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JUDICIAL COLLECTIVE ENFORCEMENT OF FUNDAMENTAL RIGHTS IN A MULTILEVEL EUROPEAN CONSTITUTIONAL PERSPECTIVE. A FOCUS ON THE ITALIAN CLASS ACTION REGIME

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“Notre tâche d'homme est de trouver les quelques formules qui apaiseront l'angoisse infinie des âmes libres. Nous avons à recoudre ce qui est déchiré, à rendre la justice imaginable dans un monde si évidemment injuste, le bonheur significatif pour des peuples empoisonnés par le malheur du siècle. Naturellement, c'est une tâche surhumaine. Mais on appelle surhumaines les tâches que les hommes mettent longtemps à accomplir, voilà tout.”

Albert Camus, “*L'Été*”, 1954

TABLE OF CONTENTS

PART I INTRODUCTION

CHAPTER I RESEARCH QUESTION AND STRUCTURE

1.	Premise.....	5
2.	Central research question.....	5
3.	Structural overview.....	8

CHAPTER II TERMINOLOGY AND METHODOLOGY

1.	Navigating linguistic and conceptual nuances.....	13
1.1.	Class actions, representative actions, collective redress and collective enforcement.....	13
1.2.	Fundamental rights, social change and public interest litigation...	18
1.3.	Supra-individual positions and judicial enforcement.....	25
2.	Methodological approach.....	28
1.1.	The European multilevel standpoint.....	29
1.2.	The comparative method.....	30
1.3.	Case studies.....	34
3.	Concluding remarks.....	38

PART II
CONTEXTUAL FOUNDATIONS: WINDS OF CHANGE

CHAPTER III
A TRANSFORMING SOCIAL CONTEXT: THE EFFECTS OF GLOBALISATION
AND NEW TECHNOLOGIES ON THE SOCIAL FABRIC

1.	Premise. Whispers of a new order.....	43
2.	A twofold methodological clarification.....	45
3.	The multiple dimensions of globalisation.....	47
4.	The overflowing effects of new technologies.....	52
5.	Concluding remarks. The rise of new “global classes”.....	54

CHAPTER IV
A MULTILEVEL CONSTITUTIONAL CONTEXT: EVOLUTIONS OF POWER

1.	Premise. A shifting landscape.....	59
2.	Constitutionalism’s role in the transforming context.....	61
1.1.	From traditional conceptions... ..	65
1.2.	... to new challenges.	69
1.3.	Adopting a constitutional perspective	73
3.	A multidimensional, multifaceted and multilevel constitutional framework.....	76
4.	Sovereignty and its discontents	84
5.	Concluding remarks. The fall of “intermediate bodies”	89

CHAPTER V
JUDICIAL ENFORCEMENT AND ITS FUNDAMENTAL GAPS

1.	Premise. A tangled framework	91
2.	Different levels, different hats, different paths	93
3.	Practical gaps in judicial enforcement	98
4.	Legal gaps in judicial enforcement	101
5.	Illustrative cases. Constitutional review and the ECtHR pilot-judgement procedure	106
6.	Concluding remarks. Regaining paradigms lost	114

PART III
JUDICIAL COLLECTIVE ENFORCEMENT: ROUTE OF CHANGE

CHAPTER VI
CLASS ACTIONS: US ORIGINS, DEVELOPMENT AND CURRENT EU CONTEXT

1.	Premise. Disrupting old ways	119
2.	United States and common law origins	122
2.1.	Objectives: advancing social change	125
2.2.	Class actions and the civil rights movement	128
2.3.	Procedural hallmarks and constitutional nuances	136
2.4.	Lessons from the common law experience	148
3.	Collective redress in the European Union	149
3.1.	Objectives: avoiding consumer scandals	153
3.2.	From “toxic cocktail” to “necessary” consumer representative actions	160
3.1.	Procedural hallmarks and constitutional nuances	162
3.2.	Current implementation: potential, challenges and open questions	167
4.	Concluding remarks. Bridging opposite enforcement traditions	169

CHAPTER VII
THE 2019 ITALIAN CLASS ACTION REFORM IN AN INTEGRATING
CONSTITUTIONAL PERSPECTIVE

1.	Premise. An intertwined procedural tapestry	175
2.	Constitutional foundations of (collective) access to justice	181
3.	The 2019 Italian class action reform: procedural hallmarks, expansion and innovations	189
4.	Enforcing fundamental rights through class actions: constitutional nuances.....	198
4.1.	Balancing constitutional arguments and constitutional traditions	198
5.	Navigating interpretative hurdles with a constitutional compass	209
5.1.	The homogeneity requirement: a key issue	209
5.2.	Passive standing and coordination trajectories with the 2009 “public class action”	243
5.3.	Publications on the telematic portal and publicity	248

TABLE OF CONTENTS

5.4.	Non-retroactivity of the new provisions	250
5.4.1.	Constitutional legitimacy	250
5.4.2.	Unlawful conducts protracted over time during the two regimes	253
5.5.	The allocation of jurisdiction	256
6.	Concluding remarks. A still evolving tapestry	260

PART IV

ENFORCING FUNDAMENTAL RIGHTS: EXERCISES OF CHANGE

CHAPTER VIII

CASE STUDY NO. 1: ENVIRONMENTAL “SACRIFICE-ZONE” AND HARMFUL MEDICAL DEVICES. THE *ILVA* AND *PHILIPS RESPIRONICS* CASES

1.	Premise. Why case studies?	265
2.	Environmental and mass health injuries	267
3.	<i>ILVA</i> case. Factual contextualisation and previous litigation	271
4.	<i>ILVA</i> case. Two pending class actions	276
5.	<i>Philips Respironics</i> case. Factual contextualization	285
6.	<i>Philips Respironics</i> case litigation	287
7.	Lessons and open questions	292

CHAPTER IX

CASE STUDY NO. 2: FOOD-DELIVERY RIDERS AND FAIR WORKING CONDITIONS. THE *DELIVEROO* AND *UBER EATS* CASES

1.	Premise. Employment class actions	299
2.	<i>Deliveroo</i> and <i>Uber Eats</i> cases. Factual contextualisation	300
3.	<i>Deliveroo</i> case litigation	305
4.	Pending <i>Uber Eats</i> case litigation	315
5.	Lessons and open questions	319

TABLE OF CONTENTS

CHAPTER X

CASE STUDY NO. 3: SYSTEMIC INHUMAN AND DEGRADING TREATMENT OF PRISONERS AND MIGRANTS. ROOM FOR FUTURE (CLASS) ACTIONS?

1. Premise. Inhuman and degrading treatment of prisoners and migrants	323
2. Factual contextualisation. Systemic and structural violations: the Italian case	325
3. The common law experience with prisoners' class action litigation. <i>Plata, Ashker and Brazeau</i> cases	333
4. Comparative evaluations and room for future (class) action	343

PART V CONCLUSIONS

CHAPTER XI

REFLECTIVE ASSESSMENT AND FORWARD LOOK

1. Premise. Picking up the threads	353
2. Integrating regulations, constitutional principles and case law: a conclusive reflection <i>de iure condito</i>	357
3. Integrating findings and socio-legal insights: a conclusive reflection <i>de iure condendo</i>	361
3.1. Competent court	363
3.2. Active standing rules hindering effective access to justice	365
3.3. Distribution, liquidation and class definition	371
4. A final lesson. Pluralism and integration	372

CHARTS

1. CHART NO. 1: Number of class actions by tribunal	379

TABLE OF CONTENTS

2.	CHART NO. 2: Distribution of class actions across tribunals	379
3.	CHART NO. 3: Number of class actions by field of law	380
4.	CHART NO. 4: Distribution of class actions across fields of law	380
5.	CHART NO. 5: Types of class actions	381
6.	CHART NO. 6: Distribution of types of class actions	381
7.	CHART NO. 7: Number of class actions filed each year	382

PART I
INTRODUCTION

CHAPTER I

RESEARCH QUESTION AND STRUCTURE

1. Premise. – 2. Central research question. – 3. Structural overview.

1. Premise.

In contemporary society, despite significant advancements across various scientific, political and cultural domains, the enduring prevalence of systemic injustices and deep-rooted inequalities remains an undeniable reality. Notwithstanding the extensive statutory guarantees and institutional safeguards established globally, including seminal documents like the European Convention on Human Rights or the Universal Declaration of Human Rights and similar constitutional charters, an alarming surge in regressive trends has become increasingly apparent. Growing in the last decades, pushed by technological developments, it is becoming ever more daunting in the last few years. Evident in daily media representations and palpable within our communities, these trends underscore the persistent challenges of our time, casting a shadow over the efficacy of existing legal structures in addressing the multi-faceted dimensions of societal disparities and fundamental rights enforcement. This recognition not only emphasises the critical need for a *comprehensive reassessment* of the current constitutional frameworks (national and supranational), but also stresses the urgency of identifying and fostering innovative *legal approaches* that can efficiently confront the injustices embedded within our globalised society. These are the two pillars on which the present research is based.

2. Central research question.

According to Zygmunt Bauman, justice is an “incomplete project”, “incomplete in a radical sense, since it is the very essence of justice to be incomplete”. It is a

special kind of “sisyphusian project”, due to which “we must completely deconstruct the positive law in order to get closer to justice. In other words, we must strive to reduce the distance between the ‘is’ and the ‘ought’, although that distance can never be eliminated”.¹ This is probably correct, and, to some degree, gives rest to unrealistic, utopian, attempts to ensure “world peace” or justice for everyone. Still, it does not mean that we should stop trying.

Ascertained that no panacea exists, nor that this research intends to be one, the goal of the present investigation is to situate itself in the scientific debate on access to justice, public interest litigation and fundamental rights enforcement. Through the lens of Italian constitutional law, situated in the multilevel European system, it stems from the assumption that the traditional techniques of fundamental rights enforcement, while foundational, are not (always) efficient in today’s globalised society. At least to some degree and circumstances, the implementation of new *collective* mechanisms of judicial enforcement could be beneficial in such context.

The postulation at the basis is that collective, standardised infringements require new, collective, standardised paths of enforcement. The traditional European *dualistic* mechanisms of judicial protection at times appear anachronistic.² As it will be depicted through case studies (see *infra*, Part IV – *Enforcing fundamental rights: exercises of change*), they must be adapted to adequately convey the contemporary complex *collective* societal patchwork, dominated by states and transnational corporations, battleground of conflicting interests, where individual stances often feel irrelevant, and the public v. private distinction fades.

Recent developments at both European and national level underscore the recognition of this limitation, evident in measures such as EU Directive 2020/1828 (hereinafter “RAD”, as per “Representative Actions Directive”)³ aimed at ensuring

¹ See HVIID JACOBSEN M. and PODER P. (2008). *The Sociology of Zygmunt Bauman: Challenges and Critique*, Ashgate Publishing, Farnham, 70 ff.

² See, already in 1976, CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparative Contribution*, in *Buffalo Law Review*, vol. 25, 643 ff.

³ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 “on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC”, aiming “to ensure at Union and national level at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers in all Member States”.

effective (injunctive and compensatory) representative action mechanisms for *consumers* across all Member States. Similarly, the parallel introduction, among other EU States, of Title VIII-*bis* on collective proceedings within the Italian Code of civil procedure in 2019 – with a *general* scope of application – and the ECtHR’s development of the “pilot judgment procedure” (Rule 61, Rules of the Court)⁴ since 2004 reflect the growing recognition of the need for new *supra-individual remedies* within contemporary European legal frameworks, too.

A radical turn-around, from European legislative, institutional and academic actors is hence registered, considering the harsh critics the common-law *class action* model received in the Old Continent for several decades, since its innovative amendment in the US in 1966, until recent years. The much-recalled definition of “toxic cocktail” in a 2008 EU Commission Green Paper Memo, in reference to such mechanism, is rather illustrative.⁵ The changes in the European (specifically, Italian) social, cultural and legal fabric – such as to radically alter the perception of collective enforcement procedures – are worth reflecting upon.

The present study, building on these considerations, focuses exactly on the assessment of the recent Italian “*class action*” model (see *infra*, Chapter VII), also in light of EU Directive 1828/2020, as a potential vehicle for driving positive social change and safeguarding fundamental rights. This is the central research question. Innovatively, with respect to the few European studies concerned with collective redress, which all tend to focus on consumer protection, this work aims, instead, to ponder on the use of this procedural model for the enforcement of human and fundamental rights. A similarly comprehensive *constitutional* approach on this topic is, until now, missing within the European academic landscape.

In particular, four lines of analysis will be followed for this purpose:

- (i) collective enforcement as a *fundamental right* itself;

⁴ Rule 61 – “pilot-judgement procedure” – of the ECtHR’s Rules of the Court “where the facts of an application reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications”, first used in 2004 and finally codified in 2011.

⁵ See, *infra*, Chapter VI.

- (ii) the specific Italian penta-partite class action model as a means of *enforcing fundamental rights*, advancing social change and filling contemporary adjudicatory gaps;
- (iii) the *effectiveness* of the class action model to provide concrete *access to justice*, both as an alternative and in coordination with other procedural tools (national and supranational);
- (iv) any potential *drawbacks and abuses* related to the class action model, with special attention to fair trial guarantees, the rights of the defendants and of the class members not directly involved in the proceedings.

In doing so, the rich common-law experience of civil rights enforcement and public interest litigation is inevitably taken into account, in a multi-faceted comparative perspective.⁶

While the analysis anticipates the imperfections of such a procedural technique,⁷ it also highlights its potential as a key instrument for societal change and for the protection of emerging meta-individual positions,⁸ as well as traditional liberties. However, this acknowledgment is not without significant caveats, which will be further explored in subsequent sections.⁹

3. *Structural overview.*

With these objectives, after the present introductory Part, the research will be divided in three parts, with a conclusive assessment.

Firstly, in *Part II – Contextual foundations: winds of change*, it will further frame its own perimeter. Drawing from socio-logical and socio-legal scholarship, it will situate the contemporary European social, cultural, political and economic context, in a comparative – spatio-temporal – perspective, highlighting the significant structural changes brought by globalisation and new technologies. Under this lens, it will specifically regard the differences and points of convergence between the

⁶ See, *infra*, Chapter II.

⁷ *In primis* the fact that it is a judicial path, whereas certain problems – at least, ideally – should be solved at a political level, not in courts.

⁸ See, *infra*, Chapter II.

⁹ See, *infra*, in particular Chapters VI and VII.

current era and the 1960s US and EU context, to stress and explain the contribution of distinct social fabrics in advancing social change. Moreover, the role of constitutionalism in the contemporary times of deep social and legal transformations will be addressed, in order to explain and justify the peculiar *constitutional* standpoint herein adopted. Such contextualisation will be instrumental in understanding the transformations of power, but also the enforcement gaps of today's age and, in particular, the shortcomings of the current (multi-level) architecture of fundamental rights protection. Several, systemic and recurring, challenges emerge, on which we shall concentrate: i.e., a massification and standardisation of relationships and of infringements, a tendential failure of democratic processes, growing inequalities, new forms of “private power” alien to traditional “statehood”, the disruption of national state barriers, an increasing transnationalisation of issues and an increasing incapability of current judicial processes to deliver “effective justice”.¹⁰ Naturally, none of these complex matters will be comprehensively addressed, for evident feasibility reasons. Rather, drawing from previous academic literature and existing jurisprudence, they will be presented to clarify the current intricate framework of fundamental rights enforcement in Europe, in which the research wishes to situate itself. It will thus provide the essential steppingstone for the next two Parts, respectively dedicated to legislation and case law.

Part III – Judicial collective enforcement: route of change will concentrate on the “collective redress”, or “class action”, models. After a brief historical premise and contextualisation of the complex procedural mechanism's origins in the US and common law world, it will critically describe the current European regulatory framework, both at EU level and, specifically, in Italy.

Regarding the former, the national implementation of the RAD needs to be closely followed. Fundamental rights, as it is known,¹¹ formally fall outside of its scope. Nonetheless, several circumstances keep the door open for a larger

¹⁰ See, *infra*, Chapters IV and V.

¹¹ See, *infra*, Chapter II.

application of the RAD.¹² Among them, the importance of linguistic choices and conceptual interpretation will be stressed: in the contemporary digital and “fluid” society, who is a “consumer”? Valid points can certainly be raised in favour of an extensive reading of such term, in order to include a larger number of positions, even in those Member States that have kept the scope of their domestic class actions limited to such sphere. This argument is supported by the extensive list of legislative acts in the annex. Furthermore, remaining at EU level, the existence of other sectorial “collective” instruments set forth in other regulations and directives must be underscored (i.e., 2014/104 “Competition Damages” Directive or 2016/679 “GDPR” Directive).

Naturally, the issue of effectiveness should be carefully considered, also in light of constitutional and supranational courts’ jurisprudence.¹³ Moving from the common law experience of civil rights enforcement from the 1960s, Part II will also analyse, on paper, the potential and risks of the contemporary European (specifically Italian) class action mechanisms if, or when, they are used for the enforcement of other fundamental rights. In particular, the four lines of study above-mentioned will be followed herein, too.

As anticipated, this analysis will preliminarily cover the EU level, and, in particular, the RAD and its implementation at national level. Subsequently, it will focus on the Italian jurisdiction and the five different “class action” models therein available. The perspective adopted in this Part will be mainly regulatory. Each class action model, as it is known, is composed of several building blocks, such as the rules for joining and forming the class (e.g., opt-in v. opt-out regime, requirements of commonality or homogeneity), scope of application, competent court and jurisdiction, rules on standing and requirements on admissibility and for joining the class, rules on funding, on adequacy of representation, on proof of causation, on liquidation of damages, remedies available, rules on settlements and executions. A minimal change in each of the provisions regulating one of these elements can substantially shift the ability of the class action instrument to *effectively* enforce

¹² See, *infra*, Chapter VI and Chapter VIII, in relation to the *Philips Respironics* case.

¹³ See, *infra*, Chapter V.

fundamental rights.¹⁴ A clear example are the rules on standing: even with the best possible class action model, if these provisions are excessively restrictive, the effectivity of the mechanisms significantly drops. This Part will thus concentrate on the array of instruments set forth by the legislators, their overlapping and coordination.

Part IV – Collectively enforcing fundamental rights: exercises of change, instead, will be dedicated to judicial applications of the class action instrument, as methodologically explained *below*.¹⁵ This will allow for a consideration of the concrete implications of using such procedural instrument, in alternative or in coordination with the already-present mechanisms, both procedural and not.

Three enforcement scenarios, further described *below*,¹⁶ will be considered: environmental harms and the right to health (Chapter VIII); workers' rights (Chapter IX), prisoners' and migrants' rights (Chapter X);. As explained, given the still scarce Italian class action case law, other EU Members States' case law (especially the Netherlands') will be considered, too, together with the much richer common law (mainly US and Canada) jurisprudence. Any relevant difference between the jurisdictions and the procedural mechanisms will be adequately stressed. Moreover, other non-class action cases will be regarded for procedural comparative assessment, too.¹⁷

The above-mentioned four lines of analysis, will be critical in this Part, too. As it will appear evident, not insignificant risks follow the introduction of the class action instrument, especially in relation to fair trial guarantees and potential abuses from the class representative. Furthermore, certain scenarios may require a different solution, already available in the legal order.

At the same time, nonetheless, judicial collective enforcement presents a number of features that, in specific circumstances, can overcome some of the most important barriers in the struggle for fundamental rights enforcement, social advancement and equality. The rich common law experience is unequivocal on this

¹⁴ See, *infra*, Chapter V, VI and VII.

¹⁵ See, *infra*, Chapter II.

¹⁶ Id.

¹⁷ Id.

point. It remains to carefully understand how – in which cases, with which limitations, with which regulatory and institutional amendments – to proceed (*Part V – Conclusions*).

It is against this backdrop that the present research aims to contribute, bringing a novel constitutional and European perspective.

CHAPTER II

TERMINOLOGY AND METHODOLOGY

1. Navigating linguistic and conceptual nuances. – 1.1. Class actions, representative actions, collective redress and collective enforcement. – 1.2. Fundamental rights, social change and public interest litigation. – 1.3. Supra-individual positions and judicial enforcement. – 2. Methodological approach. – 2.1. The European multilevel standpoint. – 2.2. The comparative method. – 2.3. Case studies. – 3. Concluding remarks.

1. Navigating linguistic and conceptual nuances.

To lay a solid foundation for the present research, a thorough examination of the fundamental terminologies hereinafter adopted is imperative.

This preliminary step seeks to create a precise and comprehensive understanding of the key concepts employed in this study, namely “*class actions*”, “*representative actions*”, “*collective redress*”, “*collective enforcement*”, “*fundamental rights*”, “*social change*”, “*public interest litigation*”, “*supra-individual positions*” and “*judicial enforcement*”. Such an examination, for obvious focus concerns, will be limited to the purposes of the present analysis. Drawing upon established legal scholarship and case law, although brief, it will elucidate the exact perimeter of the investigation. Furthermore, it will serve as a necessary basis for the subsequent in-depth evaluation of the effectiveness and implications of the class action model in judicially enforcing fundamental rights in Europe, as well as in addressing contemporary societal challenges within the currently transforming and multifaceted constitutional landscape.

1.1. Class actions, representative actions, collective redress and collective enforcement.

As illustrated, this research is focused on *judicial collective enforcement*, which is to be understood as a judicial action, in front of a court, compelling the observance or compliance with a law or rule, statutory or constitutional, to contemporarily benefit a group of people, if not the whole society. Specifically, it focuses on *one type* of judicial collective enforcement, that is the penta-partite¹⁸ “*class action*” mechanism available in Italy, partially influenced by the recent RAD.¹⁹

“Class action” is a term often avoided at EU level (with some national exceptions, such as the Italian one), forever nestled in the common law experience of private enforcement and public interest litigation. “Representative action” or “collective redress” are, instead, synonym expressions preferred within the EU, as per the abovementioned RAD or the previous 396/2013 “collective redress” Recommendation.²⁰ They are mainly used at EU level since the early 2000s to underscore a (formal) distance from the common law mechanism, until then harshly criticised in the continent.²¹

It is worth recalling that the class action mechanism is a complex procedural device that derives its success from the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure in the US.²² Since then, it became a key component of the common law legal panorama, proving particularly effective for enforcing rights of

¹⁸ See, *infra*, Chapter VI.

¹⁹ Id.

²⁰ Recommendation “on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

²¹ As it is often underscored how the same EU institutions infamously defined the “US-style class action” as a “toxic cocktail” in a 2008 Green Paper Memo, available here: <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_08_741>. For precision, it must also be pointed out that “collective redress”, at least in the scholarly world [HODGES C. and VOET S. (2018). *Delivering Collective Redress: New Technologies*, Hart Publishing, Oxford] has been deemed to encompass a larger number of situations. Moreover, it displays its focus on the objectives of the policy (“redress”) rather than on the mechanisms (“action”), under the realisation that techniques other than ordinary litigation may attain the proposed goal of compensation, too. Until now, nonetheless, the EU legislator uses both “collective redress” and “representative actions” as synonyms of the “class action” model originated from the common law tradition, as clearly visible in the recent 1828/2020 EU Directive. To this regard, it can further be noted how national legislators from the EU, even when implementing the EU Directive, adopt other terms: group actions (i.e. France), collective actions (i.e. the Netherlands), popular actions (i.e. Portugal) or even class actions (i.e. Italy).

²² See, *infra*, Chapter VI.

both constitutional and statutory nature; at first, to fight racial desegregation and advance civil rights, subsequently, for public interest litigation in general; concurrently, in consumer and securities field, too.

Judicial economy, maximisation of access to justice and deterrence of potential wrongdoers have been accounted, in particular, among the benefits of class actions.²³ By following the old adage that “there is strength in numbers”, power imbalances against large corporations or state entities have indeed been re-equilibrated in a significant number of cases. Notable examples, after the first civil rights cases from the 1960s in the US, vary from consumer and competition law, securities, employment discrimination to prisoners’ rights, foster care, education or social housing cases, through environmental, tobacco, asbestos, LGBT+ and police brutality litigation.²⁴

On the other hand, however, the common law class action model was often criticised for being exploited by greedy lawyers fishing for cases in search of large contingency fees. Its inability, at times, to offer sufficient safeguards to class members not participating in the proceedings also raised several doubts.²⁵ This contributed to regional legislative and judicial backlash,²⁶ as well as severe critiques from European shores.²⁷ Nonetheless, after numerous – mainly consumeristic – scandals, the Old continent, with a significant turn-around, has recently opened the door to a “legal transplant” of such complex procedural tool.²⁸ The abovementioned RAD on “representative actions” for consumers’ “collective redress”, now to be implemented in all Member States,²⁹ is the result of such lengthy process, begun in the early 2000s.

²³ PICHÉ C. (2021). *Class Actions in Quebec: Highlights of a Unique Procedure*, in *Revista Eletrônica de Direito Processual*, no. 15, 170 ff.

²⁴ See, *infra*, Chapter VI.

²⁵ See, *inter alia*, MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399.

²⁶ Id.

²⁷ See, *infra*, Chapter VI and, *supra*, fn. 21.

²⁸ Expression employed by HENSLER D. (2016). *The global landscape of collective litigation*, in HENSLER D., HODGES C., TZANKOVA I., *Class Actions in Context. How Culture, Economics and Politics Shape Collective Litigation*, Edward Elgar Publishing Limited, Cheltenham 2016, 3, recalling WATSON A.

²⁹ Id.

At thorough analysis, it is evident that, despite the name and some minor (variable) differences – on which we shall return in detail³⁰ –, the “representative action” model proposed by the EU legislator is the same as the US “class action” technique. For this reason, for the purposes of the present research, adopting the traditional “class action” terminology seems appropriate. It is, after all, a choice of *continuity* with the main academic literature on the matter, mostly from common law jurisdictions.³¹

This approach is coherent with that of single *national* legislators from the EU, among which Italy (see Article 840-*bis*, titled “compensatory class action”). Moreover, this option will also (hopefully) foster a *dialogue* with extra-continental scholars, in line with the decision of producing the research output in English language. As subsequently elaborated, most challenges of the contemporary society have a transnational, if not global, dimension,³² a feature which indeed demands inter-jurisdictional coordination. Consequently, for reasons of uniformity, the term “class action” will be hereinafter used to encompass also European mechanisms of “collective redress” or “representative actions”, notwithstanding the different name tag.

Under a definitional-functional standpoint, class actions should be conceived as a judicial action brought by a representative on *behalf* of a number of people who are confronted with the same or similar factual or legal issues, and who are no party to the proceedings, but are still bound by the *res iudicata* effects of the final decision (unless, for compensatory suits, they do not opt in or they opt out).³³ The suit can aim either for a compensatory or injunctive remedy. This extensive reading follows the inclusion of both types of action under the RAD, as well as under the recent Title VIII-*bis* of the Italian c.p.c. Additionally, in Italy also another (third) mechanism, the so-called “*public class action*” (d.lgs.198/2009), in front of the

³⁰ Id.

³¹ In the wake, in Europe, of UZELAC A. and VOET S. (2021). *Class Actions in Europe. Holy Grail or Wrong Trail?*, Springer, Cham, with a comprehensive evaluation of the current state of the field in Europe.

³² See, *infra*, Chapter III.

³³ See HOMBURGER A. (1974). *Private Suits in the Public Interest in the United States of America*, in *Buffalo Law Review*, 23, 343.

administrative judge, is thus encompassed,³⁴ as well as the newly-introduced – and quite unnecessary (see *infra*)³⁵ – dual “consumer representative action” in implementation of the RAD (both injunctive and compensatory). Hence, the pentapartite nature of class actions in Italy. Such large definition is not devoid from necessary fundamental distinctions, *in primis* historical, in light of the civil law long-standing experience with the “*actio popularis*” (since Ancient Rome), on which we shall return (with comparative design) in the relevant section.³⁶

Examples of “classes” range from pre-formed social groups (i.e., in discriminatory suits), voluntarily-formed groups (i.e., in employment or consumer issues) and involuntarily-formed social groups (i.e., mass harms) to the whole collectivity, either local or national (i.e., lack of sufficient health care measures) or even global (i.e., climate change).

The (self-chosen) *representative* function of the claimant(s) and the extension of the *res judicata* effects of the decision to individuals who are not, formally, parties in the proceedings are central elements of this type of litigation, as further analysed (see *infra*, ...). Its affirmative *regulatory* objective is also a key feature, as shown by the rich litigative experience from common law countries. Finally, the potentially *private* nature of the enforcement must be stressed, in the sense that, despite having collective – sometimes public – effects, it can be initiated *also* by private non-institutional actors, as opposed to public and institutional ones (i.e. public administrations or public prosecutors, for instance in criminal matters). All these components, evidently, contribute to the potential, but also to the risks of the technique at hand, on which we shall return in the relevant sections,³⁷ together with the recent *ouverture* of EU institutions towards it.

³⁴ See, *infra*, Chapter VII.

³⁵ Id.

³⁶ Taken into account – as a different remedy – also by the ECtHR when considering its own application routes. See, *infra*, Chapter XI.

³⁷ See, *infra*, Part III.

1.2. Fundamental rights, social change and public interest litigation.

It has been clarified that class actions should be conceived as a procedural tool by which one or more members of a class – that is a group of people affected by the same unlawful activity of a common defendant – sue such common defendant on *behalf* of the whole class itself, as its representatives.³⁸

In Europe, the introduction of such mechanism has been intended mainly for the protection of *consumers*. This is clearly depicted by the title of the RAD (EU 1828/2020 Directive “for the protection of the collective interests of *consumers*”), as well as by most of the (few) scholarly works on the matter. Nonetheless, it must be stressed how the RAD does *not* exclude the possibility for Member States to adopt class action instruments with a *larger scope* of application, or even a *general* one. It is interesting to note that this was the approach initially followed by the EU Commission itself, with its 396/2013 Recommendation “for [all] mass harm situations caused by violations of rights granted under Union Law”.³⁹ Such wider scope of application can be found in different EU States: the Netherlands and Italy, above all, with a general scope, but also France or Portugal, for instance, with *actions de groupe* and *ações populares* available in several fields (i.e., for environmental issues or employment discrimination, too).

As anticipated, scholarly studies in Europe on class actions so far – safe for very limited, long-standing or transitional references – have always focused either on the competition and consumer law sphere or on the strictly civil procedural nuances of the mechanisms.⁴⁰ A comprehensive *constitutional focus* on this complex technique – characterised by a disruptive potential, especially if it has a general scope of application – is currently missing in the European, specifically Italian, academic panorama.⁴¹

³⁸ See HOMBURGER A. (1974). *Private Suits in the Public Interest in the United States of America*, in *Buffalo Law Review*, 23, 348.

³⁹ I – “*Purpose and subject matter*”, Article 1.

⁴⁰ See *supra*, fn. 31.

⁴¹ For a focus on class actions for human rights’ protection from a European perspective, see SILVESTRI E. (2018). *Human Rights Class Actions*, in UZELAC, A., VAN RHEE, C. (eds.). *Transformation of Civil Justice*, Ius Gentium: Comparative Perspectives on Law and Justice, Springer, Cham.

As introduced above, the present research aims to fill this gap, by providing a detailed examination of:

- (i) collective enforcement as *a fundamental right* itself;⁴²
- (ii) the class action model as a means of *enforcing fundamental rights*.⁴³

It will also question:

- (iii) the *effectiveness* of the class action model to provide concrete *access to justice*, also in light of Goal 16 of the UN SDGs, and in comparison (but also coordination) with other procedural tools (national and supranational, i.e., the pilot-judgement procedure before the ECtHR);⁴⁴
- (iv) any potential drawbacks of the class action model from the other side of access to justice, that is *fair trial* guarantees.⁴⁵

The first argument – collective enforcement as *a fundamental right* itself – is backed by the principle of access to justice and the right to an effective remedy. As it is known, they are enshrined both at national (i.e., Article 24, in conjunction with Articles 2 and 3, of the Italian Constitution) and supranational level (i.e., Article 13 ECHR, to be read in connection with the right to a fair trial, set forth under Article 6 ECHR; Article 47 CFREU). As further addressed, in light of the adjudicatory obstacles raised by the globalised society (and, in particular, its *collectivisation* and *standardisation* effects), it could be argued (and it has already been argued, in front of some constitutional courts)⁴⁶ that *effective* access to justice requires collective forms of judicial proceedings.⁴⁷ Naturally, important caveats and possible shortcomings must be taken into account, *in primis* from the point of view of the fair trial guarantees (i.e. Article 6 ECHR, Article 47 CFREU, Article 111 of the Italian Constitution). On this crucial issue we shall return in the relevant section, where we will also delve into the three other lines of analysis, too.⁴⁸

⁴² See, *infra*, Chapter VII.

⁴³ Id.

⁴⁴ See, *infra*, Chapter VII and Part IV.

⁴⁵ See, *infra*, Chapter VII.

⁴⁶ E.g., in front of the Belgian Constitutional Court, [2006] Case 41-2016, as cited and commented by VOET S. (2021) in *Class Actions in Belgium: Evaluation and the Way Forward*, in UZELAC A. and VOET S. (2021). *Class Actions in Europe. Holy Grail or Wrong Trail?*, Springer, Cham.

⁴⁷ See, *infra*, Chapter VII.

⁴⁸ Id.

For now, it is important to preliminarily address the threshold linguistic issue of what will be herein conceived as “*fundamental rights*”, whose enforcement through class actions are herein considered.

To this regard, it should first be noted that “fundamental rights’ enforcement” is an expression mainly European, of civil law tradition. It could, therefore, appear extraneous to the *common law* readers, who – at least in this field – do not distinguish *adjudication* on the basis of the constitutional or statutory *status* of the rights enforced, but, rather, on the *interest* that is being protected, or the goal that is sought (i.e., social change). This is shown, for instance, simply by the titles of the seminal studies of Adolf Homburger,⁴⁹ Robert L. Rabin,⁵⁰ Abram Chayes,⁵¹ and Mauro Cappelletti,⁵² as well as by the more recent scholarship on “*social change*” or “*public interest litigation*”.⁵³

This perspective, based on the notions of “private” or “public” “interests”, enforced by private actors in the judicial arena, poses a series of relevant conceptual issues, at least for European scholarship.

The traditional *private v. public paradigm* is, in fact, under several aspects, increasingly questioned nowadays.⁵⁴ Hence, it could be challenging to precisely determine what is “public” and what is “private”, both in relation to the “interests” and to the “holders” of those interests. An example could be that of companies

⁴⁹ HOMBURGER A. (1974). *Private Suits in the Public Interest in the United States of America*, in *Buffalo Law Review*, 23.

⁵⁰ RABIN R.L. (1976). *Lawyers for Social Change: Perspectives on Public Interest Law*, in *Stanford Law Review*, 28(2), 207.

⁵¹ CHAYES A. (1976). *The Role of the Judge in Public Law Regulation*, in *Harvard Law Review*, 89, 1281.

⁵² CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, in *Buffalo Law Review*, vol. 25, 643.

⁵³ See, e.g., CUMMINGS S.L., RHODE D.L. (2009) *Public Interest Litigation: Insights from Theory and Practice*, in *Fordham Urban Law Journal*, 36, 603., KALAJDZIC J. (2013). *Public Goals by Private Means & Public Actors Protecting Private Interests: A Response To Professor Jones*, in *Canadian Business Law Journal*, 53, 371.

⁵⁴ HORWITZ M.J. (1982). *History of the Public/Private Distinction*, in *University of Pennsylvania Law Review*, 130, 1423; HARTMANN E. and KJAER P.F. (2018). *The Status of Authority in the Globalizing Economy: Beyond the Public/Private Distinction*, in *Indiana Journal of Global Legal Studies*, 25(1), 3; DAGAN H. and ZIPURSKY B.C. (2021). *The Distinction between Private Law and Public Law*, in DAGAN H. and ZIPURSKY B.C. (eds.). *Research Handbook on Private Law Theories*, in *Fordham Law Legal Studies Research Papers*, no. 3641950; KJAER P.F. (2023). *Five Variations of Transformative Law: Beyond Private and Public Interests*, in *Erasmus Law Review*, 2, 140.

which are partially by the state; or of companies that, while pursuing their profit, are still required to be “sustainable” (i.e., the recently amended Article 41, para. 3 of the Italian Constitution: “The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and coordinated *for social and environmental purposes*”). This blurring distinction between the private and the public sphere is a key issue underlining the research.⁵⁵

Conceded, for the moment, that the “private interest” may correspond to that of a specific individual (natural or legal person), it is important to consider here what may be identified as the “*public interest*”. Its pursuit is, in fact, often used – mainly in common law jurisdictions – as a terminological alternative to “fundamental rights’ enforcement” (i.e., “public interest litigation”), although as a broader alternative, carrying socio-political connotations, too. It is a contention at the basis of this work that both concepts – although stemming from opposite perspectives – share a similar (not identical) ground of analysis, as the subjective positions that they both aim to enforce are, in part, overlapping.

For starters, such an expression – “public interest” – is recurring in European constitutional charters as well: either literally (i.e., Article 1 of Protocol 1 ECHR, Article 17 CFREU, Article 43 Italian Constitution, in relation to the right to property) or with similar forms (i.e., Articles 8, 9, 10, 11 ECHR; “general interest” under Article 52 CFREU; “collective interest” under Article 32, para. 1 of the Italian Constitution, with regard to the right to health). It is mainly used to justify limitations to the rights therein enshrined. Particularly exemplary is, for instance, the general clause under Article 52, para. 1 CFREU: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of *general interest* recognised by the Union or the need to protect the rights and freedoms of others”.

⁵⁵ See, *infra*, Chapter IV.

However, as observed by Vittorio Angiolini, the use of these general clauses can be (and has – historically – been) problematic.⁵⁶ It justifies *discretionary* choices of the sovereign powers (legislator, public administration, judiciary). When determining what is the “public interest”, certain “interests” or “values” could prevail in a purported “*balance*” as “superior” only by virtue of a *presumed* “superiority” *authoritatively* certified by the sovereign power.⁵⁷ In this sense, the Italian constitutionalist argues in favour of a “true balance”, free from the sovereign power and based on the different identities and cultural choices concretely manifested by the people concerned, either as individuals or as a collective.⁵⁸ Such a conception – which opposes sovereigntist views, in the wake of Hobbes’ Leviatan – is certainly not easily put into practice. Still, it hits a critical point.

Accepted that the public interest is indeed that which benefits, in general, the community of a certain legal order, fostering its moral and material progress,⁵⁹ the issue of *who* should identify it (and *how*) remains, in fact, in the background, unresolved. As further addressed, it is a matter of *legitimacy*, and *authority*, on the one hand.⁶⁰ But it is also a question of *limiting* whoever is granted such (“sovereign”) power of identification, on the other hand. “The remedy”, echoing again Angiolini, “can be the desertion from sovereignty, the reclaiming of our responsibility to have rights”.⁶¹ In this sense, with a relevant series of caveats,

⁵⁶ ANGIOLINI V. (2016), *Sulla rotta dei diritti. diritti, sovranità, culture*, Giappichelli, Turin, 37-40.

⁵⁷ For all these reasons, despite the common features shared with the similar concept of “public interest litigation”, it makes sense, for the present research, to reverse the perspective, focusing on “fundamental rights” (interpreted in such an extensive way), rather than the “public interest”, susceptible of discretionary identifications from the sovereign powers. This is also in line with the European, civil law, tradition of constitutional adjudication. To this regard, the issue of whether the judiciary has sufficient authority, but also democratic legitimation, to conduct such type of balancing in highly political and ethical issues, possibly clashing with the legislator’s discretion, has been and still is the object of a heated debate. See, e.g., ZANON N. (2021). *I rapporti tra Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali*, federalismi.it, 3; KAVANAGH A. (2023). *The Collaborative Constitution*, Cambridge University Press, Cambridge. On the balancing between judicial flexibility and legal certainty, see CAPPELLETTI M. (1994) *Dimensioni della giustizia nelle società contemporanee*, il Mulino, Bologna, 157, as always anticipatory, also with CAPPELLETTI M. (1984). *Giudici legislatori?*, Giuffrè, Milano.

⁵⁸ ANGIOLINI V. (2016), *Sulla rotta dei diritti. diritti, sovranità, culture*, Giappichelli, Turin.

⁵⁹ PIZZORUSSO A. (1972). *Interesse pubblico e interessi pubblici*, in *Rivista trimestrale di diritto e procedura civile*, 26, 57.

⁶⁰ See, *infra*, Part IV.

⁶¹ ANGIOLINI V. (2016), *Sulla rotta dei diritti. diritti, sovranità, culture*, Giappichelli, Turin.

mainly related to due process (see *infra*),⁶² it could be argued that private enforcement (through litigation), although not ideal, is a possible solution, indeed.

Private enforcement, in this case, would entail the *identification* of the “public interest” to be vindicated in court by the concerned *people* themselves.⁶³ As described by Adolf Homburger in 1974, “‘private suits in the public interest’ [...] are remedial devices which rely on private initiative to secure the vindication of mass or public rights. [...] Reaching beyond traditional confines, they seek adjudications which *transcend* the interests of the parties before the court”. In essence, this is common law’s “*public interest litigation*”:⁶⁴ the parties themselves that, under the old adage “there is strength in numbers”, confront their much more powerful (to some degree “sovereign”) opponents. Notable examples, brought by the common law scholarship and case law, mentioned above, touch racial desegregation, employment discrimination, prisoners’ rights, foster care, education, social housing, environmental, tobacco, asbestos, LGBT+ and police brutality cases.⁶⁵

It is, nonetheless, crucial to recall the *self-imposed representative* function of class actions and, in general, of “private suits in the public interest”. Such function constitutes the key aspect of such type of litigation. By trying to overcome an obstacle (facing a too powerful opponent for a single individual, acting alone), a new one might be generated, whenever the class representative does not act in the interests of the whole class (the “public interest”, in this case) or whenever, by identifying the interest of a specific group of people (not everyone) within the class, that of single individual components of the class is thwarted. This is a significant

⁶² See, *infra*, Chapter VII.

⁶³ On the private v. public distinction, see CHAYES A. (1976). *The Role of the Judge in Public Law Regulation*, in *Harvard Law Review*, 89, 1281, and, more recently, HARTMANN E., KJAER P.F. (2018). *The Status of Authority in the Globalizing Economy: Beyond the Public/Private Distinction*, in *Indiana Journal of Global Legal Studies*, 25(1), 3.

⁶⁴ Quite interestingly, this phenomenon has started to be studied, and promoted, in recent years in Europe too, within academic and institutional centres, under the label of “strategic litigation”. This “rebranding” is, after all, in line with the already-observed European trend of renaming institutions and phenomena from overseas. See, e.g., HESS B. (2022). *Strategic Litigation: A New Phenomenon in Dispute Resolution?*, in *MPILux Research Paper Series*, 3.

⁶⁵ See, *infra*, Chapter VI.

potential drawback of judicial collective enforcement, as it will be further analysed, against which a series of safeguards must be adopted.

Turning again to the aim of this section – that is precisely framing the perimeter of the research –, it can be envisaged how “enforcement of fundamental rights” is, thus, to be conceived not from a formalistic viewpoint, but rather in a more *extensive* sense. The “fundamental rights” whose protection through class actions is hereinafter considered are not merely those *explicitly* formulated in a constitutional text (which, as we shall address, can be both national and supranational).⁶⁶ They are, instead, more generally, those rights pertaining to every human and to their *dignity*, envisioned as a “moral autonomy” and as a “chance of self-development of individuals, alone or conceived collectively, released from external constraints, and ‘free’ from the sovereign, [...] in pursuing their ‘inclinations’, their own acquired identities, and their own cultural choices”.⁶⁷ They are, then, above all (but not only), the rights of the minorities, the under-represented and the less powerful in the political and economic context,⁶⁸ the safeguard of which, as subsequently addressed,⁶⁹ corresponds to the essential core of constitutionalism. They are, not least, the concrete realisation of the right of access to justice, a fundamental, if not the fundamental, right itself.⁷⁰

In this perspective, the class action model presents itself – on paper – as an extraordinary instrument of “bottom-up” and even “counter-majoritarian” enforcement,⁷¹ whenever the entitled “public” powers fail to safeguard, or implement, fundamental rights (interpreted in such an extensive way) or whenever any kind of power (even “private”) infringes them. Judicial collective enforcement, therefore, becomes a subsidiary way to promote inclusion and positive *social*

⁶⁶ ALEX Y. R. and RIVERS J. (2009). *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

⁶⁷ ANGIOLINI V. (2016), *Sulla rotta dei diritti. diritti, sovranità, culture*, Giappichelli, Turin, 29.

⁶⁸ Such an attention to the rights of minorities finds an evident analogy in the principles of equality, solidarity and non-discrimination, which permeate the European civil law constitutional tradition. See, also, ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44, 369.

⁶⁹ See, *infra*, Chapter IV.

⁷⁰ See, *infra*, Chapter VII.

⁷¹ ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44.

change, under the fundamental values (in this, extensive, sense “constitutional”) of solidarity, equality and respect for human dignity.⁷²

1.3. *Supra-individual positions and judicial enforcement.*

A taxonomy of the positions which will be considered for this research cannot limit itself to their *fundamental* nature. The issue of *enforcement* should be further addressed. In particular, it should be inquired who are the *holders* of those “fundamental rights” and, consequently, who can run as “champion of the class”, that is as the *representative* that brings the claim to court on behalf of the whole class. In short, to further frame the perimeter of this study, it needs to be clarified *to whom* pertain those fundamental rights enforced through the class action. This will shed light on who has the *standing to sue* and, thus, commence *judicial enforcement*.⁷³ In this context, the pervasive linguistic challenge of defining the new concepts emerges once again, as it becomes imperative to adapt traditional legal paradigms to new societal challenges.⁷⁴

To this regard, a twofold growing global trend must be preliminarily stressed. On the one hand, there is a tendency towards a *standardisation* of (contractual and extra-contractual) relationships. Such is the case, for instance, of numerous employment or discriminatory issues, as well as those mass harms caused by a defective product or service. This creates a series of homogenous and similar rights, that belong, individually, to several people at the same time. The case of social rights, and their lack of implementation, is particularly noteworthy to this regard. On the other hand, there is a tendency towards a *fragmentation* of subjective

⁷² See Article 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

⁷³ This is particularly relevant since some procedural paths of enforcement may require a direct connection to the case of the claimant/applicant, thus creating a justiciability obstacle whenever they are not holders of the enforced positions. Numerous suits in the field of climate change, for instance, have been declared inadmissible for these reasons. See, *infra*, Chapters VII and XI.

⁷⁴ Concurrently, also traditional notions are put into question, such as the legal paradigms behind the adjectives “public” and “private”, whose divide now appears more than ever blurred. See, *infra*, Chapter IV.

positions, with the emergence of interests that pertain to everyone and to no one in particular. A significant example is that of climate change.⁷⁵

As a consequence of these two trends (on which we shall return in further sections), traditional subjective *individual* rights (such as the right to life, or freedom of expression) have been joined by the categories of *collective* rights and *diffuse* interests. This taxonomy, however, is not siloed. Categories tend to overlap with each other. Traditional subjective individual rights, for instance, at times are also collective or diffuse. Such is the case of collective infringements to traditional subjective rights: to freedom of expression on social media platforms, for example, or migrants’ or prisoners’ inhuman and degrading treatments. They are individual rights, but their protection also concerns the public – collective – interest. At the same time, diffuse interests, although not always directly linked to a specific person, tend to touch every natural person’s fundamental freedoms: i.e., the right to life or to health in climate change or environmental polluting cases.

Aside from the definitional hurdles that mark these concepts, and that can vary from jurisdiction to jurisdiction, based on the different legal traditions, it appears evident that they all share a common feature, which is key for framing the perimeter of this research: they are positions that do not “*belong*” to a single person.⁷⁶ They pertain to a larger, autonomous entity (e.g., an association, another organisation, or simply a group of people) or to the whole collectivity (e.g., the right to live in a healthy environment, not affected by climate change). In both cases, their protection is not, at least *prima facie*, up to single individuals⁷⁷ and – even if it is for their own, specific individual rights – it is not for *all* individual rights within the group.⁷⁸

⁷⁵ In relation to environmental mass harms, see, *infra*, Chapter VIII.

⁷⁶ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist’s Contribution*, in *Buffalo Law Review*, vol. 25, 643.

⁷⁷ CARAVITA B. (1982). *Interessi diffusi e collettivi*, in *Diritto e società*, 187.

⁷⁸ There are, indeed, circumstances where the subjective positions at stake concern undoubtedly specific persons. This occurs, for example, for consumer, social or labour rights. The members of a group or category of people, united by a certain quality or condition, share homogeneous, or common, positions. Each of them, in abstract, is still the individual holder of their own right, thus entitled to enforce it. They are not, however, the holder of every single individual “homogeneous” right composing the group.

The central issue concerning these “supra-individual rights” is, thus, emphasised: an overall struggle to tag (all of) them to a specific holder, entitled, encouraged and legally *enabled* to enforce them. They are, in short, in the words of Mauro Cappelletti, “*meta-individual*”: they do concern single individuals, but, at the same time, they also go beyond (“*meta*”, in ancient Greek), in the sense that they encompass a whole group or community, affected in a similar way.⁷⁹

Additionally, the power and economic dynamics of the current standardised and massified society, often place a series of practical and legal “barriers” which, in practice, hinder – sometimes even prevent – any attempt of enforcement.⁸⁰ In tandem, even if individually affected parties – against every rational incentive – decided and managed to successfully sue their large corporate or state opponent, their redress would be minimal, in relation to the harm concretely inflicted and to *all* the people concerned. This occurs because each specific person – *even when* they can be identified as specific holders of the right in question – only entails a mere, “insignificant fragment” of the whole group (“class”). The defendant wrongdoer, on the other hand, would not be discouraged at all from continuing to pursue its harmful activities (or omissions), whereas all the other hundreds and, potentially, tens of thousands of affected individuals would receive no utility from the decision. Hence, there would be no concrete (collective) redress.

This creates a clear adjudicatory, or enforcement, gap, which class actions – as above-defined – could, on paper, overcome. They allow, indeed, a representative person, or organisation, to sue *on behalf* of the whole concerned group.

Simultaneously, while considering class actions, it is imperative to ensure the upholding of *fair trial guarantees*, which serve as the cornerstone of a just and equitable, democratic, legal system. One of the main challenges in this regard involves ensuring that the (usually not chosen) representative possesses the

⁷⁹ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, in *Buffalo Law Review*, vol. 25, 643.

⁸⁰ The most common examples of these obstacles are information on the available protective mechanisms, knowledge or capability to untangle in the constitutive complexities of the judicial and legal system, the costs of litigation (attorney fees in particular, but also the financial capability to wait years for an enforceable decision) and the different parties' litigative experience. See, *infra*, Chapter V.

necessary competence, means and expertise to effectively advocate for the interests of the entire class. Any conflicts of interests must be spotted and avoided, in relation to the representative, but also to any – direct or indirect – funders of the suit, both for the protection of the class and of the respondent. Moreover, active involvement and understanding – that is, *participation* – of all class members, who are not formally recognised as parties in the class proceedings, is of paramount importance. This requires the establishment of mechanisms that encourage the active engagement of all affected individuals, allowing their voices to be heard and considered in the process: either directly or indirectly, through *adequate representation* structures. Special attention must be paid to ensuring that marginalised or disadvantaged members of the class are not (in)advertently excluded or silenced within the legal discourse.⁸¹

Furthermore, it is crucial to develop robust safeguards that protect the interests of the *defendants*, too, particularly in relation to the potential impact of class actions on their rights, businesses, public perceptions and resources. Balancing the delivery of concrete justice for the affected class members with the need to prevent undue harm or prejudice to the defendants is a delicate task that demands careful consideration and strategic legal implementation. The establishment of procedural practices and regulations that promote transparency, accountability, and the preservation of their due process rights is essential in maintaining the fairness of the legal proceedings.⁸²

In this sense, the judicial enforcement considered in the research transcends any binary, one-to-one, conception of litigation and can, thus, be defined as “collective”, “meta-” or “*supra-individual*”.

2. *Methodological approach.*

Once the perimeter of the study is established – that is the use of the new class action instruments in Europe (specifically Italy) for enforcing fundamental rights

⁸¹ See, e.g., BELL D.A. JR. 1976. *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in *Yale Law Journal*, 85, 470–516.

⁸² See, *infra*, Part III.

pertaining to large groups of people –, a focus on the methodology adopted is necessary. In particular, the following research features should be explained: *(i)* the European multi-level standpoint; *(ii)* the comparative method; *(iii)* the use of case studies as a research strategy. The choice of the English language and the constitutional approach have already been addressed.⁸³

2.1. The European multilevel standpoint.

The perspective herein adopted is the Italian one, conceived as a jurisdiction part of the larger European multi-level constitutional system of fundamental rights' protection. Especially in this age of globalisation, massification and inter-connection of human relationships, it is not possible to conceive issues only nationally, within the traditional state borders.

As it will be further argued, the classic concept of statehood has been radically revolutionised, if not disrupted. It is imperative to address legal problems also in light of supranational legislation, courts and institutions. The mechanisms, principles and criteria for coordination (and interpretation) among the different levels must be taken into account, too.

The focus of the research is still, undoubtedly, the Italian constitutional framework. This is due to the present researcher's academic background, which favours a comprehensive understanding of the jurisdiction, with all the legal formants and issues involved. The recent enactment of class action mechanism with a general scope of application, moreover, fosters such preference for the Italian jurisdiction. At the same time, nonetheless, Italy is to be considered as a Member State both of the European Union and of the Council of Europe.

The substantive and procedural tools available for Italian citizens (to be read extensively, hence residents, too) as a consequence of such membership will, therefore, need to be addressed, too. In particular, when looking at the adjudication gaps which the class action model could potentially fill, and when comparing (and framing) such procedural technique to (and within) the already-existing paths of

⁸³ See, *supra*, Chapter I.

enforcement, also the supranational alternative routes should be addressed. The mechanisms in front of the CJEU and the ECtHR, in particular, (especially the pilot-judgement procedure) must be taken into account, too.

Aside from the procedural paths, also the substantive remedies should be noted, with special regard to the legislation and interpretative standards set by the supranational apex courts. Additionally, also the horizontal dimension of “dialogue” and coordination between apex courts of different national European jurisdictions needs to be considered. Such dialogue is, after all, a tool for evolutive and statutory advancements, especially for new issues.

In short, no man is an island, in Europe at least. He (or she) is part of the “European society”,⁸⁴ a complex, inter-twined, system of fundamental rights’ protection.

2.2. *The comparative method.*

Moving from the proposition that the current multilevel European architecture of fundamental rights’ enforcement presents a series of significant gaps⁸⁵ – mostly caused by the developments of the globalised society and by its related deep constitutional transformations – this investigation seeks to verify how (if) the class action technique can fill, at least partially, some of them. The perspective assumed will be the Italian one, inevitably declined in the larger, constantly intertwined, supranational, transnational and international dimensions of justice, with special regard to the EU and CoE levels, and – for comparative design – to some of their other Member States that have successfully implemented class action procedures.

Preliminarily, it is worth underlining again – especially for the Italian academic scholars – that this is a *constitutional law* research. Comparison is not the goal of this study. Nonetheless, it is an essential *tool* that needs to accompany it. This methodological choice follows in the footsteps of prominent academics from civil law jurisdictions, according to whom comparison is not only advisable, but

⁸⁴ See VON BOGDANDY A. (2023). *Comparative Public Law for European Society*, in *MPIL Research Papers*, no. 2022-28.

⁸⁵ See, *infra*, Chapter V.

“necessary” in the fabric of “legal scholarship in European society”.⁸⁶ In a wholly interconnected society and economy, where most issues – even local ones – are shared on a macro-dimension, it is crucial to reason concurrently on a larger scale. As summarised by Cappelletti, “comparative analysis, in short, can and should provide one more measuring unit to probe the validity, utility, and ‘justice’ of legal developments in a given place or country. [...] If a legal trend is apparent in all, or most, of the countries which have reached a roughly similar state of cultural, economic, and social development, then there must be compelling reasons for such a common trend. If the need at the root of that trend, far from being the ephemeral expression of a passing situation, is a lasting and growing one, then even such value-laden concepts as ‘progressiveness’ or ‘backwardness’, ‘justice’ or ‘injustice’, can be objectively measured against the milestone of such a trend”. Coordination, thus, becomes key, both through dialogue – at statutory, institutional, judicial, policy-maker and academic level – and through the (careful) “legal transplant”⁸⁷ of successful solutions from other jurisdictions, even if very distant from our traditions.

The *comparative method*, in particular, will be key for this investigation, under two dimensions: the regional and the procedural one.

As to the *regional* one, as already anticipated, the introduction of the class action model in Europe stems from the common law tradition (primarily US, but also Canada and Australia). It is, thus, imperative to take into account such rich experience as a starting point of the research. These jurisdictions’ long record, since 1966, in successfully using the class action vehicle to enforce fundamental rights will prove extremely valuable. Relevant examples of “public interest litigation” through this device have regarded, as already mentioned, for instance, racial segregation, employment exploitation, education discrimination, housing and social welfare, foster care deficiencies, poor detention conditions, same sex couples, and

⁸⁶ See VON BOGDANDY A. (2023). *Comparative Public Law for European Society*, in *MPIL Research Papers*, no. 2022-28.

⁸⁷ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist’s Contribution*, in *Buffalo Law Review*, vol. 25, 643.

several more.⁸⁸ Such extensive case law – rich of cases of fundamental rights (as above-defined) enforcement – and relative academic literature cannot be ignored. This exercise could prove particularly useful since the European case law of class action litigation is still developing, in order to envisage possible future trends.

A distinct example is that of class actions for the protection of prisoners' rights, a long-standing and unresolved issue in several EU states (Italy, *in primis*). They have not been brought yet in Europe, despite representing a significative part of common law's success with class actions; hence, the importance of considering this possible development on European ground, too.

For matters of feasibility, nonetheless, it must be stressed that the specific focus of the present research is the European continent (and, in particular, the Italian jurisdiction). The common law's class action mechanisms, hence, will not be thoroughly examined; rather, certain trends already drawn by the common law scholarship in regard to such procedural mechanism will be highlighted, to better understand the negative and positive potential of its implementation in Europe, where both established case law and academic studies with a particular focus on the fundamental rights' enforcement are currently lacking.

Such exercise will prove particularly beneficial once intertwined with the second dimension of comparison, that is the *procedural* one. The preliminary assumption at the basis of this research is the (at least, partial) ineffectiveness of the current adjudicatory architecture for fundamental rights' protection. The present research aims to investigate whether, in which circumstances and to what extent, the class action model can overcome some of the obstacles therein erected. To adequately conduct this evaluation, the positive and negative features of the already-present routes of enforcement must be well-known, and taken into account. Only this way, by considering the overall multi-level organism and “nervous” system in which it is being “transplanted”, the class action tool can be properly studied, by looking at how it can substitute, but also cooperate with, the other already-present “immune-system” mechanisms.

⁸⁸ See, *infra*, Chapter VI.

The other procedural paths of enforcement considered for this comparative exercise will be those that can be activated by private individuals. By “private” it is meant *not* “public” – hence statual – entities or officials, whereas “individuals” encompasses both natural and legal persons. In this sense, the perimeter is limited to the above-mentioned “private enforcement” paradigm, typical of common law systems.

At supranational level, the direct application route to Strasbourg under Article 34 ECHR and the pilot-judgement procedure under Rule 61 of the Rules of the (ECHR) Court will be considered.⁸⁹ Remaining within the CoE system, the “collective complaints procedure” in front of the European Committee of Social Rights, set forth under Article 1 of the 1995 Additional Protocol to the European Social Charter, should be viewed, too, in relation to social rights. No specific emphasis will be dedicated to the EU judicial mechanisms of enforcement given their tendential closure to (direct) private complaints. This methodological choice is prompted also by the objective of keeping the research ground not too broad, for obvious feasibility reasons. At national level, instead, constitutional review, but also ordinary (principally, individual ones) and administrative complaints (mainly, for social rights’ implementation) will be regarded. Other, more sectorial procedures will be recalled when relevant, i.e., for anti-discriminatory or employment suits.

It must be stressed, finally, that this comparative analysis will not be in-depth, but rather widespread through the research, built on the evident characteristics of the procedural models considered, as underscored by the established scholarship and case law. This choice is due, once again, to the desire to keep the research’s scope narrow. While it is imperative to take into account the substantive and procedural framework in which it is placed, the focus is, once again on the *class action* model (and, more specifically, on the Italian one).

⁸⁹ See, *infra*, Chapter V and Part IV.

2.3. Case studies.

Inevitably, as explained in the next section, an important part of the research (Part III – *Judicial collective enforcement: route of change*) will be historical and descriptive, clarifying the exact social, constitutional and regulatory framework in which the new class action model is placed. However, as argued by Barney G. Glaser and Anselm L. Strauss in their seminal “The Discovery of Grounded Theory”, only a connection with empirical reality allows for the development of a testable, relevant and valid theory.⁹⁰ Hence, the dedication of the fourth Part of this work to case studies, in order to concretely evaluate the implementation,⁹¹ the potential and risks of the procedural device in question.

The case study is a research strategy which focuses on understanding the dynamics of specific settings or procedures and which can be used to provide description, test or generate theory.⁹² It is particularly helpful to answer research questions which cannot employ only, or mainly, quantitative analysis. For the purposes of this investigation, a *comparative multi-case study* approach has been selected.

A significant step in this process has been that of case selection: not only in the sense of selecting the right cases, but, rather, in the meaning of selecting cases in the right way. It was crucial not to be biased while data-collecting and choosing which cases to center the analysis on. This was a delicate exercise for the present study given the extensive latitude of “fundamental rights”. On the other hand, nonetheless, the still very limited European (and, specifically, Italian) case law on class actions has allowed for a comprehensive overview of the cases initiated under the new class action model. For this purpose, a part dedicated to *Charts* is offered at the end of this work. Out of the available jurisprudence, selection has moved under two directives: diversity and procedural comparativeness.

⁹⁰ GLASER B.G. and STRAUSS A.L. (1967). *The Discovery of Grounded Theory: Strategies for Qualitative Research*, Aldine Transactions, New Brunswick.

⁹¹ YIN R.K. (2017). *Case Study Research and Application*, 6th ed., 14.

⁹² EISENHARDT K.M. (1989). *Building Theories from Case Study Research*, in *The Academy of Management Review*, 14(4), 532.

Diversity has been a guideline for choosing case studies in the sense of providing a limited, but still varied array of enforced fundamental rights, to ensure external validity.⁹³ (i) environmental harm and mass personal injuries; (ii) unfair working conditions; (iii) prisoners' and migrants' rights. Different rights and interests require different ways of enforcement. They present distinct features, in relation to justiciability, redressability, dimensions and commonality within a class.⁹⁴ Different subjects – usually the public administration or private corporations – can infringe them, with active conducts or omissions. Different remedies – at times not even judicial – may be sought by the claimants: i.e., injunctions, monetary compensation, so-called *cy-près* or “fluid recovery” solutions, public and political attention. Evidently, these differences play a role when assessing the effectiveness of a procedural route in enforcing fundamental rights and moving social change. Hence, the necessity of taking into account different rights and circumstances for a more comprehensive assessment.

By *procedural comparativeness*, instead, a special attention to cases that have already been litigated through other procedural paths is meant, either in relation to the exact same case or through similar cases. A perfect example is the *ILVA* case study (*Chapter VIII*), concerning the steel plant in the province of Taranto (Italy) recently labelled as a “sacrifice zone” by the UN Special Rapporteur on Human Rights and the Environment, due to the high level of air pollution to which it exposes the local population. After being litigated at numerous stances in front of the Italian Constitutional Court, Court of Cassation, Council of State and even the European Court of Human Rights, in 2022 the case has been brought to the Court of Milan with the filing of an injunctive class action suit (and, subsequently, a compensatory one, too). Without anticipating the findings of the case study (see *infra*), this sets an ideal ground for comparative case study analysis. Furthermore, the much richer common-law experience with similar cases of local environmental

⁹³ MERRIAM S. (ed.) (2002). *Qualitative Research in Practice: Examples for Discussion and Analysis*, Jossey-Bass, 29.

⁹⁴ See LUCIANI M. (2018). *Convegno 'L'obbligo di vaccinazione nella legalitacostituzionale: principi e responsabilità.'* Roma, Camera dei deputati, 13 febbraio 2018, in *Diritto e salute. Rivista di responsabilità medica*.

pollution litigated via class actions will be taken into account (with the obvious institutional and regulatory differences with the Italian class action device, which will be adequately underscored), in order to consider possible trends and future developments.

Apart from (i) environmental mass harm (including climate change) and other standardised violations of the right to health, the other case studies will concern (ii) employment discrimination and (iii) unfair conditions within detention and migration centres. Given the still forming case law on the matter, some of these case studies may not only concern Italian class actions. They will, also, draw from concrete cases litigated through other procedural devices – constitutional review, ECtHR applications, CoE collective complaints for social rights, ordinary and administrative complaints – to evaluate the possible use of class actions in such context. This exercise will only be possible with the invaluable assistance of, once again, the decades-long common-law class action case law on the matter, as well as that of other EU Member States that have implemented class actions under the new 1828/2020 EU Directive (*in primis* the Netherlands, which has already developed a rather prolific jurisprudence and has a general scope of application, like Italy). Needless to state, the consideration of foreign cases will occur only by means of established local legal scholarship.

Sources will be secondary academic commentaries, especially for better understanding such foreign jurisdictions, legal databases (institutional and not), reports from governmental and non-governmental institutions and, most importantly, primary legal documents (such as judgements or decisions, but also parties' memoranda, settlement agreements and single orders or decrees). For the latter in particular, given the topicality of the matter and how most cases (at least in Italy) are still pending, the cooperation and assistance of the lawyers directly involved in the judicial proceedings has been invaluable. Notwithstanding the possibility, formal interviews with them or with judges have not been carried out, to avoid the risk of response bias, subjective inaccuracies or simply bias because of poorly articulated questions (due to the present researcher's limited direct experience with such methodological source).

Beyond the two guidelines of selection, it is worth anticipating the benchmarks chosen for construct validity, internal validity and reliability. As argued by Richard Yin,⁹⁵ it is imperative, while pursuing case study research, to have a solid explanation and evaluation strategy. Given the research question (“How can class actions enforce fundamental rights in Europe and, specifically, Italy?”), as well as the multiple-case approach, a mix of *pattern-matching* and a *cross-case synthesis* technique has appeared as the most suited.

Contaminating differences among individual cases have been considered to highlight *recurring patterns* or inevitably *unique findings* that separate the class action cases from those with other procedural devices. While still pursuing a “ground up” approach, a number of theoretical propositions – drawn from the study presented in *Part III* (concerned with the regulatory framework) – has been developed.⁹⁶ The case study analysis (*Part IV*) aims to test them on concrete applications, with findings further elaborated in the conclusive *Part V*.

These theoretical propositions concentrate both on the “effectiveness” and on the possible risks of the class action procedure.⁹⁷ A comparative consideration (both in a regional and procedural perspective, see *above*) of the relevant case law, reports and academic scholarship has been, once again, fundamental for adequately formulating them. Studies on Article 47 CFREU and Article 13 ECHR (and their jurisprudential application) have been of paramount importance for the former category of propositions (“effectiveness”).⁹⁸ At the same time, a thorough

⁹⁵ YIN R.K. (2017). *Case Study Research and Application*, 6th ed., 14.

⁹⁶ See, *infra*, *Part III*.

⁹⁷ See, *infra*, *Chapter V* and *Part IV*.

⁹⁸ In particular, Art 13 ECHR: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. Art. 47 CFREU: “1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”. “The principle of effective judicial protection”, as it is known, “is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union” [CJEU, T-49/07, *Sofiane Fahas v. Council of the European Union*, 7 December 2010]. As found by both the CJEU and the ECtHR in several instances, “it is for the domestic legal system of each Member State to designate [...] the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights” [CJEU, C-583/11 P, *Inuit Tapiriit Kanatami and Others v. European*

investigation of the class action jurisprudence has been crucial. The numbers and types of such cases within the Italian context are presented in the final part dedicated to *Charts*.

3. *Concluding remarks.*

With these premises, we can now embark on the (brief) analysis of the current social and constitutional context, which will prove instrumental for further understanding and investigating in a more nuanced perspective the class action model in the subsequent Parts.

As the reader might have already grasped from the Table of contents, the next *Part II* presents in its structural, but also logical thread, a veiled reference to John Milton and his poems, “*Paradise Lost*” and “*Paradise Regained*”.⁹⁹ Such literary and not purely legal references will be forgiven, one hopes, not only for the beauty of the words expressed therein, but also and above all for the indispensable lessons they have gifted us with, from a primarily cultural point of view. And since law is itself, among other things, first and foremost culture, in the sense of a complex of knowledges, skills, beliefs, institutions and political and social manifestations which characterise the life of a given society at a given historical moment and which serve – or at least should aim to serve – such society, it seems pertinent to refer to them.

Similar challenges, universal and structural, and similar solutions, collective and radical, from those of the abovementioned literary works can – indeed must – be identified under the compass of constitutional values. Of this, by reknitting the threads of references and the strictly legal, constitutional and comparative analysis

Parliament and Council of the European Union, 3 October 2013, para. 102]. The nature of the rights at stake, the facts of the specific case and the characteristics of each legal system may prompt different procedural remedies in order to grant effectiveness. The jurisprudential and doctrinal elaboration of both – CJEU and ECtHR – supranational courts offer, in any case, several insights for this purpose.

⁹⁹ MILTON J. (1667). *Paradise Lost*; MILTON J. (1671). *Paradise Regained*.

proposed in the earlier Parts, further clarification will be given in the conclusive paragraph of the next *Part II*, and, one hopes, in the final *Part V* of the research.

For now, concluding – or perhaps, more appropriately, starting – with another literary reference: “*and thence we came forth to see again the stars*”.¹⁰⁰

¹⁰⁰ DANTE (1304). *Inferno*, XXXIV.

PART II

CONTEXTUAL FOUNDATIONS:
WINDS OF CHANGE

CHAPTER III

A TRANSFORMING SOCIAL CONTEXT:
THE EFFECTS OF GLOBALISATION AND NEW
TECHNOLOGIES ON THE SOCIAL FABRIC

1. Premise. Whispers of a new order. – 2. A twofold methodological clarification. – 3. The multiple dimensions of globalisation. – 4. The overflowing effects of new technologies. – 5. Concluding remarks. The rise of new “global classes”.

1. Premise. Whispers of a new order.

In the words of Georg W.F. Hegel, to understand social phenomena, we must trace their development.¹ In the same way, to understand constitutional processes, we need to situate them in a precise historical and geographical context.

The social, cultural, scientific, economic and political framework provides fundamental elements for a better comprehension of juridical dynamics, elements and transformations. Very much alike the fact that no man is an island, no legal provision or institution is set in a vacuum. Rather, it takes from, gives back and adapts to the specific environment in which it is placed. Being the role of norms that of regulating human relationships, to properly analyse them we must preliminarily address the backdrop in which they are entangled.

Looking at the most pressing issues within our society from a merely (for now) sociological perspective, a series of underlying common trends and features can be uncovered. It is a general assumption of this work that they can all be traced back to two main phenomena, mutually dependent under a causal viewpoint: *globalisation*, on the one hand, and *technological innovation*, on the other hand.

¹ See von BOGDANDY A. (2022), *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft*, Suhrkamp Verlag, Berlin, 11.

Such phenomena are, undoubtedly, the common, pervasive and entrenched traits of the current age.²

As summarised by Paul Hopper, “globalization is a multidimensional reality”.³ Similarly to physics’ string theory⁴ – according to which there are more dimensions (ten, eleven, or even twenty-six) than those that meet the eye, and they all concurrently interact, mix and overlap with each other –, globalisation, together with technological advancement, brings a kaleidoscope of effects. They can be analysed from different perspectives and, in turn, be broken down in a taxonomy of even more sub-processes and sub-layers.

Those more relevant for the purposes – effective access to justice in a constitutional perspective – and in the inevitable constraints of this research, will be pointed out in this chapter. In particular, drawing from previous sociological scholarship, five emerging dimensions of globalisation will be considered: (i) *time*, (ii) *space*, (iii) *relationships*, (iv) *economy/finance* and (v) relevant *players*.⁵ They will be hereinafter presented to stress the main social dynamics crossing, and disrupting, the contemporary constitutional fabric.

Therewith, in close connection with globalisation, serving simultaneously as one of its effects and causal concurrents, technological development must be taken into account, too. As far-sightedly conveyed by Sherry Turkle, “we have reached a cultural watershed”,⁶ in which scientific advancement – *in primis*, in the computer sector (nowadays AI), internet, digital field and in bio-engineering – is “changing the way we think, [...] the forms of our communities, our very identities”.⁷ As further developed, such innovations pose fundamental questions on the way we create and experience life itself; on what is *human*, on what is *society*.⁸

² See CASSESE S. (2009). *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Einaudi, Turin.

³ HOPPER P. (2018). *Understanding Development*, 2nd ed., Polity.

⁴ ROVELLI C. (2014). *Sette breve lezioni di fisica*, Adelphi, Milan.

⁵ See HOPPER P. (2006). *Living with Globalization*, Berg, Oxford and New York.

⁶ TURKLE S. (1999). *Identity in the age of internet*, in MACKAY H. and O’SULLIVAN T. (eds.). *The Media Reader. Continuity and Transformation*, Sage Publications, New York, 302.

⁷ Id.

⁸ Id.

In this fluid, tottering and decentered, post-modernist age the form of *relationships* is adjusting, the ever-more convoluted and replicable on large, potentially non-finite, scale. Just like genetic reengineering studies which – for a purported higher goal (curing and preventing diseases) – promise to map and mutate DNA and, thereby, however, by shifting pieces of genetic code, potentially risk also a shift in the markers that determine one’s personality, preferences and most intimate way of being, the social tissue is changing so fast and so significantly to a point where it might become a completely different – virtual – fabric.

The subsequent chapter (*Chapter IV – A multilevel constitutional context: evolutions of power*) builds on these complex phenomena and processes to explain contemporary constitutional transformations, highlighting the core issues of *power* and *responsibility*, on the one hand, and of *rights* and *duties*, on the other hand, (in both cases as two sides of the same coin), which lay at the intersection between all the tangled socio-dimensions herein underscored.

A reflection on the contemporary constitutional transformations, and, in particular, the consequent shortcomings in the enforcement of fundamental rights (*Chapter V – Fundamental gaps in rights’ enforcement*), will then assist the analysis on the implementation of class actions in such intricate milieu (conveyed in the following *Parts III and IV – Judicial collective enforcement: route of change and Enforcing fundamental rights: exercises of change*).

2. A twofold methodological clarification.

Before advancing, two preliminary methodological clarifications seem appropriate.

Firstly, it must be stressed that the viewpoint herein adopted is the European one. As much as globalisation itself has disrupted state barriers and expanded the realms of casual interconnections, it is evident that “European society”⁹ presents different characteristics than that from other continents. Even when analysing global trends and notions, hence, the standpoint from which we operate will, inevitably and even

⁹ VON BOGDANDY A. (2023). *Comparative Public Law for European Society*, in *MPIL Research Papers*, no. 2022-28.

unconsciously, bias our perceptions, for instance by giving more attention to certain phenomena or expressions rather than others. As argued by Michael Ignatieff, the very concept of human rights – in theory universal and indivisible – is strictly related to the particularism of single geographical and cultural areas of the world (the Western ones, in this case). Other cultures, such as the Islamic, Hindu or Chinese one, consequently struggle with the epistemological framework based around this notion.¹⁰

Under a micro-comparison, substantial differences can be found, too. This occurs within a single continent – or supranational legal order, such as the EU. For instance, declining birth rates are nowadays a critical issue in Italy or Spain, whereas other Member States, such as France – still witnessing a downward, but less vertical, rate – may expose other trends as more urgent. This may be, for example, the case of pension systems. Due to the current reform, which aims to increase the standard minimum age for retirement in France, the topicality of the matter is highly felt within this country, probably much more than in other EU States, such as Sweden or Norway, where the minimum age is lower. Another example is that of populist, mostly right-wing, movements recently emerging in the political scene. This tendency largely tends to regard all Europe (also since it directly affects the European Union). Evidently, nonetheless, its implications differ from State to State, where the success obtained by these movements, or parties, varies even significantly and presents relevant exceptions.

Instead, from a strictly juridical point of view, these regional differences are exemplified by the doctrine of the “margin of appreciation”, granted by the ECtHR to Member States when fulfilling their Convention obligations. It is, as it is known, a space of flexibility, based on their cultural and legal traditions, in delicate cases when there is no “European consensus”, while still ensuring the respect of the minimum common standard of protection.¹¹ These intra-continental and intra-EU

¹⁰ IGNATIEFF M. (2001). *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton.

¹¹ See RANDAZZO B. (2023) *Access to Justice in a Multilevel Constitutional System, Protecting Human Rights*, Giappichelli, Turin.

differences are, in any case, less remarkable, at least for the purpose of this paragraph, which is to bring out *major global trends*.

Secondly, another important caveat is that sociological analysis is not the focus of the present research. Nor it aims to be the field of expertise of the present author. Various better-equipped scholars have offered, and continue to offer, precious output, from a more appropriate sociological, socio-legal and socio-political angle. Rather, this investigation draws from them, in order to put into the spotlight those “*environmental elements*” prodromal to the constitutional transformations we are currently witnessing. Without keeping them into account it would be impossible to adequately understand such constitutional changes, as well as, subsequently, even consider the possible solutions to the contemporary societal challenges. As it will be highlighted, the latter transformations bring significant consequences for the *enforcement of fundamental rights*, which is the central question of this work.

3. *The multiple dimensions of globalisation.*

With these premises, it seems appropriate to start by the definition of *globalisation*. According to Anthony Giddens, it can be accounted as “the intensification of world-wide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa”.¹² This illustration conveys both the element of interconnection and that of capacity to overcome time and space barriers with relative ease. They are the *time*, *space* and *relationships* dimensions.

It causes, as described by Robert Roberson, a “compression of the world and [...] concrete global interdependence”,¹³ achieved through technological and digital advancements. This is clearly visible in relation to the new means of communication and transportation. Diffusion does not limit itself to information, people and goods, but it also extends to ideas, news, capital, entertainment, art, culture, fashion trends, languages and – as recent experience teaches (i.e., the covid-

¹² GIDDENS A. (1991) *The Consequences of Modernity*, John Wiley and Sons Ltd, Hoboken.

¹³ ROBERTSON R. (1992). *Globalization: Social Theory and Global Culture*, Sage Publications, New York.

19 pandemic) – even diseases and, to a certain degree, wars. A tendency to *homologation* and *spreading* can thus be appreciated.

As a consequence, both social and economic relationships are radically altered. The change in the latter (*economic* dimension) is emphasised, in particular, in relation to the classic scheme of production, distribution and consumption. All these processes are exponentially sped up (*time* dimension) in an ever-connected net (*relational* dimension), where distances are annulled (*space* dimension). Global value chains are a valid example. A computer from a US brand, for instance, may be assembled in China, where labour wages are extremely lower, by using key metal pieces extracted in Africa and South America, which had been previously converted into a chip in India, on the basis of designs from Australia or Canada, and later on be sold in Europe.¹⁴

The effects on the economic and labour markets are substantial. Obvious advantages are a larger availability of resources and markets, as well as possible cooperation aimed at services' and goods' improvement. Nonetheless, this continuous expansion tends to push production and distribution processes to *standardisation* and, at times, even *exhaustion*. David Held and Anthony McGrew refer to this phenomenon as “intensification, or growing magnitude of interconnections, interactions and flows across society and states”.¹⁵ *Inequalities* between top and bottom of the chain are, thus, increasingly emphasised. This pushes towards a polarisation in the distribution of richness, both from an individual and market-oriented perspective, which can be encompassed under the *economic/financial* dimension, as well as the *relational* one. According to Neo-Marxists, this favours labour exploitation and reinforces inequalities also between countries.¹⁶ A general dissatisfaction with traditional political parties' ability (in Europe, at least) to tackle these growing cracks has given rise to populist political movements, which have, in turn, exacerbated the political context and brought (sometimes, back) anti-democratic or, in the best scenarios, nationalist stances.

¹⁴ See CASSESE S. (2009). *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Einaudi, Turin.

¹⁵ HELD D., MCGREW A. (2003). *Global Transformations Reader*, Polity, Cambridge.

¹⁶ See OHMAE K. (1995). *The End of the Nation State: The Rise of Regional Economies*, Free Press, New York.

This layer inevitably collides with the *players'* dimension. Large, often transnational, corporations have established themselves, at times with more say and capital than single states.¹⁷ Ever-growing gaps separate the elite of decision-makers and the vast majority of the population, which severely struggles in achieving social mobility (*relational* dimension, too). As summarised by Yuval Noah Harari, the main struggle of the 21st century may very well be that against *irrelevance*.¹⁸ This issue is only exacerbated by the 2007-2008 financial crisis and, now, the upcoming recession.¹⁹ New forms of richness and commerce have established themselves, too, often relying on immaterial assets, such as data, cryptocurrencies, NFTs or, ultimately, the metaverse (*economic/financial* dimension).²⁰ Concomitantly, the development of AI technologies threatens the replacement of countless categories of workers in different industries (*players'* dimension).²¹

To this regard, the advent of new technologies and digital transformation finds a propulsion force in in the complex processes of globalisation, which has fostered an environment conducive to the rapid advancement and dissemination of digital technologies. By forging intricate networks of international trade, communication, and interdependence, globalisation has not only accelerated the cross-border flow of information, but it has also triggered a heightened demand for new digital infrastructure and tools, essential for navigating the interconnected global

¹⁷ See, e.g., TULLY J. *et al* (2016). *Introducing Global Integral Constitutionalism*. *Global Constitutionalism*, 5 Cambridge University Press, Cambridge, 7; BARTLEY T. (2018). *Transnational Corporations and Global Governance*, in *44 Annual Review of Sociology*, 145.

¹⁸ HARARI Y.N., *How to Survive the 21st Century*, open transcript from the presentation at the World Economic Forum Annual Meeting 2020, Betazone from 23 January 2020, <<http://opentranscripts.org/transcript/survive-21st-century/#:~:text=These%20three%20existential%20challenges%20are,threat%20posed%20by%20technological%20disruption>>.

¹⁹ See OECD, *A Broken Social Elevator? How to Promote Social Mobility*, June 2018 <<https://doi.org/10.1787/9789264301085-en>>.

²⁰ DWIVEDI Y.K. *et al.* (2022). *Metaverse beyond the hype: Multidisciplinary perspectives on emerging challenges, opportunities, and agenda for research, practice and policy*, in *International Journal of Information Management*, 66, 102542.

²¹ Council of Europe Commissioner for Human Rights, *Human rights by design. Future-proofing human rights protection in the era of AI*, follow-up Recommendation to *Unboxing AI* (2019), May 2023 <<https://rm.coe.int/follow-up-recommendation-on-the-2019-report-human-rights-by-design-fut/1680ab2279>>.

landscape (*relational* and *space* dimensions). At the same time, the process moves in the opposite direction, too, as addressed in the following, with technological advancement being the motor and one of the driving factors behind globalisation itself. It is, after all, the structure on which globalisation bases its interchanges.

Consequently, the intricate interplay between these two phenomena has ushered in a paradigm shift, reshaping the contours of contemporary society and redefining the parameters of legal, economic, and socio-cultural discourse on a global scale. This has propelled technological research to until recently unimaginable heights and “made it possible to overcome the barriers of space and time to an unprecedented degree”.²²

Some authors, such as Alvin Toffler, have even described it as a “demise of geography”,²³ whereas others, like Saskia Sassen, have stressed the “privatisation” of regulatory practices beyond state borders in favour of large corporate interests (*economic/financial, players’*, *relational* and *space* dimensions). Luciano Gallino places emphasis on this *economic/financial* aspect, when defining globalisation as “a primarily economic phenomenon” and a “universalism of the market”.²⁴ What is worth stressing indeed is the traditionally “*private*” nature of the main actors (*players’* dimension) of these new markets, which evidently cannot be controlled (*relational* dimension) by states, since they go well beyond national borders (*space* dimension).

As it will be further addressed, this touches the critical issue of *power* and enhances the risks of critical gaps of control and responsibility.²⁵ Nation-states are no longer the exclusive focal points or primary structures of governance, as authority has become increasingly dispersed among public and private entities at various levels, from local to global (*relational* and *players’* dimensions). This shift of perspective is pointed out by transformationalist socio-political scholars, such as John Ruggie or Saskia Sassen, according to whom, respectively, we are witnessing

²² LÄPPLE D. (2001). *City and Region in an Age of Globalisation and Digitization*, in *German Journal of Urban Studies*, 40(2), 15.

²³ TOFFLER A. (1970). *Future Shock*, Random House, New York.

²⁴ GALLINO L. (2003). *Globalizzazione e diseguaglianze*, Laterza, Rome.

²⁵ See *infra*, Chapter IV.

an “*unbundling*” of the relationship between sovereignty, territoriality and state power, and “sovereignty [...] partially disassembled”, with an “increasing privatization” of the executive branch of the government (no longer part of the state in the Westphalian conception), whereas other “components of the state’s territorial authority, especially of the legislature, shift to other institutional homes, notably an emergent jurisdiction of global regulators”.²⁶

At the same time, David Held and Anthony McGrew highlight how even local actions can have global consequences (*relational dimension*).²⁷ They call this feature “impact”, and a *magnification* of the events. Combined with the ability of escaping responsibility for their actions, this phenomenon allows dominant economic actors to produce *planetary damage*. In particular, nowadays two waves of unprecedented dimensions promise to affect the whole globe concurrently. They are, on the one hand, *climate change*, with the inherent risk of ecological collapse, and, on the other hand, *AI and biotech innovations*, with the related peril of technological disruption.²⁸

The former, as it is well-known, increases the chances of extreme weather and climate disasters, such as floods, wildfires, hurricanes, high temperatures, droughts, decrease of biodiversity, higher sea levels or less availability of fresh water. All these phenomena inevitably carry social implications, too: for instance, they might cause climate migratory routes, if not wars permanent health issues in more vulnerable parts of the population or, in general, impairment in the full enjoyment of one’s rights in their everyday activities.²⁹ Migration, together with the reception and integration of immigrants, often mistreated and subjected to degrading living and working conditions, is a particularly relevant topic of the present age, exacerbated by recent wars.

²⁶ SASSEN S. (2013). *When Territory Deborders Territoriality*, in *Territory, Politics, Governance*, 1(1), 21.

²⁷ See *supra*.

²⁸ HARARI Y.N., *How to Survive the 21st Century*, open transcript from the presentation at the World Economic Forum Annual Meeting 2020, Betazone from 23 January 2020, <<http://opentranscripts.org/transcript/survive-21st-century/#:~:text=These%20three%20existential%20challenges%20are,threat%20posed%20by%20technological%20disruption>>.

²⁹ IPCC, *AR6 Synthesis Report Climate Change 2023*, 2023, <<https://www.ipcc.ch/report/ar6/syr>>.

The latter wave – AI and biotech innovations –, instead, promises to bring numerous advantages, by reaching new frontiers in healthcare and by spearheading new commodities and automation, both in the business and personal sphere. The risks connected to these scientific and technological advancements should not be overlooked, however: from data breaches and their misuse, through influence on one's self-determination abilities, algorithmic discrimination or the spreading of misinformation, to replacement of countless categories of workers in different industries.³⁰

On these shaky grounds stands the frail architecture of political governance (*players'* dimension), both at international and national level (*space* dimension). The lack of efficient cooperation (*relational* dimension) in recent global crisis, such as the covid-19 pandemic, the Ukrainian and Israeli-Palestinian conflicts or climate change, are vivid examples. Within national borders, instead, the rise of populist parties (*players'* dimension), the struggle of democratic representation and the threats to the rule of law³¹ and to judicial independence, must be accounted. Wars, religious divisions, racial hate, rises in terrorist attacks and threats contribute to this complex patchwork.

The far-reaching implications are evident, once again, across the *players'*, *economic/financial* and *relational* spheres, marked notably by the widening chasm between the leading elite and the general collectivity. Consequently, this fissure amplifies discontentment with democratic representation mechanisms, as further addressed.

4. *The overflowing effects of new technologies.*

As anticipated, technological innovation stands as the driving force behind globalisation. Without it, “the intensification of world-wide social relations which

³⁰ Council of Europe Commissioner for Human Rights, *Human rights by design. Future-proofing human rights protection in the era of AI*, follow-up Recommendation to *Unboxing AI* (2019), May 2023 <<https://rm.coe.int/follow-up-recommendation-on-the-2019-report-human-rights-by-design-fut/1680ab2279>>.

³¹ See European Commission, 2022 Rule of Law Report, July 2022, <https://commission.europa.eu/publications/2022-rule-law-report-targeted-stakeholder-consultation_en#files>.

link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa”³² would simply not be possible. Transportation, exchanges and communication through innovative technological means have contributed and keep contributing to the development of the global, interconnected market. They constitute the network on which globalisation occurs.

Concurrently, scientific progress is increasingly shaped by globalisation itself, in a cyclic casual dynamic. The exchange of ideas, knowledge, experiences, the ease in communicating and travelling has favoured and favours exponential advancements in all fields of research. In particular, as already mentioned, the sectors which are pushing to the extremes the forces behind globalisation, significantly altering the reality in which we live and its core identities, herein included the human one, are those related to the internet and computers, to artificial intelligence and to bio-technologies. It is not the goal, nor the scope, of the present research that to examine the nuances of each of these fast-evolving fields. Rather, from a constitutional perspective, two grounds of concern, further elaborated in subsequent Chapter (Chapter IV - *A multilevel constitutional context: evolutions of power*), emerge as specifically notable.

On the one side, the ramifications of new technologies on the *democratic process* and structures need to be underscored.³³ As the means of communication and acquisition of knowledge evolve, the mechanisms through which auto-determination and propaganda occur change. The difference between truth and fake news becomes a thin line. The actors driving information and the public debate are no longer physical Parliaments or (to some degree) in-person manifestations, but mainly virtual fora and personae, like social networks or influencers, and related hashtags. In this ever-connected web, every detail (“data”) about one’s preferences, movements, actions and even body is collectable and collected, both by private and public entities, often invisible to the human eye. Against this backdrop, the balancing between the “personal sphere” and the collective interaction, in Orwellian fashion, is the evermore blurred.

³² STEGER M. (2013). *Globalization: A Very Short Introduction*, Oxford University Press, Oxford.

³³ WINNER L. (1992) *Democracy in a Technological Society*, Springer Link, Cham.

On the other side, *inequalities* are vastly enhanced. As science progresses, most of the new advancements are not immediately available to the general public. Furthermore, as the global market enhances investment opportunities and gains, the differential margin widens dramatically between all corners of the globe and societal groups. Those that can afford to play with the new tools exponentially bolster their economic and personal, now even physical and mental,³⁴ abilities; whilst, for the others, trailing behind, social elevation becomes utopia rather than a concrete possibility. Such reasoning is valid both at state-level and from an individual viewpoint.

In sum, the “cultural watershed” portrayed by Shelly Turkle in 1999 appears nowadays overcome by the incessant and overwhelming flow of unregulated and, to various degrees, unregulatable flow of technological innovation.

5. Concluding remarks. The rise of new “global classes”.

Numerous discussion points emerge from the picture just painted, which could be further in depth explored. The goal of this Chapter, however, is not that of portraying a thorough socio-logical analysis of the current age. Rather, it is that of highlighting the multi-faceted, convoluted and multi-dimensional – globalised and highly technological – reality in which we live.

Time and *space* are contemporarily shrunk and exploded³⁵ in a tangled multi-directional *relational* network primarily guided by *economic and financial* interests, in which new *players* arise and distances between all players, under *new power-balances*, accumulate. The repercussions on the enforcement of fundamental rights are both substantial and pressing, under the constitutional perspective herein of interest, as addressed in the next Chapter.

The main lesson to be taken here, against this backdrop, draws from the considerations advanced by Saskia Sassen in her ground-breaking work “A

³⁴ See e.g. Neuralink’s implant: “Our brain-computer interface is fully implantable, cosmetically invisible, and designed to let you control a computer or mobile device anywhere you go”, at: <<https://neuralink.com>>.

³⁵ See HARVEY D. (1989). *The Condition of Postmodernity*, Blackwell, Oxford, and his well-known elaboration of the “time-compression” concept.

Sociology of Globalization”.³⁶ Given how the current globalised dynamics “partially disaggregate the national from within” and the previously-established social groups – that is the “intermediate bodies” or “social formations” further developed *infra*, in *Chapter VII*), namely political parties or workers’ unions – new “*global classes*” emerge.³⁷

As Manuel Castells further elaborates, in the rise of the “network society”, as traditional structures change, also social groups – *classes* – change, transcending state boundaries. Yet, they remain “partially denationalized classes” (rather than fully “global”), as their “particular features [...], especially their ambiguous position between the global and the national, point to the ongoing, even if partial, embeddedness in the national domains,” too.³⁸

While Sassen thoroughly addresses the subjective and objective features³⁹ of these new global, or partially denationalised, classes, their significance for the present analysis resides on at least *three axes*.

First, the emerging classes in the globalised and highly-technological context are not necessarily *new* social forms as such. To this regard, Sassen offers the examples of “transnational immigrant households” or “international class of powerful elites”. Another valid illustration can be that of workers in the various industry sectors. All these social groups are *not per se new*. Still, due to the multi-dimensional dynamics of globalisation described earlier, they assume new *meaning* and carry novel *implications*. New classes “arise from a subjective, self-reflexive repositioning of an old social practice or condition in a transnational framing”. It is, in particular, the process of “*incipient denationalization*” – “a changed attachment

³⁶ SASSEN S. (2007). *A Sociology of Globalization*, W.W. Norton, New York.

³⁷ In relation to political parties, see CIANCIO A. (2016). *European parties and the process of political integration in Europe*, in *Dirittifondamentali.it*, n. 2, on their features, role and challenges in the process of European integration, and their problematic dependence from national parties.

³⁸ CASTELLS M. (1999). *The Information Age: Economy, Society and Culture, Vol. I – The Rise of the Network Society*, Blackwell, Oxford.

³⁹ SASSEN S. (2007). *A Sociology of Globalization*, W.W. Norton, New York, 166-168.

to the national as historically constructed”⁴⁰ – to give propulsion to such transformations.⁴¹

Second, the issue of power is central to the development of, and any reflection on, these new “*global classes*”. Such denationalising dynamics of globalisation engender *radical power shifts*: from national states to supranational public and transnational private entities, eluding traditional categories, representation processes and oversight mechanisms; from Enlightenment-derived one-on-one perspectives to collective and diffuse, supra-individual, dimensions; from being (tendentially) regulated to chasing innovations and the risks associated with them, as well as the irresponsibility of increasingly multi-layered and elusive actors.

The outcome manifests itself as a progressively deepening schism and disparity among different social cohorts. Accordingly, the global classes at the bottom of the societal hierarchy (which Sassen, again, refers to as “the new global classes of the disadvantages”, but which, in essence, echo significant similarities with their pre-globalisation counterparts, as outlined earlier)⁴² face increasing marginalisation, compounded by the deficiencies and inadequacies of *non-global(ised) representation* mechanisms (see *infra*, next Chapter).

Third, following Pierre Bourdieu’s extensive reflections on the concepts of “*habitus*”, of classes and of social fields as spaces of potential agency and struggle,⁴³ it is possible to conceive these new “global classes” as the “strategic context for *collective action*”.⁴⁴ As subsequently addressed, this strategic context can become the fertile ground for *class actions* which, through their collective nature, serve as instruments for these groups to assert their rights and influence *social change*.

⁴⁰ Id., 173.

⁴¹ Here, Pierre Bourdieu’s notion of *habitus* can be insightful in understanding how these global classes develop new practices and structures of understanding that navigate both the global and the national spheres. See BORDIEU P. (1977). *Outline of a Theory of Practice*, Cambridge University Press, Cambridge (first published in French in 1972 by Librairie Droz).

⁴² SASSEN S. (2007). *A Sociology of Globalization*, W.W. Norton, New York.

⁴³ BORDIEU P. (1977). *Outline of a Theory of Practice*, Cambridge University Press, Cambridge, specifically at 82.

⁴⁴ SASSEN S. (2007). *A Sociology of Globalization*, W.W. Norton, New York.

Class actions become a mechanism to advance social change by *addressing the imbalances* created by the global dynamics that the traditional forms of representation and state-based governance may struggle to contend with. Against this backdrop, in its virtuous use, collective action is not a mere tactical maneuver, but becomes a form of what Anthony Giddens refers to as “structuration”, where agents and structures are mutually constitutive.⁴⁵ These classes, operating within the globally influenced but nationally embedded spaces, use their collective capacity to redefine the parameters of their agency, negotiating new forms of “social contracts” that transcend traditional state and enforcement borders. This way, as argued below, individuals find a path, however circumstantial, to regain possession of their relinquished and “*sconfinata*” (i.e., borderless) sovereignty.⁴⁶

Additionally, this potential for collective action reflects the lessons that David Harvey’s analysis of the condition of postmodernity suggests about the space for counter-movements within the dynamics of capital flow and the reconfiguration of spatial dimensions.⁴⁷ As classes mobilise, they also re-territorialise the global space, asserting place-based claims that are simultaneously global in scope. Illustrative examples are those of climate change, global value chains or immigrant suits. By doing so, they challenge the fluidity and seeming omnipotence of global capital with a grounded, often resistant, power of collective human action. This dialectical process echoes Bauman’s view of globalisation as a “state of interregnum” – a gap between an old order dying and a new one yet to be born,⁴⁸ where these new “global classes” both respond to and shape the emerging contours of global society.

In essence, strategic⁴⁹ collective, namely *representative*, lawsuits can redefine the nature of *agency* within a global context, presenting both a challenge and an opportunity for the enforcement of fundamental rights. The transformations are not just economic or political, but carry also deep legal and constitutional implications, demanding attention in the next Chapter where the implications for

⁴⁵ GIDDENS A. (1991) *The Consequences of Modernity*, John Wiley and Sons Ltd, Hoboken.

⁴⁶ FERRARESE M.R. (2006). *Il diritto sconfinato*, Laterza, Rome.

⁴⁷ HARVEY D. (1989). *The Condition of Postmodernity*, Blackwell, Oxford.

⁴⁸ BAUMAN Z. (2012). *Times of Interregnum, Ethics & Global Politics*, 5(1), 49.

⁴⁹ SASSEN S. (2007). *A Sociology of Globalization*, W.W. Norton, New York, 167: “they define a strategic context for collective action”.

constitutionalism and fundamental rights, within this globalised reconfiguration, will be critically examined.

The new global classes, therefore, become critical actors in the reconfiguration of new governance structures and the recalibration of justice systems in light of societal and technological most profound developments. As depicted by both Saskien and Bourdieu, *collective suits* can become the means through which groups or individuals enforce their positions against the new higher, otherwise unsurmountable, powers, as well as a means for marginalised groups to redefine the new, otherwise too unbalanced, rules of the field.

CHAPTER IV

A MULTILEVEL CONSTITUTIONAL CONTEXT:
EVOLUTIONS OF POWER

1. Premise. A shifting landscape. – 2. Constitutionalism's role in the transforming context. – 2.1. From traditional conceptions... 2.2. ... to new challenges. – 2.3. Adopting a constitutional perspective. – 3. A multidimensional, multifaceted and multilevel constitutional framework. – 4. Sovereignty and its discontents. – 5. Concluding remarks. The fall of “intermediate bodies”.

1. Premise. A shifting landscape.

The constitutional landscape provides the bedrock upon which the edifice of fundamental rights enforcement is built. In the same way, the social, cultural and historical context provides a pivotal element of constitutional change. Moving in Aristotelic fashion, syllogistically, the social cultural and historical context intrinsically touches the issue of fundamental rights enforcement, too.

Bruce Ackerman, in his ponderous “We the People. Volume 2: Transformations” outlines the crucial role played in American constitutional history by social and political upheaval, especially (but not only) in times of great crisis.⁵⁰ Similar reflections can be applied to the current Italian, European and global dynamics, as highlighted in the previous Chapter (*Chapter III – A transforming social context: the effects of globalisation and new technologies on the social fabric*). As described therein, globalisation, together with technological revolution, is a complex process which continuously affects societal and individual life in very different ways. Time, space, relationships, economy and relevant players are only some of the dimensions

⁵⁰ ACKERMAN B. (2000). *We the People. Volume 2: Transformations*, Harvard University Press, Cambridge, Massachusetts.

through which society and, consequently, constitutional equilibria are touched by this phenomenon.⁵¹

The present Chapter, building on established legal scholarship and case law, aims to underscore the main constitutional transformations characterising our time. Such dissection will pinpoint a series of *systemic* dysfunctions,⁵² or *adjudicatory gaps*, burrowed by the contemporary unrelenting forces that severely change the social and constitutional landscape, thus hampering the enforcement of fundamental rights in given, and increasing, sets of circumstances. This latter question – that of crucial gaps in the enforcement of rights – shall be examined in the subsequent *Chapter V*. Against such backdrop, the class action device will be assessed in the next Parts (Part III – *Judicial collective enforcement: route of change* and Part IV – *Enforcing fundamental rights: exercises of change*).

As it will be herein argued, a point of convergence between all the layers of constitutional consideration is the issue of *power*. On the one hand, *new gravitational centres* of power have emerged. The discontent of old actors counter-surfaces, as conflictual tensions play out in the tangled-up multilevel and multidimensional global structure, simultaneously propelled by both centrifugal and centripetal forces. In the middle, powerless, stands an overwhelmed *citoyen*.⁵³ On the other hand, it is becoming alarmingly difficult to keep these new transnational, borderless and a-institutional entities *accountable* for the exercise of such power. A lack of effective control and an increasing, general irresponsibility of those *in concreto* holding power favours substantial *serial* and *structural* violations to both individual and collective spheres.

To present these arguments, the chapter will start from the *role of constitutionalism*, since the two pillars of constitutionalism are precisely the

⁵¹ See *supra*, Chapter II.

⁵² The word *systemic* is borrowed by the ECtHR case law with specific regard to its pilot-judgement procedure. On the lack of a clear definition given by the Strasbourg Court, as well as on critical view on such procedure, see LEMMENS K. and VAN DROOGHENBROECK S. (2019). *How “Systematic” is the European Court of Human Rights’ Approach to “Systemic” Violations of the Convention?*, in *German Law Journal*, 24(6).

⁵³ See *Déclaration des droits de l’Homme et du citoyen de 1789*.

legitimacy (and limitation) of power and the respect of rights.⁵⁴ In particular, it shall be addressed how the social changes of the current globalised age are questioning the notion itself of *constitutionalism*, as well as the special lens that adopting such perspective entails (*para. 2*). Furthermore, the puzzled and blurred *multilayered nature* of the current *constitutional system* shall be briefly recalled, to explain the peculiar stage on which new and old actors are called to perform (*para. 3*). Last, the mutations of the traditional concept of *sovereignty* will be accounted, with their favouring the emergence of new gravitational centres of power, beyond the national Westphalian conception, with their questioning the traditional public v. private paradigm, as well as the very concept of statehood, and with their deep capsizing of legislative, executive and judicial functions (*para. 4*).

As anticipated, such brief and instrumental – thus without any claim to exhaustiveness – analysis will help situate the present research and justify the choice of focusing on the class action procedural device in the European context, as a possible, partial, solution; but, also, as a potential element of further turmoil.

2. *Constitutionalism's role in the transforming context.*

It has been stated that “what ‘human justice’ can do is solve, or attempt to solve, concrete problems of individual and societal life: to enact and enforce norms, to create institutions, to design processes, all with that one goal in mind – to solve actual problems”.⁵⁵

If justice is to be conceived – following the thought, *inter alia*, of Henri Bergson⁵⁶ or Noam Chomsky⁵⁷ – as the most (possible) complete realisation of the

⁵⁴ Id., Article 16.

⁵⁵ CAPPELLETTI M. (1986). *Repudiating Montesquieu? The Expansion and Legitimacy of ‘Constitutional Justice’*, in *Catholic University Law Review*, 35(1), 1.

⁵⁶ BERGSON H. (1937). *Les deux sources de la morale et de la religion*, Paris Libraire Felix Alcan. Bergson’s philosophical work, as it is known, was a large influence in the drafting of the UN Declaration of Human Rights (Curle C. (2010). *International Human Rights and the Intuition of Justice: Bergson v. Kant*, SSRN, 2: <<https://ssrn.com/abstract=1642319>>).

⁵⁷ CHOMSKY N., FOUCAULT M. (2011). *Human Nature: Justice Versus Power: The Chomsky-Foucault Debate*, Souvenir Press Limited, reporting in writing the debate between the two philosophers from 1971, fully available online at: <http://www.filosofia.it/archivio/index.php?option=com_content&view=article&id=295&Itemid=55>.

personality, and, consequently, of the “humanity”, of each person, the respect of human – or fundamental⁵⁸ – rights is its benchmark.

In a postmodern society shaped by severe inequalities, tensions, depletions of traditional centres of gravity and an overall, pervading, feeling of discontent and insecurity,⁵⁹ the effective enforcement of fundamental rights is becoming increasingly daunting.⁶⁰ Obstacles appear both under the procedural perspective of the guarantees and remedies available and under the more substantive standpoint of rights’ concrete enjoyment.⁶¹ Ironically, this occurs in an historical period characterised by the vastest, ever, array of written *substantive* guarantees, both at national and supranational level.⁶²

Several issues concerning rights’ enforcement and implementation, power structures and strands, procedural and institutional (in)efficacy stand out on the horizon. Wars, environmental damage, pandemics, new risks posed by technological and AI developments, fake news, growing inequalities, discriminatory and exploitation practices, populism and anti-democratic backsliding are only some of the most evident challenges, already cited *above*. Other more subtle issues affect people’s everyday lives: inflation and the rising price of basic needs, poor working conditions, difficulties in buying or renting

⁵⁸ Under a substantive conception, a close connection between the similar notions of human and fundamental rights emerges. To this regard, it should be noted that the former concept is more employed in international law and “aspire[s] to universal validity”. They are a moral theory of what is owed to every human (PALOMBELLA G. (2006). *From Human Rights to Fundamental Rights: Consequences of a conceptual distinction*, in *European University Institute LAW Working Papers*, no. 2006/34, available at: <<https://ssrn.com/abstract=963754>>, also cited in WOUTERS J., OVÁDEK M. (eds.) (2020). *The European Union and Human Rights. Analysis, Cases and Materials*, Oxford University Press, Oxford). Fundamental rights, on the other hand, constitute a transposition of human rights into the positive law of a specific legal order, to which they are strictly connected. Through their recognition and guarantee into the constitution, a specific democratic State sets them as one of its building blocks (OLIVETTI M. (2020). *Diritti fondamentali*, 2nd ed., Giappichelli, Turin). See also ALEXY R. (2006). *Discourse Theory and Fundamental Rights*, in MENÉNDEZ AJ., ERIKSEN E.O. (eds.), *Arguing Fundamental Rights*, Springer, Cham.

⁵⁹ ZOLO D. (2010). *Il tramonto della democrazia nell’era della globalizzazione*, in *Jura Gentium*, 28 December 2010.

⁶⁰ See EU-FRA, Fundamental Rights Report 2023, accessible at: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2023-fundamental-rights-report-2023_en_1.pdf>.

⁶¹ GENTILE G. (2023). *Effective judicial protection: Enforcement, judicial federalism and the politics of EU law*, *European Law Open*, 2(1), 128.

⁶² Aside from national constitutions, at supranational level the CFREU, binding since 2009, the ECHR and the ESC can be accounted, for example.

houses, waiting lines for public medical assistance, struggles in achieving social mobility, inadequate public education, lower and deferred pension systems. Clearly, deeper *systemic* wounds run through the social tissue. They mostly concern an *insufficient* implementation of social rights (but not only), depicting, in Cannettian jargon, the contemporary power-less nature of crowds, in an intricate, multi-dimensional, grid where traditional democratic wires appear exposed and worn out.

Concurrently, also the issue of the *cost* of rights is raised, in general (even traditional liberties), and of social rights, in particular. Faced with limited financial resources, as well as with national (the so-called “*equilibrio di bilancio*”, or balanced-budget rule, under Article 81, Italian Constitution) and supranational (mainly EU) constraints, states inevitably cannot accommodate all rights.⁶³ At the same time, financial resources have become a key piece of governance within the multilevel constitutional system, even in defence of the rule of law, through the development of new instruments such as *conditionality*, based on the so-called “power of the pursue”, capable of exercising public authority without normative regulation or pure coercion.⁶⁴

Even when costs are not the major obstacle, States may *deliberately* choose not to. As accounted in the last Council of Europe’s report on the *Supervision of the execution of judgments and decisions of the European Court of Human Rights*,

⁶³ See, e.g., HOLMES S. and SUNSTEIN C.R. (1999). *The Cost of Rights. Why Liberty Depends on Taxes*, W.W. Norton, New York; WOUTERS J., LEMMENS K., VAN POECKE T. and BOURGUIGNON M. (2020). *Can We Still Afford Human Rights? Critical Reflections on Universality, Proliferation and Costs*, Edward Elgar Publishing, Cheltenham; BIN R. (2018). *Critica della teoria dei diritti*, FrancoAngeli, Milan; LUCIANI M. (2016). *Diritti sociali e livelli essenziali delle prestazioni pubbliche nei sessant’anni della corte costituzionale*, in *Rivista AIC*, 3; MORRONE A. (2013) *Pareggio di bilancio e Stato costituzionale*, in *Lavoro e diritto*, 3, 357. This has a direct impact also on judges: “fundamental rights cannot be protected without considering the politico-financial objectives of the State. The balanced budget is not indeed only an economic- accounting rule: it relates to values and rights that can enter the balancing process and thus limit the subjective claims brought before the Constitutional Court”, MORRONE A. (2015). *Le conseguenze finanziarie della giustizia costituzionale*, in *Quaderni costituzionali*, 3, 575.

⁶⁴ BARAGGIA A. (2023). *La condizionalità come strumento di governo negli Stati compositi. Una comparazione tra Stati Uniti, Canada e Unione Europea*, Giappichelli, Turin; BARAGGIA A. and BONELLI M. (2022). *Linking Money to Values: the new Rule of Law Conditionality Regulation and its constitutional challenges*, in *German Law Journal*, 23(2); PINELLI C. (2019). *Conditionality and Economic Constitutionalism in the Eurozone*, in *Italian Journal of Public Law*, 1, 22.

“there has been an increase in the total number of judgments currently pending full execution (6,081 compared to 5,533 in December 2021)”.⁶⁵ The 2022 findings of the European Committee of Social Rights on the *Follow-up to decisions on the merits of collective complaints*, paint an even bleaker picture, with the Committee almost in every case considering that “the situation has not yet been brought into conformity with the 1961 Charter at this point”.⁶⁶ As stated by the Steering Committee for Human Rights in its *Report on the longer-term future of the European Convention on Human Rights* from 2016, the functioning of the ECHR system is contingent on “the quality, cogency and coherence of the Court’s judgments and the ensuing acceptance thereof of all actors of the system, including governments, parliaments, national courts, applicants and the public at large”.⁶⁷ Also the role of the *courts*, as a subsidiary power, hence, is put into question. On this crucial point which we shall return.⁶⁸

Intimately connected to such matter, is the question of *who* (and *how*) should be tasked with determining which rights should be satisfied over others: which values should prevail over others in case of *balancing* or whether some should always prevail, and, if so, to which degree. The underlying question of *democratic legitimacy* – and how to safeguard it – is closely linked, both at political and judicial level. As further addressed, it is also intimately connected to that of *authority*.⁶⁹

Such developments concern the European context, in which this research is framed, but also – with different intensity – the whole globe, gradually shattered by the new challenges. In the words of Antonio Guterres, Secretary-General of the United Nations, in the recent *Sustainable Development Goals Report 2023: Special Edition*, “we are leaving more than half the world behind. Progress on more than 50 per cent of targets of the SDGs is weak and insufficient; on 30 per cent, it has

⁶⁵ See, e.g., *Supervision of the execution of judgments and decisions of the European Court of Human Rights*, 16th Annual Report of the Committee of Ministers 2022, March 2023, Council of Europe, 12.

⁶⁶ *Id.*

⁶⁷ *Id.*, Overview of major developments by the Director General, 43, recalling 13. *CDDH, Report on the longer-term future of the European Convention on Human Rights* (2016). 96.

⁶⁸ See, *infra*, Chapter V.

⁶⁹ See VON BOGDANDY A. (2023). *Comparative Public Law for European Society*, in *MPIL Research Papers*, no. 2022-28.

stalled or gone into reverse. These include key targets on poverty, hunger and climate”.⁷⁰ According to the report, “structural injustices, inequalities and emerging human rights challenges are putting peaceful and inclusive societies further out of reach”.⁷¹

Again, following Guterres, “inequalities will continue to deepen, increasing the risk of a fragmented, two-speed world. [...] Unless we act now, the 2030 Agenda could become an epitaph for a world that might have been”.⁷²

2.1. From traditional conceptions...

Under a legal perspective, in such challenging scenario it can be argued that it is the role – or, at least, the objective – of constitutionalism to search for answers.⁷³ After all, the protection of fundamental rights against the arbitrary exercise of power falls within its realm of consideration.⁷⁴

Aimed at ensuring the best political order, constitutionalism has, indeed, been defined as “the juridical technique of freedoms”. It is, historically, the legal

⁷⁰ See United Nations’ Sustainable Development Goals Report 2023: Special Edition, Foreword, p. 5, accessible at: <<https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf>>. As it is known, “the SDGs are the universally-agreed road map to bridge economic and geopolitical divides, restore trust and rebuild solidarity” (Foreword, 5). The 17 Goals, adopted in 2015 and to be reached by 2030, are available at: <<https://sdgs.un.org/goals>>.

⁷¹ Id., Goal 16 “Peace, justice and strong institutions”, 44, which reports: “(i) Ongoing and new violent conflicts around the world are derailing the global path to peace and achievement of Goal 16. Alarming, the year 2022 witnessed a more than 50 per cent increase in conflict-related civilian deaths, largely due to the war in Ukraine; (ii) As of the end of 2022, 108.4 million people were forcibly displaced worldwide – an increase of 19 million compared with the end of 2021 and two and a half times the number of a decade ago; (iii) In 2021, the world experienced the highest number of intentional homicides in the past two decades; (iv) Structural injustices, inequalities and emerging human rights challenges are putting peaceful and inclusive societies further out of reach. To meet Goal 16 by 2030, action is needed to restore trust and to strengthen the capacity of institutions to secure justice for all and facilitate peaceful transitions to sustainable development”.

⁷² See *supra*, fn. 9.

⁷³ ZAGREBELSKY G., MARCENÒ V. and PALLANTE F. (2023). *Lineamenti di diritto costituzionale*, Mondadori, 4th ed., 193.

⁷⁴ ROSENFELD M. (1992). *Modern constitutionalism as interplay between identity and diversity: an introduction*, in *Cardozo Law Review*, 14(3-4), 497: “There appears to be no accepted definition of constitutionalism but, in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights. Moreover, although not all constitutions conform to the demands of constitutionalism, and although constitutionalism is not dependent on the existence of a written constitution, the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution”.

technique through which *citizens* are ensured the enjoyment of their rights (and interests) and, at the same time, the state is placed in a position where it cannot violate them.⁷⁵ From a definitional standpoint, as further addressed, modern transformations bring terminological adjustments: in an extensive view, ‘citizens’ should now be substituted by ‘individuals’ (in the sense of all human beings) and, more controversially, ‘state’ by ‘power’. The emergence of supranational, inter-state organisations, on the one hand, and the establishment of private hyper-centres of power, on the other hand, calls for the latter amendment.⁷⁶ As further addressed, the disruption of traditional statehood is an essential feature of the current constitutional landscape, with pervasive and, at times, perturbing consequences on fundamental rights’ enforcement.

Whilst the global chart of power-balances is changing – not just from a geopolitical standpoint, but also from that of its protagonists –,⁷⁷ the concept itself of constitutionalism has indeed evolved, and must evolve, too.⁷⁸ From Thomas Hobbes’, John Locke’s and Benjamin’s Constant’s classic foundational theories on constitutionalism as a means of limitation of political power (and, consequently, of ensuring respect of fundamental rights), the notion has now developed into different directions. *Inter alia*, neo or transformative constitutionalism, multilevel, global, European, liberal or illiberal, cosmopolitan, pluralist, punctiform, popular, democratic, political, financial, future, societal and, even, irenic v. polemic constitutionalism can be accounted. They all depict societal and doctrinal evolutions, as well as a general confusion and an overall lack of clear direction within the ranks of academic scholarship. Some authors have even gone as far as arguing the “decline of constitutionalism”,⁷⁹ insisting on its distortion and

⁷⁵ Ibidem.

⁷⁶ Yet it is also increasingly clear that constitutionalism is a meaningful concept beyond the state context, 33 that it “is relevant to, indeed constitutive of, all polities - state or non-state, mature or emergent”, WALKER N. (2001), *The EU and the WTO: Constitutionalism in a New Key*, in DE BÚRCA G. & SCOTT J. (eds.) *The Eu and the Wto: Legal and constitutional*, 32.

⁷⁷ FERRARESE M.R. (2018). *Il costituzionalismo puntiforme e l’invisibilità dei poteri globali*, in *Nomos. Le attualità nel diritto*, 2.

⁷⁸ See VON BOGDANDY A. (2023). *Comparative Public Law for European Society*, in *MPIL Research Papers*, no. 2022-28.

⁷⁹ WILKINSON M. (2021). *The Rise and Fall of World Constitutionalism*, *VerfBlog*, <<https://verfassungsblog.de/the-rise-and-fall-of-world-constitutionalism>>.

anachronism; whereas, in any case, many question its role and ability to still serve in the defying contemporary age.

Some authors, such as Massimo Luciani in Italy, advocate for the restoration of an ancient (national, constitutional) order, based on written regulation and devoid from any kind of judicial law-making.⁸⁰ He has long argued “the modest democratic yield of decision-making procedures in ‘network’ or ‘multilevel’ systems”.⁸¹ Other academics, such as Armin von Bogdandy, push for a new European (comparative) constitutionalism, guided by courts in light of European society’s core values, set forth under Article 2 TUE: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities[,] [...] pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. Moreover, in relation with EU integration, many fear the consequences of a possible – currently debated – enlargement of the EU towards new, less liberal, members, as well as the rise of anti-democratic regimes, most notably the Polish and Hungarian ones.

Another point on which the large majority of scholars seems to converge is that we are living in a defining moment of radical change, probably on the crest of a one-direction wave.⁸² Current institutions appear anachronistic and unable to offer the answers that the complex challenges of our time pose. A reform on the systems of representation, representativeness and participation to the democratic processes (at all levels) is imperative.⁸³ A reform of public – national, European and global – governance is urgent.⁸⁴ A reform in the way of ensuring justice, but also in the way of *conceiving* justice is necessary.⁸⁵

⁸⁰ LUCIANI M. (2023). *Ogni cosa al suo posto*, Giuffrè, Milan. See also ZANON N. (2021). *I rapporti tra la Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali*, in *federalismi.it*, 2021(3), 89.

⁸¹ LUCIANI M. (1996). *Costituzionalismo irenico e costituzionalismo polemico*, in *Giurisprudenza costituzionale*, 1643 ff.; see also BIN R. (2018). *Critica della teoria dei diritti*, FrancoAngeli, Milan.

⁸² ANTONINI L. (2019). *Globalizzazione e nuove sfide del costituzionalismo*, in *Diritto pubblico*, 25(2), 319.

⁸³ See CIANCIO A. (2021). *Le sfide della rappresentanza politica nell'epoca di internet. Brevi note a mo' di introduzione*, in *FEDERALISMI.IT*, NO. 15, on the current challenges of political representation.

⁸⁴ CASSESE S. (2016). *Sugli usi di governance*, in *Parolechiave*, 2, 17.

⁸⁵ KAVANAGH A. (2023). *The Collaborative Constitution*, Cambridge University Press, Cambridge.

In the words of Alessandro Pace, “the real, great task facing constitutionalism today is that of rediscovering and reaffirming its original identity as a legal theory”.⁸⁶ He questions the role of constitutionalism as a movement called upon to scrutinise any issue of general – and, as such, political – interest, as serious as it may be. At the same time, still, the same author stresses how, aside from its five core elements (written constitution, constituent power, enshrinement of rights, separation of power and judicial constitutional review of laws), modern constitutionalism “always keeps seeking to draw out the *limitations of power* in order to avoid its arbitrariness, whichever the issue under discussion”. This is its essential trait.

The other side of the coin is, then, following long-standing doctrinal consensus, the *guarantee of fundamental rights*. Together with the separation of powers, it is enshrined as the cornerstone of any constitution since the French *Déclaration des droits de l’homme et du citoyen*, from 1789, and its Article 16.

The main test of our time is ensuring such fundamental rights’ guarantee *in spite* of the transforming sovereign power, as declined in the complex fringes of the new millennium. As stated by Vittorio Angiolini, there is “the *need* for a rethinking of the proposals advanced with regard to fundamental rights, by which people’s identity and cultural choices, their interests and values, both collective and individual, should remain subject to the conditioning of force or sovereign power, which is also, or can be, a constant threat to the manifestation of differences with equal opportunities”.⁸⁷

It stands as an ontological basis of this research that such a feature of constitutionalism cannot remain indifferent in the contemporary, primarily social, context, where the traditional concept of sovereignty – and, thus, power – has been revolutionised.⁸⁸ Quite the opposite, it is enhanced by the transformations of the modern world, as new – individual and societal – challenges continuously appear

⁸⁶ PACE A. (2003). *Le sfide del costituzionalismo del XXI secolo*, in *Costituzionalismo.it*.

⁸⁷ ANGIOLINI V. (2016), *Sulla rotta dei diritti. diritti, sovranità, culture*, Giappichelli, Turin.

⁸⁸ See, e.g., MORRONE A. (2018). *Sovranità*, in *Rivista AIC*.

on the horizon, requiring a statutory, institutional and procedural re-thinking of our systems for delivering justice, if not of society (or Society)⁸⁹ itself.⁹⁰

2.2. ... to new challenges.

Taking a step back – for the moment – it is worth considering that the changes, and challenges, within the contemporary society are carried by the streams of scientific, digital and technological innovation, as well as by significant socio-political shakings. Evidently, they are not the result of an abrupt shift, but, rather, of decades-long dynamics involving the core of democratic institutions, economic and financial markets with their players, and the general system of international relationships, with relevant effects both on a macro and micro-scale. In short, as previously argued, of globalisation and technological innovation.⁹¹

As sustained, these phenomena radically alter the multi-level constitutional framework,⁹² requiring the scouting of new routes for ensuring fundamental rights' enforcement.

Globalisation is a term often overused, also by the media, to easily encompass under a general label the way of living of the third millennium. This carries the risk of oversimplification, by emptying the concept of its true meaning.⁹³ As explained in the previous Chapter, under a broad, critical and in-depth examination, it represents the (extremely) complex motor of a series of very specific processes that

⁸⁹ VON BOGDANDY A. (2023). *Comparative Public Law for European Society*, in *MPIL Research Papers*, no. 2022-28, 217.

⁹⁰ See, e.g., OLIVETTI A. (1952). *Società, stato, comunità: per una economia e politica comunitaria*, Edizioni di Comunità, Milano; OLIVETTI A. (1945). *L'ordine politico delle comunità*. Nuove edizioni Ivrea, Svizzera.

⁹¹ CASSESE S. (2009). *Globalizzazione del diritto*, in *Treccani.it*; ZOLO D. (2010). *Il tramonto della democrazia nell'era della globalizzazione*, in *Jura Gentium*, 28 December 2010.

⁹² Among the firsts to employ this term, PERNICE I. (1999). *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, in *Common Market Law Review*, 36(4), 703; CASSESE S. (2009), *Globalizzazione del diritto*, in *Treccani.it*, does not agree with the definition of “multi-level system”: “L'ordine giuridico globale non si sovrappone, dunque, come un altro strato, a quello statale. Questi non sono due livelli, perché le disuguaglianze e la frammentazione sono forti, perché gli Stati non sono gli unici soggetti, si mescolano con altri soggetti e perdono la loro unità, perché nessun ‘livello di governo’ riesce a mantenere il monopolio delle relazioni con le parti che lo compongono”.

⁹³ ZOLO D. (2010). *Il tramonto della democrazia nell'era della globalizzazione*, in *Jura Gentium*, 28 December 2010.

range through different fields of science. As noted by Ian Clark, these transformations “need[s] also to be understood as a number of changes within the state, and not simply as a range of external forces set against it”.⁹⁴ They touch deeply the economy, international relations, communications, transportation, military operations, work distribution, the environment and the law. These processes are often interconnected, present common features and underlying trends that have concrete repercussions on people’s everyday life.⁹⁵

As already explained, the analysis of the globalised society’s features is not the focus of the present research. Nonetheless, it is a necessary steppingstone, that contributes to justify and to explain it. The process of globalisation, together with technological innovation, has substantial consequences on the limitation (as well as on the individuation) of powers and on the respect of fundamental rights, the two cornerstones, among the above-depicted ones, of constitutionalism. It is, in sum, as stressed by Gustavo Zagrebelsky, an issue which, given its possible “tragic effects”, cannot be ignored by constitutionalism, “if its minimum essential core and its *raison*

⁹⁴ CLARK I. (1997). *Globalization and Fragmentation*. Oxford University Press, Oxford, 52.

⁹⁵ Naturally, attributing to globalisation every political matter of any relevance, shared or echoing in different parts of the world, would be blatant naiveté. It could be simplistic, for instance, to state that climate change is caused by globalisation. In particular, issues regarding the enforcement of fundamental rights are the consequence of various phenomena: i.e., *inter alia*, from private infringements to the limited amount of state budgets, or, primarily, the executive and legislative powers’ inability to properly regulate pressing or complex issues. Returning to the same example, climate change is caused by a multiplicity of concurring factors: *inter alia*, greenhouse gas emissions from private citizens and companies, as well as the absence of the political vision, unity and economic resources necessary to draft an appropriate plan of action. Still, at closer look, globalisation (in the above-depicted broad sense) is, by all means, the differentiating element between the contemporary age and the previous ones. It is the turning point of a series of economic, scientific and sociological propulsions that have revolutionised the way of living. Again, under the case of climate change, one could argue that all its concurring factors stem from this complex process of growing connection and interdependence between the world’s economies, cultures and population, often labelled as “globalisation”. Greenhouse gas emissions could, therefore, be understood as – at least – exacerbated by the constant travelling of people and goods, by the population growth, by mass production and consumption, with a consequent radical exploitation of natural resources and an increase in industrial pollution in order to meet market demands. With an extensive reading, then, the origins of climate change could indeed be traced back to such phenomenon, at least partially and under a socio-logical and casual mathematical model. See, e.g., SHAHBAZ M., SHAHZAD S.J.H., MAHALIK M.K. *et al.* (2018). *Does Globalisation Worsen Environmental Quality in Developed Economies?*. *Environ Model Assess*, 23, 141: “The empirical results reveal that globalisation increases carbon emissions, and thus, the globalisation-driven carbon emission hypothesis is valid. This empirical analysis suggests insightful policy guidelines for policy makers using ‘globalisation’ as an economic tool for better long-run environmental policy”.

d'être are – according to John Rawls' synthesis – the protection of everyone's right to equal respect".⁹⁶

From a legal perspective, the globalised dimension erodes the three conventional pillars of statehood: territory, citizens and authority.⁹⁷ As observed by Maria Rosa Ferrarese,⁹⁸ the disruption of traditional state barriers, loss of territoriality, mixture of national identities and the emergence of new centres of power – often transnational, private and barely responsible – are a few of its most evident effects.

Collectivisation, massification, standardisation of relationships,⁹⁹ on the one hand, and the decline of the traditional systems of democratic representation, on the other hand, substantially enhance these issues. As maintained, the notion of constitution in a material sense – elaborated by Italian academic scholarship and strictly connected in a finalistic way, through the key role of political parties, to that in a formal sense – is now weakened and may not be fully compensated by that of constitution as a living instrument, advanced by supranational multi-level courts, but also questioned (in its efficacy) by a not irrelevant number of commentators.¹⁰⁰

In particular, as subsequently argued, the inability of traditional *intermediate* – namely political, but also trade unions – *bodies* to adapt, represent and communicate with the different fringes of society creates a growing disconnection (and dissatisfaction) between the rulers and the ruled.¹⁰¹ The increasing inequalities between the large parts of the population and the financial-ruling elite is testing the capacity of the democratic process throughout the world and, in general, the communities' essence.¹⁰²

⁹⁶ ZAGREBELSKY G. (2013). *Constitucionalismo*, in *Derechos Y Libertades*, 29(2), 19.

⁹⁷ See VON BOGDANDY A. (2022), von BOGDANDY A. (2022), *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft*, Suhrkamp Verlag, Berlin.

⁹⁸ As observed by FERRARESE M.R. (2018). *Il costituzionalismo puntiforme e l'invisibilità dei poteri globali*, in *Nomos. Le attualità nel diritto*, 2, the global power structure, and its distribution, has radically evolved, mainly in two directions: towards international organisations, on the one hand, and in favour of new private economic authorities.

⁹⁹ See, once again, CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparative Contribution*, in *Buffalo Law Review*, 25, 643.

¹⁰⁰ LANCASTER F. (2018). *La stella polare del costituzionalismo*, in *Nomos. Le attualità nel diritto*, 1.

¹⁰¹ Already in 1992, ELIA L. (1992). *Le norme sulle formazioni sociali nella Costituzione repubblicana. Studi in onore di G. Vignocchi*, Mucchi, Modena, arguing for an increased pluralism through social formations, à la de Toqueville (see *infra*).

¹⁰² See TÖNNIES F. (2011). *Comunità e società*, Laterza, Rome, 61.

Inevitably, all these elements put into question the very concept of *sovereignty* and the ability of state authorities to *effectively* grant fundamental rights, as declined in modern constitutions. In particular, two elements of transformation demand special emphasis, on which we shall return in several sections of the following.

The increasingly *collective* – or supra-individual – nature of fundamental rights' violations in the contemporary society must be preliminarily stressed. The way in which the society and economy are structured tends to create *standardised* relationships, usually between large numbers of individuals and a much more powerful opponent (public entities or private companies, often transnational). These situations can be either contractual (i.e. work, consumer, service-related) or extra-contractual (i.e. mass harms). They can relate to both traditional civil and political rights (i.e. the basic right to life, to private life, to freedom of speech), but also to more programmatic rights (i.e. the right to social welfare or that to health care). They can also encompass individual subjective positions, as well as meta-individual ones, for instance in relation to climate change (see *supra*, Chapter II). They are characterised by an *unbalanced power-relationship* between the common opponent and each individual, and a similar, or homogeneous,¹⁰³ subjective position between all the individuals concerned.

An essential matter for consideration, as mentioned, is the emergence of *new rights* and substantive positions, some of which are not even individual.¹⁰⁴ The technological, digital and, in general, scientific developments have contributed to new situations, in which new claims and duties can be presented, and new types of violations and omissions can occur, at times not even predicted, or predictable, by the drafters of the various constitutional catalogues. Other relevant examples touch, among others, the fields of biotechnologies, neuro-rights or artificial intelligence; they have revolutionised, or are promising to revolutionise, intimately and radically the way of living of the third millennium, putting into question the very essence of being human and what, until not so far, were conceived as the unsurmountable

¹⁰³ See, *infra*, Chapter VII.

¹⁰⁴ See BOBBIO N. (2014) *L'età dei diritti*, Einaudi, Turin.

barriers to such essence.¹⁰⁵ As anticipated, they promise outstanding advancements, from the point of view of better, faster care; still, in such quest, they risk impinging the roots of self-determination and human dignity, as well as enhancing already expanding inequalities.

The two trends do not run separate rails. Sometimes they interact, generating situations encompassable under both. This is, for instance, the case once again of climate change: a new situation, until a few decades ago unpredicted (to this degree, at least), which unites all humankind. At the same time, the two tracks (*standardisation* of the infringements, on the one hand, and emergence of new subjective, *meta-individual*, positions, on the other hand) share a common ground: that of a simmering multi-faceted and *transforming sovereign power*, where private, economically-driven, forces feast in the tension and discretionary gaps left by national and supranational courts and legislators.

Against such backdrop, the last bulwark for single individuals appears that bearing the *judicial* pennant.¹⁰⁶ A similar *ultima facie* resort, however, is not devoid of questionable and perilous scenarios, all involving a blurring of the separations of powers principle, concerns on fair trial guarantees (*in primis*, independence and impartiality) and executability of judgements.

2.3. Adopting a constitutional perspective.

In this highly unstable, uncertain and, surely, unfinished¹⁰⁷ historical process, the only compass¹⁰⁸ for direction still appears to be that which points towards the study of *power* and its legitimacy (and, hence, limitations, too) within the law and of rights' guarantee.¹⁰⁹ It is undoubtedly a challenging – an increasingly challenging – task, of transnational dimensions, but it is also, probably, the only viable option

¹⁰⁵ E.g., see, *supra*, Neuralink.

¹⁰⁶ See, e.g., BOGNETTI G. (1998). *Lo stato e i gruppi di interesse negli ordinamenti borghesi*, Giuffrè, Milan.

¹⁰⁷ FUKUYAMA F. (1992). *The End of History and the Last Man*, Free Press, New York.

¹⁰⁸ See LANCASTER F. (2018). *La stella polare del costituzionalismo*, in *Nomos. Le attualità nel diritto*, 1; ZOLO D. (2010). *Il tramonto della democrazia nell'era della globalizzazione*, in *Jura Gentium*, 28 December 2010.

¹⁰⁹ See *Déclaration des droits de l'Homme et du citoyen de 1789*, Article 16.

we are left with to navigate the complexities of the current global (dis)order. At least while the democratic routes keep failing, it is imperative to look for subsidiary – *in primis* judicial – ways of protection.

To this regard, in a framework so disrupted and, at the same time, so interconnected, marked by common – hence *collective* (or supra-individual) – issues, the previous mechanisms of judicial enforcement – designed for *dualistic* litigation – may simply no longer fit. Once this is accepted, a rethinking of the whole justice system appears necessary, to overcome the social, organisational and legal obstacles set in the way of *concrete* delivery of justice.¹¹⁰

With this spirit, the present research aims to situate itself in the scientific debate on public interest litigation, access to justice and judicial enforcement of fundamental rights in Europe. Its main goal is to evaluate a relatively new (for European standards), specific procedural device – class, or representative, actions – in a *constitutional law lens*, as a means of advancing positive social change, protecting supra-individual rights and delivering effective justice when needed. Initially fully developed in the US since 1966, as it is known, they have been the subject of lively debate in Europe until recently.¹¹¹

Moving from the proposition that the current European architecture of fundamental rights’ enforcement presents a series of significant *gaps* (presented in the next Chapter – *Judicial enforcement and its fundamental gaps*) – mostly caused by the developments of the globalised society and by its related deep constitutional transformations – this investigation seeks to verify how the class action technique can fill, at least partially, some of them. The perspective assumed will be the Italian one, inevitably declined in the larger, constantly intertwined, supranational, transnational and international dimensions of justice, with special regard to the EU and CoE levels, and – for comparative design – to some of their other Member States, too. The comparative method, as already explained, albeit not being the focal

¹¹⁰ HODGES C. and VOET S. (2018). *Delivering Collective Redress: New Technologies*, Hart Publishing, Oxford.

¹¹¹ See *infra*, Chapter VI.

point of this work, has been, and still is, a key tool of investigation, in a world so increasingly and deeply inter-connected.¹¹²

With these premises, it is paramount to preliminarily frame both the contemporary social (see *supra*) and constitutional context (*herein*). Drawing from established scholarship (legal, socio-logical and socio-legal), both Italian (mainly for constitutional law) and foreign (from common law and other EU states), the main features of the current framework will thus be underscored. This initial part of the research dwells on how the most significant recent changes have affected, and keep affecting, fundamental rights' enforcement. By questioning the effectivity of the traditional paths of enforcement (see *infra*), the need for new, collective, routes up to date with the current social dynamics emerges with ever-increasing urgency.¹¹³ Such an exercise will clearly illustrate the research framework and further set the stage for the examination of the research question, in a constitutional law lens, in the subsequent Parts.

¹¹² See *supra*, Chapter II.

¹¹³ The complexity is clearly conveyed, once again, by the case of climate change and environmental pollution. Whenever a large company is emitting dangerous quantities of carbon through its industrial activities, the environment is evidently damaged; the abovementioned subjective positions are hindered. Still, at closer look, other interests, at times opposed and opposing to them, come into play: should the industrial activity be stalled, for instance, those of the company's employees, who may lose their job; those of the company's shareholders, who may lose their long-earned investments; those of the tertiary sector's workers from the nearby towns, who may see substantial decreases in their sales. On the contrary, should the unsafe polluting conduct continue, the subjective positions (*in primis*, the right to health) of the collectivity would be negatively affected. Ironically, also that of the abovementioned players, holders of opposing interests.

Lon Fuller, to this regard, introduced the term "*polycentric adjudication*" (derived from Michael Polanyi's book *The Logic of Liberty*). With such concept, he encompassed "situation[s] of interacting points of influence", which "normally involve many affected parties and a somewhat fluid state of affairs". In Fuller's view, almost all problems submitted to adjudication carry such polycentric nature. The problem arises when such centrifugal forces become so "significant and predominant that the proper limits of adjudication have been reached", see FULLER L.L. (1978). *The Forms and Limits of Adjudication*, in *Harvard Law Review*, 92, 353. Naturally, the preferred route in these circumstances would be a solution from an enlightened legislator, after a parliamentary discussion. Not all legislators, however, appear to be up to the challenges (sometimes understandably) and, even when they do, there is no guarantee that all competing polycentric interests are taken into account properly. The expectations and needs of minorities and unrepresented may be left behind, thus requiring, by all means, a subsidiary safety valve, traditionally found in the judiciary. In sum, in the globalised, ramified and inter-connected world, coordinating the different layers of such a complex architecture of protection and striking the fair balance between the various rights is becoming increasingly paramount.

3. *A multidimensional, multifaceted and multilevel constitutional framework.*

It has already been discussed how globalisation and technological innovation affect *time*, in the sense that they speed up numerous processes and activities, through technological advancement (industrial and digital) and a much wider network to tap into, e.g. for resources, workforce, markets or information. Transportation, communication, production and distribution are highly favoured. From a constitutional standpoint, this creates two different types of consequences.

In the present, it makes it harder for public authorities to *keep up* with the fast-paced developments and practices. A clear example is brought nowadays by AI, with legislators from all levels – national, supranational and international – unable to effectively regulate, if not anticipate, all the potential risks. The scientific complexity of most developments makes it even harder for *policy-makers* to address them in a timely and exhaustive manner. As further addressed, this difficulty is shared by the *judiciary*, which often – and understandably – lacks the *technical expertise* to understand new technological advancements. Hence, the necessity to seek a *synergy with scientific advisors*. Their role, however, would need to be framed under the impartiality and independence requirements set for the judiciary, too. Mechanisms for selecting and keeping them accountable would also be advisable.

For the future, it must be noted how numerous effects of globalisation's processes are *not immediately* visible, but may appear even after years. Climate change is a visible example of this, with consequences of polluting conducts starting to be perceived, according to research, only after five to ten years. Some authors have, consequently, tried to theorise the concept of “*intra-generational rights*” – in this case of future generations –, to be respected by current ones, too.

As suggested by Gustavo Zagrebelsky,¹¹⁴ however, this is an improper expression: a subjective right implies an already living (or, at minimum, conceived) person, with the ability to bring legal action to defend their position. The protection of future – not living, not conceived, merely abstractly considered – generations is,

¹¹⁴ ZAGREBELSKY G. (2013). *Constitucionalismo*, in *Derechos Y Libertades*, 29(2), 19.

therefore, conceptually incompatible with such legal category. Rather, as pointed out by the same scholar, the category of “duties” – to be considered autonomously and not just as the other side of the rights’ same coin – appears more suited.¹¹⁵

The German Federal Constitutional Court in 2021 embraced this interpretation in relation to national climate change legislation:

The fundamental right to the protection of life and health enshrined [...] obliges the state to afford protection against the risks of climate change. [...] The state’s duty of protection [...] does not take effect only after violations have already occurred. It is also oriented towards the future [...]. The duty to afford protection against risks to life and health can also establish a *duty to protect future generations* [...]. This is all the more applicable where irreversible processes are at stake. However, this duty to afford intergenerational protection has a solely objective dimension because future generations – either as a whole or as the sum of individuals not yet born – do not yet carry any fundamental rights in the present.¹¹⁶

Similar attention to “intergenerational burden sharing” has been recently stressed by the ECtHR, too, in the case *Verein Klimaseniorinnen v. Switzerland*, in which it declared a violation of Articles 6 and 8 of the Convention in relation to Switzerland’s climate change policy.¹¹⁷

In this connection, the Court notes that, in the specific context of climate change, intergenerational burden-sharing assumes particular importance both in regard to the different generations of those currently living and in regard to future generations. While the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party, it is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change (see paragraph 119 above) and that, at the same time, they have no possibility of participating in the relevant current decision-making processes. By their commitment to the UNFCCC, the States Parties have undertaken the *obligation* to protect the climate system for the benefit of *present and future generations* of

¹¹⁵ *Id.*

¹¹⁶ German Const. Court, order of 24 March 2021, 1 BvR 2656/18, paras. 144-146.

¹¹⁷ *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, judgement from 9 April 2024, no. 53600/20. See also *Duarte Agostinho and Others v. Portugal and 32 Others*, decision from 9 April 2024, no. 39371/20.

humankind (see paragraph 133 above; Article 3 of the UNFCCC). This obligation must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the *intergenerational perspective* underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review.¹¹⁸

Globalisation affects *space*, too. Distances are shortened, and the whole world is now fairly rapidly reachable. People, goods and news travel around constantly in a deeply interconnected net. An establishment of personal and, mainly, business relationships outside national borders is favoured. Traditional *national borders*, as a consequence, tend to fade, leaving room for both international and transnational contamination, pushed by centrifugal forces. This process has implications also from the point of view of the *players'* dimension, as new actors appear on the global scene. At the same time, as subsequently developed, emerging nationalist centripetal forces push back, as a consequence and refuge from the globalised dimension.

The international push is conveyed by the process of integration within the European Union, started with the European Coal and Steel Community in 1951, as well as by the progressive consolidation of *international organisations*, such as the Council of Europe or the United Nations.

The key aspect of internationalisation is that national States voluntarily limit and give up portions of their sovereignty in order to be part of these international organisations (new *players*), operating on a larger, border-less scale. Extremely positive results have been achieved in terms of cooperation and integration. Nonetheless, from a constitutional standpoint, critical aspects must be highlighted, too.

¹¹⁸ Id., para. 420.

One issue with international organisations, as highlighted by Maria Rosa Ferrarese, is that they tend to cause *fragmentation* and *decentralisation* of power.¹¹⁹ The multiplication of provisions, courts and mechanisms of enforcement, on the one side, enhances the overall level of protection, but, on the other side, also causes confusion, differences and potential coordination problems. As further observed by Massimo Luciani, the “dilution of decision-making centres and procedures prevents a precise allocation of *responsibilities*”.¹²⁰ This is especially relevant considering the lack of *direct* democratic legitimacy presented by most international organisations. It also “allows for an infinite referral of political responsibility: if all levels are equally responsible, then no one is, per se, responsible”.¹²¹

Another challenging element worth stressing with regard to the decision-making process of international organisations is the large majorities often required for significant action, or in certain cases – such as the United Nations and its Security Council – even veto rights granted to specific States. These mechanisms, albeit designed to reach uniform and shared decisions, have in different stances stalled votes on critical matters. The overall institutional public power, fragmented and at times even paralysed, is thus decreased.¹²²

The decentration tendencies operate on a transnational and private level, too, which emphasises once again the *players’* dimension, but also the *economic/financial* one. New centres of private power have emerged in the global landscape, now dominated by the economic interests of large corporations which operate across different jurisdictions, if not the whole world. Symptomatically, in the words of Giovanni Pitruzzella, “the State must, therefore, be given a ‘*double trust*’: the loyalty of its citizens and the trust of the financial markets”.¹²³ Naturally,

¹¹⁹ FERRARESE M.R. (2019). *Percorsi della sovranità. Aggirandosi tra varie definizioni e sfaccettature*, in *Nomos. Le attualità nel diritto*, 2.

¹²⁰ See LUCIANI M. (2023). *Ogni cosa al suo posto*, Giuffrè, Milan.

¹²¹ Id. See also VON BOGDANDY A., VENZKE I. (2012), *In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification*, in *European Journal of International Law*, 23(1), 20: “A functionally fragmented international judiciary threatens to weaken democratic generality in the further development of the legal order”.

¹²² FERRARESE M.R. (2019). *Percorsi della sovranità. Aggirandosi tra varie definizioni e sfaccettature*, in *Nomos. Le attualità nel diritto*, 2.

¹²³ PITRUZZELLA G. (2013). *Crisi economica e decisioni di governo - Relazione al relazione al XXVIII convegno annuale dell’AIC*, in *Rivista AIC*.

this second type of “trust” is not formalised in the constitutional process,¹²⁴ but it is still extremely relevant in practice and can, at times, contribute to significant political choices from the public authorities.

As noted by Luca Antonini, the traditional principle of responsibility of governments towards their voters is certainly affected, as a *new responsibility* towards the markets is introduced.¹²⁵ Rather ironically, it was the States themselves that caused this overturn of roles, by pushing for a liberal and *transnational market* immediately after the Second World War. The sensation, according to several authors, however, is that nowadays States cannot retrieve back the sovereignty left in favour of the newly formed *private, economic and financial, authorities*.¹²⁶ Two trends must be highlighted to this regard.

On the one hand, authors such as Gunther Teubner have argued “the emergence of a multiplicity of civil constitutions beyond the nation state. [...] Increasingly, global private regimes are creating their *own substantive law*. They make use of their own sources of law, which lie outside the spheres of national law-making and international treaties.”¹²⁷ The fast-paced economy and scientific advancements bring a pressing demand for regulation, which cannot be timely and properly satisfied by states and international organisations. The adopted solution is, hence, *self-regulation*, with prominent examples being the so-called *lex mercatoria* for international commercial practices and *lex digitalis* for the internet.¹²⁸ Other blatant cases include those of rating agencies, private actors which, quite paradoxically, rate even public states now.¹²⁹

A recent trend in *investment arbitration*, instead, regards compensation due by states to fossil fuel companies in light of multilateral trade agreements: due to

¹²⁴ ANTONINI L. (2019). *Globalizzazione e nuove sfide del costituzionalismo*, in *Diritto pubblico*, 25(2), 319.

¹²⁵ *Id.*

¹²⁶ PINELLI C. (2016). *Oligarchie finanziarie mondiali, democrazie nazionali e la dicotomia pubblico/privato. Qualche riflessione per i giuristi*, 1, in *Costituzionalismo.it*.

¹²⁷ GUNTHER G. (2010). *Fragmented Foundations Societal Constitutionalism beyond the Nation State*, in *The twilight of constitutionalism?*, in DOBNER P., LOUGHLIN M. (eds.), *The Twilight of Constitutionalism*, Oxford University Press, Oxford, 327.

¹²⁸ *Id.*

¹²⁹ PINELLI C. (2016). *Oligarchie finanziarie mondiali, democrazie nazionali e la dicotomia pubblico/privato. Qualche riflessione per i giuristi*, 1, in *Costituzionalismo.it*.

specific clauses, increasingly often states' decisions to withdraw from such agreements in relation to the climate change emergency have obliged to pay hundreds of millions to the private oil and gas companies. In 2022, for instance, Italy was ordered to pay more than 190 million euros, plus interests, to Rockhopper Explorations in the context of the Energy Charter Treaty. Rather interestingly, this sum is considerably higher than Rockhopper's initial investment of merely 29 million euros.¹³⁰ It is also worth noting that such decision, binding a *public* national authority towards a *private* transnational corporation, was handed out in the form of an *arbitral award* by an arbitral tribunal. The economic and relational dimensions of globalisation put into the spotlight *new players*, who are given extremely relevant *power*, capable of binding even state authorities and completely overturning the traditional power *balances*. These circumstances fundamentally question the traditional *public v. private* paradigm.¹³¹

On the other hand, the issue of *responsibility* must be raised once again. The transnational nature of most large corporations brings them to operate under several jurisdictions, with different regulations. They are, thus, induced to set their seat under the most favourable one, in order to escape stricter control or fiscal responsibility, in a defendant-oriented *forum-shopping*.¹³² Unregulated legislative competition between states, even inside the EU, for instance for fiscal matters, drives private corporations towards venues with slacker rules and, in general, *reduces* the minimum standard of protection for the collectivity. It is not a coincidence, for example, that all the major global digital firms – such as Google, Meta, Apple, LinkedIn – have set their headquarters in Ireland, where the corporate tax rate is set at 12,5% and *regulation* is highly corporate-friendly.

A similar trend is predictable for *passive litigation strategies*, with both potential defendants and claimants aiming at conducting proceedings in and basing their

¹³⁰ See, e.g., <<https://www.ilsole24ore.com/art/no-trivelle-italia-condannata-pagare-190-milioni-il-blocco-ombrina-AEkTAJvB>>.

¹³¹ On the conflicts between arbitral tribunals' and state courts' *potestas iudicandi*, see HENKE A. (2022). *I conflitti di potestas iudicandi tra arbitro e giudice statale nel diritto italiano e comparato*, Giappichelli, Turin.

¹³² BELL A. (2003). *Forum Shopping and Venue in Transnational Litigation*, Oxford University Press, Oxford.

substantive merits on provisions from favourable jurisdictions. This is illustratively conveyed by Shell’s decision to move its headquarters to London from The Hague after a major blow in the 2021 Dutch injunctive class action brought by Milieudefensie.¹³³ Unharmonised substantive and procedural frameworks are fertile soil for such *forum-shopping* incentives within the EU.

The fiscal forum-shopping phenomenon has significant consequences on the general population, as conveyed by the above-mentioned Saskia Sassen’s research:¹³⁴ a lower tax revenue, in fact, substantially decreases the *state budget* for social welfare and increases the *inequality gap* between powerful transnational corporations and single individuals who, deliberately or not, are put in contact with their products, services or activities, thus being subject to possible violations to their rights. The *relational* dimension of globalisation – in the form of an extremely intricate net of casual connections, where one action from a major player can substantially and simultaneously affect the positions of several thousands, or even hundreds of thousands, of unprotected people throughout the whole world – becomes relevant once again. The *economic* dimension, true motor driving and ruling the unregulated wilderness of global exchange practices, transpires, too.

At the same time, it must be noted how these large transnational players often operate through a complex *global value chain*, with branches and sub-branches all over the world (*relational* dimension). The question of which subject should be responsible for violations at the bottom of the supply chain has been raised now in a vast number of circumstances. Major scandals were that of the Nike sweatshops in 1991 in Indonesia – where children were found out to be employed as workers in extreme conditions by Nike’s suppliers¹³⁵ – or the still-ongoing cocoa one in Africa, where global chocolate firms, such as Nestlé, Mars or Hershey constantly buy cocoa harvested by children.¹³⁶ A lack of effectiveness is commonly perceived in holding transnational corporations to account for their suppliers’ misconducts in

¹³³ *Milieudefensie et al v. Royal Dutch Shell*, [2021] C/09/571932. See, e.g., <<https://www.bbc.com/news/business-59288593>>.

¹³⁴ See *supra*, Chapter III.

¹³⁵ See, e.g., <<https://www.theguardian.com/world/2001/may/20/burhanwazir.theobserver>>.

¹³⁶ See, e.g., <<https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa>>.

a far-away (host) country due to another (home) country's legislation.¹³⁷ This has opened the way to transnational exploitation and modern slavery, especially in the labour market (*e.g.*, the garment industry),¹³⁸ with new forms of hardly-liftable corporate veils. This circumstance will be further developed in the next paragraph, too.

Before doing so, another final constitutional challenge brought by the *economic* dimension of globalisation should be considered: the *cost of rights* in general and of social ones, in particular.¹³⁹ In a massified society with growing inequalities, with a stark increase in the world population, but, at the same time, also a decrease in natality (at least in Europe),¹⁴⁰ it is becoming alarmingly more complex for public authorities to grant everyone an *effective* enjoyment of all the rights enshrined in the constitutions, especially *programmatic* ones, but also basic *civil liberties*. Examples can vary from the inhuman conditions of numerous detention or immigrant centres to the lack of health treatments, of proper education, of freedom of speech platforms or of social housing support, but also of adequate pension systems and a control over decent working conditions.

Naturally, also *political choices* brought by the governing *majorities* can be a cause. *Minorities* could even be *economically discriminated*, beyond their sex, ethnicity or orientations, but rather simply because of a less-favoured social background.

The ability of both national political parties and election systems to effectively filter and represent the interests of all the collectivity in the new global asset of powers and necessities should therefore be questioned (*relational* dimension). The gap between the powerful, decision-making elite of transnational economically-driven corporations and the rest of the population seems indeed to be widening everyday, as highlighted by numerous commentators and reports.¹⁴¹

¹³⁷ NOLAN J, BOTT G. (2018) *Global supply chains and human rights: spotlight on forced labour and modern slavery practices*, in *Australian Journal of Human Rights*, 24(1), 44.

¹³⁸ See, *e.g.*, Chapter 2 – “Garment Workers: Fighting to End Sweatshops”, in CUMMINGS S.L. (2021). *An Equal Place Lawyers in the Struggle for Los Angeles*, Oxford University Press, Oxford.

¹³⁹ See *supra*, fn. 154.

¹⁴⁰ See *supra*, Chapter III.

¹⁴¹ *Id.*

The emerging populist reaction towards which a growing part of the population is turning in several countries conveys the general discontent. Such tension towards nationalist stances, paradoxically, moves *centripetal forces*.

At the same time, Constitutional Courts, such as the Italian one, have affirmed the notion of “*constitutionally necessary expenses*”¹⁴² in order to ensure the effectivity of a *minimum level* of respect of core fundamental rights, such as that to health or to legal defence. Inevitably, as it will be further addressed, a delicate balance between the *legislator’s* discretionary authority and its *inertia* needs to be struck, while considering the *judiciary’s* role and the principle of the *separation of powers* in a power dynamic increasingly stretched by *centrifugal forces*.¹⁴³

4. Sovereignty and its discontents.

In his seminal “Civilization and its Discontents”, from 1930, Sigmund Freud theorised civilisation as a phenomenon simultaneously in conflict and necessary for man’s happiness.¹⁴⁴ Civilisation ensures comfort, cultural advancement and protection from an otherwise too chaotic world; still, this very set of stabilising social relationships is one of the main sources of distress and suffering for single individuals. In sum, according to the father of psychoanalysis, to be happy one must renounce their full freedom; in doing so, however, one loses the possibility of being fully happy.

Interestingly, following Freud, the first step of civilisation is the regulation of *social relationships*. From a raw world, decided by brute force and the rule of the strongest, “the substitution of the *power* of a united number for the power of a single man”¹⁴⁵ becomes the turning point of civilised life:

¹⁴² Italian Const. Court., e.g., judgements nos. 169/2017, 10/2022, 161/2022.

¹⁴³ See, e.g., VON BOGDANDY A., VENZKE I. (2012), *In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification*, in *European Journal of International Law*, 23(1); KAVANAGH A. (2023). *The Collaborative Constitution*, Cambridge University Press, Cambridge; ZANON N. (2021). *I rapporti tra Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali*, in *federalismi.it*, 3.

¹⁴⁴ FREUD S. (1961), *Civilization and its Discontents*, W.W. Norton, New York (first published in German in 1930).

¹⁴⁵ *Id.*

Human life in communities only becomes possible when a number of men unite together in strength superior to any single individual and remain united against all single individuals. The strength of this united body is then opposed as ‘Right’ against the strength of any individual, which is condemned as ‘brute force’. [...] The essence of it lies in the circumstance that the members of the community have restricted their possibilities of gratification, whereas the individual recognized no such restrictions. The first requisite of culture, therefore, is justice – that is, the assurance that a law once made will not be broken in favour of any individual. [...] This implies nothing about the ethical value of any such law. The further course of cultural development seems to tend towards ensuring that the law shall no longer represent the will of any small body – caste, tribe, section of the population – which may behave like a predatory individual towards other such groups perhaps containing large numbers. The end-result would be a state of law which all – that is, all who are capable of uniting – have contributed by making some sacrifice of their own desires, and which leaves none – again with the same exception – at the mercy of brute force”.¹⁴⁶

These considerations to several degrees recall the “social contract” idea first developed by Hobbes, Locke and Rousseau. Their relevance for the current analysis stands in the aggregation of individuals within *communities*, where they limit their freedom and happiness under the rule of law. Everyone relinquishes a portion of their absolute individual self-determination and “natural” advantage for the collective justice and well-being, here included the security of their own.

All these psychoanalytical and, most importantly, political theories, nonetheless, stem from an *anachronistic* societal vision. They are based on the idea of a single, well-*structured* State (the “community”), holding all the *power*. The contemporary world’s multidimensional, multifaceted and multilevel *a-structured* nature, intertwined and constantly shifting, as demonstrated, is quite the opposite. The sovereign community, conceived by John Locke as an impartial and responsible (towards its members), *super partes*, “commonwealth” no longer exists. Against the current backdrop, the law – either national, supranational or international – often fails to catch “*predatory individual[s]*” towards the collectivity. This occurs in

¹⁴⁶ Id., 59-60.

reason of the fast-paced rhythm at which possible predatory (harmful) conducts are even created by technological innovation, as well as their complexity, which makes it harder to adequately regulate. It also accrues from the very nature of sovereign power: no longer “public”, rigid, solid, under a Westphalian conception of the state, but often “private”, transnational, flexible, fluid and highly elusive.¹⁴⁷

The crisis of the traditional monistic State poses two fundamental sets of problems.

From a *structural* point of view, it resonates with the stark decline of the traditional means of *representation*. In particular, their deficiencies in the political arena have long been identified as one of the factors of the traditional states’ failure to provide substantial democracy.¹⁴⁸ Political parties and labour unions, for instance, are characterised by a general loss of trust from their members and an inability to effectively represent their needs. It is the crisis of the “*intermediate bodies*”, discussed *infra*.

These crucial failures are consequently transposed to institutional representatives from the legislative (the Parliament) and executive power (the Government). The abovementioned shifting, fragmented and decentred constitutional framework restricts the room for freedom of decision and space of (effective) action of such institutional bodies.¹⁴⁹ At the same time, the classic Montesquieuan division of powers into three separate branches appears superseded today, with an ever more frequent tendency from the executive power to displace the legislative one, becoming *in concreto* the main, if not the only, decision maker.¹⁵⁰

Visible consequences of these critical tensions are insurgent nationalist trends and populist movements, often seen as an escape alternative from the “fake” self-

¹⁴⁷ HORWITZ M.J. (1982). *History of the Public/Private Distinction*, in *University of Pennsylvania Law Review*, 130, 1423; HARTMANN E. and KJAER P.F. (2018). *The Status of Authority in the Globalizing Economy: Beyond the Public/Private Distinction*, in *Indiana Journal of Global Legal Studies*, 25(1), 3.

¹⁴⁸ HÖFFE O. (2007). *La democrazia nell’era della globalizzazione*, il Mulino.

¹⁴⁹ MORRONE A. (2021). *Suprematismo giudiziario II. Sul pangiuridicismo costituzionale e sul lato politico della Costituzione*, in *federalismi.it*, 12, 192.

¹⁵⁰ *Id.*

oriented political elites. At the same time, such gaps in representativeness also favour – when possible, in their limited freedom for action – the exacerbation of *inequalities* and abuse, often through passive conducts, from the political under-representing majorities. The positions of *minorities* and less-advantaged fringes of the population, as a consequence, are increasingly hampered, especially in relation to social and, in general, rights that require *budget allocation*.

A different haven, especially against the latter abuse, is sought in the *judicial system*. A growing trend is that of picturing it as a last resort against the other two (or simply one, now) institutional power's inertia or mistreatments. An essential difference from these (or this) latter power(s), as underscored by Piero Calamandrei, in relation to the Italian Constitutional Court, is that they are free to act “under the impetus of political opportunity alone”.¹⁵¹ The judicial power, on the contrary, must act, “as commanded by the Constitution”. In the case of the Constitutional Court, Calamandrei went so far as to ascribe to it the *necessary* “power to legislate”.¹⁵²

Such lack of freedom, as recently advanced by Andrea Morrone, derives from two paradigms: on the one hand, the subordination of the judge to the law and, on the other hand, the prohibition of *non liquet*, even in absence of law. Precisely the absence of a stable constitutional framework of reference, however, increases the intrinsic value of their function. Their expertise, professionalism, purported impartiality and independence enhances their legitimacy in the eyes of the population. Concurrently, the abovementioned paradigms justify a growing discretion, to the point where the same author, Morrone, argues that in practice “there is no more actual principle of subordination”.¹⁵³

Such last view could be seen, at least to a certain degree, especially if generalised, as extreme. Nonetheless, it conveys a risk and growing critique towards the role of the judge, according to several commentators – and sometimes also courts, when handing over decisions – too discretionary and political.

¹⁵¹ Cited in *id.*

¹⁵² *Id.*

¹⁵³ *Id.*

Furthermore, *judicial review*, apart from political deviations without an elective legitimacy, presents a series of other problems. Among the most notable, growing questions on *impartiality* and *independence* need to be addressed, but also on the *authority* of certain, especially first degree, fora. Establishing jurisdiction and executing judgements against transnational entities may prove at times hardly feasible. As mentioned above, States may even give up their own jurisdiction in favour of purportedly impartial arbitral tribunals, in business investment engagements with large corporate entities.¹⁵⁴ Moreover, as examined in following, other fair trial guarantees must be ensured: for instance, a timely decision and concrete participation of all the stakeholders concerned with the merits of the trial. This proves to be particularly challenging in the highly interconnected global societal system.

From an *individual* standpoint, an overall, deep discontent emerges. Depression and anxiety are widely registered as the most prevalent psychiatric disorders of the new century, in a consumption-oriented civilisation increasingly perceived as too grand and elusive for single individuals.¹⁵⁵ Dissatisfaction stems from the lack of being part of well-structured and solid communities, counterbalanced by a general loose web of (ir)responsibility of elusive actors, exponentially more powerful than any single individual.

From *citizens*, entitled to rights from the State, there has been a gradual yet fundamental shift to *consumers*, whose vulnerability is exploited by irresponsible markets. New forms of *effective* participation and representation in the global market need to be found. Ways to keep accountable those concretely holding power bound only by economic and financial rules must be put into place, too. Conditionality, as mentioned *supra*, may be one of them, also in relation to the rule of law, as shown recently with Hungary.¹⁵⁶

Finally, tools to counterbalance the extraordinary *power asymmetries* of the contemporary age are much needed.

¹⁵⁴ See *supra*, in relation to Rockhopper Explorations and the Energy Charter Treaty.

¹⁵⁵ See, e.g., BANDELOW B. and MICHAELIS S. (2015). *Epidemiology of anxiety disorders in the 21st century*, in *Dialogues in Clinical Neuroscience* 17(3), 327.

¹⁵⁶ See, e.g., <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465>.

5. Concluding remarks. The fall of “intermediate bodies”.

The key role played by intermediate bodies in Europe, in Italy especially, in the first decades after the II World War, while implementing and enforcing constitutional provisions, has long been underscored by academic scholarship. The centrality of the community dimension as the core of political society is, after all, an ancient and well-established idea, from Greek *πόλεις*, through the Middle Ages, until modern times.¹⁵⁷

Rather ironically, however, it is precisely with modern statism that the constitutional value of intermediate communities starts being lost. In the Enlightenment-Jacobin conception, the sovereign, strongly centralised nation-State, with its bureaucratic and administrative apparatus, gradually becomes the sole protagonist of public life, aspiring to regulate the various aspects of social life without any mediation. The individual is “naked”, sole before the State, relevant “mainly as *homo oeconomicus*, interested above all in defending and increasing personal property and wealth, which find protection and guarantees in the new instruments of legislation”.¹⁵⁸

With the advent of the Republican Constitution, there is a nuanced recovery of the value of intermediate communities, with an express affirmation of protection in Article 2 of the Constitution under the formula of “social formations”, which will be discussed in more detail below, in *Chapter VII*. However, the new forms of manifestation and conformations of power often render inadequate the responses of traditional intermediate communities, which were established and developed, with fair success, in response to a nation-state constitutional construct. The sighs of globalisation and new technologies have opened up a new constitutional order, constantly expanding, in ferment, which has overturned, and emptied, all previous centres of gravity. How can national political parties maintain their representative function in an increasingly global, meta-state world?¹⁵⁹ How can trade unions

¹⁵⁷ ROSBOH M. (2017). *Le comunità intermedie tra storia e istituzioni*, in ROSBOH M. (ed.), *Le comunità intermedie e l'avventura costituzionale*, Heritage Club, 11-12.

¹⁵⁸ Id., 17.

¹⁵⁹ See CIANCIO A. (2016). *European parties and the process of political integration in Europe*, in *Dirittifondamentali.it*, n. 2.

continue to advance their demands in the face of elusive, foreign employers, often hidden by multiple corporate veils? How can family, religious and educational associations hold their own in an increasingly liquid, changing world, subject to multiple and constant, all-pervasive stimuli?

It is pluralism itself – global, digital, technological – that, to a certain extent, has disaggregated the traditional configurations of community power charged with mediating with a state subject that no longer exists or at least is no longer the same, single and principal, interlocutor.

CHAPTER V

JUDICIAL ENFORCEMENT

AND ITS FUNDAMENTAL GAPS

1. Premise. A tangled framework – 2. Different levels, different hats, different paths. – 3. Practical gaps in judicial enforcement. – 4. Legal gaps in judicial enforcement. – 5. Illustrative cases. Constitutional review and the ECtHR pilot-judgement procedure. – 6. Concluding remarks. Regaining paradigms lost.

1. Premise. A tangled framework.

Until now, the transforming social and constitutional contexts have been presented. It has been shown how the current societal trends of globalisation and technological innovation have been pushing shifts in the constitutional framework, too. In particular, power relationships and structures have deeply changed, favouring the emergence of irresponsible, often private and transnational, actors and violations of systemic and pervasive nature. Concurrently, the states' inabilities to tackle severe inequalities and increasing global issues severely hampers, especially (but not only) in relation to social rights, the positions of large numbers of individuals, often coinciding with less-favoured and weak societal groups.

The present Chapter builds on these reflections to briefly address a series of “*enforcement gaps*” that hinder *in concreto* the judicial protection of the rights and principles enshrined in the rich European constitutional catalogues, of both national and supranational nature. The linguistic choice of the word “gap” specifically aims to convey the lack of power precluding *effective* judicial enforcement,¹⁶⁰ either economical, informational, organisational or time-related. It also seeks to

* Parts of this Chapter have been anticipated in MAGLICA A. (2023). *Public Interest through Private Means: A Comparative Study on Public Interest Litigation in Europe*, in *Erasmus Law Review*, 2, 71, and MAGLICA A. (2023) *Climate Change Cass Actions in Europe? The Italian Perspective*, in ALOGNA I., BILLET C., FERMEGLIA M. and HOLZHAUSEN A. (eds.). *Climate Change Litigation in Europe. Regional, Comparative and Sectoral Perspectives*, Larcier Intersentia, Cambridge, 327.

¹⁶⁰ See LUCIANI M. (2014). *Garanzie ed efficienza nella tutela giurisdizionale*, in *Rivista AIC*, 4.

underscore the substantial difference between the “law in the books” – that is, the rights guaranteed *on paper* – and the “law in practice” – that is, the way in which *in practice* those very rights are enforced in courts, or not.

Methodologically, identifying such gaps is not an easy task. Certainly, it suffices to browse any media outlet or simply walk on the streets to perceive the stark difference between the inspiring provisions written in the several catalogues and regulations and their everyday enactment. For a juridical analysis, still, this is far from satisfactory. The institutional and non-institutional reports, safe for relevant but not too recent examples (i.e., the “Handbook on European law relating to access to justice”, from the European Union Agency for Fundamental Rights and Council of Europe, in 2016),¹⁶¹ appear often more focused on purported implementation strategies rather than on the identification of the concrete *systemic* and *recurring* gaps.

Academic scholarship, on the other hand, offers particularly precious guidance for understanding the major constitutional and socio-legal trends underlying the current structures or, quite the opposite, very thorough sectorial analysis. However, for a fully comprehensive, truly global, and yet micro-oriented – that is, focused on the *concrete* delivery of justice to single individuals – one needs to go back to the landmark Florence Access-to-Justice Project from the 1970s, led by Mauro Cappelletti and Bryant Garth.¹⁶² Policy-oriented, counting on the surveys and multi-disciplinary expertise of scholars from all over the world, the research identified common “barriers to access to justice”, investigating promising solutions from various countries to overcome them.

The present Chapter builds on the findings of the four-volume book resulted from that Project,¹⁶³ as well as on more sector-oriented scientific contributions on its wake, also from more recent years, to highlight the main enforcement gaps of the current multilevel European system of fundamental rights protection. A thorough examination would evidently be a too ambitious project, outside the

¹⁶¹ See <<http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>>.

¹⁶² See also HODGES C. and VOET S. (2018). *Delivering Collective Redress: New Technologies*, Hart Publishing, Oxford.

¹⁶³ CAPPELLETTI M. (1979). *Access to Justice*, 4 vol., Giuffrè, Milan.

perimeter of this research. Instead, a mere *sketch* of the most evident and widely accepted gaps shall be offered. A further, extremely valuable, source to draw from, for such purpose, have been the ECtHR and CJEU jurisprudence in relation to Articles 6 and 13 ECHR and Article 47 CFREU, enshrining the rights to a fair trial and to an effective remedy. The Courts' Guides and reports, when available, have been consulted, too.

The final goal of this exercise is to provide a brief, yet clear overview of the main issues that the traditional and currently available techniques of judicial enforcement present. Against such backdrop, collective redress – in particular, *class actions* – will emerge as a possible alternative to fill the abovementioned gaps, at least in certain circumstances, to a certain degree and with certain safeguards. Consequently, their procedural nuances shall be addressed in a constitutional and comparative perspective in the subsequent Parts of the research, first in a “in vitro” analysis (Part III – *Judicial collective enforcement: route of change*) and subsequently in practice (Part IV – *Enforcing fundamental rights: exercises of change*), with concrete applications through case studies.

The present Chapter, thus, making the inevitable choice to conduct the analysis on a mere surface-level, serves an instrumental function to this aim.

2. Different levels, different hats, different paths.

To gauge the efficiency and enforcement potential of the current architecture of fundamental rights protection in Europe, before focusing on some of the specific techniques of enforcement, it is essential to consider the complex judicial framework in which such litigation is called to operate. Such a system is characterised by multiple levels, techniques and courts, that offer valuable alternatives between each other, but also pose the risk of dangerous intertwinements, or even confusion.

When referring to the system of protection of fundamental rights in Europe, the term “multilevel” is now widely employed, as already addressed.¹⁶⁴ Apart from the

¹⁶⁴ See PERNICE I. (1999). *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, in *Common Market Law Review*, 36(4), 703.

national legal order to which they pertain, individuals in Europe benefit, in fact, also from the substantive and procedural guarantees set under the EU, as well as under any international treaty agreed upon by their State. For instance, since all Member States of the EU are also Member States of the Council of Europe, the array of protection encompasses the provisions of the ECHR and, consequently, the possibility of applying in front of the ECtHR, too. The same regards the UN system of protection and its (mostly substantive) guarantees.

From a substantive point of view, the most relevant catalogues of fundamental rights applicable in Europe are undoubtedly the national constitution of each state, the CFREU and the ECHR. Although each of them has been achieved through its own constitutional and historic process, declined in its own peculiar way, deep ties with one another – both explicit and implicit – can be found in almost every European constitution. A shared core of fundamental rights can indeed be found within the EU “as they result, in particular, from the constitutional traditions and international obligations common to the Member States”, as stated in the Preamble of the CFREU. The Treaty of the European Union (TEU), in its Article 2, emphasises how “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. The CFRUE, which is legally binding since the 2009 Treaty of Lisbon, “substantially reproduces in a written catalogue the general principles of law set forth by the CJEU in its jurisprudence, developed over the years”.¹⁶⁵ Its respect is required by EU institutions and national bodies “when they are acting within the scope of EU law”.¹⁶⁶

A close influence derives also from international law. The CFREU, for instance, explicitly refers to the ECHR in its Article 52, para. 3 (“In so far as this Charter

¹⁶⁵ AMALFITANO C. (2018). *General principles of EU law and the protection of fundamental rights*, Edward Elgar Publishing, Cheltenham, 16.

¹⁶⁶ See CJEU 26 February 2013, Case 617/10, *Aklageren v. Akerneq Fransson*.

contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”). Moreover, some national Constitutions explicitly mention the Universal Declaration of Human Rights (e.g., Article 10, para 2, of the Spanish and Article 16, para. 2, of the Portuguese Constitutions). General and implicit influences can be found in almost every European constitution. These references to one another demonstrate an increasing degree of inter-connection between the domestic and supranational level, which lately can be perceived through a vibrant growing dialogue between courts at all levels and coordinates, even from different continents.¹⁶⁷

From a procedural perspective, the *fora* within the EU in which these rights and principles can be enforced pertain to the three abovementioned *different levels*: national courts (in front of the ordinary judge, the administrative one or, if present, the constitutional one), the CJEU and the ECtHR.

Within these levels, national judges represent a *unicum*. Borrowing an expression from Barbara Randazzo,¹⁶⁸ they wear “*different hats*”, in the sense that they are simultaneously applying domestic regulations and supranational ones. Pursuant to the principles of primacy and direct effect, for instance, they apply not only national law, but also EU provisions, both directly and indirectly when interpreting national law, given that such EU provisions are sufficiently clear and unconditional. When it is not such case, the preliminary ruling procedure *ex* Article 267 TFEU is available as a key tool for ensuring uniform application of EU law and raising questions on its interpretation and validity to the CJEU. A similar instrument of dialogue has been recently introduced under the CoE system as well, although

¹⁶⁷ RANDAZZO B. (2023) *Access to Justice in a Multilevel Constitutional System, Protecting Human Rights*, Giappichelli, Turin.

¹⁶⁸ *Ibid.*

with limited ratifications, pursuant to Protocol 16 from 2018, that is the advisory opinion to the ECtHR.¹⁶⁹

Furthermore, within the different levels, there are numerous *procedural paths* through which parties (e.g., natural persons, organised entities, like NGOs, or government-appointed officers) can reach the courts. Each of these routes has different procedural features, due to political design, historic tradition, the composition of the court or the legal system to which they belong.

For instance, each way presents its own peculiar *requirements* to access it. Regarding *standing*, some techniques entitle everyone to bring the claim in front of the court, whereas in most cases only certain subjects are allowed to, such as, depending on the procedural tool, the individuals directly affected by the act, the public minister, specifically named administrative agencies or institutions, or a Member State. Different *admissibility criteria* can be set, too: previous exhaustion of other (or all) available remedies, previous establishment of ordinary proceedings, homogeneity of the rights enforced, proof of notice to the interested parties, adequacy of representation, direct connection with the case. Moreover, most actions can be started within a very strict *time limit*, whereas others do not have one.

In relation to the *types of claims* that can be filed through each procedural route, divergences regard the possible *defendants* of the case: certain procedures can be brought only against Member States, private parties, public entities, agencies or institutions. Limitations may also concern the *types of acts* (or omissions) that can be claimed to be infringing a series of rights and interests: for example, only those from the legislative, administrative power and not from the judiciary or, rather, from private parties or linked to specific sectors of law. Additionally, third parties may or may not contribute to the discussion in the proceedings, e.g. as *amici curiae*. In others, their involvement is even mandatory (i.e., Advocates General in front of the CJEU). The means and possible effects of their *participation* vary, too.

¹⁶⁹ CRIVELLI E. (2021). *Il contributo dei Protocolli nn. 15 e 16 Cedu al processo di riforma della Corte di Strasburgo*, Giappichelli, Turin; LEMMENS K. (2019). *Protocol No 16 to the ECHR: Managing Backlog through Complex judicial dialogues?*, in *European Constitutional Law Review*, 15(4).

Finally, each procedural route can lead to *different outcomes*. In relation to the *type of relief*, some allow the judge to award interim measures or injunctions, others compensation and some even more structural change, such as a reform in the law. The *execution* phase, naturally, is closely linked to the type of relief sought. Regarding the *effects of the decision*, instead, some are binding only *inter partes*, whereas others *erga omnes*, on the whole community. Certain decisions can be *appealed* within a number of days, others are final and absolutely cannot.

The different interlocking of all these elements contributes to shaping each procedural technique and its potential in enforcing specific rights and interests. Like pieces of a complex puzzle, each composition delivers a different outcome. Some will be more effective for vindicating certain policies, whereas others will be better suited for other litigative aims. The choices behind some of the elements are rooted in the tradition of the legal order or system to which they belong, whereas others are due to temporary political choices. Some are easier to change, whilst others will probably remain fixed for long.¹⁷⁰

When questioning which, if any, procedural technique is more suitable to vindicate fundamental rights, the sum of the correct elements becomes cardinal. Probably, however, unlike in ordinary puzzles, there is no correct universal answer, or “perfect formula”. There is no procedural tool or system of intertwining which *per se* delivers every time the most efficient result. This is especially true considering the broadness of the perimeter of the present research: the vindication of fundamental rights, which differ substantially between each other. Depending on the concrete circumstances of the case – that is the specific right vindicated, the community involved, the urgency, the overall legal system – certain procedural techniques may result better suited than others. It is, thus, a very delicate contest of balancing and choosing the best available procedure according to the concrete circumstances of the case at hand.

¹⁷⁰ See VIOLINI L. and BARAGGIA A. (eds.) (2018), *The Fragmented Landscape of Fundamental Rights Protection in Europe: the Role of Judicial and Non-judicial Actors*, Edward Elgar Publishing, Cheltenham.

Nonetheless, as it shall be demonstrated, a series of trends – the here-defined “gaps”, or in other circumstances as “barriers”, or “obstacles” – emerges in the European multilevel constitutional architecture of fundamental rights enforcement through judicial action.¹⁷¹

3. *Practical gaps in judicial enforcement.*

The previous paragraph has dwelled on the complex multilevel European constitutional architecture of fundamental rights’ protection. Concrete access to justice, however, moves well beyond substantive provisions. It lingers in the creases of everyday life, from the moment a subjective position is infringed, or even put at risk of infringement. It presents a struggle that can be attributed to both practical and legal obstacles, which litigants are faced with throughout the entire judicial process: the trouble individuals or public bodies face in even entering the courts and have their claims examined, the cumbersome and complex process of adjudication and, even in the case of favourable decisions, the paucity of proper remedies to execute them.

As illustrated by Cappelletti, law – at least from the viewpoint of the access-to-justice movement – is composed of several elements. Among them, the normative one certainly plays an important role, but not the primary one, which pertains to “the people, with all their cultural, economic and psychological features”.¹⁷² It is, in fact, essential to realise that human beings are driven by both rational and irrational incentives. Since norms are designed to regulate human behaviour, it is, thus, only natural to include these elements in any evaluation on legal institutions and their possible impact.

With regard to judicial enforcement, four main practical factors substantially discourage or limit litigation: *time*, *information*, *money*, and *organisation*. These elements hinder litigation conducted both by public enforcers (such as special administrative agencies or public prosecutors) and private ones (either individual

¹⁷¹ See CAPPELLETTI, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to-Justice Movement*, in *The Modern Law Review*, 56, 282.

¹⁷² *Id.*

nature persons or legal entities, such as no-profit associations or other organisations).¹⁷³

As to the former, as already advanced, when the standing to bring lawsuits in the “public interest” (e.g., against greenhouse emissions) is entrusted solely to *public* bodies, it should be considered that they may not always be up to their task. They may in principle be provided with more funding and manpower, in particular if specifically recruited for a sectorial protection (e.g., the consumer one), as opposite to private parties, but this is not always the case. In general, it has been proven that the bureaucratic machinery over the years tends to show a loss of zeal and become too centralised. Furthermore, its hierarchical rigid structure and its dependence from the legislative power often makes it unable to adapt rapidly enough to the latest tendencies, to be aware of all the situations deserving litigation, to receive direct information from them or to assemble the most appropriate legal and scientific teams of experts in relation to the specific circumstances of each case. Additionally, a dangerous tendency to fall within conflicts of interests with the possible defendants (the government itself or multinational organisations, most of the time) can be expected and, eventually, cannot be contrasted either, especially if the members of such bodies are politically appointed. In particular, in case the government itself was failing to comply with internationally agreed standards or violating its duty of care towards citizens, it would not be possible for the administrative body to bring a lawsuit directly against it. As addressed subsequently, similar considerations arise in relation to private enforcers’ “oligopoly” through the enactment of too strict rules for registration in the “qualified entities” list for standing to sue.¹⁷⁴

Consequently, several jurisdictions and, within them, several models of judicial enforcement justifiably allow the alternative path of “*private* enforcement”. Still, this form of litigation is no panacea. It may indeed carry several other practical (and legal, as examined in the subsequent paragraph) issues (at times shared with public

¹⁷³ Id.

¹⁷⁴ See, *infra*, Chapter XI.

enforcement) that can even prevent the entrance of potential fundamental rights enforcers into the judicial arena.

First, litigating is expensive, in terms of *costs* of attorney, court fees and scientific research, which can be particularly extensive in lawsuits, especially those concerning fundamental rights.

Second, as addressed in the previous Chapters, the evolution of society has brought significant *power asymmetries* and created new gravitational centres. Litigating against States or powerful corporations (both repeat players in the litigation field, that dispose of extensive funding and lobbying networks) may highly intimidate single claimants, last excessively, and cost even more. There are, hence, also clear *organisational* obstacles.

Third, *information* asymmetries cause most individuals to underestimate the matter and even to doubt their entitlement to a judicial remedy. In particular, uncertainties regarding science attribution and the proof of causation usually restrain them from seeking economic compensation for the damages triggered to their fundamental rights, even in smaller cases.

Last, the issue of *time* is of the essence, too. Litigating is often onerous also from a temporal standpoint, since judicial proceedings usually take years to conclude. Furthermore, in the case of fundamental rights, as discussed in the following paragraph, if one were to address specifically sensible or competent apex courts, such as the national constitutional ones or the supranational European ones, legal barriers slow down even more significantly the delivery of justice.

All these elements conjunctively determine several substantial *practical* disincentives for private individuals to even start proceedings. Their right of access to a court, although enshrined in abstract, e.g. under Article 6 ECHR, in practice is far from ensured. The massification of relationships, the exacerbation of inequalities and the evolution of power trends and structures, discussed until now, are key elements since they expose single individuals to exponentially and increasingly higher economic, organisational, informational and temporal costs.

In sum, from a purely economic analysis of law perspective, barring extraordinary incentives, very few rational *individuals* would undertake litigation

alone, but rather expect the governmental authorities to tackle the problem or free ride behind the rare idealistic plaintiffs, if any.¹⁷⁵

4. *Legal gaps in judicial enforcement.*

In the event that, despite the abovementioned *practical* hurdles, a lawsuit is aimed to be filed, major problems still remain. As herein argued, several of them are related to the civil law traditionally *dualistic* nature of adjudication, as well as to the cumbersome European architecture of fundamental rights protection, which poses numerous enforcement gaps also from a *legal* perspective.

As already mentioned, most of the procedural techniques available for fundamental rights enforcement present legal requirements to be satisfied *before* any discussion on the merits. They regard the *standing to sue*, which can be attributed only to selected subjects: e.g., the public minister, specifically named administrative agencies or institutions, or a Member State. Some mechanisms, like the *indirect* form of constitutional review in Italy, only allow questions raised by judicial bodies, true “gatekeepers” of the proceedings. Other techniques, such as the individual application procedure before the ECtHR pursuant to Article 34 ECHR, even when they enable private persons to *directly* file claims against a violation of their fundamental rights, underscore how the applicant – safe for exceptional circumstances – must be “*directly* affected” by the measure complained thereof. Complaints *in abstracto*, which would envisage a sort of “*actio popularis*”, are by no means allowed under said procedural path.¹⁷⁶

This requirement entails, on the one hand, the procedural onus on the applicant of proving a direct connection to the complained conduct, a task not always unproblematic given the ever-increasing diffuse and fragmented nature of “fundamental goods”, e.g. *in primis* the environment and a healthy climate.¹⁷⁷ On the other hand, as subsequently further argued, a crucial consequence is the impossibility for all *other individuals*, similarly affected by the complained

¹⁷⁵ See VISSCHER L. and FAURE M. (2021). *A Law and Economics Perspective on the EU Directive on Representative Actions*, in *Journal of Consumer Policy*, 44, 455.

¹⁷⁶ See *infra*, Parts IV and V.

¹⁷⁷ See *infra*, Chapter VIII.

conduct, to benefit from the effects of the decisions. Hence, *even if* one was to champion the harmed group and surmount all practical obstacles against a much more powerful opponent, *despite* all rational disincentives to do so, it would bring no substantial redress to the rest of the community and no deterrent effect.¹⁷⁸ If a single conduct from a single powerful entity harms a large number of individuals, a single legal claim is not sufficient. This hurdle inevitably *multiplies* the practical costs for the affected parties, whilst for the respondent is practically the same. Instead of reducing power inequalities, they are increased.

Before a discussion on the merits, different *admissibility criteria* can be set, too. The previous exhaustion of other (or all) available remedies, required, for instance, for direct individual applications before the ECtHR or other types of direct proceedings before national constitutional courts, *in concreto* severely slows down the delivery of justice. The previous establishment of ordinary proceedings, instead, typical of indirect constitutional review proceedings, is another path of enforcement which cannot grant an immediate evaluation of the claim from the designated judicial body.

In relation to the *types of claims* that can be filed through each procedural route, divergences regard the possible *defendants* of the case: certain procedures can be brought solely against Member States, private parties, public entities, agencies or institutions. These legal provisions may create fundamental gaps of enforcement. For instance, the ECtHR protection inevitably cannot extend to acts from private parties (safe for an obligation from the State to prevent such harmful conducts, as recalled *supra*). Similar gaps arise in relation to domestic constitutional proceedings. In relation to the latter, limitations may also concern the *types of acts* (or omissions) that can be claimed to be infringing a series of rights and interests: for example, only those from the legislative, administrative power and not from the judiciary or, rather, from private parties or linked to specific sectors of law. Italian constitutional review, for instance, concerns, safe for exceptions, legislative acts. Hence, the scope of enforcement of the Italian Constitutional Court is evidently

¹⁷⁸ CAPPELLETTI, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to-Justice Movement*, in *The Modern Law Review*, 56.

narrowed. Such wide protection meshes leave deep gaps in which it is constantly easier to elude responsibility for the increasingly powerful transnational private actors, discussed at length in the previous Chapters.

The *type of relief* which can be sought differs between procedural mechanisms. Some allow the judge to award interim measures or injunctions, others compensation to the applicant and some even more structural change, such as a reform in the law. The *execution* phase, naturally, is closely linked to the type of relief sought. Regarding the *effects of the decision*, instead, some are binding only *inter partes*, whereas others *erga omnes*, on the whole community. The latter usually occurs with declarations of unconstitutionality by the Constitutional Courts, which, as mentioned, regard mainly legislative acts.

Even the pilot-judgement procedure before the ECtHR, which was specifically designed to address “systemic issues in a Member State”, as subsequently addressed,¹⁷⁹ is inefficient in terms of compensatory redress for all the injured individuals. It cannot be filed against private entities either, but merely against Member States. Moreover, similarly to the collective complaints procedure before the ECSR, introduced in 1995 “to improve the effective enforcement of social rights”,¹⁸⁰ its execution is dependent on the supervision from the CoE’s Committee of Ministers, that is a highly political body which not seldom fails in such task.¹⁸¹ As stated by the Strasbourg Court in conclusion of the recent abovementioned *Verein Klimaseniorinnen v. Switzerland* case:

The Court reiterates that under Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the

¹⁷⁹ See also, *infra*, Chapter X.

¹⁸⁰ Preamble, *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, 9 November 1995.

¹⁸¹ See LEMMENS K. and VAN DROOGHENBROECK S. (2019). *How “Systematic” is the European Court of Human Rights’ Approach to “Systemic” Violations of the Convention?*, in *German Law Journal*, 24(6); GLAS L.R. (2018). *The Execution Process of Pilot Judgements Before the Committee of Ministers*, in *Human Rights & International Legal Discourse*, 13(2), highlighting how around 40% of the pilot-judgements were not executed within two years or more.

respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects [...] The Court further points out that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions and spirit of the Court's judgment. [...] In the present case, having regard to the complexity and the nature of the issues involved, the Court is unable to be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the present judgment. Given the differentiated margin of appreciation accorded to the State in this area (see paragraph 543 above), the Court considers that the respondent State, with the assistance of the Committee of Ministers, is better placed than the Court to assess the specific measures to be taken. It should thus be left to the Committee of Ministers to supervise, on the basis of the information provided by the respondent State, the adoption of measures aimed at ensuring that the domestic authorities comply with Convention requirements, as clarified in the present judgment.¹⁸²

Hence, despite declaring a violation, in this case in relation to a fundamental collective good as the environment, the Court is unable to provide sufficiently detailed and prescriptive instructions to the Member State(s) to comply with, leaving all supervision to the Committee of Ministers, a *political body*. Given how climate change (like many others) is an untackled issue not just in one, but in most Member States, it is highly doubtful that the Committee of Ministers will provide adequate measures to ensure *full and effective compliance* from one of its peers.¹⁸³ This evidently quashes in practice, at least partially, the significance of the otherwise – on paper – historic judgement from the Strasbourg Court.

¹⁸² *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, judgement from 9 April 2024, no. 53600/20, para. 655 ff.

¹⁸³ See LEMMENS K. and VAN DROOGHENBROECK S. (2019). *How "Systematic" is the European Court of Human Rights' Approach to "Systemic" Violations of the Convention?*, in *German Law Journal*, 24(6).

Drawing conclusions, two main legal gaps seem to emerge from the traditional architecture of judicial enforcement of fundamental rights: *first*, the inability to address in a *timely and direct* fashion infringements from either governmental or non-governmental authorities, with a degree of *flexibility* for the relief sought, in front of *sufficiently authoritative* judicial bodies; *second*, the possibility to *extend the favourable effects* of the decision to individuals equally harmed who would otherwise find significant hardship in surmounting alone the practical obstacles.

Authority of ordinary courts – that is non-apex courts, which, incidentally, present also easier access and more flexibility concerning the type of relief and standing to be sued – finds common ground with the need for decisions whose *effects extend* beyond the mere applicants. The former, in fact, contributes to justifying the latter. As further developed in the following, the identification of proper systems of *participation* of all the concerned stakeholders appears crucial to this regard.¹⁸⁴ A forum and procedural devices capable of ensuring effective participation not just of the individual claimant and of the respondent, but of everyone affected by the proceedings, could indeed give the necessary authority even to courts of first instance, despite the fundamental nature of the positions at stake and the vast effects of the decision. Such authority seems particularly relevant in the field of fundamental rights, whose constitutional nature, especially if programmatic (e.g., social) ones, often confronts that of the political power, standing on the ever more blurring line of separation of powers.¹⁸⁵

Not entirely successful attempts to fill this gap have been offered by the provisions allowing third parties' intervention, in the proceedings, e.g. as *amici curiae*. In others, their involvement is even mandatory, for instance through public officials (i.e., Advocates General in front of the CJEU, or public ministers in certain matters). The next Parts (Part III – *Judicial collective enforcement: route of change* and Part IV – *Enforcing fundamental rights: exercises of change*) will address

¹⁸⁴ BOGNETTI G. (1998). *Lo stato e i gruppi di interesse negli ordinamenti borghesi*, Giuffrè, Milan.

¹⁸⁵ VON BOGDANDY A. and PARIS D. (2021). *Power is Perfected in Weakness. On the Authority of the Italian Constitutional Court*, in BARSOTTI V., CAROZZA P., CARTABIA M. and SIMONCINI A. (eds.), *Dialogues on Italian Constitutional Justice. A Comparative Perspective*, Routledge, London, 263.

whether the *representative* character of the class action technique can ensure such participation, without compromising fair trial guarantees.

5. Illustrative cases. Constitutional review and the ECtHR pilot-judgement procedure.

It is undisputable that *constitutional review* has and continues to be in Europe an essential backbone in protecting the rights and principles enshrined in the national constitutions and in advancing society in accordance to them. Countless judicial decisions up to today have proven this.

Naturally, each national legal order presents its own peculiar features in its own system of constitutional adjudication, as a result of its own historical, cultural and political tradition. For instance, some countries, like Germany,¹⁸⁶ have a constitutional court with strong powers which serves as a weighty counterbalance to the parliament's majority, whereas others, like Italy, as a result of compromise, have shaped a delicate yet efficient system of 'inter-judicial relationality',¹⁸⁷ in which constitutional and ordinary courts cooperate with one another. Both these countries have a centralised system of constitutional review, which is by far the prevalent one in the EU. There is, however, at least one notable exception, Portugal, which has adopted a decentralised system,¹⁸⁸ according to which ordinary courts exercise a control of constitutionality. This is certainly not the place to classify and examine all the different systems. Rather, a few selected common characteristics of the predominant model of centralised constitutional review within the EU will be stressed, mainly to find whether some enforcement gaps exist, and whether they can instead be filled by other procedural models.

First, among those entitled to file a constitutional claim, certain systems – like the German or Spanish one – encompass also private parties. This means that, at least on paper, any single individual has the possibility to *directly* address the

¹⁸⁶ See Articles 93 (Jurisdiction of the Federal Constitutional Court) and 94 (Composition of the Federal Constitutional Court) of the Basic Law of the Federal Republic of Germany.

¹⁸⁷ BARSOTTI V., CAROZZA P., CARTABIA M. and SIMONCINI A. (eds.) (2016). *Italian Constitutional Justice in Global Context*, Oxford University Press, Oxford, 236.

¹⁸⁸ See Article 204 (Compliance with the Constitution) of the Portuguese Constitution.

constitutional court. Other countries, like Italy, on the other hand, have adopted an *indirect* mechanism, according to which only ordinary courts are allowed to raise questions of constitutionality. The latter model, at times, can impose a significant limitation, in light of the need to find a concrete case in which the resolution of the question of constitutionality is necessary in order for it to proceed.

For example, as mentioned above, the German Constitutional Court in 2021 delivered a landmark decision regarding the national climate change legislation, which was deemed insufficient.¹⁸⁹ As a result, the German Parliament was given a short period of time (until 31 December 2022) to implement the legislative changes necessary to safeguard the different fundamental rights of present and future generations, otherwise posed at risk. It was indeed a remarkable ruling from the point of view of public interest litigation, brought to the German Court through a direct constitutional challenge from private citizens. Shifting the perspective to indirect systems of constitutional review, like the Italian one, it is difficult to imagine a concrete case where a similar question becomes essential for its resolution, to the point that the ordinary judge feels compelled to raise a question of constitutionality. Even if it was raised, it is extremely unlikely that the concrete case from which the question stems would allow the Court to give such broad indications to the legislator, other than a more or less subtle reprimand or warning.

Other examples of possible adjudicatory gaps posed by an indirect system of constitutional review have been highlighted by Spanish scholars, too, based on their concrete experience with direct constitutional challenges. For instance, in cases regarding the constitutionality of abortion law or same-sex marriage, it has been argued that it may have been difficult, if not impossible, to find a concrete case in which the constitutional question was relevant.¹⁹⁰ In any case, even if there were no

¹⁸⁹ Already cited *supra*, BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, <http://www.bverfg.de/e/rs20210324_1bvr265618en.html>. In particular, the Court deemed the KSG unconstitutional since the reductions until 2030 were too soft, consequently imposing an unbalanced burden on future generations to battle climate change and adapt to a green society, thus limiting too severely fundamental freedoms.

¹⁹⁰ FERRERES COMELLA V. (2021). *The Potential Virtues and Risks of Abstract Constitutional Challenges and Individual Complaints: Some Reflections from Spain*, in BARSOTTI V., CAROZZA P., CARTABIA M. and SIMONCINI A. (eds.), *Dialogues on Italian Constitutional Justice. A Comparative Perspective*, Routledge, London, 263: “It would have been difficult for the Court to address this

adjudicatory gaps, it is undisputable that it could take time – hence, a loss of effectivity – to find the proper case: as it has happened, for example, in relation to assisted suicide (the so-called *Cappato* case)¹⁹¹ or, recently, to the bearing of the surname of both parents.¹⁹² Moreover, private parties are always dependent on the approval from ordinary judges, true and only “gatekeepers” to the Constitutional Court.

The issue of time, on the other hand, together with that of efficiency, weights on the scale of comparison against direct constitutional review. These systems, in fact, usually require the previous exhaustion of all the other available remedies. Moreover, statistics show how only a very small percentage of claims are considered, due to the screening that the constitutional courts inevitably must operate, with a risk of discretionary oversight of founded claims. The burden on them, otherwise, would be – and, partially, has been – excessive to pursue their ordinary work. As a result, in Germany, a second Senate of the constitutional court has been opened, only to help dealing with these cases. The result, however, is that the composition of the Court varies, and not all the judges decide on the same cases. This possibility has been keenly rejected in the past in other jurisdictions, such as the Italian one.¹⁹³

Second, an important limitation of constitutional review is related to the *possible complaints* raised and to the *respondents* in the case. In certain systems, like Italy, only legislation can be reviewed, whereas in others administrative acts and judiciary

controversial issue in the context of a concrete case. Even if judges in Spain often intervene in administrative procedures to formalize marriages, they cannot refer questions to the Constitutional Court when they do so. Under Spanish law, the constitutional question can only be posed when the judge is exercising ‘jurisdiction’, with all the attributes of judicial independence. According to the Constitutional Court, when judges handle the matrimonial proceedings, they act as administrative organs that are subject to the instructions of the executive branch. So the Court refused to examine the constitutional questions that several judges had formulated in that capacity. Moreover, once two persons of the same sex have entered into marriage, it is hard to see who would have standing to challenge its validity before the ordinary courts on the grounds that the statute authorizing same-sex marriage is constitutionally infirm”.

¹⁹¹ Italian Const. Court, order no. 207, 2018.

¹⁹² Italian Const. Court, judgement no. 131, 2022.

¹⁹³ For a comparative analysis of the Italian and German constitutional system, see VON BOGDANDY A. and PARIS D. (2021). *Power is Perfected in Weakness. On the Authority of the Italian Constitutional Court*, in BARSOTTI V., CAROZZA P., CARTABIA M. and SIMONCINI A. (eds.), *Dialogues on Italian Constitutional Justice. A Comparative Perspective*, Routledge, London, 263.

decisions can be reviewed, too. This represents a significant difference, on which, however, the present analysis does not focus. Rather, it should be considered how they are exclusively acts from *public* authorities. It is not possible to seek specific relief from the constitutional court when there is an infringement caused by another specific *private* party, when it has clearly violated specific fundamental rights and principles. In that case, the competence will pertain to the ordinary judge.

Lastly, reasoning even only in the abstract, it is evident that the ordinary judge, especially at first instance, does not enjoy the same *authority* as a constitutional court. Whenever it finds itself having to decide with effects on subjects other than the parties to the case, it is necessarily essential to find forms of *participation* of those different subjects in order to justify the extension of the effects and overcome the deficiency of authority.

Third, a similar shortcoming of constitutional review regards the *available remedies*. Several fundamental rights cases may not require *merely* a regulatory reform. In certain cases, compensation may play a central role: this would make the claim more suited for the ordinary judge, although with the abovementioned drawbacks due to the systemic nature of the cases. In other scenarios, sums *stricto sensu* may not be required, but highly expensive performances could still be part of the claims (also from a state-budget-wise financial perspective).

This is for instance the case of prison overcrowding, where either massive investments to build new structures or a huge depenalisation would be necessary. Both alternatives are of political nature and, especially the former, encompass high costs. It was this plurality of solutions that induced the Italian Constitutional Court in 2013 in declaring inadmissible the issue in a case on that matter, since it would have meant crossing the line of political, hence parliamentary, discretion.¹⁹⁴ Technically the solution may be correct (although the same Court, in several occasions, has stressed how even the principle of the separation of powers wanes in front of clear violations to essential rights – e.g., in relation to the right to

¹⁹⁴ Italian Const. Court, judgement no. 279, 2013.

education of disabled individuals, otherwise discriminated), but practically it is far from effective.¹⁹⁵

A partial solution to this specific case – prison overcrowding in Italy in 2013 – was reached through the next examined procedural route.

The second technique herein considered is the *pilot-judgement procedure* in front of the ECtHR, which pertains to the supranational level, and, to some degree, can fill the gaps left by domestic constitutional review. This procedure, as is known, was first introduced in 2004 with the *Broniowski v. Poland* case and, subsequently, in 2010, was codified in the Rules of the Court. It was specifically designed as a solution for its historic backlog and increasing workload.¹⁹⁶ It stems from the consideration that a large number of similar, repetitive cases deriving from the same root cause – an unaddressed systemic issue in a Member State – are often filed in front of it. By selecting one or a few of these cases, the Court seeks to deliver a decision that covers all the other pending and future similar cases. Rather interestingly, with this procedure the Court overcomes its individualistic and case-by-case approach. It delivers a decision which presents a solution for a wider audience than the single applicant from the selected pilot case. Apart from determining a violation in the particular case, in fact, the Court identifies a dysfunction within the national legal system as the root of the violation and gives “clear indications to the Government as to how it can eliminate the dysfunction”. In particular, it usually asks the Member State found responsible for the violation to put in place a (retroactively applicable) domestic remedy for all the other cases stemming from the common root cause.¹⁹⁷

At first glance, this feature alone puts the procedural instrument into the spotlight as especially suited for fundamental rights enforcement. Pursuing structural change, through reforms in the state’s regulations or policies affecting a large part of the population is indeed one of its key features. The fact that it takes place in front of

¹⁹⁵ Italian Const. Court, judgement no. 275, 2016.

¹⁹⁶ *Broniowski v. Poland*, ECHR (2004) 31443/96 [GC].

¹⁹⁷ See Information Note of the Court’s Registrar on the Pilot-Judgement Procedure. Available here: <https://www.echr.coe.int/documents/pilot_judgment_procedure_eng.pdf>.

the ECtHR and that it grants a degree of flexibility in the judges' decision checks numerous components.

Quite extraordinarily, contrarily to individual applications under Art. 34 ECHR, through pilot-judgement procedures the Court can steer new domestic legislation and adopt decisions with both a direct and, to some degree, *erga omnes* effect.¹⁹⁸ This is shown, for instance, by the *Torreggiani and Others v. Italy* case,¹⁹⁹ analysed in *Chapter X*, concerning systemic prison overcrowding in Italy, which pushed the national government to enact a number of legislative measures, among which the introduction of a form of complaint to a judicial authority about the materials conditions of detention and a compensatory remedy. Despite several critiques on the effectivity and execution of the measures, the numbers of prison overcrowding in Italy decreased and the ECtHR itself, in subsequent decisions, praised the Member State.²⁰⁰ In this specific case, hence, the pilot-judgement procedure was more effective than constitutional review. This shows the potential – that is exhorting state action whenever there is political inertia, there is a lack of appropriate or efficient remedies for the specific type of issue and the domestic legislative process is slow –,²⁰¹ but also one of the main risks of the pilot-judgement procedure: it is completely dependent on state cooperation. The current situation in Italy, still, demonstrates how the root cause of the dysfunction was not, in any case, completely eliminated, and how, thus, significant fundamental rights' violations still take place in this sector.²⁰² Other unaddressed pilot-judgements on the same matter against other Member States, such as Hungary or Romania, confirm this point.²⁰³

¹⁹⁸ FYRNYS F. (2011). *Expanding Competences by Judicial Law-making: The Pilot Judgment Procedure of the European Court of Human Rights*, in *German Law Journal*, 1231.

¹⁹⁹ *Torreggiani and Others v. Italy*, ECHR (2013) 43517/09, 46882/09, 55400/09 et al. See, *infra*, *Chapter X*.

²⁰⁰ *Stella and Others v. Italy*, ECHR (2014) 49169/09 et al.

²⁰¹ FYRNYS F. (2011). *Expanding Competences by Judicial Law-making: The Pilot Judgment Procedure of the European Court of Human Rights*, in *German Law Journal*, 1231.

²⁰² FAVUZZA F. (2017). *Torreggiani and Prison Overcrowding in Italy*, in *Human Rights Law Review*, 17(1), 153.

²⁰³ KINDT E. (2018). *The Pilot Judgment Procedure at the European Court of Human Rights: An Evaluation in the Light of Procedural Efficiency and Access to Justice* (doctoral dissertation, on file at Universiteit Gent, Gent, 2018).

Another completely unaddressed case, despite the easy solution to its systemic root cause, *Novruk and others v. Russia*,²⁰⁴ related to the discrimination of HIV-infected individuals who were not allowed to enter or reside in Russia (at the time still a Member State of the CoE) because of their health condition, corroborates it. In that case, it would have sufficed for the Member State to change the legislation and for the domestic courts to stop deporting HIV-positive foreigners, without having to take upon any significant economic or organisational burden (contrarily to prison overcrowding). Nonetheless, Russia failed to do so, leaving the pilot-judgement completely unexecuted. Basically, should the Member State found responsible of a structural violation fail to comply with the ECtHR's requests or, in the future, fail to execute the terms agreed, no real benefits would be offered to the affected community. In those circumstances, as stated in the *Burmych* case, the Court would simply hand over the matter to the Committee of Ministers (a political body, not always fast and efficient in ensuring enforcement).²⁰⁵ As anticipated above, the same shortcoming hampers the ECSR's decisions.

Other possible drawbacks are inherent to the specific characteristics of the pilot-judgement procedure itself. The bundling of the proceedings cannot be chosen by the applicants. Rather, it is the Court itself that decides when to deliver a pilot-judgement. This could entail a lack of (systemic) remedy due to the Court's unwillingness, or impossibility, to proceed on that route, especially if there is not a consistent number of repetitive cases brought to it. A relevant example is climate change, since very few related cases are pending before the Court. Despite it being a major and structural issue in several Member States, the Court has not, to date, been able to deliver a pilot-judgement in this field. Another element to consider is the necessarily *systemic* character of the violation, which from advantage could become a relevant limitation in cases where there is a collective infringement, but specifically situated. For instance, in the case of *Mandić and Jović v. Slovenia*,²⁰⁶ regarding prison enforcement, the Court found that there was no structural problem,

²⁰⁴ *Novruk and Others v. Russia*, ECHR (2016) 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14.

²⁰⁵ *Burmych and Others v. Ukraine*, ECHR (2017) 46852/13, 47786/13, 54125/13 et al. [GC].

²⁰⁶ *Mandić and Jović v. Slovenia*, ECHR (2011) 5774/10 and 5985/10.

since the overcrowding concerned mainly only one prison (but, still, hundreds of inmates) throughout the whole nation. This could happen in several other cases, regarding local discrimination practices, for instance. Furthermore, after the implementation of the general measures required with the pilot-judgement, the procedure is closed and the adjourned applications are struck out of the Court's list of cases. This shows how the procedure at hand may be at times more oriented to decreasing the Court's backlog than delivering concrete individual justice.²⁰⁷

Finally, four other drawbacks which are common to any kind of litigation in front of the ECtHR, in part anticipated *supra*, may arise, too.

First, the extreme *length* of the process should be considered: before a review of the case, the Court usually takes several years; and all available national remedies must be exhausted in advance. Moreover, concerning specifically the pilot-judgement procedure, all the other similarly situated cases will be declared inadmissible due to non-exhaustion of the newly set domestic remedies. Hence, individuals will need to start again the judicial proceedings in front of their national courts, perhaps to find out that the new domestic remedies are not that effective, after all. Inevitably, this creates a serious issue of access to justice, as well as, to some degree, a problem of non-representation of all the parties involved.

Second, another important limitation is the fact that the ECtHR only addresses violations from *Member States*. Hence, it cannot be used in cases brought directly against a private corporation or public entities, which still may arise and concern the public interest.

Third, it *cannot* be used to claim *compensation*, either, or at least not for all the individuals affected by the infringement. This substantially undermines the – at least, immediate – enforcement potential of the remedy.

Last, a *direct connection* from the applicant to the specific case is required. This could hinder the admissibility of cases concerning certain rights – especially diffuse ones – and principles – especially positive and programmatic ones. Despite the

²⁰⁷ See LEMMENS K. and VAN DROOGHENBROECK S. (2019). *How “Systematic” is the European Court of Human Rights’ Approach to “Systemic” Violations of the Convention?*, in *German Law Journal*, 24(6).

obvious positive features of these procedural path in front of the ECtHR, these highlighted obstacles may hinder its effectivity in pursuing public interest litigation, as framed under this contribution.

6. *Concluding remarks. Regaining paradigms lost.*

For a while the one v. one model of adjudication, typical of civil law jurisdictions, backed by constitutional (domestic and supranational) courts, has partially worked. Today, nevertheless, the inevitable and increasing, as already emphasised, complexity of social life exposes the shortcomings of such model of adjudication, just as those of the traditional systems of *representation* and *participation* in the political arena.

The result is an increasing need for a new form of “social contract”, one that starts from the bottom and sets on a renewed “pluralism revolution” of rights enforcement. In the intricacies of modernity, to face elusive and transient, invisible powers single individuals must learn again to work together. In such sense, the democratic benefit of *associationism* – in this context, a judicial, or procedural, one – can already be found in Alexis de Tocqueville’s reflections from the seminal “*Democracy in America*”.²⁰⁸ In this work, the XIX century’s French thinker underscored the centrality of the foreign country’s “spirit of association”, as “the universal and, so to speak, unique means that men can use to attain the various ends that they propose”.²⁰⁹

“In democratic countries the science of association”, according to de Tocqueville, “is the mother science; the progress of all the others depends on the progress of that one [...] Among the laws that rule human societies there is one that seems more precise and clearer than all the others. In order that men remain civilized or become so, the *art of associating* must be developed and perfected among them in the same ratio as equality of conditions increases”.²¹⁰ Social

²⁰⁸ DE TOCQUEVILLE A. (1999). *La Democrazia in America*, ed. by CANDELORE G., BUR, Milano (first published in French between 1835 and 1840). See also BOGNETTI G. (1998). *Lo stato e i gruppi di interesse negli ordinamenti borghesi*, Giuffrè, Milan.

²⁰⁹ Id.

²¹⁰ Id.

articulations, in sum, carry an inestimable value for substantial democracy, since they are able to ensure widespread, although indirect, *effective participation* by individuals.²¹¹

It is this very spirit of associationism, and private entrepreneurialism, that led to the development and success of class action litigation in North America since the 1960s. It is also this exact spirit of associationism, considered as a union of forces for a common good, that must now be reproduced, under new forms, new channels and towards new challenges. Only this way, as held by Robert Dahl, *democratic “polyarchy”* can be reached, that is a virtuous state in which “multiple institutions and people share power”.²¹²

Declined innovatively, this would be a fair state in which there is no “*tyrant power*” – just like there is no “*tyrant right*” over others, as famously stated in 2013 by the Italian Constitutional Court –; no tyrant power as in freedom against standardised, repetitive, systemic and structural abuses from both public and private entities; no tyrant power as in a constitutional framework in which fundamental rights are granted not merely on paper but also in practice, both civil and social ones; no tyrant power in which neither practical nor legal obstacles stand in the way of seeking justice when necessary; no tyrant power as in a sort of power that cannot be contrasted, due to unrecoverable inequalities.²¹³

It is a state of disruption, in which individuals, *lost*, unnamed and “unseen”,²¹⁴ learn again to collaborate together, finding, and, *regaining*, purpose under the pennant of solidarity and true equality, overcoming challenges from within, through

²¹¹ See ELIA L. (1992). *Le norme sulle formazioni sociali nella Costituzione repubblicana. Studi in onore di G. Vignocchi*, Mucchi, Modena, 553; see also CIANCIO A. (2020). *Ripensare o “rinnovare” le formazioni sociali? Legislatori e giudici di fronte alle sfide del pluralismo sociale nelle democrazie contemporanee*, Giappichelli, Turin.

²¹² DAHL R. (1971). *Polyarchy: participation and opposition*, Yale University Press, New Haven

²¹³ See CHILTON A., VERSTEEG M. (2020). *How Constitutional Rights Matter*, Oxford Scholarship Online, quoting FUKUYAMA F. (1995). *Trust: The Social Virtues and the Creation of Prosperity*, Free Press, New York 356–57: “Francis Fukuyama described associations and organizations as crucial to the creation of social capital, the ‘ability of people to work together for common purposes in groups and organizations.’”.

²¹⁴ “Millions of spiritual Creatures walk the Earth / *Unseen*, both when we wake, and when we sleep”, Book 4, lines 677 ff., MILTON J. (1667). *Paradise Lost*.

common resilience. As analysed in the following *Part III*, namely in *Chapter VII*, specifically related to the Italian regulatory framework, fundamental constitutional principles (but also supranational values, *see*, e.g., Article 2 TEU), such as *solidarity*, *effective protection* and *juridical pluralism*, not only legitimise but, rather, call for a *meta-individual* dimension of adjudication to overcome the contemporary expanding gaps of enforcement.

PART III

JUDICIAL COLLECTIVE ENFORCEMENT:
ROUTE OF CHANGE

CHAPTER VI

CLASS ACTIONS: US ORIGINS, DEVELOPMENT AND CURRENT EU CONTEXT

1. Premise. Disrupting old ways. – 2. United States and common law origins. – 2.1. Objectives: advancing social change. – 2.2. Class actions and the civil rights movement. – 2.3. Procedural hallmarks and constitutional nuances. – 2.4. Lessons from the common law experience. – 3. Collective redress in the European Union. – 3.1. Objectives: avoiding consumer scandals. – 3.2. From “toxic cocktail” to “necessary” consumer representative actions. – 3.3. Procedural hallmarks and constitutional nuances. – 3.4. Current implementation: potential, challenges and open questions. – 4. Concluding remarks. Bridging opposite enforcement traditions.

1. Premise. Disrupting old ways.

The previous Part aimed at delineating the socio-constitutional transformations that have fundamentally altered power dynamics across broad and narrow scopes. This foundational context paves the way to delve into the pivotal inquiry of this study: discerning if, and in which manner, the class action framework can facilitate the enforcement of fundamental rights and foster societal progress. The analysis will focus on the Italian class action model instituted by Law No. 31 from 12 April 2019, into force since 19 May 2021. This dual procedural instrument, crafted to “bolster access to justice”,¹ has been cast – partially unexpectedly² – into the Italian regulatory landscape, with a general scope of application and, on paper, a disruptive

* Parts of this Chapter have been previously portrayed and further elaborated from the Author’s master’s thesis MAGLICA A. (2020) *Collective redress and access to justice. Current issues and future challenges* (unpublished).

¹ See, *infra*, Chapter VII.

² Id. The populist nature of the two majority parties at the Government at the time (MoVimento 5 Stelle, especially, and Lega) has certainly played a key role, as further explained.

potential. While further jurisprudential implementation is still necessary for a comprehensive evaluation of the instrument, it is clear that its introduction has substantially shuffled the cards, altering the established paradigms of fundamental rights enforcement. Its injunctive and compensatory mechanisms could empower marginalised and politically under-represented groups, challenging inequities and reducing power asymmetries. On the contrary, there is also a risk of class representatives' systematic abuses against the class interest or strategic engagement in litigation to undermine business rivals. A spectrum of different scenarios looms on the horizon, including the potential ineffectiveness of the mechanism due to minor yet key legislative and interpretative decisions,³ each with significant constitutional implications.

Investigating these prospective outcomes necessitates a detailed review of the Italian regulatory framework, declined, also comparatively (horizontally and vertically), in the multilevel European constitutional context (to which is dedicated the present Part, Part III – *Judicial collective enforcement: route of change*), as well as an evaluation of its concrete jurisprudential enactment via case studies (to which is dedicated the next Part, Part IV – *Enforcing fundamental rights: exercises of change*).

Still, this necessitates *additional groundwork*. It is essential to first reflect on the *origins and objectives* of the class action model that emerged in the United States in 1966. Furthermore, the *European Union milieu*, within which the Italian model is embedded, requires scrutiny for potential intersections and overlaps. The already much-mentioned Directive 2020/1828 is particularly pertinent in this regard, as well as European society's fundamental shift from perceiving class actions as a "toxic cocktail"⁴ to recognising them as a "necessary mechanism",⁵ driven by the crisis in representative governance and the amplification of inequalities through multi-dimensional relational imbalances.⁶ To this additional contextualisation will be

³ Id., i.e., regarding standing, competence or the meaning of "homogeneous rights".

⁴ See Question 9, at: <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_08_741>.

⁵ Recital 5, at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32020L1828>>.

⁶ See *supra*, Part II.

dedicated the present Chapter. The subsequent Chapter, instead, will draw the focus on the Italian jurisdiction (*Chapter VII*).

Finally, while conducting these reflections, it is critical to consider the multifaceted and multilevel landscape of judicial enforcement within which the Italian class action mechanism is called to operate in Europe. Various enforcement avenues exist, both national and supranational, individual and collective. Throughout this analysis, while still maintaining the focal point on Italian class actions, a *comparative* lens should be kept towards the most notable among them.⁷ Considering traditional techniques' main adjudicatory gaps and strengths allows for a proper backdrop against which class actions' effectiveness can be benchmarked. Among the former, for instance, certain apex courts' requirements for a previous exhaustion of domestic remedies or a previous establishment of ordinary proceedings where the specific legal question becomes relevant come into play.⁸ Other collective enforcement routes, at national and supranational level, but also individual claims – i.e. for injunctive redress – should be accounted, too.⁹ These other pathways of enforcement, nonetheless, are not only *alternatives*, but can also function in a *complementary* fashion with the class action technique. The remedial processes before the European Higher Courts (ECtHR and CJEU) and the Constitutional Court are, once again, illustrative examples. Therefore, the mechanisms of *coordination* and collaboration among the different levels and routes of enforcement are also an integral part of this discussion.¹⁰ No specific

⁷ On the increasing importance of comparative analysis, in all fields of legal study, see *supra*, *Chapter II*.

⁸ I.e., respectively the ECtHR, under Article 35, para. 1 ECHR, and the Italian Constitutional Court, under Article 1, Constitutional Law No. 1 from 9 February 1948.

⁹ Among the alternative collective enforcement routes a distinction should be kept between national and supranational ones. Among the former, the other “class action” mechanisms available in the Italian jurisdiction should be considered: the so-called (dual) “consumer class action”, (unnecessarily, as subsequently argued) introduced in 2023 in implementation of the 1828/2020 EU Directive, and the so-called “public class action” in front of the administrative judge. Among the latter, the pilot-judgement procedure in front of the ECtHR, under Rule 61 of the Rules of the ECHR Court, holds special comparative relevance. Individual actions, instead, should always be considered in alternative to injunctive class actions, considering why a collective claim, rather than an individual one, should be more effective. The next Part, focused on case studies, will address this question (see *infra*, in particular, *Chapter X*).

¹⁰ See RANDAZZO B. (2023) *Access to Justice in a Multilevel Constitutional System, Protecting Human Rights*, Giappichelli, Turin.

chapter will be dedicated to them, but rather they will be the *evaluative backdrop* against which the class action mechanism will be presented and discussed, throughout this Part and the next.

2. United States and common law origins.

Any reflection upon group representative litigation must start in the common law world and, more specifically, in the United States in 1966.

It is true that multi-party suits originated way, even centuries, before in the United Kingdom.¹¹ It is also correct that “public interest” actions have long been

¹¹ Historical records show that the roots of this complex procedural model date back to the Middle Ages, with some examples as far as in the 12th century and most forerunners amid the 17th and 18th century. See YEAZELL S.C. (1987). *From Medieval Group Litigation to the Modern Class Action*, Yale University Press, New Haven; STERNLIGHT J. (2000). *As Mandatory Binding Arbitration Meets the Class Action, will the Class Action Survive?*, in *William and Mary Law Review*, 42(1); ANDREOTTI T. (2017). *Dispute Resolution in Transnational Securities Transactions*, Bloomsbury, London.

The very first cases, which took place in the English countryside on the eve of the agricultural revolution, portrayed a rather different concept of group litigation, mostly regarding cohesive social groups of tenants already formed before the “suit”, who *specifically* consented to being represented in their manorial disputes for reasons of status rather than economy and sparing of time. A very good example is “Brown v. Howard”, 21 Eng. Rep. 960 (1701), where tenants were fighting with the lord of the manor over the sum he could exact for permitting succession to a tenancy, described in YEAZELL S.C. (1980). *From Group Litigation to Class Action*, Part I, in *UCLA Law Review*, 27(3), 514. See also HAZARD G., GEDID J. L., SOWIE S. (1998). *An Historical Analysis of the Binding Nature of Class Suits*, in *Faculty Scholarship*, 1423. In contrast, see CHAFEE Z. (1950). *Some Problems of Equity*, in *Michigan Law School Review*, according to whom: “In such situations, each member of the multitude had the same interests at stake as every other member, so that it was an obvious waste of time to try the common question of law and fact over and over in separate actions [...] It was much more economical to get everybody into a single chancery suit and settle the common questions once and for all.” In YEAZELL’S, HAZARD G.C. JR. and ANDREOTTI’S opinion, instead, these cases had an all-or-nothing character and more of a regulatory function, where “the judicial system would perform a legislative function with the judgement serving as a basis for a change in the substantive law governing the relationship between the parties.” The reason for this was the social structure itself: the groups were small, cohesive and had exactly identical rights to one another, since their relationship with the manorial lord or parishioner was the same. In a way, they were already institutionally and almost politically organised against their direct administrative unit/social superior (the manorial lord or parishioner). It was only in the middle of the 19th century that a new form of group litigation started to emerge, with substantial differences with regards to the members of the group and, thus, more similar to the modern one. Cases from the epoche show a noteworthy transmutation: the “multitude”¹¹ seeking litigative recognition were no longer a pre-existing social group (tenants fighting the same lord of the manor for the same tenancy issues, i.e. in “Brown v. Howard” in 1701 in England), but now had no apparent connection with one another, except the unlawful event giving rise to their damage and consequent claim.¹¹ Aggregating their suit was now indeed a question of economic and time-saving efficiency. An example would be that of shareholders defrauded by the same company while buying stock¹¹ or creditors entitled to be paid out of the same transaction or fund.¹¹ Hence, together with the shift from an agricultural, customary and rural society to an entrepreneurial-capitalist, individualistic and urban world, “group litigation

present in the civil law tradition (see, e.g., the Roman *actio popularis*).¹² The class action model, as herein intended and analysed, however, dates back to a precise historical context and legislative amendment: that, from 1966, to the well-known Rule 23 of the US Federal Rules on Civil Procedure, first adopted in 1938.¹³

began its transformation into class litigation”.¹¹ The more the opportunities for working together and connecting with each other in everyday life increased,¹¹ the more the demand for new procedural instruments capable of aggregating similar claims from similar plaintiffs against common defendants for common questions of fact and law increased as well. It was, therefore, the evolution of society itself to foster legal practitioners and scholars’ creativity in order to devise the necessary new legal technologies.¹¹

¹² The so called *actiones populares* from Ancient Rome, that could be brought to protect the *res publica*, which literally translates as the ‘public thing’, or ‘good’. They are accounted in *De popularibus actionibus*, Title XXIII, Book XLVII of the Digesto. See, also, FADDA C. (1984). *L’azione popolare: studio di diritto romano e attuale*, UTET, Milan, CASAVOLA F. (1958). *Studi sulle azioni popolari romane. Le ‘actiones populares’*, Jovene, Napoli, or, more recent, CAIELLI M. (2015). *Cittadini e giustizia costituzionale. Contributo allo studio dell’actio popularis*, Giappichelli, Turin (2015). Among the examples from these Authors, actions aimed at removing an object which may dangerously fall from a building (*actio de posito et suspensio*), actions for the good maintenance of aqueducts (*lex Quinctia de aquaeductibus*, y. 745) or actions against those violating a grave (*actio sepulchri violati*) can be reported. Rather interestingly, all these actions could be brought by anyone from the community having the right to vote (hence, not women or children) and in most of them damages could be retrieved in favour of public funds. In general, they were conceived as actions in which ‘the claimant, by defending the interest of the people, defends also his own interest’ (DI PORTO A. (2013). *Res in usu publico e ‘beni comuni’*, Giappichelli, Turin as cited by CAIELLI, above – unofficial translation). This was certainly encouraged by the identity between private interests and those of the whole community, in Ancient Republican Rome, as opposed to the distinction between the public and private sphere of the modern State from the 19th and 20th centuries (CAIELLI, above), which, nonetheless, as discussed in this paper, lately seems to be increasingly merging.

¹³ In the U.S., three legislative steps were taken, in the years 1848, 1921 and 1938 in order to regulate aggregate litigation, but none of them managed to explicitly and in a clear-cut way answer the question.¹³ The result were a series of contrasting decisions,¹³ with some courts clearly pushing for bindingness on all the potential members of the group while others kept preserving the absentees’ rights in the due process’ name. It was only in 1966, with the amendment of Rule 23 of the Federal Rules of Civil Procedure, that the issue was definitively tackled and that the class action model was brought to its current design.

In 1848, Federal Equity Rule 48 was introduced, according to which “where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed with the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants in the suit properly before it. But in such cases the decree shall be *without prejudice* to the rights and claims of all the *absent parties*.” (emphasis added, in BASSETT D.L. (2006). *Constructing Class Action Reality*, in *Brigham Young University Law Review*, 1415-33; in 1912, the Federal Equity Rules were revised and aggregate litigation became governed by Equity Rule 38, which did not explicitly state that class actions could be binding on absent class members but neither denied such a possibility; in 1938, instead, with the promulgation of the Federal Rules of Civil Procedure, Rule 23 was issued, allowing class actions, although raising different problems, among which “the proper labelling of a class action, the effects arising from it, the extent of the judgements in class actions and the lack of binding effect of a ‘spurious’ class action on non-party class members.” [in ANDREOTTI T. (2017). *Dispute Resolution in Transnational Securities Transactions*, Bloomsbury, London, and FORD T. (1966). *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, in *Antitrust Law Journal*, 254 – “spurious” was in

Since then, until modern times, it has collected vibrant praise for its access-to-justice and deterrence functions, as well as harsh critiques for its favouring of abusive litigation and fair trial guarantees' infringements.¹⁴ An undisputed point, still, by all means, is its central role in the common law – US, especially¹⁵ – legal system, built over the last six decades. In such length of time, an enormous, almost incalculable, amount of class actions has been filed over all the concerned jurisdictions. The results, from a socio-legal point of view, have been various: at times extremely positive, in other stances neutral and in a not-indifferent percentage even negative. The guiding parametres for these assessments can be, also interchangeably: *judicial economy*; concrete and fair *redress* for the injured – or at risk of injury – parties; effective *deterrence* from otherwise repetitive harmful activities, respect of *fair trial* guarantees; *systemic* consequences (beneficial or detrimental) for specific societal groups or for the society at large.¹⁶

The societal fields concerned are numerous, too. Examples of this *transsubstantive nature* are offered, *inter alia*, with regard to the enforcement of civil rights, in consumer law, product liability, anti-trust, securities frauds, discriminatory practices, employment law, police brutality, foster care, mass torts,

theory the main of the three categories of class actions envisaged by the Federal Procedural Rules, although in practice it was very difficult to identify the proper cases where it could be used].

See “Smith v. Swormstedt”, 57 US 288 (1853) and “Supreme Tribe of Ben-Hur v. Cauble”, 255 US 356 (1921), where the Supreme Court found that “if the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented”. These decisions were read by different federal courts as an establishment of the possibility of binding effects of collective actions on absent members. Still, other federal courts [i.e. in “Hansberry v. Lee” 311 U.S. 32, 45-46 (1940), “holding that the doctrine of res judicata does not apply to absent class members whose interest were not represented by the parties to the original suit”, kept ruling in favour of the absentees’ right to sue, “thus creating legal uncertainty” [See Hazard, *supra*.; ANDREOTTI T. (2017). *Dispute Resolution in Transnational Securities Transactions*, Bloomsbury, London].

¹⁴ MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399.

¹⁵ But also Canada and Australia. To a lesser degree the United Kingdom, although there seems to be a growing trend in recent years.

¹⁶ See UZELAC A. and VOET S. (2021). *Class Actions in Europe. Holy Grail or Wrong Trail?*, Springer, Cham.

environmental and data protection.¹⁷ This large variety of cases is in line with the fundamental goals of the legislator when amending Rule 23.¹⁸

2.1. *Objectives: advancing social change.*

Before further delving into the main features of the “US-style” class action suits, it seems relevant to briefly dwell on such goals. Drawing from local scholarship’s insights, two main reasons, partially merging into one, can be attributed behind the bold amendment-choice from 1966. They both respond to the precise historical socio-economic context and to the peculiarities of the US (and common law) constitutional framework and ways of adjudication. Somehow, as it shall be discussed in the following, similar *liaisons* undergo the most recent process of introducing collective redress within EU-civil law jurisdictions; safe for the crucial distinction of an antonymic legal fabric and tradition, which affects the tolerability of the “legal transplant” at hand.

The first reason was already highlighted with farsightedness by Oliver Wendell Holmes in 1897, when he underscored the *shifting nature of tort-law*, based on the then-establishing new industrial, social and economic structures:

Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is

¹⁷ See, *inter alia*, GREENBERG J. (1997). *Civil Rights Class Actions. Procedural Means of Obtaining Substance*, in *Arizona Law Review*, 39, 575; MARCUS D. (2011). *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, in *Florida Law Review*, 63, 657; MARCUS D. (2015). *The Public Interest Class Action*, in *Georgetown Law Journal*, 104; MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 587.

¹⁸ *Id.*, in particular MARCUS D. (2011). *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, in *Florida Law Review*, 63, 657.

desirable that the public should insure the safety of those whose work it uses.¹⁹

Such view was subsequently, with reason, emphasised by several other scholars, as it is nowadays in the European continent as well.

Some argued, from an economic analysis of law perspective, “the economic justification of the class action”,²⁰ stressing the importance of assigning the correct market value to injury-causing activities, however small,²¹ and of offering sufficient economic incentives for pursuing interests shared by however large groups.²² Similar reasoning has been offered in relation to the recent EU Directive on collective redress (the above-mentioned RAD),²³ underscoring how, in theory, “collective actions can potentially provide a solution for the problem that individual litigation will not take place due to rational apathy, information problems, free-riding, etcetera”.²⁴

Others have focused on the changing role of the judiciary and of the nature of civil litigation, to explain how the class action model answered the growing “proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects”.²⁵ Others again expanded the vision to the society at large, to demonstrate how, from the initially binary, *one v. one*, common sets of relationships, the society had (is) progressively and exponentially evolved (evolving) towards a *one v. multitudes* typical connection in every-day life (see *supra*).²⁶ It is, in short, the process of

¹⁹ WENDELL HOLMES O. JR. (1897). *The Path of the Law*, in *Harvard Law Review*, 10, 457. Extract first cited by ISSACHAROFF S. (2013). *Assembling Class Actions*, in *Washington University Law Review*, 90, 699.

²⁰ ADLER V.O. (1972). *The Viability of Class Actions in Environmental Litigation*, in *Ecology Law Quarterly*, 2, 533.

²¹ CALABRESI G. (1970). *The Cost of Accidents: a Legal and Economic Analysis*, Yale University Press, New Haven.

²² OLSON M. (1965). *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard University Press, Cambridge, Massachusetts.

²³ See, *supra*, Part I.

²⁴ VISSCHER L. and FAURE M. (2021). *A Law and Economics Perspective on the EU Directive on Representative Actions*, in *Journal of Consumer Policy*, 44, 455.

²⁵ CHAYES A. (1976). *The Role of the Judge in Public Law Regulation*, in *Harvard Law Review*, 89, 1281.

²⁶ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, in *Buffalo Law Review*, 25, 643.

standardisation and *massification* of human relationships brought by technological innovation and globalisation.²⁷ As argued, from a judicial standpoint, this created (creates) a series of *adjudicatory gaps* which can't be addressed by the single individual alone, with the traditional one v. one paths of enforcement.²⁸

The second reason – which partially falls back into the first – pertains to the specific rise of *racial desegregation* and, in general, *civil rights movements* in the United States starting from the late 1930s and culminating in the 1960s, at the time of the Rule 23 amendment.²⁹ The class action model emerged as an ideal mechanism for bringing the political instances of such upcoming groups into the judicial arena, and, in general, in subsequent years, as a valuable instrument of the liberal “left” wing of the political spectrum.³⁰ It was a technique capable of posing “*counter-majoritarian force*”³¹ against the governmental and legislative inertia, if not intentional stalling, and advancing social change through the courts. It was also, and most importantly, in the minds of the amendment drafters, a mechanism capable of litigation-driven *systemic integration*. Its design was specifically aimed at overcoming segregationist judges’ delaying tactics through repetitive individual (and burdensome) litigation.³²

Rule 23(b)(2), regulating the injunctive class action, in particular, was designed with this aim, as shown by the notes of the Advisory Committee to the 1966 Amendments: “[i]llustrative [...] various actions in the *civil-rights* field where a party is charged with *discriminating unlawfully* against a class”. On this noble altar, certain due process procedural guarantees were sacrificed, especially for the injunctive remedy, to favour wider substantive justice.³³

²⁷ Id.

²⁸ See *supra*, Chapter V.

²⁹ See MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 587.

³⁰ CUMMINGS S.L. (2020). *Public interest litigation in a comparative perspective*, in *Australian Journal of Human Rights*, 26, 184.

³¹ ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44.

³² MARCUS D. (2011). *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, in *Florida Law Review*, 63, 657.

³³ Id.

The class action model, in sum, established itself as a form of *private enforcement*, as opposed to the public one, through which *private individuals*, self-appointed champions of the (or a) community, brought issues which concerned not just themselves, but a large part of the *public interest*.³⁴ Under this viewpoint, it shattered the traditional divide between private and public law, still largely followed in the contemporary civil law experience.³⁵ On the one hand, it entrusted, if not outsourced, the enforcement of public goals to private individuals; this is particularly evident in the litigation for the civil rights movement. Its counterbalance is the significantly lower number of public “administrative agencies”, if not “public enforcers”, in the common law world, as opposed to the civil law tradition.³⁶ On the other hand, returning to Wendell’s premonitory evaluations of tort law from the end of the nineteenth century, as well as to the already-discussed social and constitutional shifts of the recent decades (see *supra*), it fundamentally questioned the legal paradigms of “public” and “private” interests.³⁷

Social change was no longer sought in the Parliament (or, rather, Congress), but also, with larger impact, in the courts.

2.2. *Class actions and the civil rights movement.*

The historical reconstruction from US scholarship clarifies the central role played by the objective of creating an effective tool for desegregation suits in the

³⁴ HOMBURGER A. (1974). *Private Suits in the Public Interest in the United States of America*, in *Buffalo Law Review*, 23.

³⁵ *Id.*

³⁶ See MILLER A. (2010) *From Conley to Twombly to Iqbal. A Double Play on the Federal Rules of Civil Procedure*, *Duke Law Journal*, 60(1), 6, quoted in ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44, 390: Miller “powerfully makes the point about the deregulatory impulse behind the private attorney general model: ‘Even though private lawsuits might be viewed as an inefficient ex post method of enforcing public policies, they have dispersed regulatory authority; achieved greater transparency; provided a source of compensation, deterrence, and institutional governance; and led to leaner government involvement. Without this private-attorneys-general concept, the substitution of an alternative methodology would be necessary. This probably would mean the establishment of the type of continental-style, centralized bureaucracies and administrative enforcement that many think are inconsistent with our culture and heritage.’”

³⁷ CHAYES A. (1976). *The Role of the Judge in Public Law Regulation*, in *Harvard Law Review*, 89, 1281.

drafting of the 1966 class action model, especially for its injunctive remedy.³⁸ After the first successes in desegregation litigation through the new tool, by the NAACP Legal Defense Fund and similar associations, their attention turned to other ventures of progressive/liberal stance.³⁹

It is not a coincidence, therefore, that in 1983 “civil rights class actions” represented 38,6% of all registered class action suits filed under Rule 23, the largest percentage of any category in front of federal courts.⁴⁰ A non-exhaustive list of cases touches: discrimination in employment or education settings, the education of children with disabilities, the safety and health of children in foster care, the right to public housing and other facilities, promotion of welfare reforms, police brutality, immigrants’ and prisoners’ rights.⁴¹

The main justification behind the use of a class action, instead of an individual suit, was twofold: on the one hand, ensuring *erga omnes* extensive effects of the *res judicata* (in regard to the whole class); on the other hand, obtaining *systemic* “diffuse” effects, often quasi-regulatory, to overcome legislative or executive inertia.

The former goal (*trans-individual* effects) was repeatedly mentioned by the Advisory Committee to the 1966 US Federal Amendments in its working papers

³⁸ MARCUS D. (2011). *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, in *Florida Law Review*, 63, 657.

³⁹ MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 587.

⁴⁰ ANCHETA A.N. (1985). *Defendant Class Actions and Federal Civil Rights Litigation*, *UCLA Law Review*, 33, 283

⁴¹ See, e.g., GREENBERG J. (1997). *Civil Rights Class Actions. Procedural Means of Obtaining Substance*, in *Arizona Law Review*, 39, 575: Class actions have been used to challenge discrimination in employment, education, the use of public facilities and housing, to assert prisoners' rights, and to promote welfare reform, to name just a few areas that conventionally are put in the civil rights category. In one case, 'a district court granted a stay of execution in a class action habeas corpus proceeding on behalf of a class consisting of all Florida inmates on death row'. CARROLL M. (2021). *Civil Rights, Access to Counsel, and Injunctive Class Actions in the United States*, in FITZPATRICK B. and THOMAS R. (eds). *The Cambridge Handbook of Class Actions: An International Survey*, Cambridge University Press, Cambridge, 25: “Injunction-only class actions, however, continue to be certified, and they continue to play an important role in civil rights litigation. For example, federal courts have recently certified injunction-only class actions in cases involving family separation at the border, the education of children with disabilities, the health and safety of children in foster care, medical care for incarcerated persons, and the reproductive rights of immigrant detainees, to name just a few”.

and exchanges.⁴² Unsuccessful cases from the previous class action regime, from 1938, and from individual injunctive suits, which had failed to obtain a wide application, were specifically taken into account. Illustrative examples are those allowing on otherwise all-white means of transportation or schools only the named plaintiffs, or individual claimants, rather than the whole concerned group.⁴³ This significantly raised the litigation costs and time, obliging to litigate one by one and making even successful suits quite unattractive for potential plaintiffs, since they would have been the only ones allowed from the concerned group (black bus-riders or students, in this case).⁴⁴ Furthermore, information asymmetries and possible fear of retaliation in appearing as plaintiffs were considered, too. Class actions, brought by (self-)elected champions for the whole community, solved this apparently minor yet crucial issue.⁴⁵

The latter justification, that is the possibility of reaching systemic and structural effects became the evermore evident after the 1966 amendments. Other cases, too, such as those concerning prisoners' rights, clearly demonstrate the problem. An overcrowded prison system, for instance, could not be tackled systemically by an individual suit.⁴⁶ Through it, an individual could merely receive modest economic redress for the suffered treatment. Certainly, individuals could not file a complaint regarding the widespread and structural violations resulting from systemic overcrowding. Moreover, being just one person – further compounded by the ordinary economic, organisational, informational, and psychological disincentives dictated by their circumstances –, the economic incentive for state authorities to pursue structural change would be none. Another key issue raised by US scholarly commentators is the fact that prisoners there lack(ed) voting rights.⁴⁷ This fundamentally hinder(s)(ed) their possibility to participate to the political process

⁴² MARCUS D. (2011). *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, in *Florida Law Review*, 63, 657.

⁴³ Id.

⁴⁴ Id.

⁴⁵ See ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44, commenting *Brown v. Board of Education*.

⁴⁶ Id. See, *infra*, Chapter X.

⁴⁷ Id.

through elected representatives, thus making it even harder for them to have their stances advanced in *fora* other than the judicial one. Further comparative assessments emerge in relation to other mechanisms available in the EU multilevel constitutional system – *in primis*, the pilot-judgement procedure before the ECtHR.⁴⁸

For now, it suffices to underscore the ability – and goal – of class actions, at least in the initial US experience, to transcend the individual rights and interests of the parties involved in the proceedings.⁴⁹ Evidently, not only individual, but also collective rights and diffuse supra-individual interests can thus be enforced (see *supra*, Chapter II). The general right to breath clean air or to live in a healthy environment, not affected by climate change’s adverse effects, is an extremely relevant example today. Despite most recent drawbacks and backlash,⁵⁰ class actions in the US, as its case law demonstrates, have been an invaluable tool for landmark systemic and structural reforms, in light of otherwise-dormant civil rights and constitutional substantive regulations.⁵¹

⁴⁸ See *infra*, Chapter X.

⁴⁹ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist’s Contribution*, in *Buffalo Law Review*, 25, 643.

⁵⁰ MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399.

⁵¹ In sum, they assume a public-almost regulatory role. In this regard, it has long been stated that litigation can serve as a powerful “governance tool” in any attempt to ensure compliance and enforceability of substantive laws and prevent or discourage dangerous activities causing loss or injury to others [HENSLEY D.R. (2001). *Revisiting the Monster: New Myths and Realities of Class Actions and Other Large Scale Litigation*, in *Duke Journal of Comparative and International Law*, 11, 179, 211-2; MURPHY B. and CAMERON C. (2006) *Access to Justice and the Evolution of Class Action Litigation in Australia*, in *Melbourne University Law Review*, 30 (2), 399-440; ROSENBERG D. (1987). *Class Actions for Mass Torts Doing Individual Justice by Collective Means*, in *Indiana Law Journal*, 62(3)]. To this regard, it should be stressed that such a need for concrete justice flows in most cases not from a lack of substantive rights, but simply because there is no adequate and effective procedural remedy to enforce them. After all, as it has often been stated [i.e. UZELAC A. (2014). *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*, Springer, Cham], substantive and procedural rights are nothing but two sides of the same coin and, as advanced and innovative some rights recognised by the legal system may be, no real value would come from them to society and to the individuals who compose it, unless there is a proper and solid structure to hold them and, at the same time, grant, not only to each citizen, but to each human being and to each legal entity their true and concrete recognition and enforcement. In this case, it has been noted [Rosenberg D. (1987), *supra*], the class representatives and legal counsels bringing the class action would assume the function of a sort of “private attorney general”.

The premise is that the government administration and “captured or resource-strapped public agencies cannot [always] adequately enforce the substantive law” [MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law*

The defendants in such cases are both private (in particular, discriminating employers or polluting companies, recently even “private detention centres”)⁵² and public, in the sense of governmental agencies if not the State itself. The latter option, is, as we shall see, not always guaranteed under the EU-model class suits. This evidently curtails significantly the concrete perimeter of application of the collective procedural device.

As depicted by the above-mentioned percentages, in any case, other types of claims were brought through class actions, too. Largely concerned fields of law were *consumer*, defective products and securities disputes, on the one hand, and *mass harm* cases, on the other hand. As subsequently argued, it is merely this kind of class-litigation (with partial doubts on mass harms) that has been subject of the EU legislator’s most recent initiatives on collective redress.

Review, 90, 587.], but rather, quite often, find themselves unable to control and offer appropriate deterrence to large businesses’ improper activity. If, in addition to this, we count the abovementioned notoriously high costs of individual justice and unbalanced, almost prohibitively, power relationships between weak parties and corporate defendant “repeat players”, it is evident that, without an alternative tool like class actions, “a great deal of substantive law would go under-enforced” [MARCUS D. (2013), *supra*], as no one would sue or act to vindicate those claims and impede the unlawful activity.

On the other hand, economies of scale rising from a class action’s joinder of claims enable an independent, well-financed and specifically-prepared “cadre of private attorney generals” to compensate for the inadequacies of government regulators and individual litigants, thus helping “implement a positive program[me] of social or economic reform”⁵¹ and making Rule 23 “an evolutionary response to the existence of [otherwise] unremedied injuries” [MARCUS D. (2013), *supra*]. It must be noted, in any case, to this regard, that the critics to this “regulatory conception” (in favour of the so called “adjectival conception”, which stresses the importance of the substantive law over the procedural and the necessity to strictly abide by formal procedural rules) claim it “prioritizes regulatory efficacy as a primary rule” [MARCUS D. (2013), *supra*], while leaving individual remediation as a secondary goal, if that [MOORE, B.C. JR. (1977). *Does it Go Far Enough?*, in *Applied Business Administration Journal*, 63, 837-42, arguing that “the primary function of the class action is the deterrence of harmful conduct” and “judicial efficiency and compensation of small claimants are merely desirable by-products”].

⁵² See the case known as the ‘Kids for cash scandal’, which regarded hundreds of children sent to a private detention center by two judges from Pennsylvania in exchange for large amounts of money from the developers of the detention center (Mericle Properties). Several of the children were sent for minor issues (such as, literally, stealing candy) or none at all, and suffered traumatic stress from this experience, leading some of them even to suicide. After the criminal trial, a settlement was reached with Mericle Properties for around 20 million dollars, which were put in a specifically set foundation. In August 2022, moreover, a 206 million-dollar verdict was handed down in a civil law class action against the two judges.

Consumer, defective products and securities class action respond to the *rationale* – first proposed by economic-analysts of law, such as Guido Calabresi⁵³ or Richard Posner,⁵⁴ followed by several other commentators⁵⁵ – pursuant to which also *small claims* deserve to be litigated for the economic well-functioning of the societal markets. As notably argued by the same Posner, acting as a judge (after having been an academic), “only a lunatic or a fanatic sues for \$30”.⁵⁶ In today’s society, it is indeed rather common that in different areas of law and everyday life potential claims arise,⁵⁷ but they are so small that it wouldn’t be worth pursuing them for a single individual. Especially in consumer law, several examples can be found of claims of few hundred dollars which cannot be pursued singularly.⁵⁸ Hence, even though *substantially* one party may have the right to ask for a refund or have its damage repaid, *procedurally* and practically it is impossible for them to have legal satisfaction, because their “claims may be so small and unmanageable [...] that the cost of enforcing them outruns any promise of benefit”⁵⁹ and, also, since the power and resource advantages “repeat litigation players” enjoy over

⁵³ CALABRESI G. (1970). *The Cost of Accidents: a Legal and Economic Analysis*, Yale University Press, New Haven.

⁵⁴ POSNER R.A. (1973). *Economic Analysis of Law*, Aspen, Boston.

⁵⁵ E.g., VISSCHER L. and FAURE M. (2021). *A Law and Economics Perspective on the EU Directive on Representative Actions*, in *Journal of Consumer Policy*, 44, 455.

⁵⁶ *Carnegie v. Household International, Inc.*, 376 F3d 656, 660–62 (7th Cir 2004).

⁵⁷ The availability of such a mechanism is of increasing importance in a global economy in which civil wrongs are often committed on a mass scale by large and powerful entities [MURPHY B. and CAMERON C. (2006) *Access to Justice and the Evolution of Class Action Litigation in Australia*, in *Melbourne University Law Review*, 30 (2)].

⁵⁸ YAN J. (2011). *A Lunatic’s Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, in *Berkeley Journal of Employment and Labour Law*, 32, 551; ; STERNLIGHT J. (2000). *As Mandatory Binding Arbitration Meets the Class Action, will the Class Action Survive?*, in *William and Mary Law Review*, 42(1); “Eisen v. Carlisle & Jacquelin”, 417 U.S. 156 (1974): “A critical fact in this litigation is that petitioner’s individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner’s suit proceed as a class action or not at all.”; “Phillips PetroleumCo. V. Shutts”, 472 U.S. 797 (1985): “class actions [...] may permit the plaintiffs to pull claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”.

⁵⁹ GALANTER M. (1974). *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, in *Law and Society Review*, 9, 95.

“one-shooters” creates a fundamental power imbalance.⁶⁰ Additionally, some authors have noted that in some cases, “single players”, apart from the resources, may even lack the legal knowledge to realise that they have been harmed and are entitled to raise a claim.⁶¹

Furthermore, from an economic analysis of law standpoint,⁶² this entails a major incentive for large corporations to pursue illicit activities or fraud schemes, knowing that they will be shielded by the lack of procedural protection for injured people and that the few hundred dollars saved for every single one of them, if multiplied by hundreds or even thousands, represent significant sums.⁶³ The consequent risk is the start of a vicious circle, where strong parties get away with their business, despite repeatedly harming large groups of people, become stronger, bolster their presence on the market, enhance their lobbying network and, possibly, even gain a dangerous monopoly position, while weak and single individuals are left alone, in rational apathy, with their empty substantial rights and worthless claims.⁶⁴

This applies to consumer law and small claims, but it can be easily transposed to torts law, securities and other fields as well,⁶⁵ where, despite having suffered major

⁶⁰Id.; CAPPELLETTI, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to-Justice Movement*, in *The Modern Law Review*, 56.

⁶¹ RESNIK J. (2011). *Fairness in Numbers: Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, in *Harvard Law Review*, 125(1), 78-171.

⁶² POSNER R.A. (1973). *Economic Analysis of Law*, Aspen, Boston.

⁶³ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

⁶⁴ A fundamental critique, to this regard, is that potential defendants would just raise the prices of their products/services, to cover the risk of class litigation.

⁶⁵ In torts law, for example product liability, oil spills or asbestos exposition. The securities field has probably seen the largest class action settlement awards. In fact, the early 2000s were characterised by several shareholder suits against large corporations for faulty accounting, price fixing, falsification of financial statements to investors, schemes to conceal the internal losses and similar scandals which unexpectedly had led the companies to bankruptcy, leaving the shareholders overnight with nothing but complete loss of their savings and pensions. The result, thanks to the class action mechanism, were the awards of literally billions of dollars in damages. Some examples are “Enron” from 2006, with 7.2 billion dollars (688 millions of which were destined to the law firm who led the class action during six years) awarded in settlement to approximately 1.5 million individuals and entities, “WorldCom”, with 6.1 billion dollars awarded in settlement in 2005 to approximately 830.000 investors, and several other settlements, like “AOL Time Warner” (2005), with 2.5 billion dollars, “Cedant” (2000) with 2.5 billion dollars and “Tyco International” (2007), with 3.2 billion dollars. To this regard, it’s interesting to note, on one side, that, after certification, all the defendants were interested in a settlement rather than risking a jury trial and, on the other side, that after this short period of time not so many big cases have come up in this field, making it

injuries and losses, individual claimants are incapable of dealing equally or even dealing at all with governments, corporations and other powerful, “deep-pocketed and well-informed” defendants,⁶⁶ who manage to swamp and bury any single claimant’s rightful claim under endless discovery, appeals and unsustainable legal fees.⁶⁷

Against such backdrop, the class action model set itself up, in several stances, safe for most recent backlash and still relevant causes for concern, subsequently analysed, as the appropriate tool to level the juridical field between weak single parties and otherwise dominant players. Suddenly, by aggregating the common interests of a certain group of individuals, weak parties were able to enforce their rights in a single suit and reduce the power imbalances.⁶⁸ In sum, proving correct the old adage that “there is strength in numbers”, class actions offered a “way of

believable that companies have learned the lesson the hard way and, therefore, that, at least to some extent, the deterrence objective has been attained. Second, although less advertised because of the considerably lower sums and number of members involved, consumer class actions are certainly worth a mention as a typical example of collective lawsuit, where individuals obtain redress for small damages which, solely, they would have never been able to vindicate. A ground-breaking case to this regard was “Vasquez v. Superior Court” from the California Supreme Court 1971, where the class sued a frozen food and freezers company to rescind their instalment contract, claiming that the company’s door-to-door salesmen had employed fraudulent sale’s talk. The key for certification of the class action was managing to prove that all the buyers/class members had been subject to a common “sales pitch”, based on a monologue contained in a training book and sales manual that all salesmen of the company were employing, thus creating on all buyers common reliance for common reasons. The Court reasoned that the “[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society” and that “class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims” [“Vasquez v. Superior Court”, 1971 Cal., accounted by CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

⁶⁶ “Fostif Pty Ltd v. Campbells Cash & Carry Pty Ltd”, 63 NSWLR 203, 226 (2005), on the issue of litigation funders.

⁶⁷ ROSENBERG D. (1987). *Class Actions for Mass Torts Doing Individual Justice by Collective Means*, in *Indiana Law Journal*, 62(3): “In mass tort cases involving claims for personal injury, which pose daunting problems of causation and remedy, the price of individual justice is notoriously high. Because they typically involve complex factual and legal questions, mass tort claims are exceedingly, if not prohibitively, expensive to litigate. The questions of whether the defendant’s conduct failed to satisfy the governing standard of liability frequently entail interrelated technological and policy issues that require extensive discovery, expertise, and preparation to present and resolve adequately. Equally demanding are the causation issues in mass tort cases, such as whether the plaintiff’s condition was caused by exposure to the substance in question or to some other source of the same disease risk”.

⁶⁸ GALANTER M. (1974). *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, in *Law and Society Review*, 9, 95.

enforcing rights which exist on the books but are meaningless because there is no practical way to protect them”,⁶⁹ in a (worldwide) trend⁷⁰ to *effectively* make the law work.⁷¹

2.3. Procedural hallmarks and constitutional nuances.

As already expressed, the modern model of class action, largely portrayed as a “uniquely American procedural device”,⁷² came to life in 1966, after the revision of Rule 23 of the U.S. Federal Rules of Civil Procedure.⁷³ These Rules, adopted in 1938 and subject to different amendments since, govern civil proceedings in the United States district courts⁷⁴ with the purpose “to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁷⁵

The modern Rule 23, titled “class actions” and which is still nowadays rather similar to the 1966 version, is structured in a way as to present: *i)* the four prerequisites necessary in order to form a class action; *ii)* the three different kinds of class actions available, characterised by a transsubstantive nature; *iii)* the certification, notice and judgement phases; *iv)* the orders the court may make in the

⁶⁹ HOMBURGER A. (1974). *Private Suits in the Public Interest in the United States of America*, in *Buffalo Law Review*, 23.

⁷⁰ CAPPELLETTI, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to-Justice Movement*, in *The Modern Law Review*, 56.

⁷¹ To this regard, it should be stressed that such a need for concrete justice flows in most cases not from a lack of substantive rights, but simply because there is no adequate and effective procedural remedy to enforce them. After all, as it has often been stated [i.e. UZELAC A. (2014). *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*, Springer, Cham], substantive and procedural rights are nothing but two sides of the same coin and, as advanced and innovative some rights recognised by the legal system may be, no real value would come from them to society and to the individuals who compose it, unless there is a proper and solid structure to hold them and, at the same time, grant, not only to each citizen, but to each human being and to each legal entity their true and concrete recognition and enforcement.

⁷² SHERMAN E.F. (2002). *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul Law Review*, 52, 401; BORN G. and SALAS C. (2012). *United States Supreme Court and Class Arbitration: A Tragedy of Errors*, *The Symposium*, in *Journal of Dispute Resolution*, 1, 3.

⁷³ In particular with the introduction of Rule 23(b)(3) and of the opt-out approach, which will be further on analysed.

⁷⁴ See “United States Courts” official website: <<https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure>>.

⁷⁵ Rule 1 Fed. R. Civ. P. It must be noted that, for matters governed by State and not Federal law, these Rules do not apply, although some States have adopted the very same or at least extremely similar provisions with regards to class actions. Hence, as most authors have done in the past, for reasons of simplicity and clarity only Rule 23 Fed. R. Civ. P. will be hereby analysed.

conduct of actions; *v*) the eventuality of settlement (rather common in practice, once certification is obtained), voluntary dismissal or compromise; *vi*) the possibility of appeals; *vii*) the appointment of the class counsel; *viii*) the award of attorney fees.

All these issues will be hereinafter briefly presented and synthetised (without mentioning more specific and related rules), highlighting the relevant features for the purposes of this work. Procedural and constitutional nuances will then be brought on the comparative table against the backdrop of the current EU and, in particular, Italian regime of representative litigation.

The very first preliminary question pertaining any class action regime should be *who* brings the claim before a court, given that the class is all but formed at this stage. The one to take this task under the US Rule 23 is a *member of the class* (or more than one), who will assume the role of named plaintiff. Despite this peculiarity, it is important to stress that, in the future, his or her position will not be in any way different from that of the other class members; in fact, this individual is not rarely recognised as a “mere figurehead” used by the class lawyer as a “pawn needed to gain entry to court.”⁷⁶ As it shall be discussed, the 2019 Italian class action presents, formally, a similar figure, who bears the same name (“class representative”) but has a substantially different function.⁷⁷

Retaining focus on the US regime, the peculiarity distinguishing this first named plaintiff from *general* society is the fact that he or she, like the rest of the class, has suffered a *specific* wrong. In particular, what puts them into motion is an act or omission from the defendant, “radiating outwards and harming different people”, at which point they “step[s] forward to champion the rights of all those affected.”⁷⁸

The latter, that is the future class, may form in different backgrounds, depending on the setting where the act or omission of the defendant was perpetrated. Its

⁷⁶ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, in *Buffalo Law Review*, vol. 25, 643; CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92) some authors even argue that such figure causes confusion and should hence be eliminated, see BURNS J.W. (1990). *Decorative Figureheads: Eliminating Class Representatives in Class Actions*”, in *Hastings Law Journal*, 42, 165-8.

⁷⁷ See *infra*, Chapter VII.

⁷⁸ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

members could come from a pre-existing group, such as a school's students, factory's workers, a company's shareholders, a small town's residents; alternatively, they could be united only by the act or omission suffered, such as being the consumers of the same defective product or harmful service. What, under any circumstance, connects them is a common complaint against a common defendant for "common questions of law or fact."⁷⁹ An example could be a company which sells defective products to its customers. In this case, the initial plaintiff would be one of the customers, who previously bought the company's defective product and now suffered damage from it. Other examples could be the depositors from the same bank suing the bank directors for breach of trust,⁸⁰ or the inhabitants of a small region fighting the same chemical corporation that was dumping its wastes in the local water and thus contaminating it.⁸¹

A key feature of this regime is, hence, the existence of a *class* of people. It cannot be the general society; however large, it still needs to be a *confined* group or category of individuals. As argued by Samuel Issacharoff, this key trait sets the procedural technique at hand as a specific mechanism of *counter-majoritarian* stances.⁸² Looser rules, instead, seem to have been set for the Italian class action, especially for the injunctive one, as subsequently discussed in the next Chapter.

The *representative* nature of this type of suit is central. Per Rule 23(a), "One or more members of a class may sue or be sued as representative parties *on behalf* of all members". This entails the *non-participation* (at least directly) to the judicial proceedings of all the other members of the class (potentially even billions of people) who will be bound by the *res judicata* effects of the decision. In favour of judicial economy, effectiveness of justice and injury-deterrence, the right to "a day in court" is therefore sacrificed. Constitutional concerns for the respect of fair trial guarantees arise, only partially tempered by the prominent guarantor role of the

⁷⁹ Rule 23 of the U.S. Federal Procedural Rules "One or more members of a class may sue or be sued as representative parties on behalf of all only if [...] there are questions of law or fact common to the class".

⁸⁰ "Perry v. Meak", Oklahoma (1980).

⁸¹ "Sterling v. Velsicol Chemical Corp", 6th Circuit (1988).

⁸² ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44.

judge and by notice and opt-out possibilities – the latter not for injunctive actions *ex* Rule 23(b)(2), though.

Another characteristic is that the class – conceptually at least – *preexists* to the filing of the action. This is strictly connected to the opt-out regime established in 1996, presented in the following.

Ordinarily, the individual willing to “champion” both his or her own harmed rights and those of the other people (members) similarly situated contacts a lawyer or is contacted by one already aware of the issue at stake. It is not unusual for the latter circumstance to occur, given the *entrepreneurial* nature of this type of litigation for class attorneys. In this regard, it is important to note that the lawyer should be ready to take the risk as well, since litigation costs, and, in particular, the heavy costs of notice to all class members, are borne by them.⁸³ Hence, the importance of “*adequacy*” and “*representativeness*”, as prerequisites for all class actions under Rule 23.⁸⁴ The benefits class lawyers can gain from this “legal bet” are usually well worth the gamble. In case of successful outcome, in fact, all costs will be either recovered from the losing party or from the fund set for the compensation of the class and, most importantly, the *contingency fees* they work on could grant them a massive payoff, especially in case of settlement.

Statistics often show that most of the certified class actions end with a *settlement*, without further continuing the proceedings. As a consequence, attorneys have often been criticised for their tendency to “create” class actions in order to pursue their own interests (i.e., the contingency fees), rather than those of the class. In fact, one of the main and most condemned (especially on European shores) issues regarding class actions is this: on the one hand, class lawyers have often been found to push for a settlement adverse to the interests of the class, sometimes leaving its members with just “coupons” or very modest paybacks, in order to close deals very beneficial to their own pockets with the corporate defendants (not so rarely in *collusive* agreements); on the other hand, they have often tried to ride the mediatic wave of

⁸³ Although third-party funders are increasingly gaining importance in this field as well. See *infra*.

⁸⁴ See *infra*, Chapter XI.

certain disputes against corporate businesses by creating an “*in terrorem* regime” and pushing for settlement, once the suit is certified.⁸⁵

Once these preliminary issues are settled and the class named plaintiff and legal counsel are found, the suit is brought before the court, where a judge will hear the parties and decide on the question of class certification, which represents a fundamental step, since it’s aimed at granting class action status to the lawsuit. After that, it is not rare at all to start negotiations for settlement.⁸⁶ On this matter, most of class actions’ critics emphasise how corporate defendants, despite not being guilty, might often be pushed to settle in order to avoid all the bad publicity arising from the trial or the risk of a potentially financially-destructive judgement for their business, also in light of the juries’ notorious unpredictability and in particular because of the high costs of discovery. The issue of equality of arms and, in general, of fair process regarding defendants needs to be considered, too. In particular, the role (and boundaries) of the media and the possibility of class actions filed by competitors should be accounted.

In this context, in order to grant certification, Rule 23 sets four prerequisites to be assessed by the court. They are the following: “*numerosity*”, meaning that joinder of all class members in ordinary litigation is otherwise impracticable;⁸⁷ “*commonality*” of the questions of fact and law, meaning that the harmful event from the defendant is the same and that the decision can resolve “in one shot” all the claims of the class;⁸⁸ “*typicality*”, meaning that the representative’s claims or

⁸⁵ MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399.

⁸⁶ Note (1978). *Class Actions under the Truth in Lending Act*, in *Yale Law Journal*.

⁸⁷ There has been a lot of discussion on which is the exact number to render a class “numerous” and whether such number really exists. Some courts argue that a class is numerous if it counts at least forty members [“*Marcus v. BMW of N. Am.*”, LLC, 687 F.3d 583, 591-92 (3rd Cir. 2012)], while others insist that no fixed number is sufficient and that such prerequisite must be addressed case by case on the basis of the members’ geographical dispersion, the ease with which they can be identified, the size of the claims and the nature of the action [“*TWL Corp.*”, 712 F.3d 886, 894 (5th Cir. 2013)]. See *infra*, *Parts IV and V*.

⁸⁸ A very important decision to this regard was “*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. Supreme Court, 131, 2541 (2011)”, where it was clarified that merely reciting a list of common questions is not sufficient. Instead, “[w]hat matters [...] is the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation” [emphasis added]. The class members’ claims “must [therefore] depend upon a common contention [...] of such a nature that it is capable

defences must have equal characteristics to those of the rest of the class;⁸⁹ “adequacy” or “representativeness”, that is worthiness⁹⁰ of the class representative to protect the class interests in a “fair and adequate” way and of the class counsel’s competence and financial capability to sustain the considerable expected expenses.⁹¹

For certification, in addition to meeting all the four prerequisites under Rule 23(a), the class action must be of one of the three types presented under Rule 23(b). As a matter of fact, one of 1966’s main amendments to Rule 23 regarded this classification and the introduction of the following, not mutually exclusive, three categories.⁹²

of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”.

⁸⁹ It is usually sufficient to show that the claims of the named plaintiff and class members “arise from the same event or pattern or practice and are based on the same legal theory” [“Ault v. Walt Disney World Co., 692 F.3d 1212, 1216 (11th Cir. 2012)”]. Moreover, although not significantly, some variations between the claims are permissible. What matters is that the named plaintiff’s claim is not subject to a unique defence which will likely become a major focus of the litigation [“Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591-92 (3rd Cir. 2012)”].

⁹⁰ Also defined as “seriousness” by CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist’s Contribution*, in *Buffalo Law Review*, vol. 25, 643.

⁹¹ Rule 23 specifically demands that “the representative parties will fairly and adequately protect the interests of the class.” In particular, potential conflicts of interests, between the named plaintiff and the defendant, intra-class and with the class counsel are analysed by the court. The suit is deemed not to be in the interests of the class when plaintiffs seek relief “that duplicates a remedy that most buyers already have received and that remains available” to class members [“Aqua Dots Prods. Liability Litig., 654 F.3d 748, 752 (7th Cir. 2011)”]. Additionally, other courts view these requirements as “unrealistic” given the “nominal” role of the named plaintiff in a lawsuit that “is in fact entirely managed by the class counsel” [“Phillips v. Asset Acceptance, LLC, Case No. 13-2251, 2013 U.S. App. 23984, 8-10 (7th Cir. Dec. 2, 2013)”]. This last consideration about the class counsel is shared by CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92, who argue that “the class lawyer represents three often conflicting sets of interests: his own financial stake; his named client; and the class”, although noting that “yet no special set of rules has been devised to manage conflicts between class lawyer and plaintiff, apart from the court’s duty to supervise class action settlements.”;

⁹² Until then, in 1938’s original version, the categories were defined in terms of the theoretical nature of the rights involved and each one of them was associated with an applicable scope or extent of the possible judgment, so as to determine the res judicata effect and who was it to be considered binding upon. The “true” category involved “joint, common or secondary rights”, the “hybrid” category involved “several” rights related to “specific property”, while the “spurious” category concerned “several” rights associated with a common question and common relief [US Legal: < <https://civilprocedure.uslegal.com/class-action/categories-of-class-actions/> >]. This classification, however, generated vast confusion, contrasting decisions and a scarce use, thus proving an ineffective resource to address collective concerns regarding access to justice [ANDREOTTI T. (2017). *Dispute Resolution in Transnational Securities Transactions*, Bloomsbury, London].

First, Rule 23(b)(1) starts by addressing circumstances where separate individual actions would create uncertainties or prejudice to individual rights either for the defendant or other individual parties not participating in the case. Two kinds are presented.

Rule 23(b)(1)(a), the so-called “*incompatible standards*” class, is specifically designed for defendants seeking insulation from repeated similar individual actions and inconsistent judgements, “establish[ing] incompatible standards of conduct”. An example could be a trustee facing the challenge of more and more cases springing up from different beneficiaries, with each one of these cases potentially decided in a different way with incompatible standards concerning the distribution.⁹³

Rule 23(b)(1)(b), the so-called “*impeding of interest*” class action, instead, is devised for absent potential class members in a common property or right, whose interests “could be impaired if issues are resolved by individual actions.” A classic example is that of the “limited fund”, where the claims of the class members exceed the defendant’s assets and separate suits could leave nothing for other potential class members to satisfy their claims.

Both these types, that is the first category in general, have seen a very limited use.⁹⁴

The second category is presented under Rule 23(b)(2) and is also called the “*injunctive*” or “*declaratory relief*” class action. As the name says, its aim, rather than pursuing monetary damages (which can still be pursued by this means incidentally, although with some limitations),⁹⁵ is to alter the common (and

⁹³ SHERMAN E.F. (2002). *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul Law Review*, 52, 401.

⁹⁴ *Id.*

⁹⁵ The express wording of Rule 23 is “where the *primarily* relief sought is injunctive or declaratory, not monetary” [emphasis added]. Although some courts have held a restrictive reading, the main perception is that monetary damages may be recovered under this class suit if they are incidental to the injunctive relief. [SHERMAN E.F. (2002). *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul Law Review*, 52, 401]. An interesting example is that of class members who were exposed to hazardous substances or took allegedly dangerous medical drugs, hence significantly increasing the risk of contracting a serious disease, for which “medical monitoring” is deemed necessary (i.e. periodic examination for early detection and treatment) [see “*Abuan v. Generally Electric Co.*”, 9th Circ. (1993)].

potential future) defendants’ conduct, to prohibit or require it to act in a certain way, on the basis of a court order issued on grounds applicable to the entire class. The most paradigmatic case is that of the “civil rights suits” of the 1960s-80s, by which several constitutional and important civil rights were enforced.⁹⁶ Some notable examples are those which brought an end to racial segregation, or those that ensured a wide range of statutory standards in prison or mental institutions.⁹⁷ The main constitutional concerns, to this regard, appear to be the extension of the *res judicata* effects on the whole class, without a concrete (formally, at least) participation of all its members to the proceedings. A similar issue appears relevant today in the injunctive class action filed against ILVA and Acciaierie d’Italia by some residents of the province of Taranto, under the 2019 Italian regime.⁹⁸

Last, the third category under Rule 23(b)(3), also known as “*common questions*” class action, is a “catch-all” device⁹⁹, which, in the words of the Supreme Court, has the purpose to allow “vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all’”.¹⁰⁰ In the same decision, the Court continued by quoting a 7th Circuit opinion, which reminded how “the policy at the very core of the class action mechanism is to overcome the problem that *small recoveries* do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor”.¹⁰¹ The class action’s fundamental goal to provide an effective instrument of *access to justice* to weak, individual parties harmed in their *everyday life* by powerful players emerges once again.

⁹⁶ *Id.*

⁹⁷ SHLANGER M. (2006). *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Orders*, New York University Law Rev., vol 81, 550.

⁹⁸ See *infra*, Chapter VIII.

⁹⁹ SHERMAN E.F. (2002). *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul Law Review*, 52, 401

¹⁰⁰ In “*Amchem Products, Inc. v. Windsor*”, 521 U.S. 591 (1997), quoting the Advisory Committee to the Rule’s revision.

¹⁰¹ “*Mace v. Van Ru Credit Corp.*”, 109 F.3d 338, 344 (1997).

In addition to Rule 23(a)’s previously enunciated four prerequisites, these class suits present two additional requirements to be met: *predominance* and *superiority*. On the one side, the court must verify whether the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members”¹⁰² and, on the other side, whether “the class action is superior to other available methods for the fair and efficient adjudication of the controversy”.¹⁰³ In order to make these determinations, the court should consider the following factors: “the interest of class members to individually control separate actions”; “whether and to what extent any litigation concerning the controversy has already been undertaken” by or against class members; “the advantages or disadvantages of litigating the claims in the particular form”; “any likely difficulties in managing the class action”.¹⁰⁴ In particular, class certification has been denied on numerous occasions, especially in mass torts cases, for lack of the last element, “manageability”, for instance because of the large number of potential class members, inability to properly locate and identify them, conflicts of law or difficulties in the determination of damages.

Despite most recent backlash, the number of successful lawsuits (and, consequently, effective redress) by means of this mechanism is massive. Most of American class actions are under Rule 23(b)(3)¹⁰⁵ and most authors agree that, since its introduction in 1966, it was this very provision to exponentially boost the success of the U.S. model,¹⁰⁶ becoming the vehicle for *damage* class action suits and, consequently, concrete economic redress for millions of otherwise weak parties across a broad spectrum of legal matters.¹⁰⁷

¹⁰² A recent example of denial of certification for lack of “predominance” was in an anti-trust class action from 2013, where it was found that the damages were too individualized to be calculated on a classwide basis and, hence, common class questions didn’t predominate over the individual damages questions [“Comcast v. Behrend” 133 S. Ct. 1426 (2013)].

¹⁰³ Rule 23(b)(3).

¹⁰⁴ *Id.*

¹⁰⁵ SHERMAN E.F. (2002). *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul Law Review*, 52, 401.

¹⁰⁶ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

¹⁰⁷ SHERMAN E.F. (2002). *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul Law Review*, 52, 401.

In particular, the key element which, since 1966, managed to boost this mechanism's power-force was the “*opt-out*” approach adopted with said revision of the Rule.¹⁰⁸

A crucial distinction between different types of collective redress is the one between the “*opt-out*” and the “*opt-in*” procedure. The former approach stands on the idea that, at the start of any class action, *everyone* who would theoretically be entitled to be part of it (by falling within the defined class) – that is everyone who is in a similar position to that of the plaintiff/now class representative, having suffered from the same defendant's act or omission and having, therefore, the same rights – is, very simply, part of it. Consequently, unless the potential class members decide to *exclude* themselves from the suit by a certain date (that is to “*opt out*”), they will be automatically included in it, with no explicit consent needed. The judgement (and so the *res judicata* effects), whichever the outcome, will be binding for all of them unless they leave the class themselves. The class members might, thus, receive compensation without ever appearing in court with a totally passive conduct. Still, they will be precluded in the future to litigate the whole claim or any particular issue relating to it, even if they were absent to all the proceedings.

The introduction of this approach in 1966 and the abandoning of the “*opt-in*” one, where, instead, all potential class members are required to *sign-in* in order to become part of the suit, set a revolutionary thrust.¹⁰⁹ It was no longer necessary to hold open “absurdly lengthy opt-in periods to encourage as many [potential] class members as possible”,¹¹⁰ who perhaps were not even aware of their legal entitlements,¹¹¹ or who were too lazy or doubtful to actually opt-in. It simply sufficed to raise the claim in order to immediately count with the large numbers of

¹⁰⁸ This approach, however, regarded only the third type of class actions, while Rule 23(b)(1) and 23(b)(2) were deemed mandatory and did not mandate even individual notice [Id.].

¹⁰⁹ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

¹¹⁰ MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 587.

¹¹¹ CAPPELLETTI, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to-Justice Movement*, in *The Modern Law Review*, 56.

the class and its consequently higher *negotiating-power*. Any initial and structural power unbalance with corporate defendants was immediately removed.

Two major concerns, are commonly raised with regards to this approach. On the one hand, as already mentioned, the risk is that the *attorney gambles* with the class numbers and, thus, creates class actions without class awareness or real necessity or, even worse, in shady attempts to conclude settlements favourable only to their pockets.¹¹² The issue, in short, is that no real control on the decision-making is held by the class itself. Furthermore, European scholars, who have been the most sceptical to this approach, find difficulties in “conceptually framing” the merely formal role of the named plaintiff/class representative (in favour of the class attorney).¹¹³ On the other hand, major *due process* concerns are raised in relation to the awareness of absent class members of a dispute which will be binding on them, as well as their loss of the right to “a day in court”.¹¹⁴

In light of these considerations, a proper *notice* to all the potential members appears of the outmost importance.¹¹⁵ *First*, for questions of justice and to answer their right to be informed on a dispute whose effects will be binding on them. *Second*, for logistics and consistency reasons, in order to avoid future challenges on the basis that some members were not properly made aware of the proceedings. To this regard, Rule 23(c)(2)(b), referring to the 23(b)(3) “damages” class action, requires “the best notice that is *practicable* under the circumstances, including

¹¹² ; STERNLIGHT J. (2000). *As Mandatory Binding Arbitration Meets the Class Action, will the Class Action Survive?*, in *William and Mary Law Review*, 42(1). Apart from the absentees’ rights and lack of involvement in any decision regarding the case, the most delicate issue here is that class counsels may easily use the class’ numbers to their complete advantage. With class actions that can involve literally millions of people and without the need to concretely seek their approval, the negotiating power class counsels have is as immense as their liberty in taking relevant decisions, without any control, expect that from the judge, over their sensitive choices.

¹¹³ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

¹¹⁴ MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 587.

¹¹⁵ STERNLIGHT J. (2000), *supra*; “Mullane Case” (1950); “Eisen Case” (1974); “Phillips Petroleum Case” (1985), where it was held that notice of class action, sent by first-class mail to the home address of all the known potential members and including notification of the “opt-out” right, satisfied due process. Despite traditional mail still being the standard, some concerns have been raised: first, standard mail notice programs for millions of people can be extremely expensive and deter low-value class actions from even being brought in the first place; second, individuals may move and change the address, so there could be inaccuracy.

individual notice to *all* members who can be identified through *reasonable effort*".¹¹⁶

In different consumer and product liability cases, where there are insufficient records of purchase and therefore it is not possible to identify all the class members, notice through public media, such as newspapers, radio and television, or through posting in calculated locations frequented by potential class members has been deemed acceptable.¹¹⁷ Recent cases have even seen publicity through very modern means: e.g., podcasts, TV spots, or subways posters with QR codes. The issue of notice is still a delicate one and always in the limelight, especially after the quite recent amendments from 2019, which, in the extensive commentary to the Rule, declared that the notice was to be not only "practicable" but also "*appropriate*",¹¹⁸ based on the unique circumstances of each case,¹¹⁹ in what is seen as a general trend towards enabling the class to make more informed decisions.

Subsequently, once the notice phase is concluded, all opt-out members are tabulated and the final number of class members can be assessed.¹²⁰ Provided the number is still sufficiently high and, thus, satisfies the requirement of "numerosity" of the class suit, pre-trial activities can start; discovery for the purpose of gathering evidence on the disputed issues and pre-trial conferences follow. Finally, should no settlement agreement be found between the parties (a rare circumstance), the trial takes place.¹²¹ The judgement will precisely identify all class members, in order to provide certainty regarding *res judicata* in any future dispute. In practice, almost every certified class action case is settled before reaching the judgement phase.¹²²

¹¹⁶ "Eisen Case" (1974), where it was held that the costs of adequate notice to all class members must be paid by the representative plaintiff, even when such costs are so high as to make litigation infeasible.

¹¹⁷ SHERMAN E.F. (2002). *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul Law Review*, 52, 401.

¹¹⁸ Advisory Committee, from Rule 23: see MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 587.

¹¹⁹ I.e. for the elderly using electronic means of communication may not be sufficient.

¹²⁰ HANOTIAU B. (2004), *A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration*, *Arbitration International, LCIA*, 20, 1.

¹²¹ Instead, should a settlement be found, class members would still have the option to opt-out.

¹²² MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399.

Important comparative reflections with the EU, especially Italian, opt-in regime will be presented in the following.

2.4. *Lessons from the common law experience.*

Different authors agree that American class actions with the beginning of the new century are facing an evolving dysfunction, caused by a large variety of factors.¹²³

The “romantic narrative”¹²⁴ of the white-knight-in-shining-armour attorney who comes to save the day and rescue multitudes of weak parties harmed by large, dark and greedy corporations is not always true. There is also another (dark) side of the coin: for instance, the numerous concerns regarding the capacity of legal counsels to duly represent the interests of the whole class, not to fall prey to easy and tempting collusions with defendants or, perhaps worse, not to push for “*in terrorem*” settlements or actions, conducting what have been defined as “fishing expeditions”.¹²⁵ At the same time, relevant questions on bindingness of the decisions on totally unaware absent class members with absolutely no decision-making status emerge, too, as well as the possible counter-effects of the aimed deterrence: with large corporations starting to view class judgements and settlements as a “*cost of doing business*”¹²⁶ and, consequently, simply raising and passing along the costs to the very same consumers.¹²⁷

¹²³ Id., also MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 587.

¹²⁴ MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399.

¹²⁵ This expression refers to an attempt to collect incriminating information against large corporations without having real proofs of their wrongdoings, usually by means of extensive discovery (i.e., by having access to the company’s business records). Such a threat is often used by ruthless attorneys in order to leverage settlements.

¹²⁶ See DRAHOZAL C. (2001). *Unfair’ Arbitration Clauses*, U. Ill. L. Rev.; Joyce T. (2014).

Reining in Crazy Class-Action Lawsuits, National Review Online.

Avialble at: <<https://www.nationalreview.com/2014/01/reining-crazy-class-action-lawsuits-tiger-joyce/>>.

¹²⁷ ; STERNLIGHT J. (2000). *As Mandatory Binding Arbitration Meets the Class Action, will the Class Action Survive?*, in *William and Mary Law Review*, 42(1).

On the other side, “doctrinal complexity and disarray in class action jurisprudence”¹²⁸ has all but helped, with the increasing risk of “endless rounds of reactive pleading”¹²⁹ frustrating litigants’ ability to reach the merits of the dispute or Rule 23’s initial purposes.

Moreover, after many years of growth in the use of the class action device, the current trend sees both the U.S. Supreme Court and the Congress acting in order to limit them, in particular by providing courts with a greater power in the scrutiny of settlements and by *raising the threshold* for certification of the class.

Furthermore, the recent additions of conservative Justices in the Supreme Court’s composition are casting concerns on further limitations in the years to come. An alarming example is the one regarding arbitration clauses and class waivers, by means of which, in certain circumstances and business fields,¹³⁰ companies can now prevent class action litigation in general¹³¹ simply by requiring that consumers (or workers) agree to *individual arbitration* of any future claims.

In sum, all these elements show how the U.S. class action mechanism, once-envisaged as the perfect sling in David’s hands in order to defend himself from Goliath’s abuses, may still provide collective redress to weak parties, but, at the same time, is all but flawless and requires a substantial restructuring or even rethinking,¹³² in order to deliver effective justice to everyone in the most efficient way.

3. *Collective redress in the European Union.*

For several years, decades even, the US class action model was a dazzling comet flying through the legal universe of substantive rights and procedural mechanisms. Internationally speaking, it was a thunderous exception, often admired at distance,

¹²⁸ MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399, who notes how the Wright, Miller & Kane standard treatise on federal practice and procedure dedicates four entire volumes to the class action practice.

¹²⁹ *Id.*

¹³⁰ Mostly in consumer law and product liability cases, although also in employment cases, for example (see *Lamp Plus v. Varela* from 2019).

¹³¹ Thus, both class litigation and class arbitration.

¹³² MULLENIX L.S. (2014). *Ending Class Actions as We Know Them: Rethinking the American Class Action*, in *Emory Law Journal*, 64, 399.

always with great care and, not seldom, wary suspicion. While in some countries traditionally close to the U.S. culture and influence, such as Australia¹³³ and Canada,¹³⁴ similar models were shortly after adopted and still seem to thrive well,¹³⁵ the European reaction was much more complex.

First, the continental civil law tradition was deeply marked by an *individual approach* to judicial protection, “constructed around individual rights and individual access to justice rather than collective interests and collective litigation.”¹³⁶ This deep-rooted, *dualistic mindset*, “one against one, incident by incident”,¹³⁷ made it extremely difficult for European jurists to accept a different kind of litigation from the one “conducted by and on behalf of the individual *named parties only*”.¹³⁸

Second, the “rough justice” and *potentially abusive* incentives set by the US model, which often “slighted or even trampled [...] venerable rights and ethics”,¹³⁹ frightened and repelled European commentators, to the point that even the EU

¹³³ The first Australian class action regime was enacted in 1992, with the amendment of Part IVA of the Federal Court Act from 1976. For further analysis see, e.g., MURPHY B. and CAMERON C. (2006) *Access to Justice and the Evolution of Class Action Litigation in Australia*, in *Melbourne University Law Review*, 30 (2).

¹³⁴ Class actions were first introduced in Quebec in 1976, then in Ontario in 1992, in British Columbia in 1996, whereas in other provinces subsequently. For further analysis see, e.g., WINKLER W.K., PERELL P.M., KALADZIC J. and WARNER A.M. (2014). *The Law of Class Actions in Canada*, Thompson Reuters, Toronto.

¹³⁵ VOET S. (2017). *Where the Wild Things Are – Reflections on the State and Future of European Collective Redress*, in KEIRSE A. and LOOS M.B.M. (eds.), *Ius Commune Europaeum*, Intersentia, Cambridge, 115.

¹³⁶ GABOARDI M. (2019). *New Ways of Protection of Collective Interests: the Italian Class Litigation and Arbitration Through a Comparative Analysis*, in *Journal of Dispute Resolution at the University of Missouri Law School*, Fall issue, 4, according to whom there “is a traditional approach in civil law countries to emphasizing an inherent link between individual rights and their claims of protection”.

¹³⁷ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 220, noting how this bipolar model is “a subtly powerful suppressant of substantive legal development” in the European Continent, being “so protective of violators and blind to individual justice”.

¹³⁸ “Wal-Mart Stores, Inc. v. Dukes”, 564 U.S. 338, 348 (2011), quoting “Califano v. Yamasaki”, 442 U.S. 682, 700-701 (1979).

¹³⁹ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), referring to venerable rights such as “notice of proceedings, to choosing your counsel, to being free from ad hoc courts, to suffering juridical harm only after having been heard” or venerable ethics such as “lawyers [...] ‘buying into’ lawsuits, clients [being] puppets not puppeteers, and meritless lawsuits [...] brought for the mere in terrorem settlement value” and, thus, comparing the class action model to the American Wild West.

Commission itself described it as “*toxic cocktail*”, to avoid at all costs.¹⁴⁰ As subsequently addressed, the political upheaval caused by the so-called *Dieselgate scandal* was crucial in shifting the perspective.

Still, it was undeniable that globalisation and economic transformation of the society (see *supra*) – in which production, distribution and consumption had now become “mass phenomena” – had created a new “organisational obstacle” to effective justice.¹⁴¹ In the farsighted words of Mauro Cappelletti, in this new, fast-paced, fully-connected society “social rights have emerged as most important”, in the need to protect “broad categories of [otherwise] discriminated or weak persons: children, women, old people, racial or linguistic minorities, those affected by a handicap, *etc*”, with significant examples being those of an “isolated consumer of a good produced *à la chaine* and distributed in large quantities” or “the case of the individual damaged by mass pollution”.¹⁴² In these cases, even the harshest European critics had to agree that “the individual alone is usually incapable of vindicating effectively the rights involved; since these are collective or ‘diffuse’ rights, the only really effective protection is one which reflects the ‘collective’ or ‘class’ character of the rights.”¹⁴³

In sum, new economically and socially complex situations required new substantive rights, which, in turn, required new procedural mechanisms, in order to enforce them and grant *de facto* what otherwise would remain as vain and empty liberties for the weakest members of our society. With this premise, the US model of class actions could certainly be criticised or feared because of its potential

¹⁴⁰ As anticipated, the expression “toxic cocktail” was first used by the EU Commission itself in 2008 in a Memorandum 08/741: “US style class action is not envisaged. EU legal systems are very different from the US legal system, which is the result of a ‘toxic cocktail’ – a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures. [...] This combination of elements – ‘toxic cocktail’ – should not be introduced in Europe. Various effective safeguards, including the loser pays’ principles, the judges’s discretion to exclude unmeritorious claims and the accreditation of associations which are authorised to take cases on behalf of consumers, are built into existing national collective interest schemes in Europe”, Green Paper on Consumer Collective Redress – Questions and Answers, Memo/, Brussels, Nov. 27, 2008, p.4 (2008).

¹⁴¹ CAPPELLETTI, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to-Justice Movement*, in *The Modern Law Review*, 56.

¹⁴² *Id.*

¹⁴³ *Id.*

abusive backfire power; nonetheless, although flawed, it was an answer to the cultural, economic and social growth of our world. In Europe, on the contrary, “nothing worth mention [was] being done to offer procedural justice in cases of mass victimization.”¹⁴⁴ Once assimilated this, it appeared clear that a solution had to be found in the Old Continent as well, keeping in mind Europe’s strong desire to set itself up in the international landscape as a champion of human rights, democracy, justice and equality. Serious discussions, therefore, began at both academical and institutional level on which was the most appropriate tool, and are still ongoing in what has been called a “never ending story”.¹⁴⁵

In this vast, lingering and uncoordinated debate, the first step was a *radical break* from the US class action model; a distancing which started even with the use of a *different name*. In fact, in the beginning, until the late 1990s, the European discussion on the protection of weak parties was all about the viability of “class actions”, with the U.S. mechanism being perceived as the only alternative. Later on, instead, the discussion moved on to the concept of “collective actions”, in an attempt to distinguish the European approach from the U.S. mechanism, often depicted overseas as a “toxic cocktail”¹⁴⁶ or a “Rube Goldberg artefact – a strange-looking melange of pushes and pulls and bells and baubles”¹⁴⁷ because of its complexity and potentially abusive incentives. Finally, the current terminological stage of “*collective redress*” was reached, under the notable consideration that terminology should encompass the ultimate goal, that is the compensation of harmed individuals. In particular, this last shift reflects the intention to substantially cover wider situations and focus on the *objectives* of the policy rather than on the mechanisms,¹⁴⁸ under the realisation that private litigation is not always the only nor the most appropriate device to deliver mass redress, as other techniques, such

¹⁴⁴ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

¹⁴⁵ HESS B. (2014). *European Perspectives on Collective Litigation*, in HARSAGI V. and VAN RHEE C. H., *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Intersentia, Cambridge.

¹⁴⁶ See *supra*, note 21.

¹⁴⁷ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

¹⁴⁸ HODGES C. and VOET S. (2018). *Delivering Collective Redress: New Technologies*, Hart Publishing, Oxford.

as public regulatory redress, consumer ombudsmen, ODR, ADR mechanisms or civil “*piggy-backing*”¹⁴⁹ on criminal prosecutions, may be cheaper, simpler and quicker.¹⁵⁰ Moreover, these terminological changes show the intensity of the debate and the *struggle* Europe has faced in taking a clear position and establishing a *coherent legal framework*.

The historical evolution of this piecemeal and totally uncoordinated legislation, both at the EU level and in relation to national models, will be analysed in the following, with a focus on the *consumer-oriented goals*. The *procedural hallmarks* and *constitutional nuances*, together with the main questions left in the current regulatory context will be subsequently detailed.

3.1. Objectives: avoiding consumer scandals.

The debate on collective redress reached European shores around the 1980s, increasing between the late 1990s and the early 2000s, first at national level,¹⁵¹ then at EU level, with a complete eruption around 2005 and the so-called Dieselgate scandal (see *infra*).¹⁵² Before the RAD on consumer representative actions, particularly significant was the Commission’s Recommendation from 2013, aiming at harmonising and delivering a clear common legal framework; although with very poor results.

The reasons for the arise of this intense and evolving discussion were only partially overlapping those that had originally brought the US to develop the class action model. The goal of providing effective access to justice and protecting weak parties was present. The enforcement of *small claims*, seldom brought because of cost-effectiveness and rational apathy, was indeed a central point of the European

¹⁴⁹ The term “*piggybacking*” – which literally intends the act of “rid[ing] on someone’s back with your arms around the person’s neck and your legs round their waist” [Cambridge Dictionary, 2020] – has been employed by different scholars, such as HODGES C. and VOET S. (2018). *Delivering Collective Redress: New Technologies*, Hart Publishing, Oxford, in order to refer to civil claims brought as “*partie civile*” by one of the victims in already-pending criminal prosecutions.

¹⁵⁰ *Id.*

¹⁵¹ For example, in CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), regarding the introduction of class actions in Italy.

¹⁵² HODGES C. (2010). *Collective Redress in Europe: the New Model*, in *Civil Justice Quarterly*, 7, 1.

debate. Ensuring *fair competition* and deterrence of illicit activities from large business corporations were principles closely linked to the EU's traditional attention to the common market.¹⁵³ Nonetheless, the other goal of the 1966 US amendment drafters, that is providing an effective procedural tool for fighting racial discrimination (and civil rights in general) in courts, was lacking in the EU political agenda for collective redress.

This is portrayed by the historical evolution of collective redress in Europe, which took place around the continent at different paces in a highly confused and (still) unharmonised way.¹⁵⁴ To this regard, three phases can be identified.

First, a few single countries, in the wake of the common law-class action experience, were frontrunners in developing – *autonomously* – their own national models of collective litigation. In particular, Spain, Greece, Portugal and Hungary introduced collective litigation mechanisms respectively in 1984, 1994, 1995 and 1996.¹⁵⁵ The results in these four countries, safe for Portugal in recent years, nonetheless, are still rather unsatisfying, (mainly consumer and competition) sector-based, with extremely rare cases and no significant change brought by the new procedure. Around the same years, discussions on collective redress were starting in the Scandinavian countries as well, which led to the adoption of group procedures in Sweden for the first time in 2003 and, subsequently, between 2007

¹⁵³ Some authors insist it is more appropriate to talk about “affecting future behaviour” rather than “deterrence”, since both behavioural psychology and empirical evidence show that “supportive, responsive and often no-fault regulatory policies” appear to be more effective than “legal systems [simply] based on principles of fault and deterrence”, HODGES C. and VOET S. (2018). *Delivering Collective Redress: New Technologies*, Hart Publishing, Oxford.

¹⁵⁴ VOET S. (2017). *Where the Wild Things Are – Reflections on the State and Future of European Collective Redress*, in KEIRSE A. and LOOS M.B.M. (eds.), *Ius Commune Europaeum*, Intersentia, 158, 109.

¹⁵⁵ According to Art. 20(1), from the Spanish “Ley General para la Defensa de los Consumidores y Usuarios” from 1984, now Article 24 of the Royal Legislative Decree 1/2007 of 16 November (“Texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias”), Spanish associations of consumers and users are entitled to file lawsuits to defend their members and the general interests of consumers and users. In Greece, instead, in 1994, with the adoption of law 2251/1994 on “Consumers’ Protection”, consumer organizations were allowed standing to claim damages on behalf of groups of injured consumers. In Portugal, the so-called “Popular Action Law” was introduced by means of Portuguese Law 83/95, of August 31st, 1995, combined with Art. 52(3) of the Portuguese Constitution. In Hungary, finally, an opt-out mechanism was introduced in 1996 for cases relating consumer and competition law.

and 2008, in Denmark, Finland and Norway, too.¹⁵⁶ The remarkable feature of these four Nordic countries – which makes them stand out in relation to the other initial European models of collective redress – is the fact that they all give standing and great importance to *public regulatory bodies*, in particular to Consumer Ombudsmen. The Scandinavian model shows a way to deal with mass victimisation and group proceedings under certain aspects innovative – alternative too, in the sense depicted by Mauro Cappelletti when talking about the “procedural obstacles”, which must be overcome by “alternatives to the ordinary courts and the usual litigation procedures”¹⁵⁷ – and certainly not afraid to look past the beaten track of the US class action. Other notable examples of such kind include the Netherlands’ WCAM model and the German KapMuG (Capital Markets Model Case Act), both from 2005 and both inspired by concrete cases demonstrating the inefficiency of the judicial system to provide effective and tangible justice. Last, by the end of the first decade of the 21st century, discussions were progressing both at EU level and, autonomously, in other national States. Following their footsteps, Italy and Poland, for example, both adopted an opt-in consumer-limited mechanism in 2010,

¹⁵⁶ The so-called “Swedish Group Proceedings Act” (SFS 2002:599 “Lagen Om Grupprättegång”) from 2002; the “Danish Administration of Justice Act” (AJA), chapter 23a, section 254(a-k) from 2008; the “Finnish Class Action Act” (444/2007); the Norway “Civil Procedure Act”, Section 35-1(2). In Sweden, the first among the four, a governmental reporting team lead by Professor Lindblom was first issued in 1995, expressing itself in favour of the introduction of an efficient procedural system aimed at granting effective justice to certain types of smaller claims. Initially, the implementation of an opt-out system was proposed, similarly to the U.S. class action’s model. However, the political debate continued and it was only in 2003 that the new law for group actions entered into force, with a more lenient approach and favouring an opt-in procedure, among others.

¹⁵⁷ CAPPELLETTI, M. (1993). *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to-Justice Movement*, in *The Modern Law Review*, 56, in what has been defined as the “third wave” of the access to justice movement. CAPPELLETTI M., for instance of completeness, referred mostly to conciliation, mediation and arbitration. However, the rationale behind his considerations, that is the idea that “in certain areas or kinds of controversies, the normal solution – the traditional contentious litigation in court – might not be the best possible way to provide effective vindication of rights”, still applies today to other forms of redress. This analysis, as it will be presented in the last chapter, is strongly supported by HODGES C. and VOET S., who argue that ordinary litigation should be avoided and effective justice should be pursued by means of public regulatory figures and coordinated ADR. Nonetheless, it must also be noted that in other circumstances [supra, 285] CAPPELLETTI M. himself, despite acknowledging the “special expertise” Ombudsmen could bring, was sceptic about the fact that said solution could “burden the state with more bureaucratic machinery and regulations. Also, [...] there might be a decline of the agency’s zeal and activism; and the agency might tend to be ‘captured’ by the very interests it was expected to control. Moreover we should keep in mind that the interests involved are primarily private, not public in nature, even though they belong to groups or classes of people”.

although with mediocre results. The main element to underscore hereby is the generally scarce use of these mechanisms and their limited scope of application, mainly to consumer, securities and competition law issues.

The *second phase*, instead, saw a protagonist role from the EU institutions, in order to contrast the otherwise hazy, poor and uncoordinated collective redress panorama, described, not coincidentally, in an-early 2000s study as “one of astonishing diversity and total underdevelopment”.¹⁵⁸ To this regard, alongside the autonomous national developments from the first phase, discussions had indeed been ongoing in EU political chambers and institutions for decades already. However, fundamental difficulties arose in balancing the opposite interests of consumer groups and of the lobbying industry, that is between the needs for easily accessible, flexible instruments and the necessity of protecting corporate defendants from abusive litigation. An EU Directive from 1998 “on injunctions for the protection of consumers’ rights” was the first step of this process of harmonisation. Its goal was to facilitate *cross-border* injunctive relief against infringements harmful to large groups of consumers. Said Directive, subsequently amended several times, aimed at “terminating in good time” infringements harming a cumulation of interests of individuals. Actions could be brought by “qualified entities”, such as independent public bodies or organizations with coinciding statutory purposes. A list of the “qualified entities” was provided by each Member State, in order to allow intra-community infringements and foreign qualified entities to apply other Member States’ courts. Moreover, orders requiring the cessation or prohibition of any unlawful activity, as well as penalty fees to be paid in case of delay, were among the possible measures. Currently repealed by the RAD, its application was limited.

With regards to compensatory claims, instead, the “Ashurst Study” from 2003, mentioned above, together with different commentators, had already criticised the complete lack of coordination and coherence in the European legal framework in relation to competition law. The debate became even more intense, just like the

¹⁵⁸ Arshust Study, 2003.

need for a harmonised and consistent response was even more evident. Numerous soft-law initiatives took place, such as a Green and White Paper respectively from 2005 and 2008, another Green Paper from 2008, a public consultation from 2011 and a Resolution of the European Parliament in 2012. Yet, it was only in 2013, that the EU Commission took a fundamental step, by issuing the aforementioned *Recommendation* “on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”.¹⁵⁹ At least provisionally, despite the choice of another non-binding instrument, the debate at EU level was thus paused.¹⁶⁰

As delineated in its first operative paragraph, the aim of the Recommendation was to “facilitate *access to justice*, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union Law, while ensuring appropriate procedural safeguards to avoid abusive litigation”. For that purpose, “Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive”, on the assumption that “the possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court.”¹⁶¹

The main feature of the Recommendation was its *horizontal* – or transsubstantive (see *supra*) approach. The Commission, in fact, aimed at a general and common framework of collective redress in *all* areas of EU law, rather than a sectorial one, relating, for example, only to consumer or competition law. The reason for this was to avoid “inconsistencies between the different Commission initiatives on collective redress, a fact which points to the need for a more coherent system”.¹⁶² As it will be discussed, the RAD from 2020 represented a partial *step back* from this decision, since it narrowed down again the scope of application to

¹⁵⁹ Rec. 2013/396/EU.

¹⁶⁰ HESS B. (2014). *European Perspectives on Collective Litigation* in HARSAGI V. and VAN RHEE C. H., *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Intersentia, Cambridge.

¹⁶¹ 2013 Recommendation, para. 1.

¹⁶² EU Commission’s Communication regarding the same Recommendation, para. 1.3.

mere consumer and competition issues. At the same time, however, this Recommendation served as a guiding compass for a number of countries, among which, for instance, Italy or the Netherlands, which adjusted their group litigation tools *before* the publication of the RAD. These national implementations, hence, present horizontal scopes of application, notwithstanding the latter's narrower model.

The instrument chosen – a Recommendation –, still, was *non-binding*. Member States were not bound to introduce new legislation, but simply provided with a series of, suggested, rules.¹⁶³ Despite the good intentions and some “revolutionary” elements,¹⁶⁴ the Recommendation received from the beginning numerous criticisms. One author, for example, described it as “a squeaking mouse hurrying over the floor of the EU Commission, frightening no one”.¹⁶⁵ Several others wondered whether it was “a breakthrough or a damp squib”¹⁶⁶ and, in general, doubted if efficiency and concrete access to justice could really be attained thanks to the (or, simply, a) new Recommendation. In particular, the fact that it was a *non-binding* instrument was stressed as a major disincentive for Member States to follow the EU Commission's presented guidelines, as further proved.¹⁶⁷

¹⁶³ Those guidelines advocated for a model which – on paper – was purposely different from the U.S model of class actions, only a few years before described, as abovementioned, as an abusive “toxic cocktail” [Green Paper on Consumer Collective Redress, COM (2008) 794, 27.11.2008, para. 48]. In particular, it proposed that any European approach follows a series of standards and adopts several safeguards in order to avoid the risk of abusive litigation and economic incentives to bring speculative claims, like the experience across the Atlantic had showed. Accordingly, the list of suggested safeguards were: first, collective actions should be brought only at the fulfilment of certain admissibility conditions; second, the class representative should be subject to scrutiny of its both financial and personal adequacy to act in the best interests of the represented group; third, the opt-in model should be preferred, although the opt-out procedure (which some Member States already had) could be “justified by reasons of sound administration of justice”; fourth, effective information on pending collective actions should be provided to all potential claimants; fifth, effective cross-border enforcement should be ensured; sixth, alternative dispute resolution methods (such as mediation) should be available as well; seventh, the “loser pays” principle should generally be followed with regards to litigation costs; eighth, contingency fees and punitive damages should under all circumstances be avoided, considering the dangerous incentives they set for “fishing expeditions”, collusions between corporate defendants and class counsels or “*in terrorem* actions” pushing for settlements; last, third-party funding should be allowed only within certain terms.

¹⁶⁴ HODGES C. (2013). *Collective Redress: a Breakthrough or a Damp Squib?*, Journal of Consumer Policy, p.87 (2013).

¹⁶⁵ GOLDSMITH J. (2013). *European Collective Redress*, The Law Gazette, 20 June 2013.

¹⁶⁶ HODGES C. (2013). *Collective Redress: a Breakthrough or a Damp Squib?*, Journal of Consumer Policy, p.87 (2013).

¹⁶⁷ *Id.*

In fact – and this leads to the current *third phase* –, following the 2013 EU Recommendation, Member States were expected by the Commission itself to implement efficient collective regimes by July 2015, with a reassessment on the collective redress landscape in the EU by July 2017. Nonetheless, the impact of said Recommendation on different national systems was indeed – quoting an emblematic comment from a Study commissioned by the EU Parliament in 2018 – “*small*”.¹⁶⁸ On its Report on the implementation of the 2013 Recommendation, the Commission acknowledged that only “9 Member States [out of 28, at the time] “still ha[d] no compensatory relief mechanism in place and only 7 Member States ha[d] reformed their respective laws on collective redress after its adoption”. Moreover, said reforms had not always followed the Recommendation’s guidelines, “neither regarding the broad scope suggested for the collective redress vehicle, nor the opt-in principle.” Not only *inequality* in the *availability* of the collective redress instruments, but also the “implementation of *safeguards* against the potential abuse of such mechanisms [wa]s very unevenly distributed across the EU.”¹⁶⁹ In sum, such non-binding attempt of harmonisation had been a failure.

Another key element to take into account, at this point, was the series of *consumer scandals* which vexed hundreds of thousands individuals all over Europe, gaining major relevance on the media. Among them, the *Volkswagen “Dieselgate”* is probably the most notable example. The strikingly different compensation experiences between US and EU consumers in this case – see *infra* – pushed even further the debate for collective redress. In similar fashion to how the historical context – that of racial segregation, and its fight against it – had ended up fundamentally shaping the class action model in the US in 1966, and consequently in the common law world, these scandals became the propulsion engine behind the launch of the currently-in force RAD.¹⁷⁰

¹⁶⁸ “*Collective Redress in the Member States of the European Union*”, PE 608.829, p. 66 (2018). This report, prepared by the British Institute of International and Comparative Law, together with a few similar ones and some major scandals (such as the Dieselgate one, see *infra* para.), brought the EU Commission to propose the RAD.

¹⁶⁹ *Id.*

¹⁷⁰ See *infra*, New Deal for Consumers.

In particular, following the EU 2016 Inquiry¹⁷¹ into emission measurements in the automotive sector due to said scandal, in 2017 the EU Parliament called on the Commission to “propose legislation on a harmonised system of collective redress for EU *consumers*, based on practices within and outside the EU”, in order to “end the current situation where consumers lack protection in many Member States which do not allow them to enforce their rights collectively.”¹⁷² In April 2018, with the so called “*New Deal for Consumers*”, the European Commission launched a series of initiatives, among which a Proposal for a Directive on representative actions for the protection of the collective interests of *consumers* (which later became the RAD).¹⁷³ As stated in the related “Explanatory Memorandum”, the aim of such proposal was to “modernise and replace Directive 2009/22/EC (‘the Injunctions Directive’),”¹⁷⁴ addressing its shortcomings,¹⁷⁵ broadening the scope also to compensatory relief and harmonising the otherwise uncoordinated and unbalanced European legal framework for *consumer* redress.

3.2. From “toxic cocktail” to “necessary” consumer representative actions.

Aside from the goals and concrete historical events (consumer scandals) that brought its entry into force, the 2020 RAD represented an extraordinary and unprecedented step for the civil law world. For the first time, a *binding* instrument was issued by EU institutions accepting that “Globalisation and digitalisation have increased the risk of a large number of [individuals]¹⁷⁶ being harmed by the same

¹⁷¹ 2016/2908 EU (RSP).

¹⁷² Para. 1., “Explanatory Memorandum”, EU Commission Proposal “on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC”, 11.42018.

¹⁷³ <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0184>>.

¹⁷⁴ *Id.*

¹⁷⁵ As mentioned in the “Explanatory Memorandum”, “the 2008 and 2012 Commission reports on the application of the Injunctions Directive and the 2016-2017 Fitness Check confirmed the Directive’s importance. However, the Fitness Check concluded that it had considerable shortcomings, which, if left unaddressed, would continue to hinder its full effectiveness and lead to sub-optimal use. Even in Member States where injunctions are considered effective and are widely used, the Directive’s potential is not fully exploited due to a number of elements that it does not sufficiently address. The key shortcomings are its limited scope, the limited effects of injunction decisions on redress for harmed consumers and the cost and length of the procedure (see section 3 for an overview of the results).”

¹⁷⁶ Added. Original wording: *consumers, in RAD, recital (1).

unlawful practice”. “The lack of *effective* means for the enforcement” of such hampered positions was also acknowledged by EU institution, together with the crucial realisation that “it is *necessary* to strengthen procedural mechanisms for the protection of the collective interests of [individuals]¹⁷⁷ to cover *injunctive* measures as well as *redress* measures”.¹⁷⁸

With this step, therefore, the EU definitively abandons the long-defended civil law tradition of binary litigation, one v. one, that binds the *named parties only* for both injunctive and compensatory remedies. It accepts the significant *power unbalances* of the contemporary society and the need for forms of litigation that *re-equilibrate* them. Simultaneously, and probably unwillingly, it also opens the door for enforcement processes that, despite concerning the general public, are conducted by private parties.

Considering the reluctance until the early 2000s (and more), for over half a century, to even contemplate this option, heavily criticising such “almost-barbaric” practices of the common law world, the development is astounding. It radically alters the traditional cornerstone of adjudication in the civil law world, in view of societal change and of the key objective of granting *effective* access to justice to everyone – a fundamental right itself, if not the most essential, together with that to life.

Nonetheless, the result – as it often occurs when compromising – is quite unsatisfying, both from a procedural and a constitutional point of view. The most disappointing aspects, in this regard, are, on the one hand, the *limited scope of application* and, on the other hand, also as a consequence, the *failed attempt* to successfully *harmonise* the level-playing field for all EU countries and their citizens (here included, not the least, all the potential defendants).

¹⁷⁷ Id.

¹⁷⁸ RAD, recital (5).

3.3. *Procedural hallmarks and constitutional nuances.*

The essential features of the 2020 Directive, in comparative view to the above-depicted US model, will be hereinafter presented. The main constitutional and procedural issues stemming from the model at hand will also be underscored.

As addressed, said Directive “sets out rules to ensure that a *representative* action mechanism for the protection of the collective interests of *consumers* is available in all Member States”, by offering “at least one procedural mechanism [...] for the purpose of both *injunctive* measures and redress measures” at national level.¹⁷⁹

The key *representative function* from the common law class actions is hence confirmed, since the suits in question are “brought by a qualified entity as a claimant party *on behalf* of consumers to seek an injunctive measure, a redress measure, or both”.¹⁸⁰

The notion of “*qualified entity*” becomes particularly relevant to this regard, since they are the “self-elected champions” who can file the class suits. The EU institutions, in this occasion, chose to abandon any reference to the “natural or legal persons” from the 2013 Recommendation, as well as to turn in an opposite direction to the US model. The latter, as discussed above, attributed standing to sue to one or more *members* of the class, who became class representative(s). This figure is lacking under the EU Directive, which prefers to entrust the keys of (consumer) collective redress to *qualified* legal persons, either organisations or public bodies. A twofold set of problems immediately arises from a constitutional evaluation.

Primarily, Article 4 of the Directive sets an improper, confusingly unnecessary and dangerous *distinction* between qualified entities for *cross-border* and *merely domestic cases*. Requirements for the former are specified, whereas for the latter they are not. Such differentiation can lead to absurd situations where the threshold for bringing a domestic action may be higher (or lower) than that for cross-border cases – thus pushing potential claimants to design on purpose merely formal cross-border cases – or where different states have different requirements – creating significant *disparities* in access-to-justice remedies between EU citizens and

¹⁷⁹ RAD, Recital (7).

¹⁸⁰ RAD, Article 3(5).

incentivising *forum-shopping*, both for plaintiffs and potential defendants when choosing their seats.

Another possible cause for concern is the potentially narrowing trend from a remedial standpoint represented by the choice to *prevent class members* from bringing the suits themselves. Under a comparative standpoint, this recalls in several ways the *collective complaints procedure* before the ECSR, where only selected organisations are entitled to do so. One of the most treasured features of the class action model from common law is that *any* individual *directly* affected (any member of the class) can, potentially, file a collective claim. Taking this possibility away, might fundamentally cripple the effectiveness of the redress mechanism, obliging injured members to *always* find an intermediary. This places them at risk of exploitation, deprived from the *alternative* of leading the case themselves. Moreover, despite the Directive’s requirement that qualified entities be “independent and not influenced by persons other than consumers”, in practice conflicts of interest may be difficultly perceived, as well as more likely to appear once such an “oligopoly” is generated.¹⁸¹ Even in the best-case scenario, these qualified entities will only be interested in more mediatic, lucrative and larger cases (see *infra*, in relation to the 2019 Italian regime).¹⁸²

The possibility for *public entities* to file class suits, instead, should be favourably applauded, in light of the abovementioned positive Scandinavian experience with consumer ombudsmen, of possible connections with infringements already investigated by such authorities, as well as the general *regulatory pluralism* until now advocated (and partially lost with the exclusion of class members’ standing to sue).

In respect to the US model, the *role of the lawyer* is evidently less central, partially clouded by that of the qualified entity – with which, still, they could collaborate. Interestingly, one of the much-criticised aspects of the common law class action, that of *contingency fees*, is not expressly disapproved by the Directive, nor any possible limit is mentioned. This goes beyond the 2013

¹⁸¹ See, *infra*, Chapter XI.

¹⁸² *Id.*

Recommendation,¹⁸³ leaving Member States with the option of allowing the use of this particular, and incentivising, financing tool. In order to avoid abusive litigation – as stated in several provisions of the Directive –, a maximum threshold could have been set, as well as a clarification – like in the 2013 Recommendation – that “The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to *full compensation* of the members of the claimant party”. Punitive damages, on the other hand, are explicitly forbidden by the Directive, in line with the Recommendation:

“(10) It is important to ensure the necessary balance between improving consumers’ access to justice and providing appropriate safeguards for traders to avoid abusive litigation that would unjustifiably hinder the ability of businesses to operate in the internal market. To prevent the misuse of representative actions, the awarding of punitive damages should be avoided and rules on certain procedural aspects, such as the designation and funding of qualified entities, should be laid down”.

To this regard, the rules on funding of representative actions do not appear currently sufficient, giving room to possible abusive use by competitors or third parties interested in their mere financial gain rather than the class redress. *Third-party litigation funding*, from an economic analysis viewpoint, presents positive incentives to overcome information and organisational asymmetries, high procedural costs and rational apathy, very similarly to contingency fees.¹⁸⁴ It has also been a phenomenon on the rise in recent years, currently esteemed to represent a 40-80 billion industry in the continent.¹⁸⁵ Despite a Proposal for a Directive “on

¹⁸³ “Legal representation and lawyers’ fees”, Article 29: “The Member States should ensure that the lawyers’ remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties”; Article 30: “The Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party”.

¹⁸⁴ VOET S. (2016). *The Crux of the Matter: Funding and Financing Collective Redress Mechanisms*, in HESS B., BERGSTRÖM M., STORSKRUBB E., WAHL N. and CRAMÉR P. (eds.). *EU Civil Justice: Current Issues and Future Outlook*, Hart Publishing, Oxford, 201.

¹⁸⁵ See, e.g., <<https://www.equaltimes.org/does-the-new-eu-consumer-rights?lang=en>>.

the regulation of third-party litigation funding” from the EU Parliament from September 2022, however, the landscape currently remains unregulated, although a study to map third party litigation funding has recently been ordered by the EU Commission. One of the main reasons for pausing discussions around such Directive has been – it seems – the critical report from the International Legal Finance Association (ILFA) on the maximum limit – “Absent exceptional circumstances” – of 40%¹⁸⁶ as a share for third-party funders from the total award, as too low. This obstacle to regulation needs to be paired with the elimination from the RAD of the 2013 Recommendation’s prohibition to “base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties”.¹⁸⁷ Both elements question whether the EU, while advocating on paper against abusive litigation, is leaving the door open to third, completely financial-oriented, parties to do so.

The infamous “toxic cocktail” from the EU Commission’s Memorandum from 2008 for the US class action model referred to a combination of several elements: among which, expressly cited, punitive damages, contingency fees and the opt-out regime. Accordingly, in relation to the *opt-in* “ingredient” of such cocktail, the 2013 Recommendation required that the class be formed on the basis of the “express consent of natural or legal persons claiming to have been harmed (‘opt-in’ principle)”.¹⁸⁸

¹⁸⁶ See the proposed Article 14 – Invalid agreements and clauses: “Absent exceptional circumstances, where a litigation funding agreement would entitle a litigation funder to a share of any award that would dilute the share available to the claimant and the intended beneficiaries to 60% or less of the total award, including all damages amounts, costs, fees and other expenses, such an agreement shall have no legal effect”.

¹⁸⁷ See Article 32: “The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties”.

¹⁸⁸ See Articles on “Specific Principles Relating to Compensatory Collective Redress”: 21. “The claimant party should be formed based on the express consent of natural or legal persons claiming to have been harmed (‘opt-in’ principle). Any exception to this principle, by law or court order, should be duly justified for reasons of sound administration of justice”; 22. “A member of the claimant party should be free to leave at any time before the final judgment or valid settlement, subject to the same conditions that apply to withdrawal in individual actions. This should not deprive

It is relevant to note today that, at odds with such provision, the RAD, instead, chose to leave a margin of appreciation to Member States: “To best respond to their legal traditions, Member States should provide for an opt-in mechanism, or an opt-out mechanism, or a combination of the two”.¹⁸⁹ This regulation – which concerns only compensatory remedies (not injunctive ones, where no adhesion is required) – is certainly positive from an access-to-justice perspective, seeing how such regime was pivotal for the success of damages class actions overseas, since 1966. At the same time, it requires appropriate safeguards from a notice-perspective, for ensuring clear understanding and acceptance from all the class members. The current regulatory framework does not appear to set them appropriately, leaving *all* discretion to national implementation. A previous assessment from judges, a maximum value or limited type of the claims could have been appropriate guiding parametres for Member States, as well as further regulation on notice, currently lacking.

Absent as well from the RAD’s provisions is any reference to any *criterion* to identify the “collective interests of consumers”. *Collective interests*, in the definitory article (Article 3), are described as “the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers”, whereas a consumer appears to be “any natural person who acts for purposes which are outside that person’s trade, business, craft or profession”.¹⁹⁰ Commonality and predominance (see *supra*) or the homogeneity test (see *infra*, *Chapter VII*) are examples of possible criteria for determining the presence of “collective interests” stemming from “the same unlawful practice” harming a “large number of consumers”. With the lack thereof, once again, the EU leaves determination to Member States. The goal of *harmonisation*, with the already

them of the possibility to pursue their claims in another form, if it does not undermine the sound administration of justice”; 23. “Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgment is given or the case is otherwise validly settled, as long as it does not undermine the sound administration of justice”; 24. “The defendant should be informed about the composition of the claimant party and any changes therein”.

¹⁸⁹ RAD, Recital (43).

¹⁹⁰ RAD, Article 3.

mentioned perils, is thus not completely achieved, making the Directive at hand an improvable instrument.

The issue is proven also with relation to the notion of *consumer*, too wide as defined by the Directive itself and too flexible as bound by the hyper-connected society and economic global framework. The references in the Annex to several other EU pieces of legislation – extremely varied – may cause some confusion on the exact scope of application of the Directive, too. On the one hand, it is not clear who is exactly a “consumer”, whilst on the other hand it is not specified how to narrow the collective interests that form the “large number of consumers” harmed (since the term “class”, is obstinately avoided). Although, it must be said, such references from Annex I could also be an important “trojan horse” to bring class actions in other fields of law, too.¹⁹¹

In addition, it should be underscored that the Directive, under Article 1, para. 2, expressly allows “Member States from adopting or retaining in force procedural means for the protection of the collective interests of consumers at national level”, as well as, implicitly for the enforcement of collective interests in other fields of law. Apart from constitutional doubts on the legitimacy of collective redress mechanisms only for certain infringements (to consumers and in competition law), analysed in the following, the concern underlying the document at stake emerges once again: that is the concrete risk of a European Union running at very different paces, with completely different rules for each Member State.

3.4. Current implementation: potential, challenges and open questions.

The overall sensation analysing the Directive is exactly this: EU institutions finally realising the necessity to provide collective procedural paths to tackle the ever-increasing collective societal issues, but, due to competing lobbying interests, not completely achieving the desired results in such delivery.

The enforcement gaps left by the Directive can be subsumed under two paradigms.

¹⁹¹ See, *infra*, *Philips Respironics* case, in *Chapter VIII*.

First, the vagueness of the provisions set forth cannot be stressed enough. It is true that the instrument chosen is a Directive, which pursuant to Article 288 TFUE leaves to Member States the precise choice of form and methods to achieve the bindingly-set result. At the same time, nonetheless, the aimed result still appears too indefinite for national authorities to adequately and, most importantly, harmonically attain it. Furthermore, despite the much-depicted intention to leave no room for abusive use, the broadness of certain provisions or the complete lack thereof dangerously allows for pernicious conducts from business competitors, third-party funders or “qualified entities” supposedly representing the interests of the class. Although in practice hardly achievable, a Regulation might be more suited to reach the proclaimed goals.

Second, in any case, the scope of application of the Directive appears too narrow, posing fundamental questions on the right to a judge and the principle of equality, under a constitutional viewpoint. Limiting collective redress to the consumer and competition sector (provided one can properly define the contours of such fields) does not appear justified nor by the historical evolution of group litigation nor by socio-legal evaluations of efficiency.

This “*silo approach*”,¹⁹² exacerbates the disparities in legal protection within the EU, since some fields of substantive law may count on a collective tool whereas others might not. Significant interpretative and “access to justice” concerns inevitably arise, especially if the deficient fields are of “fundamental” nature.¹⁹³ If the EU legislator deems it “necessary to strengthen procedural mechanisms for the protection of the collective interests of consumers to cover injunctive measures as well as redress measures” and thus “sets out rules to ensure that a representative action mechanism [...] is available in all Member States [...] to improve consumers’ access to justice”, it appears at least questionable that no such instruments are available for the safeguard of human dignity, the right to life, physical and mental integrity, proper education, health care and social assistance, environmental protection, freedom of thought and information, against inhuman or

¹⁹² As defined by VOET S.

¹⁹³ See *supra*, Chapter II.

degrading treatment, unfair working conditions, and several more European “common values”. Article 38 CFREU, on consumer protection, merely sets one right – and arguably, if a balancing were to be made, not the most important. Why should it be the only one granted with an “effective remedy” (assumed, as the EU legislator does, see *supra*, that class actions concretely provide such effectiveness)? There is a blatant contradiction with Article 47 CFREU, according to which, “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”: *any right* guaranteed by EU law, not just consumer ones.

Further doubts arise in relation to the considerable limitations of both *active and passive standing*, especially when matched with the (at least, at times) positive common law experience. This concerns the above reflections on the “qualified entities” and those on the confinement of possible defendants to the business world (the so called “traders”, from Article 2 of the RAD). The administrative-jurisdiction tradition of civil law only partially justifies this choice, as subsequently addressed in relation to the Italian regime. This touches also cross-border enforcement, as shown by the so-far underwhelming case law.

4. Concluding remarks. Bridging opposite enforcement traditions.

The transposition at national level of the EU Directive for representative action was due by 25 December 2022, with the entry into force of the domestic procedural measures by 25 June 2023.

At the moment, apart from Austria, Estonia, Luxembourg and Poland, 23 Member States out of 27 have transposed it.¹⁹⁴ By June 2027, and annually thereafter, each Member State should report to the Commission relevant information on the number and type of actions, infringements, parties and outcomes of the related proceedings. Commission’s reports are also expected starting from the subsequent year.

¹⁹⁴ As per official EU reports. Some of this Member States, however, already had collective redress mechanisms.

Considering how most countries are – questionably (see *infra*)¹⁹⁵ – adopting procedural instruments for conducts subsequent to the entry into force of said procedural mechanisms, it is expectable that it will take some time for the first case law to develop. Nonetheless, safe for significant exceptions, after almost one year the general numbers still seem rather low.¹⁹⁶

It does not appear as a coincidence, however, that the most promising implementations come from jurisdictions which offer regimes with a *large scope of application*, if not fully general, and with – at least in certain cases – an *opt-out regime* (for compensatory relief). The Netherlands, who adopts both, is by all means the trailblazer within the EU,¹⁹⁷ with several US law firms specialised in class litigation and third-party funders opening offices therein.

Other Member States, for one reason or the other, appear to be lagging behind. Belgium and Portugal, for instance, present opt-out regimes, but limited scope of application. Italy, on the other hand, as it shall be analysed in the following, presents a promising remedy with a general scope, but confined – for the compensatory relief – to an opt-in regime.¹⁹⁸

Furthermore, all EU countries seem to be lacking, even when standing is not too limited, the necessary proper *education* to class litigation. This concerns both jurists – judges and attorneys – and civil society. Appropriate *funding* rules and good practices need to be developed, too.

Such considerations link directly to the common law experience with group litigation, which was not introduced *ex abrupto*, but rather built on the, although not so efficient, previous experience of class actions. The breakthrough arrived in 1966 with the *amendments* to Rule 23 of the US Federal Rules of Civil Procedure, initially introduced in 1938. This means almost *three decades* to grow accustomed to the procedural technique at hand; that is without taking into account the previous legislative efforts of aggregate “representative” litigation dating as far back as 1848

¹⁹⁵ Chapter VII.

¹⁹⁶ See Tables.

¹⁹⁷ See, e.g. <<https://cms.law/en/media/international/files/publications/publications/european-class-action-report-2023?v=2>>.

¹⁹⁸ See Chapter VII and Tables.

and 1921. Evidently, it is not an easy task; as such, it takes a long time. The civil law traditional binary mindset of litigation only heightens this issue.

At the same time, still, the knowledge provided by *almost sixty years* of class litigation from overseas cannot be disregarded, in its positive as well as negative aspects. It is too precious of a pool of data and lessons to pretend it does not exist (e.g., by refusing to use the name “class actions” at EU level). Rather, *building* on it, judges and court auxiliary structures – centred around a dualistic concept of litigation – should be adapted to better deal with collective claims.

Judicial seminars and training courses should be offered to delve into the procedural and constitutional nuances of this complex kind of litigation. It is naïve and counter-productive to expect that a first-instance judge, educated and used to binary litigation, who has only seen and studied such type of cases, suddenly, on top of their ordinary workload, starts to efficiently manage collective cases, involving several stakeholders who are not parties to the proceedings and requiring very different reasoning and mechanisms for claim admissibility, evidence, liquidation and execution (as well as settlements, one of the most probable outcomes in the common law experience, after certification). Judicial training and case management,¹⁹⁹ therefore, are key aspects on which the EU needs to work, to truly develop effective class litigation techniques.

Concurrently, these aspects also apply to potential *class attorneys*, who may distrust the new procedural paths due to ignorance of the organisational, time and economic costs (especially, the latter, in case of loss), and not sufficiently advertised (or present) incentives for them to bring the suit.

Finally, similar reflections can be put forth with regard to *civil society*, too.

On the one hand, especially in jurisdictions with opt-in regimes, potential class members need to be made aware of the existence of class suits. In the common law world people walking by are not surprised to find posters advertising class suits, which are, viscerally, an *inner* part of its *social texture* (see all the entertainment

¹⁹⁹ SILVESTRI E. (2024). *Brevi note su case management e ricorsi collettivi*, in in HENKE A., RANDAZZO B. and VOET S. (eds.), *L'azione di classe italiana nel quadro europeo: profili sostanziali e processuali*, Giappichelli (forthcoming in 2024).

outputs portraying them, e.g. from the film industry). Individuals in Europe, instead, may be surprised, if not skeptical thinking it might be a scam, when notified with a potential class adherence.

On the other hand, common law has a tradition of public interest litigation, of forms of private enforcement through the courts to promote social change. This element is not extraneous to the civil law world. However, it pertains mainly to *different fora* (constitutional courts, the ECtHR or the CJEU), rather than in front of ordinary, first-instance, judges. In these different fora the legitimacy of the complained norms or conducts to constitutional or supranational standards is mainly verified, thus spreading its *erga omnes* effects. Such effects are indeed *erga omnes*, that is on the *whole* community. This is not the case of class litigation, in which the effects do fall in favour of (or against) more than one person, but still *not* in favour of (or against) *every* member of the society: rather in favour of (or against) a *minority* or a less-advantaged group.²⁰⁰ These different civil-law cases, both in front of national constitutional and supranational courts stem from individual disputes, one v. one, or applications (safe for, e.g., the pilot-judgement procedure, see *supra* and *infra*). The effects of the decision can *extend* on other individuals, but (in most cases) are not of compensatory nature and, most importantly, do so as members of the whole community, not as members of a class whose harmed (or potentially harmed) subjective positions were enforced on their behalf, with an implicit or explicit adherence, by a representative person or entity.

Similar types of *representative relationships* can be found in continental Europe in *other forms of association*: e.g., political parties, labour unions, churches or even families. The example of *labour unions* seems particularly pertinent, as it shall be analysed in the following, comparing the stances brought in the civil law world through negotiations of these entities on behalf of the workers and those brought in the common law world through litigation. Likewise, significant civil rights achievements in the former jurisdictions have been achieved through *political representation*. This is the case, for instance, of same-sex couples or the right to

²⁰⁰ There are possible exceptions, e.g., climate change.

abortion. Often, these political changes have been based on constitutional values or decisions; again, nonetheless, if any litigation was involved it was at initial stages and in front of the apex courts, stemming from individual cases.

Against such backdrop, the absence of fundamental actors from the common law system can be perceived in the civil law one. They are all those organisations and associations constituted specifically to *litigate* public interest claims. Very few, if any, exist with that principal focus. There is a number of no-profit entities dedicated to the judicial enforcement of *consumer* rights, but very few to those of civil and fundamental rights through the courts. In the same way, there is a number of no-profit entities devoted to the protection of human rights, but very few statutorily aiming to do so via litigation; rather, they act more through political advocacy and campaigning. This might also explain (not justify) the limited scope of application of the RAD and several domestic regimes, which in turn explains the lack of such types of organisations, in a vicious mutual cycle.

Under this standpoint, the US and common law social soil, instead, was much more fertile for group litigation, also from a funding perspective, with historic organisations such as, *in primis*, the Legal Defense Fund which had brought the landmark *Brown v. Board of Education* case in 1954, and historic foundations *economically backing* them.

In conclusion, it can be assessed how the European Union is slowly, and drastically, changing course in relation to collective redress, accepting the need for new supra-individual procedural tools to tackle to supra-individual challenges of the contemporary world. Nonetheless, this process is proving to be dangerously short-sighted and unharmonised, thus exacerbating disparities between Member States' citizens and, in most cases, providing procedural redress only on paper, due to relevant regulatory obstacles or unaddressed gaps. The lessons from the previous and rich common law experience are not adequately taken into account.

The most important lesson from these being that mere procedural innovations are not sufficient, unless supported by concrete actions for change within the legal and social texture, too.²⁰¹

²⁰¹ See *infra*, Part V.

CHAPTER VII

THE 2019 ITALIAN CLASS ACTION REFORM
IN AN INTEGRATING CONSTITUTIONAL PERSPECTIVE

1. Premise. An intertwined procedural tapestry. – 2. Constitutional foundations of (collective) access to justice. – 3. The 2019 Italian class action reform: procedural hallmarks, expansion and innovations. – 4. Enforcing fundamental rights through class actions: constitutional nuances. – 4.1. Balancing constitutional arguments and constitutional traditions. – 5. Navigating interpretative hurdles with a constitutional compass. – 5.1. The homogeneity requirement: a key issue. – 5.2. Passive standing and coordination trajectories with the 2009 “public class action”. – 5.3. Publications on the telematic portal and publicity. – 5.4. Non-retroactivity of the new provisions. – 5.4.1. Constitutional legitimacy. – 5.4.2. Unlawful conducts protracted over time during the two regimes. – 5.4.3. The allocation of jurisdiction. – 6. Concluding remarks.

1. Premise. An intertwined procedural tapestry.

As anticipated, on 19 May 2021, Law No. 31 from 12 April 2019 came into force, introducing a *new dual class action* regime in Italy, under Title VIII-*bis* of the Code of civil procedure. The new regulations, characterised by compensatory and injunctive remedies, replace the previously underutilised Italian consumer class action, extending its original applicability both objectively and subjectively. The intent to “*bolster access to justice*” to all citizens for the protection of their rights and interests, even of constitutional relevance, in every sector is evident and has been repeatedly expressed, also in the preparatory works.²⁰² The legislative choice

²⁰² See the report of the parliamentary discussions from 1 October 2018: <<https://www.camera.it/leg18/410?idSeduta=0053&tipo=stenografico>>.

of setting a *general scope of application* presents it as a tool with disruptive potential.²⁰³

The new dual collective regime is extremely innovative also in reference to the other Member States' choices and to what has been advocated by the European Union itself, as depicted *supra*. In Europe, in fact, it is worth stressing again, class actions have always been viewed with considerable scepticism. Only in recent years, a worrying series of scandals harming consumers and users has led the various legislators – of individual Member States, autonomously and in parallel, on the one hand, and of the EU, on the other hand – to a gradual trend reversal. The last step of this legislative policy-*revirement* is marked by the already-mentioned recent RAD, focused on *consumer* collective redress (see *above*, *Chapter VI*). The Italian legislator from 2019, however, proposes a dual mechanism that significantly *surpasses* the protection threshold established by the EU legislator in 2020.

The reasons for this – surprising, and bold, at first glance – choice from the Italian legislator is twofold.

It must be preliminarily recalled how the EU Commission's 2013/396 *Recommendation* “on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law” provided for injunctive and compensatory collective mechanisms for *all* “mass harm situations”.²⁰⁴ The limitation to consumer protection came into play only subsequently with the RAD, after several lobbying interventions. It is, therefore, reasonably probable that the Italian legislator still had the 2013 EU Commission's Recommendation in mind when drafting the new domestic class action regime.

This links to the second reason, that is the *political parties* sitting in the Parliament's majority and leading the Italian government at the time of the implementation. The two main political parties were MoVimento 5 Stelle and Lega Nord, both (especially the former) characterised by populist stances and an

²⁰³ See RUFFOLO U. (2021). *Interessi collettivi (e diffusi), azione inibitoria collettiva e “misure idonee” correttive*, in RUFFOLO U. (ed.) *Class action ed azione collettiva inibitoria. Commento sistematico alla legge 12 aprile 2019, n. 31*, Giuffrè Francis Lefebvre, Milan, 7.

²⁰⁴ See *supra*, *Chapter VI*.

attention, in their electoral manifestos, for the most disadvantaged segments of the population, against institutional and corporate interests. A mention of the class action instrument appeared in their “Contract for the Government of Change”, presented to the Parliament in May 2018, after winning the elections: among several commitments, that “to implement the class action instrument, thereby enabling it to protect both private citizens and businesses against frauds or abuses committed by the same economic entity”.²⁰⁵

Such commitment followed the long-standing effort of Alfonso Bonafede, the new Minister of Justice, to amend the until then scarcely-used 2010 consumer class action also during the previous parliamentary term.²⁰⁶ The introduction of a bill regarding class actions by no other than then-deputy Bonafede dates back to 9 July 2013 – incidentally *right after* the EU Commission 2013/396 Recommendation from 11 June 2013 (thereby revealing its close influence).²⁰⁷ This proposal, however, foundered in the Parliament’s Senate after initially receiving favourable consideration in the Chamber of Deputies.²⁰⁸ Still, the explanatory report for such bill is particularly revealing of the objectives underlying the 2019 reform, when Bonafede became Minister: in sum, “to make the tool more usable and

²⁰⁵ At page 15, “Area civile, procedura civile e costi della giustizia”, available here: <https://www.ansa.it/documents/1526568727881_Governo.pdf>.

²⁰⁶ See SILVESTRI E. (2021). *Rebooting Italian Class Actions*, in UZELAC A. and VOET S. (2021). *Class Actions in Europe. Holy Grail or Wrong Trail?*, Springer, Cham, 201, for a nuanced analysis of the 2019 Italian reform and according to whom, in relation to previous consumer-focused class action regime: “Since 2010, the year when the rules governing class actions for damages entered into force, the number of class actions commenced and successfully brought to an end (meaning, with an award of damages granted, in general, to a small group of subjects) is just a handful. There are no official records. One can assume that probably 20 or 30 class actions were instituted, but the majority did not overcome the initial stage of the procedure, when the admissibility of actions is tested, and therefore it is impossible to track cases unless one has access to the records of the courts where they were brought”.

See also the report from the parliamentary discussions from 21 March 2017. According to Alfonso Bonafede, at the time still a Deputy (for MoVimento 5 Stelle), the reform to the previous class action regime that he had proposed, as a Deputy, in 2013, had failed after years of negotiations because of corporate and insurance companies’ interests. Available here: <<https://documenti.camera.it/apps/nir/getRiferimentiNormativi.aspx?base=1&blnDea=0&strURL=http://documenti.intra.camera.it/leg17/resoconti/assemblea/html/sed0763/stenografico.htm>>.

²⁰⁷ Proposal presented on the 9 July 2013, available here: <https://documenti.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0012560.pdf>.

²⁰⁸ See *supra*, fn. 489 and fn. 485.

attractive”.²⁰⁹ For this purpose, “the first fundamental intervention” involved “*expanding* its potential users”:²¹⁰ hence, in 2019, the general scope of application and the different legislative trajectory in relation to the 2020 EU Directive. The rest of the objectives will be further examined in the following.

In the meantime, it is worth highlighting the entry into force of the 2020 EU Directive (RAD), requiring Member States to implement it at national level by 25 December 2022. Despite the possibility of merely amending Title VIII-*bis* of the Code of civil procedure (embedding the 2019 class action provisions), however, the new Italian legislator – in a significantly different Parliament, with different majorities – in 2023 introduced an *additional* (dual, once again) consumer-limited regime.²¹¹ A simple amendment would have been certainly advisable for a more coherent and harmonious system of collective enforcement, as well as admissible under the Directive itself.²¹² Thus, in addition to the *two general* remedies – compensatory and injunctive – introduced in 2019 (effective from 2021) and included in the Code of civil procedure, there are now a *third and fourth* class action (compensatory and injunctive), dedicated to *consumer* protection, included in the Consumer code and in implementation of the EU Directive.

Furthermore, as if it were not complex enough, a *fifth* collective remedy before the administrative judge, originating from 2009, complements the framework. It is the so-called “public class action”, or “action for the efficiency of administrations

²⁰⁹ This objective is sought “through interventions on the extension of standing to sue, the introduction of incentives for use by actors and their representatives, the effectiveness of protection and guarantees in the overall conduct of the procedure, and a more detailed and precise regulation of such proceedings, also to avoid gaps and interpretative uncertainties”, see fn. 490, 8.

²¹⁰ Id. “The first fundamental intervention to extend the usability of the tool involves broadening its potential users. Extracting the class action procedure from the consumer code and more aptly placing it in the civil procedure code could prevent the exclusion from such protection of all those subjects who find themselves, as consumers might, in a situation requiring access to justice characterised by modest compensatory claims caused by multi-offensive unlawful acts, or in a situation where, even if the claim is not modest nor the structural weakness established, they still intend to act collectively for procedural convenience. This would serve to enhance the deflationary effect of the tool and to reduce the risk of forming conflicting judgments in relation to the same conduct and homogeneous positions”.

²¹¹ The so-called “representative actions for the protection of the collective interests of consumers”, pursuant to Articles 140-ter ff. cod. cons. (the Consumer code), enacted by legislative decree from 10 March 2023, no. 28.

²¹² Article 1, para. 2: “This Directive does not prevent Member States from adopting or retaining in force procedural means for the protection of the collective interests of consumers at national level”.

and public service concessionaires”, pursuant to Legislative Decree of 20 December 2009, No. 198. Although until now scarcely implemented, it may potentially overlap with the injunctive class action from the Code of civil procedure, as subsequently discussed.²¹³

In this context of fragile certainties, the innovative Italian legislative intervention of 2019 is placed and will be herein analysed. It is worth stressing, once again, how the perspective adopted is not a civil procedural one. Rather, it is a constitutional one, and, as such, it will concentrate only on certain aspects of the procedural remedies, relevant under an access to justice and fair trial standpoint, as well as in line with the deep constitutional transformations highlighted in Part II.

With this purpose, the Chapter shall proceed as follows.

First, it will concentrate on the constitutional foundations of *access to justice through collective procedural means*. It will ground the subsequently analysed mechanisms to the Italian constitutional values and provisions, proposing an oriented reading of the right to action in light of the principles of pluralism, effective protection and solidarity, under Article 2 of the Constitution. “Social formations” will be underscored as a key notion for encompassing representative actions’

²¹³ At the same time, in addition to coordination with the supranational EU level and its implementations, an assessment of the national regulatory framework is necessary also in relation to the other, various, tools of collective judicial protection. Even before the previous consumer class action, in fact, several collective tools had entered the Italian legal system. Extremely sector-specific, they concerned, for example, the matter of abusive general contract conditions (Art. 37 Consumer Code), the repression of anti-union conduct (Art. 28 Workers’ Statute), the repression of unfair conduct (Art. 2601 Civil Code), and especially anti-discrimination (Legislative Decree No. 286 of 1998, on discriminations ‘for racial, ethnic, linguistic, national, geographic origin or religious reasons’; Legislative Decree no. 215 of 2003 ‘for equal treatment of people regardless of race and ethnic origin’; Legislative Decree no. 216 of 2003, ‘for equal treatment in employment and working conditions’; Law no. 67 of 2006, for the protection of ‘people with disabilities victims of discrimination’; Legislative Decree no. 198 of 2006, ‘Code of Equal Opportunities between Men and Women’). However, Law no. 31 of 2019 does not mention these tools, unlike what happens with the previous consumer class action (arts. 139, 140 and 140-bis Consumer Code), which is expressly repealed, and with the so-called administrative class action (or ‘public’, Legislative Decree December 20, 2009, no. 198, ‘appeal for the efficiency of administrations and public service concessionaires’), which is expressly saved. To these, the new ‘representative action for the protection of the collective interests of consumers, ex Art. 140-ter et seq. Consumer Code is now added. In the legislative silence, the doubt concerns the possible overlap with the new remedies of Arts. 840-bis et seq. and 840-sexiesdecies of the Civil Procedure Code. With this in mind, the main issues that the institute itself and its first applications raise from a constitutional perspective will be considered below. The analysis, in any case, will focus mainly on the discipline introduced by Law no. 31 of April 12, 2019.

classes, as vehicles for ensuring more effective participation, justice and representation from all individuals, as an alternative to the traditional intermediate bodies.

Second, it will focus on *fundamental rights’ enforcement* itself, through such complex procedural remedies. In particular, it shall return on the opportunity of enforcing essential and sensible rights through collective representative mechanisms. On the scales of effective justice, the right of access to a court, reasonable length of the proceedings and the principle of equality of arms should be weighed against the fair trial guarantees, which encompass the right to effective participation in the proceedings. As argued before, under the legal lodestar of Article 24, in connection with Articles 2 and 3, of the Italian Constitution a right to collective enforcement can indeed be recognised. The constitutional legitimacy and appropriateness of the *general* scope of application of Title VIII-*bis*’ injunctive and compensatory class actions, rather than a merely sectorial one – such as the EU model from 2020, limited to consumer and competition law – will be pondered. As argued, also in the next Part (*Part IV – Enforcing fundamental rights: exercises of change*), extremely positive effects can stem from an application of said techniques, even far beyond those originally conceived by the 2019 legislator, as comparative lessons teach.

Third, *interpretative hurdles* for a more effective instrument will be addressed. Key concepts and provisions shall be analysed with a critical mindset, taking into account the legislator’s rationale and the overall constitutional perspective of the present investigation. In particular, the homogeneity requirement, the rules on standing, on jurisdiction and competence and coordination with the previous tools – especially the so-called administrative class action, from 2009 – will be examined. As argued, a series of relevant potential negative outcomes must be considered, too. They range from a stalling of the class action mechanism through restrictive interpretations or minor but crucial legislative choices to a completely abusive and improper use. Regarding legislative choices, the two subsequent parliamentary majorities, after the one that introduced the dual mechanism in 2019, in fact, have appeared not to prioritise its development as a key item of their political agenda;

rather, they seem to hold quite the opposite position, as it will be addressed. Furthermore, the nascent and evolving body of jurisprudence on this matter will be taken into account.

Such analysis will favour the following Part's concrete examination of the class action tool through case studies, as well as the final Part's proposals for future development.

2. *Constitutional foundations of (collective) access to justice.*

Access to justice in the contemporary age undertakes collective connotations, as addressed in the above. Social evolutions have been considered so far, with the related constitutional transformations, primarily on the side of powers, on the one hand, and the legislative innovations, which seek to adapt to the former, on the other hand.

These changes cast the very concept of access to justice into a new supra-, if not "meta-", individual dimension. In this sense, the historical dualist civil law conception of the trial appears outdated.²¹⁴ This renders an analysis of the new instruments of the outmost urgency.

As a preliminary matter, however, an assessment of the very constitutional legitimacy of collective forms of jurisdiction appears imperative. As argued herein, in light of the Italian constitutional principles, such forms appear not only *legitimate*, but even *necessary*. In this sense, Giuseppe Chiovenda's reading of the "right of action" at the beginning of last century is extremely topical and valuable. On this, it can be maintained, is based much of the structure of the current Code of civil procedure from 1940, as well as, inevitably, the Constituent Assembly's reflections in relation to Article 24 of the Italian Constitution.

According to said Article 24, para. 1, It. Const., "Everyone can take legal action to protect their rights and legitimate interests". The legislator is thus prevented from surreptitiously depriving individuals from the substantive rights recognised. It

²¹⁴ See, already in 1975, CAPPELLETTI M. (1975). *Formazioni sociali e interessi di gruppo davanti alla giustizia civile*, in *Rivista di diritto processuale*, 25, quoting MORTARA L.'s extremely anticipatory views, from as early as 1904.

enshrines, in short, the key principle, summarised by Chiovenda, according to which “every concrete will of law whose formation according to a substantive law is possible, must find suitable means of implementation in procedural law”.²¹⁵ It is exactly in the reflections of the great Italian civil-proceduralist, from the first decades of last century, that one can find two illuminating principles in relation to such “right to action” (“*diritto di azione*”): that is, its “atypicality” (“*atipicità*”) and its *public character*.

The former, in particular, emphasises, with foresight, the need for *effectiveness* of the judicial protection, to be construed as absolutely instrumental to substantive provisions. The consequence, of great practical significance, is that “the process must, as far as concretely possible, give those holding a right everything and precisely what they are entitled to. [...] To sum up: *every way* of enforcing the law (and *every means* of enforcement) that is *practically* possible and not contrary to any general or special legal norm must be deemed admissible”.²¹⁶ These considerations, therefore, reveal a fundamental obligation on the part of the legislature to provide the most appropriate procedural instruments for the *concrete* protection of the substantive subjective rights guaranteed in the abstract. The same considerations can, indeed must, be proposed with regard to any interpretation effort of the right of access to justice itself, which is under consideration here in its collective dimension.

This tension, as desirable as is necessary, becomes even more pressing in the light of the entry into force of the 1948 Italian Republican Constitution, which makes the cardinal principles of procedural law its own by bathing them in the supreme values with which it is imbued. It is true that, notwithstanding the principle of atypicality of the action, the aforementioned Article 24 of the Italian Constitution, at least on a historical-literal level, posits a *subjectivist* concept of protection. Nevertheless, it is still possible, indeed necessary, in light of the key values of Articles 2 and 3 of the Italian Constitution, as well as of a conception of

²¹⁵ PROTO PISANI A. (2002). *Nel centenario del magistero di Giuseppe Chiovenda: La tutela giurisdizionale dei diritti nel sistema di Giuseppe Chiovenda*, in *Il Foro Italiano*, 125, 125, referring to CHIOVENDA G.’s *Istituzioni*, I, n. 10, 31 ff.

²¹⁶ *Id.*

the national constitution as a “living instrument” on par with the ECHR, to argue in favour of an *ouverture* to collective procedural techniques for the judicial enforcement of rights (group litigation techniques which, it should be recalled, were far beyond the imagination of the Italian constitutional drafters from 1948, the decisive reform in the US, mentioned above, dating back to 1966).²¹⁷

The reference in Article 2 It. Const. to the “*social formations*” in which the individual’s personality develops, and in which their inviolable rights are guaranteed is paramount to this regard.²¹⁸ As is known, their constitutional recognition stems from catholic solidarism and the so-called doctrine of “*juridical pluralism*”, referred to by Giorgio La Pira during the Constituent Assembly’s discussions as that doctrine “which recognises the rights of the individual and the rights of communities and thereby gives a truly integral view of the imprescriptible rights of man, [...] lead[ing] to a type of state that corresponds as much to the social needs of our time, as much as to the organic structure of the social body.”²¹⁹ Among such communities, the family, above all, should be counted, well-rooted in the catholic Italian cultural tradition, but also, among others, political parties and labour unions.

The words of Aldo Moro in relation to these “social formations” *ex* Art. 2 It. Const., during a subsequent session of the Italian Constitutional Assembly, are particularly enlightening:

And we identify and specify them in this way, presenting them as those in which man’s dignity and freedom is expressed and unfolds. By referring to man as the holder of a right that finds its expression in social formation, we can clearly clarify the humanistic character that essentially pertains to the social formations that we want to see guaranteed in this article of the Constitution. And from another point of view, speaking in this case of the rights of man, both as an individual and in social formations, makes it clear that the protection accorded to these formations is nothing more than a further

²¹⁷ See *supra*, Chapter VI.

²¹⁸ “The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the *social formations* where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled”.

²¹⁹ Discussion from 9 September 1946. Report available here: <https://www.nascitacostituzione.it/01principi/002/index.htm?art002-003.htm&2>.

explication, a development of the rights of autonomy, dignity and freedom that have been recognised and guaranteed in this constitutional article to man as such. That is, the source of the dignity, autonomy and freedom of these social formations is emphasised, which are expressions of human freedom, expressions of the essential rights of man, and as such must be valued and recognised. In this way, we establish a coherent democratic development; for the state truly ensures its democratic nature by basing its order on respect for man seen in the multiplicity of his expressions, man who is not just single, who is not just an individual, but who is society in its various forms, a society that is not exhausted in the state. Man's freedom is fully guaranteed if man is free to form social aggregates and develop within them. The truly democratic state recognises and guarantees not only the rights of the isolated man, which would actually be an abstraction, but the rights of the man associated according to a free social vocation.²²⁰

These words take on significant relevance in a coordinated reading with Article 24 of the Italian Constitution. If one interprets the “social formations” referred to in Article 2, in fact, as illustrated by Moro, as vehicles for the *full guarantee* of the inviolable rights of individuals, it is evident how, in the current unbalanced social and constitutional context, the free possibility of *forming social aggregations* – that is “social formations” – must be recognised in order to re-equilibrate the growing inequalities, imbalances of power and the very distortions of the democratic-representative process.

It does not appear accidental that Moro emphasises how man (or woman) is not just a single individual, but he (or she) is society in its various forms, “a society that does not end in the state”. Well, today, in view of the evident inefficiencies and

²²⁰ Discussion from 24 March 1947. Report available here: <<https://www.nascitacostituzione.it/01principi/002/index.htm?art002-003.htm&2>>. He follows: “With these clarifications and these corrections of form, which may not be perfect (we are not absolutely satisfied with the wording either), but which are the best we have been able to find to express this essential concept, it seems to me that this article of the constitution takes on a more stringent and proper form, a more juridical form, and that consequently the objections raised by various colleagues, tending to exclude this article, as a whole, from the constitutional charter, must be considered less well-founded. In this way, it has a clear legal significance and contributes to defining an essential aspect of the characteristic purposes, of the historical face of the Italian state. And I hope that the formula we have drafted will receive the sympathy of most of my colleagues, so much so that this article - which expresses a fundamental position in the construction of the new Italian state - will receive almost unanimous consensus, so that it, also through this large vote, will be manifested as a fundamental stone of the new political constitutional edifice that we are raising”.

already-addressed dysfunctions of the *democratic* state (see *supra*, Part II), *in primis* in reason of *representative* and *participatory* gaps, those words are enriched with meaning, with a new teleological and interpretative value. At the same time, such an interpretation also carries considerable practical effects, intimately tying in with the above-mentioned Chiovendian conception of the right of action. Not only the legal obstacles, but also the practical gaps that concretely, systematically, hinder individual access to justice must be overcome in practice.²²¹ In sum, in the current shattered de-structured framework, which “does not end in the state”, but rather goes beyond, and behind, it, social formations stand as the ultimate device capable of bridging otherwise unsurmountable gaps for the single individual.

In a world with such unbalanced economic and social relations, on the other hand, only a union of forces of individuals seems to be able to rebalance their positions in the face of massified and standardised violations of their rights and interests. It is, in other words, a direct realisation of the *principle of social solidarity*, expressed in the remainder of Article 2 It. Const., as underscored by the Italian Constitutional Court in different stances. The “original connotation of man *uti socius*”, using the latter’s words, is “the basis of social coexistence as normatively prefigured by the Constituent Assembly”.²²²

In relation to volunteering – understood as “a fundamental model of the positive and responsible action of the individual who spontaneously and gratuitously performs personal services in favour of other individuals or of *collective interests* worthy of protection by the community” –, the “*Consulta*” has long expressed the need for the national legislator to “establish the necessary conditions to ensure that it is carried out as uniformly as possible” throughout the country.²²³ According to the Court, volunteering should be considered as an expression of the solidaristic principle at hand, through the means of social formations, as a general scheme of action in societal life to contribute to the guarantee of everyone’s inviolable rights.

²²¹ See *supra*, Chapter V.

²²² See, e.g., Italian Const. Court, judgement no. 75 from 1992.

²²³ *Id.*

Equally, all social formations are to be conceived as a way to overcome the “atomistic limit of individual freedom [...] beyond the constraints deriving from public duties or commands of authority” – in short, beyond the constraints deriving from *sovereignty* and the concrete manifestations of power, whether it be public, private or hybrid in nature. Among them, on the side of the effective protection of rights, and the correlated personalist principle, also recognised by Article 2 of the Constitution, one cannot forego the intuition, even *in fieri*, of a series of social formations – such as the class actions, herein examined – which would come into existence with this fundamental purpose. They dovetail seamlessly, after all, in the Constitutional Court’s above-mentioned definition in relation to volunteering, as “a fundamental model of the positive and responsible action of the individual”, that is the name plaintiff of the class, “who spontaneously and gratuitously performs personal services in favour of other individuals or of *collective interests* worthy of protection”.²²⁴

Furthermore, one can find in this type of social formations a key expression of the principle of *social pluralism*, precisely the cardinal junction – rather than a balancing point – between the other two principles expressed by Article 2 of the Italian Constitution, the *personalist* one, on the one hand, and the *solidaristic* one, on the other hand.²²⁵ Just as the legal public/private dichotomy has become blurred, so too the evanescent role of political parties – themselves social formations in which the personality of the individual is expressed –, which today are in deep crisis, as are other social formations such as trade unions (but also family itself, under different respects), appears replaced by new social formations capable of more *effectively representing* their demands for the enforcement of rights, otherwise unfulfilled.²²⁶ Social formations, manifested through collective and representative judicial actions, become the means through which old paradigms lost are regained.

Indeed, it appears not so radical, also in the light of the aforementioned constituent debate, to identify in the “classes” of class actions the new social

²²⁴ Id.

²²⁵ ELIA L. (1992). *Le norme sulle formazioni sociali nella Costituzione repubblicana. Studi in onore di G. Vignocchi*, Mucchi, Modena.

²²⁶ See RIDOLA P. (1987). *Democrazia pluralistica e libertà associative*, Giuffrè, Milan, 37.

formations pursuant to Article 2 of the Constitution that implement, albeit in an *atypical* manner, but, as demonstrated above, legitimate, the right of action set forth in Article 24, para. 1 of the Constitution. The “*public character*” of the latter provision thus vigorously emerges, too, just like traditional public enforcers are flanked, if not replaced, by new “private” enforcers.²²⁷

This reading, based on the emergency valve of Article 2 of the Constitution, which chisels a collective dimension in the guarantee of rights, hereincluded that to a judge, finds correspondence in Article 3 of the Italian Constitution. The latter norm, as is known, has long been considered in the Italian constitutional framework as a general reasonableness clause, that is a limitation for the legislative discretion, an “all-pervasive criterion for measuring the legality and appropriateness of the political choice”,²²⁸ prohibiting provisions incompatible with the overall logic of the constitutional system. In relation to the right to action, *ex* Article 24 It. Const., such provision has been described as “a directive of rationality”, i.e. a principle pursuant to which the *structure* of the judicial proceedings must not be to the detriment of the *concrete substantive* position of the plaintiff who is in the right.²²⁹

In the – reasonable – balancing of the different interests at stake – that of an effective protection of rights, also and above all through collective procedural instruments, on the one hand, and those, discussed *infra*, which oppose obtaining this through collective procedural instruments, on the other hand –, one cannot therefore account a purported upholding of the individuality of the right of action or an undefined (current) structural deficiency of the judicial system to sustain collective treatment. The effective protection of rights must always prevail in such cases. This stands *a fortiori*, according to the solidaristic principle expressed-above and to the principle of substantive equality *ex* Article 3, para. 2, It. Const., when confronting deep-rooted, systemic or standardised, mass inequalities, involving entire communities and, especially, those weak parties to whom the Italian

²²⁷ See HOMBURGER A. (1974). *Private Suits in the Public Interest in the United States of America*, in *Buffalo Law Review*, 23.

²²⁸ MEZZANOTTE C. (1991). *Quale sistema delle fonti? Le fonti tra legittimazione e legalità*, *Queste istituzioni*, 87-88, in relation to Article 3.

²²⁹ PROTO PISANI A. (2002). *Nel centenario del magistero di Giuseppe Chiovenda: La tutela giurisdizionale dei diritti nel sistema di Giuseppe Chiovenda*, in *Il Foro Italiano*, 125, 125.

Constitution – in the same Articles 2, 3 and 24, but in general throughout the text – refers for a preference of protection, as individuals whose patrimony of rights is “more subjected, due to their human condition, to conditionings and compressions”.²³⁰ As argued by common law scholarship (see *supra*), class actions can become fundamental tool of counter-majoritarian force.

Approaching the conclusion of these brief outlines on the constitutional foundations of the right of access to justice exercised through collective procedural mechanisms, namely, in the present case, representative ones – constitutional foundations, in any case, taken for granted by the few Italian, and not only, constitutionalists who have dealt with the matter,²³¹ albeit not *funditus* –, it is necessary, lastly, to outline what the above-mentioned interests might be which, in a possible, abstract balancing scenario, oppose the right to effective enforcement.

As clarified, mere *structural or managerial reasons* cannot be sufficient arguments to even be placed on the balancing scales. This has unmistakably been underscored by the Italian Constitutional Court on numerous circumstances.

The remaining, still significant, interests are therefore also an expression of the more general guarantee of *due process*, to which the right of access to justice accedes, in many respects mixing and overlapping with it. In this respect, reference is made to the previous Part’s mention of the case law of the ECtHR, namely in relation to Article 6 ECHR. Also in the Italian Constitution, important references to these crucial values can be found, again in Article 24 It. Const., as well as in Article 111 It. Const. They are the right of defence, attested as inviolable at every stage and level of the proceedings by the second paragraph of the same Article 24 It. Const.; the right to a “fair trial governed by law”, in an adversarial process between the parties, on equal arms, before a third and impartial judge, and with reasonable duration, pursuant to Article 111, paras. 1 and 2, It. Const.

²³⁰ MARTINES T. and SILVESTRI G. (2011). *Diritto costituzionale*, Giuffrè, Milan, commenting Article 2 It. Const.

²³¹ PACE A. (2011). *Interrogativi sulla legittimità costituzionale della nuova “class action”*, *Rivista di diritto processuale*, 1; RORDORF R. (2010). *L'azione di classe nel novellato art. 140 bis cod. consumo: considerazioni (e qualche interrogativo)*, in *Il Foro Italiano*, 133, 183.

Clearly, these values are fundamental, too, to be strenuously defended in any democratic order. There would be no effective protection, no justice accessed or delivered, if not through due process; for all the parties involved, plaintiffs, but also defendants and possible third parties. Their guarantee is crucial. However, it would be incorrect to argue that these important interests are in *direct* conflict with that of effective protection, including through representative collective procedural instruments. The latter do not in themselves constitute a violation of the former, nor does one exclude the other. On the contrary, there are numerous arguments already raised in doctrine, for several decades, to the effect that they can facilitate better participation in the process and a concretisation of the principle of equality of arms. It is simply necessary to rethink judicial forms and structures to support such litigation more effectively, while also guaranteeing the interests outlined above. Just as there are obvious examples of procedural distortions and violations of these interests within class actions (but, it is worth remembering, also within binary, one-on-one litigation), there are also numerous practical examples – mostly from overseas, returned by comparative analysis – of virtuous use of the same, with total respect for the due process.

The alternative, after all, is very simple: in radical contrast with the key *solidaristic* spirit of the Constitution, to not even allow the last and weakest members of society to have access to a trial for the protection of their substantive rights, which, consequently, would become mere abstract words, drowning any concrete possibility of ever testing, in accordance with the principle of the rule of law, the democratic nature of the system itself.

3. The 2019 Italian class action reform: procedural hallmarks, expansion and innovations.

Before delving into the main interpretative and applicative issues of the 2019 class action regime, a brief examination of its salient features is imperative. This dual – compensatory and injunctive – route of enforcement forms the core matter

of the present research, necessitating an exhaustive presentation to facilitate subsequent constitutional discussions.

The limited success of the previous consumer tool, together with a unique political context, particularly favourable, has already been highlighted. As anticipated, the scarce use and scepticism towards the previous device – both from legal practitioners and the general public –, coupled with a series of major economic scandals, led the parliamentary majorities at the time – characterised by a populist nature – to seek a remedy capable of “bolstering access to justice”. The answer was found in a radical overhaul of the previous mechanism, set in the Consumer code since 2007, with relatively minor amendments from 2010 and 2012.

The most relevant choice was undoubtedly a full expansion of the *scope of application* of the class action regime. From *consumer*-limited it became *general*. Accordingly, from the Consumer code its regulation was transferred to the Code of civil procedure (hereinafter “c.p.c.”), under the new Title VIII-*bis* (“On collective proceedings”) of Book IV. The expansion regarded both the compensatory and the injunctive remedy, a dualism which was maintained: the former, for the enforcement of all “homogeneous individual rights”; the latter, for any type of “interest [...] of a plurality of individuals or entities”. This choice – innovative also with respect to the content of RAD, as already mentioned – is undoubtedly one of the most significant of the 2019 Italian reform. So far, since its entry into force on 19 May 2021, at least²³² 22 class actions have been brought: ten on consumer issues, five in employment and labour matters, three for the protection of the right to health, two (inadmissible) on tax matters, one on securities, one on competition law.²³³

The confirmation of the dual collective remedy is also extremely important: on the one hand, the compensatory *azione di classe* pursuant to art. 840-*bis et seq.* c.p.c.; on the other hand, the injunctive *azione inhibitoria collettiva* pursuant to art. 840-*sexiesdecies* c.p.c. Although most of the doctrinal debate and legislative focus so far seems to be on the compensatory class action, this duality is central.²³⁴ The

²³² Not all of them are uploaded on the portal, see *infra*, Chapter XI.

²³³ See *Charts*.

²³⁴ *Id.*

two instruments are profoundly different. At times synergistic and complementary, they are still autonomous and the result of two opposing legal traditions.

The *compensatory* class action is probably the best-known procedural mechanism of the common law culture from overseas, aiming at compensation for damage or, more rarely, at the return of a specific good. As elaborated further, it allows, in theory, for a recovery of damage for all the individuals affected by the same unlawful activity, through a single suit. This process inevitably requires a – more or less – explicit adherence by all individuals (so-called “opt-in” and “opt-out” regimes), as well as – at times – “creative” forms of judicial handling, *i.e.* subclasses or even fluid recovery (“*cy-près*”) mechanisms.²³⁵ In comparison to individual suits, economy redress is favoured, given the non-necessity to personally initiate legal proceedings (and bear their costs). At the same time, as a counter-balance, a certain degree of standardisation in the quantification of damage is expected in most cases. It is, thus, evident that the true battleground on which most compensatory suits are decided stands already at the admissibility phase, with the verification of the “homogeneity” (“commonality”, overseas) requirement.²³⁶

The collective *injunctive* action, instead, stems from the continental civil law elaboration, and in particular from the *actio popularis* of Roman law proposed *uti civis*.²³⁷ It seeks a ruling to cease, or a prohibition to repeat, a certain activity.²³⁸ As touched subsequently, because of this, it is closely linked to the so-called “public”, or “administrative”, class action, in front of the administrative judge, set under Legislative Decree of 20 December 2009, No. 198.²³⁹ The few commentators who have evaluated it, agree on its “disruptive potential”,²⁴⁰ especially given the lack of the homogeneity requirement and the looser rules on standing: “Anyone who has

²³⁵ See *infra*.

²³⁶ *Id.*

²³⁷ See RUFFOLO U. (2021). *Interessi collettivi (e diffusi), azione inibitoria collettiva e “misure idonee” correttive*, in RUFFOLO U. (ed.) *Class action ed azione collettiva inibitoria. Commento sistematico alla legge 12 aprile 2019, n. 31*, Giuffrè Francis Lefebvre, Milan, 7.

²³⁸ See AMADEI D. (2019). *La nuova azione inibitoria collettiva*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl, 229.

²³⁹ See *infra*.

²⁴⁰ RUFFOLO U. (2021). *Interessi collettivi (e diffusi), azione inibitoria collettiva e “misure idonee” correttive*, in RUFFOLO U. (ed.) *Class action ed azione collettiva inibitoria. Commento sistematico alla legge 12 aprile 2019, n. 31*, Giuffrè Francis Lefebvre, Milan, 7.

an interest in the issuance of an injunction against acts and behaviours, put in place to the prejudice of a plurality of individuals or entities, may act to obtain an order for the cessation or the prohibition of the reiteration of the omissive or commissive conduct”.²⁴¹ Some judges’ reluctance thus far in applying the instrument, further analysed in detail (Part IV), corroborates this. The non-immediate yet substantively significant variances relative to individual injunctive actions should be duly assessed, too, under a comparative lens.

From a systematic point of view, for now, it is noteworthy how the compensatory class action is allocated fourteen articles (Articles 840-*bis-quinquiesdecies* c.p.c.), while the injunctive collective remedy is relegated to the end of Title VIII-*bis*, with only one article, the last one (art. 840-*sexiesdecies* c.p.c.).²⁴² This appears to reflect a diminished emphasis on this mechanism by the legislator, as shown by the very scarce mentioning in the preparatory works and overall parliamentary discussions, as echoed by the majority of academic commentary, too. Nonetheless, in the context of paramount interest here – the judicial enforcement of fundamental rights – it holds the potential to be as crucial as the primary instrument, if not more so for certain aspects.²⁴³ At the same time, somewhat surprising is the legislative choice to not allow the joint handling of the two types of collective actions, given the potential common facts at the base and the purported goal of judicial economy of the 2019 reform.

The *judge competent* for both actions, nonetheless, is common, identified by the legislator in the specialised “business section” of the tribunal of the place where the respondent is based. This selection probably follows the aim of promoting greater specialisation and technicality, given the primarily entrepreneurial nature of the disputes, at least according to the original design of the legislator. Such *specialisation*, however, fundamentally clashes with a remedy of *general* application, as subsequently elaborated upon, and as shown by the first jurisprudence. The attribution of *passive standing* to “companies or entities

²⁴¹ Id.

²⁴² Under para. 4, “Article 840 *quinquies* is applied, as it is compatible”.

²⁴³ See *infra*, Chapter XI.

managing public services or services of public utility, in relation to acts and behaviours carried out in the performance of their respective activities”²⁴⁴ does not appear a sufficient attribute to anchor jurisdiction in such section. *Firstly*, because companies are not the only subjects with passive standing pursuant to the regulation: “entities managing public services or services of public utility” – a delicate expression on which we shall return – are to be accounted, too, and they do not present a direct connection to the “business section of the tribunal”, as companies might do. *Secondly*, it should be stressed the *general* nature of the violations against which the dual class action instrument could be used, in theory – and, now, also in practice – very distant from the business section’s everyday matters. *Thirdly*, since the limitations on passive standing appear questionable, also under a constitutional perspective, and should therefore be removed. All these arguments will be examined in detail in the following.

For now, focusing only on the presentation of the procedural hallmarks and main novelties of the reform, (partially) common rules on *standing to sue* should be accounted, too. The new legislation allows actions from both natural and legal persons. Concerning active standing of natural persons, a distinction must preliminarily be made between the compensatory *azione di classe*, under art. 840-*bis et seq.* c.p.c., and the injunctive *azione collettiva*, under art. 840-*sexiesdecies* c.p.c. While the former can be proposed by “any *member* of the class”, the latter is accessible to “*anyone* with an interest” in obtaining an injunction. Therefore, for the *compensatory* action, the individual proponent must necessarily claim *class membership*, namely of being the holder of an individual subjective right that has been infringed, in the specific case, in a manner that is homogeneous to that in which equal individual rights of members of the same group (the “class”) have been infringed by the same conduct. Such common, collective and “homogeneous” infringement creates, from a procedural standpoint, the class. The elements to underscore here, in relation to active standing, are the *individuality* of the rights – hence, no collective or diffuse interests – and the *homogeneous* nature, relevant in

²⁴⁴ Article 840-*bis*, para. 3 c.p.c.

the admissibility phase. Both will be thoroughly addressed in the following, together with the possibility, pursuant to Article 840-*bis*, para. 6, c.p.c., of a *substitution of the proponent*, “in the event that, following settlement agreements or conciliatory arrangements between the parties, the petitioning parties are entirely missing”. Additional admissibility requirements for the compensatory *azione di classe*, under Article 840-*ter* c.p.c., are the lack of conflicts of interest from the claimant towards the defendant and the appearance of being capable of adequately managing the rights asserted in court.

The *injunctive azione collettiva*, under Article 840-*sexiesdecies* c.p.c, instead, allows “anyone with an interest” to sue. Such broad expression casts doubt on whether even individuals with *no* connection to the class can initiate the collective proceedings in question. As it is known, according to Article 81 c.p.c., “beyond the cases *expressly* provided by law, no one can claim, in a judicial proceeding, *a right of another under their own name*”. An example of express exception to said rule – the so-called “extraordinary standing” (“*legittimazione straordinaria*”) – is that of the public prosecutor, pursuant to Article 69 c.p.c., in the cases provided for by the law, *e.g.* in certain matrimonial matters (i.e., Article 85, para. 2, c.c.). The standing to sue of the subject initiating the class action could be encompassed within said exceptional space. Mauro Cappelletti, in particular, in his seminal article “*Formazioni sociali e interessi di gruppo davanti alla giustizia civile*”, from 1975, recognised a “relationship of *ideological representation*” between the one initiating the suit and the whole class.²⁴⁵ Such interpretative solution, recently repropounded by recent Italian scholarship,²⁴⁶ applies also to the compensatory class action, given the claim in *representation* of all the other holders of “homogeneous individual rights”.

A differential feature to underscore here, for the *injunctive azione collettiva*, is the non-mention of both “individual” and “homogeneous” rights, as it occurs under Article 840-*bis* c.p.c., for the compensatory *azione di classe*. It appears, in fact, as

²⁴⁵ See *supra*, fn. 497.

²⁴⁶ DONZELLI R. (2019). *L’ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl.

if also supra-individual interests, not *directly* linked to an individual subject, not directly held by any individual because of their “diffuse” nature, can be enforced through Article 840-*sexiesdecies* c.p.c.’s new injunctive class action. As subsequently examined, this interpretation – if supported by the case law – would open the door of judicial protection to several mass harm infringements in which no direct *individual* holder can be identified. A prime example is that of climate change suits. A threefold comparative reflection is appropriate, at this point: under a *vertical* dimension, in relation to the ECtHR; under an *external horizontal* dimension, in relation to foreign class action case law; under an *internal horizontal* dimension, in relation to individual injunctive actions.

A lack of scrutiny on the homogeneity of the class – as confirmed by the forming case law²⁴⁷ – needs also to be stressed. The absence of such a requirement, and generally of the admissibility filter, makes the injunctive remedy *significantly* more streamlined. If, in addition, the still-evolving jurisprudence was to interpret among the “measures suitable to eliminate or reduce the effects of the violations found” (a possibility provided for the claimants within this process, under Article 840-*sexiesdecies*, para. 7, c.p.c.) also those of an economic nature, the potential of this tool would be even more remarkable. All these elements of discussion will be resumed in the following. The highly problematic choice to attribute standing to bring class action claims (both compensatory and injunctive) also to “organizations

²⁴⁷ See Trib. Milano, XV sez. (spec. impr.), order from 16 September 2022, no. 10166/2021: “It is necessary to start from the fact that such a condition of admissibility is neither stipulated nor referred to by the provisions of Article 840 *sexiesdecies* of the Code of Civil Procedure. It is significant, moreover, that for the injunction action, the phase of admission of the claim as per Article 840 *ter* of the Code of civil procedure is not provided, and instead, only the provisions of Article 840 *quinquies* of the Code of civil procedure, relating to the procedure, are invoked as compatible. And among the incompatible ones are certainly those (Article 840 *quinquies*, paragraph 1, of the Code of civil procedure) related to the phase of adherence of the subjects bearing homogeneous individual rights, because this phase begins with the publication of the ordinance admitting the class action, an ordinance which, as mentioned, is not provided here” (emphasis added).

In accordance, see Trib. Torino, I sez. (spec. impr.), 21 April 2023, and, partially, Trib. Roma, sez. XVI (spec. impr.), 13 December 2022, no. 3426/2022: “at art. 840 *sexiesdecies* c.p.c., which is focused on the determination of the infringement and not on that of the right claimed”. In conflict, see Trib. Milano, from 13 October 2022: “such determination appears inevitable also considering that subjective positions, different in their constitutive elements, cannot be considered homogeneous (thus precluding the injunctive protection due to the lack of the homogeneity requirement of the individual rights enforced)”. See *Part IV* for further elaboration.

or [...] non-profit associations whose statutory objectives include the protection [of the rights or interests prejudiced]” registered in a public list established at the Ministry of Justice, upon verification of *its* requirements, will be subsequently analysed, as well, in the conclusive Chapter XI.

The purpose of this paragraph remains that of introducing the principal features of the dual class action regime from 2019, favouring a more nuanced subsequent discussion. Other significant novelties have been brought with the objective of adapting the procedural structure to the peculiarities of the new collective instrument, based on the (unsuccessful) previous consumer class action experience. Among these, in particular, the establishment of a new *telematic portal*, with a dedicated section in the public area of the telematic services portal managed by the Ministry of Justice, stands out.²⁴⁸ This official website section is immediately assigned a key role, both for the publicity of the various proposed cases (through the publication within ten days, by the registry office, of the decree setting the hearing, as well as, subsequently, of other acts of the process), and for simplifying the procedure of joining the class, now exclusively online. This significantly reduces the burden on the court registries, but, above all, on the claimants, called upon to form the class. Moreover, *in theory* (see *infra*, Part V) it allows the general community to remain always informed about the class actions initiated and, through the elimination of paperwork, exponentially favours class adhesion. This clear simplification through the aid of new technologies represents, therefore, a significant step. In principle, joining the class is now one mere click away.

Class adhesion – necessary only in the case of the *compensatory* class action – is encouraged by the possibility to join during two different time-frames, namely at the end of each of the first two phases of the proceeding, as it is already the case in France. The various steps of the procedure are as follows: a *first* phase concerning the admissibility of the compensatory claim (at the end of which a first window for class joining opens); a *second* phase of decision on the merits and of definition of the class characteristics (at the end of which a further window for class joining

²⁴⁸ Available here: <https://servizipst.giustizia.it/PST/it/pst_2_16.wp>.

opens, evidently incentivised at this point); a *third*, possible, phase of liquidation (conducted by a new figure, the “common representative of the members”, appointed among those with the qualifications for appointment as a bankruptcy trustee). On this point, of considerable interest from a more civil-procedural perspective, various readings, including critical ones, are noted, as further reported (see *infra*).

Regarding class adhesion, the decision to confirm the exclusivity of the so-called “*opt-in*” regime, which requires an *explicit* manifestation of intent to become part of the class and to be bound by the effects (both positive and negative) of the decision, has been maintained. This choice, promoted (but not imposed) at the EU level, clashes with the goal of *effective* access to justice in certain minor cases, but undoubtedly safeguards the principle of full participation of the parties in the process, as opposed to the “*opt-out*” regime.

As an incentive to propose more actions, the exceptional introduction of a *premium fee* for the plaintiff’s lawyer is noted, to be calculated as an additional percentage (between 9% and 0.5%) on the total amount due to all class members, progressively and varying based on their number. The percentages do not entirely convince – they could be higher (especially in light of those, greater, intended for the “common representative” of the class) – nor does the choice to limit such premium compensation to compensatory actions. Given Italy’s ban on contingency fees (in practice easily circumventable, through coordination with non-attorney third parties), this provision nevertheless represents an important step forward in encouraging lawyers – the true engine of numerous class actions from overseas – to undertake actions with the new procedural instrument.

Finally, regarding *evidence*, the innovations introduced by art. 840-*quinquies* are noted. On the one hand, it imposes the obligation to advance the expenses for a possible technical consultant on the respondent and establishes that the judge may use statistical data and simple presumptions for the purpose of ascertaining responsibility.²⁴⁹ On the other hand, it introduces a system of disclosure somewhat

²⁴⁹ See *infra*, Parts IV and V.

similar to the typical US discovery, also concerning confidential information of the defendant and supported by an administrative pecuniary sanction from 10.000 € to 100.000 € in case of non-compliance.²⁵⁰ This system could greatly benefit the claimants, both from a strategic litigation perspective (thus, not necessarily aimed at a victory in the courtrooms) and in negotiating potential out-of-court settlements. At the same time, it is crucial to maintain adequate safeguards for defendants, ensuring fair process guarantees and protecting against meritless legal actions initiated by competitors, aiming to harm their business rather than addressing genuine grievances, or by “buccaneering attorneys”, looking for causes of actions and easy settlements in “fishing expeditions”.²⁵¹

4. Enforcing fundamental rights through class actions: constitutional nuances.

As anticipated, the 2019 reform has expanded the scope of application of the class action regime to *all* areas of law. From a constitutional perspective, this choice carries paramount implications. The possible enforcement of fundamental rights through such complex procedural representative tool must be assessed, both for the injunctive and the compensatory remedy. Constitutional principles – *effective protection*, on the one hand, versus *fair trial* guarantees, on the other hand – need to be balanced against the backdrop of the continental *civil law tradition*, alien to such forms of private collective judicial enforcement, and of the peculiarities of primary, constitutionally-enshrined, rights and interests, stemming well-beyond the consumer sphere. Comparative lessons from other jurisdictions’ both long-standing and emerging experience, together with insights from socio-legal scholarship, can ultimately serve as a confirmatory yardstick of the evaluative findings.

4.1. Balancing constitutional arguments and constitutional traditions.

When it comes to protecting economic interests of modest value, related to the consumption of goods or services, the utility of a collective action is clear. In

²⁵⁰ Id., in particular *Philips Respironics* case.

²⁵¹ See *supra*, Chapter VI.

today's globalised society, characterised by mass and large-scale relations, serial violations in this field are increasingly common. In these relationships, there is a financially stronger party, often a company, not seldom transnational, that contracts under the same conditions and in a *standardised* way with hundreds, if not thousands or tens of thousands, of individuals. A violation of such contractual conditions or an extra-contractual infringement while performing them will, therefore, be *serial*, infringing upon all consumers and users who have related to said company in equal or, at least, rather similar ("homogeneous") measure. Common examples can be found in the case of *banking or investment* contracts (e.g., the compensatory class action against a cryptocurrencies platform, pending at the Tribunal of Milan, or the compensatory class action against a bank for the sale of its shares, admitted at the Tribunal of Venice), *telephony or utility services* (e.g., the compensatory class action admitted at the Tribunal of Venice or the one pending at the Tribunal of Milan, both for electricity supply contracts), *defective products* or those not carrying the promised or necessary qualities (e.g., the injunctive class action against a company marketing electronic cigarettes, upheld by the Tribunal of Turin), *transportation or travel* (e.g., the compensatory class action admitted at the Tribunal of Rome, concerning a traveler loyalty rewards programme of the former national airline, or the one concerning a cruise trip, initiated at the Tribunal of Naples and settled out-of-court). Many of these relationships involve injuries for *small amounts*, often not enough to justify an *individual* legal action: hence the opportunity to aggregate one's common individual claims in a collective action, since, in a cost/benefit analysis, individual proceedings turn out to be anti-economic in most cases due to excessive costs and time. As argued *supra*, a reading of Article 24 of the Italian Constitution in connection with Articles 2 and 3 It. Const. supports it.

On the other hand, it is undeniable that other subjective situations, not strictly related to the consumption of goods or services, can be serially and simultaneously harmed by the same active or omissive conduct. The new class action regime under examination responds to these considerations. The shift from a protection limited to "homogeneous individual rights of *consumers and users*" (former Article 140-

bis cod. cons., repealed in 2019) to *all* “homogeneous individual rights” (new Article 840-*bis* c.p.c.) is self-evident. The expansion of the application perimeter of both compensatory and injunctive collective actions appears, thus, at least on paper, exceptional.

Indeed, there are pertinent instances, previously unaddressed by the Consumer code, involving entrepreneurs, professionals or even other enterprises who have suffered serial damages in the course of their *professional activities*. The legislative expansion beyond “homogeneous individual rights of consumers and users” evidently extends protection to these subjects as well. As a matter of fact, the legislative preparatory discussions unmistakably reveal that the lawmaker highly contemplated their safeguarding when broadening the scope of the previous regime, together with the positions of “small claims” holders or of “individuals who are in a similar situation, even *without* [formally] possessing the qualification of consumer”.²⁵² It is apparent, therefore, that *economic* infringements still constituted the primary concern for violations envisaged by the reform legislator in 2019.

²⁵² See, e.g., the speech of On. Valentina D’Orso (M5S), at the majority at the time, on 1 October 2018 at the Chamber of Deputies, presenting the reform. Available at: <<https://www.camera.it/leg18/410?idSeduta=0053&tipo=stenografico>>: “Certainly shared and shareable is the objective of this measure: to free the class action from the narrow, tight confines of the consumer code. Indeed, the class action is transferred from the consumer code to the civil procedure code, thus becoming a tool of general and universal scope. This systematic shift will have the disruptive effect of broadening the pool of subjects entitled to bring action, as well as extending the object of protection.

It will no longer be only consumers who can act, but *also entrepreneurs and professionals*; it will no longer be the violation of contractual rights or subjection to unfair commercial practices or anti-competitive behaviors as the sole prerequisite founding the action, but the action may be exercised to protect all homogeneous individual rights infringed by acts and behaviors carried out by companies or entities managing public services or of public utility in the performance of their respective activities. For, *who says that a professional or an entrepreneur, in the course of their activity, cannot be harmed by oppressive contracts, cannot be subject and damaged by illicit behaviors carried out by other companies or entities managing public services and utilities?* Upon closer examination, to confine, as has happened so far, the class action to consumers alone does not meet the actual needs for protection widespread in today’s complex and varied society. Upon closer examination, the new conception of *the class action instead finally responds to the urgency of protecting honest and transparent professionals and entrepreneurs who, despite difficulties, continue to grow the productive fabric of this country*; and it simultaneously constitutes a deterrent for all those companies that operate unfairly and, by doing so, even distort competition and the free market. All companies, not only those that will promote the class action or adhere to it, but also those that will remain outside, will nonetheless benefit from a deterrent effect that this tool will have. We further believe that the introduction of the new class action will produce virtuous mechanisms and will contribute to raising the quality standards of goods and services offered to citizens.” (emphasis added).

Nonetheless, it is also undisputable that the expressions “individual homogeneous rights” (Article 840-*bis* c.p.c., for the compensatory class action) and “interest [...] of a plurality of individuals or entities” (Article 840-*sexiesdecies* c.p.c., for the injunctive class action) encompass *any* kind of right and (for the injunctive remedy) interest. Hence, also *fundamental* ones. It is superfluous to recall that this *literal* interpretation prevails over any *historical* one, pursuant to Article 12 of the preliminary dispositions to the Italian Code of civil procedure. It is, in any case, interesting to note, that even though in passing, Bonafede himself in 2013 mentioned the protection of at least one fundamental right – the right to health – as lacking from the scope of application of the previous consumer-related class action.²⁵³

Let’s proceed with examples. If a company pollutes a portion of territory, causing serious diseases to the local residents (*e.g.*, the ILVA case, see *infra*, *Chapter VIII*) or contributes significantly to climate change (*e.g.*, the well-known Urgenda and Milieudefensie cases, in the Netherlands), or exploits its employees, binding them to unfair or discriminatory working conditions (*e.g.*, the food-delivery riders case, or the employment discrimination case against ITA Airways, see *infra*, *Chapter IX*) it is evident that the homogeneous individual rights (and/or) interests of a large group of people are affected by a same act or conduct. The foundedness

See also then-deputy On. Alfonso Bonafede’s speech on 9 July 2013 at the Chamber of Deputies presenting a bill on class actions, which didn’t pass and that he substantially repropounded in the next legislature, with the 2019 reform, after becoming Minister of Justice: in <https://documenti.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0012560.pdf>: “Regarding active legitimacy, the placement of the class action within the consumer code currently limits its operation to the sole category of consumers and users, thereby depriving other parties of the possibility to access such a tool, who may likewise find themselves in a situation of substantial imbalance when facing companies (or other “strong” entities), as *holders of small claims* (as may happen, for example, for small and medium-sized enterprises, or for individuals who are in a similar situation, even without possessing the qualification of consumer or user). [...] The fundamental first step to extend the usability of the tool consists in the expansion of its potential users. Extracting the class action procedure from the consumer code and its more appropriate placement in the civil procedure code could prevent the exclusion of *all those subjects who find themselves, as consumers might, in a situation of needing access to justice characterised by modest compensatory claims caused by multi-offensive wrongdoings, or in a situation where, even if the claim is not modest nor the structural weakness established, there is still an intention to act collectively for procedural convenience.*” (emphasis added).

²⁵³ Available here:

<https://documenti.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0012560.pdf>, at 1335.

on the merits should be ascertained in each concrete case; the presence of all admissibility requirements, too. The possibility of seeking their enforcement through the two new collective procedural mechanisms should not: the right to health and that to live in a safe environment (Article 32 of the Italian Constitution, Article 117 of the Italian Constitution through the “interposed parameter” of Article 8 ECHR, enshrining the broad “right to respect for private and family life”), the right to fair working conditions and non-discrimination in the work place (Articles 3, 4 and 36 of the Italian Constitution, Article 117 of the Italian Constitution through the “interposed parameter” of Articles 8 and 14 ECHR), affected in the examples at hand, can all indeed be encompassed within the general expression “*individual homogeneous rights*” and “*interest [...] of a plurality of individuals or entities*”, set by the 2019 reform.

To encapsulate the full extent of the new regime’s formidable potential, post the 2019 expansion of the application scope, one might consider other cases, including, but not limited to: violations of privacy, infringements upon freedoms of expression and information, encroachments on freedom of thought and discriminatory practices on the grounds of religion, gender, sexual orientation, political beliefs, race, or disability. The rights of vulnerable groups such as children and the elderly, matters of social security and welfare, as well as misconduct by public officials, such as the police, should be recalled, too. Finally, the essential rights to human dignity and to personal liberty should also be subsumed under the term “individual homogeneous rights”. Such an inclusion could pave the way for even more impactful class action litigation, confronting not only isolated grievances, but also entrenched systemic and structural dysfunctions. Emblematic of these are the harsh conditions within overcrowded prisons or the inhumane and degrading treatment prevalent in immigrant detention centers (see *infra*, Chapter X).

Evidently, these *serial* infringements would deserve a political solution. In an ideal world, rather than the judiciary, the legislative and executive bodies would deal with them, if not all of them collaboratively.²⁵⁴ Nonetheless, as it is known, it

²⁵⁴ See KAVANAGH A. (2023). *The Collaborative Constitution*, Cambridge University Press, Cambridge.

is the role of procedural law to come into play as an ancillary normative body whenever the protection offered by substantial – especially constitutional – law fails.²⁵⁵ If said judicial enforcement is granted for *individual* claimants contesting an infringement of their rights or interests, it extends logically, after the 2019 reform, that also *class* proceedings can be followed for the enforcement of the *same* rights or interests (and of those similarly situated), provided *homogeneity* (solely for compensatory suits) and the other admissibility requirements are satisfied. In all the above-depicted cases and countless others, on paper, there are the premises to act collectively through a class action: a common injurious conduct, a common author of such conduct, a group of individuals offended by such conduct in an equal or at least similar manner. The comparative experience, mostly of common law, is rich of valuable examples.

The principal difference from the previous consumer protection regime lies in the object of the protection, as it mainly concerns rights and interests of a *constitutional nature*, distant – at least in their core – from mere economic considerations. They are not the so-called “small claims”, but, on the contrary, they are suits that touch the very essence of the self, of human life, identity and dignity. It is, therefore, imperative in relation to these cases – concerning fundamental rights such as the right to health, to live in a healthy environment, to fair working conditions, as well as the principle of equality or the most basic personal freedoms – to assess, *firstly*, whether the collective remedy is *preferable* to the individual one and, *secondly*, if it is constitutionally *legitimate*, considering the sensitivity of the subjective positions involved.

Regarding the first issue, a collective procedural mechanism such as the class action can undoubtedly be more efficient than individual action in certain circumstances, even concerning fundamental rights or social interests.

Firstly, it should be noted that the main *relief* sought in judicial actions for fundamental rights enforcement, rather than past-focused, is *more forward-looking*. Rarely it consists of a mere compensation for damages, as in the traditional civil

²⁵⁵ LUISO F.P. (2017). *Diritto processuale civile. Vol. 1: Principi generali*, Giuffrè, Milan, 3.

liability scheme. The main goal of the members of a group harmed by the same multi-offensive conduct seldom is mere compensation of the damage itself, but rather achieving the cessation or prohibition of a harmful activity: in short, an *injunction*. Furthermore, when the infringement concerns more than one person, success is not measured exclusively by the results of the judicial proceedings, but also by the *impact* that they have generated *within the society*: for instance, by raising public awareness or by motivating legislative forces or large corporations to act or to change their policies. *Sums* may still be pursued, but in that case usually as adaptation costs, through equitable remedies (*cy-près*, in common law jurisdictions) or fluid recovery mechanisms.²⁵⁶

A typical example is environmental pollution by a company, as in the aforementioned *ILVA* case (further discussed in Chapter VIII). In this case, the local residents would primarily be interested in stopping the polluting activity of the company and only subsequently in seeking compensation for the damage suffered. Considering the collective utility of the action – the possibility of *sharing procedural costs*, proceeding *not personally* but through an association or another organisation, the greater *media impact*, the undeniable *deterrent* effect, and the *faster process times* –, when a conduct is harnessing more than one person, it usually results more efficient, and sometimes necessary, to proceed collectively rather than individually. This regards consumer rights, as already argued, and even more fundamental rights, which concern more deeply the core of one's personality and individuality and require more urgent redress.

In an environmental pollution case, thoroughly addressed in the case studies *Part IV*, an *individual* injunctive action would indeed be less effective in achieving the cessation or prohibition of a harmful activity than a *collective* one. The severe power asymmetries of an individual potentially facing alone a multinational corporation could thus be reduced under the old adage that “there is strength in numbers”. Another valid example is that of climate change, where it might be complex to prove that the individual claimant is the *holder* of a right. The injunctive

²⁵⁶ See *infra*, present Chapter VII.

azione collettiva under art. 840-*sexiesdecies* c.p.c. overcomes this issue by allowing class actions for the protection of meta-individual “interests”, too. Furthermore, the collective nature of the proceedings favours a collective *forum for discussion* and validates a decision which has repercussions on a larger number of people than any dual litigation technique. Under this perspective, it is certainly *preferable* to an individual injunctive action.

On *second instance*, regardless of the pursued injunctive or compensatory end, it must be considered how other *practical elements* could discourage the exercise of individual action for some class members. These “*barriers*” to access to justice (already discussed *above*, in *Chapter V*), surmountable through the class action mechanism, are manifold and regard all rights, not just fundamental ones: *economic*, understood as the lack of financial resources to face the high costs of a trial; *informational*, understood as unawareness of being entitled to act in protection of ones’ infringed subjective position; *temporal*, understood as the difficulty in waiting the excessively long times of a process; *organisational*, understood as the incapacity to navigate through the complexities of the legal and procedural system against economically and informatively stronger subjects, as well as habitual litigators, and thus, far more accustomed to that type of dispute (such as large multinationals or even state entities); *psychological*, understood as a feeling of intimidation towards the far more powerful procedural opponent.

These obstacles, hardly surmountable through individual action, occur even more frequently in the most *disadvantaged social groups*, whose members, precisely because of this, are more accustomed to suffering injustices, in what soon becomes a dangerous vicious cycle. Under this viewpoint, tIn addition, even if the individual – despite all rational calculation and managing to overcome the aforementioned barriers – acted successfully against the much more powerful counterpart, their personal procedural victory would entail nothing but a mere “*insignificant fragment*” of the damage actually caused within society by the defendant found guilty. The latter, in fact, would not be obliged to compensate the additional hundreds or thousands, or hundreds of thousands, of subjects affected by their illicit activity for the damage suffered or to be suffered, nor, even less, obliged

to stop or concretely discouraged from pursuing the same. Such a *deterrent effect*, much hoped for by the same legislator in the 2019 preparatory works, is instead achievable through the compensatory class action mechanism, as the United States experience shows. Finally, as already addressed in general also in relation to consumer disputes, the class action would also bring greater *judicial efficiency* compared to individual action to the judiciary system in general, in both a litigation-deflating perspective and procedural economy, thanks to the joint handling of hundreds, if not thousands, of cases.

Having established the preferability of the class action over individual action at least in certain circumstances and for certain individuals, we return to the second issue, namely whether such a type of collective aggregation of claims is *constitutionally legitimate* for the enforcement of fundamental rights, rather than just consumer-related ones. This assessment is demanded in reason of the particular sensitivity of constitutional nature rights, such as the aforementioned social rights or the most fundamental freedoms. Indeed, there could be doubts due to the approximate quantification of the damage actually suffered by each class member, as well as to the renunciation to effectively participate in the proceedings, despite being bound by the effects of the decision.

Three arguments, nonetheless, contribute to the constitutional legitimacy of the use of such collective instrument for the protection of fundamental rights.

First and foremost, the principle of equality, enshrined under Article 3 of the Italian Constitution, in coordination with the right of access to justice, set forth under Article 24 of the Italian Constitution, already discussed above. Why should certain violations be granted a collective remedy whereas others not? Why should only the holders of certain rights be awarded said opportunity? The Italian Constitutional Court has long insisted on the absence of an “absolute hierarchical order” of fundamental rights. And if there was, but there is not, it can be safely argued that primary values as the environment and health would not be ranked lower than consumer and competition rights. Moreover, the increasingly blurred line between social and, consequently, also subjective positions must be underscored once again. Who is a consumer? Does a scope of application limited to consumer

rights forbid the protection of the right to health hampered by a defective product? Similar issues pertain to the 2020/1828 EU Directive and its implementation at national level. In Italy, the unnecessary introduction of a dual consumer-limited class action in 2023, on top of the already present (and viable) dual general remedy from 2019, poses coordination problems, too.

Second, domestic implementation of the EU Directive promises to cause additional issues in term of discrimination between EU citizens, depending on the perimeter of application of the collective procedures available in each Member State.

Third, it should be noted that the Italian model, contrary to the United States one, envisages a system of *express adherence* to the class to become part of it (the so-called “opt-in” regime). Therefore, class members who deem a serial appraisal inadequate concerning the damage suffered and have the necessary means (economic, informational, temporal, and organisational) to face the unbalanced power relationship with their damaging defendant, *may* still proceed individually. Unless they *explicitly* favour the class action, by actively joining it, individual action will constitute the default path and no consequences of the *res judicata* will be borne by them. On the other hand, for all those who could not act individually in court to protect their rights due to the aforementioned barriers, there will be the precious *alternative* of being able to join the class, accepting – without any bond – as a counterpart a possible approximation in the quantification of their damage and an inability to effectively participate in the process. From a constitutional perspective, such *explicit* adherence eliminates any doubt on the legitimacy of the class procedure for sensible rights, too. At most, adequate safeguards will need to be put into place to ensure sufficient knowledge of the adherence’s consequences and fair trial guarantees without formal participation.

The opportunity to offer a collective remedy also for fundamental rights is evident, therefore, from what has been analysed so far. When, even for a minimal portion of individuals, the class action tool turns out to be the *only* procedural mechanism capable of efficiently filling the normative gaps that do not allow them to obtain justice for the violations suffered to their substantive rights and, at the

same time, the multi-offensive nature and uniqueness of the harmful conduct allows them to aggregate their claims, necessarily such an institution must be an integral part of our legal system and, in the words of the ECtHR (in the context of Article 6 of the ECHR, relating to the right to a fair trial), “of any democratic society”. The alternative, in fact, is to deprive certain portions of the population of the fundamental right of access to justice, even more necessary when it comes to injuries to essential rights enshrined in the constitutional text. The social and, consequently, constitutional changes highlighted in the previous Part of this research have brought a change of paradigms, of dynamics and *equilibria*, which require fundamental *procedural* changes to keep new powerful actors accountable for their violations, and make *substantive* rights effective in practice, not just in abstract.

Finally, with reference to the objective scope of application, it is important to highlight once again the fundamental distinctive trait in the peculiar dichotomy between *compensatory* class action and *injunctive* collective action. The former, pursuant to Article 840-*bis* c.p.c., indeed specifies that “homogeneous individual rights can also be protected through the class action, according to the provisions of this title”; follows Article 840-*ter* c.p.c., which specifies that “the claim is declared inadmissible: [...] when the court does not recognise the homogeneity of the individual rights protectable under Article 840-*bis*”. The notion of *homogeneity*, subsequently elaborated on, therefore becomes the cornerstone of the compensatory class action pursuant to Article 840-*bis* c.p.c., being decisive for its admissibility.

As for the collective inhibitory action, on the other hand, Article 840-*sexiesdecies* c.p.c. remains very generic, stating that “anyone with an interest in obtaining an injunction against acts and behaviors carried out to the detriment of a plurality of individuals or entities may act [...]”. It is, therefore, not necessary to demonstrate belonging to the class, nor the presence of similar or identical rights: it will be sufficient to prove the existence of a prejudice to several subjects. For this reason, authoritative commentators have defined it as a “remedy for the protection of super-individual interests (and in particular, as we will say, of those collective

and diffuse, not individually actionable)”.²⁵⁷ It is important, thus, to highlight how for the injunctive action, contrarily to what is provided for the feasibility of the collective compensatory remedy, the existence of any underlying individual substantive situation is *not* required. Interests that are diffuse, for whose prejudice no single individual would be entitled to an individual action, are, therefore, included in the scope of protection: for example, environmental issues, collective health and safety, or, more broadly, a concretisation of the principle of equality and the duty of political, economic, and social solidarity pursuant to Article 2 of the Italian Constitutional Text.

Awaiting the first practical applications, the new injunctive mechanism can, thus, be viewed with keen interest, for the considerable spectrum of values – often fundamental and, so far, not always effectively protected – that it proposes to protect. It does not seem unreasonable, however, to highlight the possible abusive uses that such a tool could lend itself to; primarily, for instance, in the hands of competing companies.

5. Navigating interpretative hurdles with a constitutional compass.

The present paragraph will dwell with the main interpretative issues of the legislation at hand, under a constitutional standpoint, with proposed stances. In particular, it shall concentrate on: (i) the key requirement of “individual homogeneous rights”, for the compensatory remedy; (ii) on passive standing limitations and possible overlapping with the so-called “administrative”, or “public”, class action from 2009; (iii) the telematic portal and an unharmonised practice between different territorial courts regarding the injunctive *azione collettiva*; (iv) the succession of laws over time and, in particular, the non-retroactivity of the 2019 provisions for events occurred before its entry into force, in May 2021.

5.1. The homogeneity requirement: a key issue.

²⁵⁷ RUFFOLO U. (ed.) *Class action ed azione collettiva inibitoria. Commento sistematico alla legge 12 aprile 2019, n. 31*, Giuffrè Francis Lefebvre, Milan.

Article 840-*bis* c.p.c., in relation to the compensatory *azione di classe*, specifies that “*homogeneous individual rights*” can be enforced also through the class action, following the provisions of this title”. It is then followed by Article 840-*ter* c.p.c., which clarifies that “the claim is declared inadmissible [...] when the court does not recognise the *homogeneity* of the individual rights protected under Article 840-*bis*”.

The notion of *homogeneity*, evidently, becomes the keystone of such compensatory class action, being decisive for its admissibility. Given the full extension of the scope of application in 2019, beyond the original consumer field, it is the only element – together with the rules on standing to sue and to be sued, and the minor requirements under letters *c)* and *d)* of Article 840-*ter* c.p.c. – currently limiting the perimeter of (compensatory) class proceedings in Italy. It is, thus, essential to precisely clarify its meaning, given the vagueness of the term and the lack of legislative definitions.

Under a strictly literal standpoint, “homogeneous” means “of the same species, of the same nature, of the same character [...] by extension, similar, analogous, akin [...] figuratively, of a set composed of equal or related elements, or also well harmonised with each other”.²⁵⁸ Etymologically, it stems from the ancient Greek “ὁμογενής”, which translates as “with the *same origin*”. In the context of Article 840-*bis* ff. c.p.c., therefore, it appears to signify “individual rights” which are similar, but not completely identical, and which share same circumstances in relation to the action brought before the court.

The uncertainties and interpretative difficulties in approaching such an a-technical, “meta-juridical” notion,²⁵⁹ quite exceptional in the Italian civil-procedural panorama, are numerous and evident. They are also amplified by the fact that such requirement for admissibility concentrates on how the dispute appears

²⁵⁸ See Treccani Vocabulary, at <<https://www.treccani.it/vocabolario/omogeneo>>.

²⁵⁹ SILVESTRI E. (2020) *Nuovi orizzonti per l'azione di classe?*, published on <<https://www.giustiziainsieme.it/it/processo-civile/1299-nuovi-orizzonti-per-l-azione-di-classe?hitcount=0>>.

in the judicial and contentious dimensions, focusing on the concrete characteristics of the lawsuit, rather than on the nature of the rights asserted in the trial.²⁶⁰

Comparatively, the notion of “homogeneity” finds parallelisms in the Portuguese and Brazilian class action regulations and – to a certain degree – analogues in the “commonality” and “predominance” requirements under the classic common law collective regimes (see *infra*). As it will be analysed, a large part of the Italian debate concerns precisely whether a meaning closer to “commonality” or to “predominance” should be adopted.

From a systematic viewpoint, “homogeneity” is not a concept which finds other civil-procedural references in the domestic legal order. Its only use until now has been exclusively in relation to collective proceedings: within the initial consumer class action (now repealed), in substitution (since 2012) of the previous adjective “identical”; in the here-analysed general class action pursuant to Article 840-*bis* ff. c.p.c., from 2019 and in force since 2021; in the new consumer representative action, (unnecessarily, see *supra*) adopted in 2023 in enactment of EU Directive 1828/2020. Its mention in the previous consumer class action offers, nonetheless, a decade of precious, yet far from unanimous, doctrinal and jurisprudential elaboration.

On the other hand, cautious yet precious considerations can be drawn from the use of such linguistic term in the domain of *constitutional law*. This occurs namely in relation to referendum questions,²⁶¹ to the decree law and its conversion into law²⁶² and to federal systems’ federal and federate constitutional provisions,²⁶³ but

²⁶⁰ DONZELLI R. (2019). *L’ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl.

²⁶¹ PACE A. (2016). *I limiti alla revisione costituzionale nell’ordinamento italiano ed europeo*, in *Nomos. Le attualità del diritto*, n. 1; PACE A. (2016). *Ancora sulla doverosa omogeneità del contenuto delle leggi costituzionali*, in *Rivista AIC*, n. 2; SICLARI M. (2016). *È possibile richiedere un referendum costituzionale parziale?*, in *Nomos. Le attualità del diritto*, n. 1.

²⁶² FILIPPI S. (2023). *Gli ancora incerti contorni dell’omogeneità nella giurisprudenza costituzionale recente sul decreto-legge*, in *ConsultaOnline*, n. 2; Lupo N. (2012). *L’omogeneità dei decreti-legge (e delle leggi di conversione): un nodo difficile, ma essenziale per limitare le patologie della produzione normativa*, in D’ELIA G., TIBERI G. and VIVIANI SCHLEIN M.P. (eds.). *Scritti in memoria di Alessandra Concaro*, Giuffrè, Milan.

²⁶³ THEILEN J.T. (2021). *European Consensus between Strategy and Principle*, *Nomos*. Baden-Baden, 105 ff. DELLEDONNE G. (2017). *L’omogeneità costituzionale negli ordinamenti compositi*, Editoriale Scientifica, Napoli; CAPONI G., CAPUOZZO V., DEL VECCHIO I. and SIMONETTI A. (2014).

also to describe similar but not identical situation under the principle of equality.²⁶⁴ The contours of “homogeneity” in such contexts are equally vague and uncertain. The understanding that can be drawn for the purposes of this research, nonetheless, is rather valuable. They confirm, in fact, the literal standpoint, which reads “homogeneous” situations – especially for decree laws (and their conversion) and referendum questions – as situations not extraneous to each other’s rationale or based on different objectives or objects.²⁶⁵ This allows for a degree of differentiation among such homogenous situations, as long as they maintain an overall common ground; hence, by no means they should be conceived as completely identical.

Coming back to the current class action reform, the interpretative reconstructions from the previous regime (the consumer one, from 2007 onwards) must be gauged today in light of the parliamentary preparatory works from both concerned legislative periods (in particular the discussions from 2013 and 2018, see *supra*), in coordination with the additional regulatory changes from the 2019 reform (primarily the new liquidation phase and its key players), as well as with the very first jurisprudential applications under the new 2019 general class action provisions. Only this way a proper understanding of such a key term for the success and viability of compensatory class actions in Italy can be fully grasped.

With such aim, the questions herein relevant are numerous.

First, it needs to be clarified *what* exactly is to be conceived as “homogeneous” today, in light of all the above-mentioned elements of evaluation. Is it required for the “individual rights” to share the same cause of action (“*titolo*”) or should other common elements be considered? And, if so, to which degree are personal (that is, non-common, or non-identical) elements allowed? Furthermore, following a

Omogeneità costituzionale europea e identità nazionali: un processo di integrazione circolare tra valori costituzionali europei e teoria dei controlimiti, in *federalismi.it*, n. 24.

²⁶⁴ See, e.g., It. Const. Court, the recent judgements no. 40 from 2024, no. 108 from 2023, no. 270 from 2022 and no. 172 from 2021 finding a violation of such principle whenever “homogeneous situations are regulated in an unjustifiably different manner”.

²⁶⁵ See It. Const. Court, judgement no. 149 del 2020, cons. in dir. para. 6.3.

relatively recent judgement from the Court of Cassation's *Sezioni Unite*,²⁶⁶ does this concern only pecuniary or also non-pecuniary damage?

Second, *when* should the assessment on homogeneity be conducted? At a preliminary (so-called “admissibility”) stage or after the court’s determination on the defendant’s liability? Evidently, the degree of in-depth of the assessment varies substantially in accordance with the procedural phase. In the former case, in fact, it could only be speculative.²⁶⁷ Moreover, *who* should undertake it, to which degree and *where*?

Third, provided a degree of “individualisation” is accepted among the individual rights of the class, it should be sorted out *how* to proceed for the quantification of damages. Different personal, or individual, elements within the subjective positions of the different class members lead to an entitlement to different sums as damages. *Who* should propose a method of quantification which considers both the common elements and the personal ones: the judge forming the class, the plaintiff with their lawyers, the delegate judge or the new figure of the “common representative”? And, rather significantly, which quantification methods should – and *can* – be followed? The elimination of any reference to a “homogeneous calculation criterion for liquidation” from the previous consumer class action (Article 140-*bis*, para. 12, cod. cons., now repealed), on the one hand, and the establishment of a whole new phase of “project of the homogeneous individual rights of the adherents” (Article 840-*octies* c.p.c.), on the other hand, provide valuable interpretative indicators, as it shall be analysed. At the same time, the foreign experiences with class action litigation offer other criteria for quantification and diversification among homogeneous yet partially different individual rights: sub-classes, lump sums and *cy-près*, or fluid recovery, are some of the most notable mechanisms.

Last, the inevitable approximation in the quantification of individual damages given by the standardisation characterising – in any case – class proceedings needs to be evaluated against the backdrop of *fair trial guarantees*, both from the

²⁶⁶ See *infra*, present Chapter VII.

²⁶⁷ DONZELLI R. (2019). *L'ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl, 16.

perspective of the class members who, despite adherence, are *not* parties to the proceedings (the right to a day in court, counter-balanced by the right to effective delivery of justice and the requirement – to some degree, criticisable²⁶⁸ – for an *explicit* adherence to the class, the so-called opt-in regime) and from the viewpoint, usually less regarded but not less important, of the defendant (equality of arms). The documentary-centred evidentiary regime, the rules on legal expenses and the provision on execution of the liquidation project are closely linked, too. The repercussions of all these issues on a constitutional level, foremost of access to justice and due process, are obvious.

As to the *first issue*, following legislative and jurisprudential developments, it is now undisputed that the expression “homogeneous individual rights” indeed allows for differentiated traits within the mass of subjective positions composing the class. In short, the individual rights whose enforcement is collectively sought *can* present, in addition to a necessary *common* (hence, identical) core, a *differentiated* (also referred to as “personal”, “exclusive” or “individualised”) part between each other, that is a set of factual or legal issues which pertain to a single individual position rather than to the class as a whole.²⁶⁹

The initial, stricter, interpretation which required a *total* identity of the individual rights (that is of all the factual and legal issues related to each individual subjective position) is hence abandoned.²⁷⁰ The legislative substitution in 2012, still with regard to the previous consumer class action (now repealed), of the adjective “identical” with “homogeneous” has clearly ended such debate. At the same time, also the doctrine proposing a “predominance” test – that is finding homogeneity only when the common issues prevail over the individual ones – appears overcome today. On the one hand, it is complex to find solid criteria to equally determine predominance in concrete cases, as required by the principle of certainty and as shown by the US case law under Rule 23 (b)(3). On the other hand, it is, in any

²⁶⁸ See *infra*, Chapter XI.

²⁶⁹ DONZELLI R. (2019). *L’ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl, 13.

²⁷⁰ See POLI R. (2012). *Sulla natura e sull’oggetto dell’azione di classe*, in *Rivista di diritto processuale*, 1, 38; MENCHINI S. and MOTTO A. (2010) *Art. 140 bis*, in *www.judicium.it*.

case, a test extraneous to the legislator's intention and to the literal meaning or systemic reading of the adjective "homogeneous". None of the recent cases mentions it.

Rather, the academic and jurisprudential elaboration is currently divided on the *perspective* to adopt. Whereas some propose to consider the *judicial claim*, and in particular the objective elements identifying it (the so-called "*causa petendi*" and "*petitum*", see *infra*), others stress the need to focus on the mere *factual situation* at the basis of the claim, and in particular on the fact *generating* the damage (rather than its consequences, the so-called "event"). The consequences stemming from the adoption of one interpretative angle over the other are not irrelevant. The *former* requires the same "*causa petendi*" (that is the cause of action, in other words the set of facts and legal reasons underpinning the claim) and the same "*petitum*" (that is the specific type of relief or remedy requested to the court) for all the individual rights aggregated through the class action.²⁷¹ Following the *latter*, to find homogeneity it suffices to demonstrate (on evidence, see *infra*) that the action or omission (in short, the *conduct*) of the defendant that has given rise to a harm for which compensation or restitution is sought is common to all the individual rights presented as part of the class.²⁷²

The insistence on an identity of the *causa petendi*, under the former view, evidently encompasses *also* the facts generating the damage, whose mere identity is required according to the latter interpretative standpoint, too. Same cause of action, however, also means identity of the *other constitutive facts* of the compensatory (or restitution) legal situation, such as, e.g. under Article 2043 c.c., damage, causation, unlawfulness, fault or intent, or absence of excluding causes.

²⁷¹ See, *inter alia*, after the 2019 reform, CONSOLO C. (2020). *L'azione di classe, trifasica, infine inserita nel c.p.c.*, Rivista di diritto processuale; DONZELLI R. (2019). *L'ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), Class action. *Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl; MENCHINI S. and MOTTO A. (2010) *Art. 140 bis*, in www.judicium.it. in reference however to the previous consumer class action, when the adjective "identical" was still used.

²⁷² See GIUSSANI A. (2020). *Diritti omogenei e omogeneizzati nell'azione di classe*, in *Rivista di diritto processuale*, 359.

The requirement of the same causation (in Italian, “*nesso di causalità*”) and of the same damage appears particularly onerous for the class plaintiffs, since they usually vary in cases of mass-harm conducts. It is extremely rare – e.g., in cases of mass incidents or defective products – that all the affected individuals have received the same type of harm and due to the same conduct. Cases concerning the right to health (e.g., due to environmental pollution, to a defective product,²⁷³ to a mass incident or to a harmful medicine) are rather illustrative of how the damage suffered by each individual could be significantly different. Some may die, some may be permanently affected, whereas others could only be slightly injured. In addition, the way in which the damage has been produced could also vary within the group of affected people, for example considering other contributing causal factors (e.g., a physical or environmental predisposition, an unhealthy life-style or a scarce attention to the information folder).

The identity of the *petitum*, instead, could vary whenever a different type of relief is sought for different rights within the class: for instance, in some cases a restitution, in others a compensation for damages may be more appropriate to remedy the same harmful conduct of the defendant. Not always monetary redress is the only option to address a damage suffered. In some cases, for instance regarding fraud securities, the investors may seek different types of redress, according to their own different causes of actions: in some cases, simple restitution; in others, compensation for damages. Adopting this perspective would entail an inadmissibility of actions with *similar* classes.

It is noteworthy that such former viewpoint draws from, and in several stances was proposed before, 2012, during the validity of the initial consumer collective regulations, when the adjective “identical” was still used instead of “homogeneous”, in relation to the class of individual rights.²⁷⁴

²⁷³ See *infra*, Chapter VIII.

²⁷⁴ For instance, MENCHINI S. and MOTTO A. (2010) *Art. 140 bis*, in *www.judicium.it*. and POLI R. (2012). *Sulla natura e sull'oggetto dell'azione di classe*, in *Rivista di diritto processuale*, 1, 38. See also Trib. Milano, X sez., 8 November 2013 (ord.), *Associazione Altroconsumo c. Trenord s.r.l.*, one of the first cases after the substitution of the adjective “identical” with “homogeneous”, which, despite finding an inadmissibility, unequivocally stated that “This Court indeed believes that the damages claimed must present common basic characteristics (although not requiring the identity of

Hence, even more today, the latter interpretation appears preferable, that is the one which identifies “homogeneity” in the mere presence of a *common causative fact*. Furthermore, while not universally accepted, it is the prevailing one in the most recent jurisprudence. The preferability is supported both by literal and systematic and logical-reconstructive reasons of the norm’s *rationale*.

As anticipated, *etymologically*, “homogeneous” derives from the ancient Greek noun “ὁμογενής”, which translates as “with the same origin”. Given the a-technicity of the concept, it seems correct to favour its most literal reading, rather than infer from it an additional burden of proof on the plaintiffs. *Comparatively*, this is also in line with those legal orders, such as the Brazilian and Portuguese one, from which the expression at hand was most presumably borrowed, which merely refer to the “*origen común*”. Such view is supported by the clear *rationale* of “bolstering access to justice” of the 2019 class action reform, along with a series of *regulatory changes* in relation to the liquidation phase (subsequently analysed). The former, stricter, interpretation would, in fact, raise the *admissibility threshold*, by requiring a higher degree of common issues and, consequently, hindering the legislative intent behind the recent reform.

A nuanced analysis, to this regard, cannot fail to mention an even broader, and more flexible, interpretation emerging from the parliamentary discussions (“*lavori preparatori*”, in Italian) prior to the enactment of the 2019 reform. As it is known, the 2019 legislator missed once again the opportunity to shed light on the exact meaning of the “homogeneity” requirement, if not – even better – to replace it with a more technical and objective legal criterion. It is superfluous to add that the same occurred in 2023, with the (last-minute) choice to refer once again to such vague and confusing notion. It is also barely relevant to add that the reports from 2018 discussions show that a general amendment to include a definition of the term in

the *petitum*)”. This shift in perspective has also been clearly stressed by CAPONI R. right after the substitution, in CAPONI R. (2012). *Azione di classe: il punto, la linea, la discontinuità*, in *Il Foro Italiano*, 151: “With the second amendment, the concept of ‘identity’ is replaced with that of ‘homogeneity’ of rights and situations protected by the class action. [...] From the wrongful act arise rights to compensation or restitution, linked by the commonality of the questions to be resolved to ascertain their existence. Therefore, neither the identity of the *petitum* nor that of the *causa petendi* is necessary”.

the new regulations was proposed, however unsuccessfully. Still, as discussed *above*, it is worth recalling that the Minister of Justice at the time of the 2019 reform (XVIII legislature), Alfonso Bonafede, during the previous legislature (XVII, from 2013 until 2018) had been the proponent of a bill for a class action reform which did not pass despite favourable and long parliamentary discussions, and which very much resembled the subsequent 2019 reform (enacted in the subsequent legislature, once Bonafede was Minister of Justice, after his political party included it in its electoral programme). Hence, the significance of reading the proposal for such bill, from 2013, in which the future Minister of Justice himself gave indeed a definition of “homogeneity”:

Homogeneity can, in other words, depend on the identity of the good (or service) being contracted by the different subjects, the identity of the conduct held by the professional towards multiple contractors, the identity of the consequences, or from the fact of common relevance. This complex and delicate operation defines the traits of the class, identifying its characteristics and potential number, allowing the judge with their assessment to determine either a restriction or an expansion of the evaluation of the class that the actor had proposed. In this sense, the attribution of a margin of discretion to the judge in the evaluation of the homogeneous character of the rights is fundamental, in order to allow them to clearly define the characteristics of the class and ensure easy access to the process and its effective unfolding.²⁷⁵

Although non-binding, this perspective appears particularly interesting for its flexibility: on the one hand, avoiding any reference to the claim and its cause of action (“*causa petendi*” and “*petitum*”), possible *alternatives* to the identity of the harm’s “*generating fact*” (or “origin”, that is the etymological viewpoint) are offered in the “identity of the *good or service*” (for contractual liabilities), in the “identity of the *conduct*” (also for extra-contractual, or tort, liability) and even the identity of the *consequences* or a mere, general, “*common relevance*”; on the other hand, a *margin of discretion* of the judge when determining the presence of homogeneity is stressed, with the clear intent to “ensure *easy access* to the process” as well as its “*effective unfolding*”.

²⁷⁵ See *supra*, para. 4.1., present *Chapter VII*.

The rationale, evidently transferred during the subsequent legislature to the then-successful 2019 reform, is unmistakably that of advancing concrete access to justice through the class action procedure. With this purpose, a broad (if not the *broadest* possible) interpretation of the concept of “homogeneity” was proposed by the legislator.

Another highly-debated interpretative issue addressed by then-deputy Bonafede in his 2013 parliamentary bill presentation was that of the *quantification* of damages. Following the initially stricter “identical” requirement from the first consumer class action, some courts and minoritarian doctrine had been advocating for a need of identity not just of the “*causa petendi*” and of the “*petitum*”, but also of the so-called “*quantum*”, that is the precise monetary sum sought as indemnification for the incurred damages. After the 2012 substitution of the adjective “identical” with “homogeneous”, nonetheless, the clear majoritarian approach (both doctrinal and, more slowly, jurisprudential) shifted in admitting a *differentiation* in the *quantification* of damages within the individual subjective positions composing the class. In short, different sums can now be awarded to different members of the class under the “homogeneity” requirement.

This view was anticipately (in respect to the case law, at the time still rigid) proposed by Bonafede, who specified in the same occasion (2013) how “the different extent of damage potentially suffered by individual consumers, to be calculated according to homogeneous calculation criteria, does not necessarily condition the admissibility of the claim. These criteria allow for satisfying diversified individual claims by applying the same calculation method”. The issue of the “homogeneous calculation method” will be analysed in the following.

For now, with regard to the issue of diversified quantification, it is important to dwell on a key decision from the Italian Court of Cassation from 2019, in the *Trenord case* (the only one so far from the “*Sezioni Unite*” in relation to class action proceedings),²⁷⁶ since, at first sight, it could misleadingly appear to propose a regression from such interpretative stance, which admitted a different “*quantum*”

²⁷⁶ Cass. Civ., Sez. III, 31 May 2019, no. 14886.

within the class. The discussed statements from the Italian Higher Court are the following:

the rights concretely prejudiced [...] are] to be characterised [...] by the essential requirement of their relative homogeneity (pursuant to art. 140-*bis* cited), intended [...] as the distinctive trait of individual claims that, claimed by a set of consumers or users, are united by characteristics such as to justify a serial assessment and a joint procedural management, having to *exclude*, on the logical plane, even before the legal one, the compatibility of the procedural instrument thus outlined by the legislator with the execution of *assessments calibrated on specific personal situations* or with evaluations that dwell on the specific consistency of the emotional sphere or of the dynamic-relational experience of individual injured parties. In cases where, in fact, the complaints of the injured parties are such that they do not prefigure the possibility of a *tendentially standardised assessment* also of the related prejudicial consequences (both as regards specifically the *an* and the *quantum* of the damage), the class protection mechanism must be considered impracticable for this reason.

[...] From these premises it follows that [...] the class action remains nevertheless *compatible* with the claim for compensation for *non-pecuniary damages*, where regarding the latter *the traits* in some way *common* to all members of the class are *strictly highlighted* (provided they are adequately specified and proven), with the consequence that the original proposer has the burden of requesting the repair of a non-pecuniary damage that is *not individualised*, but is based on circumstances common to all members of the class.

[...] With the further specification, in cases of non-pecuniary damages claimed in the forms of class action (and precisely in order to *prevent an inadmissible punitive interpretation* of the compensatory responsibility, in the absence of legislative parameters capable of justifying it: see United Sections Judgment no. 16601 of 07/05/2017) of the allegation and proof of the concrete profiles of the prejudices complained of capable of enhancing the traits shared by all members of the class, *not personalisable* in relation to single injured parties, but united by characteristics such as to justify both the *serial appreciation* and the *jointly claimed procedural management*.²⁷⁷

²⁷⁷ Id.

As it can be read, the Court of Cassation directly addresses, for the first time, the notion of homogeneity specifying how it should be “intended”. A potential ambiguity of the decision stems, however, from a possible contrast with the majoritarian view, according to which the quantification of damages within class actions can vary among the different subjective individual positions. This is due to expressions such as “having to *exclude*, on the logical plane, even before the legal one, the compatibility of the procedural instrument [...] with the execution of assessments calibrated on *specific personal situations*”, or those stating how the class action mechanism cannot be employed in cases in which the injured parties’ complaints do *not* “prefigure the possibility of a *tendentially standardised assessment* also of the related prejudicial consequences (both as regards specifically the *an* and the *quantum* of the damage)”, or, again, those stressing how the complainants should specify “the traits shared by all members of the class, *not personalisable* in relation to individual injured parties”.²⁷⁸

Still, the Court does not move from the majoritarian approach, as confirmed by subsequent judgements of lower courts.²⁷⁹ Apart from the arguments above, it should be considered, in fact, how the Court does require a “standardised assessment”, but only a “*tendentially standardised*” one. It excludes personalised evaluations in relation to injured parties, but only in relation to “*single*” individuals. It underscores indeed the importance of “serial appreciation” and “joint procedural management”. These are, however, as specified by the Court itself, logical assumptions before (or rather than) strictly legal ones.

It is conceptually *inherent* to the nature of collective proceedings, which, by definition, necessitate a collective (hence, joint) evaluation. It is a *technical necessity*, related to the court’s *procedural* assessment, which in no way should influence the interpretation of the concept of homogeneity, instead related to the *substantive* positions at stake. Under this perspective, the judgement at hand is indeed questionable. It appears also disputable in the part in which it seems to set the burden of proving – not homogeneity, but rather – the *feasibility* of joint

²⁷⁸ Id.

²⁷⁹ See, *infra*, Part IV.

procedural management on the class plaintiffs. Instead, as subsequently argued, once homogeneity is found and the claim proceeds as admissible, joint procedural management should *always* follow, *automatically*, under the judge's directions according to the concrete case's peculiarities.

A key additional aspect of the Cassation Court's findings in the *Trenord* case should be highlighted. It is the fact that the Court addressed the homogeneity test only in relation to the possibility of compensating *non-pecuniary* damages through the class action procedure. The principle of law declared by the *Sezioni Unite*, as a matter of fact, does not even mention the homogeneity concept, rather focusing on the central issue.²⁸⁰ Despite declaring, in abstract, the compatibility of class proceedings with the claim for compensation for non-pecuniary, the Court recalled its own, well-established principles on the matter: (i) the *constitutional relevance* of the interests violated (otherwise leading, in practice, to a repeal by interpretative means of Article 2059 c.c. – following which “non-pecuniary damage must be compensated only in cases determined by law” – since any non-pecuniary damage, by the very fact of being such, that is, affecting personal interests, would be compensable); (ii) the *infringements' severity* (the offense should exceed “a minimum threshold of tolerability”, pursuant to Article 2 of the Constitution, which requires everyone, under the principle of solidarity, to tolerate a minimum, acceptable, degree of intrusions into their personal spheres, inevitably arising from being part of the same society); (iii) the *non-triviality of the damage* suffered (it should not consist of mere inconveniences, dissatisfactions, disappointments, anxieties or annoyances, nor in the infringement of “entirely imaginary rights”, like the right to quality of life or to happiness).

²⁸⁰ Id., para 35: “The assessment of non-pecuniary damage claimed in the context of a class action lawsuit filed under Legislative Decree no. 206 of 2005, Article 140-*bis* – in addition to the allegation and concrete proof of the ordinary requirements: 1) the constitutional relevance of the interests harmed; 2) the severity of the related injury; and 3) the non-triviality of the damages (i.e., that they do not consist of mere inconveniences, annoyances, disappointments, anxieties, or any other type of dissatisfaction concerning the most disparate aspects of life, in accordance with what was stated by Sec. U, judgment no. 26972 of 11 November 2008, Rv. 605493 – 01) – also requires the specific allegation and proof of the concrete profiles of the claimed prejudices, capable of enhancing the traits shared by all members of the class, not customizable in relation to individual injured parties, but united by characteristics such as to justify both the serial assessment and the jointly claimed procedural management”.

The *Trenord* case was about a series of “significant inconveniences” of extraordinary nature suffered by the users of the rail transport service managed by the defendant company, which, according to the Court of Appeal of Milan, justified granting them a generalised lump sum of 100 € for each user as non-pecuniary damage. According to the Cassation Court,²⁸¹ however, the Court of Appeal failed to adhere to the abovementioned three requirements – in particular to explain concretely and specifically how the gravity and seriousness threshold had been exceeded –, as well as the common traits justifying a standardised treatment. The impact on the future viability of class action suits in Italy is evident and significant, since such an interpretative perspective would severely raise the accessibility level, eliminating *de facto*, for most cases, the collective compensability of *non-pecuniary* damages.

²⁸¹ Id., para. 17: “In the case at hand, the Court of Appeal of Milan, far from adhering strictly to the principles so far mentioned, appears to have neglected both the aspect related to the identification of the constitutionally protected interest underlying the non-pecuniary prejudices compensated (except for a generic and abstract reference – moreover deduced for other purposes – to the “limitations suffered in relation to one's free movement”: see page 15 of the challenged judgment), and the specific identification and description of the forms and manners in which the non-pecuniary prejudices purportedly identified actually exceeded that threshold of sufficient gravity and seriousness identified interpretatively by the United Sections of 2008, as an essential limit of compensatory protection, failing to explain how the damages complained of, necessarily linked by a controllable material and legal causal connection to the contested non-performance, represented the outcome of a truly serious and grave offense to the interest protected at the constitutional level, without translating into mere inconveniences, annoyances, disappointments, anxieties or any other type of dissatisfaction concerning the most diverse aspects of life.

In fact, in the challenged judgment, the judge *a quo* appears to have limited their argument to the mere observation of “prolonged delays, cancellations of runs, transfers from one train to another, changes of routes, overcrowded train conditions” which turned out to generate, in a purportedly uniform and generalized manner, “a form of anxiety and intolerance for the inconveniences, annoyances, and difficulties, if not even the impossibility, of carrying out one's normal movements in order to reach workplaces, places of study, and so on”, without taking on the burden of deducing and articulating in a concrete and specific manner the demonstration that such forms of anxiety, intolerance, annoyances, and difficulties/impossibilities are not reducible to those mere inconveniences, annoyances, disappointments, anxieties or any other type of dissatisfaction concerning the most diverse aspects of life that, as repeatedly emphasized, preclude, by virtue of the principle of social solidarity under Article 2 of the Constitution, the compensatory protection of non-pecuniary damage under Article 2059 of the Civil Code, to the extent that they express terms of an inadequately appreciable impact on the individual personal sphere, inevitably arising from the fact of social coexistence.

Nor are the profiles of the identified prejudices sufficiently alleged and proven in the challenged ruling, capable of enhancing the traits actually and concretely common to all members of the class, not customizable in relation to individual injured parties, but united by characteristics such as to justify both the ‘serial’ appreciation and the jointly claimed procedural management, in respect of Legislative Decree no. 206 of 2005, Article 140-*bis*”.

For this reason, such standpoint appears questionable. Pursuant to Article 24, in connection with Article 2, of the Italian Constitution, that is the above-discussed right to *effective* justice, which inevitably assumes *collective* connotations in light of societal developments, a *balancing* needs to be made. On the one hand, the righteous and strict, well-established, jurisprudence on non-pecuniary damage, developed under the traditional *individual* civil-procedural litigative perspective. On the other hand, the urgency to provide the *possibility* (even with explicit adherence, given the opt-in regime) of compensatory redress for small claims which otherwise could (and would) not be pursued autonomously. The latter issue, coupled with the necessity of *detering* wrongful conducts of large and repetitive players that systematically harm societal members without taking account (paying compensation, in short) for such negative externalities.

A constitutionally oriented reading, in light of the values at stake, might suggest a different consideration of the thresholds of “gravity” and “seriousness” necessary, according to the well-established Italian case law, for the compensability of non-pecuniary damage. They would still be present and would still need to be proven. However, this would not happen *individually*, by considering the sufficient gravity and seriousness in relation to the *single* homogeneous individual right. Rather, the territorial courts, in verifying such requirements, should make – precisely because of the constitutional values mentioned above – a *unified assessment* of the class as a whole. Thus, the gravity and seriousness of each single homogeneous subjective position (hence, with a factual “common origin” and nothing else, see *supra*) should be *aggregated* to reach the total for the class. Even if the gravity and seriousness were not sufficient *individually* – and, therefore, assuming that the individual right holder sought non-pecuniary compensation through ordinary individual and autonomous judicial proceedings, it would be correctly denied redress for lack of reaching the minimum gravity and seriousness threshold –, *collectively* they could be reached. This way, with a constitutionally oriented reading, in light of Articles 24 and 2 of the Italian Constitution, the above-identified values could be balanced.

The alternative, otherwise, is the creation of a significant “free zone” (“*zona franca*”, borrowing an expression from the Italian Constitutional Court) of

protection within the legal system, a free zone which, *inter alia*, the legislator of 2019 deliberately wanted to fill. In this sense, it is worth recalling that the decision of the *Sezioni Unite* of the Court of Cassation of 2019 regarded the legislation, now repealed, of the Consumer Code. The introduction of the new regime in 2019, into force in 2021, supports – with more force – the arguments set out above. Beyond the preparatory works and the full extension of the scope of application – quite indicative of the fundamental goal of expanding the paths of access to justice –, indeed, there are several provisions of the new discipline that, from a systematic perspective, favour a broader, more flexible approach.

In particular, regarding in general the quantification of damages, a further interpretative layer is offered also by the new internal discipline on the *liquidation phase*, introduced with the 2019 reform. Article 840-*octies* c.p.c. provides for a specific phase to examine class adherence and to draft a liquidation project (the so-called “project of the homogeneous individual rights of the adherents”). This choice suggests that, beyond the initial phase of verifying the common (“homogeneous”) features at the admissibility stage, a more *individualised* quantification among the different class components is still feasible.

This is supported by the fact that the individual tasked with such liquidation (the so-called “*common representative of the adherents*”), pursuant to Article 840-*sexies*, letter g) c.p.c must meet the requirements for appointment as a bankruptcy trustee, a process in which *individualisation* is indeed allowed in the liquidation phase. According to Article 840-*octies* c.p.c., the common representative of the adherents can avail themselves of the support of *technical experts* for the evaluation of the facts. Furthermore, they must “present their motivated conclusions for *each*” adherent, on the basis of (strictly) documentary evidence. Adherents and the respondent, within thirty days from the communication of the liquidation project, may deposit written observations and supplementary documents for a re-evaluation from the common representative. After a control from the judge, who can accept in whole or in part the adhesion, the respondent is ordered to “pay the sums or things owed to *each* adherent as compensation or restitution”.

Such wording of the norms clearly indicates room for an assessment “*individualised* in relation to single injured parties” (recalling the Court of Cassation’s 2019 judgement).²⁸² Evidently, such assessment will be *partially* (rather than “*tendentially*”) standardised. As stressed by the Court, this is logically inherent to the nature of collective proceedings. The innovative stance, with which courts still need to get acquainted, is their fundamentally different role in this type of judicial setting. It is the *court*’s responsibility to identify the best technique to manage the joint claims. In doing so, they must consider the concrete features of the case at stake, adopting an active – even creative – stance, if necessary.

The Montesquieuan conception of the judge as ‘*bouche de la loi*’, who passively interprets and applies the law to the facts presented by the parties, is definitively abandoned. Instead, they become the main directors of proceedings of the highest complexity, due to the different interests at stake and voices to be heard, most of which not even formally participating to the trial. In most cases their control will continue also after the decision, to ensure a correct application of the tasks set therein (e.g., urging action from the legislative bodies, administrative agencies, corporations or other entities acting as defendants, but also from the claimants, for instance towards the rest of the community not formally involved in the proceedings). This may require creative thinking, even during the examination of the case, as well as an active check regarding adequacy of representation and lack of conflicts of interests among all the parties.²⁸³

Regarding quantification of damages, they need to learn to balance the exigence of *standardisation*, following the goal of judicial economy and the procedural

²⁸² That is: “specific allegation and proof of the concrete aspects of the claimed prejudices, capable of enhancing the traits shared by all members of the class, *not* individualised in relation to single injured parties, but instead unified by characteristics such that they justify both the serial assessment and the jointly claimed procedural management”.

²⁸³ Quite skeptical, UZELAC A. (2014). ‘*Why No Class Actions in Europe? A View from the Side of Dysfunctional Justice Systems*’, in HARSAGI V. and VAN RHEE C. H. (eds.) *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Intersentia, Cambridge: “The organisational design of the European judiciary 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’. The formalistic, lengthy, rigid and one-to-one traditional organisational design of the European judiciary is probably one of the highest obstacles for public interest litigation”.

limitations, with the necessity of providing a *minimum* degree of *diversification* in light of the different individual positions within the class, against the backdrop of *fair trial guarantees*, to be maintained in such a complex judicial setting.

The techniques for this purpose are numerous and largely tested in previous foreign experiences with collective proceedings, mostly from overseas. Among them, the most notable, as anticipated above, are:

a) the distribution of a *general lump sum* to all the class members:

Whenever no significant divergences can be found within the class in order to form two or more sub-classes, a mere lump sum may be individuated. In order to avoid the “inadmissible punitive interpretation of the compensatory responsibility” (an issue – partially questionable²⁸⁴ – raised by the *Sezioni Unite* in the *Trenord Case*), a twofold preventive measure can be adopted: on the one hand, the *minimum individual damage* could be compensated to all the class members; on the other hand, preferably, the *overall damage* received by the class should be quantified and *divided by the total* number of the class members, the result of such operation being the sum to which each individual member is entitled.

The trouble with the latter approach would, however, be the impossibility of anticipately taking into account how many (and which) members will actually opt-in (or opt-out, under the regimes of other jurisdictions), provided their number can be concretely identified. This is certainly an argument in favour of an opt-out regime, at the very least for smaller claims suits. Still, given that this “collective quantification” criterion should be preferred only in cases in which the substantive positions forming the class hold no significant divergences, both defendant- and class-wise no substantial favourability should be found (in respect to a scenario in which all potential class members were to sue individually). Defendant-wise, hence, it can be argued that rather than *punitive* any such quantification might be *equitative*, under Article 1226 c.c.

²⁸⁴ See GIUSSANI A. (2020). *Diritti omogenei e omogeneizzati nell'azione di classe*, in *Rivista di diritto processuale*, 359.

Class-wise, furthermore, given the double window to join the class pursuant to Article 840-*quinquies*, para. 1 c.p.c. and Article 840-*sexies*, para. 1, letter *e*) c.p.c., the class members will still have clear knowledge of the class outline, with the alternative possibility of not adhering and proceeding individually with an ordinary action, should they consider the standardisation excessive. An example of use of this technique is the *Trenord Case*, in which the Court of Appeal of Milan, before the Cassation ruling from 2019, awarded 100 € of non-pecuniary damages to all the class members for distress caused by extraordinary train delays.

b) the division into sub-classes:

In cases in which significant divergences do emerge within the class, two or more sub-classes should be formed, according to the harm suffered. The same reasoning above-depicted for the general lump sum applies for each sub-class. In the words of Rule 23 of the US Federal Rules of Civil Procedure letter C, section 5: “When appropriate, a class may be divided into subclasses that are each treated as a class under this rule”. The present technique appears rather valuable to reduce the area of differentiation within the class, increasing effectivity of justice, class participation and, consequently, judicial economy.

So far, only one case in Italy – from the Tribunal of Cagliari, under the previous consumer-limited regime, against a water-supply company – has been registered to use this joint-management criterion.²⁸⁵ In such case, the court divided the class into three sub-classes:

- 1) The sub-class consisting of those who, in the territory of the municipality of Porto Torres and during the aforementioned reference period, have suffered the non-fulfillment in its *maximum gravity*, namely those who have not been able to use water for *all types of human use* on one or more occasions;
- 2) The sub-class consisting of those who, in the territory of the municipality of Porto Torres and during the aforementioned reference period, have suffered the non-fulfillment in its

²⁸⁵ Trib. Cagliari, sez. II civ., ord. 17 November 2016, no. 10016/2015.

intermediate gravity, namely those who on one or more occasions have not been able to use water *for drinking and cooking*;

3) The sub-class consisting of those who, in the territory of the municipality of Porto Torres and during the aforementioned reference period, have suffered the non-fulfillment in its *minimum gravity*, namely those who on one or more occasions have not been able to use water *solely for drinking*.

Such sub-division of the class members favours a “*tendential standardisation*”, while also reaching the above-mentioned goals. It can be undoubtedly replicated in other types of cases, even ones in which the quantification of the damage might not be so immediate, as the comparative case law demonstrates: for instance, regarding securities or consumer issues, but also asbestos contamination and environmental pollution, prisoners or labour issues.

Furthermore, they can efficiently address classes of homogeneous individual rights in the strictly etymological sense (see *supra*), hence with different *causae petendi* or *petita*: for example, when despite the same origin, there are factual differences between the causes of actions (e.g., regarding causation), or in cases where different groups of people seek different types of relief (e.g., some look for medical monitoring, others for immediate monetary compensation).

c) the identification of a lowest common denominator as a *multiplication parameter*.

Taking example from the previous consumer class action, a multiplication parameter, or “homogeneous calculation criterion for liquidation” (Article 140-*bis*, para. 12, cod. cons., now repealed), can be employed. As stated by Bonafede in the above-mentioned speech from 2013, “the different extent of damage potentially suffered by individual consumers, to be calculated according to homogeneous calculation criteria, does not necessarily condition the admissibility of the claim. These criteria allow for satisfying diversified individual claims by applying the *same calculation method*”.

Its main advantage is the fact that, potentially, it allows very diversified classes. It requires no identity at all between the damages concretely claimed by each class

member. In abstract, they could all differ, as long as a minimum common parameter for multiplication is identified. At first sight, it seems only compatible with claims of mainly economical nature, that is, for instance, in the securities or consumer law field. Still, other litigation based on rights related more to the personal sphere, e.g., the right to health or other fundamental liberties, could also use this criterion for quantification of damages provided a *mathematical* classification of the infringement is offered. This could occur, for example, by counting the *number of days* or, as already well-established in the jurisprudence, by taking into account the *percentages of disability* caused. Accordingly, the damages stemming from a broader spectrum of violations could be quantified within class proceedings through this technique: e.g., for detention, degrading, unfair or discriminatory conditions, violations to the right to privacy, to the right to health, and several more.

Any explicit reference to such parameter is currently lacking under the 2019 general regime. There is no reason, however, to consider it cannot be used. On the contrary, given the access-to-justice approach of the reform, the lack of explicit reference could be perceived as a way as not to limit plaintiffs' and judges' attention to such sole technique of joint-management, granting them *maximum flexibility*.

This is supported by the most recent case law, under the new regime, which already offers a successful employment of the present criterion. The Tribunal of Rome, for instance, in the recent *Millemiglia* case,²⁸⁶ still pending, about a loyalty programme from the former national flight company (Alitalia) with prizes offered in exchange for miles travelled/points, used this technique for admitting the compensatory *azione di classe* under Article 840-*bis* c.p.c. Evidently, each member of the loyalty programme had gathered a *different* number of miles, which entails the right to a different, from a *quantum* point of view, compensation. In order to “tendentally standardise” the quantification, and hence give the admissibility green light due to a satisfaction of the homogeneity requirement, nonetheless, the court, following the plaintiffs' application, found that:

It is *not preclusive* to the formation of a single class that the damages claimed by individual members are not susceptible to a unitary

²⁸⁶ Trib. Roma, sez. XVII civ. (spec. imp.), order from 8 November 2023, no. 1577/2023.

liquidation or require the application of different criteria or sub-criteria for liquidation. [...]

The current *commonality* of positions among the claimants is determined by the *ownership of miles* and the fact that it entails the application of the Regulation of the prize competition named *MilleMiglia Program* [...]

The Court concludes that, given the present circumstances, the claimants' subjective situations are *homogenous*, and there seem to be no differences between the positions of members who accumulated points in various ways. Concerning the *petitum*, the claimants formulated the request in a way that dispels any doubts regarding the homogeneity of their positions. They specifically asked that the compensation for the alleged suffered damage be *liquidated* in a manner correlated to the *number of points held by each*, making their positions, in the case of the claim's acceptance, definable uniformly. This involves identifying a *unitary parameter* that can determine the measure of restitution easily and serially, without the need for any individualised assessment.²⁸⁷

²⁸⁷ The fully relevant part of the Tribunal's order: "The homogeneity of rights, therefore, assumes the role of the main admissibility requirement for the action: its centrality is strictly related to the nature of the class action and its function, which is to allow the procedural aggregation of positions attributable to different subjects but susceptible, due to their serial nature, to be treated in a standardized manner.

The homogeneity of individual rights must be evaluated with regard to the 'causa petendi' of the action, so that rights based on the same action or omission of the same defendant can be considered homogeneous. This entails that the involved rights are characterized by a causal connection (identity of the title) or of an improper nature (identity of issues), as well as with reference to the 'petitum' (mediate and immediate). It is not preclusive to the formation of a single class that the damages claimed by individual members are not susceptible to a unitary liquidation or require the application of different criteria or sub-criteria for liquidation. It is necessary that the serial claims can be defined with a single decision and do not require individualized assessments, and this occurs when, due to the characteristics of the substantive case, the judge's decision can be based on common evaluations. This evaluation must be made based on the allegations of the parties, not on actual situations. Therefore, to satisfy the admissibility requirement of the action, the claimants must base the demand on aspects common to the injured parties, even if this means excluding certain aspects of prejudice not present in most positions.

In the present case, the claimants have alleged to be all members of the MilleMiglia Program, holders of a number of miles equal to or greater than twelve thousand as of October 27, 2021, the date of Alitalia's cessation of air carrier activity. They claimed to have suffered damage as a result of the respondent's conduct, which would have seriously prejudiced the rights they allegedly acquired through mileage accumulation. They asserted to act for the restitution of the suffered prejudice, explicitly requesting that it be quantified uniformly and correlated to each one's number of miles, without taking into account possible differentiations in positions resulting from some of them acquiring additional benefits related to the method of earning points. The Court, based on these allegations, finds that the subjective situations subject to the claim of the claimants against the respondent are homogeneous regarding the "causa petendi." The current commonality of positions among the claimants is determined by the ownership of miles and the fact that it entails the application of the Regulation of the prize competition named MilleMiglia Program, the management

The “unitary parameter” (the value of *one* point/mile), hence, serves as a unitary liquidation criterion, allowing for the joint management of common and yet diversified (*quantum*-wise) subjective positions (that is, homogeneous in an etymological sense). In theory, more complex cases, could see a simultaneous use of more techniques, such as the present one and the above-mentioned sub-classes.

d) *cy-prés* or *fluid recovery* mechanisms:

A final, more creative, and by all means unorthodox (for civil law jurisdictions, at least) method of assessment of otherwise diversified subjective positions is that of *cy-prés*, or fluid recovery.²⁸⁸ It is a technique by several means extraneous to the Italian legal, and in general to the civil law, tradition. Its promising features – *in vitro* – and its partial success – *in concreto* – in the common law (especially US and Canadian) experience with class action litigation, nonetheless, demand special consideration. Against the backdrop of its functional features and potential,

and development of which, according to the respondent, has been entrusted to Italia Loyalty S.p.A. since 2012. The Court concludes that, given the present circumstances, the claimants' subjective situations are homogenous, and there seem to be no differences between the positions of members who accumulated points in various ways.

Concerning the petitum, the claimants formulated the request in a way that dispels any doubts regarding the homogeneity of their positions. They specifically asked that the compensation for the alleged suffered damage be liquidated in a manner correlated to the number of points held by each, making their positions, in the case of the claim's acceptance, definable uniformly. This involves identifying a unitary parameter that can determine the measure of restitution easily and serially, without the need for any individualized assessment”.

²⁸⁸ On the difference between the two see REDDISH M.H., JULIAN P. ZYONTZ S. (2010). *Cy Pres Relief and the Pathologies of Modern Class Action: A Normative and Empirical Analysis*, 62(3), 620: “While a broad definition of both concepts does render them largely equivalent, it is important to discern subtle but significant differences. As an abstract matter, both concepts refer to efforts to provide the “next best” form of relief in cases where it is impractical or impossible to directly compensate the injured class members. In more recent times, however, the term *cy pres* has generally referred to an effort to provide unclaimed compensatory funds to a charitable interest that is in some way related to either the subject of the case or the interests of the victims, broadly defined. In contrast, “fluid class recovery,” in the sense in which we use the term here, refers to efforts to fashion relief to those who will be impacted by the defendant in the future, in an effort to roughly approximate the category of those who were injured in the past. Thus, both concepts involve some form of “second best” relief. However, [...] fluid class recovery represents a far more disciplined effort to indirectly compensate injured victims (through future approximations of who those victims were) than does *cy pres*, which in its modern form demands merely some generic link of the proposed recipient charity to the nature of the suit. Today, of these alternative methods, *cy pres* relief appears to be the one most often employed by federal class action courts”.

See also KALAJDZIC J. (2013). *The “Illusion of Compensation”: Cy prés Distribution in Canadian Class Actions*, in *Canadian Bar Review*, 92(2), 173.

essential questions on its constitutional and regulatory legitimacy must be answered, too.

One of the most effective ways to explain how it works is to proceed by examples. The influential *Daar v. Yellow Cab Company* case, from 1969, reported by American scholarship,²⁸⁹ stands as particularly illustrative. The case was a compensatory class action brought in front of the California Supreme Court for illegal overcharges performed to its customers' fares by a taxi company, Yellow Cab, in the city of Los Angeles for a period of four years. Two sets of problems arose right away.

First, the homogeneity (for simplicity we shall refer to the current Italian terminology) was questionable, since – despite the common origin – the claims were based on *different factual elements*, ranging over several years. This issue, still, was easily surmountable, and surmounted, thanks to the above-discussed reasoning on a broader interpretation, based on a *common origin*, of such requirement.

Second, most importantly, the *class members* were mostly *unknown*. To this regard, Yellow Cab, the defendant, argued that the class action could not proceed since the names of the cab riders could not be *identified*. Without knowing to whom any awarded damages should be distributed, how could the class be certified? Referring to the current Italian regime under Article 840-*bis* f.f. c.p.c., can a class action be admitted for the compensation of “homogeneous individual rights” if the holders of those rights, that is those entitled to damages, are unknown? How can someone join (through opt-in) the class if they are unable to submit “the documentation [...] to provide evidence of the ownership of homogeneous individual rights”, as required under Article 840-*sexies*, para. 1, letter *d*) c.p.c.? Article 840-*octies*, para. 3 c.p.c., stating “In the adhesion procedure, means of proof other than *documentary* evidence are not admissible”, also needs to be taken into account.

²⁸⁹ Cited by CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 243.; also in HEMKER-SMITH C.E. (1976). *Consumer Class Actions in California: A Practical Approach to the Problem of Notice*, in *Pacific Law Journal*, 7, 811.

The court built its solution on the *exact knowledge* of Yellow Cab's *illegal gains*. Thanks to the company records, it was, in fact, possible to calculate the precise amount that the taxi company was – in *total* – bound to compensate. In practice, the issue on the impossibility of identifying the large majority of the *individual* cab riders from the *past* four-year period (very few had kept a receipt from their ride, provided it was ever given) was overcome by subsidising the lowering of *future* Yellow Cab rates. In other words, the damages' sum which could not be awarded to harmed past cab riders (that is unidentified class members) for lack of *individualised* (not *total*) documental proof, was awarded to a future, equally unidentified, class. The recovery was "*fluid*" since the compensation was not awarded *exactly* to those who had suffered the harm. The public interest and deterrent nature of this type of litigation thus emerges.

Similar solutions have been brought in a large variety of cases from common law jurisdictions, especially in consumer law, anti-trust, securities or employment issues. They have been particularly praised for very-small claim cases in which the incentive for the class to act is minimal. Through fluid recovery, by shifting the perspective and focusing on the total damages caused by the *defendant/injurer*, rather than on the single compensation for the *single member* of the class, an optimal *economic allocation* of the harmful activity can be reached. This way, it has been argued, the correct market value is assigned to such injury-causing activity.

A similar approach makes even more sense for the protection of *diffuse rights*, given the hardship in identifying a single holder and the general – public – interest in curbing harmful conducts which affect a large part of, if not all, the society.²⁹⁰ The main example, under this standpoint, is that of environmental pollution and climate change litigation, which could see the polluter investing the damage awarded in measures aiming at mitigating the effects of its polluting conduct, with a benefit for the whole community, rather than a mere compensation of hard-to-identify individuals.

²⁹⁰ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, in *Buffalo Law Review*, 25, 682.

Apart from a much-debated implementation of this technique even in the common law jurisdictions from which it originates, with a currently predominant use in settlement agreements rather than in judicial decisions, several concerns and points of discussion arise in relation to a possible use in the *current* Italian legal order.²⁹¹

The initial argument against fluid recovery in Italy is the fact that it proceeds to compensate subjects that are *not parties* to the proceedings. It introduces in the – in theory – adversary bilateral adjudication process a *non-party* (or several, even unknown, non-parties), which is (or are) awarded damages despite not being *formally* involved in the judicial proceedings nor even being involved in the legally relevant *factual* circumstances which gave rise to the suit. Without a *clear regulatory provision* allowing it, it is difficult to argue for its use, given the current system of civil procedure in Italy.²⁹²

This raises fundamental questions regarding the role of the judge, too, who, rather than awarding compensation, ends up creating a new substantive remedy which, under different aspects, equals to an administrative sanction. The respect of the separation of powers principle is thus put at risk, especially considering the limitless discretion of the judge in determining the extent and features of the future *fluid* class. The key matter of *deterrence v. compensation* as the underlying justification of class litigation emerges, too. At the same time, the issue of *punitive damages* and its – partial – extraneity to the Italian legal order could be raised, too (although any critique on the matter would not hold, should the total amount awarded as damages equal the sum of all the individual injured members of the class adherent to it).

²⁹¹ CAPONI R. (2009), *Il nuovo volto della class action*, in *Il Foro italiano*, V, 383 seems quite open to this possibility: “The theme of the liquidation of compensable damage is one of the most delicate aspects of the collective compensation action and would deserve a specific treatment. The problem would require a substantive law legislative solution. Civil procedure cannot renounce (at least *de iure*) to the precise implementation of substantive law, but it can conform and temper the latter, in the case of multi-offensive illicit acts, so as to make its faithful implementation possible even through mechanisms of collective liquidation of damage (for example, as happens in the American experience with *fluid recovery*)”.

²⁹² See *infra*, Chapter XI.

Further, essential caveats stem from *fair trial* guarantees, both with regard to the defendant and the injured subjects who receive no compensation. In particular, the main obstacle for the current Italian legal order appears indeed to be the *opt-in* regime, which requires *explicit* adherence. To respect *due process* rights, the compensation awarded as full recovery should be only that resulting from the sum of all the adhering class members' entitlements to damages. Being them *unknown*, which is the reason behind fluid recovery, however, it results *impossible*. Hence, an apparent catch-22 situation, as long as opt-in is the only regime applicable.

All these issues, which fall outside the notion of homogeneity, will be further addressed in the following with concrete examples, in the conclusive Part V dedicated to *de iure condendo* remarks.²⁹³

For the time being, regarding the four methods of *quantification* presented above, it seems appropriate to recall and stress that the homogeneity assessment, relevant for the admissibility of compensatory class actions pursuant to Article 840-*bis* and -*ter* c.p.c., is not an evaluation on the *merits* of the case. On the contrary, it is merely a “determination of whether there are common issues” (factual or legal, i.e., a common origin) “justifying representative litigation”.²⁹⁴ Issues of quantification and liquidation, despite crucial at the subsequent stage, should not be relevant for the verification of such requirement. This is also due to the *prejudicial nature* of the *admissibility phase*.²⁹⁵

Such considerations link directly to the *second issue* raised at the beginning of this paragraph, concerning homogeneity, that is *when* should its determination be conducted, and *by whom*.

The one tasked with assessing it should be the judge, on the basis of the plaintiff's claim. Following Article 840-*ter* c.p.c., the decision on admissibility

²⁹³ Id.

²⁹⁴ KALAJDZIC J. (2021). *Climate Change Class Actions in Canada*, in *Supreme Court Law Review*, 100(2), 52: “Ultimately, however, certification is not a test of the merits of the case but only a determination of whether there are common issues justifying representative litigation. Issues of liability alone would be sufficient to satisfy commonality”.

²⁹⁵ DONZELLI R. (2019). *L'ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl.

should be taken within thirty days from the first hearing. Evidently, the exam taken by the judge can only be approximate. This is supported by the other requirements for inadmissibility: “a) when it is *manifestly unfounded*; [...] c) when the petitioner is in a state of *conflict of interest* with the respondent; d) when the petitioner does not appear capable of *adequately representing* the homogeneous individual rights asserted in court”. None of them postulates an examination on the merits. Consequently, the homogeneity test (“b) when the court does not perceive *homogeneity* of individual rights protectable under Article 840-*bis*”) should not presuppose either a thorough and comprehensive factual or legal analysis.

Rather, drawing from the prospect offered by the plaintiffs in their claim, the judge should declare the inadmissibility of the class action only when the individual rights enforced appear lacking a common link – that is a common *origin*, following the broad etymological interpretation herein proposed. Any evaluation on the merits, encompassing the defendant’s liability, but also quantification and liquidation, should be *postponed*. This is in line with the assessments on admissibility before Apex courts such as the Italian Constitutional Court or the ECtHR, where no thorough examination on the merits is ever conducted.

Class composition and the exact “features of the homogeneous individual rights”, that is “the necessary elements for inclusion in the class of subjects [...] holding homogeneous individual rights”, according to Article 840-*cinquies* c.p.c., are deferred to a *subsequent* phase, after the judge, with a judgement, has *accepted* the class action and determined the respondent’s liability for the conduct alleged by the plaintiffs.

Until then, therefore, the judge does not yet have to identify the criteria for joint-management and standardised liquidation. As a matter of fact, given the – dual – opt-in regime, they will probably be very far from even guessing the extent of the actual class (composed by those who concretely and explicitly adhere to the collective action, which is possible within a minimum of 60 days and a maximum of 150 days both after the admissibility order and the “acceptance judgement” – *sentenza di accoglimento* in Italian). This is another argument for the looser (yet literally more rigorous) interpretative standpoint on homogeneity.

As to the *third issue*, the different possible techniques for joint *quantification of damages* have already been presented. It has also been pointed out how Article 840-*octies*, para. 3, c.p.c., specifies that “In the adhesion procedure, means of proof other than *documentary* evidence are not admissible”. Together with other normative choices from the 2019 regime – such as the regulation of the class proceedings by the summary judgement procedure (“*giudizio sommario di cognizione*”) provided for by Article 702-*bis* c.p.c. –, the *complexity* of the dispute, particularly with regard to the *evidentiary* aspect, appears – according to some courts – to be a possible constraining factor for the examination of the suit.²⁹⁶

This is understandable from the perspective of *judicial efficiency*, less from the standpoint of *access to justice* (which, between the two, indeed seems to be the guiding objective of the reform). At the same time, if the evidentiary aspect has a limiting effect on the scope of application of the dispute,²⁹⁷ it is not clear why – if that is the case – the legislative choice does not explicitly include such requirement (i.e., “a lack of evidentiary complexity”) among the grounds for inadmissibility under Article 840-*ter* c.p.c.

Moreover, from the fair trial lens, it must be noted how Article 840-*septies*, para. 3, c.p.c. allows the single *adherent* to submit, for an evaluation at the judge’s “prudent discretion”, *statements from third parties*, whose identity is certified by a lawyer acting as public official pursuant to Article 252 c.p.c. This provision appears rather questionable, given the otherwise *strictly documentary nature* of the presentable evidence, as well the fact that the third parties at hand don’t appear to be possibly heard as witnesses nor to be bound by any oath of stating the truth. Furthermore, most importantly, under the *equality of arms* principle, it constitutes a clear violation of the defendant’s rights, given its apparent impossibility to present such third-party statements.

Apart from these evidentiary considerations, the subjects involved in the quantification and liquidation process should be highlighted. In particular, *new*

²⁹⁶ See *infra*, Parts IV and V.

²⁹⁷ DONZELLI R. (2019). *L’ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl, 20.

figures emerge as protagonists under the 2019 regime: the “*common representative of the adherents*” and the “*judge delegated* for the adherence procedure”.

Both are named at the time of the “*acceptance judgement*”, when the court holds that the defendant, through the conduct alleged by the petitioner, has infringed a set of homogeneous individual rights, simultaneously defining their *features* and the *documentation* that must be produced, if necessary, by any adherent to provide proof of being holders of said homogeneous individual rights. Furthermore, raising serious doubts of constitutional legitimacy, it has been provided that, if necessary, the court in such instance can set a *monetary sum* to be paid by each adherent (including previous ones, from the first window to join-in, after the admissibility order) as a “*contribution to the expense fund*”, presumably (but not clearly, per lack of specification of the norm) to be paid in favour of the common representative, therein named.

As discussed above, the *common representative*, who must meet the requirements for appointment as a bankruptcy trustee, is in charge of drafting a *liquidation project* on the basis of the acceptance judgement’s indications on the features of the homogeneous individual rights and class composition, as well as the documentation submitted by each adherent and the exceptions raised by the defendant, with a possibility for *written observations* from the parties for a re-evaluation. In this task, the common representative can avail themselves of the support of *technical experts* for the evaluation of the facts. Moreover, as anticipated, they must present their *reasoned* conclusions for *each* adherent, on the basis of (*strictly*) *documentary* evidence. It is not clear who should cover the costs of any such evidence, whenever obtaining it may pose an economic or even organisational burden on the adherent. This could be relevant, for instance, in relation to the right to health, in cases in which a medical evaluation may be required. Evidently, a centralised system of independent technical experts named, managed and paid by the common representative would be preferable.

The delegated judge is then tasked with verifying compliance and each adhesion. On the basis of the project of liquidation, with a motivated decree, they will finally

order the defendant the payment of the sums or things owed to each adherent as compensation or restitution.

As explained above, the wording of the norms indicates room for an assessment *partially individualised* in relation to single injured parties (as opposed to the Court of Cassation’s 2019 judgement, referred to the previous consumer class action).²⁹⁸ Still, as mentioned, given the collective nature of the proceedings, and the related goal of judicial efficiency, individualisation will necessarily have to be included in an *overall standardised* evaluation.

This is logically presupposed by the fact that the representative action entails a renunciation to individual and with full consideration (“*a cognizione piena*”, in Italian) proceedings, in favour of a series of economic, organisational and time advantages for each adherent. *Pro quo*, pending (explicit) acceptance of the class member, the assessment on quantification is only partially individualised, and partially standardised. Hence, we return to the initial description (see *supra*) of the concept of homogeneity: in addition to a necessary *common* (hence, identical) core, a potentially *differentiated* (also referred to as “personal”, “exclusive”²⁹⁹ or “individualised”) part between each individual class member, that is a set of factual or legal issues which pertain to a single individual position rather than to the class as a whole.³⁰⁰

The role of the common representative does not seem sufficiently clear nor impartial. An element of concern, in fact, together with the ambiguous possibility of a limitless “contribution to the expense fund” for all adherents,³⁰¹ is the

²⁹⁸ That is: “specific allegation and proof of the concrete aspects of the claimed prejudices, capable of enhancing the traits shared by all members of the class, not individualised in relation to single injured parties, but instead unified by characteristics such that they justify both the serial assessment and the jointly claimed procedural management”.

²⁹⁹ See MENCHINI S. and MOTTO A. (2010) *Art. 140 bis*, in *www.judicium.it*, 5.

³⁰⁰ See DONZELLI R. (2019). *L’ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl, 13.

³⁰¹ One must wonder whether such provision is necessary, also considering how under Article 840-*quinquies*, para. 3, c.p.c states that: “When an expert consultant is appointed, the obligation to advance the expenses and the fees for the latter are placed, unless there are specific reasons, on the defendant”. At least a maximum limit should be defined by the legislator, as well as the conditions which allow its request and subsequent use.

provision, under Article 840-*novies* c.p.c., para. 1³⁰² of a *percentage* – calculated progressively on the basis of the number of class members – on the total amount due to all adherents, to be paid by the defendant, in favour of said figure. This manifestly sets a significant and *direct interest*, for the common representative, on having more individuals adhere to the class as well as a higher sum awarded to them as damages. A potential conflict towards the *interests of the defendant* arises.

A pecuniary incentive is understandable, and to a certain degree laudable, for the *class attorneys* bringing the lawsuit. It recalls the contingency fees from the US class action model, with a narrow (probably *too narrow*) percentage rate in order to avoid “fishing expeditions” and abusive litigation. Incentivised attorneys are, thus, vested with a *private enforcement function* for the public interest. On the other hand, however, it is not comprehensible *why the common representative* – who enters the proceedings only at a later stage, once the responsibility of the defendant has

³⁰² Art. 840-*novies* (Costs of the proceeding): “With the decree under Article 840-*octies*, fifth paragraph, the delegated judge also orders the respondent to pay directly to the common representative of the adherents, as compensation, an amount determined based on the number of class members on a progressive scale:

- a) from 1 to 500, not exceeding 9 percent;
- b) from 501 to 1,000, not exceeding 6 percent;
- c) from 1,001 to 10,000, not exceeding 3 percent;
- d) from 10,001 to 100,000, not exceeding 2.5 percent;
- e) from 100,001 to 500,000, not exceeding 1.5 percent;
- f) from 500,001 to 1,000,000, not exceeding 1 percent;
- g) over 1,000,000, not exceeding 0.5 percent.

The percentages mentioned in the first paragraph are calculated on the total amount due to all adherents. The percentages can be modified by a decree of the Minister of Justice. The reimbursement of documented expenses is also due.

The judicial authority may increase or decrease the amount of compensation liquidated in accordance with the first paragraph by no more than 50 percent, based on the following criteria:

- a) complexity of the assignment;
- b) use of collaborators;
- c) quality of the work performed;
- d) diligence in conducting activities;
- e) number of adherents.

For matters not provided for in the first and second paragraphs, the provisions on judicial costs apply. With the same decree mentioned in the first paragraph, the delegated judge also orders the respondent to pay directly to the lawyer who defended the plaintiff until the pronouncement of the judgment under Article 840-*sexies* an additional amount in addition to the sums due to each adherent as compensation and restitution. This additional amount, recognized as a premium compensation, is liquidated in accordance with the first paragraph. This premium compensation can be reduced by no more than 50 percent, based on the criteria established in the fourth paragraph.”

already been upheld – should have the same, if not higher (see percentages),³⁰³ incentive. This clashes with Articles 2, 3 and 111 of the Italian Constitution.

Being a subject charged with the task of drafting a project of liquidation, their *fees* should by no means be *dependent on the outcome* of the suit. Fairness and equality of arms demand *full impartiality*, which – as consolidated, also supranational, jurisprudence requires – encompasses also its *appearance* when objectively justified. Such is the case of economic remuneration linked to the extent of damages awarded to one party.

Another reason to fear a possible conflict of interests of the common representative, this time towards the class, is their role in reaching a *settlement agreement*, pursuant to Article 840-*quaterdecies* c.p.c. After the acceptance judgement, with which the court holds the defendant liable for the harmful conduct claimed by the plaintiffs, the common representative can negotiate, on behalf of the adherents, a *settlement agreement* with the defendant. Pending authorisation from the delegated judge, the settlement agreement is binding for the class adherents, save for those that raise individual objections and, subsequently, after the judge's authorisation, decide – within fifteen days – to revoke the common representative's power to settle on their behalf. Such a short notice to decide whether to revoke and the fact that it is a subject which, once again, should be *impartial* – and instead negotiates vis-à-vis the other party, *representing*, as the name says after all, one party – leaves doubts on the appropriateness of the provision.

In sum, it is essential to ensure that this new *sphinx figure* – partially *representative of the class*, partially *impartial judicial auxiliary* – does not fall prey of *easy economic incentives*. At the moment, pending concrete jurisprudential development, the guarantees do not appear sufficient, as well as its overall role ambiguous and confusing. It seems that its partial representative functions towards

³⁰³ See, also *id.*, para. 6, “With the same decree mentioned in the first paragraph, the delegated judge also orders the respondent to pay directly to the lawyer who defended the plaintiff until the pronouncement of the judgment under Article 840-sexies an additional amount in addition to the sums due to each adherent as compensation and restitution. This additional amount, recognized as a premium compensation, is liquidated in accordance with the first paragraph. This premium compensation can be reduced by no more than 50 percent, based on the criteria established in the fourth paragraph”.

the class – especially in smaller cases, with a more fiduciary base – could be taken by the plaintiff themselves with their attorneys (who, after all, brought and studied the case, until the court’s holding of the defendant’s liability), whilst the impartial judicial auxiliary duties by the delegated judge (already a second judge within the whole proceedings) or court experts.³⁰⁴

Further issues pertaining to the respect of fair trial guarantees, that is the *fourth issue* raised, will be more exhaustively addressed in the following.

5.2. *Passive standing and coordination trajectories with the 2009 “public class action”.*

Passive standing, as mentioned above, is attributed by the 2019 reform, to “*companies or entities managing public services or public utility services*, with respect to acts and behaviours carried out in the performance of their respective activities”. Such provision is common to both compensatory and injunctive remedies, pursuant, respectively, to Article 840-*bis* and Article 840-*sexiesdecies* c.p.c. This unequivocally confines the passive legitimacy of the new instrument to the *business world*, raising constitutional legitimacy doubts.

Preliminarily, it remains uncertain whether *natural persons* acting as entrepreneurs fall within this scope or if the term “companies” should be interpreted exclusively as legal entities. An extensive reading – to be preferred, following the access-to-justice rationale of the reform – would also include natural persons who carry out *entrepreneurial* activities.

Apart from this specification, however, all private individuals who do not engage in business activities and who do not fall under the expression “managing public services or public utility services” appear by all means excluded from the passive legitimacy scope. This choice is problematic for a variety of reasons.

While the limitation to companies could have been reasonable under the previous consumer-focused regime, the new *generalised* scope of application requires a general extension of the passive legitimate parties, to avoid undue distinct

³⁰⁴ See *infra*, Chapters X and XI.

treatment between similar (homogeneous) situations, contrary to the principle of equality. An illustrative case is that of water pollution affecting numerous adjacent lands, caused by a *non-entrepreneur* private individual. This situation would result in an improper disparity compared to similar cases where the polluter is a company. Faced with two analogous situations – pollution by a private individual and pollution by a company – the current system, based on a strictly literal interpretation, would not offer the same procedural tools. Given the apparent unreasonableness of such a provision, a constitutionally oriented interpretation should be pursued, by including within the term “companies” any private entity – also natural persons – who engages in *possibly harmful* activities, per Article 3 of the Constitution. Still, in this case, the underlying pre-existence of a *duty to act with care* on the future defendant, despite its questionability, appears necessary.

In sum, an extension of the passively legitimated subjects can be argued according to constitutional principles. The general “*nenimem laedere*” obligation should operate especially in circumstances in which a higher degree of attention and care can be expected from those acting. Returning to the previous water-pollution example, consequently, a blameless and unpredictable accident caused by a private person could not be part of a class action under the current 2019 regime. Whereas, instead, following such broad interpretation, it could be in a case in which it is proved that the individual causing the pollution – despite not being formally a company or an entity managing a public or public utility service – could or *should have*, concretely foreseen and avoided the incident. It could occur, for instance, in delicate environments or concerning the use of materials that present a higher risk of contamination.

This interpretative standpoint stems from the specification, under the 2019 reform, that even companies and entities managing public or public utility services can be sued through a class action *exclusively* “with respect to acts and behaviours carried out in the *performance* of their respective activities”, that is within a *professional* context. A legislative desire to allow the use of representative proceedings only for harms caused in the milieu of professional or, at least, delicate

activities – which require a *higher degree of care* – can be implied therein. This key feature needs to be kept into account for natural persons, too.

Doubts might also arise regarding claims against educational centres, hospitals, detention facilities or religious institutions, whether private or public, for-profit or non-profit. The question is whether they can be encompassed under the expression “*entities managing public services or public utility services*”. According to the jurisprudence formed with the previous consumer class action, such entities are to be understood as “the *private entrepreneurial subjects* (with or without profit-making purpose) to which the public administration, in charge of the public service or public utility at a local level, delegates the relative management, but not directly the Public Administration itself”.³⁰⁵

The case law, albeit very limitedly, has already confronted this issue under the previous consumer-focused class action regime under Article 140-*bis* of the Consumer Code. In 2012, in the *Agostino Gemelli case*, before the Rome Tribunal, concerning an alleged tuberculosis contagion of 1,271 neonatal ward patients by a nurse, the court deemed the class action admissible based on a systematic interpretation of the term “company”, which included “activities connected to intellectual professions, traditionally excluded from business activities, and activities carried out by public entities”, as well as “the healthcare facility operating under an agreement with the National Health Service”.³⁰⁶ Specifically, by combining Articles 2082 of the Civil Code and Articles 3 and 18 of the Consumer Code, the Rome Tribunal rejected the restrictive interpretation of “company” necessarily connected to the “for profit” purpose, “since the absence of such an *aim* does not in itself *preclude* the possibility of qualifying the activity as entrepreneurial”, as long as it is based on *professionalism* and *economic efficiency*.

Considering, now – with respect to Article 840-*bis* and Article 840-*sexiesdecies* c.p.c. –, the passive legitimacy of *public service or public utility managing entities*

³⁰⁵ Court of Appeal of Rome, ord. No. 6884/2019 of 21 June 2019., R.G. 2398/2019. For an in-depth study, see GRECO G., CAFAGNO M., GALETTA D., RAMAJOLI M. and SICA M. (2021). *Argomenti di diritto amministrativo. Volume I*, IV ed., Giuffrè, 394 ff. See also *infra*, Chapter XI.

³⁰⁶ Trib. Roma, order from 27 April 2012, *Codacons/Rossi c./ Policlinico Universitario Agostino Gemelli*.

and, once again, the *access-to-justice rationale* of the reform, a broad interpretation aimed at allowing claims against the largest possible number of entities – public or private – that perform *organised* and *professional* activities, *economically efficient*, in a *serial* manner, regardless of the profit or non-profit goal, appears correct.

Finally, the exclusion of the *public administration* and the *State* from passive legitimacy under the new Title VIII-*bis* of Book IV of the Civil Procedure Code needs to be underscored.

Concerning the former, the legislator explicitly refers to the so-called “*public (or administrative) class action*” under legislative decree 198/2009 concerning “appeals for the efficiency of administrations and public service concessionaires”. Such provisions are preserved pursuant to Article 840-*bis* c.p.c., with an express reference, and Article 840-*sexiesdecies*, which refers in general (and more confusingly) to “special legislation”.

However, it should be emphasised that such remedy before the administrative judge has rather *different features*. It operates against “public administrations and public service concessionaires” for the restoration of the *correct performance* of the function or the proper provision of the service. It is, in fact, “functional to achieving a *result* that benefits all co-holders of the diffuse interest in restoring [...] the *correct delivery of the service*”. The ordinary class action, instead “presupposes the exercise of an individual right, transposed onto each holder individually identified”³⁰⁷ The collective procedure before the administrative judge is, thus, aimed at protecting the class members through a specific condemnation *to act*, correcting potential dysfunctions of administrative apparatuses or public service operators. It constitutes a positive obligation, seeking to achieve a *specific result*, corresponding to the correct services, standards or deadlines set by the law, regulations or charter.

The administrative judge, however, cannot order any *compensation nor restitution*: hence, the difference with the *compensatory azione di classe*, pursuant to Article 840-*bis* c.p.c. It cannot order the “*cessation or prohibition* of the repetition of the omissive or commissive conduct” harming a plurality of

³⁰⁷ Cass. civ. no. 19453/2015.

individuals or entities, nor substitute itself by ordering “measures suitable for eliminating or reducing the effects of the established violations”, either: hence, the difference with the *injunctive azione collettiva*, pursuant to Article 840-*sexiesdecies* c.p.c.

The key difference between the injunctive class action from the Code of Civil Procedure and the “administrative class action”, is exactly this. While the former poses a *negative* obligation to avoid *concrete* harmful acts, the latter poses a *positive* duty to comply with specific *abstractly*-set standards, deadlines or rules (so-called objective prerequisites of the action).³⁰⁸ Unlike the class actions under Articles 840-*bis* and 840-*sexiesdecies* c.p.c. (formerly Article 140-*bis* cod. Cons.), the latter does not have a *direct satisfactory nature* and therefore does not allow for compensatory or injunctive protection.³⁰⁹ It rather has a *declaratory* nature. It requires *rigorous* objective prerequisites, as it can be brought only against the specific and *typified* infringements provided by d.lgs. 198/2009: a violation of qualitative and economic standards; a breach of obligations stated in the service charters; a failure to exercise supervisory, control, and sanctioning powers; a violation of deadlines; a non-issuance of obligatory general administrative acts.

Evidently, the general scope of application of the injunctive class action under Article 840-*sexiesdecies* c.p.c. provides a great alternative, which interlocks efficiently for all the un-typified infringements from “*public service concessionaires*”. Such expression largely corresponds to the “entities managing public services or public utility services” from the 2019 class action. However, the exclusion of the “*public administration*” from the subjects that can be sued through the 2019 ordinary class action, poses a fundamental problem. A highly concerning safe haven for these public entities appears.

This was noted by a recent ruling of the Rome Tribunal, which, in a collective injunction action filed against the Municipality of Rome, found a lack of passive standing of the *municipality* based on a strictly literal interpretation of Article 840-

³⁰⁸ MALTONI A. and FIDONE G. (2024 – forthcoming), *L’azione per l’efficienza delle amministrazioni e dei concessionari pubblici*, in HENKE A., RANDAZZO B. and VOET S. (eds.), *L’azione di classe italiana nel quadro europeo: profili sostanziali e processuali*, Giappichelli (forthcoming in 2024).

³⁰⁹ *Id.*

sexiesdecies. At the same time, still, the Tribunal raised doubts on the appropriateness of the legislator's choice. Curiously, the same Tribunal of Rome, in 2013, had declared two actions filed against a municipality admissible under the previous consumer class regime, in an evidently extensive interpretation. Absent legislative amendments, given the reform's rationale, the latter, broader interpretation should be preferred, encompassing municipalities within the expression "entities managing public services".

The same perplexities can be raised regarding the exclusion of the availability of collective compensatory or injunctive remedies against the State. This appears significant both from a comparative perspective – since numerous class actions against the state entity are encountered (e.g., in the Netherlands) – and, potentially, for the necessary coordination with supranational protection pathways (particularly the pilot judgment procedure before the ECtHR), as well as in cases of actions directed against legal entities of private law with total, or at least significant, *state participation*.

A legislative amendment to this effect is highly desirable, under the principle of equality, pursuant to Article 3 of the Italian Constitution, in connection with Articles 2 and 24 of the Italian Constitution, as well as Article 113 of the Italian Constitution – according to which judicial protection against acts of the public administration is always admissible, without exclusion or limitation.

5.3. *Publications on the telematic portal and publicity.*

A minor, but still relevant, point of interpretative divergence regards the duty of court clerks to *publish on the public area of the telematic services portal* the files of injunctive class actions, in addition to those of compensatory ones.

While the Tribunal of Rome has already ordered the publication for two injunctive *azioni collettive* proposed before it, other territorial courts – at least the Tribunal of Milan three times and the Tribunal of Turin once, as informally gathered –, fail to do so. Such application uncertainties are constitutionally significant, given the important disparity of treatment between analogous situations. A prompt resolution is hence desirable.

The reluctance to publish presumably stems from the lack of an *explicit* provision imposing such a duty under Article 840-*sexiesdecies* c.p.c., the sole concerning the injunctive class action. Such provision, nonetheless, refers, in its paragraph 4, to the regulations set for the compensatory class action and, in particular, to “Article 840-*quinquies*, to the extent compatible”. This latter provision, titled “Procedure”, refers to the publication on the telematic services portal (provided for also under Article 840-*ter*) both in paragraph 1 and, in particular, paragraph 14. Any direct reference to Article 840-*ter* c.p.c. (which does not directly touch the issue of the publication on the telematic portal, either) is evidently lacking from Article 840-*sexiesdecies* c.p.c. since the former provision regulates the “form and admissibility” of the compensatory *azione di classe*, mentioning a phase (that of admissibility) and some requirements (e.g., homogeneity) which do not apply with regards to injunctive collective suits. Any reference to it under Article 840-*sexiesdecies* c.p.c. would have been otherwise rather confusing.

Consequently, the interpretation so far adopted by the Tribunal of Rome, which envisages a duty of publication of the procedural acts *also* for injunctive class actions *ex* Article 840-*sexiesdecies* c.p.c., rather than only for compensatory ones *ex* Article 840-*bis* c.p.c., is to be preferred by all means.

Not even the legislative choice to handle the collective injunctive actions through the forms of the in-camera proceeding under Articles 737 *et seq.* of the Code of civil procedure – quite surprising in itself – seems to justify the failure to publish on the portal. At most, this – questionable, but herein irrelevant – choice is due to the absence of formality (in terms of timing and assumption of evidence) from the in-camera proceedings. The lack of a public hearing typical of in-camera proceedings, indeed, does *not* conflict with the mere publication on the portal of the decree setting the hearing date or the subsequent decisions of the judge (and only those of the *judge*, since the parties’ documents remain hidden from the public, safe for the introductory claim application, filed by the plaintiff – which is also debatable, under an equality of arms perspective, too). Indeed, given the collective and potentially *superindividual nature* of the interests at stake, it seems reasonable

to allow the community to become aware of the initiation, and conclusion, of the collective injunctive proceedings.

Moreover, the appropriateness of publishing the decree setting the hearing is justified, in a systematic reading, also by the need to prevent further collective injunctive actions based on the same facts and against the same defendant, as expressly provided for by Article 840-*quater* with reference to the compensatory class action.

Further reflections shall be spent on this particular choice in the last chapter of this work, under *Part V*.

5.4. *Non-retroactivity of the 2019 provisions.*

Article 7 of law No. 31 of 2019, the one introducing the new class action regime, states that “the provisions of this law shall apply to unlawful conduct put in place after the date of its entry into force”, that is 19 May 2021. *Ad abundantiam*, the next sentence reiterates that “the provisions in force prior to the same date of entry into force shall continue to apply to unlawful conduct put in place previously”. In case of offences relating to the consumer sphere or to the use of services, therefore, the previous rules pursuant to Articles 139, 140 and 140-*bis* of the Consumer code apply. In other non-consumer cases, however, the only remedy available will be the individual action.

In this regard, it is worth reflecting, first of all, on the *constitutional legitimacy* of this transitional rule and, secondly, on a case not regulated by the legislator, that is that of unlawful *conducts protracted over time* during the term of both regulations, on which a number of application uncertainties could develop.

5.4.1. *Constitutional legitimacy.*

The letter of the law, on the one hand, and the preparatory works, on the other hand, irrefutably deny the applicability of the new procedural instrument to facts that occurred (and were fully concluded) before 19 May 2021. Such a provision of non-retroactivity – which is among other things the subject of much parliamentary debate – would undoubtedly be legitimate and opportune in the event that the new

rules had a *substantive* nature of regulating legal relations or made new rights or interests justiciable. However, numerous profiles lead to attributing to the new class action mechanism a mere *instrumental* nature with respect to subjective situations already protected previously.

This qualification – on which the majority of the doctrine, in the debate that has already arisen in relation to the previous consumer class action, agrees – would entail an “unreasonable exception to the rule that, if new procedural rules are introduced, allows the deduction in court of rights arising at an earlier time than the one in which action is taken under the new rules”,³¹⁰ according to the principle “*tempus regit actum*”.

Among the arguments that can be deduced in support of this thesis is the fact that the legal situations that can be protected through the new instrument pre-existed it. It did not introduce new substantive legal positions, but merely an *alternative* to the individual action, which was already previously available. This is evidenced by the literal fact of the new legislation, where it states that “homogeneous individual rights may also be protected by class action” and that “in any event, the right to individual action remains unaffected”.³¹¹ This interpretation is also supported by the rulings of legitimacy courts relating to collective action for environmental damage, introduced by Article 18 of Law No 349 of 1986, in which the Constitutional Court pointed out that the notion of environment finds its “*genetic source*” not in the new procedural instrument, but in the pre-existing constitutional and primary provisions.³¹² It appears, therefore, evident that the instrumental nature is also shared by the new class action, whenever it aims, in the same way, to protect the environment, other “primary and absolute intangible public values” or other multiple “homogeneous individual rights”.

One could, therefore, question the constitutional legitimacy of Article 7, paragraph 2, of Law No. 31 of 2019 in the part in which it does not provide that the

³¹⁰ CAPONI R. (2009), *Il nuovo volto della class action*, in *Il Foro italiano*, V, 383 and, although more neutral, PACE A. (2011). *Interrogativi sulla legittimità costituzionale della nuova “class action”*, *Rivista di diritto processuale*, 1.

³¹¹ Article 840-*bis* c.p.c., respectively first and last para.

³¹² Cass. civ., no. 25010/2008.

provisions of that law also apply to unlawful conduct put in place prior to the date of its entry into force (19 May 2021) for breach of Articles 3 and 24 of the Constitution. It should, nonetheless, be specified how the Constitutional Court’s constant case law has recognised “the legislature’s wide discretion – subject to the limit of manifest unreasonableness – in establishing the transitional rules dictated to facilitate the transition from one regime to another”.³¹³ On several occasions, the Court has rejected questions of constitutionality raised on this point, reaffirming this principle. Therefore, it remains unlikely that such an issue would be upheld.

Nevertheless, when one considers the preparatory works, it is difficult to regard the current legislative choice as reasonable.³¹⁴ In fact, they clearly show how the legislature, in exercising its discretion, did not impose a temporal distinction with the intention of “safeguarding the reliance on legal certainty” or to favour “the gradual substitution of the new for the old discipline without identifying particular situations”,³¹⁵ so as to avoid excessive initial litigation with repercussions on the principle of the reasonable duration of proceedings.

Quite the contrary, as clearly emerges from the parliamentary debate, the legislative choice is dictated by the desire to prevent the application of the new rules to certain *specific* facts prior to 19 May 2021 (in particular, the name of *Autostrade per l’Italia S.p.A.* recurs several times³¹⁶ – against which, among other things, an action pursuant to Article 840-*bis* has already been brought),³¹⁷ as happened in 2009 with the previous consumer class action, in relation to scandals such as Parmalat, Cirio or Giacomelli.

The time limitation introduced by the transitional rule does not, therefore, appear to pursue the general interest, but rather seems to be aimed at preventing *certain* companies from being exposed to claims for damages, hitherto hindered by the

³¹³ Judgement 309/2008; Order No 419/1990; Judgement 268/1986; Judgement 301/1986

³¹⁴ The speech from On. Zanettin from report No. 53 from 1 October 2018, that from On. Bartolozzi from report No. 54 from 2 October 2018, that from Onn. Bartolozzi, Pittalis e Zanettin from report No. 55 from 3 October 2018 are particularly relevant.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Declared however inadmissible exactly for regarding facts and conducts preceding the entry into force. See Trib. Roma, sez. XVII spec. impr., order from 14 October 2022, No. 21595/22.

inefficiency of individual procedural instruments, but to which they would – in abstract terms – *already* be bound under substantive law.

In this context, the perplexity as to the reasonableness of the choice made by the legislator seems well-founded. Preventing the use of the new collective procedural instrument for events occurring before 19 May 2021 does not, in fact, protect the interest in legal certainty or other values of constitutional importance, but merely makes it more unlikely that guilty defendants will be called upon to answer in court for their violations of individual subjective positions.

5.4.2. *Unlawful conducts protracted over time during the two regimes.*

Quite apart from the foregoing assessments on their constitutional legitimacy, the transitional provisions of Law No. 31 of 2019, in introducing the temporal distinction of application, have left some perplexity as to the “unlawful conducts put in place” both before and after the date of entry into force. Three different cases are proposed below that could cause interpretative uncertainties, in addition to the, albeit limited, case law on the subject.

We shall assume, first, the case of the *same defective product* sold to some consumers *before* 19 May 2021 (date of the entry into force) and to others *afterwards*. Can the new class action under Art. 840-*bis* ff. c.p.c. be used for all? This is a classic case of a tort repeated over time and the answer is certainly yes. The new discipline of the class action, in fact, does not present an “*atomistic*” conception of the various injuries, but constantly emphasises the collective and unitary nature of the multi-offensive tort.³¹⁸ Therefore, the multi-offensive conduct must be identified as a *unicuum* and, whenever even a portion of the unlawful activity (such as the sale of the defective product even to a single person, in our example) has taken place after the entry into force of the new discipline, this will be applicable.

Second, we can think of a case of serious environmental pollution by a company, such as – according to the plaintiffs’ claims – in the double injunctive *azione*

³¹⁸ DONZELLI R. (2019). *L’ambito di applicazione e la legittimazione ad agire*, in SASSANI B. (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pacini Editore Srl.

collettiva, initially, and compensatory *azione di classe*, then, against *ILVA* and *Acciaierie d'Italia* (see *infra*, Chapter VIII). In this circumstance, the right to live in a healthy environment, the right to individual health of many local residents, and their right to property would be infringed, due to a significant devaluation of the market value of property in the area. If the polluting activity started after 19 May 2021, no problem would arise, as the new class action, both compensatory and injunctive, would certainly be applicable. On the other hand, what if the polluting activity is *still continuing*, but *started before* 19 May 2021? The conduct would qualify as a “*permanent tort*” and, even in this case, the answer must certainly be in the affirmative. In fact, it would be absolutely unreasonable, as well as contrary to the principle of equality pursuant to Article 3 of the Italian Constitution, to prohibit the use of the new procedural tool against certain unlawful conduct – even if it is still in existence – merely because it has an origin dating back in time, almost as if this represented a shield of unprocedibility against them, whereas, if they had started later, the new rules would be applicable.

In relation to the limitation of (its) jurisdiction *ratione temporis*, *inter alia*, the European Court of Human Rights has also expressed itself extensively, coming to similar conclusions and elaborating the notion of “*continuous violation*”, according to which the procedural law in force at the time of the last infringing conduct or, alternatively, even only at the time of an element of it, must apply.

Therefore, the same considerations set forth above regarding the unitary conception of multi-offensive conducts apply. It should also be noted how this interpretation – so far widely shared by domestic doctrine and jurisprudence – is in line with the comparative experience of other European states on the subject of class actions.

Lastly, as a third possibly problematic case, let us assume, taking up the previous example concerning the pollution of a portion of territory by a company, that the activity is terminated before the entry into force of the new rules, but that the *effects* of the new rules (also) manifest themselves *after* 19 May 2021 (which is quite likely, especially for environmental or product damage, e.g., due to defective

medicines): would the new collective procedural rules be applicable in these cases as well?

The limited domestic jurisprudence (not yet of legitimacy) – in relation to the previous consumer class action of 2009 (for which a similarly ambiguous provision was prepared) – has so far denied the application of the new discipline in the case of so-called “*instant torts with permanent effects*”, interpreting as “unlawful conduct” only the facts and *not* also the effects of these. This interpretation is in line with the above-mentioned interpretation of the ECHR on the subject of *continuous violation*, which has determined on several occasions that the continuation of the effects of an act over time is not sufficient for the purposes of determining jurisdiction *ratione temporis*.³¹⁹

However, in the case law so far examined by the Italian courts, a marked divergence in the factual reconstructions of the infringing conduct, when this has been protracted in time, should be noted. In particular, similar or even identical cases have been qualified as either an “*instant tort with permanent effects*” or as a “*permanent tort*” depending on the court or level of jurisdiction, without the adoption of any common criteria for determination. In view of the different rules that the courts have hitherto deemed applicable depending on the *qualification* within one or other case (on the one hand, the previous rules in the case of the “instant tort with permanent effects”; on the other hand, the new procedural rules, in the case of the “permanent tort”), the serious consequences that this difference in reconstruction may lead to in terms of *legal certainty* are therefore obvious.

Pending a greater consolidation of the case law on the subject, also by means of rulings from the Court of Cassation, it remains, therefore and in any event, desirable for the courts to adopt an extensive reading of the concept of “unlawful conduct”, aimed at guaranteeing access to the procedural instrument to the greatest possible number of cases characterised by the same multi-offensive conduct protracted over time.

³¹⁹ See *X v. United Kingdom*, CEDU, no. 7379/1976, para. 6; *MELTEX LTD v. Armenia*, CEDU, no. 37780/02, para. 1; *Călin et autres v. Roumanie*, CEDU no. 25057/11, 34739/11 and 20316/12, para. 58 ff.; *Iordache v. Roumanie*, CEDU, no. 6817/02, para. 49.

5.5. *The allocation of jurisdiction.*

Finally, the division of jurisdiction between the ordinary courts and the administrative courts becomes relevant, in Italy, in view of possible exceptions of defendant companies, from two standpoints: on the one hand, in the event that the defendant company has carried out its acts in *conformity with an act of the public administration*; on the other hand, in the event that the case in question falls within the *exclusive jurisdiction of the administrative courts*.

With reference to the first problem, it is a well-established principle of the Italian legal system that any compliance with measures of the public administration is not sufficient to alter the system of attribution of jurisdiction, if this already pertains to the ordinary judge. The jurisprudence of legitimacy has had the opportunity to reaffirm this principle recently in a series of unequivocal pronouncements, in which it has definitively clarified how

jurisdiction is determined on the basis of the request and, for the purposes of the division of jurisdiction between the ordinary judge and the administrative judge, it is not the prospect made by the parties that is relevant, but rather the substantive petitum, which must be identified, not only and not so much in function of the concrete pronouncement that the judge is asked to make, but, above all, in function of the *causa petendi*, i.e. the intrinsic nature of the position brought before the court and identified by the judge with regard to the facts attached.³²⁰

Therefore,

in the dispute in which the private individual, having ascertained the noise, nuisance and intolerability of the immissions produced by the wind turbines of a wind farm, as well as the detrimental effects caused by them on his own health and that of his family members and on the economic value of his property, has requested their cessation or at least their reduction within the limits of tolerability, together with compensation for damages, belongs to the jurisdiction of the ordinary courts, having regard to the substantive '*petitum*' of the claim, which does not concern the annulment of the administrative measure authorising the installation and operation of

³²⁰ Cass. civ. S.U., no. 29298/2021.

the plant for the production of electricity from wind power (nor does it presuppose the establishment of its unlawfulness), but concerns the protection of subjective rights to health and property, on the basis of the breach of the limits of tolerability laid down by Article 844 of the Civil Code.³²¹

The case in question, therefore, gives continuity to the principle of law of the so-called “substantial *petitum*” and reaffirms how the fact that a conduct is placed in conformity or not with administrative measures does not in any way affect the division of jurisdiction. When the plaintiff does not request the annulment of such measures, but rather the *protection of their own subjective position* (such as, for example, the right to health or the right to property, requesting compensation for damage, the total inhibition or the reduction within tolerable limits of a certain activity), the ordinary judge will still have jurisdiction. Already in 2006, the United Sections of the Court of Cassation affirmed how fundamental rights (such as, in the case then under consideration, that to health) operate in private relations and override the public administration, which “has no power, not even in the public interest, not only to weaken them, but not even to prejudice them *de facto* and indirectly”.³²²

It follows, therefore, that both injunctive and compensatory relief are devolved to the ordinary courts irrespective of whether or not they comply with administrative acts. If the unlawful conduct *complies* with acts of the public administration, the ordinary judge will limit themselves to “*disapply* the aforementioned regulation and imposing the cessation or adjustment of the activity so as to eliminate the harmful consequences”, in the case of an action for an injunction, or deciding on the compensation of damages or the restitution of the property, in the case of an action for compensation or restitution. In the opposite eventuality of *non-compliance* with acts of the public authority, on the other hand, the ordinary judge will simply *sanction the activity as non-compliant* with administrative regulation, inhibiting it or bringing it into compliance.

³²¹ Id.

³²² Cass. civ., no. 23753/2006.

The second problem, on the other hand, as anticipated, concerns the relationship with the exclusive jurisdiction of the administrative judge, pursuant to Article 103, para. 1 of the Italian Constitution. Considering, for example, the case represented by letter c) of Article 133 c.p.c., which, as is well known, sets out the matters subject to the jurisdiction of the administrative court as follows: “disputes concerning public services relating to concessions of public services, excluding those concerning indemnities, fees and other consideration, or relating to measures adopted by the public administration or by the manager of a public service in an administrative procedure, or relating to the entrustment of a public service, and to the supervision and control of the manager, as well as relating to the supervision of credit, insurance and securities market, pharmaceutical services, transport, telecommunications and public utility services”. In view of the fact that both Article 840-*bis* (class action for damages or restitutory relief) and Article 840-*sexiesdecies* (collective action for injunctive relief) mention that they may also be brought “against the managing bodies of public services or public utilities, in respect of acts and conduct committed in the performance of their respective activities”,³²³ doubts may arise as to the court to be called upon to obtain judicial protection in such matters.

On this point, the Tribunal of Rome has already had the opportunity to express its stance in the very first collective action brought under the new rules.³²⁴ Recalling the orientation of the *Sezioni Unite* of 2015 in relation to the previous consumer class action pursuant to Articles 139 and 140 of the Consumer code

where it observed that ‘it is not possible to derive from such norms the attribution to the court, competent to judge on the so-called class actions [...], of a jurisdiction extended beyond the limits that in general pertain to it, with the exception of the cases included in the exclusive jurisdiction of the administrative judge’,³²⁵

it reiterated how:

³²³ See Italian Const. Court, no. 35/2020. See also, *ex multis*: Cass. civ. S.U., no. 25578/2020; Cass. civ. S.U., no. 8092/2020.

³²⁴ Trib. Rome, XVI sez. civ. (spec. impr.), no. 4274/2021.

³²⁵ *Id.*

class actions would not have introduced a derogation, only because of the common nature to an indefinite number of possible users – and in this sense collective – of the interests affected, to the traditional division of jurisdiction between ordinary judge and administrative judge, based on the distinction between subjective rights and legitimate interests, [...] seeing no reason to differentiate, in class actions, as regards jurisdiction, the legal regime of matters reserved by law to the jurisdiction of the administrative court from those in which the jurisdiction of the administrative court is correlated to the legal nature of the asset being protected (legitimate interest rather than subjective right).³²⁶

It concluded – with a thesis that appears reasonable – that the ordinary division of jurisdiction between the ordinary judge and the administrative judge must be maintained also in the application of the new (dual) instrument of collective judicial protection. Therefore, the general perimeter of application of the new collective discipline (homogeneous individual rights, under the compensatory and restitutory profile; in general, subjective, also super-individual, positions harmed by a common conduct, under the injunctive profile) necessarily reduces where the exclusive jurisdiction of the administrative judge is provided for.

Within the scope of the matters reserved to the latter, it will be possible to bring the aforementioned public (or “administrative”) class action pursuant to Legislative Decree no. 198 of 2009 (“recourse for the efficiency of public administrations and public service concessionaires”), aimed at “restoring the correct performance of the function or the proper provision of a service”, following the “violation of deadlines or the failure to issue general administrative acts that are mandatory and do not have regulatory content [...], the violation of the obligations contained in the service charters or the violation of established qualitative and economic standards” by public administrations and public service concessionaires. This remedy, as already recalled, is the only one expressly excepted by the 2019 reform, which, however, has different compensatory and injunctive aims and, therefore, can be well coordinated with it.

³²⁶ Id.

An exception to the administrative court’s exclusive jurisdiction over subjective rights, in matters where it is expressly provided for by the legislature, on the other hand, will be represented by disputes aimed at protecting rights of high constitutional rank, such as the right to health or equality. Notwithstanding the increasing number of rulings by the administrative courts concerning fundamental rights, the natural judge of these will still be the ordinary judge.

The harm of constitutionally protected rights by conduct in compliance with administrative measures will not, therefore, be susceptible of degrading them to mere legitimate interests; consequently, jurisdiction will in any case lie with the ordinary judge. A similar result will be reached in disputes in which there is no connection with the exercise of a discretionary power of balancing public interests by the public administration: even if they fall within the matters identified by the legislature as the subject matter of exclusive jurisdiction, the protection of these “subjective rights which cannot be affected”³²⁷ will in any event fall to the ordinary courts, with the consequent applicability of the new class action.

6. Concluding remarks. A still evolving tapestry.

This Chapter has tried to offer a closer look at the nuances of the 2019 dual class action regime in Italy, under a constitutional lens. As shown, and as declared in its premise, it is a quite intertwined procedural tapestry, situated in the already complex Italian constitutional fabric. It is, however, also an unfinished work, which will require serious interpretative effort from all the legal practitioners and social actors involved, to foster its use for more concrete access to justice for everyone, while maintaining constitutional guarantees of a fair trial.

In these final reflections, it should be taken into account that the new regime entered into force three years ago. It was, and still is, a “wild thing”,³²⁸ very alien to the legal and social tradition in which it has been cast. Therefore, some time for adequate reception of the “legal transplant” is only natural. After all, even in the

³²⁷ See Cass., S.U., 9 March 1979, no. 1463, and Cass. S.U., 6 October 1979, no. 5172.

³²⁸ VOET S. (2017). *Where the Wild Things Are – Reflections on the State and Future of European Collective Redress*, in KEIRSE A. and LOOS M.B.M. (eds.), *Ius Commune Europaeum*, Intersentia, Cambridge, 115.

US, where the current class action model emerged in 1966, several decades passed before the right formula was found by the legislator (considering that the then amended Rule 23 on class actions had first been introduced in 1938, with similar versions in place even before).³²⁹

At the same time, nevertheless, the contemporary social and constitutional transformations highlighted in the previous *Part II* pose a series of radical and unprecedented challenges which require an urgent solution. Class actions will not be the *panacea*, but could be a partial answer, at least to some of the issues we are, globally, confronted with. For this reason, we simply cannot afford to miss on the correct implementation of this double-edged tool, nor to wait for several decades before seeing any concrete results in terms of effectiveness.

As a consequence, to facilitate a more nuanced analysis and future implementation, it becomes mandatory to study also its concrete application, through the cases proposed in the next *Part IV* (with a comparative view to foreign experiences), as well as to propose the already evident necessary changes, in the final *Part V*.

³²⁹ And even today, as touched upon *supra*, in *Chapter VI*, several commentators would argue that it is far from being an effective tool.

PART IV

ENFORCING FUNDAMENTAL RIGHTS:
EXERCISES OF CHANGE

CHAPTER VIII

CASE STUDY NO. 1: ENVIRONMENTAL “SACRIFICE-
ZONE” AND HARMFUL MEDICAL DEVICES.
THE *ILVA* AND *PHILIPS RESPIRONICS* CASES

1. Premise. Why case studies? – 2. Environmental and mass health injuries. – 3. *ILVA* case. Factual contextualisation and previous litigation. – 4. *ILVA* case. Two pending class actions. – 5. *Philips Ventilators* case. Factual contextualisation. – 6. *Philips Ventilators* case litigation. – 7. Lessons and open questions.

1. Premise. Why case studies?

As anticipated in Chapter II, a fundamental assumption at the basis of this investigation is that only a connection with empirical reality allows for the development of a testable, relevant and valid theory.¹ Hence, the dedication of a whole Part of this work, the present one, to case studies, in order to concretely evaluate the implementation, the potential and risks of the procedural device in question.

Through the following case studies the dynamics of class action litigation will be further understood. Concurrently, theories and ideas from the previous abstract analysis will be tested against the backdrop of concrete reality, of concrete people and rights enforced through the mechanisms in question.² For the purposes of this investigation, a *comparative multi-case study* approach has been selected.

As explained *supra*, out of the available jurisprudence, selection has moved under two directives: diversity and procedural comparativeness.

¹ GLASER B.G. and STRAUSS A.L. (1967). *The Discovery of Grounded Theory: Strategies for Qualitative Research*, Aldine Transactions, New Brunswick.

² EISENHARDT K.M. (1989). *Building Theories from Case Study Research*, in *The Academy of Management Review*, 14(4), 532.

Diversity has been a guideline for choosing case studies in the sense of providing a limited, but still varied array of enforced fundamental rights, to ensure external validity:³ (i) environmental harm and mass personal injuries; (ii) unfair working conditions; (iii) prisoners' and migrants' rights. Different rights and interests require different ways of enforcement. They present distinct features, in relation to justiciability, redressability, dimensions and commonality within a class.⁴ Different subjects – usually the public administration or private corporations – can infringe them, with active conducts or omissions. Different remedies – at times not even judicial – may be sought by the claimants: i.e., injunctions, monetary compensation, so-called *cy-près* or “fluid recovery” solutions, public and political attention. Evidently, these differences play a role when assessing the effectiveness of a procedural route in enforcing fundamental rights and moving social change. Hence, the necessity of taking into account different rights and circumstances for a more comprehensive assessment.

By *procedural comparativeness*, instead, a special attention to cases that have already been litigated through other procedural paths is meant, either in relation to the exact same case or through similar cases. A perfect example is the *ILVA* case, concerning the steel plant in the province of Taranto (Italy) recently labelled as a “sacrifice zone” by the UN Special Rapporteur on Human Rights and the Environment, due to the high level of air pollution to which it exposes the local population. After being litigated at numerous stances in front of the Italian Constitutional Court, Court of Cassation, Council of State and even the European Court of Human Rights, in 2022 the case has been brought to the Court of Milan with the filing of an injunctive class action suit (and subsequently a compensatory one). Without anticipating the findings of the case study (see *infra*), this sets an ideal ground for comparative case study analysis. Furthermore, the much richer common-law experience with similar cases of local environmental pollution

³ MERRIAM S. (ed.) (2002). *Qualitative Research in Practice: Examples for Discussion and Analysis*, Jossey-Bass, 29.

⁴ See LUCIANI M. (2018). *Convegno 'L'obbligo di vaccinazione nella legalitacostituzionale: principi e responsabilità.'* Roma, Camera dei deputati, 13 febbraio 2018, in *Diritto e salute. Rivista di responsabilità medica*.

litigated via class actions will be taken into account (with the obvious institutional and regulatory differences with the Italian class action device, which will be adequately underscored), in order to consider possible trends and future developments.

Apart from (i) environmental mass harm (including climate change) and other standardised violations of the right to health, the other case studies will concern (ii) employment discrimination and (iii) unfair conditions within detention and migration centres. Given the still forming case law on the matter, some of these case studies may not only concern Italian class actions. They will, also, draw from concrete cases litigated through other procedural devices to evaluate the possible use of class actions in such context. This exercise will only be possible with the invaluable assistance of, once again, the decades-long common-law class action case law on the matter, as well as that of other EU Member States that have implemented class actions under the new 1828/2020 EU Directive. Needless to state, the consideration of foreign cases will occur only by means of established local legal scholarship.

Lastly, contaminating differences among individual cases have been considered to highlight *recurring patterns* or inevitably *unique findings* that separate the class action cases from those with other procedural devices. While still pursuing a “ground up” approach, a number of theoretical propositions – drawn from the study presented in *Part III* (concerned with the regulatory framework) – has been developed.⁵ They will emerge through the present Part’s discussion, but also conclusively presented in the final Part V.

2. *Environmental and mass health injuries.*

That of collective environmental damage and mass harms to individuals’ health is shown by the comparative experience as one of the possibly most impactful uses of the class action procedure for fundamental rights’ enforcement. This kind of protection can be entailed both as a form of compensation for damages suffered and

⁵ See, *infra*, *Part III*.

as a form of cessation and deterrence of dangerous activities. Notably, asbestos cases or cases related to defective products – usually medical or pharmaceutical – can be recalled to this regard.

For instance, the well-known *Agent Orange* litigation from the 1980s should be recalled, defined as “perhaps the greatest Rule 23 adventure of all time, at least up to that point”.⁶ Such case concerned a highly toxic herbicide sprayed during the Vietnam War by US forces over Vietnam, Cambodia and Laos from 1961 until 1971, seriously affecting, immediately and long-term, the health of millions of people, including several US and foreign soldiers. The damage suffered from the inhalation of even a few minutes of such herbicide – if not by eating food cultivated or animals living in the area where it was sprayed – was various and extensive: from short-term “darkening of the skin, liver problems and severe acne-like skin disease” to “type 2 diabetes, immune system dysfunction, nerve disorders, muscular dysfunction, hormone disruption and heart disease”.⁷ In different cases, it could lead and unfortunately led to death. Moreover, its dangerous dioxin favoured miscarriages and several other diseases on developing fetuses.⁸

Stemming from it, after the successful use of the class action tool in the 1960s and 1970s mainly for civil rights litigation and for structural reform, several actions were brought in different jurisdictional avenues from the 1980s for personal mass harm cases.⁹ In particular, a federal class action filed in 1979 on behalf of 2.4 million US veterans who had been exposed to such “Agent Orange” toxic herbicide during the Vietnamese War, after being certified, was settled for a record-award, at the time, of 180 million dollars.

The *role of the judge* in this case, Judge Weinstein of the Eastern District Court of New York, was notably praised for his judicial creativity and tenacity in “miraculously cabin[ing] the mass of ‘Agent Orange’ claimants into a single class suit, strong-arm[ing] a settlement and creat[ing] a bureaucracy to distribute the

⁶ MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 646.

⁷ See, e.g.: <https://www.history.com/topics/vietnam-war/agent-orange-1#section_4>.

⁸ Id.

⁹ See MARCUS D. (2013). *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Washington University Law Review*, 90, 646.

settlement fund to victims. As stressed by Weinstein himself, the class action device in this circumstance had the ability to avoid “a tedium of repetition lasting well into the next century” (it was 1979).¹⁰ In sum, the collective representative model promoted *judicial efficiency* and concrete *delivery of justice*.

Several similar actions have been successfully brought in the common law world in relation to collective violations to the right to health from the 1980s, in *a new wave of “mass personal injury” litigation*. They did not concern only mass harms related to environmental pollution, but also defective products, especially medical and pharmaceutical ones. Some of the most well-known cases are, for example:

- a) the *diethylstilbestrol (DES) litigation*, concerning a synthetic hormone designed to prevent miscarriage but causing very serious side effects in the reproductive organs of the future children (mainly female), sold from the 1940s until early 1970s;
- b) the *Pfizer Heart Valve* litigation, related to a heart valve implanted in about 55.000 people around the world from 1979 to 1986 which presented a number of failures and fractures;
- c) the several *silicone breast implant* cases, purportedly increasing chances of several serious diseases in implanted women;
- d) the *Essure* litigation against Bayer, concerning a female sterilisation device which caused diseases and severe discomfort;
- e) *contaminated hemophilia blood products* cases, concerning the infection with HIV and hepatitis C of several thousands of hemophiliacs a result of blood transfusions with a blood clotting product concentrate, sold in the 1970s and 1980s;
- f) the *tobacco litigation* which put pressure to the defendants, leading, *inter alia*, in 1998 to the landmark Tobacco Master Settlement Agreement (MSA) between the largest tobacco companies and the attorney generals of forty-six US States.

¹⁰ CAPPALLI R. and CONSOLO C. (1992). *Class Actions for Continental Europe – A Preliminary Inquiry*, in *Temple International and Comparative Law Journal*, 6(2), 217-92.

These cases – most of them concluded with settlements and, sometimes, with the involvement of public officials, too – managed to effectively deliver redress to the millions of injured individuals. The relief obtained was both *compensatory* – often through settlement funds set up to cover medical screening and future medical costs, at times even not arisen yet – and *injunctive*. In connection to the latter, the hazardous products or conducts were taken off the market or ceased. Moreover, the astronomical costs covered by the defendant companies often raised standards of care for the future, thus creating a strong *deterrent effect* to avoid similar mass harms.

As a negative effect of the “personal harm litigation” wave, the tendency to convey most of the compensation in the attorneys’ pockets and in other administrative fees must be accounted, too. Judge Weinstein himself, in 1995, in relation to the above-mentioned DES cases, noted how “Given transactional and other costs, somewhere in the order of 20 percent of each dollar paid by industry or society probably goes to the victim”. This was, and still is (see *supra* and *infra*), a strong argument against “*tort-lottery lump sum payments*”.¹¹

As it shall be further argued, alternative dispute resolution “fluid” arrangements *stemming* from class action suits and aiming at providing a sort of “*complete insurance policy*” should, rather, be preferred.

With these premises, the present Chapter aims to focus on class litigation, under the 2019 Italian regime, relating to two cases of “mass personal injury”. The first is the well-known *ILVA* case and concerns *environmental pollution* in the Taranto region, in the south of Italy, whereas the second is the *Philips ventilators* case, with regard to a *harmful medical device* for respiratory and sleep therapy. Both cases, still partially pending and involving the claim for relief of both *injunctive* and *compensatory* nature, will be discussed below. A parallelism will be naturally drawn with the above-depicted types of litigation, the *Agent Orange* litigation in relation to the *ILVA* case and the other *defective health products* cases in relation to the *Philips ventilators* case.

¹¹ WEINSTEIN J. (1995). *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidation, and other Multiparty Devices*, Northwestern University Press, Evanston.

3. ILVA case. *Factual contextualisation and previous litigation.*

As anticipated, the first case herein examined is the *ILVA* case.

ILVA is a company specialised in the production and processing of steel, firstly in the city of Genova in the beginning of the XX century and subsequently, since 1965, operating in the province of Taranto, too. At one point, it counted the Italian State as its main shareholder; it was then privatised and is now, since 2015, under “*extraordinary administration*” (“*amministrazione straordinaria*”) due to its status of severe insolvency.

Over the years, the impact of emissions from ILVA’s steel plants on the environment and on the local population have been debated extensively and object of long and harsh *legal* and *political battles*. Whereas the former have seen for several years litigation in a large number of, national and supranational, judicial fora, the latter have seen the involvement, in several stances, of the Italian Government, with purported attempts since the early 1990s to put into practice a de-pollution plan for the rehabilitation of the area, given the “high risk of environmental crisis”.

In particular, numerous AIAs (“*Autorizzazione Integrata Ambientale*”, that is “integrated environmental authorisation” from the Environmental Ministry) and “saving ILVA” decree-laws (repeated in time, and consequently constitutionally illegitimate, as found by the Constitutional Court itself in 2018) have been proposed since 2011 to allow the continuation of the steel company’s activity, judged as of “*strategic national interest*”, while adopting purported measures to reduce the impact of polluting emissions on the environment and on the local population.

Despite the fact that the authorised emissions have been constantly exceeded, the administrative extensions and concessions have continued and are still continuing in the Tarantino area. This despite, *inter alia*, the UN Special Rapporteur on Human Rights and the Environment’s precise and unequivocal definition of Taranto as a “*sacrifice zone*” in the world, in a recent report from 2023, due to the extremely high level of air pollution.

It should be noted that the steel plant has for decades now compromised residents’ health and violated human rights by discharging vast volumes of toxic

air pollution. Nearby inhabitants have suffered and still suffer from elevated levels of respiratory illnesses, heart disease, cancer, debilitating neurological ailments and premature mortality. For this very reason, the Genoa steel plant was closed in 2005, following court orders and agreements with the institutions, and relocated to Taranto, due to the high environmental damage and mortality rate. Some *epidemiological studies*, in fact, had shown a link between the particles emitted by the plant and the mortality rate of the population, much higher in the affected neighbourhood than that observed in other neighbourhoods of the city. Others, several scientific studies shown a similar, if not stronger, link in the province of Taranto.

Among the numerous *jurisdictional initiatives*, three call for special attention.

They are, *first*, the several *criminal, civil and administrative proceedings*, also in front of the Italian Cassation Court, which have, *inter alia*, led to the conviction of former owners and directors of the ILVA company (now Acciaierie d'Italia). Some of them are still pending (e.g., *inter alia*, a very recent one for the death, in 2014, of a five-year-old child whose mother worked near the steel plant during the pregnancy). They have also seen an active role from public prosecutors and criminal judges in trying to stall the steel plants' activity – i.e., through emergency preventive confiscation, although never definitive – to protect the residents' and the workers' rights.

The Government's intervention, through the means briefly depicted above, however, has until now managed to save ILVA from a full closure, that is a *ceasing* of the harmful conduct. The fact that it is the Government, charged with executive power, rather than the Parliament, responsible of legislative functions, to stall the judiciary's initiative to enforce constitutionally-enshrined values raises essential questions on the separation of powers principle, too.

Moreover, despite the criminal conviction and ascertainment of the violation – in particular of the casual link between ILVA's activity and the numerous environmental, health and property (i.e., the value of the buildings) damages – safe for exceptional cases there has been no concrete *compensation*. Economic redress has indeed been sought in several stances and its legitimacy has been confirmed,

inter alia, by the Court of Cassation. The resources of the ILVA's *insolvency procedure*, still, quite brutally and simply, are declared by the extraordinary administration as not sufficient. An additional aspect to take into account is that of accessing proceedings for single individuals. The *practical costs* may be, and are, too high for all the affected individuals to pursue damages in court, especially given the length and complexity of proceedings until now and the difficulty in establishing smooth mechanisms for compensation, even future one.

Second, there have been several proceedings in front of the *Italian Constitutional Court*, which have been taking place since 2003. None of them has managed, however, to effectively stop the steel plant's harmful activity. In 2013, in particular, the Court declared *inadmissible* the question of constitutionality raised by a criminal judge from Taranto, in the context of criminal proceedings for the extremely toxic emissions coming from the steel plant, with regard to the AIA (see *supra*) authorising ILVA to proceed with its activity and to regain possession of its property and factory, despite the ordered judicial confiscation. The criminal judge raised doubts, *inter alia*, on the constitutional legitimacy on the merits of said decree-law with respect to the right to health and to a healthy environment, protected by Article 32 of the Italian Constitution (and, as regards the environment, since 2023, by Article 9 It. Const., too). The Constitutional Court, however, replied as follows:

The rationale of the censured regulation consists in achieving a *reasonable balance* between the fundamental rights protected by the Constitution, in particular health (Article 32 of the Constitution), from which derives the right to a *healthy environment*, and work (Article 4 of the Constitution), from which derives the constitutionally relevant interest in maintaining *employment levels* and the duty of public institutions to deploy every effort to that end. All the fundamental rights protected by the Constitution are in a relationship of mutual integration and it is therefore not possible to identify one of them as having absolute precedence over the others. Protection must always be 'systemic and not split up into a series of uncoordinated and potentially conflicting rules' (Judgment No. 264 of 2012). If this were not the case, there would be the unlimited expansion of one of the rights, which would become a '*tyrant*' against the other constitutionally recognised and protected legal

situations, which together constitute an expression of the dignity of the person.

For the reasons set out above, it is not possible to share the assumption of the referring judge for preliminary investigations, according to which the adjective “fundamental”, contained in Article 32 of the Constitution, would reveal a “pre-eminent character” of the right to health with respect to all the rights of the person. Nor does the definition given by this Court of the environment and health as ‘primary values’ (judgment no. 365 of 1993, cited by the referring court) imply a ‘rigid’ hierarchy between fundamental rights. The Italian Constitution, like other contemporary democratic and pluralist Constitutions, requires a continuous and reciprocal balancing of fundamental principles and rights, without any claim to absoluteness for any of them. The qualification of the values of the environment and health as ‘primary’ therefore means that they cannot be sacrificed to other interests, even if constitutionally protected, not that they are placed at the top of an absolute hierarchical order. The point of balance, precisely because it is dynamic and not pre-established in advance, must be assessed - by the legislature in laying down the rules and by the court of laws in its review - in accordance with criteria of *proportionality* and *reasonableness*, such as not to permit a sacrifice of their essential core.¹²

The Court, moreover, admitted that in a case of “*completely annihilation*” – as argued by the referring criminal judge from Taranto – of the right to health and to a healthy environment in favour of economic and productive interests there would indeed be a constitutional violation of Article 32 of the Constitution “since no requirement, however constitutionally grounded, could justify the *total* impairment of health and the environment”.¹³ However, the Court did not find that in the case at hand the *censured provision* – that is the authorisation to continue polluting production – *normatively* amounted to such a “complete annihilation”.¹⁴

In particular, according to the Court, the path of environmental restoration and the taking into account, besides the right to health and the environment, of the *right to work*, guaranteed as well by the Constitution, from such AIA authorisation was

¹² Italian Const. Court, judgement no. 85/2013.

¹³ Id.

¹⁴ Id.

deemed sufficient by the Court. The decision, very questionable, shed, in any case, light on a huge gap of the Italian constitutional review system: that is, the scope of the review limited to mere *legislative acts*, not grounded to *factual* circumstances.

Subsequently, after further authorisations, a new ruling from the Constitutional Court in 2018 declared the new authorisation as constitutionally unlawful on the grounds that the authorities had ended up over-prioritising the interest of the continuation of *production activities* to the detriment of the protection of the constitutionally protected *rights to health and life*.¹⁵ Yet, it still remained inconclusive as regards definitively stopping ILVA's harmful activity.

Third, another significant yet inconclusive step of the *ILVA* litigation saga was the application in front of the ECtHR from several residents from Taranto, in the *Cordella* case from 2019.¹⁶ In such case, the Strasbourg Court unanimously found a *violation* of Articles 8 and 13 of the ECHR, but also declared that the finding of an infringement is in itself sufficient to equitable satisfaction for the non-material damage suffered by the applicants. Moreover, the Italian State was to pay a mere 5.000 € to each of the *applicants* (not to all the *residents*, but just to the individual applicants in the proceedings at stake).¹⁷ Furthermore, it dismissed the claim for equitable satisfaction. In relation to such decision two elements should be analysed.

On the one hand, there is, once again, a *clear judicial assessment* of a “continuation of a situation of environmental pollution endangering the health of the applicants and, more generally, that of the entire population residing in the areas at risk”. The Court identifies “the existence of a *causal link* between the productive activity of the company Ilva from Taranto and the compromised health situation”¹⁸ and that “Pollution has undoubtedly had a detrimental effect on the well-being of the claimants concerned”.¹⁹ Furthermore, the Italian authorities, according to the ECtHR, “have failed to take all the measures necessary to ensure *effective protection* of the right of the persons concerned to respect for their private life”,

¹⁵ Italian Const. Court., judgement no. 58/2018.

¹⁶ ECtHR, *Cordella v. Italy*, Judgement from 24 January 2019, nos. 54414/13 and 54264/15.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

whilst *no fair balance* can be struck between any purported economic interest (e.g., economic production) and the extremely serious harm suffered by the residents of Taranto.

On the other hand, there is the inability – again, another *enforcement gap* – of the judicial authority at stake to provide *effective justice*, even in front of a blatant infringement to essential rights of a large group of people. The Strasbourg Court, in fact “taking into account all the circumstances of the case and in particular the technical complexity of the measures necessary for the rehabilitation of the area concerned, which falls within the *competence of the domestic authorities*,” stated that “it is *not for the Court* to address detailed recommendations with a *prescriptive content* to the Government,” rather, “It is for the *Committee of Ministers*, acting under Article 46 of the Convention, to indicate to the respondent Government the measures which, in practical terms, must be taken by the latter in order to ensure the implementation of this judgment”.²⁰

The applicants’ request to apply a pilot-judgement procedure was therefore rejected. At the same time, however, after more than five years the execution of the case is still pending, with ongoing supervision, as per official reports of the Department for the Execution of Judgements of the European Court of Human Rights. As a matter of fact, even the payment of the sums awarded for costs and expenses is still pending, as per the last reports.

4. ILVA case. Two pending class actions.

Shortly after the entry into force of the new class action proceedings, in 2021, an injunctive *azione collettiva ex* Article 840-*sexiesdecies* c.p.c. was filed at the Tribunal of Milan (where the defendant company has its seat).²¹ Other proceedings had reached before other apex courts (i.e., the CJEU, the Council of State, the Court of Cassation), but all unsuccessful.

²⁰ Id.

²¹ *Zaninelli et al. c. ILVA S.p.a., Acciaierie d’Italia Holding S.p.a. e Acciaierie d’Italia S.p.a.*, Trib. Milano, sez. XV (spec. impr.), no. 10166/2021.

The claimants of the injunctive class action are eleven residents from the city of Taranto, for many years (decades even) personally engaged as activists or even representatives of associations aiming at the closure of the ILVA steel plant. All of them, in different ways, with different harms, either directly or indirectly through close relatives, have been seriously affected by the defendant company's wrongful conduct.

With the class action at stake, they seek the protection of their “right to health, to serenity and tranquillity in the conduct of their lives, as well as their right to a climate”, alleging the current, malicious, continuous and no longer tolerable infringement by the defendants (ILVA and connected companies, i.e. Acciaerie d'Italia).

The plaintiffs state, with the overwhelming support of several scientific reports and of all the previous judicial ascertainties – domestic and supranational (in particular the EctHR judgement from 2019) –, that the pollution caused by the steel plants' emissions is exposing residents to death and severe additional diseases.

In concreto, for these reasons, they act on behalf of the approximately 300.000 residents in the Taranto area, for an order to close ILVA's activities. They seek a total closure or, in the alternative, a more limited closure aimed at decreasing in any case by at least 50% ILVA's emissions before 2026. In addition, they request that the respondents be ordered to give full effect to the measures invoked. Pursuant to Article 614-bis c.p.c., referred to in Article 840-*sexiesdecies* c.p.c., should the execution of the injunctive measures be delayed by the defendants, they ask that they should be ordered to pay each of the applicants a “just amount”, as a measure of *indirect coercion*.

Moreover, from the outset, the plaintiffs reserved the right to institute a subsequent *compensatory class action* in order to obtain damages “not for the personal injuries suffered individually, but for those *common* to the entire class, unjustly exposed, day after day, to the same risks as themselves”. As it shall be reported, such compensatory class action was indeed filed, once again in front of the Tribunal of Milan, in July 2023, two years after the injunctive one.

Maintaining the focus on the injunctive *azione collettiva*, for now, it is important to note that, although the proceedings are still pending, two significant orders – of interim nature – have already been issued by the Tribunal of Milan, on 16 September 2022.

They are, *first*, a rejection of all the defendant companies’ exceptions on the inadmissibility of the application. This implies that such rejection must be read solely in relation to the allegations and deductions from the application, not in relation to their merits. Still, a rejection means that the collective injunctive application is deemed *admissible* by the court. The exceptions raised by ILVA and Acciaierie d’Italia, and therein rejected, were four.

(i) Regarding *jurisdiction*, the defendants argued that it pertained to the administrative judge, rather than the ordinary one, as it concerned the non-exercise of a public power (that is the control on the respect of the AIA authorisation), as well as the overall adequacy of the AIA authorisation, that is an administrative act. Such objection, however, was dismissed by the Tribunal of Milan, based on the well-established case law, recalled *supra* (Chapter VII), that clearly admits the ordinary judge’s jurisdiction *a)* on purported violations of administrative measures (the AIA authorisation, herein) by private individuals, under the perspective of the *injury* caused to the subjective rights of third parties and the consequences (compensatory or injunctive) of that injury, as well as *b)* on private individuals’ conduct in conformity with an administrative measure which is alleged to be unlawful and therefore susceptible to *disapplication*, once again in the perspective of the injury to the subjective rights of third parties and of the consequences (compensatory or injunctive) of such injury.

(ii) Also *standing*, both active and passive, was contested by the defendant companies. As to the former – that is, the *legitimatio ad causam* – they argued that the plaintiff in a collective injunctive action pursuant to Article 840-*sexiesdecies* c.p.c. must be “the holder of a subjective right concretely affected by the (necessarily unlawful) conducts alleged to be injuring the homogeneous rights held by individuals belonging to the same ‘class’”.

The Tribunal of Milan, however, refers to the wording of the norm – “Whoever has an *interest in the issuance* of an injunction of acts and conduct” (not an individual right) – to clarify that the assertion of a *concrete* and effective infringement of a subjective right of which the applicants claim to be the homogeneous holders is *not* required for the injunctive class action at stake.

Rather, the reference to a “*prejudice*” in rest of the norm, demonstrates that, to be entitled to bring an action, it is sufficient for the plaintiff to envisage “a *present risk* – i.e. the danger of *future* damage – affecting his active subjective legal position and, like his own, so also that of a plurality of other legal subjects belonging to the same ‘class’”. Hence, the test is much more *flexible*, especially given the peculiar aim of injunctive actions to prevent *future* harm, for which the *casual link* is not yet foreseeable nor provable (thus, the explicit reference to statistical data and simple presumptions): not a concrete infringement, but a mere relevant (future) *risk*. The level of such risk shall be addressed in the merits of the proceedings.

Moreover, in relation to a purported lack of representativeness of the class plaintiffs (a requisite under Article 840-ter, para 4, letter d c.p.c. for the compensatory class action – regarding the admissibility phase), the Tribunal of Milan sets a *crucial precedent*. It states, in fact, as extensively argued *supra*, that the *admissibility* phase is not part of the injunctive *azione collettiva ex* Article 840-sexiesdecies c.p.c. but *merely* of the damages *azione di classe ex* Article 840-bis c.p.c.

The Milanese judge is very clear. This interpretation is based on literal, analogical, systemic and historic/logical reasons, which can be read above, in *Chapter VII*. The result is much more flexible proceedings for the former type of procedural remedy. As shown later (in the next paragraphs – *Philips Respironics* case – and in the *next Chapter IX – Deliveroo* injunctive class action –, ironically both in front of the Tribunal of Milan, in a different Section), this view – although very convincing, and fully supported herein – is not yet totally established.

(iii) The exception on the absence of *standing to be sued*, instead, will not be commented here, for a lack of relevance for the present analysis. It suffices to recall that it has been rejected, too.

(iv) The last exception from ILVA and Acciaierie d'Italia, rejected as well, instead, touched on the issue of time. According to the defendants, the conduct the claimants aimed to inhibit was prior to the date of entry into force of the law (May 2021). On this matter, too, we shall refer again to the reflections above from *Chapter VII*, on the hermeneutical issue, for the purpose of identifying the applicable discipline, of distinguishing between the types of conduct long identified by general legal theory: instant conduct, instant conduct with permanent effects and permanent conduct.

As explained above, it is undisputed that, in case of permanent violation continuing beyond the relevant regulatory date (May 2021, herein), the conduct in its entirety – not being divisible since it is permanent – is subject to the superseding provisions, namely here the new class action from 2019, with a general scope of application. In the case at stake, recalling the ECtHR judgement from 2019 and other previous domestic judgements, the Tribunal of Milan qualified the conduct whose inhibition was asked by the plaintiffs – that is, the exercise of the productive activity of the ILVA steel plants – as of permanent nature, rather than instantaneous with permanent effects. Hence, the rejection of such exception, too.

The *second order* from the Milanese judge concerns three questions referred to the CJEU for a *preliminary ruling*, pursuant to Article 267 TFEU. According to such tool, as is known any court or tribunal of an EU Member State may, if it considers that a decision is necessary to enable it to give judgment, request the CJEU to give a preliminary ruling on an interpretation of the Treaties or on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

All three questions, in this case, refer to *Directive 2010/75/EU* of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) – in particular recitals nos. (4), (18), (34), (28) and (29) –, whilst the first also to the precautionary principle and the protection of human health set forth in Articles 191 TFEU. Such supranational provisions enshrine environmental protection as a *fundamental objective* of EU

policy, declaring that “environmental damage should as a priority be rectified at source and that the polluter should pay”.²²

The questions referred put the ball in the CJEU’s court, as regards the *merits of the case*. The Tribunal of Milan, in fact, basically asks whether the legislative and administrative acts allowing the continuation of a blatantly harmful activity, beyond EU environmental standards, as set out in the mentioned Directive, are legitimate.

Specifically, it inquires whether the omitted health damage assessment (“*valutazione del danno sanitario*”) for the purpose of granting the AIA authorisation and the consideration of merely one set of pollutants are in line with EU law. It also asks whether the extension of the initial deadline granted to adapt the industrial activity with sufficient environmental and health protection measures, for approximately seven and a half years and for a total duration of eleven years, is legitimate.

The hearing in Luxembourg took place on the 14 December 2023, with a decision expected for the 25 June 2024. In the meantime, the strong stance took by the Advocate General, Juliane Kokott, in favour of the class claimants, can be accounted:

Article 11(a) of the Industrial Emissions Directive must therefore be understood to mean that all the appropriate measures must be taken to prevent or reduce recognised environmental risks from an installation. [...] Article 11(c) may nevertheless establish obligations to take protective measures going beyond the best available techniques on account of specific characteristics of the installation in question, in particular on account of on-site conditions. Under that provision, no significant pollution may be caused by the installation. If the installation causes significant pollution despite the application of the best available techniques, additional protective measures must therefore be taken to prevent that pollution. [...] Such protective measures are also to be considered appropriate within the meaning of Article 11(a), as the notion of ‘significant pollution’ imposes an *absolute limit* on the operation of installations. If protective measures to that effect are not possible, a permit may not be granted for the installation. [...] Human health protection therefore has particular importance, which

²² Article 191, para. 2 TFEU.

can also justify significant economic disadvantages. [...] Irrespective of such legislation, pollution is to be considered significant if, taking into account the circumstances of the individual case, it results in excessive harm to human health. Pollution which violates the fundamental rights of the persons concerned by causing harm to human health is always significant.²³

In the balancing between *economic rights* and that to *human health*, a clear indication for the protection of the latter is thus displayed. Furthermore, Advocate General Kokott has underscored the necessity, whilst authorising or reviewing an environmental authorisation, to consider all pollutants emitted in significant quantities and their impact on human health. A reference to the ECtHR abovementioned *Cordella* case can be found in her speech too, while stressing the importance of safeguarding human health and how pollution harm to it is *always* significant.

While still waiting for the Court’s decision, it is evident that if the Advocate General’s approach were to be followed, an extremely powerful infusion of *authority* would be added to the (first-degree, ordinary) Tribunal of Milan. With it, an order to cease ILVA’s conduct would be foreseeable in what would become immediately an historic decision. Relevant considerations, in any case, in terms of evidentiary pieces and participation of the involved stakeholders (i.e., the steel plants’ workers), would still be required, as argued in the following.

Concurrently, as anticipated, another *azione di classe*, a *compensatory* one, was filed in July 2023, pursuant to Article 840-*bis* c.p.c., with a first hearing in April 2024.

The competent court is once again the Tribunal of Milan, section specialised in company matters.²⁴ With such application, the plaintiffs, more than one hundred residents from Taranto, argue that – pending the suspension of the injunctive collective action while attending the CJEU’s preliminary ruling – “significant new developments” have occurred, both with regard to the increase in emissions of toxic

²³ Available here:

<<https://curia.europa.eu/juris/document/document.jsf?text=&docid=280637&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6457288#Footref38>>.

²⁴ Once again Section XV, the same from the injunctive class action.

and carcinogenic substances, and with regard to the defendant companies' actions, namely a purported application for a re-examination of the AIA authorisation for another twelve years, from which “it is inferred that the pollution, instead of being reduced, will be further aggravated”. Their application is on behalf of all the residents from the Taranto area, 249.672 as per last census from 2023.

A “parallel *deterrent function*” of the present class action for damages is hence underscored by the plaintiffs themselves, who clearly state their intention to put pressure on the “stubborn” (*sic dixit*) defendant companies, trying to have them desist at least from their plan to increase production through anaerobic combustion of coal, “knowing that, if they do not, they will also be called to account for the further damage resulting from the implementation of this ill-fated plan”.

An interesting deterrent potential of compensatory class actions is thus presented as a secondary, *last-resort, injunctive attempt*. “If substantive rights will not stop you, perhaps economic disincentives – since it is the economic compass to drive your actions – will”, the plaintiffs, in sum, seem to say to ILVA and to the related companies.

The main legal battle, once again, will be that of *admissibility* and, in particular of *homogeneity*, given that the other possible exceptions have already in large been rejected in the injunctive class action by the Tribunal of Milan. According to the claimants, such issue should not be debated for long, since it has already been recognised by the Tribunal itself in one of its two orders from September 2022, when it referred to the CJEU for a preliminary ruling. In particular, the following statement from the Milanese court has been recalled:

“In the light of the foregoing, it appears that the applicants have standing to bring proceedings, since they have stated that - as a result of the polluting emissions of the ILVA plant - they are in a situation of significant risk to their health, to the tranquillity of their lives, and to their right to a climate, *a situation common to all persons residing, like them, in the municipality of Taranto*”.²⁵

The adjective *common* would, therefore, demonstrate an already ascertained “homogeneity” of the individual rights enforced through the present class action.

²⁵ Order from 16 September 2022, p. 15, see *supra*.

Nonetheless, being the order in question, from September 2022, an interim one, it holds little if any authority. It will be on the claimants, therefore, to demonstrate fully the homogeneity at stake.

They appear, in any case, conscious of a *crucial distinctive trait* within all the class members' subjective positions: that is, the different *degree of risk* based on the *distance of residence* from the steel plants. Those living closer to them, in particular those within the first 20 km radius, about 40% of the class members, in fact, present a higher occurrence of death or additional diseases connected to the inhalation of ILVA's emissions, as per the scientific reports presented.

According to the class plaintiffs, still, this differentiating element should not be accounted by the court since the workplace, schools, as, in general, every movement of Taranto's people "in a *highly integrated urban fabric*" should be considered.

Hence, safe for a different opinion of the Tribunal, they do not request a differentiation in the *liquidation of damages* per each class member. The compensation they request is, therefore, based on Article 1226 of the Civil Code, pursuant to which states "if the precise amount of the damage cannot be proved, it shall be assessed by the court on an *equitable basis*".

Interestingly, within such compensation they ask to include also *future damages*. Such request is based on some jurisprudential precedents, also from the Italian Court of Cassation, which have allowed the compensation of future injuries when there is a certainty or, alternatively, a *high degree of probability* of their occurrence, which has a "reasonable basis in an injury that has already occurred, or in objective facts that are directly connected with the illicit conduct and represent a cause". In sum, the "well-founded expectation",²⁶ according to the "normality and regularity of the causal development" is required – and sufficient, according to said jurisprudence – to award immediate compensation for harm yet to suffer.²⁷

²⁶ Cass. civ., sez. II, sent., 15 December 2021, no. 40120.

²⁷ Trib. Milano, sez. I civ., 27 January 2015, recalling *ex multis*, Cass., nos. 1637/2000, 1336/1999, 495/1987, 2302/1965.

From this point of view, a comparison with the settlement reached in the *Agent Orange* case litigation in the US and the setting up of foundations tasked with medical monitoring for future illnesses, may be relevant.

The explicit reference, under Article 840-*quinquies*, para. 4 c.p.c. to *statistical data* and *simple presumptions* “For the purpose of establishing the liability of the defendant” appears rather welcoming towards this option. The *scientifically reported* emergence of diseases even years after the inhalation, even in future children, yet to be conceived or born, is a further element to take into account to this regard, as further elaborated in the following.

Additionally, recalling the decision from 2017 of the United Sections from the Italian Court of Cassation, which opened the door, in abstract, to *punitive damages*,²⁸ the class claimants ask for them, too, underscoring a purported fraud from the defendant companies, as well as the seriousness of the harm caused. It seems unlikely, however, that the Court of Milan should award them, given how the same “*Sezioni Unite*” from 2017 underscored that further requirements must be met, namely typicality, foreseeability and quantitative limits, all of which currently seem lacking.

It only remains to wait for the Tribunal of Milan’s decisions, which inevitably will be influenced by that of the CJEU on the preliminary ruling *ex* Article 267 TFEU.

5. *The Philips Respironics case. Factual contextualisation.*

As commented above, the common law experience has shown a wide range of class actions connected to harmful products and devices, especially in the medical and pharmaceutical field. One particularly illustrative case – *Philips Respironics*, an injunctive *azione collettiva* – was decided in Italy, too, in 2023,²⁹ with a decision on appeal delivered recently, in January 2024.³⁰

²⁸ Cass., S.U., no. 16601/2017: “It is therefore not ontologically incompatible with the Italian legal system the institution of US origin of punitive damages”.

²⁹ Trib. Milano, sez. XIV, ord. 30 March 2023, no. 35350/2022

³⁰ Corte di Appello di Milano, sez. spec. impr., ord. 29 January 2024, no. 1059/2023.

The case stems from a global alert, from June 2021, from the multinational company Philips on a “serious accident” involving some of its medical respiratory devices, the use of which would have posed a serious health risk to patients using them for the treatment of sleep disorders and various respiratory diseases. Among the harmful consequences for the patients, cancers, lung problems and even death were accounted. According to evidence subsequently presented, however, Philips was aware of such risks since 2014, at least.

The problem, in particular, concerned the foam inside the medical devices used for sound-absorbing functions. Such foam was made of poliurethane polyester, a material whose degradation causes the release of particles and toxic substances, which were easily inhaled or ingested by the patients using the devices, with consequent serious risks for their health. In Italy, those patients were approximately 100.000. In line with EU standards, namely Regulation 2017/745, Philips undertook to substitute, repair or, at least, recall the defective medical devices.

In Italy, this process of substitution started in December 2021 and was supposed to finish by the 31 December 2022, as per deadline set by the Italian Ministry of Health. However, after fifteen months, only approximately 25% of the devices had been substituted, with previsions showing that full substitution would not be obtained before the end of 2024. Such delay was exposing all the users of the medical device to severe health issues, since they could be unaware of the risks or, when they were aware but were provided with no alternative, they had to decide whether to undertake such serious risk or see their health deteriorate in the absence of a medical device capable to cure the illnesses that had initially brought them to buy the Philips’ harmful product.

Moreover, a note from April 2022 of the President of the Italian Institute of Health, addressed to the Italian Ministry of Health, underscored the dangers stemming from the use of such medical devices, as they released carcinogenic and genotoxic volatile organic substances. In such note, he stated that the risk from the devices in question could be considered “acceptable in the case of exposure for short-term use, with replacement within one year”, while a longer period of use of

the medical devices could not exclude “potential unacceptable risks for human health”.

As a result, in September 2022, in the wake of foreign experiences (i.e., in the US), litigation started in Italy under the new class action regime.

6. *The Philips Respironics case litigation.*

The case, as anticipated, is an injunctive class action initially brought, once again, in front of the Tribunal of Milan in September 2022.

The class plaintiffs are two associations, *Associazione Apnoici Italiani APS* and *Adusbef APS*, acting as mandataries of a class member, a patient who was a former user of one of the harmful medical devices. The latter association was regularly registered in the Ministry’s register for legal entities with standing to sue in class lawsuits *ex* Title VIII-*bis* c.p.c. Both associations were involved in the protection of patients with illnesses that required use of the medical devices in question. Moreover, the individual patient was clearly a member of the class, since he had acquired one of the harmful medical devices in 2017 and stopped using it in 2021, right after Philips’ communication. When filing the suit, more than one year later, he had not received yet a substitutive device and, because of this, his health conditions were compromised.

The first-instance decision by the Tribunal of Milan in such injunctive class action was rather successful for the applicants. Their request was the issuance of an *order of cessation* of the defendant companies’ violations in progress – both omissive and active – and the fulfilment of the obligations and deadlines imposed by the competent national authorities. Furthermore, the plaintiffs asked for the fixing of an appropriate *penalty in case of delay*, as well as the *publication of the order* and any other suitable measure aimed at ensuring its exact and timely implementation.

Based on “*multiple evidence*”, on 30 March 2023, the court upheld the application for an injunction, by ordering the two defendant companies – Philips and Respironics – to *complete the corrective action* before 30 April 2023. As a *penalty* for each day of delay, it further set a sum of 20.000 €. As further mentioned

in the appeal proceedings, such payments were addressed to the *two plaintiff associations*. Finally, the Tribunal ordered, at the defendants' expenses, a publication of such orders on their websites and on three of the most read Italian newspapers. The urgency to remove the sources of risk, identified by Philips itself, did not appear “further procrastinable” in light of the fundamental interests at stake and the time already elapsed, according to the first-degree judge.

The Court of Appeal of Milan was then seized with a complaint (“*reclamo*”) from the defendant companies shortly after the first-instance decision. Out of twelve reasons for complaint from Philips and Respironics, the Court of Appeal *partially upheld* only the last one, concerning the orders from the Tribunal of Milan. Pursuant to the Court of Appeal, the deadline set by the latter – 30 April 2023, set on 30 March 2023 –, was excessively close. It hence allowed for two extra months, extending the deadline to 30 June 2023.

Regarding the penalty, the Court of Appeal confirmed it until its decision, on the 29 January 2024. For the future, it decreased it to 10.000 € for each further day of delay in completion of the corrective (i.e., substitution) measures. According to the second-instance judge, such lower amount was justified based on the continuation of the remedial action by the defendant companies during the proceedings and the consequent reduction in the number of products to be remedied, thus finding a balance between a deterrent effect and the protection of health of the concerned individuals.

The rest of reasons for the complaint were deemed unfounded. As previously done by the first-instance Tribunal, the Court of Appeal of Milan stressed that any difficulties found by the defendant companies in providing the corrective measures in a timely fashion, even if dependent on third-parties, should be borne by them, as per EU Regulation 2017/745 (see *infra*). Moreover, in any case, they could still substitute the defective products with those from other companies, if they truly did not have the industrial ability to do so; an ability which they had, nevertheless, demonstrated to have in other jurisdictions, were the corrective plan was more advanced.

Concerning the other reasons for complaint, the Court of Appeal in its decision mainly referred to the Tribunal of Milan’s previous order, once again, an order which had also preliminarily given a *theoretical recognition* of the therein employed injunctive *azione collettiva* pursuant to Article 840-*sexiesdecies* c.p.c. and its preventive goals.

The most relevant takes from both courts’ orders, for the purposes of the present analysis, will be herein briefly mentioned.

First, like in the *ILVA* case, the *injunctive* class action is underscored as a tool “designed to provide protection for the goods of life that are being damaged, but which have not yet been lost”.³¹ The unlawful conduct is in place, but it may not yet have caused any damage or, if it has, it may not yet have completely exhausted its harmful effects.

This brings a “*retreat of the threshold of access to judicial protection*” to the moment preceding the occurrence of the damage, that is *before* the completion of such damage. It is, in sum, to be conceived as a means of *prevention*, through an order projected to the *future*, independent from the actual harm, but, rather, dependent from a mere wrongful act, posing a *serious risk*. As a “restorative or reintegrative” measure, according to the Tribunal, the injunctive actions aims to re-establish an altered factual or legal situation, regardless of the damage that may have occurred.

Second, it insists on the element of *homogeneity*. The homogeneity of the interest integrates, “a prerequisite for the individual to bring a collective injunction”, according to the Tribunal of Milan in such instance. At the same time, still, it seems to read such requirement in a rather *extensive* way: “since the injury must [...] be diffuse or collective, it is necessary that the individual’s interest coincides with that of a group or class united by exposure to an identical or at least *analogous risk of harm*”.

In the case at hand, the court still found the presence of homogeneity within the class. In particular, it was found in the fact that all class members had been “*equally*

³¹ Trib. Milano, sez. XIV, ord. 30 March 2023, no. 35350/2022.

exposed to the risk of potential damage to health caused by the degradation of the polyurethane polyester sound-absorbing foam and the possible emission of harmful volatile particles and compounds to be inhaled during use” and in their *common interest* in a timely and complete corrective action.

This occurred despite the *significantly different* types of – potential – diseases, the different illnesses as a reason for using the medical device (with consequent potentially different predispositions to certain further diseases), the different period of use of the medical device and even the different medical devices used (the case concerned more than one, all produced and commercialised by Philips and Respireonics). Evidently, its interpretation of such key concept – which, we insist, should be applied only to compensatory class actions – is a *very broad* and flexible one. This finding sets a *key precedent* for similar cases related to health injuries.

Third, the Tribunal of Milan stresses in its order the “legislative will to regulate a streamlined procedural form *devoid of evidentiary complexity*”,³² justifying such interpretation by recalling Article 840-*sexiesdecies*, para. 5 c.p.c., which provides the possibility for the judge to use of *statistical data* and *simple presumptions*. As further argued, namely in the next *Chapter IX* in relation to the *Deliveroo* case (decided by the same Section of the Tribunal of Milan, Section XIV), this assumption appears questionable.

Fourth, in the case at stake, such *lack of evidentiary complexity* was favoured by the global alert, from June 2021, of a “serious accident”, issued by Philips itself, as well as by the numerous scientific reports and statements both from Italian and foreign main institutional health authorities.

Additionally, with regard to the notion of “serious accident” it is interesting to note that the Tribunal of Milan makes copious reference to *EU Regulation 2017/745* “on medical devices” (namely Articles 2 and 87) for the qualification of such concept in the field at hand and the necessary corrective actions to be expected in such circumstances. The correctness of seeking a qualification within such EU Regulation is confirmed by the Court of Appeal in several parts of its decision, too:

³² Id.

On the basis of that framework, it must be noted, as the Tribunal correctly did in the order complained of, that the health risks described in the safety warnings issued by the complainants themselves “and the identification of possible toxic and carcinogenic effects related to the accidental inhalation or ingestion of particles and volatile organic compounds released by the deteriorating sound-absorbing foam undoubtedly fall within the concept of ‘serious accident’ provided by the European Union legislation, in the present case, an alteration of the characteristics of the medical devices capable of causing the death of the user or a significant deterioration, temporary or permanent, of his state of health”.

Considering, therefore, that the concept of ‘serious accident’ is also linked to the mere injurious potentiality of the defect of the product and that such injurious potentiality can be said to be recognised by the complainants themselves, who for that reason issued the warnings and initiated the corrective actions, the completion of which was deemed necessary by the Health Authorities of our country, the ground of complaint, aimed at claiming the non-existence of an ascertained dangerousness, is without foundation.

By this ground the complainants claim, therefore, that the studies on the dangerousness of the devices are still in progress and have been entrusted to independent and authoritative subjects, contrary to what the complainants claim.³³

A further point for consideration linked to EU Regulation 2017/745 is the fact that it is explicitly mentioned in the Annex I, no. 57 of the *EU RAD* for the protection of the collective interests of *consumers* (discussed *supra*, in *Chapter VI*).³⁴ Pursuant to Article 2, para. 1 of the latter, it applies to any infringement of the provisions of Union law referred to in said Annex I – hence, also those from the Regulation 2017/745 on medical devices. This poses a twofold set of reflections.

On the one hand, it underscores the significance, and urgency, of coordinating the Italian *consumer-focused class action regime from 2023* (which implemented EU Directive 2020/1828, and hence, *in abstracto*, could have been used for the present case, too) with the regime from 2019 from the Italian Code of civil procedure (with a general scope of application, and which was indeed used in the

³³ Corte di Appello di Milano, sez. spec. impr., ord. 29 January 2024, no. 1059/2023.

³⁴ See *supra*, *Chapter VI*.

present case, *in concreto*). The scarce utility of such a procedural instrument (the one from 2023, consumer-limited), if not bearing the aim of generating further complexity and confusion in the Italian legal order, has already been pointed out. Its domestic implementation is sincerely difficult to understand.

On the other hand, such final element for consideration recalls once again the question of what it really means to be a *consumer*, or a *user*, in the currently global and extremely interconnected reality. Reference to *Part II* of this work is thus appropriate.

Last, in conclusion of the account on the class action litigation in Italy in the *Philips Respironics* case, one cannot help but wonder whether such litigation effort has really come to a conclusion. The sensation, in fact, is that a *compensatory azione di classe* could be brought, too, on the same matter. This is supported by a comparative analysis on foreign lawsuits related to the same mass harm, which have already reached (partial) settlements of several hundred million dollars.³⁵

7. Lessons and open questions.

Neither of the two Italian cases related to mass environmental and personal harms – *ILVA* and *Philips Respironics* – has completely ended, if we are to believe, as expectable, that a damages class action will follow the already-decided injunctive *azione collettiva* in the *Philips Respironics* case. However, significant trends already emerge from the four judicial orders delivered so far, incidentally all by the Tribunal of Milan and its Court of Appeal. The reason for such concentration of cases in Lombardy's regional capital is, as already addressed, the provision(s) establishing jurisdictional competence in the section specialised in company matters of the place where the defendant has its seat, pursuant to Article 840-ter, para. 1 c.p.c. and Article 840-sexiesdecies, para. 3 c.p.c., which in most cases – at least for large corporations – tends to be Milan.

³⁵ In the US, for instance, a class action lawsuit against Philips was partially settled for 479 million dollars in September 2023, only as a coverage of monetary reimbursements to device users and sellers who might have anticipated a replacement to their clients. Furthermore, such amount is uncapped, meaning that it could (will) increase based on future adhesions. See, e.g.: <<https://www.nytimes.com/2023/09/07/health/cpap-defect-recall-philips-respironics.html>>.

The elements to highlight under the present analysis are the following.

(i) In the words of the Tribunal of Milan in the *Philips Respireonics* case, the injunctive class action *ex* Article 840-*sexiesdecies* c.p.c., in relation to the damages class action *ex* Article 840-*bis* ff. c.p.c, constitutes a “*retreat of the threshold of access to judicial protection*” in a perspective which is *temporal* but also, we may add, strictly *regulatory*, in the sense that lower standards for its admissibility are required.

The *temporal* aspect has already been extensively commented as an anticipation of the moment considered: not necessarily the total completion and *effective* occurrence of a harm, but merely a (present) *serious risk* of such (even future) harm: in sum, a *prejudice*. On this stance, the courts in both cases agree.

As a consequence, they also agree on the latter – a lower *regulatory* threshold – aspect; this is almost by default, given that no causal link nor an effective damage needs to be proved, in contrast with the compensatory *azione di classe ex* Article 840-*bis* c.p.c. However, as commented under the next point, a different view is given on the extension of the *admissibility* requirements set under Article 840-*ter* c.p.c. for the compensatory class action.

(ii) Section XV of the Tribunal of Milan, in the *ILVA* case, in fact, is quite explicit and convincing in stating that the *admissibility phase* regulated under Article 840-*ter* c.p.c. is *not* required for the injunctive *azione collettiva ex* Article 840-*sexiesdecies* c.p.c., but *merely* for the damages *azione di classe ex* Article 840-*bis* c.p.c. Such procedural stage, as is known, encompasses several requirements, among which the “homogeneity of individual rights”.

Section XIV of the same Tribunal, in the *Philips Respireonics* case (as well as in the *Deliveroo* case, see *infra* – Chapter IX), instead, conceives the presence of homogeneous individual rights as a requisite, “certainly” (*sic dixit*), of the former – injunctive – procedural remedy, too. As further argued *infra*, concerning the *Deliveroo* case, such latter view appears questionable. The different approach followed by the different judges – in this circumstance, even from the same Tribunal – appears rather confusing.

Conversely, as already underscored, it must be noted that the Tribunal of Milan's interpretation of such requirement in the *Philips Respironics* injunctive class action is, in any case, very *broad*. Beyond the formal qualification attributed in each case, the interpretation largely coincides with that from the above-mentioned *ILVA* injunctive class action, where the court referred to a “*common situation*”.

Paradoxically, by qualifying such commonality of circumstances as homogeneous, the Tribunal of Milan in the *Philips Respironics* injunctive class action exposes itself to having to accept the verification of such test almost by default in a hypothetical subsequent *compensatory* class action, pursuant to Article 840-*bis* ff. c.p.c.

(iii) Such last reasoning paves the way to what appears as a possible consolidating *strategical trend* on the plaintiffs' side, as further argued in the following: that is, to start injunctive proceedings, as a first litigation step, and proceed with the compensatory ones only at a subsequent time. This could occur since the latter ones are more onerous, not only from a “threshold of access to judicial protection” standpoint (see *supra*, point (i)), but also from an economic, temporal and organisational perspective.

(iv) Such lower – regulatory – threshold for the injunctive remedy is deemed by Section XIV of the Milanese Tribunal, from the *Philips Respironics* and the *Deliveroo* (see *infra*) cases, as a reason for admitting only cases with “lack of evidentiary complexity”. Again, Section XV of the same Tribunal, in the *ILVA* case does *not* embrace – at least explicitly – such opinion.

This is clearly visible from the reference both Sections make to the possibility of using *statistical data* and *simple presumptions*, under the new regime: according to the *former*, this possibility underscores the “*simple*” (*sic dixit*) evidentiary nature of the collective proceedings at stake; pursuant to the *latter* – herein supported – such possibility merely prefigures a more *flexible* approach when considering the existence of a causal link between conduct and harm (even future ones). In no way should this theoretical construction become a hindrance to the admission of cases that are too complex, from an evidentiary standpoint, if anything the opposite.

(v) A related aspect on which both Sections seem to find agreement is the *recurring reference* to other normative – hard and soft law – and judicial sources. In particular, a strong attention to the *EU legal order* must be fundamentally underscored, i.e. by the explicit use of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) and EU Regulation 2017/745 “on medical devices”. In the former case the request by the Milanese Court to the CJEU to give a preliminary ruling pursuant to Article 267 TFEU is especially significant.

The proposed reading of such – undisputable – *trend*, further developed in the conclusive Chapter of this research, stems from the perception – which is also a self-perception, by the Tribunal itself – that a *first-instance* Tribunal may feel like lacking the necessary *authority* to give decision of such magnitude, both from an economic and social perspective. Even the injunctive action can have disruptive consequences for a corporation and all of its workers and investors, at times even more than a compensatory one. The examples of ILVA – whose economic continuation, which could be completely and forever stalled, has been deemed “strategic” by the Italian government itself – or of Philips – which has been ordered to pay 20.000 € per day until it completes its corrective plan – are quite illustrative.

In this sense, as further argued, its own deficiencies in authority can be filled by the very authority that descends from the supranational legislators and judges. Such references, of course, tie in with the internal constitutional order, in the Italian case under Articles 117, 10 and 11 of the Italian Constitution, which “open” the domestic legal system to the rules of international law.

This *modus operandi* does not limit itself to the EU legal order. Rather, especially for matters that do not fall within the EU competence, it can be carried out by directing to the CoE system and, to a lesser extent, by comparative references. This can be seen, for instance, in the numerous references by the applicants and the Tribunal itself in the ILVA to the ECtHR *Cordella* judgment from 2019 and, in the oral discussions, to the recent and successful Dutch injunctive class actions *Urgenda v. the Netherlands* and *Milieudefensie v. Royal Dutch Shell*,

respectively from 2019 and 2021, through which the plaintiffs obtained an order (directed, in the former case, to the State and, in the latter, to a major corporation) to significantly reduce carbon emissions.³⁶

(vi) It has just been recalled that Philips, in the *Philips Respireonics* injunctive *azione collettiva*, has been ordered to pay a penalty of 20.000 € for each day of delay from 30 April 2023 until 29 January 2024, and 10.000 € from 30 January 2024 until it completes its corrective plan. This sum, acceptable whether considered daily, becomes much more relevant in the larger perspective, as underscored by Philips and Respireonics in their complaint. A rough estimate, in fact, reveals that the defendant companies have already paid 5.480.000 € until 29 January 2024 and, since then, approximately 300.000 € per month.

To this regard, *first*, once again the significative potential *economic consequences* of the injunctive class action, too, must be noted.

Second, the issue of *who* is entitled to *receive* such sums is extremely relevant, and until now – it seems – scarcely addressed. The order of the Court of Appeal shows that they are paid to the associations who filed the claim as mandataries of a class member.

On the one hand, doubts arise whether, since they were acting as his *mandataries*, it should not be the class member himself to collect such sums.

On the other hand, a significant question of legitimacy – *in primis* on constitutional grounds – surfaces vehemently: that is, whether a single *individual* member of the class is entitled to receive a sum which is due to a delay affecting the *whole class*, rather than just himself (or herself). What is more, as is the case at stake, such single individual at one point could even receive (individually) the *redress sought* for the prejudice suffered, which *ab origine* gave rise to the injunction order and related penalty: namely, in the *Philips Respireonics* case, a substitution of the harmful medical device.

The fact that an *association* collects the sums rather than a single individual member of the class may appear more in line with the constitutional *dictum* (i.e.,

³⁶ *Urgenda Foundation v. State of the Netherlands*, [2015] C/09/00456689; *Milieudefensie et al v. Royal Dutch Shell*, [2021] C/09/571932, currently appealed.

with regard to the rationality and equality principles, under Article 3 It. Const.). This would occur especially when, pursuant to Article 840-ter, para. 4, letter d) c.p.c., the court has verified that they are “able to adequately address the homogeneous individual rights asserted in the case”.

However, such requirement pertains to the *admissibility phase* and, as such it does relate at all to the injunctive *azione collettiva*, as extensively argued until now and, in relation to such specific requirement, expressly stressed by the Tribunal of Milan in the *ILVA* case. Thus, the absence – at least pursuant to the current regulatory regime – of a *procedural requirement* pursuant to which the judge checks the *adequacy* of the receiver of the penalty payment, which can become rather significant, as the *Philips Respironics* case shows. The shadow of “buccaneering” class actions (see *supra* – Chapter VI) lingers against the backdrop of these reflections, as well as subsequent reflections (Chapter X) on the Canadian system’s cy-près distribution technique, in relation to the *Brazeau* case.³⁷

Moreover, it is not really clear how these funds will be managed by the associations in question, nor whether a control on any such management will be conducted and by whom.

Third, as is known, Article 840-novies c.p.c. innovatively sets a series of “rewards”, or *contingency fees*, calculated on a proportional basis for the plaintiff attorneys in case of successful outcome of the *compensatory azione di classe* under Article 840-bis ff. c.p.c. Following the same rationale, under Article 3 It. Const., it appears at the very least questionable that a similar occurrence is not provided for the *penalties* in injunctive class actions.

(vii) The last element to underscore from these two Italian class action cases is not intrinsic to the judicial proceedings or orders *per se*. Rather, it regards the publication of such orders on the *official ministerial portal*, a publication currently lacking. As stressed above, such practice from the court registry offices is by all means *contra legem* (and *constitutionem*) and inconsistent with that from other

³⁷ See *infra*, Chapter X.

Tribunals (i.e., that of Rome – whilst that of Turin, in at least one case, seems to follow the – incorrect – Milanese example).

Furthermore, it is fundamentally against the rationale of the reform and the desirable goal of sharing the outcome (and reasoning) of a *collective* case with all the concerned group, rather than the mere parties.³⁸ The *una tantum* publication of the mere ruling (*sensu stricto*, not the full order, with the reasoning) on three newspapers is by no means sufficient to compensate such crucial, permanent, shortcoming.

³⁸ It is fairly obvious, but it may be worth mentioning that, given the complexity and novelty of the new instrument, it could be – extremely – useful for attorneys, too.

CHAPTER IX

CASE STUDY NO. 2: FOOD-DELIVERY RIDERS
AND FAIR WORKING CONDITIONS.
THE *DELIVEROO* AND *UBER EATS* CASES

1. Premise. Employment class actions. – 2. *Deliveroo* and *Uber Eats* cases. Factual contextualisation. – 3. *Deliveroo* case litigation. – 4. Pending *Uber Eats* case litigation. 5. Lessons and open questions.

1. Premise. Employment class actions.

As anticipated,³⁹ at least five class actions have already been brought in Italy under the new dual general regime from 2019, in force since 19 May 2021, for the protection of workers' rights. Four of them are injunctive *azioni collettive ex* Article 840-*sexiesdecies* c.p.c., whereas one, the most recent and still pending, is a compensatory *azione di classe ex* Article 840-*bis* c.p.c. Out of five, in chronological order of filing of the claims, one has been extinguished due to the subsequent cessation of the matter in dispute (otherwise, it would have been declared inadmissible), one has been rejected, one has been declared inadmissible, one has been settled and the last one (compensatory) is still pending.

At first glance, the count does not appear favourable to applicants. Still, there are numerous points for reflection; first and foremost, the *non-trivial number* of actions involved, and, in any case, the fact that such number is progressively growing in this specific sector of law. Under this perspective, the US trend of civil rights class actions against employment discrimination, highlighted above,⁴⁰ promises to be resumed on the other side of the Atlantic.

³⁹ See *supra*, Chapter VII. See also, *infra*, Charts.

⁴⁰ See *supra*, Chapter VI.

In addition, it is worth mentioning the expectable *assimilation time* for the legal system to gradually incorporate class actions, like in any type of transplant, a legal one in this case. On the one hand, in fact, *attorneys* must get used to the new procedural instrument: hence, the wait for the first damages suit, more complex and probably for this reason only recently proposed and still pending; similarly, this could explain the possible declarations of inadmissibility or extinction. On the other hand, the *courts* themselves have to adjust to the new collective procedural context and learn how to cope with the new collective mechanisms and their regulatory and interpretative nuances. As further explained, this has given rise to questionable takes.

This Chapter will concentrate in particular on the *food-delivery riders* class actions that have been filed in Italy: for unfair working conditions (an *injunctive* action declared inadmissible) and for the unfair termination of their employment relationship (a *compensatory* one, still pending). A third injunctive *azione collettiva*, against ITA Airways, declared inadmissible, will be taken into account when relevant, too, although not centrally for the present analysis.

The extinguished injunctive action, against the Municipality of Rome, or the settled one, in relation to private security workers, instead, will not be discussed here as they have not entered the merits of the discussion as regards workers' rights. The former one, against the Municipality of Rome, is in any case very relevant from a passive standing perspective, as mentioned *above*.⁴¹

2. Deliveroo and Uber Eats cases. *Factual contextualisation.*

The first case, the *Deliveroo* case, was brought in representation of 8.000 food-delivery riders from Deliveroo Italy srl, a company leader in the meal delivery service (MDS) in Italy since late 2015. As is known, Italy saw in recent years, an exponential increase of demand of MDS services, globally boosted, among other factors, by the 2020 pandemic.

⁴¹ See *supra*, Chapter VII.

Last counts mention over 60.000 riders in the whole country, in charge of delivering food supplies all over Italian cities directly to the home or office of clients who ordered through a mobile application. Riders often move with (usually personal) electronic bikes, through traffic, and with high speed, as their performances are ranked by algorithms, based on criteria of efficiency – that is number of deliveries and speed of delivery –, with a tendency to exclude the least performing, according to a highly competitive logic. Such organisation increases the pressure on workers and has widely been criticised as discriminating and a cause of road accidents.

This form of work generated from the beginning great controversy and legal mobilisation, increasingly from 2019 and 2020. In particular, the most sensitive elements for discussion were the lack of any kind of guarantee for the riders.

Often migrants, although legally residents, paid extremely low wages based on piecework, they were usually tied to companies through an occasional self-employment relationship that did not provide any coverage for fiscal contributions, holidays, sickness, incidents or any other form of protection.

After a series of road accidents in 2019 which caused the death of riders, investigations from public prosecutors started in several Italian cities. Individual actions to demonstrate that they were not in fact self-employed workers (*“lavoratori autonomi”*), but, rather, employed workers (*“lavoratori subordinati”*) were filed, too. Notably, the Court of Cassation in 2020 recognised hetero-organisation in this type of work relationship, classifying it as subordinate employment. Hence the need to apply all the health and safety provisions of subordinate employment to riders.

At the same time, also in 2020, negotiations were held by the most representative labour unions in Italy with the employers’ association, “Assodelivery”, to which all the main MDS companies belong, for the conclusion of a national collective agreement (CCNL) on riders, at the invitation of the Ministry of Labour. However – and this is where the present lawsuit arises – rather unexpectedly and while negotiations were pending, in September 2020 the same employers’ association, “Assodelivery”, entered into an agreement with a newly formed association, called “Ugl Rider”.

The agreement with this interlocutor, later defined by the courts as “*of convenience*”, took place without any verification of its representativeness. The agreement was reached within a few days, without prior participation or any kind of involvement of the workers nor of the historic and fully representative labour unions, previously involved in the negotiations. It was criticised by, among others, the Ministry of Labour itself.

Among the unfavourable conditions provided for by this CCNL “*of convenience*”, in fact, were the non-recognition of paid holidays, weekly rest periods, paid leave, as well as a determination of hourly wages significantly lower than those provided for by the CCNLs of similar sectors signed by the most representative trade unions (e.g., CCNL Logistics or CCNL Tertiary Sector). This evidently hindered the rights, constitutionally enshrined (e.g., Article 36 of the Italian Constitution, but also Article 3 It. Const.), of the MDS riders.

Deliveroo Italy, together with other (but not all) companies from Assodelivery, nonetheless, started to apply such CCNL to its workers. In particular, it was noted that it pushed them to accept under threat of non-prosecution of the work relationship. Several protests and critiques from academia, from the Minister of Labour and from the most representative labour unions were constantly registered on the *lack of representativeness* of the association UGL Rider, which appeared to have been set up on purpose for that agreement and met most of the Assodelivery demands, leaving those of the riders mainly unattended.

In the subsequent months, several judicial decisions upheld the claims for anti-union conduct brought by trade unions and considered not effective such CCNL in individual disputes brought by individual riders before them. In particular, the Tribunal of Bologna in June 2021 found and declared the unlawfulness of the application of said CCNL to riders by Deliveroo Italy and ordered it to refrain from applying said agreement to its riders. It also ascertained and declared the discriminatory and anti-union character of the reasons referred to by Deliveroo Italy for the termination of the employment relation of the *single* rider who had brought, *individually*, the case before the court.

Still, despite other similar decisions in *individual* cases, Deliveroo Italy continued to apply said CCNL and its unfair conditions to its approximately 8.000 riders throughout all Italy. As a consequence, the first case at hand, an *injunctive azione collettiva* was brought in 2021, right after the entry into force of the new 2019 regime, against Deliveroo, in front of the Tribunal of Milan, to forbid the application of said CCNL, signed by Assodelivery and UGL Riders, towards all riders of the MDS company. The action at hand was brought by an individual rider, hence a natural person member of the class, with the support of several labour unions, acting as their mandataries (not UGL Riders, but others, more representative ones, from CIGL).

The second case considered, the *Uber Eats* case, instead, is a *compensatory* class action. Also in the MDS sector, but this time against another company, Uber Eats Italy s.r.l., also a member of Assodelivery and employing around 4.000 riders, in about sixty Italian cities. The case has been brought very recently, in late December 2023, and the first hearing is scheduled for April 2024. It stems from the sudden termination by Uber Eats Italy of the work relationship in June 2023 with all its riders. After seven years (since 2016) on the Italian market, in fact, the multinational company deemed the market insufficiently profitable and abruptly decided to cease all delivery activities in the country. The riders were given a mere one-month notification, after which they could no longer access the delivery application and, hence, continue, to work.

According to the data subsequently provided by Uber Eats Italy itself to the labour unions, 95,82% of its network of riders had carried out an average of 466 deliveries (that is 40 hours/month, with peaks in almost 14,65% of the cases of 66 hours/month) in the last six years of activity. The average monthly earnings for the 95,82% of the riders were € 549.83.

No compensation was given by their former employer, despite the existence of a personal, continuous and coordinated form of work and despite the fact that Assodelivery itself, on behalf of its member companies (hence also Uber Eats Italy), had signed agreements with the most representative labour unions (once again CGIL, in this case, contrarily to the previous CCNL agreement, not with UGL

Riders), agreements that regulate working conditions with a view to combating digital *caporalato* and that impose information flows to the CGIL, as well as a specific obligation to refrain from using third-party companies for the delivery of orders, and recognising to the CGIL a specific action to protect riders through anonymous reporting mechanisms.

In September 2023, for these reasons, the Tribunal of Milan (labour section), on the basis of Article 28 of the Workers' Statute, upheld the complaint for anti-union conduct of Uber Eats Italy, filed by trade union organisations, acting as mandataries. Uber Eats Italy's decision to cease operations in Italy and to terminate the employment relationships of its 4.000 riders was declared unlawful for failure to activate the information and consultation procedures provided by the legislation (namely law no. 223/91, Article 1, paras. 224-236, and law no. 234/21, Article 24).⁴²

Moreover, the Tribunal of Milan ordered to Uber Eats, on such occasion, to revoke the terminations of its 4.000 employment relationships from June 2023, as they were implemented in breach of such consultation, ordering the riders' reinstatement, as well as to initiate the prescribed comparison procedures with the labour unions before taking any unilateral initiative.

All the riders, subsequently, did receive the "revocation" of the termination from Uber Eats Italy. Still, the revocation was merely formal since riders were not enabled by the MDS company to connect to its application platform and receive delivery offers. Hence, since the 15 July 2023, notwithstanding the formal revocation of the termination, the riders have not received any remuneration from Uber Eats Italy nor has any process of consultation concretely started.

On these basis, the class action at hand was filed, once again in front of the Tribunal of Milan (*company matters* section), by individual riders acting through the labour unions, as their mandataries, to seek an order against Uber Eats Italy to pay *damages* equal to the lost remuneration, to be determined *ex aequo*, in light of

⁴² Trib. Milano, sez. lavoro, decree from 28 September 2023, no. 6979/2023.

the average monthly remuneration and the equiparable CCNL for commerce or logistics (given the current lack of a specific “riders CCNL”, see *supra*).

It is worth highlighting that both suits follow in the wake of a global trend of class litigation in the food delivery sector, especially in common law jurisdictions (US, Canada and Australia), with very similar claims.

3. Deliveroo case litigation.

As anticipated, the first case, the *Deliveroo* case, was an *injunctive* class action against Deliveroo Italy.⁴³ It aimed to obtain a judicial order forbidding the MDS company to apply to all of its riders in Italy, more than 8.000, the conditions laid down in the CCNL signed by Assodelivery with only one *manifestly unrepresentative* trade union organisation, UGL Rider. Among the unfavourable conditions provided for by this CCNL were the non-recognition of paid holidays, weekly rests, paid leave, and hourly wages significantly lower than those provided for by the CCNLs of similar sectors signed by the most representative trade unions (e.g., CCNL Logistics or CCNL Tertiary Sector). In this perspective, the plaintiffs sought protection through a collective injunction action pursuant to Article 840-*sexiesdecies* c.p.c.

The case was significant from several points of view. It was, in fact, the first real class action on labour matters in Italy, as well as one of the first under the new rules introduced by Law No. 31 of 2019. It represented, therefore, an opportunity to assess the operability of the new collective procedural tool both for more general profiles and, specifically, as a means of protection in the employment law sector.

The breadth of the 2019 legislative provisions – set under the new Title VIII-*bis* of the Code of civil procedure and in force since May 2021 – until then did seem to legitimise collective actions to protect workers harmed by the same conduct, whether active or omissive. At the same time, nonetheless, (mainly) potential defendants argued that class actions in labour matters could not be brought since the competence for class actions under the 2019 regime was attributed to the

⁴³ Trib. Milano, sez. XIV (spec. impr.), no. 33816/2021, rejected on 13 October 2022.

specialised section in *company* matters of the tribunal, whereas labour matters pertained to the specialised section in *labour* matters. This was, as a matter of fact, from the very hearing one of the main arguments of Deliveroo Italy, thereby insisting on an inadmissibility of the claim, either on the aforementioned grounds or because the *azione collettiva* should have been proposed in front of the specialised section in labour matters.

The significance of the issue is evident. If confirmed by the courts, the scope of an applicative extension to the employment sphere would have been indeed extraordinary: at the level of *guarantees*, implementation of the right of defence and concrete access to justice, but also at the *socio-economic* level, considering the consequences to which a possible exposure of companies to “internal” class actions, too, could lead, from the point of view of market choices, but also of better working conditions, as a deterrent fringe consequence. The common law experience, as discussed *supra*, has been particularly rich since the early 1960s in this sector, with numerous successes and progress achieved in the labour sphere precisely thanks to class actions.⁴⁴ One can refer, for instance, to the extensive case law on discrimination or exploitation in the workplace.

For these reasons, the test faced by the Milanese court in the present case was certainly considerable. The decision, although reached in October 2022, was published in January 2023 by the Court of Milan, section XIV specialised in company matters, through an *order of rejection*.⁴⁵

The main themes emerging *before* the decision were several: (i) a confirmation of the applicability of the class action discipline to *labour matters*; (ii) the *competence* of the specialised section on company matters also for employment disputes, notwithstanding their attribution to the labour judge of Article 413 c.p.c.; (iii) the *standing to sue* of labour unions; (iv) the possible *coordination* with the other instruments of collective judicial protection already present in the system, such as the action for the repression of anti-union conduct under Article 28 of the Workers’ Statute or, the anti-discrimination ones; (v) the actual scope of paragraph

⁴⁴ See *supra*, Chapter VI.

⁴⁵ Trib. Milano, sez. XIV (spec. impr.), order from 13 October 2022, no. 33816/2021.

7 of Article 840-*sexiesdecies* c.p.c. when it provides that “with the sentence to cease the omissive or commissive conduct, the court may, at the request of the public prosecutor or the parties, order that the losing party adopts *appropriate measures to eliminate or reduce* the effects of the violations ascertained”, as requested by the applicants.

The response of the Court of Milan to these issues, while presenting positive elements, is not entirely convincing. In particular, from the rejection order the following can be noted.

(i) and (ii) The applicability of the class action to *labour matters* is confirmed (“Among the individual rights that can be protected, it does not appear that those connected to employment relations can be excluded”).⁴⁶ This interpretation is in line with the wording of the law and the legislator’s clear intention, as depicted from the parliamentary discussion reports.

An inadmissibility on these grounds, as proposed by Deliveroo, would have opened the door to manifest questions of constitutionality, given an irrational and unfair exclusion from collective means of protection of this specific sector of law and category of individuals (workers, whichever the qualification – self-employed or not – and specific type of work), notably weaker in relation to their employers.

Moreover, as is known, also other non-labour sections of the tribunal increasingly often are called to deal with labour matters, such as is the case of the bankruptcy section. The assignment of a dispute to a section rather than another should not generate a question of technical competence, but a mere internal allocation of resources within the same judicial office, as observed by the United Sections of the Court of Cassation in 2019.⁴⁷

⁴⁶ Id.

⁴⁷ The United Sections of the Italian Court of Cassation in their judgment no. 19882 from 23 July 2019 have held that “the establishment of the specialised section for the enterprise responds to ‘the need for a better organisation and quality of the response of justice, which is not inherent in the profile of competence’”, also considering that “the option in favour of the configuration of the relations between the ordinary section and the section for the enterprise as of competence in a technical sense contrasts with the most recent choices of legislative policy, oriented in the sense of a drastic reduction of the questions of competence”, as referred to also by the plaintiffs in the present case.

This confirmation is *landmark*, as it paves the way for a new line of collective litigation which the comparative experience has shown as cardinal in ensuring a substantial increase of protection for workers. At the same time, however, the Milanese court in several passages seems to *improperly raise the standard* required for the proposition of the lawsuits in this field, in this way risking to make meritorious actions impracticable in practice. This occurs in two respects.

First, under a more general one, the injunctive class action pursuant to Article 840 *sexiesdecies* c.p.c., brought in the present case, is equated with the compensatory class action pursuant to Article 840-*bis* ff. c.p.c. under a key aspect. In the rejection order is incidentally emphasised, in fact, that the necessary requirement of *homogeneity* of the individual rights asserted in the class action (set forth under Articles 840-*bis* and 840-*ter*, governing the admissibility phase of the *compensatory* class action – not the injunctive one). This reading appears – by all means – *incorrect*.

From a strictly *literal* point of view, such a requirement (“homogeneous individual rights”), in fact, is expressly provided for only in respect to the compensatory class action. Indeed, in relation to the collective injunction action, there is talk of “interest [in the decision]”, thus favouring the protection of collective or diffuse subjective situations, too, as thoroughly described above, not necessarily individual ones. This is supported by an historical reading, considering the origins – dating back even to the Roman *actio popularis* – of the collective action for injunction, precisely for the protection of supra-individual positions. No reference to homogeneity is present in Article 840-*sexiesdecies* c.p.c., either. Furthermore, a systematic viewpoint favours this interpretation, by reason of the reference (insofar as compatible) of Article 840-*sexiesdecies* c.p.c. to Article 840-*quinquies* c.p.c., relating to the procedure of class actions for damages, but *not* to the previous articles in which the requirement of the homogeneity or individuality of rights is posed (the already mentioned Articles 840-*bis* and 840-*ter* c.p.c.).

More correct appears to be the line dictated by the same Tribunal of Milan, (different) Section XV (the other section specialised in company matters), in the previous collective injunction action – against *ILVA* and *Acciaierie d’Italia*,

discussed above (*Chapter VIII*) –, in which the applicability of compensatory class actions' admissibility conditions – including the requirement of homogeneity – was excluded for collective injunction actions.⁴⁸

This view is also supported by other injunctive class actions, which have not dealt with the issue of homogeneity. The Tribunal of Rome, in the *ITA Airways* injunctive class action from December 2022 (but published later), has been particularly explicit on this point, embracing the thesis here and hitherto argued:

The purely interim nature of the proceedings at issue, in fact, is incompatible with the complex procedure aimed at the adhesion of the holders of homogeneous rights, which presupposes the publication of the order of admission of the class action, the latter phase not provided for collective actions for injunction.

In fact, Article 840 *sexiesdecies* [quinquies] of the Code of Civil Procedure refers to the court proceedings referred to in Articles 737 et seq. of the Code of Civil Procedure and only "insofar as compatible" with Article 840 quinquies of the Code of Civil Procedure: it follows that the procedure of adhesion of the holders of homogeneous rights to those at issue is not compatible with the collective injunction action.⁴⁹

Second, under another respect, the concrete claim was *rejected* due to the peculiar nature of the *chambers procedure* pursuant to Article 737 ff. c.p.c., provided for collective actions for injunctions. According to the court, in fact, such streamlined procedural form excludes assessments endowed with investigative complexity, being Article “840 *sexiesdecies* c.p.c. focused on the ascertainment of the injury and not on that of the right asserted”.⁵⁰

Hence the rejection, since the claimants in the present case requested an ascertainment “well *beyond* the *incidental nature* of the recognition of the right

⁴⁸ See *supra*, *Chapter VIII*.

⁴⁹ Trib. Roma, sez. XVI, order from 13 December 2022, no. 3426/2022. At the same time, actually, as a reason for its order of inadmissibility, the Tribunal of Rome refers to the decision of the Tribunal of Milan in the Deliveroo case: “In accordance with recent case law, the Court considers that the proceedings referred to in Article 840 *sexiesdecies* of the Code of Civil Procedure, in referring to the forms of the proceedings in chambers pursuant to Article 737 et seq. of the Code of Civil Procedure, with the application, in so far as compatible, of Article 840 quinquies c.p.c. - denotes a ratio legis in favour of a streamlined procedural form devoid of any investigative complexity (as underlined by the provision of the fifth paragraph of Article 840 *sexiesdecies* c.p.c. where it is provided that the Court may ‘make use of statistical data and simple presumptions’).”

⁵⁰ Trib. Milano, sez. XIV (spec. impr.), order from 13 October 2022, no. 33816/2021.

asserted”, contesting the contractual basis of the employment relationship and requiring a “*particular complexity in the correct identification of the actual injuries suffered and [...] of the homogeneity of such injuries in relation to the persons who would constitute the class to be defined*”.⁵¹ This view is embraced by the Tribunal of Rome in the abovementioned *ITA Airways* case (which – it must be said – seemed to require a much more, perhaps too, complex preliminary ascertainment).⁵²

On this point, it should be emphasised – again – that it is not necessary to prove the *homogeneity stricto sensu* of the injuries, but rather the mere commonality of

⁵¹ Id.

⁵² See *supra*, fn. 651. The decision proceeds as follows: “This hermeneutic analysis is corroborated by the envisaged separation of the collective compensatory action from the collective action for injunctive relief, where they are proposed with a single action (Article 840 *sexiesdecies* u.c. of the Code of Civil Procedure). The collective action for injunction therefore joins the collective action for damages, as it is provided for by Title VIII-bis of the Code of Civil Procedure, “Of collective proceedings”, constituting a completion in the function of protection against the continuation of damaging conduct (see Tribunal of Milan 13/10/2022, N.R.G. 33816/2021). 4. On the merits, [...] take legal action against ITA Italiana Trasporto Aereo s.r.l. invoking the collective injunction protection under Article 840-*sexiesdecies* c.p.c. in order to obtain ascertainment of the takeover under Article 2112 c.c. of ITA - Italiana Compagnia Aerea S.p.A. to Alitalia - Società Aerea Italiana S.p.A., with the consequent ascertainment of the injury suffered by the employees of the aviation asset, whose interests they claim are homogeneous, as a result of the failure to continue their employment relationship with the defendant. The application as brought is inadmissible. The action for an injunction brought by the plaintiffs does not in fact seek to obtain the protection of the infringement of homogeneous rights carried out by ITA S.p.A. by means of a *cease and desist order* or the *prohibition of the repetition* of omissive or commission-based conduct, but rather requires and presupposes the ascertainment that between Alitalia S. p.A. and ITA S.p.A. a transfer of business has taken place, with the consequent application of the protections provided for the workers of the transferred company, pursuant to and for the purposes of Article 2112 of the Civil Code which requires the continuity of the employment relationship of the employees of the transferred company and the preservation for them of the rights arising therefrom. The plaintiffs’ requests therefore imply an *ascertainment exceeding the incidental nature* of the recognition of the right asserted, underlying the proceedings for collective injunction under Article 840 *sexiesdecies* of the Code of Civil Procedure, which is focused on the *ascertainment of the injury and not on that of the right asserted* (in terms of Trib Milano 13 October 2022 cited above), as inferable, *inter alia*, from the provision of the fifth paragraph of Article 840 *sexiesdecies* of the Code of Civil Procedure, which, for preliminary investigation purposes, provides for the use of statistical data and simple presumptions, incompatible with the preliminary investigation requirements aimed at ascertaining the existence of the *transfer of a branch of business* between Alitalia S.p.A. and ITA S.p.A., firmly contested by the latter and, consequently, the rights arising from it for the former employees of Alitalia S.p.A.. It is therefore a question of a *complex double assessment*, incompatible with the typical cognition of collective actions for injunctions, aimed at the sole purpose of inhibiting commission or omission of conduct prejudicial to a plurality of individuals or entities: and indeed, the plaintiff’s request, although qualified as a collective injunction, in reality has as its object the condemnation of ITA S.p.A. to continue with the plaintiffs the individual employment relationships corresponding to those entered into with Alitalia S.p.A., as a result of the establishment of business continuity between the two companies, a ruling certainly to be referred to a trial on the merits before the labour court.” (emphasis added).

the acts causing injury to a *plurality* of individuals or entities; a *commonality* which is evident in the case in question, given the application of the same CCNL Ugl Rider and the distribution of work through the same algorithm.

The homogeneity test is by no means part of the injunctive class action. Furthermore, for the same reasons, the investigation of the case in question does not appear to be excessively complex, a complexity which, in any event, should not exempt the court from making an assessment. A certain degree of complexity may, in fact, be considered *inherent* in the collective nature of the class action. Higher the degree of complexity, higher the *judicial economy* gained.

Concurrently, to assess an injury to a subjective position (i.e., a right), such a subjective position must be preliminarily ascertained. The reference “to *statistical data* and *simple presumptions*” from Article 840-*sexiesdecies*, para. 5 c.p.c., recalled by the Tribunal of Milan in the present *Deliveroo* case – as well as by the Tribunal of Rome in the *ITA Airways* case – to justify the “legislative intention to regulate a procedural form streamlined and devoid of any evidentiary complexity”,⁵³ appears improper and misleading.

On the one hand, it must be underscored how such use of statistical data and simple presumptions is a *mere (additional) possibility* set out by the legislator, not a standard evidentiary rule provided for class proceedings. As is known, pursuant to Article 2729 of the Italian Civil code, “*Presumptions* not established by law are left to the prudence of the judge [116 c.p.c.], who must admit only serious, precise and concordant presumptions”. To this regard, the well-established jurisprudence has long elaborated that “Simple presumptions constitute complete evidence to which the court of merit may attribute relevance, *even exclusively*, for the formation of its own conviction”.⁵⁴ *Statistical data*, instead, although the explicit reference in class proceedings’ regulation is not trivial, have been used by Italian judges in both civil and criminal proceedings for a significant time now, as is equally well known.

On the other hand, the *legislative intention* to create a streamlined and swift procedural certainly exudes from all of Title VIII-*bis* c.p.c.’s recent provisions.

⁵³ Trib. Milano, sez. XIV (spec. impr.), order from 13 October 2022, no. 33816/2021.

⁵⁴ See, e.g., *inter alia*, Cass. civ., sez. lav., sent. 15737 from 21 October 2003.

Such objective, nevertheless, is instrumental to a much larger – and paramount, for the legislator – aim: that of “expanding its potential users”, “to make the tool more usable and attractive” and, in sum, of “bolstering access to justice”.⁵⁵ In this sense, the choice of the *chamber procedure* – although highly debatable – should be intended as seeking more *flexibility* rather than *simplicity* in relation to the class assessments.

To this regard, although the chamber procedure is probably not the most appropriate, its rules do not exclude the possibility of carrying out investigative activities, possibly even complex ones. The goals of “bolstering access to justice” and the collective nature of the action, indeed, should lead *judges* to a more *proactive role* in ascertaining the subjective situations asserted and finding whether the “cessation or prohibition of the repetition of the omissive or commissive conduct [...], carried out to the detriment of a plurality of individuals or entities,”⁵⁶ should be ordered.

In the case at hand, the conduct “carried out to the detriment of a plurality of individuals or entities” was no other than the application, to its more or less 8.000 riders, of the unfair conditions set out under the CCNL signed by Assodelivery with the non-representative UGL Rider.

It is also understandable, however, the hesitancy of a judge *specialised in corporate matters* to make ascertainments in a highly technical and specialised matter such as that of labour, to which he is *inevitably extraneous*. Hence, the fundamental need to reconsider the *appropriateness* of the legislative choice to attribute *exclusive jurisdictional competence* to that section, even for *labour matters*.

Proper means to increase *participation* from all the involved stakeholders, as already mentioned *supra* (and *infra*) should be offered by the legislator, too. This seems especially relevant in injunctive cases, given that the effects of the decision fall on everyone, without a chance of opting-in or even opting-out.

⁵⁵ See *supra*, Chapter VII.

⁵⁶ Article 840-sexiesdecies, para. 1 c.p.c.

(iii) The *Deliveroo* decision also found the *lack of standing to sue* on the part of the applicant labour unions, since they were not in the *public list* established at the Ministry of Justice (Decree No. 27 of 17 February 2022) to which Article 840-*sexiesdecies*, paragraph 2, refers. In that decree, fixing the criteria for inclusion in the list, labour unions were expressly excluded, by means of a reference to “third sector entities” pursuant to Article 4 of Legislative Decree No. 117 of 3 July 2017. The ministerial choice was questionable, also from a constitutional point of view, since these are exactly those *social formations* that are often better placed to represent the collective protection instances of workers, as well as better able to bear the costs (including media costs) of any collective action than an individual worker. Given the letter of the decree, however, the court’s decision seemed mandatory, safe for the possibility of raising a question of constitutionality to the Constitutional Court.

The raising of such question will not be needed in the future. It must be noted, in fact, that with a subsequent ruling from June 2023, the *Regional Administrative Court (TAR)* of Lazio, appealed by labour unions, *annulled the provisions* of the same ministerial regulation that established the requirements for registration in the special register of the Ministry of Justice of the entities qualified to bring class actions, effectively excluding labour union organisations.⁵⁷

The Regional Administrative Court pointed out that, “in exercising its regulatory discretion, the administration had acted in a clearly illogical and unreasonable manner, circumscribing the legitimacy of the action to the mere possession of the qualification of third sector entity”,⁵⁸ betraying the spirit of the law, which, on the contrary, is intended to favour the widest possible scope of action for non-profit associations.

It also recalled that “the defence of the homogeneous individual rights of a specific category of subjects (in the case of the applicants, subordinate workers) is intrinsically inherent to the associative purposes typical of labour unions: the exclusion of such exponential entities from the list of those entitled to collective

⁵⁷ TAR Lazio, sent. from 5 April 2023, no. 06661/2022.

⁵⁸ *Id.*

action is, therefore, irrational”, underscoring how “On the other hand, historically, the birth of trade unions is functional to the exercise of collective initiatives in defence of the ‘class’ of workers (e.g. collective bargaining)”.⁵⁹

Such reading appears in line with the concrete *access to justice aim* of the reform, as well as with the interpretation of the right to action in light of the principles set out in the Italian Constitution, as discussed above.⁶⁰

(iv) Concerning the *coordination with other instruments* of collective protection, the court recalled the last paragraph of Article 840-*sexiesdecies*, which states “without prejudice to the provisions laid down on the subject by special laws”, to exclude the possibility of resorting to injunctive collective actions against the repression of labour union conducts, for which the remedy of Article 28 of the Workers’ Statute already exists.

In the present case, according to the court, it was not possible to examine the possible anti-union nature of Deliveroo’s conduct. Recalling the jurisprudence of legitimacy, in any event, the Tribunal of Milan emphasised how the infringement by the employer of the employee’s individual rights – as in the case under consideration – does not constitute trade union conduct. Such an interpretation, if extended also to discriminatory actions (for example, by giving preference to the action established under Article 44, paragraph 10, of Legislative Decree No. 286 of 1998), could *considerably reduce* the scope of application of the new Italian class action.

(v) Lastly, given the rejection of the appeal, it was not possible to ascertain the actual scope of the expression “*appropriate measures* to eliminate or reduce the effects of the violations ascertained” set forth under paragraph 7 of Article 840-*sexiesdecies* c.p.c.

This is a very interesting provision, since – if understood in an extensive form, concerning also *economic* measures – it could allow to overcome by means of the injunctive class action certain criticalities of the more complex class action for damages, pursuant to Articles 840-*bis* ff. c.p.c. Another general profile to be

⁵⁹ Id.

⁶⁰ See *supra*, Chapter VII.

considered in future cases will be that of *passive standing*, given the limitation to companies and entities managing public services or public utilities, of dubious constitutional legitimacy and, still, recalled several times in the *Deliveroo* case order.

4. Pending Uber Eats case litigation.

As anticipated, the second class action for the enforcement of MDS riders rights is still pending. The first hearing took place in April 2024, in front of the Tribunal of Milan, section XIV (the same one, but with a different President and judicial composition).

It is a compensatory *azione di classe* seeking an order against Uber Eats Italy to pay damages for the abrupt and unfair termination of the work relation with its approximately 4.000 riders. Compensation, according to the claimants, should be equal to the lost remuneration of the riders, to be determined *ex aequo*, in light of the average monthly remuneration and the equiparable CCNL for commerce or logistics (given its current lack, see *supra*).

The key foreseeable elements of discussion, relevant for the present analysis, on which the court shall rule, are the following: (i) inadmissibility of the action for lack of *competence* of the specialised section in company matters; (ii) inadmissibility of the class proceedings for non-fulfilment of the *homogeneity* requirement; (iii) the issue of *time*, that is inadmissibility of the 2019 regime, into force since May 2021 and only for subsequent conducts (see *above*), given that several workers might have started operating as Uber Eats riders before that date; (iv) in case of admissibility, how to ensure adhesion and liquidate the damages – that is, the *quantum* for each adherent rider.

(i) Given the precedent of the same Tribunal of Milan in the *Deliveroo* case, it is unlikely that *competence* should be declined in favour of the specialised section in labour matters of the Tribunal. This is also supported by the other case law in employment matters, for instance in the *ITA Airways* case, in which the defendant company had preliminarily objected as well the “functional incompetence” of the

appealed judge (specialised in company matters) in favour of the labour judge, only to see such exception rejected by the court:

As is well known, the distribution of business within the same judicial office does not pose a problem of jurisdiction, since there is no possibility of choice between two different judges belonging to different judicial offices abstractly competent to judge the dispute, with the consequent inadmissibility also of the regulation of jurisdiction on the relative issue (see Civil cassation no. 4889 of 2001). It has thus been reiterated that the nature of the labour dispute is capable of influencing only the *applicable proceeding* and not the competence, with the consequence, moreover, that where the court of merit has assessed the recurrence of the factual conditions for the traceability of the dispute within the scope of Article 409(3) of the Code of Civil Procedure, the ground of appeal objecting to the lack of jurisdiction of the court hearing the case is inadmissible, as it translates into a request for a different assessment of the facts as opposed to that made in the judgment under appeal (Civil cassation no. 189/2011; Civil cassation no. 12753/2003).⁶¹

Still, despite the nature of the labour dispute influencing merely the applicable proceedings rather than the competence, there are arguments to insist on the appropriateness of a discussion before the *labour judge*, certainly more sensitive to certain issues and armed with the, sometimes essential (see *Deliveroo* case), expertise, as already argued and further presented in the following.

(ii) and (iv) That of homogeneity will probably constitute the legal battle on which the procedural victory will be played out, similarly to the abovementioned ILVA compensatory class action, pending as well in front of the same tribunal, that of Milan. As extensively argued (see *supra*, Chapter VII), *homogeneity* of individual rights should be conceived – *in primis* under an etymological standpoint (i.e., “same origin”) – as a *commonality* of the fact or conduct generating the harm; and nothing more. Once (if) demonstrated such common origin, the plaintiffs – but, following the principle “*iura novit curia*”, the judge, too – will need to devise an efficient criterion for joint management and liquidation of the damages due.

⁶¹ See *supra*, fn. 651.

It is important to stress how the *common origin* should, under a constitutionally-oriented (but also historical) interpretation, be conceived *elastically*: in the present case, as a work relation with Uber Eats Italy and its abrupt termination in June 2023. As to any search for efficiency in *management* and *liquidation*, again, we must underscore (see *supra*)⁶² that such determination does not pertain to the *admissibility* phase.

Such phase – it must be recalled – is a fundamental yet merely *pre-judicial* and, thus, *speculative* stage of the proceedings. Management and liquidation, therefore, should not determine the admissibility of the claim, but rather be discussed at a subsequent procedural moment (that is, when the judge eventually issues the “acceptance judgment” – “*giudizio di accoglimento*”, pursuant to Article 840-*sexies* c.p.c. –, in which he/she “defines the characteristics of the homogeneous individual right [...] specifying the elements necessary for inclusion in the class” of their holders).⁶³

In any case, as regards (*iv*), should the claim be declared *admissible*, it will undoubtedly be a challenging task.

First, it will be necessary to find all the riders. As anticipated, many of them are migrants and often do not speak the language; they rarely follow the news. A proper system of *publication and notice* – including translators – to allow them to properly understand the extent of the decision and opt-in, whether interested, should be set up.

Cases like the present one raise doubts on the efficiency of an opt-in mechanism. An *opt-out* one, on the contrary, would have given more negotiating power to the class attorneys in negotiating a *settlement* for the whole class, once eventually the claim is deemed admissible. This would follow the common law usual practice of settling once the class action is certified. Such an incentive to settle, given that – with an opt-in regime – substantially less members will actually adhere, nor even be made concretely aware of such possibility, might be substantially hindered in cases like the present one.

⁶² See *supra*, Chapter VII.

⁶³ *Id.*

Second, attributing to each rider the *same* compensation, determined *ex aequo*, in light of the average monthly remuneration and the equiparable CCNL for commerce or logistics, does not appear as a viable option (nor one currently sought by the claimants in the present case).

A different criterion for determination of the *quantum* should, therefore, be identified, taking into account the possibility of dividing the riders into sub-classes and/or of using a lowest common denominator as a *multiplication unitary parameter*, like in the *Millemiglia* case, concerning a loyalty programme, discussed above.⁶⁴ Such parameters and sub-division could be based on the number of hours worked per month by each rider, as well as on the number of months worked for the company. An economic value should be attributed to such minimum parameters, within the “acceptance judgment”, pursuant to Article 840-*sexies* c.p.c., and then multiplied for each rider during the liquidation phase, after the adhesions, by the “common representative of the adherents”, acting as public officer.

(iii) In relation to a *potential inadmissibility* of the 2019 regime, into force since May 2021 and only for subsequent conducts, given that several workers might have started operating as Uber Eats riders before that date, the reflections and case law from *Chapter VII* on the “permanent tort” scenarios can be recalled here, too.

Pursuant to Article 3 It. Const., even if the activity started out before the entry into force of the new collective procedural instrument, no impediment to its application could be raised, given that it took on also after May 2021. In any case, it should be noted that the activity started out before the entry into force is the *working relation*, not the harmful conduct to which the “permanent tort” jurisprudence refers, too. Such harmful conduct is the one from June 2023 (and afterwards), consisting in the abrupt and *unfair termination* of the work relation, as described above.

⁶⁴ See *supra*, *Chapter VII*.

5. *Lessons and open questions.*

In conclusion, employment disputes through class actions still have to develop in Italy. While lawyers and – most importantly – judges still have to adjust to the new procedural tool, important cases have been filed in this field, with the potential to advance fundamental rights’ enforcement.

The causes for uncertainty still shrouding the institution, in force for almost three years now, are various.

First and foremost, the pervading *legislative confusion*, which leaves a powerful instrument of general application in the hands of *judges specialised* in a single and different subject – company matters –, overburdened and limited by interpretative and procedural uncertainties should be underscored.

Also, the *reluctance of the judges* themselves should be accounted, however. They are the ones who must – and can, accompanied by other legal practitioners – embrace the new rules and become protagonists, even creatively and innovatively (from a procedural point of view), in a process and in a society that is increasingly calling upon them, in the face of legislative inertia, to take decisions with a strong social impact. The rejection order in *Deliveroo* case seems particularly illustrative – and concerning – to this regard: it shows an improper reference to compensatory provisions in injunctive class proceedings (the homogeneity test), on the one hand, and an unjustified rejection for purported “particular complexity” in the identification of the harm suffered, on the other hand.

These judicial interpretations cause concern and also make one wonder whether the, *natural, labour judge* should not be more suited for deciding such employment claims. It would indeed be interesting to see future class action claims in labour matters filed in front of the specialised section of the tribunal in labour matters, rather than in company ones. Should the former doubt (as they should) on their *competence* to decide, in favour of the latter, there would be cause for raising a *question of constitutionality* in front of the Constitutional Court. This way, given legislative inertia, a coordination of the different paths of judicial protection would be put into practice.

Furthermore, different types of proceedings, rather than the *chambers procedure* pursuant to Article 737 ff. c.p.c., could be provided by the legislator in the future, to discard a certain judicial *perception* that complex matters cannot be brought through a class procedure. Perception, it must be stressed, and not conviction, given how other decisions in injunctive *azioni collettive* have been successfully discussed on the merits without the raising of the abovementioned obstacles related to a purported over-complexity of the matters. A clear example is the abovementioned *Philips Respironics* case, in front of same section XIV from the Tribunal of Milan (with a judicial composition equal in two thirds to that from the *Deliveroo* case), confirmed in appeal by the Court of Appel of Milan; also the injunctive action in front of the Tribunal of Turin for an unlawful marketing campaign.⁶⁵

It must be stressed how the latter two cases were not related to employment matters, but rather, *inter alia*, to defective products or misleading corporate practices. This implies an encompassment within “corporate matters”, certainly more akin – rather than more complex, one might hypothesise – to the specialised section in corporate matters than the labour ones dealt with in the cases examined in the present Chapter. Hence, an argument once again in favour of a rethinking of the determination of the *jurisdictional competence*, either through legislative change, currently improbable although preferable, or through constitutional review.

Second, the upcoming decision on *homogeneity* from the compensatory class action in the *Uber Eats* case, together with that in the ILVA case, promises to be crucial for the future development of collective suits in Italy. A high degree of flexibility and, in part, also of procedural creativity will be required from all parties involved.

Third, the actors involved are indeed the key pieces of the intricate class action puzzle in Italy. Judges, as much underscored, defendants, but also potential claimants need to be proactive and understand the procedural and interpretative nuances of the new regime. Specific *training*, of judges and legal practitioners in

⁶⁵ Trib. Torino, sez. I (spec. impr.), ord. from 21 April 2023 (*No. unavailable*).

general could be highly beneficial to this regard – as well as necessary legislative and regulatory amendments, further presented in the last *Part V*.

Last, a growing trend can be envisaged of labour unions – that is, “old” actors, or social formations – using the “new” procedural paths to pursue their battles.⁶⁶ It can thus be registered a transformation, or even a *transmigration*, of intermediate social bodies (labour unions, in this case) from their previous old forms to new, evolved, ones (class actions) to cope with the systemic voids and growing power inequalities brought by the contemporary radical social and constitutional changes (while still maintaining, formally at least, their previous forms).

⁶⁶ CIANCIO A. (2020). *Ripensare o “rinnovare” le formazioni sociali? Legislatori e giudici di fronte alle sfide del pluralismo sociale nelle democrazie contemporanee*, Giappichelli, Turin.

CHAPTER X

CASE STUDY NO. 3: SYSTEMIC INHUMAN AND
DEGRADING TREATMENT OF PRISONERS AND
MIGRANTS. ROOM FOR FUTURE (CLASS) ACTIONS?

1. Premise. Inhuman and degrading treatment of prisoners and migrants. – 2. Factual contextualisation. Systemic and structural violations: the Italian case. – 3. The common law experience with prisoners’ class action litigation. *Plata, Ashker and Brazeau* cases. – 4. Comparative evaluations and room for future (class) actions.

1. Premise. Inhuman and degrading treatment of prisoners and migrants.

Article 3 of the ECHR and Article 4 of the CFREU clearly state that “No one shall be subject to torture or to inhuman or degrading treatment or punishment”.

The Grand Chamber of the ECtHR even defined it as “one of the most fundamental values of a democratic society” and “a value of civilisation closely bound up with respect for human dignity”.⁶⁷ As underscored by the ECtHR, the prohibition in question is an *absolute* one, even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances – i.e., in the fight against terrorism, organised crime, severe economic burden or potentially overwhelming migrant fluxes –, whichever the conduct or alleged offence committed. Similar provisions and developments can be found in national and supranational constitutional texts and jurisprudence.⁶⁸

Still, severe and *systemic* violations to such right are periodically accounted all over Europe (and beyond), under numerous aspects. In particular, the present

⁶⁷ ECtHR, *Bouyid v. Belgium* [GC], 2015, para. 81.

⁶⁸ I.e., in the It. Const., Art. 27, para. 3 (“Punishments may not consist of treatment contrary to a sense of humanity and must aim at the re-education of the sentenced person”) and Art. 13, para. 4 (“All physical and moral violence against persons subjected to restrictions of liberty is punishable”).

Chapter will concentrate on two types of infringements: those concerning *prisoners and detainees*, on the one hand, and those related to *migrants and asylum seekers* and their reception (or, rather, lack thereof), on the other hand. Italy, specifically, has a negatively impressive track record with regard to both these selected matters. Despite judicial and political reprimands at all levels for several years, decades even, the situation does not seem to improve, but, rather, it appears quite stagnant.

At the moment, no class action – injunctive or compensatory – has been brought in this field in Italy under the new regime, from 2019. This occurs despite significant litigation having been brought in recent years for the protection of prisoners and migrants, both in front of Italian courts and, most importantly, in front of supranational apex courts, namely the ECtHR. The Strasbourg Court, in particular, backed up by institutional and non-governmental reports, has repeatedly condemned Italy for violations of Article 3 of the ECHR, also pointing out on multiple occurrences the existence of unaddressed systemic and structural deficiencies in the country in relation to this field.

A comparative assessment, on the contrary, reveals a remarkable use of the class action procedural device in the common law experience for the enforcement of prisoners' and detainees' rights. Jack Greenberg, the well-known Director (and legal counsel) of the NAACP Legal Defense Fund from 1961 until 1984, for instance, when discussing in a 1997 paper three relevant areas of civil rights litigation through class actions, chose precisely, as the first one, that of "prisoners' rights":

Class actions have played a major role in securing the rights of prisoners. Since the federal class action rule was revised in 1966, prisoner rights litigation has utilized the mechanism of class action to bring broad relief to inmates and detainees throughout the country. Prisoners' rights litigation has thoroughly reformed entire state prison systems in Texas, Florida and Georgia. In cases which lasted for years, those and other systems have been placed under judicial management for long periods of time. Less far-reaching cases have involved class action relief from double ceiling, religious discrimination, due process violation in parole standards,

restrictions on an inmate's right to marry, solitary confinement, and denial of contact visits.⁶⁹

Similar accounts can be found in other scholarly and non-governmental output from common law, when commenting class actions brought in the interests of disadvantaged parties or, in general, as a public interest litigation tool.

For these reasons, the present Chapter will, *firstly*, briefly recall the factual background of the violations of the fundamental right to not be subject to degrading or inhuman conditions, suffered by prisoners and detainees, on the one hand, and by migrants and asylum-seekers, on the other hand, in Italy. For this purpose, it shall refer to significant cases brought before domestic and supranational courts – mainly the ECtHR –, as well as recent reports and scandals.

Secondly, a selected number of cases from common law jurisdictions – namely US and Canada – will be described. In this part, the most relevant aspects, from a procedural standpoint, shall be highlighted. Such exercise will draw from local scholarship's valuable insights and comments.

Lastly, an *in vitro* evaluation on the possible future use of the dual Italian class action device from 2019 – injunctive or compensatory, or both – shall be conducted, building on the previous analysis. A comparison with other non-class action procedural paths – i.e., in front of the ECtHR – will be proposed, too. As it shall be argued, there is indeed room for bringing collective suits to judicially address these relevant issues, although some regulatory and interpretative obstacles may stand in the way. These lessons will be included in the subsequent conclusive Chapter, when addressing the next possible steps for allowing a more efficient use of the class action model in Italy.

2. *Factual contextualisation. Systemic and structural violations: the Italian case.*

As anticipated, Italy – alike numerous others European countries, and beyond – has a bleak history of fundamentally degrading treatment of prisoners and

⁶⁹ GREENBERG J. (1997). *Civil Rights Class Actions. Procedural Means of Obtaining Substance*, in *Arizona Law Review*, 39, 575.

detainees, on the one hand, and migrants and asylum seekers, on the other hand. Such history is not confined to the past, but, rather, well-rooted in the present and, unless the trend is substantially reverted, part of the future, too.

Regarding the former issue, that of prisoners and detainees, a first notable judgement for Italy is that from the ECtHR from 2009, in the *Sulejmanovic* case.⁷⁰ In such instance, the individual applicant lamented having been confined, from January until April 2003 in the Roman Rebibbia penitentiary, in a jail cell of 16,20 square metres with five other people, resulting therefore in a personal living space available for each of them of 2,70 square metres. From April until October 2003, he was placed in a different cell with only four people, resulting in a personal living space available for each of them of 3,40 square metres. This kind of detention conditions was common throughout all the Rebibbia prison, which accommodated a number of individuals between 1.456 and 1.660 while its maximum capacity was for 1.271.⁷¹

These concrete conditions contrasted with the minimum standards set in 2006 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”, instituted by the CoE system, as is known).⁷² Pursuant to them, the space available per prisoner in the cells should be 7 square metres, with a distance of 2 metres between the walls and 2,50 metres between the floor and the ceiling. Moreover, each prisoner should be able to spend at least eight hours a day outside his or her cell, another element conflicting with the facts reported by the individual applicant, in the case at hand. Such parametres, it must be recalled, were presented as “desirable” by the CPT; still, as pointed out by the applicant, the Court had already referred to them on multiple occasions.⁷³ Today, especially after the ECtHR Grand Chamber *Muršić v. Croatia* judgement, from 2016, such standards have been lowered, as 3 square metres of surface area

⁷⁰ ECtHR, *Sulejmanovic v. Italy*, 2009.

⁷¹ Id.

⁷² See at: <<https://www.coe.int/en/web/cpt/home>>.

⁷³ See ECtHR, *Kalashnikov v. Russia*, 2002.

per detainee in a multi-occupancy cell appears to have become the applicable minimum standard to strongly presume a violation of Article 3 ECHR.⁷⁴

In its decision from 2009 against Italy, the Court found a violation for the period of detention from January to April 2003, stating that “the applicant’s flagrant lack of personal space constituted inhuman or degrading treatment”.⁷⁵ It also recalled the *absolute* nature of the prohibition set by Article 3 ECHR, stressing that the serious repercussions that prison overcrowding can have on prisoners’ rights, including the right not to be subjected to inhuman and degrading treatment, should not be underestimated. It also noted that a problem of overcrowding undoubtedly existed in the Roman Rebibbia penitentiary at the time of the applicant’s deprivation of liberty.

After the ECtHR judgement, the overall situation – which regarded the Rebibbia penitentiary, but, in general, all the Italian prison system – did not improve in subsequent years. If anything, it was exposed even more.

In January 2013, it was the landmark *Torreggiani* case, once again in front of the ECtHR, to bring the focus back to the issue.⁷⁶ This time, however, the Strasbourg Court did not decide on an individual application. Quite extraordinarily it employed the so-called “pilot-judgement procedure”, first introduced jurisprudentially in 2004 to deal with systemic and structural deficiencies within a national legal order. After a previous case against Russia, this was the second-ever time that such complex procedure was used against one of the 47 CoE Member States (now 46, after Russia’s expulsion in 2022) for the violation of Article 3 ECHR.

The case stemmed from seven applications against Italy, from individuals complaining in particular about the conditions in which they had been held in the Busto Arsizio and Piacenza prisons for different periods of time, between November 2006 and June 2011. The Court considered that the applicants were not provided with a living space that complied with the parametres it had found

⁷⁴ ECtHR *Muršić v. Croatia* [GC], 2016.

⁷⁵ ECtHR, *Sulejmanovic v. Italy*, 2009, para. 43.

⁷⁶ ECtHR, *Torreggiani v. Italy*, 2013.

acceptable in its case law; in all cases, in fact, it was inferior to 4 square metres, exacerbated by a lack of hot water for a long period of time and inadequate lighting and ventilation. The Court considered that such detention conditions, having regard also to the length of the applicants' imprisonment, "subjected them to an ordeal of an intensity which exceeded the unavoidable level of suffering inherent in detention", therefore finding a violation of Article 3 ECHR.

Furthermore, the Court, based on the information received, found that prison overcrowding in Italy did not exclusively concern the applicants' cases. In particular, it noted that the *structural* and *systemic* nature of prison overcrowding in Italy was clear from the *statistical data* referred to above and from the terms of the declaration of a national state of emergency by the President of the Italian Council of Ministers in 2010 himself, already extended (at the time, January 2013) twice. As of 13 April 2012, Italian prisons housed 66.585 inmates, representing an overcrowding rate of 148%; 42% of the inmates were awaiting trial and held in pre-trial detention.⁷⁷

Taken together, these facts showed, according to the Strasbourg Court, that the violation of the applicants' right to adequate conditions of detention "was not the result of isolated incidents but stemmed from a systemic problem resulting from a chronic malfunctioning of the Italian prison system which had affected and was likely to continue to affect many people".⁷⁸ This practice was incompatible with the Convention and confirmed by the several hundred applications against Italy, constantly increasing, already received by the Court.

As a consequence, the Court decided to apply the pilot judgment procedure to facilitate the quickest and most effective resolution of such systemic malfunction. In doing so, it reiterated that, "in view of the non-derogable nature of the right protected by Article 3 of the Convention, the [Italian] State is under an obligation to organise its penitentiary system in such a way that the dignity of prisoners is respected".⁷⁹

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

In particular, it stressed that it is not up to the Court itself to indicate the specific necessary actions. Such task was incumbent on the Italian State, under the supervision of the Committee of Ministers, either by reducing the prison population, by building new penitentiary centres and by introducing new remedies or amending already-present ones for allowing preventive and compensatory redress. They were to be put in place within one year from the date on which that judgment was to become final. It especially underscored that, in matters of prison conditions, “‘preventive’ and ‘compensatory’ remedies must co-exist in a complementary manner”.⁸⁰

Such landmark judgement was followed by several others in front of the Strasbourg Court. Among them, for instance, the Court found violations of Article 3 ECHR in the *Viola* case, from 2019, in relation to the so-called “*ergastolo ostativo*” (irreducible life sentence), or in the very recent *Libri* case, from January 2024, concerning inadequate health care for a prisoner in serious need, can be accounted. Another application, stemming from the death of nine inmates in March 2020 in the Modena prison during a covid-related riot (thirteen deaths in total in Italy), is currently pending before the ECtHR, too.

Such cases demonstrate how the apparently positive reaction from the ECtHR in the *Stella* case, from 2014, one year after the *Torreggiani* pilot-judgement, has not found support in subsequent actions.⁸¹ In sum, the problem still seriously persists.

This is substantiated by the last report, from 2023, of the National Guarantor of the rights of persons deprived of their personal liberty (“*Garante nazionale dei*

⁸⁰ Id.

⁸¹ ECtHR, *Stella v. Italy*, 2014. In such case the Court found an inadmissibility of applications lamenting the lack of effective remedies in respect to prison overcrowding in Italy, following the *Torreggiani* pilot-judgment: “Following the communication of the applications to the Government, the Court had applied the pilot-judgment procedure in the case of *Torreggiani and Others v. Italy*, in which it had noted that prison overcrowding in Italy represented an endemic and structural problem. [...] Following that judgment, the Italian State had enacted a number of legislative measures aimed at resolving the structural problem of overcrowding in prisons and, in parallel, had reformed the law to allow detained persons to complain to a judicial authority about the material conditions of detention and had also introduced a compensatory remedy providing for damages to be paid to persons who had been subjected to detention contrary to the Convention. [...] The respondent State’s domestic authorities had thus complied with the principles established in the Court’s case-law in this area, and with the findings set out in the pilot judgment under Article 46 of the Convention”.

diritti delle persone private della libertà personale”) to the Italian Parliament. The report is rather striking, while painting an ongoing bleak picture of the current conditions of the overall Italian prison system:

A decade after the ECHR Court’s ruling in *Torreggiani and others v. Italy*, our country does not seem to have resolved many of the critical issues that characterise its prison system. A clear symptom of this is the general increase in critical events that represent a sort of thermometer of the quality of the prison system and in particular of in particular of hetero- or self-directed ones, such as suicide acts, which in recent years have shown an increasing trend. The widespread structural degradation, the precarious hygienic and sanitary conditions of many detention areas, the absence in many cases of premises for treatment activities, the inadequacy of space, resources and personnel necessary to meet the numerous needs of health care needs of detainees, just to mention a few of the critical issues underlying the condition of widespread malaise, in the majority of cases have not yet found a solution, while, on the other hand, the chronic phenomenon of prison overcrowding is still present and extremely influential.⁸²

These words make obvious, once again, the need for a structural reform in this sector in Italy. *Systemic* and *continuous* violations to the fundamental right to live in basic human conditions are currently in place – and have been, for decades – for the 60.382 prisoners and detainees from all over the country, as per the last census (from 17 January 2024), with a current overcrowding ratio of 127,48%.⁸³ Furthermore, the overall ineffectiveness of the attempts – judicial and not – to fill the mass gaps in the enforcement of “one of the most fundamental values of a democratic society”, borrowing once again the words of the ECtHR Grand Chamber from 2015, manifestly emerges from them.

The second type of cases for which the use of class actions is hereby proposed is that of *migrants and asylum seekers*. Such infringements are strictly connected to those of prisoners’ and detainees’ rights. As a matter of fact, the same report from the National Ombudsman of the rights of persons deprived of their personal liberty

⁸² Available here, at p. 100:

<<https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/fc13013de38c3ba97c6d0357fe21b941.pdf>>.

⁸³ Id, p. 40.

spends significant words on the increasingly worse and, to some degree, less talked-about conditions in the Italian “Detention centres for repatriation” (“*Centri di permanenza per il rimpatrio*” – “*Cpr*” –, substituting the previous “*Centri di identificazione ed espulsione*” – “*Cie*” –, that is “centres of identification and expulsion”), as well as in the “Reception centres for asylum seekers” (“*Centri di accoglienza per richiedenti asilo*” – “*Cara*”) or in the so-called “hotspots”, acting as “suitable premises” to be used only – more in theory than in practice – as a kind of back-up of *Cprs* at police headquarters.

Such report from the National Ombudsman, as well as the specific ones for individual centres, underscores an equally dramatic picture in such centres, where fundamental rights – namely that to a judge, to health and to “relational connections” – are often deprived from migrants. In sum, once again Italy appears to be violating in a systemic and structural manner the prohibition from Article 3 ECHR, to avoid inhuman and degrading treatment; a prohibition which, as already stated, amounts to one of the most cardinal values of any democratic society, and is also set forth in the CFREU and in the Italian Constitution itself. In the words of the National Guarantor of the rights of persons deprived of their personal liberty:

This absence of connection is plastically represented by these places being emblematic of emptiness, both spatial and temporal.

Spaces often designed only to contain, without any activity or meaningful internal relations, in a flow of time characterised by the indeterminateness of the outcome of its unfolding. A reality in which strongly harbours anger, failure, the desire for destruction and self-destruction.

[...] three aspects of protection because I believe that the shortcomings of each of them in the present context give the physiognomy of the current form of administrative detention: ever more extensive, in ever more varied places with little or no openness to the outside world, always lacking in fundamental safeguards. The risk is that it tends to legitimise itself more as a reassuring measure for the community rather than as an effective component for a strategy that, as has been repeatedly affirmed, including in recent times, succeeds in reducing situations of irregular presence on

national territory and the consequent risks, also in terms of possible criminal connections.⁸⁴

[...] On the de facto deprivation of liberty, the regulatory perspective is still lacking, especially with regard to detention practices in hotspots or in the waiting areas of airport transit zones.⁸⁵

Furthermore, with regard to *Cprs*, the report stresses how, in 2022, out of 6.383 individuals detained in the *Cprs* only 3.154 – that is, 50,60 % – have been effectively repatriated in the end. This makes, in practice, the deprivation of liberty of the remaining 49,40 % – an “inviolable” right, as per Article 13 It. Const. – in most cases, at the very least, questionable.⁸⁶

These data are aggravated by recent protests in *Cprs*, such as that from Milan in via Corelli from February 2024, for the unbearable treatment received by migrants every day, with harsh videos surfacing of them being beaten down by public officers with truncheons, practically naked, under the heavy rain and covered with mud.⁸⁷

Evidently, these issues are much wider and regard all European countries. This has been recently highlighted, for instance, in a recent article from March 2024 by Dunja Mijatović, then still Council of Europe Commissioner for Human Rights:

Europe’s insistence on looking tough on migration is endangering rule of law across the Continent. Pursuing ever more stringent asylum and migration policies, European countries are not only perpetuating human rights violations against asylum seekers and migrants; they are also dismantling collective human rights safeguards, as well as eroding wider legal and democratic checks and balances that protect all our rights.⁸⁸

The ECtHR itself has repeatedly condemned Italy for its violations of Article 3 ECHR in relation to migrants’ degrading and inhuman treatment in its reception centres. Three recent notable cases against Italy, for instance, are *J.A. and others*, *M.A.*, and *A.B.*, all from 2023, in all which the Court held – unanimously – that there had a violation of Article 3 ECHR for the conditions to which the migrants

⁸⁴ Id., pp. 47 and 48.

⁸⁵ Id., p. 78.

⁸⁶ Id., p. 46.

⁸⁷ See, e.g.: <<https://www.milanotoday.it/cronaca/migranti-nudi-pioggia-cpr-2024.html>>.

⁸⁸ Available at: <<https://www.politico.eu/article/looking-tough-on-migration-is-eroding-human-rights/>>.

were subjected while in the Lampedusa hotspot. In its assessment, the ECtHR gave great relevance to the reports from previous years of the already mentioned National Guarantor. It also acknowledged how, in general terms, living conditions in hotspots were criticised by the UN Committee against Torture in its 2017 reports on Italy.

In conclusion, to this day, as shown, no concrete substantial improvement seems to have occurred in relation to either of the two issues until now raised.

3. The common law experience with prisoners' class action litigation. Plata, Ashker and Brazeau cases

As mentioned, the common law experience with class actions offers a large number of cases related to detention conditions in prisons. As accounted by local scholarship, such cases have been successfully brought for decades now, mainly in relation to prison overcrowding. Recent years, furthermore, have seen a filing of class action suits by migrants, too, i.e. in relation to the unhealthy and degrading conditions in detention centres.

Given the more established case law to this regard, as well as the existence of a considerably more developed academic scholarship, the present paragraph will merely concentrate on cases related to *prisons and penitentiaries*. Still, as resulting from the examination of the Italian system, it can be argued that these cases share numerous similarities with the ones of *migrants and asylum seekers*. Hence, the lessons derivable from studying the former will be applied also to assessing the future viability of class actions in Italy for the enforcement of the latter's rights. Any relevant differences will, however, be reported in the concluding paragraph when relevant.

The chosen cases pertain to the US and Canada jurisdictions. They have managed to successfully improve the conditions of inmates, achieving both structural reform and injunctive and compensatory relief.

The first illustrative one, on which we shall concentrate in depth, is the *Brown v. Plata* case. *Brown v. Plata* started as a lawsuit filed in 2001, in the US Northern District Court of California, initially named *Plata v. Davis* and then *Plata v.*

Schwarzenegger, which reached the US Supreme Court in 2010 (decided in 2011). Due to its massive proportions and ramifications, it has been described by academic commentators as “the most significant class action litigation of the past decade”.⁸⁹

It stemmed from the unbearable overcrowding of California’s state prisons, which were accommodating approximately 150.000 inmates despite being designed to hold a maximum of approximately 80.000 people. While the numbers increased, the conditions of incarceration worsened for all the inmates, from the quantity of personal space available, to basic systems of health, lightning, ventilation, control and security. This caused a surge also in the number of accidents, suicides, fights and physical and mental illnesses, with several deaths reported, too.

Special attention to the *lack of sufficient health care* – or its delay – was initially stressed by the applicants in the class action. As accounted, an *unnecessary inmate death* once every six or seven days on average was being reported because of such systemic failures.

The plaintiffs were ten inmates from different California state prisons who had been “seriously injured because of the defendants’ deliberate indifference to their serious medical needs in violation of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution”. A *subclass* was also presented, encompassing prisoners with disabilities.

The class action was an *injunctive* one, under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of the class of all the prisoners with serious medical needs who were then, or would have been in the future, under the custody of the CDC (California Department of Corrections), excluding prisoners from Pelican Bay State Prison. The reasons for class treatment, apart from a purported commonality of questions of law and fact, were the numerosity of the class, which made joinder of all members impracticable, and the risk of inconsistent or varying adjudications establishing incompatible standards, should the class members proceed separately.

The plaintiffs sought a declaration on the unconstitutionality and unlawfulness of the conducts suffered, as well as an injunction from subjecting the whole class

⁸⁹ ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44.

to said “acts, omissions, policies, and conditions”. Monetary damage was sought only for the named plaintiffs. The class was filed against the Governor of California, the California Department of Corrections (CDC) and several Directors and public officials therein connected, in their official capacity.

In 2002, a *settlement* was successfully negotiated between the parties and subsequently approved as fair, reasonable and adequate by the Court. Such order, however, was *appealed* by the defendants, with a consequent continuation of the litigation. It must be noted that the litigation is still ongoing today, although with very positive progress, as accounted by the Court itself (i.e., in 2012).

The first relevant result of the litigation was the court appointment, in 2005, after six continuous days of evidentiary hearings, of a *Receiver* “to take control of the delivery of medical services to all California state prisoners confined by the California Department of Corrections and Rehabilitation (“CDR”)”. Based on the abovementioned statistics of a preventable inmate death every six to seven days due to constitutional deficiencies in the CDR’s medical system, the court found that a “dramatic overhaul” was necessary. The situation, according to Judge Thelthon Henderson, could not be “more grave, and the threat of future injury and death is virtually granted in the absence of drastic action”. He also stated: “By all accounts, the California prison medical care system is broken beyond repair”. The Receiver was bound to give a report initially twice (subsequently three times) a year and had extraordinary power to implement a plan for action. Such power was also *economic*, with orders of payment of millions of dollars and the possibility of constructing new buildings or hiring new personnel.

It was on the wake of this plan and of the Receiver’s reporting, that the problem of *prison overcrowding* and its interfering effect on overhauling the prison health care system emerged. These led to a plaintiffs’ motion to convene a new three-judge district court to impose a *population cap*, with consequent reduction of the number of inmates in the CDR prison system.

As a result of such motion, a new litigation path emerged which led to the above-referred Supreme Court decision in 2011. With a five-to-four majority such Court affirmed the previous injunction order to reduce the prison population by releasing

approximately 46,000 inmates. According to the Court, such order was an *extrema ratio* due to the legislative and executive powers' longstanding unwillingness or inability to find the financial resources necessary to remedy the systemic and structural problem. Since no other relief could have remedied the violation and substantial flexibility had been given to the State in determining its execution, the order was affirmed by the Supreme Court.

Subsequently, in practice, as expectable, a substantial restructuring of the prison system was enacted by California legislature, with the passing of new regulations, the redefinition of several felonies and the moving of numerous inmates from California prisons to county jails.

Today, as per the last official report from the CDR, from 6 December 2023, California's adult prison population is 91,429, occupying 121% percent of its current design capacity.⁹⁰ Considering the almost 200% capacity from 2001, when the first *Plata* injunctive class action was started, the outcome has been, by all means, massive.

Other cases to account, briefly, are *Ashker v. Brown* and *Brazeau v. Canada*.

Ashker v. Brown was another class action suit filed against the California state prison system, this time in relation to solitary confinement in the Pelican Bay Security Housing Unit. Similarly to the *Plata* case, it started out, in 2012, as an *injunctive* suit, with ten named plaintiffs who had been placed in solitary confinement for over a decade on the basis of a purported gang-association or membership.

The class included all the approximately 1,100 inmates serving indeterminate SHU sentences at the Pelican Bay SHU on the basis of gang validation. Also in this case, a *subclass* was proposed, including all inmates who were then, or in the future, imprisoned at the Pelican Bay SHU under the same conditions and policies for longer than ten continuous years, in violation of the Eighth Amendment. They sought declaratory and injunctive relief, including an order compelling the defendants (i.e., the Governor of California and several other related state

⁹⁰ See: <<https://www.cdcr.ca.gov/3-judge-court-update/>>.

authorities)⁹¹ “to swiftly develop constitutionally-adequate procedures for reviewing ongoing placement in the SHU, to release from the SHU those prisoners who have languished under the cruel conditions there for over a decade, and to alleviate the conditions of confinement for all Pelican Bay SHU prisoners”.

In 2014, the case was *certified* by the Court as a class action. Interestingly, the main issue was the *commonality* test. According to defendants, “a host of individual questions not subject to classwide proof” were present. In the court’s view, nonetheless, such requirement was met since, to satisfy it, “a plaintiff need only show that his or her claims raise *some* questions that are amenable to classwide adjudication”.

In particular, the common questions of law and fact raised by the plaintiffs were identified *a)* in the long-term confinement inside the Pelican Bay SHU, exposing inmates to a “sufficiently serious” deprivation of basic human needs and *b)* in the defendants’ common conduct, in assigning inmates to the SHU for indefinite terms acted with a “sufficiently culpable state of mind”. The fact that the conditions in the SHU and the mental health risk were *common* was deemed sufficient, whereas the fact that different inmates may exhibit *different symptoms* was not sufficient to defeat commonality. Pursuant to the Court, individual factual differences were even less decisive for such test, in class actions challenging a “*system-wide*” policy.

After certification, a *landmark settlement* was reached in 2015 that fundamentally altered the nature of SHU confinement in California.⁹² It dramatically reduced it, changed it from a status-based (gang affiliation) to a behaviour-based system, proposed valid alternatives, allowed more out-of-cell time and introduced constant monitoring. It was approved by the Court.

For the sake of completeness, it must be pointed out that the execution of such settlement has not been fully respected by the defendants and that, therefore, the

⁹¹ Namely CDCR’s Secretary, Pelican Bay’s Warden, and the Chief of CDCR’s Office of Correctional Safety, each of whom was sued in his official capacity. This is why the suit, originally “v. Schwarzenegger”, was later amended in “v. Brown”, upon the changing of the California Governor.

⁹² Available here: <https://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement_Agreement.pdf>.

litigation is still ongoing. Nevertheless, like in the previous *Plata* case, significant progress has already been made.

Finally, the last case reported is *Brazeau v. Canada (Attorney General)*.⁹³ Such Canadian class action shares elements of both previous US class actions in *Plata* and *Ashker*. Contrarily to them, however, it introduces the issue of *damages* and *compensatory* collective relief. Rather than from a single action suit, it stemmed from a multiplicity of suits (apart from *Brazeau*, also *Reddock v. Canada (Attorney General)* and *Gallone c. Canada (Attorney General)*), in front of the Ontario Superior Court of Justice and of the Superior Court of Québec, subsequently united in a jointly written decision. The reason for this was the fundamental intertwining between them.

The main facts of the case involved once again inmates of penitentiaries, this time operated by the Correctional Service of Canada (“CSC”). In particular, in the original *Brazeau* class action suit, filed in 2015, the plaintiffs sued the Government of Canada (represented by the Defendant Attorney General of Canada) for breaches of ss. 7 and 12 of the Canadian Charter of Rights and Freedom. They lamented the conditions of their administrative segregation – i.e., solitary confinement, very similarly to the *Ashker* case –, *systemic failures* in providing them with the necessary health care and, as a consequence, a worsening and further developing of serious medical illnesses (physical and, mainly, mental). Moreover, they alleged that they had been deprived of necessary medications for long periods of time and that they had suffered *damages* due to the systemic abuses perpetrated by Canada, for which they sought compensation.

After a series of amendments, the original *Brazeau* class was *certified* in 2016 as composing:

All offenders in federal custody, who were placed in administrative segregation in a federal institution situated outside Québec after February 24, 2013, or who placed in administrative segregation in a *federal institution anywhere in Canada* before February 24, 2013 were diagnosed by a medical doctor with an Axis I Disorder

⁹³ See *Brazeau v. Canada (Attorney General)*, 2020 ONSC 7229 (CanLII), <<https://canlii.ca/t/jbw7p>> and *Brazeau v. Canada (Attorney General)*, 2021 ONSC 1828 (CanLII), <<https://canlii.ca/t/jdpmf>>.

(excluding substance use disorders) or Borderline Personality Disorder, who suffered from their disorder, in a manner described in Appendix A, and reported such during their incarceration, where the diagnosis by a medical doctor occurred either before or during incarceration in a federal institution and the offenders were incarcerated between November 1, 1992 and the present, and were alive as of July 20, 2013.⁹⁴

At this point, after certification, the parties tried to *negotiate*, as required, the so-called Distribution Protocol and of the Individual Issues Protocol, in order to determine the procedure for assessing individual issues of damages, given the individual difference between each inmate. These differences regarded, for instance, the number of days under administrative segregation or the type and seriousness of the illness suffered as a result, or worsened after such segregation. Since no agreement was found, the superior courts of Ontario and Québec agreed to hold a joint hearing to determine themselves such criteria.

We shall not go currently into detail on such complex determinations. Merely the following elements, of interest for the present analysis, shall be considered.

First, the class action regards, with specifications, inmates from federal penitentiaries “*anywhere in Canada*”. Such amplitude of the class is key. The courts of Ontario and Québec certified the class in spite of evident *differences* in the questions of law and fact. Such different legal and factual elements stemmed also from the different time frame and personal illnesses reported by each individual inmate, in each prison.

Evidently – and we agree – the courts deemed such lack of identity of the questions of law and fact not decisive for the future joint management of the class nor relevant for determining commonality. This is in line with the definition of “*common issues*” under the Canadian Class Proceedings Act, from 1992, as “(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts”. This point raises important interpretative questions, in relation to

⁹⁴ See *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836 (CanLII), <<https://canlii.ca/t/gw1xd>>.

the *homogeneity* requirement in Italy, which have already been raised and to which we shall return below.

Second, the class action was a *damages* one. The damages sought were Charter and punitive ones, to be awarded, firstly, in the *aggregate* (as a base award) to the class and, then, through an *individual damages* assessment as compensation for pecuniary and non-pecuniary personal injury sustained by each class member.

Again, this follows the Canadian Class Proceedings Act, from 1992, which, in Section 24, establishes the possibility for the court to determine the *aggregate* or a part of a defendant's liability to class members where "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability" and "the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members". In this case, the court may also order that such award be shared by individual class members on an average or proportional basis. In such circumstance, the court also determines *non-complex procedures* for individual class members to present their claims, i.e. by using standardised proof, receipts or other documentary evidence, and even the auditing of claims on a sampling or other basis.⁹⁵

Furthermore, pursuant to Section 27.2 of the same Act:

The court may order that all or part of an award under section 24 that has not been distributed to class or subclass members within a time set by the court be paid to the person or entity determined under subsection (3) on a *cy-près* basis, if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly.

The person or entity determined under subsection (3), to whom payment of non-distributed damages, should be made on a *cy-près* basis are:

(a) a registered charity within the meaning of the Income Tax Act (Canada) or non-profit organization that is agreed on by the parties, if the court determines that payment of the amount to the registered

⁹⁵ Available at: <https://www.canlii.org/en/on/laws/stat/so-1992-c-6/latest/so-1992-c-6.html#sec24_smooth>.

charity or non-profit organization would reasonably be expected to directly or indirectly benefit the class or subclass members; or
 (b) Legal Aid Ontario, in any other case.

The issue of *cy-près* and *fluid recovery* schemes has been already discussed in *Chapter VII* as a valuable distribution alternative, at the moment alien to the Italian system but certainly to be considered for the future.

In the case at hand, 20 million \$ were awarded as an *aggregate damages* award, to be subsequently distributed with a specific and detailed scheme to the *class members*, as a partial remedy for their unlawful placement in administrative segregation, contrary to ss. 7 and 12 of the Canadian Charter of Rights and Freedoms.⁹⁶ The class members were also granted judgments to have their *individual damages* determined. Proportionally similar judgements were also awarded in the *Reddock* and *Gallone* cases, whose decision were subsequently joined to *Brazeau*.

Third, after judging on the common issues, the court had to set out the procedure for the *individual issues* determinations. This phase, subsequent to the ruling on the common issues of the class, regards issues that require the participation of individual class members, which, as a consequence, shall be determined individually.⁹⁷ In doing so, the court, pursuant to the Canadian Class Proceedings Act, section 25(3), has a great margin of *flexibility* in determining the procedure. This can be done either by dispensing unnecessary procedural steps and by authorising any appropriate special procedural steps, also relating to discovery and proof. Furthermore, a reasonable time frame within which individual class members can present their claim is set, too. Naturally, an adequate plan for *dissemination of notice* had to be provided, too.

In the case at hand, without entering into details, it should be noted that the courts, after taking into account the plaintiffs' and defendants' proposals (since they could not reach a settlement), drafted a rather *articulated plan of distribution*. As

⁹⁶ This was the result of an overturning in appeal. In the initial summary judgment decision, in fact, the 20 million \$ award less Class Counsel's fee were to be paid by Canada for additional mental health or program resources at its penitentiaries.

⁹⁷ Sections 11 and 25, Canadian Class Proceedings Act.

summarised by the courts themselves, such plan had nine major elements. The ones we shall highlight are two.

On the one hand, individual class members were provided with a “claims form” in which they could select one of *three different tracks* to make their claim for individual compensation. Each track entailed a different, progressively more complex, assessment procedure, as well as a different, progressively higher, monetary range of the individual damages sought.

On the other hand, the key involvement of a so-called “*Administrator*” and of a “*Roster of Manager/Experts*”, named by agreement of the parties or by order of the court, must be noted. Such manager/experts were not appointed as referees with adjudicative authority. They had, nevertheless, the key function of determining the individual class member’s eligibility to receive a share of the distribution of the aggregate damages award by reviewing the claims form and their file, reporting to the administrator. They were also in charge of determining, for track 2 claims, the quantum of the individual class members’ claims by reviewing the claims form, their individual file, the affidavit material, the transcripts, and facts filed by both the individual class Member and the defendant, reporting to the Ontario Superior Court of Justice or to the Superior Court of Québec.⁹⁸

Rather significantly, such manager/experts were required to have *proven medical knowledge*.⁹⁹ Moreover, also relating to experts’ contribution, as set forth under Section 23 of Canadian Class Proceedings Act, for the purposes of determining issues relating to the amount or distribution of a monetary award, “the court may admit *as evidence statistical information* that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted

⁹⁸ Track 3 claims, instead, were presented, for individual damage, to a judge of the Ontario Superior Court of Justice or of the Superior Court of Québec who would determine the class members’ claim pursuant to a summary judgment procedure or an analogous procedure.

⁹⁹ “(a) a person licensed to practice medicine in any Canadian jurisdiction; (b) a person licensed to practice psychology in any Canadian jurisdiction; (c) a person registered as a psychotherapist in any Canadian jurisdiction; (d) a person registered as a psychiatric nurse in any Canadian jurisdiction; or (e) a person licensed as a psychiatric social worker in any Canadian Jurisdiction.”, para. 110.

Available at:

<https://www.canlii.org/en/on/onsc/doc/2020/2020onsc7229/2020onsc7229.html#_Toc57119296>

by *experts* in the field of statistics”. The explicit reference to the possibility of using *statistics* has been repeatedly mentioned in the Italian cases commented in the previous two Chapters, although with contrasting interpretative views. On this, we shall return in the following.

Last, the conclusive aspect to underscore about the *Brazeau* class action is shared with the previous two US cases commented, the *Plata* and *Ashker* Californian class actions. It is the question on who the class *defendants* were: in *Brazeau*, the Attorney General of Canada; in *Plata* and *Ashker*, the Governor of California, the California Department of Corrections (CDC) and several Directors and public officials therein connected (i.e., also prisons’ wardens), all in their official capacity. The relevance of this element is cardinal when assessing the possibility of similar class actions in Italy, as discussed below.

4. Comparative evaluations and room for future (class) actions.

The three reported class actions related to prisoners’ rights in US and Canada are particularly illustrative to show the potential of this type of litigation. They have been selected among a large array of cases in order to extract lessons that may prove valuable to anyone evaluating similar proceedings in Italy, pursuant to Title VIII-*bis* c.p.c., herein analysed. Both *practical and procedural advantages* emerge in relation to other litigation models employed until now, i.e. the above-referred individual applications or the pilot-judgement procedure before the ECtHR. At the same time, also *potential obstacles* arise that may hinder an efficient use of the class action mechanism in this particular field. It is hereby relevant to highlight them, too, in order to suggest – especially in the next conclusive Part – interpretative, institutional and regulatory solutions.

With this objective, the present paragraph shall concentrate on the following issues.

(i) The main question mark concerning prisoners’ and migrants’ rights class actions in Italy, under the 2019 regime, is that of the *standing to be sued*. As presented, Articles 840-*bis*, para. 3 and Articles 840-*sexiesdecies*, para. 2 c.p.c. establish that both compensatory and injunctive class actions in Italy can be brought

against companies or against entities managing public services or public utility services, in respect of acts and conducts in the performance of their respective activities. The notion of “*entities managing public services or public utility services*” is therefore crucial.

In fact, one should wonder if – recalling the US and Canadian cases – the state attorney general, the governor, the national department of corrections, the single penitentiary entity and the directors and public officials connected to them, all considered in their official capacity, may be called as defendants under the Italian provisions, too.

By all means, it seems that all these subjects – especially the single penitentiaries – can be encompassed under the notion of entities managing public services or public utility services. Their *public nature* is highlighted by the fact that they are all called as defendants “in their official [that is, public] capacity”. Their role is that of ensuring penitentiary treatment and the execution of criminal judicial decisions (in the case of prisoners and detainees). Criminal law, as is known, has, *inter alia*, general-preventive and deterrent functions, which seek the benefit (hence, utility) of the whole society (hence, the public). Criminal sanctions, as set forth under Article 27, para. 3 of the Italian Constitution, furthermore, must aim at the re-education of the convicted person. Such re-education, as specified by Article 1, para. 2 of the Italian law on the prison order (“ordinamento penitenziario”), should aim, also through contacts with the outside, to social reintegration. As per Article 15, para. 1 of the same law, the treatment of convicts and inmates should be carried out “through education, vocational training, employment, participation in projects of *public utility*, religion, cultural, recreational and sporting activities”. Moreover, pursuant to Article 20-ter, para. 1 of the same law, they may even work voluntarily and free of charge within the framework of *public utility* projects, both internal and external. Hence, the close connection with *public utility services* and *public services* which are indeed part of the activities carried out by penitentiary centres and their officials.

In addition, as discussed in *Chapter VII*, the jurisprudence, albeit very limitedly, has already confronted this issue under the previous consumer-focused class action

regime under Article 140-*bis* of the Consumer Code. In 2012, in the *Agostino Gemelli* case,¹⁰⁰ before the Rome Tribunal, standing to sue was admitted against a hospital, which – for several degrees – may be equated to a prison. In that case, the court deemed the class action admissible based on a systematic interpretation of the term “company”, which included “activities connected to intellectual professions, traditionally excluded from business activities, and activities carried out by public entities”, as well as “the healthcare facility operating under an agreement with the National Health Service”.¹⁰¹

Specifically, by combining Articles 2082 of the Civil Code and Articles 3 and 18 of the Consumer Code, the Rome Tribunal rejected the restrictive interpretation of “company” necessarily connected to the “for profit” purpose, “since the absence of such an *aim* does not in itself *preclude* the possibility of qualifying the activity as entrepreneurial”, as long as it is based on *professionalism* and *economic efficiency*. The same reasoning can be applied to the case of prisons, since their activity is also based on these objectives.

(ii) Slightly more complex may appear the issue of coordination with the so-called *administrative* or *public class action*, pursuant to legislative decree 198/2009, in front of the administrative judge. Such action, as anticipated above, concerns “appeals for the efficiency of administrations and public service concessionaires”. As discussed, such provisions are preserved pursuant to Article 840-*bis* c.p.c., with an express reference, and Article 840-*sexiesdecies*, which refers in general (and more confusingly) to “special legislation”.

Such conflict, nevertheless, is only apparent. In fact, as developed *supra* (Chapter VII), the goal of the – three – class action models is rather different:

- a) the *compensatory* device, under Article 840-*bis* ff c.p.c., aims at economic redress or restitution after a suffered *harm*;
- b) the *injunctive* one, pursuant to Article 840-*sexiesdecies* c.p.c., seeks an order to *cease* an activity which is causing prejudice, to be conceived elastically, thus also as the *risk* of a *future* harm;

¹⁰⁰ See *supra*, Chapter VII.

¹⁰¹ *Id.*

c) the *administrative* one, as per l.d. 198/2009, focuses on achieving a *specific result*, corresponding to the correct performance of services, respect of standards or deadlines set by the law, regulations or charters.

The admissibility of each action, as a consequence, depends on the specific formulation of the *claim* by the class plaintiffs. The strategy, evidently, will be closely connected to the concrete nuances of each case.

(iii) To this regard, the *injunctive* class action appears particularly powerful and feasible for cases of prison overcrowding or migrants' mistreatment in Cprs or hotspots in Italy. A *collective* suit could indeed be effectively brought on behalf of all the inmates subjected to the same degrading and inhuman treatment seeking the ceasing of the conducts causing it (i.e., filling cells with too many inmates, or a lack of appropriate health care in Cprs or migrants' hotspots). In this perspective, Samuel Issacharoff's comment on the *Plata* case seems applicable to the Italian situation, too: "Absent unitary treatment through a class action, no prisoner would have a claim as to the *systemic* violations caused by overcrowding, but only standing to seek legal redress for his or her *individual* harms".¹⁰²

The ECtHR's inability to provide concrete *structural* redress, could be overcome by the simplicity and yet profound force of the class injunctive tool. The (correctly) broad readings developed until now by the Italian courts (namely the Tribunal of Milan), especially in the *ILVA* and *Philips Respironics* cases, when assessing the admissibility of the suits bodes well with an access to justice perspective. This is relevant both in relation to the commonality/homogeneity (see *supra*, Chapter VII) of the subjective positions prejudiced, but also to the very concept of prejudice. The latter, according to the Tribunal of Milan in the abovementioned cases can entail a mere *risk* of a *future* harm.

The representative character of the class suit, on the one hand, and the lack of any adhesion phase for the injunctive action (no necessary opt-in or opt-out phase), on the other hand, makes the procedural instrument's potential extremely

¹⁰² ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44.

disruptive. In fact, in its decision, the court would need to evaluate the interests of the whole class. As such, very much alike the *Plata* or the *Ashker* case, it would inevitably need to adopt a *systemic* view. A systemic standpoint which, it could be argued, is by a certain degree *intrinsic* to the very nature of the injunctive class action, given the two elements recalled above: the *representative* nature and the *erga omnes* effects, due to a lack of any necessary adhesion.

(iv) The ECtHR case law, nevertheless, may still prove crucial for the litigation at hand, at least in Italy. The constant search for *authority support*, highlighted above, in relation once again to the *ILVA* and *Philips Respironics* cases, may be fulfilled through it. A declared infringement of systemic nature by the supranational courts certainly eases the work of the first-degree judge, called to an order of such potential magnitude. The backup of other institutional documents and reports can be paramount, too (e.g., see those, *above*, from the National Guarantor for the rights of the detained persons or deprived of their personal liberty).

(iv) The possibility of using *statistical data* and simple presumptions, as discussed *supra*, has been mentioned by some courts (e.g., *Philips Respironics*, *Deliveroo* or *ITA Airways* cases – not the *ILVA* one) as interpretative evidence of the non-complex nature of the evidentiary assessments that class actions can perform. On the one hand, it must be noted the key use that the common law experience offers with these data, especially in prisoners' rights cases, as commented above. On the other hand, the complexity of these cases – still ongoing, in the *Plata* case for more than two decades – should be taken as models by judges.

(v) The role of *judges*, indeed, as argued in the next Part, is crucial. In these types of proceedings – of high complexity, of high stakes and of high flexibility – they become the leading directors. As such, they need to embrace their newfound function and the procedural flexibility awarded to them, in terms of evidence and structuring of the proceedings. In such role, it becomes fundamental that they seek the support of experts to share the otherwise unsurmountable managerial burden and any technical deficiencies– e.g. in the *Brazeau* case –, not eschewing from inviting the parties to settle when necessary and, most importantly, from elaborating articulated plans or creating technical support groups. The division into several

ranks of the different potential individual claims and the presence of a *roster* of medical managers/experts (and one administrator) in the *Brazeau* compensatory class action needs to be underscored once again.

(vi) The compensatory relief, observed in *Brazeau*, deserves a final reflection.

First, any pondering on limiting the application of the 2019 damages class action in Italy, contrarily to its access-to-justice rationale, on the basis of a strict interpretation of the homogeneity requirement should consider such case. In fact, it brilliantly demonstrates how the possibility of a “*tendentially standardised assessment*” (recalling the words of the Italian Cassation’s United Sections from 2019) exists practically in any collective proceeding stemming from common (but not necessarily identical) issues of law or fact. The complexity of the distribution and management in *Brazeau* was considerable. Yet, with the abovementioned technical support and articulated planning any difficulty was overcome.

Furthermore, the opening of another phase for individual distribution, after judging on the common issues and the aggregate damages award, radically contrasts with the view of the Italian Cassation’s United Sections from 2019, which argued that the compatibility of “assessments calibrated on *specific personal situations*” (recalling the words of the Italian Cassation’s United Sections from 2019) should be excluded “on the logical plane, even before the legal one”. On the legal plane, such argument is poorly convincing under a literal and under a systemic interpretative standpoint (see *supra*, Chapter VII). On a logical plane, it is now refuted by the concrete and successful example of the *Brazeau* case (*inter alia*), which proves that joint “assessments calibrated on *specific personal situations*” is indeed possible.

What is more, such an evaluation, as demonstrated in the same Canadian class action, is indeed possible also concerning *non-pecuniary* damage. Once again, the assistance of technical experts – in this case medical experts – can be key to this regard.

Second, the possible *parallel deterrent, or even injunctive, function* of compensatory class actions was advanced while commenting the *ILVA* case. It is possible that both prisoners’ and migrants’ rights cases may see the use of such

procedural tool in addition to the injunctive one for this purpose – to put further pressure on the defendants; further pressure that may be fueled also by a system of so-defined “*integrated advocacy*” (see *infra*, Chapter XI). To increase such parallel deterrent and injunctive function, however, probably regulatory amendments should be introduced, too: for instance, concerning adhesion (opt-in v. opt-out), the system of dissemination of notice (see *supra*, *Brazeau*) or a distribution of damages through fluid recovery or cy-près mechanisms (again, see *supra*, in relation to Section 27.2(3) of the Canadian Class Proceedings Act, while discussing *Brazeau*).

The last institute – fluid recovery or cy-près –, in particular, could provide the sort of desirable “*complete insurance policy*” mentioned at the beginning of this *Part IV* while discussing Judge Weinstein’s considerations, from 1995, on personal harm class litigation and, specifically, the DES cases.

The focus on these concluding reflections, however, pertains to the next *Part V*.

PART V
CONCLUSIONS

CHAPTER XI

REFLECTIVE ASSESSMENT AND FORWARD LOOK

1. Premise. Picking up the threads. – 2. Intregrating regulations, constitutional principles and case law: a conclusive reflection *de iure condito*. – 3. Integrating findings and socio-legal insights: a conclusive reflection *de iure condendo*. – 3.1. Competent court. – 3.2. Active standing rules hindering effective access to justice. – 3.3. Distribution, liquidation and class definition. – 4. A final lesson. Pluralism and integration.

1. Premise. Picking up the threads.

The current research is based on a few cardinal pillars. Building on them, the central thesis has been developed.

As a preliminary foundation, the need for a comprehensive reassessment of the constitutional framework has been highlighted as of the outmost urgency in the contemporary, constantly shifting, evading and intertwining socio-economical skein. *Globalisation* and *technological innovation*, as reported in *Chapter III*, are fundamentally *transforming* – if they have not already, irremediably, transformed – the context in which we live. Such context, under a different layer of perspective, is also the setting in which our rights and interests are enforced – or supposed to be enforced.

Such shifting trends are not necessarily negative. Progress not even conceivable until a few decades ago has been reached in different areas of science and life. This regards several sectors: from medicine and health to transportation and communications, with an enriching and continuous exchange of ideas, people and knowledge (which, among other things, also makes this research possible).

At the same time, nevertheless, new challenges have emerged, too. Their distinctive and salient feature, if one was to be sought, while beginning to adopt the perspective of the constitutionalist, is probably their utter impinging on *power*. To

this fascinating yet complex issue is dedicated *Chapter IV*. Such dwelling is crucial for the subsequent reflections, yet merely transient, for obvious necessities of not diverting too far from the main research question. Drawing from well-established academic scholarship has been foundational for this purpose.

The resulting picture is one where *new centres of gravity* emerge, propelled by emerging centrifugal and centripetal forces, where the dichotomy between private and public law becomes the ever more blurred, much in the same way as the borders between national states. As accounted, sovereignty from the traditional Westphalian state is increasingly shifting towards new actors. Supranational systems and international organisations emerge, while multi-located and veiled transnational corporations and their supply chains cross the original national state's ground.

These tensions and power migrations create open fractures in which single individuals more easily fall. Such cracks are characterised by a collapse of the traditional (under the civil law tradition) mechanisms of *responsibility* of the subjects concretely holding power. Elusive, punctiform, crossing borders and legal orders, riding new, often unregulated practices and devices, it becomes extremely difficult to hold them *accountable* for their conducts.

The traditional paths of democratic *representativeness* – the so-called intermediate bodies, *in primis* political parties and labour unions – struggle, with legislative and executive actors, consequently, often being unable or even disinterested in pursuing the interests of all the population. Even when they are, they might lag behind for lack of resources – also economic ones – or technical abilities. *Inequalities*, as a result, are exponentially increased.

Despite their enshrinement on paper – in several constitutional charts, national and supranational –, *systemic* and *standardised* violations of the most basic rights occur on a daily basis. The systemic and structural, on the one hand, and massified and standardised nature, on the other hand, of these infringements is key. They are the result of those very phenomena which fueled the constitutional transformations: globalisation and new technologies.

Conducts of the new powerful actors tend to take place in such a way: a systemic one, operating through all the social tissue, dealing with people not one at time, but

as infinitesimal *nameless fragments* of their major – or mass – scale activities. From *citoyens*, they become mere consumers, or users. The individual is left naked, unrepresented and unable to make his or her voice heard whenever a violation from these much more powerful actors is suffered.

A goal for those studying the evolutions of power, its limitations and the guarantees of rights, becomes that of finding new paths of enforcement. To this regard the present research decides to focus on the judicial one. However, the abovementioned fractures in the social and constitutional context, evidently, cannot be filled with the ordinary litigation models (nor even by litigation alone, see *infra*). New challenges require new responses. Another foundational point of this work, to which *Part III and IV* have been dedicated, is exactly this: to identify and foster new legal – specifically, herein, procedural – approaches that can efficiently confront the new type of injustices embedded within our society.

For this purpose, the *class action* mechanism has been analysed, especially in the Italian legal order, as part of the larger multilevel European constitutional system. The main research question was to evaluate it in a *constitutional perspective*: as an instrument of more effective *access to justice*; as a potential tool of disorder and constitutional illegitimacy by infringing *due process guarantees*; and its use for enforcing not just consumer rights but *fundamental* ones, too.

Particular attention has been paid to the regulations introduced in 2019 in the new Title VIII-*bis* of the Italian Code of civil procedure. The extension of the scope of application set forth therein, from a perimeter previously limited to consumers to, now, a general one, in fact, requires careful consideration also of constitutional nature, given the disruptive potential of the new dual (injunctive and compensatory) device. This has been the central focus of *Chapter VII*.

Preliminarily, instead, a general overview of the class action model has been provided under *Chapter VI*, dedicated to its US and (common law) origins and only in recent years, after heated debate, legally transplanted in Europe, too. The implementation of the so-called RAD Directive has been discussed, to this regard. In particular, it has been worth recalling that, after the well-known US amendments from 1966, the first wave of class action litigation was for the enforcement of *civil*

rights, and against racial segregation specifically. The EU focus on collective redress, instead, has been on consumer and competition law, i.e. in the RAD Directive.

Part IV, finally, with *Chapters VIII, IX and X*, has been dedicated to a more practical approach. Through case studies, we have analysed concrete application of the class action instrument in Italy for the enforcement of fundamental rights: in *environmental matters* and *mass health harms* stemming from a medical device; in *discriminatory matters* and unfair exploitation in gig economy *labour* contexts; for inhuman and degrading treatment, due to systemic dysfunctions, of *prisoners*, detainees, *migrants* and asylum seekers.

In most cases the approach has been *comparative*: towards other procedural instruments (in a vertical way, too, e.g. mainly towards the ECtHR paths of enforcement), but also in relation to other jurisdictions (in particular US and Canada, with richer class action litigative experience, especially in *Chapter X*).

It is exactly this element of comparison, coupled with that of *coordination*, to convey the keystone with which we wish to propose, at present, a closing for the research: that is, the crucial elements of *pluralism* and *integration*. Pluralism and integration assume relevance from multiple standpoints: of ideas, models, interpretations, techniques, provisions, structures, practices; between jurisdictions, courts, plaintiffs, attorneys, judges, defendants, civil society (academics, too) and other powers (the legislative and the executive).

For these reasons, the implementation in Italy of a class action technique with a general scope of application must be evaluated *extremely positively*. It enhances the *access-to-justice* potential through judicial action, with a tool capable of re-balancing again power *equilibria*, of overcoming otherwise unsurmountable legal and practical barriers and of filling otherwise too deep gaps in enforcement and representation processes.

The lessons conveyed by the case studies leave optimism. At the same time, however, the dual mechanism, although a fundamental step forward, is *far from perfect*. It lends itself to abusive practices, too.

To avoid such risks, *interpretative and practical* attention must be paid while implementing the *current* mechanisms. The next paragraph will be dedicated to a brief recapitulation on this matter.

Active changes in the legislation, still, will be necessary, too. The current regulatory provisions can and, therefore, must be *improved*. This holds special importance given their disruptive potential to influence the subjective positions of several individuals, and with mass economic impact, too. Lessons from the first developing case law and from successful experiences from abroad should be taken into account, too. The third paragraph of this Chapter will recall the most relevant among these reflections.

Last, a final consideration on *pluralism* and *integration* shall be offered.

2. *Integrating regulations, constitutional principles and case law: a conclusive reflection de iure condito.*

The lack of clear interpretative certainty surrounding the key concept of *homogeneity* has been extensively debated throughout this work, in several circumstances.

As explained, such test should merely be applied to compensatory class actions as depicting (in a broad view) “a common origin”.¹ The Tribunal of Milan, in the *ILVA* injunctive class action, has provided an order confirming such view, with particular reference to its limitation to compensatory actions. At the same time, however, the same Tribunal of Milan and – less explicitly – other courts in other cases (e.g., the *Philips Respironics* or the *Deliveroo* cases, in Milan, or the *ITA Airways* injunctive class action, in front of the Tribunal of Rome) present different readings.²

As argued, the latter standpoint may paradoxically prove more favourable to plaintiffs planning to proceed with an injunctive action, initially, and a damages one, subsequently. In fact, should homogeneity be declared in the injunctive *azione*

¹ See *supra*, Chapter VII.

² See *supra*, Part IV.

collettiva, it may be easier to proceed at a later time with the compensatory *azione di classe*. This could become an important *strategical trend* for class plaintiffs.

In particular, actions concerning particularly serious and *continuous harms* seem to see the consolidation of this trend. The interpretative inclusion of the “homogeneity” test, as part of the admissibility phase, within injunctive collective actions, too, does not appear to be a decisive factor for this trend, either.

After all, this tendency is only logical. The developing jurisprudence significantly seems, in fact, to be distinguishing the injunctive instrument from the damages one in relation to the type of infringement suffered.

The former is evaluated by the courts as a lawsuit aiming to stop a *potentially* harmful conduct or situation. The *effective* harm is not necessarily an element to prove for the plaintiffs. It is sufficient to demonstrate the existence of a *serious risk* that an injury will occur. Or, in the case of continuous violations, to show that they have not ended yet. Thus, in sum, the completion of the harm is not *per se* required for seeking such particular type of relief.

In the latter class action model, aiming at compensatory redress, instead, plaintiffs need to present adequate proof of all the elements of the injury, included the harm itself, its *quantum* and the specific *casual link* between the conduct and the exact harm. There is, consequently, a significant difference concerning the *evidentiary threshold* expected for each action. This threshold, as argued above, is lower for the injunctive *azione collettiva*, in light of the elements underscored.

Contrarily to the statements of some courts (i.e., see *supra*, *Philips Respironics*, *Deliveroo* and *ITA Airways*),³ however, such lower threshold does not exclude *per se* the admissibility of injunctive class actions for particularly *complex* matters. It merely regards the evidentiary *onus* on the plaintiffs. The judge will have to balance on the one hand, the need to prevent irreparable harm with the necessity of not issuing unjustified measures, which could harm in turn the defendants. In complex circumstances, the judge can, and should, make use of *auxiliary tools*, such as the

³ Id.

hearing of experts or the request for technical reports to better understand the matter and assess the applicability of the injunctive action.

The explicit reference to the possibility of using *simple presumptions* and *statistical data* is a further support for him (or her) while completing such delicate assessment, in order to have a more nuanced view and flexibility. The abovementioned courts' view that the provisions expressly recalling this possibility actually demonstrate the Italian legislator's intention of excluding the admissibility of injunctive class actions for evidentiary complex matters does not seem to hold. Not only since such possibility already existed in the Italian legal order, but because, on the contrary, this explicit reference reiterates the core *access-to-justice goal* of the reform.

Statistical data and simple presumptions, in other words, are underscored by the legislator simply as additional means for demonstrating the risk of future harm. Given the lack of such concrete injury, it is rational to expect the use of presumptions and statistical analysis for determining its probability in light of a specific conduct. Any complexity in ascertaining, previously, that such conduct concretely took place or the correctness of such statistic does not pertain the *admissibility* of the action at stake.

Limiting the perimeter of application – both for injunctive and compensatory actions – for a purported evidentiary complexity on the basis of this, rather questionable, reasoning empties the 2019 class action provisions of their true rationale. It is, in fact, in particular complex cases that a unitary assessment may be more beneficial: both for *judicial efficiency* reasons (i.e., avoiding the evidentiary assessment on the same complex matters repeatedly, in potentially hundreds of thousands of proceedings) and on the grounds of the *higher* economic, temporal and organisational *costs* that may prevent a single individual from acting alone (thus, *in concreto* denying him, or her, justice).

These reflections, which are necessary, should not distract us from the final point of arrival of the present considerations: spurious of these interpretative limits, in the light of a purely literal, systematic and historical interpretation, the 2019 Italian

injunctive *azione collettiva* has an extraordinary potential, dictated by its expressive simplicity (it is regulated by only one article, it should be recalled).

The *ILVA* case demonstrates this fully: it aims to stop an activity declared, on several occasions, by various governments, even as being of “strategic national interest”, with the incredible economic consequences – for the company as much as for its workers – that a possible closure would entail. The high sum paid by the defendants as a penalty for the delay in executing the court’s order in *Philips Respironics* case should be accounted, too.

In this sense, given how in several injunctive class actions the delicate issue of the separation of powers could arise, the other *trend* that is developing seems rather reasonable. This is the tendency of the courts– especially first instance ones, when confronted with the most delicate cases, with the most far-reaching consequences – to seek support in institutional reports, in supranational legislation and in previous decisions of supranational courts, like the CJEU and ECtHR.

Once again, therefore, we return to the theme of *coordination* through the concept of *integration*; integration, in this case, between sources and courts in order to attribute the necessary *authority* to an ordinary judge of first instance – of a specialised section – in making decisions that may cause *profound societal effects*.

The common law experience shows, on the other hand, a far greater ease from the courts in making use of the class action instrument. While still considering the particularities of the Italian legal and cultural tradition (i.e., in relation to punitive damages), the Italian judges should follow their example, supported by technical experts and data.⁴

In direct connection with the issue of sharing and increasing knowledge and good practices among courts is the fact that the publications of decisions on the *ministerial portal* are only partial. In some cases, key information is lacking. In most injunctive class actions, no news on their filing – hence, *existence* – are even given. Furthermore, with the introduction in 2023 of the consumer representative action, those cases are thrown into the mix, too. The result is a confusing potpourri

⁴ See, e.g., *supra*, Chapter X.

of *partial information* which assists in no way the courts and the legal practitioners, as well as potentially interested members of the class. Paradoxically, in the *ILVA* and *Philips Respireonics* injunctive class actions, the members themselves of the class could not access the orders already issued by the courts (in the latter case even of appeal). Such practice does not seem to align with the values set forth in the Italian Constitution.

Finally, maintaining an access to justice perspective, we refer to the reflections on the *non-retroactivity* of the new provisions for unlawful conducts preceding 19 May 2021 (date of entry into force of the 2019 class action regime) and on *standing to be sued*.

Regarding the latter, the importance of encompassing among potential defendants *public entities* such as hospitals, penitentiaries or schools has been stressed, also in relation to the potential class actions for the protection of prisoners' and migrants' rights.⁵ In addition to what has already been asserted, it appears mandatory to include them in consideration of the principle of equality set under Article 3 It. Const., too. Otherwise, an unreasonable difference of treatment would occur between private entities operating such public service and the public ones: e.g., between private and public hospitals or schools (but also detention centres, should such service be entrusted to a private entity). The former could potentially be sued in a collective suit, whereas the latter would be shielded from such possibility.

3. Integrating findings and socio-legal insights: a conclusive reflection de iure condendo.

The present paragraph aims at discussing *regulatory hurdles* than substantially hinder the use of the class action device in Italy. In such evaluation, it suggests elements for future improvement. In particular, it focuses, (i) on the *competent court*, that is – currently – the section of the tribunal specialised in company matters, (ii) on the rules on *standing to sue*, limited to certain subjects and thereby

⁵ Id.

dangerously hampering the effectiveness of the dual collective remedy at stake, and, finally, (iii) on possible amendments regarding the *distribution of damages*, especially considering the comparative experience, and *class definition*.

3.1. Competent court.

As is known, the recent discipline establishes that “the application for class action shall be brought by means of an application exclusively before the specialised section on company matters competent for the place where the defendant has its seat”.⁶ It also sets forth that the action “may be brought against companies or against entities managing public services or public utilities, with regard to acts and conduct carried out in the performance of their respective activities”.⁷ This choice, on the one hand, tends to *circumscribe the passive legitimacy* of the new procedural institution to the world of companies and, on the other hand, precisely because of this, hinges the jurisdiction at the *specialised section* on company matters of the tribunal where the defendant has seat.

The already mentioned doubts as to the constitutional legitimacy of the provisions limiting *passive standing* to the business world also affect the present provisions on *competence*. This choice, in fact, does not seem completely appropriate. One can understand the legislator’s decision to bring class actions to this section of the court to ensure greater *technicality*, as well as to increase over time the *expertise* of judges, faced with a procedural instrument as new to civil law legal culture as it is complex. One cannot deny, however, the problematic nature of the current competence. It is, in fact, discordant to delegate to judges *specialised* in a given subject (company matters) the decision of disputes with a *generalised* scope of application.

In relation to the perimeter of the present research, further concerns arise.

If, as hitherto hypothesised, actions were to arise in connection with fundamental rights related to the individual’s *personal sphere* (“private life”, borrowing ECHR

⁶ Article 840-ter, para. 1 c.p.c., with similar provisions for the injunctive class action pursuant to Article 840-sexiesdecies c.p.c.

⁷ Article 840-bis, para. 2 c.p.c., with similar provisions for the injunctive class action pursuant to Article 840-sexiesdecies c.p.c.

vocabulary), such as that to health, to a healthy environment or personal freedoms, the judges of the specialised business section would be required to decide matters *extremely different* from those dealt with on a daily basis, in which their sensitivity and technical preparation would inevitably be less than that of their colleagues in other sections, with a significant increase in the burden of study for the judges themselves and the risk of an improper decision for the parties. The case studies analysed already show a trend in this direction.⁸

At the same time, it is urgent to emphasise once again the considerable *variety of fields* of law in which class actions could appear (and are already appearing) before the judges.⁹ And it must not be forgotten how, in addition to having to familiarise themselves with the significant peculiarities of the new procedural discipline, as well as having to delve from time to time (if not simultaneously) into extremely technical and diverse matters, they are called upon in the meantime to also carry out the *ordinary workload* of their chambers. This inevitably causes an important extension of procedural times and questions the overall hold of the reform's judicial economy goal.

In addition, with regard to *special rites* such as the *labour* one, there are strong doubts. As analysed above, in the *Deliveroo* case, a class action between workers (food-delivery riders) and their employer has already caused concerns. On this occasion the Court of Milan confirmed the applicability of the class action to labour matters (“Among the individual rights that can be protected, it does not appear that those connected with labour relations can be excluded”).¹⁰ At the same time, however, the Milanese court in several passages of the (brief) decision seems to *improperly raise* the standard required for bringing the collective suit, thereby running the risk of making meritorious actions impracticable in practice. The latent concern, as argued, is that behind the – questionable – complaint of “particular complexity in the correct identification of the actual injuries suffered” as

⁸ See *supra*, Part IV.

⁹ See *infra*, Charts, after the present Part.

¹⁰ See *supra*, Chapter IX.

justification for the claim’s rejection there is a(n understandable) lack of sensitivity to labour matters that exacerbates the complexity of the issues.

Considering the ordinary handling of such matters by the labour judge, the jurisdictional dichotomy between cases brought through *individual action* – decided by the labour judge – and cases brought through *collective action* pursuant to the new Title VIII-*bis* c.p.c. – decided by the specialised section on company matters, far less expert and accustomed to them – is somewhat disconcerting.

In addition to labour issues, the exclusion of jurisdiction in *tax matters* from the ordinary tribunal, in favour of the tax court (pursuant to Article 2 of Legislative Decree 546/1992), must be borne in mind. On this point, already on a few occasions,¹¹ the emerging case law on the reformed dual class action regime has had occasion to pronounce itself, denying jurisdiction in favour of the “*Commissioni Tributarie*”. This, it seems, is correct, and for the class action for *injunctive* relief also made explicit by Article 840-*sexiesdecies* c.p.c., last para. (“The provisions laid down in special laws on the subject are not affected”).¹²

For *compensatory* class actions, however, there is no reference to special laws other than the so-called administrative class action (see *above*, “The provisions on redress for the efficiency of administrations and of public service concessionaires”).¹³ This makes it more complex from an interpretative point of view to justify the decision to deprive tax rights of protection also through class action. The statutory provision in Article 840-*bis* of the Code of Civil Procedure is, moreover, unequivocal: “Individual homogeneous rights are enforceable also by means of a class action”. In view of the appropriateness of leaving the handling of

¹¹ See *infra*, *Charts*. See also, specifically, the Tribunal of Bari, IV Sez. Civ. (specialised section in company matters), No. 2124/2022, from 7 November 2022: “It follows that, since the applicant party sought the annulment of the payment notices for the years 2016-2017, relating to land reclamation levies, having ascertained of the illegality of the tax claim made, a finding which, as seen, is reserved for the cognizance of the tax court, the jurisdiction is that of the present Specialised Section, belonging to the ordinary judicial plexus”. See, also, specifically, the Tribunal of Venice, specialised section in company matters, No. 3/2023, from 18 May 2023: “Disputes concerning refunds of undue tax payments, in cases where, like the present one, the right to repayment of the tax is contested, are therefore entrusted exclusively to the tax court, with the result that the present dispute is inadmissible, since the jurisdiction of the ordinary courts over the appellant’s claim is lacking”.

¹² Article 840-*bis*, para. 3 c.p.c.,

¹³ See *supra*, *Chapter VII*.

the matter to the tax court, the question therefore arises as to whether – before that court – class actions for the protection of tax rights are indeed possible. So it seems, unequivocally, from a reading of Article 840-*bis* c.p.c. and, in general, of all the regulations set forth in Title VIII-*bis*.

If this were the case, then, it would be necessary to assess, again from a constitutional and systemic perspective, the *legitimacy* (rather than the appropriateness, which lacks) of this disparity: on the one hand, to admit the handling of class actions before the *tax judge* in the highly technical and delicate tax matters; on the other hand, to insist on the handling of actions in equally technical and delicate labour matters not before their natural judge for individual actions (the *labour one*), but before the specialised section on company matters. Furthermore, also the reasonableness of providing a collective compensatory relief, but not an injunctive one seems lacking.

It would certainly be interesting, for the future, to examine the filing of collective actions, under Article 840-*bis* and Article 840-*sexiesdecies* of the Code of civil procedure, before these two courts, rather than before the section of the tribunal specialised on company matters.

In the meantime, pending jurisprudential – if not constitutional – developments, a legislative clarification would be appropriate.

3.2. *Active standing rules hindering effective access to justice.*

Regarding standing to sue, the 2019 Italian class action regime allows representative actions both from natural and legal persons. Concerning active standing of *natural persons*, a distinction must be made between the compensatory class action, per Article 840-*bis et seq.* of the Code of civil procedure, and the collective injunctive action, per Article 840-*sexiesdecies* c.p.c. While the former can be proposed by “each member of the class”, the latter is accessible to “anyone with an interest” in obtaining an injunction.

Therefore, for the *compensatory* action, the individual proponent must necessarily prove class membership. Similarities to the ECtHR requirement of “*victim status*” for individual applications, pursuant to Article 34 ECHR, can be

found to this regard. As is known, although this criterion is not to be applied “in a rigid, mechanical and inflexible way” for the admissibility of the applications, the Strasbourg Court has long underscored that, according to such test, no “*action popularis*” can be envisaged under the Convention. By this term, the Court refers to an action aiming to complain about a domestic provision or practice “*in abstracto*”, without having been *directly* affected by it.¹⁴ In the same way, in a completely different jurisdictional context, Article 840-*bis* requires that the plaintiffs have *concretely* suffered a breach to their personal sphere, giving rise to an *individual* right to compensation for damages or to restitution.

The *injunctive* remedy, instead, on paper can be filed even by individual (natural persons) plaintiffs with no *direct* connection to the class. They can promote the action *uti civis*, as champions of the community, for the protection of the *public* interest before their *personal* interest (or even in its absence). In this sense, with the necessary caveats, the action at hand indeed seems to be qualifiable as “*actio popularis*”.

The absence of such a requirement, and in general of the admissibility filter, in fact, makes the injunctive remedy significantly more streamlined. The presence of an “*interest* in obtaining an injunction” – that is an order of cessation or prohibition of a conduct harmful for a plurality of individuals or entities –, which is still demanded, sets a lower threshold. To check it, it appears not necessary to prove the suffering of a concrete and direct infringement. Rather, moral and indirect interests in the proceedings come to relevance, too. Following the rich doctrinal and jurisprudential interpretative elaboration of Article 100 of the Italian Code of civil procedure – pursuant to which “to propose or to contradict a claim it is necessary to have *interest* to it” –, to be read in connection with Article 24 of the Italian Constitution (“Everyone can take legal action to enforce *their* rights and legitimate interests”), it should be intended as a *benefit* for the plaintiff in the event of acceptance of the claim. In particular, Article 24 of the Constitution still requires a

¹⁴ See, e.g., ECtHR, *Roman Zakharov v. Russia* [GC], 2015, para. 164; *Aksu v. Turkey* [GC], 2012, para. 50; *Burden v. the United Kingdom* [GC], 2008, para. 33; *Dimitras and Others v. Greece*, 2017, paras. 28-32; *Cordella v. Italy*, 2019, para. 100; *Kalfagiannis and Pospert v. Greece*, 2020, para. 46.

personal link to the claim. It seems, however, in comparison to the stricter requirement for the compensatory class action, that the *injunctive collective remedy* allows for a looser active-standing test in order to encompass the protection of subjective positions which do not pertain solely to the plaintiff, if they can be found to pertain to someone at all. They are, in sum, borrowing an expression from Mauro Cappelletti, “rights and interests in search of an author”¹⁵, whose justiciability, otherwise, could be harder to prove.

An illustrative example is the diffuse interest to live in a healthy environment, unaffected by climate change. Evidently, everyone would gain a benefit from an order to cease activities harmful to the planet, potentially threatening the whole humankind (hence, the checking of the personal “interest”).¹⁶ The argument that the global nature of the problem (worldwide concurring activities and consequences) might quash the “benefit” for single plaintiffs against a single defendant, hence making the claim non-justiciable, has been convincingly dismissed by the Dutch Supreme Court in the well-known *Urgenda* case, citing the “partial responsibility” doctrine.¹⁷ Thanks to the lower threshold, the injunctive remedy does not ask the

¹⁵ CAPPELLETTI M. (1976). *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, in *Buffalo Law Review*, vol. 25, 648, using himself a “Pirandellian formula”, from the well-known PIRANDELLO L., *Sei personaggi in cerca di autore*, 1918.

¹⁶ For instance, in its recent decision in *Smith v. Fonterra* in New Zealand from October 2021, the Court of Appeal found that ‘every person in New Zealand – indeed, in the world – is (to varying degrees) both responsible for causing the relevant harm, and the victim of that harm’. *Smith v. Fonterra Co-Operative Group Limited et al*, CA128/2020 [2021] NZCA 552 § 18.

¹⁷ That is: “Partly in view of the serious consequences of dangerous climate change [...], the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country’s own share in global greenhouse gas emissions is very small and that reducing emissions from one’s own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC cited above. [...] Also important in this context is that, as has been considered in 4.6 above about the carbon budget, each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget. The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible. [...] Climate change threatens human rights, as follows from what has been considered [...] above. This is also recognised internationally outside the context of the Council of Europe. [...] In order to ensure adequate protection from the threat to those rights resulting from climate change, it should be possible to invoke those rights

plaintiffs to demonstrate to have *concretely* suffered a breach to their personal sphere.

If, in addition, the still-developing jurisprudence will interpret the “measures suitable to eliminate or reduce the effects of the violations found” (a possibility provided for plaintiffs within injunctive proceedings per Article 840-*sexiesdecies*, para. 7) as encompassing also those of *economic* nature, the potential of this tool would be even more remarkable. The rather high penalties for each day of delay in executing the corrective plan, examined in the abovementioned *Philips Respironics* case, could be framed under this perspective.¹⁸

This could open the door to partial forms of fluid recovery, or *cy-près*, distribution, too; especially if their usability were to be rejected for compensatory class suits.¹⁹ The *damages* distribution function of these techniques, nonetheless, would mandate careful *coordination* considerations, given the – questionable – impossibility to bring together the two collective remedies.

In addition to natural persons, both actions also allow actions from “*organisations* or [...] *non-profit associations* whose statutory objectives include the protection” of the rights or interests prejudiced. However, it is established that “only organisations and associations registered in a *public list* set at the Ministry of Justice” may propose the action. Article 196-*ter* disp. att. c.p.c. further provides that the “Ministry of Justice, in agreement with the Minister of Economic Development,

against individual states, also with regard to the aforementioned partial responsibility. This is in line with the principle of effective interpretation [...] that the ECtHR applies when interpreting the ECHR and also with the right to effective legal protection guaranteed by Article 13 ECHR [...] In view of the considerations [...], the Supreme Court finds that Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do ‘their part’ to counter that danger. [...] this constitutes an interpretation of the positive obligations laid down in those provisions that corresponds to its substance and purpose [...] This interpretation is in accordance with the standards set out [...] that the ECtHR applies when interpreting the ECHR and that the Supreme Court must also apply when interpreting the ECHR.” Available here: <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf>.

¹⁸ See *supra*, Chapter VIII.

¹⁹ See *supra*, Chapter VII. See also KALAJDZIC J. (2021). *Climate change class actions...*, 55: “the availability of *cy-près* distributions of damages also obviates the need to seek an order requiring the government to make budget allocations, relief that would likely be denied as not justiciable. Although the difference between the two forms of relief is subtle, if not semantic, a class action judge familiar with the use of *cy-près* might be amenable to the argument”.

after consulting the competent parliamentary committees”, by its decree, poses “the requirements for registration in the list referred to in Article 840-*bis*, second paragraph, of the Code, the criteria for suspension and cancellation of the registered organisations and associations, as well as the contribution due for registration and its maintenance”. It should be noted, to this regard, the subsequent (April 12, 2022) publication of such decree, effective from April 27, 2022, thus allowing the proposition of appeals also by non-profit legal persons with statutory objectives coinciding with the protection sought.

Among the most notable *requirements* for registering to the mentioned list, it expects: formation at least two years prior to the application for registration; headquarters in Italy or in another EU state; the statutory objective, even if not exclusive, of protecting homogeneous individual rights, without profit; a democratic order; the continuous carrying out of activities, through territorial articulations, public initiatives, and an updated website; statutory provisions of requirements of integrity and, above all, administrative and accounting transparency, with the annual publication and review of the budget.

Among these, the choice to limit registration only to entities established at least *two years* prior, while understandable for reasons of seriousness and reliability of the claimants, does not seem appropriate at all. It prevents, in fact, the proposition of collective actions through *ad hoc* legal vehicles. Indeed, in concert with the requirement of continuous activity (even with territorial branches), it seems to converge precisely towards the formation of a dangerous *oligopoly* of organisations or associations dedicated to class actions.

The risks, in such an event, are multiple: loss of zeal and a tendency towards bureaucratisation on the part of the registered organisations, conflicts of interest with potential claimants, lack of flexibility to cope with the rapid developments of society or the specific needs of concrete or minor cases, incentive to focus only on cases of larger size and scope, if not national, that correspond to the interests (including media and economic ones) of the associations, abuse of their dominant position over the individual class members (through the imposition of onerous membership fees, for example).

It is worth stressing again the *exponential increase* in organisational and economic burdens of litigation in the case of a collective action compared to an individual one. Except for the so-called “idealistic claimant”,²⁰ few natural persons are incentivised to choose the former route and, even if they wish to, they may not have sufficient resources to proceed. For this reason, it would be particularly valuable to be able to resort in all circumstances – even those of a purely local nature – to flexible legal vehicles created *ad hoc* to bear such burdensome charges. By maintaining the other requirements and the judge’s control at the admissibility stage, their independence and adequacy to represent the class would still be guaranteed. Alternatively, *limiting from the outset* the legal entities authorised to propose an appeal would represent a significant closure in terms of the effectiveness of access to justice, as this would continue to be guaranteed only to the wealthier, or exclusively to a predetermined, and thus more easily influenced, narrow circle.

To prevent the significant and bold innovations proposed by the 2019 legislator from finding space only in theory, or worse, lending themselves to abusive practices, it is therefore desirable, under a constitutional compass, for the Ministry to reconsider opening registration also to recently established organisations or associations, as advised by the positive comparative experience from common law or other European countries, such as the Netherlands.²¹

²⁰ CAPPELLETTI M. (1975). *Formazioni sociali e interessi di gruppo davanti alla giustizia civile*, in *Rivista di diritto processuale*, 25.

²¹ KRAMER X.E. and TZANKOVA I.N., *From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands*, in UZELAC A. and VOET S. (2021). *Class Actions in Europe. Holy Grail or Wrong Trail?*, Springer, Cham, 100: “The Dutch experience also demonstrates that *ad hoc* foundations are needed in a mature civil (law) justice system: over time longstanding associations may suffer from agency issues as well and struggle to properly fulfil their role due to constraints of various types. *Ad hoc* organizations make sure that a proper system of checks and balances with respect to longstanding associations may suffer from agency issues as well and struggle to properly fulfil their role due to constraints of various types. *Ad hoc* organizations make sure that a proper system of checks and balances with respect to longstanding associations in collective redress remains in place”. See also GIUSSANI A. (2019). *La riforma dell’azione di classe*, *Rivista di diritto processuale*, 6, 1574; ISSACHAROFF S. (2012). *Class Actions and State Authority*, in *Loyola University Chicago Law Journal*, 44: “On the ability of such groups to serve the role of consumer protection adequately, compare Issacharoff & Miller, *supra* note 1, at 194–97 (noting potential conflicts of interest between nonprofit organizations and the consumers they represent), with COFEE J.C. JR., *Litigation Governance: Taking Accountability Seriously*, in *Columbia Law Review*, 110, 288, 347 (2010) (arguing that because nonprofit organizations stake their “reputational capital” on the outcome of litigation, they are likely to deliver “loyal and competent performance”)). ISSACHAROFF (*supra*), also refers to “Acemoglu and Robinson, who attribute the atrophying of

3.3. *Distribution, liquidation and class definition.*

The issues of distribution and liquidation of damages have already been extensively touched in *Chapter VII*. Reference to it shall therefore be made for detail.

On the other hand, it still seems mandatory to underscore the necessary changes concerning this crucial phase. The new figure of the “*common representative* of the adherents” does not seem like a sufficiently technical nor expert subject. More flexibility should be awarded to the judge in identifying, case by case, the best technical expert – or roster of experts (see *Brazieu, Chapter X, supra*) – to assist him, or her, during distribution.

Concurrently, explicit reference to distribution criteria in the provisions from Title VIII-*bis* c.p.c. would be highly beneficial, too. *Lumps sums*, *sub-classes*, different *tracks* and a *unitary common parameter* are valid examples. They are still applicable, but an express mentioning of them would certainly foster their use by the Italian judiciary.

A provision of *fluid recovery* or *cy-près* mechanisms for distribution would be very positive, too, like – regarding the latter – in Section 27.2 of the Canadian Class Proceedings Act from 1992. Direct economic compensation to each member of the class, in fact, may not always be the best solution for the injured class. This has been discussed above, while commenting Judge Weinstein’s remarks on the mass personal injury litigation in the US. In cases like *ILVA* or *Philips Respironics*, for instance, the possibility of setting up a foundation in charge of medical monitoring and covering costs for any disease that may arise in the future in any member of the class (e.g., even children not yet born) seems way more preferable.²²

Currently, these solutions can be reached in Italy only through settlement agreements. The opt-in regime, however, does not give class plaintiffs much negotiating power in this regard, like it may do in other jurisdictions with opt-out regimes. Hence, the importance of allowing such type of relief, not directed to

Venice in part to the elimination of flexible economic organizations, such as the commenda, in favor of fixed state licenses, a process that promoted capture by established economic actors and that in turn led to economic stagnation”.

²² See *supra*, *Chapter VIII*.

individual members of the class, but to collective *ad hoc*-created or specifically selected foundations or organisations.

The Canadian Class Proceedings Act from 1992, introduced in relation to the *Brazeau* case, appears a particularly positive model to follow for future legislative improvements in Italy. For instance, regarding *homogeneity*, the definition of “*common issues*” under the Canadian Class Proceedings Act, as “(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts” would indeed solve most of the jurisprudential and doctrinal Italian debate.²³

Regarding class formation and adhesion, instead, a margin of flexibility for judges in choosing whether to proceed with an *opt-in or opt-out regime* would be beneficial, too, once the action is admitted and the specific circumstances and necessities of the case have been examined, e.g. like in the Belgian model.²⁴ To this regard, also more elasticity in the *evidentiary phase* would be appropriate. This would entail moving from a strictly documental nature, allowing also other types of proof to be presented to the court – i.e., witnesses – so that it can reach a more nuanced decision.²⁵

4. *A final lesson. Pluralism and integration.*

The final lesson we can draw from the present research is that the process of setting up efficient mechanisms for fundamental rights’ enforcement is far from complete. The current paths of protection, either political or judicial, are simply not sufficient, in light of the most powerful contemporary social and constitutional changes.

Setting up mechanisms of collective redress may indeed be the answer to re-equilibrate some of the otherwise too unbalanced, elusive and, therefore, irresponsible power dynamics of the new millennium. Class actions indeed have

²³ See *supra*, Chapter X.

²⁴ See VOET S. (2021) in *Class Actions in Belgium: Evaluation and the Way Forward*, in UZELAC A. and VOET S. (2021). *Class Actions in Europe. Holy Grail or Wrong Trail?*, Springer, Cham.

²⁵ See e.g. the six continuous days of extensive evidence phase in *Plata*, with numerous witnesses, too, *supra*, Chapter X.

the potential to become valuable vehicles for the pursuit of common values, for bridging profound social and economic gaps and for putting into the discussion table, at the very least, issues that a *democratic* society must deal with, but which the current democratic process cannot seem always capable to.

At the same time, however, they all present significant risks of due process guarantees, for defendants and for the class members who are not parties to the proceedings, but merely *represented*. The issue of adequate representation should, therefore, be carefully considered. Rather than by legislators when drafting the regulations, it should be assessed by courts when confronted with each dispute, in light of the concrete specificities of the case.

Important ramifications in terms of representation and due process concern the element of *funding*. It really is “the crux of the matter”,²⁶ given the often-unsurmountable costs of litigating group, or even mass, claims. Without adequate economic backing, it is simply impossible to conduct class litigation. This entails, on the one hand, the possibility – not per se necessarily negative – of investors in this type of venture. On the other hand, such third-party investments should be regulated and controlled, to avoid that they fall prey to abuse and to the pursuit of interests alien to those of the class.

At the same time, collective litigation should not be intended either as a black-and-white type of scenario. It aggregates the subjective positions of many, and, as a consequence, it presents interests within the class that may be conflicting. The mentioning of the interests of ILVA’s workers and shareholders, in relation to the residents’ injured right to health, probably presents a too unbalanced conflict between opposing values. But it does give the idea of the complex and intricate patchwork in which we live, and in which prejudices and harms occur in the contemporary society. Hence, the importance of delivering the most nuanced opinions for the judges, ensuring participation *through* representation and adequate representation of *all* the stakeholders involved in the conflict at stake.

²⁶ VOET S. (2016). *The Crux of the Matter: Funding and Financing Collective Redress Mechanisms*, in HESS B., BERGSTRÖM M., STORSKRUBB E., WAHL N. and CRAMÉR P. (eds.). *EU Civil Justice: Current Issues and Future Outlook*, Hart Publishing, Oxford, 201.

Such objective may only be achieved, following the essential realisation at the end of this work, through a *pluralism* of sources, operations and actors, all *integrated* together in a “holistic framework, or, as was mentioned above, a ‘multilayered framework of regulation, lawmaking and law application’.”²⁷ The driving force of the CJEU and ECtHR in the *multilevel* system of fundamental rights’ protection has been underscored to this regard,²⁸ through the increasing tendency of seeking support in terms of *authority* in these apex courts’ decisions, as well as in the regulatory background in which they operate.

This trend also finds assistance in *reports* and *scientific findings*. The complexity and intricacies of most of the current society’s “mass conducts” carry implications that transcend the expertise of a single individual, let alone a single discipline. The consequence is the necessity of *integrating*, once again, courts with technical support; a technical support which should be *flexible*, malleable in relation to the concrete features of each case. Once again, the need for an *active and dynamic* role of the *judge* to ensure such coordination in the quest for a more effective enforcement of rights.²⁹

Finally, integration should not concern only the paths of judicial enforcement. Class action are not the procedural *panacea*, as already stressed. They can efficiently address some of the enforcement gaps left by more traditional dualist procedural mechanisms for standardised and mass claims. At the same time, however, other issues will continue to be better addressed by other means of judicial enforcement, *in primis* those of constitutional review. Judicial enforcement, on the other hand, is not the cure to all issues, either. It also raises important questions

²⁷ See VOET S. (2017). *Where the Wild Things Are – Reflections on the State and Future of European Collective Redress*, in KEIRSE A. and LOOS M.B.M. (eds.), *Ius Commune Europaeum*, Intersentia, Cambridge, 138, quoting “the pivotal work in Belgium of W. Van Gerven and S. Lierman”, *Algemeen Deel. Veertig jaar later*, *Privaaten publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing*, Kluwer, Mechelen 2010, p. 515–23.

²⁸ See RANDAZZO B. (2023) *Access to Justice in a Multilevel Constitutional System, Protecting Human Rights*, Giappichelli, Turin.

²⁹ See again CHAYES A. (1976). *The Role of the Judge in Public Law Regulation*, in *Harvard Law Review*, 89, 1281. In relation to the ECtHR, see also LEMMENS K. (2019). *Criticising the European Court of Human Rights or Misunderstanding the Dynamics of Human Rights Protection?*, in POPELIER P., LAMBRECHT S. and LEMMENS K., *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, Intersentia, Cambridge.

regarding the respect of the legislator's discretion, a discretion, at times, possibly exercised through inaction.

As a matter of fact, walking the path of judicial enforcement alone does not appear sufficient. The most significant results can be achieved only through a close *coordination* of litigation strategies with political campaigning and legislative involvement, in what has been defined as “*integrated advocacy*”.³⁰ This entails, to foster more effective social justice, building alliances with social movements, in wider not-strictly and not-merely legal tactics and governance structures. In sum, especially when the focus of the enforcement is beyond a simple economic redress, but rather to tackle deeper structural and systemic inefficiencies, the effort must necessarily be coordinated within a *larger political campaign*. The involvement of *other powers*, the legislative and executive one, must be sought to reach more effective and long-lasting results.

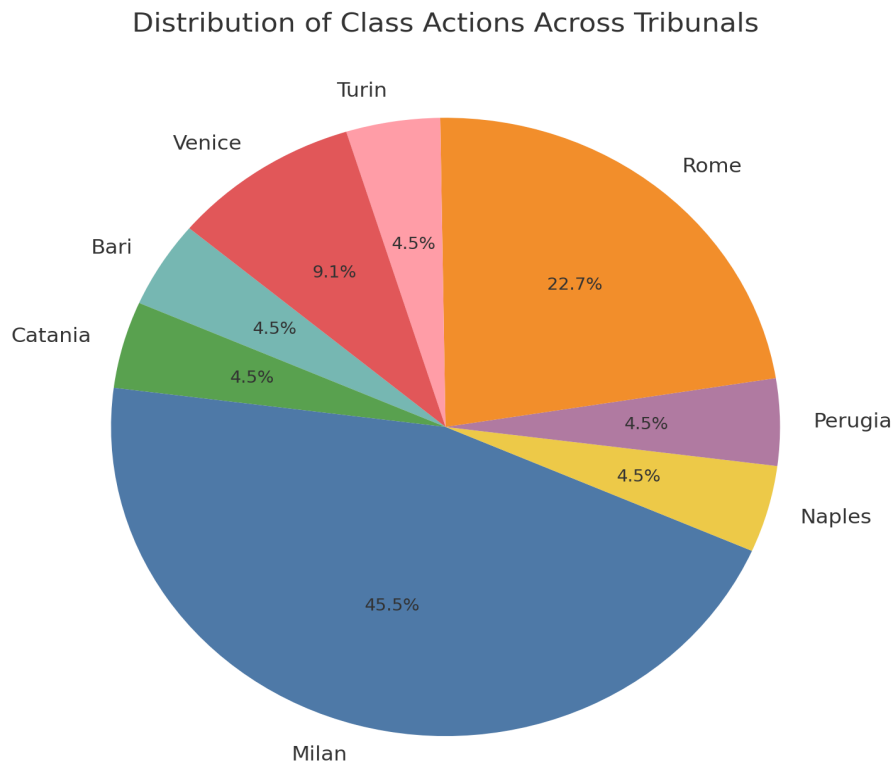
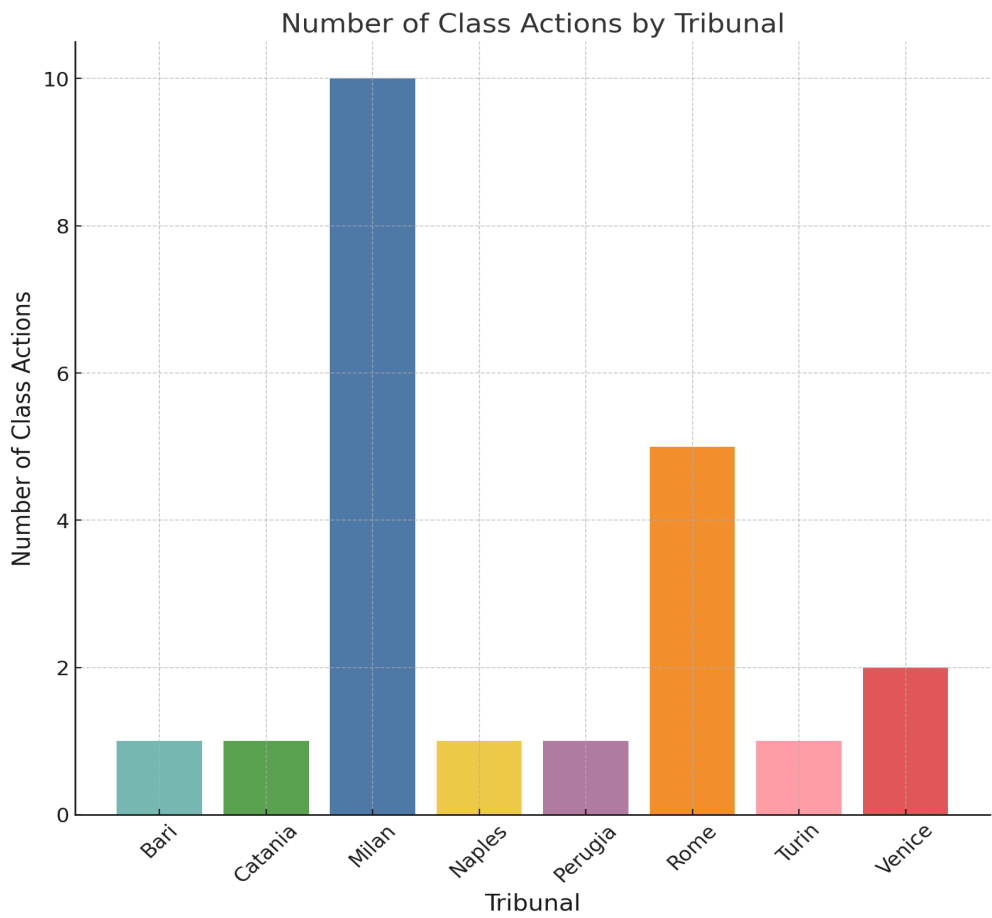
In conclusion, the final lesson to highlight is, once again, one of pluralism,³¹ flexibility and integration. Coincidentally, they are all key ingredients of that very globalisation phenomenon which, with technological advancement, has propelled the constitutional transformations at the basis of the current research.

³⁰ See CUMMINGS S.L. (2018) *Law and social movements: reimagining the progressive canon*, in *Wisconsin Law Review*, 3, 494: “Overall, the new canon campaigns to change law and social practice reveal a pattern of legal mobilization I call integrated advocacy in which lawyers: (1) work in collaboration with nonlawyers in coordinated efforts; (2) engage in a range of legal advocacy, inside and outside of court, to pursue movement goals; and (3) deploy legal and nonlegal strategies in pursuit of policy reform and implementation. The form of legal mobilization in new canon campaigns thus diverges from the old canon emphasis on lawyer control and elite planning oriented toward rights-based court challenges. Yet the outcomes of the new canon campaigns reveal a familiar balancing of positive gains-new laws, short-term upticks in enforcement, public attention, and grassroots mobilization-against long-term enforcement backsliding, countermobilization by opponents in the judicial and political arenas, and internecine movement disputes”.

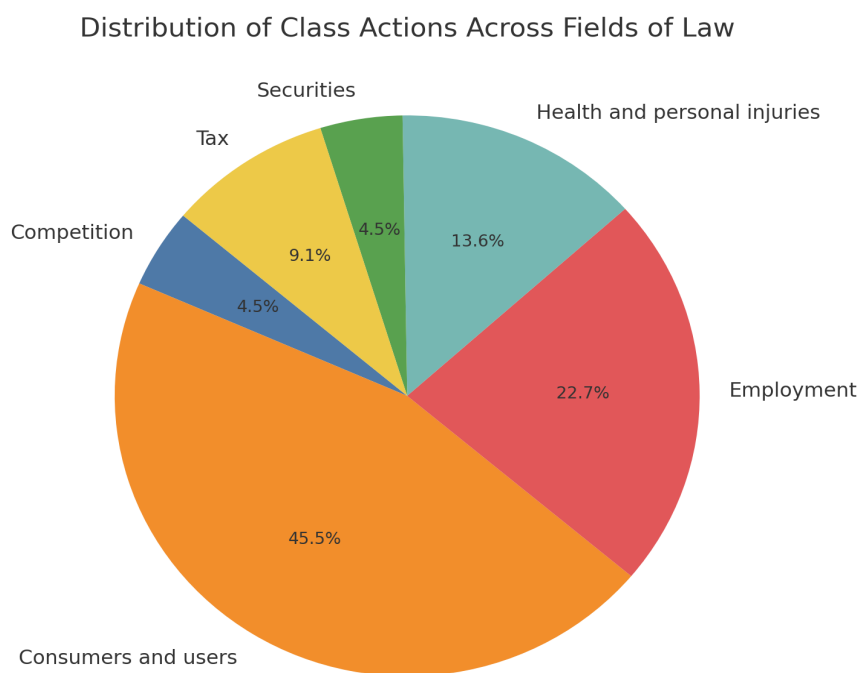
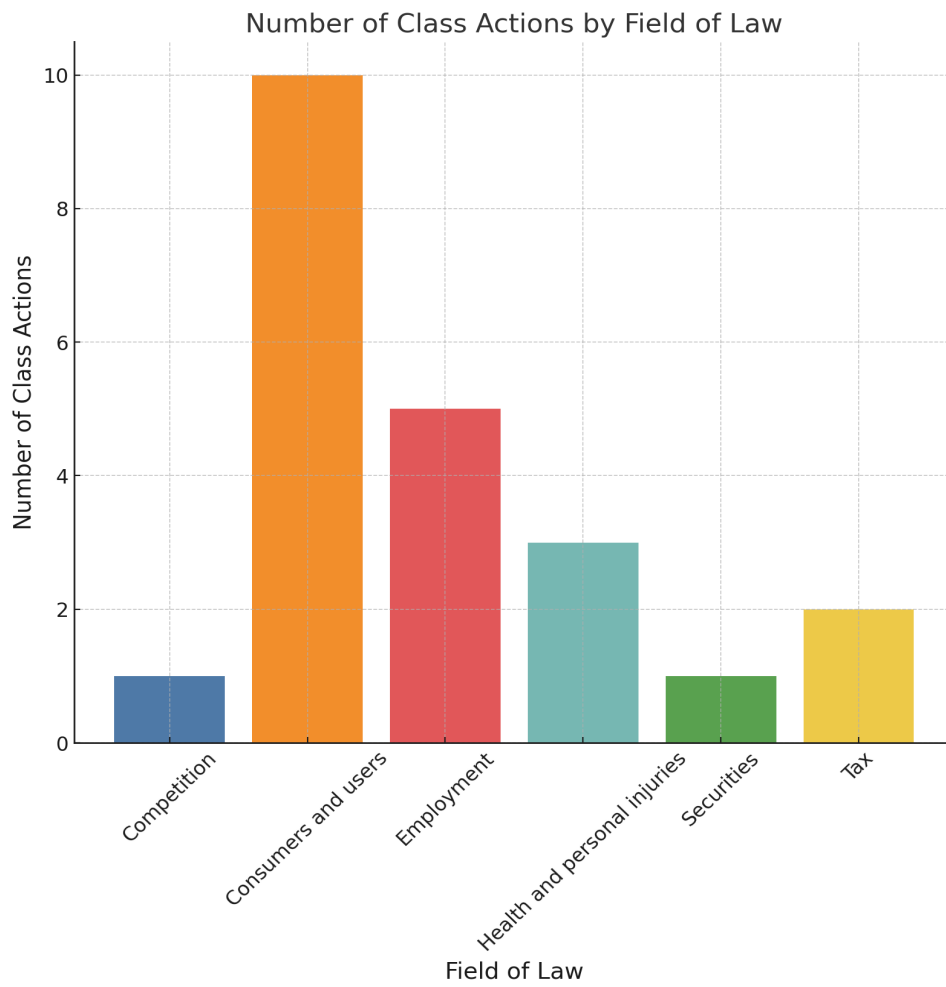
³¹ On the final lesson of pluralism, see CAPPELLETTI M. (1975). *Governmental and Private Advocates for the Public Interest in Civil Litigation: a Comparative Study*, 73(5), in *Michigan Law Review*, 883. See also ELIA L. (1992). *Le norme sulle formazioni sociali nella Costituzione repubblicana. Studi in onore di G. Vignocchi*, Mucchi, Modena, 553: “I also hope that Tocqueville's pluralism (it is no coincidence that we are celebrating the bicentenary of the US constitution) will help us solve the problems of our democracy by extending and strengthening a strong safety net against the ‘decaying effects’ of the political class and party system”.

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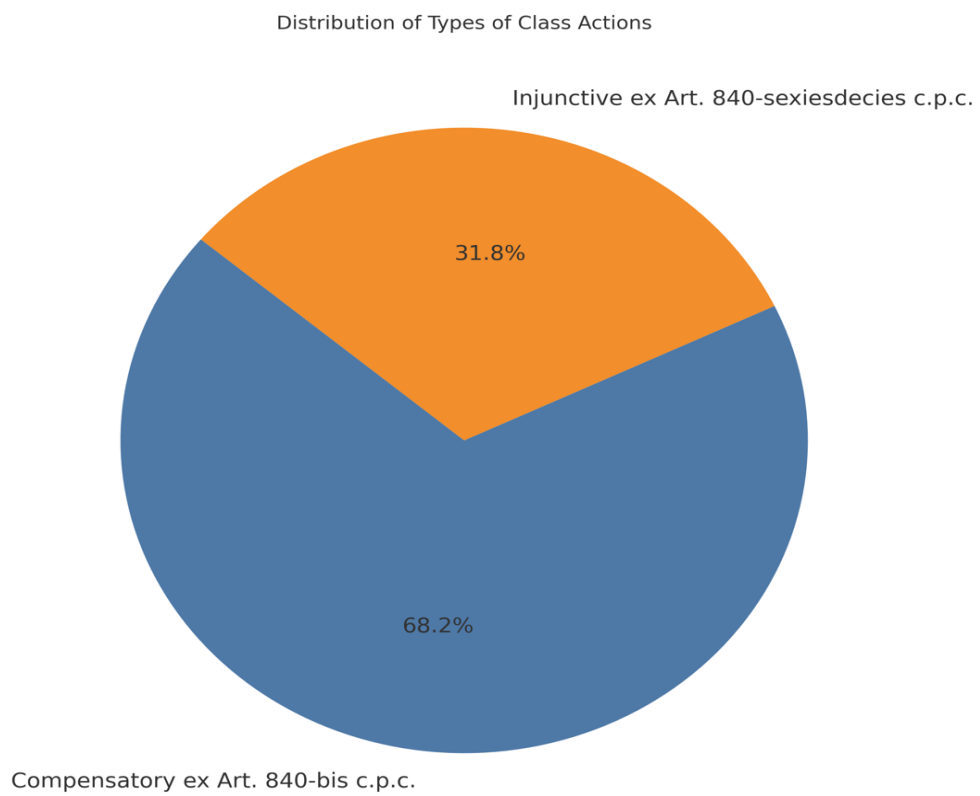
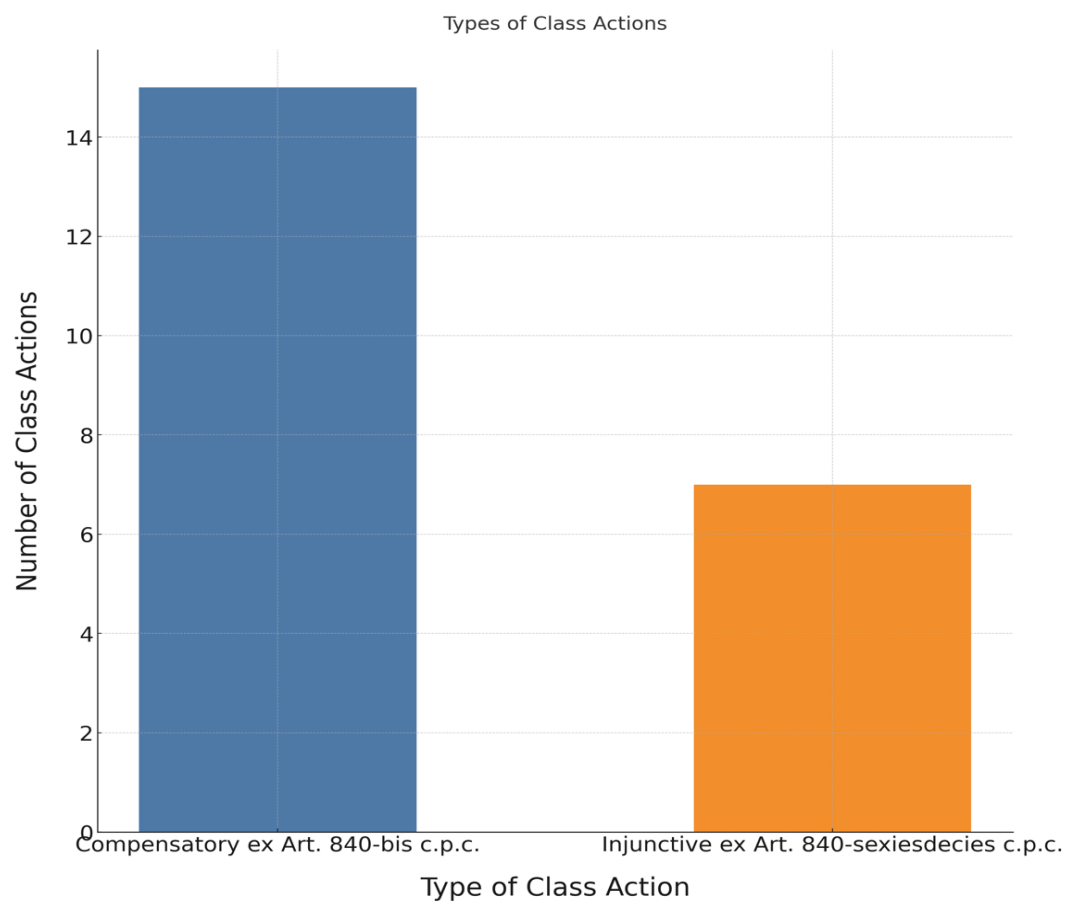
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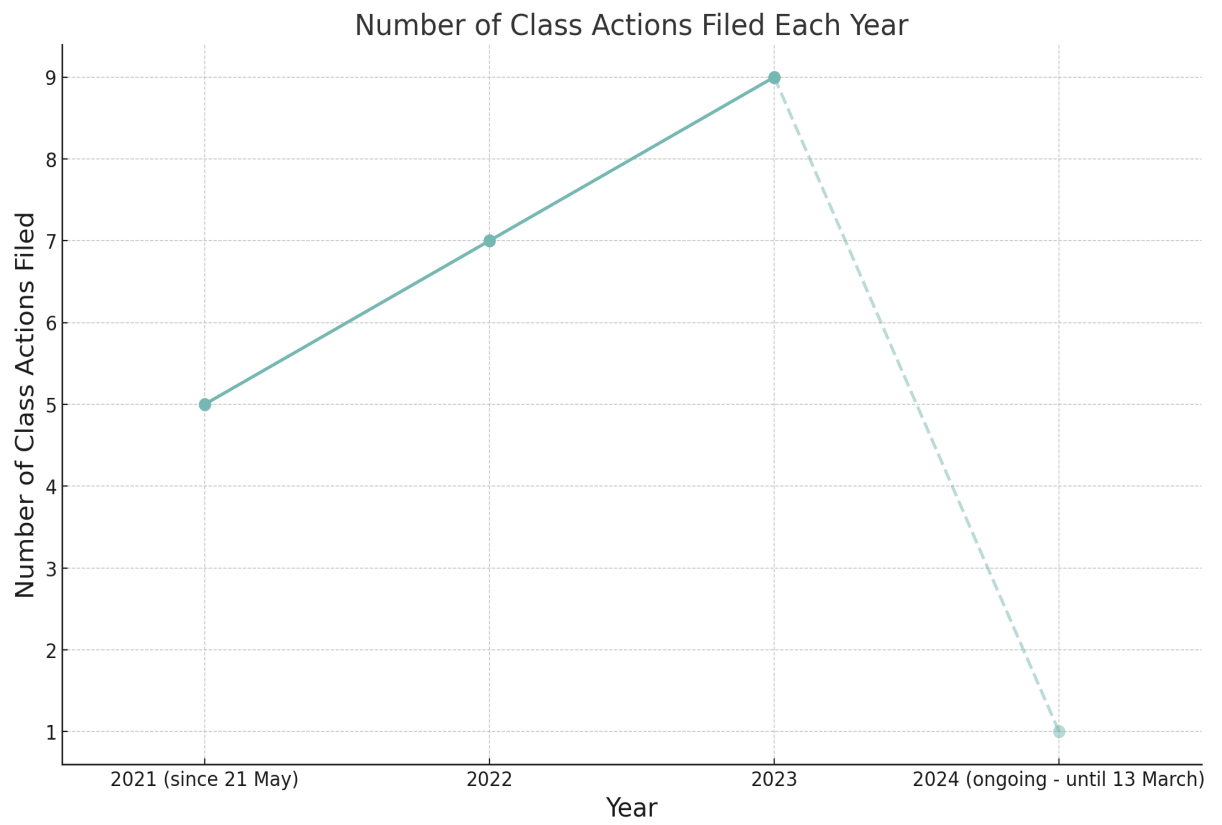
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