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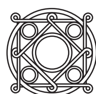

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Parte I

PROCESSO E COSTITUZIONE: L'EREDITÀ DI MAURO CAPPELLETTI

Giacomo Pailli

WALKING ON THE SHOULDERS OF A GIANT. THE HERITAGE OF MAURO CAPPELLETTI AND THE FLORENCE ACCESS TO JUSTICE PROJECT

Summary: 1. Introduction. The Access to Justice Movement. – 2. A Shift in Social Paradigms and the Emergence of New Rights. – 3. Enforcement and the Importance of Deterrence. – 4. A Class Action and Its Necessary Features. – 5. Conclusion.

1. When reading the General Report of the Florence "Access to Justice" project[1], three things, among others, struck the reader: (1) the project's breadth, not only in terms of participants, but for the variety and importance of the topics covered; (2) the modernity of Cappelletti's analyses and ideas; (3) the concrete and realistic approach of his work, never limited to theory but constantly striving toward making the world a better place.

As to the first point, the three waves of the Access to Justice movement that Cappelletti describes (legal aid, protection of diffuse interests, ADR), are each a dense and rich pool of issues and comparative exercises. "Access to justice" is a much broader concept than bringing those who are distant from 'justice' to the doorstep of a courthouse: it is a whole movement, a set of ideas and analyses that relates to and touches upon different subjects. It means removing economic, cultural and social obstacles that prevent people from having their 'day in court', allowing them to actually recognize that they have a claim and plead or defend themselves before a judge. It also entails shaping the procedural features inside the proceedings to allow collective and diffuse interests – as he calls them, "new rights" – to be brought under the scrutiny of a state-made justice. Finally, it explores beyond judicial justice, pursuing other means of dispute settlements, aiming at values different from adjudication, such as maintaining long-term relationships, conciliating

[1] M. Cappelletti *et al.* (eds), *Access to Justice*, Milano/Sijthoff/Noordhoff, 1978, four volumes.

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and bringing peace to indissoluble relationships, or simply providing answers to small value claims.

As to the second point, modernity, this is Cappelletti's signature element. Not only he had much diverse scientific interests[2], but his capacity of analysis was so deep and out of the box that his way of reading situations, the points of focus he highlighted, and the reforms and proposals he suggested, all have a direct impact on the legal assessment of our world today and on shaping answers to current challenges.

Finally, Cappelletti's attention for reform is a constant element of his thought, and a cornerstone upon which his entire work should be measured, at least in the area we are covering. We may recall, as a sort of manifesto, that «[t]*he desire to make the rights of ordinary people real … calls for far-reaching reforms and for a new creativity*»[3].

Surely he did not lack creativity when putting together a movement such as Access to Justice to craft a legal system «*equally accessible to all*» and leading to «*results that are individually and socially just*»[4]. For sake of time, I will focus my brief remarks on the so-called second wave, the protection of what he called 'diffuse' or 'collective' interests, and which evokes the concepts of «class action» and «private enforcement».

I will be, thus, reluctantly forced to leave at the boundaries of my inquiry the other two waves. The plea for an effective and not purely formal equality of arms, in its double dimension of overcoming both economic and socio/cultural obstacles, is still lacking a concrete answer[5]. The story of legal aid is not a lucky one. When the General Report was being written much still had to be done, but legal aid movements were on the rise in many countries. Today we are witnessing a major downsizing of existing programmes and a negative trend, partly due to the recent and on-going world crisis and, perhaps, partly because of a diminished focus on social rights[6].

[2] No citation is required here: it is enough having a look at the many other contributions in this *Annuario* dedicated to the work of Cappelletti.

[3] M. Cappelletti, B. Garth, *Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective*, in 27 *Buff. L. Rev.* 181, 1977-1978, p. 182.

[4] *Ibidem.*

[5] Once again Cappelletti's stress in this project is on concrete, substantial, effects – not on declarations and abstract principles.

[6] By no means, however, the topic has lost meaning and importance. Suffice to say that with few colleagues of the Institute we have just begun a project whose aims is specifically to bridge the gap between beggars and access to justice

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The third wave, on the contrary, with its focus on alternatives to judicial adjudication, is gaining momentum in the Western hemisphere – partly to ease an overburdened judiciary, partly recognizing the inherent limits of adjudication to settle certain kind of disputes. Sometimes, however, the shift to ADR seems to be not a cultural move but an imposition coming at the expenses of an effective "access to justice": such is the Italian experience, where several disorganised attempts of reforming civil procedure have reformed too little, trying, instead, to forcefully channel ordinary people's disputes in ADR schemes, curtailing – at least temporarily – their ability to go before a judge, while constantly rising the costs of brining a judicial action. This certainly seems not to be in line with «[t]*he evident need … to preserve the courts while creating other, more accessible forums*»[7] that Cappelletti advocated.

2. Coming to the core of my brief remarks, the first relates to the shift of social paradigms and its consequence on the law, particularly on procedural law. The French revolution, overcoming centuries of differentiation and particularism, handed to the XIXth Century and to the many codes an admirable construct, the unification of the subject of law (*soggetto di diritto*) under the one definition: «*Les hommes naissent et demeurent libres et égaux en droits*»[8]. However, rules and schemes that were built upon that paradigm, on the liberal idea of the bourgeois citizen owner of land, with a 'one rule fits all' approach, strive to adapt to today's relations, which have departed from this model.

Disputes more often arise between small and isolated employees, consumers or users on one side and complex multinational corporations on the other, hardly comparable one to the other. No doubt that one party cannot match the resources and power of the other, which often outweighs even public authorities entrusted with regulatory functions.

Cappelletti clearly understood this when he focused on the massification and serialization of society[9]. The loss of individuality and of speci-

[7] See M. CAPPELLETTI, B. GARTH, cit., *supra*, 3, p. 239. In basic terms, ADR should not be viewed as a compulsory substitute to judicial justice, but as a voluntary means of settling a controversy. Cappelletti particularly stresses the difference between composing a dispute and vindicating a right, showing that ADR is suitable only for the former.

[8] *Déclaration des Droits de l'Homme et du Citoyen de 1789*, art. 1.

[9] See, also, M. CAPPELLETTI, *Appunti sulla tutela giurisdizionale di interessi collettivi o diffusi*, in *Le azioni a tutela di interessi collettivi*, Padova 1976, p. 191: «*la realtà nella*

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ficity renders individuals groups, classes, and sets of homogenous rights or claims holder: this still remains the starting point of any policy-oriented analysis today. As he warned, «*this is not to say that individual rights no longer have a vital place in our societies; rather, it is to suggest that these rights are practically meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all*»[10].

As a by-product of this new massive dimension, Cappelletti put at the centre of his thoughts what he called the 'new' social rights, where "social" is to be intended also as "collective", such as environmental, health, discrimination and consumer related rights.

What at the time he did not have before his eyes is the unimaginable development of the Internet, with an increasing importance of privacy rights and the emerging concept of big data as an ultimate massification, with a complete loss of individual features, and a gradually increasing focus on human rights. Cappelletti would surely have paid attention to these issues – as well as to online dispute resolution, with its technically tremendous, yet not very much expressed, potential of being a cost/effective means of solving small consumer disputes[11].

3. There are many possible approaches to today's issues relating to the protection of new 'collective' rights, spanning from public enforce-

quale viviamo» è «*quella di una società di produzione di massa, di consumo di massa, di scambi di massa, di turismo di massa, di conflitti o conflittualità di massa (in materia di lavoro, di rapporti fra razze, religioni, ecc.) per cui anche le violazioni contro le quali la "giustizia" è intesa a dare protezione, sono evidentemente non soltanto violazioni di carattere individuale, ma spesso anche di carattere collettivo, che coinvolgono e colpiscono categorie, classi, collettività, sono, insomma, "violazioni di massa"*».

[10] M. Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, in 25 *Buff. L. Rev.* 643, 1975-76, p. 646.

[11] In Europe much hopes are put on ODR schemes as an alternative to collective remedies. It rests to be seen whether these are indeed of any help. See the elegant critique by G. Wagner, *Private law enforcement through ADR: Wonder drug or snake oil?*, in 51 *Common Market Law Review*, 2014, pp. 165-194. On the Directive 2013/11/EU on ADR for consumer disputes, see also M. Stürner, *ADR and Adjudication by State Courts: Competitors or Complements?*, in M. Stürner, F. Gascón Inchausti, R. Caponi (eds), *The Role of Consumer ADR in the Administration of Justice*, Sellier, 2015, p. 29, who concludes: «*Member states* [may] *no longer invest in their civil justice systems but rather privatize adjudication by way of seemingly cheap, but binding ADR mechanisms. Recital 15 of the ADR Directive reads like an explicit encouragement in that sense*».

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ment (e.g. *Ministère public* and regulatory agencies), mixed approaches, and private enforcement (e.g. modelled after the idea of private attorney general). As a rule of thumb, there should be no taboos. Cappelletti himself devoted much energy to the analysis of the various forms of enforcement of rights, encouraging scholars to explore "*a wide variety of reforms*"[12].

Without obscuring the need for public enforcement of public interests, public regulatory bodies lack resources and interest to act in any and all situations. In all those cases, empowering private parties to act could have the positive consequence of vindicating a greater public interest while the parties are asking for a private remedy. This is particularly the case when rights or interests are simply too diffuse or too small to allow for individual action, beside the initiative of infamous 'lunatics'[13].

Although practical difficulties abound, what seems clear is that the two models of enforcement, public and private, should be viewed as complementary, and not mutually exclusive, parts of an efficient and modern way of achieving an effective enforcement of rights, not satisfied of purely formal declarations.

In turn, an effective enforcement is linked to the deterrence. In quite elementary "law and economics" terms, in order to perform an effective dissuasive function, the sanction threatened or imposed should be at least equal to the gain that the 'wrong' conduct brings to the wrongdoer[14]. Rendering economical unfeasible or inconvenient for a business to engage in a certain practice means, at least, neutralizing all profits arising out of that practice.

[12] M. Cappelletti, B. Garth, cit. *supra* n. 3, p. 225.

[13] It is the often cited definition of Judge Posner in *Carnegie v. Household Int'l*, Inc., 376, 656, 661 (7th Cir. 2004), where he notes that, for low value claims, the realistic alternative to a class action is no action at all (the so-called *rational apathy*).

[14] See, e.g., the analysis of D. Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, in *Harv. L. Rev.* CXV, 2001-02, pp. 831-33. It is an element widely analysed, for instance, in antitrust law in the context of international cartels. See, e.g., J. Connor, *Latin America Cartel Control*, March 14, 2008, available at http://ssrn.com/abstract=1156401 (last visited November 28, 2010), p. 51 «*absent government fines far in excess of the current legal maximums, private rights of action are essential to achieving optimal (ex ante) deterrence of international cartels*»; J. Connor, *Effectiveness of Antitrust Sanctions on Modern International Cartels*, in *J. Ind. Compet. Trade* VI, 2006, p. 195. See, also, Z. Juska, *Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress*, in 7 *European Journal of Legal Studies*, 2014, pp. 128-136.

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Private enforcement through collective dispute resolution mechanisms can be, sometimes, the only way of deterring wrong behaviours and fostering a greater public interest, capable of reaching where public agencies and regulations fall short[15]. In the United States, all this is achieved through procedural devices such as class actions, discovery and treble damages. Taken together these mechanisms evoke the concept of the "private attorney general"[16], namely the idea that public interest can be advanced by means of private "egoistic" litigations. Not all that glitter is gold and a rightful deterrence might turn into an undesired over-deterrence: something that in antitrust terms will be said to have a "chilling effect" on competition[17], and in more general term is simply undesirable. No doubt these can be, and maybe too often are, abused by unprincipled plaintiffs and greedy lawyers blackmailing corporate defendants to obtain favourable settlements[18]. It is common knowledge that a number of US class actions settle, enriching mostly the lawyers[19], sometimes leaving the victims with nothing more than a coupon[20]. These are elements that must be constantly kept in the background while dealing

[15] As A. Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, in 51 *Am. J. Comp. L.* 312, 2003, pp. 330-31 shows, a repeat class action defendant may be the Government itself and its many possible illegal behaviours (as it appears to be the case of Brazil).

[16] See, S. Burbank, S. Farhang, H. Kritzer, *Private enforcement of statutory and administrative law in the United States*, in *Int'l Lis*, 2011, 3-4, p. 153 ss.; and H. Buxbaum, *The Private Attorney General in a Global Age: Public Interest in Private International Antitrust Litigation*, in *Y. L. J.* XXVI, 2001, p. 219.

[17] W. Wills, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, in *World Competition*, XXVI, 2003, pp. 9-14.

[18] See, e.g., F. Easterbrook, *Discovery as Abuse*, in 69 *B.U. L. Rev.*, 1989, p. 635; E. Dudley, *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, in 26 *U.S.F. L. Rev.*, 1991-199, p. 1892; C. Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, in 96 *Col. L. Rev.*, 1996, p. 1618. Contra, L. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, in 46 *Stan. L. Rev.*, 1993-1994, 1393.

[19] See S. Issacharoff, *Class Action Conflicts*, in *U.C. Davis L. Rev.* XXX, 1996-97, p. 805.

[20] See, e.g., C. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, in *UCLA L. Rev.*, XLIX, 2002, p. 991; J. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, in *Wm. & Mary L. Rev.*, XLII, 2000-01, p. 34.

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with class action, in order to inquire whether it is really *superior* ways of dealing with mass consumer's disputes[21].

Something should be added here. In a constantly more integrated and transnational society, issues and disputes easily transcend national borders, calling for a necessary global enforcement, if deterrence is to be achieved. This is a dimension that was not at the centre of Cappelletti's analysis, but which cannot be ignored today.

There was a time when U.S. courts seemed to play the role of a global court capable of redressing global wrongs, wherever happened and however characterized. This is not true anymore. Class action is being severally limited domestically and, as far as transnational disputes are involved, doors are being closed to foreign plaintiffs.[22] Something has changed in the role that U.S. judges think they should play in the world order. The hope is that the fading of one forum could signify a renewed global debate around the answers that might or should be provided to new transnational and global issues.

4. «*The new social, collective, "diffuse" rights and interests can be protected only by new social, collective, "diffuse" remedies and procedures*»[23] wrote Cappelletti, adding wittily «*the quest for these new remedies and procedures is, in my judgment, the most fascinating features in the modern evolution of judicial law*»[24]. Collective and class actions are a necessary means for granting a real and effective access to justice to mass and serial disputes[25]. This leads us toward the closing of these brief notes, and on the main feature that should accompany an effective class action.

[21] See, *e.g.*, the safeguards in the Brazilian class action, such as that the Attorney General is always notified of a new class action and invited to participate as a "*custos legi*". See A. Gidi, cit. *supra* n. 15, pp. 339-340.

[22] Symbols are decisions such as *Empagran*, *Morrison*, and *Kiobel*. We have explored this area in *Global Deterrence of Wrongful Behaviours and Recent Trends in Class Action and Class Arbitration: Are the U.S. Stepping Down as the World's Problems Solver?*, in *Civil Justice Quarterly*, 2014, pp. 266-280.

[23] M. Cappelletti, cit. *supra* n. 10, pp. 647-48.

[24] Id., p. 648.

[25] See H. Muir Watt, *Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation*, in *IPRax*, 2010, p. 111; e R. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, in 62 *Vand. L. Rev.* 1, 2009.

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We are referring to the dilemma between opt-in or opt-out participation mechanisms. By adopting a concrete 'access to justice' approach, the doubt is readily solved: members of a class usually do not take any action, they either do not opt-in nor opt-out. Hence, an opt-in class action is simply ineffective.

Italy's recently enacted class action law is a perfect example: amidst all its many defects, it was not a bad law. However, by featuring only an opt-in, quite burdensome, mechanism, it simply does not work in practice. If we want class action to work and to work and to produce an effective deterrent effect, we should no doubt embrace opt-out. Otherwise we only have another nice, but useless, joinder procedural device to handle disputes with 50/100 parties.

Opt-out should not be seen as a betrayal of the right to be heard, or as an unjustified corruption of traditional notion of *res judicata*, but as a shift from an individual to a social (i.e. collective) notion of due process of law[26]. According to Cappelletti, «*even the most sacred principles of "natural justice" must… be reconsidered in view of the changed needs of contemporary societies*»[27]. I would add that, sometimes, formal guarantees of an individual right of action can be instrumentally used as an obstacle to the effective enforcement of rights, and that it is natural justice that could require a deviation toward a collective dimension of legal actions. The sacrifice of individual autonomy is compensated by the practical consideration that in many instances individual action would not have taken place anyway (*e.g.* because the claim was too small to be brought) and by a shift from individual entitlements to ensuring that the class champion adequately represents the interest of the group[28].

[26] M. Cappelletti, cit. *supra* n. 10, p. 684.

[27] Id., p. 686.

[28] Another aspect that Cappelletti underlines is the plan of remedies, such as the need to have some component of punitive damages if deterrence is to be achieved (and I am aware that this concept is alien to European culture and much opposed). There are a number of other issues, which cannot find their place here, such as: standing (see Cappelletti, cit. *supra* n. 10, pp. 648-ff.), adequate representation, res judicata, accountability for private enforcement choices, contingency fees – not to mention cultural issues such as acknowledging a different function of judicial proceedings, and a different role for litigants, lawyers and judges when the interest in play transcend a private dispute. See A. Gidi, cit. *supra* n. 15, *passim*. See also Burbank, Farhang, Kritzer, cit. *supra* n. 16, p. 153 ff. See, also, Buxbaum, cit. *supra* n. 16, p. 222-ff. and critics in W. Wills, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, in 26(3) *World*

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Admittedly, class action alone is clearly not enough to ensure an effective private enforcement. Another sacred principle of Continental civil procedure is to be partially reinterpreted in light of the new social paradigms that we are facing. I am referring specifically to the principle of *nemo tenetur edere contra se*, which seems no longer capable of meeting all the needs of a modern culture of litigation[29]. Some forms of discovery, or putting it in a milder form, of disclosure of documents upon request by the other party, seems to be inevitable if levelling the playing field and achieving an effective protection of right is our goal. Disclosure (more often today, electronic disclosure) may be the only way, in many types of disputes, to reach evidence and documents that are jealously kept in a corporate's vault, forming what has been aptly called the "corporate DNA"[30]. Sometimes no discovery means simply that there is no way of bringing an action.

This need has not been overlooked by European lawmakers, which are starting to implement some form of disclosure in European instruments, for instance in the context of intellectual property rights in the framework of the so-called Enforcement Directive[31], or in the context of Action for damages in the Competition law setting[32].

Cappelletti was by no means an unconditional enthusiast of class action and seen it as «*an extremely valuable instrument only if accompanied by adequate controls*»[33]. It seems, though, that so far in Europe the main concern is preventing abuses, and not empowering individuals: as if we would build a big red stop button before actually having built the machine.

In the end, «*while critics of the class action have suggested that at-*

Competition 473, 2003, pp. 9-14. On punitive damages in general, D. Markel, *How Should Punitive Damages Work?*, in 157 *U. Pa. L. Rev.* 2009, p. 1383.

[29] See G. Hazard, *From Whom No Secrets Are Hid*, 76 *Tex. L.Rev.* 1665, 1998, pp. 1671-72.

[30] R. Marcus, *E-discovery & Beyond: Toward Brave New World*, 1984, in 25 *Rev. Litigation*, p. 644.

[31] It is not clear if, in practice, European judges have been apt to…

[32] Directive….. but very mild

[33] M. Cappelletti, cit. *supra* n. 10, p. 669. A. Gidi, cit. *supra* n. 15., p. 314 is right in noting: «*civil law systems can emplpy a class suit procedure but cannot transplant the American class action model into their system without substantial adaptation*» calling for a 'responsible transplant'. The A. also shows as Brazil «*has devised a system of remedies and solutions for the class action problem that reflect the specific needs faced by the society*». Id., cit., p. 315.

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torneys are the main beneficiaries of the class suit, they usually neglect to point out that at least the public interest is being represented (if the suit has merit) and that this representation is being provided without substantial cost to the public»[34].

5. Cappelletti was no foul. «*Recognizing the importance of… reforms… should not prevent us from seeing their limit*»[35],he wrote, as «[j]*udicial and procedural reforms… are not sufficient substitutes for political and social reform*»[36]. A purely normative stance, furthermore, would be unsatisfying, as «*rule change may become a symbolic substitute for redistribution of advantages*»[37], and «[s]*ymbols are used by the entrenched interests to assuage dissident groups, to give them the feeling that they have accomplished their objectives when in fact tangible results are withheld*»[38].

What is needed, thus, is to craft something that effectively grants access to justice to underrepresented individuals and groups and give protection to new massive rights and interests.

I did not have the chance of meeting Cappelletti in person and to get directly influenced by his passion and his wit, but I did have the privilege of growing up in what has been for many years his Institute.

Preparing for this contribution and the 10 years conference, much alike the man who discovered that he had been talking prose his entire life, I discovered that I feel part of the access to justice movement and resonate with many of the ideals and priorities that Cappelletti set long time ago. All still look very current today.

This is the single most valuable contribution that can be made to these writing in honour of the great Maestro: his heritage not only is modern, current, and up to date, but, we tried to show, is walking on

[34] M. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, in 73 *Mich. L. Rev*. 793, 1974-75, p. 799

[35] Cappelletti, cit. *supra* n. 3, p. 222.

[36] Id., p. 289.

[37] M. Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, in 9 *Law & Soc'y Rev.* 95, 1974, p. 149.

[38] J. Handler, *Public Interest Law: Problems and Prospects*, in *American Assembly, Law and the American Future* (Schwartz ed.), 1976, p. 110. As far as our Continental systems are involved, A. Gidi, cit. *supra* note 15, p. 346, is right in suggesting that «[f]*or a major legal innovation to occur, civil law jurists must first arrive at a consensus to change the 'science'*».

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many new legs. And in moving these steps, while facing great and intriguing challenges ahead, we should feel reassured, because we are walking on the shoulders of a giant.

Abstract

Il presente contributo si concentra sulla *second wave* del grandioso progetto *Access to Justice*, stimolando la riflessione sul tema generale delle azioni collettive e di classe in un contesto di paradigmi sociali ormai profondamente mutati e di insorgenza di nuovi diritti e nuove situazioni. Tutto ciò mostrando come il pensiero di Cappelletti intorno a tali argomenti abbia ben resistito al trascorrere del tempo, rappresentando ancora oggi il punto di partenza dell'analisi.

This paper focus on the *second wave* of the monumental project "Access to Justice", stimulating thoughts around the topic of collective and class actions in a context of deeply changed social paradigms and of newly emerged rights and situations. All, showing that what Cappelletti said decades ago has endured the passage of time and it is still today the starting point for any analysis.

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