DEBATES OVER GROUP LITIGATION IN COMPARATIVE PERSPECTIVE: WHAT CAN WE LEARN FROM EACH OTHER?

FOREWORD

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Modern societies all face in varying degrees the problem of possible liability for actual injuries, and prevention of threatened ones, to large numbers of people, with the injuries resulting from a single event or product or other common cause.[1] The sources of injury or threat can vary greatly—a tragedy such as a hotel fire or airplane crash; widespread distribution and use of a drug or other product such as asbestos, tobacco, or Fen-phen; claimed violations of civil or human rights; environmental pollution; and business practices such as alleged price-fixing, misleading statements affecting values of publicly held securities, insurance overcharges, and violation of consumer protection laws.

However parallel the problems, the responses of different legal systems have varied widely among nations, with varying emphases on class actions, group litigation by associations or unions, regulatory enforcement, social compensation schemes, and other approaches. In the United States the class action has for the last third of a century been the most prominent but by no means exclusive mode—and has been a focus of much controversy.[2] Only a few other nations have

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1. Six decades ago, two American legal scholars presciently observed:

> Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.

Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 686 (1941).

2. For an extensive, recent study of class action issues and illustrative cases in the United States, see DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000).

adopted the class action device even to a limited extent; and in many countries, particularly the civil law systems of continental Europe, resistance to the class action is strong, and responses to widespread-injury problems are sometimes limited.

How well legal systems respond, in whatever forms, to such problems is vital for reasons both concrete and philosophical. Effective national and international markets and financial systems require considerable transparency; perceived lack of the enforceable rule of law can hinder investment and growth. Unrighted wrongs can leave victims uncompensated, under-deter harmful conduct, and foster social resentment. Government enforcement, although essential, is sometimes inadequate due to underfunding, "capture" by targets of regulation, or worse. Also, public enforcement is often more effective at stopping or preventing conduct than at assuring compensation for harms inflicted, and individual rather than collective private enforcement is often not worth pursuing when losses to most or all victims are small—even if the harms are widespread, and the gains to violators (as with small overcharges to large numbers of consumers) great. At the same time, there is considerable concern for possible abuses in devices like the American class action, with some criticizing small recoveries to class members along with large fees to class counsel, "lawyer-driven" litigation, and weak suits forcing settlements because of their *in terrorem* value.[3]

The adequacy, or excessiveness, of current responses is the subject of mounting discussion and action. Those responsible for proposing revisions to federal courts' procedures in the United States recently considered but mostly shelved several possible changes and restrictions to class actions,[4] but may be on the verge of bringing forward new proposals.[5] Some scholars have debated the wisdom and feasibility of more or less American-style class actions in various European contexts;[6] and Scotland, Finland,[7] Sweden,[8] and Norway[9]

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3. *See id.* chs. 2-3, 15-16 *passim* (surveying American class action history, controversies, and reform proposals).

4. *See id.* at 25-37 (history of consideration of possible revisions to Federal Rule of Civil Procedure 23 from early to late 1990s).

5. *See, e.g.,* Lee H. Rosenthal, *Renewed Examination of Federal Rule of Civil Procedure 23 in 2000,* 69 U.S.L.W. 2163 (2000); *Push for Federal Rules Change Accelerates, but Tactical Approach Remains a Concern,* 69 U.S.L.W. 2296 (2000); *Judicial Conference Hones Proposal to Revamp Class Action Procedure Rule,* 69 U.S.L.W. 2457 (2001); *Judicial Conference Advisory Committee Approves Draft Changes to Class Action Rule,* 69 U.S.L.W. 2684 (2001).

6. *See, e.g.,* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry,* 6 TEMP. INT'L & COMP. L.J. 217 (1992); Per Henrik Lindblom,

have developed or are developing proposals—none as yet adopted—for class actions. Some forms of class action have been adopted in a few Canadian provinces,[10] in Australia,[11] and in Brazil. The South African Law Commission in 1998 produced a major report on recognizing class and public-interest actions.[12]

Yet despite the amount of interest in class actions, only fairly limited actual steps have been taken elsewhere in the American direction. The reasons for this reluctance are several and of different natures—doctrinal, cultural, economic, institutional. In civil law countries there is a powerful doctrinal emphasis on the individual nature of a legal claim of right,[13] going beyond a presumption in favor of proceeding on one's own—the rebuttable status of which in the United States underlies the American class action. Restrictive standing doctrines, governing who is entitled to bring various types of claims, can impede collective litigation by associations on behalf of their members.[14] The perceived extremes to which Americans have taken things, with large contingent fees and entrepreneurial plaintiffs' lawyers and punitive damages, can turn off those in whose traditions such practices are anathema.[15] Loser-pays rules governing liability for attorney fees, followed nearly everywhere but in the United States,

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Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure, 45 AM. J. COMP. L. 805 (1997).

7. *See* Lindblom, *supra* note 6, at 824 (mentioning proposals put forward by state-appointed commissions in Scotland and Finland).

8. *See id.* at 824-29 (describing, and discussing reactions to, 1995 Swedish report and proposal); Roberth Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Short Proposal,* 11 DUKE J. COMP. & INT'L L. 381 (2001).

9. *See* Norwegian Civil Procedure Commission, Proposed Rules Governing Group Action (provisional draft Feb. 2000) (visited May 11, 2001) <http://www.law.duke.edu/grouplit/papers/ProposedRules.pdf>.

10. *See* Garry D. Watson, *Class Actions: The Canadian Experience,* 11 DUKE J. COMP. & INT'L L. 269 (2001).

11. *See* S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective,* 11 DUKE J. COMP. & INT'L L. 289 (2001).

12. South African Law Comm'n, The Recognition of Class Actions and Public Interest Actions in South African Law (1998) (visited May 11, 2001) <http://www.law.wits.ac.za/salc/report/classact.pdf>.

13. *See, e.g.,* Cappalli & Consolo, *supra* note 6, at 269-70 (discussing individualistic concepts underlying Continental civil litigation).

14. *See, e.g.,* Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 COLUM. J. TRANSNAT'L L. 259, 272-82 (1995) (discussing standing doctrine, and its sometimes restrictive effects, in Italy before legislative reforms).

15. *See, e.g.,* Cappalli & Consolo, *supra* note 6, at 219-20 (discussing Italian and German reactions to American class action practices).

pose major problems for anyone who might contemplate being a class representative, and for those crafting class action proposals.[16] Civil law concepts of the judicial role, whatever impressions Americans may have of somewhat more "inquisitorial" approaches elsewhere, may not mesh readily with the kind of managerialism displayed by many American judges in processing class actions and fostering settlements.[17] And political opposition from those, such as some business interests who see themselves as likely to be disadvantaged by plaintiffs' use of a class device, can present a significant practical obstacle to adoption of class action proposals.[18]

A conference on these issues took place in Geneva, Switzerland, in July of 2000 with about ninety lawyers, legal academics, judges, and law students from over twenty nations in the Americas, Asia, and virtually all corners of Europe participating. The sponsoring organizations and those who contributed to support the conference are listed at the end of this Foreword; their assistance is gratefully acknowledged. The conference sought to confront issues of responses to widespread injury on a transnational basis, comparing approaches in different countries in the hope that all might learn from experience elsewhere. The aim was neither to promote nor to condemn the class action but rather to consider it along with other approaches, and persons with a diverse range of perspectives attended. The articles that follow, based on presentations at the conference, make its insights available to a wider audience.

Senior United States District Judge Jack Weinstein, in his keynote address, brought the perspective of America's premier complex litigation trial judge to bear on approaches to dealing with transnational widespread-injury problems.[19] Professor Deborah Hensler draws on the recently completed RAND Institute for Civil Justice study of American class actions[20] to present a balanced picture of cur-

16. *See, e.g.,* Donald N. Dewees et al., *An Economic Analysis of Cost and Fee Rules for Class Actions,* 10 J. LEGAL STUD. 155 (1981) (given general Anglo-Canadian background of loser-pays fee liability, considering several alternatives for class action fee rules).

17. *See, e.g.,* Parker, *supra* note 14, at 299-310 (discussing attitudes toward judicial power in Italy).

18. *See, e.g.,* Lindblom, *supra* note 6, at 829-30 (discussing reaction of Swedish industry and business to class action proposal).

19. *See* Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms,* 11 DUKE J. COMP. & INT'L L. 165 (2001).

20. *See* HENSLER ET AL., *supra* note 2.

rent realities of class and other group litigation in the United States.[21] From years of experience as Reporter to the United States Judicial Conference's Advisory Committee on Civil Rules, which has considered and proposed many changes in Rule 23 governing federal court class actions, Professor Edward Cooper raises questions that those in other nations considering the adoption or modification of a class device would do well to consider.[22]

Broadening from the American scene to approaches in other common law systems, Professor Neil Andrews discusses significant recent developments in the mother country, which has not yet developed the class device it originated to the same extent as have the Americans and some other Commonwealth nations.[23] Professor Garry Watson surveys what has quickly become a vigorous class action practice in some Canadian provinces,[24] while Australian practitioners Stuart Clark and Christina Harris examine the recent burgeoning of class litigation there;[25] both articles offer suggestions for others based on experience in the authors' countries.

Providing a transition to discussion of civil law systems, British barrister Christopher Hodges looks within his own country and across the Channel at mechanisms for resolution of large-scale disputes in the European Union, considering the reasons for the paucity of multiparty actions and the need or lack thereof for class litigation in Europe.[26] Also looking at EU law as well as German national practice, Professor Harald Koch discusses group litigation devices and prospects in different European systems and in various fields of substantive law.[27] His fellow German now teaching in Switzerland, Professor Gerhard Walter, considers obstacles to American-style class litigation in continental systems; he goes on to assess the several alternative approaches used in Switzerland and to some extent Ger-

21. *See* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation,* 11 DUKE J. COMP. & INT'L L. 179 (2001).

22. *See* Edward H. Cooper, *Class Action Advice in the Form of Questions,* 11 DUKE J. COMP. & INT'L L. 215 (2001).

23. *See* Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions,* 11 DUKE J. COMP. & INT'L L. 249 (2001).

24. *See* Watson, *supra* note 10.

25. *See* Clark & Harris, *supra* note 11.

26. *See* Christopher Hodges, *Multi-Party Actions: A European Approach,* 11 DUKE J. COMP. & INT'L L. 321 (2001).

27. *See* Harald Koch, *Non-Class Group Litigation Under EU and German Law,* 11 DUKE J. COMP. & INT'L L. 355 (2001).

many for responding to mass-tort problems.[28] But showing that class actions are not inconceivable in civil law systems, Judge Roberth Nordh gives background on changes creating perceived need for a class device in Sweden and a proposal aimed at bringing it into existence.[29] Professor Michele Taruffo, one of the world's preeminent scholars of comparative procedure, concludes this issue with an elegant overview of developments, purposes, and current issues concerning group litigation in both common and civil law systems.[30]

28. *See* Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland,* 11 DUKE J. COMP. & INT'L L. 369 (2001).

29. *See* Nordh, *supra* note 8.

30. *See* Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective,* 11 DUKE J. COMP. & INT'L L. 405 (2001).

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