



COLLECTIVE REMEDIES FOR MINORITIES:
A PROCEDURAL PROPOSAL

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but there wasn't, there was no common denominator, no interdependence between them, the only order and relationship existing within the discrete worlds of above and below, and indeed of anywhere

László Krasznahorkai, *War and War, Like A Burning House*, 8 (1999)

what you believe depends on what you've seen, – not only what is visible, but what you are prepared to look in the face

Salman Rushdie, *Satanic Verses*, London, Vintage Books, 252 (2006)

If we tie a lot of cherry-peppers on a string, they'll make a pepper-wreath. However, if we don't tie them on a string, they won't make a wreath. Although it's the same amount of peppers, just as red and just as hot. But still no wreath.

Does it only lie in the string? No, it doesn't. That string, as we all know, is an incidental, third-rate thing.

Then what?

People capable of brooding over it and taking care not to let their mind wander about, but keep them on the right track may get a scent of eternal verities.

István Örkény, *The Meaning of Life*, transl. Katalin N. Ullrich

Please, please! This is supposed to be a happy occasion! Let's not bicker and argue about who killed who.

Monty Python and the Holy Grail (Father after Launcelot indiscriminately massacred half of the celebrating crowd)

ABSTRACT

There is a gap between minority claims and international minority rights guarantees or minority rights on national levels. Where justified claims are systematically thrown out by both political and judicial bodies, that marks a failure of the legal system to live up to the expectations of law that protects all equally. The thesis argues that there is an area where the rejection of minority rights claims is illegitimate and where a solution is available that does not challenge the basic structure of states and legal systems. I present a proposal that builds on a type of judicial procedure, collective procedures or group litigation, in order to bridge the gap between minority claims that have a decisive collective element and the tendency in many legal systems to screen out such claims as non-enforceable. The proposal covers claims from more past-centered, historical injustice claims, often based on large-scale crimes, to present-day discrimination claims including desegregation in education and language use. The fact, however, that the proposal seeks accommodation without challenging the overall setup means that many autonomy related claims, most importantly territorial autonomy and self-determination, might fall outside the scope of the thesis.

The adoption of a rule allowing for collective procedures, if it targets or is also applicable to the types of claims raised by minorities, will help expand the ability of law and the courts to engage, in more meaningful ways, with minority claims. More specifically, the proposal seeks to expand the ability of the legal system to consider claims, arguments, proof and context that go beyond a strictly individualist approach. The proposal brings important benefits like better access to justice, allowing a challenge to wider social practices and statistical evidence

on group-level that is not easy to translate to proof on the individual level; judicial efficiency; contextualization that can tame hidden biases; recognition and empowerment, giving voice to victims.

Judicial group recognition offers various ways to address individual and intragroup variation. This will limit the possible dangers of full and permanent recognition of groups, most importantly the possible limiting effect on group members, in line with liberal multiculturalist accounts. The procedural approach avoids the sensitive question of ‘collective minority rights’ while allowing the enforcement of claims that can only be construed on the level of groups. The thesis is meant to be a contribution to bridging the gap between minority claims, framed as group rights, and minority rights limited to individuals.

While the thesis seeks to preserve the individual-based liberal view, maintaining that it is ultimately on the individual level that we should measure the benefits of rights enforcement, the expansion of rights enforcement can link back to how rights are conceived. Once rights with an important collective element are endorsed in judicial awards, that can reinforce the group context of rights even for those who are otherwise unwilling to depart from a strict individualist reading of rights.

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INTRODUCTION

A gap exists between accommodation claims raised by minorities and the measures that majority institutions are willing to adopt. International minority rights guarantees offer limited ways to challenge the elements of the institutional setup that present undue constraints on minority rights claims. That domestic law and minority rights guarantees fall short of what minorities would like to see is not problematic in itself: human rights never claimed to satisfy all. More concerning is the challenge that there are justified claims raised by minorities that the rights based approach fails to address for structural reasons, e.g., due to inherent biases in the system. This thesis argues that there is an area where the rejection of minority rights claims is illegitimate and where a solution is available that does not challenge the basic structure of states and legal systems.

The following chapters present a proposal that builds on a type of judicial procedure, collective procedures or group litigation, in order to bridge the gap between minority claims that have a decisive collective element and the tendency in many legal systems to screen out such claims as non-enforceable. For minority rights, I consider the areas covered by documents like the Council of Europe Framework Convention on National Minorities and the UN Declaration on the Rights of Indigenous Peoples, which would include all domestic provisions covering relevant questions. The fact that the proposal seeks accommodation without challenging the overall setup means that many autonomy related claims, most importantly territorial autonomy, might fall outside the scope of the thesis.

Claims related to self-determination and self-government are hard to conceptualize as judicially enforceable rights.¹ I am skeptical about the proposal's ability to boost the justiciability of autonomy-related claims, or the right to self-determination, where this is currently not part of the legal framework. It is hard to find justiciable standards to divide humanity into mutually exclusive territories and corresponding societies. It is not a good excuse that this topic would require a separate thesis. The reason that should make this choice acceptable, I hope, is that the proposal addresses the claim – 'we want institutions of our own' – on a different level, and does not leave the claimants empty-handed. It seeks to create and reinforce the sense that institutions are indeed 'of their own,' even if they are minority members of the society. On the other hand, once a legal system recognizes self-determination and autonomy rights as justiciable, the collective procedural solution makes it easier to deal with the right-holder entities that are necessarily collective. It allows both for granting rights to groups that are otherwise not recognized by law and for more flexibility, considering the judicial determination on the boundaries of the entitled group. The main limitation will lie in how far courts can go in addressing structural questions.²

Minority claims other than those about self-determination and political autonomy, from more past-centered, historical injustice claims, often based on large-scale crimes, to desegregation in education and language use, can more directly benefit from the proposal, and will be discussed despite the fact that these claims might otherwise differ considerably from each

¹ One such solution that has been proposed to the International Court of Justice when it considered the case of Kosovo was 'remedial secession.' The Court rejected to address this question. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 438, ¶ 82–83.

² The 'Remedies' and 'Judicial' chapters will address these questions in more details, refining the scope of where the proposal is applicable. Here I wanted simply to acknowledge that the proposal does not encompass all areas of otherwise legitimate minority rights claims.

other.³ Accordingly, the limitation concerning the types of rights does not mean that all public law related remedies are ruled out, to the contrary.

This introduction will briefly address the main elements of the proposal, definitional questions and the structure of the thesis. Chapter 2 provides a more elaborate presentation of the proposal.

My claim is that the adoption of a rule allowing for collective procedures, if itself applicable to the types of claims raised by minorities, will help expand the ability of law and the courts to engage, in more meaningful ways, with minority claims. More specifically, the proposal seeks to expand the ability of the legal system to consider claims, arguments, proof and context that go beyond a strictly individualist approach. While this in itself helps some minority claims, it does leave in place many constraints, including what type of claims are justiciable, what are the areas where the decisions of the political branches remain indispensable and what are the areas where judges feel largely incompetent.

Despite the remaining constraints, this thesis argues that the proposal brings important benefits, and I will list a number of issues where the collective procedural solution is likely to provide advantages that are relevant in the minority rights context. Furthermore, adopting the proposal has an innovative potential: the expansion of rights enforcement can link back to how rights are conceived. Once rights with an important collective element are endorsed in judicial awards, that can reinforce the group context of rights even for those who are otherwise unwilling to depart from a strict individualist reading of rights.

³ The proposal does not rely on a common core that links all such claims, but I would argue that these claims are aiming at the creation of an equal status in society that has been challenged by a violation that targeted individuals based on (supposed) group belonging and that requires a response that, at least partly, provides remedy on the level of the group. The fact that remedies can be both backward-looking (compensation) and forward-looking (guarantees of non-repetition) also connects, rather than separates, these claims.

This thesis seeks to preserve the individual-based liberal view, maintaining that it is ultimately on the individual level that we should measure the benefits of rights enforcement; while improving the ability of the majority institutions – courts and legal systems – to address minority claims that are arbitrarily thrown out, only because they do not seem to fit the common legal approach to harms and remedies. Even if rights are only acknowledged on the individual level, existing attempts to find efficient ways for group litigation (e.g., in consumer actions) in various jurisdictions could be combined with individual minority rights that would allow groups to appear before courts as groups, and benefit from many advantages of a collective approach (like aggregation, public recognition, evidentiary advantages etc.). At the same time the procedural group recognition will limit the possible dangers of full and permanent recognition of groups, most importantly the possible limiting effect on group members. In line with liberal multiculturalist accounts, courts can act as a filter that weeds out claims deemed problematic, e.g., from a human rights point of view. This is not to claim that this solution can do all. It will fall short of some of the minority claims that seek full and permanent collective recognition – on the other hand, it provides for a more flexible type of recognition, one that is better at adapting to the particular claim in question and less prone to the fears and dangers of a political, one-and-for-all recognition. The collective procedural device can provide for a viable intermediary solution that the majority legal system can accommodate.

The procedural approach avoids the sensitive question of ‘collective minority rights’ while allowing the enforcement of claims that can only be construed on the level of groups. Majorities are often resistant to the idea of collective rights, as in the case of most Western legal systems, at least on the level of rhetoric; majorities in the Eastern regions of Europe can feel and act like (threatened) minorities. The proposal works in such cases better than a

frontal assault on the non-minority-friendly regimes, as it starts with a legal solution that is on its face neutral – in the sense of formally targeting all persons equally – in a way that counters some disadvantages of minority status and ‘neutralizes’ them. The proposal is ‘neutral’ only in the sense of levelling the field and ‘neutralizing’ the disparate effects of minority status. As the detailed overview seeks to demonstrate it is meant not to be ‘neutral’ in a structural sense, helping more those whose disadvantages are more apparent for courts or easier to remedy by judicial means once they appear in an aggregated form. The proposal thus contributes to bridging the gap between minority claims, framed as group rights, and minority rights limited to individuals. It achieves this by focusing on enforcement. While substantive minority rights norms might lack a collective aspect, by recognizing the group level in the context of litigating rights, it seems possible to square the circle and rely on individual rights while addressing collective claims.

Rights enforcement through courts means better access to adequate remedies. Adequate and effective remedies are not simply a goal that should drive judicial reform and changes in the wider legal realm, but also a state obligation under international law and a human right.⁴ The changing reality, with the ubiquity of the state and the mass scale of violations where they occur, akin to the large scale harms that mass production creates, calls for innovative solutions.⁵ Better access to courts, a driving ideal of many judicial reforms, means more actions brought. Faced with the dilemma of how to cut the number of claims they receive or how to deal with them in a more efficient way, courts should and do look for ways to innovate rather than throw out cases to the detriment of access to justice. The mass scale of violations also means that there will unavoidably be similarities between many of the claims brought.

⁴ See more on this in the chapter ‘Judicial’ under ‘Access to justice.’

⁵ On this change, see the overview in section ‘The need for collective procedures’ in Chapter 2.

Aggregation in litigation is an innovative approach to the increased social expectations towards law and courts. The proposal in this thesis rests on the idea that group litigation has a potential that is especially important for litigating minority group claims.

Currently, group litigation gets more attention in business-related cases, commercial litigation and consumer protection, while the present class action rule, Rule 23 of the Federal Rules of Civil Procedure in the US, was adopted with civil rights litigation in mind.⁶ Many other states apply a structurally similar procedural device, and countries all over the world have adopted or considered a similar solution, often limited to specific areas of law.⁷ The EU itself has engaged in a similar endeavor.⁸ The attempt to address larger groups of victims instead of a limited number of individually identified victims has not been limited to the national level: class actions are becoming global, transcending state boundaries,⁹ and similar solutions have

⁶ For the readers unfamiliar with Rule 23 of the Federal Rules of Civil Procedure, subchapter 2.3 gives an overview of the history and substance of the US class action rule.

⁷ A good collection of materials describing global trends can be found at the site of the Global Class Action Exchange, a cooperation between Stanford Law School, the Oxford Centre for Socio-Legal Studies, and Tilburg University: <http://globalclassactions.stanford.edu/>. For the UK, e.g., see Ministry of Justice, 'Group litigation orders' (24 July 2015), <https://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>. In Australia, before federal courts, there are currently two human rights related cases out of the 63 representative proceedings: Corporations and Corporate Insolvency sub-area: 34; Regulator & Consumer Protection sub-area: 15; Commercial Contracts, Banking, Finance and Insurance sub-area: 12; Administrative and Constitutional Law and Human Rights: 2. Of the latter, one is a disability discrimination act (intellectual discrimination in employment competence assessment: Tyson Duval-Comrie (by his Litigation Representative Claudine Duval) v Commonwealth of Australia) and the other is Wotton v State of Queensland (QUD 535 of 2013). See the full list: Federal Court of Australia, Case Management Services: Representative Proceedings, as of 31 March 2016, <http://www.fedcourt.gov.au/case-management-services/class-actions>. Canada also applies the class action rule: Brandon Kain, *Developments in Class Actions Law: The 2013-2014 Term – The Supreme Court of Canada and the Still-Curious Requirement of "Some Basis in Fact"*, 68 S.C.L.R. (2d) 77 (2015). The collective approach has also conquered the arbitration arena, see a comparative account: S. I. Strong, *Resolving Mass Legal Disputes through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT'L L. & COM. REG. 921 (2012).

⁸ See the Collective Redress Recommendation of the European Commission: European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU). For an overview, see Damien Geradin, *Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now?*, 22 GEO. MASON L. REV. 1079–1102 (2015); or and Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures – European Debates*, 58 INT'L & COMP. L.Q. 379, 395–396 (2009).

⁹ See, e.g., Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7 (2009).

appeared on the international level as well. The European Social Charter has a collective redress mechanism.¹⁰ While this concerns social rights, the relevance for minority rights is made clear by the fact that Roma rights NGOs like the European Roma Rights Centre and the European Roma and Travellers Forum, have been making use of the system and have filed complaints. The International Criminal Court's Victim Fund targets victims of mass scale violations like genocide, war crimes and crimes against humanity, where the challenge of great numbers is always present.¹¹ The European Court of Human Rights introduced a procedure to address a greater number of claims that show similarity, by deciding one case and calling for a remedy that addresses all underlying claims. In case of the failure of the state in question to deliver by deadline set by the court, the court threatens with opening all other pending cases.¹²

The present thesis builds on a similar insight, in the context of minority rights: violations of these rights, the patterns of discrimination often result in larger scale victimization where remedies targeting the entire group of (potential) victims seem more effective and adequate.

At the same time, the judicial recognition of the collective aspect of the violations can respond

¹⁰ This Council of European treaty has an optional protocol specifically allowing for a 'collective complaints' system: Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, November 9, 1995, E.T.S. No. 158.

¹¹ See Rome Statute establishing the International Criminal Court art 79, July 7, 1998, 2187 U.N.T.S. 136; and the site of the Trust Fund for Victims: <http://www.trustfundforvictims.org/>. Rule 98-3 of the Rules of Procedure and Evidence specifically talks about collective remedies: 'The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.' Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, at 59, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

¹² Rule 61 reads: 'The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of *a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications*.' The Rules of the European Court of Human Rights as of 1 January 2016, Rule 61-1, *emph. added*. A common example for where the Court might apply the collective approach is the Bug River case, where Poland did not fulfill its obligation to compensate those who lost their property as a result of the border changes after the Second World War: *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1. Dinah Shelton argues that in the Bug River case, the ECtHR 'turned the individual complaint into a class action.' DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 285 (2005).

to minority concerns about the willingness or ability to address exactly this aspect of the violations they suffer.

To make the argument less abstract, here are a couple of examples where the purely individualist approach might be too constraining. Starting with claims related to the most serious rights violations, members of groups targeted by perpetrators of genocide and other wide-scale crimes that might take place in an armed conflict can raise claims that go beyond the individual scope of common reparations. First, a genocidal crime and other war crimes could have purged entire families and communities, leaving in some cases no survivors in the position to claim reparation under traditional inheritance rules. Second, part of the harm caused might not be assessable on the individual level. Third, related to this, the nature of the harm might require action on a collective level. If a local culture ceased to exist, it is hard either to assess or repair the loss on the individual level. Fourth, the mere number of victims and claims might challenge the capabilities of courts, especially in a post-conflict environment. Fifth, the perpetrators and even the state in a post-conflict situation might not be capable of paying for all victims. Aggregating the claims in one or a low number of court cases might address the courts' capability problem as well as the limited funds issue. Sixth, many claims might not make it to courts, either because some victims are not in a position to sue (that can easily be a result of the violations), lack information, willingness (for fear of reviving the horrors) etc. Seventh, it might not make sense to leave the benefits with the perpetrators if victims fail to sue for any reason. Eighth, connected to this, the effect of deterrence is served only if we increase the likelihood that no violation remains without (material) sanctions. Ninth, evidence can be inaccessible in war-like situations, witnesses killed or otherwise unavailable for testimony, documents never produced or destroyed etc. Connecting claims can provide evidence that altogether complete the picture and persuade

judges that would be otherwise inclined to dismiss claims based on insufficient evidence. Evidence gained in one case might inform other cases and the courts' general assessment of similar cases might give rise to a presumption that benefit all victims struck by the same fate. It is not only the victims of the most serious violations who can benefit from the collective procedural solution. It might not make sense to litigate an individual case where a minority member's right to use her mother tongue in official dealings was violated. And even if she does sue and wins, the compensation to be paid and a court order to accommodate linguistic claims might not trigger adequate response. However, if similar claims are aggregated and hundreds or thousands of similar claims land in court, a modest form of compensation granted for every individual can easily divert the initial will to deny these rights on the part of the decision makers. Some cases that the thesis presents as examples may be considered 'extreme' in the sense that they are about mass scale and grave violations, like the crime of genocide, and not more 'mundane' claims commonly raised by minorities. What this apparent discrepancy shows, in my view, is not that the collective element is rightly recognized in extreme cases only. Rather, these were the cases where it would have been very difficult to ignore the wider, collective context that similarly present in 'less extreme' minority rights violations where it is easier to ignore. It would be a waste to ignore or limit the lessons learnt in such cases. A proper reading of claims arising from 'extreme' violations makes them structurally similar to more traditional minority claims in that they seek change after a systematic failure of adequate rights protection.

The collective procedural solution can make the biases of seemingly neutral legal rules apparent. An individual lawsuit between a landowner belonging to the national majority and a minority member relying on customary ownership might not induce the court to revisit its

evidentiary standards. Many indigenous claims face this problem, communities and members cannot document ownership the way majority members can. Yet, if it is faced with historical claims of a community that is effectively wiped out by reliance on strict standards of proof, it might be more inclined to alter those standards. This is not to say that some of these claims cannot be accommodated without relying on a collective procedure. But even if this is the case (and with the evidentiary argument, it certainly is), aggregation makes the court face the full scope of the consequences of a judicial choice and, as a result, might be more favorable to the claimants. In the rape cases committed by Bill Cosby, it took many years and, more importantly, a wide range of victims, to persuade legal officials of various sorts that the alleged crimes took place, making it harder for the perpetrator to dismiss the claims. The case also shows an additional benefit of the collective procedural solution: it makes it harder to target individual claimants by discrediting them. Victims that are particularly vulnerable might be less exposed by belonging to a group. Aggregation translates to empowerment and a sense of protection.

The collective procedural solution comes with a number of conditions and constraints. First, it is a judicial solution, assuming that there is an independent and working judiciary to enforce rights, and an overall commitment to the rule of law and human rights remedies in general.¹³ Second, there should be a minimum level of willingness to accommodate minority claims, even if there is widespread opposition to grant collective rights or official and permanent recognition to minority groups. A further constraint, not inherent in the proposal, but driven by a desire to narrow down the focus for the discussion that will follow, is that I am not dealing with non-western legal systems. Western legal systems seem to grapple the most with the

¹³ It seems especially relevant to note considering that I am writing this in Hungary in 2016.

question of the legal recognition of groups. In many non-Western jurisdictions, it is more common to use a collective approach. In India, the legal protection on the level of groups seems to be more accepted, sometimes explained by historical reasons.¹⁴ Considering the scope of diversity in India, differences in language, religion and culture, the legacy of the caste system and the ‘scheduled tribes’ who would in themselves make up a larger country,¹⁵ it is not surprising that the legal system acknowledges the group level in many forms.¹⁶ In the African human rights system, rights are formulated not only on the level of the individual ‘human’ but also of the peoples, under the African Charter on Human and Peoples’ Rights, as it has been acknowledged in the case of the Endorois people.¹⁷ Indigenous legal traditions themselves are usually seen as more receptive of group-level thinking.¹⁸ Part of the collective recognition of the minority problem stems from these conflicting views, from claims made in collective terms that are rejected by the dominant legal culture that cannot (does not want to) deal with non-individual rights claims. The proposal does not mean that all such claims are answered in the affirmative; it only seeks to assure that courts can give a fair consideration to such cases, just like more common legal claims that fit perfectly the individualist compensatory framework.

The thesis presents a ‘conceptual’ proposal: it seeks to be as inclusive as possible, speaking persuasively for the widest audience possible, with many details of how a collective

¹⁴ J Derret, *Human Rights and Fundamental Freedoms in India* in RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L’HISTOIRE COMPARATIVE DES INSTITUTIONS XLVII: L’INDIVIDU FACE AU POUVOIR DEUXIEME PARTIES: AFRIQUE, ASIE, AMÉRIQUE 159, 163 (1988), cited by LISA TORTELL, *MONETARY REMEDIES FOR BREACH OF HUMAN RIGHTS. A COMPARATIVE STUDY* 95 (2006).

¹⁵ Over 100 million people according to the 2011 census. Census of India, 2011, Population Enumeration Data (Final Population), http://www.censusindia.gov.in/2011census/population_enumeration.html.

¹⁶ For an overview, see Manoj Kumar Sinha, *Minority Rights: A Case Study of India*, 12 INT’L J. MIN. & GR. RTS. 355 (2005).

¹⁷ Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication No. 276/2003, African Commission on Human and Peoples’ Rights (November 25, 2009).

¹⁸ Christine Zuni Cruz, *The Indigenous Legal Tradition as Foundational Law* (2015), available at <http://ssrn.com/abstract=2797508>.

procedure works deliberately omitted or addressed only briefly, on a higher level of generality. This will allow me to address theoretical and conceptual questions, while not neglecting practical questions, either: the proposal sets conditions for how a concrete procedural design should look like. However, the thesis does not, for it cannot, provide a blueprint that could be used in any particular legal system: the solution that fits a particular legal context will depend on many factors that could not be considered within the limits of the present thesis.

The proposal is limited in the sense that it does not rely on any assumption about the special role of litigation or the judiciary in bringing about political changes. It simply aims at strengthening the potential of judicial rights enforcement in the area of minority rights and allow for litigation in more contexts – once litigation is a chosen venue. This does not necessarily imply that litigation will best serve a particular minority claim. The proposal takes a position, however, on the role of litigation in bringing about social change: in cases of rights, judicial enforcement should be available as one form of political struggle, otherwise the rights themselves would suffer. Furthermore, where public enforcement, for some reason, does not take place, private actors should be able to bring claims to courts. This requires courts to embrace more actively their role in policy making. This is not to say that courts in all jurisdictions are ready to accept this challenge. Yet, the challenge is there, with the increasing expectation on courts to enforce rights, and provide for complex remedies, often involving a large number of victims. Recognizing the entire collectivity as a party that needs to be adequately represented in the litigation, and whose interests should be adequately dealt with, is an essential part of fully embracing this challenge, making it more transparent, more articulate and, ultimately, more likely and obvious to solve. The thesis will consider the

legitimacy and the feasibility questions raised by this approach.¹⁹ To achieve the full potential of the proposal, courts should act in a way that engages the political branches to act in line with the equality concerns underlying the minority claims in question. This is also in line with the general approach of the thesis: it seeks to remain open to people of various convictions, be it about the 'existence' of groups, collective rights, the proper role of courts and of legal representatives etc. The proposal as it is presented below speaks to those, e.g., who are otherwise hostile to claims of a collective nature, but still see the maximization of individual rights guarantees as a legitimate goal. This thesis, on the substantive level, keeps an open mind about the desirability of collective rights.

The thesis uses words like 'collective,' 'groups' or 'minorities' that are not self-evident, and many disagreements involve differing views on what these (should) mean. I will use 'collective claims' as a shorthand for claims made primarily on behalf of a group rather than by mere individuals. Aggregate claims will be used to speak about the collection of individual claims, e.g., for efficiency, as opposed to truly 'collective claims' that might not be cognizable on the individual level. I will use the terms group litigation and collective litigation (or procedure) interchangeably.

A more pressing question is the type of minorities and groups I consider. The Genocide Convention, a treaty from 1948, defines the protected groups as follows: 'national, ethnical, racial or religious group.'²⁰ The International Covenant on Civil and Political Rights, from 18

¹⁹ See especially the chapter 'Judicial.'

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide art. II, December 9, 1948, 78 U.N.T.S. 280.

years later, in its Article 27 talks about ‘ethnic, religious or linguistic minorities.’²¹ The famous footnote 4 of *Carolene Products* lists ‘religious, or national, or racial minorities’ as ‘discrete and insular minorities’ that require special protection.²² The European Commission used the term ‘vulnerable groups,’ a notion that has been also featuring in the decisions of the European Court of Human Rights.²³ These are partly but not perfectly overlapping categories. Owen Fiss writes about ‘specially disadvantaged groups.’ For example, ‘Blacks are the prototype of the protected group, but they are not the only group entitled to protection.’²⁴

The importance of these definitions, bringing together groups that might differ to a great extent, lies in the step that follows identification: the argument that the groups defined along these lines deserve a heightened level of legal and judicial protection. The challenge is whether these grounds of identification match the goals of the heightened scrutiny. Fiss links protection, along the lines of footnote 4 and John Hart Ely, to social groups – i.e., ‘preexisting’ groups – that have been in perpetual subordination and that still have severely limited political power; if these conditions are satisfied, stronger judicial protection is warranted.²⁵

The question is why is it these groups that deserve special protection? Fiss lists three forces that contribute to the disadvantaged status: they are a numerical minority, on the national level; they are in a bad economic position, a ‘perpetual underclass’; and they are a ‘discrete and insular minority’ that is the object of prejudice.²⁶ A possibly more decisive element is that the traces along which the particular groups are defined largely reflects traces that play a role

²¹ International Covenant on Civil and Political Rights art. 27, December 16, 1966, 999 U.N.T.S. 179.

²² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²³ Lourdes Peroni & Alexandra Timmer, *Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law*, 11 INT’L J. CONSTIT. L. 1056 (2013).

²⁴ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 155 (1976).

²⁵ *Id.* at 154–55 & 153.

²⁶ *Id.* at 152. For Fiss, income based groups or classes would not qualify under this because ‘those classes do not have an independent social identity and existence, or if they do, the condition of interdependence is lacking.’ *Id.* at 156.

in imagining and organizing political communities. National unity and identity often makes reference to common ancestry, common language and, even though these appear far less legitimate, religion and race. Other cultural elements might also play into the division between 'us' and 'them.' If these are overt and covert elements of organizing the political community and driving its practices and biases, this can justify special regard to groups that are permanently in a minority position exactly along these lines. The groups are not only 'suspect' in the sense that courts ought to pay more attention to laws singling out them. They are also more suspect in the eyes of many legislatures. While many 'intermediary' groups – inhabiting the field between individuals and states – are recognized by law, e.g., those confined business (corporations), civic activities (associations), and territorial units subject to the central government (cities, counties etc.), there often is a strong unwillingness to recognize competing collective entities: ethno-national, linguistic, religious minorities, organized along traits that are also important for the national community. Minorities might face hostility and even persecution where they are seen as challenging the state or its official identity. Whether these fears are completely unfounded (as is often the case) or there is some truth to them (minority elites are actively challenging central authority), this hostility or bias makes it hard even for otherwise legitimate claims to survive as legally recognized claims.

All this does not mean that other types of disadvantages like disability, gender, sexual orientation and gender identity could not benefit from the solution offered here. The thesis is simply focusing on the said areas without normatively excluding other groups. It would actually be desirable to assess the benefits of the availability of collective judicial procedures for human rights enforcement in general, or more specifically for anti-discrimination. In this framework, the thesis can also be read as a case study targeting a sensitive and emblematic case, that of racial, ethno-national, linguistic and religious minorities. The choice of focus can

also be justified by a concern with the groups that seem to be the particularly vulnerable to large-scale human rights violations.

As is apparent from the overview, some accounts presuppose a group that exist as an organic entity prior to, and independently from, the violation. This thesis does not make such a claim. It might be that it is the perpetrator's action that unites the members of the group, and even then, it might not be more than 'unification' through the violation and the legal consequences. The various victim groups of the Nazi regime, killed and enslaved on the basis of race, religion, sexual orientation and disability, do not form a 'minority.' Yet, legal responses that seek to address mass scale violations might largely benefit from aggregation, as we will see. The tool of group litigation is an apt form of furthering minority rights protection and that it is able to realize the advantages enumerated in the thesis.

The thesis will discuss in more details the topics touched upon in the foregoing overview. The first part addresses the theoretical background of dealing with collective entities, most importantly in law and in political philosophy. The second chapter elaborates on the proposal, its main potentials and possible constraints, discusses the need for collective procedures and the role of groups in human rights litigation aiming at more equality. The remaining three chapters address the various elements of the proposal for 'judicial' 'remedies' for 'groups.' The third chapter discusses the structural questions of what courts can and what they ought to do, in the context of collective procedures and minority claims. The fourth chapter breaks down the term 'remedies,' and considers the goals and the various types of remedies, and how and where collective remedies can be of help. The fifth chapter deals with issues of representation and empowerment, discussing how the presence of the group is possible and

beneficial in court procedures. Finally, the concluding chapter reiterates how and where the collective procedural proposal helps in making more responsive courts and a more accommodating legal and political system for minorities.

1 'COLLECTIVE:' THE PROBLEM OF THE GROUP

This chapter presents an overview of basic dilemmas concerning the necessity and ability of legal systems to deal with collective claims. Its focus is determined by the ultimate interest in a collective procedural solution targeting ethno-cultural minorities. The chapter first looks at the theoretical debate around groups and group rights to illustrate the disagreement about the desirability of recognizing collectivities and the moral and legal status of these groups. Opinions vary from theoretical approaches that confirm the 'reality' of groups and their moral relevance, to claims that they are largely 'superfluous.' An only partially related question posed in the chapter is whether group rights should be recognized. The discussion gradually turns closer to the central interest of the thesis, minority groups and asks whether these should hold collective rights. In this context, I discuss the principle of state neutrality and problematize the central role of the state.

The theoretical approach of this chapter means that I will at times spend time with theoretical counterarguments that might have less relevance in the political realities, but are important to build the proposal on solid grounds. An important aspect of the approach that builds partly on arguments that are less directly relevant for practice is that it takes seriously the opposition to collective minority rights, despite the fact that the rhetorical opposition of national governments is usually matched with accommodating measures that present important features of collective rights, e.g., in the field of language usage and education.

The aims of the chapter are relatively modest. I will not seek to establish the reality of groups or the necessity for legally recognizing groups and group rights. Rather, I focus on problems raised in the debates about collective rights, taking stock of the relevant problems. The discussion starts on a general level and slowly makes a transition into the questions more

specifically raised concerning minorities. It is also limited in that it focuses on modern Western liberal legal thinking, in line with the focus of the thesis. It is only the final question that seeks to address the problems identified in the theoretical overview, by sketching a collective procedural solution: the concluding part of the chapter will take up the collected issues and relate them to the procedural solution, to have a preliminary assessment of its potential.

The concept of collective or group rights remains contested. The different levels of the debate include the questions of what we should understand by these terms; whether there are moral foundations to such rights; to what extent law ought to recognize these rights; what are the rights involved; and how to decide on the right groups to be invested with these rights. As we will see, these questions are largely interrelated, and answering one will necessarily involve discussion of some of other questions. First I will discuss the normative background, the ‘reality’ of groups as understood in social sciences and then move on to the positive law aspects of group rights, moving closer to the minority context.

1.1 THE NORMATIVE STATUS OF GROUPS AND INDIVIDUALS

The common starting point for normative theories is individualism, i.e. treating individuals as the elementary building blocks. This approach goes well with individual methodology, the common method in social sciences. Max Weber builds his social theory around ‘action’ that should be taken ‘in the sense of subjectively understandable orientation of behavior’ that ‘exists only as the behavior of one or more *individual* human beings’²⁷ (emphasis in the original). Influential thinkers like Karl Popper or Friedrich August von Hayek take a similar view

²⁷ MAX WEBER, *ECONOMY AND SOCIETY, AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 13 (1978).

as their starting point.²⁸ Pettit calls it the ‘personalist assumption’ that ‘the relevant constituency for judging the normative adequacy of political institutions is human beings.’²⁹ This does not exclude the possibility of recognizing collectivities, however. Under his theory, for example, a ‘racial community’ exists ‘only if the actions of the members are purposively related to one another; in the most elementary case, we require that the members segregate themselves from the “racially alien” environment because other members also do it.’³⁰ This Weberian definition applies a thick and internal approach. On the other hand, it is possible to define groups from the outside, applying a thin definition of what makes a group, e.g., the perpetrators who discriminate against people based on their perceived group-belonging, or non-membership. As Weber notes, the relevant definition will depend on the aim of the endeavor. What drives the distinction between recognizing the existence of certain groups while not others, in Weber’s case, is ‘scientific understanding.’ He argues that the adequate level of unit depends on the goals of the analysis, and he only speaks about sociological work when he limits his focus to ‘particular acts of individual persons.’ The ultimate goal of what he calls methodological individualism is to understand social phenomena. Thus, we ought to adopt methodological individualism to better understand various actions.³¹ The question is, then, what to do if our goal goes beyond understanding and seeks, as my proposal, to maximize benefits from a rights-remedies perspective. Without giving a definite answer, Weber leaves the door open:

For still other cognitive purposes—for instance, juristic ones—or for practical ends, it may on the other hand be convenient or even indispensable to treat social collectivities, such as states, associations, business corporations, foundations, as if they were individual persons. Thus they may be treated as

²⁸ CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 3 (2011).

²⁹ PHILIP PETTIT, THE COMMON MIND: AN ESSAY ON PSYCHOLOGY, SOCIETY AND POLITICS 287 (1993).

³⁰ WEBER, *supra* note 27, at 1377.

³¹ *Id.* at 13–15.

*the subjects of rights and duties or as the performers of legally significant actions.*³²

Somewhat like in natural sciences, the adequate level of the basic entity to be studied might vary depending on the discipline and the goal of the research, ranging from particles through cells, individuals, groups, species all the way up to galaxies etc. Jeremy Waldron at one point actually uses the term 'moral particles.'³³

At the meeting point of natural and social sciences, some psychological accounts suggest that cognitive functions are different on the collective level, and there is something that can be called 'distributed cognition' and 'collective mentality.'³⁴ This might inform our decision whether we see (certain) groups as moral agents or not. 'When someone wrongs a group to which we belong, in some way undermining our capacity to continue to act as a participant in that group, we can properly feel resentment in response to the harm that has been done to us.'³⁵ It is thus possible that groups should be seen as moral agents even if not performing the full range of what we see as essential elements of moral agency.

Emile Durkheim dealt with the difference between individualist and collectivist approaches from the point of view of knowledge. Before offering a comprehensive theory that builds on both of these, he summarizes the contrast as follows:

The knowledge that people speak of as empirical [...] is the knowledge that the direct action of objects calls forth in our minds. Thus they are individual objects that are wholly explained by the phisic nature of the individual. But if the categories are essentially collective representations, as I think they are, they translate states of the collectivity, first and foremost. They depend upon the way in which the collectivity is organized, upon its morphology, its

³² *Id.* at 13.

³³ Jeremy Waldron, *Taking Group Rights Carefully*, in LITIGATING RIGHTS PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 203, 225 (Grant Huscroft & Paul Rishworth eds., 2002).

³⁴ BRYCE HUEBNER, MACROCOGNITION: A THEORY OF DISTRIBUTED MINDS AND COLLECTIVE INTENTIONALITY (2014).

³⁵ Huebner, reviewing List and Pettit's book: Bryce Huebner, *List, Christian, and Pettit, Philip. Group Agency: The Possibility, Design, and Status of Corporate Agents. Oxford University Press, 2010. Pp. 240. \$45.00 (cloth), 122 ETHICS 608, 612 (2012).*

*religious, moral, and economic institutions, and so on. Between these two kinds of representations, then, is all the distance that separates the individual from the social; one can no more derive the second from the first than one can deduce the society from the individual, the whole from the part, or the complex from the simple. Society is a reality sui generis; it has its own characteristics that are either not found in the rest of the universe or are not found there in the same form.*³⁶

As a result, the ‘two kinds of representations’ are both important for understanding social phenomena. Furthermore, Durkheim also argues that society is ‘a reality *sui generis*,’ one that cannot be reduced to its components. The question of whether society or other collectivities should be seen as ultimate entities to be studied or whether they are mere proxies when studying social phenomena is a question that interests researchers to this day.

To cite a recent attempt, Christian List and Philip Pettit in their ambitious book on ‘Group Agency’ assess the foundations of moral agency and conclude that, subject to certain conditions, groups can and should be seen as agents. They present their theory as a middle ground between what they call ‘eliminativist’ (individualist or anti-group) and ‘emergentivist’ (accepting the reality of groups) accounts. They argue for the reality of groups, but maintain the essential connection between groups and their members. In their account, group agency emerges from the action of the members but ‘materializes superveniently on the contribution of group members.’³⁷ That’s why they label the theory as ‘non-redundant’ realist. The word ‘superveniently’ plays an important role in the theory. While the authors maintain the mainstream methodological individualism of the social sciences, they argue that group actions are ‘not readily reducible’ to the members’ individual actions.³⁸ As a side-kick to emergentivist theories, they argue that their approach does not rely on some ‘mysterious

³⁶ EMILE DURKHEIM, THE ELEMENTARY FORM OF RELIGIOUS LIFE 14–15 (1912).

³⁷ LIST & PETTIT, *supra* note 28, at 75 & 76.

³⁸ *Id.* at 5–6.

force' (like the 'ether' in physics), they only work based on individual agency. The 'realist' element is that, at some point, explaining social phenomena and group behavior from individual actions turns too complex ('not readily reducible') and using collective categories becomes useful. This, they maintain, is a move away from the mere metaphorical use of collective notions.

How the 'supervenient' move happens has been the subject of political theories, going back at least to Thomas Hobbes. A common approach is to differentiate between groups that merit legal and political recognition and those that do not. David Copp, based on various works of Hobbes, talks about 'bodies politic' (with sovereign authority), 'bodies private' (without sovereign power) and 'multitudes of men' or 'mere concourse of persons.' The latter includes collectives that lack an 'authorized representative,' even if it shares a common purpose, or interest.³⁹ Peter French writes about 'aggregate collectivities' and 'conglomerate collectivities'⁴⁰; Dwight Newman differentiates between 'sets' and 'collectivities'⁴¹; List and Pettit talk about 'mere collections' and 'groups.'⁴²

One common objection the reality of groups is that, while we often speak of collectives as having feelings, intentions, rights and duties just like individuals, this in itself does not prove group agency or the truth of the proposition that such groups should also be seen as genuine actors who have feelings, intentions, rights and duties. One could argue that when we speak in those terms, we speak figuratively, a 'façon de parler.' A quote from Anthony Quinton aptly summarizes this position:

³⁹ David Copp, *Hobbes on artificial persons and collective actions*, 89 THE PHILOSOPHICAL REVIEW 596 (1980).

⁴⁰ PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984).

⁴¹ DWIGHT NEWMAN, *COMMUNITY AND COLLECTIVE RIGHTS: A THEORETICAL FRAMEWORK FOR RIGHTS HELD BY GROUPS* 4 (2011).

⁴² LIST & PETTIT, *supra* note 28, at 31. To get a broader picture on the complexity, see Figure 1.1 on page 40 of the book.

*We do, of course, speak freely of the mental properties and acts of a group in the way we do of individual people. [...] But these ways of speaking are plainly metaphorical. To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members.*⁴³

On the other hand, Pettit, e.g., argues that '[i]ntegrated collectivities are persons in virtue of being conversable and responsible centers of judgment, intention, and action.'⁴⁴ An adequate theory should, accordingly, tell us when it is mere symbolic speech and when groups have moral relevance.

Bratman talks about shared agency in the sense that there is a shared intention that does not necessarily mean that there is also a shared subject.⁴⁵ He proposes a theoretical framework continuous with individual planning agents, 'modest sociality'⁴⁶ or 'augmented individualism':⁴⁷

*the further steps from individual planning agents who know about each other's minds, to modest sociality, while substantive and demanding steps, are nevertheless primarily applications of the conceptual, metaphysical, and normative resources already available within our theory of individual planning agency. The deep structure of at least a central form of modest sociality is constituted by elements that are continuous with those at work in the planning theory of our individual agency.*⁴⁸

This account denies the gap between strictly individualist approaches and those that embrace the collective dimension. List and Pettit set up a model to see who and what counts as an agency – be it individual or collective. They conclude that are four conditions of agency.

⁴³ Anthony Quinton, *The Presidential Address: Social Objects*, 76 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1–viii (1975–76), Quoted in Philip Pettit, *Groups with minds of their own*, 12 SOCIAL EPISTEMOLOGY ESSENTIAL READINGS 167, 179 (2003); and in David Copp, *On the Agency of Certain Collective Entities: An Argument from "Normative Autonomy"*, 30 MIDWEST STUDIES IN PHILOSOPHY 194, 213 (2006).

⁴⁴ Pettit, *supra* note 43, at 188. Quoted in Copp, *supra* note 43, at 213. Copp summarizes Pettit's position as follows: 'purposive collectives such as courts and political parties can be so organized that they are capable of the kind of rational unity that is required for agency.' *Id.* at 221.

⁴⁵ MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014).

⁴⁶ *Id.* at 151.

⁴⁷ *Id.* at 11.

⁴⁸ *Id.* at 8.

Members should have a shared goal (shared goal requirement); they individually intend to contribute to reach that goal (individual contribution); this intention flows partly from the belief that others share this intent (interdependence); shared belief that the earlier conditions are met and others also believe this (common awareness).⁴⁹

1.2 A VIEW FROM THE OTHER SIDE: COLLECTIVE RESPONSIBILITY

Under most theories, moral agency might mean duties as well as rights. It is important to see how the group agency argument can play out in this respect. Karl Jaspers in his famous book on German guilt writes about four types of guilt that can be moral, political, metaphysical and criminal: 'Guilt [...] is necessarily collective as the political liability of nationals, but not in the same sense as moral and metaphysical, and never as criminal guilt.'⁵⁰ Responsibility in the latter senses should be assessed on the individual level. While 'criminal guilt,' legal responsibility under criminal law, should not be extended to the collectivity, remaining strictly individual, it is not clear what this account says about other forms of legal responsibility. Many forms of legal obligations, other than criminal, might fall under the 'political' rubric in this categorization. Remedies sought by the victims are of this sort. At one point, Jaspers writes about law as the form of subjection to the victors' power:

All Germans without exception share in the political liability. All must cooperate in making amends to be brought into legal form. All must jointly suffer the effects of the acts of the victors, of their decisions, of their disunity. We are unable here to exert any influence as a factor of power. Only by striving constantly for a sensible presentation of the facts, opportunities and dangers can we—unless everyone already knows what we

⁴⁹ LIST & PETTIT, *supra* note 28, at 33. They also identify four aggregation function criteria and argue that a collectivity can never fulfill all four of those, but it is possible to imagine that they meet three at the same time, which might be enough to conclude that they are truly autonomous moral agents. For the four criteria, see *ibid* 49.

⁵⁰ KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 55–56 (E. B. Ashton trans., 2000).

*say—collaborate on the premises of the decisions. In the proper form, and with reason, we may appeal to the victors.*⁵¹

While law here appears as ground for collective guilt, this does not mean normative justification and instead reads as a ‘victors’ justice.’ In fact, collective guilt in law is usually seen as contrary to Western liberal legal thinking. And yet, we often see solutions that effectively make people share guilt without individual assessment. A state can be made liable, making those taxpayers contribute to the reparations that themselves might be victims. Corporations can pay and can even be held criminally liable under some jurisdictions, and the burden will be shared by owners and, indirectly, partners. Daryl Levinson argues that collective sanctions not only are being applied in Western liberal legal systems, but also make sense under certain circumstances.⁵² If effective sanctions are to target those who are best placed to prevent wrongdoing, regardless of moral responsibility or ‘blameworthiness,’ in some cases group cohesion makes sanctions targeting groups more effective. From the long line of cases that Levinson cites, here we should probably mention families, discrimination and assimilation, and ethnic conflict.⁵³ Where entities show strong solidarity and can exercise ‘low-cost and highly effective control over their members,’⁵⁴ it makes sense for a legal system to push the group to use this control, through sanctioning the group itself. Levinson notes the dangers in reifying the groups themselves as a side-effect, but also argues that ‘[t]he price of social order in ethnically divided societies may be some measure of intra-group tyranny.’⁵⁵ In Levinson’s account, individual guilt is separated from legal responsibility, but the goal remains

⁵¹ *Id.* at 67.

⁵² Daryl Levinson, *Collective Sanctions*, 56 *STAN. L. REV.* 345 (2003). Just to name an example he obviously does not deal with but that can sound familiar with the European reader: disciplinary sanctions at the European Football Championship can be applied to national football federations that are most often fined for misbehaving fans abroad.

⁵³ *Id.* at 411–419.

⁵⁴ *Id.* at 412.

⁵⁵ *Id.* at 419.

individual: it is ultimately individual liability and prevention that is (sought to be) made more effective.

David Copp presents an approach where he explicitly exonerates all members from responsibility while maintaining that the collective itself can still be held liable. Copp's examples include a state engaging in a war and dropping a bomb at a wrong place, and he uses these examples to show that it is indeed possible to hold a state responsible while no individual can be made responsible:

It is possible [...] that there is no individual who did anything relevant such that the bad upshot would not have occurred if she had not done what she did; perhaps many people were ready and able to drop the bomb in place of the persons who actually did drop the bombs. In this case [...] the bad upshot is a 'consequence' of the state's bombing the city, but it is not the 'consequence' of any member's action.⁵⁶

Although it is likely that when a collective bears moral responsibility, then at least some members are also responsible, we cannot exclude the possibility, according to Copp, that sometimes the collective can be held responsible while no individual member(s) are accountable. If we contrast this theory to the earlier accounts, Jasper's notion of political guilt can be extended to such cases, and Levinson's effective sanction principle can be applied as well. There is, however, in addition a clear emphasis on the lack of individual responsibility.

To show how responsibility on the individual and the collective level can relate to each other, Copp creates a complex scheme. He distinguishes between 'all-in' ('all things considered', a stricter obligation) and 'pro tanto' duties (that can be outweighed by other obligations). Applying these two types of duties on both the collective and the individual level, Copp creates an eight-item matrix. From those, he rejects the thesis that would maintain the

⁵⁶ David Copp, *The Collective Moral Autonomy Thesis*, 38 J. Soc. Phil. 369, 372 (2007).

possibility of no individual *pro tanto* duty in a collective with an all-in duty. The war example, to me, seems to be just this type. The problem with Copp's examples (the one on the bombing and his later examples) is that it seems to treat the procedures and institutions as given, whereas moral responsibility should also extend to decisions on the institutional and procedural design that shape decision-making in the way that allows Copp to argue that no individual member is blameworthy while the collective clearly erred.⁵⁷ Arguably, there is some, more direct responsibility in Copp's examples even on the individual level for maintaining the institutions and procedures that allow for wrongdoing, even if no individual wrongdoing occurred in close connection with the event in question.

Copp gets closest to this problem in his piece towards the end of the Tenure Committee example where he tries to do away with this objection by supposing that the relevant procedure was adopted hundreds of years ago. (The example shows that a strange, cross-cutting voting pattern can cost a candidate the position even though all members agree that she is qualified.) Copp, however, does not address the moral responsibility of the relevant actors for not revisiting this rule.⁵⁸ It can be argued that there is at least a *pro tanto* obligation to work towards a system with rules and institutions that does not allow wrongdoing in the first place, or if it does, the beneficiaries and decision-makers are liable also on the individual level. As John Rawls' theory of justice suggests, in addition to our responsibility on the individual level, one against the other person, we also hold wider responsibility for the system we live in and maintain.⁵⁹

⁵⁷ For a similar objection, see Seumas Miller, *Collective Moral Responsibility: An Individualist Account*, 30 MIDWEST STUDIES IN PHILOSOPHY 176, 189 n.24 (2006).

⁵⁸ Copp, *supra* note 56, at 380. See the same example also in David Copp, *On the Agency of Certain Collective Entities*.

⁵⁹ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

List and Pettit also address the question of collective responsibility,⁶⁰ and talk about a ‘developmental rationale,’ the idea that holding the group responsible is beneficial for bringing about the desired changes on the level of the group, a possibly more effective preventive mechanism than the (individual) alternatives. Here, too, we find the idea that bad design somehow radiates to the individual level:

By finding the group responsible, we make clear to members that unless they develop routines for keeping their government or episcopacy in check, they will share in member responsibility for what is done by the group and may also have a negative form of enactor responsibility for allowing it to be done. We may also make clear to the members of other similar groupings that they too are liable to be found guilty in parallel cases, should their collective body bring about one or another ill.⁶¹

The overview on collective responsibility shows that even here the picture is more complex than the individual-only traditional view would suggest. Otherwise individualist legal systems might sometimes make a utilitarian calculation on the benefits of the individual vs. the collective approach to responsibility and find that holding the collective responsible is more effective.

The example of collective guilt shows the boundaries of existing legal institutions, reaching beyond the strictly individualist realm even in cases where we would think there are strict limits. The overview also illustrates the full scope of effects that accepting the group agency might involve. With my thesis I walk a less dangerous terrain where most of the concerns with ‘collective responsibility’ do not apply. This is not to downplay the dangers of the collective approach, I will address many concerns in later sections. Yet, I want to stress here that I am

⁶⁰ LIST & PETTIT, *supra* note 28, at 167–169.

⁶¹ *Id.* at 168–169.

not concerned with collectivity on the side of responsibility, but on the side of the beneficiaries.

Before we turn to the merits of, and possible challenges to, the collective procedural solution, let's continue our inquiry into the reality of the groups, now moving on to the more specific question of not guilt, but collective *rights*.

1.3 THE QUESTION OF COLLECTIVE RIGHTS

A common problem of legal practice and thinking, not only in the field of minority rights, is the question whether there truly are collective rights. Since rights are primarily understood as individual rights in the Western liberal tradition, and legal developments after World War II brought about the age of human rights, it remains highly contested whether bodies that themselves are made up of human individuals can or should be seen as holding rights *as collectivities*. If not, they might still be seen as holding rights by virtue of their individual members, but this is a mere aggregation where the locus of legal inquiry remains at the individual level. The very concept of collective or group rights – I will use the two terms interchangeably where not indicated otherwise – remains contested.

To argue that a legal system should recognize groups, the common point of departure is to argue that groups ought to be recognized because they possess moral rights, they are moral agents. This is similar to the notion of human rights: rights that humans possess by virtue of being humans and not by virtue of actual legal recognition. We have seen some positions on the 'reality' of groups in this sense. Another approach, somewhat more legal in its orientation, could build on existing legal norms to distill a consensual view of values behind them. One could argue for the acceptance of group rights by pointing out the existing 'collectivist'

solutions in Western legal systems: the fact that the rhetorical rejection of group rights goes hand in hand with the practical recognition of the same.

In this section I will discuss the question of collective rights without too much regard for how these rights ought to be enforced. The structural questions raised by judicial enforcement – most importantly whether it is legitimate for courts, in particular, to enforce collective rights – will be discussed in the ‘Judicial’ chapter later.

1.3.1 Does law speak a collectivist language?

If law does actually recognize and deal with collectivities of various kinds, there is not much ground for a wholesale rejection of the legal recognition of intermediary groups. One possible venue for such claims is the remnants of pre-individualist law. Henry S. Maine famously described the transition from primitive law, based on collective entities like the family, clan, village and tribe, to modern legal systems taking the individual as the basic entity. He quotes from the *Odyssey* of Homer an expression of ancient Greek contempt for other cultures, here the Cyclops: ‘They have no laws nor assemblies of the people [...]; each is lord and master in his family, and they take no account of their neighbours.’⁶² Maine illustrates the fundamental difference between the two approaches:

*the unit of an ancient society was the Family, of a modern society the Individual. [Ancient law] is so framed as to be adjusted to a system of small independent corporations. [...] Corporations never die, and accordingly primitive law considers the entities with which it deals, i.e. the patriarchal or family groups, as perpetual and inextinguishable.*⁶³

⁶² The *Odyssey* by Homer, translated by Samuel Butler, Book IX, available online at <http://classics.mit.edu/Homer/odyssey.mb.txt>. Maine uses a different translation from the one quoted here. HENRY S. MAINE, *ANCIENT LAW, ITS CONNECTION WITH THE EARLY MODERN HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 120 (1906).

⁶³ *Id.* at 121–122, *emph. omitted*.

Stephen C. Yeazell shows how in English law groups used to be treated as fairly obvious litigants, in a way that seems distant and confusing if seen through the lenses of modern legal thinking.⁶⁴ Accepting that there has been a transition, even development, does not mean, however, that it is obvious that this move eliminated all collectivist elements of the legal system. As we have seen, Daryl Levinson based part of his argument for the legitimacy of collective sanctions on the fact that such measures are routinely applied in modern law, too. A similar line of argument is followed by Miodrag Jovanović. He argues that there is a 'value-collectivism' behind existing legal norms, as is apparent from the right of self-determination and the right to protect one's culture.⁶⁵ This simply means that law attaches a certain value to maintaining existing collectivities, at least collectivities of certain types. The argument that there are rights that do work on the collective level, in fact, questions the strong practical resistance to group rights, under the surface of vocal political opposition to recognizing groups, especially minority groups within the larger national body.

For example, the crime of genocide shows a certain receptivity towards the recognition of the collective aspect of suffering, making otherwise more common crimes like killing or causing physical or even psychological harm the most egregious one, by adding the element that the individual crime seeks to eliminate, at least in part, a group defined along 'national, ethnical, racial or religious' lines.⁶⁶ It is enough for the prosecution, or the victims seeking remedy, to demonstrate that the perpetrator attempted at committing one of the acts listed, at the very least, to cause suffering, with the intent to destroy, at least in part, the group. (Art. II) As the specificity of the crime lies in this 'collective-driven' intent, the victim should be seen as the

⁶⁴ Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Class Action in Collective Litigation*, 39 ARIZ. L. REV. 687 (1997).

⁶⁵ MIODRAG JOVANOVIĆ, *COLLECTIVE RIGHTS. A LEGAL THEORY* (2012).

⁶⁶ See Convention on the Prevention and Punishment of the Crime of Genocide art. I, December 9, 1948, 78 U.N.T.S. 277.

victim whose existence was put in jeopardy. This means that justice and judicial economy requires the presence and representation of the whole group in a genocide compensation case. This has been acknowledged by the International Criminal Court and its Trust Fund. Rule 97 (Assessment of reparations), which expressly recognizes the role of collective reparations, an approach that can be especially useful in the types of crimes the ICC considers, including genocide and war crimes:

Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.⁶⁷

One might say that genocide and other egregious crimes constitute a special case that should not be taken as representative of the logic of modern legal systems. Indeed, looking back at pre-twentieth century legal developments, we can identify a trend that seeks to eliminate intermediary actors, a certain hostility to those between the state and the individual.⁶⁸ The question then becomes how far a legal system went with this, whether there are still traces of intermediary groups in law, and whether a turn towards intermediary groups is possible and desirable. Arguing against the complete rejection of group rights is possible on various levels, and one is the positivist endeavor to show the use of collective categories in law. Joseph Raz uses the 'existing law' argument as follows:

Rights ground requirements for action in the interest of other beings. They therefore assume special importance in individualistic moral thinking. But belief in the existence of rights does not commit one to individualism. States, corporations and groups may be rights-holders. Banks have legal and moral

⁶⁷ Rule 97-1, Assessment of reparations, and Rule 98-3, Trust Fund. Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

⁶⁸ See, e.g., the historical overview in Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

*rights. Nations are commonly believed to have a right to self-determination and so on.*⁶⁹

The argument that (Western) law is not in fact committed to pure individualism can start on a highly general level, pointing out the collectivist tendencies of law by the very fact of creating groups. All laws differentiate and define the group of people they apply to, thus, in a broad sense, all rights could be said to be group rights. In the case of truly universal rights, like the right to life clause of a binding international document, the group will be all humanity. In the case of an electoral law, it will be most likely the adult, non-convicted citizenry, with certain exceptions both expanding and restricting this boundary. In the case of taxation, it might be the group of people who have residence, or those who work or make transactions, on the territory of the country. In the case of a federal state or a state divided into regions with important powers, the legislative power on those levels will mostly target people living in those geographical units. In the case of welfare rights related to childcare, it can be the mothers giving birth to babies or the newborns themselves. In all these cases, the legislator defines a group, with specific conditions of entry, and apply the rights to individuals who qualify under those terms. It is definitely true that there are cases where the definition of the group becomes more salient and will be used for a wide variety of laws and rights. Such a prevalent proxy is citizenship. Where the group definition can be both salient and sensitive, the term group rights will most likely appear. This is certainly the case with ethnic or national minorities, indigenous peoples, immigrants etc. But, as we have seen, this will simply mean that there is a body of laws within the legal system that will apply to people based on their belonging (or non-belonging) to such communities – be these actual groups with a strong sense of belonging, or classes or categories. In this sense the term group rights will not orient

⁶⁹ Joseph Raz, *On the Nature of Rights*, 93 MIND N.S. 208 (1984).

us in any way as for the way it applies to individuals, and it also does not shed light on why claims for group rights emerge in certain contexts.

Another argument for the utility of the term 'collective rights' points out that there are certain rights that can only be exercised collectively. The right to education in one's mother tongue will be practically impossible to exercise without a critical mass of students (and their parents) with similar aspirations. But here, too, we end up with considerations that are inherent to rights in general. The right to education, regardless of language, will be hard to be ensured if those entitled are not large enough numerically. This argument relegates the question of group rights to the level of feasibility, and it does not touch upon the fundamental issue of the collectivities are right-bearers.

A further, third objection could be raised against the individualist refusal that maintains that all rights can be either translated to individual rights or else they are not rights worthy of recognition. The objection suggests that there is something additional in the case of group rights that cannot be translated into the individual rights of the group members. Something would be lost in the process, and it is exactly this extra that explains why the term group rights is a useful and indispensable concept. On the other hand, this seems to go against some of the earlier arguments on behalf of group rights, in the sense that the listed individual rights cannot themselves legitimate the claim for collective rights: there is something additional that needs to be recognized.

The 'lost in translation' argument, on a general level, simply suggests that the social context matters. But there are other rights that are dependent on the larger community and that are largely meaningless without a community. The freedom of assembly and the freedom of association, or political rights in general, all presuppose such a community, and we could

safely add freedom of press. Something important is lost if we lose sight of the wider picture and forget that there are more than one individual here. What we would like to call group rights is not something special but a common feature of many types of rights. (If not all: it is hard to imagine legal rights without the prior existence of the political community.⁷⁰) But here, too, the bite of the argument is largely lost. Even if we add all the above ingredients it seems impossible to say that these, taken together, will produce something inherently different than ordinary, individual rights. But this argument seems self-defeating: if all rights all collective in this sense, then we already have collective recognition, shouldn't that suffice? If we want to argue for the recognition of certain group rights, to be exercised by minority groups, it is not enough to argue that such rights are already in place, as the argument about the lack of practical, as opposed to political, opposition suggests. It should be demonstrated that in specific contexts they are normatively compelling. Let's look at how the concept of right fits some of the arguments for the collective element.

1.3.2 Is a 'collective right' possible?

That law speaks, at times, a collectivist language does not mean that this is consistent and normatively persuasive. The normative question is whether the prevailing concepts of rights exclude the possibility of collectivities holding rights or not and, on the other hand, if these concepts support a reading that compels states to recognize collectivities as right-bearers.

Joseph Raz's concept of rights, and of legal rights in particular, is probably the one most widely cited. He argues that 'an individual or a group' has a right if 'an aspect of their well-being is a

⁷⁰ This is in contrast to moral rights that exist prior to the political community – for those who accept moral rights.

ground for holding another to be under a duty.’⁷¹ Under this account it is explicitly allowed for groups to have rights. Ronald Dworkin also notes in his book ‘Taking Rights Seriously,’ as well as in his last book ‘Justice for Hedgehogs,’ that nothing in his discussion excludes the possibility of collective (political) rights, although his own view is that these are individual rights of members ‘not to be discriminated against because they are members of some group and may also include a right to benefits in common with other members of their group,’ adding that his theory ‘holds equally for group political rights if there are any.’⁷²

Another formulation of the concept of law by Raz underlines an important element of what is at the heart of rights:

*that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty, i.e. a duty to take some action which will serve that interest, or a duty the very existence of which serves such interest.*⁷³

Here the word ‘interest’ is apparent and it places the theory at the opposition of accounts based on the ‘will’ theory. The interest theory goes back to Jeremy Bentham, the father of utilitarianism. The interest theory is well placed to account for collective rights as under this theory it should be enough to demonstrate that the collectivity in question has a common interest. A will theory, on the other hand, would require us to establish that the group not only has an interest, but a will of its own. While this is not impossible to establish,⁷⁴ this condition seems harder to fulfill – but not impossible.⁷⁵

⁷¹ Joseph Raz, *Legal Rights*, 4 OXFORD JOURNAL OF LEGAL STUDIES 1 (1984). A lengthier formulation: “‘x has a right’ if and only if x can have rights, and other things being equal, an aspect of x’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.’ Raz, *supra* note 69, at 195.

⁷² RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 91 (1977, 1978); and RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 473-474 n.1 (2011).

⁷³ Raz, *supra* note 71, at 5.

⁷⁴ See earlier the discussion based on LIST & PETTIT, *supra* note 28.

⁷⁵ I will come back to the question of will and interest in the section on ‘Representation’ in Chapter 5.

Under Raz's concept, recognizing collective rights is possible even if we conclude that the interests of the body in question are not intrinsically valuable. Or, for that matter, if no group whatsoever can have interests that are intrinsically valuable:

*Corporations also have interests determined similarly by their purposes, powers and duties. It is true that protecting these interests is not intrinsically valuable. Nevertheless corporations [...] have rights in the same sense as other individuals. They have rights if and only if their interests are sufficient to justify holding others to be subject to duties.*⁷⁶

The formulation suggests that it is finally up to the particular interests that might or might not justify the recognition of collective rights. The logical step is, then, to look at the various rights or types of rights and assess whether they should be recognized. This question is inherently linked to the types of collectivities that are claimed to be right-bearers. Benefiting from a right might be justified for one type of group, but not the other.

Does the recognition of collective rights (or a collectivity as a bearer of certain rights) necessarily mean strengthening of those rights? The answer is most likely no. Collective recognition can be an expansion as well as a limitation of a right, as compared to its recognition as a solely individual right. In the case of the right to self-determination, the fact that it can only be invoked by 'peoples' considerably limits its scope of application, especially under Protocol No. 1 creating an individual complaints system. In the *Kitok* case, involving Sami rights of using land for reindeer herding, the UN Human Rights Committee found that this right cannot be invoked by individual petitioners.⁷⁷ Or, the Second Amendment to the US

⁷⁶ Raz, *supra* note 71, at 20. Elsewhere Raz writes, leaving open the question of collective rights: 'Whatever explains and accounts for the existence of [artificial] persons, who can act, be subjected to duties, etc. also account for their capacity to have rights. Whether certain groups, such as families or nations, are artificial or natural persons is important for determining the conditions under which they may have rights.' Raz, *supra* note **Error! Bookmark not defined.**, at 204.

⁷⁷ '[T]he Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 of the

Constitution if construed as guaranteeing a collective right of the people to maintain militias, which in turn includes the related right to bear arms, protects a considerably more limited right than the interpretation, following *Heller* (and *McDonald*), that sees the Second Amendment as guaranteeing an individual right to bear arms.⁷⁸

On the other hand, as Will Kymlicka's overview – see in a minute, under 'Minority individuals and groups on the international level' – shows, minorities all over the world formulate collective rights claims and present them as part of a 'more complete' and 'more powerful' rights protection. If the right to use a language, practice a religion, enjoy one's culture, maintain the relevant institutions, media, schools, churches, museums, and the related decision-making bodies, are all part of the rights realm with a collective right-holder, in addition to individuals holding the relevant rights, that can be seen as strengthening the relevant rights.

Shifting the relevant right-claimant from the individual to the collective level can change the substance of the right itself,⁷⁹ yet, it is often unclear whether this should be interpreted as 'more' or 'less' protection. This underlines the importance of individual guarantees in all cases, an element that sits well with the judicial solution that this thesis argues for.

We have seen that many rights can be said to have a collective aspect. One way to make sense of this somewhat chaotic picture is to classify rights based on how strongly they show a collective element ('collective affinity'). It is possible to conceptualize collective rights in various ways. Looser definitions will include many rights that are usually seen as individual

Covenant deals with rights conferred upon peoples, as such.' *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), ¶ 6.3.

⁷⁸ The two cases: *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the more explicit formulation of an individual fundamental right: *McDonald v. Chicago*, 561 U.S. 742 (2010).

⁷⁹ See also the *Lovelace* case in the following section.

rights but exercised in community with others. A thick concept will only include a right that cannot be meaningfully construed on the level of individuals exercising it. The first category will include rights like the right of assembly, the right of association, and many aspects of religious freedom. The right of self-determination might be at the other end, and also contested rights like the right to development or environmental rights. In these cases, it is debated whether applying the concept of a 'right' is meaningful: it is hard to ascertain who can be a bearer of the right, how the right can be enforced and, most importantly, what are the judicial standards that make courts the right fora to decide on these questions.

To see how rights can be classified, we should get back to the following question: in what sense can we speak of group rights? All rights are conferred upon a particular group of people. By this, law creates a collectivity, defining its boundaries, conditions for membership etc. By the very move to select these people to be eligible for the rights, law also circumscribes the community, e.g., the 'nation' as a political community by regulating political rights and allocating citizenship. There are also rights exercised in community with others. Other than political rights, rights of expression are also hard to make sense without an audience. Collective labor rights, the right of assembly and of association, most aspects of religious rights, social rights that depend on redistribution within a community, education, rights related to public goods like the environment, rights protecting ties like those within a marriage and family all belong here. This argument only shows that individuals are routinely categorized and classified. The argument does not do away with the basic individualist tenet that it should be ultimately individuals that are bearers of these rights. Even if some of the said rights only make sense if others also exercise them, this does not mean that the rights themselves also become less individual, it only means that even the most individual rights are exercised in a social context.

As we have seen, rights can be 'purely' individual in nature and be exercised regardless of whether others also exercise them. I can exercise my freedom of expression by walking in a city wearing a T-shirt with a political message. There, are however, rights that are usually exercised in community with others. If the same political expression takes the form of an assembly, that would be a right that is commonly perceived as exercised in a group. A further category is the rights that only make sense if others also exercise them. Using a language in education and in the media presupposes that there are others, ideally in substantial numbers, that also exercise their right to use their own language. A further classification could identify the rights, like the formulation of the right to bear arms in the US, that change considerably with the shift from the individualist to the collectivist reading. Finally, there are rights that are inherently collective in nature, like the right of self-determination or the right to a healthy environment.

A theory of collective rights has to draw the line somewhere and show from which point the nature of rights changes inherently, or else it should demonstrate that in a specific context the differentiation makes sense. The present thesis does not consider all types of rights and groups, it is interested in how particular minority claims can be accommodated. It might well be that the types of groups I consider, ethno-cultural groups, will lack the adequate level of organization or homogeneity that some of the 'group theories' require, or that the types of rights they claim are best conceived on the individual level. So even if we accept that in principle there ought to be group rights, these particular groups might not be able to benefit from these. The advantage of the procedural thesis is that even groups with a lower level of organization and self-awareness can benefit from aggregation, where other elements justify the collective treatment, as we will see.

The final section of this chapter will consider more specifically the type of minority groups addressed in this thesis, their status in international law and the various dilemmas of collective recognition.

1.4 THE NORMATIVE STATUS OF MINORITY GROUPS

1.4.1 Minority individuals and groups on the international level

International minority rights offer less than what most minority groups or individuals would like to see. That claim-makers complain about getting less than they deserve does not in itself justify that they indeed should receive more; this is a rather general pattern of claiming rights. What raises concerns is that this is not only a common phenomenon, but that the offer of international minority rights is itself inconsistent and unstable. Will Kymlicka screens the international minority rights scene and concludes that it, in its present form, ‘creates (a) moral inconsistencies, (b) conceptual confusion, and (c) unstable political dynamics.’⁸⁰ The present framework distinguishes between indigenous groups and national minorities, in addition to recognizing ‘generic’ minority rights, applicable to all minorities. While Kymlicka argues that this division is problematic in itself – ‘at best, a drastic overgeneralization, and at worst a serious misinterpretation’⁸¹ – but especially concerning is that ‘generic minority rights are “regarded as fatally weak” and as “completely inadequate [...] to their needs,”’⁸² that national minorities are treated as a largely homogenous group, and that they are given less than what is normatively desirable, for it is assumed that “indigenous peoples” have a right to

⁸⁰ Will Kymlicka, *The internationalization of minority rights*, 6 INT. J. CONST. LAW 1, 10 (2008).

⁸¹ *Id.* at 6.

⁸² *Id.* at 17, quoting Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 81 (1994), and Miriam Aukerman, *Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context*, 22 HUM. RTS. Q. 1011, 1030 (2000), respectively.

accommodation, whereas “minorities” have a right to integration.’⁸³ The gap between Articles 1 and 27 of the International Convention on Civil and Political Rights captures best this problem. Article 27 describes a ‘generic’ right, applicable to individuals belonging to various minorities:

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*⁸⁴

The rights recognized by Article 27 are generic to the point that the Human Rights Committee, tasked with interpreting the Covenant, in its non-binding General Comment No. 23, thought that the rights apply to ‘migrant workers or even visitors,’ not only to citizens or permanent residents.⁸⁵ This norm can be seen as the ‘minimum’ of minority rights guarantees. Article 27 is also a good example for how the shift from the individual to the collective level might transform the content of rights. In the famous case of *Lovelace v. Canada*, Sandra Lovelace claimed a violation because the tribe she was born into ceased to recognize her as a member.⁸⁶ If it were not for the individualist formulation of Article 27, it would have been hard to construe the right to allow an individual to exercise the right against the will of the group in question. If the bearer of the ‘right to enjoy [one’s] own culture’ is the tribe, and the tribe decides to exclude someone, it is actually the ‘intruder’ who seems to violate the right to protect the tribe’s culture and not vice versa. This example also shows that the test for this distinction is what Kymlicka calls ‘internal restrictions.’ If the collective right is never capable of overriding the individual interest, it remains a group right in the sense of mere aggregation:

⁸³ Kymlicka, *supra* note 80, at 3 & 6.

⁸⁴ International Covenant on Civil and Political Rights art. 27, December 16, 1966, 999 U.N.T.S. 179.

⁸⁵ UN Human Rights Committee, CCPR General Comment 23: Article 27 (Rights of Minorities), April 8, 1994, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994), ¶ 5.2.

⁸⁶ *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

individuals exercise, in community, a right that they otherwise would exercise as an individual right. The interpretation of the right enshrined in Article 27 resulted in an expansion on the side of the individual and a limitation on the part of the tribe, the collective entity. Note, however, that the collective element is inherent even under this individual interpretation: it was the membership in the community and rights entailed by this status that was at stake, and not some self-standing right of the individual.

At the other end, we find the claim, especially of 'national' minorities, to decide about the fate of the territory or territorial unit that they inhabit.

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁸⁷

It is hard to see how the right stipulated here can be 'brought down' to the individual level. It might not only be the case that something is 'lost in translation,' but also that there is nothing meaningful left of the original idea. Self-determination can include the power to secede and form a separate political unit, a state; and more modest forms of self-determination include important decisions about the future of the community as a whole. As Hurst Hannum notes, '[i]n a sense, autonomy lies at the end of a progression of rights.'⁸⁸ While Article 1 can be seen as the most that a minority can wish for, Article 27 is too far from most aspirations. The gulf between Articles 1 and 27 of the International Covenant on Civil and Political Rights lies in that Article 1 'is too strong, for it has traditionally been interpreted to include the right to form one's own state,' while Article 27 is 'too weak' for 'it simply reaffirms that members of national minorities must be free to exercise their standard rights of freedom of speech,

⁸⁷ International Covenant on Civil and Political Rights art. 1–1, December 16, 1966, 999 U.N.T.S. 171, 173.

⁸⁸ HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 474 (1996).

freedom of association, freedom of assembly, and freedom of conscience.⁸⁹ Concerning indigenous rights, Karel Engle argues that the UN Declaration on the Rights of Indigenous Peoples ‘signifies the continued limitation of human rights, especially in terms of the recognition of collective rights.’⁹⁰ Kymlicka argues that the European national minorities framework also fails to bridge this gulf, and the glaring gap between the two can be seen as the inadequacy of the international framework, an inadequacy addressed in more details in Kymlicka’s book on the ‘international politics of diversity.’⁹¹

Darian Heim, in turn, criticizes Kymlicka’s account because it denies more complete rights to immigrant groups, as opposed to ‘homeland’ minorities.⁹² The advantage of the procedural solution that it does not have to stick on fixed notions of minorities like ‘immigrant’ or ‘homeland.’ Courts should simply consider the claims in question and decide whether the group as a whole can and should be present in the procedure, and devise a corresponding remedy that can include collective elements. Although judicial remedies will have inherent limitations in how far they can go, most importantly, in accommodation through challenging the institutional structure,⁹³ within the structural limitations, judicial remedies can give a more flexible and adequate response to the claims in question, if they are provided with a suitable procedural frame.

The international response to minority claims has not always been this restrictive. As Tibor Várady notes, citing the advisory opinion of the Permanent Court of International Justice in

⁸⁹ WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 123 (2001).

⁹⁰ Karel Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT’L L. 141.

⁹¹ WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* (2007).

⁹² Darian Heim, *“Old” natives and “new” immigrants: beyond territory and history in Kymlicka’s account of group-rights*, 13 MIGR. LETT. 214 (2016).

⁹³ See the discussion under the ‘Judicial’ chapter below.

the case of the Minority Schools of Albania, '[b]efore World War II, a rather favorable attitude was taken internationally towards group rights.'⁹⁴ The said opinion acknowledges, among others, that 'there would be no true equality between a majority and a minority if the latter were deprived of its own institutions.'⁹⁵ A more individualist and restrictive approach followed after 1945.

This overview does not say anything about the adequacy of the national frameworks. However, minorities usually turn to the international framework when they find the national framework inadequate and unresponsive to their claims. The inadequacy of the international framework falls heavily on those whose majority state is least willing to recognize them. The procedural proposal can create a more accommodating legal framework on the national level, in addition to international guarantees that are more receptive to group-level violations presented by minorities.

After the 'positivist' overview of what international minority rights offer, I am now turning to the normative questions underlying collective minority rights.

1.4.2 Collective rights in the minority context: challenges and classifications

Those who argue for group rights should also define what groups qualify as right-bearers. One line of argument to be picked up from the earlier discussion is that groups should be capable of showing certain features to be able to benefit from collective treatment. We have seen that List and Pettit or Levinson have an account of how to identify the right kind of groups. Combining the argument with the 'type of rights' approach, the argument for collective rights

⁹⁴ Tibor Várady, *Minorities, majorities, law, and ethnicity: Reflections of the Yugoslav case*, 19 HUM. RTS. Q. 9, 30 (1997).

⁹⁵ *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) at 17.

should show, in addition to the possibility and even necessity of collective rights, that there are groups that match these rights and that should be recognized as right-bearers.

It does not seem possible to avoid the dilemma of whether minority groups should get legal recognition. Law (attorneys and courts) can try to sidestep the problem by resorting to less disputed entities, instead of group recognition, and empower already existing institutions. This could be a church in the case of a religious community or an ethnic-national group defined along religious lines. It could also be an established representative body.⁹⁶ This is only an apparent solution because it poses challenges similar to other cases of group recognition. In addition to the requirement that the institution should pre-exist (should receive prior legal recognition), it should also 'fit the claim' in the sense that there is an overlap between those rightly thought to be under the umbrella of the institution and those who have a valid claim to a remedy. The most common criticism of affirmative action is exactly that it does not properly identify the right victims, and instead helps the privileged within the collectivity otherwise loosely identified as the victim group. We can call this the 'right fit challenge.' To embrace this challenge, it is better to face it in the first place, recognizing the problem of a possible mismatch between preexisting entities and the claims. To duck the problem – with no alternative but dismiss the claim in case of mismatch – is not to avoid the dilemma but to make a bad judgment more likely.

A second challenge for matching rights and groups is the feasibility problem. One argument cited above suggested that there are certain rights that can only be exercised collectively. The

⁹⁶ If an institution emerges as the ultimate body for representing a community, this will make it a par excellence political body that should be subject to heightened scrutiny, both internally and externally. Internally, basic guarantees of fair representation (democracy) should be in place. Externally, the body might act as a quasi-government, or self-government, that should be recognized by national governments in its dealings, otherwise its very status is dubious.

right to education on one's mother tongue will be practically impossible to exercise without a critical mass of students, and parents with similar aspirations. The right to education, regardless of language, will be hard to be ensured if those entitled are not large enough numerically. Let's take the case of a small group of students living in a village, on farms or in a distant suburb. Or the case of students with special needs but living in a small town where only two or three other students with similar needs live. Or else a small number of socially disadvantaged students that require special preparatory classes to make up for the lack of motivation from home and/or what Bourdieu called 'cultural capital.'⁹⁷ Easy access to adequate education will be impeded in all of these cases, regardless of the type or cause of hardship the students face in practice.

A third, related challenge is fragmentation. We can create endless types of groups that will require special treatment based on a certain personal trace or status. It might be that persons belonging to a certain minority face discrimination, based on statistical evidence, but it is equally true that there will be great variation within the group. The intersectionality thesis in its original formulation maintains that the experiences of women of color will differ both from men of color and white women.⁹⁸ Women of color who are (and look) wealthy, those with or without kids, married or living without a husband etc. might also have experiences that are different in a way that is important from a policy perspective.

It might be apparent that none of these problems is unique to rights held by groups. They are rather common to many individual rights. Law has to be able to distinguish the holders of the rights from those who do not benefit from them. Many rights (with the possible exception of

⁹⁷ Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in KNOWLEDGE, EDUCATION, AND CULTURAL CHANGE: PAPERS IN THE SOCIOLOGY OF EDUCATION 71 (Richard Brown ed., 1973).

⁹⁸ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

strictly negative liberties) are subject to the feasibility challenge and their implementation will depend on limited state resources. Fragmentation is also an inherent feature of our legal systems. Taxation and political rights are detached and travel restrictions or entitlement to various social benefits similarly vary greatly depending on the status of a person.

Will Kymlicka argues, accordingly, that the real dividing line is not whether some rights are labelled as 'individual' or 'collective.' As we have seen, Kymlicka dismisses the term 'collective rights' as misleading,⁹⁹ irrelevant and 'morally unimportant.'¹⁰⁰ He instead distinguishes between 'internal restrictions' and 'external protections.'¹⁰¹ Instead of 'collective rights' Kymlicka talks about 'group-differentiated' rights. He further categorizes the relevant minority claims as falling into three groups: self-government rights, polyethnic rights, and special representation rights.¹⁰² The labels 'collective' and 'individual' in themselves are irrelevant in the minority context and the debates around them remain sterile.¹⁰³ Tibor Várady uses the term 'group-sensitive' rights to denote rights that apply depending on group-belonging, stressing that these should not be seen as 'extra rights' or something in addition to general human rights. They are, in most cases, necessary for members of non-dominant groups to enable them to exercise the *same* rights, on equal footing.¹⁰⁴ Kymlicka argues that terms 'group-differentiated rights' or 'group-specific rights' are more apt to describe the element that links such rights.¹⁰⁵ The legitimacy of the claim for minority education does not

⁹⁹ WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 34 (1995).

¹⁰⁰ *Id.* at 45.

¹⁰¹ *Id.* at 35.

¹⁰² *Id.* at 27.

¹⁰³ *Id.* at 45 ('sterile') & 47 ('irrelevant').

¹⁰⁴ Várady, *supra* note 94, at 33–35.

¹⁰⁵ KYMLICKA, *supra* note 99, at 27.

depend on whether we think of the related rights as ‘collective’ or not. Kymlicka argues that focusing on this question, in the case of minorities, is misleading.¹⁰⁶

However, the tension and struggle behind the notion of ‘collective minority rights’ seems to be real. They are heavily contested and heavily fought for in many contexts. What is, then, the dividing line? As we have seen, Kymlicka uses the distinction between ‘internal restriction’ and ‘external protection’ to replace the sterile debate between individual and collective rights. Both are related to claims that are made on behalf of minority groups, often under the rubric of collective rights. But to confuse them would be a huge mistake, Kymlicka argues, for internal restrictions are highly suspect, while external protection might be compatible or even compelling in an egalitarian system. Internal restrictions refer to the claims of a group vis-à-vis its own members, seeking protection from dissent potentially destructive for the group. External protection, on the other hand, seeks exemption from decisions made by the majority society that might disparately impact the minority and its members, for it does not adequately take into account existing differences.¹⁰⁷

Kymlicka’s classification has the potential to appease tensions. Yet, there is a real struggle behind the debate that asks to what extent the majority, through majoritarian decision-making and majority institutions,¹⁰⁸ should be able to define the boundaries of the legally possible or how wide the boundaries should be.

¹⁰⁶ *Id.* at 34.

¹⁰⁷ *Id.* at 35. For a more recent critique of this aspect, and an alternative theory, see Dwight Newman’s book that provides a more robust defense of the collective approach: NEWMAN, *supra* note 41.

¹⁰⁸ I call majority institutions the institutional structure set up by primarily majoritarian democratic means, even if only indirectly. It should distinguish those institutions that are, in a constitutionally protected area, set up and maintained by minorities.

Jacob T. Levy frames the debate as a continuing tension within and between liberal traditions. He labels the two ideal types as pluralist and rationalist, respectively.¹⁰⁹ This accentuates the differences and presents them as a tension that is real and very much alive. If one is more motivated by the fear of oppression by the minority group, it seems logical to rely on the universalist ideal and secure, against the group, the same rights as to everyone else, regardless of group membership. If, however, the danger is seen as coming more from this homogenizing urge, the pluralist liberal might say that protecting diversity and the difference of these groups should have priority.¹¹⁰

It seems 'cleaner' to maintain the universality of rights in the legal realm, with some variation that is subject to state-based control, but Levy is right that the potential of liberal pluralism might be lost by the same move, depending on how widely the boundaries are drawn. To phrase it with the terms from the earlier discussion in this chapter: the meaning and bite of collective rights only appear when they want to override individual rights. The potential of misuse lies in that what is autonomy from the external perspective can turn into oppression from the inside. The rights might concern both members (internal restriction) and non-members (external protection). In the former case, a group might wish to maintain a language by making it costly for group members to opt out. In the latter, a group might seek to limit existing rights of even those who belong to the majority to use certain symbols, names, exercise usage rights (fishing, hunting, mining, military tests) or acquire ownership. (Note that this formulation shows the partial overlap between what Kymlicka seeks to divide.) The real tension, it seems to me, lies at this juncture: whether a liberal democracy maintains the

¹⁰⁹ JACOB T. LEVY, *RATIONALISM, PLURALISM, AND FREEDOM* (2014).

¹¹⁰ JACOB T. LEVY, *MULTICULTURALISM OF FEAR* (1999).

polished view of a universal citizenship or it endorses a more fragmented vision of the people(s). This could be called the ‘pluralist challenge.’

Levy himself is skeptical about the possibility of harmonizing rationalist and pluralist accounts of liberalism. The three synthesizing attempts that he assesses critically, Taylor, Rawls, and Hegel, all end up favoring the rationalist side at the expense of genuine pluralism.

Given the challenging nature of the diversity problem in law it seems logical to look for alternatives. A possible approach to deal with diversity is to give up on the thickness of the ultimate framework, and maintain a national level that truly encompasses the diversity underneath, uniting all those living in the country. This success of this proposal, a genuinely liberal solution, will depend on to what extent the system manages to remain neutral, or appear to be neutral for those subject to it. In what follows, I will argue for the need to accommodate diversity by pointing out the hardship in pursuing the neutrality ideal.

1.4.3 State neutrality and beyond

It is a basic tenet of liberal democracies that the state should treat all of citizens with equal concern and respect. The exact formulation used here comes from Ronald Dworkin who argues that equal concern is a prerequisite of legitimacy for all governments.¹¹¹ In his book ‘Taking Rights Seriously,’ he writes:

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It

¹¹¹ DWORKIN (2011), *supra* note 72, at 2.

*must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.*¹¹²

János Kis argues that the principle of state neutrality is a derivative principle of political morality, and it is the 'equal concern and respect' principle from which it is derived.¹¹³ Kis further differentiates between two types of state neutrality: neutrality as non-discrimination and neutrality as shared reasons. Both are relative in structure, but the first requires the state to treat every citizen as an equal and the latter requires the state to speak to and about its subjects by relying on reasons that are accessible to them. The two concepts converge, however, in that both require the state to act in a way that conveys the message that all subjects are part of the 'we' in the name of whom the state acts.¹¹⁴

Historically the neutrality principle emerged from the idea of religious tolerance – see most famously Locke's formulation from 1689¹¹⁵ – to avoid conflicts in multi-religious societies, arguing for toleration and non-interference. The principle is equally applicable to diversity on grounds other than religion. The 1990s showed that the conflict-minimalization in divided societies is a topical political problem. Ensuring neutrality is an ongoing challenge, starting with the problem of what is it exactly that neutrality requires.

András Sajó lists the challenges that neutrality poses to the functioning of a modern democratic state, or can be an obstacle to its implementation.¹¹⁶ First, it limits the role the state and democracy plays, relegating it to passivity, which might have undesirable consequences, like non-intervention in cases of serious rights violations, and otherwise

¹¹² DWORKIN (1977, 1978), *supra* note 72, at 272–73.

¹¹³ János Kis, *Neutrality*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 318, 320 (Michel Rosenfeld & András Sajó eds., 2012).

¹¹⁴ *Id.* at 331–32.

¹¹⁵ JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689).

¹¹⁶ András Sajó, *Concepts of Neutrality and the State*, in FROM LIBERAL VALUES TO DEMOCRATIC TRANSITION: ESSAYS IN HONOR OF JÁNOS KIS 107, 133 (Ronald Dworkin et al. eds., 2004).

devaluing the 'political.' Here one can think of the Schmittian critique of liberalism.¹¹⁷ The passivity problem is a challenge that is actual in contemporary liberal democracies. The ever-increasing state cannot fulfill the expectation of neutrality the same way as it did with religions, especially after secularization. The scope of state activities is expanding into new areas, and even the decision to withdraw from certain areas, privatize or delegate authority shows this, by the very idea that the state can still control and take back direct control whenever it wishes to. If state control already extends to most aspects of social life, a negative concept of neutrality (the lack of action) is very hard to achieve. It does not necessarily mean that it is impossible, but the ubiquity of the state in a modern diverse society adds to the challenge. The state, in this sense, cannot remain neutral when facing the various structures that work to the detriment of some who differ from the majority ideal:

The motivating idea behind the nonsubordination principle, Rawlsian in character, is that differences that are irrelevant from the moral point of view ought not without good reason to be turned, by social and legal structures, into disadvantages. They certainly should not be permitted to do so if the disadvantage is systemic, in the sense that it operates in multiple spheres of life, or if it applies in realms that determine basic participation as citizen in a democracy.¹¹⁸

Critical theories claim that the liberal concept of neutrality only makes domination less apparent, practically contributing to its sustained existence, through its tendency to favor the status quo – it is, in this sense, apologetic.

There are also practical limitations to the extent that neutrality can be put into practice, see the example of the use of language in public services.¹¹⁹ The apologetic nature of neutrality is undeniable in that the goal of the endeavor, as we have seen with Dworkin, is to strengthen

¹¹⁷ CARL SCHMITT, THE CONCEPT OF THE POLITICAL (1932). Not in the (in)famous definition on the distinction of the enemy and the friend, but in the critique of the liberal tendency of depoliticization.

¹¹⁸ Cass R. Sunstein, *The Limits of Compensatory Justice*, 33 NOMOS 281, 303 (1991).

¹¹⁹ Sajó, *supra* note 116.

governmental legitimacy. The criticism is right in that neutrality is a requirement that should be scrutinized and, if not met, the mere pretention should not help legitimacy. One way to address the feasibility problem is to deal with the most pressing (or threatening) claims, and target the largest minorities, engaging in the creation of multinational states. Kis argues, e.g., that a nation-state cannot pass the neutrality (and legitimacy) test if it fails to take into account its internal diversity. In some cases this might mean to become what he calls a 'co-nation state.'¹²⁰ The neutrality principle is important in that it shows that there is a heavy burden on the state to work for a system that all citizens can perceive as their own. The traditional liberal answer concerning neutrality is a negative formulation of the concept: the state should remain neutral in certain questions, starting with religion all the way to culture. Decision on the truth and the good to be pursued in these areas should be left to the individual.

Kymlicka's formulation differs somewhat in that it emphasizes the positive aspect and stresses that the state should actively promote the cultural choices its citizens make in great numbers.¹²¹ This translates into the promotion and affirmation of national cultures instead of only one culture, and does not allow the state to deal with diversity by retreating from certain areas. This or the co-nation idea sounds like a promising option for stronger and better organized minorities that are left out from, or are targeted by, the majority nation-building, but might not be so appealing to others, e.g., newcomers or otherwise more fragmented groups.

¹²⁰ János Kis, *Beyond the Nation State*, 63 SOCIAL RESEARCH 191 (1996).

¹²¹ KYMLICKA, *supra* note 99.

Charles Taylor challenges the traditional liberal view of universality, with a limited view of non-discrimination that can actually be levelled against his idea of politics of difference and that he calls 'difference-blindness' that might end up 'imposing a false homogeneity.'¹²²

Maintaining diversity is important for liberty, as Hannah Arendt argues:

[N]o formation of opinion is even possible where all opinions have become the same. Since no one is capable of forming his own opinion without the benefit of a multitude of opinions held by others, the rule of public opinion endangers even the opinion of those few who may have the strength not to share it.¹²³

Iris M. Young argues for 'differentiated citizenship', empowering different types of groups that society is made of.¹²⁴ She stresses the importance of facilitating procedures that take into account diversity, and the participation of groups otherwise weak or silent in public discourse. Speaking of legal rights, this might mean that rights claimed by powerful minorities are extended more widely to include less powerful groups. This projects a highly fragmented society or at least a framework that follows closely the already existing fragmentation, with a large number of groups and potential group rights. We arrive to a similar result if we take Rainer Bauböck's proposition on 'stakeholder citizenship'¹²⁵ and apply it on a case-by-case basis, separately for different kinds of political decisions. This would require us to change the boundaries of those entitled to take part in the decision every time when we change topics, depending on whom we consider as having a stake in the outcome of the process. This will also result in a legal system with a multitude of group rights.

¹²² Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 39–44 (Amy Gutmann ed., 1992).

¹²³ HANNAH ARENDT, *ON REVOLUTION* 225 (1990).

¹²⁴ Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 2 *ETHICS* 99, 117–142 (1989).

¹²⁵ Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 *FORDHAM L. REV.* 2393 (2007).

Van Dyke criticizes Rawls for neglecting the group component, and more importantly for ‘the apparent assumption is that societies are homogeneous.’ He claims that the Rawlsian theory doesn’t take account of the reality of groups:¹²⁶

The groups [...] distinguished by relatively fixed qualities such as race and language or by a set of fundamental beliefs and attitudes of comprehensive importance such as religion and nationalism [...] commonly share a tradition and culture that set them apart, and the members tend to have a consciousness of kind. In practice many such groups demand what they regard as justice for themselves as collective entities; [...] when they get it, [...] questions of justice for individuals get intertwined with questions of justice for groups [...] and] a theory of justice must concern itself with groups as well as with individuals, and thus that groups as such must somehow be represented in the original situation.¹²⁷

While Van Dyke is most likely right in that Rawls’ theory of justice concentrates on the individual and on individual choices, it is not that clear that Rawls assumes a homogeneous society. In fact, Rawls does have in mind differences when talking about the basic structure of society:

The basic structure [...] contains various social positions and that men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men’s initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit or desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply.¹²⁸

Groups do not appear in this account, but the concern with inherent and unjustified inequalities is central to the Rawlsian view. Furthermore, some inequalities at least are also

¹²⁶ Nozick also raises the question, in his discussion of Rawls’ second principle, ‘why individuals in the original position would choose a principle that focuses upon groups, rather than individuals.’ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 190 (1999).

¹²⁷ Vernon Van Dyke, *Review: Justice as Fairness: For Groups?*, 69 THE AMERICAN POLITICAL SCIENCE REVIEW 607 (1975).

¹²⁸ RAWLS, *supra* note 59, at 7.

‘presumably inevitable,’ which require equality based measures. This will not satisfy everyone, but it is certainly enough to justify the type of measure that this thesis is considering.

Adullahi An-Na'im argues that ‘the human rights movement is much more weakened by their wholesale exclusion than the inclusion of some [collective rights], in accordance with appropriate “quality control” criteria and process.’¹²⁹ The diverging state practices and the resulting landscape of inequalities show that this is not a remote, theoretical dilemma. The United States Supreme Court, not surprisingly, is mostly dismissive of group rights. As Michel Rosenfeld critically notes:

*By relegating group affiliation to the background, American constitutional jurisprudence has sometimes carved out individual rights in ways that promote discrimination against individuals who belong to certain minority groups.*¹³⁰

Two US Supreme Court cases, from the 1970s, where groups took precedent, according to Michel Rosenfeld, are ‘illustrative of the drawbacks’ of collective recognition. Both judgments grant exemption from important human rights standards, one concerning education and the Amish exception,¹³¹ the other releasing Native communities from the thorough observance of gender equality.¹³² Furthermore, the US legal system proved to be more receptive in the case of mainstream groups, with regards to exemptions like using peyote versus alcohol.

¹²⁹ Abdullahi An-Na'im, *Human Rights and the Challenge of Relevance: The Case of Collective Rights*, in *THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY: HUMAN RIGHTS, INTERNATIONAL ORGANISATION AND FOREIGN POLICY* (Monique Castermans-Holleman, Fried van Hoof & Jacqueline Smith eds., 1998) 3; quoted by PETER R. BAEHR & MONIQUE CASTERMANS-HOLLEMAN, *THE ROLE OF HUMAN RIGHTS IN FOREIGN POLICY* 32 (2004).

¹³⁰ Michel Rosenfeld, *Can Human Rights Bridge the Gap between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*. *Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 *COLUM. HUM. RTS. L. REV.* 249, 262 (1999).

¹³¹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that forcing children to attend school past eight grade violates the free exercise of religion).

¹³² *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that a gender discrimination challenge is prevented by tribal immunity).

Rosenfeld observes that ‘the individual right to freely exercise one’s religion fluctuates depending on whether one belongs to a mainstream religious group such as Catholics or Jews or to a much more marginal group such as Native Americans.’¹³³ Rosenfeld advocates a ‘pluralist,’ or ‘comprehensive pluralist’ approach that treats individuals and groups alike, contrary to what he calls the ‘monism’ of both liberals and communitarians.¹³⁴

He contrasts his concept to Kymlicka’s liberal multiculturalist account that we have seen above. The definitions and categorizations in the collective rights literature are innumerable,¹³⁵ and I will not discuss here more. What links the concern with collective rights to the question of neutrality is that some groups – or, in individualist terms, members – of the society might feel excluded if neutrality is not met for them. Maybe accepting more than one culture into the national pantheon will include numerically more people, but might still exclude others. Maybe the liberal multiculturalist approach that Kymlicka proposes will be able to accommodate some minority claims, but not others, because it is still subject to recognition by a wider framework: the state.

The standard of evaluation remains individualist and human rights based, and might exclude claims from collectivist societies. Levy is right that as such, this approach is not going down the road of genuine pluralism. So the question remains: how far should the neutrality principle go? As it is ultimately a relative principle, the answer depends on the context where it appears, and this context is the state. Being relative means that it should be construed and applied with the target population in mind. In case of a largely homogenous society, no matter how hard it is to imagine one, neutrality might not require much from the state. As diversity

¹³³ Rosenfeld, *supra* note 130, at 263.

¹³⁴ *Id.* at 269.

¹³⁵ Kymlicka himself notes that ‘there are hundreds of definitions in the literature.’ KYMLICKA, *supra* note 99, at 45.

grows, both in numbers (e.g., the number of languages) and in range (e.g., how much effort is needed to accommodate various religious practices), the challenge might become greater as well. The context is the society, the boundaries of which are defined by the state. So it is ultimately the state that provides contextualization. Assessing the problem of the state will help us understand why minority rights are necessary and what is it, ultimately, that they need to address.

1.4.4 The state-based challenge to the individualist approach

Those who completely deny the importance or relevance of collective entities should turn to the concept and functioning of the state, which is the ultimate collective entity in modern law. In order to see how the status of sub-state groups is not obvious we have to challenge the way in which the 'multitude' becomes 'one,' and the people form a state. In political and legal thinking, the state has been for long the primary entity around which ideas about collectivity centered.¹³⁶

For Hobbes, and for the political thinkers that followed, this step is crucial, and it is clear that this is not an obvious move. Once the state is formed, its inherent interest is to legitimize its existence and power. In Hobbes' terms, the multitude is the lack of society, and not the organized mass of people that are in the position to conclude the social contract. Under the theory described in the Leviathan, the multitude becomes commonwealth with the act of

¹³⁶ For a vivid account see Skinner's lecture, arguing against the view that the notion of the state has been losing its relevance. Quentin Skinner, A Genealogy of the State, lecture at Northwestern University (2013) <https://www.youtube.com/watch?v=d-bcyHYNxyk>. More importantly for our topic, he defends the fictional view of the state against the absolutist and the populist vision. This move could 'neutralize' many of the criticisms raised in this section.

authorization.¹³⁷ In this sense, the Hobbesian view is more individualist than the contractarian position, for it applies a quite demanding standard.

Whatever we call this act or how we define the legitimate emergence of state power, the transfer or emergence of central power is crucial in the sense that it distributes majorities and minorities. This also means that we distribute advantaged positions, too, especially for those who have little chance to become the majority. Patrick Macklem argues that it is possible to ground minority rights directly in the shortcomings of the existing international system, the interests of those on the losing side of the state-based regime – an argument that sounds like an international variation of the neutrality challenge.¹³⁸ (He calls it a ‘distributive’ argument, although it could also be cast in ‘remedial’ terms.)

Historically, when the minority protection regime appeared in Europe in the interwar period, there seemed to be a background idea that remedy should be provided to minorities for not living in their own state.¹³⁹ This also sounds like a remedial logic, compensating for not being in the majority, for things that minority members miss and that majority members take for granted, i.e. a state power that, by design, tends to adopt measures that correspond to the majority culture.

Someone could still argue that countering biases does not require recognizing these minorities as groups. States and individuals are meaningful actors, but why should intermediary groups be recognized in addition, and why is it the ethno-national aspirations,

¹³⁷ See Chapter XVI of the *Leviathan*. Discussed in LIST & PETTIT, *supra* note 28, at 7.

¹³⁸ Patrick Macklem, *Minority Rights in International Law*, 6 INT’L J. CONST. L. 531 (2008).

¹³⁹ See THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 40 (2000), quoting such a view from 1929.

based on politicized differences, usually traced back to racial, ethnic, national, religious, linguistic and cultural differences, that should be privileged in any way?

One way to answer the ‘intermediary groups’ question is to challenge the unique role of the state. Why should we accept the existence of the state as not only the ultimate and strongest embodiment of human associations, but also the only one that deserves legal-political recognition? It is hard to provide a straightforward answer, other than the legal positivist response: because this is how the law – including international law – currently stands. (Or the ‘realist’: that power lies with the states.) The application of the international human rights regime that is universal in its inspiration also reflects the biases of state-based approach. For example, the European Court of Human Rights allows states a margin of appreciation in applying rights enshrined in the Convention. If someone claims that there is a mismatch between the source of power, the government that is granted this margin, and the underlying differences, that would also mean that the margin doctrine is not applied adequately. Normatively it might be disturbing to allow variation to Norway and Sweden, but deny a similar variation to the Saami who live in both states. This is of course not so much the result of the Court’s reluctance than of the international legal setup. Raising questions about why it is states that mark the evident boundaries of cultural differentiation, even if ostensibly neglecting patterns of claims and differences, shows the need for differentiation within states, necessarily taking into account intermediary groups.

Problematizing the key role that states play in our world turns the question around. Instead of asking why recognize groups other than the state, it asks why the state should be the only public entity with legal and political recognition. Like the infamous (and rhetorical) question from the Yugoslav conflicts: ‘Why should I be a minority in your state if you could be a minority

in my state?’¹⁴⁰ The dilemma points to the basic dilemmas around self-determination. As in that case, it is hard, if possible at all, to find legally applicable standards that remove the question somewhat from the realm of pure political decisions. The present thesis seeks to remain within the realms of existing legal systems and expand their capabilities, rather than challenge their boundaries, so I can spare the reader from a discussion on the right of self-determination. The discussion here serves to show that the role of the state is central to the concept of neutrality, that is itself linked to legitimacy. When we use words like ‘democracy,’ ‘state,’ ‘public,’ ‘people’ or ‘nation,’ these seemingly neutral expressions hide the fact that they imply unanimity or legitimately resolved differences where there is diversity with minorities. This move is especially burdensome for those who are systematically in the non-unanimous, neglected part, that can be labelled as ‘discrete and insular minorities’ (*Carolene Products*) or ‘societal groups’ (Kymlicka). The role of the government is to further the ‘public interest,’ but if the ‘public’ represented systematically excludes parts of the underlying diversity, additional protection is necessary. Neutrality is best assured if there are special guarantees in place to counter the disadvantage of underrepresentation or non-representation. It is possible to tame the conflict between the primacy of the state as collective entity and the collective claims of some sub-state or transborder collectivities by granting recognition and accepting some of these claims.

The source of power shifts the landscape for rights. If we speak about group rights, those rights cannot benefit the whole community if the rights are meant to be enforced against the power exercised in the name of that community. Dworkin discusses the possible objection to

¹⁴⁰ A quick search reveals that the question is attributed to various authors, including an ‘anonymous activist’ from former Yugoslavia, and Kiro Gligorov, the first president of the independent Macedonia. Charles Hauss, *Nationalism*, BEYOND INTRACTABILITY (September 2003), <http://www.beyondintractability.org/essay/nationalism>; Tara McCormack, *Yugoslavia, Scotland and the end of nation*, SPIKED (October 1, 2014), <http://www.spiked-online.com/newsite/article/yugoslavia-scotland-and-the-end-of-nation/15935>.

the way he understands rights that appeals to the rights of the majority or of the society. If that group has a right, the possibility opens that such a right can trump individual rights. He calls this a confusion because it uses the ambiguity in how we use the word 'right.' If we take rights seriously, we should think of them as guarantees against the government in the first place, so to allow the same entity to claim (possibly) overriding rights on its side is self-defeating:

If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights.¹⁴¹

This means that where a government exists, rights should be held against them, at least in their relation to the people subject to its power, and the government itself cannot use this right to override individual rights. The logic is applicable to group rights (for groups smaller than the full body of citizens represented by the state) as well, with a twist: the argument in that case also limits a group's ability to use these rights against those that fall under the power of the group, provided that the group has such a power. This would be the case if the group is organized under a self-government of some sorts. So we cannot talk about 'group rights' that are exercised by majorities, and being a majority is relative to the source of power.¹⁴² Majority is relative in two senses: it should be understood rather as the dominant group, that might actually be a numerical minority; and the minority that has some self-governing rights will become a local majority, subject to the duty side of rights held by those subject to its

¹⁴¹ DWORKIN (1977, 1978), *supra* note 72, at 194.

¹⁴² It is thus possible to see French-speaking Canadians as a minority vis-à-vis national laws while a majority when it comes to Quebec laws. Note, however, that the 'source of power' thesis should not be read as a subjective assessment, especially of those in power: anti-minority measures are often adopted by majorities who 'think like minorities,' perceiving an imminent threat of disappearance, by neighboring countries, national minorities and immigrants.

power. This illustrates the central role that the government or state plays in the concept of what rights, especially minority rights, require.

The notion of 'nation-states' obscures a further difference. Being state-centered is not the same as being nation-centered. Kymlicka argues that the current tendencies that challenge the adequacy of the state-based political framework, including globalized commerce, migration and environmental challenges, does not mean that the nation-based political thinking (nationalism) also becomes obsolete. No matter what we think of the desirability of the nation as a key political entity, Kymlicka argues that this phenomenon is to remain, and tendencies that are usually seen as challenging its relevance actually show its centrality and suggest its longevity: minority challenges are also nationalist struggles at a different level; immigrant transnationalism when looked at closely show the importance of national communities as well as the importance of integration into a national community; transnational advocacy networks hardly challenge the national setup and mostly target decision-making on the national level; the national also remains central to international law and its human rights component; finally, the only genuine challenge to the national/liberal concept of citizenship and political communities is the emergence of transnational legislative bodies, but the only promising project, the EU, doesn't fare too well in this respect.¹⁴³ One could argue that its success is actually linked to mimicking the nation-building exercise on a supranational level that, by this move, will become a new national level itself.¹⁴⁴ This then results in the dilemma whether to apply the national-level neutrality standard to intermediary

¹⁴³ If this was true in 2004, at the time Kymlicka wrote the piece used here, it is even more so in 2016.

¹⁴⁴ Will Kymlicka, *Nationalism, Transnationalism and Postnationalism*, in *FROM LIBERAL VALUES TO DEMOCRATIC TRANSITION: ESSAYS IN HONOR OF JÁNOS KIS* 226 (Ronald Dworkin et al. eds., 2004).

groups. If we do, we are losing out on the diversity side, if we don't, we might endanger internal minorities and individuals.

Not only law-giving but judicial practice tends to be biased, erring on the side of the status quo. By applying standards that take existing distributions as a baseline, court can screen out challenges to the current setup and even protect against legislative attempts at rectifying wrongs under a broader perspective:

The current distribution of benefits and burdens as between blacks and whites and women and men is not part of the state of nature but a consequence of past and present social practices. [...] The status quo, reflective as it is of both law and injustice, presents a questionable baseline from which to distinguish between partisanship and neutrality, or action and inaction. In these circumstances, nothing is neutral in the use of criteria that, while not discriminatorily motivated, entrench those practices or ensured that they will have important current consequences.¹⁴⁵

The overview should have shown that the national setup that creates or at least maintains the challenge to neutrality will most likely be a reality staying with us for long. This means that the problem of minority claims not evidently addressed by democratic decision-making will also remain a limitation and there continues to be a need for innovative solutions to expand the capabilities of law in this respect.

1.5 CONCLUSION

This chapter assessed the arguments for the legal recognition of minorities as groups. First, it can be argued that it is arbitrary to single out individual actors as the only entities that should be vested with rights. States are collective actors and it can be shown that collectivities have a place in law if law wants to adequately capture agencies, i.e. how human decisions are

¹⁴⁵ Sunstein, *supra* note 118, at 294.

made. The main limitation of this argument is the extent to which it can persuade people that individual rights exercised jointly with others cannot be equally effective in doing the job.

Second, it can be argued that the way people exercise rights is often inherently collective. Political rights only make sense when exercised in community with others, and human rights presuppose an organized community. If the very structure of human rights is linked to the collective component, it should not be surprising that certain rights can also be exercised by collectivities, not by individuals. This would not challenge the idea that individuals are the primary and ultimate bearers of rights; groups can only have rights in the sense that they are based on membership and do not change the individual nature of other rights. This normative argument might be important to consider the structure of rights but cannot in itself justify the need for collective rights. Furthermore, while there are strong candidates for existing practice or group rights, most importantly the indigenous cases, it seems dubious that there is a meaningful threshold that could guide us in differentiating between individual and collective rights.

Third, a non-conclusive argument could point out that groups used to be, or still are in many cases, important actors. Before the twentieth century, Western courts routinely dealt with group claims. Corporations are vested with important rights, and the current trend is not to curtail but to strengthen the scope of these. This argument might suggest that once law treats certain collectivities, like states and corporations, as right-holders. This should suffice to prove that groups should indeed be vested with rights. The main problem with this argument is that it does not work as an argument for recognition in jurisdictions that are hostile to group rights. If legislators do not recognize groups, or certain groups, as right-holders, why would they change course? This argument is, however, useful in that it points out that historically and in

certain areas of contemporary legal systems groups were and are treated routinely as having rights that can be detached from their individual members.

Fourth, one can argue that collective rights are (normatively) necessary for the goals of the human rights regime. Most importantly, equality arguments can challenge the theoretical neutrality of the state and support the argument that in order to secure genuine equality to individuals, a legal system cannot disregard groups. Once we recognize that states and governments are not neutral, groups that bear the burden of this should be empowered in areas where neutrality is failing, e.g., concerning language use or religion. However, it remains an open question whether the legal recognition of group rights is actually required. Non-discrimination often counters distinctions based on group belonging (assigned, rightly or wrongly, by the perpetrator) and the legal response often takes the collective element into account. Affirmative action is all about group belonging, yet, this does not mean that the rights flowing from such measures are necessarily collective, too.

The argument can be refined by looking at specific rights and specific groups: we need to have a standard for deciding what groups should be vested with rights, and what types of rights these should be. Maybe there isn't a general case for collective rights, but they are normatively compelling in certain contexts. The question is, then, who should decide. Regardless of the content of these rights, the primary goal of minority claims is not to be subject to routine majoritarian decision-making:¹⁴⁶ rights are legally enforceable, even against the wish of the political bodies representing the majority society, and this ultimately leads to judicial recognition and enforcement for their claims. If left to the majoritarian decision-

¹⁴⁶ The argument here builds on Dworkin's theory differentiating between majority rule and democracy. RONALD DWORKIN, *FREEDOM'S LAW. THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997).

making, the paradoxical result will be that those legal systems will have farfetched minority recognition and protection that are the most favorable to minorities anyway, and protection will be lacking where it is the most needed.

A final clarification is in order. The state-based nature of law and positive rights is not only a source of frustration. It is also setting a task and providing hope: constitutional and international guarantees exist because states and majorities were willing to accept them. The proposal builds on this insight by offering a formally neutral norm, a procedural device, that strengthens these legal guarantees to the benefit of minorities. The adoption of such a device cannot happen without an input from majoritarian political institutions and, at time, the benign ignorance of majorities. The proposal is aimed to work as constitutional guarantees work to provide protection to claims and minorities otherwise unpopular with majorities: a general commitment to protection allows claimants to seek protection against majoritarian decision-making and cases and patterns of private violations.

Based on the overview in this chapter, we can now move on to present the proposal in more details.

2 THE PROPOSAL

After a theoretical outlook, this chapter elaborates on the proposal in more details: how allowing minority claims to be litigated as collective actions might help close the gap between what the law – the law with the Western, individualist bent that we know – has to offer and what minorities claim. The account here offers arguments for a thin theory, building on insights that are largely uncontroversial, to the extent that this is possible. However, we will also see that a thick theory, a stronger case for collective procedures for minority claims, emerges, provided that one is willing to accept some more controversial but legitimate starting points. These will include the interests based view of representation, as opposed to a consent-based one; the recognition of intermediary group interests,¹⁴⁷ in addition to national interests and individual interests; and embracing a more public law oriented, or law and economics, vision of tort law that prioritizes deterrence, in the case of compensation.

The proposal argues for a collective procedural solution, a type of group litigation available for minority rights claims. The thesis shows how such a procedure can allow courts and law to better accommodate certain claims regularly made by minorities. It seeks to achieve this by relying on a legal, judicial guarantee, with a community represented concerning a concrete claim – rather than recognized once and for all – without challenging the basic tenets of the majority legal system. The proposal requires a civil procedure rule that allows for groups of litigants to present a claim. There is a general perception that courts are especially well placed

¹⁴⁷ For countries that recognize collective entities, the collective procedure might only add a layer of flexibility. In India, e.g., ‘a majority of the categories of protected people are [...] groups.’ TORTELL, *supra* note 14, at 95 n.100. ‘[F]ive recognised categories of focus of constitutional rights’ are: individual, citizen, religious denomination, cultural minority, Scheduled Caste or Tribe. J Derrett, *Human Rights and Fundamental Freedoms in India*, Recueils de la Société Jean Bodin Pour L’Histoire Comparative des Institutions XLVII: L’Individu Face au Pouvoir Deuxième Partie: Afrique, Asie, Amérique, 1988, 159, 163, quoted in TORTELL, *supra* note 14, at 95 n.100.

to protect minorities. The principle of state neutrality applies to the actors of the legal system with varying force. A member of the legislature may speak in her own name and be biased without violating the neutrality principle. Kis maintains that courts are different: 'Judges speaking in the court are at the opposite extreme, since they give authoritative interpretations of the law.'¹⁴⁸ Accordingly, when it is law that speaks and it is in the name of law that decisions are made, law should appear to be non-biased and should rest on principles that are accessible and acceptable to majorities and minorities equally. The collective procedural option is a modest contribution to this goal, without directly touching upon questions of substantial goals, and building on the idea that courts should be subject to a higher standard of neutrality. At the same time, it is not claimed that courts are alone the best placed to respond to minority claims. In fact, as we will see, non-judicial involvement will often be crucial. What it does claim is that, under the proposal, courts can do a better job in adjudicating such claims and they have an important role to play.

The idea is to have a general principle, adopted by (super)majorities, and let courts, not directly responsible to majorities, enforce it in a way that will protect those, too, or especially those, who have less or no voice in the majoritarian decision-making. This assumes that the judiciary is minimally receptive to minority claims and experiences and is more willing to accommodate these claims than the political branches. Nevertheless, having such a rule and theory is a good approximation of the ideal that the majority bias should be corrected in a liberal democracy.

The proposal builds on a procedural approximation: instead of dealing with the question of collective minority rights head-on, it starts by asking how enforcement should happen, how

¹⁴⁸ Kis, *supra* note 113, at 334.

courts should deal with claims based on such rights, formulated on the group level. If the claim is that the group should be able to exercise a certain right as a group, it can ultimately be translated into the claim that the groups should be able to ask for court enforcement to the benefit of the group. The central claim of the thesis is that *a rule that allows for the judicial recognition of groups, within the limits of particular legal claims, can avoid many problems raised in the collective rights debate. Such a solution allows the legal system to better accommodate minority claims, even claims too weak, or otherwise not suitable for litigation, if taken individually. The reasons for this weakness can be manifold, ranging from claims that are hard to be monetized on the individual level (loss of non-tangible cultural treasures) through claims that are too low if broken up individually, to cases where evidence is inconclusive on the individual level but is available on the level of a group (e.g., historical evidence on traditional collective possessions). Importantly, the benefits should be accessible on the level of the individuals, too. The procedural solution extends the capabilities of the legal system to provide guarantees and remedies for individuals that would otherwise be left without legal recourse. The present thesis thus proposes a judicial and collective procedural tool to address areas where strictly individual litigation fails and argues that this will end up benefiting minority claims in important ways.*

The proposal combines the judicial enforcement of the claim and the legal recognition of the community in question. It serves as a backup option to political recognition, for groups that cannot get the latter yet want judicially enforceable guarantees. This approach can disregard the dilemma concerning the blurred line between individual and group rights, since it asks a more practical question about how the underlying claims can be enforced and leaves the decision on 'what groups' and 'what rights' to a specific court dealing with concrete claims. Returning to **Error! Reference source not found.**, the procedural solution can accommodate r

rights belonging to all areas of the spectrum: It includes rights that are on the individualist side, litigated and enforced by a group of persons subject to violations (mere aggregation), but also rights that could not be litigated and enforced without recognition of the group as claimant (expansion of litigable claims).

The procedural solution does not depend on whether one accepts the existence of moral collective rights (rights that ought to be recognized by law) or not. For those who accept them ('collectivists'), the proposal extends the venues for actual judicial enforcement of these pre-existing rights. For those who reject these rights ('individualists'), the proposal offers a procedural tool to make individual rights more efficient through collective enforcement. For a utilitarian, the proposal should make sense because it treats rights – exercised by a group through the collective procedural solution – as a means to more effectively advance individual interests.

This thesis seeks to show that even if we accept a strong version of methodological individualism, or any type of approach that focuses on the individual, the idea of procedural legal group recognition is still an appealing addition. The natural sciences parallel suggests that our view of the proper agents will depend on what we are seeking to achieve. For certain types of research questions, we will look into elementary particles, atoms or molecules, while for others, cells or organisms, and yet for others, groups of organisms and (animal or human) societies. For a rights-based solution to work, it should demonstrate that a collective solution serves best the substantive goals of the rights to be guaranteed. If the proposal succeeds in showing that recognizing collectivities in some contexts provides for more effective guarantees, even of individual rights, this should secure its legitimacy.

List and Pettit argue for differentiation among groups with regard to the specific rights they should enjoy.¹⁴⁹ My approach takes this further – to the extreme, if you like – with a case-by-case assessment of both the group and the claim in question. It is the type of rights violation that will determine whether group recognition is legitimate. If a systemic violation singles out certain members of a society along identifiable lines, an adequate remedy should be able to find, as closely as possible, those targeted by the violation. This of course entails a high level of fragmentation, pluralism entails a society fragmented along a series of lines. Fragmentation can be a beneficial feature for a legal system that reflects actual social differences, whereas disregarding them could result in systemic violations. With the collective judicial solution, fragmentation is ‘normalized,’ i.e. it is subject to the normative requirement that recognition should be linked, in a reasoned way, to the specific legal claims.

Levy might be right that there is an internal tension, or a constant struggle, between the pluralist and the rationalist liberal reading (the ‘pluralist challenge’). Yet, this just shows that both selection (limiting the minority claims allowed and enforced) and pluralism are important goals. While maintaining the skepticism that an ultimate resolution can be found, the procedural approach seeks to tackle the larger issue in a piecemeal fashion, by empowering courts to focus on a single case at a time. This can postpone the decision to find a permanent synthesis to how the state deals with intermediary groups.

Focusing on procedure might bring some of the advantages of what proponents of group rights seek to achieve but avoid some of the dangers that opponents see in full-scale legal recognition of collective entities. Let me mention why some fears that appear when discussing collective rights are tamed by the procedural approach.

¹⁴⁹ LIST & PETTIT, *supra* note 28, at 177ff.

Group rights for minorities may sound suspicious for a liberal ear. They are distinguishing people, members and non-members, based on race, language, national or ethnic origin, indigeneity, etc. These are, to use the American term, suspect categories. History teaches us that such classifications come with an inherent danger. Maybe this does not mean that all such distinctions are illegitimate. Recognition of the collectivity may be necessary to assure the full enjoyment of human rights of its members and many indigenous and other minority groups are recognized this way in their home countries.

The primary caveat is that respect for individual rights should always apply. The procedural solution means that collective rights will be subject to judicial scrutiny, by design, and the scope of recognition will be limited to specific claims. This means that the dangers involved are considerably less threatening.

We should address one further source of resistance. As the surge of international interest in minorities during the 1980s-90s show, security considerations are central to debates over recognition. Collective groups defined by race, ethnicity, language or religion are suspect not only because they bring with themselves a shadow of discrimination, but also because they can become challengers to the state itself, especially a state with a national identity defined by similar characteristics.

The state will be less inclined to resort to political measures to 'protect itself' against minority claims if the claims are broken up into justiciable claims. This move to tame dangers, as perceived by majority institutions, is only available once minority claims become litigable, and this is what the collective procedural solution proposes. This comes with a price, however: the ability of the collective procedural solution will be limited when it comes to public powers. This is linked to the biggest challenge of collective or group rights, i.e. their suggestion that

the relevant group needs to be recognized on a permanent basis. In many cases this will be too ambitious and not viable politically, but dealing with group claims by a piecemeal fashion might be a compromise acceptable on both sides, those who fear from an 'oppressing majority' and those who fear from a minority challenging the legitimacy of the state.

The proposal treats the current legal-political setup as given. At the same time the proposal is without prejudice to whether a genuine group-rights approach is necessary or not. The compromise means that the solution can be accommodated within the legal systems we have, and it should be acceptable as an intermediary, second-best solution even for those who would otherwise like to see a more radical turn towards minority recognition or collective rights.

Majoritarian political institutions represent the 'public good' that tends to aggregate individual interests and goals and present them as a unified 'common good.' This translation might systematically leave out some of the original diversity. If individuals are left out more often than others, and certain interests are neglected more often than others, this might show a system-wide problem with how the state functions. This is the insight in Ely's *Democracy and Distrust*: those systematically disfavored, or left vulnerable, by the political processes of democracy should get guarantees from oppression, most likely be found in rights enforceable before independent courts. The positive reading suggests, however, that states in fact tend to accept rules that benefit minorities directly or to adopt principles on a higher level of generality, like equality, that can be applied by willing institutions to the same end. This means that law and courts can be used the way the proposal suggests.

The overview will be peculiar in that it tries not to limit arguments to one jurisdiction. Yet, there is one jurisdiction with an incredible richness where there have been active debates

around collective procedures for the past decades. The experiences of class action in the United States provides a vast resource of the various dilemmas that group litigation presents, hence the recurrent reliance on US examples in what follows.¹⁵⁰ Even where I rely on the class action literature, however, I will try to phrase the arguments in a way that is not limited to one jurisdiction, but remains relevant in various settings, be they national or international. This also means that the arguments here cannot be read as engaging with the class action debate in the US – that would require more specific treatment of the questions in that context. An exact and detailed solution would not be desirable because the optimal wording will depend on the legal, political and social context that varies across jurisdictions. The idea is to present a conceptual proposal that could be tailored to suit the local circumstances, both on the side of the (majority) legal system and the types of minority claims that arise in the country.¹⁵¹ The discussion of the various subtopics will include concrete judicial cases to illustrate the points addressed, on the level of generality that does not limit the insights to one jurisdiction.

Before we get to the benefits of the procedural solution, a couple of remarks on the constraints are in order. First, not all claims made by, or on behalf of, minorities are legitimate. It would be impossible to come up with a universal formula in the present thesis on what claims should be seen as legitimate. What is possible, however, is to identify, based on the overview in the previous chapter, state behavior that is clearly illegitimate. Where minority

¹⁵⁰ For those unfamiliar with class action litigation (Rule 23), the final section of the present chapter gives a short overview.

¹⁵¹ The adequate solution for incorporating the collective procedural solution into a legal system will depend on a number of social, economic, political and legal elements. The varying local context would make a one-size solution unworkable. Tortell in her comparative analysis of human rights remedies in the US, New Zealand and India (and applying her insights to the case of the UK) notes that the legal recognition of groups in human rights litigation is commonsensical in India while courts in other jurisdictions are more resistant or even hostile to that approach. TORTELL, *supra* note 14.

claims are rejected merely because they do not fit the majority legal framework, without regard to the merits of the claims, that should be a reason for concern. This is not the case where the substantive element of the claim triggers the filter of the legal system, most importantly where they fail to meet human rights based criteria. But where they simply fail because minority notions of property, usage rights, cultural attachment etc. are too far from the majority notions, this only shows the bias of the legal system, the fact that it chose not to accommodate minority claims. This ultimately corrodes the legitimacy of the legal system and the state, vis-à-vis the said minority. To tame this type of bias is to strengthen the legitimacy of the legal system and to prevent further violations flowing from a denial of justice to minority members.

The proposal is limited in that it presupposes an independent judiciary, with basic rule of law and human rights guarantees in place. Furthermore, it assumes a working democracy that performs adequately in terms of translating majority preferences into policy choices.¹⁵² The proposal does not make further assumptions about the constitutional structure of the state, whether it is federal or unitary, whether it functions as a parliamentary or a presidential system etc. The proposal actually excludes most claims where the basic structure of the state is challenged. This is a serious limitation, for a good number of minority claims seek power sharing mechanisms. This constraint is not absolute, and it is necessary in light of the trade-

¹⁵² This might not be uncontroversial even in emblematic cases like the USA, see, e.g., the shocking conclusions of a Princeton study on the performance of American democracy: Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564: 'economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.' *Ibid.* Cf. with President Kennedy's statement: 'Harry Truman once said there are 14 or 15 million Americans who have the resources to have representatives in Washington to protect their interests, and that the interests of the great mass of other people, the hundred and fifty or sixty million, is the responsibility of the President of the United States. And I propose to fulfill it.' OFFICE OF THE FEDERAL REGISTER, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY—1962, at 364-65 (1963). Quoted in Milner S. Ball, *Judicial Protection of Powerless Minorities* 59 IOWA L. REV. 1059, 1071 (1974).

off between judicial enforcement within the existing legal framework and the political nature of claims that can be accommodated. It is not absolute because courts can order injunctive measures that transform institutional structures. Yet, it is hard to imagine that a court will go as far as upsetting the basic constitutional structure of a state because it fails to properly consider legitimate minority concerns. Willing courts can go quite far, but this not alter the fact that there usually is a limitation on how far courts can go.¹⁵³ This constraint is necessary in light of the aim of the proposal to circumvent, at least to a certain extent, the political opposition (or ignorance) to better accommodate minority claims. There is a terrain where the judicial solution can provide an important input. This is not to claim that political decision-making will not play any role, but that there will be an area where courts can successfully operate to amplify minority claims.¹⁵⁴

The overview can't and won't do justice to the topic of group litigation. There are a number of questions that will not be addressed specifically, but I should recognize here that are also relevant. The wider legal context will matter in how a collective procedural solution can play out and also in what type of procedural design has a chance to achieve optimal performance. Such elements include the litigation culture, incentives and attorney fees (creating financial incentives that claims are actually brought¹⁵⁵), the requirement of appropriate notice etc. Addressing these would also mean that the thesis would give up its multi-jurisdictional focus. E.g., under the US system, all parties bear their own legal costs, regardless of the outcome of the case, while in most other jurisdictions, it is the loser who pays most, if not all, of the costs. Then there are the additional rules creating exceptions for various types of claims, changing

¹⁵³ On the questions related to injunction, see the relevant section under 'Remedies' below.

¹⁵⁴ See more on this in the section on the dialogue argument below.

¹⁵⁵ Note that successful collective rights litigation will most likely require a scheme similar to the Civil Rights Attorney's Fees Award Act in the US adopted in 1976, allowing courts to award fees in such cases. The alternative, reliance of litigation financed from external sources, does not seem appealing.

the incentives in areas where, in the legislature's assessment, litigation should be encouraged more than it would be under the general regime, because it serves important public goals. Even considering all these does not tell the whole story. Outside funding might be available for litigation. This is especially true for rights litigation.¹⁵⁶

Given its focus on the collectivity on the claimant side, the thesis does not address the question of finding the right defendant, either. Many cases of minority rights violation can be linked to some state obligation – if not else, through the omissions of rights enforcement – and the state will also be available in cases where violations by the majority society are litigated. In other cases – or because the claimant side wants to avoid the problem of state immunity – individual perpetrators have to be identified. An intermediary solution is to identify key actors in the violations, corporations and institutions, or groups thereof, that can capture a large part of how systemic violations took place. While the thesis will assume that there is a party, most likely an entity, that can be made to pay, it will address a wider, related question: the constraints inherent to the compensatory logic that is usually applied by courts.¹⁵⁷

The formulation and the details of the rule can make a huge difference (all the way down to cost-related arrangements that might make the solution work or render it unworkable), but here I am focusing on the idea of a collective procedure as a venue for minority claims in general. I am not aiming at presenting a word-by-word rule (hence a 'conceptual' proposal), but argue that such a solution would be beneficial for a number of respects because it would make the legal system more inclusive. The goal of this thesis is to collect and present the

¹⁵⁶ For discussion on this, see the section on 'Private enforcement.'

¹⁵⁷ See, e.g., 'The limits of monetary remedies,' under the 'Remedies' chapter.

various benefits and risks of the procedural solution, instead of a full-depth discussion of all the relevant questions.

The proposal offers a number of concrete advantages (the following paragraphs will identify twelve), even if assessed under a strictly individualist view. After the benefits, I also list four limitations that constrain the reach of the proposal.

The solution does *not require the political recognition* of minorities as groups. (1) In an extreme case, it does not even require the government to recognize that there are minorities living in the state.¹⁵⁸ All it needs is the ability of the court to formulate judgments that apply to a wider array of people, in addition to the general framework of enforcing rights violations. This benefit prevents political majorities to completely block claims by ignoring calls for recognition, while maintaining political control because majorities in most cases remain free to respond to judicial recognition.

The judicial recognition of groups can be more *fine-tuned*, reflecting the claim(s) in question. (2) It is able to largely ignore primordialist debates about the 'true nature' or 'organic boundaries' of a minority, the general political leadership of a community. The court asks instead the question of adequate representation and the boundaries of the victim group in a limited context, with a focus on the claims presented. The question of representation, asked this way, neutralizes the sensitive aspects of leadership both from the majorities who might want to stay away from granting a legal pledge of authority legitimizing minority leaders and from the minorities where fierce political struggle might surround the question of 'genuine authority.' The stakes and pressures might be lower if the decision is not about power in

¹⁵⁸ This is not to argue that an approach that denies any collective aspect to rights is persuasive, see arguments to the contrary in Chapter 1, under 'The normative status of minority groups.'

general, but about the ability to formulate and present claims and manage funds with a specific goals, where distribution is strictly supervised by courts.

The judicial solution has an inherent rights based filter, or better *individual guarantees*. (3) Claims have to be formulated in a way that respects the rights of group members, and no serious limitations on members' rights can pass muster and be recognized in a judgment. The group-level is only empowered in a limited way, to the extent that it is required for addressing the violation; as opposed to political recognition where wider powers might result in weakening dissident voices within the group. Individuals are able to present complaints before the court that is itself tasked with supervising adequate representation and confirming the actions of the representatives, and as such is best placed to sanction complaints.

Minority claims that seek to challenge majority bias will be *structurally collective* in the sense that the violations are likely to concern all those belonging to the group. (4) The collective procedural solution reflects this underlying structure, and, by design, it deals with entire groups targeted by violations that occur to people because of their (actual or perceived) group-belonging. While ordinary (non-collective) court procedures are also able to deal with structural claims in this sense, a collective procedure makes it more likely that courts address the collective aspect and consider this structural element when designing remedies.

The solution addresses the *imbalance* between minority claims and the majority legal system already with the move to aggregate claims. (5) Presenting otherwise dispersed claims in one procedure will create an inherent pressure on the defendants to acknowledge that violations did and do occur and recognize the need for action.

Part of the imbalance comes from the *evidentiary hurdles* that minority claimants face. These might be a result of various types of biases. Judges used to strictly individualized assessment

are often inclined to overlook systematic rights violations simply because it is impossible to ascertain the discriminatory intent of the entity liable for the violation, and they exclude reliance on statistical evidence that would allow the claimants to prove discriminatory patterns. (6)

With a (more) complete body of victims present, it is harder to disregard elements that are relevant for considering the violation, but might be brushed under the carpet with a fully individualist approach. The repeat-play nature of violations that often characterizes minority rights cases might fail to be acknowledged if the transactional frame is set too narrowly.¹⁵⁹ The collective procedure facilitates better judicial comprehension of these types of violations by better *contextualization*. (7)

The proposal enhances the ability of court procedures to allow *victim participation* and to recognize losses beyond the individual level. (8) Creating representation and recognizing that an entire group makes the claim, a court procedure achieves important goals before reaching the merits and the judgment and enforcement phase. Victims can be present in a way that does not single them out, making re-victimization less likely, and this presence can amplify their voice. It will be harder for defendants and others to simply dismiss the claims.

Through providing wider *access to justice*, the proposal results in more complete remedies and better rights enforcement. (9) A collective judicial solution makes it possible for otherwise excluded claims to reach courts. First, it makes it possible to present claims that require collective claimants as justiciable, and second, to provide corresponding evidence, also on the

¹⁵⁹ See the section on 'Defining the context and statistical evidence' under 'Groups,' building on Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

level of the group (see No. 6 above). Third, by relying on economies of scale, litigating dispersed claims might become feasible.

The collective procedural solution empowers minorities in the sense that they can challenge widespread rights violations without relying on public bodies, through the *private enforcement of rights*. (10) Attorney generals might not be responsive or motivated to litigate minority claims, they might be slow, might have and represent interests that go counter these claims etc. With making private enforcement easier, the proposal makes it possible for minority litigants to take the burden of rights enforcement even where public bodies are not willing to step up. Furthermore, the ability to present all claims arising from a violation, instead of sanctioning the defendant for certain consequences, and not for others, in a piecemeal fashion, enforcement through collective litigation better serves the goal of compensation as well as optimal deterrence.

The proposal enhances the ability of courts to address *time limitations* and *limited funds* problems. (11) In cases of widespread and long-term violations, violations occurring over generations, individual approaches might not be able to identify the relevant beneficiaries, even where remedies would otherwise be justified and should not be left with the perpetrators and related beneficiaries or the society at large. In such cases, groups as long-living entities, under certain conditions, might provide the best proxy for those whom adequate remedies should target. Responding to large-scale violations often raise the problem of draining the funds available for remedies. Individual litigation risks an outcome where better placed and informed claimants get full compensation while more disadvantaged claimants remain without compensation despite the judicial recognition of their sufferings.

Combining all relevant claims in one procedure allows the court to address this problem while considering adequate remedies.

The fact that rights can be enforced in a collective procedure does not require or even trigger a change in the text of the law. Yet, by making it possible for courts to recognize rights violations that appear and are easier to prove on the group-level, the scope and nature of the rights changes as well. The proposal results in making a legal system that is more receptive to group-level claims and more sensitive to group-level violations, while maintaining its ultimately individualist focus and introducing important individual guarantees. This is the proposal's *innovative potential*. (12)

After the benefits, we can also identify a number of limitations.

The solution relies on the judiciary regarding questions that might be sensitive to majorities, hence there is usually a threat that legislature (or, in case of constitutional interpretation, constitution-amending majorities) might revisit the question. (1) While this adds to the dynamic and democratic nature of accommodation (best captured by the dialogue argument, below), it can also result in not getting reparation at all.

Courts are also not free from bias; they can frame the issue and exclude evidence in a way that makes it impossible for minority claims to prevail. (2) The collective procedural solution creates better circumstances for framing and accepting evidence from a wider set of cases, revealing discriminatory patterns that might not be persuasive when looked at isolated cases, but does not, in itself, guarantee a favorable outcome, even for legitimate claims.

Where the bias of the courts prevents them from applying the collective procedural device to minority cases in the first place, that will mean that none of the benefits can be reaped. (3)

This will indicate the inability of the national judicial framework to deal with minority claims on a more fundamental level. Addressing this goes beyond the scope of the proposal, as it is presented here. Even in such cases, an international rights enforcement mechanism can still benefit from the proposal, putting pressure on national bodies to acknowledge and address these shortcomings.

Even with willing judges, courts in many cases lack the ability to address certain (aspects of) violations, due to structural constraints. (4) The further away we move from remedies that only require traditional judicial input, and get closer to the need for the active participation of political bodies, the less likely it is that courts can in themselves remedy the harms. This will apply to collective procedures, too. While public law remedies can go far in achieving structural changes in society, as, for example, desegregation decisions show, but litigating autonomy rights that constitute an important part of minority rights will face serious hurdles. Courts will, in most cases, be reluctant to order remedies that embrace equality under such a far-reaching reading that requires the restructuring of the political system. This applies even though there are exceptions like the enforcement of the ban on gerrymandering to the detriment of minority voters. The proposal does not exclude the possibility of the remedies that require direct political decisions, but primarily considers minority claims that fall outside the scope of autonomy rights. This still leaves us with a wide array of minority claims, from rights that can be claimed and exercised individually but can mostly be secured on the collective level only (e.g., language rights and education) to claims based on historical injustices, often including, but not limited to, egregious crimes. Despite the great variety, these claims can benefit from all or most of the benefits that I listed above, the flexible judicial recognition that allows for aggregation and better contextualization and that results in improved access to justice through private enforcement.

The later chapters will address these points in more details. In the remaining part of the present chapter, I will provide additional background to the detailed discussion. First, I revisit, more specifically in the context of judicial procedures, the question of why the collective procedural proposal responds to existing needs, not only in the context of minority rights, but considering, more generally, the phenomena of mass societies and the ubiquity of the state. Second, the proposal is presented in the context of the equality principle as the driving force behind most minority rights claims. Third, the class action device is overviewed for the reader not familiar with the US context.

2.1 THE NEED FOR COLLECTIVE PROCEDURES

The benefits of the collective procedural solution, in general and in the context of minority claims, should be enough to see why its adoption and application is an important step towards a more equal and more legitimate legal system. This section first presents some arguments for why the strictly individualist approach that dominates today's Western legal systems is in many cases not adequate for responding to the challenges societies and legal systems face. Then I will review some substantive arguments for why the individualist approach might constitute a violation in itself by disregarding relevant parts of the original violation.

Many inherited features of (Western) legal systems limit the ability of law not only to adequately capture minority claims with a decisive collective element, but also to address claims that are raised by a mass society characterized by mass production and an omnipresent state. Where institutions of the state and of mass production fail, that will potentially cause harm to a large number of victims. The traditional litigation, with an ideal setup of individual parties, often prove inadequate to deal efficiently with the resulting claims. This section will build on this insight, a wider issue than the concern with enforcing minority rights, to justify,

first, collective procedures more broadly; and then second, to show how these observations apply in the minority setting.

Civil procedure is embedded in the legal culture that itself operates in a wider societal context. Courts and law respond to new challenges and shape the way we think about law and justice. The strict individualist approach appeared, historically, against a longer tradition that was more willing to accommodate collective claims.¹⁶⁰ Bogart notes that ‘research into what courts have historically done suggests that they have been much more intrusive and active than accords with the [individualist] paradigm.’¹⁶¹ Group litigation faded away with the advent of individualism, but the need appeared with renewed force when the strictly individual structure of litigation could not respond to the social expectations of litigation.

Fiss aptly describes the tendency of the legal system to favor the status quo and the strictly individualist approach – he links this to a specific political context (‘a revival of orthodox capitalism and classical liberalism’), but he also acknowledges that relying on this connection might ‘be too facile’¹⁶²; and it indeed seems to be a wider phenomenon. It might easily be a result of the structure of Western legal systems. The Ontario Legal Reform Committee in its 1982 Report on Class Actions noted that ‘[i]ndividualism, the belief in the free and independent action of individuals, is a concept that has deep roots in Western society.’¹⁶³ Fiss argues, along the same lines, that:

The social purposes served by the class action may well justify this odd form of [self-appointed] representation, but it would be a mistake to ignore or deny

¹⁶⁰ Stephen C. Yeazell, *From Group Litigation To Class Action. Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1979-1980) and subchapter 2.3.

¹⁶¹ W. A. Bogart, *Questioning Litigation’s Role – Courts and Class Actions in Canada*, 62 IND. L.J. 665, 690 (1987).

¹⁶² Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 31 (1996).

¹⁶³ ONTARIO LAW REFORM COMMISSION (OLRC), REPORT ON CLASS ACTIONS 2 (1982). The quote continues: ‘While by no means universally or unequivocally adopted by all persons and in all circumstances, the notion that one can, and indeed must, be the architect of one’s own destiny is reflected in the traditional manner in which people have related to the social, economic, political, and other institutions in our society.’ *Ibid.*

its very oddity and the fact that it runs counter to the individualistic values that so permeate our legal system. Admittedly, these values were given dramatic expression in America during the 1970s and 1980s, when we experienced a revival of orthodox capitalism and classical liberalism – the most individualistic of all ideologies – but this development might only be a matter of emphasis. The individualistic values that the class action calls into question are all pervasive features of our law, perhaps of all law, and, for good or bad, will always exert a restraining influence on the great temptation of social reformers to create collective instruments that might better serve their ends.¹⁶⁴

In an increasingly interconnected world with global structures, the ubiquitous state and mass production, large number of victims might appear to ask for prompt justice, seeking simple solutions for complex problems involving hard legal questions. As Bogart argues, criticism that group litigation goes against the basic tenets of the modern judicial system ‘takes no account of the radical transformation which has occurred in society in this century. The social structure has been transformed by the growth of aggregates of power such as corporations, government, and unions.’ Cappelletti notes: ‘More and more frequently, because of the “massification” phenomena, human actions and relationships assume a collective, rather than a merely individual, character; they refer to groups, categories, and classes of people, rather than to one or a few individuals alone.’¹⁶⁵ Enforcing civil rights might require courts to order and supervise complex remedies; mass accidents might need innovative solutions in representation and evidence, with expert testimonies and statistical formulas based on probability rather than individual proofs. Valdes argues that despite the historical roots, class action should be seen as a product of modernity: ‘Although the class action device is ancient,

¹⁶⁴ Fiss, *supra* note 162, at 31.

¹⁶⁵ Mauro Cappelletti, *Vindicating the Public Interest Through Courts: A Comparativist’s Contribution*, 25 *BUFF. L. REV.* 643, 646 (1976). Quoted by Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 *GA. ST. U. L. REV.* 627, 639 (2008).

the modern class action is itself, shaped by the forces of social, economic, and political modernization: the emergence and consolidation of “mass” societies.’¹⁶⁶

The increased interconnectedness can itself be responsible to the growing importance of how a couple of court cases come down. This is a larger phenomenon that is present regardless of whether group litigation is allowed or not. As Miller argues in the US context, referring to Rule 23 of the Federal Rules of Civil Procedure that allows for class action type litigation:

*It is important in understanding the class action debate to realize that the ‘big case’ phenomenon transcends the class action. The ‘big case’ is an inevitable byproduct of the mass character of character of contemporary American society and the complexity of today’s substantive regulations. It is a problem that would confront us whether or not rule 23 existed. Indeed, it is becoming increasingly obvious that the traditional notion of civil litigation as merely bilateral private dispute resolution is outmoded.*¹⁶⁷

This is not to say that the individual approach is always faulty, but that it has become less relevant with a recent shift that is aptly described by the 1982 report of the Office of the Law Reform Commission in Canada. The report claims that there are wider, social, political, economic and other changes that are reflected in a more comprehensive legal protection than in any earlier phase of human history, and that undermine our ability to pursue goals individually. In ‘a highly complex, interdependent society,’ or ‘a corporate society characterized by mass manufacturing, mass promotion, and mass consumption,’ where ‘mass wrongs’ are more and more likely, ‘the individual is very often unable or unwilling to stand alone in meaningful opposition.’¹⁶⁸ It is the changing needs that are the strongest trigger of legal change.

¹⁶⁶ *Id.* at 640.

¹⁶⁷ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 668 (1979). Quoted by Valdes, *supra* note 165, at 645.

¹⁶⁸ OLRC REPORT, *supra* note 163, at 2–3. The report starts with an account that is worth quoting at some length:

Carroll argues, against the view that group litigation should be avoided for its complexity, as follows:

*The existence of the policy or practice creates an interrelationship among those persons affected by it, and that interrelationship gives rise to difficult questions about remedial scope and preclusive effects. The class action represents an attempt to address those questions; it does not create them.*¹⁶⁹

In a complex world, with a ubiquitous state, claims arise in a complex web of interrelationships. The interdependence also means that ‘we are seldom so fortunate as to confront injustice in discrete doses.’ According to Jeremy Waldron, ‘[t]he world we know is characterized by patterns of injustice.’¹⁷⁰ The systemic nature of violations is especially relevant in the minority context. It definitely applies to the case of historic wrongs,¹⁷¹ but also other types of persisting minority rights violations. The recent decades and especially the 1990s brought a new wave of claims in the field of minority rights. As Kymlicka shows,

In the past, we generally have accepted as fair and reasonable the often heavy burden of ultimately vindicating our rights by the commencement of individual legal proceedings. [...] To a considerable extent, however, this perspective of our place in society is today somewhat outdated – an anachronism often more a reflection of nostalgia than reality. Individualistic notions of our capacity to assert and protect our legal rights by acting alone were, of course, never entirely in accordance with the often harsh facts. Moreover, it is hardly revolutionary to suggest that we have never had such comprehensive legal protection as we enjoy today. [...] Social, economic, political, and other changes in our society – telescoped as they have been into a brief period of time – have radically affected our ability to pursue our goals in isolation. Not surprisingly, it is the development of a highly complex, interdependent society that has impeded the capacity of each person to vindicate his legal rights. No longer are we faced with only a single individual or small business against whom we have some grievance. [...] We live in a corporate society, characterized by mass manufacturing, mass promotion, and mass consumption. The production and dissemination of goods and services is now largely the concern of major corporations, international conglomerates, and big government, whose many and diverse activities necessarily affect large numbers of persons in virtually all aspects of their lives. Inevitably, dramatic changes in production, promotion, and consumption have given rise to what may be called “mass wrongs” – that is, injury or damage to many persons caused by the same or very similar sets of circumstances. [...] And in the wake of such misconduct, the individual is very often unable or unwilling to stand alone in meaningful opposition.

¹⁶⁹ Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2058 (2015).

¹⁷⁰ Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 14 (1992).

¹⁷¹ ‘In many cases historic wrongs, such as slavery, are not singular or short-lived occurrences; they often span many years and are made up of many specific interconnected wrongful acts.’ Ori J. Herstein, *Historic Injustice, Group Membership and Harm to Individuals: Defending Claims for Historic Justice from the Non-Identity Problem*, 25 HARV. BLACKLETTER L.J. 229, 269 (2009).

however, law, and political decision-making, failed to provide an adequate response to the questions raised by these claims.¹⁷² There is a gap between the increased expectations and equality claims raised by groups like national minorities and indigenous peoples on the one hand and the legal response on the other. This is at least partly due to the inadequacy of the legal framework (and not only to factors like the illegitimacy of the claims raised). The collective procedural solution can contribute to bridging this gap in important ways.

The strongest case for group litigation will be where the claims themselves are formulated as inherent to the group as opposed to a mere aggregation of individual claims. To acknowledge this possibility, one does not need to accept the ‘reality of groups,’ as raised in Chapter 1. The individual approach is certainly able to capture many violations that are done to a larger group, because they are at the same time harms inflicted upon the individual members. Some aspects of the violation might still be left out. Hate crimes, for example, usually target individuals based on their group membership. To disregard this aspect is to disregard part of the harm and misrepresent the nature of the violation. It is exactly the intent, and also the effect, of such crimes, that a whole community is victimized, through the message of threat.¹⁷³ The adequate answer on the side of judicial remedies in such cases is to grant collective recognition of all the victims.

Consider the example given by Dubinsky:

A profound and lasting injury is done to a large number of people. Some are killed, some imprisoned, some enslaved. All are singled out for persecution because of characteristics that they share, characteristics that establish common bonds among them in a deep rather than a superficial way. By virtue

¹⁷² See the overview of the international legal developments in KYMLICKA, *supra* note 91.

¹⁷³ Note that this element is recognized in the increased punishments of common violent crimes that include a threatening intent, in the case of terrorist activities. These crimes are structurally close to hate crimes in the sense that they use violence to convey a larger message, typically targeting the whole society, not specific groups. Hate crimes in this sense can be seen as terrorism-like acts targeting more specific groups.

of these common traits, these individuals regard themselves as a collective, as some form of coherent, identifiable group with an identity that endures over time. They are a product of shared history, and they have an expectation of a shared future.

If the persecution is vast and severe, there may come a point at which there emerges a harm to the collective that is distinct from the injuries suffered by individual members. Members of the group, even those never physically in harm's way, may suffer indirectly from persecution inflicted on others. The murder of intellectuals or religious leaders drains the collective of tradition, leadership, and optimism. Repression of artists and writers undermines the group's ability to preserve its language, literature, and artistic expression. Destroying sacred sites and exiling large numbers of individuals can render the group vulnerable to assimilation and loss of identity. If the group's numbers fall below a critical mass, its very survival may be in jeopardy. In each of these scenarios, there is a collective harm, one that is different from those inflicted on individual group members. The injury stretches geographically to places far from the site of atrocity. It also stretches into the future to those who are the collective's hopes for carrying its traditions forward.

The overall impact of sustained persecution and atrocity may be a sense of profound loss and confusion enduring far into the future, leaving behind an emaciated tradition and a People in danger of losing its soul.¹⁷⁴

This holds to genocide claims where violations by definition target the group. As Dubinsky notes, this fits the case of the Holocaust, for the 'Final Solution was not primarily a plan for persecuting specific individuals. It was a blueprint for destroying an entire people.'¹⁷⁵ Systemic injustices and biases, where they go beyond moral wrongs and result in legally cognizable violations, are also of this type: the systemic nature means that people are targeted based on group belonging, without adequate regard to individual traits. It is the collective treatment that results in the violation, and it is a collective remedy that can be the most adequate, following the logic of the perpetrators. In this sense, the violation 'creates a group,' regardless of whether the group 'exists' beyond the violation, and the resulting claim, or not. This is the truth in Justice Blackmun's statement: 'In order to get beyond racism, we

¹⁷⁴ Paul R. Dubinsky, *Justice for the collective: the limits of the human rights class action*, 102 MICH. L. REV. 1152, 1181–82 (2004).

¹⁷⁵ *Id.* at 1182.

must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.¹⁷⁶ If the violation happened and made race relevant, disregarding it in court might only exacerbate the violation. The collective procedure that unites all victims based on the nature of the violation is an important part of acknowledging the aspect of the harm that goes beyond the individual cases. The class action device is commonly seen as especially apt for addressing policies that disparately affect minorities. As Matthew R. Ford explains, in the context of *Gratz*, ‘the class mechanism provides a means to challenge policies that, while not affecting the named plaintiff personally, affect a larger segment of the population.’¹⁷⁷

While it is easier for egregious violations to get beyond the judicial filter, even where the collective element is strong, the arguments apply equally to violations that are also constant, widespread and systemic, if less severe. E.g., centuries of sustained but minor violations, e.g., unequal access to education, can cause tangible harms, yet, the effects are hard to prove on the individual level if courts reject statistical comparative evidence. On the other hand, the severity of the violations might justify remedies even in the case of a time gap where the action of violation stopped in the not-so-close past. In the case of minor violations, the fact that the claim is not about ongoing violation or about violations that occurred in the recent past (i.e. within the timeframe of statutes of limitations) might mark the death of the claims.

¹⁷⁶ *Regents of the University of California v. Bakke*, 438 U.S. 265 at 407 (1978). To be contrasted with a more recent approach that would advise against the legal consideration of race, by Chief Justice Roberts: ‘The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.’ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 at 748 (2007). Courts adopting this approach will fail to face the full scope of violations, e.g., for they arbitrarily start ‘stopping discrimination’ by striking down the very measures that seek to stop discrimination.

¹⁷⁷ Matthew R. Ford, *Adequacy and the Public Rights Model of the Class Action After Gratz v. Bollinger*, 27 *YALE L. & POL’Y REV.* 1, 5 (2008).

In most other aspects, the collective procedure will offer benefits that are available for both more and less ‘severe’ claims that have a key collective component.

2.2 EQUALITY AND GROUP LITIGATION

Based on the arguments on state neutrality, all minority claims can be linked to equality concerns, in one way or another.¹⁷⁸ This can happen at varying levels of abstraction, and some claims will rely more, and some less, directly on the anti-discrimination principle. The present proposal considers equality in a limited sense only, addressing the biases identified in Chapter 1, systemic disadvantages stemming from the majoritarian state-based decision-making structure. While collective procedures might work for more far-reaching concepts of equality, these are not in the focus of the present thesis, that instead focuses on putting minority members largely in the same position as majority members by more effectively addressing, to the extent it is possible with the help of law and courts, the disadvantages specific to minority life.

Where equality based on group belonging is enforced, collective procedures seem especially adequate. This partial overlap and, at times, structural semblance creates a natural link between discrimination-type claims and collective procedures. As the Ontario Law Reform Commission noted 35 years ago, ‘courts recognize that discrimination is by its very nature ordinarily a public or “class” wrong, rather than a private wrong, and class actions are

¹⁷⁸ Equality in the context of judicial procedures can not only be understood as equality providing the ground for the claims presented, but also can relate to the procedure itself: its ability to assure genuine equality in the position of the victim-claimant, in access to justice, in the formulation of the claim, challenging cultural bias in how the judicial system filters out claims. It can point out discrimination based on the type of right litigated. Some of these will be addressed later in the overview, as the collective procedural solution, through aggregation and its ability to extend the types of claims that courts can consider, can address some of these concerns.

perceived as an effective means of redressing inequalities in the treatment of minorities.’¹⁷⁹

Group litigation is especially apt to cover claims where a wider set of individuals are affected by one policy or practice. The underlying structure is thus inherently collective – not in the sense of ‘individually not cognizable,’ but in the sense of being interdependent.

Although the overlap between the two fields is only partial, discrimination is central to many minority claims. Most minority rights can be read as specific and maybe strengthened formulations of the non-discrimination principle. And even if one disputed this claim, the underlying structure is that of dispersed violation: a violation that is not specific to one group member is harming each individual member. It might be that a legal claim on behalf of the minority is not formulated as one about discrimination and are not phrased in relative terms, but there is an underlying concern with how government practices fall too heavily on minority members. It might be that an indigenous group makes property and usage right claims over a territory, challenging military or industrial activities over their ancestral lands and yet, it looked at more closely, less strictly following litigable norms, a claim about discriminative treatment is lurking in the background.

Discrimination is a broad category that includes various types of distinctions. The principle of anti-discrimination is equally encompassing, it can stop at formal equality or go on to require more robust forms of equality. It can look for direct discrimination and discriminatory intent, or also ban indirect or ‘disparate impact’ discrimination. Policies, practices and patterns might be neutral on their face while be systematically biased against minorities as measured by outcome, if looked through the lens of statistics, leading to ‘disparate impact.’¹⁸⁰ While all

¹⁷⁹ OLRC REPORT, *supra* note 163, at 219–220.

¹⁸⁰ *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

types of discrimination have a collective aspect, because they are grounded in a violation based on group belonging, the more robust forms that also recognize indirect forms are especially apt for group litigation. Indirect discrimination includes measures and practices that disadvantage individuals based on group-belonging even in the lack of discriminatory intent. Without using the term ‘indirect discrimination,’ the European Court of Human Rights finds discrimination in a case where ‘a general policy or measure has disproportionately prejudicial effects on a particular group’ even if ‘it is not specifically aimed or directed at that group.’¹⁸¹ The importance of this move, to outlaw measures based on ‘disproportionately prejudicial effects’ cannot be overestimated. It not only fosters equality by requiring compliance in a whole new array of cases, but also eases the evidentiary burden on claimants.¹⁸²

As it might be apparent, indirect discrimination has an inherently collective aspect: it can only be ascertained at the level of groups. In the US, this led to the recognition that ‘the class action device could be implemented effectively to eradicate widespread or institutional-scale discrimination.’¹⁸³ Affirmative action is also a type of measure that cannot be understood, and defended, without considering the collective level. In Cass Sunstein’s reading, ‘affirmative action might be understood not as a remedy for discrete acts by discrete actors, or as a response to identifiable breaches of past and present duty, but as an effort to overcome the social subordination of the relevant groups.’¹⁸⁴ The strict individualist framing of harms makes affirmative actions look antithetical to equality:

¹⁸¹ Shanaghan v. the United Kingdom, no. 37715/97, Eur. Ct. H.R., § 129, 4 May 2001.

¹⁸² See also in the section on evidentiary hurdles in Chapter 5.

¹⁸³ Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J.L. & SOC. PROBS. 133, 133 n.3 (2002-2003).

¹⁸⁴ Sunstein, *supra* note 118, at 297.

*The constitutionality of remedial affirmative action thus depends on the Court's willingness to engage in group aggregation by assessing race-neutral treatment at the level of the group as a whole, irrespective of the distribution of benefits and burdens among members of that group.*¹⁸⁵

Fiss adds that we can only overcome the difficulty of justifying measures that the mechanical test shows as discriminative, like the affirmative action, if we accept that the equality principle should be read as an 'asymmetrical' standard, prescribing 'substantive ends' and acknowledges 'the existence and importance of groups.' This is the only way 'to believe that when we reject the claim against preferential treatment for blacks we are not at the same time undermining the constitutional basis for protecting them.'¹⁸⁶

The backlash against the more comprehensive, effect-based approach also means that the collective aspect is downplayed, and the evidentiary hurdles increase. In the US, the Supreme Court requires the proof of 'discriminatory purpose,' as opposed to 'discriminatory effects.' As Sunstein argues, '[t]hese decisions have had enormous consequences, immunizing from attack a wide range of practices that have disproportionate discriminatory effects on blacks, women, and others,' for '[d]iscriminatory purpose is extremely difficult to prove.'¹⁸⁷ For a court to move from one end, the judicial imperative to desegregate, to the other, a judicial ban on even politically sponsored desegregation is attainable through sliding the individual/collective scale: 'The rise and demise of by constitutional school desegregation has

¹⁸⁵ Levinson, *supra* note 159, at 1354. 'Meaningful affirmative action programs are impossible if race-based benefits must be compensatory for race-based harms at the level of the individual.' *Ibid.*

¹⁸⁶ Fiss, *supra* note 24, at 136. Note also the link between individualism and universalism, and the impact on legitimacy: 'under the antidiscrimination principle, equal protection rights are not only individualized, but also universalized and this is another source of its appeal. Everyone is protected. [...] The universalizing tendency of the antidiscrimination principle no doubt accounts for its popular appeal-no person seems to be given more protection than another. This universalizing tendency also appeals to a court.' *Id.* at 128.

¹⁸⁷ Sunstein, *supra* note 118, at 293. Sunstein links this to the traditional fault-based view of law: 'The requirement of discriminatory purpose is a clear outgrowth of compensatory principles,' not because intention is a necessary element of tort, but for other reasons including the principle that no innocent party should be held liable. Addressing inequalities would involve costs 'to be borne by people who played little or no role in "causing" the current inequalities of blacks and women.' *Id.* at 293 & 294.

thus been accomplished aggregating and disaggregating past discrimination over time and scope.¹⁸⁸

The emblematic case here would be *Washington v. Davis*, that upheld the D.C. police department's verbal skill test that had a clear disparate impact on black applicants. The Supreme Court was searching for discriminatory purpose but didn't find it, when narrowly looking at the adoption of the test. Had it been looking further, in the wider context, it could identify wider social practices based on discriminatory purpose. Daryl Levinson criticizes the focus of the court because it, arguably in an arbitrary way, decided to disregard part of the reality:

The Davis Court found no discriminatory purpose because it believed that the police department's motivation in administering the test was literacy and not race. But why focus solely on the purpose behind the test? The test's disproportionate impact on black applicants must have been in part a product of the intentionally segregated and unequal schools in the District. By enlarging the relevant transaction to include de jure school segregation along with the verbal skills test, the Court could have linked the racially discriminatory purpose to the causally connected, racially disparate effect and thus created an equal protection violation. Instead, the Court chose to disaggregate past de jure discrimination from present de facto discrimination, leaving the latter irremediable.¹⁸⁹

Fiss argues that the way the antidiscrimination principle has been devised by courts fits the way of thinking, the 'craft' of the courts rather than the real underlying dilemmas. Judges like the ill-fit, relative, mechanical test that can be applied to opticians vs. optometrists¹⁹⁰ as well as blacks vs. non-blacks. The illusion of a 'mechanical justice' serves the goal of showing that court decisions are not arbitrary, but neutral and objective. Individualized categories that seem to work without reference to groups and the wider social and political context are

¹⁸⁸ Levinson, *supra* note 159, at 1355.

¹⁸⁹ Levinson, *supra* note 159, at 1358–59.

¹⁹⁰ *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

avored over group-based notions. Universal categories, not confined to specific place and time, are perceived as better than categories that are highly context-dependent and may be specific to certain groups while not applying to others.¹⁹¹

For Fiss, all these benefits are illusory. Value-based ('substantive') judgements are required and made at various levels when applying the antidiscrimination principle, and it is impossible to explain the case law of the principle without reference to groups. Questions like what types of classifications trigger strict scrutiny and when and why affirmative action is permissible can only be answered with reference to groups, and the wider context. To mix metaphors, the individualist, neutrality-based view of justice can be seen as trading the Justitia's blindness of Justitia for the color-blindness of the opticians and optometrists.

As is apparent, equality can be approached from different perspectives and the equality principle can be interpreted in various ways. Following the structure of the comparative equality casebook by Oppenheimer, Foster and Han, equality can mean equal citizenship, neutrality, antisubordination, equal treatment, accommodation, diversity and reparative equality.¹⁹² While the collective procedural solution can be justified on any of these grounds, approaches that are more substantive (moving away from formal notions of equality) and more acknowledging of the group element are especially well suited to ground the need for collective judicial recognition.

The quest for the right approach ultimately isn't an individual vs. collective duel. The picture is more complex, requiring some individualism with an adequate regard for groups. In Kymlicka's summary:

¹⁹¹ Fiss, *supra* note 24, at 118–129.

¹⁹² DAVID BENJAMIN OPPENHEIMER, SHEILA R. FOSTER & SORA Y. HAN, *COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW: CASES, CODES, CONSTITUTIONS, AND COMMENTARY* (1st ed. 2012).

The problem is not that [the rejection of ethnic or national affiliations in political life] is too 'individualistic'. In many parts of the world, a healthy dose of individualism would provide a welcome respite from group-based conflict. The problem, rather, is that the response is simply incoherent [...for] political life has an inescapably national dimension [...that] give[s] a profound advantage to the members of majority nation.

We need to be aware of this, and the way it can alienate and disadvantage others, and take steps to prevent any resulting injustices. [...] Without such measures, talk of 'treating people as individuals' is itself just a cover for ethnic and national injustice.¹⁹³

It should be added that the inherently 'national dimension' in most cases includes the very guarantees that can provide protection against measures that disregard the existence of minorities. It is states and majorities that have decided on the relevant international and constitutional rules. An inclusive approach requires the legal acknowledgment of the diversity on the ground and sustained efforts for accommodation. The challenge is to identify the right type of difference, that requires such a response, and to identify this response. The paradox of equality is that it is a central concept in constitutional thinking yet its meaning and application remains elusive. As the Justice Rehnquist noted, the Equal Protection Clause 'creates a requirement of equal treatment to be applied to the process of legislation – legislation whose very purpose is to draw lines in such a way that different people are treated differently.'¹⁹⁴

The real question is, then, what differentiation should be deemed to be appropriate, justified and constitutional and what are the kinds of distinctions that should be seen as in violation of constitutional equality. Furthermore, such a violation can be not only the result of treating people in similar situation differently but also of treating people in different positions the same. Even if a legal system is willing to acknowledge groups and consider equality on the

¹⁹³ KYMLICKA, *supra* note 99, at 194.

¹⁹⁴ *Trimble v. Gordon* 430 U.S. 762, 779 (1977), J. Rehnquist, diss.

level of groups, inherent limitations should exist in constitutional democracies. Kymlicka narrows these constraints down to two principles: 'minority rights should not allow one group to dominate other groups; and they should not enable a group to oppress its own members.'¹⁹⁵ These constraints notwithstanding, the state has an obligation to respond to the underlying diversity of its population.

The type of inequality that the present thesis is directly concerned with stems from the bias of state, its legal system or, indeed, its constitution, towards a dominant cultural, religious, ethnic or national group; it is not equality in a broader, maybe more substantive sense. Where neutrality fails on this basic level, as it does, this results in a burden on non-members of the dominant group in areas like using their mother tongue, professing their religion and 'enjoying their culture.'¹⁹⁶ We have seen in the previous chapter how neutrality arguments lead to the recognition of the group level. To quote Kymlicka again,

*Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups. The state unavoidably promotes certain cultural identities, and thereby disadvantage others. Once we recognize this, we need to rethink the justice of minority-rights claims[.]*¹⁹⁷

This can at the same time be taken as a requirement for equal citizenship and equal treatment, for those who differ from the majority or dominant social group in the particular country. This is also to acknowledge and further diversity in a society where minorities live – practically all societies. Accommodation-based arguments lead in a more straightforward way to the conclusion that courts and court procedures have to be made more receptive of

¹⁹⁵ KYMLICKA, *supra* note 99, at 194.

¹⁹⁶ See Article 27 of the International Covenant on Civil and Political Rights and the discussion on it under 'Minority individuals and groups on the international level' in the previous chapter.

¹⁹⁷ KYMLICKA, *supra* note 99, at 108.

minority claims. Where equality is seen as a means to remedy concrete and past violations of equality, as per the reparation-based view, the logic of litigation offers a natural venue.

While the ideal of equality often features in law, especially constitutional law, the rule that equality should be enforced does little to unpack what conception of equality should be used.¹⁹⁸ As I have indicated, this thesis is concerned with ‘equalizing’ claims that now suffer largely because they come from minorities. They might not only fail the majoritarian political decision-making process, but also the judicial filter, due to, e.g., cultural distance stemming from a more collectivist understanding of claims and rights. This is closest to an anti-discrimination reading of equality that focuses on disadvantages based on group-belonging in contrast to non-group members in comparable situations. The anti-discrimination principle itself can take up different meanings and in law one can distinguish, as Fiss argues, the actual text and the mediating principle that lawyers actually apply. In the US context, the Fourteenth Amendment rule outlawing denial of equal protection (text) is usually interpreted as an anti-discrimination principle (a mediating principle). He further argues that one way to construe the principle is to take a group-based reading.¹⁹⁹ Sunstein argues, along the same lines, that what he calls the ‘anticaste principle’ should guide our constitutional reading of equality.²⁰⁰ Fiss also argues that it is odd to think about antidiscrimination without groups given that the Equal Protection Clause itself was adopted to benefit a group.²⁰¹ Yet, this does not show that

¹⁹⁸ See also the difference between concept and conception, in legal reasoning, by RONALD DWORKIN, *LAW’S EMPIRE* 90–96 (1986); and earlier, in the context of his theory of justice, talking about ‘conceptions of justice,’ see RAWLS, *supra* note 59.

¹⁹⁹ Fiss, *supra* note 24.

²⁰⁰ This principle ‘forbids social and legal practices from turning highly visible but morally irrelevant differences into a basis for second-class citizenship.’ Cass R. Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410, 2455 (1993-1994).

²⁰¹ Fiss, *supra* note 24, at 148.

it is impossible to have an antidiscrimination principle that is purely individualist, but simply shows the collectivist basis of this rule in the US context.

Recognizing groups might also be a practical move to enforce equality in a more individualist sense. Hurst Hannum argues that:

*The full and effective implementation of existing human rights norms would resolve the vast majority of contemporary “minority” complaints. [...] Nevertheless, it is clear that in many instances true group rights must be recognized in order to satisfy deeply felt needs.*²⁰²

The procedural solution matches this consideration, in a more modest form, by limiting this recognition to the judicial process and the goal of providing remedies. It is along these lines that Valdes frames the balancing potential of the class action device as the ‘antisubordination practice.’²⁰³ The collective procedural solution seeks to level the field²⁰⁴ and to shape our notion of equality by expanding the possibilities of judicial enforcement.²⁰⁵

To conclude this chapter, I will address a type of claim that illustrates how equality, in the limited sense of concern with proximity to the basic tenets of the legal system, is related to group claims and how the recognition of the collective aspect can bring benefits that go beyond the constraints of the proposal, including more equality in the distributive sense and autonomy. Indigenous land claims, as indigenous rights claims in general, are sometimes framed as historical claims, asking for compensation for historical injustice, sometimes as (timeless) equality claims, asking for the accommodation of their needs and practices, and often both. Concerning indigenous land rights, Kymlicka argues that although ‘the debate

²⁰² Hannum, *supra* note 88, at 474–475.

²⁰³ Valdes, *supra* note 165.

²⁰⁴ See the argument in more details under the section on ‘Empowerment: leverage by aggregation’ in the chapter ‘Groups.’

²⁰⁵ See more under ‘The innovative potential’ under the chapter ‘Judicial.’

over land claims is often couched in the language of compensatory justice,' the compensatory argument in itself can hardly justify the claims, without the redistributive, equality argument:²⁰⁶

*The aim of the equality argument is to provide the sort of land base needed to sustain the viability of self-governing minority communities, and hence to prevent unfair disadvantages with respect to cultural membership now and in the future. In short, the equality argument situates land claims within a theory of distributive justice, rather than compensatory justice.*²⁰⁷

In this sense, these claims fall properly within the realms of minority rights, because they do not work without the equality element. This also means that the compensatory element is considerably weakened, at least with regard to the loss of land: it is not primarily the fact of past takings that justifies remedies, but the present deprivation. This would bring indigenous claims closer to traditional minority rights claims. The remedial nature of minority rights²⁰⁸ does not only relate to loss in the sense of losing property, however. Patrick Macklem talks about minority rights as a form of 'compensation' – he calls this the 'distributive view' – for the state structure that left some groups in minority position.²⁰⁹

Being 'deprived' of a state is only a violation under a broad concept, not in the tradition sense of, e.g., takings that took place as part of, and as a result of, colonization and genocidal actions. The 'distributive view' can rely on the neutrality argument, deprivation being about

²⁰⁶ KYMLICKA, *supra* note 99, at 219–220 n.5.

²⁰⁷ *Id.* at 220 n.5.

²⁰⁸ The question of 'remedial' rights was raised in the discussion around the independence of Kosovo, concerning what could also be termed as the 'maximum of land claims,' with a collective and public law element: self-determination and power over the territory and its population. Some countries tried to justify the independence of Kosovo on remedial grounds, an argument that the ICJ advisory opinion did not endorse. See, e.g., the symposium in the *Leiden Journal of International Law*, Vol. 24 Issue 1, and Hurst Hannum's contribution: Hurst Hannum, *The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?*, 24 *LEIDEN J. INT'L L.* 155 (2011), in particular the section 'The Scope of Self-Determination and Remedial Secession' at 156–159. The opinion: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Rep. 2010, 403.

²⁰⁹ Macklem, *supra* note 138.

living under a legal and political regime that is biased against the way of living of a minority. Minority rights might be inherently remedial in that they are designed under the perception that the minority culture is losing out against the dominant culture (e.g., by less and less people speaking the language); or it can mean that there is a perceived threat that something like this might happen and the law is aimed at keeping the balance, protecting the group (members) against this danger etc. For example, the Supreme Court of Canada agreed with the appellants in *Mahe v. Alberta* that Section 23 of the Canadian Charter of Rights and Freedoms ‘was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the “equal partnership” of the two official language groups in the context of education.’²¹⁰

This is not about any specific historical violation that requires judicial response, but about rights developing, as in most cases they did, as a response to violations – but once they are recognized, they provide protection without depending on an actual violation. It is especially apparent how the indigenous peoples’ rights are reflective of actual historical violations. The UN Declaration on the Rights of Indigenous Peoples is heavily informed by historical and ongoing violations, with specific clauses seeking to guarantee land rights, protection against genocide and forced assimilation, requiring consent, protection against military use of the land etc. The clauses on land rights as well as the notions of tradition, custom and heritage link the rights to history, but these are nevertheless free-standing rights, regardless of whether a particular community has actually been affected by any of these violations historically. The goal of the Declaration is also forward-looking, seeking to secure the long-

²¹⁰ *Mahe v. Alberta*, Supreme Court (Canada) [1990] 1 S.C.R. 342, 364.

term survival of indigenous groups: '[t]he rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.'²¹¹

The proper distinction is not between rights that are remedial and those that are not, but whether the application of a certain right is dependent on some earlier act, e.g., the continued occupation of a land or a title. Minority rights guarantees apply to all groups and their members, and in this sense they are not remedial. Against this we find that many minority claims are 'tainted,' legally or otherwise, with historical claims. The compensatory logic, pervasive in tort law and beyond, makes law more sensitive to arguments about loss than wider claims of equality, especially where rooted in the notion of an inherent bias in majority institutions. Land claims and usage rights are also a good example for how courts take prior occupation as a basis for recognition.²¹²

The collective procedural solution does not make this problem go away, but emboldens the ability of the courts to consider broader equality arguments, presented on the level of the groups (see later, e.g., in the sections on 'Litigating rights...' and 'The limits of monetary remedies'). The historical argument can also serve as a basis for the shift of the burden of proof, as we will see in the section 'Shifting the burden of proof.'

The example of indigenous land claims does not mean that implementing the proposal for a collective procedure will always bring benefits under a broader concept of equality that includes welfare and sharing power with (and recognizing) constituent communities. To the contrary, it is to defend the constraints of the proposal in its focus on a narrower concept of

²¹¹ United Nations Declaration on the Rights of Indigenous Peoples art. 43, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (September 13, 2007).

²¹² See, e.g., fishing rights in *R. v. Van Der Peet*, Supreme Court (Canada) [1996] 2 S.C.R. 507. For a more recent overview, see David M. Rosenberg & Jack Woodward, *The Tsilhqot'in Case: The Recognition and Affirmation of Aboriginal Title in Canada*, 48 U.B.C. L. REV. 943 (2015).

equality, focusing on systemic disadvantages due to the structure of the state and the legal system, by showing how this limited approach can bring benefits that transcend these boundaries. More importantly, as I hope I have demonstrated, regard for the group level is central to many concepts of equality; and, as a result, a legal system and a judiciary that allows for group litigation will be more successful in accommodating corresponding claims that, most prominently for this thesis, include minority claims.

2.3 CLASS ACTIONS: COLLECTIVE PROCEDURES IN THE UNITED STATES

As the overview in Chapter 1 shows, Western legal systems lean towards the individual level. The United States in particular is described as a society with a strong tradition in individualism. Yet, it is this country, and not in what is usually seen as the more ‘collectivist’ European continent, that has the most experience with a collective type of litigation, class actions. As Dubinsky notes: ‘The class action lawsuit is our grand procedural experiment in collective justice. As against the U.S. legal system’s strong orientation toward individual rights rather than group rights, the class action is a countercurrent.’²¹³

Note that the fact that the class action device is not specific to the US, even if the experiences and the vast amount of literature warrant that the US debates are the most prominent and informative ones. For an overview of class actions around the world, see the Global Class Action Exchange at Stanford Law School.²¹⁴

For the readers who are not familiar with the US class action device, I provide here a brief overview of the history and the content of Rule 23 of the Federal Rules of Civil Procedure. A

²¹³ Dubinsky, *supra* note 174, at 1152.

²¹⁴ <http://globalclassactions.stanford.edu/>

final section gives a short introduction into how the class action device was used to litigate rights violations abroad, by relying on the Alien Tort Claims Act.

2.3.1 The history of class actions

Group litigation today, in the context of a Western legal system, clearly requires additional support, a specific legal norm that *allows* for such procedures. This sounds obvious, but it has not always been the case. It is only in light of today's Western legal systems that pre-twentieth century collective litigation might look surprising. Early English law routinely dealt with unincorporated group parties. With the requirement of corporation and later developments, group litigation slowly disappeared in England, but in the United States this type of procedure survived for longer.²¹⁵

Yeazell argues that '[t]he modern class action can trace its roots to a procedure invented by Chancery in the seventeenth century to cope with disputes between rural tenants and landlords, parishioners and parsons.'²¹⁶ More specifically, he connects the underlying question of group litigation, the issue of what representation in litigation is about, to the political debates around political representation in nineteenth century Britain:

*During the first half of the nineteenth century the British polity fought a series of battles over the appropriate form of government. In this overtly political realm the opposing forces struggled over the concept of representation, a question that had been lurking, only occasionally recognized, in the annals of group litigation since its beginnings.*²¹⁷

²¹⁵ For an extensive historical overview, distinguishing three periods, the medieval, the transitional and the modern, in the role of groups in litigation, see STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1988).

²¹⁶ Stephen C. Yeazell, *From Group Litigation To Class Action. Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1067 (1979-1980).

²¹⁷ *Id.* at 1069.

Rule 23 of the Federal Rules of Civil Procedure, the current provision on class actions, was adopted in 1938, yet, it was the comprehensive amendment in 1966 that made it more easily applicable in a way that is known today.²¹⁸ This coincided with the civil rights era in American law, and the link is not accidental: Yeazell argues that Rule 23 was meant to facilitate the desegregation litigation of the NAACP and its Legal Defense and Education Fund.²¹⁹ Civil right cases have played an important role in expanding the role of litigation and access to courts in a wider sense, as argued by Yeazell, mostly due to the activities of the NCAAP and the Supreme Court’s protection of its activities against state legislatures. The Court summarized its relevant practice as follows: ‘The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment.’²²⁰ The link between class action and civil rights enforcement has remained strong ever since: ‘the class action device [...] plays a special role in the civil rights context’; and limiting class actions fall ‘particularly hard’ on civil rights claims.²²¹

While there are divergent views about what was the main source of motivation for the 1966 revision,²²² ranging from mere technical amendments to substantial rewriting of the rules, John Frank, a member of the Advisory Committee described the context of the modifications as follows:

the race relations echo of that decade was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a

²¹⁸ Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1683 (2013).

²¹⁹ YEAZELL, *supra* note 215, at 279.

²²⁰ *Bates v. State Bar of Arizona*, 433 U.S. 355 at 377 n.32 (1977), cited by Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1990 (2004).

²²¹ Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 850 n.38 (2016) quoting Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 484–508 (2014).

²²² ‘Practitioners and scholars have told different stories about the forces that motivated the 1966 revision of Rule 23.’ DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 12 (2000).

class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

The other factor is that 1964 was the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who must not exploit the whole population, of a fairly simplistic good guy–bad guy outlook on the world, had its consequences.²²³

Others, like Arthur Miller, think that these wider social goals were not in the forefront, maintaining that the Committee ‘had few, if any, revolutionary notions about its work product.’ Judith Resnik concludes that the Committee was mainly concerned with the judges’ and lawyers’ ‘impatience’ with the earlier framework.²²⁴

Regardless of the actual history of the amendments themselves, it is retrospectively clear that class action came to be seen ‘as a vehicle for privatized enforcement of legal rights.’²²⁵ The strong connection between class action and civil rights, at least in the early decades after the amendments, was also apparent. In 1982, the Ontario Law Reform Commission could note that ‘[c]ivil rights suits constitute the greatest number of class actions in the United States federal courts; well in excess of fifty percent’ of all federal cases.²²⁶ Civil rights can and do involve tort claims, but it was the era of the ‘mass torts’ that brought about a fundamental change in how class action is used and seen: ‘a new controversy over Rule 23 was brewing. The 1980s saw the rise of a new form of litigation, the mass tort suit.’²²⁷

²²³ John P. Frank, “Response to 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee,” (Dec. 20, 1996), in Administrative Office of the U.S. Courts, 2 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23 266 (1997), quoted in HENSLER ET AL., *supra* note 222, at 12.

²²⁴ Miller, *supra* note 167, at 669; and Judith Resnik, *From ‘Cases’ To ‘Litigation,’* 54 LAW & CONTEMP. PROBS. 5, 8 (1991), respectively. Both opinions cited in HENSLER ET AL., *supra* note 222, at 12.

²²⁵ Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 605 (2008).

²²⁶ OLRC REPORT, *supra* note 163, at 219.

²²⁷ HENSLER ET AL., *supra* note 222, at 23.

As soon as class action became an important device in addressing inequality and widespread harm, the opponents also became vocal. While ‘judicial decisions in cases brought soon after the adoption of the re-revised Rule 23 came down on the side of a liberal application of the class action rule, [...]he popular and business presses were soon replete with complaints of excessive litigation under Rule 23(b)(3) imposing unreasonable burdens on courts and corporations.’²²⁸ Arthur Miller referred, already in 1978-79, to the more than a decade long ‘holy war over Rule 23.’²²⁹ Fiss, more recently, described the recent decades in two phases:

*The momentum behind the concept of the private attorney general and thus of the class action was at its strongest during the 1960s and the Warren Court era. In the 1970s and 1980s, American politics and American law moved to the Rights, and, in that climate, the class action became a frequent target of conservative forces.*²³⁰

Today with developments that include *Falcon*, *Amchem*, *Ortiz* and the Class Action Fairness Act and later *Concepcion*, *Comcast* or *Dukes*, commentators wonder whether we hear the ‘death knell of class actions.’²³¹ Without presenting all cases,²³² they are generally seen as

²²⁸ HENSLER ET AL., *supra* note 222, at 15.

²²⁹ Miller, *supra* note 224. Quoted by Valdes, *supra* note 165, at 644.

²³⁰ Fiss, *supra* note 162, at 30. Note that he adds that he still finds a purely political explanation insufficient in itself. *Id.* at 31.

²³¹ Scott Dodson, *Squeezing class actions*, SCOTUSBLOG (August 30, 2011), <http://www.scotusblog.com/2011/08/squeezing-class-actions/>. From the burdening literature, see, e.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. L. REV. 729 (2013); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012); Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-Mart v. Dukes*, 62 DEPAUL L. REV. 659 (2013); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014); Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 153 (2015).

²³² A quick take on them: *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) (applying a strict standard of ‘typicality’); *AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (interpreting the predominance requirement as precluding class certification in an asbestos exposure case because of diverging interest, most importantly of those who have realized the injury at the time of the settlement and those who have not); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (applying a stricter certification standard for the limited fund type class actions, for an asbestos settlement); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (allowing the use of arbitration clauses to exclude the possibility of class action litigation); *Wal-Mart Stores, Inc. v. Dukes*, 564 US ____ (2011) (managerial discretion means that the claim alleging discriminatory practices concerning the 1.5 million women employees cannot be litigated as a class action); *Comcast Corp., et al. v. Caroline Behrend, et al.*, 569 US ____ (2013) (denying certification in an antitrust law suit due finding that the individual damages overwhelm commonalities).

major steps, from the side of the US Supreme Court, to cut back the possibility to bring class actions. Maureen Carroll argues that the (judicial) backlash against class action is primarily a result of criticism concerning the damage-aggregation class actions and its devastating effect on other types of class action, including rights litigation, was only accidental.²³³ Linda S. Mullenix also argues that criticism raised in the mass tort context is the root cause of the assault on class actions: ‘The ascendancy of the damage class action has been accompanied by the panoply of problems that bring class litigation into disrepute,’ and ‘[m]any of the class action harms that have developed recently would be avoided with elimination of the damage class action from the rule.’²³⁴ Indeed, today’s standards could have eliminated many of the classical, post-*Brown* civil rights class actions.²³⁵ Dubinsky notes, against a history of civil rights class actions, that the

*current jurisprudence under Rule 23, while perhaps adequate for much tort and commercial class action litigation, falls short of the pursuit of full and useful reparations in human rights class actions, where the effects of widespread and severe oppression go beyond individual injury.*²³⁶

The overview shows the pivotal role of the Supreme Court in shaping the landscape of class litigation. The justice to replace Justice Scalia, the author of the two recent leading class action decisions (*Concepcion* and *Dukes*), might cast the decisive vote in class action cases in the years to come.

2.3.2 The rule for class actions

The Federal Rules of Civil Procedure, including Rule 23, has a special status in terms of its adoption. Bronsteen and Fiss even claim that ‘Rule 23 lacks the force of the law, as that term

²³³ Carroll, *supra* note 221.

²³⁴ Mullenix, *supra* note 231, at 439–40, cited also in Carroll, *supra* note 221, at 850 n.36.

²³⁵ *Cf.* Carroll, *supra* note 221, at 850.

²³⁶ Dubinsky, *supra* note 174, at 1179.

is ordinarily understood.²³⁷ The Rules are adopted by the Judicial Conference of the United States, and it is the Supreme Court that sends them to Congress that can then reject it. It is hard to define what it is: it is not a statute, not a judicial decision, and not an administrative regulation, but a bit of all.²³⁸ Fiss argues elsewhere that the rules actually do not bind the Supreme Court:

*In my view, the [Supreme] Court was not bound by this rule or, for that matter, any other of the class action rules because the process by which the federal rules were promulgated was unable to generate rules that might be able to bind the Court in any meaningful sense of that word.*²³⁹

The rule includes four preconditions and four types of class actions and four preconditions. The requirements are usually described as those of numerosity, commonality, typicality and adequacy. Note that in the case of minority claims, most of these would be readily given, with a sizeable group suffering similar violations:

Rule 23(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
*(4) the representative parties will fairly and adequately protect the interests of the class.*²⁴⁰

²³⁷ John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1451 (2003).

²³⁸ See, along these lines, *id.* at 1450–51.

²³⁹ Fiss, *supra* note 162, at 29, with emphasis in the original.

²⁴⁰ In other jurisdictions, usually similar requisites are set, see, e.g., the Code of Civil Procedure of Quebec, 1003, adopted in 1978, before the Canada-wide class action rule:

The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(a) the recourses of the members raise identical, similar or related questions of law or fact;

(b) the facts alleged seem to justify the conclusions sought;

(c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

Bronsteen and Fiss argue that the conditions and the types are illogical in their present form, and would amend the entire Rule. The revision that they propose would include the elevation of the superiority requirement to the level of general conditions, claiming that ‘class actions should be allowed only when there is no good alternative.’²⁴¹

Predominance and superiority are additional conditions to the aggregate or mass-tort type. This is based on the difference between the various types of class action. The present (post-1966) form of class action formally encompasses four types of group litigation. Carroll calls these ‘logical-indivisibility, limited-fund, injunctive civil-rights, and aggregated-damages class actions, respectively.’²⁴²

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.²⁴³

²⁴¹ Bronsteen & Fiss, *supra* note 237, at 1424. The question is, of course, what counts as a ‘good alternative.’

²⁴² Carroll, *supra* note 221, at 848.

²⁴³ Rule 23(b)(3) continues:

The matters pertinent to these findings include:

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

Bronsteen and Fiss describe the four-type class action rule as composed of ‘three pigeonholes’ and ‘a catchall’ clause, the last type, i.e., Rule 23(b)(3).²⁴⁴ The four rules can be put under two categories with different rationales. One is the concern with remedies that touch upon the rights of absent members (the threat of inconsistency and dispositiveness); and the other is the concern with dispersed claims that are not viable individually (injunction, declaration and the efficiency of aggregation).

The relations of the various types are not without problems. Carrol describes how criticism of one type of class action had a detrimental effect on all types:

*The current class-action debate generally relies on an underlying assumption that denying certification usually does represent an effective response to concerns about class treatment. This assumption itself arises from the context of the aggregated-damages class action, where denying certification can be expected to lead to the abandonment of individually low-value claims and the nonclass litigation of individually high-value claims.*²⁴⁵

Something might work in the mass-damages context but not in the context where individual claims are viable in themselves. If the solution relies on an assumption that is valid only in a subset of cases, other sets of cases will suffer – as the recent history of class actions in the US has shown.

A further problem with the present solution of Rule 23 is that the recognition of the group, class certification is dependent on the type of remedy sought by the plaintiffs. However, in a typical rights violation case, the remedy will be injunction, declaration *and* compensation, all at the same time: the court will declare the violation, calls for the end of the rights violating practice and award compensation to those already wronged. The hybrid type of the remedies

(D) the likely difficulties in managing a class action.

²⁴⁴ Bronsteen & Fiss, *supra* note 237, at 1434.

²⁴⁵ Carroll, *supra* note 221, at 903.

will create a difficulty in deciding under which rubric the claim will belong and what conditions should the class action satisfy exactly to be certified. Bronsteen and Fiss suggest an amendment because '[t]he judicial inquiry should not vary depending on the remedy sought.'²⁴⁶

A key element of class action is the judicial decision to recognize the collectivity: class certification. The history of class certification shows the transition from one extreme to the other.²⁴⁷ In a 1974 case, the US Supreme Court held that Rule 23 does not allow a court to enter the merits when deciding on whether the class action should be maintained.²⁴⁸ At the other extreme, the *Wal-Mart* decision from 2011 and the *Comcast* decision from require the demonstration that all class members (actually) suffered the same harm, going deeply into the merits.²⁴⁹

Carroll, following Marcus, suggests that 'the injunctive civil-rights' class action rule should allow 'certification based on no greater showing than that required to establish the plaintiffs' standing.'²⁵⁰ Why this is not happening, and why certification has become the greatest hurdle for class actions? The question what role class certification (preliminary procedural group recognition) plays cannot be answered without considering the full context of group litigation. In the US, the prevailing fear is that certification itself will push the defendant(s) to settle, regardless of the merits of the claims.²⁵¹ Without entering that debate here, this phenomenon

²⁴⁶ Bronsteen & Fiss, *supra* note 237, at 1433.

²⁴⁷ See, e.g., the short overview in Schwartz, *supra* note 218, at 1672–73.

²⁴⁸ Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

²⁴⁹ Wal-Mart Stores, Inc. v. Dukes, 564 US ____ (2011) and Comcast Corp., et al. v. Caroline Behrend, et al., 569 US ____ (2013).

²⁵⁰ Carroll, *supra* note 221, at 905, citing David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 828 (2016) (in Carroll's article, still as forthcoming publication manuscript, 58).

²⁵¹ This is the most common criticism levied against class actions, appearing in amicus briefs and statements often made by or on behalf of business entities, claiming not only the settlement pressure but the threat of bankruptcy, even in case of 'frivolous' claims. A term often used is 'blackmail settlements.' See Ted Frank's 'Center for Class Action Fairness' or amici from the cases cited earlier. One example: Brief of DRI—The Voice of

and the related fear might also show the empowering potential of group recognition: The sole fact that a court allows plaintiffs to appear as one ('stand united') before the court makes them appear as powerful as a large corporation (even if this is a one-time possibility, and the coordinated action of a large business entity applies its force on an everyday level). The fairness of this empowerment depends to a great extent on whether the recognized collectivity will also be held responsible, if losing the case, for the huge expenses that occurred caused by the group litigation, on both sides. (In addition to insurance plans that mitigate the potential of bankruptcy.)

The act of judicial collective recognition (class certification) can create such a strong pressure on defendants to settle, in general, that the only adequate remedy seemed to be to make class certification itself harder – or even unavailable under certain circumstances. Now, for example, potential claimants can be prevented from suing as a class by inserting an arbitration clause excluding the possibility of class action, a formula routinely applied by various service providers. Pushing substantial inquiries to the pre-certification stage also serves the goal to increase the burden for certification. The other, harder, way would have been to address the causes of the pressure to settle, other than the mere act of certification. Such an approach could mean that the baby is not thrown out with the bathwater, and the aggregating and rights and remedy maximizing potential of class action is saved, preventing, for example, defendants to run free with a large number of small harms. Class certification might in many cases simply mean that the imbalance between the two parties, one unified and the other

the Defense Bar as Amicus Curiae in Support of Petitioner at 3, *Wal-Mart*, 131 S.Ct. 2541 (No. 10-277), 2011 WL 288903. There are voices in the literature that question this, claiming that these statements are based on 'factual assertions that are questionable or unproven.' Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003). Cited in Schwartz, *supra* note 218, at 1674 & 1692.

dispersed, is equalized. Preventing aggregation does not solve the right problem, but puts us back to the default position of imbalance, in most cases.²⁵²

It is yet to be seen to which direction the US Supreme Court, that has an immense power in defining the future of class action, turns, considering that a new justice to be elected after the death of Justice Antonin Scalia can tip the balance. The wider lessons for group litigation and judicial collective recognition are, however, clear: the threat of group litigation can become too costly,²⁵³ especially from a business perspective, that can result in a backlash against the institution itself, rather than addressing the more complex causes of the problem, like litigation costs and insurance plans.

2.3.3 Class actions and the Alien Tort Claims Act

Many rights based class actions brought in the US are about claims based on violations that did not happen on US soil. Some class action cases cited in the thesis made use of the Alien Tort Claims Act, an old litigation device revived in the 1980s. The rule is adopted by a 19th century act, and it was its 20th century interpretation that allowed for such actions to be brought. The Alien Tort Claims Act, Alien Tort Statute (28 U.S.C. § 1350) grants universal jurisdiction for tort actions for certain violations of international law.²⁵⁴

²⁵² Schwartz summarizes this based on data on the settlement pressure of class certification from a 1996 study of the Federal Judicial Center: 'the grant of class certification may be less a death sentence for defendants than the denial of class certification is a death sentence for plaintiffs.' The judicial shift making certification harder means that there will be more of such death sentences. Schwartz, *supra* note 218, at 1694. The study cited therein: THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61* (1996).

²⁵³ Note also that requiring substantial discovery in the pre-certification stage will mean that most of the costs will be occurred at that point, which will not allow for too much cost-saving by the denial of certification. For this point, see Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 *GEO. WASH. L. REV.* 324, 356 (2011).

²⁵⁴ For an excellent overview of the revival and decline of this clause, see Ruti Teitel, *The Alien Tort and the Global Rule of Law*, 57 *INT'L SOC. SCI. J.* 551 (2005).

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

After its adoption in 1789, the Act was largely considered dormant. Starting with a 1980 case, courts started to consider rights violation cases from abroad if they are about violations of the 'laws of the nations' that included torture, genocide and war crimes. In the flagship case, *Filartiga*, a Paraguayan victim of torture brought a claim against a Paraguayan police officer. The Second Circuit held that it had jurisdiction based on ATCA.²⁵⁵ (Note that after 1991 a specific rule can provide a more solid basis for torture victims, the Torture Victim Protection Act.²⁵⁶)

In a famous ATCA-based class action case, Philippine nationals sued their former dictator, Ferdinand Marcos. The Ninth Circuit upheld the class certification under these terms: '[a]ll current civilian citizens of the Republic of the Philippines, their heirs and beneficiaries, who between 1972 and 1986 were tortured, summarily executed or disappeared while in the custody of military or paramilitary groups,' including some 10,000 people.²⁵⁷ Further actions brought under the Act include Holocaust²⁵⁸ and apartheid claims,²⁵⁹ war crimes claims from the post-Yugoslav region²⁶⁰ and other torture claims.²⁶¹

Maatman sees 'extraterritorial' litigation as a trend

²⁵⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁵⁶ Torture Victim Protection Act, 28 U.S.C. § 1350 (2000).

²⁵⁷ *Hilao v. Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996), quoted in George A. Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181, 185 (2006-2007).

²⁵⁸ See, e.g., *In re Holocaust Victim Assets Litigation*, No. CV-96-4849, 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000).

²⁵⁹ See, e.g., *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (2002).

²⁶⁰ See, e.g., *Jane Doe I v. Karadzic* 176 F.R.D. 458 (S.D.N.Y. 1997).

²⁶¹ See, e.g., *Daimler Ag. v. Bauman et al.*, 644 F. 3d 909 (Argentinian Mercedes factory cooperating with oppressive state and leading to torture, not enough connections to be sued in CA (Ginsburg); Sotomayor, conc.).

*in which multinational corporations are increasingly being held to task in litigation forums for their human rights performance in foreign countries. Most often, corporations are sued in their home jurisdiction on the basis of allegations of human rights breaches arising from the corporation's activities in a foreign jurisdiction. Almost always, these cases take the form of a class action.*²⁶²

This is a positive take on how class actions and universal jurisdiction can increase the ability of the legal system to require compliance even on the global scale. Yet, while *Filartiga* opened the way for this type of litigation in the US, a more recent decision, *Kiobel* seems to have closed the door for claims based on truly universal jurisdiction, requiring a significant connection between the harm and the United States.²⁶³ The 25-year experiment nevertheless provides important insight into the possibilities of expanding the potential of large-scale private enforcement.

In what follows I will elaborate on the benefits and possible limitations of the solution that seeks to provide 'judicial' 'remedies' for 'groups,' under sections organized around those three aspects of the proposal.

²⁶² Gerald L. Maatman, Jr., *Class Action Litigation Over International Human Rights Issues.*, 3 J. EMP. DISCRIM. L. 9, 10 (2001).

²⁶³ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. ____ (2013).

3 'JUDICIAL:' INSTITUTIONAL AND STRUCTURAL QUESTIONS OF LITIGATION

The procedural solution is 'judicial' because it relies primarily²⁶⁴ on courts or – especially in the international human rights context – quasi-judicial bodies. It is these forums that should decide on the recognition of the collectivity, the boundaries of the collectivity, individual guarantees and adequate representation, in addition to the merits of the underlying claims. The central question that this chapter raises whether courts are the right forum for deciding such claims. A possible criticism of the collective procedural proposal is that it politicizes litigation instead of neutralizing (a set of) minority claims. Yeazell notes in his historical overview of class actions that 'as the size of the represented group increases, group litigation begins to resemble politics.'²⁶⁵ This raises an important point about the nature of rights litigation, especially when it comes to enforcing politically sensitive minority claims through courts.

Allowing courts to deal with collectivities might seem like a step towards more intrusion into the sphere reserved for political bodies. One formulation is the antimajoritarian difficulty that can result in a challenge to the courts' legitimacy. If courts deal with entire sections of the society and deal with disputes between groups rather than individuals, it makes a court procedure resemble political struggles. This can be seen as a separation of powers dilemma or a criticism of creating unchecked power. Judicial managerialism, usually inherent to collective litigation, is often perceived as a 'serious judicial usurpation of the functions of the

²⁶⁴ See the 'dialogue argument' below for how other institutions share the responsibility for adequate enforcement.

²⁶⁵ Yeazell, *supra* note 160, at 515.

legislature.²⁶⁶ Yet, some judgments are necessarily of a collective nature, as we will see later.²⁶⁷ Judgments requiring structural changes will involve a larger body of people. The same might be true of strictly individual awards that set a precedent guiding national policy on wider issues like same-sex marriage or health care. All the collective judicial recognition seeks to do is to formalize the connection between the interested group and both the court procedure and the remedy, in cases of minority claims. From this angle, the legitimacy challenge seems less convincing. Under a more substantive reading, the legitimacy of collective procedural solution will depend on the adequacy of the procedure and that of the collective award.

While the overview below offers arguments for why courts are particularly well placed to litigate minority claims, and that collective judgments can also be justified, it is important to see that the collective procedural solution does not rely on the claim that courts are necessarily better in assessing minority claims. To see the advantages of the solution it is enough to accept the judicial way as a backup option, an additional layer of protection in cases where minorities and their claims are not recognized by majoritarian decision-making. If courts function as 'gates,'²⁶⁸ in the case of minority claims, they open new gates where the political door is closed. A minimalist account to defend the collective procedural solution relies on the insight that institutions matter and wherever minority claims can take refuge should be made use of.

The arguments for the special role of courts is further weakened by the insight that what ultimately counts are not judgments but enforcement. The connection between rights and

²⁶⁶ H. Patrick Glenn, *Class Actions in Ontario and Quebec*, 62:3 CAN. BAR REV. 247, 270-73 (1984), quoted in Catherine Piché, *The Cultural Analysis of Class Action Law*, 2 J. CIV. L. STUD. 101, 120 (2009).

²⁶⁷ See the chapter on 'Remedies.'

²⁶⁸ For an overview of the analogy, see, e.g., Schwartz, *supra* note 218, at 1654.

justiciability has preoccupied legal theorists for long.²⁶⁹ Asbjørn Eide argues, in the context of socio-economic rights, that the ultimate question is not about justiciability, but effective protection.²⁷⁰ Martin Scheinin concludes that international and national mechanisms should be seen primarily as ‘a contribution towards the effective protection’ of rights.²⁷¹ Any lawyer in practice can confirm that having a favorable judgment is only the first part of the victory, that should be followed by voluntary compliance or effective enforcement. The proposal of this thesis aims to strengthen private judicial enforcement as part of a larger effort towards protecting minority rights and accommodating minority claims. While I will primarily focus on courts in a national jurisdiction, most arguments will, *mutatis mutandis*, apply to international and/or quasi-judicial bodies. It is assumed in all cases that guarantees of independence are in place.

I will start with the question of whether judicial bodies are actually the right forum to deal with collective claims. This might seem to go against well-established guarantees of separation of powers and challenge the traditional role of judges. After the general overview, I will assess more closely the question of whether the arguments hold in the minority context. An additional argument is offered to show why judicial guarantees are properly considered an added layer of protection: because they allow private enforcement even if public bodies would otherwise not act to counter violations. These sections will revisit some of the questions addressed in Chapter 1 on collective rights (1.3), albeit from a different angle: here the focus is on the structural aspect of the same issues, whether courts ought to be enforcing

²⁶⁹ See, e.g., Raz, *supra* note 71.

²⁷⁰ Asbjørn Eide, *Future Protection of Economic and Social Rights in Europe*, in MONITORING HUMAN RIGHTS IN EUROPE: COMPARING INTERNATIONAL PROCEDURES AND MECHANISMS 214 (A. Bloed et al. ed., 1993), quoted by Martin Scheinin, *Economic and Social Rights As Legal Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 62 (A. Eide, C. Krauss & A. Rosas ed., 2001).

²⁷¹ *Ibid.*

these rights. The chapter concludes that there is no general problem with collective judgments under the separation of powers doctrine.

The proposal is defended against the claim, that the thesis otherwise accepts, that courts are also not free from the biases of majority institutions. Courts operating in a constitutional regime are expected, more than other decision-makers, to render principled decisions that respond to specific, legally formulated claims, without having too much direct institutional stake in the outcome. But whether they succeed is an empirical question. Yet, courts can still play an important role in that they can offer an additional level of protection where other institutions, under more direct political influence, fail. Based on a broader view of enforcement, also considering the wider (not only judicial) setting of litigation, I argue that courts have an important role to play in enforcing minority rights, even considering their limitations. The dialogue argument is presented as an intermediary view on how court decisions should be seen as only one part, even if a key part, of a larger framework that is responsible for minority rights enforcement.

Finally, the chapter will consider the innovative potential of the proposal, triggering a change in how rights are perceived, and four areas where collective procedures offer benefits, especially concerning minority claims, by extending access to justice: in financing litigation, broadening standing, expanding the relevant time frame and through judicial economy as a result of aggregation.

3.1 THE LEGITIMACY OF COLLECTIVE JUDGMENTS: SEPARATION OF POWERS AND THE PROPER ROLE OF JUDGES

We can assess the validity of the separation of powers criticism if we go back to the original idea. In Montesquieu's famous account, there are three branches of power: legislative, executive and judicial. Allowing one person or body to exercise more than one of these functions is to allow despotism. He defines legislative power as the adoption and amendment of laws; executive power as making war and peace, send and receive ambassadors, maintaining security and preventing invasions; and judicial power as the punishment of crimes and settling disputes between individuals.²⁷² It is apparent that his definitions reflect state responsibilities of another time, and also that the tasks of the judiciary are framed in individual terms: targeting criminals and legal disputes between individuals. Yet, if we look at the formulation of the danger he identifies, group litigation does not seem to be excluded.

Montesquieu argues that the combination of legislative and judicial power leads to arbitrary decisions, because it would be the judge who would set the law upon which the decisions relies. If the judiciary had executive powers, the power of force, that would make it oppressive.²⁷³ Allowing collective procedures does not alter the basic structure where legislation is made outside of courts. It also does not alter the setup where the power to

²⁷² *Il y a dans chaque État trois sortes de pouvoirs : la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.*

Par la première, le prince ou le magistrat fait des lois pour un temps ou pour toujours, et corrige ou abroge celles qui sont faites. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions. Par la troisième, il punit les crimes, ou juge les différends des particuliers. On appellera cette dernière la puissance de juger, et l'autre simplement la puissance exécutrice de l'État.

MONTESQUIEU, DE L'ESPRIT DES LOIS, Deuxième partie (livres IX à XIII), Livre XI: des lois qui forment la liberté politique dans son rapport avec la constitution, Chapitre VI: De la constitution d'Angleterre (1748).

²⁷³ *Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire : car le juge serait législateur. Si elle était jointe à la puissance exécutrice, le juge pourrait avoir la force d'un oppresseur.*

Ibid.

execute decisions lies outside of the judiciary. This means that separation of powers concern, viewed through a functionalist lens, cannot be used to discredit collective judicial procedures.

Furthermore, the checks and balances approach allows for mixing the tasks belonging to separate branches, under Montesquieu's classification, as long as it is made sure that no power thus granted goes without a corresponding power checking it. It is clear from the preceding that collective procedures leave the basic structure untouched: it is still the executive that has the power to act and enforce and the legislature is still responsible for writing laws. If anything, collective procedures can add to the power of the judiciary to check on political branches. The opposition to courts dealing with larger groups can be more of a reflection of individualist inclinations and maybe also a result of shying away from judgments with far-reaching consequences than caution in face of an actual threat to the basic structure of government.

Courts might resist dealing with larger groups because of the wider impact. Part of this might be based on misrepresentation: consistent (and, in fact, even inconsistent) case law has the effect of guiding behavior. Companies calculating risks will rely on the likely determination of whom the courts will find liable. Public bodies will design policies that take into account the scrutiny it is likely to get from courts. Trying to avoid wider policy implications of court decision is a futile judicial goal. But part of the argument might be well-founded. In certain cases, one class action decision can be stronger than many non-class awards. The Supreme Court of Canada argued that a class action award

may mean, in practical terms, the end to many claims which, mathematically at least, may amount to about five million dollars[, ...and] having regard to the practices in the modern market-place [...], it is not an unreasonable risk that the vendor undertakes if he is now found to be exposed to class actions by dissatisfied purchasers. [...] These, of course, are matters of policy more

*fittingly the subject of scrutiny in the legislative rather than the judicial chamber.*²⁷⁴

The wider impact argument, from the first part of the quote, follows from the benefit of collective procedures regarding judicial economy²⁷⁵ that group litigation will likely have a stronger impact. Isn't it a measure of the effectivity of court decisions that they guide market behavior, among others? The last part of the argument seems to confuse this impact, that is desirable, with the power of the legislature to set general rules that also frame behavior. That the legislature has the power to alter the framework does not exclude the exercise of judicial power in that area. After all, part of what legislature do is to codify or amend existing judicial standards for decision.²⁷⁶

To see why collective procedures are not only not excluded, but also desirable if viewed through the question of what the judiciary ought to do, we need to go back to the question of legitimacy. Society and social expectations are changing, and it is not clear how law and courts could be immune. Rights based litigation has transformed the way we see the role of legal institutions. Bogart argues that it is not the changing role of courts that can undermine legitimacy, to the contrary: 'What will call courts' legitimacy into question is an insistence upon immutable forms of dispute resolution shaped by very different social forces and needs many years ago.'²⁷⁷ Piché quotes Cappelletti on the transformations that raise the issue of collective litigation: 'judges [must-and have-become] the protectors not only of the traditional individual rights, but also of the new diffuse, collective and fragmented rights and interests which are so characteristics of our mass civilization.... inevitably new powers and

²⁷⁴ G.M. (Canada) v. Naken, [1983] 1 SCR 72 at 102, quoted in Bogart, *supra* note 161, at 683.

²⁷⁵ See the argument below, under 'Aggregation and judicial economy' at the end of this chapter.

²⁷⁶ For the beneficial effect of this overlap, see the section on 'the dialogue argument.'

²⁷⁷ Bogart, *supra* note 161, at 690.

responsibility [have fallen] upon the judiciary.’²⁷⁸ Chayes closes his famous piece on ‘The Role of the Judge in Public Law Litigation’ with some notes on legitimacy and concludes that ‘judicial action only achieves such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.’²⁷⁹ These demands call for new judicial roles in some cases, including wide-spread and complex (public law) remedies.

The conclusion on the legitimacy of the role courts play in group litigation depends on our view of the proper role of the courts and the judge, which in turn also determines what issues we see as proper for courts to consider. Opposition to the procedural proposal might come not only from separation of powers concerns, but also to the limits of what courts realistically can do. Under a traditional view, courts should not deal with complex remedies that include oversight of political bodies and their political decision-making. Yet, enforcing rights often require just such endeavors, as aptly showed by the judicial sanctioning of desegregation plans. The concerns based on such institutional constraints and on the separation of powers doctrine are both present in the ‘political question doctrine.’ A central question is how we should understand ‘political’ in this context. Concerning the opposition to litigating rights, ‘political’ is best understood as questions that should be left for the political branches. An important formulation of what belongs to the political branches in a way that it bars judicial interference can be found in *Baker v. Carr*:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an

²⁷⁸ Mauro Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 MONASH U. L. REV. 15, 36-37 (1981), as quoted in Piché, *supra* note 266, at 139.

²⁷⁹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

*unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*²⁸⁰

This means that if there is no textual exclusion of litigation, or practical exclusion in the form of necessary political decision or a necessary reliance of such decision, or the judgment would unduly interfere with the political branches, including ‘embarrassment,’ and there are judicial standards that judges can use to decide a case, the claim should not be rejected out of hand. The above list reads like a negative definition: whatever is not excluded should get a pass. There are also substantive readings about what courts ought to do.

Many writers contrast two types of litigation, and two corresponding views of adjudication. Abram Chayes writes public law litigation as opposed to private law litigation.²⁸¹ Owen M. Fiss differentiates between the traditional approach and the one that is willing to use litigation for social reform, or ‘structural reform.’²⁸² Both of them endorse the public / social reform type of litigation. Raz notes, along these lines, that ‘[l]egal rights can be reasons for legal change.’²⁸³ As we will later see, injunctive remedies and interest-based representation²⁸⁴ is more fit for group litigation as well as the ‘public law litigation’ or ‘structural reform’ type, that is more concerned with enforcement and deterrence, and targets more directly future compliance – as opposed to the traditional private law focus on isolated past harms and consent-based representation.

²⁸⁰ Baker v. Carr, 369 U.S. 186 at 217 (1961).

²⁸¹ Chayes, *supra* note 279; Abram Chayes, *The Supreme Court, 1981 Term – Foreword. Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

²⁸² Owen M. Fiss, *Two Models of Adjudication*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 36 (Robert Goldwin & William Schambra eds., 1985).

²⁸³ Raz, *supra* note 71, at 15.

²⁸⁴ See later under ‘Remedies’ and ‘Groups,’ respectively.

Sunstein argues that courts have limited capabilities when it comes to wider issues that can hardly be framed as an isolated dispute between two parties.²⁸⁵ It is true that, often, judicial rights protection is best where combined with an accommodating legislative framework. Even then, if legislative and executive action is lacking, we should not give up efforts to make court procedures more accommodating to such claims. While Sunstein maintains that courts are not the best forum to deal with non-compensatory problems – he specifically names risk management and nonsubordination – it is possible to depart from the strict discrete and individualized compensatory logic in court proceedings, too. His main concern seems to be with courts that block progressive legislative and administrative attempts at rectifying wrongs – which is understandable in the US context that he considers – and yet, Sunstein himself offers arguments on how to remedy this. He writes about small claims as an area where courts should ‘abandon compensatory principles.’²⁸⁶ These can be dealt with as class actions where individual compensation is not the primary goal, because individual distribution along traditional compensatory principles would make enforcement non-efficient and, as a result, would be self-defeating. Not only mass claim class actions, but injunctions are also of this type, where courts can and do deal with more complex remedies than isolated one-to-one compensation.

Sunstein further argues that ‘[d]evices should be developed to allow for damages or punishment in cases of probabilistic harms’ and proposes, to this aim, the ‘development of some sort of mixed public and private enforcement mechanism.’²⁸⁷ In fact, a broader understanding of statistical evidence and measuring impact as opposed to intent both allow

²⁸⁵ In a similar vein, Fuller, following Michael Polanyi’s insights, describes ‘polycentric disputes’ that courts are not best placed to settle, and are more apt for political or ‘managerial direction and contract (reciprocity).’ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 398 (1978).

²⁸⁶ Sunstein, *supra* note 118, at 302.

²⁸⁷ Sunstein, *supra* note 118, at 302.

for courts to remedy violations where liability is only probabilistic, as opposed to the strictly individual and direct connection of harms and wrongdoers.

In his skeptical account, 'The Hollow Hope,' Gerald N. Rosenberg argues that there are two visions of the judiciary, one is the 'Dynamic Court' and the other is the 'Constrained Court.' The former sees courts as triggers of social changes, leading the constant transformation of society towards more liberty and equality (the court of *Brown* and *Roe*), while the latter emphasizes the limited role of courts and the eminence of political processes.²⁸⁸ While neither view adequately captures the role courts actually play, Rosenberg's book primarily attacks the dynamic view by undermining its ultimate premise: that courts can make a change, can bring about 'significant social reform.'²⁸⁹ Rosenberg argues that courts are not best placed to lead social reforms, even if they can make a difference if a number of conditions are present, subject to a number of constraints. He identifies three constraints: (1) concerning claims of social reform, courts lack established legal precedents; (2) '[c]ourts depend on political support to produce [social] reforms'; and (3) courts lack 'implementation powers.'²⁹⁰ These are important limitations that should be kept in mind, however, they do not make it go away that courts have a responsibility in enforcing rights to the extent they can. Legal precedents concerning social reform might be available in the case of equality-driven measures, and a court decision might be a catalyst to political action, which in turn will contribute to effective implementation.²⁹¹

²⁸⁸ GERALD N. ROSENBERG, *THE HOLLOW HOPE* 2–3 (1991).

²⁸⁹ *Id.* at 6.

²⁹⁰ *Id.* at 12–21, 35, & 336–337

²⁹¹ Rosenberg himself identifies some conditions that allow courts to overcome these constraints by: (1) outside incentives, (2) external costs, (3) market implementation, (4) allies who are willing to act and use court orders as 'leverage, or a shield, cover, or excuse.' *Id.* at 32–35.

The two functions might also be, and often is, combined, with courts fulfilling both tasks. Bogart voices his criticism on how Canadian courts move back and forth between a role of an ‘arbiter,’ pondering complex social and political issues, and a more mechanical enforcement of individual rights:

The courts themselves have manifested substantial ambivalence. They have accepted a more expansive role in other areas: as a matter of first impression, they have embraced their role as arbiter between citizen and state in Charter litigation, a task requiring them to face directly complex social and political questions. However, there is also a troubling tendency to view their mission under the Charter as exclusively one of protection of those individual rights which enjoy their greatest potential with the government kept at bay. And in this there is a danger that Charter litigation will dissolve into a discourse concerning a specific set of entitlements reflecting a particular brand of individualism which does not capture the entirety and complexity of Canadian society.²⁹²

We can now see the complexities of rights enforcement, when it requires sweeping structural changes and embracing a new role for courts. Both Sunstein and Rosenberg offer arguments for why courts are not fit for the task. Yet, it is one thing to say that courts have limited means to bring widespread practices in line with constitutional standards, and another to argue that courts should stop playing a role and we should stop thinking about how, within these constraints, they should get better at performing this constitutional duty. But to embrace the legitimacy of the structural reform type of litigation is not to argue that claims should primarily be litigated and not pass through the political process. It is simply to say that once claims get to the courts, the legal system should do everything it can to provide effective remedies and accommodate them. We cannot give up the judicial way for enforcing minority rights. For, as Sunstein argues in the US context, it is ‘an important and even constitutional

²⁹² Bogart, *supra* note 161, at 699.

duty, violated by widespread current practices, to eliminate the castelike features of American society.²⁹³

Chayes describes the traditional view of lawsuits as bipolar, retrospective, maintaining the independence of right and remedy, self-contained, and party-controlled.²⁹⁴ He contrasts this to public law litigation where the scope of the lawsuit is not given, it is not rigidly bilateral, fact inquiry is predictive and legislative, the relief is forward looking and flexible, often touching upon the interests of non-parties, and it deals with public policy instead of a mere dispute between individuals.²⁹⁵ These features flow from public law litigation that courts are routinely engaged with, in the era of rights litigation. They are not a result of group actions. Chayes argues further that legitimacy is not compromised because the legislature can revisit the decision of the courts and that courts are only responding to the changing demands for justice.²⁹⁶

Once we allow judicial challenges to political decisions based on broad and far-reaching principles like equality and freedom, it is hard to argue that courts should avoid decisions with wider, structural implications. Just like with the increased responsiveness to social expectations, allowing such challenges is not only not precluded by legitimacy considerations, it is positively reinforcing the social acceptance of institutions and laws. Law, and public law in particular, has an important role to play in making sure that political decisions are widely accepted, strengthening the legitimacy of public decisions. If I can challenge those decisions based on principles that I agree with on a high level of abstraction (freedom, equality, fairness

²⁹³ Sunstein, *supra* note 200, at 2455.

²⁹⁴ Chayes, *supra* note 279, at 1282–83.

²⁹⁵ Further elements: negotiated, not imposed, remedy, continuing and active participation of the court. *Id.* at 1302.

²⁹⁶ *Id.* at 1316.

etc.), I will more likely abide by norms that I deeply disagree with. This is especially true if I can also sustain the hope that these same policies will change one day, e.g., because political leadership will change to one that is closer to my taste. The types of minorities this thesis considers will be more likely to be in this position, hence the widely recognized necessity to provide special protection for them.

Concerning the question of the legitimacy of collective judgments, we can conclude that there is not general consideration against allowing or even requiring courts to grant collective judgments where they serve the goal of better enforcement. It is not collective judgments per se that frustrate the goals of the separation of powers, and judges should be willing to go beyond the traditional role of courts to respond to rights claims. It would be a denial of justice to refuse such efforts.

3.2 MIGHT THE FACT THAT COURTS ARE PROTECTING MINORITIES JUSTIFY COLLECTIVE LITIGATION?

The common charges against litigating rights include the antimajoritarian difficulty and the critique that courts intrude into areas that are properly left for political decision-making. It is true that it is in the nature of rights that they are political; and the very idea of litigating rights is to challenge majority decisions, or lack thereof. When it comes to litigating rights,²⁹⁷ the very idea of judicial enforcement is to override majority decisions, were the two in conflict. As the 5th Circuit stated in 1963, to 'require a plebiscite to determine whether a community is going to follow the Constitution of the United States, [...] the constitutional invalidity [...] is so palpable as to make a contrary claim frivolous.'²⁹⁸ If somebody is happy with the outcome

²⁹⁷ By rights litigation I understand claims based on human rights, constitutional rights and, in the US, civil rights; in the minority context, these usually include equality based claims.

²⁹⁸ Potts v. Flax, 313 F. 2d 284, 290 (5th Cir. 1963).

of the political decision, she is unlikely to ask for judicial intervention. Under Ely's distrust concept, 'constitutional law appropriately exists for those situations where representative government cannot be trusted.'²⁹⁹ Also, any litigation can become political if there is willingness from political actors to engage with it. The most private affairs, strictly business-related questions and rights violations can find themselves in the middle of political controversy. Without judicial enforcement, it would be a denial of justice to exclude, e.g., minorities pursuing tort claims just because they are somehow politically controversial. The question is not so much whether courts can override majority decisions, but where they are able to do so. As Hurst Hannum argues: 'the ability of groups to veto or reject majority decisions can be exercised only to protect legitimate group rights.'³⁰⁰ The challenge of 'political questions' does not mean that judicial review is ruled out in every case.

It has often been argued that courts are better in enforcing rights because they tend to be more principled and consistent. It is true that through the appeals system and the tendency to defer to earlier case law, courts are less likely to make sudden turns, unlike the political branches that are regularly voted in and out. First, courts are hardly isolated from political shifts. As Bruce Ackerman has shown, constitutional moments can happen without textual changes, through the changing interpretation of courts.³⁰¹ Political views and actors can have a strong influence on how courts interpret text. Second, even if courts tend to be more 'principled' and consistent, this might not work to the benefit of minorities. Carens argues that 'people are supposed to experience the realization of principles of justice through various concrete institutions, but they may actually experience a lot of the institution and very little

²⁹⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST. A THEORY OF JUDICIAL REVIEW* 183 (1980).

³⁰⁰ Hannum, *supra* note 88, at 476.

³⁰¹ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

of the principle.³⁰² It might be dissenting voices within the judiciary that provide some protection to minorities that generally face hostility and rejection.

The fact that courts usually focus on compartmentalized issues makes it more likely that they will take into account special circumstances, making, on average, judicial solutions more flexible and responsive. As Bogart argues,

*no matter how strong the role of the legislature is, or should be, in any society, this branch of government is unlikely to be able to address with sufficient specificity the myriad issues surrounding particular actions taken by other aggregates or its own agencies and emanations. Allegations against such powerful groups concerning mass wrongs need to be addressed by a body which is able to carefully sift through the evidence and arguments relating to the argued injury and to forge a solution responsive to the particulars which have been demonstrated in an open, public and scrutinizable way. This is the function of a court.*³⁰³

Diversity means variation and minority claims might be seen as particular as opposed to the general. If this is the case, that might benefit minorities – occasionally. As opposed to political branches, the judiciary is usually not directly responsible to majorities, and is thus seen as better placed to protect minorities. However, there is no insurance that courts will be more favorable to minority claims than the political branches. This is ultimately an empirical question and the balance might vary from country to country. On the other hand, there are widely accepted arguments for why courts should play the role of protecting minorities that are less likely to receive adequate representation and protection from majoritarian institutions. Federalist No. 78 includes a statement on ‘the effects of occasional ill humors in the society’ that ‘sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.’

³⁰² Joseph Carens, ‘Citizenship and Aboriginal Self-Government’ (paper prepared for the Royal Commission on Aboriginal Peoples, Ottawa, 1994), 39, quoted by KYMLICKA, *supra* note 99, at 203 n.6.

³⁰³ Bogart, *supra* note 161, at 698.

Courts are more likely to resist the temptation to put pressure on minorities to show allegiance to the state, especially if it is in ways that serves more to reinforce majoritarian visions of the community than to actually help integration. As Justice Jackson argued:

*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.*³⁰⁴

Even where strong majorities support ‘orthodoxies,’ the ideal expressed in Jackson’s words should apply a check on how much uniformity government can prescribe. Orthodoxies and homogenization in this sense also create a challenge for the legitimacy of government and law. On the other hand, where courts come in to strike down what they find to be ‘orthodoxies,’ these decisions appear as inherently undemocratic, because it is not directly elected judges who override the powers of elected bodies and officials.

Ronald Dworkin defends judicial review against the charge ‘that judicial review is inevitably and automatically a defect in democracy.’³⁰⁵ He describes a test to assess whether the practice of judicial review in a country can actually be deemed to be democratic: if it ‘improves overall legitimacy by making it more likely that the community will settle on and enforce some appropriate conception of negative liberty and of a fair distribution of resources and opportunities, as well as of [...] positive liberty.’³⁰⁶ Dworkin’s test for democracy is based on the ‘equal respect and concern’ requirement, the fact ‘that no adult citizen’s political impact is less than that of any other citizen for reasons that compromise his dignity—reasons that treat his life as of less concern or his opinions as less worthy of respect.’³⁰⁷ The collective

³⁰⁴ West Virginia State Board of Education v. Barnette, 319 U.S. 624 at 642 (1943) (J. Jackson for the Court).

³⁰⁵ DWORKIN (2011), *supra* note 72, at 399.

³⁰⁶ *Id.* at 398.

³⁰⁷ *Id.* at 388.

procedural solution seeks to address the fair distribution problem as well as the possible shortcomings of the democratic system.

John Hart Ely in his book 'Democracy and Distrust' presents a theory that justifies judicial review, a theory he calls 'a participation-oriented, representation-reinforcing approach to judicial review.'³⁰⁸ He uses the logic of the famous footnote of American constitutional law, footnote 4 of *Carolene Products*, by Justice Stone, itself allegedly based on Louis Lusk's arguments.³⁰⁹ His analysis of the footnote clearly separates the three paragraphs: the first is 'pure interpretivism,' presenting the idea that the Court is simply enforcing what is written in the Constitution, also noting that this part is a later addition³¹⁰; the second paragraph describes the judicial task as ensuring that 'the channels of political participation and communication are kept open'; finally, the third paragraph talks about the need for special judicial attention in the cases of 'discrete and insular minorities.' It is worth quoting the footnote in its entirety (omitting the citations):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. [...]

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny

³⁰⁸ ELY, *supra* note 299, at 87.

³⁰⁹ 'Louis Lusk, today a professor at Columbia University Law School, is generally credited as the source of a fruitful idea contained in a footnote of an opinion by the late Justice Harlan Fiske Stone. The note, attached to a 1938 decision upholding a federal law that restricted milk marketing, warned that while the court was unwilling to interfere with this economic regulation, it might take a closer look at laws that affected civil liberties or discriminated against minority groups. The footnote helped open the way to expansion of court activity in the civil liberties and civil rights fields. Mr. Lusk emphasizes, however, that "I never got an idea into a Stone opinion that the Justice didn't want there, and I couldn't have if I had tried.'" Falk, *High Court Law Clerks Rarely Sway Decisions, But Job is Prestigious*, WALL ST. J., July 22, 1971, at 1, col. 1.' Quoted in Ball, *supra* note 152, at 1060–61 n.4. Ely also attributes the footnote to Lusk's influence: 'Professor Lusk [...] as Stone's law clerk was substantially responsible for the footnote.' ELY, *supra* note 299, at 76.

³¹⁰ 'Professor Lusk [...] revealed that the first paragraph was added at the request of Chief Justice Hughes.' *Ibid.*

under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [...]
Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [...] or national, [...] or racial minorities [...]; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. ³¹¹

Ely argues that the theory reflected in the first paragraph is inconclusive, 'pure interpretivism' requires additional theoretical apparatus. The second and the third paragraphs in his account offer two interrelated, although 'by no means self-evidently linked,' theories, both based on participation and representation.³¹² The crucial assumption that he questions is that representation based on the majority rule is also a representation of all, in his words, 'the protection of the many was necessarily the protection of all.'³¹³

Ely reads the US Constitution as one based primarily on 'process and structure' and not on 'substantive values,' and that the Constitution is in many respects open-ended.³¹⁴ This was the original idea and the later amendments, even though they did add specific values, did not alter the picture substantively.³¹⁵ Furthermore, the representation-reinforcing approach that he offers is not only not at odds with representative democracy, the driving ideal of the Constitution. Finally, courts can, according to Ely, 'claim to be better qualified and situated to perform' the tasks that such a view of judicial review requires, better relative to politicians.³¹⁶ Although lawyers are experts on process, it is the perspective of courts that matters. Ely here invokes the example of antitrust litigation, that is not there to impede but exactly to ensure

³¹¹ United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

³¹² ELY, *supra* note 299, at 77.

³¹³ *Id.* at 81.

³¹⁴ 'my claim is [...] that the original Constitution was principally [...] dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values.' *Id.* at 92.

³¹⁵ See his overview: *Id.* at 93-101.

³¹⁶ See the three arguments: *Id.* at 87-88.

the working of a free market.³¹⁷ This embodies the ‘distrust’ element, the fact that the actors in the market, or in the political arena, cannot be fully trusted with maintaining the framework that allows them to compete in the first place.

An important element of paragraph 2 of footnote 4 is that it is symmetrical in the sense that it not only seeks to protect the minority (‘insular and discrete minorities’ that are not likely to have their voice carry too much weight) but also to protect the majority, by subjecting to a pressing judicial review decisions related to the working of the political decision-making process. The second paragraph of the Justice Stone’s footnote mentions the question of ‘whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.’ This is in line with the hopefully consensual view that judicial scrutiny along these lines does not impede democratic decision making; on the contrary, it is guaranteeing and strengthening it. The antimajoritarian difficulty is meant to be antimajoritarian and is not (necessarily) antidemocratic at the same time.

There is, however, a third paragraph in the footnote, and a second element to Ely’s theory. The footnote, after all, names ‘religious,’ ‘national’ and ‘racial’ minorities, which sounds like there is an asymmetry between the majority and certain minorities. The argument that Ely offers is based a need for additional protection for those minorities that don’t have a chance to meaningful representation even in the case of a fully fair system of representation.³¹⁸ This

³¹⁷ *Id.* at 102–3.

³¹⁸ *Id.*, Chapter 6.

reflects the general idea behind minority rights that should be observed, and judicially enforced, regardless of the wishes of majorities.

Rosenberg notes that Ely's insight on when courts should primarily act, i.e. where the political process has failed, identifies 'precisely those instances where [courts are] most unlikely to be of any help.' For court decisions, as shown by the three constraints, have to rely on working political processes.³¹⁹ This is only a problem if we take the role of the courts as enforcing rights in isolation from, or in opposition to, the political branches. As we will see, this is not necessarily so.³²⁰

An additional problem with this approach is the ambivalence of the term 'discrete and insular' minorities. It is hard to discern what groups qualify under this standard. Two readings can illustrate this difficulty. Ely quotes Justice Rehnquist's account:

*Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road.*³²¹

Against this charge of being overbroad, Ely elsewhere notes that 'I'm not sure I'd know a discrete and insular minority if I saw one.'³²² To find out what the notion means, we need to go back to the rationale of the test.

Ely's reading justifies heightened judicial protection for those groups that cannot protect themselves politically. The reasons for this political failure might be manifold, and the driving ideal might be not captured best by the notion of 'discrete and insular' minorities, or the

³¹⁹ ROSENBERG, *supra* note 288, at 338 n.2.

³²⁰ See the section on the dialogue argument, below.

³²¹ Sugarman v. Dougall, 413 U.S. 634 at 657 (1973) (Rehnquist, J., dissenting). The quote in Ely's book is shorter, ELY, *supra* note 299, at 151.

³²² John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935 (1973).

immutability of the characteristics. Ely refers to Dworkin's standard of 'equal concern and respect' at various places in his book,³²³ and 'prejudice'³²⁴ or stereotyping might better capture who belong to the target groups.³²⁵ The presence of prejudices in everyday life – this is what Ely describes as the social component, in addition to the political³²⁶ – can lead to systemic discrimination that requires systemic responses, for 'prejudice is a lens that distorts reality.'³²⁷

In the case of the collective procedural tool, it is not only the shortcomings of the political processes are at stake, but also the blind spots of the judiciary. The political and the legal system has a tendency to neglect or even punish outliers.³²⁸ Claims, and cultures, that do not fit what is considered 'usual' might be losing out, without adequate justification for why difference means rejection.

Note that the argument for judicial protection does not only apply to ethno-national, racial, linguistic and religious minorities. Aliens, without a right to vote, definitely qualify.³²⁹ Chayes notes that 'prisoners, inmates of mental institutions, and ghetto dwellers' are even less likely to take refuge in the political process than are numerical minorities.³³⁰ It is apparent that the

³²³ Citing Dworkin: ELY, *supra* note 299, at 82; in the context of discussing 'discrete and insular' minorities: *id.* at 157.

³²⁴ Appearing next to 'discrete and insular minorities' in Justice Stone's footnote 4: 'prejudice against discrete and insular minorities may be a special condition.'

³²⁵ ELY, *supra* note 299, at 155. Ely differentiates between various types of legislative generalizations, noting that '[s]ome time-honored generalizations are unusually inaccurate, but others are not.' *Id.* at 158.

³²⁶ *Id.* at 161: 'To render the concept [of discrete and insular minorities] useful, [...] we have to recognize and break apart its two components, the political and the social. Political access is surely important, but [...] it cannot alone protect a group' against prejudices.

³²⁷ *Id.* at 153.

³²⁸ See, on a different level, the common account of what practices the US Supreme Court is likely to strike down: policies and practices that are only present in a fewer number of states. Similar arguments are made in connection with the European Court of Human Rights. In the US context, see, e.g., Roderick M. Hills, Jr., *Counting States*, 32 HARV. J. L. & PUB. POL'Y 17 (2009). For Europe: Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L.J. 1730 (2011).

³²⁹ ELY, *supra* note 299, at 161: 'discrimination against aliens seems a relatively easy case' for they 'cannot vote in any state, which means that any representation they receive will be exclusively "virtual."'

³³⁰ Chayes, *supra* note 279, at 1315.

European history of group litigation has been largely revolving around consumer protection, where the central idea is to ‘protect the weak party’ in a contract. Yet, to say that the argument applies to other vulnerable groups is not to question its force, but to stress the point that the judiciary is particularly well placed to protect vulnerable groups. Minority protection is driven by a similar concern, focusing not only on economic, but also other, most importantly political, asymmetry.³³¹

Note also that the criterion of political powerlessness can create a moral hazard, a perverse incentive where a minority pursuing a claim is interested in showing that the political process failed them, instead of being interested in (partial) political success.³³² This risk means that the standard that provides heightened protection to certain groups and individuals based on their ‘powerlessness’ creates perverse incentives by motivating them to remain powerless. This is not to say that this protection will necessarily or actually prevent minorities from self-organizing. It is a realistic danger, however, that if they do mobilize successfully, succeeding with some of their claims, they risk to lose their specially protected status. Even a partial success could prove that the group is not that powerless. Of course, powerlessness is a relative term, and will almost never mean that the minority lacks any political power, or can only mean that under extreme circumstances, e.g., complete formal disenfranchisement. If it is not this extreme case, the court needs to find a baseline against which powerlessness is measured, a standard that could be called ‘adequate level of power.’ It is not hard to reach the conclusion that this is a very problematic judicial task. Here Sunstein’s anticaste principle

³³¹ The present thesis, as it has been stated earlier, should not be read as excluding other types of minorities from the enhanced protection through collective litigation; some or most of the arguments might be applied to other groups as well, but that should be assessed by further research.

³³² In addition, Rosenberg argues that relying on courts instead of political processes has its dangers and can dry funds and create a setback among rights movements (a ‘fly-paper’ for social reformers). ROSENBERG, *supra* note 288, at 341.

provides an important insight, with the requirement that the disadvantage suffered by the minority has to be serious and persistent (caste-like).³³³ Without this, the court will assume that the powerlessness standard is not obviously violated, and the political process should be primarily relied upon. Nevertheless, the 'moral hazard' critique advises one to be careful with the sole reliance on a unified notion of 'powerlessness' concerning a minority when deciding on the level of protection owed to them.

The added value of the collective procedural tool might be that it deals with the question of powerlessness in a piecemeal fashion, topic by topic. It might well be that a minority is deemed powerless in one policy area, where its strong preference for an exemption meets with strong opposition from the majority.

Protecting minorities does not only apply to the minorities 'from the outside'; it should also apply to minorities within the minorities. Both levels are present in using judicial oversight for settlements and other arrangements that apply to groups not involved in the process that led to the agreement. The 'voiceless' members who do not have a strong, or any, representation might find their rights not vindicated. It is better in such cases to have courts as guarantors that the arrangements are fair also for non-parties. As we will see with cases of injunction, structural-institutional changes often touch upon the rights of many, not only the directly involved stakeholders. The collective procedural tool allows courts to be involved and better consider the interests of those who are not present.

So far we have discussed the question whether courts are the right fora to deal with certain minority claims. Another dilemma is whether the dominant legal system itself is the right platform from which non-dominant group members should launch a claim. My proposal does

³³³ Sunstein, *supra* note 200.

not seek to neglect the force of this second dilemma. On the contrary, it seeks to embrace it to the extent that this is possible while remaining within the boundaries of a solution that remains within the limits of the legal system(s) in question.

A 19th century case illustrates what this dilemma entails. Chief Justice Marshall, in *Johnson v. M'Intosh*, was faced with the conflict between native title and the power of the Congress to override it.³³⁴ Bringing the dilemma to a more abstract level, the question is whether minority rights based on tradition can be extinguished by the sheer power of conquest and the sovereign (and unilateral) decision of the conqueror. While Marshall showed some cultural sensitivity to native claims, and sought to constrain the scope of the judgment,³³⁵ he also recognized that a court that is established by the majority society whose very existence is based on conquest, there are structural limits to what it can do, even if, on a personal level, he might not see the conquest justified: 'Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.'³³⁶

The fact that courts have structural limitations by virtue of being part of a larger institutional framework does not mean that they cannot push the boundaries further, and we should not

³³⁴ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

³³⁵ For this and a more favorable reading of the opinion, see Joseph W. Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 488–92 (1994); for a more critical account, see JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2011).

³³⁶ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 at 588 (1823). For a similar dilemma, see another Rhode Island case where a state court had to decide whether the leader of the 'people's government,' Governor Dorr should be convicted. Dorr, who led the events known as the 'Dorr rebellion' challenged the more exclusive 'Charter government' in Rhode Island. The judge argued that 'if a government had been set up under what is called the people's constitution, and they had appointed judges to give effect to their proceedings, and deriving authority from such a source, such a court might have been addressed upon a question like this; but we are not that court.' (The case went to the US Supreme Court: *Luther v. Borden*, 48 U.S. 1, 26. The quoted section from the state court decision can be found here: <http://caselaw.findlaw.com/us-supreme-court/48/1.html>.) Similarly, Chief Justice Marshall could have liked to have his case before a court that is not an entity of the country whose existence is based on the very conquest the legality of which was being challenged. But by assuming office, he also acknowledged the limits of what he, as the head of the judiciary, itself part of the majority institutions, can do.

aim at pushing these boundaries. The collective procedural solution cannot offer remedy for the limitations raised in the above examples, but can result in judicial procedures more accommodating for minority claims.

One feature of litigation is that it can result in enforcement at the initiative of otherwise powerless private parties. This is an additional element for why the judicial solution is apt for minority rights enforcement. The following section will assess this argument.

3.3 PRIVATE ENFORCEMENT

Maybe group litigation is not problematic because it should simply be seen as a step towards decentralizing rights enforcement. Bronsteen and Fiss argue, in the affirmative, that ‘the class action provides for the private enforcement of laws that are aimed at protecting the public.’³³⁷ Perceived this way, private enforcement works in line with Madison’s vision in Federalist No. 51, ambition counteracting ambition and ‘giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.’ Private enforcement through group litigation should not be seen as antimajoritarian, but a democratization, privatization, liberalization, or decentralization of rights enforcement.³³⁸ Decentralization means that decisions to (and how to) litigate is less prone to improper influence and there is less limitation in terms of information access and processing. Decentralizing enforcement also allows for a better and

³³⁷ Bronsteen & Fiss, *supra* note 237, at 1419.

³³⁸ Note also the other side of the public-private ‘merger,’ public officials acting not in the name of direct government interest, but grounding their standing in furthering the interests of citizens, under the *parens patriae* doctrine. Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 *FORDHAM L. REV.* 3043, 3070–77 (2013).

more flexible use of resources. Burch summarizes the benefits of private enforcement as follows:

*It frees the public from bureaucratic remedies, vindicates substantive rights too costly to pursue individually, overcomes federal information gaps about local practices, insulates enforcement from agency capture, supplements regulatory resources, and is a viable alternative to costly governmental monitoring.*³³⁹

This change has been happening, combining group representation in courts and rights enforcement: ‘Standing to sue has been granted to “private attorney generals” or “ideological plaintiffs,” and such plaintiffs—whether individuals or organizations—have been regarded as the “adequate representatives” of numbers and classes of people, most of whom might not even know that a “representative action” is being brought “on their behalf.”’³⁴⁰ There are accounts that challenge our common, centralized view of law, starting and ending with government, and assuming that ‘the rule of law is a product of government.’ Hadfield and Weingast argue that a ‘legal system cannot achieve rule of law, [...] unless there is an essential role for private, decentralized, enforcement of law.’³⁴¹

The idea of private enforcement could also be seen as a solution flowing from Ely’s distrust argument: access to courts should not be impeded by political bodies and officials for that defeats the idea that rights can be enforced against the will of the political branches. Why

³³⁹ Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 25 (2009). For a more detailed account, see: Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517 (2008).

³⁴⁰ Cappelletti, *supra* note 278, at 36–37, as quoted in Piché, *supra* note 266, at 139.

³⁴¹ Gillian K. Hadfield & Barry R. Weingast, *Is Rule of Law an Equilibrium Without Private Ordering?* 27 (USC CLASS Research Paper No. 16-16, USC Law Legal Studies Paper No. 16-18, Stanford Law and Economics Olin Working Paper No. 493, 2016), available at <http://ssrn.com/abstract=2785017>. Yeazell raises the question why it is not the libertarian right that embraces the idea of civil litigation as a main driver of regulation – decentralized regulation by civil actors. He explains this with *Brown*: as civil litigation of this sort originates in civil rights cases, that shaped the political landscape and the parties’ attitude towards this type of ‘private enforcement,’ that includes class action. Yeazell, *supra* note 220, at 2003. For his more detailed overview on the party politics of class action, see Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752 (2013).

should, after all, the power to litigate issues with strong links to public interest be constrained to public bodies? If others are willing to sue, that takes burden from the government, also working as a check on government: if they are not willing to sue, others might step in.

One important difference between public enforcement through legislative or executive action (not through courts) and private enforcement is that in the former case decision makers and representatives can be held accountable through the political process (at least this is what is usually assumed).³⁴² On the other hand, in case of private enforcement, representation is not subject political scrutiny. There are, however, safeguards in place, because the representative is subject to judicial scrutiny that should make sure that the entire group of those affected are adequately represented, both in person, by the actual representation, and by the terms of the judgment or the settlement.³⁴³ If losing the case means that there are costs to be borne by those who start the case (which applies under both the loser pays and the American, non cost shifting system), that should work as adequate filter for frivolous claims. Considering that the claims need to survive judicial scrutiny, the objection that attorney generals are subject to democratic scrutiny and 'private attorney generals' are not, is not a persuasive danger. It is not clear that the link to accountability through the political process, on the side of actors

³⁴² As Justice Oliver Wendell Holmes, Jr. noted:

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Investment Co. v. State Board of Equalization 239 US 441, 445 (1915). Cited in Nagareda, *supra* note 225, at 644.

³⁴³ Note also that non-party interests are often affected even in strictly individual litigation. In those cases, there are usually no formalized means to make sure those interests are properly represented, unless a solution like the supervised representation in the case of collective litigation is presented.

like attorneys general, is inherently stronger than accountability through the sanctions of losing a case.

If we add that it is more accurate to speak of 'public interests,' in plural, rather than a unified public interest, also considering the minority context, that creates a strong case for allowing non-public actors to start public law litigation. Just as intermediary groups are halfway between the state and the individual level, minority interests can be seen as located between public interest proper and mere private interest. Claims and court cases can be classified along the types of interests the lawsuit is seeking to advance. At one end, we find cases where courts are asked to protect interests that are only very remotely linked to public goods, or are actually contrary to most conceptions of what is in the public interest: these are overwhelmingly private suits, with a private party litigating its private claim. There might be cases that are farther from this extreme ideal type, advancing primarily private interests that at the same time also advance public goals. Most cases will fall under this category, as a large majority of private litigation necessarily help wider goals like predictability, the general principle of enforcing contracts, reinforcing the relevant expectations that have wider implications in a market economy. At the other extreme, we find cases that can hardly be translated into private lawsuits: wrongdoings and crimes without concrete victims might fall under this rubric.

What often gets lost is interests that are not easily translated into any side of the spectrum, interests whose individual litigation is either impossible, unlikely or doesn't pay off; and, viewed from the other side, interests that are not elevated to the level of public policy. This might just be temporary, as such interests can be recognized as public interest at any point,

and law can reach out to accommodate these interests as justiciable. The procedural proposal seeks to accomplish the latter goal: allowing cases that would otherwise be thrown out.

At a general level, the enforcement of human rights, human rights remedies provided by courts, no matter how individual the enforced rights are, serve the interests of the wider collectivity. Just like in the economic theory of the 'invisible hand',³⁴⁴ pursuing private interests on an aggregate level lead to better rights enforcement, itself in the public interest. This can be captured by statements like the one from Raz: 'One reason for affording special protection to individual rights is that thereby one also protects a collective good, an aspect of public culture.'³⁴⁵ The remedies provided at some level benefit the whole society. As Paul McCold, director of research for the International Institute for Restorative Practices argues, '[b]y repairing the harm to victims, we're helping the whole of society heal' and '[t]he betterment of victims equals the betterment of the whole society.'³⁴⁶

Looking at both structure and substance, litigating rights can be conceived as the (individual or collective) private enforcement of overriding elements of public policy. The structural element means that regardless of whether it is one victim, several victims, the entire victim group, or someone else in the name of the victim group (or one or several victims) that litigates the claim, the remedy sought will equally touch upon the rights of all. In substance, it means that it is not simply a private interest that is litigated, but a question of public policy,

³⁴⁴ See most famously ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1904), Book IV, Chapter II: Of Restraints upon the Importation from Foreign Countries of such Goods as can be Produced at Home, available at <http://www.econlib.org/library/Smith/smWN13.html>; and BERNARD MANDEVILLE, *THE FABLE OF THE BEES: OR, PRIVATE VICIES, PUBLIC BENEFITS* (1988), available at <http://oll.libertyfund.org/titles/mandeville-the-fable-of-the-bees-or-private-vices-public-benefits-2-vols>.

³⁴⁵ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 256 (1986). Quoted in TORTELL, *supra* note 14, at 90 n.57.

³⁴⁶ A.J. Porter, *The Jerry Lee Program Research on Restorative Justice: Promising Results*, RESTORATIVE PRACTICES E-FORUM, 13 April 2016, www.iirp.org, quoted in Tom Daems, *Criminal Law, Victims, and the Limits of Therapeutic Consequentialism*, in *FACING THE LIMITS OF THE LAW* 143, n.1 (Erik Claes, Wouter Devroe, Bert Keirsbilck eds., 2009).

albeit through private enforcement. As Yeazell notes that in such cases ‘the individual is acting less to enforce a peculiarly private right than a public policy—a policy that should be enforced whether other similarly situated persons desire it or not.’³⁴⁷ The claim is based on ‘fundamental values dictated by substantive law.’³⁴⁸

Disputing the general view with attorneys advancing purely private interests on the one hand and government bodies representing public interest, Garth, Nagel and Plager argue that ‘private attorneys general who piggyback their efforts on the government do not represent a flaw in the system; in crucial respects, they represent the system at its best.’³⁴⁹ Kalven and Rosenfield apply the term ‘semi-public’ to indicate the ability of class actions to motivate individuals to sue in a way that benefits others who are similarly situated, in addition to motivate them to sue in the first place: ‘the class suit as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice.’³⁵⁰ This might be especially relevant for minority claims as they usually raise problems that concern other members of the minority group. Furthermore, the term ‘semi-public’ can be understood as interests halfway between genuinely private interests and public interests that cover the entire national community. ‘Semi-public remedies’ can thus be read as the recognition of the plurality of interests worthy of legal recognition in a diverse society.

³⁴⁷ Yeazell, *supra* note 216, at 1115.

³⁴⁸ *If federal civil rights legislation proclaims it a violation of national policy to discriminate in education on the basis of sex, and an active litigant presents herself, alleging that she belongs to a definable group suffering from such discrimination, the court may feel itself hard pressed to deny that it is in the “interest” of the group’s members to seek redress for such discrimination. National law has, in effect, proclaimed a national interest in eliminating such discrimination.*

Ibid.

³⁴⁹ Bryant G. Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 397 (1988).

³⁵⁰ Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941), quoted by Valdes, *supra* note 165, at 641.

We can witness the rapprochement of public and private law from the other side, too, from how the government deals with mass wrongs. Public officials can step in to start litigation. ‘Parens patriae’ is the expression used for public representation in litigation, where usually the attorney general sues or intervenes in the name of public interest.³⁵¹ Zimmerman describes the phenomenon of ‘public officials’ growing commitment to collect and distribute victim compensation from corporate wrongdoers’ as ‘Corrective Justice State.’³⁵² In Zimmerman’s account, this is also an attempt to compensate larger groups of people rather than the whole society or individuals:

*‘corrective justice’ philosophy [...] does not match the complex nature of the modern administrative state. Corrective justice is often associated with the private law of torts, contracts, or property—a form of “intrapersonal justice” where one person, specifically responsible for a wrongful loss, compensates another person suffering from that loss. Corrective justice differs from traditional public approaches to compensation in three ways. Corrective justice: (1) provides remedies to discrete classes of wronged parties, rather than society as a whole; (2) uses a wrongdoer’s funds to restore individual losses, rather than to improve social welfare, equality, or need; and (3) relies on sanctions of specific wrongdoers, rather than prospective regulation across broad constituencies.*³⁵³

This ‘corrective justice’ view brings public administration closer to the private realm through applying the compensatory logic. This is a way to regulate through (the threat of) large-scale compensation. Such schemes can expand the scope of compensation by including claims and victims that are connected to the wrongdoer only in an indirect way. For example, the Federal Trade Commission set up a plan under which indirect victims of antitrust violations who would not be able to get recovery under federal law were compensated.³⁵⁴ Kenneth R. Feinberg is

³⁵¹ Burch, *supra* note 338, at 3048–49.

³⁵² Adam S. Zimmerman, *The Corrective Justice State*, 5 J. TORT L. 189, 192 (2014).

³⁵³ *Id.* at 192.

³⁵⁴ Victims who bought indirectly from antitrust violator are such a group. For discussion and citing criticism, see *id.* at 203.

widely known for his work in the field of large-scale compensation schemes. He has been appointed to supervise funds in a number of cases where state involvement was also crucial. The 9/11 victim compensation fund, the BP oil spill fund and the Boston bombing fund were all cases where the government played an important role. Such regimes can be used to collect funds from diverse sources in order to compensate large number of victims under a unified, partly individualized compensatory scheme. In most cases, relying on the alternative resolution scheme is not compulsory, and victims retain the right to sue separately. (Which did happen even in the case of 9/11 victims.)

Note, however, that the state based response in itself does nothing to the guarantees in cases where it is the state that is not willing to act. There are cases where there is strong political will to compensate (the 9/11 victim fund certainly belongs to this category), and there are cases where support is not unequivocal, but there are public bodies, agencies that are willing to act. But there will always be cases where neither of these two cases applies, and reliance on political bodies does not bring compensation. In those cases, it is private enforcement that is the only chance.

According to Fiss, the idea of private enforcement, the fact that private actors can start civil suits to enforce laws, is rooted in the distrust of government.³⁵⁵ As such, it can serve a check on government decisions and allows to circumvent a central decision not to litigate a case: ‘the unwillingness to make the government-initiated lawsuit the only civil option in these situations may be rooted in the misgivings with the official system of governance and how public officials discharge their duties. The issue is one of accountability.’³⁵⁶ Private

³⁵⁵ Fiss, *supra* note 162, at 22.

³⁵⁶ Fiss, *supra* note 162, at 22.

enforcement, under this account, is primarily about not allowing public institutions to prevent claims to be brought to courts, about decentralizing enforcement where the courts are the only gatekeepers.

Bogart argues in the context of the Anglo-Canadian tradition that, for historical reasons, the office of the Attorney General should not be trusted. The 'Attorney General's resources have most often been deployed in challenging standing claims-claims which often involved or challenged the government that the Attorney General represented or some emanation of it,' which is disturbing if we consider that what was at issue is exactly the monopoly over litigating public interest issues. This might apply in particular to collective procedures: 'In class actions the potential for conflict between the Attorney General and the class will often be present since the theory of liability may often implicate the government.'³⁵⁷

In the case of minority claims, there is an even stronger case for such distrust, due to the common bias against minority claims and perspectives (see the arguments under 'Biased courts?' and 'Easing evidentiary hurdles'). Fiss argues that in case of government discretion that 'might be abused because of corruption or that the needs of certain sections of society – for example, the politically powerless – might be systematically slighted.'³⁵⁸ This combines litigation in the public interest (or, as the split in what that interest means as shown by the rejection of an attorney general: public interests) with private initiatives and private litigation.

The private enforcement argument is often voiced to support group and aggregate litigation. A published discussion on the topic shared experiences from all over the world and including many European countries and the European Commission itself concluded that an effective

³⁵⁷ Bogart, *supra* note 161, at 697.

³⁵⁸ Fiss, *supra* note 162, at 22–23.

enforcement system cannot exist without private enforcement and this element should be strengthened while screening out the potential abuses. The various countries apply collective type litigation in areas from consumer protection and securities to antitrust. Many benefits of private enforcement are not specific to one area of law, but are equally applicable to these cases and rights litigation.³⁵⁹ Private enforcement through group litigation can work as a check on centralized structures that impede or neglect rights enforcement in certain areas, that might fall more heavily on minorities.

3.4 JUDICIAL BIAS AND THE DIALOGUE ARGUMENT

An important element of the proposal is that there are functioning and independent courts that enforce minority rights. Independence means that no undue interference happens.³⁶⁰ In this section I will first address and accept the argument that courts themselves are part of majority society and, as such, share many of the biases against which minority rights guarantees and the proposal seeks to offer refuge. A qualified formulation of this observation acknowledges the truth in this statement but maintains that courts play an important role in that they can offer an additional level of protection where other institutions fail, because they are largely shielded from the direct political pressure under which the political branches function.

Second, I will argue that a comprehensive view that considers the wider, non-judicial setting of litigation, will tame concerns over the 'intrusion' of courts into political questions, with

³⁵⁹ *Class Action / Collective Action and the Interface Between Public and Private Enforcement. Summary of Discussion*, 2009 OECD J. COMPETITION L. & POL'Y 91 (2011).

³⁶⁰ A quintessential statement concerning minority rights enforcement from Justice Black echoes this view: 'Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.' *Chambers v. Florida*, 309 U.S. 227 at 241 (1940). Quoted in Ball, *supra* note 152, at 1096.

collective judgments. The requirement of independence does not mean, and cannot mean, however, that courts are completely isolated from the political and social context they work in. Complete isolation is not only unrealistic, but also undesirable.

Starting with the charge of judicial bias, it is possible to justify the reliance on judicial institutions as opposed to political (elected) ones, based on the likelihood that they are more sensitive and responsive to minority concerns. Yet, this is not to claim that judges are immune from majority biases. Law is closely connected to the wider culture surrounding a legal system. Courts and litigation are not exceptions.³⁶¹

Just as institutions matter, the surrounding culture also has a huge impact on judicial decision-making. The very question whether collective procedures are accepted might be premised on attitudes and the dominant legal culture. Piché lists three elements from American and Canadian culture that help the acceptance of class actions: an increased expectation concerning access to justice, the emergence of ‘managerial judging’ and the preference for settlement.³⁶² Similarly, cultural biases are present with courts that are but one set of institutions in a political system. As Piché argues, ‘it is difficult to argue in favour of a unified, truly Canadian or American legal culture,’³⁶³ and yet, there are cultural differences that are within the boundaries of what mainstream institutions endorse or are willing to accept, and those that fall outside of the ordinary working of the legal system.

Indigenous communities might be wary of majority institutions, including courts, justified by a history of deprivations: ‘Indian leaders fear that white judges on the Supreme Court may

³⁶¹ Arguing for a close connection between civil procedure and culture, in the context of class actions, see Piché, *supra* note 266.

³⁶² *Id.* at 125–136.

³⁶³ *Id.* at 125.

interpret certain rights in culturally biased ways.³⁶⁴ A similar lack of trust (and legitimacy) might be present in other minority communities. In the US, the discrepancies in the criminal justice system, showing egregious racial disparity, can lead to a view that there are separate justice systems, one for the affluent and white, and one for the less well off, usually black people, be they victims or defendants.³⁶⁵ A recent empirical study showed how basic perceptions of real life events, like police chasing a car, are interpreted differently, depending on who is the observer. Using a famous police chase case that resulted in paralyzing the fleeing target (*Harris v. Scott*), Kahan, Hoffman and Braman show, on a sample of 1350 respondents, that the ‘unequivocal’ presentation of the ‘facts’ based on the video (the argument by the court) is questioned when answers are analyzed through differences based, e.g., on gender and race.³⁶⁶ The authors conclude that ‘[t]he Court’s failure to recognize the culturally partial view of social reality that its conclusion embodies is symptomatic of a kind of cognitive bias that is endemic to legal and political decisionmaking and that needlessly magnifies cultural conflict over and discontent with the law.’³⁶⁷ The authors ask the question,

will judges inevitably succumb to the subconscious influence of their cultural predispositions even as they exercise the particular corrective we have urged to avoid cognitively illiberal judicial factfinding? Maybe. [...] There is certainly no reason, then, to dismiss out of hand the possibility that the device we are recommending — that judges pause to consider whether what strikes them as an ‘obvious’ matter of fact might in fact be viewed otherwise by a discrete and identifiable subcommunity — is one that would function as an effective debiasing strategy for cognitive illiberalism. Indeed, the very gesture of

³⁶⁴ KYMLICKA, *supra* note 99, at 39.

³⁶⁵ For a powerful overview including historical and literal references on racial views of law, see J. Sotomayor’s dissent in *Utah v. Strieff*, 579 U. S. ____ (2016).

³⁶⁶ Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). Not only did the Supreme Court majority find the video speak for itself, as a result of their decision, in similar cases, no jury will be available to actually assess whether there is indeed a consensus (or at least wide agreement) among those exposed to the evidence. *Id.* at 880.

³⁶⁷ *Id.* at 881.

*attempting to do so in good faith would go a long way to counteracting the message of exclusion associated with a decision like Scott.*³⁶⁸

To act against bias and at least show a gesture, extending the hand to minorities, requires the acknowledgment of bias. This might be easier in case of remote cultures and hard with our own: 'we are only able to see and "condemn the racism of another place [...] or time. [...] But that of our own place and time strikes us, if at all, as unexceptional, trivial, well within literary license."³⁶⁹ This makes it close to impossible 'to correct the racism of our time because we do not perceive such racism.'³⁷⁰ Peggy C. Davis traces how covert biases, attitudes and ignorance lead courts to see blacks through a biased lens, and how that undermines the perception of fairness and legitimacy of the judiciary.³⁷¹

These biases are especially worrying if we add that it is the treatment of the losing side that has the largest impact on the perception of fairness and legitimacy. If the losing party, whose position gave away to competing goals, does not feel respected in the way she is treated in the procedure, that is arguably more problematic than a similar experience for the winning side.³⁷² If the collective procedural solution serves to strengthen the case of the side that is usually considered the weaker party, that in itself can result in increased sense of fairness and legitimacy.

³⁶⁸ *Id.* at 899. Citations omitted.

³⁶⁹ Martinez, *supra* note 257, at 194, quoting from RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION* 14 (1994).

³⁷⁰ *Ibid.*

³⁷¹ Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559 (1988-1989).

³⁷² Kahan, Hoffman and Braman argue that some sensitivity on the part of the court might also help:

The ability of defeated parties to identify with [court] decisions, notwithstanding their disagreement with them, is preserved, in part, through the law's genesis, and continued amenability to revision, in democratic politics. But just as important, the dignity of dissenters is protected by idioms of justification, including formalism, that disavow the law's endorsement of a cultural orthodoxy. Indeed, the array of techniques associated with judicial minimalism is animated by a recognition on the part of the judiciary that promoting liberal pluralism in law requires judges to attend carefully to the language they use to justify their decisions.

Kahan et al., *supra* note 366. Emph. omitted.

One way to address the bias is to design the political, legal and judicial system in a way that avoids judgments by majority institutions over minority matters. Kymlicka proposes that

in multination states, the appropriate forums for reviewing the actions of self-governing national minorities may skip the federal level [...and] the decisions of self-governing national minorities are reviewed in the first instance by their own courts, and then by an international court. Federal courts, dominated by the majority nation, would have little or no authority to review and overturn these decisions.³⁷³

If minorities have judicial autonomy in this sense, the bias question does not arise with the same force – although minority protection would still apply to minorities within the group. Here I am concerned with the majority of the cases, where majority judicial institutions do maintain considerable oversight (usually having the last word) on rights enforcement.

Assuming that there is a willingness from the side of the courts to address the bias phenomenon, neutrality can require fundamental changes that a legal system might not be able to accommodate on the substantive level. Taisu Zhang argues, based on a comparison of property rights in China, Japan and England, that ‘cultural paradigms’ play a pivotal role in defining property institutions, explaining variation across states.³⁷⁴ In the minority context this suggests that where different ‘cultural paradigms’ exist within a single state, and the legal system is based on one such paradigm, this creates obvious problems for neutrality and, ultimately, legitimacy. Moreover, this cultural setting is not only true for specific rights, but the way law and judges work and are approached, making the neutrality critique even more pressing. That the courts are embedded in a larger structure not only means that judges are influenced by the majority culture, its biases and blind spots, but also that the legal and

³⁷³ KYMLICKA, *supra* note 99, at 169.

³⁷⁴ Taisu Zhang, *Paradigms in Property Institutions* (Yale Journal of International Law, Forthcoming; Yale Law & Economics Research Paper No. 545, 2016), available at <http://ssrn.com/abstract=2785880>.

political system marks the limits of what courts can do. An outer limit is apparent from the ‘domestic dependent nations’ cases in the US. With a structural resemblance to the twentieth century rights cases, the potentially disruptive nature of constitutional protection seemed to suggest that other political decisions that took the form of law and that formed the basis of the country, namely taking land away from native tribes, should be declared invalid. (See Chief Justice Marshall’s dilemma earlier.)

If the interpretation and enforcement of the right stays ultimately with majority institutions, the right might not become what the minority expects, falling short of protecting the difference it was meant to maintain. If minority institutions are vested with these rights (interpretation and sanctioning), it is already the terrain of genuine group rights, with internal restrictions. The present thesis remains agnostic as for the wider institutional setting of the judicial forum that deals with the collective claim. This is, however, not a strategic decision, but a choice of focus. It matters a great deal how a court is organized, what majority or majorities stand behind them, what courts treat as principles, tenets and basic structure that they cannot question or overwrite etc. The discussion here takes these limitations as given, identifies them as biases in violation of the neutrality principle, and seeks to tame or counterbalance them by a procedural tool that empowers or amplifies group claims.

Judicial biases can in fact be detrimental to the collective procedural solution. With court reluctant to apply the collective procedural solution to minority cases – see the argument, in the US context, that there is a bias against race-based class action certification as opposed to human rights cases³⁷⁵ – the device will be yet another part of the arsenal allegedly serving minority interests, a concession from the majority, that fails to deliver. The approach of this

³⁷⁵ Martinez, *supra* note 257.

chapter that assesses select minority claims class actions and analyses the benefits and the challenges should not hide the fact that US courts show some, arguably increasing,³⁷⁶ reluctance to take cases based on human rights abuses. Claims challenging practices that target or targeted minority groups have a hard time to survive. Such unsuccessful challenges include the fight of the Ogoni people of Nigeria against Shell operations – alleging support for ‘beating, raping, killing, and arresting residents and destroying or looting property,’ resulting in a dismissal for extraterritoriality³⁷⁷ –, Bougainville claims from Papua New Guinea – various crimes against indigenous secessionist movement and other violations³⁷⁸ – and the Herero genocide claims, from Namibia, against Germany,³⁷⁹ apartheid claims³⁸⁰ and slavery claims. This does not necessarily establish that courts are biased, it is simply to show that despite the line of successful cases, litigating large-scale minority claims is not an easy endeavor. Both Paul R. Dubinsky and Beth Van Schaack conclude in their overviews that human rights class actions fail to deliver.³⁸¹

Bias of this sort would indicate that the judiciary has fundamental problems with accommodating minority claims, and the procedural solution might only be available at an

³⁷⁶ For an overview of the formidable challenges, primarily driven by the Supreme Court, see the last chapter of the history of class actions in the subchapter 2.3.1.

³⁷⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. ____ (2013); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001). Note that in the latter case, Shell did agree to settle, for a sum of USD 15.5 million, yet, without acknowledging complicity in the crimes. See the overview and the documents on the site of one of the organizations involved in the law suit: EarthRights International, *Wiwa v. Royal Dutch/Shell*, <https://www.earthrights.org/legal/wiwa-v-royal-dutchshell>.

³⁷⁸ *Sarei v. Rio Tinto, PLC*, 722 F. 3d 1109 (2013) (Ninth Circuit dismissing after the Supreme Court vacated and remanded the case for further considerations in light of *Kiobel*: *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995, 185 L. Ed. 2d 863 (2013)).

³⁷⁹ For an overview, see the site of the Business & Human Rights Centre <https://business-humanrights.org/en/german-cos-lawsuit-by-hereros>.

³⁸⁰ See, most recently, *Balintulo v. Ford Motor Co.*, No. 14-4104 (2d Cir. 2015) (dismissing the claim due to extraterritoriality).

³⁸¹ Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279.

international judicial body, putting pressure on national decision-makers to address the situation. But these types of institutional questions fall outside of the scope of this thesis.

To conclude, courts might well have a mixed record in protecting minority rights. This in itself is not a challenge to Ely's assumption that the judiciary has still better chances at this task than the two other branches of government. Furthermore, as the procedural tool of collective judicial recognition is only activated where there is no prior political recognition in place, this should make sure that the judicial protection I envisage can only raise and it never lowers the standard. Furthermore, even if absolute neutrality is a non-attainable ideal, the courts' role might be to find and build on the overlapping consensus, most importantly expressed in a constitutional document, and aim at 'relative neutrality,'³⁸² that constantly seeks to eliminate decisive biases in the legal system and the working of the courts – to the extent that this is realistic for courts themselves part of the majority institutional setup.

It should be apparent in this formulation that courts are considered in the context of their relations with other institutions. This not only means that courts as institutions and judges as actors work in an institutional setting that goes beyond the judicial system. It also means that court procedures and judgments also play out in a wider setting that includes the behavior and possible reaction of the political branches. That courts might not have the final say can be seen both as a weakness (of the judiciary, of rights enforcement and of the procedural proposal); but also as a way to tame antimajoritarian objections or separation of powers

³⁸² Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959); Dubinsky, *supra* note 174.

concerns. Court decisions that cut into vested majority interests can be overridden with legislative decisions, or might otherwise go unimplemented if no political action follows. Courts are often seen as the ‘least dangerous branch’ for a reason: ‘the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.’ The judiciary ‘may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.’³⁸³

Where political input is necessary, more sustained efforts including judicial nominations might be necessary to bring about the results desired by dominant political forces. In all other cases, all that the courts (and the plaintiffs empowered by them) can hope, in the lack of political support, is benign negligence from legislatures. This is not to downplay the role courts play: the margin might be wide, and judicial input might be decisive; but it is an important limitation, considering that in all cases requiring cooperation from the political branches, most benefits of the procedural proposal are only present where there is in fact compliance, showing a minimum level of receptivity from the political side.³⁸⁴ If the political branches disregard judgments or treat them with outright hostility, maybe even acting against judicial decisions, that can create a ‘negative feedback loop,’ rendering courts unwilling to write judgments that require cooperation from other branches. This two-way relationship is best described as the requirement of some level of mutual trust, without which the full potential of rights enforcement in many cases will be unreachable. Under a dialogue concept, however, where the judicial and the political branches are willing to cooperate, even if

³⁸³ THE FEDERALIST NO. 78 (Alexander Hamilton).

³⁸⁴ One area where no such cooperation is necessary is the direct advantages of judicial recognition and the possible organizational benefits. See under ‘Groups’ below.

reluctantly, the challenge of a 'weak judiciary' does not mean that certain rights remain unenforced.

The opposition to judge-driven structural reform comes only partly from the inability view that we have seen so far. Even if courts can act, interference with areas properly reserved for political decision-making creates legitimacy problems. This critique is considerably weakened once we acknowledge that litigation might not be the last word in most cases where important political input is necessary. In almost all cases, political branches can react and might even push back. This is less true for judicial review with binding constitutional interpretation, where political influence can happen only indirectly, by challenging the particular interpretation through persuasion, legislation and nominations. Where the collective procedure alters the interpretation and enforcement of a constitutional right, true change might happen without the ability of the political branches to directly challenge the outcome. The design of the collective procedure is favorable to the enforcement of rights that are hard to litigate through exclusively individual procedures and as such, will most likely benefit minority rights. If collective procedures alter the constitutional interpretation of right relevant for minorities, this will happen most likely in favor of minorities. In cases other than binding constitutional interpretation, the effect of judicial decisions remains subject to political revision through legislation. An apt example is the history of Australian aboriginal land claim cases, where an initial judicial recognition³⁸⁵ led to robust legislative reactions and further judicial interventions.³⁸⁶ Even when judgments are based on hard-to-amend

³⁸⁵ *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1, [1992] HCA 23. The High Court of Australia refused to apply the 'terra nullius' doctrine to the aboriginal claim in question, and recognized aboriginal title under certain conditions.

³⁸⁶ See the 1993 Native Title Act and its consequent amendments and further case law including *The Wik Peoples v State of Queensland & Ors*; *The Thayorre People v State of Queensland & Ors* (1996) 187 CLR 1 (18 December 1998); and *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [1998] FCA 1606 (18 December 1998).

constitutional provisions (as in the US constitutional jurisprudence), consequent litigation might challenge an earlier interpretation. This can partly rely on input from the political branches.

G. Edward White argues in the context of minority rights that legitimacy is not simply a product of the court's decision, but of a 'dialectical' relationship between the judicial decision and public reaction. This resembles the dialogue concept:

The Court's initial decision that asserted minority rights deserve the status of constitutional protection, then, is an authoritative one but one that has not yet been legitimated. It is authoritative because it rests on the generally acknowledged status of the Court as a viable and respectable governmental institution, but it is not legitimated because the Court's attempt to influence popular opinion has not yet met with a response. The process of influence and response is a dialectical one. The Court makes an initial judgment that some minority claims rise to the level of constitutionally protected rights, and others do not. The public responds to that judgment. The Court may take note of the public's response. At some point in time, the initial judgment is legitimated or revised.³⁸⁷

These actions circumscribe what is usually termed as 'the dialogue' between the various branches. A collective procedural solution might be an additional impetus for dialogue, in areas that could otherwise be neglected. It is hard to imagine how aboriginal land claims could have risen to the national agenda in Australia, if not through litigation and endorsement from courts. Allowing group litigation by minorities might be yet another tool to give voice to minorities.³⁸⁸

Once we acknowledge that courts are just one of the players, together with the political branches, the challenge of courts intruding into strictly non-judicial (i.e., political) territories largely disappears. The Holocaust litigation show the extent to which non-judicial actors from

³⁸⁷ G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 297 (1973).

³⁸⁸ For further arguments see the chapter 'Groups.'

the political field, from civil society and the public opinion played an important role in making compensation possible in cases that had been routinely thrown out earlier. Paul R. Dubinsky tells the story of the Holocaust reparation cases that illustrates the cooperation between the judiciary and governments.³⁸⁹ He reviews two books, one by a 'Washington insider,' Stuart E. Eizenstat, who stresses the importance of political action and government-to-government negotiations;³⁹⁰ and one by a human rights lawyer, Michael J. Bazylar, who stresses more the role of human rights litigation.³⁹¹ That both views can be convincingly argued shows the relevance of both types of actors. It is true that the litigation before US courts that triggered government reaction. It is Michael J. Bazylar who shows that earlier litigation attempts were unsuccessful. In Dubinsky's summary, it is 'a myth that Survivors idly sat on their claims, allowing statutes of limitations to run out. Many vigorously pursued restitution soon after the War's end, only to have claims dismissed.'³⁹² It was only in the 1990s that the circumstances became favorable to the claims: 'The timing of the Holocaust cases was not accidental. Historical and legal transformations had brought the restitution movement to that point.'³⁹³ Actually, both books 'acknowledge [...] that class action litigation likely would not have produced results for Holocaust survivors absent other advocacy efforts' targeted at the political bodies, Congress and the White House.³⁹⁴

The Holocaust reparation cases, the primary point of reference for historical injustice claims as well as minority group claims, suggest that it is the traditional government-to-government approach that is decisive. And yet, Dubinsky argues, '[d]espite what might appear to be recent

³⁸⁹ Dubinsky, *supra* note 174, at 1167–74.

³⁹⁰ STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003).

³⁹¹ MICHAEL J. BAZYLAR, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* (2003).

³⁹² Dubinsky, *supra* note 174, at 1167.

³⁹³ *Id.* at 1171.

³⁹⁴ *Id.* at 1153.

setbacks for the human rights litigation movement, there is no indication that the international system will substantially return to the days when reparations were purely a government-to-government matter.³⁹⁵ It was exactly the constellation of judicial and political receptivity that led to a view that courts have a role to play in historical injustice claims raised by victim groups.

To conclude, I quote Philip B. Kurland who starts with the minority protection view of the judiciary, and argues that this task should go hand-in-hand with an obligation, on the part of the courts, to persuade majorities:

[The Supreme Court] is politically irresponsible and must remain so, if it would perform its primary function in today's harried society. That function, evolving at least since the days of Charles Evans Hughes, is to protect the individual against the Leviathan of government and to protect minorities against oppression by majorities.

Essentially because its most important function is anti-majoritarian, it ought not to intervene to frustrate the will of the majority except where it is essential to its functions as guardian of interests that would otherwise be unrepresented in the government of the country. It must, however, do more than tread warily. It must have the talent and recognize the obligation to explain and perhaps persuade the majority and the majority's representatives that its reasons for frustrating majority rule are good ones.³⁹⁶

Kurland goes on to argue that the Warren Court performed the first task (protecting minorities) but not the second (persuading majorities). The collective procedures that this thesis argues for should also be subject to this test, and should aim at transforming not just the legal, but also the political and social reality, by strengthening support for the claims in question. This is, however, an element that is not inherent in the proposal, but instead is left to the practical sense of the judges.

³⁹⁵ *Id.* at 1189.

³⁹⁶ PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 204–5 (1970), quoted in Ball, *supra* note 152, at 1074–75 n.72.

The following section will also deal with a potential benefit that collective litigation might bring for minority claims.

3.5 THE INNOVATIVE POTENTIAL

The dialogue argument takes account of the fact that rights enforcement sometimes has to rely, in important respects, on political branches, in addition to judicial awards. This not only means that actual enforcement might fall short of the ambitions of the courts and claimants, but also that judgments themselves appear in the public discourse and shape democratic decision-making. It might well be that a legislative response to a court decision defines the future landscape of rights enforcement more than the original judgment.

Yeazell shows that group litigation historically played what could be labelled as a transitional role, changing from time to time in a dynamic relationship between judicial and legislative recognition. Claims arise and can pose challenging questions to judges, starting an evolution that might result in the ‘maximum’ of legislative recognition (specific legal solutions to address the issue raised by the claims) or complete disappearance.³⁹⁷ The lack of legislative response might allow courts, or force them, to experiment with innovative solutions, that can then trigger legislative response etc. This could result in a ‘positive feedback loop’ where the scope and content of rights is shaped by all actors.

This process offers a way to develop legal solutions that help building a legal system that better accommodates minority claims. An initial mismatch between claims and enforcement might result in a change of our view of both rights and court procedures, bringing the two sides closer. Dubinsky argues that group injuries are in many cases real, citing cases like the

³⁹⁷ Yeazell, *supra* note 160.

German-Jewish reparations and Native American ‘mass slaughter, enslavement and dispossession.’ He then asks the question of why the legal system still refuses to recognize this type of suffering. He concludes that one reason is the US ‘legal system’s aversion to speculative damages and attenuated causation’; while the other is ‘the precarious relationship between the substantive law of human rights and the procedural law available to enforce it.’³⁹⁸

This account confirms the substantive relevance of procedure. If a right is not enforced, a certain type of violation goes systematically unsanctioned, that, for all practical means, challenge the view that there *is* a right in the first place. There is a ‘feedback loop’ between the substantive norm and the procedure that is meant to enforce it. Raz connects rights to judicial enforcement.³⁹⁹ Collective claims should therefore be construed as being primarily about the ability to go to court as a group. The proposal seeks to fulfill that demand without upsetting the primarily individualist approach of law. Fiss also argues for the role court decisions in changing public sentiments:

*It is not the job of the oracle to tell people [...] what they already believe. [...] The Equal Protection Clause provides the Court with a textual platform from which it can make pronouncements as to the meaning of equality; it shapes the ideal. [Court decisions] play an important—though by no means decisive—role in shaping popular morality.*⁴⁰⁰

This is a reflexive view that looks at court decisions as a tool to influence the way we see rights, the way we see what is feasible, what is appropriate and what is a proper subject for law, a problem that is possible to tackle, at least in part, through law and courts. Group litigation can play a decisive role in this. In the US context, David L. Shapiro argues that ‘it is

³⁹⁸ Dubinsky, *supra* note 174, at 1185.

³⁹⁹ Raz, *supra* note 71, at 3.

⁴⁰⁰ Fiss, *supra* note 24, at 173.

partly through the class action device that we may be witnessing, and taking part in, a sea change in our understanding of both substantive and procedural law.⁴⁰¹ Systems science also suggests that the various parts of the system, like substantive rules and the procedural context, all shape our understanding of rights. According to Alan Calnan, 'complexity theory teaches [...] that you cannot understand a system simply by knowing its individual parts. [...] Because the system is synergistic, piecemeal tactics can have unintended consequences.'⁴⁰² This does not only apply to constrain the applicability of comparative argument, but also means that individual parts of the system can have wide-ranging consequences, when regularly applied. The causal use of group litigation can transform the legal system, above all its ability to deal with dispersed harm that would be hard to consider in isolation, on the individual level.

The innovative potential of the collective procedure is not limited to how rights are enforced. The solution also feeds back to our concept of rights. Seeing rights enforced on a group level will shape our understanding of how rights can be conceptualized. This can happen directly, through deterrence: just like mass tort litigation pushing potential wrongdoers to work on prevention, potential rights violators will be motivated to be concerned with the rights that might otherwise be neglected for a variety of reasons. It can be that rights are not valued too much if measured in an isolated way, individually, partly because enforcement is unlikely; it can be that it is hard to think of isolated instances as violations because they are dispersed and are only show the pattern of violation if measured in a systematic way – a way that reflects the systemic nature of violations. The reasons can be manifold, but the potential is

⁴⁰¹ David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 914 (1998).

⁴⁰² Alan Calnan, *Systems Science and the Supreme Court* 10–11 (2016), available at <http://ssrn.com/abstract=2793146>.

there: once courts use their authority to reveal the violations and focus public attention on issue areas, the small procedural step can translate into changes of substantive law, if not through formal changes, but through shifts in our conception of rights. Changes can thus happen in an indirect way as well, changing our expectations towards judges. Piché shows not only how class actions are shaped by a particular culture, but also how the use of class actions influences our concept of law and courts.⁴⁰³

Finally, I address a possible effect that is a danger of implementing the collective procedural rule. On the hands of actors hostile to minority claims, collective procedures might not only become unable to present the benefits presented here, but they might also be turned against minorities. It is not hard to imagine majorities that feel threatened by particular minorities and envisage litigation that seeks to protect majority groups from minorities. Yet, this is not an argument against collective procedures in particular. The danger is present in all equality measures: a formal reading of non-discrimination can be used to invalidate substantive anti-discrimination measures, as the backlash against affirmative action shows in the American context. Without downplaying this danger, it is safe to assume that the role of a collective procedure in this is minor and cannot outweigh the potential benefits of the proposal.

The following section will revisit some of the challenges raised in the above discussion, this time exclusively focusing on the enforcement of minority rights.

3.6 ACCESS TO JUSTICE: THE PROPOSAL'S POTENTIAL TO ADDRESS SOME IMPEDIMENTS

There are a number of limitations that courts put before claimants and that can hinder efforts to get remedy. The slavery reparation litigation in the US can illustrate some of these

⁴⁰³ Piché, *supra* note 266, at 136–41.

constraints. In *In re African-American Slave Descendants Litigation*⁴⁰⁴ the court found against the claimants, seeking remedy for slavery, and dismissed the claim for a number of reasons, among others: because it constituted a political question, because the claimants lacked standing and because the statute of limitations has run out. In *Cato v. United States*,⁴⁰⁵ also a litigation about slave descendant claims, the court similarly dismissed the claim (for sovereign immunity, for lack of standing, and for lack of a specific, individualized grievance).⁴⁰⁶ Here I will discuss⁴⁰⁷ four elements that can impede access to justice, in order to illustrate how a collective procedure can present a reasoned expansion of how far law can stretch. This will potentially include minority rights enforcement where the dispersed nature of harm, the time factor or feasibility could otherwise result in no litigation – and rights without enforcement. These involve questions of standing and the statute of limitations, that appeared in the slavery cases, and the questions of funding litigation. Finally, the broader institutional problem of judicial economy will be dealt with in a separate section.

3.6.1 Financing litigation and affordability

For private enforcement to actually happen, there should be incentivized private actors who bring the claims. This is also true for group litigation. While financing in case of public enforcement happens from public funds, this is not evidently so in the case of private enforcement, where financing might be an issue with wide-ranging consequences. Fiss identifies three ways of funding public interest litigation initiated by private parties.⁴⁰⁸ First,

⁴⁰⁴ *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. 111. 2004).

⁴⁰⁵ *Cato v. United States*, 70 F. 3d 1103 (9th Cir. 1995).

⁴⁰⁶ See Dubinsky, *supra* note 174, at 1153 n.3.

⁴⁰⁷ I have addressed the political question doctrine above, under ‘Litigating rights...,’ and will omit the issue of sovereign immunity here. I will also assess the individualization challenge in the following chapter, on ‘Remedies.’

⁴⁰⁸ Fiss, *supra* note 162, at 23–24.

the fee shifting rule can be applied to such cases. (This is the common European solution and also applies to certain sets of cases in the US, too; see, e.g., the Civil Rights Attorney's Fees Award Act.⁴⁰⁹) A possible danger in this approach that even where fee-shifting applies, courts might not recognize all relevant costs that are still left with the respective party, regardless of the final outcome.

The second possible solution is to secure outside funding. Civil rights cases might benefit from public sources and donations. Special rules can address the class action tool more specifically, as it happened in Quebec, with the creation of the *Fonds d'aide aux recours collectifs*, an administrative agency deciding on funding class actions.⁴¹⁰ Private funding might play an important role in addition to public funding, allowing litigation, even where it is costly and risky and where it will most likely not pay off in purely financial terms. The third option to fund public litigation, according to Fiss, is class action itself. A collective procedure can make it easier to collect parties that are represented in a lawsuit, also broadening the base for funding.

An additional source of financing might be to use the award to pay for litigation costs. An often neglected aspect of this approach is that it is not available in all cases. There is an important difference between monetary and non-monetary remedies in that the former can be used to compensate for legal costs, where they are not covered by the opposing party, while this is not available if the remedy lies in changing a practice or a policy.⁴¹¹ In such cases, funding should happen through one of the options Fiss listed.

⁴⁰⁹ 42 U.S. Code § 1988. Note that this rule only allows, and does not compel, the judge to apply fee shifting to the prevailing party in civil rights cases.

⁴¹⁰ Bogart, *supra* note 161, at 686; see also the website of the fund: <http://www.faac.justice.gouv.qc.ca/>.

⁴¹¹ The point is raised by Bogart, *id.* at 696.

All elements – fee-shifting, public funding, aggregation and funding from compensation – can play an important role, depending on the circumstances, in making sure that private enforcement does happen even where there is no willingness from the side of public bodies. In private actions, there should be litigants willing to sue. Depending on the type of remedies sought and other circumstances, the motivation of the potential plaintiffs might vary. Normally, the promise of the remedy plays the central role in motivating claimants to litigate. In the case of a complex and dubious claim, or claims including small individual damages, there might be additional motivating factors that ultimately resolve whether litigation does actually happen. In the case of limited funds, this might be the threat of draining resources. In other cases, especially concerning indivisible remedies, however, a reversed motivation might discourage litigants to start litigation.

In a case where available funds are limited, early plaintiffs might drain the funds of the defendant, thus practically precluding other successful (and rational) litigation.⁴¹² In a case involving considerable damage claims nor raising the problem of limited funds, those who sue early might bear costs that latecomers might not need to cover. They can rely on an earlier decision, if favorable to their claims, and decide not to sue if the first judgment shows the weakness of these claims. This strengthens a free rider effect. In the case of injunctive

⁴¹² Regardless of the type of remedy, finding a violation results in obligations on the defendant's side that entail financial expenses. Most likely these will be monetary awards, but injunction can also be costly, it is enough to think of comprehensive policy reforms, bringing about structural changes. If a judgment distributes all funds available for a certain violation, that will practically preclude all similar claims, making all remedies that target those funds 'indivisible,' or at least 'interdependent.' There are good reasons why courts in such cases should combine all claims and address them in one lawsuit. On the other hand, limited funds might create just the proper incentives for those who litigate first and not allow latecomers and free riders to benefit from the risk taken by others. Yet, this is not a very disciplined way for allocating resources. The funds might drain up after free riders arrive, and latecomers might not necessarily be free riders, only parties who learned of their claims at a later time, e.g., the symptoms appeared later. There are other solutions to incentive litigation and the final award can anyway favor those who started the litigation, acknowledging the risk and efforts with awarding corresponding fees, but on more considerate grounds, not in a haphazard fashion. In the rights context, it seems especially problematic to allow such a 'rush for gold.'

remedies, a similar effect is present, with the first plaintiffs securing a judgment that covers all potential plaintiffs. On the other hand, early cases might also go wrong, making it more risky for later claimants to sue successfully.

A comprehensive approach that includes all potential claimants can address all of these concerns. Aggregation can play a decisive role in allowing more cases to go forward. The Supreme Court of Canada linked the costs of litigation, access to justice and aggregation the following way:

*by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.*⁴¹³

Rights under this threshold will not be litigated, it will be too costly to enforce them through private litigation. This would mean that such rights are outside of the realm of judicially enforceable rights. Aggregation can allow them to redeem their 'legal right' status. Finally, aggregation means that funds available for collecting evidence and securing adequate representation can be used more efficiently, strengthening the claim and making it more likely that it succeeds.

3.6.2 Standing

The greatest hurdle for claims that do not fit the traditional framework of adjudication is probably standing. Courts are anyway pushed to throw out as many cases as possible, to

⁴¹³ *Western Canadian Shopping Centres v. Dutton* (2001) 2 S.C.R. 534 ¶28, quoted by Piché, *supra* note 266, at 127.

alleviate docket overload,⁴¹⁴ and cases that look complex and, at the same time, raise issues of standing, the natural inclination might be for a refusal for lack of standing. If judges are the gatekeepers, their most common weapon is the standing doctrine, that requires that the injury that the plaintiff suffered is ‘concrete and particularized’ as well as ‘actual or imminent, not conjectural or hypothetical,’ while also demonstrating ‘a causal connection between the injury and the conduct that is the target of the litigation.’⁴¹⁵

A case in point – that is connected to group litigation through the non-identity problem – is environmental protection and the rights of future generations. In the *Sierra Club* case, a challenge to an investment impacting natural resources. Petitioner, a ski resort company, could not show ‘individualized harm’ and thus lacked standing. In its reasoning, the Court cites ‘De Tocqueville’s [...] observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.’⁴¹⁶

*It will be seen, also, that, by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.*⁴¹⁷

The ‘real want’ gives the force of the argument and, in the judgment, the link is made to a concrete individual injury. While this is an important filtering mechanism, taken too

⁴¹⁴ On how judges are pressured not to reach the merits or write opinions, see an account from a former judge: Judge Nancy Gertner, *Opinions I Should Have Written*, 110 NW. U. L. REV. 423 (2016).

⁴¹⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), as cited in Herstein, *supra* note 171, at 273.

⁴¹⁶ *Sierra Club v. Morton* 405 U.S. 727 at 740 n.16 (1972).

⁴¹⁷ *Ibid.*, quoting ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 120 (1945).

narrowly,⁴¹⁸ it can lead to the dismissal of cases where there is actual harm, trickling down to the individual level, but the harm does not completely fit the individual compensatory logic. This confirms Cass Sunstein's observation that '[t]he problems raised by the standing cases is whether the courts ought to see, as judicially cognizable, actions that attempt to prevent harms that statutes were written to redress, but that do not fall within compensatory principles.'⁴¹⁹ A recent Supreme Court decision illustrates this dilemma, holding that a concrete injury is necessary for standing.⁴²⁰

A proper standing doctrine should make sure that cases are thrown out only on justified grounds, and for judicial comfort and custom. Where familiarity plays a role, non-mainstream claims will suffer disproportionately, which will likely include many minority claims. In many cases, the legal system should just try harder to accommodate claims before they are thrown out for structural reasons, because they do not fit the common pattern of transactional harm. The collective procedural solution is an attempt in that direction. Allowing aggregation can make sure that the individual harm is present, within the recognized group, even if identifying which individuals suffered exactly what harm might be harder to ascertain. It is still for the courts to decide how far they are willing to stretch the standing doctrine, especially if it remains individualist in essence, but with groups present in the litigation, minority claims with a collective aspect are less likely to be rejected only because of this collective element.

One area where this extension might be crucial is the case of intergenerational claims.

⁴¹⁸ An example for such a narrow reading is Justice Stevens's dissent in *Gratz v. Bollinger*, 539 U.S. 244 at 289 (2003), quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976): 'a class action [...] adds nothing to the question of standing.' Quoted in Ford, *supra* note 177, at 18.

⁴¹⁹ Sunstein, *supra* note 118, at 293.

⁴²⁰ The alleged violation is based on inaccurate credit information in an aggregate database operated by defendant. The Supreme Court, after elaborating on the right standard of standing, sent the case back to the Ninth Circuit: *Spokeo, Inc. v. Thomas Robins*, 578 U. S. ____ (2016).

3.6.3 The time element: intergenerational claims and remedies as temporary measures

An important constraint on rights enforcement is that claims have to be brought before the courts with violations that occurred in a specific timeframe and individuals directly related to the violation. The violations to be remedied cannot have happened too long ago, otherwise statutes of limitation in most cases bar judicial enforcement. Adjudication also cannot go too much ahead of violations: the violations have to have happened and their consequences known, with rare exceptions of direct and judicially assessable threats of violations. In cases of individuals who died, either as a result of the violations or due to the distance between the violations and adjudication, identifying relatives might be the only option to pursue claims. In the lack of relatives who can be reached with the aim of litigation, remedies might never materialize.

Litigation in the name of groups might be used to circumvent problems of tracking inheritance and personal, non-inheritable claims, where the funds should not be left with the perpetrators or the wider society. Injuries that happened in the past to individuals who might have deceased, otherwise be unavailable, without heirs (especially in the case of genocidal crimes) or with heirs who are hard to find might, in certain cases, be conceptualized as wrongs that happened to a larger community, going beyond the family. Genocide claims are definitely of this nature, and less horrible violations of community existence, cultural heritage and community bonds might also qualify for the judicial recognition of group-level harm.

In the case of horrendous crimes, the common arguments for statutes of limitation might be outweighed by the interest in providing remedy, even where longer time has passed. This might call for what could be termed a time-based Radbruch formula. Gustave Radbruch, a German legal theorist argued, after the Second World War, as a departure from strict legal

positivism, that law is invalid if 'its conflict with justice reaches so intolerable a level that the statute becomes, in effect, "false law."' ⁴²¹ The way as this departure from justice can trump the presumption of legal validity, the gravity of rights violations can trump the presumptions behind statutes of limitations. Malveaux describes this position: 'Where the claims are so horrendous they cry out for equitable relief and yet so remote in time they seem insurmountable, the legal system must reexamine the underlying policies of statutes of limitations and recognize when they are not being served.' ⁴²²

Both formulas raise questions: How to draw the line for the type of 'injustice' that invalidates law, a potentially destabilizing move? How to decide where the violation is so 'horrendous' as to justify a departure from common norms? Furthermore, overriding statutes of limitation raises the question whether justice can actually be served, considering not only the difficulties in gathering evidence, but also the increased difficulty in finding the right remedy and the ability to have the right parties: perpetrators and victims.

Ori J. Herstein argues that for historical injustices most arguments supporting the application of statutes of limitation – like 'finality, predictability, freshness of evidence, prompt prosecution and judicial efficiency' – are considerably weaker than in traditional contexts: for large scale violations, evidence is often unearthed by historians, regardless of litigation; and 'considerations of finality, predictability and reliability of third parties are suspect when used

⁴²¹ 'Preference is given to the positive law, [...] unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, 'false law' and must therefore yield to justice. [...] Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "false law", it lacks completely the very nature of law.' Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, *Süddeutsche Juristen-Zeitung* 1 (1946) 105-8 at 107, in *Gesamtausgabe* ('Collected Works'), Vol 3, in Winfried Hassemer (ed) *Rechtsphilosophie III* (Heidelberg: C. F. Müller, 1990) 89-93 at 89; quoted by Stanley L. Paulson, *Radbruch on Unjust Laws: Competing Earlier and Later Views?*, 15 *OXFORD J. LEGAL STUD.* 489, 491 (1995).

⁴²² Suzette M Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 *GEO. WASH. L. REV.* 68, 122 (2005).

to dismiss claims based on grand historic parties are suspect when used to dismiss claims based on grand historic injustices[, ... because t]hose who benefit the most from the finality and rehabilitation injustices.⁴²³ Regarding the availability of the parties, in the case of minorities, it is the persistence of the group as such that might help to sustain the justiciability of the claims.⁴²⁴

Jeremy Waldron argues that remedying harms from a distance of generations generates special problems (the counterfactual, what would have happened had the violation not taken place; and the changed expectations) that might actually justify a process of ‘superseding’ injustices.⁴²⁵ He writes that ‘some rights are capable of “fading” in their moral importance by virtue of the passage of time’⁴²⁶ and that ‘it seems possible that an act which counted as an injustice when it was committed in [certain] circumstances [...] may be transformed [...] into a just situation if circumstances change [...]. When this happens, I shall say the injustice has been *superseded*.’⁴²⁷ This insight is reflected in the legal realm through statutes of limitation, standing (connection between the party and the harm; and defendant and the harm), and designing the remedy. Restoration claims might weak by time and monetary claims might also decrease by time or, rather, over generations, because it is harder and harder to make the connection between harm, victim and perpetrator.

What is more, the claim to a remedy might completely ‘fade away.’ According to Waldron: ‘If something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the exercise of my autonomy is much less credible.’⁴²⁸ Yet,

⁴²³ Herstein, *supra* note 171, at 274.

⁴²⁴ See the discussion later under the section on ‘Groups.’

⁴²⁵ Waldron, *supra* note 170.

⁴²⁶ *Id.* at 15.

⁴²⁷ *Id.* at 24, emphasis in the original.

⁴²⁸ *Id.* at 18–19.

supersession is not a rule that does not allow for exceptions: 'from the fact that supersession is a possibility, it does not follow that it always happens.'⁴²⁹ First, regardless of the distance, it seems safe to assume that 'if the injustice had not taken place, the descendants of those who suffered [the violation] would be better off than they are and descendants of those who perpetrated it would be somewhat worse off than they are. So a transfer from the latter to the former seems justified.'⁴³⁰ (This might be called the *de minimis* argument.⁴³¹) Second, in certain cases, where the violation is 'resilient,' remedies seem justified even after a longer time. Waldron gives the example of groups, especially minority groups that maintain their distinct culture, where the violation relates to this culture, e.g., the taking of a spiritual place:

*[The 'fading rights' argument] may not apply so clearly to cases where the dispossessed subject is a tribe or a community, rather than an individual, and where the holding of which it has been dispossessed is particularly important for its sense of identity as a community. [...] Religions and cultural traditions we know are very resilient[.]*⁴³²

Even in cases where the resilience claim is less strong, the goal of recognizing suffering, the victims and identifying the perpetrators, in addition to the insight that some remedy surely looks legitimate (*de minimis* argument) can still justify judicial intervention. Yet, to be able to apply a remedy after a longer time, we need to identify the proper parties: those who are made pay and those who receive payments. The judicial recognition of collective parties helps in recognizing claims that reach over generations.

The argument has been made that not only claims in connection with past generations, but also with future generations can be accommodated through aggregation. The claim that

⁴²⁹ *Id.* at 25.

⁴³⁰ *Id.* at 11.

⁴³¹ My expression, Waldron does not use this term.

⁴³² Waldron, *supra* note 170, at 19.

future generations and their members can make claim is controversial, best captured probably by the ‘non-identity problem.’

The dilemma raised by the non-identity problem is that considering harm from a distance of generations, either into the past or into the future, raises the problem that eliminating the harm might also mean that the people who make claims would also not exist. Other people might exist, but their hypothetical existence cannot justify actual remedies provided for them; and those who exist cannot claim violations based on which their own existence depends.⁴³³

In the context of forward-looking remedies, however, the benefits ideally concern people who are not yet born. If group-level assessment can be used to address past violations, it might also be used to get around the non-identity problem. Ori J. Herstein argues exactly along these lines, circumventing the non-identity problem through what he calls ‘constitutive harm’:

When the interests those individuals have in the well-being of the group are constitutive of their identities, as they can be when people are formatively attached to a group, the harm to the group can ipso facto harm the attached individuals as a function of “who they are,” creating a constitutive harm. In other words, in certain cases the harm to a group caused by an historic injustice also functions as a constitutive harm to the group’s formatively attached individual members.⁴³⁴

Under this model that connects individual harm to collective harm, where the two are connected through the notion of being ‘constitutive,’ the non-identity problem does not arise, because regardless of other benefits (including the fact that particular individuals are born), ‘without rectification or identity transformation the harmfulness of the historic injustice is

⁴³³ See, e.g., Derek Parfit, *On Doing the Best for Our Children*, in *POPULATION AND POLITICAL THEORY* 68 (James S. Fishkin & Robert E. Goodin eds., 2010); or Saul Smilansky, *Morally, should we prefer never to have existed?*, 91 *AUSTRALASIAN J. PHIL.* 655 (2013).

⁴³⁴ Herstein, *supra* note 171, at 265. See also: ‘In many cases historic wrongs, such as slavery, are not singular or short-lived occurrences; they often span many years and are made up of many specific interconnected wrongful acts. While initially these acts may have caused the formation of the group now demanding historic justice, after the group identity had been sufficiently established those wrongs began to harm that group without radically affecting its very identity.’ *Id.* at 269.

indelible.⁴³⁵ Note that for this solution to work, you have to set the ‘transaction frame’ in a way that does not allow offsetting the said benefits against the harms.⁴³⁶ What remains true is that some remedies seem justified. This coincides with what I called Waldron’s *de minimis* argument.

Note that Herstein’s ‘constitutive harm’ presupposes not only the survival of the group (and its identity, including its ‘constitutive’ nature), but also that the harm also remains: ‘historic injustice is not just a matter of identity continuity but also a matter of continuity of the harmful effect of the historic wrong.’⁴³⁷

The slavery reparation litigations⁴³⁸ are a good example for how dispersed and historic claims can be presented, but also for the limitations of the compensatory logic inherently limits the availability of remedies. The *In re African-American Slave Descendants Litigation* considered this question, and the court dismissed the claims concluding that ‘it would be impossible by the methods of litigation to connect the defendants’ alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct.’⁴³⁹

The question raised by the slavery reparations debate is not so much about the ‘accuracy’ of a class-wide relief. The historical distance makes it clear that there is some mismatch. The question is more whether the pervasiveness of the violations and the surviving effects warrant a remedy today. This is where the debate is most heated, and all the collective procedural solution does here is to offer a practical means for remedies, class-wide relief, if

⁴³⁵ *Ibid.*

⁴³⁶ Along the lines of Levinson’s argument, see the section on ‘Defining the context....’

⁴³⁷ Herstein, *supra* note 171, at 269.

⁴³⁸ Some highlights from the literature: Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457 (2003); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003).

⁴³⁹ *In re African-American Slave Descendants Litig.*, 471 F.3d 754 at 759, quoted in Herstein, *supra* note 171, at 274.

the answer is positive. It does not settle the dispute, only keeps open an option that would otherwise look even less appealing.

A different critique of the temporal limitations in providing remedies for rights violations concerns the exclusive focus on the compensatory logic. For a theory that seeks to cherish difference, maintaining cultural diversity, regardless of past discrimination, the need to prove historical injustice or other past violations might look like an unnecessary burden. From the perspective of minorities, it is not only limiting in what minorities can seek what measures, but puts a time limit on the benefits for those minorities that qualify. Charles Taylor criticizes the remedial approach as a temporary solution to a deeper problem:

Reverse discrimination is defended as a temporary measure that will eventually level the playing field and allow the old “blind” rules to come back into force in a way that doesn’t disadvantage anyone. This argument seems cogent enough—wherever its factual basis is sound. But it won’t justify some of the measures now urged on the grounds of difference, the goal of which is not to bring us back to an eventual “difference-blind” social space but, on the contrary, to maintain and cherish distinctness, not just now but forever.⁴⁴⁰

This could be contrasted to a widely cited statement, from the other side of the spectrum, from 2003, by Justice Sandra O’Connor: ‘We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.’⁴⁴¹ This is not so much an either-or question, but rather which of the two should apply to what measures. Courts might require accommodation and other equality measures regardless of a history of

⁴⁴⁰ Taylor, *supra* note 122, at 40.

⁴⁴¹ Grutter v. Bollinger, 539 U.S. 306 at 343 (2003). Note that the primary reason of why it is the notion of ‘classroom diversity’ that is winning the day might lie not in the fact that this is the most persuasive argument for equal access to higher education, but the fact that this can be best cast in individual terms. It is equally easy to point out, however, that it is impossible to truly make sense of this diversity without reference to disadvantaged *groups*.

discrimination in certain cases, while limit certain measures to those cases where only pressing historical evidence can justify the remedies.

Kymlicka distinguishes talks about group representation that can be justified by systematic discrimination. At the same time, he argues that the other source of justification is self-determination and advancing self-government. While the former, remedial logic is usually apt for judicial consideration, the latter terrain offers only a very thin layer of legal standards, one that is probably better left out of courts – in any case, the procedural solution as presented in this thesis does not deal with claims of this type.⁴⁴²

Otherwise the collective procedural solution is agnostic as for whether equality measures are temporary or permanent. It allows for a third, intermediary approach as well, maintaining the temporary element with measures that are limited in time, and through re-litigation, while also leaving open the possibility of continuous group-level remedies. Group litigation can bolster the remedial argument by establishing a line of past discriminations, even across generations; but it can also support non-temporary measures by pushing the court to acknowledge the continuous presence of the group and its difference. As a minimum, the collective procedural approach strengthens the possibility that courts remain open to such remedies. Owen Fiss argues that the temporal dimension is not decisive: if vulnerability emerges today, the relevant group would be worthy of protection, and the weakness can cease despite a long history of subordination.⁴⁴³ Rather, it could be maintained that history can create a presumption of weakness/vulnerability. Regardless of whether one accepts a view with temporal limitations, it is hard to imagine that positive measures targeting

⁴⁴² See Chapter 7: Ensuring a Voice for Minorities in KYMLICKA, *supra* note 99. His argument, in short, is that 'some representation rights are defended, not on grounds of overcoming systemic discrimination, but as a corollary of the right to self-government for national minorities.' *Id.* at 142.

⁴⁴³ Fiss, *supra* note 24, at 151 n.67.

minorities and discrimination will cease to be relevant, in 2028 (2003 + 25 years) or later, considering that even artificial intelligence seems to be tainted with racial biases.⁴⁴⁴

3.6.4 Aggregation and judicial economy

Arguments for aggregation in the form of collective litigation are often based on saving precious judicial resources by litigating one case that covers a series of (potential or actual) cases. Yet, the reason why group litigation is beneficial for victims of rights violations is partly based on the fact that these allow for additional cases to be litigated, cases that would otherwise be thrown out. Reasons for this could be that individuals are not motivated, e.g., because the individual claims are too small or too risky or else too costly to be brought, that it is hard to individualize the claim and/or the evidence proving the violation and other factors. If such arguments hold, then the simple argument that allowing for group litigation results in less judicial resources exhausted does not hold too much water.

Courts are often seen as 'gates' with judges as 'gatekeepers.'⁴⁴⁵ Following this analogy, allowing for collective litigation is a way to open up the gates to claims that might otherwise not be allowed, for various reasons. The reason why this does not necessarily go hand in hand with the overburdening of courts is that group litigation can replace a series of individual claims, by way of aggregation. Furthermore, considering that the ultimate goal of rights litigation is to best secure the underlying rights, a more complete judicial guarantee should generally prevail. In the context of historical injustice claims, formulated by minority groups, Ori J. Herstein adds that even if we were to open justiciability, against general statutes of limitation standards, the cases that would qualify would still be limited. In the time limitation

⁴⁴⁴ Kate Crawford, *Artificial Intelligence's White Guy Problem*, N.Y. TIMES, June 25, 2016, <http://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html>.

⁴⁴⁵ See the use by, and a list of other uses in: Schwartz, *supra* note 218, at 1654.

context, that we have seen, this means that ‘not all the wrongs perpetrated in history continue to harm individuals throughout the generations – groups change or over – come past wrongs. Therefore, most claims based on historic wrongs dissolve with time as they cease to harm currently living individuals. Therefore, opening the gates of justice to those claims based on historic injustice would not result in a flood of claims going back to antiquity.’⁴⁴⁶

Yet, one goal of group litigation, one that fits the logic of this thesis as well, is undeniably the ability to allow more litigation. Based on his historical overview of class actions in the US, Yeazell identifies ‘a central dilemma of modern class action theory:’

whether the function of the class action is to consolidate suits that would otherwise be brought (and thus make the judiciary more efficient) or to facilitate the bringing of suits that would otherwise not be brought because the individual stakes are too small (and thus serve substantive goals).⁴⁴⁷

The answer to the dilemma is not yes or no, the outcome might be more complex – which is only better from the point of view of the overall functions of the judiciary: The actual results of a well-functioning collective procedural rule (not held back by factors like requirements of extreme homogeneity or problems of funding) could be better described by the combination of better rights protection resulting in more suits brought and judicial economy because cases that can be dealt with in one unified procedure are litigated that way.

The idea that class action could be used to better enforcement is not new, and goes back to at least 1941, when Harry Kalven, Jr. and Maurice Rosenfield argued that the primary function

⁴⁴⁶ Herstein, *supra* note 171, at 275.

⁴⁴⁷ Yeazell, *supra* note 216, at 1089.

of class action is to allow small claims to be litigated through aggregation.⁴⁴⁸ In other words, achieving economies of scale. This is an account confirmed by the Supreme Court.⁴⁴⁹

Aggregation might also help where an individual case would just drain judicial resources, because it is thrown out at a later stage where only a completely new litigation can help. If there is a problem with standing or other problems related to the individual, but not the entire affected group, the case might die at a high level after years of litigation, without resolving the underlying issue. This cannot happen in a case where the entire group is a party to the case. If the court decides that group members with a certain status cannot make the claim, that either empties the group or leaves others in the group who can continue the litigation. In other words, the decision against some members will only result in redrawing the boundaries of the group and the substantive claim is still pending before the court.

Some claim that the case of *Fisher I* shows this. The plaintiff there was a white applicant who was rejected at the undergraduate program at the University of Texas in Austin and who challenged an affirmative action element of the admission procedure. She was litigating as an individual, not as a class, and there were arguments for why the plaintiff, who graduated when the case was decided by the Supreme Court (eight years after the case started), might have lacked standing.⁴⁵⁰ If the Supreme Court decides a case involving an important question

⁴⁴⁸ Kalven & Rosenfield, *supra* note 350.

⁴⁴⁹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp*, 109 F3d 338, 344 (7th Cir 1997):

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

⁴⁵⁰ See Carroll, *supra* note 221, at 900, esp. n.333. Carroll argues that, as the *Fisher* case was not brought as class action, a reluctant court could avoid the substantive question by finding that the individual plaintiff was not wronged, for a reason specific to her case; while it would have remained uncontested that in an admission system with a race-conscious element, there will be non-minority applicants who are rejected based on race. Carroll, *supra* note 169, at 2045–48.

by rejecting standing, that makes it questionable whether the case was an adequate use of judicial resources if there are other potential plaintiffs to whom the rationale would not apply. Furthermore, as Kaplan notes, in a non-class desegregation case, it is ‘very likely the relief will be confined to admission of the individual to the school and will not encompass broad corrective measures— desegregation of the school. This would be unfortunate.’⁴⁵¹ A language discrimination case had been litigated for nine years when the Supreme Court said that the case should be dismissed because the plaintiff of the individual lawsuit no longer worked for the state.⁴⁵²

Bronsteen and Fiss seem to disagree, and offer a solution for continuing litigation. While they acknowledge that the class action might be used to avoid mootness at a later point, ‘occasioned, for example, by the graduation of the named plaintiffs in a school desegregation case,’ they claim there is an alternative: ‘the lawyer for the named plaintiff would find a substitute or bring the individual action on behalf of a number of individuals.’⁴⁵³ This solution ends up acknowledging that there is a ‘pool’ of potential plaintiffs out there, whose interests are so much at stake that they can jump in any time to litigate on their own. This makes the decision on who is represented in the lawsuit quite arbitrary, and raises the question of how to make sure that the interests of others from the pool of potential plaintiffs are adequately represented. In addition to the other benefits of collective litigation, this is a structural element of the class suit that might not be properly taken into account in individual lawsuits. Standing issues are often interwoven with judicial economy concerns, from both sides: a standing doctrine that is too wide might allow too many cases to be litigated. On the other

⁴⁵¹ David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 700 (2011), quoted by Carroll, *supra* note 221, at 907–908.

⁴⁵² *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), cited by Carroll, *supra* note 169, at 2037.

⁴⁵³ Bronsteen & Fiss, *supra* note 237, at 1433.

hand, as we have seen, uncertainty around standing and a more restrictive approach to standing might result in wasting judicial resources, leading to unnecessary relitigation.

Individual litigation concerning claims that are inherently linked also risks to increase the possibility of inconsistency. While inconsistency might be seen as a wrong on its own, that might not be the most pressing argument for why aggregation is desirable. The same move that allows inconsistency also encourages experimentation. Carroll argues that

*class actions can suppress rights articulation. Instead of multiple claims percolating through multiple courts, a class action can result in a global settlement of all related claims in a single proceeding, or a single judicial decision resolving all potential litigants' claims at once. This cost to rights articulation is the flip side of the class action's benefits to judicial economy and closure.*⁴⁵⁴

While the experimentation argument might not be strong enough to persuade those whose judge 'got it wrong' in the process, and it is in general dubious whether supporting inconsistency is a legitimate and workable goal for designing a judicial system, the 'experimentation' argument might nevertheless be beneficial in some contexts. Note, however, that the collective procedural solution does not completely rule out experimentation and dispersed litigation or relitigation. What it does is that it unites those cases that really belong together and as such, should be litigated together.

Finally, we should not forget the ultimate goal of litigation. Judicial economy and doctrines of standing are not goals on their own. From a rights enforcement perspective, it is hard to imagine 'too many cases' to be litigated. As most of the cases deal with specific policy questions and the number of cases brought depends more on the number of policy questions and other factors (willingness and organization behind rights litigation) than the number of

⁴⁵⁴ Carroll, *supra* note 169, at 2068.

potential clients. The number of cases will grow after a controversial right-limiting policy is adopted than after the standing doctrine is relaxed.

The imperative to serve justice precedes the argument of judicial economy, unless the threat of overburdening courts is so large that it creates a genuine risk of crippling courts, resulting in a dysfunctional judiciary. With no rights enforced, those who are anyway left out are definitely not better off, while others are considerably worse off. In all other cases, judicial economy should only inform our decision how, and not whether, to serve justice. Ori J. Herstein goes further and connects this imperative to the threat of ‘wide social inequality and unrest,’ considering historical injustices.⁴⁵⁵

Enforcing rights, after all, is a constitutional duty. Fiss connects this to a broader ethical argument when stating that ‘[t]he ethical issue is whether the position of perpetual subordination is going to be brought to an end for our disadvantaged groups, and if so, at what speed and at what cost.’⁴⁵⁶

3.7 CONCLUSION

The collective procedural solution relies on courts. This comes with important structural limitations and legitimacy challenges. While an executive or legislative action might go far in dealing with larger groups and address their claims, courts are usually seen as having a narrower margin of action. This chapter provided an overview of the arguments why collective litigation is no less legitimate than litigating individual claims. The minority rights context means that some concerns, distrust in government bodies, are especially relevant and underline the importance of allowing private enforcement of rights. This does not mean that

⁴⁵⁵ Herstein, *supra* note 171, at 275.

⁴⁵⁶ Fiss, *supra* note 24, at 173.

courts will be the sole actors. Litigating minority claims on a larger scale in many cases will inevitably involve the political branches. While this might not be a good news for the claimants, it tames legitimacy challenges and might serve broader goals in the long run, like persuasion and mainstreaming. The collective procedural solution facilitates minority rights litigation in a number of ways: by easier financing; with a more accommodating application of the standing doctrine; and by responding to the time-related constraints in certain cases. Of course all these benefits come with a caveat: courts share most of the biases of the majority society, and while they might be better placed to remain responsive to minority claims, this does not warrant an outcome that benefit minorities. All that the collective procedure can do is to create a structural setting where it is more likely that the accommodation of such claims actually takes place. As the final section has showed, concerns of judicial economy do not impede these efforts, they can even bolster the case for collective litigation.

The collective judicial proposal fits various accounts on what courts actually (ought to) do. It fits a certain vision better than others, but no view inherently excludes the desirability of the solution. While I find that in rights litigation the public view provides a more accurate description of the courts' role, group litigation of minority claims should appeal to those, too, who endorse a more traditional view of adjudication.

In the following chapter, we will see how courts can grapple with the design of remedies, where collective procedures present challenges as well as potentials.

4 'REMEDIES'

4.1 THE GOALS AND TYPES OF REMEDIES

To see how and where collective remedies work best, this chapter starts with an overview of the goals and types of remedies, with special regard to the collective element and the possible application of the general framework in the minority context.

Remedies should aim at 'undoing' the violation, to the extent that this is possible. Where this is not possible, it is often a combination of various second-best options that best approximates the first ideal. Dinah Shelton describes the purposes of redress as varying 'from victim-oriented *restitutio in integrum* and full compensation for pecuniary and non-pecuniary losses to deterrence of violations for the benefit of all members of society.'⁴⁵⁷ Complete restitution is often not possible, and monetary remedies raise the question to what extent remedies should follow the strictly individualist goal of backward-looking compensation or the wider social and forward-looking goal of optimal deterrence, and to what extent the two can be reconciled. While seeking monetary compensation for groups might not necessarily question the traditional individual-harm basis of tort law, it also raises the basic question of what goals damages should serve. The US class action debate can be roughly described as between those who start with 'the problem of due process' and individual justice and autonomy in class action cases and those who begin with the premise of maximizing welfare, the utility to the entire society.

Mulheron compares various common law jurisdictions and concludes that the goals of compensation and deterrence are not universally shared aims of class action litigations. While

⁴⁵⁷ SHELTON, *supra* note 12, at 9.

deterrence is a widely recognized aim in North America (US and Canada), it is not accepted in Australia and Scotland. Mulheron refers to the Scottish Law Commission that 'rejected the suggestion that defendant behavior modification should be relevant as to whether to permit class proceedings. It stated that the "sole proper object" of a civil action, even a multi-party proceeding, "is to obtain compensation."' The Australian counterpart also stated that the primary goal is remedy and goals like better enforcement are only incremental.⁴⁵⁸ The compensatory goal extends beyond the realm of private law, and Zimmerman describes the tendency that federal agencies get the power to collect funds from (especially corporate) wrongdoers and distribute them to victim groups, a phenomenon he labels the 'corrective justice state.'⁴⁵⁹

The economic analysis of law approach suggests that 'the primary social function of the liability system [should be] the provision of incentives to prevent harm,' i.e. deterrence.⁴⁶⁰ The reason is that in its other function, compensating victims, insurance is more effective than the system of legal liability.⁴⁶¹ Under this view, it is not clear why should the legal system bother with individualizing the compensation, especially if doing so is expensive. One proposal to address this is to separate the compensatory logic from deterrence.

To fully embrace the division between the wider goal to deter (potential) wrongdoers and the more limited and focused goal of compensating plaintiffs, the 'decoupling' proposal suggests

⁴⁵⁸ RACHAEL P. MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 65 (2004), citing Scottish Law Commission, *Multi-Party Actions* (Report, 1996) [2.23] and Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) [354].

⁴⁵⁹ Zimmerman, *supra* note 352, at 210.

⁴⁶⁰ Louis Kaplow & Steven Shavel, *Economic Analysis of Law*, in 3 *HANDBOOK OF PUBLIC ECONOMICS* 1661, 1667 (A. J. Auerbach & M. Feldstein eds., 2002).

⁴⁶¹ *Ibid.* Note also the interplay between insurance plans and historical claims raised by minorities subject to genocide: both Holocaust claims and Armenian genocide claims included claims based on insurance plans. See, e.g., *Marootian v. New York Life Insurance Co.*, No. C99-12073 CAS (MCx), U.S. Dist. (C.D. Cal.); and Francie Grace, *\$20M Settlement For Armenians*, AP/CBSNEWS, January 29, 2004, 5:07 AM, <http://www.cbsnews.com/news/20m-settlement-for-armenians/>.

the formal separation of the two components, into various stages of the procedure, establishing liability and setting damages based on optimal deterrence for all aggregate claims, and in the final 'compensation' phase, distributing damages. David Rosenberg argues that 'separating the determination of aggregate liability from the distribution of damages [...] decouples the optimal deterrence and insurance functions of mass production tort liability [...] and] eliminates the traditional mixed approach that generally results in defeating either or both goals.'⁴⁶² In the minority context, it is not hard to imagine a scenario where a type of violation is specific to minority groups, or a specific group within a minority, and as a result, deterrence does actually target the group of (potential) victims, the minority itself. Under such circumstances, the decoupling that Rosenberg proposes makes the deterrence element a type of collective action that targets the group without concern for individualization. Many forms of rights litigation do just this: target defendant behavior and seek policy reform rather than looking for compensation. This is especially the case if the selected plaintiffs serve a representative role without being able to claim substantial monetary compensation.

In this sense, decoupling, and the exclusive attention to deterrence as opposed to compensation, presents the extreme of a collective procedure, where individualization is lacking to the extent that it doesn't even matter if someone has been an actual victim or is a potential victim, the interests of the entire group of potential victims is represented as the only goal of the process. Depending on the type and scope of the violation, the target group could be individuals in a similar position, that can mean members of a minority, more likely to be victims of the violation, or the entire society.

⁴⁶² David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1876–77 (2002).

In the rights context, the promise of the legal system to address the specific claims of the victims is maybe even more pronounced than elsewhere. Removing victims from the equation does not seem a promising line to pursue. How can we evaluate the collective procedural tool in this context? It has a potential to increase the deterrence effect through the threat of effective rights enforcement through a future collective action and the tangible deterrence effect of having to compensate the entire group of victims. Also, it allows for decoupling on a case-by-case basis. If the group of victims represented in the litigation agree that the deterrence effect is given clear priority over monetary compensation – e.g. because adequate and fully individualized compensation would drain all the resources – that will result in de facto decoupling. Furthermore, as the judge is aware that there is a wider group represented, special attention will be paid to the fact that all interests are adequately weighed. For example, an assurance of non-repetition will necessarily target persons who are not victims at the time of the litigation, and the court will supervise the adequacy of the relevant measure. The collective procedural tool does not make the possible conflicts of interest go away, but makes them explicit and allow them to be tackled more effectively in a more transparent framework.

A recently filed class action suit can illustrate how deterrence and the goal of compensation can go together in the minority rights context. BNP Paribas has admitted to violate sanctions against, among others, Sudan, and helped to finance a government that engaged in large scale violations. Sudanese refugees who fled the regime filed a class action in 2016 based on the complicity of the bank.⁴⁶³ If the claim prevails, that sends a strong message about future

⁴⁶³ Adam Klasfeld, Refugees Blame BNP Paribas for Genocide, Courthouse News Service, May 3, 2016, <http://www.courthousenews.com/2016/05/03/refugees-blame-bnp-paribas-for-genocide.htm>. A similar claim has been dismissed by the Second Circuit, and the Supreme Court denied certiorari, alleging involvement in international crimes committed in Sudan: *The Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc. and*

violations for corporations that have presence in the US and engage in activities linked to large scale violations, for it will be enough for a smaller number of victims to reach US courts and ask for enforcement (see the arguments for private enforcement above). The deterrence effect is of course stronger where public enforcement goes hand-in-hand with civil litigation; in the Sudanese case, a Department of Justice action preceded the civil suit, pushing the bank to acknowledge violations of US sanctions. The public shame that such an action can bring together with the aggregate potential of unifying all potential claims for large scale abuses will make sure that not only goals of satisfaction and compensation are served, but the award will work as a guarantee of non-repetition as well.

An important overarching goal of remedies is that they should be effective and adequate. Effective and adequate remedy is not simply an ideal that should drive the judiciary and lawmakers alike. It is a human right, confirmed in various international, universal and regional, and national documents.⁴⁶⁴ Next to the other rights listed, we find the rule, confirmed already by the Permanent Court of International Justice in the *Chorzów Factory* case: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'⁴⁶⁵

Republic of the Sudan 582 F.3d 244 (2d Cir. 2009) (affirming the dismissal on grounds of no adequate showing of accessorial liability).

⁴⁶⁴ See, e.g., the list in the 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, GA res. 60/147, 16 December 2005, referring to 'article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court, [and] regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.'

⁴⁶⁵ *Factory at Chorzów Case (Germany v. Poland)*, Merits, 1928 P.C.I.J. (ser. A) No. 17, 21.

Process and the relevant choices only make sense in light of the goals of the judicial procedure, in this context the protection of rights, to be assessed on the individual level. Yet, this thesis argues, for effectiveness, these rights should sometimes be enforced both on the level of the individual and of the group. As Ball argues, the

*focus on minorities is not to be construed as meaning that oppressed individuals should not be protected by the courts. Nor should it be taken to mean that individuals must first be classified as members of a minority before they qualify for strict judicial scrutiny. The theory adumbrated hereinafter would complement or expand instead of replace or restrict the possibilities for safeguarding individual rights[.]*⁴⁶⁶

Complete individualization might be used to frustrate the goals of the plaintiffs. Carroll describes the judicial backlash in the US, especially in southern states, against *Brown* and what followed: ‘The unavailability of class treatment created serious problems for civil-rights plaintiffs. It could prevent them from obtaining any decision on the merits of their claims; for example, a school desegregation case might drag on until the individual plaintiffs had graduated, rendering the action moot.’ Such a limited approach ‘could result in an order so narrow as to be meaningless—many judges [in the post-Brown desegregation context] refused to grant system-wide relief to individual litigants in civil-rights cases.’⁴⁶⁷

In cases where a collective approach is a necessary step to be able to assess the actual practice and scope of violations, decertification (individual judicial treatment) will also frustrate the substantive goals of a litigation. Carroll cites a class action claim on behalf of children with disabilities where the complaint alleged that the state failed to identify, locate and evaluate students with special needs, a duty under the Individuals with Disabilities Education Act

⁴⁶⁶ Ball, *supra* note 152, at 1060 n.3.

⁴⁶⁷ Carroll, *supra* note 221, at 859, citing David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 680 (2013).

(IDEA).⁴⁶⁸ After the district court granted certification, the circuit court moved to decertify the class because it was hard to identify the class members (true—this is what the case was about); each child’s case was different (lack of commonality); and the relief was not really common, because the action required had to be different as well.⁴⁶⁹ This denial creates a vicious circle where addressing the hurdle would require collective recognition, but collective recognition is denied because of the hurdles. An additional level of rejection is the commonality problem, where a court’s requirement of practical homogeneity blocks . The denial to certify a class is often a sign that the court disagrees with the underlying substantive claim. This is clear from the history of class actions where the post-Brown phase was full of defiant court orders. One approach is to claim that claims are too different and lack genuine commonality—I will address these arguments under ‘Individual variation...’ below. Another possibility is to move the substantive elements (e.g., considerable part of discovery) to the pre-certification stage, and asking for the establishment of facts that already relate to the substantive claim, in the phase where the court assesses the question of collective recognition. As we will see, courts can use individual variation as a way to avoid collective or hybrid remedies. Desegregation is again a case in point: collective relief is combined with individualized assessment of many students, most likely including non-minority students as well. Once the court (and a judicial system) is on the track of requiring an adequate unified and single injunctive relief that properly addresses the underlying claim, most such claims will be thrown out.⁴⁷⁰

⁴⁶⁸ *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481 (7th Cir. 2012).

⁴⁶⁹ Carroll, *supra* note 221, at 890–894.

⁴⁷⁰ For a development of how courts deal with class certification, see subchapter 2.3, especially *Wal-Mart Stores, Inc. v. Dukes* and subsequent developments; *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), cited by Carroll, *supra* note 221, at 895–898, although the class there was ultimately certified.

The rejection is often based on a traditional conception of adjudication, focusing on strict individualization. As Bogart explains, however, this approach, rejecting aggregation altogether, can actually lead to the frustration of the individual-based goals it seeks to uphold:

To force litigation to be brought on an individual basis is to embrace a vision of the structure of society which – and in many important ways, regrettably – no longer exists. To force it into the traditional mold of litigation in the name of individualism may purport to celebrate formally the value of each one of us but, in reality, it prevents an effective means of confronting such aggregates with their capacity to pose a greater threat to that individuality.⁴⁷¹

Mulheron in her comparative analysis finds the following goals as driving all class action type solutions:

to increase the efficiency of the courts and the legal system and to reduce the costs of legal proceedings by enabling common issues to be dealt with in one proceeding; to enhance access by class members to legally enforceable remedies in the event of proven wrongful behaviour in a timely and meaningful fashion; to provide defendants with the opportunity to avoid inconsistent decisions over long periods of time and possibly in different forums; to take account of personal autonomy of putative class members where appropriate; to provide predictability of procedural rules and outcomes; and to arrive at an outcome employing the philosophy of proportionality rather than perfection⁴⁷²

Where courts are willing to consider collective remedies, they can enhance the ability of judicial procedures to provide effective and adequate remedies. At this point in the discussion we have to open up the box of ‘remedies’ and distinguish different types of remedies, because there are arguments for and against collective remedies that depend on what type of remedy we have in mind. The overview is not restricted to one jurisdiction, hence it seems logical to

⁴⁷¹ Bogart, *supra* note 161, at 699. The argument works on the international level, too: claimants that otherwise would not have access to legal systems and remedies that can provide protection for them can find themselves in a position to sue. As Maatman argues,

*claimants of modest means with complex claims can – in circumstances where their domestic legal systems are not capable of providing competent representation and funding – bring claims against multinational corporations directly in US courts (or other major commercial jurisdictions like Australia and the United Kingdom) for the activities of their foreign subsidiaries. (Maatman, *supra* note 262, at 11)*

⁴⁷² MULHERON, *supra* note 458, at 66.

use an international document as a starting point.⁴⁷³ The UN's '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' uses a three-part definition what remedy means:⁴⁷⁴

- a) equal and effective *access to justice*;
- b) adequate, effective and prompt *reparation* for harm suffered; and
- c) access to relevant *information* concerning violations and reparation mechanisms.

We have seen the proposal's potential in broadening victims' *access to justice*.⁴⁷⁵ The collective procedural device is also capable of addressing the third element, *access to information* concerning the remedy. Once the group seeks recognition, it should be made sure that the (potential) group members learn about the litigation, and the court can impose the duty, on the group representative, to notify them.⁴⁷⁶ This can happen through individual letters sent out, where a comprehensive list of the persons is available and this does not seem too burdensome compared to the remedy; or it could happen through public announcements and advertising. It is hard to imagine a more effective notification than reading a statement about legal action that has already been started, describing the violation, the remedy sought and the ways to participate.⁴⁷⁷ Proper information is also a way to further goals of access to

⁴⁷³ 'The *Basic Principles and Guidelines* ultimately blend a variety of techniques from the Common Law, Civilist, and Islamic legal systems, [...] and are therefore not bound by traditional legal orthodoxy dividing Civilist, Common Law, and Islamic legal traditions.' Kelly McCracken, Commentary on the 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, *Revue internationale de droit pénal* 1/2005 (Vol. 76), 79.

⁴⁷⁴ GA res. 60/147 of 16 December 2005, para. 11.

⁴⁷⁵ See the last part of the previous chapter.

⁴⁷⁶ For the detailed regulation of notice under the US class action rules, see Federal Rules of Civil Procedure, Rule 23(c)(2).

⁴⁷⁷ See more on this and related questions under the chapter 'Groups.'

justice, as having access to information about the possible legal remedies is often a precondition of seeking remedies.

Here I will focus on the element adequate, effective and prompt *reparation* for harm suffered, the second goal on the list. Under this rubric, the UN Basic Principles list the following remedies:

- a) *restitution*: restore the victim to the original situation;
- b) *compensation*: for physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earning (potential), moral damage, costs of legal or expert assistance, medicine and medical services, and psychological and social services;
- c) *rehabilitation*: medical and psychological care, legal and social services;
- d) *satisfaction*: effective measures to cease continuing violations, full and public disclosure of the truth; information about the victims, dissemination of information about the violations, commemorations and tributes to the victims, official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim, public apology, judicial and administrative sanctions against persons liable for the violations;
- e) *guarantees of non-repetition (prevention)*: implementing proper control to avoid reoccurrence that can mean, i.a., civilian control of the military, guaranteeing due process, fairness and impartiality, strengthening the independence of the judiciary, promoting the observance of codes of conduct and ethical norms, education and training about preventing violations, protecting persons in the legal, medical and

health-care professions, the media and other related professions, and human rights defenders, promoting prevention and monitoring mechanisms, reforming laws.

Restitution (a) is the preferred way of remedying violations as they can get closest, by definition, to the ideal of 'undoing' the harm. In cases that include non-material harms, which is likely in case of minority rights violations, a mechanical reversal to the pre-violation situation will not recognize the suffering that the violation might have caused. 'Undoing' is also not enough to deter perpetrators, if finding a violation simply results in giving back what has been taken. Restitution can thus be a key element of reparation, embodying the central ideal of remedies ('as if it had not happened'), but in many cases it is not feasible, at all or in itself. Rehabilitation (c) is linked to the 'healing' concept of remedies,⁴⁷⁸ or the non-material element of reparation.

Compensation (b) is the second-best way of 'undoing.' It assesses the harm suffered and tries to give a monetary value to all harms combined. This will necessarily involve the paradox of trying to make good, with money, what cannot be measured (and made good) with money. This contradiction shows the importance of assessing the likely effects of compensation on the victims. While compensation also serves the goal of deterrence (it is better to compensate victims, however imperfectly, than leaving the benefits with the perpetrators), compensation is inherently victim-focused, and its impact on victim should be assessed in the first place. There might be cases where accepting compensation results in further victimization, reviving a sense of loss. Accepting money in cases of sexual violence might create a sense that a serious violation of dignity can be paid off. Payments to family members in cases of disappearance

⁴⁷⁸ On the problematic nature of the idea of 'healing,' see Tom Daems, *Criminal Law, Victims, and the Limits of Therapeutic Consequentialism*, in *Facing the Limits of the Law*, Erik Claes, Wouter Devroe, Bert Keirsbilck (eds.), Springer, 2009.

are often refused because that translates to relatives as an acknowledgment that the family member will not come back. It is a paradox of compensation for rights violations that money is collected for wrongs that money cannot make right, even if leaving money with the perpetrators and others who benefited from the violations sounds even worse. In most cases, compensation is an accepted form of remedy, and rightly so. In addition to the material component, seeking to recreate a balance that has been upset, compensation is also a symbolic act. Either in itself or in combination with other acts, it communicates the recognition of the suffering and constitutes a formal acknowledgment. Other remedies that further this goal are listed under satisfaction (d). To what extent a remedy should be seen as 'symbolic' is not always clear cut, and arguably all remedies have some symbolic element. Especially when individual compensation is small, or it is not fully individualized, or both, the symbolic element might actually be stronger than the material. When Japanese-Americans were compensated for their interment during the Second World War, according to Waldron, these measures can be seen as primarily symbolic: 'The point of these payments was not to make up for the loss[, ... but] to mark [...] a clear public recognition that this injustice did happen, that it was the American people and their government that inflicted it, and that these people were among its victims.'⁴⁷⁹

Finally, prevention (e) focuses less directly on victims, and more to potential victims and, even more directly, potential perpetrators. It seeks, among others, structural changes making sure that similar violations will not happen in the future.

Different classifications of what 'remedies' mean is possible, but this overview might suffice to show that the goals of the remedies vary. Most importantly, prevention, in contrast to most

⁴⁷⁹ Waldron, *supra* note 170, at 6–7.

of the other forms listed above, is less concerned with the actual violation and considers the ‘type of violation’ in a more generalized way. It is possible to design preventive measures without identifying individual victims. In a sense, even if we do identify individual victims, prevention still remains inherently collective. It is also future-oriented, as opposed to the backward-looking nature of most other measures.

Note, however, that collective remedies do not mean future-oriented remedies. Consider the case of the Holocaust class action litigation where, despite the collective procedure, the remedies remained backward-looking: ‘The court’s order sought to alleviate current suffering whether or not causally related to past injustice, and not to fund forward-looking measures, such as Holocaust education, Holocaust scholarship, or rebuilding the properties and communal infrastructure of the Eastern European past.’⁴⁸⁰

While the general approach of rights litigation as well as tort law emphasizes the individual harm and is concerned with the victim, other approaches like the economic analysis of law rely on the observation that the best use of tort law is deterrence, focusing primarily on perpetrators.⁴⁸¹ This latter insight is based on the conclusion that insurance is better at compensating victims, if we start with the premise of maximizing social welfare. I do not want to settle this debate here, and the following discussion will accept both sets of goals as legitimate ends for judicial awards. Compensating the victim usually entails making the liable party pay, which functions as deterrence, or as a way of setting the optimal level of harm prevention.

⁴⁸⁰ Dubinsky, *supra* note 174, at 1179.

⁴⁸¹ Kaplow & Shavel, *supra* note 460, at 1667.

Just like with prevention (guarantees of non-repetition), deterrence has an inherently collective focus.⁴⁸² This is not to say that that prevention and deterrence cannot be individualized: preventive measures can be designed to fit the specific relationship between the individual victim and the perpetrator. It means that they by default do not target individuals but seek to modify behavior in a larger setting.

The primary focus of the thesis is minority rights violations. In line with this, the ultimate goal of the judicial procedure should be seen as effective rights enforcement. This reflects the constitutional commitments of most countries in the Western legal culture, and can also be linked to some underlying claims of group litigation. Michelle Taruffo concludes his comparative overview of group litigation with that our primary goal is 'to find ways to cope with these challenges [of globalization] in order to preserve and improve the concrete realization of the value of real access to justice for all and the effective judicial protection of every person's rights.'⁴⁸³ In what follows, I will assess the impact of the collective procedural solution on rights enforcement, considering both the impact on individual victims and the wider goals of deterrence.

Looking back at the typology of remedies, it is not only deterrence and prevention that have an inherently collective focus. Symbolic remedies⁴⁸⁴ like apologies, commemoration and most

⁴⁸² While there is a considerable overlap, prevention is slightly broader: deterrence presupposes a liable party and disincentivizing that party, while prevention includes other violations and means. The overlap means that the two usually go hand-in-hand. E.g., a convict is prevented from robbing a bank while in jail, but is (meant to be) deterred from committing that crime again after having served the sentence.

⁴⁸³ Michelle Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 421 (2001).

⁴⁸⁴ As with many such categories, the dividing line between symbolic and material compensation is blurred. Smaller sums can be seen as largely symbolic while gestures deemed largely symbolic can have effects that make the lives of former victims substantially better. Even where larger amounts are granted, they might be perceived as largely symbolic for the victims or survivors if the harm is so grave. It would thus be futile to attempt to establish a clear category where compensation is truly material. In light of my aim with assessing material compensation granted to members of a group I do not have to settle this issue, it is enough to state

types of remedies under ‘satisfaction’ can easily target groups of victims, individualization and group-level remedies do not pose special difficulties. Rehabilitation is described as a set of services where entitlement to special care can also include members of a wider group, once the service is set up. Finally, if reparation constitutes in restoring the original situation, that should have an effect on all victims, just like the original violation. This leaves us with compensation as the most individually-focused type of remedy, and other remedies that are injunctive and declaratory in nature as less inherently connected to individual victims.

Paul Dubinsky in his overview of the Holocaust assets litigation against Swiss banks, examines to what extent the cash payments to groups of victims can be considered truly ‘collective.’ ‘Little was awarded in the way of remedies to address injuries suffered by the collective. Nearly all the money generated by the settlements was paid out in the form of individual cash awards. Proposals for group-oriented remedies were rejected.’⁴⁸⁵ Dubinsky sees that the case confirms the individual approach that does not recognize the wider group that could make legal claims. He discusses the various alternatives to distribute surplus funds after the subclass claims were satisfied. These ranged from distributing the \$600 million to the four subclasses (deposited-assets, refugee and two slave labor subclasses),⁴⁸⁶ all Holocaust survivors, Jewish people in general, or serving wider goals of fight against intolerance, xenophobia and indifference toward refugees.⁴⁸⁷ Chief Judge Korman decided that all funds should go to the last elderly and needy Holocaust survivors living in the former Soviet Union. Dubinsky argues that this shows that it is a misunderstanding or ignorance to view the Holocaust cases ‘as

that I am interested in compensation involving a material element more for a technical reason: to examine how courts deal or could deal with collectivities.

⁴⁸⁵ Dubinsky, *supra* note 174, at 1154.

⁴⁸⁶ For a more detailed account, see the description of the four classes later, under ‘Dividing claims...’ in this chapter.

⁴⁸⁷ Dubinsky, *supra* note 174, at 1177–1178.

precedent for group-oriented remedies. They are not. Relief for individuals is what triumphed. The losses suffered by the whole were not recognized.⁴⁸⁸ He further concludes that

U.S. procedural law does not embrace the remedial aspirations of groups that lack legal personality, no matter how much those groups in fact embody collective aspirations. If the goal of other reparations movements is money damages for harm done to a collective as such — harm that is distinct from injury to individual members of the collective — the Holocaust cases did not achieve that result. Instead, they showed that class-action law in the United States was never designed with human rights class actions in mind.⁴⁸⁹

Dubinsky's account is only right if we forget that distributing within the class is also a substantially collective measure: it decouples the legal basis for individual claims and the logic of distributing funds. The surplus was distributed following a logic of 'need' as opposed to a legally cognizable link following a strictly individual justice. The only important limitation seems to be that no group or part of the group outside the class can benefit from the awards. Cy-près type awards that benefit a group other than the direct victim group certainly move further away from the individual notion of judicial remedies, but this does not mean that severing the link in a less complete way does not break with the strictly individualist notion of judicial compensation. It will, in any case, suffice for the present proposal.

Individualization and collective treatment are not two mutually exclusive categories, but features that can be present in judicial awards to different degrees. Full collectivization would mean that everybody gets the exact same remedy. This is already compromised where individual variation means that the same remedy will have different effects on persons – take the case of a desegregation plan that, while applying equally to a larger group of students,

⁴⁸⁸ *Id.* at 1179–1180.

⁴⁸⁹ *Id.* at 1176, notes omitted.

will require individual placements. If a court orders free health care services like psychological support to the victim group, this might benefit only those group members who require and accept such a support, and might also vary in how extensive and successful they are. Furthermore, a collective award does not exclude the possibility of creating subgroups, where individualization might mean assigning members to certain groups. The judicial award, especially in the case of monetary compensation, might apply a formula to calculate damages. The formula might be individualist to various degrees: it might be a formula that largely homogenizes damages, with little differentiation; it can be based on data like the number of days, without trying to assess the varying impact of violations on individuals; it can be a formula generally applied to similar cases by courts, e.g., assessing the 'worth of life'; etc. Collective procedures can also set up internal mechanisms to apply full individualization to part of the award while providing remedies on the level of the group in other parts.

To what extent individualization is possible will also depend on the type of the remedy. Remedies can be divisible or indivisible. Some types of remedies are easy to individualize, i.e., divide them on an individual basis. Compensation belongs to this category: it is easy to divide money, even where deciding on what is owed to individual claimants is hard to determine, because it requires the assessment of all individual harms. Preventive measures that require policy changes will target the entire community of potential victims (minorities in the case of minority rights), and it might easily happen that the remedy is not divisible. Where an employer is compelled to stop discriminating against members of a certain group and adopt structural changes that prevent further discrimination, individualization is hardly feasible. The goal is to prevent discrimination against members of a group.

One of the strongest arguments for collective litigation is the fact that certain remedies are structured in a way that affect others regardless of whether they are parties to a litigation or not. The note of the advisory committee to Rule 23(b)(1)(B) considers this possibility:

This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual actions would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit.⁴⁹⁰

In case of remedies that are not divisible, like implementing desegregation plans, changing discriminatory policies, apologies directed at victim communities, remembrance measures like building museums, memorials or memorial chapels, will benefit the whole community regardless of whether the community is represented in the proceedings, or not. In such cases it seems better to consider and embrace the inherently collective nature of the suit rather than dismissing this aspect.

There are remedies where individualization is possible, but changing the remedy that one individual gets will have a necessary impact on other claims and claimants. An obvious example is where there is a limited fund available, and giving more to one individual will result in less money available to all others. Based on this, we can differentiate between independent and interdependent remedies. All indivisible remedies and some divisible remedies belong under the second category, as is apparent from *Table 1*.

| Divisible remedies | | Indivisible remedies |
|----------------------|-------------------------|----------------------|
| Independent remedies | Interdependent remedies | |

⁴⁹⁰ FED. R. CIV. P. 23(b) (1) (B) advisory committee’s note (1966).

Table 1: Two categorizations of remedies

It could be maintained that non-monetary remedies are more likely to be indivisible (and often independent), while the general assumption is that injunctive and declarative remedies are indivisible (and interdependent). Burch challenges this view: ‘the idea that monetary remedies are inherently divisive, whereas injunctive or declaratory relief is not, is at odds with reality.’⁴⁹¹ But she adds that this does not make the rule illegitimate, it should instead be read as a presumption, or even fiction, that allows collective treatment where it is beneficial, even in the case of internal dissent: ‘Rule 23(b)(2)’s presumption of cohesion is pragmatic, if not realistic.’⁴⁹² For that rule allows class action certification where ‘the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole,’⁴⁹³ i.e., in cases involving injunction and declaratory relief. It follows that relying on a categorization following the type of remedies does not help. The picture is more complex, and this justifies a more refined categorization, differentiating between independent and interdependent remedies.

In case of interdependent remedies, collective determination is a logical solution, because it deals with the remedies on the group level where dependencies play out and is able to control for the effects of the remedy. As we will see, if the court considers interdependent remedies in a collective procedure, that might secure additional protection to all those concerned. It is important to keep in mind for the discussion that follows that the choice, in the case of interdependent remedies is not whether to follow the traditional individual model or turn to a collective solution. That choice is not there. The collective element is inherent, and the real

⁴⁹¹ Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 KAN. L. REV. 889, 894 (2010).

⁴⁹² *Id.* at 898.

⁴⁹³ FED. R. CIV. PROC. Rule 23(b)(2).

choice is between sticking to the traditional view while neglecting the collective element, or acknowledging the collective aspect and design the remedy and the procedure accordingly. In Carroll's formulation, most problems raised in connection with class actions are there in the case of 'quasi-individual' litigation as well, only they are not even addressed. For example, 'the class action mechanism at least attempt[s] to address the agency issues involved in aggregate litigation, however imperfectly.'⁴⁹⁴

Ernest Lobet, a Holocaust survivor summarized this dilemma in the hearing held by the court to assess the fairness of the class action:

*I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and ... that they be supported and the settlement be approved.*⁴⁹⁵

Collective procedures and remedies look more acceptable once we acknowledge that the best we can do is approximation, not perfect justice. This also relates to the design of procedures. If the judgment will affect others in important ways, it is best if the procedure itself is designed in a way that takes account of this fact. In rights litigation, this is often the case, entire classes of rights holders exposed to violations will have an interest in the litigation. Furthermore, it is not obvious that they will see their individual or collective interests as colliding. Some might want complete school desegregation while others minority schools. An award might order desegregation while leaving open the possibility of opting for minority schools. Acknowledging and addressing these variations within the group of similarly situated

⁴⁹⁴ Carroll, *supra* note 169, at 2063. For agency questions, see the chapter 'Groups.'

⁴⁹⁵ Transcript of Fairness Hearing, November 29, 1999, at 146 as quoted by Chief Judge Korman, *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 at 141.

members will recognize the inherent link between the procedure of group litigation and the substantive law. By outlawing discrimination, a legal system declared that there is a public interest in eliminating discriminatory practices, and where it is a single individual that attacks such a practice, the interest in non-discrimination will not be challenged, even by a larger segment of group members who claim that they are better off with the discriminatory practice. The lawsuit, be it an individual action or group litigation, is best described in such cases as the private enforcement of public policy.⁴⁹⁶

To complicate things further, there are lawsuits where different types of remedies are combined. Our overview of the typologies of the various remedies suggests that remedies for rights violations work best if used in combination with each other. Addressing widespread discrimination will require acknowledgment of the harm, compensation for the harm that happened, an end to discrimination concerning those already victimized and guarantees that no further victimization will happen, either to past victims or new ones. Hybrid claims and remedies mean that a court has to deal with the structural problems of interdependent (and often indivisible) remedies together with remedies that can (or should) be individualized.⁴⁹⁷

Combining remedies might also tame the sense that it is impossible to adequately recognize some egregious harms. Litigation can seek to punishing those responsible on way or another (even indirectly benefiting from the violations), to recover unjustly collected funds, to prevent similar violations to occur (through deterrence and guarantees of non-repetition) and to unearth and show the machinery that led to the violations. In line with Hannah Arendt's observation on the 'banality of the evil',⁴⁹⁸ Dubinsky notes 'the banality of profit, the banality

⁴⁹⁶ For further arguments along these lines, see the discussion in the sections 'Private enforcement' and 'Denying collective recognition....'

⁴⁹⁷ See more on hybrid claims and awards in the section under the same title.

⁴⁹⁸ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

of bureaucracy, the banality of allowing human tragedy to be buried underneath mind-numbing legalese.⁴⁹⁹ The combination of these banalities can outweigh the goal of recognizing suffering, in the eyes of the victims. A complex form of remedy that also addresses the memory of the violations and victims might serve the victim-based goals of reparation as well as deterrence through education.

To list some types of remedies that are more commonly considered, there will be large-scale compensation schemes that can be either mass tort claims with small individual amounts and/or little variation across victims, and mass tort claims with great differences, e.g., in the case of a class of torture victims. There will be declaratory remedies that are not problematic from a collective point of view, can easily address larger groups without the need for strict identification of those concerned and can remain vague even if targeted. Claimants might seek injunctive relief. It is especially the latter types that are also labelled as typical ‘public law remedies.’ Yet, regardless of how we categorize them, all types of remedies can be used to address public law violations, including rights violations.

Note that the previous chapter dealt with collective litigation, whereas this chapter addresses collective remedies as well as various types of remedies sought in a collective law suit. Collective procedures and collective remedies do not necessarily go together. The overview will show, however, that in many cases the collective remedy should be linked to a collective procedure, one that acknowledges the problem of effects on non-parties. In most cases, a need for individualization remains and that can still happen either as part of the collective procedure or in separate individual law suits – as we will see in the final part of this chapter.

⁴⁹⁹ Dubinsky, *supra* note 174, at 1166.

In what follows, I will consider the challenges and potentials of the collective procedural solution in the context of minority claims in two parts: monetary remedies, regardless of whether they serve compensatory goals or deterrence, on the one hand, and injunctive relief, structural-institutional changes and policy reform, on the other hand. As noted above, declaratory types of remedies do not pose special challenges for collective treatment, and I will not consider them separately. It will matter what type of remedy is sought and how that remedy relates to the question of individualization and collectivization. We have to differentiate because many arguments made based on one type will not work for the other.

4.2 MONETARY REMEDIES

Damages, monetary awards are the most common form of remedy in the case of mass claims.⁵⁰⁰ The overview of seven international mass claims procedures in Holtzmann and Kristjánsdóttir shows that monetary compensation was seen as the default option in most cases.⁵⁰¹ In the context of minority rights, and rights litigation in general, the first question that arises is to what extent it is adequate to consider compensation in the case of rights violations. After discussing this challenge, I will address the question of where collective compensation should play a role. Finally, I address the limitations of monetary awards.

4.2.1 Should we allow 'payments' in exchange of rights violations?

Monetary compensation for rights violations can be seen as a means to put a price tag on rights violations. The danger to this approach is that it might make violation less costly than compliance. The adequate response to this danger is not to dismiss monetary compensation

⁵⁰⁰ In this section, I will consider compensatory goals primary to monetary awards, and will use the term 'compensation,' 'monetary awards,' and 'damages' interchangeably.

⁵⁰¹ INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 72–82 (Howard M. Holtzmann & Edda Kristjánsdóttir eds., 2007), 1.05 Remedies.

altogether, but to raise the compensation to the level where it truly compensates the victim, or comes close to that, even risking overcompensation, rather than undercompensation. This lets the party liable for the violation bear the risk of determining the adequate amount, and makes sure that even where the violator considers it acceptable to violate a right, the victim is not worse off than before the violation.

While the 'buying the option to violate rights' is more of a critique of the actual price of the violation than that of the idea of a monetary sanction., there will be rights where it should not suffice that perpetrators are made to pay for the violations, and other sanctions should follow. This should either be left to other procedures, e.g., imposing administrative and criminal sanctions, to increase the deterrence potential, where necessary; or hybrid sanctions should apply, combining compensation with injunction. This is to repeat the insight that remedies work best if used in combination.

When is it especially appropriate to seek remedies beyond compensation, to make sure that violations do not occur? In addition to the unavoidable individual variation on how the idea of payments are received, this might depend on the type of right we consider.⁵⁰² There will be certain rights where violation should never be an option, and the primary goal of monetary compensation should work as a sanction to push the violator to comply and to enforce the relevant rights. Violations that inflict bodily or mental harm, or both, will belong to this category. Most minority rights violations involve discrimination that goes against the idea of

⁵⁰² For a discussion on how victims differ in how they see, and are (un)willing to accept reparations, and how compensation or reparation for grave crimes can never get close to the stated goal of 'making whole again,' see SUSAN SLYOMOVICS, *HOW TO ACCEPT GERMAN REPARATIONS* (2014). Reviewed: Rhoda E. Howard-Hassmann, *How To Accept German Reparations, by Susan Slyomovics (review)*, 37 Hum. Rts. Q. 244 (2015).

equal dignity. As such, it should never be enough to make sure that the immediate harm is compensated, further guarantees are necessary.

On the other hand, there will be rights where costs do and even should make a difference. (There is a third, crosscutting category, based on feasibility of enforcement: if litigating does not pay off, that might leave victims without effective remedies.⁵⁰³) If compliance is too costly, both the right holders and those liable for compliance might be better off with adequate compensation. A probably better conceptualization of the relationship between costs and rights is to consider costs at the stage of recognizing rights. These will be the rights in the implementation of which limited state resources can play a role. Socio-economic rights are usually seen as belonging to this category. In fact, there will be minimum standards that apply regardless of state resources, and there will be standards where considering costs is accepted. Consider the right to life. The state has an obligation to prevent loss of life, but preventive measures will have a feasibility limit. States can comply with this duty even if they could have spent more on prevention. Or consider a related right, the right to health. The formulation in the International Covenant on Economic, Social and Cultural Rights has been criticized for its seemingly maximalist formulation, with the following phrasing: ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’⁵⁰⁴ If we take the ‘highest attainable standard’ in absolute terms, that would mean to ask for the impossible. What can be attainable in a given country at a given moment will depend on, among other conditions, the funds available. Property rights can be legally constrained, in the name of public interest, subject to just compensation.⁵⁰⁵ This means that the quite vague condition of

⁵⁰³ See earlier, under ‘Financing litigation’ in the previous chapter.

⁵⁰⁴ International Covenant on Economic, Social and Cultural Rights art. 12, December 16, 1966, 993 U.N.T.S. 8.

⁵⁰⁵ This rule is usually a legal guarantee present on the level of the constitution. See, e.g., the Fifth Amendment to the US Constitution.

‘public interest’ will be enough to take away property, provided that the ‘costs’ (the price of the property) are covered.

The link between feasibility, often cast in financial terms, and rights implementation is inherent in many accommodation measures and guarantees, especially, but not exclusively, in the case of social, economic and cultural rights.⁵⁰⁶ A good illustration from the minority rights context is the structure of the European Charter for Regional or Minority Languages that guarantees language rights in areas from criminal law through education to media. According to Article 2-2 of the Charter, the ratifying country defines the protected languages and picks a list of guaranteed rights for each language.⁵⁰⁷ While maintaining a minority speaking university or vast media presence might not be feasible for a linguistic minority that is too small, these might work for larger minorities.⁵⁰⁸ When it comes to using one’s mother tongue in criminal proceedings, that right is practically unconstrainable, making financial considerations irrelevant.⁵⁰⁹

In the case of rights where financial compromises are acceptable, a collective procedure means that the court can assess more easily the overall effects of its judgment. By combining individual claims, the litigation can show a more accurate picture of the costs of compliance

⁵⁰⁶ Hurst Hannum quotes the ‘progressive realization of rights’ standard from the International Covenant of Social, Economic and Cultural Rights (Art. 2.1), then notes that ‘[i]n practice, [...] it is difficult not to conclude that civil and political rights also are implemented flexibly, if not explicitly progressively.’ Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 1, 32–33 (2016).

⁵⁰⁷ For each language, the ratifying country should pick ‘a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.’ European Charter for Regional or Minority Languages art. 2–2, October 5, 1992, E.T.S. 148.

⁵⁰⁸ Note, however, that there are no guarantees that the selection of the specific rights will not be arbitrary, under this à la carte system.

⁵⁰⁹ International Covenant on Civil and Political Rights art. 14(a) & (f), December 16, 1966, 999 U.N.T.S. 177. Although consider *Dominique Guesdon v. France*, Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986 (1990) (‘the requirement of a fair hearing [does not] mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language.’)

and the wider effects of the violation (the costs of non-compliance). E.g., in the case of linguistic rights, a collective court procedure with a linguistic minority as a claimant provides a transparent way of measuring the aggregate cost of non-accommodation on the part of native speakers. This requires a solution to the question of measuring non-tangible harms, but that is usually not a good cause to exclude the idea of compensation. The aggregate harm can then be measured against the budgetary costs of accommodation. Another advantage of group litigation is that the court might be better placed to see the overall financial consequences of its judgment. In individual cases, this might be hard or not be possible.

By assessing what disadvantage an individual suffers as a result of non-accommodation, and aggregating these for a particular group, defined by suffering from the same omission, it is possible to draw a line from which accommodation makes sense, opening the way to policy reform. This is a potentially more consistent way for deciding which rights should be implemented: if the costs of non-compliance (harm) outweigh the costs of compliance (accommodation), the defendant should be required to accommodate language claims. This would combine a past-based remedy (compensation for violation that took place at the time of the litigation) with a future-based remedy (prevention through ordering accommodation), linking compensation and deterrence.

Note two constraints, however: this should only apply to rights where it is legitimate to take budgetary constraints into account, and the underlying right should be recognized as enforceable. There are rights violations where judicial remedies should be available and financial sanctions are clearly adequate. Yet, even in the case of rights that are not constrainable based on financial consideration, monetary sanctions might be an appropriate way to press defendants to comply. This is not only a widespread practice, see, e.g., the

primary sanctioning mechanism of the European Court of Human Rights, but can also be justified as an effective way to trigger compliance. Criticism that violation should not be allowed to be 'bought' as a license is best targeted at the inadequacy of payments ordered by the court: maybe they are too low, or not enough in themselves.

4.2.2 Calculation and approximation by collective compensation

Compensation is easily to individualize and it is in fact most of the cases calculated in a way that reflects the specificities of an individual claim. However, when a larger group of individuals is harmed and the court needs to decide upon them, regardless of whether they are litigated in separate, parallel lawsuits or in one unified procedure, standardized formulas to calculate damages are likely to be applied. Courts anyway apply uniform standards, in order to maintain consistency, for how to assess damages. Depending on the individual variation, this might bring the awards close to a collective remedy, where victims get compensation essentially by virtue of group membership. Courts might calculate damages for the loss of life perspectives and suffering for discrimination in a desegregation case, and award damages based on the number of years passed in a segregated school or class. Individual exception, seeking damages beyond the amount based on the formula might or might not be allowed.

Quantifying harm is a problem that courts face routinely; courts and claimants are usually innovative in coming up with ways to measure hard-to-assess damages, and in many cases, these will be uniform enough to allow across-the-group application. Michael J. Saks and Peter David Blanck actually argue that in what they call 'collective trials of mass torts,' aggregation, 'when done well, can produce more precise and more reliable outcomes,' as opposed to the

critique (or, as they argue, the illusion), that ‘aggregation provides inferior adjudication.’⁵¹⁰ They find that calculating damages in an aggregated way not only meets constitutional criteria and the expectations of various theories of justice, but, ‘can increase efficiency, [...] systematically increase accuracy, reduce bias, and still provide meaningful individualization of awards.’⁵¹¹ The bottom line is that aggregation and sampling does not necessarily increase accuracy but also does not exclude the possibility of equally reliable calculation of damages, and well developed methods can actually increase fairness in the sense that damages calculated will be as close to actual harm as possible.⁵¹² Furthermore, the more the calculation is based on speculation, rather than actual measurement (past earning, actual market values etc.), the easier it will be to apply the damages formula to a larger group of claims. Non-pecuniary damages are especially likely to be of this type.

In many cases where rights violations occur that affect minorities, there is a moral damage component. It is not only the economic loss that results from such violations, but the reinforcement of a secondary citizen status, a compromised dignity instead of reassuring equality. There are cases where the moral suffering is present regardless of this minority aspect. Bodily harms inflicted upon victims by willing state agents and the loss of family members are just some examples where mental suffering requires compensation beyond the harm that can be assessed in a strict economic sense. Calculating damages, determining the actual sum of the optimal award, in such cases is usually harder (and can be more arbitrary) than in the case of pecuniary damages. Courts often apply formulas that lack regard to the individual variation in how deeply was someone affected by the harm. The Inter-American

⁵¹⁰ Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 815 (1992).

⁵¹¹ *Id.* at 851.

⁵¹² See a more recent take on this topic: Hillel J. Bavli, *Sampling and Reliability in Class Action Litigation* (Cardozo Law Review De Novo, Forthcoming, June 8, 2016), available at <http://ssrn.com/abstract=2798437>.

Court of Human Rights often awards ‘an identical amount to each victim rather than individualizing the award.’⁵¹³ This obviously makes these collective in the sense of non-individualization. But this is not a collective remedy in the sense of granting that based on group-belonging.⁵¹⁴

In the case of minority rights violations, however, harm will often be inflicted upon minority members, targeting them in a way that makes it hard to assess the individual level of mental suffering caused. E.g., military actions targeting minorities will cause distress in the entire community, and non-pecuniary compensation might be awarded based on group-belonging. In such cases, the two non-individualized elements make up a strong collective award where group membership entails a certain amount of compensation, and the best corresponding action will be a procedure that includes all potential claimants. This will not exclude those who are disadvantaged and are least likely to exercise their right to access to justice.

There are cases where individualizing damages does not make sense, yet, courts see it appropriate not to leave the funds with the defendant, usually based on deterrence grounds.⁵¹⁵ In the US, cy-près awards fulfil this function, making it possible for courts to award damages to a ‘closest possible’ entity, such as a foundation with corresponding goals. The other ‘collective award’ that come closest to the group-based solution is to collect damages on behalf of the state, i.e., all citizens. Under the individualist view, however, and also based

⁵¹³ SHELTON, *supra* note 12, at 263, citing the *El Amparo* and *Neira Alegria Cases*: *El Amparo v. Venezuela* (Reparations) (1996) 28 Inter-Am.Ct.H.R. (ser. C) and *Neira Alegria et al. v. Peru* (Reparations) (1996) 29 Inter-Am.Ct.H.R. (ser. C).

⁵¹⁴ Not counting here the belonging to the – in itself, superficial – ‘group’ of victims, united by being victims of a similar violation. This is not the type of group that I consider here.

⁵¹⁵ As Judge Posner argued: ‘In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to judgment) to the class members. There is no indirect benefit to the class from the defendant’s giving the money to someone else. In such a case the “cy pres” remedy (badly misnamed, but the alternative term—“fluid recovery”—is no less misleading) is purely punitive.’ *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

on common conceptions of justice, damages should, to the extent possible, benefit those who are closest to the original violation, as direct or indirect victims. On this account, the collective litigation that recognizes the community in a way that reflects the nature of the violation seems superior. *Cy-près* awards and state-based solutions are secondary at best, and should only be applied where the group based solution is unavailable, either because it is impossible to identify a corresponding group or because that group would include the society as a whole. Zimmerman talks about “community restitution”—which, like other kinds of “fluid recovery,” compensate for the broad costs their acts imposed on society.’⁵¹⁶

Both ‘*cy-près*’ awards and ‘community restitution’ is based on the idea that the compensatory logic has its structural limits, because for it to work, we have to identify the ‘receiving side’⁵¹⁷; and that even if there is no perfect match, we, in many cases, are still better off with approximation: finding a goal and maybe a collective entity that best corresponds to the violation in question. Depending on the connection with the minority, compensating the whole victim group might serve compensatory goals better than collecting the same funds to benefit the entire society.

4.2.3 The limits of monetary remedies

Monetary remedies can do a great job in compensating victims, it corresponds to the view that money is a universal measure of value, leaves the plaintiffs free to decide how to spend the monetary awards. This can contribute to increasing (and, to a certain extent, restoring) the freedom of victims. If we perceive violations as an unjust limitation of the victims’

⁵¹⁶ Zimmerman, *supra* note 352, at 206.

⁵¹⁷ See more on this in ‘Identifying the right group’ in ‘Groups’ below.

freedoms,⁵¹⁸ that seems to be an adequate response. We have seen, however, that the perception of ‘paying off violations’ can create a sense of secondary victimization, and there are violations, inflicting losses that money cannot compensate, where monetary remedies represent only a far approximation for undoing the effects of violations.

The individual liberty argument has decisive implications on harms done to collectivities as well. Where pre-existing communities suffered as a result of violations, in the sense that the social fabric of the community was torn, it might not be evident that individualizing harms and remedies, resulting in individual decisions on what exactly to undo from the effects of violations (or do completely different things), will actually address the harm done to these collectivities. In such cases, it is a dilemma whether forcing collective remedies will be appropriate. This is not an easy question, provided that one does accept neither an extreme individualist, nor an extreme collectivist approach.

As a historical parallel, when Native Americans were offered individual allotments as opposed to tribal titles over lands, without leaving a right of the tribe to limit extra-tribal selling, or leaving in place a general ban on selling to non-tribe members, this resulted in dramatically shrinking tribal properties and disappearing communities.⁵¹⁹

It is clear that this individualist approach does not come close to achieving the goal of undoing violations (‘as if it had not happened’ – requiring a collective approach in this case), but serves the goal of empowering individual victims and does not impose restrictions on individuals based on group membership that they most likely had not chosen (a more individualist consideration).

⁵¹⁸ Johan Deklerck, *Restorative Justice, Freedom and the Limits of the Law*, in *FACING THE LIMITS OF THE LAW* 161 (Erik Claes, Wouter Devroe, Bert Keirsbilck eds., 2009).

⁵¹⁹ See the Dawes Act: Indian General Allotment Act, 25 U.S.C. ch. 9 § 331 et seq. (1887).

What does a collective procedural solution have to offer in such cases? It certainly cannot resolve the dilemma whether to spend funds on collectivities rather than individuals, at least in part. This might depend on practical considerations as well as on a more fundamental view on whether communities should be recognized as having suffered harms that they as communities should be allowed to recover. This is a difference that I left open for the proposal (see the chapter on the 'Collective'), making it acceptable for both those holding and those rejecting this view.

The collective procedure can nevertheless do two things. First, by allowing the group to litigate, the procedure can be read as a proposal to remedies on the group level. Without group-level representation in litigation, it would be especially hard or impossible for the court to design remedies that benefit the group as a group. It does not guarantee such a remedy, but leaves the door open or even paves the way for such remedies. Second, the procedure itself can be seen as a symbolic remedy demonstrating that members suffered together and are fighting for reparations together. As a result, it might strengthen the community, the sense of belonging. Again, this is not guaranteed, but the collective procedure makes it more likely that the community level is addressed in the course of litigation.

An important limitation of the compensatory logic comes from how tort law in general works. Sunstein argues that compensation can address only certain types of violations: discrete and unitary injury that is sharply defined in space and time, a clear connection between the defendant's conduct and the harm (one-to-one attribution), easy-to-identify parties, in a bilateral connection, and remedies that do not extend beyond the narrow, compensatory

harm, mostly banning social reordering ('except [where] logically entailed by the principle of compensation').⁵²⁰

In many contexts, Sunstein maintains, the compensatory logic is anachronistic,⁵²¹ and blurs, rather than clears, the view of the judge: 'To try to resolve issues bearing on desegregation remedies in terms of compensatory principles is a recipe for confusion.'⁵²² Furthermore, while seemingly neutral, '[s]ubstance and not mere form is at the heart of the compensatory model,' it 'holds existing entitlements constant, and it sees revision of the status quo, or the infliction of costs on third parties, as impermissible partisanship or "redistribution" unless in the service of compensation, narrowly defined.'⁵²³ Yet, as the history of civil rights cases, including desegregation litigation, has shown, compensation is not all that is to judicial remedies. Structural changes, that we will consider in the following section, are also an available option, standing alone or in combination with compensatory claims. What Sunstein's criticism shows on a more fundamental level, is the inadequacy of the traditional view of litigation to capture the element that goes beyond the strictly individualist, 'tort-like' view, that can only consider discrete harms and backward-looking and discrete remedies: 'The problem of innocent victims appears to be a principle impetus behind the requirement of a showing of past discrimination. Under current law, affirmative action can be defended most easily in tort-like terms.'⁵²⁴

⁵²⁰ Sunstein, *supra* note 118, at 281–282.

⁵²¹ *Id.* at 285. Sunstein lists some cases where the traditional compensatory approach does not give an adequate answer: notice to small claims class members (where this makes litigation too costly); individualization of damages (damages due to class members who do not appear will stay with the defendant, frustrating deterrence goals); probabilistic harm; regulatory harms; standing to challenge administrative decisions; racial discrimination; school desegregation; affirmative action; disability.

⁵²² *Id.* at 296.

⁵²³ *Id.* at 308. See also: 'the compensatory model, despite its apparently formal character, is rooted in a deeply substantive, and controversial, conception about the appropriate role of law.' *Id.* at 299.

⁵²⁴ *Id.* at 296.

To reiterate, collective procedures can boost the ability of monetary remedies to serve the goals of compensation as well as deterrence, even if they go more smoothly with the deterrence goal. Considering the group level of harms, the structural constraint that requires tort law based justification for remedies can be used to accommodate minority claims that would otherwise be left without adequate remedy. In the following section, I will move on to the types of remedies that are more likely to be collective in nature.

4.3 INJUNCTIVE RELIEF, STRUCTURAL-INSTITUTIONAL CHANGES, POLICY REFORM

Non-monetary remedies are different from monetary ones in that individualization is not readily given. In many cases it is close to impossible to screen out external effects, benefits and costs on non-parties. The dilemma then moves from group-treatment, whether to limit remedies to those who are parties to the litigation or include wider groups, to acknowledgment: whether to address the problem of collective effects head-on or just take this phenomenon as an unavoidable nuisance to the traditional view of litigation.

There are types of awards where the fact that the litigating party is a larger group or a single individual is secondary at best, because the judgment sought would anyway bring change that concerns an entire class. In case of ending discrimination in an institutional setting, workplace, desegregating a school or a school district, redrawing voting districts, the shift in the underlying practice can be litigated by a single individual harmed or several of them or else by, or in the name of, the whole group of individuals harmed by the policy. For the sake of simplicity, I will refer to the type of judgments indicated above simply as those seeking structural changes. Note that most of the arguments also apply to declaratory judgments. It is not at all clear that the whole group needs to be a party to the case even if a declaration,

e.g., an apology, is sought that is itself targeted to all individuals in the group (or phrased in collective terms, really targeting the group as such).

Where the claim addresses a certain action or omission the effects of which are hard to be constrained to specific individuals, the award sought will necessarily touch upon the interests of all those affected by the action or omission. This might be described, from the point of view of litigation, as the ‘necessary-parties problem.’⁵²⁵ Furthermore, it is not a question of ‘necessity’ as much as efficiency, fairness, consistency and the like. The ‘necessary-effect’ might be a better term to describe the scope of the potential award in such cases.

In these cases, using the categorization applied earlier, injunctive relief will also be indivisible, or at least interdependent, remedy.⁵²⁶ This is not to say that it is impossible to have injunction that is divisible that can be applied individually, to specific persons without affecting others. E.g., courts could try to confine desegregation remedy to the parties, allowing access to a segregated school to the plaintiffs instead of complete desegregation. It is not hard to see how this results in a waste of resources, and Carroll cites arguments appear both from litigation and from literature that this should not simply be a possibility, but should be taken as a limit on what courts can do.⁵²⁷ It follows from this logic that US courts might even require claims to be litigated as class actions.⁵²⁸

Civil rights cases might be seen as a perfect fit for this type of collective litigation: ‘civil rights class actions are assumed to be easily manageable because they typically seek injunctive and declaratory relief.’⁵²⁹ The inherent group-level effects mean that courts need to face the

⁵²⁵ Yeazell, *supra* note 216, at 1110.

⁵²⁶ See the overview in the introductory part of the present chapter.

⁵²⁷ Carroll, *supra* note 169.

⁵²⁸ See Burch, *supra* note 338, at 3056 n77.

⁵²⁹ OLRC REPORT, *supra* note 163, at 220.

dilemma of effects on non-parties in a purely individual lawsuit as well. Consider cases like *Fisher*⁵³⁰ and *Hobby Lobby*.⁵³¹ *Fisher* challenged a group-based minority measure, affirmative action and its racial component that benefits university applicants based on their belonging to underrepresented minority groups. As the claimant already graduated from (a different) college by the time the final decision came down, an injunction seeking her acceptance to the school did not seem logical, and the central element of the lawsuit was anyway the challenge to the affirmative action policy, a part of the admission policy of the university. This legal challenge cannot be reconciled with a remedy that seeks policy change that only concerns the applicant in question. *Hobby Lobby* presented a challenge to the Affordable Care Act and its contraceptive mandate, based on protection granted to religious minorities. Devising the remedy that only considers the corporation in question would be hard to square with the goal of the litigation.

In many respects, if we compare a rights case, but potentially other cases, too, especially if the award sought is injunction and/or declaration primarily, the individual and the collective procedures do not differ. The award will bring about a change that concerns the interests of all, in both cases. It might well be that the ‘adequate representation’ is, in practice, well served by the work of groups like the Legal Defense Fund of the NAACP in the US or specialized civil rights NGOs in Europe. The additional step in the collective case is that there are additional, built-in guarantees that the legal representation, in court, resembles substantive representation.⁵³²

⁵³⁰ *Fisher v. University of Texas (Fisher II)*, 579 U.S. ____ (2016).

⁵³¹ *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014).

⁵³² On these dilemmas, see the following chapter on ‘Groups.’

In cases where the relief sought necessarily goes beyond the parties, the suit can only be individual in a formal sense. These formally individual actions raise the problem of whether it is better to face the fact that there is a whole group of people affected by the outcome, and formalize that collective aspect, or go ahead with the formally individual treatment. I do not want to argue that the answer to this dilemma is always obvious. Yet, where the challenge is inherently about policy questions that target a wider circle of people who are equally subject to the policy, the guarantees surrounding group treatment should tilt the balance towards the collective option, creating a presumption that it is the superior way. The acknowledgment that there are more parties to the case than those who started the litigation will force the court to consider the interests of these others. This can have ramifications on questions like adequate representation, diverging interests and views within the group, or the design of the remedy.⁵³³ Minority claims will usually belong to the category where collective treatment will be superior for these reasons.

The Fifth Circuit was considering in 1963 whether class action treatment was adequate despite the fact that at least one of the named plaintiffs declared that he only brought the desegregation claim on behalf of his kid and not others. Yet, the Court argued that '[p]roperly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school [... and b]y the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued.'⁵³⁴ Despite individual variation as for the effects of the award (who gets assigned to what school), the common element is there, and regardless of

⁵³³ See also later sections on these questions, including 'Individual variation...' below.

⁵³⁴ Potts v. Flax, 313 F.2d 284, 288-89 (5th Cir. 1963).

whether the award is achieved through collective litigation, the effect will go beyond the named plaintiffs.

Widening the 'gate' for parties can raise the question of threshold: how widely should we understand the 'effects' of structural changes? Ending a discriminatory policy at a workplace will affect bystanders as well as those who have been benefiting from discrimination; desegregation will have a huge impact on those interested in maintaining a two-level system etc. These larger groups could be seen as having a stake in the litigation. While this question might be adequate for a number of settings, in rights cases, it is not possible to include these groups unless they formulate their claims as based on competing rights. It is not enough to show that ending discrimination will have its cost.

This presents the dilemma that is not specific to minority claims, but might be especially relevant in cases where there is a mismatch between the claims and the majority legal setting, e.g., because of the cultural 'distance' between common concepts of property prevailing in the minority group in question and the majority. The dilemma is to preserve the status quo, to the extent that litigation has its structural limits in upsetting the existing framework,⁵³⁵ while serving equality or also challenging the status quo. For '[a] system of group-specific rights that does not change the social relations of power [...] runs the risk of being just another indication of the group's low status and value.'⁵³⁶

Having the whole group on the plaintiffs' side might also create or strengthen the sense that this is not a homogeneous group whose interests and claims could be neatly unified in one case. I think this is an advantage, but one that certainly creates problem to a view of litigation

⁵³⁵ See the discussion in the chapter 'Judicial,' especially the reference to Justice Marshall's dilemma.

⁵³⁶ Ulf Mörkenstan, *Group-Specific Rights as Political Practice*, in THE POLITICS OF GROUP RIGHTS. THE STATE AND MULTICULTURALISM 53 (Ishtiaq Ahmed ed., 2005).

that is based on mutually opposing, but internally homogenous claims. This is the dilemma that I will address in the next section. But before we consider that question, the closing section on the types of remedies will discuss claims that mix monetary and non-monetary remedies.

4.4 HYBRID CLAIMS AND AWARDS: COMBINING COLLECTIVE AND INDIVIDUAL, AND MONETARY AND NON-MONETARY ELEMENTS

There might be rights violations where the appropriate remedy can include both monetary and non-monetary elements.⁵³⁷ In fact, most rights violations might be addressed with a mix of collective and individual as well as monetary and non-monetary remedies. And even where it is only one type of remedy that is sought, the claims might include both indivisible and divisible elements, the first justifying collective treatment while the latter requiring individual assessment. The most common example would be a discrimination case where systemic violation led to wrongs done to a large number of people. Deciding on whether the violation occurred will equally affect all members making this part of the claim indivisible. Yet, the resulting compensation might vary from individual to individual, making it not only divisible, but making intragroup conflict quite likely.

Violations that call for hybrid remedies can either impede or facilitate collective litigation. Why is that? Acknowledging the complexity might persuade the court that the collective element cannot be neglected, and it is better to embrace it and apply special procedural guarantees, provided by group litigation devices like class action. However, the hybrid nature of the award sought might also mean that the claims involve not only common patterns but

⁵³⁷ Jon Romberg defines hybrid class action as a suit that ‘seeks both class-wide injunctive relief and damages that vary among class members.’ Jon Romberg, *The Hybrid Class Action As Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. MARSHALL L. REV. 231, 231 (2005-2006).

considerable individual variations, which allows defendants and courts to argue that, despite strong commonalities, litigating all claims within a collective procedure is not the way to go. Hybrid cases might involve individual and collective elements as well as different types of remedies, and this creates problems, among others, for adequate representation.⁵³⁸ As we will see, the solution lies in either separating the cases into separate suits or accommodating individual variation within a single suit, e.g., by creating subclasses.

Jon Romberg argues that the proper approach to hybrid or mixed cases – where considerable collective and individual elements are present – is to have a first, collective stage and a second, more individualized, but still group-based stage. Under the rules of the US class action, these translate into certification under Rule 23(b)(2) and Rule 23(b)(3), respectively:

*Mixed cases [...] should be certified under 23(b)(2) – but only as to the first stage of the case, in which the common issues going to injunctive relief are resolved. The second stage of the case, in which individual issues going to damages are addressed, should be certified under the broader (b)(3) category, which preserves autonomy rights.*⁵³⁹

Most importantly this implies that there are no opt-out rights (or guarantees concerning notice) in the first phase, while members are free to leave the class in the second part and pursue their claims individually – provided they are viable without aggregation.

The ‘hybrid’ solution seems appealing in that it saves the truly collective procedural element in cases where considerable individualization might threaten the class treatment. It should also be acceptable to anyone who thinks that claims combining an injunctive and a monetary element could be litigated in two separate lawsuits, e.g., bifurcating the establishment of liability (collective determination) and the award of remedies (individual element in individual

⁵³⁸ Burch, *supra* note 338, at 3062–67.

⁵³⁹ Romberg, *supra* note 537, at 233.

lawsuits). That would allow quasi-hybrid treatment regardless of whether the court is willing to grant 'divided' certification.

Overemphasizing the individual element and treating that as the basis for denying collective litigation creates the incentive that claims be litigated only to the point where damages are sought on the level of individuals. This favors a strategy where plaintiffs are motivated to not pursue individual damages and focus on the collective element only. This might paradoxically lead to less individualization, not more. It also threatens to exclude claims that are not viable individually. This is especially a problem where awarding damages could play an important role in shaping the behavior of the defendant. In case of high damages, compared to the financial capabilities of the defendant, the limited fund problem is also an argument for erring on the side of collective treatment. We should finally consider the effects on judicial economy. If the individual claims are viable and are in fact brought, avoiding the criticism of throwing out individual damage claims, that will mean new lawsuits with claims essentially related to the claims in the original lawsuit.

Most minority rights violations will have an individual aspect that needs to be addressed, recognizing individual suffering; together with a collective element because the harm is suffered, at least partly, by virtue of being a minority member, or otherwise shared based on membership. If the choice is between throwing out (parts of) minority claims or making it hard to formulate them as legal claims and prove that they should prevail, on the one hand, and hybrid treatment on the other – the question sounds rhetorical. Altogether, however, the hybrid proposal sounds like an attempt at squaring the circle. While it acknowledges the variation in 'how individual or collective' certain claims are, it treats them along a binary, either-or logic. In fact even the most traditional and clear cut remedies combine individual

and collective aspects. Deterrence through criminal conviction is both directed at the society and, as a form of satisfaction, the victim (or surviving family members. On the other hand, providing for adequate compensation at the expense of the perpetrator can itself be seen as a guarantee of non-repetition, especially if the procedure makes it clear that further violations will most likely result in similar awards. Additional guarantees of non-repetition usually include requiring reforms, eliminating, creating and changing structures, institutions, procedures and practices in order to minimize the likelihood of re-occurrence.

An approach that acknowledges this complexity provides a more flexible and encompassing response to violations, where the focus is not on the form of the remedy, but its adequacy and effectiveness. The fact that in rights violation cases remedies can hardly ever come close to 'undo the harm' does not weaken but bolsters this argument: once we accept that no legal award can provide a perfect solution, we also accept that all efforts of approximation are imperfect, but all such efforts should be made. It does not flow from this that flexibility and imperfection in the form of possible mismatch are always warranted. What this means is that flexibility and imperfection do not render remedies unacceptable, provided that they otherwise do a good job in approximation, by designing a more adequate and effective remedy, when looked at their entirety.

Hybrid remedies might best respond to harms that include a collective aspect because various types of remedies might target the strictly individual element and the group level, seeking to repair or strengthen group cohesion that in turn benefits members. Ori J. Herstein lists a number of remedies that might seem adequate in the context of historical injustices – including 'conversion (often of land), redistribution of resources, affirmative action and

reparations in the form of payment,' and 'apologies, symbolic gestures and reconciliation or truth-telling'⁵⁴⁰ – and argues for a complex approach to remedies in such cases:

Since the harm suffered by individuals is a function of the group harm or, more accurately, the group harm is the harm to the individual, the remedy should at least partially focus on rectifying the group rather than just its individual members. Remedies directed at the interests of the individual members of the group, such as making equal payments to the individual members of the harmed community, rather than at the group's interests as a whole, may not achieve the desired end. The interests of individuals do not always serve the interests of their group as a whole.⁵⁴¹

A combination of various types of remedies sound not simply a possibility, but an imperative in certain large-scale human rights cases. Violations targeting indigenous groups amply show this. For example, in a Canadian class action case providing remedy for Indian residential school students, the settlement reached included a wide variety of remedies, including a lump sum payment based on the number of years spent in such schools; additional compensation where sexual, serious physical or other abuses with serious psychological effects; compensation for loss of income; and funding reconciliation, research, documentation and commemoration programs.⁵⁴² The first type of remedy is a partly individualized collective remedy for it assumes a level of harm based on group membership (former students), and the only variable is the number of years spent in the institutions. The second type of remedy is more individualized, even if it is dealt with in the framework of the same collective procedure, through its 'Independent Assessment Process' and its standardized assessment.⁵⁴³ Standardization does not mean that this solution compromises individualization; rather, it is

⁵⁴⁰ Herstein, *supra* note 171, at 271.

⁵⁴¹ *Ibid.*

⁵⁴² See the agreement on the site of the class action: INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT, May 8, 2006, <http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf>.

⁵⁴³ See the detailed description in Schedule D of the Settlement Agreement: Independent Assessment Process (IAP) for Continuing Indian Residential School Abuse Claims, May 2006, http://www.residentialschoolsettlement.ca/Schedule_D-IAP.PDF.

to assure consistency across cases where individualization does happen. The third type of remedy is clearly collective in that it targets all victims and family members through group-wise programs.⁵⁴⁴

A less individualized form of hybrid award was granted by the Inter-American Court of Human Rights in its Plan De Sanchez Massacre judgment, addressing a mass-killing committed against members of the Maya-Achí community. The court obliged the state of Guatemala to investigate the events and acknowledge its responsibility, both in person (with senior state officials visiting the community) and in the media (both in Spanish and in the Maya-Achí language), commemorating the victims. The duties include providing state funds for a commemorative chapel. The state shall, according to the judgment, provide health care and housing services, including psychological treatment. The state is further compelled to invest in the local infrastructure, roads, water and sewage, and health center. Cultural remedies include investment in the study and dissemination of the Maya-Achí culture, in the language and in teaching personnel. Finally, the court ordered the state to make individual but non-individualized payments to victims, including compensation for pecuniary and non-pecuniary damages, 5,000 and 20,000 USD per person, respectively.⁵⁴⁵

Both cases show how a complex human rights violation needs a complex judicial response, and how the courts adopted a 'holistic' approach that reflected the willingness to combine various types of remedies.

⁵⁴⁴ Commemoration is collective in the sense that it is financed globally, without individualization; but also because it seeks to show the full scale of violations, even if it necessarily tells individual stories as part of the larger picture. It should go without saying that this does not question individual suffering, but puts it into perspective: the image of the individual sufferings changes by revealing the full story. This has the potential to give more voice to victims and to empower them. See more on this under the chapter 'Groups.'

⁵⁴⁵ Plan De Sánchez Massacre v. Guatemala, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 116, (Nov. 19, 2004).

The lesson of this overview is that the need for individualization is never enough to demonstrate that collective remedies are altogether useless. The questions might rather be how to best combine judicial responses, in the form of proper procedures and remedies, in a way that best fits the harm and its consequences. Large scale human rights abuses might actually require hybrid awards that available based on a collective procedure where victims are automatically included. In the remainder of the chapter, I will go through the possible judicial responses to collective claims where the court recognizes the parallel need for addressing individual variation.

4.5 INDIVIDUAL VARIATION WITHIN THE GROUP

We have seen that a common challenge to the collective approach is that there is necessarily internal variation in both the violation and the remedy sought.⁵⁴⁶ The unavoidable individual variation can be used to reject the collective approach. Even in the case of an overwhelmingly collective violation, there might be differences among the individual claims, the relevant interests and, as a result, collecting evidence will also have to happen more or less individually. It is often argued that a collective procedure is not adequate because no two claims are identical, and intragroup variation defeats the idea of having a ‘wholesale justice.’⁵⁴⁷ If it holds that collective awards can be beneficial for the reasons listed in this thesis, individualization should happen somehow in parallel to or in combination with the collective procedure. If we allow individual variation to eliminate collective procedure

⁵⁴⁶ That there are diverging interests in litigation even between parties that are on the ‘same side’ is nothing new, diverging and conflicting interests might occur in strictly individual litigation as well: several defendants might be sued for the same wrong, and they might easily be in a position where each have the interest to prove that other defendants were responsible for the violation.

⁵⁴⁷ See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009).

altogether, all its benefits are also taken away. Finding the right standard to decide where a collective procedure is desirable, despite individual variation, is a balancing exercise, acknowledging the tension between full individualization and collective litigation.

To demonstrate this tension, I will look into how the 5th Circuit decided that a desegregation class suit can proceed, in 1963, despite arguments from the defendant side, the School Board, about individual variation. All admission decisions were made on an individual basis, and a desegregation plan will require setting up a complex structure that addresses the various needs of various students, living in various geographical areas, decision needs to be made on funding, not all students will get to the same school, not students of all ages might be treated the same etc. The court decided to focus on the collective aspect, arguing that:

*Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of racial segregation. It sought obliteration of that policy of system-wide racial discrimination.*⁵⁴⁸

It is clear that there are both individual and collective elements to the suit, questions that are specific to the individuals and those that are common to all members of the class. The way the courts framed the issue allows, however, for addressing the large, common question – racial segregation must end, both declaring that there has been a violation and ordering an end to the practice – as well as for dealing with the backward-looking compensatory claims of those who have already been wronged.

This ultimately makes the court procedure more efficient, from the point of view of judicial economy, and more effective, furthering the goal of constitutional rights enforcement. It is also more victim-friendly, because the individual students and their parents don't need to go

⁵⁴⁸ Potts v. Flax, 313 F.2d 284, 288-90 (5th Cir. 1963).

through, individually, the process of establishing and arguing a case; and because it helps presenting and proving systemic violations. It supports collecting and sharing experiences on the plaintiff side, helping the information asymmetry that might be present to the advantage of the alleged rights violator. On the other hand, the defendant gets a judgment that provides a reliable and overall settlement of the issue. Once it is won or lost, all the potential plaintiffs see their claims exhausted.

In a case from the series of decisions that gave class actions a blow, *Wal-Mart v. Dukes*,⁵⁴⁹ the US Supreme Court had to decide whether the class certification of former and present female employees alleging discriminatory employment practices can stand. The Supreme Court found that the class of women alleging (systemic) discrimination cannot be certified, due to the lack of commonality. The majority opinion emphasized the differences of the individual class members, including the fact that there was managerial discretion in the decisions affecting them. This was to give defendant, and similar potential future defendants, a free ride on systemic violation, by providing a clear recipe: delegating decisions to lower levels.⁵⁵⁰ In Canada, a similar approach – that was heavily attacked by the literature – appeared in a 1983 case⁵⁵¹ where the judge argued that ‘separate proceedings [are needed] to resolve issues of reliance by individual members on the defendant’s warranty.’⁵⁵²

⁵⁴⁹ *Wal-Mart v. Dukes*, 564 U.S. ____ (2011).

⁵⁵⁰ See a similar pattern in the case of arbitration clauses, with the active role of the Supreme Court, now allows defendants to avoid class litigation. See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). Note also that allowing arbitration clauses in employee-employer relations, a pivotal tendency in the past ten years, threatens to eliminate most of the labor relations guarantees that have been central to labor law in the last hundred years or so. But also see lower courts cutting back on this trend: Jessica Silver-Greenberg & Noam Scheiber, *Court Rules Companies Cannot Impose Illegal Arbitration Clauses*, N.Y. TIMES, May 26, 2016, <http://www.nytimes.com/2016/05/27/business/dealbook/court-rules-companies-cannot-impose-illegal-arbitration-clauses.html>.

⁵⁵¹ *G.M. (Canada) v. Naken* 144 D.L.R.3d 385, 1 S.C.R. 72, 46 N.R. 139 (1983).

⁵⁵² Bogart, *supra* note 161, at 681.

Concerning race-based classes, individualization also often trumps group litigation. Martinez argues that certification in race-based cases ‘is typically denied because of too many individualized claims and issues,’ i.e. that individual questions predominated over collective ones.⁵⁵³

The dilemma is relevant in the minority context, too. Minority members will most likely be aware that they are (at least potential) victims of a harm that occurs on the level of the group, but other internal conflicts might well arise, e.g., about the right way to rectify wrongs, including the right balance between individual and collective remedies.⁵⁵⁴ Even in cases of obvious discrimination that falls heavily on all group members, and the related claims to end discrimination, there might be diverging projects within the community on how to best address the situation. In the context of racial school segregation, a 1974 decision of the 9th Circuit addressed this question and noted that ‘[t]here [is] beginning to emerge a demand on the part of large segments of minority groups, particularly among the blacks, that they run their own schools and they have black schools.’⁵⁵⁵ School desegregation cases will necessarily raise the question of how to best respond to segregation, what is the adequate remedy, and the answer to this will most likely create divisions within the victim group.⁵⁵⁶ As we shall see, the most comprehensive way to deal with such divisions is to address them through

⁵⁵³ Martinez, *supra* note 257, at 189.

⁵⁵⁴ A prominent example is Justice Clarence Thomas, the only sitting Justice on the US Supreme Court with an African-American background, who consistently opposes affirmative action, based on anti-paternalist arguments that can be traced back to black nationalist ideas. Mark Tushnet, *Clarence Thomas’s Black Nationalism*, 47 HOWARD L.J. 323 (2003-2004). Note, however, that dissent in his case might not only involve disagreement on the right remedy, but also on whether there is a violation in the first place. For a striking example, see the capital punishment case discussed in the following chapter: *Foster v. Chatman*, 578 U.S. ____ (2016).

⁵⁵⁵ *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349, 483 n.41 (9th Cir. 1974), quoted by Yeazell, *supra* note 216, at 1112 n.250.

⁵⁵⁶ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 & 476–77 (1976); Leo Crowley, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interest*, 59 B.U. L. REV. 661, 666–80 (1979), both cited in Burch, *supra* note 338, at 347 n.23–24.

mechanisms like phasing and creating subclasses, where possible, or address the varying opinions on remedies within the victim group, and not to ignore them.⁵⁵⁷ The structural advantage of a collective procedure is that it facilitates such approaches, as opposed to individual litigation where many voices from within the victim group might remain un(der)represented.

Furthermore, the internal diversity of minority groups might challenge the idea that the interest to address past violations creates a fairly homogeneous claim. Dubinsky illustrates the possible internal divisions concerning Holocaust claims as follows:

Was the future of the Jewish People in revitalizing the dying communities of Eastern Europe or in channeling resources to younger and potentially more vibrant communities elsewhere? More generally, the potential impact of these cases on the collective was always a kind of “brooding omnipresence.” The decision to litigate had been made from the perspective of Jews living in North America. But what about the potential negative consequences of that decision for Jewish communities in Switzerland and elsewhere in Europe?⁵⁵⁸

To take a more common example, victims might hold diverging views on the adequate remedy for school segregation. Imagine a group of students claiming racial discrimination and a school that has limited resources to address these claims. The allegations are well-founded, and the school is willing to settle. Various proposals are presented, one by the most active participants of the suit (group A) are asking for damages compensating those wronged by the school. There is considerable threat that the damages based on lost life-perspectives will bankrupt the school, but this first group sees this as desirable or even inevitable: all traces of the discriminatory past should be eliminated. A sizable group (group B) wants instead to push for reforms rather than individual damages, asking for an end to segregation, public

⁵⁵⁷ See the subsections under 4.5.3 and chapter 5, respectively.

⁵⁵⁸ Dubinsky, *supra* note 174, at 1175–1176.

acknowledgment of discrimination, changing the school regalia and coat of arms⁵⁵⁹ that all reflect the discriminatory past. A third proposal is to set up a fund and an institute working for the wronged community, offering special curricula, with a library and museum etc. Those arguing for the fund are evenly split between those closer to group A, who want such a fund to focus primarily on helping those wronged, through individual grants and counseling; and those closer to group B, who want it to be more open, helping a wider community, prospective students, those wronged by other schools etc. And finally, there are those who are either undecided and those who want a hybrid of the other proposals.

It is easy to see how group A is more individualist and past-oriented and group B is more collectivist and future-oriented, at least in a direct way. More indirectly, group A's proposal can be translated into a future-oriented sanction through putting a price tag on similar violations, sending a clear message to violators. Group B's solution seeks to embrace the past in a more complete way, not wanting to do away with their alma mater, to the contrary: they want to maintain it as a place of active remembrance.

In a procedural sense, group A's monetary proposal does not necessarily require collective action. It might result in fairer and more consistent awards, considering the hardship (and usual variation) in calculating related harms as well as the potentially limited funds, but it is equally feasible to imagine individual actions proceed and result in various lawsuits, some settled, some not, some winning, some not. Group B's reformatory proposal, on the other hand, is necessarily collective: it seems to give up on the individual awards part and asks for

⁵⁵⁹ As it happened in the case of Harvard Law School that decided this year to retire its shield that was adopted in 1936 after the crest of a slaveholder family who provided funds for the first law professorship.

measures that affect the whole group and even those beyond the group (e.g., future students to the extent that they cannot be represented⁵⁶⁰).

Without weighing all the possible solutions, it is clear that the most comprehensive way for a court to decide competing claims is to address them in a unified procedure and making its determination as inclusive as possible; instead of dealing with them in an ad hoc and piecemeal fashion, ordering damages to individuals who happen to sue, regardless of whether such claims will drain funds, ordering desegregation without ordering damages, regardless of the victims' actual claims or a detailed assessment on optimal deterrence etc. The structural complexity of the court case can make the traditional model of litigation, with two opposing homogenous claims with clearly identifiable parties, inadequate. With minority claims that stretch back far in time, involve larger number of victims or raise human rights violations that require complex remedies, this mismatch will be more likely to appear. Judges then face a dilemma whether to allow the case to proceed: they can either concede that court litigation is not only not entirely fit to address these claims but completely inadequate; they can use the traditional model nevertheless, defending imperfections as the result of the limitations of law and procedure; or, they can look for innovative ways to bring the procedural setting closer to the heterogeneity of claims, claimants and remedies. In the first case, access to justice will suffer, while in the second, inadequate remedies might result in a different form of denying justice. As a result, in such cases, judges should opt, and claimants and other stakeholders should push them to opt, for a collective procedure that makes these complexities explicit and offer transparent forms of dealing with them.

⁵⁶⁰ In case of a local school, it might be possible to include (likely) prospective members or at least consider their interests and assure fair representation to them.

The following sections address the various forms of how courts can respond to the problem of diversity and also offer ways to address them.

4.5.1 Denying collective recognition: individual litigation as an alternative

The most common reaction to claims involving large number of people in a legal system based on individual rights is to dismiss the collective element and apply the individual logic. If a case where the remedy will affect a wider group is litigated as a claim formulated as a structurally individual case, we lose all the advantages of collective procedures. Sticking with individual actions means doing away with the benefits of collective litigation including judicial efficiency (litigating a large number of similar cases), better consistency, economies of scale, closure, and the increased oversight of representatives (agency problems).⁵⁶¹ Individual treatment of cases where interdependence prevails might result in wasting judicial resources, can easily dismiss claims that should survive if taken together, individualization might make litigation economically unfeasible, can result in inconsistent court decisions, drain funds before all claims are exhausted, courts might slip over the question of adequate representation more easily, due to the lack of established procedural guarantees etc. – losing basically all benefits listed in this chapter.

Court cases are hardly ever a completely isolated world. In most cases, there will be non-parties whose interests will be affected by the outcome. In some cases, however, the link is so strong, that it would seem to be impossible to exclude the possibility of members of the affected group to join the lawsuit, even if no special rules apply (including specific rules on group litigation). High-profile court cases often raise public interest exactly because they

⁵⁶¹ See, e.g., Burch, *supra* note 491, at 899.

touch upon the interests and rights of many, or all. The constitutionality of Obamacare or the legal recognition of same-sex marriages are of this sort. Through the rule of stare decisis, various groups can be said to have a stake in the litigation, potentially including not just the entire citizenry, but foreigners as well. Declaratory relief and injunction are types of judgments that often concern wider groups regardless whether they are parties to the case. This is particularly the case for litigation challenging existing institutional structures, termed by Sargentich 'complex enforcement.'⁵⁶² In the said cases 'res judicata and stare decisis merge.'⁵⁶³ The question is how civil litigation can deal with this phenomenon provided that the procedure, as it exists today, is primarily aimed at concurring claims played out in a relative isolation from the wider social context.

One approach to the phenomenon of effects on non-parties is ignorance. This flows somewhat naturally from the compartmentalizing feature of civil litigation, and is not necessarily a bad thing, serving legitimate goals, making sure, among others, that the case maintains its focus. It is easy to see, however, how this attitude can lead to a frustration of due process. If my right depends on a case to which I am not a party, it is better if the court takes into account the wider implications of its judgment. This can happen through a call to joinder; declaring that non-parties should also be (fairly) represented (i.e., their interests should be represented) in the case; foreseeing ways in which non-litigants can benefit from the award, where applicable etc. Note that in these cases, representation means the representation of 'interests.' Even though this might offend a stricter, or even formal, concept of what legal representation means, e.g., based on the will theory – that parties should be

⁵⁶² His definition is 'a type of civil litigation in which a large segment of social reality is denounced as offensive to law and transformed through the judicial process of the injunction.' Lewis D. Sargentich, *Complex Enforcement 1* (March 1978) (unpublished manuscript, on file with the Harvard Law School Library).

⁵⁶³ Yeazell, *supra* note 160, at 518.

able to have actual control over how their representative acts – recognizing the wider, collective aspect and addressing the representation challenge is better than dumping the question altogether. Consider, e.g., the possibility that the case is thrown out, or taken as a strictly individual action, because the judge considers the overall claim non-justiciable for the reason that it is impossible to assure representation in the strong, individually controlled sense.

Commentators argue that, in the United States, the backlash against class actions results in less rights claims being litigated as class actions—for example, the same-sex marriage cases—and this resulted in a less than optimal situation.⁵⁶⁴ With the decline of class actions in recent year, many potentially class actions proceed as a large number of individual cases, ‘in a procedural no man’s land—somewhere in between individual litigation and class action litigation, but without the protections of either.’⁵⁶⁵

Bronsteen and Fiss list three alternatives to class action:⁵⁶⁶ consolidation of separate lawsuits; separate lawsuits allowing the principle of stare decisis to regulate a possible conflict (not satisfying, the faster wins); and intervention. In the United States, it is possible to rely on an aggregation device called ‘Multidistrict Litigation.’ Consolidation of interrelated lawsuits and intervention are possible under most jurisdictions. Especially in cases of intra-class conflict, consolidation and intervention might be workable. While this solution might bring about some of the benefits of collective litigation, it will not be able to realize all. Taking a wider group harmed by a policy or practice, with some of the victims litigating or intervening, even if we combine all lawsuits and intervening parties, non-party interests are still not present

⁵⁶⁴ Carroll, *supra* note 221, at 901.

⁵⁶⁵ Burch, *supra* note 491, at 898. For more on this, see Burch, *supra* note 339.

⁵⁶⁶ Bronsteen & Fiss, *supra* note 237, at 1428–29.

and those who don't have the means to litigate are still left out. Economies of scale are also only partly exploited.

To see why the principle of *stare decisis* also does not offer a solution for interrelated claims requires a broader view of how individual litigation works in such cases. A common mistake when comparing individual and collective litigation is to compare a single individual lawsuit to collective judicial treatment. However, as Carroll points out in the context of comparing litigation costs, this is not a realistic basis of comparison. As opposed to an analysis that 'compares the cost of a class action with the cost of a single non-class case, [...] defendant's generally applicable policy or practice, however, necessarily affects multiple potential claimants' making it 'more appropriate to compare the costs of one class action to the costs of many quasi-individual actions.'⁵⁶⁷ This insight applies to comparing aspects other than costs.

A further problem is the asymmetry created by the nature of judgments in individual litigations. Depending on who wins the individual lawsuit and whether the remedy is divisible or indivisible (or, to be more precise, independent or interdependent),⁵⁶⁸ the impact on other potential plaintiffs will vary, as will the effect on defendants. Table 2 illustrates this asymmetry.

⁵⁶⁷ Carroll, *supra* note 169, at 2051.

⁵⁶⁸ See the discussion under 'The goals of remedies' above.

| | Plaintiff prevails | | Defendant prevails |
|----------------------|--|--|--|
| | Individual (independent) remedy | Collective (interdependent) remedy | |
| Individual action | Remedy confined to the parties – wider issue unaddressed | Remedy also benefiting non- parties: asymmetry | Other plaintiffs can still sue: preclusive asymmetry |
| Collective action | All members affected | Remedy and parties aligned: symmetry | No other plaintiffs to sue, closure: preclusive symmetry |

Table 2. Preclusive symmetry and preclusive asymmetry⁵⁶⁹

The overview shows how, in the case of plaintiffs in similar position, individual litigation (shaded row) leaves out non-parties and creates an asymmetry. This is not only true for plaintiffs, but defendants as well: ‘A defendant who prevails against a plaintiff in an individual case can rely only on precedent, not *res judicata* or collateral estoppel, against a new plaintiff who brings suit on the same claim.’⁵⁷⁰ For defendants, however, the greatest danger is that an individual litigation ends with the defendant prevailing, and courts still end up precluding further challenges, by later litigants. For cases where larger number of victims are wronged, the collective procedure allows for inclusion (benefiting those least likely to have actual access to justice) and the determination of the outcome, setting off a large number of potential further lawsuits.⁵⁷¹ For interdependent claims, the collective procedure goes a long

⁵⁶⁹ Own compilation based on Nagareda, *supra* note 225, and Carroll, *supra* note 169.

⁵⁷⁰ Carroll, *supra* note 169, at 2052, citing Taylor v. Sturgell, 553 U.S. 880 (2008).

⁵⁷¹ See further arguments under sections on ‘Access to justice.’

way to match the structure of the judicial procedure with the structure of the claims, instead of an asymmetry that results in an uneven impact on plaintiffs, defendants and, most importantly, non-party victims.

Non-parties who will be affected by the judgment also have an inherent interest in the quality of representation in any earlier individual lawsuit:

*the exercise of any attorney's professional judgment creates externalities for concurrent and subsequent cases, especially in the context of the common claims addressed in quasi-individual actions. [...] Future litigants may also have to grapple with the precedent created by a quasi-individual action, which may functionally preclude their claims. The stare decisis effects of a quasi-individual action on other common claimants will be extremely strong relative to other precedents[.]*⁵⁷²

This is a reflection of the representational asymmetry in case of indivisible and interdependent claims if not litigated in a collective way: the choice of strategy and the outcome will have an impact on non-parties, but they do not have proper representation or guarantees, deepening the agency problem. A Carroll concludes: 'When a plaintiff decides not to use the class action device, and instead brings a quasi-individual action, these issues of agency and representation do not disappear.'⁵⁷³ This makes, in such cases, the collective procedure a superior way of litigation.

Full individualization might not be practical. In the case of violations involving larger groups, like it is often the case with historical injustices: 'Considering the magnitude of the number of people often affected by historic injustice, compensating each individual for such harms becomes extremely difficult and even impractical.' Ori J. Herstein argues that in such cases, 'blanket remedies' might work best. This can include 'uniform direct payments to all members

⁵⁷² Carroll, *supra* note 169, at 2059, citing William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1651 (1997).

⁵⁷³ Carroll, *supra* note 169, at 2061–62.

of the group’ as well as symbolic measures that by their very nature target the entire group, are the most appropriate.⁵⁷⁴

4.5.2 Downplaying or denying diversity

Judicial denial can appear not only on the side of individualization, denying commonality and the adequacy of the collective approach, but also on the side of collective treatment. Burch notes that ‘[m]ost courts refused to engage in a debate over conflicting interests at all, preferring instead to gloss over differences with empty conclusions.’⁵⁷⁵ I will illustrate this concern with a curfew challenge case.

The American Civil Liberties Union brought a suit against a 11:00 p.m. curfew in D.C. targeting all minors. While there was considerable diversity of opinion within the target groups (all minors and their families), many favoring the curfew as a safety measure. District Judge Charles R. Richey certified a mandatory class (with no opt-out rights⁵⁷⁶) arguing that while ‘the proposed class will inevitably include individuals who favor the curfew[, i]n matters of this type, involving a class of this size, differences of opinion are unavoidable.’ On the adequacy of the representation, the court concluded that ‘the competence and dedication of the plaintiffs’ counsel leaves the Court utterly without doubt that the named plaintiffs will fairly and adequately protect the interests of the class.’ Regarding the diversity in opinions within the class, the court concluded that ‘the interests of the class are not *antagonistic* to those of the named plaintiffs’ (emphasis in the original).⁵⁷⁷

⁵⁷⁴ Herstein, *supra* note 171, at 272.

⁵⁷⁵ Burch, *supra* note 338, at 3048.

⁵⁷⁶ Under Rule 23(b)(2).

⁵⁷⁷ *Waters v. Barry*, 711 F. Supp. 1121 at 1131–32 (D.D.C. 1989), cited in Burch, *supra* note 338, at 3047.

It is true that the representation was adequate if the interest to be represented is to end the curfew. It is also true that internal diversity is very likely to be present in large groups. However, it seems impossible to conclude that the diversity is not substantial without addressing the existing differences in opinions. Instead, the court chose to ignore this, by arguing that:

Should the plaintiffs succeed in their challenge to the Act, those members of the class who favor the curfew will not be affected in the least; they may still unilaterally obey the Act's time limits and thereby further each of the objectives [of the curfew]. The "conflict" or "antagonism" present here is thus largely theoretical; it is fundamentally different from the situation in which a successful class suit would somehow alter the rights or obligations of the dissenting class members.⁵⁷⁸

Yet, 'voluntary curfew' might not achieve the goal that the legislation sought to achieve and that part of the group seemed to support. An alternative judicial approach could have acknowledged the diversity of opinions and could have addressed the diversity by other means. Going beyond the individual case, this could have happened through any of the earlier mentioned means, decertification, creating subclasses and accommodating internal diversity through procedural guarantees that all opinions and interests are adequately represented. In the particular case, the court could have acknowledged the diversity by pointing out that the two sides in the debate are adequately represented by the two sides in the suit: the District arguing for maintaining the curfew and the ACLU arguing against. Furthermore, the controversy would have required the court to address, in the context of certification, the question whether (majority) consent to the curfew makes a difference. If it does, the suit might just fall apart and give way to democratic decision making, if necessary, supported by

⁵⁷⁸ Waters v. Barry, 711 F. Supp. 1121 at 1132 (D.D.C. 1989).

judicial oversight. If not, ACLU should be able to pursue the claim even if there is only one single minor, parent or family that questions the legality of the measure.

A collective procedure does not and should not guarantee an outcome on either side. Yet, it makes it more likely that the court perceives the problem of internal dissent and have at its disposal the structural means to address it. While the curfew example shows the structural limitations of litigation, it also reveals its potential, if adequately used. Representatives can appear on both sides of the litigation. The lawsuit can actually be described on those terms: The District is the official political representation of the wider community, while the certified class is a subgroup within that community, of families with minors.

In the minority context, this might result in competing representation for the minority. Some might argue for one remedy, while others for a remedy where the two solutions are mutually exclusive. Yet, it might be better to face this diversity directly. A collective procedure makes it more likely that the court is forced to acknowledge the differences and find a way to accommodate them. Where the defendant is a public body, the plaintiff group can be the targeted population, and representatives can intervene on both sides. The court procedure will allow for dissenting views to be heard. On the other hand, if we allow individual actions to proceed, maybe designed in a way that is not fully representative of the entire group, this collective aspect might be more easily swept under the carpet.

Internal democracy might not matter where rights violations are at stake, but the goals of procedural fairness and of recognizing diversity will be greatly served, aims that are important in the minority context as well.

4.5.3 Creating mechanisms to reflect and protect diversity

Arguably the best way to litigate claims that have both individual and collective components and where interdependence is a problem that individual litigation cannot address is to have a collective procedure with an added individualized mechanism ('phasing').

Another solution for claims where clearly identifiable divisions exist within the group, is to create subgroups along these lines ('subgrouping'). This can happen by maintaining the unified aggregated procedure, where there are commonalities that justify this; and it can happen by relegating separate subgroups, and sub-claims, to separate lawsuits. The two methods can be used alone or in combination with each other, allowing the reap the benefits of the collective procedural solution, while accommodating internal diversity.

The value of such an approach in the minority context is that it translates the non-oppression requirement into a procedural guarantee. Courts enforce the idea that collective rights should never result in groups and group leaders trenching upon the rights of members by acknowledging and addressing diversity, by phasing and subgrouping.

An important caveat here is that there are, as we have seen, indivisible and interdependent claims and remedies. In such cases, individual litigation risks incompatible judicial determinations and is thus not desirable. Where discrimination is found and structural changes (like desegregation or mother-tongue education) are mandated by the court, that will apply to individuals regardless of their status in the lawsuit, whether they agreed with the claim or whether they were (adequately) represented. A collective procedure is structurally better to deal with such settings. Internal variation in those cases can be addressed most importantly at the level of representation and participation, a topic for the next chapter. In

all other cases, where interdependence is only partial, phasing and subgrouping remain viable alternatives to full individualization and full collectivization.

4.5.3.1 Phasing

One possible solution is two-phasing the process, and to deal with the collective and the individual elements in separate phases. After recognizing the group, the court can first address the collective questions, for example, whether the defendant is liable. In addition, the collective phase can also include remedies that apply to the group as a whole, or subgroups (non-individual remedies). Second, additional remedies can consider individual variation. It is also possible to deal with the individual phase in separate lawsuits. We have seen that the decoupling proposal seeks to address this with a three-phase procedure in the case of mass tort claims.

Changelo also proposes a separate trials solution where ‘questions of liability [would] be decided together in a unified, efficient and powerful 23(b)(2) class action while questions of individual compensatory and monetary damages would be decided in separate trials.’⁵⁷⁹

In the case of minorities, phasing allows for the claim that concerns the minority as a group to be litigated collectively, while not precluding individual assessment of damages to individual members. Individuals also benefit from this solution because they will see part of their case established, e.g., they might only need to prove the individual variation and do not need to establish that there has been a violation in general; a presumption of violation would apply based on group membership.

⁵⁷⁹ Changelo, *supra* note 183, at 134–135.

4.5.3.2 *Dividing claims and groups*

Phasing works best where there is homogeneity across cases, even though individual and collective elements mix. A possibly more challenging scenario, for collective procedures, is the situation where despite important commonalities, there is also considerable variation across cases. In such cases, group recognition might happen with a bent: by also recognizing subgroups within the larger group, groups that are then targeted with different remedies. This solution is recognized in the US class action framework in the possibility to define subclasses.⁵⁸⁰

This solution might happen together with phasing, with a group-wise award at the first stage, and subgrouping happening later. The judicial solution is also flexible in that the boundaries of the groups might be changed throughout the procedure, to better reflect the possible internal variations and conflicts that emerge. When the judge certifies the class, this decision maintains the possibility of creating subclasses later, if necessary, and revisit its decision in the process of deciding over the merits.

In some cases, the commonalities might dominate the suit, while in others, the differences might be most important. In the latter case, hybrid and flexible remedies can help, and subclasses might be defined. When these solutions cannot help, and variation is too strong to be tackled with the proposed solutions, it might well be that one collective lawsuit might not be the adequate venue for the underlying claims.

To show how highly complex violations and remedies can be tackled through dividing claims and groups, I will turn back to the Holocaust litigation in the US.

⁵⁸⁰ FEDERAL RULES OF CIVIL PROCEDURE Rule 23(c)(5): 'When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.'

One way to divide the claims in a procedural sense is to pursue individual law suits, e.g., based on the various defendants targeted by the claims. Dubinsky classifies Holocaust litigations as falling largely under four types: one against the three largest Swiss banks, for dormant accounts not paid to heirs or those without heirs; one against European insurance companies, for failing to make payments in connection to Holocaust deaths; one against multinational corporations, for slavery and forced labor; and one against art collections, for holding artwork taken from Holocaust victims.⁵⁸¹ It is apparent that not only the defendants but the types of remedies sought vary as well. As we have seen, seeking various types of remedies within one law suit is fully possible (see ‘hybrid claims’ earlier), yet, when both the remedies and the defendants separate one set of claims from the other, sacrificing the aggregation benefit might be justified. An additional practical limitation to unify law suits and aggregate all claims related to a common root cause might be the various jurisdictions.

Another way to divide claims but that can benefit from the advantages of the collective procedure at the same time is to have one group procedure within which various subgroups are identified, with corresponding remedies. This allows for unified litigation of questions that are common to all subgroups, and separate awards concerning subgroups. As a result, there will be a better fit between remedies and claimant groups.

In *In Re Holocaust Victim Assets Litigation*⁵⁸² a class action was brought against Swiss banks and other entities that were thought to hold assets related to the Holocaust. A settlement was reached and approved by the court. The complexity of the claims is reflected by how the remedies were designed, reflecting the variety of harms and claims. The victim group as a

⁵⁸¹ Dubinsky, *supra* note 174, at 1157–1158.

⁵⁸² *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y. 2000).

whole include ‘persons recognized as targets of systematic Nazi oppression on the basis of race, religion or personal status,’ including ‘Jews, homosexuals, Jehovah’s Witnesses, the disabled and Romani.’⁵⁸³ Within this wider class, five subclasses were created: Deposited Assets Class, Looted Assets Class, Slave Labor Class I, Slave Labor Class II, and Refugee Class. Each subclass was defined based on specific harms, and all included heirs of victims. The Deposited Assets Class included victims with claims based on deposited assets at any of the defendants. The Looted Assets Class was based similarly on claims arising from looted assets or cloaked assets. Both slave labor classes included claims related to deposits from slave labor revenues or cloaked assets. Slave Labor Class I included those who ‘performed slave labor for companies or entities that [...] deposited the revenues or proceeds’ at the defendants included in the settlement. Slave Labor Class II targeted those who ‘performed slave labor at any facility or work site, wherever located, actually or allegedly owned, controlled or operated by any corporation or other business concern headquartered, organized or based in Switzerland or any affiliate thereof,’ with claims against any other entity (than ‘settling defendants, the Swiss National Bank, and other Swiss banks’). Finally, the Refugee Class includes those ‘who sought entry into Switzerland [...] to avoid Nazi persecution and who [...] were denied entry into Switzerland or [...] were deported, detained, abused or otherwise mistreated.’⁵⁸⁴

Without going into other aspects of the litigation, the overview illustrates how dividing claims within a larger group might fine-tune procedures and remedies in a way that allows for

⁵⁸³ *Id.* at 143.

⁵⁸⁴ *Id.* at 143–44.

collective litigation, with all its benefits, while also matching the complexity of the harms and remedies.

4.6 CONCLUSION

This chapter provided an overview on how remedies, be they collective, individual or hybrid, can advance the goal of providing effective and adequate remedies for minority rights violations. The various types of remedies might be individual or collective to differing degrees, but allowing for collective procedures leaves open the possibility of addressing claims in an aggregate form. While the arguments fit better the view that accepts the notion of collective rights or at least the imperative of the legal recognition of minority groups, and prioritizes the deterrence objective over individual compensation, the advantages are present even under an individualist compensatory view of remedies. Some remedies have an inherently collective aspect, and the collective procedure provides the best framework to address these. The closer we move to rights litigation, the more we see this 'public' role of litigation. Large scale violations that are central to minority rights claims require complex responses that most likely translate to hybrid remedies in litigation.

After recognizing the complex structure of claims, especially if this is combined with politically sensitive claims, judges might be inclined to refuse to consider claims as inapt for judicial remedies. Yet, this is the likely terrain of collective minority claims, requiring the combination of various types of remedies, involving larger number of victims and violations that are not isolated events. Rather than rejecting such claims as unjusticiable, the chapter argued that there are ways to stretch the boundaries of what litigation can address and deal with the complexity that includes individual differences.

The 'heterogeneity challenge' can be tackled by the procedural solution, by phasing and subgrouping. Phasing accepts the fact that part of the claims cannot be dealt with in one unified procedure, and only aggregates the rest, maintaining the benefits of the collective procedure in those areas, most importantly enhanced access to justice. With subgrouping, courts can divide the group and consider common elements on the level of the whole group, while allowing intra-group variation across subgroups.

An important lesson of the chapter is that collective litigation, and even a collective remedy, does not mean that no individualization is possible. The overview presented various forms of addressing intragroup variation within the broader framework of collective litigation. The collective procedure allows for courts to fine tune remedies to various subgroups and develop formulas for assessing harm on the individual level while maintaining a strong form of consistency that might not be present in dispersed law suits.

A related question concerns representation: the question is not simply what groups are represented, but how and by whom. To fully assess intragroup diversity, courts should enforce internal mechanisms to make sure that the different views on remedies are presented to the court as competing alternatives. The next and final chapter will address questions on how groups shall be present before courts. As we will see this comes with benefits like gaining leverage, but it can also present formidable challenges to a setting that is traditionally based on consent based representation and individual proof.

5 'GROUPS' IN LITIGATION: REPRESENTATION, RECOGNITION AND CONTEXT

The previous two chapters addressed the question of the institutions (who decide collective claims) and of substantive claims (the types of remedies). We have seen how courts, partly, are and, partly, can be made adequate forums to deal with collective claims, in a way that extends access to justice and serves the goal of judicial efficiency. The previous chapter also showed how the collective procedure can serve various goals of remedial justice and how it works with various types of remedies. I also discussed ways for how courts can deal with complex claims featuring both individual and collective elements. The present chapter raises questions about the actors, the collective parties, and addresses specific issues about the presence of the group in litigation.

While representing a group before a court raises concerns about adequate representation, the presence of a larger group of claimants might in itself empower and organize the group, contribute to recognition and remedying the harms. In the minority context, the judicial recognition might rely on pre-existing groups, which raises the question of a possible mismatch between those affected by a violation and the members of the group. Finally, the aggregation of cases can transform the judicial procedure in how judges are confronted with evidence. Statistical and circumstantial proof that courts might otherwise be inclined to reject can appear as central to the claims; the general evidence, e.g., based on historical and other scientific data that is hard to be fully individualized, might persuade judges to presume the occurrence and scope of violations and the extent of damages based on group belonging. The following sections will address these questions in details.

5.1 REPRESENTATION OF WHOM AND WHAT? CONSENT AND INTERESTS

A central question of litigation, especially of group litigation, is the basis of representation. The answer is more or less straightforward where individual members consent to representation. Where there is universal consent, the question is not one of representation, but adequacy: should the lawsuit be allowed to go forward as a collective procedure. What makes a collective procedure so effective is, however, that not all (potential) claimants are required to give prior consent to the litigation to proceed. The common question (and criticism) concerning collective litigation is what can justify representation, if not consent?

Bronsteen and Fiss identify this question to be the main theoretical difficulty in justifying class action. They argue that inaction should never be seen as consent. Even if we allow opt-out, and do not consider cases where opt-out is not a possibility, special guarantees should apply, most importantly regarding adequate notification. One exception they make is the cases where individual litigation is not a possibility. As there, a collective procedure is the only way to recover, it is justified to expect plaintiffs to accept the special status of plaintiffs flowing from the procedural structure. In all other cases, arguing that, as rational actors, class members would have consented ('hypothetical consent') is no solution, for this would be to miss the crucial element of choice. Yet, they agree that class action serves an important social function and should be maintained.⁵⁸⁵

Viewed through the lenses of consent, there are three types of procedural solutions applied in group litigation. The widest discretion to individual members is granted by the opt-out solution. This requires an express wish from all litigants to join the lawsuit, and does not raise questions of consent. However, it also does not really count as a collective action, and instead

⁵⁸⁵ Bronsteen & Fiss, *supra* note 237, at 1419–21.

functions as a reinforced form of intervention and consolidation, to aggregate active litigants. Asking for opt-in in the case of rights litigation might make it prohibitively costly to start a truly comprehensive collective litigation, and will instead force representatives to start individual actions.

In the second form of collective procedure, group members are treated as members by default, but can decide to opt out from the group. This form has two subtypes, one mandating notification to group members, most importantly about this opt-out option, and the other not requiring notification. The third form of collective litigation does not allow opt-out, and seems to go against the traditional view of litigation.

| | C o l l e c t i v e p r o c e d u r e s | | |
|--------|---|------------------------|------------------------|
| Opt-in | Opt-out with notice | Opt-out without notice | No opt-out (mandatory) |

Table 3. Types of collective procedures

The collective procedural solution that I consider here requires a mechanism that is able to consider group claimants without the need for all individual members to sign up to the case (opt-in).⁵⁸⁶ While I think that the type that does not allow opt out can have considerable advantages in certain contexts (e.g., extracting a settlement more favorable to claimants from the defendant due to the ability of the agreement to bring closure⁵⁸⁷), I also recognize that

⁵⁸⁶ This is why, in the US context, the multidistrict litigation device does not mean in itself collective litigation. See the relevant rules: 28 U.S.C. § 1407. This does not hold when they are combined with class actions or otherwise include collective elements.

⁵⁸⁷ For the argument that not allowing opt-out is best from an optimal deterrence point of view and should be favored for this reason, see David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

such a solution might not be acceptable in many jurisdictions, neither to legislatures, nor to most representatives of the legal profession. The proposal will consider the benefits of all options, but does not require the exclusion of the individual right to opt-out.

The underlying logic of group litigation is not consent-based but interest representation. As Yeazell shows, this approach has strong historical roots. As early as in 1837, the interest-based theory of group litigation was clearly stated: ‘when a large number of persons have a common interest in the entire object of a suit in its nature beneficial to all, one or more of them may sue on behalf of all.’⁵⁸⁸

Yeazell differentiates between two types of representations: one is based on ‘the congruence of [...] interests’ and the other on ‘the consent and supervision of the represented.’⁵⁸⁹ He describes the history of group litigation in the US as the transition from one world, relying more naturally on interest-based notions of representation, to another world, based on consent:

*the question of what circumstances justify treating a collection of people as a single litigative entity. More specifically, the question is when an active litigant may represent other, passive persons in a lawsuit. In the past few centuries two theories of litigative representation have arisen, one permitting an active litigant thought to represent the interests of the rest to proceed on their behalf, the other requiring the would-be representative to obtain the consent of the represented.*⁵⁹⁰

Pitkin in her famous treatment of different forms of representation talks about four different types of representation: formalistic (based on authorization and accountability), descriptive (resemblance), symbolic (actual acceptance within the group) and substantive (serving ‘best

⁵⁸⁸ F. CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY (1837), cited in Yeazell, *supra* note 216, at 1084.

⁵⁸⁹ Yeazell, *supra* note 160, at 522.

⁵⁹⁰ Yeazell, *supra* note 216, at 1068.

interests’).⁵⁹¹ Our expectations for representation in litigation will be different from those for political representation. In the case of legal representation, as opposed to political representation, the argument might not mean that group members should be the lawyers or that the legal team should otherwise adequately represent the group. It should mean, however, that the way the claims are formulated, argued and presented both reflects the common features of the group (most importantly that they are all victims of a certain violation) and respect intragroup variation. While group representation outside the courtroom might include other elements, e.g., through opinion leaders speaking for the group in the media (descriptive representation by ‘one of us’), courts should make sure that group representatives in the lawsuit come close to the ideal of substantive representation. While authorization will always remain limited, even where opt-out is possible, because no express consent is required, accountability should also be assured through judicial oversight and a complaint mechanism (objections). This altogether should also make sure that the representative has an adequate level of acceptance in the group (symbolic representation). Pitkin’s categorization also allows for non-consent based representation. With the debate around consent vs. interest based representation in lawsuits, we get back to the dilemma of individual vs. collective approaches that we have addressed earlier.⁵⁹² Yeazell argues that:

*The theoretical problem is what justifies the litigative representation of a group by some of its members? Answering this question is difficult because any answer collides with the ideology of individualism reflected in the belief that each person should control his own lawsuit.*⁵⁹³

⁵⁹¹ HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION (1967).

⁵⁹² See Chapter 1.

⁵⁹³ Yeazell, *supra* note 160, at 515.

Yeazell traces the tradition of representation to the Burkean view that rejected the notion of the Parliament representing some unified 'national interest' by definition,⁵⁹⁴ but accepting that individual members of Parliament could represent interests and further that there was adequate representation even if a region did not elect a representative, as long as the interests were ('virtually') represented, e.g., by representatives from similar constituencies.⁵⁹⁵ This brings his view close to the interest-based representation that is helpful in fully endorsing stricter forms of group litigation.

The common assumption is that where monetary compensation is sought, the problem of group representation (and, as a result, judicial recognition) is solved by the interest-view. All those in the plaintiff class are interested in getting as much money as possible, and this should define adequate representation: maximizing compensation.⁵⁹⁶ It is interesting to note that in the US context, the class action rule seems to presume the opposite, if we look at the presumption of cohesion. In the mass tort context, there seems to be less reason to assume group coherence (people often just happen to be harmed by the same measure), while the injunctive and declaratory relief might target people who are anyway in the same situation and perceive themselves, to some extent, as belonging to the same group. But this is not much more than speculation, and counter-examples are possible. There might be internal divisions in monetary remedy cases, too. In case of a sustained injury where the victims are not immediately aware of the harm, e.g., because the symptoms appear late in time and the full scope of the harm can only be assessed years or decades after the wrongful act, victims

⁵⁹⁴ Yeazell, *supra* note 216, at 1077.

⁵⁹⁵ *Id.* at 1079.

⁵⁹⁶ *Id.* at 1084.

at different stages of discovery might have different interests. Some might not even know, at the time of the litigation, that they are victims.

The limitation of the consent theory is that it suggests a false image of litigation: if there is no consent from all the parties, a claim cannot proceed; whereas if there is consent, all is well. For cases that necessarily alter the lives of non-parties in important ways – see the ‘interdependent’ remedies in the previous chapter – consent of the parties who can litigate should not obscure the importance of the court making sure that the judgment also respects the interests of those who are formally not represented in the suit. In fact, properly conceiving the collective party in such a case makes this aspect easier to address.

The interest-based approach, however, raises the issue of homogeneity. To what extent are the interests of the group really aligned and how far can internal diversity go without questioning the legitimacy of the group-based approach? The challenge of individualization together with a collective procedure were considered in the previous chapter.⁵⁹⁷ The solutions provided there also apply to questions of representation. Where phasing happens, representation might follow the varying interests, allowing for truly individual representation in the individualized claims part. Dividing groups into smaller subgroups also allows for separate representation for the defined units. Representation is also a problem there, but is even more important in cases where phasing and subgrouping is not available or they only provide a partial solution, because the claims and remedies are interdependent or completely inseparable. The next section will consider the question of representation in the context of individual variation.

⁵⁹⁷ See the section on ‘Individual variation....’

5.2 ADEQUATE REPRESENTATION FOR GROUPS AND INDIVIDUAL GUARANTEES

Adequate representation should mean that there is a corresponding relationship between the group represented and the representative. The judicial recognition of the group makes sure that there is a match between the group and the claim, thus the adequacy of representation will also mean that representation also corresponds to the underlying claim. Subdividing groups allows to keep the level of internal variation to a level that makes representation and, subsequently, litigation, possible, while moderate variation within the group is also tolerated. These steps allow for a relatively unified representation, a group that speaks with one voice, while maintaining the possibility of dissent. How to measure the adequacy of representation under these circumstances? In case of a group-wise representative, the individual member's ability to choose and fire the representative is necessarily limited. In fact, there will be cases where both the ability to choose one's representative and the option to leave the group are unavailable. This justifies heightened scrutiny of representation. In such cases, the court needs to evaluate the adequacy of representation. How we assess adequacy will depend on our substantive view of the class action.

Shapiro argues that we should stop seeing class actions as a mere aggregation tool where the goal is to allow individual members to retain as much autonomy as possible. He maintains, instead, that a more compelling reading is to treat the group as a party and a client.⁵⁹⁸ If members are only parties to the case by virtue of their group belonging, that turns the autonomy question around, and allows for a genuinely collective procedure. While I think this is a compelling reading of most forms of group litigation, especially where structural changes

⁵⁹⁸ Shapiro, *supra* note 401, at 918.

are sought to alleviate disparate effects on minorities, I think the collective procedural solutions can be justified on a more individualist reading, too.

Burch addresses both the individual and the group level and argues that if the underlying claim is individual, adequacy should be measured on the level of each individual, while in the case of what she calls ‘aggregate right,’ ‘[f]airness and adequacy are necessarily measured in group terms.’⁵⁹⁹ While this is plausible and will hold for certain cases, I think it is more accurate to talk about individual measurement in all cases. Even where the claim is largely collective, individual variation might be present, making it possible that representation is unfair only in the case of one claimant or a few of them. And even if the claim is throughout collective, without the possibility of individualization, it is still possible to think of a way in which representation might be adequate for some, but not for others, considering all aspects of representation. E.g., the attorney might do her best to provide adequate representation and but might fail to accommodate the special communication needs of a client with disability. This is why I would maintain the functional individualist approach in this case, too. Adequate representation on the level of the group is a result of adequate representation vis-à-vis all group members, absent or present. A case might have a collective element justifying collective treatment but individual variation cannot be ruled out in assessing the adequacy of representation. This does not mean, however, that the individually measured collective representation will have to meet the same standard as individual representation. For one, the fact that the representative cannot be fired at individual will means that in the case of a

⁵⁹⁹ Burch, *supra* note 338, at 3057. ‘When adequate representation qualifies as a group right—that is, in cases where the underlying cause of action is likewise aggregate—a group member cannot prove she was inadequately represented except by showing that counsel treated the whole group unfairly.’ *Ibid.*

sufficiently large class, there will be claimants unsatisfied with representation. This will not necessarily mean that representation is inadequate.

While opt-in group litigation protects individual autonomy the best in the sense of controlling the lawsuit, it cannot be considered a genuinely collective form of litigation, and it doesn't allow to reap the advantages of collective procedures. That leaves us with two options, opt-out and no opt-out (mandatory representation). In the case of remedies that are indivisible, or show a high level of interdependence, allowing opt-out might send a false message, both to those involved in the litigation (including the representative and the judge) and to those who opt-out, because the outcome will be dispositive to the interests of all members of the target group, regardless of whether they are parties. In such cases, a better alternative is to keep dissent within the lawsuit, forcing representatives and judges to consider opposing arguments about how to best protect the interests of the group.

There are, however, methods to help judges decide whether representation is adequate and to boost the ability of group members to exercise an optimal level of control over representation. Individual guarantees can be categorized from stronger to weaker types. The strongest form is the option to exit, that can be combined with a notice requirement, calling the attention of group members that they can opt out. An opt-out right without mandatory notice is a weaker form of securing individual autonomy, as required under the traditional view of litigation. In cases where opt-out is not allowed, by way of a 'middle ground' between opt-out and mandatory class actions, class members can raise 'objections,' voicing concerns about their representation. Furthermore, courts can hold 'fairness hearings' to assess the adequacy of representation.

The adequacy of representation is strongly linked to how we see the group to be represented, which in turn depends on how we assess the harms and the individual cases. Sometimes the group-wise harm will be evident, and individual variation does not challenge the collective remedy. Most injunction type remedies will fall under this category, and also compensation claims where individual variation in the damages is not significant, e.g., because individualization is anyway largely speculative. Where individual variation is an important element, however, representation should map this variation and take it into account.

There is no evident connection between collective remedies and lack of individualization. As we will see in the final part of this chapter, under the questions of evidence, collective assessment might even increase the accuracy of individual assessment, through systematic sampling, in addition to the obvious improvement of efficiency and consistency.⁶⁰⁰

A more basic form of ‘sampling’ is to pick representative cases that are assessed in more details, to learn about the harm typical in the victim group. While the entire community is represented in a class action, there might be named plaintiffs, like in the US class action cases. Picking the right plaintiffs will be important. Matthew R. Ford argues that, in order to keep agency costs to the minimum and avoid constitutional challenges, (named) plaintiffs in class actions should be kept as close to the claims as possible: as a minimum, they should share the injury or injuries that the claims are based upon. If those bringing the claims to court are individually interested in getting the best remedy and having it enforced, that gets rid of most agency costs.⁶⁰¹ Internal heterogeneity, in the specific injury or its even more varied impact, not to mention the diverging views on how the injury should be remedied, will mean that

⁶⁰⁰ See, e.g., Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992).

⁶⁰¹ Ford, *supra* note 177.

named plaintiffs might not perfectly cover the scope of variation. One way is to keep adding named plaintiffs until they cover, to a proper degree, all issues involved. Adequate representation in this sense will require that the individual cases directly considered by the court need to match the wider set of claims. This should be a requirement under group litigation.

Considering that no similar guarantees are present in the case of individual litigation, in case of interdependent remedies, where ‘adjudication [...] would be dispositive of the interests of the other members not parties,’⁶⁰² mandating a collective procedure might end up better protecting individual interests. A conclusion that finds a mandatory collective procedure superior even if measured on the level of individual might seem paradoxical, but in cases where non-party interests are affected, it seems better to take into account the entire group of potential plaintiffs. Note also that this also means that other plaintiffs could step in any time, and the goals of foresight and judicial economy, in addition to adequate remedy, suggests that their interests should be considered from the outset.

A general rule of thumb might be that if the group claim consists of separable claims, the ability of the individual claimants to proceed with their claims outside of the scope of the suit grows with the value of the claims. This will mostly hold for monetizable claims: ‘Commentators have long observed that as the value of claims increase claimants deserve more process in private aggregate litigation.’⁶⁰³ Statistics from the US suggest that the amount of damages, in addition to the number of class members, shows correlation with the level of opt-out and objection rates: one of ‘the most significant factor[s] explaining opt-out and

⁶⁰² ... ‘or would substantially impair or impede their ability to protect their interests,’ as under Rule 23(b)(1)(B).

⁶⁰³ Zimmerman, *supra* note 352, at 222. See also Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1065 (2002).

objector rates is the recovery per class member: as would be expected by theory, opt-out and objector rates increase as per capita recovery increases'; and 'rates of dissent decline as the number of class members increases.'⁶⁰⁴

Opt-out right gives refuge against criticism, most legitimate in case of independent remedies, that group litigation infringes upon the due process rights and autonomy, and as a result, the substantive rights, of the parties who are represented but did not expressly consent to the suit. Note that opt-out can happen at various stages of the litigation, and it is possible to devise a tool to mount pressure on representation in the case of settlements: 'super' (in fact, post-settlement) opt-out allows members to exclude themselves from the settlement after the terms are known.⁶⁰⁵

Bronsteen and Fiss argue that individual guarantees should be reinforced, most importantly through notice and opt-out. They would allow opt-out in all cases where litigating separately is possible. Yet, even they recognize the possibility of abuse, and would exclude the right to opt-out in an injunction case where the member in question would simply use this right to leave a second chance of suing, were the claim refused in the initial class action case.⁶⁰⁶ They argue that avoiding res judicata might not mean that it is possible to also overcome stare decisis, but even with this potential the judge should deny opt-out in the first place.⁶⁰⁷ It seems that their objection to opt-out is based on whether there is a free rider effect, and would apply to all cases where the otherwise individually viable claims are indivisible. If the original claim prevails, the dissidents benefit from the award regardless of opt-out.

⁶⁰⁴ Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533 (2004).

⁶⁰⁵ *Id.* at 1535.

⁶⁰⁶ See arguments on asymmetry under the section 'Individual variation within the group.'

⁶⁰⁷ Bronsteen & Fiss, *supra* note 237, at 1443.

A further, empirical argument to question the importance of opt-out is to point out that opt-out (and objection) rates are ‘trivially small in most cases.’⁶⁰⁸ While ‘[c]ivil rights and employment discrimination cases have (relatively speaking) high objector rates, [...] their average rates are both less than 5 percent.’⁶⁰⁹ While this might suggest that the theoretically important possibility of opting out might have a little bit more than symbolic role, and confirm that ‘class counsel controls the litigation,’⁶¹⁰ statistics might not tell the whole story. The threat of objections and, where available, opt-outs can work as a check on group representatives, in addition to direct judicial oversight, which can influence their work in considerable ways. After all, the statement that ‘class counsel controls the litigation’ can cut both ways: it can not only be read as confirming that individual guarantees are largely unused and unimportant, but also to show the weight of adequate representation, justifying stronger control over representatives.

In the case of group litigation, two goals have to be fulfilled at the same time. Adequate representation means adequacy from the aspect of both the overall goals of enforcement and the expressed views of the victims. This follows from the mixed nature of litigating minority claims, including both private and public law like elements.⁶¹¹ In case of conflict, the court has to assess whether the interest or the consent based representation, the public or the private law view of litigation prevails concerning the claim in question. Considering that almost all cases will include element from both and that lawsuits can actually operate with combinations of claims, compromises will often be unavoidable. Where, however, the option is no enforcement, these compromises pay off; and in other cases where compromises seem

⁶⁰⁸ Eisenberg & Miller, *supra* note 604, at 1534.

⁶⁰⁹ *Id.* at 1532–33.

⁶¹⁰ *Id.* at 1533.

⁶¹¹ See ‘Private enforcement’ in the ‘Judicial’ chapter.

to frustrate the goals of litigation, courts should weigh this challenge against the danger that individual litigation as an alternative might pose to optimal enforcement. If our goal is optimal deterrence, opt-out rights can easily undermine this aim, as Rosenberg shows.⁶¹²

A stronger case for where individual variation should be overridden is the case of norms that should be applied regardless of whether some victims agree or not. Rights violations should be judicially sanctioned, e.g., impediments to an equal right to education should be enforced, even if segregators manage to convince parents that it is in their interest that their kids are kept in a segregated school or class.⁶¹³ A flexible approach allows the court to disregard internal dissent on public law grounds where rights enforcement should happen regardless of the diverging views of the victim group; and, on the other hand, to design remedies according to the expressed wishes of the victims, where this does not frustrate overriding (public) interest in rights enforcement.

Applying these insights to minority claims can raise questions about the interests expressed as maintaining a ‘traditional way of life’ and the group itself, on the level of the group, and exit options and more individual-centered preferences of some members. Kymlicka discusses the question of how far a liberal state can go in suppressing illiberal minority practices.⁶¹⁴ His concept of liberal multiculturalism maintains that we ‘should endorse certain group-differentiated rights for ethnic groups and national minorities[, b]ut this endorsement is always a conditional and a qualified one,’ in that there should be guarantees that the group does not oppress its members and other groups.⁶¹⁵

⁶¹² See, e.g., Rosenberg, *supra* note 587.

⁶¹³ As it happens with many Roma desegregation cases.

⁶¹⁴ See the chapter ‘Toleration and Its Limits’ in KYMLICKA, *supra* note 99.

⁶¹⁵ *Id.* at 152.

This question arises with less force in the case of minorities seeking judicial recognition for rights in the context of majority law. What majority law should do is accommodation without the expectation that it also gives up its fundamental tenets. We can safely state that court-enforced minority claims are quite unlikely to result in any of the two types of oppression. The structure of rights claims and judicial oversight are guarantees that rights are not invoked in an abusive way. In the process of fighting for the recognition of their claims, groups and members are pushed to formulate and present their claims in a way that makes it clear that misuse is improbable. Furthermore, judicial recognition is always more limited than political recognition. Granting powers to groups might sound to some as writing blank checks, which requires additional institutional guarantees. Judicial recognition is limited and can always be challenged by similar court procedures by those who feel oppressed by virtue of the rights granted in the judgment. Conflicts can arise, and the layer of liberal minimum guarantees should be enforced. In the case of collective judicial determination, this guarantee is inherent in the court procedure.

If we apply the heterogeneity challenge not on the level of the society, including majorities and minorities, but on the level of a single minority, the goal of empowering minority groups, as groups, might clash with the reality of individual differences. This balancing problem is also manifest concerning internal diversity in group litigation. This thesis shows how collective procedures can benefit minority claimants in a number of ways. Excluding the possibility of collective representation because of individual variation would leave such claims without sufficient means to achieve fair accommodation. On the other hand, a central challenge to the strictly individualistic approach was⁶¹⁶ that, by limiting collective recognition to the state,

⁶¹⁶ See the chapter on the 'Collective.'

it often ends up denying existing diversity, disfavoring those who do not belong to the dominant group that whose cultural, linguistic and religious traits are naturally reflected in the working of the political institutions. Iris M. Young describes this as the suppression of differences, inherent in all present forms of representation.⁶¹⁷ Recognizing minority groups carries the same danger by allowing such communities to become the 'local' dominant group, pushing 'internal minorities' into a similarly disadvantaged position. The challenge for group litigation is that it might threaten with committing the same error, ignoring internal dissent.

Young presents the fundamental problem of representation as the tension between the monolithic interest to be represented and the actual diversity even in relatively well defined interest groups. Her proposal is representation as a 'differentiated relationship,' a fluid and dynamic process.⁶¹⁸ She envisages a dynamic relationship between the representatives and those represented, a link that minimizes the chances of neglecting differences. When describing the relevant differences, she identifies three main dimensions: differences in interests, opinions and perspectives. (The latter meaning differences stemming from the varying backgrounds of social experiences.) Proper representation should reflect all these differences.

The proposal of group litigation for minority claims follows Young's insights in several ways. First, recognition under the proposal will be limited to the litigated claim, and the danger of homogenization (and domination) is also limited. This means that representation is fragmented in that it is limited to one set of claims. This in itself contributes to the variation of group representation and the dynamics that Young favors. We have seen that it is possible,

⁶¹⁷ IRIS M. YOUNG, INCLUSION AND DEMOCRACY 125–27, 129 (2000).

⁶¹⁸ *Ibid.*

in group litigation, to divide claims into (sub)classes to keep individual variation at a level that still allows collective treatment.⁶¹⁹ Second, in case of a group claim based on systemic violations, the litigation will be more likely to present the perspectives of all victims of the violations in question. Third, internal differences can be accommodated in various ways, and where this diversity is too strong, the case might simply be dismissed. In addition, representation and group recognition, defining boundaries etc. are all subject to close judicial oversight, making sure that the representation is fair and adequate.

In the case of legal representation, as opposed to political representation, the argument might not mean that group members should be the lawyers or that the legal team should otherwise adequately represent the group. It should mean, however, that the way the claims are formulated, argued and presented both reflects the common features of the group (most importantly that they are all victims of a certain violation) and respect intragroup variation.

In some cases, the commonalities might dominate the suit, while in others, the differences might be most important. In the latter case, hybrid and flexible remedies can help, and subclasses might be defined. When these solutions cannot help, it can be that one collective lawsuit might not be the adequate venue for the underlying claims. In all other cases, individual guarantees should make sure that adequate representation happens in a collective procedure.

We have seen that while the collective procedural approach offers various ways to accommodate individual variation on the level of representation, the task is still a challenging one. If securing adequate representation for groups is so challenging, it seems easier to revert

⁶¹⁹ See the section on 'Creating mechanisms to reflect and protect diversity' in the previous chapter.

to an action that seeks enforcement without the need to identify and represent the group. The following section will review this alternative, and compares the two procedural solutions.

5.2.1 Why not have representative lawsuits instead of a collective procedure?

A compelling alternative to group litigation is a representative lawsuit where it is not the group that is a party to the case, not even an individual, but simply the representative, often an association.⁶²⁰ Having a representative without a group is only seemingly less complex, as the adequacy of representation raises similar questions.

A number of objections might seem to justify representative litigation over collective lawsuits. A representative lawsuit might better shield victims from the experience of litigation, decreasing the chances of retraumatization. On the other hand, this can also undermine the goal of the procedure to recognize and address the violation, and making the connection to all victims. Considering that in collective litigation with larger number of victims, exposure is not too high, and that procedures should anyway be designed to prevent revictimization, this might only rarely justify the choice to start representative litigation over a collective one. The *Residential Schools Class Action Litigation* in Canada illustrates this point. The settlement agreement reached in that case allows for former students to get compensation, based on the years spent in residential schools, without showing any specific suffering.⁶²¹ Demonstrating individual suffering is only needed if victims want to benefit from further funds, dedicated to psychological support, or if they want to opt out and litigate separately.

⁶²⁰ Note that representative lawsuits should not be confused with strictly individual litigation – see earlier, under ‘Denying collective recognition...’ – despite some resemblances and the blurred line separating them. Representative litigation formally acknowledges the effects on non-parties and makes these wider concern the primary interest in the litigation, while for individual litigation the central concern remains to provide remedies for the individual victim, and treating wider effects as secondary.

⁶²¹ See the agreement on the site of the class action: INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT, *supra* note 542.

Representative litigation might save us the burden of dealing with a large body of people who should be represented. Yet, this might frustrate goals of adequate representation in that only selected people will be singled out, which might be based on an arbitrary selection, and others whose rights will be affected are left out.⁶²² Furthermore, participation can be a remedy on its own, giving voice to victims, empowering them, helping contacts and communication among them, and giving a sense of recognition as belonging to those who have been wronged. We have seen that group litigation often has a public law component. If we take the ‘public’ view one step further, it is possible to argue that rights litigation should be allowed without class representatives, named plaintiffs, with representation by an entity associated with the public goal – an environmentalist group for environmentalist cases, a body like the NAACP for racial discrimination etc. Representation could be delegated to special interest groups. It is also possible to create a market for bringing such claims to court. Macey and Miller argue that for large-scale, small-claim lawsuits, auctioning the right to litigate would best address the agency problem. They maintain that our fixation on the ‘traditional lawsuit’ hold us captive and prevent courts embracing innovative solutions.⁶²³ Such a solution creates adequate representation through financial incentives. In rights cases, however, where financial motivation might not play a central role, the auction method might not work.⁶²⁴ Korsmo and Myers also argue for aggregation and the creation of ‘claims market.’⁶²⁵ However, in the minority context, ‘purchasing representation,’ the right to litigate, creates the risk that the

⁶²² See the arguments concerning ‘asymmetry’ under the section ‘Individual variation within the group’ in the previous chapter.

⁶²³ Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 83 (1991).

⁶²⁴ This is not to argue that the wider lesson of not to shy away from innovative solutions does not apply either.

⁶²⁵ Charles Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing Class Actions with a Market for Legal Claims*, 101 IOWA L. REV. 1323 (2016).

process will lack the force of confronting rights violators with the group of victims and might miss the act of recognizing (both symbolically and monetarily) the wrong. It is not by chance that the authors identify corporate and security litigation as the areas that are most likely to benefit from their proposal and show that it might not work for other types of claims.

Representative litigation might be a viable option where there are clear standards of performance and enforcement should happen regardless of the views of those affected. For example, where a discriminatory policy can be clearly established, it should not matter whether some of those subject to it argue against raising a judicial challenge. Even in such cases, however, collective litigation comes with a number of advantages.

Group litigation is more than representative litigation in a subjective sense, by providing judicial recognition of a minority group, even if a limited one, now appearing as a 'real' entity before the law.⁶²⁶ The process is more transparent, in that those affected by the policy and its challenge are included in the process, making it clear that they have a stake, exerting pressure on all sides, judges, representatives and defendants, to consider their interests, including the need to address internal dissent. In a representative action, intragroup variation might go unnoticed or otherwise unaddressed. While this creates an illusion that the claim and the procedure itself is more simple, it can lead to a mismatch between actual victims and the remedy. The representative action is also less effective in giving voice to all victims (see the next section on 'Empowerment and giving voice.')

Where the remedy includes backward-looking elements – and compensation often plays an important role in recognizing past suffering and sanctioning the perpetrator – those who should benefit from this are readily available in the case of group litigation. Representative action might be more suitable where

⁶²⁶ See more on this in the section on 'Recognition,' below.

the claims include no such benefits, or where monetary remedies do not go to the victims or victim groups.⁶²⁷ In this sense, the representative action is more ‘collective’ and is further away from the individual approach than is collective litigation. The collective action, by giving voice and participation, a critical mass of voices, showing internal diversity, makes it less likely that a selected case will create a false sense of the issue in the court, a ‘manipulation’ of some sort.

Representative actions might seem more adequate in cases where it is hard or impossible to identify a victim, and requiring a strict ‘injury in fact’ will make it impossible to litigate claims. Common examples include rights enforcement concerning environmental issues and secret surveillance. Who should be able to sue on behalf of environmental interests and on behalf of those who are allegedly unlawfully spied upon? These cases raise standing issues, and it is not obvious that representative action provides a better solution than group or private litigation. Litigation of such cases is either excluded, under a strict standard of standing, or allowed, on the basis of a ‘potential victim’ standard. In such cases, accepting a representative action requires a further step, that of linking the representative to the claim, and does not make it easier to argue that the case should be allowed to proceed. One exception is where there is a legislative ground, creating special venues for litigation, but this is equally true for all types of litigation. Legislatures might create rules for individual and collective challenges to violations that otherwise could only be challenged through public enforcement.

Litigation in these cases can rely on an interest-based approach, but adopting this approach does not determine whether individual, collective or representative litigation is the best type of procedure for a particular remedy. It is possible for a single ‘potential victim’ or ‘indirect

⁶²⁷ See, e.g., *cy-près* awards in the chapter on ‘Remedies.’

victim' to sue, it is possible to recognize a group of such victims, and it is possible to devise a representative lawsuit to litigate this interest. The representative action itself is not able to solve the standing problem. Where it is possible to devise a plaintiff group where those harms are necessarily part of the group, but it is impossible, at least for the plaintiffs and at the pre-trial phase, to identify exactly who the victims are, group litigation makes it harder for courts and defendants to deny remedy on pure standing grounds.

We have seen that one benefit from the group-based approach in contrast to simply 'representing interests' without the group being 'present' is that it can stimulate actual participation. I will now turn to this question.

5.3 EMPOWERMENT AND GIVING VOICE: VICTIM PARTICIPATION

Group litigation has the potential to amplify minority voices and allow a wide range of victims to play an active role in presenting the consequences of violations and argue for adequate remedies. In the case of minorities, another important aspect of getting a voice is that it allows for the public affirmation of what Young calls '(social) perspectives' that are based on experiences specific to members of certain groups. Young adds that, as opposed to interests and opinions, perspectives can never be 'wrong.'⁶²⁸ Facilitating the participation of the group in a court procedure might secure a more adequate representation of both the group and the claim. The same way as the 'critical mass' argument suggests that there should be enough minority students in class to be able to show diversity within a minority group,⁶²⁹ showing diversity can be an important added value for a collective court procedure.

⁶²⁸ YOUNG, *supra* note 617, at 146.

⁶²⁹ See, most recently, *Fisher v. University of Texas (Fischer II)*, 579 U.S. ____ (2016).

Iris M. Young talked about veto rights for minorities over ‘issues that most specifically affect them’ – an idea she later called an aspect that ‘seemed [...] particularly controversial.’⁶³⁰ A potentially less controversial formulation can build on the concept of minority rights as they are in many cases rights to alter decisions made (or not made) through majority decision-making bodies, solely relying on minority claims and courts. Empowering minorities to litigate their claims is akin to giving them a more powerful vote, or at least voice, in the process, giving them a ‘piece of power’ that would otherwise be unavailable to them. Collective judicial recognition is one way to implement this. A common criticism of majority-based decision-making is that it is in many cases unable to weigh votes in areas where there are considerable differences in how one decision affects one voter or the other. This is an argument against equating democracy with majoritarian decisions.

There is wide recognition that a court procedure involving larger amount of individuals should address the problem of representation.⁶³¹ Burch argues for a procedure that embraces diversity: ‘Where there can be only one uniform remedy that affects the entire group, the answer must be to permit as many “inputs” as possible in considering and fashioning that remedy.’⁶³² Under this account, internal democracy should be allowed to play a role, recognizing internal diversity rather than dismissing it, and communication between group members should be the primary means towards realizing this ideal.⁶³³ While this might be illusory considering that it is common to have large number of passive members who do not wish to actively participate and shape the litigation, this might require innovative ways of

⁶³⁰ The earlier work: IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990), ch. 6. The place with the quote citing the controversies: YOUNG, *supra* note 617, at 144 n.27.

⁶³¹ See, e.g., the contributions to the symposium ‘The Democratization of Mass Litigation?’ in the *Columbia Journal of Law & Social Problems*, Summer, 2012.

⁶³² Burch, *supra* note 338, at 3068.

⁶³³ She goes as far as to say that under a better scheme ‘[n]o longer can one attorney or one group of attorneys make autocratic decisions on the group’s behalf.’ Burch, *supra* note 491, at 916.

making sure representation is adequate. Considering how issue communities grow and work on various social media sites⁶³⁴ and the fact that most class actions themselves include a central webpage that contains all relevant information, it is not too farfetched to imagine a community that becomes a community through sharing experiences and discussing strategies, parallel to the litigation. Burch argues that this community-building should itself be recognized as a goal of group litigation.⁶³⁵ More voice not only serves a better understanding of the underlying claims and the ‘sense of fairness’ from the part of the victims, but also the goal of offering more alternative solutions to a case.

Victim participation through group litigation can be an effective way to combine individualization and collective treatment. The procedure might allow victims to present their own stories, and having their suffering publicly acknowledged, while maintaining a more cost-effective collective award as a result. Minority participation itself can be seen as a remedy and an attempt to end the circle of continuing violations:

*Deliberations that include [minority] voice are [...] essential to the perceived legitimacy of the law. So long as legal decisionmaking excludes black voices, and hierarchical judgments predicated upon race are allowed insidiously to infect decisions of fact and formulations of law, minorities will perceive, with cause, that courts are fully capable—and regularly guilty—of bias. Minority communities will therefore continue to struggle with a mixed message of law: announced as the legitimate assertion of collective authority, but perceived as microaggression.*⁶³⁶

Wider participation might also help representation overcome the information and organizational hurdles that are inherent in cases with large number of victims. The judicial

⁶³⁴ The pivotal example could be the growing web of ‘subreddits’ at reddit.com.

⁶³⁵ Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87 (2011).

⁶³⁶ Davis, *supra* note 389, at 1577.

recognition of group representation not only gives an informal advantage to group members, but a very tangible advantage in the negotiations, now present as a unified interest group.⁶³⁷

The presence of the victims might also bring risks. There might be cases where additional guarantees are necessary to make sure that the individuals are not put at an additional risk, after the first victimization, with the court procedure, or to consider and respect that they do not wish to stand and speak up against a powerful defendant that they might otherwise depend on in their daily lives, be that an employer, a government body or other entity. Consider the account of one of the Bill Cosby victims: 'I certainly didn't want to be remembered as the woman that Bill Cosby raped. But I just felt so vindicated that I wasn't alone.'⁶³⁸

Vulnerability might apply with special force to the case of minority members. One possible solution is to have those claims brought as public interest litigation, a form that might also allow for saving cost and time for the plaintiffs' side. Yet, this might come at the expense of actually trying to bring those wronged, 'the people' in the law suit, the democratization of the procedure, that would help, or force, the court to grasp the situation more accurately. On the other hand, individual litigation would considerably constrain the ability of the court to shield individuals from exposure.

Comparing the collective procedure to the case of individual victims litigating,⁶³⁹ it might be better to have the whole group on board, as a matter of procedure, than to single out

⁶³⁷ This is amply confirmed by the US debate around class certification, alleging that it can push defendants to settle even 'frivolous claims.'

⁶³⁸ Joan Tarshis, one of the women who accuse Cosby of rape on how she became convinced that she needs to speak up and seek justice. Noreen Malone & Amanda Demme, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen*, N.Y. MAG. / THE CUT, July 26, 2015, <http://www.nymag.com/thecut/2015/07/bill-cosbys-accusers-speak-out.html>.

⁶³⁹ For additional arguments on why individual or representative action might not be superior, see the sections on 'Denial of collective recognition' and 'Why not have representative lawsuits...?', respectively.

individuals who bear the ultimate risk of reprisal. If fears are present, additional protection in the form of anonymity might be better, and the very question of the sense of insecurity and threat could be made part of the case, a rights problem that needs to be addressed as part of the final award.

Take the example of school desegregation. A successful strategy of desegregation, at the end, will necessarily involve the ultimate stakeholders, the students and their parents. Their cooperation will be crucial for a workable solution in the hard process of actual desegregation. The risk of the collective procedure is that internal variations might make it hard to maintain the consistency of the claim. It might be that the very process of bringing about, and maintaining, adequate group representation results in the emergence of opposing views on how desegregation should actually happen. Considering such a scenario, it still looks better for these cleavages to surface in the court procedure than later, allowing for the court to address them and pick the award that best considers the variety of opinions and options.

The requirement to have the group of victims appear on one side of the case might help to show the entire story and give a human face to it, in addition to, e.g., statistical materials. This is not to say that this is not possible in non-collective cases; for example, a desegregation judgment can point out, largely in the abstract, that there are students wronged. But the presence, or representation, of a whole group of victims, in a court case, makes it more likely that the case is presented as one about a series of individual sufferings and not just a violation in the abstract. Courts can devise a procedure that allows for various levels of victim participation in a collective lawsuit, with victims presenting individual stories about the loss of life prospects, the lost chance of social mobility etc. In the most sensitive cases, a representative should be allowed to speak for a group; selected individuals can also present

their case; and it is possible for all individuals who wish to present their case can to do so. This can depend on many factors, one being the wish to protect members of the victim group from exposure that they wish to avoid.

Group litigation, the ability to present group claims in a formal way, does not guarantee that there is an adequate judicial response to the issues raised.

*In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is [...] a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. [...] And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.*⁶⁴⁰

Courts might be unable or unwilling to provide adequate remedies. Even without that crucial final component, the procedure fulfills the goal of allowing minorities to voice concerns, gather support, that might result in a political response.⁶⁴¹ In cases where democratic decision making does not risk to frustrate the core of minority protection, this approach makes the claim procedure more democratic.

The fact that group litigation facilitates victim participation can make the court procedure itself more democratic. First, because it provides better access to courts, especially for those who are, for various reasons, not active litigants, by the rule of automatic inclusion. Second, the democratization of the procedure lies in the ability of the group members to voice concerns and offer alternatives. This can happen either through the representative, who, as a group representative, is tasked with communicating with the group; and members can also

⁶⁴⁰ NAACP v. Button, 371 U.S. 415, 429–31 (1963), see also the discussion in Martinez, *supra* note 257, at 182.

⁶⁴¹ On this, see also the section on 'The dialogue argument' in the 'Judicial' chapter.

escalate worries to the court, through objections and, where available, the threat of opting out – alone or in larger numbers.

Collective litigation might mitigate the paternalist effects of rights adjudication. Constitutional paternalism suggests that adjudication might create a sense of passivity, being protected instead of self-defense, having rights guaranteed instead of fighting for rights. Considering that many rights litigation require organization and mobilization akin to political action, this criticism might actually be weaker than it first sounds, although it is possible that these efforts extend only to a small minority within the victim group. Collective litigation is not a cure in this respect, but can contribute to wider participation, through making victims actual parties, rather than passive players who happen to feature among the facts presented to the court. It was the indigenous struggle for rights consolidated the movement that is now seen as representing indigenous peoples all over the world. Collective litigation, a fight for rights enforcement in the courtroom, involving larger groups, can play a similar role, creating a ‘feedback loop’ by empowering otherwise neglected actors.⁶⁴²

5.4 RECOGNITION AS A REMEDY

The case for recognition that present thesis is advancing is a case for legal recognition. I am not using the term ‘recognition’ in the wider sense, as used in political philosophy, most importantly in the works of Charles Taylor. However, there are some important overlaps that can highlight some of the goals of this legal recognition. Taylor’s idea of recognition involves, at the basic level, three types of recognition: politics of universalism (equal recognition of humans); politics of difference (with an emphasis on the recognition of cultural difference);

⁶⁴² See the ‘feedback loop’ argument earlier, in the ‘Judicial’ chapter under ‘The innovative potential.’

and the recognition of individuality that largely falls outside of politics.⁶⁴³ Both of the political types are relevant for the legal recognition that I am arguing for.⁶⁴⁴

First, the ultimate goal of the limited legal recognition of a collectivity is a truly universal recognition on the individual level, to make sure that all members of a polity can get the same recognition (described by Taylor as ‘the equalization of rights and entitlements’⁶⁴⁵); and second, this in some cases will require recognition of difference, in the cases in question, belonging to a certain ethno-cultural group through the legal recognition of that group and granting remedies after a violation. Taylor is arguing that lack of recognition, or misrecognition, is itself a harm: ‘Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.’ Furthermore, ‘misrecognition shows not just a lack of due respect. It can inflict a grievous wound [denying] a vital human need.’⁶⁴⁶

The proposal advanced here accepts the premise that recognition is a basic human need that arises with special force in heterogeneous societies:

*with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else. The idea is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity.*⁶⁴⁷

⁶⁴³ Taylor, *supra* note 122.

⁶⁴⁴ Taylor himself acknowledges the partial overlap between the two: ‘There is, of course, a universalist basis to this as well, making for the overlap and confusion between the two.’ *Id.* at 38. He links universality and specificity as follows: ‘The universal demand powers an acknowledgment of specificity. The politics of difference grows organically out of the politics of universal dignity.’ *Id.* at 39.

⁶⁴⁵ *Id.* at 37.

⁶⁴⁶ *Id.* at 25 & 26.

⁶⁴⁷ *Id.* at 38. Here Taylor refers to Carol Gilligan’s work ‘In a Different Voice’ that challenges the seemingly neutral theory of cognitive development of Lawrence Kohlberg that ends up privileging boys over girls. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

While the proposal does not preclude (claims for) official political recognition granted to well-established groups, but it focuses for something more limited: to give a more flexible and less burdensome venue for recognition, on a case-by-case basis, when more robust forms of recognition are not available, fulfilling the goal of protection based on justiciable rights and remedies.

The proposal to provide limited legal recognition to ethno-cultural groups in some cases might also be a partial fulfillment of Taylor's aspiration. He argues that what we need to maintain is 'a willingness to be open to comparative cultural study of the kind that must displace our horizons in the resulting fusions.'⁶⁴⁸ Some of the benefits of the collective legal recognition, in remedying injustices that cannot be remedied by a strict individual approach, in easing evidentiary rules etc., should also make the legal system more open to this cultural difference based challenge.

Recognition as described here, and collective remedies, presuppose that there is a corresponding group that can be recognized. The following section will address this question.

5.5 IDENTIFYING THE RIGHT GROUP

The first step in collective litigation is to establish a claim. Concerning minority claims, this will be a harm inflicted upon the group, or members of the group based on their group belonging. The second step is to make the connection to the group itself. It is only possible to have minority groups as recognized parties to a case where the group 'fits' the harm. As a result, in addition to being able to assess the damages on a collective level, '[i]n [many] class actions, one critical question is whether there exists a plausible systematic way to identify the class

⁶⁴⁸ Taylor, *supra* note 122, at 73.

members who have been economically impacted by a wrongful act.⁶⁴⁹ Where this fails, ‘class members must pursue the case individually, which often means the case does not go forward,’⁶⁵⁰ impeding their right of access to justice.

Levinson illustrates this dilemma through aggregation based on car color:

*The driver of a black car negligently runs a light and crashes into a white car passing through the intersection. The driver of the white car sues the driver of the black car for tort damages. If the driver of the black car were clever and knew nothing of tort law, he might try to argue that, although it is unlikely that the plaintiff herself will do similar damage to his own car in the future, drivers of white cars as a group will likely inflict as much negligent damage on owners of black cars as the other way around.*⁶⁵¹

Aggregation should not be allowed because the color of the car is not relevant for the harm in question. If, however, car color, and the group of owners of a car of a specific color, fit a certain harm, the idea of aggregation would seem less absurd. Consider, e.g., that a certain car paint is toxic; or the car with a special car paint is considerably harder to notice, and this results in statistically significant increase in accidents. Take the case of the first documented accident involving a self-driving Tesla. The official account stated: ‘Neither Autopilot nor the driver noticed the white side of the tractor trailer against a brightly lit sky, so the brake was not applied.’⁶⁵² Once a connection is made between the white paint and the accidents happening under similar weather conditions, owners might be expected to have a repaint, and manufacturers would be expected to stop selling vehicles and trailers of this color. The failure to do so would be to invite accidents and act recklessly. The claim of aggregation might

⁶⁴⁹ James Langenfeld & Raleigh Richards, *The Law and Economics of Class Actions: Yesterday, Today, and Tomorrow*, in 26 THE LAW AND ECONOMICS OF CLASS ACTIONS, RESEARCH IN LAW AND ECONOMICS 1 (James Langenfeld ed., 2014).

⁶⁵⁰ *Ibid.*

⁶⁵¹ Levinson, *supra* note 159, at 1327.

⁶⁵² The Tesla Team, *A Tragic Loss*, TESLA MOTORS BLOG, June 30, 2016, <https://www.teslamotors.com/blog/tragic-loss>.

still sound far-fetched, but certainly less absurd than the original case described by Levinson. This exercise illustrates when and how aggregation should match groups and harms, without which collective litigation would not make sense.

In the minority context, this dilemma translates into the question of where minority belonging (based on self-identification and recognition or traits like ancestry, language, religion etc.) is a relevant attribute in the context of the specific violation. Even the most egregious and clear cases of minority rights violations, genocidal acts might have blurred lines and include people who do not belong to the targeted minority and exclude people who are otherwise considered members. Where the violation has a clear connection with the minority group, based on the stated or implied intent of the perpetrators, other circumstances and statistical evidence, courts are right to consider the minority group as a victim group that should be recognized as such.

Identifying the right group means that the group and its boundaries should be defined in a way that matches the violation. One way to deal with this problem is to look for *pre-existing groups* that match the violation.⁶⁵³ As Levinson argues:

*The possibility of aggregating over groups probably also depends on the existence of relationships, although in a somewhat different, and difficult to capture, sense. Group aggregation usually becomes conceivable only where individuals are connected through special social, economic, or cultural bonds that create some sort of collective identity.*⁶⁵⁴

Of course, relying on pre-existing groups carries the danger of mismatch. The benefits are, that the court can, in such cases, rely on an entity that has formal organization that assures

⁶⁵³ Fiss uses the expression 'natural class' following Tussman and tenBroek, and explains it as referring to the fact that it is not formally created by the law in question.' Fiss, *supra* note 24, at 123. In the original: 'whether, in defining a class, the legislature has carved the universe at a natural joint.' Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949).

⁶⁵⁴ Levinson, *supra* note 159, at 1329–1330.

adequate and permanent representation, and maybe also some level of cohesion that lowers the likelihood of fundamental internal disagreement concerning the remedies for the violation that impacts the whole group. There might also be groups that are usually perceived as a group from the outside, but that lacks this type of internal cohesion; or groups that is only a collection of loosely connected individuals. Finally, it is possible to litigate, even in the case of minority claims, on behalf of a group united only by the harm, based on an ad hoc interest to get remedy. A continuing violation or a serious trauma can also contribute to an emerging sense of groupness, and it is possible for a judicial procedure to assist in this process, fostering a certain 'internal democracy' within the victim group. A minority can become to be seen as a group through a longer tradition of discriminatory practices.

The group itself might dynamically change its structure, moving along this continuum, from a more structured entity to a looser collection of individuals, and vice versa. While the formulation of the claim might benefit from stronger cohesion, especially if truly collective claims are included, that could not be litigated on behalf of the composing individuals, courts usually do not assess cohesion. Burch argues that 'courts look for a clear group trait like race or gender and presume that class members are cohesive and homogeneous so long as that unifying trait existed before the litigation.'⁶⁵⁵ What seems more important is to create the match between the common trace, and the violation. In the Holocaust cases, group membership was based on actual connection to the harm, itself caused along certain traces, but not necessarily matching preexisting groups. As Dubinsky notes 'Holocaust victims were

⁶⁵⁵ Burch, *supra* note 491, at 892.

singled out because of traits central to their identity: religion, race, sexual preference, and disability.’⁶⁵⁶

A possible pushback against the collective procedural solution is to point to the ability of the legal system to deal with collective entities and require those who make collective claims to make use of these potentials. Not only corporations but associations are also widely recognized as entities that unite individuals under common representation. In fact, rights litigation in many cases can be traced back, in one way or the other, to associations created with the goal of furthering specific rights. What is it, then, that allowing associations to sue, and not banning associations created in a way that follows minority membership, two conditions that most jurisdictions already fulfill, cannot do? First, creating associations works like an elevated opt-in requirement, that would work as a serious impediment to litigation that covers all victims. (See the earlier discussion on opt-in vs. opt-out in section) This would be a solution for the minorities with the highest level of organization. Second, judicial recognition is more flexible than the creation of a permanent entity, and can be designed in a way that reflects the specificities of the violation in question.

In the case of international disputes between states, it is structurally given that states will make claims against states, even for violations that occurred to an identifiable segment of the society, committed by concrete individuals. In inter-state disputes, states are often ready to make claims on behalf of members of the titular nations. E.g., Georgia filed a petition against Russia for violating its duties under the Convention for the Elimination of All Forms of Discrimination (dismissed for lack of negotiations prior to submission to the ICJ, as required

⁶⁵⁶ Dubinsky, *supra* note 174, at 1158–59.

by Art. 22 of the CERD),⁶⁵⁷ and both Croatia and Bosnia and Herzegovina filed motions against Yugoslavia / Serbia and Montenegro / Serbia for violation of the Genocide Convention, which included Serbia's counter-claim that the Croatian army committed genocide (in Serbia's and Croatia's case their claims were dismissed for lack of intent to eliminate the group; in Bosnia's case the ICJ found Serbia liable for failing to prevent genocide).⁶⁵⁸ In all cases, states stepped up in the name of victim groups that are either of the majority ethnicity of the relevant states (Georgians and Croats) or minority members whose ethnicity differed from the majority ethnicity of the perpetrator state (non-Serbs, and non-Croats in the case of Serbia's counter-claims). It would be easy to point out the mismatch between the states and the group of victims: had Serbia been ordered to pay compensation to Croatia, ethnic Croatian taxpayers living in Serbia would have paid, while ethnic Serbs, some of whom might have even supported the Serbian operations, would be on the receiving side. Yet, these actions are better perceived not as collective actions, but as states litigating on behalf of certain communities, representing them to enforce legal protection to their benefit.⁶⁵⁹ For example, in the case of Georgia's claims, reference was made to 'the ethnic Georgian, Greek and Jewish populations in South Ossetia and Abkhazia.'⁶⁶⁰

While representative action is not collective action in the sense that the group itself does not become party to the case, this example shows how pre-existing minority groups might be combined and even narrowed down to those who were targeted. As a result, members of

⁶⁵⁷ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, 2011 I.C.J. Rep. 70.

⁶⁵⁸ See, respectively, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2008 I.C.J. Rep. 412; and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Rep. 43.

⁶⁵⁹ See the discussion under the section 'Why not have representative lawsuits instead of a collective procedure?' above.

⁶⁶⁰ Georgia v. Russian Federation, *supra* note 657, at 78.

various minorities who live in a certain region might become members of the claimant group, as a result of violations that target them all. This flows from the common pattern that discrimination targets 'others' based on their difference from a dominant group, not based on some inherent link to each other.

It is to a large extent the violation that defines the boundaries of the claimant group. When identifying the right group, courts face the challenge of defining the boundaries of the group, and the trace they will be looking for, somewhat paradoxically, will rely on the thinking of the perpetrator, the same logic, or at least the results of the violation. The additional factor that might also play a role is a specific type of cohesion that could be termed 'dependence.' It is usually acknowledged that heirs, surviving family members and, in some cases, members of a wider community, can make claims connected to a violation that did not directly target them, but was inflicted upon a family (community) member. In cases where the harm 'radiates' to the level of the group (e.g., the severe psychological effects of harsh discrimination targeting group members based on group belonging) or cultural factors bring the harm to the level of the group (e.g., killing elderlies who carried the communal knowledge; or care for orphans is taken over by the community and not by the direct family etc.), an adequate remedy cannot disregard the group element.

Collective litigation opens new possibilities to consider this wider aspect of the violations, taking a more comprehensive approach to remedying harms. This can remind perpetrators and the wider community that inflicting harm based on group membership has wider implications beyond the individuals who suffered directly, and perpetrators should be held liable for both types of effects. The collectivity that is granted judicial recognition might be an entire minority group, relevant subgroups or a combination of (subgroups) of minorities,

depending on the violation in question. Judicial recognition allows for adequate flexibility in this respect. This also makes it possible, for example, to accommodate claims reflecting intersectionality: claims that are based on the argument that certain violations occur to some minority members, defined along other group-membership, but not to others. Minority rights violations might target minority women but not men, and the court, in such cases, is able to, and should, recognize this when identifying the right group.

5.6 EMPOWERMENT: LEVERAGE BY AGGREGATION

Aggregation triggers the power of large numbers. A common criticism against the class action device in the US and elsewhere is that the fact that many plaintiffs with small claims (threaten to) act together will force defendants to settle, even in cases of ‘frivolous’ claims, leading to ‘blackmail settlements.’⁶⁶¹ I doubt whether the claims are really without merit if the mere aggregation will force defendants to settle. Allowing the aggregation of claims rather seems to be a move to (re)create the balance between plaintiffs and defendants: mass-producing defendants and defendants whose actions have an impact on large segments of society are anyway ‘unified’ and ‘coordinated,’ as organized bodies, corporations and other institutions. This, in most cases, does not apply to the typical other side. Just like creating trade unions might be seen as a remedy to this inherent asymmetry, in the field of labor relations and on a more permanent basis, aggregating claims can be seen as a more general, albeit also case-by-case, solution to this issue:

[The class suit] affects the bargaining power of the parties, enabling plaintiffs to command more litigation resources by combining their cases and giving

⁶⁶¹ The argument appears in the OLRC Ontario Law Reform Commission’s 1982 report: OLRC REPORT, *supra* note 163, at 39, 101, 103 & 146–63; as well as in the 2006 discussion of national experts on class action in the OECD Journal: *Class Action / Collective Action...*, *supra* note 359. The criticism is widespread in the literature as well as arguments made before courts and legislative bodies.

*them much greater leverage greater leverage by compounding the defendant's risk of loss.*⁶⁶²

The empowerment effect might be especially relevant in the minority context. Even in the case of a relatively well organized minority group, considering the majority-based functioning of a democratic system, the structural bias will be present.⁶⁶³

We should note, however, that while the effect of empowerment might seem asymmetrical when applied to a concrete case, it, in theory, can cut both ways. Francisco Valdes draws a historical arch from the emergence of class action type litigation in the seventeenth century and the (twentieth century) backlash against class actions (that he calls a ‘holy war’ on class actions) by reference to domination. He argues that ‘[t]he class action was invented to aid the powerful in maintaining the social and economic status quo vis-à-vis the disempowered.’⁶⁶⁴ He refers to the *Vermuden* case where a wealthy plaintiff sought to collect money from a group of less well-off defendants who did not respect the plaintiff’s customary rights over the mining of ore. Linking this to the anti-class action tendencies in the recent decades, he claims that

*the earliest uses, the earliest motivations, the earliest social needs perceived to be satisfied by what we now call the class action, were perceived tailored to the preservation of an entrenched caste system. More specifically, elites and their tribunals invented the class action to aid those in possession of “traditional” prerogatives in their fight to sustain them despite transformative transformative changes in the society and throughout the economy.*⁶⁶⁵

This shows that class actions can go either way, it is not inherently pro-minority (pro-poor) or pro-majority (pro-rich), and entrenched interests can well play into how group litigation rules

⁶⁶² Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401 (2002), quoted by Valdes, *supra* note 165, at 646.

⁶⁶³ See the arguments challenging state neutrality in Chapter 1.

⁶⁶⁴ Valdes, *supra* note 165, at 630.

⁶⁶⁵ *Id.* at 632.

play out in the courts. Considering that only allowing individual actions will give even more leeway to judges – especially through screening out many claims based on collective, systematic and dispersed violations that are common in the case of minority groups and members, as well as through the arbitrary (de)contextualization of cases – allowing group litigation is not likely to make things worse for minorities, even though, in itself, it does not guarantee progress, either.

In most cases, however, allowing aggregation can establish a balance that counters the ‘systemic bias’ that helps those who commit violations. Not allowing aggregation still lets perpetrators rely on economies of scale while denying the same from victims of widespread violations.⁶⁶⁶ This empowerment potential is especially important for minorities that can face powerful actors that engage in systemic and often covert ways of discrimination.

5.6.1 Why not target the really disempowered and not groups that might include powerful subgroups?

A common criticism levied against minority empowering proposals is that it might end up empowering minority elites rather than those who really need empowerment. This is especially relevant where minority groups are targeted rather than individuals. This criticism, however, cannot defeat the proposal to allow minority claims to be litigated in collective procedures, because it simply uses the power of aggregation that is already available to majorities (and to recognized, self-governing minorities in certain respects). This should be a legitimate reason for legal procedures.

⁶⁶⁶ David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000).

A more general argument against backward-looking remedies can be formulated based on the equality principle. If we are genuinely concerned about equality, why not seek that, based on the current distribution and seeking a future just distribution. Waldron raises this question in his account on the limits of historical injustice claims: why not target equality, rather than asking for the reversal to a status quo that itself might not have been just.⁶⁶⁷ It is true that at some level, the compensatory logic is also about distribution: ‘Reparation of historic injustice really is redistributive: it moves resources from one person to another.’⁶⁶⁸ Why not go forward with full equal redistribution?; maybe the original status quo was not just, either. Kymlicka also argues, regarding land claims that the compensatory logic in itself cannot justify these claims, and the redistributive logic cannot be disregarded.⁶⁶⁹ The logic works in the opposite direction as well: in the case of grave injustices, disregarding the compensatory element can hardly do justice. It is certainly possible to taking into account distributive principles in the judicial procedure,⁶⁷⁰ especially under proposals that separate the deterrence and the compensation stages.⁶⁷¹ Yet, this does not make considering group-based disadvantages illegitimate. Furthermore, insights of the economic analysis of law suggests against this approach: For redistributive goals, taxation is more efficient than relying on more complex and sporadically applied legal regulations. ‘There is not a good reason [...] to employ legal rules to accomplish redistributive objectives given the general alternative of achieving sought-after redistribution through the income tax and transfer programs.’⁶⁷² This does not

⁶⁶⁷ Waldron, *supra* note 170, at 13–14.

⁶⁶⁸ *Ibid.* 13.

⁶⁶⁹ KYMLICKA, *supra* note 99, at 219–220 n.5.

⁶⁷⁰ See Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 732 (2003) (describing principles of distributive justice in compensation funds), quoted in Zimmerman, *supra* note 352, at 206 n.71.

⁶⁷¹ See the decoupling proposal in the chapter on ‘Remedies.’

⁶⁷² Kaplow & Shavel, *supra* note 460, at 1763.

exclude the possibility of using compensation to ‘redistribute’ to the benefit of minorities. Under this logic, minority claims should not be granted simply because they are in a financially disadvantaged position. Rather, the merits of the claim should prove that a specific violation occurred.

Fiss offers a more practical defense of targeting entire groups, rather than singling out specific (less well off) individuals in the group. He argues that ‘imprecision is not itself a constitutional vice,’ considering that the ultimate goal is not exact fit but overcoming the pervasive disadvantage on the group level. It makes sense, in some cases, ‘to treat blacks as a single group without trying to sort out the “rich blacks,”’ partly for ‘administrative convenience—the likely number of rich blacks are so few, and the costs of the mechanisms needed to identify them are so high, that the sorting is not worth the effort.’⁶⁷³

It has also been argued that poverty should also qualify for a protection like minorities.⁶⁷⁴ While nothing excludes this from the arguments offered here, the chosen focus of this thesis deals with minorities of a certain kind. However, the flexibility of the collective procedural solution means that, where poverty is a relevant status, the group definition applied by the court can include this element as well.

The main added value of the collective procedure is that it might better capture systemic disadvantages, that cause and maintain the disadvantaged status, and allow them to be litigated, resulting in compensation and guarantees, through prevention, that the legally assessable causes of disadvantages are removed. In the context of compensation for

⁶⁷³ Fiss, *supra* note 24, at 163. Note also that he talks about ‘legislators and administrators,’ and the application of this argument to ‘judicial administration’ of remedies might be limited – although it should not be excluded, either.

⁶⁷⁴ Frank Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

dispersed harms, aggregating allows to reap the advantages of economies of scale on the plaintiffs' side. This is not to disregard other considerations of equality, but to counterbalance a specific source of inequality that impedes the effort of minority claims that might otherwise not be enforced due to their dispersed nature.

5.7 EASING EVIDENTIARY HURDLES?

Does it make a difference in proving rights violations that individual victims sue or there is one unified procedure? After all, the evidence, e.g., the account given by the victim, should be the same. The court might rely on expert opinion that should also not depend on whether there is just one victim or there are a couple of victims or else there is a large number of them. Yet, in many cases, it is exactly the group effect that tilts the balance. This is especially the case if powerful actors are challenged by persons who get less sympathy from the majority, and courts. Consider a 'powerful actor' case in a literary sense, the Bill Cosby rape controversy. The victims who decided to speak up in 2014 and 2015 gave not only a sad account of how they were sexually abused, but also how they felt it impossible to be taken seriously by society, including the legal system. It was the force of numbers that changed the tide: 'part of what took the accusations against Cosby so long to surface is that this belief extended to many of the women themselves.'⁶⁷⁵ Numbers add up, and it is always easier to be in a litigation as a victim among many than a single victim whose credibility will be harshly targeted, making it easier to challenge her account.

⁶⁷⁵ Malone & Demme, *supra* note 638. This is not to downplay the importance of the account that sparked the heightened public scrutiny, by Andrea Constand, see: Mark Seal, *The One Accuser Who May Finally Bring Bill Cosby Down for Good*, VANITY FAIR / HIVE, July 6, 2016, <http://www.vanityfair.com/news/2016/07/bill-cosby-andrea-constand-sexual-assault-trial>. It is simply to show that earlier accounts were not given credit, and even Andrea Constand's case did not get far: criminal charges were dropped and her civil case was settled, with a confidentiality agreement.

The ‘power of sheer numbers’ has limits as well. Even if courts are faced with large number of similar cases, as mere statistics, they might be less persuaded than in cases where they consider real life victims. Cohen argues, in the US context, that courts are biased against statistical lives, as opposed to identified lives. Courts are quite likely to not only deny remedy, but to throw out a case, if it is based merely on non-identified, likely victims, most often on standing and ripeness ground. The class action device presents an intermediary way that can circumvent this challenge, in some cases, and allows litigation through what Cohen calls ‘representative lives.’ Courts have to make sure that the ‘life’ in question is representative of the entire class, and goes on to litigate the issue based on that life.⁶⁷⁶

In addition to the persuasive force of several victims speaking out and reinforcing each other’s voice, there are cases where aggregation is not simply a plus, but an essential element without which courts are likely to dismiss that there has been a violation. These can include cases where producing evidence on the individual level is hardly possible, and where excluding statistical evidence dooms a claim. These judicial denials fall disproportionately on minority claims. The following subchapter will look into the problems of providing evidence in collective claims cases.

5.7.1 Shifting the burden of proof

One specific instance of how collective procedures can make it easier to prove institutional and systemic violations is through shifting the burden of proof. Courts might not be willing to go beyond the need for individualized evidence, but might be inclined to assume that the violation has happened and caused harm to individual members once they face the

⁶⁷⁶ I. Glenn Cohen, *Identified versus Statistical Lives in US Civil Litigation. Of Standing, Ripeness, and Class Actions*, in *IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE* 162 (I. Glenn Cohen, Norman Daniels, & Nir Eyal eds., 2015).

overwhelming evidence of the pattern of violations on the level of the group. Even if not all elements of interdependent claims are dealt with in a collective manner, individual claims can still benefit from presumptions based on common patterns. This is better warranted by one common lawsuit where the same court assesses the individual variations and weighs them against a collective standard.

In the discrimination context, such collective presumptions flow from the structure of violations. The US Civil Rights Act of 1991 established a process where class-wide injunction can be ordered as a first step, and other remedies are available in a second phase. Changelo describes how the group-based presumption can work to the benefit of plaintiffs under this scheme: ‘Class members enter this second phase with a presumption in their favor “that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy.” This presumption acts to “substantially lessen each class member’s evidentiary burden.”’⁶⁷⁷

Law might be biased towards majority members in that it is more likely to recognize claims that are anyway recognized by law, in the form of official documents. Long-term titleholders whose titles were not only not recognized by the state but were constantly challenged. This commonly happens with the challenge to land usage rights of indigenous peoples, rights that survived colonization. A Sami case from Norway illustrates the dilemma of pondering evidence in such cases. The lawsuit was based on a group claim, made by some 200 farmers who disputed the Sami reindeer herders’ use of their property as pasturing area. The Supreme Court of Norway found, against the farmers, that the usage rights of the Sami reindeer

⁶⁷⁷ Changelo, *supra* note 183, at 137, quoting from *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977), and *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 159 (2d Cir. 2001) *cert. denied*, 535 U.S. 951 (2002), respectively.

herders were justified based on the traditional use of the land, even if that did not resemble the conditions of how land use is usually conceived (in the majority culture).⁶⁷⁸ For instance, land use was sometimes sporadic,⁶⁷⁹ there is a lack of written culture that would allow documentation of land use,⁶⁸⁰ combined with a general lack of ‘physical traces’ of traditional usage, ‘since the Sami [...] used organic materials that decompose.’⁶⁸¹ Furthermore, the Court found it proper to consider ‘the fact that in communication between Norwegians and Sami, misunderstandings can arise because linguistic and cultural differences may lead to their taking one another to mean something they do not.’⁶⁸² Questions that usually fall heavily on minority claims, when adjudicated before institutions of the majority culture, are here carefully balanced by considering cultural differences. This approach, together with the legislative framework that established that ‘weight shall be placed on whether the nomadic Sami have engaged in reindeer husbandry there from time immemorial,’⁶⁸³ warranted a judgment favorable to the Sami pasturing rights. The court adopted culturally sensitive, accommodating approach that established a general presumption of Sami presence, despite it being sporadic and hard to prove. The Court explicitly rejected the compartmentalized approach: ‘one cannot therefore exclude the acquisition of right through use from time immemorial in this border zone on the grounds that the use therein has been below what is required for common of pasture if the border zone is *considered in isolation*.’⁶⁸⁴ Including the

⁶⁷⁸ Jon Inge Sirum et al. v. Essand Reindeer Pasturing District and Riast/Hylling Reindeer Pasturing District, Judgment of 21 June 2001 serial number 4B/2001, Supreme Court of Norway. The English version of the judgment can be found at https://www.elaw.org/system/files/selbu_case.pdf.

⁶⁷⁹ *Id.* at 25.

⁶⁸⁰ *Id.* at 29.

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid.*

⁶⁸³ Reindeer Husbandry Act, as quoted *id.* at 19.

⁶⁸⁴ *Id.* at 57, emphasis added.

entire group of claimants allows for a comprehensive assessment of the rights that minority members exercise by virtue of their group membership.

5.7.2 Defining the context and statistical evidence

A question closely connected to accepting evidence from a broader set of facts is the question of how a court defines the boundaries of the case, what is it that a judge considers relevant for the litigation, and what is excluded as too remote. This is the ‘objective’ side of defining boundaries, next to the ‘subjective’ side, where the court needs to decide who is bound by, and how benefits from, its judgment. Compartmentalization can make courts blind to systemic violation, and this might fall especially heavily on minorities who are subject to biased treatment that are hard to notice, if taken in isolation.⁶⁸⁵

Cass Sunstein notes that law does not only take the status quo given and justified, but also creates and maintains constraints on those who seek to challenge the current setup. It never asks, and does not allow to address, the question ‘Are existing distributions unjust or already a product of law?’⁶⁸⁶ Where discriminatory patterns today are based on discriminatory policies (law) from yesterday, combined with seemingly neutral present policies, narrowing the focus allows for neglecting discrimination altogether. This is especially the case where pervasive discrimination burdened larger parts of the society over decades or centuries. Courts might not be able to fully assess historical circumstances. Yet, to forget that the state was itself a perpetrator, adopting and enforcing discriminatory policies is akin to engaging in a second, judicial discrimination: discriminating those who have a harder time to prove

⁶⁸⁵ To cite a prominent example, Kenneth R. Feinberg shows how in cases that he was involved with, the 9/11 victims fund or the BP oil spill case, require a broad view on calculating damages, which includes statistical evidence. Kenneth R. Feinberg, *Keynote Address, Actuarial Litigation: How Statistics Can Help Resolve Big Cases Symposium*, 2011-12 CONN. INS. L.J. 221.

⁶⁸⁶ Sunstein, *supra* note 118, at 299.

discrimination for it's a more pervasive and complex type of discrimination with historical roots. In Fiss's formulation:

*The difficulties of these backward-looking inquiries are compounded because the court must invariably deal with aggregate behavior, not just a single transaction; it must determine the causal explanation for the residential patterns of an entire community, or the skill levels of all the black applicants.*⁶⁸⁷

Compartmentalized litigation and its individualist focus is conditioned to disregard the wider context. Some of these omissions might be inherent to the structural limitations of adjudication.⁶⁸⁸ Yet, without trying how far litigation can actually go, it does not seem warranted that these are practical limitations, and not limitations that simply flow from a limited view on what litigation can achieve. What a collective procedure has to offer is to help the court avoid the mistake of arbitrary framing, to the detriment of victims, by conceiving the victims as a group and making the impact of systemic harms more apparent.

Daryl Levinson provides a systematic overview of how courts use 'framing' as a way to decide cases. 'Framing transactions' is an often less-than-transparent way⁶⁸⁹ of conceiving and presenting claims in a way that warrant a certain outcome. As opposed to a typical private law dispute, that fits the traditional view of litigation, there are cases where plaintiffs and defendants have been in a continuous, 'repeat-play' relationship, where it is not easy to establish the boundaries of the transaction, that should be assessed by the court.⁶⁹⁰ Minority violations are often of this sort. A framing that is too narrow will leave out the core of the claim and might result in dismissal, i.e., non-enforcement. Levinson lists three 'dimensions' of

⁶⁸⁷ Fiss, *supra* note 24, at 145.

⁶⁸⁸ See earlier in the 'Judicial' chapter.

⁶⁸⁹ As Levinson argues, 'the framing step usually remains unconscious and invisible.' Levinson, *supra* note 159, at 1319.

⁶⁹⁰ Levinson, *supra* note 159, at 1320.

aggregation: time, scope and group. This means that harm and benefit might or might not be allowed to be combined and offset across time (e.g., a patient gets exceptional treatment and survives, but later suffers malpractice performed by the same medical team), across harms that are based on various types of violations (e.g., environmental harm of pollution and the economic benefits of the underlying activity) and aggregation on the level of groups.⁶⁹¹ Levinson describes a ‘pattern of limiting remedies by disaggregating past discrimination’ that rejects any type of approximation, and denies collective types of remedies.⁶⁹² This implies that the strict individualist, compartmentalizing, ‘transactional’ view often leads to the conclusion that no remedy is better than an imperfect remedy.

According to Levinson’s conclusion, the ‘transactional,’ common law based approach to constitutional rights should give way to more systemic views that do not try to avoid substantial questions.⁶⁹³ Collective procedures push courts to consider claims in a broader framework, which makes it more likely that the kind of shift Levinson envisages eventually takes place.

The basic insight holds for strictly public cases, lawsuits brought by attorneys general as well. In an anti-psychotic drug case, brought by a state attorney general, most claims were dismissed arguing on the ‘now widely held view of aggregate litigation, particularly in the products liability or fraud context, that statistical proof is in most instances insufficient to show reliance, loss-causation, or injury on the part of individual class members.’⁶⁹⁴ Requiring

⁶⁹¹ *Id.* at 1326–29.

⁶⁹² *Id.* at 1354.

⁶⁹³ *Id.* at 1389.

⁶⁹⁴ *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 434 (E.D.N.Y. 2009), cited in Zimmerman, *supra* note 352, at 204, n.61.

Judge Jack Weinstein [...] rejected statistical evidence offered by the Mississippi Attorney General to establish that the state overpaid Eli Lilly through its Medicaid program for Lilly’s extremely successful—but unlawfully marketed—anti-psychotic drug, Zyprexa. Observing that Mississippi’s individual claim was, in fact, founded on “many thousands of conceptually separate claims,

individualized proof here means the exclusion of statistical evidence by relying a strictly individual reading of the case, which also frustrates deterrence goals. Rosenberg shows that the mass exposure cases, where a large number of individuals are affected by a toxic or otherwise harmful practice, applying the strictly individualized evidence standard frustrates the goals of enforcement and optimal deterrence. In such cases, getting individualized evidence might be prohibitively expensive, unfeasible (e.g., because harm is probabilistic and partly will only manifest in the future) or just repetitive, creating unnecessary costs. Without aggregation, not only proof but other related costs will be multiplied with the risk of a large number of cases (re)litigating the same issues.⁶⁹⁵ As we have seen,⁶⁹⁶ treating and calculating damages in a collective, aggregated way ‘can increase efficiency, [...] systematically increase accuracy, reduce bias, and still provide meaningful individualization of awards.’⁶⁹⁷

Note that the exposure cases show strong structural resemblance with violations of minority rights, that target individuals based on group belonging, or groups as such. There, too, harm is dispersed, might be probabilistic, requiring the adoption of statistical evidence, and establishing the harm is more economic on the group level, with a lower level of individual variation or, in certain cases, excluding individual variation.

Refusing to consider the context in which a violation takes place might make it impossible to notice the violation itself. In a Hungarian non-discrimination case, it was established that the police engaged in racial profiling and fined Roma cyclists for infractions, most often for lack

coordinated and aggregated by the State,” the Court found that the state attorney general failed to introduce sufficiently individualized proof of each victim’s “reliance, loss-causation and injury.” The Court reluctantly held that the same “individualized proof rule” that destroyed other class actions applied equally to state attorney general claims.

Id. at 204.

⁶⁹⁵ David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

⁶⁹⁶ Under the section ‘Where should compensation be collective?’

⁶⁹⁷ Saks & Blanck, *supra* note 600, at 851.

of equipment. The unequal treatment was clearly established in the case, with the help of statistical evidence.⁶⁹⁸ It would have been impossible to ‘see’ the violation if the cases are taken in isolation: the fact that other bicycles lack equipment (which the majority of bikes do) simply could not feature in an individual case. If evidence is presented, it will be dismissed as irrelevant.

In a case with an individual plaintiff, especially the case is about discrimination or a (or other) type of systemic rights violation, the court can easily exclude statistical evidence showing a pattern of violation, a clear deviation from random or neutral patterns, by stating that the sweeping nature of the proof goes beyond the case before it and cannot demonstrate violation there. Carroll brings up two examples for when non-class treatment would result in rights violating practices left standing. Both in *Parsons v. Ryan*⁶⁹⁹ and *Peralta v. Dillard*,⁷⁰⁰ nonclass treatment would have meant that underresourcing that caused Eighth Amendment violations could have been unaddressed.⁷⁰¹

An even more serious systemic problem with the US criminal justice system is the discriminatory pattern of capital punishments. A US death penalty case can be used to illustrate a court’s unwillingness to acknowledge and address pervasive discrimination in the justice system, by relying on a strictly individualist notion of evidence and a restricted vision of discrimination. In *McCleskey v. Kemp*⁷⁰² the plaintiff, a black man convicted for killing a white police officer, sought to demonstrate that his death sentence violated his constitutional rights. To prove this, a study was presented that concluded, based on 2,000 murder cases,

⁶⁹⁸ Ivány Borbála – Pap András László, *Rendőri etnikai profilalkotás az Egyenlő Bánásmód Hatóság előtt [Racial profiling by the police before the Equal Treatment Authority]*, FUNDAMENTUM, 2012/3, at 103.

⁶⁹⁹ *Parsons v. Ryan*, 754 F.3d 657, 680 (9th Cir. 2014).

⁷⁰⁰ *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc).

⁷⁰¹ Carroll, *supra* note 221, at 890 n.270.

⁷⁰² *McCleskey v. Kemp*, 481 U.S. 279 (1987).

that there was great disparity in death penalties, based on race, both the race of the perpetrator and the victim.⁷⁰³ Without questioning the validity of the data, the Supreme Court rejected the argument that the study could be used to demonstrate that there was violation in the case of the defendant in question. The two pivotal elements of the Court's argument is that 'to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.'⁷⁰⁴ So he both needs to prove that there was discrimination in his case, taken in isolation, and that it was not merely a discriminatory effect, but 'purposeful discrimination.' To ask for proof of discriminatory intent in the case of the plaintiff is to ask the (almost) impossible.⁷⁰⁵ It means that statistical evidence that is short of proving that there was discrimination (or, more precisely, discriminatory purpose) in all cases, without exception, is excluded. The majority reasoned that such evidence 'are best presented to the legislative bodies,'⁷⁰⁶ a conclusion somewhat striking if we consider that the case is about the functioning of the judicial system in light of constitutional requirements that it clearly fails to fulfill.⁷⁰⁷

⁷⁰³ In the majority opinion's summary, the study stated that
'defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants. [...T]he death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. [P]rosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

Id. at 286–87 (1987).

⁷⁰⁴ *Id.* at 292, emphasis in the original.

⁷⁰⁵ In a 2016 case to be presented below, in light of evidence that race played a role in jury selection, based on the notes of the prosecution, it was only Justice Thomas who thought that the conviction should be upheld. See *Foster v. Chatman*, 578 U.S. ____ (2016). Considering the history of the case, it does not seem likely that this kind of evidence is available in more than a tiny minority of the cases where racial discrimination plays a role and results in death.

⁷⁰⁶ *McCleskey v. Kemp*, 481 U.S. 279 at 319 (1987).

⁷⁰⁷ The two amendments invoked are the Eight and the Fourteenth.

The Court defied its constitutional duty and excluded the perspective of a whole range of citizens against whom the justice system itself acts in a discriminatory way, to a great extent and systematically. Considering that racial bias has become largely unconscious or at least covert,⁷⁰⁸ this means that challenging discrimination, no matter how pervasive, became close to impossible. With this move, the judicial system not only fails to address systemic discrimination, but increases the problem. It strengthens the view that there are 'two justice systems, one for whites and one for blacks,' not only in terms of the race of the perpetrators, but also the race of the victims.⁷⁰⁹ The fact that courts send the message that life's worth depends at least partly on race is a serious blow to the legitimacy of the system.

Is there a role to play for the collective procedural solution in this question? Imagine the same case with all the black convicts acting as plaintiffs. Surely some of them have been discriminated against, so it would be hard to avoid the conclusion that there has been violation. The court could still reject the constitutional challenge, but it would make it harder to argue that there is a discrepancy between the offered evidence and the plaintiffs' case. The collective procedural setting would press the court hard to at least acknowledge that there has been a violation, even if it were still reluctant to offer a meaningful remedy. (This of course supposes that we can disentangle the statistical evidence on the wider setting of social disadvantages and similar evidence on biases of the judicial system. In fact, refined statistical methods can show disproportionalities that cannot be explained by social disadvantages.) The procedure would make it harder to avoid the conclusion that a future-looking remedy should be warranted, measures that put an end to the violation. This would

⁷⁰⁸ For an excellent overview concerning the biases of the legal system, see Davis, *supra* note 389, at 1559.

⁷⁰⁹ For a commentary of the case that raises this aspect, among others, see Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

in turn make it also more likely that proper individual remedy follows, in the form of compensation and retrials with safeguards against the pervasive bias that the study demonstrated.

In a more recent case involving capital punishment, *Foster v. Chatman*,⁷¹⁰ the original death sentence, from some thirty years ago, was rendered by a jury from which black jurors were all eliminated by peremptory strikes. As the prosecution's jury files, that the defendant's side managed to obtain in 2006, show, race was definitely considered: black jurors' names were marked with a 'B' and were highlighted; 'N's were put next to the names on the jury venire list. The Supreme Court, in a 7-to-1 decision – with Justice Clarence Thomas as the sole dissenter⁷¹¹ – reversed the order of the Georgia Supreme Court that, in line with all other earlier decisions, affirmed the death sentence. As Chief Justice Roberts, who wrote for the majority, noted during the announcement of the judgment: 'it is rare to have such explicit evidence of race discrimination.'⁷¹² This implies that other death sentences from the line of cases that show the discriminatory pattern of jury selection could have easily been left standing.

The *Foster* opinion also shows the ways in which the number of cases might matter. Two jurors were struck, and the majority opinion transitions from reviewing one to the details on the other by noting that 'we are not faced with a single isolated misrepresentation.'⁷¹³ In addition, the majority opinion can rely on comparisons between white jurors and black jurors

⁷¹⁰ *Foster v. Chatman*, 578 U. S. ____ (2016).

⁷¹¹ Even if his dissent is in line with his disdain for anti-discrimination attempts perceived as white paternalism (an opinion often labelled as his form of black nationalism), it is striking that he was the sole member who remained convinced, despite the long list of evidence to the contrary, reviewed in the majority opinion, that the 'race-neutral reasons were valid.' *Foster v. Chatman*, 578 U. S. ____ (2016), slip op. at 15.

⁷¹² Nina Totenberg, *U.S. Supreme Court Decides 3 Cases Involving Race*, NPR, May 23, 2016, <http://www.npr.org/sections/thetwo-way/2016/05/23/479240531/u-s-supreme-court-decides-three-cases-involving-race>.

⁷¹³ *Foster v. Chatman*, 578 U. S. ____ (2016), slip op. at 17.

to show that race-neutral reasons cited by the prosecution were not credible. Were these cases treated one by one, in a compartmentalized way favored by the individualist view of litigation, the chances that the defendant's side could convincingly show discrimination in one instance of peremptory strike would be considerably diminished or could even vanish. In case of doubt, the individual instance that counts towards the skewed statistics is allowed to stand, in effect maintaining racial discrimination.

While in individual, 'compartmentalized,' cases, it is left to the goodwill of the judge to allow statistical evidence that goes beyond the concrete case to demonstrate discriminatory patterns, in case of group litigation, this type of evidence could hardly be dismissed because it should be considered both on the level of deciding whether the group should be recognized, with the type of violation really uniting the members, and on the level of substance, with the evidence truly demonstrating violation.

Opposition to minority claims can take refuge in the view that the presented cases are isolated (because they are in fact taken in isolation) and do not require broader remedies, or don't even raise concerns of constitutional rights violation. When faced with a large number of similar violations, this dismissive attitude will be hard to maintain. Statistical evidence will be harder to reject, and probabilistic proof will look more fitting. Individual cases can be presented as illustrating the rule, rather than the exception. As Justice Sotomayor noted recently: 'We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.'⁷¹⁴

⁷¹⁴ J. Sotomayor's dissent in *Utah v. Strieff*, 579 U. S. ____ (2016), slip op. at 12, citing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY. ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 274–83 (2002).

From the European context, a Roma school desegregation case might illustrate best how a court can consider facts and evidence from a wider context than the individual victims named in the application. To assess the situation of pupils in Ostrava, the Czech Republic, the Court (the Grand Chamber⁷¹⁵) devoted a large part of the judgment to provide a general background of the Roma in Europe, including their history, the Europe-wide assessment of the situation of the Roma by international organizations and NGOs, questions specific to the Czech Republic, but not to the region, etc.⁷¹⁶ What is more striking is that the Court directly cites these in its conclusions:

*The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (see also the general observations in the Parliamentary Assembly's Recommendation No. 1203 (1993) on Gypsies in Europe, [...] and point 4 of its Recommendation no. 1557 (2002) on the legal situation of Roma in Europe [...]). As the Court has noted in previous cases, they therefore require special protection[.]*⁷¹⁷

The Court goes on to cite statistics on the general situation of Roma students in the Czech Republic, showing a vast Roma overrepresentation in 'special schools.' Here, too, the Court acknowledges that the evidence is not specific to the claimants, not even to the region: 'the [...] figures [...] do not relate solely to the Ostrava region and therefore provide a more general picture,' yet, the Court can conclude that the numbers 'show that, even if the exact percentage of Roma children in special schools at the material time remains difficult to establish, their number was disproportionately high.'⁷¹⁸ How can the Court, that is usually

⁷¹⁵ Unlike the Second Section that did not find a violation: D.H. and Others v. the Czech Republic, no. 57325/00, Eur. Ct. H.R., 7 February 2006.

⁷¹⁶ D.H. and Others v. the Czech Republic [GC], no. 57325/00, 2007-IV Eur. Ct. H.R. 241.

⁷¹⁷ *Id.* at 312, § 182. And, more permissively for the respondent state: 'As is apparent from the documentation produced by ECRI and the report of the Commissioner for Human Rights of the Council of Europe, the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European States have had similar difficulties.' *Id.* at 318, § 205.

⁷¹⁸ *Id.* at 315, § 193.

sensitive to rely on evidence with clear connection to the violation, justify this approach? First, the quote indicated that the exact numbers are hard to establish, and it would be the primary responsibility of the state to provide these figures. The Court rightly held that the fact that the state failed to assess the gravity of the problem and provide details should not be held against the claimants. Second, the Court notes the shift in its case law that now allows the use of statistics, ‘on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or *de facto* situation.’⁷¹⁹ This is because ‘it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.’⁷²⁰ Finally and most importantly for this thesis, the Court justifies the broader approach that is clearly more beneficial to the minority applicants by referring to ‘an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle.’⁷²¹

In line with the proposal, the Court points out that the wider context should be assessed with regard to ‘the special needs of minorities,’ an approach that considers, where applicable, the general disadvantaged position as compared to non-minority (‘average’) applicants. The most important element of this approach is that the Court shifts the burden of proof because otherwise it sees it close to impossible to establish violation in a court procedure. This is to show sensitivity both to the structural specificities of the procedure and the substantive rights in question, and to apply the procedural norms in a way that allows the protection of the latter.

⁷¹⁹ *Id.* at 311, § 180.

⁷²⁰ *Id.* at 314, § 189.

⁷²¹ *Id.* at 312, § 181.

5.8 CONCLUSION

Group litigation means that there is a group, present and represented, in the court procedure. Under an interest based view of legal representation, this does not pose particular challenges – group litigation can work just like representative actions. Under the consent based view, however, we need additional arguments for why, in particular cases, it is justified to litigate claims with collective parties without requiring individual consent from all parties represented, i.e. where departing from the opt-in view can be warranted. The chapter showed that the answer depends on the nature of the violations and the remedies. In the case of monetary remedies, it can be safely assumed that the interest of the victim group is to extract the largest possible amount from the liable parties. In the case of indivisible or fundamentally interdependent claims, the collective approach is also superior in protecting the interests of all victims. Furthermore, if it is a rights violation where enforcement is mandated by law, remedies should be awarded regardless of the consent of all victims. Where overcoming individual dissent is not dictated by the above considerations, collective procedures can still offer ways to deal with heterogeneity within the claimant group by controlling the adequacy of representation and considering the various views within the group. The fact that minorities are usually no more homogenous than majorities does not mean that collective procedures cannot be applied. The individual guarantees inherent in the judicial process mean that minorities within minorities also get a voice.

In fact, the presence of the group better serves goals that are important on the level of the individual victim: victim empowerment and recognition. It gives voice to group members, but also creates a need for making sure that there remains space for internal variation and dissent. The most important benefit of having groups present claims is probably the fact that the

collective setting is able to shift the relevant contextual frame. As we have seen, this is a decisive move for law to consider opposing claims, especially in rights litigation that involve the state and dispersed and systemic violations. The collective approach might have ramifications in assessing evidence, with tools like shifting the burden of proof and statistical evidence. These elements have huge potential in creating a litigation setting that is more responsive to the type of claims that minorities are likely to present.

CONCLUSIONS: COLLECTIVE PROCEDURES FOR MINORITIES — WHERE AND HOW?

The proposal presented in this thesis starts with the recognition that law as it stands falls short of many of its promises. The collective procedural solution addressed but one such area, seeking to broaden the sphere where law can make a change and accommodate minority claims. The account offered arguments for a thin theory, building on insights that are largely uncontroversial, to the extent that this is possible. However, a thick theory, a stronger case for collective procedures for minority claims, emerges, provided that one is willing to accept some more controversial but legitimate starting points. These elements include the interests based view of representation; a more public law oriented (or law and economics) vision of tort law, prioritizing deterrence; the recognition of intermediary group interests (in addition to national interests and individual interests).

If the arguments for acknowledging the collective aspect of remedies succeed, and I believe they do, the question is not so much whether we should accept the possibility of collective remedies, but how to deal with this aspect of litigation. Furthermore, a collective procedure can extend the ability of law and litigation to provide effective and adequate remedies, even where we assess the impact on the level of individuals. Dubinsky brings up the example of mass atrocities,⁷²² but the ‘massification’ and the omnipresence of the state means that there are more and more areas where the strictly individual action is neither effective nor adequate. The growing role and reach of the state can be both beneficial and detrimental to minorities.

⁷²² ‘Still unaddressed are the unique injuries that result when mass atrocities are inflicted on collectives.’ Dubinsky, *supra* note 174, at 1190.

It expands the scope of majoritarian decision-making to areas where there used to be a 'natural autonomy' in the times of a more restrained state and that better satisfied self-government ideals. On the other hand, the state becomes able to penetrate into areas where anti-minority bias used to play out without legal interference. The proposal seeks to limit the possible threats of the former phenomenon, strengthening the judicial check on majority decisions; and to bolster the latter potential, private enforcement in all areas where law and courts can realistically make a change. The thesis argued that, in limited but important areas, collective procedures can do just this. Before I summarize the potentials of the collective procedural solution, I address the question of where the proposal works, and where it might not.

The proposal works best in areas where there are judicial standards, and pushes further the boundaries of where judicial action can be meaningful. As I see its limitations, it can get far with embracing a group-level view of equality (in the limited sense of countering systemic biases), while it seems to offer less when it comes to claims based on the rights of self-determination. Kymlicka writes about two grounds for group representation.⁷²³ One is based on systematic discrimination. The procedural legal solution can help addressing this problem. His other argument is based on self-determination and advancing self-government: 'some representation rights are defended, not on grounds of overcoming systemic discrimination, but as a corollary of the right to self-government for national minorities.'⁷²⁴ This is a terrain with a very thin layer of legal standards, one that is probably better left out of courts – in any case the procedural solution as presented in this thesis does not deal with claims of this type.

⁷²³ KYMLICKA, *supra* note 99, Chapter 7: Ensuring a Voice for Minorities.

⁷²⁴ *Id.* at 142.

The collective procedural approach to minority rights enforcement might best work in cases where there is a strong equality-based claim that fits the substantive legal framework (non-discrimination, minority rights) even if it cannot be fully individualized, and there is minimal receptivity from the legal system and, especially in a case where state action is required, a minimum level of political receptivity for the claim. The level of how much of the two components is required will depend on the particular type of relief sought by claimants. It is hard to imagine that a claim that meets with harsh opposition from the political bodies representing the majority will and also if the claims themselves are too much off from what the majority legal system can accommodate as legal (as opposed to political, moral, religious etc.) claims will succeed. The former condition should be conceived as not too demanding in a functioning rule of law state, considering that compliance with court orders will, in those cases, most likely trump even stronger forms of political opposition.

In other words, the collective procedural solution works best at the margins: where claims have some foundation in substantive legal regulation (above all, non-discrimination law and minority rights), but are likely to be thrown out due to a strictly individualist approach; and where claims are not likely to succeed through the political channels, but are also not so harshly rejected as to make compliance with court orders unthinkable. The necessary interplay between the various branches might mean that in certain cases, the judicial response might not be able to fully work out, and the political response to court decisions will alter the outcome. This happened in the case of Aboriginal land claims in Australia, with the legislative branch pushing back and only made small concessions to the minority. The Holocaust claims also reinforced the conclusion that both the court and the political branches play an important role in addressing mass scale violations, especially where the litigation transcends geographical boundaries and stretches through several decades.

Collectivities may live for ever,⁷²⁵ but traditional compensation might not make sense after too much time has passed, for various reasons. The proposal provides a means to accommodate claims going back far into the past, but it does not tackle the question of how far remedies should go back. It allows for extension, through generations, using the group to connect the generation of the original victims with the generation of the claimants. This might be most relevant for the cases where the harm continues to radiate to group members, i.e., the present-based equality logic and the backward-looking compensatory argument are both applicable. The final decision is still left for the court, it can still conclude that injustices have been ‘superseded,’⁷²⁶ but the collective procedural approach makes it possible to consider a remedy at all.

The proposal is also limited in that it is a ‘conceptual’ proposal and does not provide a blueprint for legislation and litigation. Research to determine the exact design of a collective procedural rule that fits a legal context should be sensitive to that context in particular, a task this thesis did not fulfill. It did not address questions of how exactly the procedure and the courts should look like (domestic or international body; jury, elected or appointed judges; traditional judicial or quasi-judicial bodies); how the financial and other motivating factors should be designed; or where individual ‘veto’ should be allowed to override the public interest in optimal deterrence. In some cases it should really be up to the individual victim to decide, exclusively, on whether reparation should follow. Similarly to criminal law, prosecution without the will of the victim should follow only in cases where the interest of

⁷²⁵ MAINE, *supra* note 62, at 121–22.

⁷²⁶ Waldron, *supra* note 170.

the closer or wider community warrant this and there is no overriding interest on the side of the victim.

The two most important points of criticism raised against group-based accounts is that (1) collective treatment will necessarily overlook relevant variation within the group, and that (2) it can help and reinforce oppression within the group. In both cases, recognition ends up going against the values it seeks to maintain, on the level of group members, creating a sense of misrecognition and restricting freedom. An important insight is that groups 'take their particular shape only because of certain historical circumstances or because particular political institutions prevail and not because they are part of some natural order [...] group composition changes over time [and] most groups are not homogeneous at any given moment.'⁷²⁷ As the proposal secures recognition of a collective in a limited form, it is less open to the challenge of homogenization. Both the procedure and the remedy can be designed in a way that avoids the danger of overlooking intra-group heterogeneity. Courts can define sub-groups, allowing for differentiation. The method of compensation might be also able to make distinctions, e.g., by applying a formula that compensates more those who were exposed to more serious violations, for a longer time etc.

The proposal acknowledges the dangers of homogenization and oppression, and seeks to minimize them by the judicial oversight that is inherent in court cases. A filter is present in the class action rule, through the fairness hearings and the duty of the court to supervise the process and the remedies – even where the parties end up settling the case. All types of

⁷²⁷ Chandran Kukathas, *Are there any cultural rights?*, in *THE RIGHTS OF MINORITY CULTURES* 234-35 (Will Kymlicka ed., 1995).

collective procedure should contain similar guarantees, both at the initial recognition and in later stages, e.g., enforcement in case of an intra-group distribution mechanism administered by the group itself, after the collective judicial award. It is important to point out that individual variation is not only a challenge but also an inherent limit on collective procedures: if tensions within the groups are too high, with irreconcilable conflicts of interest, the court should not recognize the group with regard to that particular claim.

The procedural solution grants limited recognition to groups, only applicable for the litigation and the remedies in question. In that it conforms with the requirements of liberty. Kymlicka argues that 'a liberal view requires freedom within the minority group, and equality between the minority and majority group.'⁷²⁸ The procedural solution seeks to grant limited group recognition in order to advance the cause of equality while maintaining judicial oversight to assure that this move does not threaten internal freedom of the individual members.

The judicial recognition of collectivities is also flexible in that the boundaries of the groups can be redrawn depending on the particular procedures and remedies: it is 'updated' with every claim. Political recognition is often seen as 'freezing' difference, at least the relevant cultural difference, in the sense that change might jeopardize the benefits granted. The most common examples would include various traditional indigenous life styles that are often seen as a condition of their special status, so the group recognition also 'locks' these people into their 'distinct culture,' as perceived by the majority, for better or worse. The procedural solution is agnostic as for the types of groups in question, be they indigenous peoples, autochthon groups or immigrants, a central dilemma of minority rights. Flexible in determining who gets legal recognition, and targeted in the sense that recognition can be

⁷²⁸ KYMLICKA, *supra* note 99, at 152.

granted for certain aspects of group difference, while might be denied for others. The proposal also seeks to make sure that there is a mutual fit between the class and the particular claim. Yet, this comes at a cost: recognition is uncertain and subject to change and constant challenge. In certain cases the official 'once-and-for-all' recognition might be preferred. Until a group manages to secure such a status, however, limited judicial recognition can provide a solution.

The fact that the proposal seeks to activate judicial intervention in the field of minority recognition means that there will be an area where majority decision-making does not have a say. However, it does not weaken but emboldens democracy, if properly managed. It is precisely the disadvantaged position as a result of sheer numbers that certain minorities ought to be protected.⁷²⁹ The way the beneficiary groups are conceived, based on the impeded access to political power, makes sure that the criticism that collective recognition would end up 'over-empowering' minorities does not hold too much water. This is not a concern with most ethno-cultural minorities, as opposed to, e.g., what List and Pettit describe as the 'pathology' of the role of corporations, a different type of collective entity.⁷³⁰ As we have seen, recognition under the proposal also remains limited, leaving room for democratic decisions. Furthermore, the types of claims I consider are based on rights violations where providing remedy is a legal obligation, considering an earlier violation. Nobody would think it in violation of democratic principles that a particular group of people living in a district whose houses are demolished are entitled to fair compensation without recourse to democratic decision-making.

⁷²⁹ In line with the logic of the famous footnote 4 in US constitutional law (*Carolene Products*) and Ely's *Democracy of Distrust*, among others, as presented in the 'Judicial' chapter.

⁷³⁰ LIST & PETTIT, *supra* note 28, at 129–130.

A legal solution will always be open to the political challenge, the danger that it will 'de-politicize' people and groups, demotivating political participation and fight through political institutions, persuading others by free and democratic means, instead of 'extra-political,' and 'anti-democratic' enforcement, against the will of the majority. This challenge builds on the assumption that fight through court cases is not political action, and that there is a payoff between fighting through courts and fighting through the institutions of majoritarian decision-making. This is not to claim that courts themselves are free from biases, to the contrary.⁷³¹ Yet, litigation can itself be part of a larger political challenge to the status quo, raising awareness, showing individual stories, explaining the harm, and formulating the claim, most likely using a rights language that is accessible to many (or showing why that language is too constraining on non-Western cultures). Going to courts in this sense is itself a political action, and it can contribute to the democratic discussions focusing on the claims made by minorities, instead of somehow taking away steam from strictly political struggles.⁷³² The underlying claim of this thesis is that it is better to empower minorities to better make their case through legal means than to leave them without this, even if this risks overriding majoritarian decisions. Without this element, the proposal could not produce the desired effects.

The Ontario Law Reform Commission summarized the benefits of class actions, a group litigation method it was considering, as follows: 'judicial economy, increased access to the courts, and modification of the behaviour of actual or potential wrongdoers.'⁷³³ These apply

⁷³¹ See the section on 'Judicial bias...' in the 'Judicial' chapter.

⁷³² This can be aptly illustrated by the fight for same-sex marriage in the United States, where political actions (by legislation) and court decisions were both part of the game, both contributing to the dynamics of extending rights, creating a complex interplay where synergies and contradictions were existing on all levels. Legislation against legislation, courts against courts, legislation helping legislation, courts helping courts, legislation acting against or helping courts and vice versa.

⁷³³ OLRC REPORT, *supra* note 163, at 117.

to the collective procedural solution, in the context of minority claims. The proposal opens the gates wider by building on economies of scale through aggregation and helping standing claims. But the advantages go further than these. It might help in particular in the case of: harms that are not assessable (with ease and efficiency or with adequate certainty) on the individual level, including harms that can only be addressed on the collective level; harms too low to make litigation pay off; high number of victims and claims; limited funds, allowing the court to make a more just award, e.g., by evening out compensation; no surviving victims or family members; many victims not in the position to sue (fear, lack of information etc.); evidentiary hurdles where contextualization and statistical evidence may provide a decisive input on the violations and the damages. This altogether makes it less likely that benefits are left with perpetrators. This also means that the proposal reinforces the deterrence effect through higher chances of full compensation. Contextualization means that claimants might be able to present a stronger case by the weight of sheer numbers, and avoid some framing problems that result in the dismissal of the case on technical grounds, for the claims do not fit the individualist framework.

The collective procedure also allows for addressing some biases of law and litigation. Disadvantages are usually not 'given' but created by social practices, law included. As Cass Sunstein argues in the context of disabilities: The 'systemic harm' lies in 'that practices designed by and for the able-bodied predictably create a range of obstacles to the disabled [and it is largely these] practices, and not disability "itself," a highly ambiguous concept' that are responsible for the disadvantages.⁷³⁴ Sunstein's conclusion can be applied to law and litigation: 'The objection from the standpoint of equality is that such systems turn a difference

⁷³⁴ Sunstein, *supra* note 118, at 298.

into a systemic disadvantage and must accordingly be justified or changed.⁷³⁵ The collective procedural solution can neutralize, to a certain extent, the inherent biases in decisions by the political branches to recognize or deny recognition to certain groups, by accommodating claims that would otherwise be blocked by the filter of cognizable claims in litigation.

The judicial decision of identifying and accepting a collective party as a claimant will in itself bring a benefit: empowerment and recognition, with the advantages that this brings to groups and individuals alike.⁷³⁶ It gives voice to victims, recognizes their suffering, presenting it as part of a larger harmful practice. Furthermore, recognition is more likely to be based on a consistent and reasoned decision, subject to the rule of law requirements. Giving voice and face to sufferings on a large scale makes it harder to neglect or downplay the wrongs, both in public discourse and in the process of assessing damages. It is more likely that one can relate to the loss of life perspectives in the case of an individual victim than it is when talking about a larger group of victims.⁷³⁷ This way, somewhat paradoxically, the collective procedural solution can strengthen the personal-individual element of the claim. Furthermore, by making victims parties to the case, the assessment of the monetary element might become more nuanced, more adequate and better at reflecting the actual individual variation among members of the victim group. With the potentially stronger impact on public discourse, the collective procedural tool can also contribute to the non-legal effects of litigation, persuading the public and, indirectly, political decision-makers to act. The proposal's potential to

⁷³⁵ *Ibid.*

⁷³⁶ See the chapter on 'Groups.'

⁷³⁷ On the dangers of neglecting the individual voice and of 'unsought and unwanted representation' in rape cases, see Catharine A. MacKinnon, *Collective Harms Under The Alien Tort Statute: A Cautionary Note On Class Actions*, 6 J. INT'L & COMP. L. 567 (2000).

strengthen private enforcement of rights can also be read as a boost to the individual, in addition to being a benefit from the point of view of checks and balances.

The proposal should ultimately be read as an argument for using collective procedures to the benefit of minorities, where such procedures are available, and as an argument for adopting such procedural rules, where they are not present and where minorities could benefit from them. As Dubinsky argued, '[c]ollective victims need procedural rules specifically written with human rights class actions in mind,'⁷³⁸ in addition to targeted substantive rules. This thesis has argued that this is particularly applicable to minorities, regardless of whether we are willing to see them as 'collective victims.' Policy makers and those seeking better minority rights enforcement should look into procedural rules and look for ways to better protect these groups and individuals. Norms should be adopted to allow for group litigation and also allow for these rules to be used in the context of minority claims.⁷³⁹ This can be accomplished through adopting a general collective procedural rule like the class action in the US, but it could also be a specific human rights or targeted anti-discrimination tool only applicable to (parts of) rights litigation.

In particular, the procedural proposal means for judges that they should be ready to accept collective claims and consider collective remedies in the minority context especially where the indivisibility and interdependence of claims would mean that the judgment would anyway have a considerable impact on non-parties (most importantly in the case of injunction) and where individual variation within the victim group would not matter (as in the case of rights enforcement mandated by law and monetary compensation where maximization is the

⁷³⁸ Dubinsky, *supra* note 174, at 1189.

⁷³⁹ As Dubinsky argues, '[t]he source of such rules will be in Congress, in treaty conferences, in the work of the new international tribunals, and in the example set by foreign legislation.' *Id.* at 1190.

ultimate common interest of claimants). The ability of courts to control representation and provide individual guarantees as well as the benefits for judicial efficiency should give judges confidence that the efforts put in collective procedures pay off. If not else, for the reason that the collective procedure ultimately serves the primary mission of judges: to provide access to justice to claimants, especially to those, like minority members, who are less likely to get adequate attention and due regard from majoritarian decision-making. Considering the possible majoritarian biases of the court system, judges should be aware that seemingly neutral decisions on narrowing the focus of litigation can arbitrarily exclude otherwise justified claims. The collective procedural approach helps in that it triggers more self-reflection through contextualization and a broader approach to what evidence should be accepted.

The proposal suggests that legislators should adopt adequate rules that allow courts and claimants to benefit from a collective procedure, be it designed specifically for minorities, targeting, e.g., anti-discrimination claims, or covering potentially all types of claims (as in the case of US class actions). Politicians and majorities who seek to build a legal system that fulfills more perfectly the equality ideal, as is often the case considering constitutional and other legal commitments to this end, should support the adoption of the relevant rules. On the international level, binding and non-binding norms should seek to encourage or, ideally, mandate states to adopt collective procedures. International judicial and quasi-judicial bodies should consider how collective procedures can advance their goals of providing international guarantees, especially in the case of human rights norms. Litigants and rights defenders should lobby for adoption where it has not happened and make use of the device where it is available. Concrete cases should show the possible shortcomings of the norm as it is implemented and should seek revisions accordingly. This should make sure that the

innovative potential, the ability of collective procedures to change our perception of rights, in a way that benefits minority claims with substantial collective elements, is maximized.

Finally, minorities should make use of collective procedures to raise their voices against the biases of legal systems and to increase their ability to address wider problems, to the extent that this is possible through litigation. The central goal of the proposal is to extend this ability of law and courts.

The approach taken by the proposal, accommodating collective claims without upsetting the individualist approach of law and litigation, can be seen as a Trojan horse that helps some minority claims get through the wall of over-individualist legal systems with majority biases, without directly confronting the substantial tenets of majority law. Some may see parts of the thesis as revisiting questions with obvious questions. Others might see the collective procedural proposal as a radical vision that is utopian at best and that has no place in Western legal systems, it is already an oddity in the US and wherever it also popped up. I am inclined to stay in the middle and argue that the proposal is neither obvious, nor impossible. It would serve important goals that align well with the goals of minority rights enforcement. In this, it charts a territory largely untouched in academic discussions: how collective procedures could serve the goal of minority protection around the world, especially in Western jurisdictions where the individualist bent of the legal system and other institutional and social constraints might block many minority claims.

Cass Sunstein summarizes the link between literature and practice:

Much academic writing in law is not intended for the bar, at least not in the short-term, but that is not a problem. Such writing is meant to add to the stock

of knowledge. If it succeeds, it can have significant long-term effects, potentially affecting what everyone takes to be “common sense.”⁷⁴⁰

This is not to claim that this thesis would have a transformative potential even close to that. However, a collective procedural solution that becomes a routinely applied device has the potential to transform the ‘common sense’ view of how rights can be litigated, reinforcing the legitimacy of the group based view, and ultimately supporting minority claims by helping law accommodate claims that otherwise do not fit the majority legal system. This is a longer term perspective in addition to the more direct benefits of the proposal to enable better access to justice for minority claims, without directly challenging the basic tenets of (Western) legal systems.

⁷⁴⁰ Cass R. Sunstein, *Foreword: In Praise of Law Books and Law Reviews (and Jargon-Filled Academic Writing)*, 114 MICH. L. REV. 833, 833 (2016).

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