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I met Ada Pellegrini and Juan Carlos Barbosa Moreira in Bahia in 2004 (IAPL Colloquium). While talking with them, I realized the strong connection between Europe - especially Italy - and South America as far as procedure was concerned. This is the reason why I would like to raise an issue that concerns both continents: is a class action a kind of representation or a kind of substitution? I would like to raise the question in English since the answer is a matter of language.

If it is a kind of representation, group members in a class action become parties to a civil litigation. In contrast, if it is a kind of substitution, they do not become parties. This was actually the question which was addressed to the working group I belonged to, and which was dedicated to 'parties and collective redress action', as part of the joint ELI-UNIDROIT project "From Transnational Principles to European Rules of Civil Procedure". The difficulty stems from a concept of representation which is wider at Common Law than it is at Civil Law. Consequently, the category of representative action may encompass class actions in Common Law systems but not necessarily fit the notion of collective redress actions in Civil Law countries such as Spain, Brazil or France. The expression of representative action is used in Northern European countries (the Netherlands, Belgium, Norway) that are closer to the Common Law tradition than to Southern countries. However, it creates some kind of confusion between a traditional representative action where the represented person remains a party and the new collective redress action.

In order to tackle the difficulty, I would like to have a theoretical reasoning. I would like to avoid two individualistic approaches of procedure through rights and economy based on a rational and isolated agent. I would like to see parties as connected people.

As a matter of fact, I have a relationist approach to procedure, and this implies significant implications not only for the parties but also for the analysis of class actions as representative or substitutive actions. Actually, in my definition, it is not enough to define a party as a member of a lawsuit. A party is the one who is part of a procedural relationship. To that definition, I shall add another concept: the concept of 'prospective party'. In other words, a specific person should be part of a lawsuit because his/her rights are at stake. In a representative action in a Civil Law sense, a party may be represented in court and remain a party to the procedural relationship. In a substitutive action, a prospective party who has rights at stake in a litigation does not become a party to the procedural relationship but only to the substantive relationship. A group member in a class action becomes a defendant's creditor.

I will first present the relationist approach to procedure and then the consequences of the analysis of collective redress action in relation to the ELI-UNIDROIT Project on European Model Rules of Civil Procedure (which has started in 2014 and should become public in 2019).

Part. 1. - The relationist approach to procedure.

The main idea of this approach is to analyse litigations as a set of legal relationships. It was developed by 19th-century German authors but should be revisited today. I will present a brief history of the relationist approach to procedure and then will show how it is possible to revisit it today.

1. - The traditional relationist approach to procedure.

Apart from the field of procedure, the relationist approach of law was initiated by Savigny (F. C. von Savigny, S*ystem des heutigen römischen Rechts* (8 vols., 1840–1849 ; *System of the Modern Roman Law* by

Friedrich Carl Von Savigny, William Holloway (translator), 2013 ; *Système de droit romain*, v. sur Gallica) who considered the legal relationship, « *rechtsverhaltnis* », as *the* key concept in law .

By the mid-19th century, Bülow affirmed that litigation was a legal relationship distinct from the substantive legal relation at stake, for example a contract or a tort situation *(Die Lehre von den Prozesseinreden*, 1868, § 1 s, p. 3). For this reason, he is considered as the founder of procedural science since his analysis lead him to show that procedure was distinct from substantive law.

A debate took place afterwards in Germany concerning procedural relationships. Bülow thought that procedural relationships were the ones between a judge and the parties, so that there was a public bond between them. At the end of the 19th century, Bülow was criticised by Kohler who suggested that procedural relationships consisted in the relations between the parties under the aegis of the judge (*Der Process als Rechtsverhältnis*, 1888).

At the outset of the 20th century, Goldschmidt said that this situation was vain (*Der Prozess als Rechtlage*, Berlin 1925) since parties had no obligations in procedural relationships but charges. However, such distinction between obligations and charges has not been used in the ELI-UNIDROIT project; the concept of obligation has hence been preserved without difficulty. As a result of this German debate, it seems that in Germany some professors have a relationist approach to procedure while others consider that it is not useful and that litigations are simply legal situations.

This debate also influenced Italian scholars: to name but one, Chiovenda kept the idea of procedural relationships, hence describing litigations as relations mainly between parties under the aegis of the judge. In France, Vizioz was in turn influenced by the latter Italian scholar and retained the idea of procedural bond, coining the term "*lien d'instance",* instance bond.

It is easy under this approach to define parties as members of a procedural relationship. But it is, in a way, too easy and not

satisfactory, since a party to a procedural relationship may well not have a good reason to be a party. It might be due for example to a simple mistake made by the claimant (Liza Veyre, *La notion de partie en procédure civile*, PhD France, 2016). Conversely, a person may have a right at stake in a civil litigation but feel reluctant to bring the action in court. Such is the case of substitutive actions. From that perspective, how shall we know who should be a party to this procedural relationship? A further concern is also related to a certain lack of content to the procedural relationship, which needs to be elaborated: what is its object, its regime, etc.? Last but not least, what choice between public procedural relations i.e. between judges and parties and private relations i.e. between parties under the aegis of judges? As a result, it is necessary to revisit the relationist approach to procedure.

2. - Revisiting the relationist approach to procedure.

Apart from the procedure itself, Savigny's relationist approach has been updated and revisited by different authors: Jennifer Nedelsky did so for Canada in 2011 and Alexander Somek for Austria in 2017. I tried to contribute my share for the French tradition in a book released two years ago (*La théorie relationiste du droit*, LGDJ, 2016). J. Nedeslky suggests adopting a three-step relationist method when assessing human rights for example: What are the legal relationships and interests at stakes? - What are the conflicting values? – Which solution best enhances the party's autonomy? (Jennifer Nedelsky, *Law's Relations: A Relational theory of Self, Autonomy, and Law,* Oxford University Press, 2011). Alexander Somek suggests that it is worth considering law, first, as a set of legal relationships and after, as norms, rights and institutions. He adds that in a relationship, one can imagine standing in for another person to solve a dispute. That is the role of procedural relationships (Alexander Somek, *The Legal Relations*, Cambridge University Press, 2017).

It seems to me that there are two sets of relationships in procedure, i.e. the public and the private ones. I share the point of view of both

Bülow and Kolher. The point is that, in each type of relationships, different duties, obligations, powers and rights do coexist. Over the 20th century, the idea has emerged that the principle of cooperation is obviously a consequence of the Franz Klein reform (the Austrian Code of Civil Procedure achieved by Klein, who served as Minister of Justice around 1900), as well as of the relationist approach (Bernhard Hahn *in Kooperationsmaxime im Zivilprozess ?*, Carl Heymanns, Cologne, Verlin, Bonn, Münich, 1983, p.1 cf. too R. WASSERMANN, *op. cit.*, p. 97 ff, the paragraph is entitled: « *Der Zivilprozess als Arbeitsgemeinschaft* » i.e. civil litigation is a team work). Such set of duties, rights of the parties and powers of the judge has to be balanced, which is the exact definition of the principle of cooperation. It appears to be the main principle of the ELI-UNIDROIT Model Rules.

Now, it is not enough to revisit the relationist approach. I need to give some content to the procedural relationship I'm talking about. It is important to specify that the parties to this relation may have capacity or not. Procedural relationships are tangible, not abstract in the Kantian way. In this line, we have to take into account the care approach, which means that weak people who have litigation capacity but cannot bring an action themselves have to be protected.

If we want to be as realistic as possible, we should consider not only the parties but also their rationality and emotions. This is what is called the Emotion Turn in philosophy and law. An American scholarship actually focuses on "Law and Emotion", with Martha Nussbaum and Peter Goodrich among the academics.

The main idea of the trend is not only that judicial reasoning involves emotion as much as reason but also that we need to take into account emotion in order to reach the best possible decision. However, emotions fluctuate over the course of the day and the place involved, which means in practical terms that they vary depending on the country and the period of time at stake. In ancient time, the goal of procedure may have been to calm down the judge

who might have felt upset with the dispute. The cultural approach of procedure should actually take into account the cultural construction of emotions. A test in the United States has shown that female witnesses who get angry while under examination appear less convincing than male witnesses experiencing the same feelings. Consequently, it may be said that emotion is gendered.

Emotions are channelled during the procedure, not only to keep them in check but also to reach the best possible solution to the dispute. Channelling emotions implies that a procedural process - which is a symbolic one - is to be entered into, such as a courtroom, the courtroom decorum, lawyers and judges' robes. In light of the above, digital proceedings will create difficulties; this is also a topic we discussed in Rome: robots as parties. So, I would suggest that procedural relationships as a whole establish a symbolic space between the parties, but not a physical bond.

A legal bound is not a physical bond; much to the contrary, it is a symbolic space between the parties. The goal is to have autonomous parties or to help parties be autonomous. Some legally capable people are just too weak and dependent, such as consumers or employees in the modern world. Hence, the representation device in the strict sense of someone bringing an action on behalf of another is not always sufficient. We need what Italian scholars call a procedural substitution.

Part. 2. - Relationist approach to procedure and the analysis of collective redress action in the ELI-UNIDROIT project.

The ELI-UNIDROIT project in Rule 1 provides a definition of a party:

(1) Parties to a civil action are all the persons by and against whom the action is being brought.

(2) Anybody who has the capacity to possess a right under substantive law may be a party in civil proceedings.

This is a double definition: a party is a member of a procedural relationship – called 'civil action' in the rule; additionally, a party should be a member of such procedural relationship if s/he has a right at stake in the case. In a precise sense, his/her rights are potentially concerned by the case. So, there is both a descriptive and an axiological definition of what a party is: the one who is a party and the one who should be a party.

The principle is that the person who has an interest to bring an action should be a party, since s/he has a prospective right.

From this theoretical definition, the concept of procedural parties leads to four typical situations:

- Some people should be parties since they have rights but they have no litigation capacity: they need to be represented;
- Some people may bring an action in the name of a superior interest, be it public or collective;
- Some people should be parties but do not take part in the proceedings; however, they could become parties: this is what we call intervention;
- Some people could be parties but they are not able to bring the action; their interests are nevertheless protected: this is what we call the mechanism of substitution.

Those four situations are covered by four mechanisms: representation of parties, public and collective interest, intervention of parties, and substitution of parties. I will only focus in this paper on representative actions and substitutive actions.

1. - Representation of parties.

In our Model Rules, a distinction is made between, on the one hand, the capacity to possess rights in civil actions and, on the other hand,

litigation capacity. The distinction is found all over the world under different names.

Rule 2 [Litigation Capacity of Natural Persons]:

(1) Litigation capacity is the capacity to exercise rights in civil actions.

(2) Anybody who has full capacity to exercise rights or obligations in their own name under substantive law shall be recognized as having litigation capacity.

(3) Anybody not within the scope of paragraph (2) must be represented in proceedings by a representative according to the rules of the applicable law.

This is especially the case of a legal person.

Rule 3 [Representation of Legal Persons]: Legal persons and other entities, which are parties, shall exercise their rights through the natural persons entitled to represent them according to the rules of substantive law.

Again, this is a very traditional solution, at least in Western law. The concept of legal persons includes "other entities" which can be e.g. trusts, partnerships or unincorporated associations. In the future, it may also include technical entities (e.g. robots) or natural entities (e.g. animals, rivers, trees) should they be granted legal capacity under substantive law.

An issue for the future is whether or not robots should be considered as legal persons. Again, that will depend on substantive law. It might be useful to find out who is behind the damage caused by a robot. It actually might be difficult to determine whether it is the producer, the owner or the user of the robot who will be held

liable. And what about wild robots, free of owners? One solution might consist in considering robots as legal persons, hence obliging owners to insure their robots accordingly. In a tort situation, the insurer would directly compensate the victim.

For the time being, I am not in favour of considering technical or natural entities as parties. I stick to my idea that a procedural relationship is a symbolic link involving a mixture of reason and emotion to get the best possible judgment, so it has to be a relationship between human beings. Even a legal person is created at the outset by a set of people; there are reasons and emotions behind such legal person.

A robot may have the ability to reason but has no emotions: a self-driving car recently killed some people in the United States and it showed no emotion whatsoever in doing so. In a near future, engineers might be able to incorporate the fear factor in a robot, thus preventing accidents, but in my opinion, it is going to be a limited and channelled kind of emotion and such emotion is not going to be transformed at court by procedural rules.

As far as animals or trees are concerned, I can understand they have emotions, they do suffer for example, but they do not reason and there is no possibility for them to symbolise their emotions in a courtroom. I would prefer to consider that natural and technical entities brought in court are objects of a lawsuit by or against the owner or a person who is of the opinion s/he has interest in the litigation. With regard to wild animals, trees or robots without owners (which might exist in the future), we will need another mechanism, such as the possibility for natural or interested associations to bring an action instead of natural and technical entities. It is not a matter of representation since such natural or technical entities will not become parties. I will come back on this point later on.

However, the New-Zealand parliament considers the river Whanganui as a legal person. Nature is a legal person in some

south-american countries (« *Pachamama* » in Ecuador, « Mother Earth » in Bolivia). In India, the High Court of Uttarakhand (case Modh Salim v. State of Uttarakhand, n°126 of 2014) stated the 20th of March 2017 that: "All the Hindus have deep Astha (faith) in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community ». So the director of the Namani Gange, the Chief Secretary of the State of Uttarakhand and the General Advocate of the State of Uttarakhand are « persons in loco parentis ». Thus, a river may be represented by designated persons as would be a child. Now, the concept of representative action in Common Law countries is larger than in Civil Law country. I will come back to this point afterwards.

2. - Substitution of parties.

The mechanism of substitution was discovered by Kohler (*in Succession in das Processverhältnis,* S. 296, 1888); an Italian book was published in Italy in 1942 on the topic (E. Garbagnati, *La sostituzione processuale*, 1942, paragraph 81 Italian Code of Civil Procedure: « Sostituzione processuale. Fuori dei casi espressamente previsti dalla legge, nessuno può far vallare nel processo in nome proprio un diritto altrui »). The idea is that a person - usually in a weak or a dependent situation - might be substituted by another one who is not a representative. A distinction is to be made between representation and substitution: in the mechanism of substitution, the one who brings the action is a party indeed, even though the interest of another person, a third party, is taken into account. The third party does not become a party. Substitutive actions exist in different countries: Art. 18 of the New Brazilian Code of Civil Procedure refers to law in general, and

not any longer only to statute law to make exceptions, so that case law may create a substitutive action[1]. It is interesting to point out that the Brazilian article in Portuguese refers to a substitutive action and the translation in English to a representative action[2].

The Italian CCP inspired us Rule 6 of the ELI-UNIDROIT project:

Rule 6 [Persons Entitled to Bring Actions]

Persons having litigation capacity must bring actions in their own name and on the basis of their own substantive rights unless either the rules in Chapter X and Y or a rule of substantive law permits otherwise.

This means that generally speaking, people will bring actions in their own name, although a substantive law may permit otherwise. For example, a derivative action will allow a minority of shareholders to bring an action in lieu of the corporation against the corporation's managers for their mistakes. Different kinds of indirect actions exist as well (e.g. "action oblique" in France).

Chapter X stresses another very important exception to collective redress actions. It actually highlights the fact that collective redress action gives standing to an entity to bring an action on behalf of group members although those group members do not become parties.

Rule [X1] Collective Redress Action
A collective redress action is an action which is brought by a qualified claimant on behalf of a group of persons who he claims

[1] I would like to thank Hermes Zaneti for this comment. See F. Didier e H. Zaneti, Curso de direito processual civil, 8° ed. 2013, pub. Podium, Brazil, chap. 6.

[2] Art. 18. « Ninguém poderá pleitear direito alheio em nome próprio, salvo quando autorizado pelo ordenamento jurídico. Parágrafo único. Havendo substituição processual, o substituído poderá intervir como assistente litisconsorcial ». This provision is translated in the English version (made by Alexandra Barros and coordinated by Teresa Arruda Alvim and Fredie Didier Jr.) by : Art. 18. « No one can claim another's right in his or her own name, unless so authorised by the law. Sole paragraph. In the case of the representative proceedings, the one represented may intervene in the action as an assistant ».

are affected by an event giving rise to mass harm, but where those persons are not parties to the action ("group members").

We avoided writing in the Rule that collective redress actions are representative actions. It would have created some confusion with the mechanism of representation we had previously used in the rules. I acknowledged that at Common Law the concept of representation is wider than it is on the Continent. Take the example of a legal representative: s/he may be the heir to the estate under Common Law (JC Gémar et V. Ho-Thuy, Nouvelles difficultés du langage du droit au Canada, éd. Thémis, Montreal 2016, pp. 488-491). So, under Common Law, it is possible to talk about representative action in lieu of class action in a very wide sense: this is not the notion we use in our Rule when mentioning representation since in this situation, the owner of the right remains a party. To be consistent and give only one meaning to the notion of representative action, we consider that it applies only to the situation where a party is represented in a civil action and remains a party. In a collective redress action, the party who brings the action is the actual party while group members do not become parties. So, s/he is not a representative party but a qualified claimant. This analysis entails the whole system of collective redress actions. This way of thinking allows us to have collective redress actions which fit in with the European categories, hence which are culturally acceptable tools. However, there is an on-going discussion to know if collective redress actions are substitutive

actions in Italy (Remo Caponi[3]), in France[4] and there could be debate in Germany as well, should class actions be implemented[5].

CONCLUSION. Collective redress actions are substitutive actions since group members do not become parties. It is a matter of efficiency. If group members were to become parties to the procedural relationship, they would interfere with the litigation. However, technically, group members are parties to the substantive relationship since they are the defendant's creditors. One possibility would be to have class actions with an opt-in system where group members might become parties to the litigation. In such a case, they would be represented by a qualified claimant, should the group member give him/her special mandate. That could be a good situation analysis as specific objections between a group member and the defendant are always raised (individual challenges are possible in French collective redress actions). Hermes Zaneti suggests that in the opt-in system, group members would have the choice between a representative action and a substitutive action, especially where a specific question that concerns the two of them[6] is raised. It must be said that there may be different kinds of substitutive actions according to the (more or less distanced) relationship, between the substituted person and the substitute (4 of them in Brazil).

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[3] **Litisconsorzio «aggregato» L'azione risarcitoria in forma collettiva dei consumatori,** Rivista trimestrale di diritto e procedura civile, 2008, p.819, n°14 : "La ricostruzione proposta esclude che l'attore formale possa essere qualificato come legittimato straordinario o sostituto processuale *ex* art. 81 c.p.c". Other Italian scholars analyse the Italian class action (art. 140) as a substitutive action (BRIGUGLIO, *L_'a_z_i_o_n_e_ _c_o_l_l_e_t_t_i_v_a_ _r_i_s_a_r_c_i_t_o_r_i_a_*, risposta n. 1. Più cauta sul punto la posizione di CONSOLO, in CONSOLO, BONA, BUZZELLI,_ *_O_b_i_e_t_t_i_v_o_ _c_l_a_s_s_ _a_c_t_i_o_n_:_ _l_'a_z_i_o_n_e_ _r_i_s_a_r_c_i_t_o_r_i_a_ _c_o_l_l_e_t_t_i_v_a_*, cit., VI, 4). R. Caponi's idea is that a qualified association to bring the class action is a formal party, not the real party and so it has no extraordinary standing to bring the action.

[4] See E. Jeuland, **Substitution ou représentation ? À propos du projet d'action de groupe,** JCP Générale n° 37, 9 Septembre 2013, 927 ; ***Retour sur la qualification de l'action de groupe à la lumière de la loi « justice du XXI° siècle »,*** *JCP 2017, 354.*

[5] Remark of B. Hess in Rome 2017 pointing out that ZZP parag 51 to 54 on Processstandshaft could be understood as a mechanism of representation or substitution.

[6] Discussions in Dubrovnik, May 2018, and F. Didier e H. Zaneti, Curso de direito processual civil, 8° ed. 2013, pub. Podium, Brazil, chap. 6, p.209, 235.

I would like to conclude on animals, trees and robots. I'm not in favour of allowing these entities to become parties, not because they are inferior to human beings, but because procedure involves reason, emotion and symbol, which are specifically human. I'm not in favour of considering a robot as a legal person for example. However, I think that all interests should be recognised in court. So, I would admit that someone get some legal standing to bring an action instead of an animal, a tree or a robot. It would be a substitutive action based on our Rule 6 requiring a substantive law to recognise it. These entities would not become parties but could benefit from the judgement as group members of a collective redress action. We could even imagine a specific collective redress action where animals, trees, rivers or robots would be group members. The action at stake would not be a representative action since natural and technical persons cannot be parties (even with a representative) but a substitutive action[7].

[7] Such popularis actions exists in Costa-Rica, Ecuador and Bolivia to defend Pacha Mama (Mother Earth) ; a collective redress action exists in France in environmental law since the statute of the 18th of Nov. 2016 see : M. Hautereau-Boutonnet et E. Truilhé-Marengo, Quel modèle pour le procès environnemental ? revue Dalloz 2017, 827.