Chapter 3.

HAS CLASS–ACTION CULTURE ALREADY HIT POLAND?

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Nowadays in a globalized world more and more conflicts arise. What can decision–makers do to improve the quality of conflict resolution, in particular to speed up the pace of justice? At the moment it is a signum temporis that if they do not want to be accused of doing little to develop the system of procedural law, they need to find out about solutions across Europe and even beyond. It enables decision–makers to identify solutions that can be adopted and adapted to suit local needs.

There is, however, a significant qualification to be made, i.e. that law reformers should be sensitive to the cultural context. Countries are different, legal cultures are different and further to this, court cultures differ. The previous papers inspire to reflect upon whether particular court cultures are conciliatory or litigative and search for an appropriate adjective. The comparisons demonstrate that neither adjective is accurate enough to describe the Polish court culture but it is much more litigative than conciliatory. Compared to other Europeans and Americans, we – Poles – exhibited what appears to be a much less committed approach to advancing our claims through legal channels. Having faced pervasive shortages under socialism we became individualists, competitors fighting for a slice of a finite cake (including strictly individualised protection afforded by courts). The American court culture seems much more litigative than the Polish one; sometimes we can also hear opinions that in the United States there is a "class–action culture" and, therefore, a litigation culture or almost a culture of abuse of litigation. At the pre–trial stage, the American court culture seems much more conciliatory.

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However, both the American adversarial legal culture (conflict–promotion culture) and the Polish culture prefer a confrontation approach to problem resolution, rather than consensus, which makes them (as well as other European historically evolved litigation cultures[2]) different from the Far–Eastern conflict reconciliation culture[3].

The term "legal culture" describes attitudes about law; it refers to "those parts of general culture – customs, opinions, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways"[4]. And the term "court culture" is generally held to denote "the beliefs and behaviours shaping 'the way things get done' by the individuals – judges and court administrators – who have the responsibility to ensure cases are resolved fairly and expeditiously"[5]. In my opinion, this term includes not only the courts' (judges', court administrators') attitudes towards resolution of cases. Court culture has more dimensions (levels). Also the parties' and their lawyers' behaviours and attitudes towards courts and resolution of cases make up an important part of court culture. Court culture is a relative concept, not only depending on various values and attitudes to courts and resolution of cases, but also being shaped by the laws introduced to govern resolution of cases and organisation of courts. Thus, there are three subjective levels that structure court culture:

- courts (judges, court administrators, laypersons, etc.),
- parties and their lawyers,
- law–maker[6].

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2 See e.g. W.H. Rechberger, *Economy and efficiency of civil procedure versus litigation culture – an Austrian perspective*, [in:] *Recent trends in economy and efficiency of civil procedure*, Vilnius 2013, p. 225 et seq.

3 See P. Gilles, *Civil justice systems in East and West 2007 plus – fundamental current reform movements and some speculations about civil conflict resolution systems of the future*, [in:] *The recent tendencies of development in civil procedure law – between East and West*, Vilnius 2007, p. 37–38.

4 L.M. Friedman, *The Legal System: A Social Science Perspective*, New York 1975, p. 15.

5 B.J. Ostrom, Ch.W. Ostrom, R.A. Hanson, M. Kleiman, *Trial Courts as Organizations*, Philadelphia 2007, p. 22.

6 See A. Piszcz, *Scales of Justice: An Introduction to Polish Court Culture*, [in:] A. Piszcz (ed.), *Court Culture – Contemporary Problems*, Białystok 2014, p. 17; A. Piszcz, *"Class Actions" in the Court Culture of Eastern Europe*, [in:] L. Ervo, A. Nylund (eds.), *The Future of Civil Litigation – Access to Courts and Court Connected mediation in the Nordic Countries*, Springer International Publishing, Switzerland 2014 (forthcoming).

Due to this division it is possible to create a classification of court cultures as court cultures in a real sense (attitudes and behaviours which take place in fact) and court cultures in a normative sense (attitudes and behaviours desired by law–makers). We cannot ignore the influence of changes in values (as well as the impact of numerous constitutional, economic, political and social factors in which courts operate) on court cultures, but, also legislation and its enforcement can be understood as an important factor determining court culture in its real sense. On the other hand, attitudes towards courts and resolution of cases may affect new legal concepts, in particular foreign legal transplants. Court culture manifests itself through aspects of the justice administration such as: procedural fairness, substantive fairness (including consistency of decisions in similar cases), access to courts (including court fees, compulsory or voluntary representation) and efficiency. If we have easy access to courts, fair procedure, fair and consistent case law, quick dispute resolution[7], then court culture could be perceived as high.

Traditionally, the Polish rules of civil procedure have allowed standard tools for increasing efficiency of justice such as, among others, joint actions and representative collective actions. On the contrary, a class (group) action is a particular novelty in Poland (although it is hardly new in the world). A class (group) action[8], as a method of collective redress, allows a collective claim to be made by the plaintiff on behalf of all those who are adversely affected (a class or a group). The plaintiff, as the representative, seeks redress for all the members of the group (who are not appearing in court) and not (only) for himself or herself.

Poland was not the only EU Member State to introduce group actions into the national law. The process of "class actionisation" of national laws has been initiated by many EU Member States, either at their own initiative or with encouragement from the European Commission which issued, among others, the Green Paper of 2008 on consumer

7 And slow, long–lasting court proceedings and bureaucratic ways of working are in conflict with the "I want it now" culture in which young generations are growing up today. See A. Piszcz, *Liability and sanctions in the legal culture – selected aspects*, [in:] M. Giżyńska, A. Piszcz (eds.), *Liability of public officers – selected issues*, Płock 2013, p. 20–21.

8 While talking about such Polish actions and not American ones, I prefer the term "a group action" instead of "a class action".

collective redress[9]. The idea of this process provoked a strong reaction demonstrating, inter alia, that "Britain will get a damaging 'class action' culture like the US under plans to help consumers get compensation when they are ripped off"[10], "allowing opt–out collective actions in the UK would open up the legal system to the worst abuses of the US class action culture"[11] and "business leaders in France have already expressed concern as they fear their companies, like their American counterparts, could become embroiled in long, expensive court procedures driven by groups of consumers"[12]. However, more recently, the EU Commission issued its Communication "Towards a European Horizontal Framework for Collective Redress"[13] accompanied by a Commission Recommendation[14] which recommends that all Member States have national collective redress systems based on a number of common European principles. The Member States should implement the principles set out in the Recommendation in national collective redress systems till 26 July 2015 at the latest. Therefore, the "class actionisation" in EU Member States is not going to be free anymore.

In Poland, on 17 December 2009 the Act on Pursuit of Claims in Group Proceedings was passed and it came into force on 19 July 2010[15]. The opt–in model of group actions was adopted. It differs in some respects from the common European principles defined in the Recommendation of 2013. Therefore, the new version of the existing national system of collective redress will need to be defined. The question arises whether we have already copied a class–action culture or we are going to have it after 26 July 2015 at the latest. Another question, then, is this: is a

9 Green Paper on Consumer Collective Redress, COM(2008) 794 final, available at: http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf (7 December 2013).

10 http://www.telegraph.co.uk/finance/financial–crime/9833128/UK–facing–litigation–culture–warns–CBI.html (7 December 2013).

11 http://ourlegalfuture.co.uk/collective–actions/ (7 December 2013).

12 http://www.commercialriskeurope.com/cre/2259/56/French–class–action–bill–moves–forward/ (7 December 2013).

13 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final. Available at: http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0401:FIN:EN:PDF (7 December 2013).

14 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law; OJ L 201, 26.7.2013, p. 60–65.

15 Journal of Laws No. 7, item 44.

group action phenomenon (going to be) a central feature of our court culture? First of all, it seems that even if one copies legal framework, it is impossible to copy a particular court culture. However, the opposite theory may be built on the old saying that "opportunity makes the thief". The introduction of a legal transplant may make a particular court culture transform from one "shape" to the other. New legal provisions can be wedded to processes of cultural transformation. But the idea that harmed persons will inevitably go to court to sue the infringer for damages where there is statutory regime allowing for group actions runs counter to my findings. Consumers understand that there are benefits to being part of a Groupon–esque program but they do not seem to apply the "there is power in togetherness" logic to their claims too frequently.

The Polish Ministry of Justice study for the 2010–2012 group actions claimed that 93 group actions had been brought into the Polish courts within the stipulated time frame (21 in 2010, 37 in 2011 and 35 in 2012)[16]. One–fourth of the resolved cases (41 cases) was rejected without ever reaching trial; 51 per cent were returned to claimants by the court without any further examination; and in one case a judgment was rendered in 2012 against the plaintiff. There are, on average, around 18–19 group action cases filed each half–year in Poland. However, three–fourths of them are rejected or returned to claimants. Also my 2012 enquiry for the 2010–2011 biennium unearthed a high level of rejections and returns. My research was based on information provided by the courts voluntarily to me, at my request[17]. Nearly four–fifths of the Polish courts, i.e. twenty three of the twenty nine commercial regional courts (in Polish *okręgowe sądy gospodarcze*)[18] and thirty six of the forty five civil regional courts (civil divisions in general courts), responded to my survey, while nearly 75 per cent of those surveyed (courts that responded to the survey) did not handle group litigation at all. Of commercial courts, only the Regional Court in Warsaw indicated they had received a group action suit (in 2011; it regarded unfair competition) and no respondents received such a suit in 2010. Last but not least, there were not any

16 http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki–2013/ (7 December 2013).

17 Statistical data were gathered in my projects No. 524/BMN and 538/BMN (University of Białystok).

18 Specialized commercial divisions in general courts; they handle "commercial disputes", i.e. disputes arising between businesses.

antitrust group actions. It is worth noting that there are several dozens of thousands of individual litigious cases being filed in commercial courts every year and over one hundred thousand of individual litigious cases being filed in civil courts every year. One might get the impression that the Polish group actions proved quite rare in their first years. Certainly, we cannot see the rise of the "class action culture" in Poland.

One may try to explain why there are not many successfully filed group action cases in Poland that could drive the Polish court culture in the direction of the "class action culture" in various ways. There is no lack of violations of individuals' rights amongst those explanations. One can argue that the potential members of the group are insufficiently accessible or insufficiently educated to make a choice about joining the group. They may be insufficiently interested in group litigation. The last explanation may be closely associated with the overriding argument that the Act of 2009 has not provided a set of tools sufficient for potential group plaintiffs. The adoption of the Act was motivated by, among others: ensuring consistency of judgments in similar cases; reducing costs; improving access to courts; increasing efficiency. These reasons for introducing group actions into the Polish legal system can be seen from the explanatory notes[19] to the Government's draft of the Act. On the one hand, some differences can be seen between the Government's original intention and outcome in the form of the Act and its application. On the other hand, the Act yielded some solutions incompatible with the above–mentioned reasons.

First, the scope for application of the group action regime is too narrow (this reservation does not apply to the standing to sue due to the fact that a group must consist of at least ten persons and such a threshold cannot be considered creating barriers to access to courts). The Act applies to consumer protection, product liability and tort liability claims. Group lawsuits seeking to protect personal rights are barred by the Act (Article 1 paragraph 2 *in fine*). This exclusion is a relatively broad one as it encompasses everything that might be referred to as personal rights, including health, freedom, esteem, liberty of conscience, name and/or

19 Available at http://orka.sejm.gov.pl/proc6.nsf/opisy/1829.htm (7 December 2013).

pseudonym, image, etc.[20] The "personal rights" exclusion was added to the Act at the last minute by the Senate. As a result, in 2011 the Regional Court in Warsaw[21] ruled inadmissible the group action concerning the collapse of a trade hall in Katowice that had taken place in 2006. The court decided that group action treatment was inappropriate because many members of the group sought to protect their personal rights, i.e. to hold the State liable for injury to person. In my view, due to common issues of fact and law, accidents such as a building collapse or a plane/train crash resulting in injuries to numerous persons are appropriate for a group action.

Second, some reservations can be held about the group representative (plaintiff). A member of the group (lead claimant) or a regional (municipal) consumer ombudsman[22] can act as the group representative. It is incomprehensible why such an important form of protection of market participants as group actions filed by consumer (non–governmental) organisations is seen as dispensable by the Polish law–maker. This limitation will have to be revoked to enable the development proposed by the above–mentioned Recommendation. The plaintiff (lead claimant or consumer ombudsman) must be represented by a barrister or legal advisor. It is obligatory unless the plaintiff is a barrister or legal advisor himself/herself. However, civil legal aid does not include the provision of civil legal services in the form of legal representation to a party to group proceedings.

Third, according to Article 2 of the Act, in cases concerning monetary relief, the amounts of individual claims, which make up the overall group litigation, have to be standardised. If the standardisation is not approved by all members of the group, group proceedings will not be allowed by the court. Article 2 paragraph 2 of the Act stipulates that the standardisation can be made in subgroups of at least two members of the group. It is disputable how to standardise claims and what can be results thereof in the light of the rule of full compensation typical for our legal culture which makes punitive damages (as opposed to damages

20 See Article 23 of the Act of 23 April 1964 – Civil Code (consolidated text Journal of Laws 2014, item 121).

21 Case No. II C 121/11; this ruling was confirmed by the Court of Appeal in Warsaw.

22 In Polish *powiatowy (miejski) rzecznik konsumentów*.

limited to the amount actually suffered) unavailable. Therefore, it is frequent that declaratory reliefs are sought rather than monetary reliefs. Such an action was filed in the Regional Court in Łódź by the Consumer Ombudsman of Warsaw against BRE Bank (a Polish unit of German Commerzbank)[23]. It gathered a group of over 1.2 thousand plaintiffs. In July 2013 the bank lost the case in the first instance. If declaratory reliefs are going to be followed by massive individual suits against the bank, it will undermine one of the goals of group action concept, i.e. not to multiply actions brought to the courts. Therefore, unclear rules on standardisation should be deleted, especially that currently the standardisation is a fiction, as the smallest subgroups may comprise two persons[24].

Fourth, while it is true that the court registration fee for group proceedings is, as a rule, 2.5 times lower than the court registration fee for individual proceedings (which is intended to raise the incentive for plaintiffs to aggregate their individual claims in a group action) and lawyer's contingency fees of up to 20.0 % of the total amount eventually won (if any) are allowed, it is unclear – and even doubtful – whether contingency fees can be charged to a losing defendant according to the "loser pays" principle. It seems that the court cannot charge more than the maximum fee amounts stipulated in the fees regulations in respect of individual actions[25]. In individual proceedings, the contribution of the losing party toward the fees for the winning lawyers has, as a rule, the highest minimum value of PLN 7,200.00 (approx. EUR 1,700) where the claim is over PLN 200,000.00 (approx. EUR 47,700). The court can increase it by up to six fold (here, to PLN 43,200.00) but that is dependent on such factors as: the nature of the case, lawyer's effort, his or her contribution to clarifying and/or bringing the case to a resolution. Moreover, practice shows (and it ought perhaps to come as no surprise) that lawyers want members of the group to pay the full amount for services in cash up–front.

23 Case No. II C 1693/10.

24 See also M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa 2011, p. 77.

25 See also T. Ereciński, P. Grzegorczyk, *Effective protection of diverse interests in civil proceedings on the example of Polish Act on Group Action*, [in:] *Recent trends in economy and efficiency of civil procedure*, Vilnius 2013, p. 38.

Fifth, at the request of the defendant accompanying his or her first procedural activity, the court can order a deposit of up to 20.0 % of the claim value to be paid in cash by the plaintiff within at least one month in order to secure the defendant's claim for the costs of the proceedings (Article 8 of the Act). The court's decision is appealable. If the plaintiff fails to pay the deposit, the court – at the request of the defendant – shall reject the statement of claim and oblige the plaintiff to recover the costs incurred by the defendant. It is unclear whether a deposit can take the form of cash–like instruments and how to treat ombudsmen as the group representatives in respect of a deposit (the law exempts them from payment of any court fees but literally a deposit is not a court fee). Fortunately, courts are not eager to order a deposit to be paid at all.

Sixth, the legal framework governing the course of group proceedings is complex. At the very beginning, the court holds an admissibility hearing. The determination of admissibility (the decision to examine the case in group proceedings) and the determination of inadmissibility (which means rejection of an application) are appealable. After the decision to examine the case in group proceedings is final and binding, the court orders an announcement in the press to be made. The announcement contains, amongst others, information on the possibility of joining the group and the time limit therefor of at least one month but not exceeding three months (Article 11 paragraph 2 of the Act). After the notices of joining are given to the group representative, the court specifies a time limit of at least one month for the defendant's objections regarding the membership of particular persons in the group or subgroups. The objections are made available to the plaintiff and the court specifies a time limit of at least one month for the plaintiff's answer. After the above periods of time the court decides the composition of the group. This decision is appealable. After the group is formed, the court examines the merits of the case. Unless the case is settled, it is pursued through to judgment. The complexity of group proceedings (long deadlines and many appealable decisions) makes application thereof undesirable and impractical in some respects for harmed persons. They do not want to be "stucked" in long–lasting proceedings. Only lower court fee may be an insufficient justification for choosing group action.

Group proceedings could be far more efficient and friendly from a plaintiff's point of view, if the procedural chain was shorter.

This chapter describes some disadvantageous or unclear provisions of the Act that make their application problematic and painful to courts and parties to the proceedings. It is easy to see why the adoption of the Act did not result at once in a "storm" of collective claims; the drawbacks of the Act contribute thereto. So concerned has the Polish law–maker been with the threats of the American "class–action culture" that too little attention has been paid to possible practical outcomes of the introduction of the Act. Instead, the concern was the threat of abuses of the use of group actions. So far, the Polish group actions have not constituted themselves as a cultural shift, even a shadow of a litigation culture. On the other hand, it does not seem possible to easily generate a culture of American style litigation in a society with Central–Eastern European cultural background. However, practical results of the current "class actionisation" processes will vary depending on the outcomes of the first "wave" of group actions. By that I mean that the first final judgments will have a strong influence on the occurrence of the next group actions or the lack thereof. Successful ones may result in the progressive development of group actions in Poland but not necessarily lead to "class action" culture in the American sense (as almost abuse of litigation). On the contrary, judgments in favour of defendants may easily result in potential plaintiffs' scepticism about group actions.

At the end of this paper, it is worth giving an account of conciliatory aspects of the Polish group actions regime. It is not in vain that the title of this part of the volume sounds provocative suggesting that class (group) actions unite litigation and non–litigation (conciliation) mechanism which makes them playing the role of "the icing on the cake" of litigation and conciliation cultures. According to Article 7 of the Act, at each stage of the group case the court may refer the parties to mediation. Moreover, it is possible to conclude a settlement in a group case if more than a half of the members of the group agreed and unless it is against the law or good morals or is aimed at circumvention of the law or is in gross violation of the interests of the members of the group.

Negative publicity, possibility of aggregated claims of hundreds, if not thousands, of individuals and an expensive lawsuit can be reasons for settling stronger than in the case of individual action. Therefore, although we associate class actions with litigation culture, in Poland they seem to be more "conciliatory" than individual actions. On the other hand, this increases the risk of speculative cases and so called "blackmail settlements". But so far, this risk has not materialised in Poland.