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Collective/Individual Minority  
Rights Division: A Procedural  
Proposal**

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# Transcending the Collective/Individual Minority Rights Division:

## A Procedural Proposal

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### *Abstract*

*Violations of human rights often target minority groups. This paper argues, through the case of minority claims, that the right to effective remedy entails an obligation to provide non-individualized remedies where lack thereof would result in non-remediable rights violations. Using class action or a similar tool to aggregate claims in a court procedure will in itself fulfill certain embedded claims and, as a result, contribute to achieving the goal of providing adequate remedy. While many collective procedures can be cited as concrete examples for implementation, the US class action rule will be used here as an example through which the various challenges and possible benefits of a collective procedural tool are assessed. The article presents a conceptual proposal based on insights from the US experiences with class action and concludes that a right view of legal remedies might not only allow but also require accommodating certain collective claims, and such a move could benefit group members in a number of respects, providing for a more efficient and adequate remedy that is sensitive to the context and addresses symbolic claims as well as the problem of limited funds.*

### **Introduction**

The notion of “collective rights” in the minority context has long been a contentious area,

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regarding both its definition (and whether it is of use) and its normative status. This paper accepts as a starting point that at least some claims clad in collectivist terms are legitimate but are thrown out by the individualist filter of the legal system. In other words, there is a gap between what Western-type legal systems can recognize and what minorities and their members legitimately seek through legal procedures. This paper discusses a *conceptual proposal* that seeks to provide certain minority groups with a procedural tool that expands their capabilities for addressing systemic biases of the majority legal system. The proposition is to adopt a procedural rule that allows formulating and presenting claims by groups, ideally through an opt-out regime,<sup>2</sup> that is applicable for minority claims. The paper argues that this in itself will bring benefits to minority rights litigation.

The paper explores the proposal concerning *racial, ethnic, national, linguistic and religious* minorities. This is not to say that other minority groups cannot benefit from this solution, it is only to indicate that this question is outside the focus of this paper (i.e. the selection does not imply a normative claim). These are groups that are commonly treated as entitled to some kind

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<sup>2</sup> See, e.g., the recent Czech proposal on collective redress.

of heightened protection. While the rationale for this treatment remains debated, the differentiation has strong basis in positive law, both on the domestic and the international level. The most famous footnote of constitutional law talks about “discrete and insular minorities,” namely “particular religious, or national, or racial minorities” that might deserve special protection.<sup>3</sup> Article 27 of the International Covenant on Civil and Political Rights defines rights for individuals belonging to “ethnic, religious or linguistic minorities.” Violations against these groups have traditionally been a major concern in mass conflicts. An early document addressing this problem, the Genocide Convention protects “national, ethnical, racial or religious” groups.<sup>4</sup> These groups might also be seen as requiring special legal venues because group claims in their case potentially reach through generations. Groups that self-identify along the above mentioned – racial, ethnic, national, religious or linguistic – lines have played an important role in what has been dubbed the ‘age of reparations,’<sup>5</sup> trying to translate moral claims

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3 U.S. v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), citation omitted.

4 Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

5 The ‘age of reparations’ is commonly associated with reparations claims from the past decades, made by groups that have been historically discriminated against, like indigenous peoples in Australia, Canada, victims of slavery in the US, to name a few.

into legal ones, seeking remedy for historical or more recent mass atrocities and widespread, systemic injustices. Such claims can be barred for various reasons, like strong political opposition from majorities (that might take the form of legislative counteraction), statutes of limitations, biases of the legal system and its institutions, including the courts (making it impossible to translate claims into law suits), and the inadequacy of the legal system to address collective claims that cannot be individualized, or can only be individualized in part.

The *claims* themselves can involve remedies for various harms: for colonization, see the indigenous claims for loss of land and loss of culture, or, more widely, by losers of nation-building; remedies for genocide and other mass killings targeting minorities (Holocaust claims, ‘ethnic cleansing’ in the Balkans etc.), other discriminatory policies (e.g., slavery, apartheid, force removal from territories, typically, of indigenous groups, or to camps, like the Japanese-American internment, infamously discussed in *Korematsu*,<sup>6</sup> or else from families, like in the ‘Lost Generation’ boarding school cases in Australia and Canada<sup>7</sup>); and other discriminatory practices that disparately impact certain minority groups. While I have all such cases in mind

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6 *Korematsu v. United States*, 323 U.S. 214 (1944).

7 These are claims based on the forced separation of indigenous children from their families.

when discussing the adequacy of collective procedural solutions and making the general assessment, the article will focus more specifically on US class action cases.

While few would question that adequate remedies are important in the mentioned cases, one is hesitant to jump to the conclusion that only because groups are targeted do we also need a collective procedure. Existing minority rights guarantees usually fail in two respects: back up rights with *material guarantees* and consider the *collective element* inherent in many minority rights claims.<sup>8</sup> As for the latter element, the paper remains open: regardless of whether terms like 'collective rights', 'group rights' etc. make sense and, if so, whether they are desirable, I claim that the proposal fulfills goals that are important from a *strictly individualist* approach. Providing for *effective remedies*, a universal principle and recognized human right, proves to be an impossible task in many cases where claims are too small or whose *value* is hard to be expressed by concrete sums, and *evidentiary* hurdles might also prevent claimants from successfully litigating their claims. As we will see, a collective procedural solution can address

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8 An excellent summary of what international minority rights have achieved so far and how these stand vis-à-vis the actual claims that minority groups raise, see WILL KYMLICKA, MULTICULTURAL ODYSSEYS. NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY (2007).

many of these concerns. In addition, the procedural tool can serve a symbolic goal by legally identifying a collectivity that seeks *recognition* as a group, while avoiding more essentialist debates by focusing on concrete violations. The procedural tool does not seek to resolve the question of what a minority is, once and for all, which is a central concern around minority rights both in the literature and more generally in law, and a major obstacle for recognition through political means. This also means that the procedural tool will have built-in limitations, and are in most contexts not suitable to address autonomy claims, the 'maximum' of minority claims. Also, in some cases, claims never get to court, either because they are addressed through other (political) means (e.g., a legislative compensation scheme), or the victims fail to sue for other reasons (e.g., because they see legal proceedings as hopeless), while in other cases courts are involved and play some role in the fate of the claims. It is this latter area that is of special concern for claiming collective legal remedies. Exploring the advantages of the collective procedural solution involves (a) identifying the group or *class*: membership, agency, one-time recognition and its symbolic message; (b) choice of *remedy*: injunction, compensation and restitution, proportionate scaling down in case of insufficient funds, budgetary constraints (the limited funds argument); and (c) allowing *access* to justice: empowerment, collective-only

claims and otherwise inefficient claims. According to the hypothesis, in all these areas, solutions distilled from the class action jurisprudence could inform a proposal for collective procedures dealing with minority claims. Despite the collective element, the paper ultimately adopts a functional individualist approach, acknowledging that even aggregated remedies should ultimately be assessed on the individual level. The conclusions suggest that a right view of legal remedies can accommodate certain collective claims, and such a move will benefit minorities in a number of respects.<sup>9</sup>

The proposal remains conceptual, meaning that it does not argue for a specific legal solution to be adopted, it only provides arguments for a collective procedural tool of some sort, examining the possible benefits and dangers through the experience of the US class action tool. The proposal could be implemented both domestically and on the international level. Indeed, there are areas where attempts point to a similar direction, but they fail to present a coherent framework for addressing collective minority claims. The Inter-American human rights

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<sup>9</sup> All this does not mean, of course, that litigating claims formulated by minority groups should always be litigated through a class action type collective procedure. What it means is that such a tool should be available because certain group claims will raise issues that only such a tool can accommodate.



system has famously dealt with collective claims already.<sup>10</sup> The African human rights system has had a strong emphasis on collectivities from the outset. The International Criminal Court has a separate Victims' Trust Fund that could benefit from collective procedures. Other international mechanisms are also seeking ways to deal with widespread and systemic violations. The ECtHR is already implementing the pilot judgment procedure that is "a means of dealing with large groups of identical cases that derive from the same underlying problem",<sup>11</sup> potentially covering minorities facing systemic discrimination. The European Social Charter includes a collective complaints mechanism<sup>12</sup> that can accommodate group claims of the sort I consider. See, e.g., the various (successful) complaints filed by the European Roma Rights

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10 See, above all, the decisions in the Aloeboetoe and Plan de Sanchez Massacre cases: Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Sept. 10, 1993); Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (Nov. 19, 2004). In the latter case, a tribe was a victim of rape, torture and assassination by armed forces and civil patrols. The judgment provided for remedies to members of a tribe, without individualization, in addition to public (and publicized) acknowledgment: funds for a commemorative chapel, health institutions (including a local health center) and a special psychological and psychiatric program benefiting the victims, adequate housing, a state-financed study of the Maya-Achí culture (the culture of the victim tribe), maintenance and improvement of the road systems, sewage system and water supply, schooling with bilingual teaching personnel, a pecuniary damage of \$5,000 and a non-pecuniary damage of \$20,000 per person.

11 European Court of Human Rights, The Pilot-Judgment Procedure. Information note issued by the Registrar, 2009, 1, [http://www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf).

12 Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, No. 158, Strasbourg, 9 September 1995.

Centre or the European Roma and Travellers Forum.<sup>13</sup> The proposal presented here would go beyond these mechanisms in several respects, most importantly more effective deterrence through aggregated damage claims.

Considering the recent backlash in applying class action to group claims in the US, the proposal speaks also to a US audience by highlighting the potentials of this tool, both in a wider setting and in US race relations more specifically, with examples from US case law. But more importantly, the US case allows me to rely on experiences with a group litigation device, specifically in the civil rights context, and to show that allowing a group to litigate will have some features that benefit minority groups in particular, and finally to draw lessons that are applicable more widely, potentially in all jurisdictions where minority claims could appear. The lessons learned in class action claims presented by minority groups should encourage the application

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13 See complaints No. 15/2003 European Roma Rights Centre (ERRC) v. Greece, No. 27/2004 European Roma Rights Center (ERRC) v. Italy, No. 31/2005 European Roma Rights Center (ERRC) v. Bulgaria, No. 46/2007, European Roma Rights Centre (ERRC) v. Bulgaria, No. 48/2008 European Roma Rights Centre (ERRC) v. Bulgaria, No. 51/2008 European Roma Rights Centre (ERRC) v. France, No. 61/2010 European Roma Rights Centre (ERRC) v. Portugal, No. 64/2011 European Roma and Travellers Forum (ERTF) v. France. The European Commission of Social Rights found a violation in all cases, without exception. As of early 2015, there are two similar collective complaints pending, both of them declared admissible: No. 100/2013 European Roma Rights Centre (ERRC) v. Ireland, No. 104/2014 European Roma and Travellers Forum (ERTF) v. Czech Republic.

of similar approaches in various contexts: the observations can inform judges and legislators in domestic settings as well as improve the adequacy of international human rights remedies for mass violations targeting minorities, a large segment of violations occurring globally. While the cases studied here address the most egregious violations, genocide claims, the solution can be applied more widely, from cases of segregation to denial of rights to the use of language. A group-based procedural solution in such cases might not trigger the outright opposition that many sub-state collective claims need to face.

In what follows, I first problematize the strictly individualist approach of law and legal remedies. Second, I explore the possible benefits of a collective procedural solution. For the sake of brevity, I will address here neither the general literature on class actions or the background question of whether courts are the adequate forum to deal with such claims, nor specific cases in details, but will refer to related questions where necessary in the overview of the potentials of and the possible challenges to the proposal.

## Limits of the Individual Approach

A common criticism of the liberal tradition that determines crucial commitments of Western legal systems is its almost unique reliance on individualism. By concentrating almost exclusively on the individual, it routinely neglects the collective aspect. In law, this translates into a distinctive deafness to anything that cannot be presented readily as a sum of individual rights, claims or interests. Harm on the collective level needs to be presented as psychological loss for the members, caused by increased suffering with the loss of community. While strong presumptions work to acknowledge harm close to the direct harm, including harm to close family members, other forces work to exclude most harms that go beyond this realm. While this is a defensible approach, it can also become an impediment to law's ability to address harm that is otherwise very much present for concrete individuals.

Modern Western law is embedded in a liberal tradition that values individual rights, and the Western state is usually hostile to all other collective entities or at least looks at them with suspicion.<sup>14</sup> As for its anthropological view, the human ideal of our legal tradition is an

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<sup>14</sup> There has been "a continuing liberal unwillingness to tolerate an intermediate entity that appears to threaten

independent actor, largely free from outside interference. Charles Taylor describes the broader liberal approach as atomism, a way of thinking that puts rights over duties and the individual over the community, neglecting that the wider society produces most if not all of the alternatives that an autonomous individual is free to choose.<sup>15</sup> The same classical liberal features in traditional legal areas that neglect the social context and “features atomistic individuals who interact only at the point of a discontinuous event.”<sup>16</sup> Revisiting the individualistic approach of law allows us to uncover hidden assumptions, inherent in the way litigation is set up, the civil procedural rules,<sup>17</sup> and adjudication in general. By problematizing the focus on the individual, taken in isolation, one reaches quickly fundamental questions about the role of courts and substantial questions concerning the rights to be litigated. Hans Kelsen once proposed to think of persons as “the personification of a norm complex,” which will allow us to dissolve “the pseudo-antinomy between individual and community.” He argued that we should understand

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the interest of both the state and the individual.” Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

15 See, e.g., CHARLES TAYLOR, *THE MALAISE OF MODERNITY* (1991).

16 Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002).

17 Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497 (1987).

the individual as someone who, while being a whole, exists only as a “dependent component of the community.” The “insoluble conflict” of the individual with the community, that many want to present as a given, “is simply an ideology in the struggle of certain interests to resist containment by a collective system.”<sup>18</sup>

Individualist selectivity is problematic not only if the described filtering somehow reflects an inherent difference. If it arbitrarily drops out values and interests, that will in turn question its basic functioning and legitimacy. Collective remedies can extend law’s ability to recognize legitimate claims in two interrelated ways. First, it allows us to see that collective forms of remedies can be applied in more areas than usually assumed. Second, where they do (or should) apply, they can provide benefits that are not available under a strictly individual scheme.

What the argument does not say is that a collective remedy will be superior under all circumstances. The adequate remedy in a particular case will depend on a number of factors.

It might involve both qualitative and quantitative considerations. It might be that the nature of violations requires a collective legal framework because damages can only be claimed

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18 Under § 25(f) or the “Ideological Significance of the Antinomy between Individual and Community,” HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (THE PURE THEORY OF LAW) 51–52 (1992).

effectively on the collective level. And even if this is not the case, the sheer number of the claimants, combined with the similar pattern of violations, might justify the application of a collective judicial solution. Considering the type of harm, “injuries caused by public law violations frequently are intangible, symbolic, and difficult to measure,”<sup>19</sup> which will have an impact on the judicial remedies.

The following sections explore and list possible benefits of the collective approach. For a concise but more complete list, see the Annex. As these are interrelated goals and benefits, maintaining a strict division is impossible and undesirable, and there is a strong overlap between the categories.

## **Limited Funds**

Budgetary constraint is a legitimate concern in the case of claims for widespread violations, especially in the context of transitional justice. Under traditional judicial treatment, early claims

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19 Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1378 n.126 (1991).

might end up emptying the funds available, provided there are available funds in the first place – a central concern in the practice of mass violations claims.

Claims aggregation, a measure used in class actions, aims at solving just that problem, by denying exclusive preference to claims made prior to other claims. However, as already mentioned, it became considerably harder to get a class certified on a mere limited fund rationale, based on Rule 23(b)(1)(B), after the Supreme Court's decision in *Ortiz*.<sup>20</sup>

## Empowerment and Trust

A rule of US class action – Rule 23(b)(3) – allows claims too small to be litigated individually to move forward.<sup>21</sup> This can make viable claims of widespread but hard-to-quantify and, as a result, neglected forms of cultural discrimination. Aggregation of seemingly minor, e.g., language-based discrimination might allow such claims to move forward and deter further violations through damage awards, even in the lack of an available injunctive relief.

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<sup>20</sup> *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999).

<sup>21</sup> I will not address just mention here the problem of a possible opt-out that might have a direct effect on whether it is efficient to maintain a class, after the most economic claims leave it. See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002).



Aggregation might effectively counter the inherent but arbitrary bias of the tort system. Certain tortfeasors pay, while others, who cause damages that happen to be too much divided among victims, can run free. The difference can only be explained by a technical difficulty, and that is hardly a persuasive ground for a substantial distinction, especially in the minority rights context where the burden might already fall heavily on insular groups, having no other means to challenge the current setup that contributes to continuing victimization.

Continuing victimization might also flow from being singled out for the sake of bringing legal challenges, especially in the case of harsh or sensitive violations. The NAACP Legal Defense & Educational Fund argued in *Concepcion* that class actions “offer remedies for civil rights violations in circumstances where individuals are unlikely to proceed on their own because they lack timely notice, have insufficient resources, or fear retaliation.”<sup>22</sup> This might be especially relevant in the minority context, vindicating rights and damages that go against established

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22 Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Respondents, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), 3 [hereinafter LDF Brief], available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_893\\_Respo](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_893_Respo)  
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views in the mainstream society.<sup>23</sup> Victims in an underprivileged position might not be reachable for litigation and we lack the information necessary to bring (individual) justice for everyone. In areas like “prisoners’ rights, school desegregation, and employment discrimination [...] class actions have played a vital role. They have made it possible to afford relief to large numbers of persons who, realistically, could not have been parties to litigation.”<sup>24</sup>

While individualization has its own benefits, there are areas where aggregation may yield better results. Brandon L. Garrett argues that this is the case with developing constitutional values, where “[b]igger lawsuits may sometimes be better” than a purely individual approach: “If constitutional litigation becomes a purely solitary affair, sporadic cases may have an outsized impact, but in an ad hoc way that provides poor notice to government officials. Aggregation can improve clarity, legitimacy, participation, and representation.”<sup>25</sup> This will also help minorities to get leverage in a political struggle. Class action litigation can “focus attention on the scope and

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23 The NCAAP LDF amicus brief quotes Judge Robert Carter, building on his experience as a civil rights litigator: “in cases ‘seeking to vindicate novel rights in the face of majoritarian hostility, the very ability to proceed required the institution of a class action’ because a ‘lone plaintiff’ may be ‘extremely vulnerable to the pressure of intimidation.’” LDF Brief, *supra* note **Hiba! A hivatkozási forrás nem található.**, at 16.

24 Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 585 (1997).

25 Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 648.

magnitude of discriminatory practices and create pressure for government regulators and legislators to address issues they might otherwise ignore.”<sup>26</sup>

Furthermore, this attention to minority issues has the potential to build trust through demonstrating that majority institutions can accommodate claims that go against established structures and a clear majority interest, supporting causes that are largely neglected or even hostile to majoritarian decision-making. This can reinforce the sense in minority members that public institutions are also theirs, an important step towards integration.

The concern that aggregation results in a pro-plaintiff bias can be seen as merely making up for the overall bias of the (political, majoritarian) system against certain types of minorities, thus contributing to their empowerment. On a different level, the very decision that allows or mandates aggregation is part of the remedy, benefiting the victim group at the expense of the alleged perpetrator. While this happens before legal responsibility is established, it can be seen as a form of preliminary injunction, and it also carries some symbolic value for a community.

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<sup>26</sup> LDF Brief, *supra* note 22, at 25.

## Symbolic Value

Class actions have an additional symbolic value largely specific to the minority context, flowing from the fact that minority members can see their cause litigated with the entire community, and the members' suffering, recognized in a court setting. Furthermore, recognizing a group in the proceedings can be more than symbolic, and it can contribute to the remedial goal: "The class certification process, as well as the public and media attention that class actions generate, broaden awareness about and expand participation in civil rights and other litigation."<sup>27</sup>

If we see rights litigation as part of a broader strategy, for political emancipation, a class action can embody a cause, creating an issue that all those concerned can relate to: "for individuals who have experienced discrimination and other civil rights violations, [...] association for litigation may be the most effective form of political association."<sup>28</sup> This potentially goes beyond strictly symbolic benefits and links back to the empowerment argument.

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<sup>27</sup> LDF Brief, *supra* note 22, at 16.

<sup>28</sup> NAACP v. Button, 371 U.S. 415, 431 (1963); accord *In re Primus*, 436 U.S. 412, 423–26 (1978), cited in LDF Brief, *supra* note 22, at 25.

## Efficient Remedies

Judge Jack B. Weinstein, listing the advantages and disadvantages of class action in general,<sup>29</sup> talks about the reduction of duplication (in discovery and other procedural aspects, including appeal). This allows a judge to have a more holistic view of the case,<sup>30</sup> helps consistency and facilitate closure (through a single judgment or facilitating global settlements). Consistency – equal results – will satisfy a basic sense of justice, about like cases decided alike. On the other hand, defendants might also benefit from the fact that their liability is more calculable, or at least appears as “a single fair punitive damage amount instead of repetitive and overlapping punishment.”<sup>31</sup> And ultimately, the wider public also benefits from aggregation, as “class actions serve broader public interests by effectively remedying and deterring civil rights violations and especially systemic discrimination.”<sup>32</sup>

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29 Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT’L L. 165, 172–74 (2001).

30 Garrett, *supra* note 25, at 613.

31 Weinstein, *supra* note 29, at 173.

32 LDF Brief, *supra* note 22, at 3.

Claims that otherwise would not appear before the courts for various reasons, e.g., because only aggregation generates enough incentive for plaintiffs and their attorneys, but the process also empowers the courts to control legal fees. By providing for more procedural safeguards, the court can improve legitimacy, not just efficiency, through greater participation, access to information and better (because more economic) representation and discovery.<sup>33</sup>

While injunction might, by itself, trigger wider changes (in policy and practice), the fact that it came through a class action challenge might still matter. In case of deeply entrenched, complex practices operating through largely hidden means, presenting the harm in a broader fashion (both to the court and the wider public) and designing the remedy accordingly might be more effective.<sup>34</sup>

It is possible to claim that by aggregating all claims flowing from a damaging conduct, we might eliminate the rationale for punitive damages: “it may be said that mass tort class judgments also perform a regulatory function in reshaping the patterns of the [actual and potential]

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33 Garrett, *supra* note 25, at 613.

34 LDF Brief, *supra* note 22, at 20.

wrongdoers' behavior."<sup>35</sup> While economies of scales is usually seen as benefiting plaintiffs (making claims litigable and giving more power) and courts (less aggregate burden),<sup>36</sup> coherence and the fact that aggregation is possible on both sides might also end up helping defendants. Even where plaintiffs are empowered by aggregation, in the case of victimized minorities, this might be seen as just fair, moving to tilt back the field, by uniting otherwise disperse interests (see the arguments about empowerment).

Finally, we should not forget that efficiency of a legal remedy is not simply a policy question about better enforcement or a plus of the tort system; it is at the same time a question of *rights*. It is a necessary condition of a well-functioning legal system – seeking to create optimal deterrence,<sup>37</sup> see later – and, at the same time, a legal obligation. State violations that make it to the international level, especially when they concern minorities, often identify systemic problems or atrocities that concern large groups. The failure to address these is a violation of the right to an adequate remedy and a violation of the underlying right. A whole

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35 Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 410 (2001).

36 Garrett, *supra* note 25, at 613.

37 STEVEN SHAVELL, FOUNDATIONS OF THE ECONOMIC ANALYSIS OF LAW 280–87 (2004).

array of international norms (e.g., UDHR Art. 8, ECHR Art. 13, ICCPR Art. 2.3, CERD Art. 6, ACHR Art. 25, African Charter Art. 7<sup>38</sup>) require states to provide adequate, effective remedy for various human rights violations. The right to adequate remedy that is also part of customary international law.<sup>39</sup> There are cases where individual remedies are too constraining and are unable to encompass considerable damages that the violations caused. Accordingly, collective types of remedies that can target damages occurred on a group level should be seen as necessary under any standard of adequacy or effectiveness. In addition, if the violation is widespread and serious ('gross' or 'mass' violations occurred),<sup>40</sup> the remedy should be designed accordingly. But regardless of the scope, without aggregation we get a less just and

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38 For an overview, see also Dinah L. Shelton & Thordis Ingadottir, *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79). Recommendations for the Court Rules of Procedure and Evidence*, The Center on International Cooperation, New York University, 1999, *available at* [http://www.pict-pcti.org/publications/PICT\\_articles/REPARATIONS.PDF](http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF).

39 The Universal Declaration of Human Rights is generally considered to have become part of international customary law. Its Article 8 guarantees the right to an effective remedy. In 1927, the Permanent Court of International Justice already spoke of an established rule and famously noted that it is "a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." *Chorzów Factory (Jurisdiction)*, 1927 P.C.I.J. Series A, N°8, at 21.

40 See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).



less safe society, because “eliminating the risk of liability for aggregated civil rights violations means that some number of those injuries will remain unredressed,”<sup>41</sup> also compromising the goal of optimal deterrence.

David Rosenberg summarizes the obstacles to address material (physical or emotional) losses as follows:

By concerning itself only with ‘legally cognizable’ losses, the system promises only partial compensation. Compensation is further limited by juries’ prejudices against racial minorities and the poor, by high litigation costs, which deter competent plaintiffs’ attorneys – particularly in mass exposure cases – from investing in lawsuits; by the failure of many mass exposure victims to associate their illnesses with the toxic agent to which the defendant exposed them; and by the inability of some victims to reach the assets of wrongdoers, who may be insolvent or otherwise legally unaccountable by the time the victims bring suit.<sup>42</sup>

These sound as serious limitations. To be able to criticize what is left out we should first be clear about the goals. For damages, a central element concerns the choice favoring the deterrence or the compensatory goal of an award. In the following section I will address this question in more detail, in the context of collective minority claims.

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41 LDF Brief, *supra* note 22, at 4.

42 David Rosenberg, *Mandatory-Litigation Class Action: The Only Option For Mass Tort Cases*, 115 HARV. L. REV. 831, 878 (2002).

## Adequate Remedy: Injunction and Damages, Deterrence and Compensation

In the case of historical injustices, the high complexity, the issues of evidence and intergenerational claims, with the lapse of time, all make individualization unfeasible or undesirable. Furthermore, especially in egregious violations like loss of life, wartime sexual violence, but also with other human rights violations, victims might be hostile to compensation. The judgment granting damages might seem like 'forced sale,' causing a devaluation of life, health, bodily integrity, emotional suffering, "when it is the wrongdoer who chooses whether, when, and – to a large extent – at what price injury will be inflicted. [...] Money damages can never fully compensate for personal injuries that result in death or severe disability. Translating such losses into dollars and cents not only demeans the individual rights at stake."<sup>43</sup> In cases of forced disappearances, family members might refuse to accept compensation as an adequate remedy, as that would mean that they gave up the hope that their beloved one will return. In these cases, a collective type of remedy like commemoration, research aimed at

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<sup>43</sup> *Id.* at 878–79.

better historical understanding, free services provided to the victims and families (that all lack strict individualization) might serve better even the goal of strictly individual compensation.

The relationship between the different types of remedies (injunctive and declaratory relief or damages) and the goals of these remedies (deterrence and compensation) is not always clear.

A common approach would be to link damages to (individual) compensation, a backward-looking remedy, and injunctive and complex remedies to the forward-looking element of lawsuits. Yet, at least in one sense, the exact opposite is true: in the case of complex remedies, the court needs to specify the type of change in practices and policies, limiting how complex the remedy can actually get, and how far they will reach (both in time and in space); in the case of damages, by shifting the level of liability for certain types of actors, precedents might trigger a more complex set of changes in the behavior of those potentially liable, through market mechanisms, guiding action well beyond the parties. For minority claims, the question is how we can connect the goals of the claims – deterrence and compensation – to the form of remedies, and how to assess the right purposes of class litigation.

Remedies can be of two types, both of which raise distinct sets of problems. There are remedies that are, in a way, inherently collective: the ‘systemic,’ ‘administrative’ or ‘complex’ remedies, positive injunctions, that require a shift in policies and practices.<sup>44</sup> The essence of systemic violations and remedies is captured by what Roberto Unger calls “destabilization rights,”<sup>45</sup> seeking institutional change in case of entrenched policies and practices that fail to meet certain aspirations, or rights obligations. Such measures, like public law injunction, will have an impact on non-parties, regardless of whether the case is litigated as a class action. The second type of remedies is compensation, usually understood as an individualized damage award, reflective of the harm suffered by the particular person. Even in this form, it is possible to go collective, and award damages to the class, without full individualization – at least individualization as we know it from traditional damage awards. Class action suits often work with extremely high numbers of parties, that make it very costly, if not impossible, to engage in full individualization, whereas a wholly collectivized grant would look highly unjust. Statistical sampling, using a

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44 For a general overview, see Lewis D. Sargentich, *Complex Enforcement* (March 1978) (unpublished manuscript) (on file with the Harvard Law School Library).

45 Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

random sample, with the possibility of sub-classes, can address this issue, as it happened in the *Marcos* litigation with torture victims claims.<sup>46</sup>

Using a different terminology, these remedies can be called forward-looking or future-oriented, and backward-looking or past-oriented remedies. Forward-looking remedies seek change, directly, mostly through injunctions, with a high potential of impact on non-parties. Backward-looking remedies seek damages, compensation for a past harm, without necessarily being preoccupied with what will happen in similar future cases. However, even in such cases, damages will exert an influence, through deterrence, on future behavior.

If we consider the deterrence effect that any type of remedy ought to exert on potential tortfeasors, the above distinctions quickly dissolve. Establishing liability, applying certain standards of negligence always has a systematic effect on future behavior, because norms and their applications are (ideally) general. In this sense all judgments are collective, because they have a potential impact on what defendants can expect in similar cases, and how they should adjust their behavior to the judgment even if it was about a remote, single case. Again, this

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46 There the court created five categories and adopted a statistical method of random sampling. In re Estate of Marcos, 103 F.3d 767, 782 (1996). For more details on the enforcement, *see* <http://claimants1081.org>.

applies to the deterrence effect of an individual case. It is impossible to define the optimal remedy without considering this impact, which means that judges should always consider the wider ('collective') context.

Despite the malleability of the categories, in order to decide how to best shape remedies in cases where minorities raise collective claims, we need to be clear about the goals of providing the remedies in the first place: what is the right aspiration for courts, or even for the minority members themselves? As with human rights violations in general, it would seem that both deterrence and compensation play an undeniably important role, including their mutual reinforcing effects.

It can be argued that in the civil rights context, enforcing damages might or should not be the most important element, even if they constitute the core claim, because "class action litigation may bring public attention to human rights atrocities."<sup>47</sup> Furthermore, litigation can be part of a broader strategy, exercising pressure and gaining attention, using the court as a forum where

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47 Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers For Group Litigation*, 2004 MICH. ST. L. REV. 643, 655.

victims can make their voices heard, sometimes with clear political goals in mind.<sup>48</sup> This approach is based on a completely different perception on what courts are doing, or what law and litigation is good for, and might alter (broaden) our view on the role of courts. In this sense, ‘soft’ remedies, e.g., mere declarations, or ‘symbolic’ remedies can have an impact by triggering change through venues other than judicially created legal obligations. Official recognition might make it easier to proceed with minority claims through non-judicial means.

From a policy perspective, regarding the outcome, the change that class action litigation can trigger might not be best captured by the legal nature of the remedy sought. While injunction or a declaratory judgment is usually seen as leaning more towards push for change, damages can prove to be more effective in influencing decision-makers through deterrence, by making potential defendants internalize the costs of the harm. Damages might also make defendants (as well as the public) aware of the actual harm they are causing. It is easier to oppose a court-mandated desegregation plan than to question the loss of life perspectives of kids forced into segregated environments, that can equally serve as a push towards non-discriminatory

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48 *Id.* at 656.

practices, even if it might be hard to prove and quantify the harm, the very process can be educative for the violators and the wider public. Only with goals like deterrence and compensation in mind can courts address the question of what is an adequate remedy.

First, compensations can be defined based on a deterrence rationale. Michael Thad Allen considers the difference between *quantum meruit* (value of service/labor) and unjust enrichment (profit) damages, in the case of forced labor compensation. He argues that applying the latter might create new injustices; restitutionary claims tend to distort history.<sup>49</sup> Grounding compensatory amounts in gains might differentiate between companies not based on the harm they have done, but on their economic performance, potentially shielding an employer with low or negative performance. Compensatory damages calculated based on losses are better because they have a better deterrence effect.

Second, courts do detach standing to claim damages from deterrence and redressability. In *Doe v. Unocal Corp.*<sup>50</sup> the court found that it is not enough for plaintiffs to show that they were

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49 Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-De-Sac of International Human-Rights Law*, 17 WIDENER L. REV. 1 (2011).

50 *Doe v. Unocal Corp.*, 67 F.Supp.2d 1140, 1144–45 (C.D.Cal. 1999).



harmful by the defendant, as other potential defendants were out of the reach of the deterrence effect. After the court concluded that other elements of the standing requirements were fulfilled, it went on to examine an additional factor for injunction: “plaintiffs must prove additional facts for their equitable claim that they would not have to establish for their damages claim.”<sup>51</sup> The court subsequently found that non-parties were responsible for 70% involvement in the project and further that even in the case of defendants present, their place could easily be taken by other companies, which makes injunction ineffective: “For purposes of class certification, plaintiffs’ allegations and supporting evidence do not demonstrate that injunctive relief against Unocal is likely to redress their alleged injuries.”<sup>52</sup> This made Rule 23(b)(2), conditional on the appropriateness of “injunctive relief or corresponding declaratory relief,” inapplicable.

Here the court was concerned that deterrence of the harmful activity would not result from the remedy. We can easily apply this argument in the other direction. If only collective remedies can result in optimal deterrence, they should be used. To see how this can work, let’s turn to

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51 *Id.* at 1145.

52 *Id.* at 1147.

what District Court Chief Judge Korman said, pessimistically, about the chances for Holocaust claimants to win in court:

The alternative to this settlement was prolonged, complex and difficult litigation, in which plaintiffs' chance of success as a class was uncertain. The age and health of many of the class members also presses for a prompt resolution. Because of the passage of time, the destruction of records, and the death of most of the percipient witnesses, the potential amount of damages plaintiffs might have recovered, even if they had been able to prevail in litigation, would have been extremely difficult to calculate with precision.<sup>53</sup>

This reads like an argument against the case for judicial remedies only if we stick to the idea of individualized damages. The Swiss parties, including the government, moved, under the pressure of the suits, to produce evidence that was not enough to ascertain in every single case what was due and to whom, but pointed to an aggregate estimate of potential claims. The question then arises if the law allows to leave this with entities that benefited from the systematic killings or the ideal of adequate remedies dictates a solution that allows victims and their heirs to recover. Decoupling, in this sense, makes it possible to recover claims after families

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<sup>53</sup> In re Holocaust Victim Assets Litigation, 105 F.Supp.2d 139, 148 (E.D.N.Y. 2000).

exterminated without heirs, benefiting victims who did survive, a solution that is close to the *cy-près* mechanism, but gets most likely as close as possible.

What is important is that awarding damages is possible with deterrence in mind, and an adequate level of damages can prove to be more effective in achieving legal conformity than injunction.

## **Contextualization and Individualization**

That courts do, or ought to, consider the social context, in this sense going well beyond the individual context, has been a largely uncontroversial view ever since the sweeping challenge to formalism by legal realism. More recently, critical legal studies have emphasized the role of the oft-hidden social vision of the law. E.g., Henry J. Steiner argues, in considering accident law, that courts “increasingly understand accidents not as random events first linking a defendant and victim, but as a serious problem of systematic incidence.”<sup>54</sup> He describes a

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54 Henry J. Steiner, *Justification and Social Vision in Common Law Change: The Case of Modern Accident Law* 15 (July 1983) (unpublished manuscript) (on file with author).

general trend from dyadic, individual and unique approaches to a broader, systemic, group and statistical view of cases.

The very fact of aggregation can show a different picture, helping the plaintiffs in using evidence that otherwise could be rejected as irrelevant statistical data about issues outside the scope of the litigation. Showing the whole picture, or a larger part of it, might in itself tilt the scales: “It’s difficult for an individual to persuade a jury that he’s telling the truth, [but] when you have 50 or 60 or 100,000 people coming in, it changes the balance, it really changes the balance of power. It’s like having a union.”<sup>55</sup> The sexual harassment cases from the recent years seem to prove this point: earlier isolated claims resulted in further victimization but triggered to action, while the appearance of a critical mass of victims made it harder to question the accuracy of the accounts. Furthermore, there are many types of claims where only statistical evidence can come close to conclusive proof of practicing victimizing minorities. If a court rejects statistical evidence – e.g., because they reject disparate impact assessment<sup>56</sup> – it will become hard to

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55 Quoting William Claiborne attorney for the class of strip-searched detainees, Paul Karlsgodt, Class *Certification Means “Everything” for Baltimore Arrestees*, CLASSACTIONBLAWG.COM, (March 23, 2009), <http://classactionblawg.com/2009/03/23/class-certification-means-everything-for-baltimore-arrestees/>.

56 See *Washington v. Davis*, 426 U.S. 229 (1976).

prove that the lack of black jurors in a case is a result of a discriminatory practice rather than an isolated instance.<sup>57</sup> Looking at a class of cases will necessarily unfold the practice.

Systemic biases working to the detriment of minority interests are especially vulnerable to individualization: if presented and assessed in isolation, one case might not be able to prove the pattern that shows persuasively the existence of discrimination. When Southern racist policies switched to non-written rules of exclusion, it became easy to avoid the conclusion that discrimination was demonstrably present in single cases.<sup>58</sup> The fact that a black defendant in a criminal trial was convicted by a jury having no black jury member might not prove a whole lot; if the exact same pattern is being repeated and demonstrated through hundreds and hundreds of cases, with no or almost no exception, the picture and the court's assessment might be different. In *McCleskey v. Kemp*, the Supreme Court rejected such a challenge that was otherwise based on wide and solid statistical evidence.<sup>59</sup> A class action challenge of the

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57 This happened in *McCleskey v. Kemp*, 481 U.S. 279 (1987), with a clear discriminatory pattern of capital punishment decisions, see later. Garrett, *supra* note 25, at 624–25.

58 E.g., in jury selection cases or voting rights litigation. For an overview of the historical context, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2006).

59 *McCleskey v. Kemp*, 481 U.S. 279 (1987).

underlying practice would have meant that the Court could not have avoided the wider but relevant context in which the individual cases played out.

In a way, being able to present the context will shift the burden of proof for every individual case in the class. This is basically the mechanism that makes Title VII or the Age Discrimination in Employment Act so powerful (especially in contrast to the Equal Protection Clause):<sup>60</sup> plaintiffs can win by showing disparate impact (instead of intent). This also means that discrimination through allowing wide discretion (to low-level decision-makers) cannot shield a policy. Note that class action Rule 23(b)(2) should fit exactly this scenario: “the party opposing the class has acted or refused to act on grounds that apply generally to the class.” District Judge Gray argued that class action is a particularly apt tool to litigate race discrimination, because, “whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.”<sup>61</sup>

The other side of contextualization and commonality is individualization. That claims could and should be dealt with in an aggregate fashion does not mean that individualization is out of the

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60 Garrett, *supra* note 25, at 639–40.

61 Hall v. Werthan Bag Corp., 251 F.Supp. 184, 186 (M.D. Tenn. 1966).

equation, e.g. in the distribution of remedies due to members of the group. While, as we have seen, individualization is very much possible in a group litigation context, the need for individualization, too much individual variation might undermine the applicability of group litigation. The Supreme Court in *Wal-Mart* made a class action challenge of discriminatory employment practices impossible, simply because the practices were also subject to certain managerial discretion that allegedly caused great variation.<sup>62</sup> As all cases will inevitably have both elements in common and questions that distinguish them, a lot will depend on how a court assesses the importance (preponderance) of one against the other.

A further lesson can be drawn from landmark cases like *Wal-Mart*, where the collective approach was not ruled out entirely, only constrained, or *Brown*, where desegregation, the actual sanction, was to be applied “with all deliberate speed.” Even when courts are willing to consider the possibility of a collective remedy, and certifying the class for that purpose, they might not go far enough to allow an effective challenge to the background practice. Too much leeway to defendants in manipulating this practice will simply send the message that all they

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62 *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338, 131 S. Ct. 2541 (2011).

need to do is to design a policy that achieves the same goal (segregation, discrimination etc.) through means purported to be individualized enough not to allow claims aggregation. This, somewhat ironically, fits with the message sent in affirmative action decisions, where an inherently collective remedial measure needs to be, or at least shown to be, implemented as individualized.<sup>63</sup> Less of a coincidence, this seems more to be the consequence of the same individualized approach being applied to two areas of litigation.

A similar pattern appears in American Indian cases. The Court, in unison, dismisses collectivity arguments (or the Indian difference), struggling to reconcile tribal exceptions with the constitutional framework, with more often than not, Indians being on the losing side of enforcing consistency.<sup>64</sup>

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63 This is a background question for assessing affirmative action. See, e.g., J. Souter's dissent in *Gratz v. Bollinger*, 539 U.S. 244 (2003), arguing that what the Court did in that case and *Grutter* is to punish the more transparent admission program, the one that admitted the collective consideration in addition to the individual assessment. *Gratz v. Bollinger*, 539 U.S. 244, 291 (2003) (Souter, J., dissenting).

64 The Roberts Court decided ten American Indian cases so far, and the Indian side only won in one. Kristen A. Carpenter, *American Indians. Living Cultures & the Roberts Court*, Lecture at Harvard Law School, April 7, 2014.



In general, courts do not need to think too hard to come up with requirements of individualization that make it impossible to certify a class, as every individual claim, making up the purported class, is different. Even if plaintiffs have been subject to the very same policy, the actual harm might be different, as well as the evidence, the length and timing, and all sorts of circumstances; just consider a discriminatory policy targeting prisoners or those subject to police actions. After all, “Section 1983 requires proof of actual damages,”<sup>65</sup> which might effectively prohibit damages class actions that go beyond mere “symbolic recovery of nominal damages.”<sup>66</sup> On the other hand, it is easy to see that there is a common core element, namely the policy, that could be litigated across the class, presenting each case in a unified action, but this can be prevented by focusing on the elements that necessarily differentiate single claims. In such cases, members of the (non-certified) class can benefit from successful first litigations through the estoppel rule. What the class (as a whole and through its members) loses, however, are the advantages of a class action litigation, as described earlier, including the use of economies of

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65 *Daly v. Harris*, 209 F.R.D. 180, 197 n.5 (D. Haw. 2002), *in* Garrett, *supra* note 25, at 608 n.70.

66 A possible solution for these problems is provided by decoupling, a fascinating proposal I cannot explore here. See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002).

scale, better discovery and heightened standards for representation, a chance to participate in the decisive suit, more equitable distribution of costs (first litigants might need to bear most of the costs, which then allows late-comers to free ride) and material benefits (consider high amount damages and a limited fund). The decision on aggregation is most crucial, however, in cases that could not be successfully litigated if they need to proceed through isolated suits. Litigating a class of cases makes it harder for the defendant to present the facts, and argue the law, in a way that specifically counters one occurrence of the discriminatory pattern.

All this shows how aggregation, that seems to be a mere question of numbers, will result in a qualitative change that might determine the outcome. Allowing claims to be litigated in an aggregate fashion can broaden the scope of application of substantive rights, which is in itself a change in substance. Courts will be more likely to face, discover and address patterns of rights violations as opposed to isolated cases or conducts.<sup>67</sup> The impact of group proceedings on substance has been acknowledged in areas outside the civil rights context.<sup>68</sup> The class

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67 On class action addressing systemic issues: Rosenberg, David, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 851 (1984); cf. Sargentich, *supra* note 44.

68 For a concise overview, see Garrett, *supra* note 25, at 599–602, subchapter I-A.

action literature recognizes the transformative potential of procedural rules allowing aggregation,<sup>69</sup> often changing the content of the underlying substantive rights.

It is important to keep in mind that the way aggregation happens is usually not a given. Defining the relevant group, the relevant rights and duties, the relevant conduct or practice, might have a direct bearing on the outcome of the controversy. Control over the right ‘framing,’ as it is called by Daryl Levinson, will decide what counts as permissible affirmative action because it corresponds to a relevant past discrimination and offsets just that:

In sum, the model of transactional harm offers no guidance as to how to frame constitutional transactions and places no limits on aggregation over time, scope, and group. Because the model relies on such a thin and simplistic understanding of undesirable government behavior – discrete instances of individualized harm-infliction – it simply lacks the conceptual resources to generate a normative theory of how harms and benefits ought to be framed against the background of the continuous relationship between government and citizens.<sup>70</sup>

This criticism points to the importance of the culture within which courts operate. In addition to claims that are negligible on the individual level or otherwise cannot be economically proved

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69 See, e.g., ROBERT H. KLONOFF, EDWARD K.M. BILICH, SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 7 (2d ed. 2006).

70 Levinson, *supra* note 16, at 1374–75.

and litigated there are claims that can only be formulated as collective claims. There are cultural losses that are hard to identify on the individual level, but can be easily demonstrated on the level of a tribe or other community. This last aspect is especially important if we consider that Western legal systems, especially as applied to non-Western cultures, tend to be selective and filter out interests that might be pressing for these cultures while not valued when viewed through the lenses of law.

The emblematic case for judicial review (after *Carolene Products* footnote 4 and the procedural approach of Ely) seeks the judicial protection of minorities. This goal cannot be achieved if potential remedies are always subject to filter that throws out most that the same minorities would value. This is especially true for cases where the cultural distance is larger, but will also apply to minorities that are very close to each other in all social factors.

Another cultural element, a court's general attitude towards individualization and aggregation might also prove to be decisive, as questions like commonality, preponderance, the availability of a class-wide remedy are assessed before the case is litigated, i.e., before individual cases are thoroughly examined. What judges need to rely on might be closer to educated guesses

than a result of full discovery. This means that personal attitudes will play an increased role. In this sense all class certifications are 'speculative,' like stressed in a common charge against plaintiffs claiming to represent a class of similarly situated individuals.

A lot will depend on how much courts are willing to engage with the wider (and not necessarily extra-legal) context, generalize rather than individualize, when looking for the central rationale of the case. The US lesson warns us that the individualist bias might prevent aggregation, thus going against benefits that can very much be individualized, but also benefit the wider public, through better deterrence.

The problem of isolated assessment of harms and benefits, in this reading, points to a wider problem with the right level of analysis. Even if we agree, as most would do, that we should assess harm (and the benefits of remedies) on the level of the individual,<sup>71</sup> it remains a question how we should quantify and aggregate these:

As for group aggregation, nothing internal to a general model of constitutional rights as prohibitions on transactional harm dictates the choice between individual-

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71 For a criticism of liberal theories for not addressing the 'locus' of moral and legal inquiry, see Levinson, *supra* note 16, at 1374–75. "While some liberal theorists do offer elaborate theories according to which the individual is the locus of moral rights, their arguments are at too high a level of abstraction to carry any particular implications for the level at which constitutional harm should be assessed."

level and group-level analysis. Nevertheless, the default assumption in most areas of constitutional law seems to be that harms and benefits must be calculated at the level of the individual. At the same time, however, group-level analyses often compete for attention and occasionally prevail.<sup>72</sup>

By aggregating harms and benefits, on the procedural level, we switch “the unit of constitutional analysis from the net welfare of an individual, to, at the limit, the net welfare of society as a whole.”<sup>73</sup> What makes class action special in this context is that it provides for a powerful device for the plaintiffs to create the frame, present the relevant group, that can then influence the judgment of the substantial claim. As a result, the ‘framing’ that is usually hidden will become part of the litigation, part of the problem that the parties and the court will need to address in a transparent process. Without this, judges might be inclined to find formalist ways to avoid this question – a step that gives away all the possible benefits of the collective procedural approach I have reviewed so far.

## **Conclusions: Practical Considerations**

The article reviewed the class action device and its possible use for a specific type of human

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<sup>72</sup> *Id.* at 1374.

<sup>73</sup> *Id.* at 1371.

rights litigation, addressing minority group claims. The lessons show that courts can address claims involving large number of claimants, and this can be applied to violations targeting minority groups. The overview showed how collective procedures can bring benefits to the litigation of minority claims. I will conclude with some practical remarks on group litigation in the minority context.

First, where claims touch upon sensitive and highly politicized questions, involve high numbers and an incredible complexity, courts alone might not be able to provide adequate redress, extra-judicial elements might be as important as the determination of the courts. This is also to say that they do play a(n often decisive) role. Second, where courts decide to engage, the remedies should be worked out in a way that reflect the underlying complexity and the nature of the injustices.

The reviewed cases show that the decision of the court, even if final, might only mark a small step in the march towards adequate remedy. Chief Judge Korman's order (that certified subclasses for Holocaust compensation) is indicative in this respect, with its tentative language.

To a certain extent, all court decisions are tentative: how successful enforcement turns out to

be is as important as legal victory in the courtroom. This is even more true in the case of complex remedies involving a large number of plaintiffs and unwilling defendants. Court proceedings might only be one link in the chain of the strategy of victims to get adequate remedies. This complexity is, then, due to various factors. Public law litigation can raise issues that challenge the traditional framework of civil procedures.<sup>74</sup> Human rights violations might raise additional issues that require innovative legal approaches. When violations show a systemic pattern, remedies might need to reflect this, making effective judicial resolution harder even after full determination of the harm, e.g., by identifying an adequate form of injunctive relief.<sup>75</sup> Claims involving large and diverse groups might pose seemingly insurmountable hardships. This, in certain cases, is exacerbated by distance in time and/or space, between the violations and the court proceedings. It should come as no surprise that extra-judicial elements, like administrative inputs, political pressure, might be necessary or prove to be essential for claims to succeed.

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74 Rosenberg, *supra* note 67.

75 Sargentich, *supra* note 44.



Courts play a role by focusing attention on an issue. A class certification often proves to be an essential push towards settlement. The proceedings can empower those who bring suits in other ways. But all this should not hide the fact that courts can exert their power very effectively by providing adequate remedies. This is especially true for complex cases.

Despite the ultimate fate (decertification or settlement) of class action suits, the reviewed cases show that courts are capable of addressing mass human rights violations targeting minority groups, overcoming challenges like identifying victims decades after the violations took place.

The complexity of the cases will necessarily mean that courts can choose from a wide set of reasons were they to reject a collective procedural instrument. But they can also go ahead and make use of instruments like defining subclasses and setting up distribution mechanisms that are different from the traditional, individualized harm-assessment. This points to a hidden rationale that we addressed earlier, about the courts' ability to move beyond fully individualized compensations, with an eye on optimal deterrence.

As has long been acknowledged elsewhere, the ideal types of collectivism and individualism should not be necessarily seen as mutually exclusive.<sup>76</sup> The article, building on genocide class action cases, has shown that the collective approach is necessary, in certain cases, to acknowledge individual suffering and provide for legally enforceable guarantees. The general considerations of these cases are applicable outside the genocide or US class action context. Judicial and political decision-makers, both on the domestic and on the international level, should make use of the benefits the collective procedural device has to offer.

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76 A conclusion from psychology, see, e.g., Eva G. T. Green, Jean-Claude Deschamps and Dario Páez, *Variation of Individualism and Collectivism within and between 20 Countries: A Typological Analysis*, 36 JOURNAL OF CROSS-CULTURAL PSYCHOLOGY 321, 322 (2005), “it is commonly acknowledged that individualist and collectivist attitudes are not mutually exclusive.” On the individual level, this might mean the following: “Some people may be high on individualism and low on collectivism or vice versa. Others, in turn, can be high or low on both.” *Ibid.*

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