Collectivization of European Civil Procedure: Are We Finally Close to a (Negative) Utopia?

Alan Uzelac and Stefaan Voet

Abstract Europe is unison in its rediscovered interest for collective and group litigation. New initiatives, legislative projects and model rules on collective redress emerge almost on a daily basis. In this chapter, the editors provide the background to this development and introduce the research presented in other chapters gathered in this book. Longstanding tradition of American class actions and their broad practical use are contrasted to the relatively recent European fascination with collective redress mechanisms and their limited reach. But, while incoherent and fragmented legislation on collective redress still does not produce spectacular results, many diverse initiatives demonstrate that the landscape of collective litigation is changing quickly. The trial and error approach that has so far characterized European attempts to introduce a workable collective redress system that is radically different from American-style class actions, did not so far produce a universal solution. However, a few important steps towards the Holy Grail of effective European collective redress have been made, both at the EU level, and at the level of its Member States. After a brief summary of the developments noted in the chapters which follow, the authors ask questions regarding the limits of collectivization of civil justice in a European context. Should the spread of collective procedures be embraced without reservations, or may it turn out to be a 'wrong trail'? The answer to this question depends on the ability to adjust collective redress mechanisms to urgent social needs and public purposes on one side, and to specific features of European legal systems on the other side. Recent global developments show that particular local circumstances play an important role in designing specific forms of collective redress. The enthusiasm about class and representative relief should take into account multiple risks entailed in the collectivization of civil procedure. Examples from Canada, Brazil and China indicate that local procedures may or may not work properly, but that none of them

A. Uzelac (✉)
Faculty of Law, University of Zagreb, Zagreb, Croatia
e-mail: auzelac@pravo.hr

S. Voet
KU Leuven, Leuven, Belgium
e-mail: stefaan.voet@kuleuven.be

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can be simply exported to different environments with different social policies and institutional infrastructures.

1 Approaching the Elusive Target: The Rise of Collective Redress on the Old Continent

Can Europeans become Americans without American flaws? Can Americans export their virtues to Europe, free from specific flavours of their peculiar American character? In a nutshell, these two questions—asked in the context of collective legal procedures that involve a large number of people—summarize the contents of this book.

Ever since the global spread of Hollywood blockbuster movies featuring the successes and glories of judicial battles of lone fighters against collective injustice, Europe was infected with the virus of procedural collectivization. In the year 2000, Soderbergh's Erin Brockovich, a true story about a single mother that successfully initiated litigation against a powerful water polluter, and ultimately winning the largest settlement ever paid in a direct-action lawsuit in U.S. history, cashed in more money outside than inside America. Twenty years later, European filmmakers are still interested in the Agent Orange case, the story of several million people (including many American soldiers) who were exposed to toxic defoliant which was used during the Vietnam War.[1] The common denominator of these and many other mass harm situations, if litigated in the US, are class actions.

Class actions are generally considered to be a very specific American type of litigation, which partly spurred the interest for them in the rest of the world, and where they were largely felt as fascinating but strange. Difficult to define, they were described by the U.S. Supreme Court in a negative way, as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only'.[2] In this feature of 'American civil procedural exceptionalism' (Marcus 2014) a representative acts on behalf of a large class, and the decision made in the process not only affects the representative and the sued party or parties, but also affects a whole class of other unnamed persons who do not directly participate in the process. In procedural terms, the latter persons are bound by the *res judicata* effect of the class action decision, although not being a party to the proceeding.

Such form of representative action for the benefit of a group or a class of unnamed litigants has been until recently unknown in Europe. But, the Old Continent, the cradle of Western legal civilization, over time developed a perplexed, love/hate relationship with class actions. For a long time class actions were considered incompatible with the European legal culture, so much that enforcing U.S. class action decisions was held incompatible with public policy. But, at the same time, the

[1] See for instance Agent orange, la dernière bataille, French-US documentary, 2020.

[2] *Wal-Mart v. Dukes*, 564 U.S. 338 (2011).

insufficiency of one-on-one civil litigation in the context of ever more complex and collective disputes triggered the original European attempts to introduce something similar to class actions, but at the same time different and truly European. The whole history of European collective redress development is marked by a pursuit of a such native European forms of class actions which would be powerful and effective, without being 'too American'. This book explores the fate of this pursuit.

In order to distinguish European forms of collective processes from their American counterpart, labels were changed. Instead of 'class actions', Europeans speak of 'collective redress' and 'representative litigation'. However, beyond such disguise, the fundamental structure remains the same, as well as the fundamental challenge: how to remain truly and authentically 'European' and at the same time reach at least a fraction of the efficiency of American class actions.

So far, the responses to this formidable challenge failed to produce spectacular results. As reported in 2014, in most European countries collective redress was a very much discussed topic, but in practice it resembled to the metaphor of 'squeaking mice' (Harsági and Van Rhee 2014). While in the U.S., collective litigation is ubiquitous, in many fields overtaking by importance (and even by volume) individual litigation, in Europe it has been largely an exception. However, things are moving at a fast pace, and some very recent developments seem to promise essential changes. Is Europe approaching the elusive target of effective collective litigation? This book explores the new developments, seeking to find whether the Holy Grail—a purely 'European' but still functional concept of collective redress that can be widely embraced and broadly used—is starting to emerge on the horizon.

2 Class Actions in Europe

For several decades, collective redress and class actions have been on the political and policy agenda of many European countries. There have always been three leagues. First, there are the self-proclaimed European frontrunners: jurisdictions that are supposed to have relatively long-standing class action procedures. The most notable examples are Portugal and the Scandinavian countries. Second, there are European countries that have adopted class action procedures more recently. Some of these regimes are limited to a specific sector, and are not of a universal or transsubstantive nature. Examples are Belgium, France, England and Wales and the Netherlands. Third and finally, one can distinguish countries which traditionally did not have class action procedures, in the sense of representative collective or group actions, save in very exceptional cases. This is for example the case in Eastern European countries. In other words, the class action landscape, on the Member States level, remains scattered and widely differing.

The European legislator also struggled for a long time with taking a clear position on collective redress and establishing a coherent legal framework. Over the years, piecemeal legislation was enacted, of which the effectiveness is limited. Reference

can be made to the CPC (consumer protection cooperation) Regulation (which was revised in 2017)[3] and the 2009 Injunctions Directive.[4] In June 2013, and after a series of studies and preparatory policy documents, the European Commission published a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.[5] The goal is not to harmonize the national systems, but to list some common, non-binding, principles relating both to judicial (compensatory and injunctive) and out-of-court collective redress that Member States should take into account when crafting such mechanisms.

In April 2018, the European Commission published its New Deal for Consumers package.[6] It aimed at stepping up the enforcement of EU law in a holistic way and securing more effective consumer redress in mass harm situations. It included a proposal for a Directive on representative actions for the protection of collective interests of consumers.[7] The latter intends to modernize and expand the scope of application of the 2009 Injunctions Directive. In December 2020, the new Directive of 25 November 2020 on representative actions for the protection of the collective interests of consumers was published.[8]

The new Directive will make it possible for Qualified Entities (such as consumer organisations and independent public bodies) to request injunctive and compensatory redress measures. The Directive will be the *leitmotiv* for the coming debate and development of European class actions.

This book wants to contribute to this forthcoming academic and policy debate by addressing collective redress from three different angels. The next part deals with the (still existing) critical perspectives on collective redress, followed by a part that looks at the many faces of collective litigation in Europe. The fourth and final part looks at the global perspectives of collective redress.

[3]Regulation 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation, 2017 O.J. (L 345) (EU).

[4]Directive 2009/22 of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, 2009 O.J. (L 110) (EC).

[5]Recommendation of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013 O.J. (L 201).

[6]https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620435. Accessed 6 Nov 2020.

[7]European Commission (11 Apr 2018). Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:184:FIN. Accessed 6 Nov 2020.

[8]Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020 O.J. (L 409) (EU).

3 Critical Perspectives on Collective Redress

In the next chapter, entitled *Evaluating Collective Redress: Models, Evidence, Outcomes and Policy*, Christopher Hodges (Oxford University) asks two fundamental questions. What should the aims of collective redress be? Which mechanisms best deliver collective redress? The first is a normative question, and the second is an empirical question. The second question asks to what extent any particular technique or mechanism succeeds in satisfying the objectives set in the first question. According to Hodges, the answer to the first question is a matter of public policy and perhaps legal philosophy. The answer to the second can only be decided by empirical evidence. Hodges concludes that the empirical evidence indicates that a number of techniques are better than others. Current evidence is that mechanisms such as online independent ombudsmen and regulatory authorities with mass redress powers are particularly effective in delivering redress to consumers.

Another critical view on collective redress is expressed in the chapter *For the Defense: 28 Shades of European Class Actions*. Linda Mullenix (University of Texas) looks at the European collective redress developments from an American perspective. She states that throughout the twentieth century, virtually all European countries that had studied the American class action had rejected its implementation as a part of domestic law. In the early twenty-first century, however, several European countries reconsidered their longstanding antipathy to the American class action. In 2013, the European Commission launched its Recommendation for Injunctive and Compensatory Collective Redress Mechanisms. This was not a success. According to Mullenix, the 28 EU countries have developed a patchwork quilt of differing approaches to collective redress and largely have eschewed implementing procedural mechanisms that resemble the American class action rule, in efforts to preserve domestic cultural and legal norms, and to avoid American style class action abuses. Mullenix concludes that the overarching portrait that emerges from this chaotic assemblage of initiatives is one that is curiously cautious and decidedly non-revolutionary.

4 Many Faces of Collective Litigation: European Perspectives

The above conclusion is illustrated in the second part of this book that looks at the many faces of collective litigation in Europe.

In a fourth chapter of this book, *The Dawn of Collective Redress 3.0 in France?*, Maria José Azar-Baud (University of Paris—Sud) and Alexandre Biard (Erasmus University Rotterdam) describe the situation in France. France has limited experience when it comes to group actions. The instrument was formally adopted in 2014 after decades of debates and controversies. Subsequent developments have been patchy, and problems plaguing group actions remain multiple in practice. Azar-Baud

and Biard conclude that the development of group actions in France has triggered several interesting evolutions: they have revitalised existing old procedural mechanisms, such as representative joint actions, and in parallel also indirectly led to the emergence of a myriad of new Legaltech actors attracted by an emerging mass litigation market, actors who use online tools and platforms for mobilising individual claimants and structuring mass claims.

In a fifth chapter, *From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands*, Xandra Kramer (Erasmus University and Utrecht University) and Ianika Tzankova (Tilburg University), explore the Dutch system. They start with the 2005 Dutch Collective Settlement Act which in a number of cases with a global outreach has proven to be effective. In 2019, a collective action procedure for compensation of damage was introduced. According to Kramer and Tzankova, a crucial aspect for the effectiveness of these collective redress mechanisms is the availability of funding. In particular, they pay attention to third party funding. Although highly controversial in Europe, they consider this kind of funding as a solution to enable inherently expensive collective actions.

In a sixth chapter, *Class Actions in Belgium: Evaluation and the Way Forward*, Stefaan Voet (KU Leuven) analyses the Belgian class action system. In 2014, Belgium introduced a consumer class action. In 2018, the procedure was expanded to disputes between SMEs and businesses. The chapter gives a description of Belgium's class action procedure (class action prerequisites, jurisdiction, opt-in or opt-out, procedure, redress and enforcement phase). It follows with an overview of the cases brought to date (nine in total). This (limited) case law allows to draw a number of conclusions about the pros and cons of the procedure. The chapter then draws attention to new and alternative ways to achieve collective redress (consumer dispute resolution (CDR) and regulatory redress). Voet concludes that the focus should be on exploring and optimising all options for mass harm situations and to connect these options so they can form an integrated dispute resolution framework.

In a seventh chapter, *Class Actions and Group Litigation—A Norwegian Perspective*, Maria Astrup Hjort (University of Oslo) looks at the class action system in Norway. Class actions were introduced with The Norwegian Dispute Act of 2005. Norwegian civil procedure already had several other types of collective litigation, but these procedures did not cover the catchment area for the class action rules. The chapter on class actions was a novelty when the act was passed and it represented something new in Norwegian civil procedure. The ability to decide on a legal question with effect for many individual claims reduces the costs of each claim and thus gives access to the courts for claims involving amounts or interests so small that they would otherwise not be brought as individual actions. Hjort gives an introduction to the Norwegian class action rules and discusses whether they have been a success or not.

In an eight chapter, *Group Actions in East-Nordic Legal Culture*, Laura Ervo (Örebro University) looks at the class action developments in Sweden and Finland. In Sweden, a system of group actions has been in force since 2003. Since then only 21 of these actions have been initiated. In Finland, public group actions, that can only be brought by the Consumer Ombudsman, are allowed by the 2007 Group

Action Act. To date, no such actions have been initiated. Thus, so far, Swedish and Finnish group actions have not been very successful. The question is why? In Sweden, there are proposals on how to make group actions more effective. In Finland, current discussions focus on expanding the scope of application. A frequent argument is the risk of US-style litigation that does not fit well into Nordic legal culture. Ervo tries to answer the question whether this is really true.

In a ninth chapter, *Rebooting Italian Class Actions*, Elisabetta Silvestri (University of Pavia), analyses the 2019 Italian statute providing for a new regulation of collective redress. The statute moved Italian group actions, both actions for compensatory relief (i.e. damages or restitution) and actions for injunctive relief, from the Consumer Code to the Code of Civil Procedure. According to Silvestri, this reflects a new vision of collective redress, namely a wider scope of application: no more references to consumers and users, but standing granted generically to bearers of 'homogenous individual rights', whether or not they are consumers or users. Furthermore, the new perimeter of class actions encompasses any claim arising out of both contract liability and tort liability, which signals another significant change aimed at designing class actions as general remedies. Yet, Silvestri concludes that nothing has changed as far as the procedure by which class members can join the action (via opt-in) is concerned. In spite of a few interesting features, the new rules sketch a procedure that is still cumbersome and excessively technical.

In a tenth chapter, *Challenges in Drafting and Applying the New Slovenian Collective Actions Act*, Aleš Galič and Ana Vlahek (University of Ljubljana), examine the 2017 Slovenian Collective Actions Act. The new legislation was perceived as an urgently needed piece of legislation and a top priority in guaranteeing access to justice. In the meanwhile, three collective actions have been filed with the courts under the new rules. Galič and Vlahek show the challenges faced and the decisions taken in drafting the act as well as the problems the parties and the judiciary have been facing in the application of new Act. They conclude that the Slovenian experience may serve as a model of the 'dos' and 'don'ts' for all drafters of such legislation in the EU Member States where collective redress has not yet been implemented.

Chapter 11, The *Lessons of Airfreight Cartel: Mechanisms of Coordination of Parallel Collective Lawsuits in Several Jurisdictions?*, is a case study by Jorg Sladič (European Faculty of Law, Ljubljana). Airfreight Cartel is a regulatory case being litigated before the Court of Justice of the EU. This case is an example of how to coordinate class actions in the United States, Canada, Australia, the Netherlands, the United Kingdom and France. The chapter assesses the stakes in coordination of parallel lawsuits in collective redress from a European point of view. According to Sladič, mechanisms of coordination of parallel lawsuits in collective redress are the cornerstone of any successful cross-border collective redress mechanism. These include mechanisms such as *forum non conveniens*, anti-suit injunctions, *lis pendens* and related actions doctrine. According to Sladič, a novel approach in coordination could be an international panel on cross-border collective redress.

In final chapter of this part, *Collective Redress in the EU: Will it Finally Come True?*, Alexandre Biard (Erasmus University Rotterdam) and Stefaan Voet

(KU Leuven) look at the new and forthcoming Directive for representative actions for consumers, which will allow Qualified Entities across the EU to collectively claim compensation in mass harm situations. Presented by the European Commission in April 2018 as part of its New Deal for Consumers package, the Directive intends to strengthen the enforcement of consumer rights and to ensure access to justice when large-scale damage arise. It also gives considerable leeway to the Member States when implementing the new rules into their national legislations. According to Biard and Voet, the effectiveness of the new EU instrument will therefore strongly depend on the procedural choices made at national levels. These issues are pivotal to ensure that the EU collective redress instrument fully meets its objectives.

5 Global Perspectives on Collective Redress

The fourth and final part looks at the global perspectives of collective redress.

In chapter 13, *The State of Reform in First and Second Generation Class Action Jurisdictions*, Jasminka Kalajdžić (University of Windsor) explores the state of reform in the first and second generation class action jurisdictions: the United States, Australia, Israel and Canada. Besides an outline of their respective class action procedures, she discusses the reform initiatives of the past 3 years in each of the four countries and explores common areas of concern as well as areas of divergence. Comparing and contrasting these reform efforts illustrates the evolution of class actions in these countries and provides useful insights for those studying and contributing to the development of newer collective redress systems.

In a 14th chapter, *Empirical Data and the Powerful Lessons Learnt about Class Actions in Quebec*, Catherine Piché (University of Montreal) evaluates the economic utility and effectiveness of class actions in Quebec based on empirical data obtained at the Class Actions Lab over a period of 25 years. The University of Montreal Faculty of Law's Class Actions Lab is conducting this study in the course of its 'Class Action Compensation Project'. The Project measures the end product of class action litigation, the value and benefit of this kind of litigation, and, incidentally, its costs as assumed by the parties and the system. This is the first Canadian study of its kind. Piché shows that class actions are instruments of compensation of class members, but that this compensation remains imperfect by way of the number of members compensated, the extent to which they are compensated and the exorbitant costs of bringing such actions.

In a 15th chapter, *Collective Redress in Brazil: Success or Disappointment?*, Hermes Zaneti Jr. (Federal University of Espírito Santo) recognizes that the Brazilian experience with class actions is one of the most developed in the civil law world. However, this experience is not only successful. The goal of this chapter is to sketch a broad and realistic view by looking at the good experiences (and by using some quantitative and qualitative data), but also by taking into account new trends and being aware of the evolution of the Brazilian system. Zaneti focuses on the

emergence of aggregate litigation as a form of collective redress, in combination with Brazilian class actions, and what he calls 'the procedural law of disasters'.

In a 16th and final chapter, *Class Actions and Public Interest Litigation in China*, Yulin Fu (Peking Law School) looks at China's two major judicial reliefs against large-scale rights' infringement. On the one hand there is the 'mass private interest action' under which the victims of mass harm can opt in and join the class plaintiff in representative litigation. The plaintiffs are bound by the judgment. The victims who did not join the plaintiff's class may sue separately, but in separate litigation the class judgment is usually applied as a kind of 'model-litigation'. On the other hand, a new form of collective relief was created in 2012: 'public interest litigation'. In public interest litigation the procurator and some other legally authorized social organizations act as plaintiffs in cases of environmental harm and mass infringement of consumer rights. An individual consumer is not allowed to file a public interest lawsuit, in spite of the fact that the legally authorized plaintiff entities often lack motivation to file such claims.

6 A Wrong Trail? Some Concluding Remarks on the Risks of Collectivization

All developments described in this book give us right to conclude that a lot is going on, and even more is expected to happen in a very foreseeable future. Some invisible barriers in the European approach to collective redress are falling, or are just about to fall. Compensatory relief in collective mass claims has entered through the front doors of European legislators. Leading European academics gathered in the ELI-UNIDROIT project of model legislation for civil procedure included collective redress as a regular and standard feature for future national procedural codes.[9] But, how far can this process go, and should we applaud this development without reservations, accepting it only as a process that enhances access to justice and offers enforcement of claims that were previously regarded hopeless?

The answer to this question depends on the ability to adjust collective redress mechanisms both to pressing social needs and public purposes, and to specific features of European legal systems, which are otherwise much more prone to public enforcement of collective claims and public means for the resolution of mass harm situations.

Starting with the latter, Europe is not burdened with the deeply rooted American distrust of intrusive central government and its regulatory agencies (Kagan 2001). On the contrary, in most European countries there is a plentitude of administrative bodies authorized to deal with similar situations as the ones that occur in the American-style class actions. Maybe their effectiveness is limited, but the emergence

[9] https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf, Accessed 4 Dec 2020.

of collective redress in Europe can complicate the situation and could cause enforcement conflicts and/or an excuse for non-action. Further research on the juxtaposition of administrative and judicial means for enforcement of collective claims is needed, focusing on their coordination and interference. While collective redress mechanisms may be the best way to deal with particular issues, good administrative response may cover the others.

Where judicial response to collective claims is needed, it still remains to be seen where collective procedures are ultimately necessary. In the light of development of technology, advanced algorithms and the use of artificial intelligence provide unprecedented potential for making individual litigation cheaper, simpler and faster than ever before. Quick and easy access to online adjudication may provide an alternative to collective redress, especially for small value claims, such as consumer claims. A part of this potential, if only properly realized, could empower those litigants who would otherwise not be motivated to initiate judicial processes due to rational apathy or other reasons.

But why would collective redress schemes not be preferable to modern tech and ADR schemes, if they are faster and cheaper? Improvement of individual redress schemes is maybe worth the effort in itself, even if slightly more complex and expensive. Many of the often-cited grounds for the use of collective schemes are not motivated by their superiority, but by the weakness of conventional procedures used by national civil justice systems. If introducing collective procedures is a shortcut to bypass the clogged arteries of conventional litigation, would it not be better to undertake necessary reforms and address the very heart of the crisis? Class actions are not a panacea for the chronic diseases of our judiciaries. They can be useful, but they can also distract us from the real problems in the dispute resolution systems of our modern societies. So, instead of spending efforts and energy on the adoption of procedures developed for a different societal background, should we not focus on what is essential?

If we disregard the systemic objections, there may be another catch. Collective redress has found its broadest application in the common law world, and its driving forces were, as emphasized by its champions, in entrepreneurial lawyering, contingency fees and punitive damages (Klonoff 2015; Miller 2018). All these components seem to be missing in Europe. Even if we see some signs of their emergence, maybe we should not embrace them too eagerly. Some chapters in this book provide good examples why this is the case. Huge compensatory claims, aggressive law firms, explosive growth of new and underregulated litigation funding schemes and the erosion of the 'loser pays' rule are not necessarily the future which Europe should desire. Some, albeit not quite disinterested observers have already warned of 'very powerful indicators that all of the same incentives and forces that have led to mass abuse in other jurisdictions are also gathering force in the EU' (ILR 2017).

There are also other more structural problems. European judiciaries are quite diverse, but on the average, they are more prone to a positivistic way of thinking, and less trained to find innovative and flexible ways of dealing with complex situations, which arise in processing mass cases. The formation of a new generation of judges and training them to move away from their customary routines not only takes time,

but also calls for a comprehensive change in attitude. It is feasible, but it is rather more probable that new ways of mass litigation will be given to old-school legal professionals, which is likely to result in a mismatch. European-style class actions have therefore rarely been very successful, especially when introduced in the more conservative judicial environments of Southern and Eastern Europe where modern case management techniques are only waiting to be put on the agenda. In an environment where individual actions need decades to be processed, it is hardly to expect that collective litigation will last any shorter. It is interesting, and somewhat paradoxical, that exactly those countries which otherwise experience inefficiency and problematic quality of their civil justice systems have expressed interest in the quick development of collective redress schemes, as demonstrated by the chapter of Galič and Vlahek in this book. For some, steering complex social issues to collective litigation in an inefficient court system can be compared to sending busses of clients to a restaurant that has a record of poor quality and slow service to individual guests.

All these doubts apply also to EU models of collective redress. So, before Brussels starts to cheerfully play the class action tunes, we need to ask more questions. Where is the proper balance between restrictive rules that keep collective litigation in the EU at its minimum, and the open regulatory opt-out invitation that may lead to an overflow of abusive litigation spilling over to the Old Continent? If some of us are lawyers, we may feel delighted by this prospect of expanding our business model. However, those who advocate a reasonable and fair system of dispute resolution that works for the benefit of citizens and businesses may have some doubts.

The potential issues of trans-border recognition of collective redress outcomes can also open interesting new horizons. Can we envisage that in the future EU-made class actions resulting in substantive awards of damages against American companies are enforced in the U.S., or that American class action decisions awarding punitive damages are regularly recognized in Europe? No matter whether Europe will steer its course towards a more comprehensive spectrum of collective litigation means (as it does at present), there will still be sufficient differences to cause frictions in transnational context, and we can only expect that arguments for and against recognition will become fuzzier.

But let us suppose that all these problems can be miraculously resolved by quick and comprehensive reforms (so rare in the past several centuries). What remains is the question of legitimacy of judicial collectivization. Maybe we can again disregard the fact that, according to EU Justice Scoreboard,[10] in at least one half of the Member States citizens and businesses do not have trust in their judiciaries, and assess their independence as fairly or very bad. However, if we accept that one of the goals of collective redress is the modification of behaviour affecting a large number of people, its function is eminently political (Scott 1975). For a policy-implementing judiciary (Damaška 1986), an impeccable record and high public level of support is

[10] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. Accessed 4 Dec 2020.

needed to allow it to make decisions with resolve and wisdom. In a political system that generally prefers that public policies are enforced by private means, it is easier to accept that judges play political roles. However, even there, as expressed by an influential judge, it is not unproblematic, since judicial legislation lacks democratic legitimacy, which is the essential glue that connects the fabric of a political community (Sumpton 2019).

In Europe, where Montesquieu's concept of judicial power is still resonating, acceptance of the potential political nature of judicial intervention may be even harder, just like the acceptance of the vision of economic liberalism according to which private plaintiffs will be the best representatives of public political goals. For that reason, in Europe, but also in other parts of the world (as showed by the chapters of Fu and Zaneti in this book) the crucial issue is who should have class action standing. Which individuals, public or private entities, organizations or bodies are/may be eligible to file collective suits? While in the U.S. the driving force behind class actions are private lawyers who, in a way, are understood as 'private attorneys general' (Miller 2018), this seems to be (still) unacceptable elsewhere. On the contrary, public attorney generals play a vital role in collective litigation in China and Brazil, and most European jurisdictions limit class action standing to selected associations and organizations.

The readers of this book will in the end decide for themselves the answer to the question indicated in the title of this book. Is collectivization of procedures in European civil justice systems desirable and inevitable? Is it a temporary fashion that threatens to jeopardize fundamental principles of European civil process? Is it going to spread, suppressing conventional litigation to a bare minimum, or will it continue to be a rare and ineffective road to justice? Is it a Holy Grail of a wrong trail? Progress or decay? Utopia or dystopia? We hope that we have provided sufficient food for thought based on a number of diverse examples from Europe and beyond. Factors that shape collective litigation are cultural, economic and political (Hensler et al. 2016), and they are quite diverse. Ultimately, the answer to these questions may depend on the ability to adjust collective redress mechanisms to urgent social needs in the context of specific features of each European legal system.

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Alan Uzelac Professor of Law at the University of Zagreb, Croatia, where he teaches Civil Procedure and Comparative Civil Procedure, Organization of the Judiciary and Alternative Dispute Resolution. Founding Member of the European Commission for the Efficiency of Justice (CEPEJ) in Strasbourg. Delegate in the UNCITRAL Working Group on Arbitration and Conciliation. Co-director of the Public and Private Justice seminar at the Inter-University Centre, Dubrovnik, Croatia. Director of the research project Transformation of Civil Justice Under the Influence of Global and Regional Integration Processes.

Stefaan Voet Associate professor of civil procedure at the University of Leuven and a host professor at the University of Hasselt. Programme Affiliate at the CMS/Swiss Re Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies at the University of Oxford. Member of the Class Actions Exchange Network spearheaded by the universities of Stanford, Oxford and Tilburg and affiliate at the Class Action Lab of the University of Montréal. He is also a member of different working groups of the European Law Institute.