

WHY NO CLASS ACTIONS IN EUROPE? A VIEW FROM THE SIDE OF DYSFUNCTIONAL JUSTICE SYSTEMS

1. Introduction

In Europe, collective redress is increasingly becoming a popular topic, both for learned scholars, and for international organizations. Not surprisingly, the European Union has joined this trend.¹ Political dictate and academic curiosity are powerful driving forces, therefore it can be safely predicted that further exploration of various forms of collective litigation and their introduction in the legislation and practice of European countries will continue to gain momentum.

All the same, the optimistic wave of pro-collectivist procedural activism needs to have a reality check. In this chapter, we will point to a few reasons why it is not likely that class actions and similar forms of collective (aggregate, multi-party) litigation will ever develop into a serious procedural vehicle in a number of European countries. The primary focus of the analysis will be the institutional and organizational (in)capacity of the European civil justice systems, particularly in the (not so small) number of countries that experience difficulties with the efficiency and quality of their judiciaries. Some typical difficulties with the introduction of various forms of collective litigation (very modest ones, indeed) will be illustrated in the example of Croatia and its association suits (*Verbandsklagen*) in the area of consumer protection and anti-discrimination.

In conclusion, it will be questioned whether the very intentions of the introduction of collective redress mechanisms are clear and well thought out, and whether they, to the extent that they are clear, have the capacity to satisfy those intentions. Ultimately, the chapter will attempt to prove that a movement in favour of private enforcement of public interest matters in a European context does not have a chance of improving access to justice. On the contrary, it might work harmfully, both for the achieved level of public enforcement of legal rights, and for

¹ See for an update of European developments in the area of collective redress Silvestri 2013 and the contribution of Hess to this volume.

the achieved level of judicial protection of rights in 'conventional', individual civil litigation.

Before entering into the merits, a small disclaimer: the topic of this chapter is not an 'American style' class action. In the title of this chapter 'class actions' refers to the most extreme form of complex, multi-party civil actions with elements of public interest. But, the notion of 'class actions' epitomizes in a certain way all forms of collective or aggregate litigation,² including large consolidated litigation, representative proceedings, test-case litigation, *Verbandsklagen*, group litigation orders, model cases and the like.³ By pointing to difficulties and problems regarding several much softer forms of collective redress, *argumento ad maiori ad minus* we hope to say something about class actions in the narrow sense of the term as well.

2. Alice Meets the White Rabbit: Discovery of Collective Litigation by a (Southern) European Judiciary

The history of group litigation in Europe is certainly long.⁴ But after a surge that corresponded to the collectivist nature of medieval feudal societies, in modern times group litigation has only been 'a temporary phenomenon', confined to a narrow substantive range. In essence, the exceptional cases of group litigation in the 19th and 20th centuries were 'dictated by the concerns of the particular groups momentarily occupying social and judicial interest' and lasted only so long as such groups either gained sufficient political power to change legislation in their favour or 'lost their claim on public attention and faded both from reports and social consciousness'.⁵

The re-discovery of group litigation in Europe in the 2000s was not a product of an organic development. It was also not an original invention aimed to improve the range of services offered by national judicial systems.⁶ In its largest extent, the European developments in favour of group litigation were the product of fascination with the 'curious animal' of American class actions. Even today, a discussion among European lawyers about American practices of collective

² A good definition of aggregate litigation as 'litigation that undertakes some manner of unified resolution with regard to related civil claims held by multiple persons' is given by ALI – see *Principles of the law of aggregate litig.* § 1.02 cmt. a (Council Draft No. 2, at 12, 18 November 2008), cited according to Nagareda 2009, p. 4-5. It may be important to note that all general points of this chapter are limited to litigation, as opposed to mediation, collective negotiation and consumer ADR, which in the view of the author have much better potential as dispute resolution devices than aggregate litigation.

³ For various forms of aggregate litigation in Europe see, in addition to the chapters assembled in this book, Andrews 2013, p. 621-656 (for England); Baetge 2007 (for Germany); Kulski 2011 (for Poland); Lindblom 1997 (for Sweden). See also Eliantonio *et al.* 2013.

⁴ For a detailed account on the historical development of group litigation see Yeazell 1987.

⁵ *Ibidem* at p. 195-196.

⁶ Before the 2000s, forms of group litigation in Europe were more interesting to American than European scholars (see Fisch 1979), with the exception of Mauro Cappelletti, who was a pioneer also in this field, see e.g. Cappelletti 1975.

litigation resembles the encounter of Alice with the White Rabbit from the famous 1865 novel of Lewis Carroll: the main characters are transported into a strange but fascinating world of inexplicable logic, with some creatures – like opt-out class actions – possessing stranger charm than others. Playing with the curiosities and spectacular creatures of Wonderland is indeed wonderful, but transposing the adventure into the real world may be more of a challenge. In the following text, I will illustrate this in the examples of the (very modest) uses of the new means of collective litigation in Croatia.

2.1. *Collective Litigation in Croatia or How Croatia Completed the EU Accession Homework and Devised the ‘Most Modern’ Legislation for Group Litigation*

Certain, very specific forms of proceedings regarding diffuse, fragmentary and collective rights existed in the period of the Socialist Federal Republic of Yugoslavia (fuelled by the doctrine of the self-managed socialist economy run by ‘associated labour’).⁷ In the transition period in the 1990s the practice of litigation in most post-Yugoslav states attempted to escape ‘homemade’ procedures and return to conventional practices of individual litigation. The interest in collective and public interest litigation therefore occurred relatively late, and only in recent times under the influence of the EU accession process, during which it was perceived that the introduction of collective redress is part of the homework that has to be completed prior to joining the EU.⁸

If we disregard some relatively exotic forms that were primarily of academic interest, the first law that introduced a version of ‘association suits’, inspired by the German *Verbandsklage*, was the Consumer Protection Act of 2003 (hereafter: CPA, Off. Gaz. 96/03).⁹ The action was granted for suppression of unfair contractual and business practices and illicit advertising to consumer associations against companies and telecom operators. This form of action was further reshaped in CPA 2007 (Off. Gaz. 79/07 *et seq.*), allowing additional organizations and entities the right to bring claims in the interest of consumers. The new CPA was at the time of its promulgation declared to be ‘one of the most modern in Europe’, but at the same time everyone conceded that the broad guarantees and rights were not converted into real life.¹⁰

Another law that introduced a similar form of *Verbandsklage* was the Anti-Discrimination Act of 2009 (hereafter: ADA, Off. Gaz. 85/08). That law provided for an even broader *locus standi* for claims relating to discrimination, that was defined to include ‘associations, public bodies, institutions and other organisations in

⁷ See e.g. Rakić-Vodinečić 1982, p. 60.

⁸ See Tomljenović 2008.

⁹ See Dika 2003a; Dika 2003b; Baretić 2009; Triva & Dika 2004, p. 824.

¹⁰ See a typical journalist’s report on ‘good law, but consumers’ interests still violated’ at: <www.poslovnih.hr/mobile/hrvatska/dobar-zakon-a-potrosaci-osteceni-80916> (last accessed in January 2014).

accordance with the law and [which] have legitimate interests for the protection of the collective interest[s] of a particular group or deal with the protection of the right to equal treatment'.¹¹

Finally, as a part of the final stage of alignment of national legislation with EU law, the government added in the 2011 Amendments to the Code of Civil Procedure (hereafter: CCP, Off. Gaz. 57/11) another chapter, titled 'Actions for the protection of collective interests and rights'.¹² However, instead of supplying new, specific forms of the 'horizontal' framework of collective redress, the new CCP rules provided only a general definition and a few general rules for 'collective rights and interests claims', which apply under the condition that such claims are expressly provided in legislation regulating the specific sector (such as CPA or ADA).

Apart from these options, there are no other specific public interest multi-party proceedings, at least not in the area of civil litigation. In the domain of administrative disputes, the new Act on Administrative Disputes (hereafter: AAD, Off. Gaz. 20/10 and 143/12), written under the influence of German experts from an EU project, provided for an option of representative litigation (Croatian: *ogledni spor*, German *Musterverfahren*),¹³ which has been available since 2012 when a new network of administrative courts was established. However, this instrument has not yet been transplanted to the CCP and the domain of civil litigation.

At the purely technical level, the new multi-party litigation devices may be assessed as state-of-the-art pieces of procedural legislation, with most issues regulated similarly to some other European countries (mainly Germany and Austria). For instance, the 'associational' anti-discrimination suits, just as the individual ones, introduce shifting the burden of proof and *prima facie* proof of discrimination. On the side of the plaintiffs, multiple entities may initiate the proceedings, but they can also join the proceedings in individual anti-discrimination suits as auxiliary intervenors (*Nebenintervenienten*). But, in order to produce legal effect as to all members of the group, the litigation needs to be instituted by a collective action, upon petition of an organization that has legitimate interests for the two sectors (consumer protection or the fight against discrimination). In such cases, the relief sought has to be limited to the establishment of violation (e.g. declaration of unfair standard contract terms in consumer contracts, or finding of discriminatory practices). While possible claims include the petition for injunctive relief (reinstatement of the *status quo ante*, prohibition of further illicit practices and the court order to publish the text of the judgment), no compensatory relief is available within the group litigation proceedings. In order to seek monetary damages, all members of the affected group need to bring individual actions. In those actions, the findings of the court in the

¹¹ Art. 24, para 1 ADA. The author of this chapter was a member of the drafting group of that Act, contributing mainly to the procedural scheme described above.

¹² See more in Dika 2011; Mendušić Škugor 2012.

¹³ Art. 48 ADA enables the Administrative Court to select a representative case if 10 or more administrative suits with the same factual and legal background are pending before it. The 'model suit' in such a case proceeds, while the other pending proceedings are stayed.

collective proceedings, if final and binding, would also have preclusive effect in the individual litigation, where it would have force of *res iudicata* which resolves in and of itself preliminary issues such as the existence of illicit business practices or the presence of discrimination.¹⁴

All these topics may be elaborated at considerable length, and they have been indeed extensively commented upon by a number of academic lawyers.¹⁵ More informative, however, is an insight into the practical use of the new procedural vehicles. Admittedly, some of these vehicles have been available only for a few years, but the doors were opened for the first collective consumer litigation already over a decade ago – and this should be a period of sufficient length to justify inquiry into the real life of collective litigation in Croatia.

Not surprisingly, there is not much to show. Admittedly, the two outlined multi-party devices are not in their entirety ‘empty boxes’ (to borrow an expression from Professor Silvestri), but it might have been better had it been the case. Namely, that small content that filled the normative framework (‘boxes’) for collective litigation in everyday judicial practice turned out to be very different from the optimistic expectations of the lawmakers. We will first demonstrate this in the example of anti-discrimination legislation, and then in the context of collective consumer protection cases.

2.2. *In the Quest for Gay Rights: First Anti-Discrimination Verbandsklagen and Their Meagre Success*

First, as to the quantity. In anti-discrimination cases, according to reports of various citizens’ associations, only six collective anti-discrimination suits were filed in 2009 and 2010, in spite of thousands of registered complaints filed with civil society organizations, and several hundreds of complaints submitted to offices of various ombudspersons. Official data is until the present day incomplete, as the Ministry of Justice failed to publish forms required for adequate monitoring, and therefore individual and collective anti-discrimination suits could not be separately reported.¹⁶ But, the aggregate results are interesting as well: according to Ministry of Justice (MoJ) data for 2012 (the last published report at the time of the writing of this chapter), there were 116 pending individual and collective anti-discrimination cases, but only 16 cases were finally disposed of, ‘out of which 1 anti-discrimination claim was accepted, three denied, and 12 cases otherwise disposed of’. The rest, exactly 100 cases, are ‘still pending’.¹⁷ In short, even after four years of application, anti-discrimination litigation has resulted in very few final and binding judgments that found discrimination (3 in 2011 and 1 in 2012).

¹⁴ See more in Uzelac 2009, p. 95-109.

¹⁵ See *supra* n. 9 and 12 above.

¹⁶ Ombudsman Discrimination Report 2012, p. 25.

¹⁷ *Ibidem*, p. 29.

Among the interesting examples of 'successful' collective anti-discrimination suits, we can mention two publicized cases regarding 'gay discrimination in playing football'. One of them was initiated by an alliance of gay and lesbian associations (LGBTQ Rights Protection Alliance) after media statements of the President of the Croatian Football Federation (CFF) that 'gay football players as sick persons would never play for the national team'. Similar statements were echoed by the informal boss of the Zagreb football club *Dinamo*, and they were also the subject of other collective anti-discrimination proceedings. Interestingly, in both cases, in spite of loud public outcry and close monitoring by the Ombudsperson's office, trial courts found no discrimination, holding that anti-gay statements were 'personal opinions'. In one of these cases, the first instance court judgment was reversed by the Supreme Court, and the President of the CFF had to publicly apologize for his statement. But, the same court upheld upon appeal the dismissal of the second anti-discrimination suit; today, almost four years after the controversial statements were made, the secondary appeal against this decision is still pending. On the other hand, collective anti-discrimination suits filed by gay and lesbian associations against a nun who taught, within her classes of religious education in primary schools, that homosexuality is a sickness, was finally dismissed based on lack of evidence, as well as on the basis that the nun was only teaching the official catechism. Another similar suit against a priest who praised anti-gay violence against 'perverts' at the Gay Pride in Belgrade in his internet blog was more successful, and resulted in a finding of discrimination and an order for removal of the discriminatory content from the internet.¹⁸

To complete the picture of anti-discrimination proceedings in Croatian civil courts, another case may be noted, though formally not a collective one. It was lodged as an individual anti-discrimination suit, in which several gay associations and the Gender Equality Ombudsman acted as intervenors (*amici curiae*). The case dealt with a junior university professor who was exposed to mobbing and mockery by his senior faculty colleagues on account of his sexual orientation, which in the end resulted in failure to put him up for promotion. The peculiarity in that case was that the trial court ultimately found discrimination on some accounts of the civil suit, but in the end the claimant was ordered to pay the quite substantive costs of the other side (the Faculty of Organization and Informatics in Varaždin), because the court held that the claimant succeeded in only 20 per cent of his claims.¹⁹ As the claimant only got symbolic satisfaction, with no compensatory relief, he ended up paying for his own success. Although the decision was successfully appealed, the whole matter finally resulted in the plaintiff's quitting his job and leaving the country after issuing a public statement that the harassment at his workplace continued.

¹⁸ For a good case study of the association suits in Croatia see Poretti 2014, p. 7-42.

¹⁹ OS Varaždin, 18 P-3153/10-89, judgment of 12 July 2012.

2.3. *Interim Victory of Bank Loans Consumers in Swiss Franc Appreciation Case*

Apart from a few collective suits for the protection of rights of sexual minorities (which almost entirely covered all case law in collective anti-discrimination suits)²⁰ the *Verbandsklagen* only occurred in the context of consumer protection. Technically, the consumer protection collective actions were supposed to be the 'big brother' of actions under ADA, but they were overshadowed by the anti-discrimination cases described in the previous section. In fact, for about eight years, there were no association suits for consumer protection whatsoever, for various reasons.

Some of the hidden restrictions to collective consumer protection claims were apparently inspired by EU law. So, for instance, as EU Member States are required to give notices to the European Commission concerning qualified entities that may request an injunction for the protection of consumers' interests,²¹ the CPA provides that only those entities that are listed by a special government decree have *locus standi* to submit collective consumer rights' protection claims. The actual government decree, however, contained a rather short and inconsistent list of qualified bodies that mentioned more governmental bodies than associations for the protection of consumers' interests.²² To that extent, the *locus standi* rules of the CPA were different from those of the ADA, which contained an open formula ('any organization or body ...') – and this led to a much smaller volume of litigation in this area.

The story about the (so far) unique (and therefore even more famous) collective consumer litigation case in Croatia known as 'Swiss franc litigation' also began by the dismissal of the action for reasons of lack of standing. This association suit was the consequence of the sharp rise in the value of the Swiss franc after the global financial crisis, which caused monthly instalments for consumers of bank loans indexed to the Swiss franc to rise on average by around 50 per cent. The claimant, the association for the protection of the interests of consumers of bank loans *Franak*, managed to circumvent the restriction of *locus standi* by linking to another association (*Potrošač*) that was among the qualified entities on the

²⁰ Due to a number of collective redress cases initiated by gay and lesbian organizations, one researcher has argued that a false impression is created among the general public that collective anti-discrimination redress exists only for the use of the LBGTQ community. Poretti 2014, p. 30.

²¹ See Directive 98/27/EC (now Directive 2009/22/EC), Art. 4(3). It should be noted that the Directive only applies to cross-border disputes, and that it does not bind the Member States in national disputes, but the national legislator may nevertheless chose to use it as a model.

²² E.g. among the qualified bodies the Decree lists the Ombudsperson for Child Protection (but not the general Ombudsman office), and only two consumer protection organizations. See *Uredba o određivanju osoba ovlaštenih za pokretanje postupaka radi zaštite kolektivnih interesa potrošača*, NN 124/09. The list also authorizes various government ministries to institute proceedings, which is not in line with the EU Directive that requires qualified bodies to be 'independent' – see more in Poljanec 2013.

government list.²³ In the second try, the case was declared admissible, and resulted in one of the most well-known and controversial judgments in recent Croatian history. The Commercial Court in Zagreb, namely, ordered on 4 July 2013 that the eight biggest commercial banks (selected by the claimant as those that gave most loans with Swiss franc indexation clauses) had to recalculate the loans in favour of the consumers.²⁴ In his judgment, Judge Radovan Dobronić found that loans given in Croatian national currency (*kuna*), but linked to the Swiss franc, were governed by contracts that allowed banks to change the interest rates in a non-transparent manner, thereby violating the consumer protection rules.

The final destiny of this decision is still uncertain. It was appealed to the High Commercial Court, which is unlikely to decide on the appeal until the end of 2014. The comments on the decision were mixed, ranging from sharp criticism to fervent approval. It also caused political reactions, and partly motivated a change in legislation that provided a statutory recalculation that lowered the interest rates for the consumer loans indexed to the Swiss franc.²⁵

This case also attracted international attention.²⁶ Not entirely unconnected to this Croatian case was a series of litigations in courts in Serbia and Bosnia & Herzegovina. There, the procedural device was not collective, but individual litigation. Some reported first instance judgments decided that agreements on variable interest rates indexed to the value of the Swiss franc were null and void, some found illegality of contract terms, or rejected claims. None of the decisions in these countries has, at the time of submission of this chapter, become *res iudicata*.²⁷ Meanwhile, different judgments regarding the same matter have been reported from Austria and Hungary.

3. Why Not? Inferences from Particular Southern European Examples

The experience from about a decade of very modest forms of collective litigation in Croatia, which were used in real life in an even more modest way, may be limited and incomplete. Yet, some inferences may be drawn, partly exactly because of the scanty reception of collective litigation in practice. I will first suggest several conclusions based upon the presented developments in Croatia that may be relevant especially for some European judiciaries that experience difficulties with

²³ Yet, *Franak* remained the main factual claimant which continued to control the litigation, issuing public statements, providing its own lawyers, and financing litigation from its own funds, while *Potrošač* acted only as the formal plaintiff, bringing the façade necessary for the admissibility of the claim. See *inter alia*: <<http://udrugafanak.hr/index.php/stavovi-udruga/item/572-slucaj-franak-sazetak>> (last accessed in January 2014).

²⁴ Judgment of the Commercial Court in Zagreb of 4 July 2013, 26.P-1401/2012.

²⁵ See Amendments to Act on Consumer Loans from November 2013 (*ZID Zakona o potrošačkom kreditiranju*, Off. Gaz. 143/13).

²⁶ <www.reuters.com/article/2013/07/04/croatia-banks-idUSL5N0FA1DZ20130704> (last accessed in January 2014).

²⁷ See *inter alia*: <<http://danas.net.hr/svijet/susjedi-slave-kreditu-u-svicarcima-proglasenistetnima>>; <www.vesti.rs/counter.php?id=4982694> (last accessed in January 2014).

the functioning of their civil justice systems. While less relevant for a number of more effective and flexible European judicial systems, some points may still apply to them as well. Further, more general arguments will be added in the last part of this chapter.

The three inferences from Croatian experience that I suggest may be summarized as follows:

1. If a judicial system is not capable of securing litigation within a reasonable time in conventional, 'one-on-one' litigation, it will not be able to do any better in collective litigation.
2. If the effectiveness of judicial protection is limited due to the excessive availability of means of recourse that impede finality and prevent final enforcement, collective litigation cannot fulfil its main purpose.
3. If a civil justice system does not dispose of organizational and procedural mechanisms and case-management techniques for handling complex multi-party and multi-claim matters, any collective litigation device will be inappropriate and will be perceived as 'legal irritant'.

These statements will be briefly explained below.

3.1. *Slow Individual, even Slower Collective Justice*

The hallmark of southern European judiciaries has been for decades their slowness. Delays and backlogs have been for a long time the characteristic feature of Italian civil justice, but the situation is not much different in a number of other southern European countries, like Greece, Portugal, Slovenia and Croatia, as well as in a number of post-Socialist countries, like Poland.²⁸

The Croatian experience demonstrates that delays happen even in cases of very minor social and financial importance, for instance in small claims' litigation. After several decades of judicial reforms, it can still be safely predicted that relatively simple cases defined in law as 'urgent' – like trespassing (*Besitzstörung*, disturbance of possession) – will last for many years.

Should collective litigation devices expect any better – and faster – processing? This is not likely. Rather, what can be expected is that an increased level of complexity will bring along an increased time use. The higher level of social importance and multiplication of the people affected by the judgment could add to the need to take more evidence, and for countries like Croatia, which nurture a paternalistic and inquisitorial style of court proceedings in which the court has to take care that 'no stone should be left unturned', delays will definitely occur on a much larger scale. As shown in some Croatian anti-discrimination cases, in which the issues were quite straightforward (evaluation of a single public statement), the time needed to produce a final decision was over two years (with a very

²⁸ See *inter alia* Uzelac 2008.

controversial final result). In addition, due to the fact that *Verbandsklagen* cannot result in any determination of compensation, such adjudicated cases serve only to cover a preliminary issue in subsequent satellite litigation, in which the determination of damages may again result in years of litigation.

3.2. *Lack of Finality and Effective Enforcement: Toothless Collective Justice*

In connection with the previous point is the proneness of civil justice to submit almost every judicial decision to re-examination, which may lead – according to the European Court of Human Rights – to a systemic procedural deficiency described as an ‘endless cycle of remittals’.²⁹ In successor countries of the former Yugoslavia, for instance, the right to appeal against any judicial decision is lifted to the level of a constitutional guarantee. Until very recent times, almost every appeal suspended the enforcement of the decisions. Therefore, the first instance judgments were generally thought to be only an indication, a draft without a binding legal effect.

To that extent, even if, in a heroic and singular achievement, a first-instance judge were exceptionally to produce a well-reasoned judgment within a reasonable time (as in the earlier cited judgment of Judge Dobronić in the *Franak* case), such a decision might linger to the point of oblivion in the dockets of the higher court, with a high probability that a case would be remitted again with a ‘give it another try’ instruction. All the efforts in producing an exceptional piece of legal writing with convincing arguments may in the end prove to be a masochistic exercise, since the judgments of trial courts are rarely if ever published, and the reasoning of the court might ultimately remain unknown even to the circle of legal experts.³⁰

And, if, at the very end of a long chain of legal remedies, all the procedural links were broken, and the judgment became *res iudicata*, another battle may be in sight – the battle for the enforcement of the decision. This battle may be equally lengthy and ineffective as the one for the final and binding judgment. As demonstrated above in the case of a gay scholar and his anti-discrimination claims, the belated victory may effectively mean ultimate defeat, since adverse judicial findings with a mild admonition issued after many months of delays may only encourage the perpetrators.

3.3. *No Appropriate Personal and Organizational Design for Mass Claim Processing*

Let us for a moment disregard the challenges of slow processes and their ineffective transformation into real life. One may say that these challenges are the same for individual and collective litigation, and therefore do not bring anything new into

²⁹ See ECHR case, *Božić v Croatia*, No. 22457/02, § 36, 29 June 2006.

³⁰ Indeed, the full text of the *Franak* judgments was never published, and the author of this contribution had to procure it upon special request addressed to the court.

the debate. But, there are still some special difficulties that may pertain solely to collective litigation devices. They relate to the fact that the personal and organizational design of the European judiciaries in several aspects collide with the ideals of appropriate decision-making regarding claims affecting interests of large groups of people.

Back in 1969 John Henry Merryman pointed to the 'quite different status of the civil law judge' as compared to the 'judicial supremacy' of the judges as 'culture heroes' of the common law tradition.³¹ He described the civil law judge as 'a kind of expert clerk', whose task is 'to fit into the formal syllogism of scholastic logic' the whole process of judicial decision-making, as 'an operator' with 'a mechanical function', briefly put as 'a civil servant who performs important but essentially uncreative functions'.³² A frank, self-critical analysis forces us to conclude that Merryman's over 45-year-old descriptions have not lost their freshness and accuracy, at least when the Judiciary of the European South is concerned. At the organizational level, similarly fresh is the description of the specific design of courts and judicial bodies by Mirjan Damaška who pointed to 'a strong attachment of the judicial apparatus to hierarchical bureaucratization'.³³ The distinctive features of judicial bureaucracy in almost all judiciaries of the 'Mediterranean' model³⁴ are formalism, inflexibility and concentration on the processing of individual actions in cases predominantly of private interest.

One of the clear illustrations of these features is the total absence and virtual unsuitability of judicial organizations for any form of teamwork – a feature that should be crucial for the effective resolution of large, complex matters. In Croatia, for instance, the only collaborators of judges are their typists. Even though some judicial personnel are supposed to assist judges, such as 'judicial advisors' or senior interns that used to be on the judicial career track, they never fulfilled their advisory or auxiliary role, but instead were assigned to the individual handling of less important cases in the solitary isolation of their offices.³⁵

The very idea that the courts and judges should be flexible in their procedural rules and practices in order to adjust to the requirements of the case at hand is generally perceived as contrary to the strict nature of procedural legislation and the duty to apply the same rules to every case, which is generally assigned to the individual judge by random selection in a pre-set order which does not (and should not) recognize any priority. In an attempt to prevent corruption, judicial reforms are even further reducing the room for adjustment, as the need for reassignment to a

³¹ Merryman 1985, p. 34-35.

³² *Ibidem*, p. 37.

³³ See Damaška 1986, p. 34.

³⁴ A recently concluded EU project 'Professional development of Judicial Advisors and future Judges and State Attorneys through establishment of a Self Sustainable Training System' (IPA 2009) confirmed that the role and status of judicial advisors need to be changed, but so far has caused no reaction from the competent Croatian authorities.

³⁵ For the concept of 'Mediterranean civil procedure' see Uzelac 2008, p. 73-75.

specially proficient judge or a group of judges may be expressly forbidden as potentially dangerous 'judge shopping'.³⁶

At the level of case management and court administration, most practices are also constructed around the ideal of the rational processing of individual cases of average or below-average complexity. Sometimes such a setting creates considerable problems even in cases that are governed by conventional procedural rules. The simple multi-party and multi-claim rules (German: *Streitgenossenschaft*) in the current procedural codes originate from 19th-century codifications. Still, their application in a modern context, in a case with dozens or hundreds of claimants or respondents, becomes a nightmare for courts and individual judges. In Croatian judicial practice, therefore, the courts prefer to separate and process individually such cases wherever possible, instead of consolidating them for resolution of 'cloned' cases in joint proceedings.³⁷

Additional arguments regarding the logistical unsuitability of civil justice for the processing of large, multi-party cases concern the sheer technical conditions of work, like the lack of adequate courtrooms or suitable software for case tracking. Most trial court hearing rooms in Croatia have between 10 and 20 square meters, and higher courts generally do not have hearing rooms at all when civil cases are concerned. Not surprisingly, new IT systems for case management regularly do not have modules for collective litigation.

Finally, one may ask whether southern European judges have any reason to like aggregate litigation. The reply would without hesitation be negative. The judicial resentment towards multi-party and collective litigation is not surprising, since there are very few systemic incentives for judges and judicial personnel to engage in managing and adjudicating large, complex cases. Why bother resolving hard cases when performance monitoring methods are based on quantity? For instance, the new framework criteria for the workload of judges in Croatian courts (a document that is elaborated in collaboration with an EU sponsored project of assistance to judicial reforms) provides that a judge in a commercial court should annually deliver about 200 judgments in litigation proceedings.³⁸ At the same time, quality measurement is centred on the percentage of quashed judgments. Under such circumstances, a judge who produced (like the one in the cited *Franak* case) a judgment of 180 pages that is likely to be set aside by the higher court as

³⁶ Random or pre-set assignment of cases to judges is in some countries, like Germany, lifted to the level of constitutional principle (*das Recht auf den gesetzlichen Richter*) – see Art. 101, para 1(2) of the Constitution. In other European countries it is a part of statutory law (see e.g. Art. 10(1) of the Croatian Law on Courts). Quite to the contrary, the American practice of aggregate litigation contains a 'selection bias' in favour of judges who share enthusiasm for group litigation – see Marcus 2008, p. 2284-2287.

³⁷ Such cases occurred in the practice of Croatian courts, e.g. as mass claims for payment of benefits of state employees under collective labour agreements.

³⁸ *Okvirna mjerila za rad sudaca*, Zagreb, 6 June 2007, MoJ (<<http://pak.hr/cke/pro-pisi,%20zakoni/okvirna-mjerila-za-rad-sudaca/OKVIRNA.pdf>> (last accessed in January 2014)). This was amended on 28 December 2012, when the new Framework Criteria decreased this number to 180 (but with increases in other categories).

controversial is not only irrational but is also running the risk of disciplinary proceedings at the end of the year, when the court presidents have the obligation to report all judges who significantly underperform in the statistical evaluation of their work and miss the set targets of work performance.

4. Why Yes? A General Test for the Desirability of Public Interest Litigation in Europe

Now, let us imagine that we are able to overcome all organizational and technical difficulties. Would that justify the generous introduction of multi-party devices into the judicial systems of European countries? Before jumping to any conclusions, it would be helpful to see whether the novelties under consideration would pass another simple test – this time not of the feasibility, but of the desirability of such a development. I would like to propose three questions that forward-thinking reformers and policy-makers might find useful to ask when assessing plans for the introduction of innovative collective litigation devices.

They are:

1. Will it make the handling of major disasters and burning social issues any better?
2. Will it improve the functioning of the Judiciary?
3. Will it be more attractive for the end users of the justice system?

Here are some thoughts regarding each of these questions.

4.1. *Will It Make the Handling of Major Disasters and Burning Social Issues any Better?*

Today, in a global context, class actions and other collective litigation devices are associated with attempts to deal with modern challenges, like major disasters (from airplane crashes to the harmful side-effects of drugs or toxic substances). They are also used to address some burning social issues, from indirect discrimination to nicotine addiction. Indeed, the ubiquitous topic of consumer protection is among those issues as well.

What can be gained by the more proactive involvement of civil courts and judges, and by the expansion of the devices of group litigation? Indeed, group litigation inevitably has an element of policy-making, which can come close to social engineering – after all, most important conferences devoted to collective litigation speak of ‘protecting supra-individual legal interests’³⁹ or ‘public interest litigation’.

Beyond the technical tools for making group adjudication feasible and effective, and successful in dealing with supra-individual legal interests, policy matters need appropriate human substance – adjudicators who have broad

³⁹ E.g. at the XIV World Conference of IAPL – see Ortells Ramos 2014; Kulski 2011; Verbic 2011.

experience and versatile training, and who know how to deal with matters of general, future importance. Are such individuals available in European systems of justice? The view from the European South shows us that it is increasingly difficult to find a judicial official who would correspond to these professional requirements. In stark contrast with the USA, the European career Judiciary has a number of features that are more or less inconsistent with the need for an authoritative, wise and experienced policy-maker. Judges are generally recruited shortly after graduation; they pursue only one career track, have little or no experience other than that gained in law school and in the corridors of courtrooms, and dislike discretionary decision-making as something that is adverse to legal certainty. Can we claim that young professional bureaucrats trained to resolve past disputes on the basis of highly technical legal knowledge are the best forgers of policy judgments that will determine our future? Not likely.⁴⁰ For justice in mass tort cases, what is needed is a curriculum that can match the curriculum of Judge Jack B. Weinstein⁴¹ – and such a curriculum is almost impossible to find in Europe.

In addition, in all European judicial reforms thus far in the 21st century, one element has played a key role – the element of judicial independence. Judicial independence, in the European understanding, implies a high level of separation of the Judiciary from every other branch of power, but also from any influence of society (from the media to social sciences and economic studies). Independence also *per definitionem* implies immunity from any political responsibility (and, to a considerable degree, immunity from any responsibility at all). While independence and impartiality may be necessary for the fair and just handling of individual disputes, are they equally necessary for passing good policy decisions that affect the future rights and interests of a large number of people? Or, would we prefer to have a policy-maker that is subject to some form of democratic political responsibility?

4.2. *Will It Help to Improve the Functioning of the Judiciary?*

Optimistic European approaches to collective litigation often suggest that expanding devices of group litigation can cure deficiencies of the judicial system and fill in the gaps that exist in conventional litigation devices. For instance, it is often proposed to expand *locus standi* and give more leeway to various public-interest groups and associations. Yet, the causal link between the broader authority to sue in favour of diffuse public interests and the improvement of individual

⁴⁰ On this point, see Rick Marcus' comment that 'there is at least some reason to feel uneasy about this "professionalized Judiciary" ... that is insulated from the very public it is supposed to serve'; Marcus 2014, p. 109.

⁴¹ Judge Weinstein, who was as a judge at the very centre of the biggest mass tort cases, including Agent Orange, asbestos litigation, breast implants and tobacco producers cases (see Weinstein 1995), was throughout his career a successful lawyer, prosecutor, federal judge (appointed when he was 46 years old), law professor at Columbia Law School (from 1952 to 1998, simultaneously with his judicial career) and legal writer – author of leading treatises and numerous academic articles on legal practice, evidence and mass torts.

litigation of private claims has not been sufficiently demonstrated. Already Mauro Cappelletti was cautious:

Opening the doors of judicial (or even legislative and administrative) proceedings to so-called public-interest groups is risky if no adequate controls are available to check abuses detrimental to either the individual or the public interests, or both.⁴²

Particularly in the context of transition economies, it was argued that a possible cure for the notoriously bad quality of the legal system is a legal-reform strategy which puts enforcement of public rules in the hands of private individuals and their individual court actions.⁴³ But, if public justice does not produce good results with enforcement of private agreements, it will be hard to expect that private enforcement of public interests in collective or class litigation would be a magic wand that would improve the quality of the legal system. The charging of a system with additional tasks was never a good method of improving it. On the contrary, switching problems from a dysfunctional state bureaucracy to not much more functional state courts may cause them to be even less effective.

The risks of overload and further backlogs are not the only risks in this context. More dangerous is the risk of confusion. Many systems have been struggling with the definition of the proper role of the Judiciary. Finally, among various goals of civil justice, the goal of steady and rational processing of a large number of routine individual cases has emerged as dominant in many legal systems.⁴⁴ Many elements of judicial architecture were adjusted to this goal, from the court network to the requirements for the promotion of judges, from the design of court buildings to software programmes for IT support for the Judiciary.

The need to clarify the concept of the separation of powers and to build an independent and impartial Judiciary that has no political function was particularly great in the transition countries. The need still exists, because especially in the higher echelons of judicial power, which have a larger share of those who mentally and ideologically belong to past times, one can find tendencies to control the thinking of judicial peers, at least of those from the lower levels of the judicial hierarchy. Putting the emphasis on civil cases where public interest prevails over individual justice may contribute to the trends and tendencies to promote uniformity in adjudication by imposing collectivist, policy-motivated oversight. This may affect the role of the supreme courts and other highest tribunals, which could turn into centres of informal political power. In short, collective litigation may encourage the collectivist spirits of the past, and this is not necessarily good for the quality of the Judiciary.

⁴² Cappelletti 1975, p. 858.

⁴³ Hey & Shleifer 1998, p. 400, focusing on the example of Russia. In their final analysis they conceded, however, that 'public enforcement is surely the ultimate goal of any legal reform', p. 402. On arguments why a Legislature would favour private enforcement see Farhang 2011, p. 3-18.

⁴⁴ See Uzelac 2013, p. 3-31.

4.3. *Will It be More Attractive for the End Users of the Justice System?*

Finally, the last but probably most important question is what collective redress brings for the citizens as the ultimate 'consumers' of the state services for law enforcement. More effective protection of vulnerable rights holders is supposed to be the crucial argument in the discussions about collective redress.

The American experience of class actions is often invoked as a good example of private enforcement of public law. However, American enthusiasm for private enforcement may be a signal of deficiency, not of virtue.⁴⁵ Over many years, there was a consensus in comparative legal research that the American system of civil litigation was, in comparison to European systems, exceptional.⁴⁶ Whether as a blessing or as a curse, American exceptionalism was in its definition linked to a relatively compact blend of features that along with (opt-out) class actions include contingency fees, lack of fee-shifting rules, reliance on jury trial and extensive discovery, and the availability of punitive damages.⁴⁷ More importantly, the background of the rise of American class actions was not the response to specific needs of the users, but the deep distrust in public enforcement bodies and devices:

US-style civil litigation [is] the regrettable by-product of a deep cultural hostility to the kind of robust bureaucratic administration by public regulatory bodies in Europe. ... US-style tort litigation, for instance, [is] an unwieldy substitute for social insurance programs and the plaintiffs' bar [is] a useful form of privatized bureaucracy, at least in the absence of robust Euro-style public administration.⁴⁸

Indeed, Europe is not poor on regulatory bodies. In a small country like Croatia, there are currently 44 state agencies with over 6,000 employees, out of which 34 are financed directly from the state budget.⁴⁹ And, indeed, it is often doubted whether they provide good services to the users in the fields they are supposed to regulate. Whether they provide good value for tax payers' money is also debatable. However, advocating any form of aggregate litigation, no matter whether opt-in or opt-out, usually does not go hand-in-hand with the coherent policy of the restructuring (not to speak of the downsizing) of the state regulatory bodies. It is more a sign of capitulation, the admission that the public enforcement devices do not do what they are supposed to do. What remains is to steer the users towards 'entrepreneurial litigation',⁵⁰ for which they have neither means nor incentives.

All the same, one may say that inefficient aggregate litigation is no more harmful than inefficient public administration. But, in the long run, the creation of

⁴⁵ For a critical perspective on the American civil justice system among US scholars see Langbein 1985 (as a representative example of older scholarship) or Maxeiner 2011 (from a more recent perspective).

⁴⁶ On American exceptionalism see e.g. Marcus 2013; Carrington 2006.

⁴⁷ Cf. Nagareda 2009, p. 2.

⁴⁸ *Ibidem*, p. 3.

⁴⁹ IJF Newsletter 2014, p. 1.

⁵⁰ For the notion of 'entrepreneurial litigation' in the context of US class actions, see Coffee 1987.

more 'empty boxes' that serve as fig leaves for poor governance at all levels is not a useful way of managing social affairs. For governments, it can be another temporary alibi for poor performance; for the Judiciary, it can be another source of confusion that may hamper already flimsy reforms aimed at efficient (individual) dispute resolution. Last but not least, the end users, being steered towards self-help and private initiative, may thereby be dragged into another hopeless maze of endless procedures, this time more costly and more time-consuming.

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