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*Special Issue — Harmonizing and Enhancing the Enforcement of Consumer Law: A  
Comparative Analysis of Germany and Italy*

## COMPARATIVE LAW REVIEW

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Office address and contact details:

Department of Law - University of Perugia

Via Pascoli, 33 - 06123 Perugia (PG) - Telephone 075.5852437

Email: [complawreview@gmail.com](mailto:complawreview@gmail.com)

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# RESEARCH PERSPECTIVES ON COLLECTIVE LITIGATION AND SOCIETY

Axel Halfmeier\*

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**Keywords:** Collective Litigation – Society – Impact – Economy – Deterrence

## I. SUBJECT MATTER AND CURRENT STATE OF RESEARCH

Collective litigation has been studied intensively over the last decades, in particular since the reform of the U.S. class action in 1966.<sup>1</sup> In the following decades, various types of collective litigation phenomena appeared around the world, and one can say that there has been a world-wide spread or even evolution in the direction of more collective litigation instruments.<sup>2</sup> The U.S. model of class actions has been replicated – albeit with many variations – in important jurisdictions such as Canada,<sup>3</sup> Australia<sup>4</sup> and Israel.<sup>5</sup> In Europe, there has been a parallel, but somewhat different trend with regard to the increased use of associations actions, for example in Germany<sup>6</sup> and France<sup>7</sup> since the 1960s. The Netherlands have evolved as an important forum state for collective actions since

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Leuphana Universität Lüneburg

<sup>1</sup> In 1966, rule 23 FRCP was rewritten and created the U.S. class action in its modern form. On the history of this rule see D. Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 Florida Law Review 657 (2011); J. Resnik, *From „Cases“ to „Litigation“*, 54 Law & Contemporary Problems 5 (1991); the same author provides a helpful overview on the workings of the U.S. court system in J. Resnik, *Seeing „The Courts“: Managerial Judges, Empty Courtrooms, Chaotic Courthouses, and Judicial Legitimacy from the 1980s to the 2020s*, 43 Review of Litigation 193 (2024). The practice and reach of class actions in the United States may have changed over the last decades, on these developments see R. Klonoff, *The Decline of Class Actions*, 90 Washington University L. Rev. 729 (2013); R. Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DePaul L. Rev. 497 (2016); R. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. Rev. 971 (2017).

<sup>2</sup> See, on the global spread of collective litigation: D. Hensler, *The Globalization of Class Actions: An Overview*, Annals AAPS 622 (2009) 7; D. Hensler, I. Tzankova & C. Hodges (eds.), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation*, Cheltenham, 2016; D. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. Kan. L. Rev. 965 (2017); B. Fitzpatrick & R. Thomas (eds.), *The Cambridge Handbook of Class Actions. An International Survey*, Cambridge, 2021; for Europe see A. Uzelac & S. Voet (eds.), *Class Actions in Europe. Holy Grail or Wrong Trail?* Cham, 2021; M. Bartkus et al. (eds.), *Collective Litigation in Europe: Law and Practice*, Huntington, NY, 2025.

<sup>3</sup> See, e.g., J. Kalajdzic, *Class Actions in Canada*, Vancouver, 2018.

<sup>4</sup> See, e.g., M. Legg & J. Metzger (eds.), *The Australian class action: A 30-year perspective*, Alexandria, NSW, 2023.

<sup>5</sup> See, e.g., A. Klement & K. Weinshall-Margel, *Cost-Benefit-Analysis of Class Actions: An Israeli Perspective*, Journal of Institutional and Theoretical Economics (JITE) Vol. 172 (2016) 75.

<sup>6</sup> See, e.g., A. Halfmeier, *50 Jahre Verbraucherbandsklage*, Berlin, 2015.

<sup>7</sup> See, e.g., M. J. Azar-Baud, *Les actions collectives en droit de la consommation*, Paris, 2013.

the early 2000s,<sup>8</sup> and the whole European Union has made a big step in the direction of more collective litigation with the adoption of the “Representative Actions Directive” in 2020.<sup>9</sup> In view of these many developments, and after about sixty years of research, it may be worthwhile to step back a bit and look at what has been achieved and what could be future avenues of inquiry.

### *1.1. What are we talking about?*

With regard to the definition of the subject, it is not always easy to disentangle collective litigation from other relevant topics that have been and still are discussed. Such adjacent topics include “access to justice,”<sup>10</sup> the workings of the civil justice system in a broader sense, including the effects of digitalization on the justice system (such as recent “legal tech” business strategies), and also the discussion about “strategic” or “public interest” litigation.<sup>11</sup>

What is it then that makes collective litigation special and that explains why it is regarded as a specific field of enquiry? There are two aspects that are typically relevant here: One is the public or social interest in the proceedings, and the second aspect is the collective nature of the proceedings. The first aspect – the “public interest” quality – is rather obvious in associations actions as they are common in Europe, as these institutions typically claim to further some public or collective goal with their litigation activities. This idea is also very prominent in the European Union’s Directive on “representative actions,” the title of which explicitly points to the “collective interests of consumers”. In collective actions brought not by special institutions, but by individuals or even by companies, the “public interest” in the action is less clear, as one could argue that individual claims, even if aggregated in a class action, do not necessarily have much to do with the “public interest”. However, there is typically a justification given for this type of collective litigation that goes beyond a mere support for aggregated individual interests: The U.S. class action and similar instruments are seen as an instrument that is useful to better enforce the law and thus further the “public interest” in this sense.<sup>12</sup> For example, securities class actions hopefully contribute to the enforcement of capital market laws and its goal of socially optimal allocation of capital, antitrust class actions support competition in a market economy, consumer class actions strengthen consumer protection, and so on. This “private enforcement” aspect is an important feature of all studies in collective litigation.<sup>13</sup>

<sup>8</sup> See I. Tzankova & D. Lunsingh Scheurleer, *The Netherlands*, in: *The Annals of the American Academy of Political and Social Science* Vol. 622, 149 (2009).

<sup>9</sup> 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, O. J. EU 2020 L 409/1. With regard to its implementation see, e.g., P. Rott et al., *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe* (Study for BEUC, March 2025); M. J. Azar-Baud, *Implementation of the Representative Actions Directive across the European Union: State of Play*, 44 *Civil Justice Quarterly* 124 (2025).

<sup>10</sup> Note that the famous Florence Access to Justice project from the late 1970s included studies on collective litigation, but also on improving individual access to justice, for example in the chapters on small claims procedures in M. Cappelletti & J. Weisner, *Access to Justice Vol II.: Promising Institutions*, Book II, Milano, 1978, p. 491 et seq.

<sup>11</sup> See, e.g., B. Hess, *Strategic Litigation: A New Phenomenon in Dispute Resolution*, MPI Luxembourg Research Paper Series 2022 (3). However, this author’s description of strategic litigation as a “new” phenomenon is rather doubtful, however, if we look back to civil rights cases in the United States of the 20<sup>th</sup> century and other cases that have long ago deliberately been brought to influence and change social and political structures.

<sup>12</sup> As illustrated by the book title of D. Hensler, *Class Action Dilemmas. Pursuing Public Goals for Private Gain*, Santa Monica, CA, 2000.

<sup>13</sup> On the theory and practice of private enforcement see, e.g., B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 29 et seq., R. Posner, *Regulation (Agencies) versus Litigation (Courts). An Analytical Framework*, in: D. Kessler (ed.), *Regulation vs. Litigation*, Chicago, 2010, p. 11-26.

The second important function of collective litigation is, as the name implies, dealing with collectives or groups of people in litigation. Historically, a dispute between or involving groups of people is nothing special, as disputes in society often arise as “us against them” situations. We are social animals, and as such it is natural that we see our problems in context with others that are similarly situated and try to form alliances in disputes. Historical research into the medieval origins of class actions shows that the participation of collectives in litigation is certainly nothing new.<sup>14</sup>

What may be new, however, is that the involvement of collectives in litigation is regarded as an aberration or exception that needs special treatment. This may have to do with the invention and spread of the concept of the legal person in modern legal systems. This concept allows the law to treat a collective or group of persons as one fictitious person, so that the collective aspect and the issues associated with it magically disappear from legal doctrine. In the area of civil procedure, this means that a legal person is treated as one “individual” party to the dispute. With this trick of the legal system, all the issues of agency, representation, and governance that arise wherever collectives try to act, are removed from civil procedure law and pushed into other areas such as company law (for private law legal persons) or public law for public communities. This modern development of treating collectives as individuals is not only very efficient, but it also fits into a market-based society that relies on individual citizens’ rights and their protection and implementation. In this sense, it is typically said – and taken for granted today – that civil procedure law exists to enforce “individual” or “subjective” rights.<sup>15</sup> This means that civil procedure law is based on this conception of individual disputes, and therefore aims to frame all disputes as arising between individuals, which becomes possible through the legal person appearing as “one” fictitious party.

To give an example from Germany: After the Volkswagen “Dieselgate” scandal was uncovered in 2015, many thousands of individual Volkswagen customers wanted to sue Volkswagen for damages. This could be seen as a dispute between two groups: The group of several thousands of affected customers on the one side, and on the other side all the people that are associated with – and profit from – the production and distribution of Volkswagen cars, including the Volkswagen owners, the factory workers, the engineers, the managers, the distributors etc. When such a complex dispute reaches the court, the invention of the legal person makes it possible to sue the “Volkswagen Aktiengesellschaft” (stock company), as if it were one single individual. The questions of who is representing Volkswagen AG, how these representatives (the board) are elected and supervised, what their rights and duties are, how and to whom any profits will be distributed – all of these issues are treated in company law and thus kept outside of civil procedure law. On the consumer side, if they wish to act collectively, there is no such prior organization, and no regulation on all of the governance and agency issues just mentioned. Therefore, if thousands of consumers wish to sue collectively, these issues are now being brought into civil procedure law and have to be dealt with inside procedural law, not outside. This, I believe, is the main reason and explanation why “collective” litigation is seen and treated as a specific problem that justifies special academic and practical treatment. It is a left-over in certain cases where the mechanisms of company law or any other law on legal persons are not sufficient to internalize the collectivity problem.

<sup>14</sup> S. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, New Haven, CT, 1987.

<sup>15</sup> On the development of this assumption towards more “collective” instruments see, in a comparative perspective J. Zekoll, *Comparative Civil Procedure*, in: M. Reimann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2006, p. 1327, 1358.

Note that in many cases, the legal person is nevertheless used as one answer to the collectivity issue: In the German associations actions, the plaintiff association is a legal person and thus technically only “one” party. In other cases, the plaintiff group may manage to organize itself as a legal person, for example when a large number of cartel victims transfer their claims to a “special purpose vehicle”, a legal person which will then appear as a single plaintiff before the court. Technically, this will not raise any “collective litigation” issues in the law of civil procedure.

However, these attempts to formally individualize a collective dispute are not always fully successful. The defendant may challenge the validity of claim transfers on various grounds, as it often happens in German cartel damage cases, and thus try to destroy the attempted efficiency gains on the plaintiff side.<sup>16</sup> With regard to the German associations actions, a significant doctrinal problem arises where the association aims to enforce somebody else’s (the consumers’) claims, so that complicated rules are necessary to deal with the possible influence of the association action on the individual consumers’ claims.<sup>17</sup>

In sum, one could say that the various instruments of collective litigation deal with the limits of the individualization of disputes. For many or most collectives, modern company law, the law of associations and public entities managed to put them under the hood of the legal person and thus reduce their complexity. But there are some left-overs where civil procedure itself has to face the issues of collectivity, and this is the domain that is studied and compared as collective litigation.

### *1.2. Different research approaches*

Legal scholarship on collective actions appears in at least three variations: Doctrinal work, comparative law research, and an interdisciplinary “law and society” approach. The doctrinal work is important for practice and not always easy, as collective litigation instruments are often changed or newly introduced and thus create a continuing demand for interpretation and systematic commentary. Looking beyond national borders, the world-wide development of collective litigation also lends itself to a comparative legal analysis. Significant research has been already done here, and it has centered on different aspects and policy choices in the structuring of collective litigation, such as the trans-substantive approach in contrast to sectoral approaches, the question of standing, the distinction between “opt-out” and “opt-in” regimes, and issues of financing, only to name some of the most important areas of comparative law research.<sup>18</sup>

In addition to these doctrinal and comparative aspects, collective litigation has always been regarded as a matter of considerable economic and political relevance. It is not only seen as a matter of legal technicalities, practice and doctrine, but also attracts support and criticism that is based on its socio-political relevance. The introduction or expansion of instruments of collective litigation is supported by some as more “access to justice”,<sup>19</sup> and is criticized by others as leading to an unwarranted commercialization of justice or creating negative impact on businesses or the

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<sup>16</sup> On this issue see last year’s judgment by the European Court of Justice that basically requires German courts to accept such “assignment models” in order to effectively enforce the law on cartel damages: ECJ, decision of 28 January 2025, case C-253/23 – *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v. Land Nordrhein-Westfalen*.

<sup>17</sup> On the doctrinal discussion on how the German associations’ actions relate to individual claims, see, e.g., F. Maultzsch, *Das neue Verbraucherrecht durchsetzungs-gesetz – VDuG*, *Zeitschrift für Zivilprozess (ZZP)* Vol. 137 (2024) 119.

<sup>18</sup> For an overview see B. Fitzpatrick & R. Thomas (eds.), *The Cambridge Handbook of Class Actions. An International Survey*, Cambridge, 2021.

<sup>19</sup> See the title of J. Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice*, Vancouver, 2018.

economy in general. This focus on desirable or undesirable effects in society could be called a “law and society” approach in the broader sense<sup>20</sup> and leads to an interdisciplinary connection of legal research with economics, political science or other social sciences.

It is this “law and society” perspective on collective litigation that is particularly interesting for purposes of this paper. At the same time, it is also the most challenging approach for lawyers, as many of us are not trained in the social sciences or in empirical research. This is especially true for many European lawyers that have studied at universities which teach “the law only” and often disregard its connection to other social sciences. The following overview is therefore written from an amateur perspective, but it may still be useful and may serve as the starting point for more sophisticated interdisciplinary research.

Taking up the “law and society” perspective on collective litigation, one can ask at least three important research questions: First, what is the cause for the expansion of collective litigation regimes over the last decades? Second, what is the “impact,” the social effect of the existence or use of collective litigation instruments? Third, is collective litigation a good thing in the sense that it supports democracy, prosperity and the rule of law? The first two of these questions are largely empirical in nature, while the third question has considerable normative ingredients.<sup>21</sup>

## II. POSSIBLE CAUSES FOR SPREAD OF COLLECTIVE LITIGATION

Looking at the first of these three basic questions, it has not been very much addressed. Why is it that the invention of the legal person did not completely solve the issues associated with collective litigation? And why have instruments of collective litigation spread around the world over the last sixty years? On this significant spread of collective litigation, there is no comprehensive empirical data. But when we look at the qualitative and comparative studies, it becomes quite clear that after the 1960s until today, collective litigation instruments have been developed and used in a large number of countries in many parts of the world.<sup>22</sup>

On this question of why collective litigation has expanded around the world, one could develop several approaches that could build on political science, economics, or other social sciences. In political science, a specific theory on the political function of litigation in the United States has been proposed.<sup>23</sup> Under this theory, the legislative branch has installed private enforcement rights in order to insulate the enforcement of certain laws from the influence of the executive branch.<sup>24</sup> This theory may be specific to the U.S. arrangement of administration and government, and it would need further research to assess whether and to what extent it could be applied in other countries.

<sup>20</sup> On this approach to legal scholarship see L. Friedman, *Impact. How Law Affects Behavior*, Cambridge, Mass., 2016.

<sup>21</sup> Friedman (previous footnote) addresses only the first two questions at p. 1-3. In Germany, the term „Rechtswirkungsforschung“ is often used for research regarding the impact of legal norms, see, e. g., Wrase, *Rechtswirkungsforschung revisited. Stand und Perspektiven der rechtssoziologischen Wirkungsforschung*, WZB (Wissenschaftszentrum Berlin für Sozialforschung) discussion paper P-2018-005 (2018).

<sup>22</sup> See the studies cited above at footnote 2.

<sup>23</sup> S. Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States*, Princeton, 2010.

<sup>24</sup> *Id.* at p. 19-59, see also S. Burbank, S. Farhang & H. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)*, in: P. Gottwald & B. Hess (eds.), *Procedural Justice*, XIV. IAPL World Congress Heidelberg 2011, Bielefeld, 2014, p. 197, 215; note that this strategy of creating litigation rights to support regulatory goals may be employed on both sides of the political spectrum, see S. Burbank & S. Farhang, *A new (Republican) Litigation State?* 11 U.C. Irvine L. Rev. 657 (2021).

In sociology and progressive political philosophy, there has been a well-established discussion on *Verrechtlichung* (juridification) in the late 20<sup>th</sup> century.<sup>25</sup> This term is sometimes used in a purely descriptive sense, pointing out the fact that in modern society, more and more areas of life come under the regime of legal norms, adding and partly replacing existing social, religious or moral norms. Jürgen Habermas famously described this as one aspect of the “colonization of the life world”<sup>26</sup> in the sense that previously informal intersubjective cooperation and discussion is replaced by formal systems such as law or money. From a normative point of view, this development is sometimes described as paradoxically: On the one hand, more rights may mean more emancipation in spheres that used to be dominated by exploitation and unchecked oppression, but on the other hand, to reduce social and political interaction to juridical procedures may also appear to be unsatisfactory.<sup>27</sup> This paradox may also apply to collective litigation which can be seen as an emancipatory instrument as it enforces rights but at the same time may frame social and political issues only as issues of claims and monetary compensation, which may not appear as completely adequate to the problems.

Another perspective with regard to the spread of collective litigation may be to look at them as “legal transplants” in the sense that was coined by Alan Watson.<sup>28</sup> His work centers around the idea that legal change is probably not caused in a monocausal or linear fashion by social or economic forces, but that the legal system itself has a certain degree of independence. Lawyers thus “transplant” legal solutions found in other legal systems, which may lead to new or even surprising results as these transplants react with the legal environment into which they are transplanted.<sup>29</sup> This approach may be very promising in research on the global spread of collective litigation, as a considerable part of this development can be seen as transplanting the U.S. class action into other legal systems. It is noteworthy, however, that the U.S. class action is not the only concept that is “transplanted” globally but that we can also observe other developments. For example, the concept of “diffuse interests” has been developed mainly in Latin America as a theoretical foundation for popular and group actions, and has since been transplanted – in a form of reverse colonization – to Portugal and Spain.<sup>30</sup>

Finally, one could look for economic reasons or functions fulfilled by collective litigation which could also explain the spread of these instruments. It is noteworthy that many countries which are very successful in economic terms at the same time have fairly elaborate and strong systems of

<sup>25</sup> See, e.g., R. Voigt (ed.), *Verrechtlichung. Analysen zu Funktion und Wirkung von Palamentarisierung, Bürokratisierung und Justizialisierung sozialer, politischer und ökonomischer Prozesse*, Königstein, 1980.

<sup>26</sup> J. Habermas, *Theorie des kommunikativen Handelns*, Frankfurt am Main, 1981, Vol. II, p. 522: „Kolonialisierung der Lebenswelt“

<sup>27</sup> On this paradox see, from a leftist-progressive perspective: D. Loick, *Juridification and politics: From the dilemma of juridification to the paradoxes of rights*, 40 *Philosophy and Social Criticism* 757-778 (2014).

<sup>28</sup> A. Watson, *Legal Transplants. An Approach to Comparative Law*, 2nd ed., Athens, GA, 1993.

<sup>29</sup> *Id.* at 95 et seq.

<sup>30</sup> See A. Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 *Am. J. Comp. Law* 311, 354 (2003); J. Ovalle Favella, *Popular Actions for the Protection of Collective Interests*, *Mexican Law Review* 2006, no. 5; H. Sousa Antunes, *Portugal*, in: *The Annals of the American Academy of Political and Social Science* Vol. 622, 161, 164 (2009). Note that the concept of “diffuse interests” has been developed in the U.S., probably based on Mancur Olson’s work on collective action, but has been taken up also in Europe; M. Olson, *The Logic of Collective Action. Public Goods and the Theory of Groups*, Cambridge, Mass., 1965; J. F. Handler, *Social Movements and the Legal System. A Theory of Law Reform and Social Change*, New York, 1978; J. Q. Wilson, *The Politics of Regulation*, New York, 1980; N. Reich, *Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften*, Baden-Baden, 1987, p. 19-25. However, neither in Europe nor in the U.S. has this term achieved such great significance for the explanation of collective litigation instruments as it has in Latin America.

collective litigation, such as the United States, Australia, Canada, the Netherlands and some Scandinavian countries.<sup>31</sup> All of these countries also have very strong and successful economies.<sup>32</sup> As we observe this correlation, we do not know whether there is also causality in the sense that more or better availability of collective litigation is good for the economy or not. It could support the economy and society by providing better protection of rights and enforcement of the law. But it could also be the case that collective litigation is just a luxury that can only be afforded by the rich countries in the world – like air conditioning – and that it may even have a detrimental effect on the economy and on society.

In the econometric “legal origins” studies that have been undertaken in the early 2000s, some authors sought to find causal relations with respect to an alleged superiority of the Common Law model with stronger protection of shareholder rights.<sup>33</sup> However, these studies did not explicitly focus on collective litigation and their validity may be questionable.<sup>34</sup> On the other hand, one can probably not dispute the basic insight that strong legal institutions and the protection of individual rights have been very supportive for economic growth over the last centuries.<sup>35</sup> Further research is needed to determine whether and how this general proposition can be applied more specifically to collective litigation instruments. *Prima facie* and at the current state of research, it appears that there is at least not a noticeable negative effect of collective litigation on the economy, contrary to what is sometimes claimed by lobbying groups.<sup>36</sup> Even though the United States, Canada and the Netherlands have very well developed systems of collective litigation, this has obviously not stopped them from becoming and staying some of the richest countries on this planet.

As a preliminary conclusion, one can say that the question of why collective litigation has spread around the world has not received much attention in research. The possible approaches from different social sciences that have been sketched above may be some possible avenues to start research in this direction.

<sup>31</sup> For a quantitative view on a selection of countries see the PCAR (Pending Class Actions per million capita Rate) in J. Kalajdzic et al., *The (Un)intended Consequences of Legal Transplants: A Comparative Study in Collective Litigation*, 17 *Journal of Tort Law* 149-202 (2025).

<sup>32</sup> If we use the (admittedly insufficient, but readily available) measure of GDP per capita in USD, all of the mentioned countries are in the world's leading group (Norway at #7, U.S. at #8, Denmark #9, Netherlands #10, Australia #12, Sweden #14, U.K. #19, Canada #21; IMF data from 2025, available at [https://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_GDP\\_\(nominal\)\\_per\\_capita#](https://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal)_per_capita#)

<sup>33</sup> R. LaPorta, F. Lopez-de-Silanes & A. Shleifer, *The Economic Consequences of Legal Origins*, 46 *J. Econ. Lit.* 285 (2008) with further references.

<sup>34</sup> See the critique by M. Siems, *Numerical Comparative Law: Do We Need Statistical Evidence in order to Reduce Complexity?* 13 *Cardozo J. Int. Comp. L.* 521 (2005); S. Voigt, *Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory*, 5 *J. Empirical Legal Studies* 1 (2008); J. Armour et al., *Law and Financial Development: What We Are Learning from Time-Series Evidence*, 2009 *BYU L. Rev.* 1435 (2009); H. Spamann, *The “Antidirectors Rights Index” Revisited*, 23 *Rev. Fin. Studies* 467 (2010).

<sup>35</sup> D. Acemoglu & J. Robinson, *Why Nations Fail. The Origins of Power, Prosperity, and Poverty*, New York, 2012.

<sup>36</sup> Anecdotal evidence: In 2001, when I started my academic work on collective actions, including the U.S. class action, I came across an editorial in the *Wall Street Journal* that I cut out of the paper and saved in my files for a long time; today it is available in the Journal's digital archive: „Lawyers Torch the Economy“, *The Wall Street Journal*, April 6, 2001, p. A14. The editorial describes the impact of asbestos and other million-dollar litigation and how it made some lawyers extremely rich, and companies go into bankruptcy, calling for an end of such litigation. Looking back now after a quarter of a century, the U.S. economy certainly has not been „torched“ by class actions or other litigation: The U.S. gross domestic product has *tripled* since the publication of that article in 2001, with only two major recessions that certainly had nothing to do with class actions (2008-2009: financial crisis, 2020: Covid virus). Would the U.S. economy have fared even better without class actions? We simply do not know, but any possible negative effect seems to be very limited.

### III. IMPACT OF COLLECTIVE LITIGATION

The second fundamental question in collective litigation research has received more attention over the last decades: What is the impact of collective litigation instruments and how can we measure and evaluate this impact on society? In this regard, one could distinguish between intended effects and unintended effects. The focus on intended effects tries to determine whether collective litigation instruments really deliver the expected benefits that they are created for: These positive intended effects of collective litigation are typically seen in three aspects: (1.) Better compensation and access to justice for claimholders in mass harm situations, (2.) behavior modification or deterrence in the sense that the existence of collective litigation instruments reduces the probability of illegal behavior by companies and other actors, and (3.) improved judicial efficiency as courts may use economies of scale and bundle mass claims together in one procedure.<sup>37</sup>

#### III.1 *Better compensation*

On a theoretical level, it should be rather clear that the introduction of collective litigation instruments should increase compensation in comparison to a system that would rely purely on individual actions. This is because litigation always comes with a cost and cost risk to the plaintiff. The magnitude of these costs and cost risk may vary from jurisdiction to jurisdiction, but there will always be a cost, if only opportunity cost. This means that there are always claims where the expected value of litigating them is negative. If we assume rational behavior by the claimholder, such “negative expected value claims” will not be brought to court in the framework of individual litigation and thus there will be no compensation for such cases.<sup>38</sup> In this respect, the bundling of claims through collective litigation tends to reduce the cost for each claimholder, so that it becomes rational to litigate claims that would have a negative expected value in individual litigation.

This theoretical argument is sometimes supported by empirical studies, insofar as data is available. In the United States, where we find a large number of class action settlements, the problem is that there is not much accessible data on these settlements and how they are executed. In particular, the “take-up rate” is difficult to assess; this refers to the problem that even when there is a settlement that promises certain payments to the affected group, only a small part of the group may actually participate and actively claim such benefits.<sup>39</sup> Critics of the U.S. class action therefore see little empirical evidence for actual consumer benefits.<sup>40</sup> On the other hand, the distribution rates may depend on how distribution is organized: An empirical study from the U.S. shows that the benefit

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<sup>37</sup> This threefold explanation seems to be the general consensus, see the title of the classic paper on U.S. class actions by K. Dam, *Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. Legal Studies 47 (1975).

<sup>38</sup> L. Bebchuk & A. Klement, *Negative-expected-value suits*, in: Sanchirico (ed.), *Procedural Law and Economics*, Cheltenham, 2012, p. 341–349.

<sup>39</sup> See, e. g., N. Pace/W. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, RAND Working Paper WR-599-ICY (July 2008), available at [https://www.rand.org/pubs/working\\_papers/WR599.html](https://www.rand.org/pubs/working_papers/WR599.html).

<sup>40</sup> Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (2013), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>; see also the critical empirical study on consumer class actions by J. Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Columbia Business L. Rev. 1 (2017).

for class members was much higher when they were directly sent some payment instead of having to fill out claims forms.<sup>41</sup> This is only possible when their identities are known beforehand, but the expectation is that with the rise of online transactions, this will more often be the case than in the past.<sup>42</sup>

In other class action systems outside of the United States, there is at least some small evidence for compensation: In an empirical study of 55 class action cases in the Canadian province of Québec, the majority of the reviewed cases provided significant benefits for consumers.<sup>43</sup> In Australia, there is also some indication for compensation through class action settlements, although the lack of data on take-up rates is also an issue there.<sup>44</sup> A study in Israel found that only in 3.5 % of the class action cases examined, there was direct financial compensation, and in another 12 % there was some form of other remedy of doubtful effect on compensation for the class.<sup>45</sup>

However, when these and other studies show only a limited effect of compensation for claimholders through class action, this phenomenon is probably rooted in the small individual harms that are often the subject of class actions,<sup>46</sup> and probably also in the principal-agent conflict that arises when the class action attorney can effectively control the litigation and its outcome.<sup>47</sup> This means that while it is true that the class action enables negative value claims to be brought before the court, the class action instrument at the same time creates significant, but necessary transaction costs – such as lawyers' fees and distribution costs – that typically reduce the actual compensatory effect.<sup>48</sup>

### III.2 Behavior modification

This limited effect on compensation does not make collective actions useless, because the main goal of collective litigation is probably not individual compensation, but deterrence and behavior modification. Again, if we start with a theoretical model, these two goals are completely separated: A rational actor on the possible defendant side will engage in illegal action if the expected value of the illegal act is higher than the expected cost that it creates.<sup>49</sup> If the availability of collective litigation instruments leads to an increase in the cost and probability of sanctions for the actor, it will have the desired effect of reducing the attractiveness of illegal behavior. In this theoretical model, it is irrelevant whether the money that is to be paid by the illegal actor is given to the victims of the

<sup>41</sup> B. Fitzpatrick & R. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. Law & Business 767, 778 (2015).

<sup>42</sup> *Id.* at 787.

<sup>43</sup> C. Piché, *Class Action Value*, 19 Theoretical Inquiries in Law 261 (2018).

<sup>44</sup> V. Morabito, *Empirical Perspectives on Twenty-one Years of Funded Class Actions in Australia* (2023), SSRN: <https://ssrn.com/abstract=4422278>; see also M. Legg, *Access to Justice and Compensation through the Class Action*, in: M. Legg & J. Metzger (eds.), *The Australian Class Action. A 30-Year Perspective*, Alexandria, NSW, 2023, p. 40.

<sup>45</sup> A. Klement & K. Weinshall-Margel, *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, Journal of Institutional and Theoretical Economics (JITE) Vol. 172 (2016) 75, 95.

<sup>46</sup> B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 88.

<sup>47</sup> On this problem see, e.g., J. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Columbia L. Rev. 370 (2000).

<sup>48</sup> B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 95.

<sup>49</sup> This is the classic law and economics model dating back at least to G. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Political Economy 169 (1968); on the application and complications of deterrence theory see the extensive treatments e. g. by A. Popper, *In Defense of Deterrence*, 75 Albany L. Rev. 181 (2011); L. Friedman, *Impact. How Law Affects Behavior*, Cambridge, Mass., 2016, p. 96 et seq.

illegal act, to charity, to the plaintiff lawyers, or thrown into the river. The important incentive is the potential cost imposed on the actor, and not where any payments go to.

This theory about the risk calculus of potential wrongdoers addresses the issue of what is typically described as “general” deterrence in the field of criminology; the goal is to prevent the breach of the law in the first place. This can be distinguished from “specific” deterrence which looks at future behavior of an individual wrongdoer. In this “specific” aspect, collective litigation is often successful, in particular when injunctions are issued that prescribe or prohibit certain future behavior of the defendant. In Germany, associations actions are traditionally focused on such injunctions, and they have achieved significant results; for example when it comes to eliminate certain unfair contract terms in financial services and other markets.<sup>50</sup> However, these specific results do not necessarily mean that the associations actions necessarily serve as a general deterrent for companies against using other unfair contract terms.

With regard to general deterrence and behavior modification, there is an interesting laboratory experiment that basically confirms the theoretical model described above in a laboratory situation that is modelled similar to class actions: Where individuals could group their claims together against another participant, the behavioral effect on the actor was bigger than when he was faced with retribution only on an individual basis.<sup>51</sup> The authors of this study come to the conclusion that rules allowing for increased or coordinated enforcement of damages can indeed “promote social welfare.”<sup>52</sup>

However, in this experiment, the harm that the participants could inflict against the wrongdoer was suffered directly by that wrongdoing person. This is not always the case in the real world, where larger corporations are managed by executives that may not even be shareholders of the company. Where management and ownership of a company are separated, the manager making a decision to engage in potentially unlawful conduct will not always personally carry the cost of his decision. While the company may have to pay a large amount as a result of a class action, the manager may still walk away with his pockets full of money. The personal outcome for the manager depends on the willingness and ability of the company to recoup its losses from the management, on the existence and terms of D&O insurance, on reputational effects and many other variables.

In addition to this complexity, the research on “behavioral economics” has shown that the purely rational model of decision-making often is insufficient to explain real people’s conduct. In the class action context, one may wonder, for example, why Volkswagen’s chief executives in Germany decided to organize a sophisticated fraud scheme regarding its Diesel engine emissions particularly in the United States. It was well known to every half-educated observer that U.S. emission laws are strict, that U.S. class action practice is a big threat for companies, that sophisticated U.S. plaintiff law firms are out there to get you if you do something wrong, and that U.S. judges will probably not be very lenient with foreign companies that intentionally break U.S. laws and defraud the U.S. government and U.S. customers.<sup>53</sup> In the face of these obvious and enormous risks, why did the

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<sup>50</sup> See A. Halfmeier, *50 Jahre Verbraucherverbandsklage*, Berlin, 2015.

<sup>51</sup> T. Eisenberg & C. Engel, *Assuring Civil Damages Adequately Deter: A Public Good Experiment*, 11 Journal of Empirical Legal Studies 301, 322 (2014), finding that the „higher probability class action“ treatment had significant effect on behavior.

<sup>52</sup> Id. at p. 331

<sup>53</sup> For an account of the Dieselgate emissions scandal and its legal consequences, see B. Gsell & T. Möllers (eds.), *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal*, Cambridge, 2020; D. Hensler et al., *The*

Volkswagen management still go ahead to break the law?

One possible explanation is overconfidence. This has been described in the behavioral economics literature in particular for large companies' CEOs who see themselves as much smarter than the rest of the world.<sup>54</sup> Martin Winterkorn, who was Volkswagen's CEO at the time when the Diesel emissions fraud was committed, wanted his company to become the world's biggest carmaker – and almost achieved that by selling more cars than Toyota for a short period before the Dieselgate scandal was uncovered. In the garden of his villa, Winterkorn had a pond with expensive Koi fish, and Volkswagen paid 60,000 Euros to install a luxurious heating in this pond so that these exotic fish would have it warm enough in Northern Germany's wintertime. How could this person not be overconfident? Even if the potential damages in U.S. class actions had been tripled or quadrupled, it can be assumed that Winterkorn would have been undeterred, because he completely underestimated the risk of detection. On the other hand, the radically overconfident Mr. Winterkorn may be an extreme outlier: It is argued by some authors that in general, corporations tend to behave more rational than individual actors, since corporate decisions are often made by groups, after considerable reflection, and in pursuit of a clearly defined goal, namely profit in the purely financial sense.<sup>55</sup>

The significant problems relating to the theoretical concept and practical reliability of deterrence have led some authors to be very skeptical of deterrence as an adequate goal of collective litigation.<sup>56</sup> This skepticism has a valid point in that it is not always easy to find empirical evidence for deterrence.<sup>57</sup> However, there is empirical evidence for some connection between a company's knowledge about litigation and its corporate behavior.<sup>58</sup> In recent years, the most thorough literature review on the studies regarding the deterrence effect of collective litigation has been undertaken by Brian Fitzpatrick, and he concludes that "there is in fact empirical evidence" to support the theory of class actions' deterrent effect.<sup>59</sup> It is clear that deterrence is a complex issue, as it addresses human behavior, but there is still good reason to assume that collective litigation at least has a significant and realistic potential to achieve deterrence and influence human behavior, even if this may fail in some specific situations as in the Volkswagen case described above.

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*Globalization of Mass Civil Litigation. Lessons From the Volkswagen „Clean Diesel“ Case*, RAND research report 2021, available at [https://www.rand.org/pubs/research\\_reports/RRA917-1.html](https://www.rand.org/pubs/research_reports/RRA917-1.html)

<sup>54</sup> See, e. g., U. Malmendier & G. Tate, Behavioral CEOs: *The Role of Managerial Overconfidence*, 29 Journal of Economic Perspectives 37 (2015); D. Kahneman, *Thinking, Fast and Slow*, New York, 2011, p. 258 spoke of the „hubris hypothesis“ in relation to CEO behavior.

<sup>55</sup> B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 104 with further references from economic research.

<sup>56</sup> In particular C. Hodges, *Law and Corporate Behaviour*, Oxford, 2015, p. 47–157 with further references. Note, however, that Hodges also criticizes the deterrence model on normative grounds: Hodges does not like an „aggressive, accusatory and adversarial culture, in which individuals assert unlimited personal freedom until condemned“ (which he locates in the U.S. legal culture), but instead prefers „a culture of inter-relational support and cooperation“ and „the EU (European Union) solidarity model“. Unfortunately, the „EU solidarity model“ apparently was not very popular with many other Englishmen, as the U.K. decided to leave the EU for good only one year after the publication of the cited book.

<sup>57</sup> In Israel, a study on class action effects found only a „potentially low level of deterrence“: A. Klement & K. Weinshall-Margel (supra, footnote 5) at p. 101.

<sup>58</sup> L. Simard, *A View from Within the Fortune 500: An Empirical Study of Negative Value Class Actions and Deterrence*, 47 Indiana L. Rev. 739 (2014).

<sup>59</sup> B. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* in: Piché (ed.), *The Class Action Effect – L'effet de l'action collective*, Montréal, 2018, p. 181–203; B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 99–113.

### III.3 Judicial Efficiency

With regard to the third main goal of collective litigation, improved efficiency in litigation, a clear paradox must be conceded: Insofar as collective litigation enables „negative expected value“ claims to be brought before the courts, and these claims would otherwise not have been litigated, collective litigation instruments create more court procedures and thus higher costs arising in the legal system of a given society. However, this effect is inherent in the two primary goals described above – better access to justice and more deterrence – and must therefore be accepted to achieve these goals. From a cost-benefit perspective, the assumption here must be that the benefits associated with these two goals outweigh the additional costs that are created by additional litigation.

With regard to „positive expected value claims“, which will be brought to court even in the absence of collective procedures, it is rather clear that their bundling into some form of collective litigation will save costs and increase the efficiency of the judiciary.<sup>60</sup> The German experience in the Volkswagen “Dieselgate” scandal clearly shows this potential: The claims of the individual car owners were typically in the area of several thousands of Euros, thus large enough to make an individual action rational from the plaintiff perspective – especially because many of the plaintiffs had legal expenses insurance that would cover their adverse cost risk. This situation led to thousands of individual cases that put a significant burden on the German court system. Although the German legislator had introduced a specific type of association action in 2018 to deal with this problem, this „model declaratory action“ was not capable to significantly reduce the caseload of individual actions. It was therefore argued in the German literature that only a true „group action“ which would bundle individual claims could ease the burden on the judicial system.<sup>61</sup> This experience shows that while there certainly is a potential efficiency-enhancing effect in collective litigation, not all specific instruments can really achieve that effect, in particular when they are not attractive enough for potential plaintiffs to be regarded as a true alternative to individual litigation.

### III.4 Negative Effect on the Economy?

Aside from these explicit goals, one of the most controversial issues with regard to class actions and other forms of collective litigation is their alleged negative impact on the economy. This argument assumes that class actions put an extra burden on businesses and thus harm economic development by creating a wasteful “litigation industry”.<sup>62</sup>

As it was already pointed out above, there is no observable negative effect on the economy in those countries that have established strong collective litigation regimes. Even on a purely conceptual level, the derogatory description of a “litigation industry” seems very ideological and does not make much sense. It is obvious that there is a “litigation industry” in the sense that lawyers on both sides, litigation financing companies and other actors earn their living and may make good money from

<sup>60</sup> For an early empirical U.S. study on this effect, see R. Bernstein, *Judicial Economy and Class Actions*, 7 J. Legal Studies 349 (1978).

<sup>61</sup> C. Meller-Hannich, *Gutachten A zum 72. Deutschen Juristentag in Leipzig 2018*, München 2018, p. A 74.

<sup>62</sup> In Germany, paradoxically, it was mainly the “Bundesverband der deutschen Industrie” (BDI), the Federation of German Industry, who repeatedly warned of a „litigation industry“ when collective litigation instruments were discussed and introduced in Germany. See, e. g., the BDI’s press release on collective litigation of 29 April 2011, warning of a „litigation industry“ on p. 4, available at [https://bdi.eu/media/themenfelder/recht/downloads/20110429\\_Stellungnahme\\_Kollektiver-Rechtsschutz.pdf](https://bdi.eu/media/themenfelder/recht/downloads/20110429_Stellungnahme_Kollektiver-Rechtsschutz.pdf)

engaging in litigation, be it collective litigation or not. That fact alone says nothing about whether their activity is socially useful or not. In Germany, there is also a strong car industry, a chemical industry, a weapons industry, a pharmaceutical industry and many other branches of industry. All of these industries are not inherently good or bad for society or for the economy, but have positive and negative effects.

To take the car industry as an example, it clearly provides income and wealth to many thousands of German workers, managers and shareholders, and it provides its customers with great vehicles that they can use for mobility. On the other hand, there are extremely negative effects caused by the car industry: Thousands of people lose their lives or get severely injured in car accidents, the air is polluted, tons of rubber particles from tire abrasion contaminate the soil and water, and the burning of fossil fuels contributes to global warming. Whether we want to support and protect the car industry therefore depends on a weighing of social and economic cost and benefits. The same is true for any other economic activity, including the “litigation industry”: It has costs and benefits which should be weighed and evaluated by society, and regulated if necessary, but it is ridiculous to say that a “litigation industry” is inherently a bad thing.

### III.5 Abusive Litigation?

However, the “litigation industry” argument is often meant in a slightly different way, namely to criticize that meritless or “abusive” actions are being brought in collective litigation. This claim is not easy to evaluate empirically, as one would have to go to the merits of each action to determine whether it is in fact meritless and thus could be seen as abusive. Insofar as there is data on this, there are almost no indications for the existence of a significant number of meritless class actions, even in the United States, where this argument traditionally is most prominent.<sup>63</sup> In the United States, the “abuse” arguments is often brought not only with respect to class actions, but with respect to lawyer-driven entrepreneurial litigation in general; but even in this respect there is little empirical support for it.<sup>64</sup>

This lack of evidence for “abuse” is consistent with the incentive structure of such actions: In profit-driven situations – such as class actions driven by entrepreneurial lawyers – a rational actor will only invest in the case if it has sufficient merit to warrant such an investment. In this respect, Kritzer describes the contingency fee practice by U.S. plaintiff lawyers as a form of portfolio management.<sup>65</sup> If the portfolio is large enough, it may make sense for the lawyer to include some high risk cases, the success of which may be less certain on their merits. However, this can hardly be described as “abusive” as such cases present a high risk for the plaintiff lawyer in developing the law or testing new legal arguments. In a portfolio perspective, most cases brought for profit will be of sufficient merit, as the entrepreneurial lawyer needs to support himself and his staff with a steady flow of income

In continental Europe, a large part of collective litigation is put in the hands of non-profit

<sup>63</sup> See the detailed literature review by B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 74 et seq.

<sup>64</sup> See the extensive empirical study on U.S. lawyers’ contingency fee practice by H. Kritzer, *Risks, Reputations, and Rewards*, Stanford, 2004.

<sup>65</sup> H. Kritzer, *Risks, Reputations, and Rewards*, Stanford, 2004, p. 10 et seq.; see also J. Coffee, *Entrepreneurial Litigation. Its Rise, Fall and Future*, Cambridge, Mass., 2015; for an economic model on the market determination of lawyers’ contingency fees see W. Lynk, *The Courts and the Market: An Economic Analysis of Contingent Fees in Class-Action Litigation*, 19 J. Legal Studies 247 (1990),

associations or “qualified entities” in the European Union’s terminology. This creates different incentive structure, as these associations do not aim for profit, but for ideological and reputational success. At the same time, they typically have only a very limited budget, so that a lost court case will not only harm their reputation, but also endanger their financial situation. These associations will therefore build up considerable expertise in their field and have little incentive to bring meritless claims. In Germany, empirical studies have shown that such associations’ actions have a very high rate of success in litigation – typically higher than individual actions – which can only be explained by very good preparation and considerable merit in substantive law.<sup>66</sup> Note that the high success rate is not due to the associations picking only “easy” cases where the violation by the defendant would be obvious. On the contrary, both the environmental and the consumer associations have tackled complicated issues and achieved considerable success in clarifying and developing the law even in difficult areas. With regard to the German and Austrian consumer “associations”, it is noteworthy that they are generously funded by the government, so that they are not really NGOs, but rather “Quangos” (quasi-governmental organisations).<sup>67</sup>

### *III.6 Positive Effects on Society*

In total there is no evidence for any negative economic effects caused by the introduction of collective litigation instruments. On the contrary, there is some literature on possible positive externalities caused by collective litigation. These effects may not relate to the economy in the narrower sense, but to society in total. From a viewpoint of institutional economics, a German public law scholar has argued – although with respect to public and administrative law – that collective actions may support public participation and can serve to reduce the principal-agent problems in the relation between the government and the people.<sup>68</sup>

A similar argument has been made with respect to aggregate private law litigation in the United States: Such actions may generate „public goods externalities even beyond the claimants directly affected“,<sup>69</sup> as they raise issues that are relevant for society at large and create a forum for a rational discourse on the resolution of such issues. This would fit with a positive theory of litigation that looks not only at the costs created by the legal system, but also at its considerable benefits for a free and democratic society: Litigation not only helps to enforce the law, but it may also may serve to uncover previously hidden information and expose relevant facts to the public eye.<sup>70</sup> Furthermore, if we accept that adjudication is a form of lawmaking – which is obvious in a case law system, but in fact also holds true in a codified system that leaves open wide holes to be filled

<sup>66</sup> This effect of higher-than-average success is most prominent in environmental law, see A. Schmidt & M. Zschiesche, *Die Klagetätigkeit der Umweltschutzverbände im Zeitraum von 2013 bis 2016. Empirische Untersuchung zu Anzahl und Erfolgsquoten von Verbandsklagen im Umweltrecht*, Berlin, 2018; but also in private law actions by German consumer associations, there are no indications for any abusive practices by these associations, see A. Halfmeier, *50 Jahre Verbraucherverbandsklage*, Berlin 2015.

<sup>67</sup> For example, the German „VZBV“ (federation of consumer associations) in Berlin receives about 99 % of its budget (about 58 million Euros in 2024) from taxpayers’ money, see VZBV, *Jahresbericht 2024*, Berlin 2025, p. 58. I would like to thank an anonymous reviewer for pointing out the term „Quango“ to me in this context.

<sup>68</sup> A. van Aaken, *Massenklagen im öffentlichen Recht aus institutionenökonomischer Sicht: Eine Art der direkten Volksrechte*, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)* Vol. 86, 44, 74 (2003).

<sup>69</sup> R. Avraham & W. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 *U. Chicago L. Rev.* 1, 61 (2022).

<sup>70</sup> A. Lahav, *In Praise of Litigation*, Oxford/New York, 2017, p. 82.

by the judiciary – then litigation can also be regarded as a form of participation in self-government.<sup>71</sup> Furthermore, litigation puts to the test the theoretical and largely counter-factual principle of equality before the law.<sup>72</sup> In litigation, David may sue Goliath and try to enforce the little guy's rights against a big corporations. In this respect, collective litigation may at least try to alleviate factual disparities of social and economic power, and may thus support the principle of equality on which the rule of law is built.<sup>73</sup> In view of these supportive features that collective litigation may provide for democracy and for the rule of law, the legitimacy of collective litigation may rather be “the role it plays in the larger polity rather than the internal protection it offers participants.”<sup>74</sup>

#### IV. CONCLUSION AND OUTLOOK

This summary of the research on collective litigation is certainly not exhaustive or complete, but it may still enable us to draw some preliminary conclusions on the three research questions outlined above: What are the causes of the spread of collective litigation? What is the impact of collective litigation in society? And finally, how do we normatively evaluate collective litigation?

The first question about causal forces has hardly been researched at all – maybe with the exception of the historic development of the English group action<sup>75</sup> – and has not been the primary subject of this paper. There is a lot of work to be done in this respect.

On the second question – the social impact of collective litigation – there has been a lot of research over the last decades, and some of this was described in this paper. Most of this work has been qualitative and comparative in nature,<sup>76</sup> and further case studies and comparative work will certainly be useful. What may be missing is more quantitative work, but this has been very difficult until today because of the lack of data within jurisdictions, but also across jurisdictions. One necessary step here would be to collect better data within countries, which could be easier today with the advent of electronic registries of collective litigation cases, such as in some Member States of the European Union.<sup>77</sup> Furthermore, to make this data comparable, a common framework of sorting and coding collective actions would have to be established.<sup>78</sup>

Another important, but not sufficiently explored area of research is the third, more normative question that asks whether collective litigation is good for democracy and society. The existing studies described above seem to point into that direction, but should be continued and built upon,

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at p. 112.

<sup>73</sup> *Id.* at p. 121, citing Judge Posner in *Carnegie v. Household Int.*, 376 F.3d 656, 661 (7<sup>th</sup> Cir. 2004): „The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for \$ 30.“

<sup>74</sup> A. Lahav, *The Political Justification for Group Litigation*, 81 Fordham L. Rev. 3193 (2013).

<sup>75</sup> S. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, New Haven, CT, 1987.

<sup>76</sup> See, e. g., for qualitative work in the form of case studies: D. Hensler, *Class Action Dilemmas. Pursuing Public Goals for Private Gain*, Santa Monica, 2000; D. Hensler, C. Hodges & I. Tzankova (eds.), *Class Actions in Context. How Culture, Economics and Politics Shape Collective Litigation*, Cheltenham, 2016; B. Gsell & T. Möllers (eds.), *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal*, Cambridge, 2020; D. Hensler et al., *The Globalization of Mass Civil Litigation. Lessons From the Volkswagen „Clean Diesel“ Case*, RAND research report 2021, available at [https://www.rand.org/pubs/research\\_reports/RRA917-1.html](https://www.rand.org/pubs/research_reports/RRA917-1.html)

<sup>77</sup> The EU Directive 2020/1828 on Representative Actions allows the creation of electronic databases by the EU Member States (Art. 14 par. 1 of the Directive), and forces the plaintiff qualified entities to publish information on cases on their websites (Art. 13 par. 1 of the Directive).

<sup>78</sup> For proposals in this direction see D. Hensler, *Can private class actions enforce regulation? Do they? Should they?* in: F. Bignami & D. Zaring (eds.), *Comparative Law and Regulation* (2018) 238, 268.

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especially in view of the current crisis of liberal democracy around the world. In this respect, one could ask whether “more litigation” is a (negative) symptom of a society that is incapable of solving problems through administrative and political work and thus needs to resort to litigation. On the other hand, and in stark contrast to such a negative view, “more litigation” could also be a positive development by enabling more public participation, more enforcement of individual rights, more rational deliberation, and thus more trust in the workings of a civilized society that is built on democracy, prosperity, and the rule of law.

