



Class Action.
An European Perspective

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Abstract

The European Convention of Human Rights and Fundamental Freedoms (hereafter the Convention) is considered to be the most advanced international instrument for human rights protection. The Convention has proven its effectiveness, after more than half a century of implementation.

Still, as a result of social evolution, new challenges have appeared that may question the efficiency of the system. The major risk for the European Court of Human Rights (hereafter the Court) is the continuous inflow of cases. In this context the question of what needs to be done to diminish the number of cases referred to the Court arises. The solutions that we consider are either to provide a collective action in the Contracting States or to recognize an autonomous procedure before the European Court of Human Rights.

We argue that a class action adopted in the Contracting States would consolidate the guaranties provided by Article 6 of the Convention. Enacted supra-nationally, id est before the Court, a class action could save resources and could allow the Court to have a global image of a problem. Therefore, the Court would consolidate its effectiveness as a censor in concreto of human rights.

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I. General context

Not long ago, natural disasters, plagues and wars were the only events capable to produce a large number of victims. During recent decades, things have changed drastically. The globalization and the upsurge of industry, technology and movement of goods not only have brought an improvement in the quality of life, they have also created a proper environment for accidents that lead to damage being caused to a great number of persons¹. Consequently, modern society was characterized gradually characterized as the “civilization of risks”².

Therefore, the defining element of this type of society is an increase in the number of cases in which a single illegal act or injurious conduct causes a significant number of victims³. The problems raised by such events in the world of justice are extremely complex as they usually imply the application of legal rules from different branches of law.

“What often begins as a trickle, soon swells to a river, then to a flood of litigation”⁴. Damages resulted in this context are significant not only financially, but, in certain case, from the perspective of their impact over a specific community or the community as a whole. This type of damages constitutes a progressive accumulation of individual dramas that forge into a collective dimension⁵. Sometimes spectacular through the effects they cause or through the social amplitude that accompanies them, such damages are often analyzed as an expression of the vulnerability of modern society.

Every time such events occur they create an overwhelmingly workload, that drowns court dockets⁶ that may sometimes effectively exclude certain plaintiffs from litigation due to the costs of bringing claims⁷.

The complex system of damages resulted from such an event is usually defined in common law under the notion of mass tort. *Mass tort litigation emerges when an event or series of related*

1 A. Guégan-Lécuyer, *Dommages de masse et responsabilité civile*, L.G.D.J, 2006, p.1

2 P. Lagadec, *La civilisation du risque. Catastrophes technologiques et responsabilité sociale*, 1981, cited by D. Melloni, *Qu'est-ce qu'un risque collectif?* in *Riséo*, 1/2010, ph. 1, available as well at <http://www.riseo.fr/-Revue-1-#page17>, 9th of December 2010, 16:30.

3 There are plenty examples for such new harmful events, we mention as examples: the nuclear accident from Chernobyl or Fukushima, the chemical residue flooding from Kolontar, the collapse of Furiani football stadium, the explosion of AZF factory from Toulouse, the „black tides”, the asbestos contamination etc. For a presentation of the risks that threaten our modern society see OCDE, *Les Risques émergents au XXI^e siècle*, pp. 30-33, available at <http://www.oecd.org/dataoecd/52/23/37388661.pdf>, the 27th of February 2011, 11:25.

4 J. F. Rice, N. W. Davis, *The future of mass tort claims: comparison of settlement class action to bankruptcy treatment of mass tort claims*, in *South Carolina Law Review*. Vol. 50, p. 406, downloaded from HeinOnline on 16th of October 2011, 12:33.

5 D. Melloni, *op. Cit.*, ph. 1.

6 B. G. Stier, *Resolving the class action crisis: mass tort litigation as network*, in *Utah Law review* 2005 , pp. 864-865; John C. Coffee jr., *Class wars: the dilemma of the mass torts class actions*, in *Columbia Law Review*, vol. 95/1995, pp. 1363-1364, downloaded from HeinOnline on 14th of October 2011, 16:25.

7 B. G. Stier, *op. Cit.* p. 865.

*events injure a large number of people or damage their property*⁸. It is said that “a mass tort is defined by both the nature and number of claims and that the claims must arise out of an identifiable event or product, affecting a very large number of people and causing a large number of lawsuits asserting personal injury or property damage to be filed”⁹.

The problem of mass torts has become one of the major topics to be analyzed in the US legal doctrine due to the countless questions and seemingly endless debates on the manner the legal system should react to them. Even if they have not yet stirred such an active reaction on Europe, more and more scholars are focusing their attention on this topic because harmful events that cause a great number of victims become increasingly frequent. As an example, in a recent paper a French *doctrinaire* researching the problem of mass torts in an extensive manner, has defined them under the notion of *dommage de masse*¹⁰.

It ought to be established from the beginning that not all mass torts pose a threat of flooding the courts with requests of compensation. No consensus has yet been reached on the conditions for a harmful event to be categorized as mass torts. According to some, 100.000 claims are necessary, and others consider that 100 or 50 suits are sufficient¹¹. In some states, the number of victims necessary to activate the class action as special procedure designed for mass torts that we will later describe, is as low as seven in Australia or two in Canada¹².

To have an idea on the impact such a mass tort may have on a judicial system, we will first present some general data on a few mass torts in USA and then focus the attention on one such case that occurred in the Romanian legal system.

Due to the way in which the American legal system is built, several mass torts that have had a huge impact over jurisprudence and legal doctrine have come into attention during recent decades. Some of the best known cases are the asbestos litigation, the silicon gel breast implant litigation and the tobacco litigation.

Judge Robert Parker, Chair of the Judicial Conference's subcommittee responsible for asbestos litigation wrote that “*the magnitude of this assignment is unprecedented in federal court history...*”¹³. By 1990's the asbestos litigation represented seventy five percent of all new federal products liability filings, becoming the largest single category of personal injury litigation at that

8 Advisory Commision on Civil Rules and Working Group on Mass Torts, Report on Mass Tort Litigation 10, 15th of February, 1999 , reprinted without appendices in 187 F.R.D. 293- 300.

9 Federal Judicial Center, *Manual for Complex Litigation, forth*, 2004, p. 343, downloaded from <https://public.resource.org/scribd/8763868.pdf> on 6th of May 2012, 11:25.

10 A. Guégan-Lécuyer., *op.cit.*, p. 114.

11 Federal Judicial Center, *op. Cit.*, p. 343.

12 E. H. Cooper, *class action advice in the form of questions*, downloaded from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1198&context=djcil> on 03rd of April 2012, 20:41.

13 Cited by J. C. Coffe jr., *op. Cit.*, p. 1390.

moment¹⁴. Only in 2002, at least 730.000 asbestos claimants filed lawsuits against more than 8.400 defendant companies¹⁵. By some estimates, the number of Americans that have been exposed to asbestos in a manner that risks serious health problems is up to twenty-one million¹⁶.

As one Judge said, “the number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules”¹⁷. Industry experts have estimated that ultimate costs of asbestos personal injury claims in the U.S. will range from \$200 to \$265 billion.

The silicon gel breast implant litigation comprised over 435.000 claims and a total damage estimated at over \$28 billion¹⁸. In *Engle v. Liggett Group, Inc.*, a class action of nearly 700.000 Florida smokers were rendered a verdict which find the tobacco industry liable for \$145 billion¹⁹.

Mass torts are not uncommon in the Romanian legal system either. In recent years national courts had to face several case floodings determined by mass torts, from which we choose to present a mass tort, the salary cuts in the public sector. More and more litigation has been caused by Governments or of other State authorities²⁰. This statement is valid not only for the Romanian legal system²¹.

A recent study made by the Uniunea Națională a Judecătorilor din România (National Union of Judges from Romania) underlined the effect on costs for the judiciary system of cases concerning salary cuts in the public sector. This particular type of action was chosen to be object of study because a 25% salary cuts and other recent budgetary interventions in the public sector led to a major increase in the number of litigation. The study used a questionnaire addressed to judges from 11 Courts of Appeal and 23 Tribunals²².

Out of the total number of respondents, 40% considered that number of such cases is

14 J. C. Coffee jr., *op. Cit.*, p. 1363.

15 American Academy of Actuaries. Mass Torts Subcommittee, *Overview of asbestos claims. Issue and trends, 2007*, p. 3, downloaded from http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf on 3rd of April 2012, 20:20.

16 J. C. Coffee jr., *op. Cit.*, p. 1385; B. G. Stier, *op. Cit.*, pp. 870-871.

17 Judge Posner, the *Rhone-Pulenc Rorer* case, judgment available at: <http://www.projectposner.org/case/1995/51F3d1293>, 12th of May 2012, 11:23.

18 J. C. Coffee jr., *op. Cit.*, p. 1408. And this type of litigation have not yet reached the climax, as more than two million women received breast implants, each one of the being a potential claimant. For more details, see B. G. Stier, *op. Cit.*, p. 870.

19 The judgment is available at : http://scholar.google.com/scholar_case?case=9839590439027271645&q=Engle+v.+Liggett+Group,+Inc.&hl=en&as_sdt=2,5&as_vis=1. The Florida Supreme Court reversed the punitive damages verdict on appeal for a variety of procedural reasons. For more details see B. G. Stier, *Jackpot justice: verdict variability and the mass tort class action*, in *Temple Law Review*, Vol. 80, pp. 1013-1066, downloaded from HeinOnline on 14th of October 2011, 16:30.

20 The Romanian cases regarding property restitution and the violation of Article 6 of the Convention by national authorities have unfortunately long become notorious. As this matter caused an extremely complex case law, even if it is a typical mass tort issue, we consider it appropriate for a more extensive approach. Moreover, the problem of the wages of the budgetary is a more stringent one for the Courts this days.

21 As an example, in the Brazilian legal system it has been concluded that most of the cases of mass torts are caused by the acts of the government or local authorities. For more details, see A. Gidi, *Class action in Brazil- a model for civil-law countries*, in *American Journal of comparative law*, Vol. 51, 2003, p. 331, downloaded from <http://ssrn.com/abstract=903188>, on 16th of November 2010, 16:45.

22 In Romania, there are 15 Courts of Appeal and 41 Tribunals.

extremely high, by comparison to the total number of cases on their docket, while other 40% consider it high. Another question, directly connected to the previous one, was meant to determine the impact of the increased workload over the quality of work. Being asked if the time spent to solve this kind of cases affects in a negative way the overall quality of judgments, 29% of the judges felt that the quality is very much affected, 35% that it is affected, and 13% that it is slightly affected. This response should undoubtedly raise the question whether if the access to a court still is an effective one, or it has become just delusion²³.

According to the same study, in February 2011 only, each judge had on his docket an average 47 new files with this cause of action, to be added to the other 44 previous pending. As a result, each civil judge had on his desk an average of 91 cases on this particular problem., out of which he decided in the same month, 21 cases.

In terms of costs, the proceedings before the courts have cost Romania around 4.361.500 lei (approx. 1 million Euros) per year, a figure that represent the costs for the system alone, without considering the costs for the parties.

II. Violations of the Convention due to mass torts

As we have stated before, mass torts are consequently followed by a large number of actions before the national courts. In States where class action is not an option, there are two possible scenarios in case of a common cause of litigation: joining the actions or judging each case separately. In both scenarios, the effectiveness of the guarantees provided by Article 6 of the Convention – Right to a fair trial can be challenged.

A. Hearing within a reasonable time

A large number of cases before a court, even if they are joined or treated separately, will lead to a lengthy trial. All actions would imply hearing all the parties of the procedure, similar evidence would have to be analyzed by the court and the hearings would take place at longer periods of time because of the court workload. Moreover, in the case of joint actions, because of the high number of applicants, the court faces problems in carrying out all the requirements of the legal citation procedure.

Further adding to the complexity of the issue, the long duration of the trial may result in access to compensation only for those fortunate enough to have gone through the motions of trial, faster and more effectively than others. Or, in accordance to Article 6 of the Convention everyone is entitled to a fair and public hearing within a reasonable time. Moreover, in its jurisprudence, the Court has stated that justice must be brought to those who need it without delay, and without

²³ This is reflected as well in the time spent for instrumenting each cases. According to the study, for a category of cases, (law no. 220/2007) the average time spent by each judge is 67 minutes!

affecting the credibility and efficiency of the Court²⁴. The Court has constantly noted that the reasonable time will be appreciated in the light of the circumstances of each case with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and that what was at stake for the applicant in dispute²⁵.

In situations where certain types of litigation systematically breach the right to a trial within a reasonable time, the Court has appreciated that an accumulation of identical breaches constitutes a practice that is incompatible with the Convention²⁶. Therefore, the state cannot exonerate itself by justifying a duration of the trial beyond its reasonable time by the fact that it was provoked by a mass tort. As we have shown before, in modern society mass torts can no longer be considered as unforeseeable and invincible event.

This is why we appreciate that in a situation where the length of the procedure is caused by the inflow of actions related to the same mass tort, there would be a breach of the right to a trial within a reasonable time. Despite all this, the question remains whether any large enough number of individual trials can be logically expected to guarantee a reasonable time of a trial.

B. Access to court

Given that mass damage can lead to virtually thousands of applicants, taking into account the specificity of such acts, the courts may be faced with the situation of having to deal with all the cases related to the same cause, at the same time. In these circumstances, specific problems regarding access to court may arise, such as pecuniary conditions and procedural expenses.

On one hand, in certain legal systems access to court is denied in consideration of the suits' pecuniary value. In such cases, the claimant suffering a minimal damage as a result of a mass tort can not obtain compensation, even though, if all the petitioners would be joined in the same cause, the total value could be impressive, to say the least. Imagine, if a telephone provider overcharges the statement of all the consumer with 10 cents each. Reported to each consumer the damage per year is only 1.20 Euros, but considering that such a provider may have as many as a few millions clients, the summed damage would be considerable in its amount.

On the other hand, when dealing with the costs related to undertaking individual legal standings within a mass damage issue, one must understand the full extent of expenses to be taken into account, starting with cost of the administration of a complex body of evidence, expensive technical/medical/ financial expertise and legal advice and counseling. Acting individually results in that each person involved must undergo the same costs, this creating the possibility that one may be easily discouraged by the perspective of a costly, long-term investment with no certain positive outcome, and with no foreseeable return of investment.

²⁴ Case of *Moreira de Azevedo v. Portugal*, 23 October 1990, §74.

²⁵ Case of *Frydlender v. France*, 27 June 2000, §43.

²⁶ Case of *Bottazzi v. Italy*, 28 July 1999, §22.

As it has been diligently restated by the Court, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective²⁷, strengthening the position by which the Court acts as a *ensor in concreto*, establishing not only the procedural safeguards set, but also the necessary and minimal requirements of a fair trial.

Regarding the problem of access to court, the Court held that every persons right to access to Court implies the states obligation to facilitate such access, being not enough not obstruct it, but, in order to comply with this requirement, to guarantee effective and practical social and economic rights²⁸.

For these reasons, we consider that in the concrete circumstances of a mass tort event leading to mass damage, such limitations are a breach of Article 6 §1 of the Convention, in regard of the right to effective access to Court.

C. Divergence in jurisprudence

In cases of mass damage there is usually a common trigger resulting in a common and determined type of victimology, resulting in expectancy that case outcomes should be at least similar, if not identical. However, that is not always the case, given that material jurisdiction can be asserted by different courts, this resulting in a different composition of the panel, which has the potential to lead to fundamentally different judgments. At first site, it can therefore appear as though knowledge or truth are not relevant, but more likely it is a game a probability and chance.

As has been constantly stated by the Court, divergences in case-law are an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction, and that the role of a supreme court is precisely to resolve conflicts between decisions of the courts below.

However, the Court considers that, in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty and to reduce the public's confidence in the judicial system, which is one of the essential components of a State based on the rule of law²⁹.

It has also been stated by the Court that such deep routed incoherence in practice spread over a long period of time could potentially shatter petitioners' trust and belief in the functionality of the legal system. This is especially alarming when the root of such inconsistency is brought upon the legal system by the Supreme Court itself. The Court condemned such behavior, especially given the role of the Supreme Court of a country to set a definite interpretation of the law³⁰.

²⁷ Case of Artico v. Italy, 13 May 1980, §34.

²⁸ Case of Airey v. Ireland, 9 October 1979, §26.

²⁹ Case of Paduraru v. Romania, 1 December 2005, §98.

³⁰ Case of Beian v. Romania, 6 December 2007, §38.

This is the reason why we appreciate that in the event of a mass tort, in lack of an effective remedy against decisional conflict among first or second instance courts³¹, contradictory jurisprudence constitutes a breach of Article 6 § 1 of the Convention.

III. Class action as a possible solution

A. General presentation of class action

As we can conclude from the above, mass torts represent a major challenge for the courts as they cause a great number of victims and therefore a serious increase in their workload. In order to alleviate this problem, different legal systems have proposed different solutions. One of these is the class action.

The form of class action that most of the legal systems have adopted has its origins in American legislation³², more exactly in Federal Rule of Civil Procedure 23³³, which has undergone a major reform in 1966³⁴.

Even if it originated in the common-law legal systems, the class action already exists in many civil-law countries in different forms³⁵. For example : Brazil³⁶, Quebec³⁷, Germany, Italy,

³¹ Case of Tudor Tudor v. Romania, 24 March 2009. §29.

³² References to group litigation may be found as early as the year 1199 when Martin, a rector, sued the parishioners of Nuthampstead in an ecclesiastical court³².

³³ For an overview on the forms of class action existing in American legal system before the Federal Rule of Civil Procedure see N. J. Mazen, *Le recours collectif: Réalité Québécoise et projet français*, in *Revue internationale de droit comparé*, no. 2/1987, pp. 381-382, available at http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1987_num_39_2_2667, 11th of May 2011, 23:56.

³⁴ Rule 23 provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all 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.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

³⁵ For a critique of the implementation of class action in the civil law systems see R.O. Faulk, *Armageddon Through Aggregation: The Use and Abuse of Class Actions in International Dispute Resolution*, in *Michigan State University. Detroit College of Law Journal of International Law*, no. 10/2001, available at http://works.bepress.com/richard_faulk/3, 19th of December 2010, 15:37.

³⁶ For an overview on the Brazilian class action, see A. Gidi, *op. Cit.*, p. 330 and next.

³⁷ Article 999 from the Quebec Code of Civil Procedure defines the class action as being „, the procedure which

Norway, Portugal, Sweden and Denmark³⁸.

The class action, or the collective action³⁹, was defined as “*the action brought by a representative plaintiff (collective standing), in protection of a right that belongs to a group of people (object of the suit), which judgment will bind the group as a whole (res judicata)*”⁴⁰. Therefore, the essential elements of a class action are: the representative plaintiff, the protection of a right that belongs to a group of people and the *res judicata* effect of the judgement⁴¹.

Essentially, what distinguishes an individual action from a collective one is the fact that the rights of the individuals merge to form a right of the group. Therefore, there is no longer a multitude of claimants, but only one group that acts through one or more representatives to defend their rights. The members of the group act in a convergent manner in order to reach their goal. There is only one trial, between the group and the defendant.

In essence, a class action starts with a request of class action authorization brought to a court by the class representative. If the court considers that the conditions for a class action are met, it authorizes it, establishes the way in which the members of the class are informed about the launch of the class action and about their possibility to opt in/out, and the class action trial begins. In some class action systems the class decree is limited to the declaration of the defendant's liability and each individual class member must bring an individual action to prove causation and the amount or extent of the individual damages suffered⁴², while in other legal systems, such in the American one, the damage suffered by each class member is determined through the judgment given on the class action.

Regarding the representative, the solutions differ from one system to another. The American class action recognizes *locus standi* only for a class member, who undergoes close court scrutiny before final certification of the class action is granted⁴³. In doctrine, it has been said that a class action is adjudicated based on the fact that the evidence produced by the class representative is being common for all other class members⁴⁴. If the evidence brought by the class representatives

enables one member to sue without a mandate on behalf of all the members". For an overview on the Quebecois class action, see N. J. Mazon, *op. Cit.* pp. 373-411.

38 For an extensive presentation of class action in civil law countries and not only, see H. L. Kaplan, W. J. Crampton, M. E. Shall, *Class Action Developments Overseas*, available at http://www.shb.com/attorneys/Kaplan/PLI_2011.pdf, 12th of May 2011.

39 The different legal systems use different terms for this type of action. While in USA the term used is „class action”, the Brazilians use „ação colectiva”, in Quebec the term used is „recours collectif” and in France, the doctrine uses the term „action collective”.

40 A. Gidi, *op. Cit.* p. 334.

41 A. Gidi, *op. Cit.* p. 334.

42 A.P. Grinover, *The defence of the transindividual interests: Brazil and Ibero-America*, disponibil la <http://ebookbrowse.com/brazil-national-report-pdf-d282156425>, 1st of May, 2012, 16:45; A. Gidi, *op. Cit.*, p. 333,

43 J. F. Rice, N. W. Davis, *op. Cit.*, p 410.

44 As we saw, The Federal Code of Civil Procedure states that the representative parties has to fairly and adequately protect the interests of the class. Article 1003, out of the Quebec Code of Civil of Procedure states that „the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately”.

does not encompass that of class members, the premise of class action litigation no longer exists, as is the basis for binding class members to the judgment given on class action. Still, this opinion was contradicted by other scholars who argued that this is not the essence of a class action. The so called “association action” that exist in some European countries, in which the *locus standi* is held by associations, is as much a class action as the American counterpart, the only difference being the conditions set for the representative⁴⁵. This is why some other legal systems recognize *locus standi* to associations⁴⁶ or even to the Attorney General⁴⁷.

Regarding group determination, there is also some difference of approach between legal systems. For example, the Federal Code of Civil Procedure 23 provides that the questions of law or fact have to be common to the class and the claims or defenses of the representative parties have to be typical of the claims or defenses of the class. . Article 1003 of Quebec Code of Civil Procedure states that “*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*”. We may infer that systems that recognize class actions require a solid connection between group members for a unique trial to be allowed.

Regarding the effect of *res judicata*, the most important aspect is the way in which the group is determined, the legal systems being able to choose between the *opt out* and the *opt in*. According to the *opt out* system, one has to positively declare one’s intention to be part of the class. The adhesion to the group takes place after the class action is certified by the court, as the representative has to inform the other victims about launch of the class action and about their possibility to *opt in within the time frame* set by the court. The *opt out* method presumes the agreement of the victim. If one does not want to be part of the group, one has to express one’s wish accordingly⁴⁸.

When authorizing the class action, the courts establishes the way in which potential victims may become informed with respect to their right to join the class action. They may choose from mass media or internet to any method considered suitable⁴⁹. In many cases, the success of a class action may depend on how well the victims are informed, especially when the *opt in* method is

45 A. Gidi, *op. Cit.* p. 335.

46 This is the solution adopted by the French for the *action en représentation conjointe*. For more details see G. Viney, P. Jourdain, *Traite de Droit Civil. Les conditions de la responsabilité*. 2006, pp. 137-138.

47 This is the case of Brazilian class action where a class action may be introduced by the Attorney General, the Federative Republic of Brazil, the states, municipalities and some associations that fulfill a strict set of criteria. For more details, see A.P. Grinover, *op. Cit.*; A. Gidi, *op. Cit.*, p. 366.

48 Some American scholars have even suggested that an no *opt out* is the only suitable solution for mass torts litigations. For more details see D. Rosenberg, *Mandatory-litigation class action: the only option for mass torts cases*, in *Harvard Law Review*, Vol. 115, pp. 831-898 downloaded from HeinOnline on 14th of October 2011, 16:33.

49 The scholars and the courts have concluded that the best notice practicable is individual notice to all members of the class that can be identified (see J. F. Rice, N. W. Davis, *op. Cit.*, pp. 419-421). Still, in many mass tort case law this is impossible as victims are either spread over a large area, that may sometimes include several countries, or, there is no way on determine them, as for example in the case of damages caused by faulty products.

used⁵⁰.

Arguments exist for both the *opt in* and the *opt out*. While the *opt in* method allows no victim to be part of a case against his wish and a better determination of the procedural framework, the *opt out* method permits the courts to assess the scale of a mass tort and leave no benefit for the defendant as a result of non-adherence of all victims to the action. Whereas some legal system such as USA, Portugal or Quebec use the *opt out* method, others, such as Brazil or Denmark have preferred the *opt in*. There are also countries, like Norway, where both systems coexist.

Moreover, there are important differences in terms of the scope of application of *res judicata*, as there are systems, such as the Brazilian one, where the class action judgment is binding only if it benefits the victims, otherwise class members may still go to court to pursue their rights in individual actions. However, no other class action can be brought again to represent the same group right⁵¹.

B. Strong points of the class action from the perspective of Article 6 of the Convention

B. 1. Concerning the right to a trial within a reasonable time and publicity

The advantages of the class action in terms of mass tort litigation from the perspective of reasonable time and publicity, are that once the existence of a homogeneous group has been proven and the class action has been certified, the courts are no longer invaded by a overwhelming number of claims resulting from a singular harmful act or fact. As we have previously shown, all the individual rights merge and are to be uniformly represented before the court.

As there is no more flood of individual claims, some major problems regarding the duration of the trial are automatically solved. Courts no longer have to set hearings at long intervals of time. The number of potential procedural incidents, such as those regarding summoning of the parties, are reduced by default, as the entire procedure takes place only in relation to the representative of the group. As it has been noted “*the class action results in a defined outcome resolved in a timely manner*”⁵². In addition, the management of the probatory phase is improved, as there is only one set of evidence to be analyzed.

Moreover, the conditions for the selection of a class action representative are strictly provided in all systems. In countries such as the USA, where the group is represented by a member

50 For example, it is considered that the French *action en représentation conjointe* had no success as a result of the fact that the law has restricted extremely the way through which victims could be informed that such an action was brought before the Court. According to the law, the associations which bring an action en représentation conjointe may not use television, radio, leaflets or personalized letters to inform the victims. For more details see A. Guéguerre, *op. cit.*, pp. 411-412 and *Rapport d'information. Sénat. 26 mai 2010*, no. 499 from May 2010 regarding group actions, available at <http://www.leclubdesjuristes.com/publications/actualites/conclusions-du-groupe-de-travail-du-senat-relatives-a-l-action-de-groupe>, p. 16.

51 According to the Article 103 of the Brazilian Consumer Code, a class action judgment shall bind all members of the class, but the decision cannot affect their individual rights. For more details see A. Gidi, *op. Cit.*, pp. 388-394.

52 J. F. Rice, N. W. Davis, *op. Cit.*, p. 409.

of the class, the representative goes through a careful scrutiny from the court in order to see if he can fairly and adequately protect the interests of the class. In countries such as Brazil or France, where *locus standi* is given to associations, they have to fulfill some strict conditions. Moreover, the victims' council, an organism that exists in most of the systems, can closely monitor the entire activity of the group representative.

In consequence, even if not all the class members can take part to all the hearings, their interests are adequately represented and their rights are strictly protected. In some systems of law, such as the Norwegian one, the court may even change the representative if during the trial he does not prove to be sufficiently able to represent the group interests⁵³.

Furthermore, one of the great advantages of class action is that it places victims of the same harmful event on an equal position regarding the risk of the defendant's insolvency. Considering that in many cases the persons liable for a mass tort end up in insolvency⁵⁴, the reparation of damage depends on chance. In such an event, their chance to have the damage repaired depends on how quickly they brought their action to court, or on how long the court needed to decide de case. In a class action, as there is only one judgment to be enforced, all victims receive partial repair of the damage in proportion to the extent of the damage.

In addition, as shown in the study from Romania on the litigation concerning salary cuts in the public sector, the flooding of the courts leads to a decrease in the quality of justice. By reducing the number of cases, the class action also contributes to a better administration of justice, and prevents that access to the court becomes a formal one.

In conclusion, the class action may not only lead to a trial being judged in a reasonable time, but also to a better protection of the interests of the individuals that form the group.

B. 2. Concerning the costs

In many cases, especially in those regarding product liabilities, the damage suffered by each member of the class is a small one, but added together, they form a dreary image. In this way, most of the victims are discouraged by the costs and the efforts of an individual trial so they give up and no longer pursue their interests⁵⁵.

The class action allows plaintiffs "to aggregate similar claims that may be too small for individual trials and so the burden of litigation is shared among many, achieving a balance between the defendants' usually superior economic condition and the individual plaintiffs' relatively small claims"⁵⁶.

As class actions are usually extremely complex, the litigations implies high costs for the

53 For more details see H. L. Kaplan, W. J. Crampton, M. E. Shally, *op. Cit.* § 7.7.

54 See for example the impact of asbestos litigation over the industry in . C. Coffee jr., *op. Cit.*, p. 1400 and next.

55 A. Guégan-Lécuyer, *op. cit.*, p. 405.

56 J. F. Rice, N. W. Davis, *op. Cit.*, p. 416.

members of the class. The defendant will repeatedly assert the same defenses. “As a result, aggregating claims result in diminishing litigation costs”⁵⁷.

Moreover, in some countries such as Brazil, the state supports the class actions by excepting them from the fees that a usual individual claim undergoes. In Quebec, a special fund was created to financially support the class actions.

Furthermore, the class action has some benefits for the defendant as well, as he no longer has to defend a multitude of cases.

B. 3. Divergences in jurisprudence

Another advantage of the class action is that, at least for the cases within its scope, it eliminates the risks of divergent jurisprudence, considering the fact that all similar cases are brought before the same court and only one judgment is delivered.

In addition, considering the impact that such a decision has on society, it will ultimately act as a catalyst for the uniformization of legal practice by reference to other collective actions. Thus, the courts seized with with a class action will more likely be tempted to check the way in which other courts have solved similar situations because of the fact that the judgment they will deliver will be carefully analyzed by the community.

The same conclusion remains valid for the “two stages class action”. In this type of class action, after a judgment on the class action is pronounced, the individual claims brought by all members of the class are meant only to determine the amount of the damage suffered by each group member. All other aspects, such as liability of the defendant enter under the *res judicata* effect.

The strong points of the class action are extremely important from this perspective considering that a uniform jurisprudence undoubtedly contributes to an increase of public confidence in justice and, as a result, in the consolidation of the rule of law.

C. The weak points of the class action from the perspective of Article 6 of the Convention

The class action has been criticized as “being a collusive proceeding in which claimants' rights are sold out by attorneys seeking to insure their own fees”⁵⁸. Others say that “the aggregation of small claims into large class actions creates an overwhelming monetary risk and can coerce defendants to settle cases in which they have valid defenses”⁵⁹. Still, perhaps the most important problem raised by the class action from the perspective of Article 6 is one connected to the way in which the group is formed.

As we explained before, there are two possibilities to determine the group: the *opt in* method or the *opt out* method. If the *opt in* does not pose any particular problem, the *opt out* one does. The

57 J. F. Rice, N. W. Davis, *op. Cit.*, p. 423.

58 J. C. Coffee jr., *op. Cit.*, pp. 1344-1350.

59 J. F. Rice, N. W. Davis, *op. Cit.*, p. 416.

opt out implies a presumed consent of the victim to be a part of the group. If one does not expressly state that he does not want to be part of the group, the judgment given on the class action shall have a *res judicata* effect and he may not bring an individual claim before of a court anymore. No problems arise if all the victims of the class action are properly informed, but in most of the mass tort cases this has certain difficulties, as there is no way to determine who, for example, was exposed to a certain harmful substance. A general impersonal announcement through mass media is not enough, as it is impossible to determine whether it reached all victims. In this situation one may find himself bound by a judgment he had no knowledge about. If so, it is possible that the European Court of Human Rights will consider that there has been a violation of Article 6 of the Convention as no more real access to a court is granted.

This is why we consider that the *opt in* method is more suitable and offers a higher protection for the victims of mass torts.

IV. Situation of the European Court of Human Rights

Ten or fifteen years ago only few people would have taken into consideration the idea of submitting a class action before the European Court of Human Rights. This reality is justified by the fact that in 1999 the number of applications allocated to a judicial formation per year was 8.400, the number of applications pending before a judicial formation was 12.600 and the number of judgements was 177. However, this situation has dramatically changed. In 2011, the number of applications allocated to a judicial formation per year was 64.500, the number of applications pending before a judicial formation was 151.600 and the number of judgements was 1.157⁶⁰. It can easily be noted that the number of applications has multiplied more than ten times whereas the number of judges is fixed and it comprises, in general, the number of members of the Council of Europe⁶¹.

The increase in the number of applications is not without consequences. Constantly, the representatives of the European Court of Human Rights⁶² and other parties that follow its activity⁶³ have complained about the significant delays between the registration of the application and the final judgement (sometimes more than 8 years), the large amount of workload and the high level of expenses and waste of resources.

A. Development of the pilot judgement procedure

Given the importance of problems that need to be addressed, the European Court of Human Rights has been in search of effective remedies. In this context, a pilot judgement procedure has been developed, that can be used whenever a large group of identical cases derive from the same

⁶⁰These statistics are available at: http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF.

⁶¹ In 1999 the Council of Europe comprised 23 members, now it comprises 47 members.

⁶²<http://www.echr.coe.int/NR/rdonlyres/494676B6-727F-49FE-9158-17687F914D5D/0/ActesVersionEN.pdf>

⁶³<http://www.amnesty.org/es/library/asset/IOR61/005/2009/en/638dc70c-a50f-4bb9-a987-b13a18ad136a/ior610052009en.pdf>.

underlying problem⁶⁴. The idea behind this procedure is that the problem caused by systemic violations of human rights can be more easily handled at national level. In most of the cases the result depends on a change of the national law that can be considered by the Court an efficient remedy to the problem.

In concrete, after the European Court of Human Rights examines a certain number of cases and reaches the conclusion that there is a common cause of the violations alleged by individual applicants against a particular State, it will choose one of the applications in order to render a pilot-judgment and it will stop the proceedings for all the other applications. In this judgment the Court will analyze the existence of the violation of the Convention in the specific circumstances of the application and after establishing the cause of the violation under national law, it will identify possible, non mandatory remedies that the State should consider⁶⁵. If the State can successfully address the problem, the applicant in the remaining cases that were suspended will be in the position to choose between reaching a settlement with the State and accepting the national remedy.

Basically, the pilot-judgment aims at reconciling the interests of all the actors taking part in the procedure⁶⁶: the interests of the applicants in receiving compensation and stopping the violation, the interest of the State in preventing its conviction by the European Court of Human Rights and the interest of the European Court in diminishing the number of the applications.

In spite of the advantages this procedure, the European Court of Human Rights makes use of this instrument with prudence⁶⁷, as it appears to be some reluctance on the part of the Chambers to refer cases to the Grand Chamber⁶⁸. Certain criticism targeted at this procedure arose also from representatives of the European Court of Human Rights that question the competence of the court to express a view *in abstracto* and in advance on the consequences of the changes in legislation⁶⁹.

Analysing the results of the pilot-judgment on the numbers of applications pending before the Court in 2011, this procedure does not seem sufficient in order to compensate the increasing number of the applications that the European Court registers every year. This is the reason why the

⁶⁴http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf.

⁶⁵ P. Voyatzis, Dix arrêts importants dans la jurisprudence de la Cour européenne des droits de l'homme, available at : http://www.dsanet.gr/NOMIKO_VIMA_50_YEARS.PDF.

⁶⁶ E. Fribergh, Pilot judgments from the Court's perspective available at: <http://www.echr.coe.int/NR/rdonlyres/43C75D00-0F57-4176-8A7C0AE28DBD4EE8/0/StockholmdiscoursFribergh0910062008.pdf>.

⁶⁷ Case of Broniowski v. Poland, 22 June 2004; Case of Hutten-Czapska v. Poland, 19 June 2006; Case of Burdov v. Russia (no. 2), 15 January 2009; Case of Olaru and Others v. Moldova, 28 July 2009; Case of Yuriy Nikolayevich Ivanov v. Ukraine, 15 October 2009; Case of Suljagic v. Bosnia and Herzegovina, 3 November 2009; Case of Rumpf v. Germany, 2 September 2010; Case of Atanasiu and Poenaru v. Romania and Solon v. Romania, 12 October 2010; Case of Greens and M.T. v. the United Kingdom, 23 November 2010; Case of Athanasiou and Others v. Greece, 21 December 2010; Case of Dimitrov and Hamanov v. Bulgaria and Finger v. Bulgaria, 10 May 2011; Case of Ananyev and Others v. Russia, 10 January 2012; Case of Ümmühan Kaplan v. Turkey, 20 March 2012; Case of Michelioudakis v. Greece, 03 April 2012.

⁶⁸ E. Fribergh, *op.cit.*

⁶⁹ Judge Zagrebelsky and Jaeger in their separate opinion in Case of Hutten-Czapska, 24 April 2008.

former President of the European Court of Human Rights Jean-Paul Costa stated that class actions should be taken into consideration in order to efficiently deal with the workload of the court⁷⁰.

B. Possible development of the class action procedure

The pilot-judgement procedure and the class action are two different remedies that cannot replace one another. First of all, a class action is promoted at the initiative of people who allegedly suffered a violation of the Convention and not by the European Court of Human Rights as it is the case in the pilot-judgement procedure. Second, in a class action the European Court of Human Rights would determine whether there has been a violation regarding all the members of the class action and not only the particular case chosen by the court for the pilot-judgement. Third, the class action would trigger the conviction of the state whereas the pilot-judgement is meant to determine the State to remedy the cause of the violation. In order to find a solution for the latter, the State needs to cooperate with the Court. Lastly, a class action is being decided for all its members in the same time, while in the case of a pilot-judgement, all the other similar applications are being stayed until the State implements measures to remedy the violation.

The advantages of admitting a class action before the European Court of Human Rights are numerous. As it has been shown⁷¹, more than 50% of the Court's judgments in the last 50 years have been on repetitive cases and more than one quarter of 100.000 pending cases raise issues which are the subject of well-established case-law. A class action would permit the applicants the opportunity to group themselves and to submit their claims as a group to the Court in one case. This procedure would have as effect the diminishing of the number of applications, of the expenses both for the European Court of Human Rights and for the applicants and, in the same time, it would facilitate the burden of proof for the applicants while it would allow the Court to easily evaluate the real scale of the problem even from the beginning.

Another advantage of the class action is that it does not depend on the cooperation of the State in order to address the underlying problem. Convicting the State in a class action would also imply a very large expense for the State. Or, the experience of European Union shows that States are usually highly motivated to actively put an end to a violation of their obligations if they are under the financial pressure of a large sum of money that needs to be paid in case they do not respect European rules. This way, States would also be motivated to reach a friendly settlement with the members of the class action and also to solve the problem internally.

⁷⁰Seminar Ten Years of the "New" European Court of Human Rights - 1998-2008 - Situation and Outlook,, available at : <http://www.echr.coe.int/NR/rdonlyres/494676B6-727F-49FE-9158-17687F914D5D/0/ActesVersionEN.pdf>.

⁷¹J. Heine, Preliminary Comments of Amnesty International on Proposal to Add a Collective Complaints and/or Class Action Procedure to the European Convention on Human Rights Control Mechanisms, available at <http://www.amnesty.org/es/library/asset/IOR61/005/2009/en/638dc70c-a50f-4bb9-a987-b13a18ad136a/ior610052009en.pdf>.

An issue related to submitting a class action before the European Court is its compatibility with the procedure established by the Convention. Article 34 of the Convention establishes the right of individual petition for any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols.

In its interpretation of this article, the Court has constantly stressed that the right to file an individual petition is conditioned by the victim status of the applicant⁷². Following this established principle, the Court has argued that: “complaints must therefore be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of the Convention. Such persons must be able to show that they were “directly affected” by the measure complained of”⁷³. In other words, the system of individual petitions provided under Article 34 of the Convention excludes applications by way of *actio popularis*.

However, a class action and an *actio popularis* are two different notions that exclude one another. An *actio popularis* is a procedure that entitles any person or entity to act in the name of the collective interest in order to obtain a remedy whenever there is a violation of a public right. As a consequence, standing is not conditioned by the fact that the person who initiated the procedure suffered any personal damage, but it needs to prove the allegation of a breach of the public right. Or, the prerequisite of a class action is that each member has suffered a damage having the same cause and giving him the right to ask for a legal redress. It is true that in a class action the claimant acts as a group, but its aim is to compensate the personal damage suffered by its members and not to obtain a remedy for the group as a collectivity.

For these reasons, in order to analyze the status of victim in a class action before the European Court of Human Rights, a distinction needs to be made. There are two possibilities for the members of the class action to organize themselves in a class action: they can designate one or more representatives of the group or they can constitute an association to defend their rights.

In the first case, when the representatives file a petition on behalf of their members, there is no question that the condition demanded by Article 34 is satisfied because the characteristic of the group is a common claim of violation of the Convention. As long as the representative acts on the behalf of persons who claim to be victims of a violation, the European Court of Human Rights has always recognized the right to file a petition. For example, in the case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, the Court connected six applications submitted by inhabitants of different regions that were parents of families of Belgian

⁷²The notion of “victim” is interpreted autonomously and irrespective of domestic rules. More information available at: http://www.echr.coe.int/NR/rdonlyres/B5358231-79EF-4767-975F-i524E0DCF2FBA/0/ENG_Guide_pratique.pdf.

⁷³ Case of The Open Door and Dublin Well Woman v. Ireland, 29 October 1992, Series A no. 246-A, p. 22, § 44; Case of İlhan v. Turkey, 27 June 2000, 52.

nationality who applied to the Commission both on their own behalf and on behalf of their children under age, of whom there were more than 800⁷⁴.

In the second case, when members of the group constituted an association in order to defend its members rights, the status of victim of the association is more delicate. If the applicant association alleges a violation of Article 6 § 1 of the Convention and the association was a part to the proceedings brought by it before the domestic courts, the Court considers that the applicant association may be considered a victim⁷⁵. If the applicant association does not allege a violation of Article 6 § 1 of the Convention, it would be impossible to prove that the association was directly affected by the measure complained of. In this situation there are two options. There is the possibility to codify a new rule to the Rules of Court recognizing a standing of such association in a class action, similar to approach used for the pilot-judgment procedure⁷⁶. Another possibility, provided that the Convention is a “living instrument”, is for the Court to interpret Article 34 according to present-day conditions and to give an autonomously interpretation of the notion “group of particulars” that accepts a standing for associations constituted of members that are victims of a violation of the Convention and also members in the class action.

In conclusion, we appreciate that a class action before the European Court of Human Rights should be developed because it has the aptitude to prove itself as an efficient remedy for the inflow of cases that the Court deals with each year. The cooperation between the European Court of Human Rights and the States also implies borrowing instruments that have demonstrated their effectiveness at the national level. In reality, a class action succeeds in maintaining the core of the Convention untouched because it is grounded on the violation of human rights alleged by the members of the class action while it also gives the opportunity for the Court to assume a greater role and to deal with the problem at a larger scale.

⁷⁴ Case of Relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium, 23 July 1968, §1-2. Similar cases: Case of Fifty-seven inhabitants of Louvain v. Belgium, 5 March 1964; Case of Times Newspaper Ltd., The Sunday Times, Harold Evens v. The United Kingdom, 21 March 1975.

⁷⁵ Case of Gorraiz Lizarraga and others v. Spain, 27 April 2004, § 34.

⁷⁶ http://www.echr.coe.int/NR/rdonlyres/853E5F72-020B-4C47-B19F-F269B05D3F70/0/Article_61_Pilot_judgment_procedure.pdf.

Conclusion

The society is in a continuous change. Unless systems of law adapt to the new challenges, human rights and rule of law would remain abstract notions with no content. New modern judicial instruments have to be developed in order to face harmful events such as mass torts.

In the everlasting judicial battle between the responsible for the mass tort and the victims, the latter are most likely to lose if they do not act together in a common voice to stand their claims. As one voice, they equal the balance and still stand a chance.

Moreover, the image of flooded dockets becomes day by day a nightmare for the courts. Having to handle a tremendous number of claims, quality of justice is often sacrificed under the pressure of figures. Judges can no longer afford themselves the luxury to deeply reflect on cases brought to them as the pile of files rises over their heads.

In this context, class action brings hope to the victims and time for the courts by offering a procedural instrument that if built in a proper manner balances all the interests at stake.