

## ABSTRACT

The subject of the present thesis is the collective protection of private rights as a specific procedural appearance.

In the first place, we put forth the philosophy of collective judicial procedure. We contend that the system of enforcement of private rights utilizes the principles of spontaneous order, i.e. it builds on the finding that persons follow self-interests and, thus, exercise their rights. In contemporary society legal relations disintegrate into series of acts of low face value. As a consequence, a great part of rights lack corresponding (sufficiently intensive) individual interest and their procedural redress inevitably fails. Collective procedure pushes for relief through consolidation of interests on the principles of collective action. The value of the subject of the proceedings gets increased and economies of scale are achieved. We classify the aggregated interests into parallel individual interests (ad hoc grouped), general interests, which represent new quality on collective level, and public interest as a broadest category of general interest. On the basis of these conclusions, particular collective enforcement schemes are substantiated.

We analyze the collective procedure from the perspective of three criteria – the nature of the consolidator of interests (representative party), procedural position of represented persons, and structure of the collective proceedings. The representative party may be one of the members of the group of represented persons, association established to protect third persons' interests, public authority, or, in certain instances, also attorney. The represented persons may be granted a right to participate in the proceedings, but it is not a condition (however, in the later case, the represented persons should not be bound by the result of the proceedings). The claims can be automatically included in the proceedings whereas the group members, who do not agree with adjudication of their claims, may opt-out (opt-out proceedings), or group members can be required to individually enter the suit (opt-in proceedings).

The basic dichotomy of the collective enforcement mechanisms is the distinction between representative and group proceedings. In the representative proceedings, group members do not take direct part in the suit; proceedings are usually conducted by an association or public authority and its subject concentrates on enforcement of general (public) interest. By contrast, the group proceedings draw the group members in, the role of the representative party is frequently performed by one of the group members (attorney), and the

litigation is driven by a set of independent individual interests. Class action, as developed in the U.S., is a kind of opt-out group proceedings.

We inquire into the impacts of collective procedure on individual sphere from the due-process point of view (e.g. as concerns the opt-out and opt-in schemes), risks of the mass adjudication, and position of the court (litigation management). In these terms we research the information standard in relation to group members (individual notice as opposed to information through mass media), protection of passive group members, procedural measures to prevent collusion, supervision of the representative party's power to terminate, settle or otherwise dispose of the proceedings etc.

Attention is also paid to financing of collective procedure as a key factor of workability of particular regulations. Petty individual claims enforced in collective proceedings rarely motivate single group members to assume intensive litigation risks, and that is why the collective practice has to be externally stimulated. Various solutions can be contemplated, such as public subsidies to plaintiffs in group proceedings and support of associational activity. However, the easiest option is to cover the risks by attorney's contingency fees.

We describe seven legislative schemes that represent an illustrative sample of modern collective procedure: class actions in the U.S., Australia and Israel, opt-in group proceedings in Sweden, German model proceedings in capital market disputes and representative actions in Austria and France. Neither the historical context is left aside. We demonstrate the points of departure of contemporary attitudes to collective procedure on the examples of Roman *actiones populares*, formation of collective procedural standing in the 17<sup>th</sup> to 19<sup>th</sup> century England, adoption of associational actions in 19<sup>th</sup> century in France and, finally, the process of shaping the modern class action in the U.S.

Specific problems arise from international law of collective procedure. National regulations show extreme variability and recognition of foreign representative standing or group judgment is not a matter of course, as is usually the case of individual litigation. We underscore the activities of the European Union that serves as a platform for confrontation of national attitudes. We analyze the Directive 98/27/EC on injunctions for the protection of consumers' interests and inform of the projects on consumer collective redress and damages actions for breach of antitrust rules (whose intended part is implementation of collective procedural mechanisms by national legislators). The idea of collective procedural protection obviously gains momentum on the European level, and at least this is the reason why the Czech legislator cannot ignore the issue.

We criticize current provisions of the Czech Civil Procedure Code on collective procedure (§ 83(2) and § 159a(2)) for underestimating the problem and denying broad groups of persons from basic procedural rights by extending the res judicata and lis pendens effects indiscriminately. We split the application range of both these provisions into corporate matters heard in non-contentious jurisdiction, on one hand, and contentious litigation in the fields of unfair competition and consumer protection, on the other, and outline the requirements that must be met in order to keep the compliance with the due-process standard.

We conclude that the collective procedure is one of the demands for reconstruction of civil procedure in the 21<sup>st</sup> century. As a solution for the Czech Republic, we propose emancipation of associational procedural activity and, ideally, also adoption of a complex regulation of group proceedings that would enable any aggrieved party to sue on behalf of the entire group. The default model should consist in opt-in group procedure, nevertheless, in case of small claims, we do not exclude even opt-out mechanism.