'Regulatory litigation in the European Union: does the U.S. class action have a new analogue?' (2012) 88 (2) *Notre Dame Law Review*, 899: 'Although several types of regulatory litigation exist, the U.S. class action is often considered the paradigmatic model for this type of private regulation'.

<sup>7</sup> B Hess (n 3) 26, says that strategic litigation frequently concerns destruction of common goods (climate change) the protection of general interests (human rights) and large-scale unlawful situations (eg, environmental pollution). Obviously, these goods are more efficiently protected by class actions by individual lawsuits.

public interest and that cannot be solved unless a more far-reaching and structural award is given that transcends the interests of the individuals involved.

- 19 Class actions, when used in a *regulatory* role, have *redundancy* as one of their most visible characteristics, acting as a backup system when the regulatory regime fails.<sup>8</sup>
- 20 The need for regulation in complex societies is intensive. The degree of technological and scientific development gives rise, as a natural consequence, to new *risks*.<sup>9</sup> Risk is inherent to our industrial society. These risks have to be *regulated*, otherwise they can result in irreversible damage.<sup>10</sup>
- 21 Furthermore, a heightened awareness of the duties of governments leads to the need for *regulation* of matters such as health care, education, food, etc.<sup>11</sup> Sometimes this regulation is achieved as an effect of the regulatory consequences of class actions.

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<sup>8</sup> D R Hensler, 'Can private class actions enforce economic regulations? Do they? Should they?' (2015) Conference Proceedings (Submitted), available at: <https://aei.pitt.edu/79042/1/Hensler.pdf> accessed 12 February 2024: 'Modern regulatory regimes are complex technical systems. Like hardware and software, they have many moving parts. Like airplanes, spacecraft, and deep water drilling their safe and effective performance requires human action – and judgment – at critical stages. Like pilots, the public regulators are susceptible to distraction. Like aeronautical engineers, they are susceptible to "groupthink". Like drilling engineers, their incentives to assure safety may be offset by their need to meet tight deadlines under budget and performance pressure'.

<sup>9</sup> P Luff, 'Risk regulation and regulatory litigation' (2011) 64 (1) Rutgers Law Review, 175-176: 'As society developed, citizens began to look more and more to the government to deal with risk. At the same time, the industrialization of society meant that citizens were exposed to both new risks and increased probabilities of old risks. The governmental response to these risks resulted in the regulatory state we have today. But as the epigraph that begins this Article recognizes, governments cannot deal with all the risks that an individual faces on a daily basis. This observation may be as obvious as it is uncontroversial, at least when we take a moment to reflect upon it. But the problem is that the government is also unable to deal with all the risks that society *would like it* to deal with. In such cases, gaps arise between the socially demanded and governmentally provide levels-of-risks regulation. This Article argues that regulatory litigation developed – and persists – because it fills these gaps'.

<sup>10</sup> P Luff, 'Risk Regulation and Regulatory Litigation', (2011) Rutgers Law Review 64 (73), 84.

<sup>11</sup> C Sustain, *After the rights revolution: reconceiving the regulatory state* (Harvard University Press, 1990), 55.

- 22 Strategic lawsuits are able to influence the atmosphere to create new statutes.<sup>12</sup> Class actions, when playing a structural role, can be filed with the deliberate aim of leading to deeper changes in the legal sphere, even aiming to bring about changes in statutes.<sup>13–14</sup>
- 23 Usually, activists and NGOs use class actions in a strategic way. Initially, NGOs were just groups of people with similar interests, but nowadays there is a trend for them to become increasingly professional.<sup>15</sup>

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<sup>12</sup> P J Cook and J Ludwig, 'Litigation as Regulation: firearms', in W K Viscusi (ed), *Regulation Through Litigation* (AEI-Brookings Joint Center for Regulatory Studies, 2002), 89: 'In short, many of the changes in gun commerce and use that may be worthwhile in reducing the problem of gun violence in America will require legislation. Although litigation cannot affect these changes directly, the city lawsuits may alter the political environment in which the relevant legislative debates occur'.

<sup>13</sup> B Hess (n 3) 11: 'The most prominent judicial hubs for private law actions are currently England and the Netherlands. In the Netherlands, the ongoing Royal Dutch Shell litigation concerning human rights violations and ecological torts committed against the local population in Nigeria has gained much attention. However, the political ambition of the plaintiffs goes much further: The multitude of these lawsuits aims at convincing national and supranational lawmakers to implement protective legislation targeting multinationals and businesses engaged in global supply chains to impose on their contractual partners certain moral (and equally legal) standards of non-discrimination, fair salaries and adequate human working conditions – without any reference to the local legislation applicable to the branch involved'.

<sup>14</sup> K Loudenslager, 'The Volkswagen Emissions Scandal: An Ethics Case Study', available at [https://libraetd.lib.virginia.edu/downloads/td96k3017?filename=Loudenslager\\_Kelsi\\_STS\\_Research\\_Paper.pdf](https://libraetd.lib.virginia.edu/downloads/td96k3017?filename=Loudenslager_Kelsi_STS_Research_Paper.pdf) accessed 14 August 2024: 'In 2014, a study performed by West Virginia University revealed one of the largest scandals in automotive history. The study was designed to test the NOx emissions of several Volkswagen diesel cars while driving on the highway. The results exposed the company's deceit as the vehicles studied produced up to forty times the permitted amount of NOx gasses (Forsgren 2019)'.

Part X Chapter 2, 13. This case led to legislative changes in Germany: 'The model declaratory lawsuit was established on 1 November 2018. It is implemented in sections 606-14 of the German Code of Civil Procedure. The law was essentially passed to protect purchasers of Volkswagen vehicles from the tolling period which would have ended in 2018, which is the reason why the law is critically dubbed 'Lex Volkswagen'. The model declaratory suit is regulated in sections 606ff of the Code of Civil Procedure. Through the model declaratory suit, consumer protection associations can have facts and legal issues determined in court, which in turn has a binding effect on the individual processes of registered consumers. The lawsuit is aimed at clarifying factual and legal preliminary questions that are relevant in all individual cases. The model declaratory suit therefore cannot lead to a performance obligation of the defendant. The finding has no further legal consequences. For example, it does not result in compensation of injured parties, nor does it prohibit a business practice in future. Thus, although the court can determine the lawfulness of a particular business practice, the consumers must proceed with individual lawsuits to recover damages'.

Also check article C Meller-Hannich, 'Germany' in B Gesell and T M J Möllers, *Enforcing Consumer and Capital Markets Law: The Diesel Emissions Scandal* (Intersentia 2020), 104.

<sup>15</sup> B Hess (n 3).

- 24 Strategic lawsuits, normally but not exclusively brought under the form of class actions, are bound to achieve a specific goal and serve a particular cause, such as those related to societal change (eg, climate change) that goes beyond a favourable award.<sup>16</sup>
- 25 The main distinction between ‘normal’ and strategic litigation is that, as a rule, strategic litigation is ‘forward looking’, while ‘normal’ litigation, usually between private parties, is retrospective as it takes into consideration the preexisting law, the facts that took place, how they happened etc to solve a *past* dispute.<sup>17</sup>
- 26 A good example of strategic litigation can be found in Costa Rica where the Constitutional Chamber of the Supreme Court of Justice ruled on the right to health care. Many actions refer to the health system’s ‘unwillingness’ to respond to the AIDS epidemic in the 1990s. The government’s argument was always that the medication did not truly cure people, but was a mere palliative, and was furthermore very expensive.<sup>18</sup>
- 27 The case law of the Indian Supreme Court is highly relevant with regard to social rights. It is one of the most powerful constitutional courts in the world.<sup>19</sup> As we have seen in the introductory chapter, India has PIL (Public Interest Litigation) and SAL (Social Action Litigation), which are powerful instruments that ensure that the actions granted have a significant horizontal and vertical effect and have an impact on many of the country’s internal structures.<sup>20</sup>
- 28 The South African Constitutional Court has provided examples of actions in which the outcomes have had a significant impact on the country’s internal structures such as, for example, *Meaningful Engagement* in 2008. *GrootBoom*<sup>21</sup> is one of the most important cases heard by the Constitutional Court, in which the right to housing for poor people was discussed.
- 29 In Argentina, one of the most prominent class actions was filed by a group of residents affected by the high levels of pollution of the *Matanza-Riachuelo River*, a tributary of the La Plata River. It led to a decision determining that the government should prepare a

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<sup>16</sup> B Hess (n 3).

<sup>17</sup> P Luff, ‘Risk regulation and regulatory litigation’ (2011) 64 (1) Rutgers Law Review, 205: ‘The completed-events distinction seems to separate those cases – like breach of contract cases, which concern themselves with the occurrence or non-occurrence of an event specified in the contract – from cases like those involving prison or school reform, which deal with ongoing wrongs’.

<sup>18</sup> M F Jobim, *Cortes e o tratamento mundial de conflitos estruturais* (livraria do Advogado 2023).

<sup>19</sup> A O França, ‘A suprema corte da Índia,’ in R Brandão (ed), *Cortes Constitucionais e Supremas Cortes* (JusPodivm 2017), 351-388.

<sup>20</sup> P Jain, ‘Class action framework in India’, National Report, *not published yet*.

<sup>21</sup> *Government of the Republic of South Africa v GrootBoom* (Constitutional Court, South Africa) Judgment 4 October 2000 [2001] (1) SA 46.

*restructuring plan* to combat pollution and also submit follow-up reports on its compliance with the ruling.<sup>22</sup>

- 30 The same strategic structural use can be seen in the *Brumadinho*<sup>23</sup> case in Brazil. The bursting of the dam gave rise to this enormous tragedy: *Brumadinho*, 25 January 2019. 270 people were killed, and millions of cubic metres of mining waste were dumped into the Rio Paraopeba basin. The defendants are *Vale do Rio Doce* and the company German *TÜV Süd*. Crimes were committed against nature, both fauna and flora, in addition to culpable homicides, since it was shown that *Vale* was aware of the inadequacy of the safety levels of the tailings dam. The river water is still not fit for consumption and fishing is still not allowed. This disaster gave rise to a huge number of individual lawsuits, class actions and class action settlements. These settlements went far beyond what was claimed in the original claims.
- 31 The agreement reached in the *Brumadinho* case included (2019) for example: i) the professional training of young people and adults; ii) the creation and promotion of entities that support women who are victims of domestic violence, as well as alcohol and drug addiction; iii) the construction of ‘biofactories’ for the reproduction of pollinating insects, which are beneficial to agriculture; iv) legal advisory services for the legalisation of urban land ownership; v) the construction of multi-sports courts and skateboard tracks; vi) public policies for the prevention of crime.<sup>24</sup>
- 32 It is striking that the settlement involves much more than just compensating the losses caused, encompassing measures that aim to really *restructure* the region that was totally destroyed by the accident. Society seems to be satisfied with the results of this very broad settlement reached during the proceedings.
- 33 The regulatory effect of litigation may be the direct result of the judicial decision but may also stem from the voluntary conduct of the defendants. In fact, it was already stressed in the introductory chapter that class actions (aggregate litigation tools, as well as other types of lawsuits) may cause changes in behaviour.

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<sup>22</sup> R O Berizonce, ‘Los conflictos de interés público’, in A P Grinover, K Watanabe and S H Costa (ed), *O processo para solução de conflitos de interesse público* (JusPodivm 2022), 261-286 and F Verbic, *Além do papel - leituras críticas sobre processo coletivo* (Thoth 2023), 83 ff.

<sup>23</sup> T A Alvim, ‘Brazilian class actions and environmental accidents’ (2023) 27 ZJP Int – Zeitschrift für Zivilprozess International Jahrbuch des Internationalen Zivilprozessrechts, 203-218.

<sup>24</sup> D Hensler [et al], *Class action dilemmas: pursuing public goals for private gains* (RAND Institute for Civil Justice 2000), 68. Full redress agreement, available at <https://www.vale.com/documents/d/guest/cartilha-para-a-comunidade-acordo-de-reparacao-integral-12444-1-1> accessed 10 August 2023, 5.



- 34 The fact that a company gets an adverse judgment may have an impact on the conduct of other companies. This may have been predicted by the judge and by the plaintiff. In both cases, it seems to me that the regulatory effect is clear.<sup>25</sup>
- 35 Although disputes between individuals are not usually perceived as being capable of generating regulatory effects, in fact, these actions may play an important role in *filling the gaps* where the state has failed to act.<sup>26</sup> Arie Freiberg cites actions dealing with the harm caused by tobacco, alcohol, firearms, asbestos and silicone implants. In such cases, says the author, actions had compensatory, punitive and deterrent goals, and even regulatory ones, bringing about changes in behaviour. According to Freiberg, 'Class actions are a hybrid of public and private action purposes'.<sup>27</sup>

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<sup>25</sup> Ibid 68. This appears to be Deborah Hensler's stance: 'Despite their distaste for class litigation and their dismay about rising numbers of lawsuits, many corporate representatives [...] said that [...] class litigation had caused them to review financial and employment practices. Likewise, some manufacturers noted that heightened concerns about potential class action suits sometimes have a positive influence on product design decisions'.

<sup>26</sup> P Luff, 'Risk regulation and regulatory litigation' (2011) 64 (1) Rutgers Law Review, 184: 'Contracts for consumer goods involve the same risk of nonfulfillment but may carry additional risks based on the nature of the harm. For example, consider the case of negative-value consumer class actions – aggregated claims too small to be brought economically on an individual basis. A manufacturing defect in a mass production world can result in a large group of people that has purchased the same systematically defective item. But if less formal means of redress are unsuccessful and the individuals, unaware that anyone else is having the problem, are unable to put much pressure on the company to remedy the situation, most if not all of them will be hesitant to sue because the cost of bringing a lawsuit would be greater than the cost of replacing the broken or defective item. In these defective-product cases, class actions address two risks – one primary and the other secondary. The primary risk is the one mentioned at the beginning of the previous paragraph – that the producer is not upholding its part of the bargain to provide a working item that will continue to function for a reasonable length of time. The second risk is related to the nature of the harm – because the expected payoff of bringing a lawsuit against the manufacturer is small compared to the cost of bringing such a suit, the individual will have no practical recourse when the primary risk is realized. These risks are dealt with in three ways. First, we do see examples of informal regulatory bodies that have developed in the absence of formal, state regulation – organizations like the Better Business Bureau and Consumers Union – that are likely to exert strong influence on producers of household goods and can thus alleviate some of the strain on consumers when producers create the risks I have discussed. Additionally, administrative agency regulation deals with some of the risks that can come from defective products, although these are usually in the realm of tort risks rather than non-performance risks'.

<sup>27</sup> A Freiberg, 'Re-stocking the regulatory tool-kit', Jerusalem Forum on Regulation & Governance, 2010, 12: 'Governments create or authorise legal systems to facilitate and order the resolution of disputes, not just between the state and individuals or corporations, but also between private individuals and corporations. Private litigation is not ordinarily regarded as a regulatory tool, but it can have regulatory outcomes, some of which are intended by the state. Like direct government regulation through statute, litigation can arise from market failure where harm has been inflicted on a party. Where governments fail to act, or act inadequately, private litigation may play a role in filling regulatory gaps. This has occurred in recent years, particularly in relation to harms caused by tobacco, alcohol, firearms, asbestos, pharmaceutical drugs, therapeutic goods such as breast implants and professional misconduct (Smith 2002). In such cases the aim of the litigation moves beyond the compensatory to the punitive or deterrent or, more broadly the regulatory – to change behaviour. It may be regarded as a form of devolution of enforcement from the public to the private sector. Class actions are a hybrid of public and private action and purposes'.

- 36 It is important to stress that even if countries tend to have the same problems – as a result of globalization – which could theoretically lead to the creation of similar legal tools to solve them, this does not necessarily happen.
- 37 In the US, many cases that gave rise to strategic litigation either did not directly involve class actions or class actions played a minimal role in these situations. As precedents are binding there are public nuisance actions<sup>28</sup> and other judicial means that can be used strategically or, more specifically, with regulatory effects.
- 38 Nevertheless, in Brazil, most of these conflicts cited as strategic litigation would have been the subject matter of class actions, normally filed by *Ministério Público* (the Public Prosecutor's Office) or other official bodies.
- 39 This is what happened with the tobacco issue: a class action was filed in 2019 against *Souza Cruz Ltda, British and American Tobacco PLC, Philip Morris* (Brazil and International) where a claim was made to compensate the government for expenses incurred with the treatment of various types of cancer, tuberculosis, pneumonia etc, either caused or aggravated by the consumption of cigarettes or by exposure to cigarette smoke. The claim included a request for collective moral damages.
- 40 This class action led to the issuing of Decree 263/2019, which established a task force to discuss the taxation of cigarettes.
- 41 The strategic use of lawsuits, with regulatory effects, is quite perceptible in the US. A good example is the case of firearms. Several lawsuits were brought by local governments against the gun industry, having as grounds the huge losses generated by violence that was borne neither by the buyers of firearms nor by those who manufactured them.
- 42 The doubt that arose was: who must bear the costs of violence? A large portion of these costs arose from the negligence of the industry with regard to the sale of guns. A number of actions were filed and gave rise to stricter regulation of the purchase of firearms. It is deemed that the main aim of the lawsuits filed against the firearm industry was to bring about regulatory changes and not to obtain financial compensation for the costs of violence. However, it was precisely the threat of the latter sanctions – the expectation that they would occur – that brought about changes in the legislation.

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<sup>28</sup> K Boudreaux and B Yandle, 'Public Bads and Public Nuisance- Common Law Remedies for Environmental Decline', (2002) 14 (55) *Fordham Environmental Law Review*, 61: 'At common law, a public nuisance is defined as an unreasonable interference with rights held by the public in general, not merely with the rights or interests of a few individuals. An example would be interference with the public's right to maintain the navigability of a river. A public nuisance involves the harmful use of common and public property'.

- 43 These lawsuits also had an impact on the design of these firearms: child-proof triggers, mechanisms that show if the gun is loaded or a sensor that allows it to be used only by its owner.
- 44 According to Cook and Ludwig, the actions filed against the gun industry claimed that there was negligence in its marketing practices, the design of its products, or both.<sup>29</sup>
- 45 In Brazil, if this dispute were to be solved before the courts, it would be a case for a class action.
- 46 Among the International Tribunals, the decisions of the European Court of Human Rights stand out, with regard to strategic claims. One of the most well-known decisions is the *Torreggiane et al v Italy*<sup>30</sup> case, in which the existence of human rights violations in the Italian prison system was ascertained, among them, the overcrowding of cells, inadequate lighting and water heating systems. The government was ordered to implement reforms to rectify these issues.
- 47 This use or effect of class actions raises the question of whether courts are the right forum for these matters to be resolved. This is easier to answer when it comes to solving international problems before International Courts, as in the example of the last paragraph. However, when it comes to local problems, issues regarding the separation of powers could arise, which remains a delicate question.<sup>31</sup>

## 2 THE FUTURE OF COLLECTIVE LITIGATION IN EUROPE: VIBRANT, CHALLENGING AND FASCINATING?\*

- 48 In an article published in 2016, Professor Klonoff ventured a prediction on the future of American class actions. He wrote:

[T]he climate for class actions will remain difficult for plaintiffs. At the same time, large and significant class actions will continue to be brought and certified, and trials will become even more common. Vigorous ethical attacks on attorneys will continue (and in some cases succeed), with the salutary result that unethical tactics will be deterred. Technology will make the class action device more transparent and democratic, so that unnamed class members will

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<sup>29</sup> P J Cook and J Ludwig, 'Litigation as Regulation: firearms', in W K Viscusi (ed), *Regulation Through Litigation* (AEI-Brookings Joint Center for Regulatory Studies, 2002), 67.

<sup>30</sup> *Torreggiani and Others v Italy* (ECHR) Judgment 8 January 2013 [ECLI:CE:ECHR:2013:0108JUD 004351709].

<sup>31</sup> B Hess (n 3).

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be able to play an active part in the process. In short, class actions will remain vibrant, challenging, and fascinating.<sup>32</sup>

- 49 Whether this prediction has come true is an evaluation best left to the American legal community. For a European scholar, it may be interesting to question the possibility of offering the same prediction regarding group actions on this side of the Atlantic. In other words: is it sound and realistic to state that in the years to come collective redress in Europe, no matter how it is named and in spite of the different procedural mechanisms adopted to make it effective, will remain vibrant, challenging, and fascinating?
- 50 This author believes that at the theoretical level, the subject of collective redress at large will continue to stimulate an extensive array of studies and commentaries. At a practical level, the success of collective redress will depend on a variety of factors, among which the specific features and, most of all, the peculiar problems of each European legal system are bound to play a role of paramount importance. This is to say that it appears extremely unlikely that group actions will take off as viable tools for the protection of the rights and interests shared by a large number of individuals in countries facing a serious crisis of the justice system. Even the efforts of the EU institutions to harmonize the patchwork of rules and regulations adopted by Member States in the field of collective redress are bound to fail insofar as the implementation of EU regulations only adds a further layer of complication to a legislative landscape that is already confused and incoherent. This is certainly the case in Italy (this author's country). The complexity of the procedure governing the general class action according to the Code of Civil Procedure, combined with a questionable implementation of the Representative Actions Directive (RAD), and in conjunction with the lack of any attempts at coordinating the two sets of rules, are the source of doubts and uncertainties regarding which procedural tool may be best suited to bring to court collective claims. The risk of parallel actions arising out of the same events is always looming, and the problem of funding the costs of group actions remains unsolved, just to mention two of the multiple issues brought about by the applicable laws. All of this must be assessed against the background of an extensive reform of civil procedure in force since 2023 and at present (May 2024) on the verge of being amended anew and keeping in mind the well-known and apparently irreversible excessive delay of Italian civil proceedings.
- 51 If the development of collective redress in Italy seems challenging, but far from vibrant and fascinating, on a worldwide scale this author sees a panoply of areas in which group actions could gain momentum, such as the many claims falling within the perimeter of what is conventionally named public law litigation. This is the development this author looks forward to, nurturing the hope that collective redress can become in the future a powerful tool aimed at fostering social justice.

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<sup>32</sup> R H Klonoff, 'Class Actions in the Year 2026: A Prognosis' (2016) 65 *Emory LJ* 1569, 1654–55.

### 3 THE VIEW FROM THE UNITED STATES\*

- 52 Although the history of collective litigation – what we now term class actions – dates back at least to medieval England, recent scholarship and public policy debate tend to treat the United States’ Federal Rule of Civil Procedure 23 as the ur class action procedure. Migrating from England to the early English colonies and enshrined in federal equitable procedure after independence, Rule 23 was incorporated in the transformative 1938 Federal Rules of Civil Procedure that erased the division between equity and law. The 1938 version of the class action rule required plaintiffs to master complex technical requirements, which often defeated their attempts to proceed collectively. Nonetheless, the 1938 rule was used successfully by shareholders to bring suits claiming violations of federal security laws. In contrast, post-World War II efforts by civil rights advocates to use Rule 23 to challenge segregationist policies were often thwarted by federal judges in southern states holding that the rule was improperly applied. According to many accounts, frustration with these decisions led to the successful effort to amend and simplify Federal Rule 23 in 1966. As is typical in the United States, many states thereafter amended their own class action rules to emulate the 1966 version of the federal rule.
- 53 Adopted about the same time as Congress enacted a panoply of public laws granting new private rights of action to protect consumers, employees, and community members from a wide range of harms, Rule 23 became the engine to achieve socially progressive goals. Predictably, corporate representatives decried the increase in legal claimants’ ability to hold businesses accountable for legal violations. At the same time, conservative interests challenged the advisability of delegating to courts policy decisions regarding issues as diverse as prisoner rights, welfare recipient rights, and school children’s rights. Over time, federal case law trimmed back some of the more expansive uses of Rule 23 and political controversy over class actions died down as legal advocates turned their attention to matters of substantive law.
- 54 Starting in the 1980s and picking up steam in the 1990s, controversy over class actions reignited, arguably as plaintiff law firms became more expert in wielding the power of Rule 23 to bring shareholder and antitrust class actions, civil rights class actions on behalf of employees and litigation under new consumer protection statutes. The US Supreme Court began giving more attention to the implementation of Rule 23 and upheld efforts by large corporations to evade class actions by imposing mandatory pre-dispute arbitration agreements that precluded any sort of collective action on employees and consumers. Although in the immediate aftermath of the 1966 adoption of the modern class action rule, some judges looked kindly on class actions, an activist US Supreme Court’s more conservative positions on the application of Rule 23 limited the scope of the rule and heightened the requirements for using it. Ironically, just as jurisdictions around the world began adopting collective litigation procedures, US federal and state

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\* Written by Deborah Hensler.

courts severely restricted the use of class actions. While lobbyists in other jurisdictions continued to warn against the excesses of *American-style* class actions, it became increasingly difficult – and considerably more expensive – for plaintiffs to prevail in class action litigation in the United States.

- 55 Because statistics on class action litigation are woefully lacking it is impossible to quantify the effects of court-imposed restrictions on the application of Rule 23. Scholarship on mandatory arbitration suggests that many employment disputes have been shifted out of court and recent US Supreme Court decisions have heightened requirements for bringing consumer protection class actions. Mass claims are now litigated in aggregative form under the federal Multi-District Litigation (MDL) statute, ironically presenting some of the same perceived conflicts of interest that critics feared regarding class actions in a context that formally allows for less judicial oversight. In sum, rather than running amok, class actions in the United States have been increasingly reined in, to the satisfaction of some critics and the concern of those who have looked to collective litigation to mitigate some of the harms of the free market.
- 56 Against this background, it would be difficult to argue that the future of class actions in the United States is bright. However, experience suggests that the pendulum will eventually swing back in a more favourable direction for class actions, producing more balance in the application of Rule 23. Political opposition to the imposition of arbitration mandates on sexual harassment disputes led in 2023 to Congressional amendment of the Federal Arbitration Act to deem unenforceable forced arbitration of these disputes, opening the door to certain employment class actions again. (Importantly, the amendment continues to support consensual decisions to arbitrate rather than litigate such disputes.) Off the record, some corporate counsel now murmur that the judicial oversight required for class actions offered their companies more protection against frivolous claims and self-dealing plaintiff counsel than the multi-district litigation model that plaintiffs were driven to by the Supreme Court's disallowance of mass personal injury class actions. A corporate defence effort to gain the useful consequences of class actions for mass claims by substituting bankruptcy proceedings is running up against legal obstacles. The success of the class action procedure in resolving consumer protection litigation against Volkswagen and (more controversially) American football players' personal injury litigation against the National Football League suggests that the class action procedure can be useful for plaintiffs and defendants alike in the right circumstances and when closely monitored by judges of courts of first instance. And notwithstanding the barriers that the US Supreme Court has erected to pursuing class actions, plaintiffs continue to prevail in some shareholder, antitrust, and consumer class actions, and climate change litigation. Never as powerful a tool for plaintiffs as critics assert nor as beaten down as high court decisions imply class actions in the United States are likely to play a significant role in regulating market behaviour on into the future.

#### 4 AN AFRICAN PERSPECTIVE\*

- 57 Class actions on the African continent remain largely underdeveloped and underutilised. For instance, Nigeria’s class action is criticised because of its limited scope.<sup>33</sup> In South Africa, in the 30 years since the class action has been introduced into South African law, there have only been 21 certification decisions.<sup>34</sup>
- 58 There are various reasons for the underutilisation of the class action in South Africa. Many of these also apply to other African jurisdictions. The failure by the South African legislature to regulate the mechanism has resulted in the mechanism being viewed, and used, with caution. It has been left to the courts to develop the procedural framework within which class actions operate.<sup>35</sup> This has resulted in conflicting approaches by South African superior courts, for example, in relation to the issue of whether it is necessary to certify Bill of Rights class actions.<sup>36</sup> Furthermore, one of the reasons for the relatively low certification rate in South Africa is because of the stringent approach adopted by the courts in determining whether there is a triable cause of action. Only 10 of the 21 South African certification judgments resulted in certification of the class action.<sup>37</sup> Of the 11 class actions in which certification was refused, half of those cases entailed refusal of certification for reasons related to the applicants’ cause of action.<sup>38</sup>
- 59 There simply aren’t enough lawyers who are willing and able to litigate class actions. There are at most a handful of lawyers in South Africa who specialize in class action litigation. Furthermore, although litigation funding is likely to become a key feature of the South African civil litigation landscape in future, it is not currently the case. It is trite that the absence of litigation funding can impact the number of class actions instituted annually.<sup>39</sup>

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\* Written by Theo Broodryk.

<sup>33</sup> See, for example, K K Anele, ‘Revisiting Class Action Litigations against Corporations in Nigeria: Lessons for the US Experience’ (2022) *The Journal of Corporate and Commercial Law and Practice*.

<sup>34</sup> Following the publication of data recorded in T Broodryk, ‘Access to Justice Through Class Action: The South African Case’ in *Law, Justice and Transformation* (Stellenbosch University Faculty of Law, LexisNexis 2022), there have been two further class action certification decisions: *Various parties obo minors v Anglo-American South Africa Limited and Others* (High Court Johannesburg, South Africa), Judgment 14 December 2023 [2023] ZAGPJHC 1474, and *Maundu and Others v Minister of Police*, 63331/2020 (High Court Pretoria, South Africa), Judgment 10 November 2021 [2021] ZAGPPHC 772.

<sup>35</sup> Trustees for the time being of *Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), para 15.

<sup>36</sup> T Broodryk, ‘Class action certification and constitutional claims: the South African case’ (2020) *Maastricht Journal of European and Comparative Law*.

<sup>37</sup> T Broodryk (n 34) 59-66.

<sup>38</sup> *Ibid* 59-66.

<sup>39</sup> D R Hensler, ‘Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall? Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?’ (2014) *DePaul Law Review* 510.

- 60 Another reason for the underutilization of class action is a lack of education and empowerment of South African citizens, especially the impoverished, regarding class actions. More than half (30-odd million people) of the South African population live in poverty under the national upper poverty line of R1 558.<sup>40</sup> Given that class action is often used where classes comprise members from the poorest portions of our society, and taking into account that the primary aim of class proceedings is to facilitate access to justice,<sup>41</sup> the lack of education and empowerment of South Africans have certainly also played a role in limiting the number of class actions instituted to date.
- 61 A further reason for underutilization of the class action, and perhaps the most disconcerting, is South Africans' slowly eroding trust in the South African judiciary and the judicial system. Distrust in the judiciary can undermine confidence in the fairness and efficacy of the legal system, leading to the underutilization of mechanisms such as class actions for addressing systemic grievances and seeking redress for collective harm. Addressing this distrust requires efforts to enhance transparency, accountability, and public confidence in the judiciary's integrity and independence.
- 62 A detailed legislative class action framework is an essential step towards the increased utilization of class action. The recent promulgation through the South African Rules Board of Courts of Law of new High Court rules regulating certification will hopefully contribute to promoting legal certainty insofar as the utilization of the mechanism is concerned. Ultimately, the new rules will make it easier to file and maintain class action whilst ensuring safeguards against abuse. Furthermore, there needs to be increasing legal education and awareness regarding class action. It is important to raise awareness among individuals, lawyers, and advocacy groups about the potential benefits of class actions in addressing certain types of legal issues and to educate the public about their rights and the availability of class actions as a tool for seeking redress. When individuals are informed about their rights, they are more likely to recognize instances where a collective action, such as a class action, may be warranted. Empowered communities are more likely to come together to address common grievances and seek legal remedies collectively. This can lead to an increase in the number of potential class actions as communities recognize the strength in numbers. Legal empowerment initiatives may also work to reduce barriers that prevent individuals from pursuing legal action. This includes addressing issues such as financial constraints, lack of legal representation, and procedural complexities. By making legal avenues more accessible, individuals and groups are more likely to pursue class actions when faced with systemic injustices. Legal empowerment efforts can also foster collaboration between empowered communities and legal aid organizations. These organizations may provide the necessary resources,

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<sup>40</sup> Statistics South Africa, 'National Poverty Lines' (2023) available at <https://www.statssa.gov.za/publications/P03101/P031012023.pdf> accessed 13 August 2024.

<sup>41</sup> T Broodryk, 'The South African Class Action vs Group Action as an Appropriate Procedural Device' (2019) Stell LR 6-32. Trustees for the time being of *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (2013 (2) SA 213 (SCA)), para 19.



expertise, and support to pursue class actions on behalf of marginalized or vulnerable groups.

- 63 The availability of litigation funding is a key factor in ensuring that class actions can effectively serve as a mechanism for addressing widespread legal grievances and promoting access to justice. There also needs need to be a more aggressive leveraging of technology to improve communication with potential class members and enhance the administration of class actions, making the process more accessible and transparent.
- 64 It is evident that a transformative shift towards the enhanced utilization of class actions is not only desirable but imperative. The potential for collective legal actions to address systemic injustices, to protect the rights of marginalized individuals, and to promote accountability cannot be overstated. Embracing the power of collective unity in the pursuit of justice will undoubtedly strengthen African legal systems and contribute to a more equitable society. As we embark on this journey, we should champion the cause of collective empowerment through class actions on the African continent, recognizing their capacity to redress imbalances and pave the way for a more just and inclusive future for all citizens. Hopefully, it will assist in propelling Africa into an era where justice is not merely an illusory concept, but a lived reality for every member of our diverse and vibrant society.

**ABBREVIATIONS AND ACRONYMS**

AIDS	Acquired Immune Deficiency Syndrome
Art	Article
ch	chapter
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
et al	and other people
etc	et cetera
EU	European Union
ff	following
ibid	<i>Ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
MDL	Multidistrict Litigation
MP	Public Prosecutor's Office
n	footnote (internal, ie, within the same chapter)
no	Number
NGOs	Nongovernmental Organization or civil society organization
NOx	Nitrogen Oxid
PIL	Public Interest Litigation
para	paragraph/paragraphs
RAD	Representative Actions Directive (EU)
SAL	Social Action Litigation
US/USA	United States/United States of America
v	<i>versus</i>
vol	volume/volumes
ZZPInt	<i>Zeitschrift für Zivilprozess International Jahrbuch des Internationalen Zivilprozessrechts</i> (Journal of Civil Procedure International Yearbook of International Civil Procedure Law)

## LEGISLATION

### National

Code of Civil Procedure (Germany).

*Musterverfahrensgesetz* (Model Procedural Law) (Germany).

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*Maundu and Others v Minister of Police*, 63331/2020 (High Court Pretoria, South Africa), Judgment 10 November 2021 [2021] ZAGPPHC 772.

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