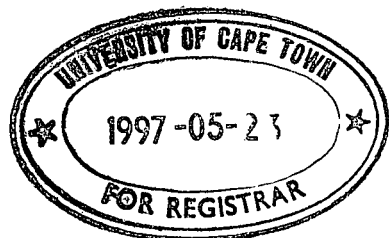


LLM Dissertation:

**Class Actions Within the
Field of Environmental Law**

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I INTRODUCTION

In recent decades an awareness of the need to protect and conserve the environment has spread world wide. Today, environmental law is an important issue of every government and legislature, as well as a concern of many individuals and environmental groups. Technological and industrial development rule today's societies in growing dimensions. The increasing 'massification'¹, significant for westernised countries, also involve mass accidents and widespread environmental damage or pollution. A single factory, or for instance an oil refinery, can cause toxic fumes polluting the air, and thus causing significant harm to people and the environment. Massification can produce dangerous living or working conditions which demand the mass to become the focal point of change. In general, environmental law has developed a distinct public law character, concerned to protect the environment as a public good. However, civil litigation has some impact on this branch of law as well, either for its direct enforcement or for the redress of environmental and personal damage. With the rise of environmentally concerned individuals as well as associations, and with the increase of mass disasters or man-made hazards² adequate remedies have to be found. Out of such incidents, affecting many people either directly or indirectly, new and complex legal situations emerge. Thus, class actions and actions in the public interest have become an important issue in many countries.

This paper shall discuss the development of such class actions and the problems accompanying it, focusing in particular on the environmental law field. It will be demonstrated how this phenomenon, particularly strong in the United States, has been approached in the legal realm of different countries, one amongst them the Indian case of 'social action litigation'. Eventually, the situation in South Africa, especially in the light of the new Constitution and the new class action device³, shall be discussed.

¹As this progress of modern civilisation is called by M Cappelletti *The Judicial Process in Comparative Perspective* (1989) 25.

²Such as Bhopal, Chernobyl or asbestos cases.

³The interim Constitution Act 200 of 1993 as well as the final Constitution, adopted in May 1996.

II BACKGROUND ISSUES OF CLASS ACTIONS

1 Access to Justice

It could be questioned whether civil remedies for the redress of damage caused to the environment and to individuals are necessary, since governmental agencies and officials are entrusted with the enforcement of environmental law. Yet time has shown that governmental enforcement has not been particularly successful in the past in reducing pollution. There are several reasons for this failure. To a certain extent public agencies as well as governmental environment-specialists generally have to advocate the interests of the public at large, but often are too dependent on political branches and ideologies, so that the voices of concerned environmentalists or of harmed individuals remain unheard⁴. Furthermore, the social and industrial progress often is ahead of according legal implementation. Also environmental law is a reaction to occurring developments and modifications. An immediate impact on situations can be - in part - better achieved by litigation. In the field of civil litigation, however, only limited remedies are to the individual's disposal. Traditional civil law procedures are based on claims of one individual against another in an adversarial system. Though especially in the field of environmental damage very often several or many individuals with similar claims are affected. Such collective problems seem to call for collective legal actions.

Another aspect arises with the economical feasibility of environmental litigation. On the one hand environmental damage can be substantial in a total amount, on the other the individual's damage may be small in amount. Thus, in many cases a civil suit initiated by an individual appears to be too expensive, time consuming and complicated. The power position of the parties involved - an individual plaintiff with limited financial capacity in contrast to an industrial giant as defendant - can be deterrent as well, so that the isolated individual might be reluctant to take legal action against the wrongdoer. The proof of causation as one example can also be mentioned in this context which in many environmental cases turns out to be almost impossible, or at least often involves special knowledge and expertise. However, more practical barriers to effective access to courts emerge from the problem of counsel fees which can be high and not afforded by the poor, or only inferior counsel to that of the wealthier adversary can be retained. In addition court costs

⁴M A Rabie et al *Implementation of Environmental Law* (1992) 120 who point out that public bodies' primary mission can even be in potential conflict with conservation.

are often a further financial burden which cannot be carried by an individual. Such barriers as well as the growing need for expert assistance not only in environmental cases pose problems which cannot be longer unconsidered. As a consequence of these barriers not many cases are brought to court, and the wrongdoers may be tempted to fail to invest in protective measures in order to save costs - knowing that they can continue the polluting activity. Even if an isolated victory could have been achieved this would hardly deter a mass polluter. Furthermore, environmental conservation as a special concern of individuals or groups does not always mean that such people are personally adversely affected. Environmentalists often try to achieve a goal in the public interest rather than based on only personal interests. The destruction of the ozone layer for instance affects the world-wide population and environment and not only some individual's rights. Traditional civil procedure has shown to be inadequate for such claims in the public interest.

However, all those problems have led to a general movement in several branches of the law, beginning in the early 1970s, to make access to justice reality. It has been recognised that guaranteeing rights to the individual affords the possibility of enforcement of such rights, and that people's rights often have been practically denied, leaving it impossible for poor, uneducated or lay people without legal knowledge to bring their case to court. This realisation calls for reform projects. Indeed, the idea of access to justice has been affirmed as an essential criterion of a modern conception of a welfare state⁵, acknowledging that access to justice should no longer be denied to its victims as the result of ignorance, poverty and rudimentary legal remedies. The principal targets of this movement, thus, have been the economic and procedural obstacles as well as the organisational obstacle which means that a transformation of traditional rules and institutions of procedural law has to be achieved so that certain 'collective' or 'diffuse' rights and interests will find adequate protection. The following section shall explain the issue of such rights.

2 Diffuse Interests and Rights

The modern welfare state and its society have developed social rights which may bring about benefits and advantages for not only the individual but mainly for large categories of persons. Yet, it also produces situations in which a single human

⁵cf M Cappelletti 'Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform' (1992) 109 SALJ 27.

action can be prejudicial to large numbers of people. For example, a large factory pollutes a river or the air; such activity can potentially damage a large and undefined number of persons. Out of such relationships in modern society not only social rights for categories of persons but also group and collective interests emerge, such as the interest in clean air. In terms of the access-to-justice movement such rights or interests cannot find protection in court since according remedies are not always available. Often such public interests are only protected by the government. Furthermore, traditional legal doctrine used to sharply distinguish between private and public rights, only the former capable to be claimed by individuals in civil law suits and the latter represented by the state as *res publica*⁶. In consequence the traditional doctrine of standing attributes the right to sue either to the private individual who 'holds' the right or to the state itself. With environmental issues at stake such distinction becomes problematic. Either such interests or rights do not 'belong' to any individual in particular or individuals own only a significant portion of them⁷. The denial of justiciability of collective and diffuse interests 'represents an offence to the most vital values and exigencies of our epoch'⁸. Thus, the private-public model appears to be inadequate for maximising the enforcement of all rights.

It is out of these issues that class actions and public interest actions are becoming more and more popular. The former is a device for a group, a class or an individual to represent a class with the aim of protecting their common interests, the latter is a device for an individual or a group to protect the public interest and not only personal private interests.

Yet, as demonstrated above, the distinction between public and private interests is not always possible. In the example of pollution so many people can be affected, that the personal interests actually become a public interest, or a person's interest can be the redress for damage to his or her health and simultaneously in the prevention of pollution (so that no further damage will occur). Clean air or a clean river can also be in the interest of an environmental group or association which pursues the aim to conserve the environment and thus does this for the benefit and in the interest of the public. Such associations or organisations may seek redress

⁶T P Van Reenen 'Locus Standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective' (1995) 2 *SAJELP* 122-123; C Loots 'Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation' (1987) 104 *SALJ* 132.

⁷Cappelletti (n 1) 273.

⁸ibid 274.

for environmental damage in a civil court. The notion of diffuse interests though concerns the opposite of concrete individual interests, such as property rights. It is characterised by the fact that potentially every citizen (or each member of a large class) is involved. Furthermore, the diffuse interest of environmental protection is connected to the notion of diffuse damage: damage to the environment which does not (yet) simultaneously involve damage to property or personal injury. It becomes clear that such diffuse damage is closely related to individual health interests, which are private interests, and cannot be strictly allocated to private or public law.

The issue of class actions is closely related to the one of actions in the public interest. Although this paper deals with the former issue, the problem of actions in the public interest shall be discussed in short, and further expositions in this paper might at some stages refer to this device as well.

III PUBLIC INTEREST ACTIONS

1 General Features

In a public interest action the litigant acts on behalf of the public at large or a segment of it. This stands in contrast to the class actions in which the litigant (an individual or a group) purports to represent a particular individual or class. It could also be distinguished from actions brought in the public interest with the plaintiff's primary intention to claim relief in the public's interest and actions based on a public right which is brought in the plaintiff's own interest but can also affect the rights of others⁹.

A person seeking relief in the public interest may not have a higher interest than other members of the public or be personally adversely affected. All common law and civil law jurisdictions though require a person seeking redress in a civil law suit ~~to have standing or *locus standi* to be able to find protection of his or her rights.~~ In other words, the right of action is usually attributed only to the 'holder' of the substantive right in issue. Only Roman law knew the *actio popularis* for a particular group of actions according to which a person could claim relief in the public interest without having shown that he or she personally was adversely affected by the wrong complained of¹⁰. In the rise of environmental law and the conservation of

⁹Van Reenen (n 6) 122-123.

¹⁰South African Law Commission *The Recognition of a Class Action in South African Law* (1995) 7.

nature as well as in the general movement of access to justice this type of action has gained significance again. Yet, it is the problem of procedural standing which for a long time was an obstacle to effective protection of the public interest. Thus, activities affecting the environment could not be effectively protected through private claims. In order to address this problem, however, several countries have relaxed the *locus standi* requirement.

2 United States of America

The most open to the reintroduction of such actions have been the United States with their citizen action in the public interest as a useful tool for controlling administrative agencies and especially in the environmental field in aiding the enforcement of legislation. There exists environmental legislation incorporating citizen suit clauses according to which all persons for the purpose of enforcing the provisions of the particular statute are granted standing. At state level the Michigan Environmental Protection Act of 1970 is to mention which grants the right of enforcement of the Act to **any** member of the public. Under US federal law the National Environmental Policy Act 1970 as well as the Comprehensive Environmental Response, Compensation, and Liability Act 1990 (CERCLA) contain such citizen suit clauses. A further relaxation of the standing requirement has been granted by the courts, whereas only a minimal personal interest is required to found standing in environmental matters¹¹, and where an organisation sues on behalf of its members it is required to plead the interests of its members¹².

3 England

Similar to the US courts the English courts have accepted a 'sufficient-interest' which is no greater than that of any other member of the public. However, locus standi is still a matter of pure judicial discretion, dependent on the nature of the remedy sought¹³. A breakthrough has been created in the judgment *R v*

¹¹*United States v Students Challenging Regulatory Agency Procedures (SCRAP)* 412 US 669 (1973), although the later judgment *Lujan v National Wildlife Federation* 497 US 871 (1990) indicated that the US courts still cling to the requirement of actual injury or threat thereof to grant standing; cf South African Law Commission (n 10) 10-11; Van Reenen (n 6) 134.

¹²*Sierra Club v Morton* 405 US 727 (1972).

¹³Van Reenen (n 6) 137.

*Inspectorate of Pollution, Ex parte Greenpeace Ltd*¹⁴, in which the applicant's standing to challenge ministerial decisions about the licensing of the THORP nuclear plant at Sellafield has been recognised. It has been held that the organisation's standing was significant, along with its status as a responsible, respected body with a genuine concern for the environment¹⁵. Yet, it also has been held that 'it must not be assumed that Greenpeace (or any other interest or pressure group) will automatically be afforded standing in any subsequent application for judicial review in whatever field it (and its members) may have an interest'¹⁶. Thus, the standing requirements have been relaxed, but a certain hesitation of the courts towards actions in the public interest can still be noticed. Moreover, this case does not constitute a secure citizen suit. However, private prosecutions in terms of environmental statutes are becoming more common as well: for instance the Prosecution of Offences Act 1985 follows a more liberal approach¹⁷ in that s 3(2) provides that it is not necessary for an individual to show that he or she has any personal interest in the outcome of the prosecution or that he or she has been injured by the crime.

4 The Netherlands

The Dutch law states a further example of the European approach. After two landmark cases in Environmental litigation¹⁸ the Collective Actions Act 1994 has been introduced, codifying the approach of those two cases, that the plaintiff's right to sue is justified solely on the ground of combining the diffuse ecological interests of citizens in pursuit of efficient legal protection. In other words, it is sufficient that there is (possible) damage to the interest of environmental protection or to the environment and that the plaintiff organisation's object is environmental protection. Interestingly this approach leads to the fact that even ecosystems, represented by legal persons with the 'right' description of their object and purpose, have standing

¹⁴[1994] 4 All ER 329.

¹⁵N Hawke 'Variation of Radioactive Discharge Consents and *Locus Standi*' (1994) 2 *Environmental Liability* CS53.

¹⁶*R v Inspectorate of Pollution, ex parte Greenpeace Ltd* (n 14); G Betlem 'Standing for Ecosystems - Going Dutch' (1995) 54 *Cambridge Law Journal* 158-159.

¹⁷Van Reenen (n 6) 137-138.

¹⁸*Die Nieuwe Meer* HR 27 June 1986 [1987] NJ 743 note Heemskerk; *Kuunders* HR December 18, 1992 [1994] NJ 139 note Scheltema and Brunner.

to sue under Dutch law¹⁹. In general it can be stated that the important criterion for admissibility is the possibility of 'bundling' of interests which leads to 'effective' or 'efficient' legal protection²⁰. The Dutch approach is more generous compared to the still hesitant approach of the English courts.

5 South Africa

In the case of South Africa public interest actions have until recently been virtually unknown. In general a plaintiff or applicant has to demonstrate a direct personal interest in the relief claimed²¹. More in public law than in private law this prerequisite has given difficulties, since a litigant's interest may sometimes be more in the public than just a personal interest, and he therefore might be unable to meet the direct interest requirement. In the judgment *Patz v Greene & Co*²² a rule has been developed, which said that where a statute was enacted in the interests of a particular class of persons, any member of that class could take action to enforce it (without personally being adversely affected), and where a statute was enacted in the public interest, any member of the public who could show that he was adversely affected by non-compliance with it would have *locus standi* to enforce it. This rule has been applied in many cases where an applicant sought to enforce a statutory provision, also in the recent judgment *Verstappen v Port Edward Town Board & others*²³, where it has been held that although the Environment Conservation Act 73 of 1989 intended to operate in the interest of the public at large, a party seeking to interdict a local authority from unlawfully operating a disposal site was required to show that contravention of the Act has caused or is likely to cause her special damage. The restrictive approach of South African courts in regard to *locus standi*, in particular in the context of actions in the public interest, also in relation to

¹⁹Betlem (n 16) 163.

²⁰P Bierbooms & L De Vries 'Collective Action and Environmental Interests: The Situation in the Netherlands' (1994) 2 *Environmental Liability* 111-112 with the note (fn 5) that the Hoge Raad determined that 'ecological interests' are especially suitable for 'bundling' since 'these interests affect all citizens, but are difficult to represent individually'.

²¹see for instance *Nasionale Party Suidwes-Afrika v Konstitusionele Raad* 1987 (3) SA 544 (SWA); *Standard General Ins Co v Gutman NO* 1981 (2) SA 426 (C); *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O).

²²1907 TS 427.

²³1994 (3) SA 569 (D) 574A-575A.

environmental issues, has repeatedly been criticised²⁴. Interest groups and organisations have on occasion been denied standing on the basis that their interest, as opposed to that of their members, was insufficiently direct²⁵, so that organisations cannot claim on behalf of their members. A more liberalised attitude of the court towards *locus standi* can be noticed in *Woods v Ondangwa Tribal Authority*²⁶, whereas a group has been granted standing to claim relief on behalf of a person whose liberty was threatened. Yet, in many other cases the *locus standi* requirement has been the crucial point of dismissing the case. This leads to the fact that up to date not many environmental litigations have been judged in concrete, so that rich environmental case law has been prevented from development.

The interim Constitution of the Republic of South Africa Act 200 of 1993 has brought significant change in the field of environmental law with the right to an environment which is not detrimental to his or her health or well-being²⁷ as well as for the issue of *locus standi* in general. Concerning the latter issue the interim Constitution provides in s 7(4) that

(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by -

- (i) a person acting in his or her own interest;
- (ii) an association acting in the interest of its members;
- (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
- (iv) a person acting as a member of or in the interest of a group or class of persons; or
- (v) a person acting in the public interest.

Thus, the Constitution relaxes the current rules of legal standing, although only with respect to infringements of or threats to the fundamental rights entrenched in the Bill of Rights (Chapter 3). S 7(4)(b)(v) explicitly allows actions in the public interest, and with the environmental provision in s 29 it appears possible, at last, to seek

²⁴T Winstanley 'Entrenching Environmental Protection in the New Constitution' (1995) 2 SAJELP 90; W Bray 'Locus Standi in Environmental Law' (1989) 22 CILSA 33-58; C Loots 'Cases and Comments: Keeping Locus Standi in Chains' (1987) 3 SAJHR 66-76; C Loots (n 6).

²⁵see for instance *South African Optometric Association v Frames Distributors (Pty) Ltd v/a Frames Unlimited* 1985 (3) SA 100 (O); *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others* 1990 (4) SA 749 (N).

²⁶1975 (2) SA 294 (A).

²⁷s 29.

relief in environmental matters concerning the public at large. Yet, much is still dependent on how widely the courts will interpret those two sections. Some scholars hold that according to s 7(4) any person or organisation may enforce the rights contained in the Bill, irrespective of whether that person or organisation is adversely affected by the infringement of the rights²⁸. A different opinion submits that the demonstration of harm or threatening of the health or well-being of an individual or group is still required²⁹. Furthermore, the clause will not assist in cases where an environmental group or a concerned individual is seeking relief on the ground of the infringement of an environmental or planning statute, thus if the protection of the natural environment is sought in circumstances where no person's health or well-being is affected or threatened³⁰. In *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*³¹ this problem has been recognised. Pickering J confirmed the view that a body such as an environmental organisation with its main object of promoting environmental conservation should also have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of a statute³². The court granted standing and therefore confirmed the change in doctrine regarding standing of associations. The decision further acknowledges the need for adaptation of common law rules of standing 'to meet the ever changing needs of society'³³. However, it appears necessary to implement the citizen suit clauses and *locus standi* provisions in environmental statutes, so that public interest actions for all types of matters will be guaranteed. This also appears important in regard to a further obstacle in South African law: the rule of statutory interpretation brings about the effect that where a specific remedy (for instance a criminal sanction or administrative action) is provided for by legislation a legislative presumption exists that all other remedies, except an interdict, are excluded³⁴. This means that, where the court decides that the provision did not allow other remedies

²⁸R Lyster 'The Protection of Environmental Rights' (1992) 109 SALJ 520-524; C Loots 'Standing to Enforce Fundamental Rights' (1994) 10 SAJHR 56-59.

²⁹Winstanley (n 24) 90-91; J Glazewski 'The Environment and the Interim Constitution' (1994) *Consultus* 23-24 as cited in Van Reenen (n 6) 146 fn 126.

³⁰J Glazewski *Environmental Rights and the New South African Constitution* (1996) 189-190; E Bray 'The Liberation of *Locus Standi* in the Interim Constitution: An Environmental Angle' (1994) 57 *THRHR* 483; C Loots 'Making Environmental Law Effective' (1994) 1 *SAJELP* 33.

³¹1996 (3) SA 1095 (TK).

³²*ibid* 1105.

³³*ibid* 1106.

³⁴*Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718; C Loots (n 6) 137-141.

than prescribed, actions for damages could be excluded. However, the courts' approach in this regard seems to be more complex. In *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*³⁵ a two-step approach has been adopted. Firstly, it had to be evaluated whether a statute allows a civil remedy such as an interdict. In case of the approval a second step contained the consideration whether the applicant has *locus standi* to seek an interdict³⁶. Therefore, it has been held that an interdict can be sought with respect to future or continuing breaches of a statutory provision, insofar as the statute does not expressly or by necessary implication exclude a civil remedy to enforce the provision³⁷. It could be concluded, thus, that despite the general principle of statutory interpretation under certain circumstances actions for damages also may be allowed, particularly in cases where the applicant's health or well-being in terms of s 29 of the Constitution has been infringed. In the *Woodcarb* decision it has been argued that the unlawful conduct in question is an infringement of the rights of the respondent's neighbours enshrined for them in s 29 of the Constitution. Insofar as none of the neighbours were applicants in this matter the applicant could rely upon the provisions of s 7(4)(b)(iv) of the Constitution for *locus standi* to apply for an interdict to restrain conduct which infringes those rights of the neighbours³⁸. This case as well as the judgment in *Wildlife Society* show the courts' willingness to do away with traditional rules of standing and to adopt a liberal approach, at least whenever an applicant can point to the Constitution.

The final Constitution of the Republic of South Africa³⁹ also entrenches a public interest action in s 38(d). Basically this provision allows the same *locus standi* prerequisites as the interim Constitution. Again this provision only refers to rights entrenched in the Bill of Rights, so that it still seems necessary to provide for relaxed *locus standi* requirements in environmental statutes. Moreover, much is still dependent on the interpretation of the constitutional provisions, and the courts will have to deal with problems such as for instance what type of interest is required in s 38 regarding *locus standi* (a direct, indirect or substantial interest)⁴⁰. In comparison

³⁵1996 (3) SA 155 (N).

³⁶*ibid* 160 with reference to *Johannesburg City Council v Knoetze and Sons* 1969 (2) SA 148 (W) 150-155.

³⁷*ibid* 161.

³⁸*ibid* 164.

³⁹adopted in May 1996.

⁴⁰see also Bray (n 30) 485 in regard to the interim Constitution s 7(4)(b).

to the interim Constitution the final Constitution contains an improved version of the environmental right. The latter's s 24 provides not only the right of everyone to an environment that is not harmful to their health or well-being⁴¹ but also entrenches in paragraph (b) the right of everyone to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. With this formulation it might become possible for environmental interest groups to claim relief, within the framework of a public interest action, for the direct impairment of the environment which might not constitute a detrimental effect to health or well-being.

6 India

In comparison to the South African development of public interest actions the example of the Indian system is noteworthy. It further serves as an example for the general access-to-justice movement, a response to the 'massification phenomenon'. In contrast to the American development of public interest actions Indian 'social action litigation' is directed towards finding 'turn around' situations in the political economy for the disadvantaged and vulnerable groups, whilst the American model is concerned with civic participation in government decision-making rather than state repression or governmental lawlessness⁴².

Part III of the Indian Constitution guarantees specific enforceable fundamental rights. Non-justiciable directive principles of state policy and governance aimed at the furtherance of social justice are vested in Part IV. The latter part includes also environmental provisions which even imposes a duty on the state to protect and improve the environment as well as a duty on the country's citizens to protect and improve the natural environment⁴³. Notwithstanding that according to Article 37 of the Constitution such provisions are not enforceable by any court, the Indian Supreme Court has relied on the environmental clauses to justify certain decisions which have come before it, so that in effect it is not completely clear what is meant by Article 37⁴⁴. An example states the case *Mehta v Union of India* whereby a public

⁴¹s 24(a).

⁴²P N Bhagwati *Social Action Litigation: The Indian Experience* (1987) 23; S Meer 'Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa' (1993) 9 *SAJHR* 360.

⁴³Arts 48A and 51A(g).

⁴⁴J Glazewski 'The Environment, Human Rights and a New South African Constitution' (1991) 7 *SAJHR* 177.

interest action was brought with respect to pollution of the Ganges, caused by the discharge of effluent from tanneries adjacent to the river⁴⁵. According to the court's reasoning it was not entirely clear which (enforceable) right of the petitioner was allegedly affected. It might have been reasoned that the claim could be grounded on Article 21 of the Constitution (the right to life), linked with the environmental Articles 48A and 51A which themselves are not directly enforceable⁴⁶.

However, based on the need for better access to justice (especially amongst the poor and disadvantaged) and the concern of the Indian courts the constitutional fundamental rights have been made available also in practice through the introduction of public interest litigation or 'social action litigation'. The use of the court's power of the judicial review made constitutional litigation readily accessible to large segments of the population. After the traditional individualistic rules of standing, which permit only a party who has suffered a legal injury personally to approach the court for relief, the *locus standi* doctrine has been widened, so that any individual or group could file a case, based on the public interest, on behalf of those who themselves are unable to do so by virtue of circumstances. This principle has been developed by Bhagwati J in *SP Gupta v President of India*, allowing any member of the public to represent a person or a determinate class of persons who has suffered a legal injury or a legal wrong but is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief⁴⁷. In a country with high poverty and social injustice such a remedy has acquired tremendous importance. The notion of access to justice is herewith largely achieved in practice, and the regular basis on which such 'social action litigation' has been conducted by individuals and organisations on behalf of poor and disadvantaged persons can be seen as the positive outcome of this relaxation of the standing requirement. Furthermore, a social action litigant may initiate proceedings by the mere writing of a letter to a court or a judge, or even a newspaper or postcard⁴⁸. This simplification of the legal proceedings partly developed from the view that it would not be right or fair to expect a person acting on behalf of the public interest to incur expenses from his own pocket, and it

⁴⁵AIR 1988 SC 1037 1115 as cited in P P Craig & S L Deshpande 'Rights, Autonomy and Process: Public Interest Litigation in India' (1989) 9 *Oxford Journal of Legal Studies* 369-370.

⁴⁶Craig & Deshpande (n 45) 370.

⁴⁷AIR 1982 SCC 149 at 189 as cited in Meer (n 42) 362; Bhagwati (n 42) 24.

⁴⁸J Cassels 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 *American Journal of Comparative Law* 499 with reference to *Mukesh Advani v State of Madhya Pradesh* AIR 1985 SC 1368.

achieved a major breakthrough in bringing justice closer to the large masses of the people⁴⁹. The grievance of social action litigation is mainly about the violation of constitutional or legal rights by governmental action or inaction, based on petitions for the enforcement of fundamental rights. Since the constitution contains a duty of each citizen to protect and improve the natural environment it also appears to have horizontal effect. It could therefore be also applicable between private parties. At least with respect to the environmental right it seems further possible to claim the infringement of it by a private party in a class or representative action. *MC Mehta v Union of India*⁵⁰ is an example thereof. In this case - although with respect to a class of defendants - the court drew the litigation to the attention of all concerned industries and municipal authorities, invited them to enter an appearance and finally made an order directed to scores of enterprises *ex parte*⁵¹.

The Indian social action litigation could be a leading example for the development of public interest actions in South Africa. Much though seems to be dependent on the interpretation of the now available constitutional provisions, in particular of the fundamental rights, amongst them the environmental clause. As Meer notes

'the Indian Supreme Court's willingness to embark into the sphere of environmental litigation and circumscribe fearlessly, corporate rights in relation thereto, are all areas which a South African judiciary and legal system steeped in positivism would do well to take note of⁵².

Besides constitutional interpretation it appears nonetheless necessary to implement citizen suit clauses in legislative instruments. As the South African Law Commission suggests, the constitutional 'acceptance of the concept of public interest litigation should be demonstrated by the enactment of a statute which will authorize public interest actions for all types of matters in all courts'⁵³.

The focus in the following chapters will be on the issue of class actions, the main concern of this paper. Whilst public interest actions comprise lawsuits which seek to vindicate important social values, affecting the public, class actions claim specific relief on behalf of class members and are therefore rather suited for claims for

⁴⁹Bhagwati (n 42) 25.

⁵⁰op cit n 45.

⁵¹Cassels (n 48) 500.

⁵²(n 42) 372.

⁵³South African Law Commission (n 10) 12.

damages and specific performance than for declaratory and injunctive relief. Class actions, however, come close to public interest actions when the class embraces a great number of individuals whose interests also are the interests of the public.

IV DEVELOPMENT OF CLASS ACTIONS

1 Origin and General Development

Contemporary class actions have developed in the last few decades within the movement of access to justice. Injuries to many persons in the same or similar position are a characteristic and inevitable risk of a highly developed industrialised society. Polluted rivers can affect the health of many individuals, toxic fumes and chemical modifications of air or water may have unintentional impact on nature, sometimes only visible after several years.

Class actions are civil actions brought either by one or more persons on behalf of others having similar grievances, or against one or more persons defending on behalf of a group of persons similarly situated⁵⁴. In the common law world, the phenomenon of such actions has its roots in the early part of the eighteenth century. Being only a marginal device, it solely has been employed in the English Court of Chancery. The aim of the Court of Chancery was equity. It decided upon and settled the rights of all persons in the subject-matter of the suit. Therefore it acted as a prerogative court concerned with effective implementation of royal policy. The common law procedure was intended to isolate and decide a single issue between the parties to litigation and contained complex and elaborate rules about joinder of parties⁵⁵. In Chancery a bill of peace could be brought when, for instance, a lord of the manor sought to appropriate some of the village common lands for his own purposes to the loss of the manoral tenants. In such situations, each member of the multitude had the same interests at stake so that it was an obvious waste of time to try the common question of law and fact in many separate actions⁵⁶. It is apparent that already in those times an economical factor has played an important

⁵⁴This paper shall only focus on class actions with respect to plaintiffs, although the accumulation of defendants causes similar problems.

⁵⁵P H Glenn 'The Dilemma of Class Action Reform' (1986) 6 *Oxford Journal of Legal Studies* 263; J A Jolowicz 'Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law' (1983) 42 *Cambridge Law Journal* 234.

⁵⁶Z Chafee 'Some problems of Equity' (1959) 2000-1, as cited in S C Yeazell 'Group Litigation and Social Context: Toward a History of the Class Action' (1977) 77 *Columbia Law Review* 868.

role for the development of such actions. After the strict adherence of the Court of Chancery to the procedural rule that all interested persons in the subject matter of a suit have been made parties to it, so that there may be a complete decree which bound all, the rising problem of injustice (unless all interested persons could be made parties to a suit in equity, none would be able to obtain relief) had been overcome by the procedural device of a representative action, where one person could claim on behalf of 'all persons materially interested, either legally or beneficially in the subject matter of the suit'⁵⁷. Yet, since the court was prerogative in nature and concerned itself only with the remedies of declaration and injunction, it did not award damages; indeed, those cases involved neither law nor litigation in the modern sense of those words, but rather made rules that would govern the behaviour of groups⁵⁸. However, the representative action of Chancery did not flourish, and a different era of class litigation began in England with the fusion of law and equity as well as with the Supreme Court of Judicature Act of 1873. Rule 10 of this Act⁵⁹ allowed a person to represent another 'on behalf of or for the benefit of all parties' where they had 'the same interest in one action'. In addition the new Supreme Court of Judicature was empowered to grant all the various forms of relief. However, the judges of England soon barred the extension of this action to remedies of damages. In *Markt & Co Ltd v Knight Steamship Co Ltd*⁶⁰ the court refused to permit a class action on behalf of cargo owners for damage caused to their cargo. It has been held that 'the machinery of a representative suit is absolutely inapplicable ... where the claim of the plaintiff is for damages', since damages were a personal relief and only applicable to the plaintiff alone⁶¹.

This restrictive attitude towards class actions stands in contrast to the judgment *Duke of Bedford v Ellis*⁶² which contains a very liberal attitude towards the new Rule, whereas the Court held that the class has to have a common interest, 'e.g., the assertion of a right alleged to have been created in the class by statute, and a common grievance, e.g., that that right has been violated, and all seek the same remedy which is beneficial to them all'. Further it was held that '[i]t is not necessary that the class represented should assert some beneficial proprietary right in the

⁵⁷Ontario Law Reform Commission *Report on Class Actions* Vol I-III (1982) 5-6.

⁵⁸Yeazell (n 56) 871; Glenn (n 55) 263.

⁵⁹36-37 Victoria, c 66.

⁶⁰[1910] 2 KB 1021.

⁶¹ibid 1035.

⁶²[1900-03] All ER 694.

subject-matter of the claim⁶³. In approval of this wide interpretation and flexibility of class actions Lord Lindley held in *Taff Vale Railway Co v Amalgamated Society of Railway Servants* that the principle of the rule 'is applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires'⁶⁴.

The restrictive attitude of the English courts remained for many years. It was only in the judgment *Prudential Assurance Co Ltd v Newman Industries Ltd* that the courts have been prepared to entertain a representative action for damages, although the relief sought by the representative plaintiff was not damages, but rather a declaration of the class members' entitlement to damages, so that, if the class action would be successful, each member of the class still had to institute an action against the defendant⁶⁵. At a later stage in the judgment *EMI Records Ltd v Riley*⁶⁶ even an award to a representative body to which all the members or the class belonged has been allowed. In this case EMI Records Ltd sued on behalf of themselves and on behalf of and as representing all other members of the British Phonographic Industry Ltd (BPI), claiming an injunction and an inquiry as to the damages suffered by the class with respect to the sale by the defendant of 'pirate' cassettes. In favour of convenience it has been held that

'it would be a wholly unnecessary complication of our procedure if the court were to insist that for purposes of the inquiry as to damages all members of the BPI must be joined as co-plaintiffs, or alternatively, all members except for EMI Records Ltd must issue separate writs and apply for them to be consolidated with the claim for damages of EMI Records Ltd'⁶⁷.

However, certain judgments still refuse damage claims in class actions at all. One of the reasons for the restrictive attitude might be the general principle of English law that the purpose of an award of damages is to compensate the plaintiff, not to punish the defendant. If, thus, a representative action seeks to recover damages in respect of losses presumed to have been suffered by unidentified members of the class, the character of the action would be transformed and would become a means of punishment and deterrence. It does not appear that in England the tendency to transform the representative action into an instrument of deterrence will emerge⁶⁸.

⁶³ibid 694, 697.

⁶⁴[1901] AC 426 as cited in Ontario Law Reform Commission (n 57) 11.

⁶⁵*Prudential Assurance Co Ltd v Newman Industries Ltd* [1979] 3 All ER 507.

⁶⁶[1981] 2 All ER 838.

⁶⁷ibid 841.

⁶⁸Jolowicz (n 55) 236.

In addition to this opinion the requirement that the persons represented must have the **same** interest is a further obstacle to the granting of damage claims in representative actions. Thus, it seems unlikely that the English view would change in future towards a more generous application of class actions as it has been achieved for instance in the United States.

In almost all common law countries the English representative action was accepted as well. For instance in Australia, the law of class actions has been almost identical to that in England. Australia also relied on the common law rule that all the members of a class represented need to have a common interest and a common grievance and that the relief claimed is beneficial to them all⁶⁹. Although the requirement of a common grievance would unlikely be an obstacle to representative actions for common complaints regarding pollution of a certain area, a class action for damages would be precluded on the same grounds as in English courts, for damages are meant to be personal only and therefore would not satisfy the requirement of a common interest⁷⁰. Nevertheless, there has been some activity to revive the importance of class actions. The Australian Law Reform Commission examined the problems of class actions, standing and public interest law, and the proposals favour among other things the expansion of the opportunities for bringing class actions⁷¹. The following reforms however are still far from the expansive procedures existing in the United States: ss 34 and 35 of the Supreme Court Act 1986 of the legislation of the state of Victoria for instance requires that all persons represented in a class must be cited and all must consent to the representation. The Federal Court of Australia Amendment Act 1991 also introduced a version of a class action and provides that the consent of a person to be a group member is not required. Unfortunately the Federal Court's jurisdiction is limited in scope, so that is has not an important impact on the development of environmental litigation⁷².

In Canada the Ontario Law Reform Commission presented in 1982 a comprehensive report on the introduction of class actions into their legal system⁷³. The incentive for such studies might have been the landmark decisions of the

⁶⁹*Markt & Co Ltd v Knight Steamship Co Ltd* (n 60); P Alston 'Representative Class Actions in Environmental Litigation' (1983) 9 *Melbourne University Law Review* 311.

⁷⁰Alston (n 69) 312.

⁷¹Thirty-sixth Report Relating to Class Actions of 1977 and Discussion Paper 'Access to the Courts II: Class Actions' of 1979 as cited in Ontario Law Reform Commission (n 57) 17.

⁷²J G Fleming 'Mass Torts' (1994) 42 *American Journal of Comparative Law* 521.

⁷³Report on Class Actions (Vol I-III) Toronto: Ministry of the Attorney General 1982, (n 57).

Ontario Court of Appeal in the 1970s, *Farnham v Fingold* and *Naken v General Motors of Canada Ltd*⁷⁴. However, within the appeal against the second decision the Supreme Court of Canada restricted the use of class actions to circumstances in which the total amount of the defendant's liability to the class could be established through common proof⁷⁵. In 1989 an Advisory Committee on Class Action Reform reported again, and in 1992, ten years after the first report of the Ontario Law Reform Commission, the Class Proceedings Act and the Law Society Amendment Act were enacted. They came into operation on 1 January 1993 and introduce a class action model also applicable to mass tort cases. They allow a great flexibility in the assessment and award of damages.

Another common law country, New Zealand, strongly follows the English developments and has not introduced any class action legislation. Rule 79 of the Code of Civil Procedure provides that 'where there are numerous persons having the same interest in an action, one or more of them may sue or be sued, or may be authorised by the Court or a Judge to defend in such action on behalf of or for the benefit of all persons so interested'. It is obvious that this provision is the equivalent of the English Rule 10 of the Rules of Procedure in the Supreme Court of Judicature Act of 1873⁷⁶.

Besides the early development of a representative action in the common law realm the class action device has been only a recent phenomenon, especially in civil law countries. Again in the wave of the access-to-justice movement and the emergence of 'mass-wrongdoers' in environmental law as well as in other fields, the claim for possible remedies in respect of diffuse interests was occupying the juristic world in civil law countries. It had to be seen that traditional individualistic schemes of procedural law were untenable for mass claims. To organise such diffuse interests of many people a so called 'ideological plaintiff' was needed, a person or agency capable of representing an entire group, category or class. While for actions in the public interest models of the Attorney General or *Ministère Public* have been

⁷⁴(1973) 33 DLR (3d) 156 and (1978) 21 OR (2d) 780.

⁷⁵*Naken v General Motors of Canada Ltd* [1983] 1 SCR 72; South African Law Commission (n 10) 19.

⁷⁶cf n 59.

developed⁷⁷, for actions of a class with similar or the same interests different ways have been found to deal with the problems attached to such actions. The strong distinction between private and public rights as well as private-law and public-law procedures might have influenced the development of class actions in some ways differently than in the common law countries. In general it can be said that no class action device has emerged as it is known in the United States, rather already available legal instruments such as joinder rules have been further developed and adjusted to the contemporary model of class suits. In addition, a type of organisational action or *Verbandsklage* has emerged as the main non-governmental institution for the representation of group interests in civil litigation⁷⁸. In France for instance, a private action for reparation of injury caused by a 'crime', 'délit' or 'contravention' belongs to anyone who has personally suffered injury directly caused by the violation⁷⁹. This formulation immediately indicates the problem of standing for persons claiming in the interest of others or for associations. It is important though to notice that over the years types of organisational actions have developed, so for instance the 'Loi Royer' of 1973 for consumer associations, or in the environmental area the Law Concerning Waste Disposal of 1975, permitting associations to act as *partie civile*⁸⁰. Thus, standing has been granted to specific - already existing - associations, qualified in terms of certain statutes. German law neither allows under public law nor under private law suits by public interest groups. But there exist similar provisions to those in France, allowing associations to sue on behalf of diffuse interests (*Verbandsklage*), and in 1976 a general organisational action has been introduced in the Law on General Terms and Conditions (AGB), whereby § 13(2) provides for an action which might be brought only by consumer associations, trade associations or chambers of industry and commerce. Under the Federal Nature Protection Act a restricted entitlement has been enacted as well, but only a few large national organisations are recognised in accordance to the standing to sue. The recent Environmental Liability Act (*Umwelthaftungsgesetz*), in force since 1 January 1991, does not create a right

⁷⁷Cappelletti (n 5) 32; for different models of such advocates of the public interest see also Cappelletti (n 1) and M Cappelletti *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study* (1978) 767-865.

⁷⁸M Cappelletti & B Garth 'Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure' (1983) 2 *Civil Justice Quarterly* 124.

⁷⁹Art 2 para 1 of the Code of Criminal Procedure of 1957.

⁸⁰W B Fisch 'European Analogues to the Class Action: Group Action in France and Germany' (1979) 27 *American Journal of Comparative Law* 67-68.

of action for public interest groups⁸¹. In addition, such associations cannot sue for damages, and generally even when such law suits are permitted in civil law as for instance in France, the association can obtain only symbolic, nominal sums, so that the recovery of damages remains bound to individualistic principles⁸². Yet, the most significant obstacles for class actions are of practical nature, such as the problem of sufficient monetary incentives for lawyers, court fees and their distribution to the parties and the role of the courts in general⁸³.

In comparison to class actions legislative efforts to confer standing on private organisations in Europe have also advantages unavailable to the class action approach. For instance the problem of legitimacy is to a greater extent resolved, since suing organisations have to qualify according to statutory criteria, or in general private organisations are strengthened according to the possibility to undertake strategies, not just litigation⁸⁴. On the other hand, the possibility that only a few organisations exist and are able to take advantage of the right to sue, is a drawback of this system. Furthermore, such organisations may be unable to afford litigation against large industrial organisations, or, if their resources are increased, the organisation may become more or less another branch of the government⁸⁵. According to environmental groups the difficulty is that legislations tend to recognise only such organisations which have been in existence for a certain period of time. Yet, environmental groups in particular are often built in regard to a special environmental issue. Such spontaneous groups though would not receive legal recognition.

However, in general private, traditional two-party litigation is undergoing a subtle but important transformation to handle these conflicts, and in part these changes arise within the trend beyond civil procedures as well. As Cappelletti, Garth and Trocker point out

'[p]olitics and society are divided into numerous groups who protect and assert the collective interests of their members, and those groups should not be prevented from advocacy in court as well as elsewhere for the rights of their members'⁸⁶.

⁸¹Betlem (n 16) 160.

⁸²Fisch (n 80) 79; Cappelletti & Garth (n 78) 132.

⁸³Cappelletti & Garth (n 78) 136.

⁸⁴as will be shown in the following section about class actions in the United States; cf M Cappelletti, B Garth and N Trocker 'Access to Justice, Variations and Continuity of a World-Wide Movement' (1982) 46 *Rebels Zeitschrift* 683.

⁸⁵ibid 684.

⁸⁶ibid 685.

2 Class Actions in the United States

The American development of class actions has been far more dramatic than in all other countries, primarily because mass litigation has been immeasurably vaster in scope. There was a strong need to provide a flexible, efficient protection of group and collective interests against the abuses of mass economy and government. In the absence of a publicly funded system of compensation for 'mass damage' or damage to collective and diffuse interests, the court system is perceived as the only available source of redress.

The history of US efforts to resuscitate the representative action of English Equity has been dominated by three legislative reforms, representing a steady progression of efforts to facilitate class litigation. The New York Field Code of 1848 represented only a slightly more generous approach to conditions of class litigation than that adopted in England in 1873⁸⁷. The Field Code allowed class actions in cases of a 'common or general interest of many persons'⁸⁸. Although other states have followed the New York class action provision, a true breakthrough was introduced only in 1938 under the Federal Rules of Civil Procedure. Rule 23 of this statute created different categories of class actions, called 'true', 'hybrid' and 'spurious', and authorised use of the class action procedure in actions for legal and equitable relief. 'True' class actions were meant for rights enjoyed jointly, that is rights that were common to all the members of the class. The judgment was binding on all class members, whether named in the suit or not. This effect has been an important step from the old English representative action to the modern class action. 'Hybrid' class actions involved rights to specific property that were several, as opposed to joint. Thirdly, the 'spurious' class action was meant for members to seek to enforce individual rights involving common questions of law or fact. It could be used for damage claims arising out of mass torts. The judgment of 'spurious' as well as of 'hybrid' class actions had only binding effect on the members named in the suit. Although in the beginning the rule did not contain a requirement of notice to unnamed members of the class, courts began to require fair notice in order to

⁸⁷supra IV.1 and n 59.

⁸⁸New York Field Code of 1848 as amended in 1849 by NY Session Laws, c 438 s 119.

preserve the constitutional due process rights of such members⁸⁹. However, the failure to require notice to class members as well as conceptual sloppiness and further problems with this Rule required revision. With the amendment of Rule 23 of the Federal Rules of Civil Procedure in 1966 it had been tried to eliminate those problems. The distinction between 'true', 'hybrid' and 'spurious' class actions was abolished, and the judgment is now binding on all class members who do not choose to opt out of the class. Rule 23, which is still operative, provides for several criteria which must be met. Paragraph (a) of the Rule provides that the class has to be 'so numerous that joinder of all class members is impracticable', that there must be questions of law or fact common to the class, that the claims or defences of the representative parties are typical of the claims or defences of the class and that the representative parties will fairly and adequately protect the interests of the class. In addition to these criteria the class action has to fall within one of three categories:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests⁹⁰.

The second category of class proceedings deals with cases where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole'⁹¹.

The third and most controversial category of class actions provides that a class action may be maintained where the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy⁹². Most class actions seeking damages are brought under this third category. It is important to notice that

⁸⁹E S Valley 'Louisiana's Class Action: Judge-Made Law in a Mixed Civil- and Common-Law Jurisdiction' (1987) 61 *Tulane Law Review* 1214.

⁹⁰Rule 23(b)(1).

⁹¹Rule 23(b)(2).

⁹²Rule 23(b)(3).

according to this provision common questions of law and fact have to *predominate*, so that class actions in which the common questions are insignificant compared to very substantial individual questions that must be resolved through separate proceedings in any event, can be filtered out⁹³. This prerequisite has also a negative effect: it can generally be satisfied only in cases of single event disasters, such as nuclear explosions or airplane crashes, where there is a common cause issue. Environmental occasions though do not always fulfil this requirement, since in many cases environmental damage and harm to individuals develop over a period of time and affect persons or property over a given area⁹⁴. A solution to overcome this difficulty is to aim at settlements which provide benefits without proof of specific causation linking the injury to the alleged cause⁹⁵.

Rule 23(c)(1) expressly stipulates that, before a class action may be maintained, it must receive judicial approval, known as 'certification'. In this process it is the court's task to ascertain whether the class action fulfils each of the requirements imposed by Rule 23. The court can also order that, where appropriate, an action be brought or maintained as a class action only with respect to particular issues, or that a class be divided in subclasses, with each subclass being treated as a separate class⁹⁶.

Under Rule 23(c)(2) a court must direct that, where a class action has been certified, class members be given 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort'. In *Eisen v Carlisle & Jacquelin*⁹⁷ the Supreme Court held that the language of this provision makes individual notice to identifiable absent class members mandatory in Rule 23(b)(3) class actions, even where the cost of distributing notice will effectively prevent the action from continuing. As Yeazell points out, the requirement of individual notice in such cases has a paradoxical quality about it, '[f]or the Rule requires notice just when discrepancy of interest among absentee members of the group is least likely', since the common questions of law and fact have to predominate in Rule 23(b)(3) class actions⁹⁸. By contrast,

⁹³Ontario Law Reform Commission (n 57) 55.

⁹⁴J G Fleming (n 72) 516.

⁹⁵ibid.

⁹⁶Rule 23(c)(4)(A) and (B).

⁹⁷417 US 156 (1974)

⁹⁸S C Yeazell 'From Group Litigation to Class Action, Part II: Interest, Class, and Representation' (1980) 27 *UCLA Law Review* 1111.

Rule 23(b)(1) and (2) class actions contain only discretionary notice requirements. In general, the notice must advise each member that the court will exclude him or her from the class if he or she requests by a specified date. In addition, the notice has to contain that the judgment, whether favourable or not, will include all members who do not request exclusion and that any member who does not request exclusion may, if he or she desires, enter an appearance through his or her counsel⁹⁹.

According to Rule 23(d) which gives the court power to make a number of orders to facilitate the conduct of class actions, it can be seen that a trial judge in class actions becomes more than just a rather passive 'party'. According to the traditional view of litigation the judge is an impartial arbiter between the parties, expected only to react to the actions of the parties. By contrast, given a very broad and flexible discretion to supervise the progress of the class action a judge acts from a managerial position, so that the organisation of such complex cases provides for the best possible means to come to a decree, tailored to each class action and its specific features.

A judgment in an action based on Rule 23(b)(1) and (2) shall include and describe those whom the court finds to be members of the class. In a 23(b)(3) action the judgment shall include and specify or describe those to whom the notice was directed, who have not requested exclusion, and whom the court finds to be members of the class¹⁰⁰. In the former two cases the judgment has the effect that it will be *res judicata* against all those persons described as members of the class, whereas in the latter type of action the judgment will be *res judicata* against all those to whom the notice was directed and who have not requested exclusion.

In the context of the solution of class actions by settlement Rule 23(e) requires judicial approval. A class action may not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. The reasons for such a restriction on the option of settlements might be the protection of absent members of the class from a settlement whose advantages accrue primarily to the active litigant or his lawyer rather than to the group as a whole¹⁰¹. Although in general a favourable provision difficulties according to Rule 23(b)(2) class actions

⁹⁹Rule 23(c)(2).

¹⁰⁰Rule 23(c)(3).

¹⁰¹Yeazell (n 98) 1115-16; Ontario Law Reform Commission (n 57) 57.

may arise, for the court must protect not only the absentee class, but also the goals of the substantive law giving rise to the plaintiff's claim. The goals of the represented group and the goals of the substantive law, however, can be in conflict¹⁰².

Furthermore, the formulation of Rule 23(b)(2) expressly excludes claims for damages and only allows injunctive relief or corresponding declaratory relief with respect to the class as a whole. Environmental class actions thus, brought under this provision, could only achieve an injunction, for instance, prohibiting a polluting activity in a certain area. Damage claims in relation to harm to the environment or to persons had to be sought in another suit.

Although the class action Rule 23 of the Federal Rules of Civil Procedure seems quite detailed, a number of issues have not been dealt with, with the effect that class actions have been subject to great controversy. The most significant matters not expressly addressed by the Rule are the assessment and distribution of monetary relief, liability for costs, including attorney's fees, and the applicability of discovery procedures to class actions¹⁰³. Thus, the initially favourable reaction to the amended Rule 23 of 1966 and the high percentage of class actions being filed in the following years changed radically, so that class action legislative reform has once again become the object of debate. Reform discussions, however, have centred on more purely procedural issues, such as interlocutory rights of appeal, preliminary screening of the merits of the case and proof of the existence of a class¹⁰⁴. However, Rule 23 of 1966 is still in force, and the debate about class action reform has not yet come to an end. By the end of the 1980s the debate about class actions posed a clash between efficiency and fairness. Especially with respect to mass torts the class action development has been rather slow and halting, even more so in respect to personal injury mass tort class actions than property damage class actions¹⁰⁵. In recent years the Civil Rules Advisory Committee has studied the possibility of amending Rule 23 of the Federal Rules of Civil Procedure and prepared a comprehensive draft. Mixed reactions from lawyers, judges and

¹⁰²Yeazell (n 98) 1115.

¹⁰³Ontario Law Reform Commission (n 57) 57.

¹⁰⁴Glenn (n 55) 268.

¹⁰⁵J C Coffee Jr 'Class Wars: The Dilemma of the Mass Tort Class Action' (1995) 95 *Columbia Law Review* 1344-46.

academics arose, and some of them viewed the draft as modest, conservative but worthwhile effort to improve Rule 23¹⁰⁶.

The described Rule 23 of the Federal Rules of Civil Procedure, it is important to mention, is a federal provision. In the United States there are two court systems, one is the national or federal court system, where Rule 23 governs the bringing of class actions, and the other one is a system of state courts, each with its own class action procedure. In addition, the subject-matter jurisdiction of these two systems differ. The federal courts can decide about cases set forth in s 2 of art III of the United States Constitution, that is amongst others, cases arising under the Constitution or under any law passed by the federal government of the United States. Under this wide provision many class actions can be brought in the federal courts, so that Rule 23 has an important impact on class actions within the United States¹⁰⁷. However, each state has its own class action provisions, some based on or similar to the federal rule, some based on common law or on the original Rule 23 of 1938¹⁰⁸. The variety of class action models in the United States, thus, is able to provide many different approaches, according to which a rich doctrine regarding class action could develop; a doctrine from which many countries, in the process of introducing a class action or similar models, can gain knowledge and profit.

In the environmental sector class actions in the United States do not form a significant portion of litigation in the federal courts¹⁰⁹. A reason for this might be that most if not all environmental statutes provide for citizen suits, the remedy for individuals to enforce environmental law and to find redress in civil litigation. Yet, it is important to notice that some of these Acts have been interpreted as prohibiting class actions, therefore only allowing an individual to commence a suit 'on his own behalf'¹¹⁰.

¹⁰⁶For a comprehensive discussion of the draft and the problems according to Rule 23 in general see E H Cooper 'Rule 23: Challenges to the Rulemaking Process' (1996) 71 *New York University Law Review* 13-73.

¹⁰⁷For more detailed discussion of the two different US court systems see Ontario Law Reform Commission (n 57) 51-52.

¹⁰⁸*ibid* 64.

¹⁰⁹*ibid* 269-270.

¹¹⁰*ibid* 270 and fn 353.

V TYPICAL FEATURES AND MATTERS OF PRINCIPLE OF CLASS ACTIONS

Suffice it to say that the most developed class action doctrine has risen in the United States, and other common law countries which provide for a type of class action often have based their models on the US approach. In civil law countries, however, the classic US model of the class action is not introduced. The reason therefore is mainly grounded in the differing system of jurisdiction and law in general, based on positive law and less on precedents. However, many problems with respect to class actions arise in both legal systems, and the matters of principle seem to strike any judiciary or doctrine. In this chapter, thus, those issues shall be highlighted and discussed.

As illustration and guideline for the following problems it might be helpful to keep the actual problem of environmental liability in mind. It has become common that environmental law can be enforced by private persons (in the public interest), headed by the US experience and introduction of citizen suit clauses in all environmental statutes. Through this way of protecting the environment, private persons or groups can claim a breach of statutory duty or an injunction prohibiting an activity which does or threatens to harm the environment and the people living in it. In addition, aggrieved individuals allegedly injured by the polluting activity of the defendant may seek to obtain compensation for personal damage. Basically, the common procedural issue is whether an entire group affected can be brought into litigation.

Since the US class action model is probably the most outstanding type of such litigation in respect of collective or diffuse rights, it appears appropriate to discuss the following problems of class action litigation based on the American approach.

1 Representative Plaintiff

The claim of rights which are in the interest of more than one person raises the question of who should be allowed to sue for environmental damage. As in the context of public interest actions the issue of *locus standi* has been debated in many countries, and the traditional model of the prerequisite of 'being personally adversely affected' had to be reconsidered.

Whether a group or specific class of people can sue in private or public law, can be approached in different ways. As showed in the previous chapter the United States

allow class actions to be brought by a 'private attorney general', ie an attorney who has one client with the relevant stake in the litigation can sue on behalf of a large and otherwise unorganised collective interest, whereby the client represents the group. Instead of bringing many suits by affected individuals against an environmental polluter, claims are 'bundled' and represented by one plaintiff. In Europe the problem of diffuse rights has been approached with organisational actions, ie actions brought by organised groups. Both systems allow the group or class to be represented, so that only one trial instead of many is necessary. In contrast to the European system in the United States a class has not to be pre-existing. It is this feature which is most difficult to find reflected in European devices, and different questions are being brought up.

1.1 The Ideological Plaintiff

Within the approach of representation through a not necessarily pre-existing group or a single person further categories are possible. Rule 23(a)(3) of the American Federal Rules of Civil Procedure provides that '[o]ne or more members of a class may sue or be sued as representative parties on behalf of all'. Likewise the Ontario Class Proceedings Act of 1992 provides in s 2(1) that '[o]ne or more members of a class of persons may commence a proceeding in court on behalf of the members of the class'. Both provisions require that the representative of the class is a member of the class him- or herself, thus, that he or she has standing to sue in his or her own right as well. A different possibility would be if the representative was an independent person, not necessarily a member of the class, seeking relief on behalf of a class. As an example thereof the Indian public interest action may be mentioned. The Indian doctrine of standing has been enormously widened, allowing any public spirited individual or group to file a case on behalf of those who themselves are unable to do so by virtue of the circumstances. In *Olga Tellis v Bombay Municipality Corporation*, the petitioner was a journalist, who, as a concerned member of the public, together with other interest groups, petitioned the court on behalf of Bombay pavement dwellers to stay their evictions¹¹¹. Hence, any person may approach the court in concern of the public respectively of a group or class of persons.

There are advantages and disadvantages with respect to both solutions. A representative who himself is a member of the class may be said to be a better

¹¹¹1985 (3) SCC 545, as cited in Meer (n 42) 363.

plaintiff than one who has no self-interest, for self-interest will help to ensure adequate representation of the class. Yet, this self-interest might also defeat the interests of the class; a representative could use the class as a deterrent for the defendant who might, under the pressure of a class action, be more willing to offer a settlement, even one more favourable than might have been forthcoming had an individual action been brought. Corresponding cases occurred in the United States when a defendant hastily settled the plaintiff's claim, leaving the class without a representative¹¹². With respect to environmental cases the self-interest may not always be very strong, indeed, for the claims involved can be small in amount. Furthermore, involved technical and complex questions may be better or best advocated and explained by an expert which, however, is maybe not a member of the class. Also from a social viewpoint this solution seems preferable: as practised in India, any person can represent a class, so that a more educated or experienced person can effectively represent the needs of the poor, uneducated or inexperienced party. In contrast, the American system has posed problems regarding the relationship between the representative and his or her attorney as well as between both of them and the absentee class. The interests of the various participants in a class action can be different and conflicting, and the class action attorney and the representative may have strong incentives to settle the class action before trial, whereas the absentee class rather seeks to recover as large an award as possible through litigation. A further problem rises with the representative's control over the attorney's conduct. Often a class representative might not have the time, knowledge or finances to thoroughly control the attorney's conduct. Thus, an attorney may have a wide scope to lead a trial, with the effect, that the representative only acts as 'phantom'¹¹³. Conflicts between the parties can - at least to a certain degree - be prevented if the representative does not have to be a member of the class. Yet, conflicting interests may also occur when a lawyer or lawyers organisation is the representative and counsel at the same time. Less of a problem might be a non-lawyers' organisation in the role of counsel. In the United States for instance, environmental organisations which employ in-house lawyers institute class action litigation themselves¹¹⁴. The benefit of such counsels is that they have specific knowledge and expertise to conduct class actions in the

¹¹²S R Lazos 'Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations' (1985) 84 *Michigan Law Review* 324-325.

¹¹³ibid 311-319.

¹¹⁴South African Law Commission (n 10) 32.

environmental field, and their interests are the same as those of their organisation and its members.

1.2 Organisations as Representatives

As required in European models of organisational actions, the 'ideological plaintiff' is an organisation, established to promote certain environmental interests. However, as in the case where a class representative does not have to be a member of the class, the question of standing to sue arises again. Therefore the standing requirements have to be reinterpreted beyond strictly pecuniary interests to more political and ideological ones, and the interests of the organisation should not be differentiated from those of a broadly defined group or category or the general public¹¹⁵. In organisational actions the individual cannot take initiative and force the association to act against its will nor personally assume the representative role. Thus, a member of a pre-existing group of persons has no right to sue for all without the prior consent of each. In contrast, in the United States a class member can sue without prior existence of the group and without consent of the class members. But the standing of pre-existing groups is still in debate. In general it can be said that environmental groups in the United States have had no difficulty in gaining access to the courts so long as their membership included some persons who were intended to be protected by the laws invoked and whose interests are or would be adversely affected by the action challenged¹¹⁶. The American system of the self-appointed representative leaves the plaintiff without the benefit of a pre-existing relationship among the class members. This feature creates many difficulties by making it much more important to evaluate the suitability of the class representative to function as such. Rule 23(a) of the Federal Rules of Civil Procedure therefore provides the requirement of fair and adequate representation of the class' interests which is central in achieving substantive and procedural fairness in class action suits, since members of the absentee class rely on the class attorney and representative to pursue their interests vigorously¹¹⁷. Based on an abundance of case law in this regard it is generally required that, before a court can conclude that the named plaintiff will fairly and adequately represent the class, it must be satisfied

¹¹⁵Cappelletti & Garth (n 78) 127.

¹¹⁶Fisch (n 80) 59; *Sierra Club v Morton* 405 US 727 (1972); further discussion above (public interest actions) III.2.

¹¹⁷Lazos (n 112) 311.

that his or her interests are not antagonistic to those of the class¹¹⁸. Furthermore, it has to be shown that counsel for the class is competent to conduct the litigation on behalf of the class. This requirement has been stated to be as at least as important as the former, since 'in fact it is class counsel who protects the interests of the class'¹¹⁹. Safeguards as 'adequacy of representation' are necessary to prevent possible abuses, because - in contrast to ordinary litigation - in class actions the plaintiff's 'seriousness' is not generally assured but has to be measured by the judge by means of various and variable criteria. Such measures can also be found in the civil law systems where it is often required that an organisation must be existing for a certain period of time and must have certain statutory objectives¹²⁰. Yet, unlike the class action device, the continental European models of organisational actions face several limitations. The class action device encourages remarkable pluralism in judicial enforcement that is not achievable with European organisational actions, for standing has been granted only to a limited number of organisations. In addition, environmental organisations tend to be relatively weak, so that the enforcement is hindered by the lack of resources and power, leaving an outsider's plight exacerbated by the tenuous position of the organisation. Although legislation may ensure that organisations are responsible and accountable to represent a class the government may also control their power and influence the possibilities of enforcement, so that the private influence on the enforcement of environmental protection is weaker than in the United States system¹²¹. Nevertheless, it is clear that certain procedural adjustments have to be introduced into the traditional civil procedures to ensure that diffuse and collective interests not only stay theoretical rights. At the level of the European Community the fifth environmental action programme recognises that 'individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped'¹²².

However, in general it can be said that it is crucial to a class action that there be a representative who can adequately represent the interests of the class. The

¹¹⁸Ontario Law Reform Commission (n 57) 353.

¹¹⁹ibid 353 with reference to Note 'Developments in the Law - Conflicts of Interest in the Legal Profession' (1981) 94 *Harvard Law Review* 1447.

¹²⁰Cappelletti (n 1) 305-306.

¹²¹Cappelletti & Garth (n 78) 129-130.

¹²²as cited in Betlem (n 16) 156.

relevant factors which have to be taken into account are the ability of the representative to adequately represent the interests of the class, the exclusion of the probability of conflicting interests between the representative and the class and the ability of the representative to manage the litigation and costs arrangements.¹²³ Moreover, at present also the American class action Rule provides that only persons who have suffered, or who can show that they would suffer an infringement of a right that the law will protect can sue at civil law. Environmental conservation associations though have normally not such rights, and rarely will they be able to show loss or damage to the association's property or interests. It therefore appears important to allow such organisations and every concerned citizen standing to sue on behalf of a class without being directly affected.

2 Existence of a Class

In the context of certification of a class action, that is the decision whether a class action can be brought, it is necessary to determine a class. The preceding test of the adequate representative is also dependent on whether a class is existing, for it is necessary to know on whose behalf the representative purports to sue. Although not always expressly mentioned it is clear that a court has to determine whether a class is numerous enough to allow a class action. This does not mean that each member of the class has to be identified by name, but it seems necessary for a court to be able to determine whether any person coming forward is a member of the class.

Furthermore, the definition of a class is important for the judgment on the question whether a certain claim is common to the class. Commonality of questions of law or fact is a common requirement in class action provisions. The United States Rule 23(b)(3) for instance requires that 'questions of law or fact common to the members of the class predominate over any questions affecting only individual members'. It appears that especially the requirement of predominance can pose difficulties and has been criticised as encouraging the proliferation of individual issues by class opponents¹²⁴. However, the question of commonality in general affords extensive examination by the courts and may lead in some cases to time consuming proceedings. Rule 23(a) further requires the applicant for certification to show that

¹²³South African Law Commission (n 10) 64.

¹²⁴Glenn (n 55) 270.

the class is so numerous that joinder of all members is impracticable. In contrast, the Ontario Class Proceedings Act 1992 requires that there be an identifiable class of two or more persons. The latter provision appears to pose less problems in defining a class and therefore also appears to allow a less time consuming certification procedure.

3 Different Types of Class Actions

The United States Federal Rules of Civil Procedure provides in Rule 23 for different types of class actions. The first type addresses actions for circumstances in which a class action is obviously desirable because the prosecution of separate actions by or against individual members of the class would create a risk¹²⁵. The second type is enacted in Rule 23(b)(2) which provides that a class action may be maintained where the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Thirdly, Rule 23(b)(3) provides for the 'common questions class action'. This type generally is intended for damage claims. There is no question that the recovery of damages through individual proceedings following resolution of the common questions is proper, where this will not place unreasonable burdens upon the courts¹²⁶. Accordingly, Rule 23(b)(3) allows a representative to sue for damages of all individuals 'similarly situated' with respect to the defendant. In case of success, the damage will be distributed to the individual members of the class¹²⁷. This development of class actions for damages stands in contrast to the development in European and Commonwealth countries where the debate revolves around the propriety of permitting the recovery of damages in class actions. The debate in the United States mainly concentrated on the use of common proof to establish the amounts that class members are entitled to recover from the defendant, and the procedures that may properly be used to distribute any aggregate award that results from such a common adjudication of class members' rights to monetary relief. The fact that there are certain issues which used to be individually determined - eg the amount of damage - does not preclude the use of a class action procedure.

¹²⁵Rule 23(b)(1).

¹²⁶Ontario Law Reform Commission (n 57) 519.

¹²⁷Cappelletti & Garth (n 78) 133.

However, the division into three different categories is an outstanding feature of the United States approach. Despite this theoretical distinction most class actions that seek injunctive or equitable relief also seek monetary damages, so that courts sometimes certify a class under several different subparts of Rule 23(b). In addition, the court may certify a class under one section of the Rule and later re-certify it under another section¹²⁸. The question arises whether three different types of a class action are necessary at all. The Ontario Law Reform Commission was of the opinion that such distinction is superfluous, since little could be gained by categorising class actions in this manner. The Commission suggested uniform rules with respect to matters such as commonality, superiority, notice and the right of class members to exclude themselves from an action¹²⁹. The American distinction between different categories is particularly significant with regard to whether it is necessary to give notice to the class members. It appears that much time could be saved when the question of categorising an action could be avoided; time which could be used for the decision whether to give notice and if so in what form it should be given.

4 Class Actions for Damages

The possibility of class actions for monetary relief has been one of the most contentious class action issues. The civil law countries in Europe do generally not allow associations to sue for damages, or when such law suits are permitted as for instance in France, the association can obtain only symbolic, nominal sums¹³⁰. Also under English law there is no perceptible move for enlarging the representative action in tort to obtain protection against environmental pollution, and damage claims in private nuisance can only be initiated by those suffering actual personal damage¹³¹. As in England - mainly based on the judgment *Markt & Co Ltd v Knight Steamship Co Ltd*¹³² which states that the requirement of common interest in representative actions precludes actions for damages, yet a declaration that each member of a class of tort plaintiffs may be entitled to prevail on the issue of liability

¹²⁸S J Safranek 'Do Class Action Plaintiffs Lose Their Constitutional Rights?' (1996) *Wisconsin Law Review* 270.

¹²⁹(n 57) 334-336.

¹³⁰Cappelletti & Garth (n 78) 132.

¹³¹Betlem (n 16) 158.

¹³²[1910] 2 KB 1021.

can be achieved¹³³ - in most European countries it has been held that damages are personal and therefore not recoverable in a class action. Moreover, the litigation by organisations to collect a large amount of damages on behalf of its members would appear to require that individual rights be cut off. Hence, traditional due process and *res judicata* principles would be violated¹³⁴. Even the generally advanced Dutch system with its Collective Actions Act 1994 explicitly bars possible further judicial development of collective actions for damages in money in so far as associations seek relief in the interests of other persons¹³⁵. The recovery of damages in the interest of a public interest group itself has been accepted since the *Borcea* case which opened the doors to actions for damages in environmental suits¹³⁶.

With regard to the United States the third type of the class action model has also been the source of considerable controversy. The requirement of predominance of common questions of law or fact over individual questions in Rule 23(b)(3) actions has shown that it effects more problems than advantages. Class actions have been refused on the ground that individual damage issues are so complex and difficult that they outweigh the common issues in the class action. This shows that in practice the attitude towards class actions for damages tend to be similar to those of countries which rather reject such actions at all. However, courts apparently are less likely to refuse class actions where they find that common questions do not predominate because of a claim for damages where the only individualised issues relate to the amount of damages. On the other hand such cases may be refused on the ground that they are not manageable¹³⁷. Environmental class actions are often refused on exactly those grounds, so that not many of them have been brought to litigation in courts.

In the federal courts a further issue has hindered the proliferation of environmental class actions. Since the judgment *Zahn v International Paper Co*¹³⁸ it has been held that the damages of individual members of a class cannot be aggregated in order to achieve the jurisdictional amount. Thus, the presumed advantage of class actions

¹³³*Prudential Assurance Co Ltd v Newman Industries Ltd* [1979] 3 All ER 507.

¹³⁴Cappelletti & Garth (n 78) 132; cf also supra IV.

¹³⁵Betlem (n 16) 162 read with 164-165.

¹³⁶District Court Rotterdam 15 March 1991 (1992) 23 Netherlands Yearbook of International Law (NYIL) 513 as cited in Betlem (n 16) 165.

¹³⁷Ontario Law Reform Commission (n 57) 529.

¹³⁸414 US 291 94 S Ct 505 (1973), which was based on *Snyder v Harris* 394 US 332 89 S Ct 1053 (1969).

was no longer available in a suit for damages only¹³⁹. The obstacle of jurisdictional amounts in connection with diversity cases has been somewhat alleviated by the recent judgment *In re Abbott Laboratories*¹⁴⁰, a consumer class action with the claim for each named plaintiff and for each unnamed class member of US\$ 20'000 in damages. The Fifth Circuit held that section 1367 of the Judicial Improvements Act of 1990 overruled the verdict of *Zahn v International Paper Co* by allowing a district court to exercise supplemental jurisdiction over members of a class who, unlike the class representatives, do not themselves satisfy the amount-in-controversy requirement¹⁴¹. This decision might be important for environmental class actions with damage claims which are individually small in amount.

In the state courts environmental class actions have been refused on the ground of 'unmanageability'¹⁴². Environmental class actions can involve problems of harm to the environment arising as a result of continuous activity inflicting damages over an extended period of time or they can involve single incident damages. In toxic damages or serial injuries as long-term occurrences, class actions have often been refused because of issues of causation and assumption of risk, which have to be dealt with individually so that those individual issues predominate over those of a common nature. The restrictive approach can be seen in particular in class actions involving water or air pollution as well as in asbestos work environment cases. The requirement of predominance can generally be satisfied only in cases of single event disasters, such as nuclear explosions, for there is a common cause issue. Accordingly, such single event class actions have been more successful and forthcoming¹⁴³. In cases dealing with water pollution and environmental hazards in the work place courts have sometimes recognised the efficacy of class actions in determining the often complex common questions concerning existence and nature of alleged environmental harm. Individual questions concerning membership in the

¹³⁹L P Mac Farland 'Class Actions In Environmental Cases' (1975) 66 *F.R.D.* 363 365.

¹⁴⁰51 F3d 524 as cited in N Duarte Martin 'Federal Jurisdiction And Procedure' (1996) 42 *Loyola Law Review* 537.

¹⁴¹ibid 528 and Duarte Martin (n 140) 537.

¹⁴²Ontario Law Reform Commission (n 57) 271.

¹⁴³For example *Biechele et al v Norfolk & Western Railway Company* 309 FSupp 354, 7 ALRF ed 894, ND Ohio, WD (June 19, 1969) as cited in Mac Farland (n 139) 367, where an action for an injunction and damages has been brought because the defendant's alleged operation of a nuisance and damages.

defined class and damages have been deferred to subsequent separate hearings¹⁴⁴.

The issue of proof of causation in tort and delict which poses a general problem in environmental liability cases thus also confronts plaintiffs in mass tort litigation. To overcome the difficulty of proving causation and damages in environmental class actions parties have tried to aim at settlements which provide benefits without proof of specific causation linking the injury to the alleged cause. It therefore seems not surprising that for a long time '[t]here has been no U.S. tort case in which class action procedures have been carried out to the stage of individual court-ordered damage awards'¹⁴⁵. Class settlements are incentive for defendants as well to attempt a full and final resolution of otherwise seemingly endless litigation. Damage claims of many people in particular bear the risk of massive financial burdens for the defendant in mass toxic tort cases. Thus in many cases parties come to court with a done deal and file the class action complaint together with a proposed class action settlement. Nevertheless, such a settlement class has to be certified by court, too, according to Rule 23 of the Federal Rules of Civil Procedure, and the settlement itself has to be approved as 'fair, adequate and reasonable'¹⁴⁶. Suffice to say that settlement class as well have fuelled a vigorous debate in the struggle of class actions. Although they might be extremely valuable for disposing of major and complex national and international class actions, the current provisions raise diverging opinions¹⁴⁷.

Recent cases demonstrate that the courts' fairly negative attitude towards class action certification is not changing. In *Applewhite v Reichhold Chemicals, Inc* the Fifth Circuit had to deal with the predominance requirement of Rule 23(b)(3) class actions. The court held that class certification required at least two issues in common to be predominant¹⁴⁸. In *Castano v American Tobacco Co* the Fifth Circuit reviewed the district court's decision to certify 'what may be the largest class action

¹⁴⁴Ontario Law Reform Commission (n 57) 272 with references.

¹⁴⁵P H Glenn 'Class Actions And The Theory of Tort And Delict' (1985) 35 *University of Toronto Law Journal* 303-304 fn 49.

¹⁴⁶Rule 23(e).

¹⁴⁷For a discussion of well known asbestos class actions in the United States and in the context of the refusal of a settlement class by the Third Circuit see 'Recent Cases: Civil Procedure - Class Actions - Third Circuit Prohibits Taking Settlements Into Account when Deciding Whether To Certify Settlement Classes' (1996) 110 *Harvard Law Review* 529-534.

¹⁴⁸67 F3d 571 (5th Cir 1995) as mentioned by Duarte Martin (n 140) 548.

ever attempted in federal court'¹⁴⁹, whereas the plaintiffs ('all nicotine dependent persons in the United States') sued against numerous tobacco companies and the Tobacco Institute Inc for compensation for nicotine addiction based upon the 'novel and untested theory' that the defendants had fraudulently failed to inform consumers of the addictive nature of nicotine and had manipulated the level of nicotine in cigarettes to enhance their addictive nature¹⁵⁰. According to the requirement of predominance it also had been held that '[i]n a multi-state class action, variations in state law swamp any common issues and defeat predominance'¹⁵¹. Basically, the certification of this class action has been refused on the grounds of manageability problems and the lack of superiority requirement, for the immaturity of the tort involved would not allow a satisfied judgment without speculations in judicial resources, that is '[t]he collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury'¹⁵². It seems that under this ruling many class actions may be refused in future, particularly in accordance to environmental concerns. Many environmental hazards and polluting activities can affect a wide geographical area of several states, and with the constantly changing and developing industry many new, untested and thus 'immature' torts may arise. Under the ruling of the federal courts though it is not likely that more environmental class actions will succeed and be certified. This tension could be avoided with the introduction of test cases, which could be useful in connection with questions of causation and damages as well. This solution has been adopted by Japanese courts in mass tort cases both for material and non-material losses¹⁵³. In other countries test cases present a useful device as a shortcut to the resolution of multiple litigation. They can be employed as models for parallel cases involving multiple parties without being binding on other parties, but setting the pattern for other like cases¹⁵⁴.

The hesitant view of American courts toward certification in damages class actions is also evident in the issue of aggregate awards. In some cases it may be appropriate to determine monetary claims as a common issue, so that an aggregate

¹⁴⁹84 F3d 734, 737 (5th Cir 1996).

¹⁵⁰ibid 737.

¹⁵¹ibid 741.

¹⁵²ibid 752.

¹⁵³Fleming (n 72) 517 with references.

¹⁵⁴ibid 524-525.

award which assesses the total liability of the defendant to the class might be granted. However, individualised treatment of monetary issues has tended to be viewed as the norm¹⁵⁵. In *Eisen v Carlisle & Jacquelin*¹⁵⁶ the district court's arrangement of a fluid recovery which is equivalent to the *cy-près* doctrine has been found to be unconstitutional by the federal court of appeal. It has been held that this solution had some parallel with a legislative decree of expropriation and would generally reallocate resources within the state¹⁵⁷.

In general it is important to notice that difficulties might arise in granting aggregate awards with respect to fairness of the procedure and the reliable proof to support such award. The defendant therefore 'should have the opportunity to argue that questions of damages are so individualised that a 'gross' award cannot be calculated or that the specific evidence introduced is too inadequate to be relied upon'¹⁵⁸. Aggregate awards may be appropriate in cases where the class members can be identified and the amount of their individual claims can be easily determined without their assistance as well as in cases where the size of the class is large but the individual claims small in amount¹⁵⁹. As an example of distribution of such awards the *cy-près* doctrine in the law of charitable trusts has been used for class action awards where actual division and distribution among the class members is impossible or impracticable. In environmental law litigation the application of this doctrine is conceivable where an award assessed in respect of damages suffered as a result of pollution of the environment is used to clean up the environment for the benefit of those affected, or to provide a health service to remedy the ills caused by the pollution¹⁶⁰. Although this type of award can be seen as a payment by the wrongdoer for its unlawful actions it also bears the flavour of the principle of deterrence. Thus, aggregate awards 'focus more on the harm *caused* by a defendant's conduct than simply the damages provable by injured individuals'¹⁶¹. An effect which also disturbed a development of class actions in Europe¹⁶². It is also arguable that the concept of fluid recovery manifests the feature of effective

¹⁵⁵Ontario Law Reform Commission (n 57) 537.

¹⁵⁶479 F2d (2nd Cir 1973) amended on other grounds 417 US 156 (1974).

¹⁵⁷Glenn (n 145) 302.

¹⁵⁸Ontario Law Reform Commission (n 57) 549 with references.

¹⁵⁹South African Law Commission (n 10) 44.

¹⁶⁰*ibid* 45.

¹⁶¹Cappelletti & Garth (n 78) 134; for a useful discussion of aggregate awards see Ontario Law Reform Commission (n 57) 531-603.

¹⁶²See for instance England, Cappelletti & Garth (n 78) 135.

protection of diffuse rights, in that it focuses on the total damages caused by the injurer, rather than on individuals who are damaged, and it increases the likelihood that an economically optimal level of the injury-causing activity will be reached¹⁶³. A strong argument indeed in favour of fluid recovery, particularly useful in environmental litigation where the protection of the environment is first priority. By this means polluter may be forced to meet certain changes in the production or of installations to prevent further damage to environment and people.

5 Class Actions in Conflict with Procedural Rights?

The class action device has brought important changes in the traditional model of civil procedure and challenges its fundamental principles. Ideological plaintiffs or representatives of a class are supposed to lead a trial on behalf of a possibly large group of unnamed class members with effects on their legal positions. Thus, the probably most fundamental guarantee of fair proceeding - the principle *audi alteram partem* - which is sanctioned by the constitutions of many countries, seems to be violated. Moreover, class action decrees have binding effect on all class members, depriving them of the right to be heard or the possibility to claim individually in the same matter. On the other hand the concept of fair hearing appears too rigid if measured against its practical consequences in class suits.

A necessary ingredient of the right to be heard is the requirement of adequate notice¹⁶⁴. As for instance the American decision of *Eisen v Carlisle & Jacquelin* has shown, the difficulties and impacts of a notice requirement can be tremendous, and yet it seems that traditional and individualistic procedural due process should be complemented by a collective concept of due process. The right to be heard should thus be preserved and guaranteed. In this context the importance of an adequate representative is again striking. The guarantee of the right to be heard should at least be granted to the representative of the class, who acts on their behalf. Due process in the United States also means minimum contact with the forum state and notice of the action. In class action cases in that country for instance, conflicting opinions arose because of differing views of what due process means in such

¹⁶³Cappelletti (n 1) 301 fn 136.

¹⁶⁴ibid 303 with references.

actions¹⁶⁵. These problems become even more visible where - as in the United States - class representatives and lawyers can force persons to be part of the class.

5.1 Possibility of 'Opting Out' and 'Opting In'

One of the outstanding issues of class action procedures is whether class members should automatically be bound by the judgment or whether class members, other than the representative plaintiff, should be required to take affirmative action after certification in order to be bound by the judgment. This fundamental question, which has given rise to great controversy, has been referred to as 'opt in' and 'opt out'.

In a class action with the possibility to opt out a judgment binds all absent class members without requiring any manifestation of their desire to be bound, but they are permitted to exclude themselves from the action and from the effect of the judgment (opt out). The 'opt in' possibility means that a class member must give affirmation in order to be bound by the class action judgment.

The opt out version is applied by the American class action Rule 23. However, Rule 23(b)(1) and (2) actions do not allow a right to opt out at all, only in Rule 23(b)(3) actions members of the class are allowed to opt out as to certain claims. This distinction has been made because with Rule 23(b)(1) and (2) class actions generally only injunctive relief is sought which in any case brings unitary relief. Under Rule 23(b)(3), because only a common question of law exists coupled with damages which must be individually calculated, a party must be given notice and the opportunity to opt out of the class pursuant to Rule 23(c)(2)¹⁶⁶. The opportunity to opt out in class actions has given rise to several problems. The drafters of this Rule believed that many persons who qualified as class members could for reasons such as ignorance, timidity or unfamiliarity with business or legal matters, simply not take the affirmative step of sending to the court a request for class membership and thus effectively be without redress¹⁶⁷. However, some scholars have criticised the opt out opportunity, and in the course of reform proposals the opt in option has been preferred¹⁶⁸. On the other hand, it could be stated that an opt in notice requirement characterises merely a 'permissive joinder device' and not a class action. Despite such opinions some statutes and Acts of the United States provide for opt in requirements. Apparently they have not caused any distinct problems for

¹⁶⁵Safranek (n 128) 264.

¹⁶⁶see *Phillips Petroleum Co v Shutts* 472 US 797, 812 (1985).

¹⁶⁷Ontario Law Reform Commission (n 57) 472; South African Law Commission (n 10) 37.

¹⁶⁸Ontario Law Reform Commission (n 57) 478-479.

those seeking to enforce their rights under those statutes¹⁶⁹. Under the Federal Rule 23 it is to notice that due process rights of plaintiffs can be cut off. Courts and class attorneys prefer to certify a class under 23(b)(1) or (2) rather than 23(b)(3), simply because in the case of the former actions institutional efficiency (one case settles all claims) appears to be ensured, or because defendants are more willing to settle a case when future contingent suits are eliminated. Furthermore, the expense of notification to class members is absent and they cannot complain¹⁷⁰.

Opting in, on the other hand, seems to satisfy due process. In addition, it would ensure the liberty of those who do not want to be part of a lawsuit, and thus a class would probably only contain those members who have a real interest in pursuing a claim. The opt in approach would also discourage the filing of class action lawsuits in which only minor wrongs are involved and where only lawyers try to achieve a private windfall¹⁷¹.

In contrast, the Ontario Law Reform Commission recommended a discretionary approach whereby the court decides in each case whether to order opt out notice or not to require notice at all¹⁷². It is yet to consider that the effect of the court not requiring notice of the action to the class members is that they will be bound by a judgment even in an action of which they are likely to have had no knowledge at all. Although this might generally not be a problem it is submitted that the courts' discretion has to be set within limits. As the American practice has shown that courts - although of course being independent - tend to circumvent Rule 23(b)(3) class actions (to avoid opt out notices) the courts' interests to lower the workload sometimes would (understandably) tend to decide for no notice or opt out requirement, and therefore abuse their discretion. The South African Law Commission, however, suggested a court's discretion be even further extended by providing a choice between opt in notice, opt out notice and no notice at all¹⁷³. The option of opt in notice - it is said - would ensure that members with substantial claims have knowledge of the action and its prosecution so that they might not suffer severe prejudice in the event of the action failing or not being as effectively prosecuted as it could be. Opt in notice therefore is important, for a judgment in a class action makes claims *res judicata* and prevents any further litigation on the

¹⁶⁹Safranek (n 128) 266 fn 20 with references.

¹⁷⁰ibid 271.

¹⁷¹ibid 266-267.

¹⁷²Ontario Law Reform Commission (n 57) 487.

¹⁷³(n 10) 38.

same issue¹⁷⁴. With regard to class settlements opt in notice has a further advantage. There would be certainty as to who the members of the class are and what their claims contain. Thus, a defendant could better estimate for what aggregate value claims he would be liable and could better decide whether to make or accept a settlement offer.

However, a social aspect favours the opt out approach. As the South African Law Commission notices, in circumstances where a large percentage of the population of a country is illiterate, ignorant and impecunious (because of lack of education) the benefits of class action might be greater in the case of an opt out requirement. The opt in notice approach should therefore be the exception rather than the rule¹⁷⁵. Over all it is arguable which option provides for best efficiency in class actions without depriving persons of important liberty or property interests. Where particularly small damage claims are involved the opt in approach is to be preferred, whilst where damages are unique or substantial a right to opt out should be granted, so that it is up to the class member to decide whether to pursue his or her claim in a class action or rather in an individual suit.

5.2 Notice Requirement

Closely linked with the 'opting' device is the requirement of due notice. As indicated, this requirement is part of the procedural principle *audi alteram partem* and traditionally a foundation of civil procedures. Notice is an important means to ensure that the interests of class members are adequately represented and protected. It is furthermore a device to advise class members of their right to opt out of a class or to opt into a class action. Thirdly, as in any other court proceeding, notice serves to inform class members of steps that they will have to take following judgment in favour of the class - and in particular in class actions for damages - to obtain their individual recoveries.

However, the notice requirement also gives rise to controversy, as it has been experienced in the United States. Depending on the size of the class, giving notice to class action members can be expensive and laborious. Hence, the questions whether notice should be sent, who should be responsible for it and who should bear the cost of notice are issues which might be of concern for the litigants. The

¹⁷⁴ibid.

¹⁷⁵ibid 39.

American debate mainly takes place around the question whether due process requires only 'adequate representation' on the part of the class representative or whether some form of notice to absentees is required; a debate which has been held for many years until present¹⁷⁶. Although the fundamental opinion that adjudications, to be binding, must provide for adequate notice and an opportunity to be heard¹⁷⁷, in the class action debate some scholars have held that 'adequate representation' would meet these prerequisites¹⁷⁸. Under the federal Rule 23(c)(2) class actions under 23(b)(3) require the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. General notice for all types of class actions is required in Rule 23(d)(2), whereby the court is empowered to make an order that notice be given to some or all class members. Thus, despite the express notice requirement for 23(b)(3) actions it has been in debate whether due process dictates that some form of post-certification notice must be given in all class actions. Once more, the crucial case of *Eisen v Carlisle & Jacquelin*¹⁷⁹ is of significance in this context. In this case the class on whose behalf the suit was brought included six million members whereof approximately two million could be determined with reasonable effort. It was estimated that the cost of sending individual notice by mail to all identifiable class members would be US\$ 315,000. Further expenses would have incurred for publication of the notice for the four million members who were not identifiable. This illustrates the importance of resolving the issue whether Rule 23(b)(3) unwaveringly demanded individual notice. Eventually the Supreme Court decided that, under Rule 23(c)(2) the class plaintiff must provide individual notice to identifiable class members and that the class representative has to pay for notice as part of his responsibility to finance his own action¹⁸⁰. Critics have stated that the outcome of this judgment would deter possible plaintiffs to initiate class actions. That the decline of class actions filed in the following years has been the effect of this ruling is, however, not clear¹⁸¹, and in the later case *Oppenheimer Fund Inc v Sanders*¹⁸² the Supreme Court held that a court may - in very limited circumstances

¹⁷⁶cf Editorial 'Developments in the Law - Class Actions' (1976) 89 *Harvard Law Review* 1402-1403 (hereinafter referred to as 'Harvard Developments'); Safranek (n 128) 263-264.

¹⁷⁷see for instance *Pennoyer v Neff* 95 US 714 (1877).

¹⁷⁸*Hansberry v Lee* 311 US 32 42-43 (1940).

¹⁷⁹417 US 156 (1974).

¹⁸⁰ibid 176.

¹⁸¹Ontario Law Reform Commission (n 57) 499-500 fn 31.

¹⁸²437 US 340 (1978).

- exercise its discretion under Rule 23(d) and order the defendant to bear the cost of identification of the class members when he is able to do so 'with less difficulty or expense than could the representative plaintiff'¹⁸³. In any case the notice requirement affords consideration and poses practical problems which have to be decided carefully. Therefore the question arises, whether it would be possible to do away with those problems and provide that a judgment or settlement will be binding only on those who come forward to claim a benefit after judgment has been given or a settlement made. In the case where class members are expected to make a contribution towards costs at commencement of the action this solution would benefit the 'wait and see' claimant to the disadvantage of the other class members. This problem, however, does not arise where the action is being brought by a benevolent representative who carries the costs of the action. In effect the judgment or settlement would only bind those who come forward to claim after the 'positive' judgment; nevertheless, multiplicity of actions would be avoided because the *stare decisis* principle will ensure that an unsuccessful action will discourage other similarly placed persons from litigating, whilst a successful judgment is likely to reduce the number of separate actions which are brought¹⁸⁴. In this context the American experience has to deal with a similar effect regarding opt out notice. With the possibility of opting out in Rule 23(b)(3) actions a plaintiff can achieve a 'free ride', ie taking advantage of class adjudication on an individual basis. In this 'freeriderism' class members opt out and wait for the class plaintiffs to get a favourable judgment which then can be used in an individual future trial. This can be done because defendants may be collaterally estopped from trying the same issues again. It is however questionable whether such tactic is in agreement with fairness, and whether it is constitutional¹⁸⁵. In any case, when deciding whether to give notice to class members and if so what form this notice should have, the extent to which the members of a class might be prejudiced by the judgment and other criteria regarding the class in particular (such as its type and size as well as the type of relief claimed) have to be taken into account by the court to ensure due process¹⁸⁶. A variant of collateral estoppel is the innovation of the Dust Disease

¹⁸³ibid 356.

¹⁸⁴South African Law Commission (n 10) 41.

¹⁸⁵S Baughman 'Notes: Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out' (1991) 70 *Texas Law Review* 224.

¹⁸⁶South African Law Commission (n 10) 66; as an example of the problem of not taking future claimants into account and of using the different types of class actions to circumvent opt out notice

Tribunal in New South Wales, Australia. This tribunal has exclusive jurisdiction for damage claims from dust diseases, and it allows the use of evidence adduced in earlier proceedings¹⁸⁷. Surely a useful approach which also can be of advantage for the following problem regarding the binding effect of a judgment.

5.3 Res Judicata

Traditionally the principle of *res judicata* requires that no matter can be tried twice regarding the same cause of action between the same parties, if the first judgment ended in a final decision on the merits. The second prerequisite of 'the same parties' strikes the issue of class actions in particular. Group litigation involves parties acting in a form of representational capacity, as an organisation acting on behalf of its members or a representative plaintiff on behalf of a class. Hence, should a class member be precluded from claiming relief in subsequent individual litigation which might have been granted in the class action, but was not sought by the representative plaintiff? On the one hand this effect is the advantage of class actions, making it also attractive to defendants in class suits. On the other hand one has to question the fairness and due process guarantee of such class action judgments with this binding effect. The before mentioned case of collateral estoppel is closely related to the *res judicata* issue which can also be determined by the 'cause of action estoppel' and the 'issue estoppel'. However, the rule that a person cannot be bound by a judicial decision *in personam* unless he or she was a party or privy to the action has to be modified in its application to class actions. Whilst some legislations expressly refer to the principle of *res judicata* there are some that contain no express reference to it. The United States Federal Rule 23 for instance does not expressly address the issue of *res judicata* effect of a final judgment on the common questions. Rule 23(c)(3) provides only that, in class actions brought under Rule 23(b)(1) and (2) the judgment 'whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class'. In Rule 23(b)(3) actions the judgment 'whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court

see the recent US case *Hayden v Atochem North America Inc* as discussed in Coffee Jr (n 105) 1410-1414.

¹⁸⁷Fleming (n 72) 526 with reference.

finds to be members of the class'. It follows that the *res judicata* effect of a judgment brought under Rule 23 can be determined only in a subsequent action, where the court will consider whether an absent class member was afforded due process of law¹⁸⁸.

Other legislation, such as the Illinois Civil Practice Act (section 57.6) or the American Uniform Class Actions Act (section 13) expressly refer to the *res judicata* effect, so that it appears more clear for whom a class action decision is binding¹⁸⁹. Furthermore, the class action requirements of adequate representation, the possibility to opt out as well as the notice requirement are safeguards to guarantee a fair trial and due process for all class members. Although in general the traditional *res judicata* principle might be stretched to a high degree to be applicable to class actions, it appears desirable and necessary to do so, if one wants to retain the advantages of class actions, such as judicial economy, diminishing expenditure of time and costs and minimising the possibility of inconsistent adjudications involving common questions and related events.

However, if implementing class actions or similar devices certain alterations of the traditional judicial model have to be taken into consideration and should be affirmed. The *res judicata* principle, traditionally limited to issues arising between the same parties in subsequent proceedings, could be extended, as it has to some extent been done in American law, where it has been indicated that class action judgments are not held binding on members of a class the representative of which was unsuccessful in the initial class action proceedings¹⁹⁰. Yet, if only the defendant but not the class is bound by a negative decision, again, problems of unequal treatment of defendants arise which could outweigh the advantages of a class action judgment. In defence of class actions it could be stated that with this device defendants had to face only one trial instead of a great many, which furthermore bear the potential danger of diverging in adjudication. Such fundamental problems surely have to be considered, and they need be weighed against the benefits class actions can offer.

¹⁸⁸*Hansberry v Lee* 311 US 32 (1940).

¹⁸⁹Ontario Law Reform Commission (n 57) 762-764.

¹⁹⁰Harvard Developments (n 176) 1394.

6 Substantive Law

A class action is a procedural device, designed to give effect to existing statutory and common law remedies. Therefore, to be of avail at all an applicable remedy is needed. Accordingly, as the Ontario Law Reform Commission notes 'an expanded class action procedure will only be as effective as the underlying substantive cause of action'¹⁹¹. However, variations in substantive law differ from country to country, so for instance in the United States in relation to actions in federal courts the vast majority of class suits are based upon statutory causes of action¹⁹², whilst in Ontario - at least in the 1970s and early 1980s - there are few statutes that expressly confer a specific right of action¹⁹³. In addition, the American courts allow class actions based on breaches of statutory provisions, thus, they allow a civil cause of action. In contrast, in most Commonwealth jurisdictions a reluctance to imply a civil cause of action for breach of a statute can be noted, based upon the doctrine of legislative intent, whereby a statute, imposing a penal sanction or providing for civil liability in relation to other provisions or containing its own enforcement mechanism, evinces an intention that a cause of action should not be implied¹⁹⁴. Thus, environmental and other class action litigants have to base their claims mainly on common law grounds of liability. The reason why the United States are more willing to allow compensation for victims of environmental damage or mass wrongs in general through courts might be the absence of a publicly funded system of compensation, so that the court system is the only available source of redress. The magnitude of multiple losses in mass catastrophes is, however, apt to overtax even the capacity of the global insurance companies. Therefore, limitations on liability have been introduced, for instance in the field of nuclear operators and maritime pollution through oil spills etc¹⁹⁵.

Less problematic appear class actions seeking injunctive relief, whereas damage recovery claims - as throughout the whole issue of class actions - pose more difficulties. As much as class actions - and also public interest actions - seem to dilute the public/private law dichotomy it also bears difficulties to draw a distinct line between procedural and substantive law. Thus, as Glenn states

¹⁹¹(n 57) 213.

¹⁹²cf table in Harvard Developments (n 176) 1325 fn 30.

¹⁹³Ontario Law Reform Commission (n 57) 215.

¹⁹⁴ibid 217.

¹⁹⁵cf Fleming (n 72) 509-510.

'[r]ights enforced by courts remain conditioned by what courts may do, and these limitations on the functions of courts may find articulation in rules using the language either of procedure (e.g., rules relating to standing) or of substantive law (e.g., damage is essential to a valid cause of action in tort or delict)'¹⁹⁶.

He further argues that the class action procedure is incompatible with the existing law of tort and delict¹⁹⁷. Glenn's arguments basically are in line with the general European reluctance towards class actions which denies the possibility to claim damages in group actions on the grounds that such claims are personal. By setting the procedural device of class actions in relation to the substantive law one becomes fully aware of the difficulties and new problems this device is posing to the traditional jurisprudence.

In both civil law and common law a defendant's conduct has to be wrongful to hold him liable. The wrongfulness has to be evaluated with regard to damage actually suffered by the complainant. Even cases of strict liability, as now introduced in many environmental statutes, require the proof of damage as well as causation. Relaxation of proof of causation occurs in cases only where liability of several defendants is in question and where no one member of the group can be proven to have inflicted the damage but one of them has necessarily done so¹⁹⁸. In contrast to individualistic judgments, class action decrees provide for a benefit at no cost for a large group of people, and such judgment is based on the proof of common questions by the class representative. He has to establish fault or negligence of the defendant in accordance to his (the plaintiff's) damage as well as to damage of unnamed members of the class. It follows that the court has to make a finding of negligence or fault absent proof of elements necessary for its determination. That makes it impossible to definitively judge the defendant's conduct in relation to damage suffered by the class members. Culpability of the defendant towards them has to be established according to different criteria¹⁹⁹. In effect the class action judgment is based on criteria different from those applied in an individual tort or delict action, and it creates new grounds of liability applicable uniquely to defendants sued in a class action which provoke major questions in terms of equality of defendants before the law. Furthermore, in such cases a court is acting according to novel criteria of distributive justice, and the class action decree is no longer a corrective act but rather an explicitly legislative one,

¹⁹⁶(n 145) 288 fn 4.

¹⁹⁷ibid.

¹⁹⁸ibid 294-295; such circumstances would allow a class action on defendant's side.

¹⁹⁹ibid 299.

'treating large numbers of people as identical in the absence of proof of transactions involving them, ordering a reallocation of resources based on the general characteristics of people, and requiring extensive measures of implementation or adjudication before being effective vis-à-vis individuals'²⁰⁰.

The effect of a judgment as legislative act is even increased by the binding effect of this decree. Contrary to a 'normal' precedent a class action judgment purports to preclude subsequent litigation on the issue of culpability and therefore creates new and particularly binding rules, much more onerous on defendants than those of the existing law of negligence and fault²⁰¹.

These issues refer to class actions in tort and delict, although they influence other remedial class actions as well, even if not to the same extent. As already mentioned, remedies for civil relief in environmental matters still have mainly to be relied upon common law devices in so far as damage claims are concerned. A greater variance of possible class actions can be found when injunctive or declaratory relief is sought. Many younger environmental statutes contain causes of action which often also provide for reduced standards of proof²⁰².

A different opportunity to remove the burden of evidence has been introduced by the Indian social action litigation. In public interest actions a fact finding commission can be appointed by the courts. Mainly in acknowledgement of the difficulties for poor and underprivileged litigants such commissions have the task to find facts and evidence, to submit reports and make recommendations²⁰³. This device can be particularly useful in environmental litigation, where cases often involve complex issues of causation which have to be examined by experts. However, commissions might also bear the danger to give the court a partial and possibly biased view²⁰⁴. Therefore they should be as independent as possible and also stay under the control of the litigants.

²⁰⁰ibid 300.

²⁰¹ibid 301.

²⁰²in relation to the United States cf for instance W H Kitchens & M P Stevens 'Environmental Toxic Torts: An Overview of Developments in American Law' (1996) 4 *Environmental Liability* 49.

²⁰³Meer (n 42) 363.

²⁰⁴Cassels (n 48) 507.

7 Class Actions in Conflict with Democratic Principles?

The lawmaking effect of judicial decrees is further suspect on democratic grounds. The boundaries between adjudication and legislation are watered down, and the principle of separation of powers seems blurred. In the context of separation of powers a vivid debate has occurred regarding the public interest litigation in India, where the judicial involvement does not end with the granting of an order but courts monitor the implementation of their directions to secure their enforcement. The most heard critique then is based exactly on these arguments that courts are taking over the function of the administration and consequently involve themselves in policy making of the executive²⁰⁵. As Baxi puts it

'[a]s regards repression and lawlessness the Supreme Court since 1980 has become the third chamber of Parliament and is close to acquiring, more effectively, the attributes of the House of the People'²⁰⁶.

It could be stated that courts only improve the channels of administration and can put in practice the welfare policy of the executive²⁰⁷. However, the Indian courts probably have penetrated policy formulation and administrative operations to a much greater extent than Western courts have done so far. A reason for this may be the Indian political institutions which are dominated by competing elite groups and the fact that social action litigation is only practised on the grounds of constitutional rights which are a direct outflow of a country's policy. Moreover, the Western debate rather sees the problem between judiciary and legislative. Set the case though that a governmental branch is involved in a class litigation, the judiciary would indirectly control the executive in ways which might be not in line with the constitutional distribution of power and tasks. Yet, in the process of adjudication, it is submitted, quite often certain policy considerations have to be made. It hardly is possible to not do so when constitutional rights have to be applied and weighed against each other. In accordance to class actions the judiciary has to experience even further alterations.

²⁰⁵Meer (n 42) 369; Cassels (n 48) 509 and 506, where it is noted that in particular 'in environmental litigation the court has shown itself willing to assume wide powers that might otherwise be left to other rule-making authorities and regulatory agencies'.

²⁰⁶U Baxi *Taking Suffering Seriously* (1987) 47.

²⁰⁷Meer (n 42) 369.

8 The Role of the Judge in Class Actions

The inherent problems of class litigation, such as conflict of interests between class members and their representative as well as manageability are difficulties with which a class action judge is confronted.

The before discussed issue of separation of powers has even been more strictly emphasised in civil law countries than in the United States with its tendency to social organisations and the overlapping of public and private law affairs. Of course, as it can be concluded by the many refusals of class certification on the grounds of manageability, American judges also show a certain reluctance towards class actions and their demand for a broad judicial role²⁰⁸. On the other hand, the United States have experience in mass tort litigation in which judges had to take a managerial role to settle the differences between the parties. In traditional adjudication the judge has, besides strong private control of the issues presented, a certain control mechanism as well. In class actions though, this control - with the purpose of, for instance, promotion of efficiency, protection of integrity of the fact finding process and protection of the absentees - becomes even more important and asks for a manager-like handling of the case, since the potential for abuse and the need to protect the unnamed and absent class members are higher than in an individual trial²⁰⁹. The federal Rule 23 of the United States Federal Rules of Civil Procedure therefore provides for a thorough test of class certification and requires judicial scrutiny of class settlements. The sometimes far reaching involvement of judges in class actions has been demonstrated in the case *Agent Orange*²¹⁰ where Weinstein J ordered 'fairness hearings' to give recognition to the Vietnam veterans' services²¹¹.

In modern societies mass conflicts have become a common feature, and the reluctance of judiciaries to deal with class actions or *Verbandsklagen* would mean a refusal to exercise control and influence on social circumstances. Demands of a multiple society and the emergence of diffuse interests and damages afford an adaptation of judicial bodies to such circumstances; a challenge for judges which could also be an enrichment and not only a necessary evil.

²⁰⁸Cappelletti (n 1) 295.

²⁰⁹Harvard Developments (n 176) 1388-1389.

²¹⁰*In Re Agent Orange Product Liability Litigation* 597 FSupp 740 (1984).

²¹¹Fleming (n 72) 518-519.

9 The Issue of Costs

One of the benefits class actions have to offer is the possibility for less financially capable individuals to achieve access to courts. In addition, a group of people with individual claims small in amount could seek relief with a class action. When this device should also be made available for socially disadvantaged groups - as it is significantly in India - further decisions have to be made according to legal aid and the distribution of attorney's fees.

Modern lawsuits are costly undertakings, even more so in environmental litigation, especially where a total amount of damages is very high in sum and expert advice is necessary. Furthermore, time consuming and complex cases may have the consequence of high attorney's fees. Therefore, the matter of costs can be crucial to the popularity and feasibility of class or organisational actions. Comparing the issue of distribution of costs in the United States and in other countries it becomes further clear why the former system allows an advanced development of a class action. In most other countries the costs, including attorney's fees, follow the outcome of the action. In the United States an order for costs in favour of a winning party will usually not include attorney's fees. Although the general rule is that each party is responsible for paying the fees of his or her own lawyer, regardless of the outcome of the action, in effect, the financial burden can be removed from the representative plaintiff.

9.1 Contingent Fee Agreements

In England as well as in other countries the American feature of contingent fees is considered unethical and not compatible with the notion of the professional independence of attorneys. The contingent fee can be described as a fee received for services of an attorney dependent on the outcome of the client's damage recovery suit. Thus, the most frequent kind of such an agreement provides that the lawyer is to receive a stipulated percentage of a recovery in the event of success. If the plaintiff loses the case, the lawyer is not entitled to a fee²¹². It has to be noticed that such agreement is only possible in actions for monetary relief. Nevertheless, this solution allows that a class representative will not be threatened with this kind of financial burden in the event of failure of the action, and it makes it more attractive to bring a class action. In addition, the contingent fee effects the distribution of costs

²¹²Ontario Law Reform Commission (n 57) 665-666 fn 85 with reference.

to all class members - since the fees are paid out of the recovery - so that the representative has not to bear alone the financial burden of the suit. In other countries the incentive for a representative to start a class action is heavily lowered by the risk that he or she carries the costs of court and the own as well as the defendant's attorney's fees in case of a negative outcome of the action.

Countries which have introduced a class action device accordingly introduced specific rules for costs, differing from the general rules. For example the Class Action Act 1992 of Ontario implemented in section 33 the recommendation of a fees agreement which in amount has to be assessed by the court, allowing only a reasonable fee. This rule has been introduced despite the general prohibition for an attorney to charge a contingency fee²¹³.

Despite the advantages of the American contingent fee rule it also has its negative effects. Class actions are particularly vulnerable to abuse on the grounds of economic goals. Class attorneys can use the class action allegation to extract an unjustifiably high settlement from a defendant for the purpose of receiving fees. Those 'lawyer's lawsuits' may also be the source of conflict of interests between the class and the attorney, and class actions have therefore been criticised to be solely financed by class attorneys without any 'realistic expectation' of client reimbursement for litigation expenses in the event of defeat²¹⁴.

The abuse of class actions by attorneys under traditional rules would be less likely in European countries. It seems that a way in between the United States approach and other systems had to be found to ensure that class actions serve the purpose of the class and not some lawyer's pocket.

9.2 Legal Aid and Special Funds

A further incentive for class actions could be provided by an adequate scheme to financially as well as legally support the class action plaintiff. The funding of class actions is often beyond the financial resources of a great many of individuals. Therefore, the possibility of funds has been introduced in some countries, also in Canada. Quebec and Ontario have created special funds to provide financial assistance to representative plaintiffs. The *fonds d'aide au recours collectifs* of Quebec offers public financial aid to enable a class action to be launched²¹⁵, and

²¹³ibid 716-722; South African Law Commission (n 10) 48-49.

²¹⁴Harvard Developments (n 176) 1605.

²¹⁵Fleming (n 72) 521, interestingly also the cost of notice can be defrayed, see Ontario Law Reform Commission (n 57) 712.

the Ontario Law Society Amendment Act 1992 established a fund to provide financial assistance in respect of disbursement and indemnification for costs awards²¹⁶. It is arguable whether such funds should be privately or governmentally supported. Class action judgments have at least to a certain extent influence on the public. This public character would assume that class actions should be supported by public funds. On the other hand such a proposal would entail considerable expenditure of time and money in the organisation and maintenance of an administrative structure²¹⁷. A moderate approach of a public fund has been suggested by the South African Law Commission which suggests public financial assistance in a class action with recovery of at least a part of the costs by contribution to the fund from class members in case of success²¹⁸. Given the economic situation in South Africa and the current demands on state funds this solution virtually imposes itself.

Another approach has been chosen by the Indian system. As indicated earlier, the established fact finding commissions also relieve the petitioner of a social action from the financial burden of proof, and the court can order that the commissions receive expenses and a honorarium from the defendant²¹⁹. In regard to legal aid a public interest action has established the right to legal aid, mandated by Arts 39, 14 and 21 of the Indian Constitution²²⁰. Moreover, in the *Shiriam Fertilizer* case where the court permitted a chemical plant to reopen after a gas leak only upon satisfying a set of stringent conditions, the defendant has also been required to deposit security to guarantee compensation to any who might be injured as a result of the enterprise's activity²²¹. The Indian approach is an incentive for concerned citizens to launch a social action. In particular in the light of access to justice movement, which also embraces the notion of class actions, specific institutions should be available for individuals to ensure the possible use of the class action device. However, it appears that traditional schemes of legal aid and cost distribution for litigation need a challenge and serious revision to do justice to the benefits of class actions. It is important to provide opportunities for plaintiffs to share the incurring costs of a procedure, so that not only the representative has to bare the risk. In group or

²¹⁶South African Law Commission (n 10) 51.

²¹⁷for a negative attitude towards public funds cf Ontario Law Reform Commission (n 57) 713.

²¹⁸South African Law Commission (n 10) 52.

²¹⁹Cassels (n 48) 500.

²²⁰ibid 497; Meer (n 42) 369.

²²¹*MC Mehta v Union of India* 1987 AIR SC 965 as mentioned in Cassels (n 48) 506.

organisational actions this burden might not be of the same impact, but where individuals claim in a class action it might be of advantage to allow more than one financially capable person to represent the class. This benefit would even be enlarged when the representative has not to necessarily be a member of the class, as it is the case in India. In pollution cases the principle of cost internalisation would thereby be fulfilled as well: The defendant who caused the pollution had to pay for the cleanup costs and eventually passes them on to the consumer²²².

The features of class actions are complex and often conflict with traditional principles of civil law litigation. The issues of diffuse interests and damages though seem not fit with conventional procedural rules. The most convenient adaptation of the class action device could occur in the United States where the system of contingent fee agreements and the lack of other public systems for damage recovery brought about the need for remedies to deal with the new concept of massification. Surely, not only the procedural differences have been an obstacle for the development of a class action in other jurisdictions, but the social circumstances and the advanced technological and industrial changes in combination with other factors called in the United States for changes and adaptation to the circumstances of massification maybe at an earlier stage than elsewhere.

VI THE CLASS ACTION DEVICE IN SOUTH AFRICAN LAW

1 New Constitutional Approach

The interim Constitution of the Republic of South Africa, Act 200 of 1993, has introduced changes with regard to *locus standi* as well as to environmental law. S 7(4)(b)(iv) and (v) introduces the action of 'a person acting as a member of or in the interest of a group or class of persons' (class action) and the action of 'a person acting in the public interest' (public interest action). The current rules of legal standing are thus relaxed, although s 7(4)(a) reserves this rule for infringements of or threats to the fundamental rights entrenched in Chapter 3 of the Constitution. In this context it is again to notice that public interest actions and class actions are closely linked. The public interest action can be seen as a means to vindicate the interest of the public, which does not necessarily include personal interests of

²²²Alston (n 69) 309.

individuals. In this context the problem of diffuse interests, in particular regarding the environment, becomes clear. The protection and conservation affects each individual, even if no personal rights, such as property rights or health interests are at stake. The protection of a nature reserve for instance, its fauna and flora can be the interest of a group of people or of the public at large. Thus, potentially every individual is involved when the ecosystem of the nature reserve is damaged. At this stage the notion of diffuse damage to the environment comes in as well which does not simultaneously involve damage to property or personal injury. The crucial question in public interest actions turns around the problem whether a personal interest or a diffuse interest is affected and thus, whether a person vindicating diffuse interests has legal standing to seek relief with an action. In the past South African law had a very restrictive standing doctrine and allowed only individuals to seek relief in an action who can prove that one of his or her recognised legal rights has been infringed or is being threatened. The courts have not even allowed organisations to claim relief on behalf of their members, insisting that the individual members must approach the court themselves²²³. The interim Constitution, however, loosened this doctrine and provides for the standing of associations acting in the interest of their members²²⁴.

In contrast, class actions rather focus on the interests of a group or class of people. It is a device of many individuals with the same or similar interests, seeking relief in one action. Nevertheless, the connection to the public interest action arises in cases where the group's interests are not private and individual but rather public. A person, trying to seek redress on behalf of many people who have the same interest, can have the interest in the public (the class or group can also be seen as the public) and may have no personal interest or right infringed. At this stage another point becomes obvious. The traditional distinction between public and private law is diminished if not completely abolished. The distinction between public and private interests disappears in particular in environmental matters where diffuse environmental damage is closely related to individual health interests²²⁵. However, procedural differences between the two actions have been developed. A public

²²³for instance *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others* 1990 (4) SA 749 (N); *South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 (3) SA 100 (O).

²²⁴s 7(4)(b)(ii), confirmed in *Wildlife Society v Minister of Environmental Affairs and Tourism*, op cit n 31, where even standing at common law has been granted; see also supra III.5.

²²⁵Van Reenen (n 6) 149.

interest action does not require notice to persons whose interests may be affected and the judgment is not *res judicata* against such persons. The main difficulty with public interest actions has been the standing requirement.

Standing in class actions is not as problematic as in public interest actions, at least as long as personal and hence private interests of class members are infringed or threatened, but this problem should not arise since the South African Constitution now allows both actions in the public interest and actions on behalf of a group or class. However, the class action device - as has been demonstrated in the previous part of this paper - is incentive to many other controversies.

South African law, contrary to other common law systems, has not introduced the English representative action. The class action device therefore is a new device provided by the Constitution as well.

S 7(4)(b)(iv) provides for actions of members of or persons acting in the *interest* of a group or class. It appears unclear what 'interest' means in this context. It has been indicated in the context of public interest actions²²⁶ that some scholars are of the opinion that any person or organisation may enforce the rights contained in the Bill, irrespective of whether that person or organisation is adversely affected by the infringement of the rights, whereas others hold that a demonstration of the harm or threatening of a right of an individual or group is still necessary. The question whether a direct, indirect or substantial interest of the group or class is necessary can also be crucial in class actions. For environmental matters the question leads to the possibility that in circumstances where no person's health or well-being is affected or threatened²²⁷ but where the protection of the natural environment is sought, the class action device may not be helpful. It is thus crucial how this constitutional standing clause will be interpreted. The recent cases of *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* and *Wildlife Society v Minister of Environmental Affairs and Tourism*²²⁸ have shown that the courts are willing to adopt a liberal approach. In the former case the applicant's interest has been defined as 'the proper administration and enforcement of the [Atmospheric Pollution] Act [45 of 1965]' and has been held as sufficient²²⁹. Furthermore, the applicant has been granted standing to sue on behalf of the respondent's

²²⁶supra III.5.

²²⁷s 29 of the interim Constitution states that '[e]very person shall have the right to an environment which is not detrimental to his or her health or well-being'.

²²⁸op cit n 35 and 31.

²²⁹(n 35) 161.

neighbours whose constitutional right to an environment has been infringed²³⁰. Therefore only an indirect interest seems to be required. Both cases demonstrate a wide interpretation of the constitutional clause of standing. It is to hope that the courts will also follow this trend in future decisions.

2 Horizontal Application of the Constitutional Provisions

The incorporation of class action devices in other statutes is in particular important because the problem of horizontal applicability has not fully been solved yet. The traditional opinion in constitutional law provides that the fundamental rights entrenched in the constitution protect the private individuals from government interference (vertical application). In recent times a vivid debate has occurred around the question whether the rights of Chapter 3 of the Constitution are also horizontally applicable, what again is decisive in relation to the scope of possible civil litigation in environmental law. The latest judgment in South Africa holds in this regard that 'chapter 3 does not have a general direct horizontal application, but that it may and should have an influence on the development of the common law'²³¹. This formulation seems to allow at least an indirect horizontal effect which implies that the values of the Bill of Rights must be taken into account in the development of the common law. The court, however, does not seem to preclude *per se* a direct application in certain cases when it stated that 'it may be open to a litigant in another case to argue that some particular provision of chapter 3 must by necessary implication have direct horizontal application'²³². The Constitutional Court at least rather favours a horizontal application in contrast to a pure vertical one. This opinion is also recognisable in the judgment *In Re Certification of the Constitution of the Republic of South Africa 1996*²³³ where the horizontal application of the final Constitution (s 8(2)) has been certified and thus accepted. In environmental matters this application is crucial where liability for environmental damage is concerned, for the tests for wrongfulness and legal causation, for instance, are open-ended standards or principles which have to be interpreted and applied to reflect the basic

²³⁰ibid 164.

²³¹*Du Plessis and others v De Klerk and another* 1996 (3) SA 850 887.

²³²ibid 887.

²³³1996 (4) SA 744 792.

values of the Bill of Rights²³⁴. However, as it has been submitted, the infringement of a right contained in the Constitution does not amount to a delict giving rise to a claim for damages or other appropriate relief, at least not in cases where only private parties are involved, as this would amount to direct horizontal application²³⁵.

3 Implications of the Right to an Environment

The effectiveness of the *locus standi* rule in s 7 and hence the class action device is further dependent on the interpretation of the environmental right of s 29. Set the case that a class action would be launched against a governmental waste deposit site which allegedly produces toxic fumes and unpleasant odours which would infringe the health and well-being of people in the area of the site. It is obvious that the courts would have difficulty in interpreting the vague formulation of s 29. To make an environmental right justiciable it is required that such right is clearly described and connected to standards against which breaches of the right can be measured²³⁶. Without guidelines which reflect the proper nature and content of the environmental right also the legal standing respectively the class action device to enforce the right will be meaningless.

4 The Final Constitution

The final Constitution, adopted in May 1996, provides in s 24 for a reformulated right to an environment²³⁷. The final right rather takes the form of a directive principle than that of a fundamental human right²³⁸ placing a duty on the state to act positively in term of the environment and to consider it in policy decisions. It further serves as interpretative guides for the courts and provides for better protection of the natural environment²³⁹. On the other hand this right seems weaker than the right in the interim Constitution, because it stipulates that the right must be fulfilled 'through reasonable legislative and other measures...', implying that unless there

²³⁴A Van Aswegen 'The Implications of the Bill of Rights for the Law of Contract and Delict' (1995) 11 *SAJHR* 52 and 56, where it has been stated that the interpretation clause s 35(3) is in effect an express adoption of the German model of 'Drittwirkung' in South African law; also 59-60.

²³⁵ibid 64.

²³⁶Van Reenen (n 6) 143.

²³⁷cf supra III.5.

²³⁸J Glazewski 'Constitutional Environmental Clause' (1996) 4 *Environmental Liability* CS78.

²³⁹Van Reenen (n 6) 148; Bray (n 30) 486.

are such measures the right is not triggered²⁴⁰. This notion is based on the way the two sub-sections are linked by the word 'and', implying that the right provided for in sub-clause (a) can only be complete if the legislative measures referred to in (b) have been passed. Yet, it could also be understood in the way that sub-section (a) stands for itself without being dependent on the further formulation of 'through reasonable legislative and other measures...' in sub-section (b). The word 'and' could only stand as a connection between two independent rights (right (a) to an environment not harmful to health or well-being and right (b) to have the environment protected), for the two sub-sections are separated from each other by the punctuation mark ';' which could imply that the environmental provision contains two rights. However, the former interpretation, although in effect rather a directive principle than a directly invocable fundamental right, would place a duty on the state to act positively in terms of the environment. In comparison, the Indian constitution contains in its Part IV 'Directive Principles of State Policy' which require legislation by the state to enable their exercise²⁴¹. Furthermore, it imposes a duty on 'every citizen to protect and improve the natural environment'. This formulation has the consequence that, to a large extent, it overcomes the problem of horizontal application²⁴².

In regard to the legal standing clause the final Constitution states in s 38(c) that 'anyone acting as a member of, or in the interest of, a group or a class of persons' may seek relief in a court and thus is in effect the same standing provision as s 7 of the interim Constitution. Again it is important to mention that clauses similar to the constitutional standing clauses should be included in environmental statutes, so that class actions also can be an effective device in the non-constitutional field. This is also important because of the rule of statutory interpretation which can exclude actions for damages²⁴³. The South African Law Commission proposes in its working paper also the availability of class actions for damage claims²⁴⁴. However, the recommendation of a Class Action Bill - it is submitted - should also take into consideration the implications of such device on the substantive law and the fundamental procedural principles.

²⁴⁰Glazewski (n 238) CS78.

²⁴¹R S Pathak 'Human rights and the development of the environmental law in India' (1988) 14 *Commonwealth Law Bulletin* 1176.

²⁴²Winstanley (n 24) 96.

²⁴³cf supra III.5.

²⁴⁴(n 10) 5.

5 Further Implications

As it has been discussed in the previous chapter the implementation of class actions is not only a procedural reform but also has implications on the substantive law of delict (on establishing fault, proof of the damage suffered and on the causal relationship between such damage and the defendant's fault). The *res judicata* effect of a class action judgment, it has further been noted, is rather an explicitly legislative act than a judgment²⁴⁵. The South African Law Commission states in this context that (in the case that a judgment or settlement would be binding only on those who come forward to claim a benefit *after* judgment has been given or a settlement made) 'multiplicity of actions will be avoided because the **stare decisis** principle will ensure that an unsuccessful action will discourage other similarly placed persons from litigating, while a successful judgment is likely significantly to reduce the number of separate actions which are brought'²⁴⁶. This opinion appears justified, yet it could be discussed whether it truly does justice to the principle of procedural equality, since the Law Commission further recommends that the decision whether to give notice to class members and if so, what directions are appropriate in respect thereof, shall be in the court's discretion²⁴⁷. It becomes clear - once more - that a class action judge has an important role in class action procedures and that he or she has to consider carefully how to use the judicial discretion. It can be pointed out as well that a class action judge in general would take a managerial role, contrary to the traditional role of South African courts with their function of merely considering requests for interim relief by the parties, the general conducting of the proceedings and the delivery of the judgment²⁴⁸.

Considering further the features of a class action device it appears that s 7(4)(b)(iv) of the interim Constitution as well as s 38(c) of the final Constitution allow a person to launch a class action without necessarily being a member of the class itself. This approach goes further than the United States Rule 23 of Federal Rules of Civil Procedure which requires that the class representative has to be a member of the class, and thus has to have a personal interest and claim. As pointed out at an earlier stage the wider approach would be of advantage, especially in cases where

²⁴⁵Glenn (n 145) 289; 300-301.

²⁴⁶(n 10) 41.

²⁴⁷ibid 71.

²⁴⁸W le R De Vos 'The Impact of the New Constitution upon Civil Procedural Law' (1995) *Stell LR* 38.

the class members are not able to represent themselves to the best possible effect, may it be because they are from a socially disadvantaged background or because the matter at issue affords expert knowledge. Like India the people of South Africa are from vastly divergent backgrounds, and many people lack education and legally sufficient knowledge to bring their claims to court. In addition, financial resources may be not available to conduct an environmental lawsuit. Thus, if a class could find support from a third person or association, access to court could be made available not only in theory. The South African Law Commission also proposes that legislation should not require the person commencing the action or the representative to be a member of the class, and it goes even further in recommending that the person applying for certification of the class should not necessarily become the representative²⁴⁹. With this opinion the Commission seems to be in line with the Indian social action litigation which also allows any public spirited individual or group to file a case on behalf of those who themselves are unable to do so by virtue of circumstances²⁵⁰. Hence, the right to sue is not solely awarded to the individual who has personally suffered injury.

When claiming that class actions are the practical device to access to justice for underprivileged and financially poor individuals the question of costs has to be taken into account, too. The general rule of English law, that the costs follow the outcome of the action including the fees of legal representation, is also applicable in South African law, and thus considerably different to American cost rules. On the one hand, an incentive for plaintiffs to launch class actions should be contained in such rules, on the other hand equal treatment of individual trial parties with class action members should be considered. The South African Law Commission proposes that a provision should be included in legislation applying the courts discretion whether to award costs to winning or losing parties and whether to award representation fees and if so, to which party²⁵¹. A further difference to the American system exists regarding the attorney's fees. In South Africa it is generally illegal to charge a contingent fee, but the legality of such arrangements is presently under consideration and investigation by the Commission²⁵². So far it is recommended that an attorney may conclude a written agreement with a representative in a class

²⁴⁹(n 10) 28, 60.

²⁵⁰Meer (n 42) 362.

²⁵¹(n 10) 47.

²⁵²Project 93: Speculative and Contingency Fees.

action stipulating fees only in the event of success in the action²⁵³. Further incentives for class action plaintiffs might be possible with legal aid facilities or class action funds, either financed by the government or organisations and parts of plaintiffs' awards.

In general the Commission's class action draft is a carefully elaborated and innovative proposal which tries to make access to justice a practical reality. Nevertheless, it is necessary to interpret the constitutional provisions, in particular the environmental clause, to further litigation as an effective means for protection of the environment. Although the essential characteristic of the environment ideally dictates more proactive and preventive measures than reactive and curative remedies, a class action can be a meaningful measure to seek preventative interdicts and injunctions. Moreover, class actions for damages can have an important influence on society by making judgments public's knowledge and laying a strong foundation for the development of environmental law and rights²⁵⁴. Jurisprudential innovation in this field has been demonstrated by India. Confronted with the well-known Bhopal tragedy, the Supreme Court departed from fundamental common law doctrine and held in *Mehta v Union of India*²⁵⁵ that where 'an enterprise ... is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such ... activity the enterprise is strictly and absolutely liable to compensate all those affected by the accident', whereby neither cause nor foreseeability is relevant in such circumstances²⁵⁶.

VII CONCLUSION

Today, environmental law is firmly embedded in many legislations. Amongst other countries, the South African Constitution expresses the country's concern to promote environmental protection for its people as well as future generations.

The fast development of industry and technology, their characteristics of mass-production, mass-distribution and mass-consumption economy and the herewith

²⁵³South African Law Commission (n 10) 50.

²⁵⁴S Gutto 'Environmental Rights Litigation, Human Rights and the Role of Non-Governmental- and Peoples' Organisations in Africa' (1995) 2 *SAJELP* 8.

²⁵⁵1987 (4) SCC 395 421.

²⁵⁶Gutto (n 254) 9.

growing concern for protection of society and the environment have given rise to the development of the access to justice movement as well as to third-generation human rights. Moreover, in this context the notion of diffuse interests appears to break the boundaries of the private law and public law dichotomy. The class action device, organisational actions as well as public interest actions are the express attempt to do justice to this development in jurisprudence. Whilst continental approaches are still rather bound by traditional principles of procedural and substantive law, class actions in the United States have developed as a unique feature of civil litigation. The struggle to come to grips with the class action device as a useful tool for mass litigation, though, has not come to an end, and the mass case management, presided over by activist judges has not been without critique. Indeed, considering the problems with which United States jurisdiction is confronted, cases with millions of plaintiffs spread over a wide geographical area, complex questions of procedural as well as substantive law, such as conflict of interest between the class and its representative, manageability, excessively punitive class actions and caseload burdens, it could be concluded that the class action reform is deemed to fail. As Glenn puts it '[s]ince the class action will not work unless we change people to make it work, there is no class action reform which can be said to meet the needs of people' and thus '[e]ffective class action reform, like other forms of Utopian social engineering, is impossible'²⁵⁷. Nevertheless, some countries seem not be of this opinion and have introduced only recently the class action device²⁵⁸, having the benefit of the American experience and the opportunity to avoid some mistakes. A quite differing approach but not less innovative, and maybe practically even more effective than the United States class action is the Indian social action litigation, aimed at making justice accessible to those who are denied their constitutional rights and are unable themselves to apply to court for legal relief²⁵⁹. The Indian model might be described as the tool emerging in the class-oriented society which is battered with the phenomenon of disparity between poverty and wealth. It might be those circumstances which allow a jurisdiction to widen their power and influence even against the risk of diluting the limitations set by democratic principles.

²⁵⁷Glenn (n 55) 274.

²⁵⁸for instance Canada (Quebec in 1978, Ontario in 1992) and Australia (Victoria in 1986, South Australia and the federal court system of Australia in 1991); Fleming (n 72) 521.

²⁵⁹Meer (n 42) 360.

Class actions might ask for innovations in our individual oriented litigation system which also might lead to important changes in substantive law. The facts of human kind's development, particularly recognisable in environmental law, cannot be ignored. The environment is simultaneously the source of our development and of life and health. Traditional jurisprudence is confronted with newly emerging issues such as massification and mass torts. Ultimately the purpose of the judiciary is to solve disputes and to guarantee the translation of written rights into practice. Forms of disputes might change in the race for development, hence, the jurisprudence has to move on within this race, maybe even at the expense of some settled knowledge and experiences. A class action procedure for environmental law can be an effective means to enforce existing remedies in this field of law. In absence of class actions, moreover, aggrieved persons would be denied the benefit of an existing remedy where the cost of individual litigation outweigh the size of their claims.

An elaborate class action procedure has the benefit of judicial economy, increased access to courts and the modification of the behaviour of actual or potential wrongdoers. In the environmental field the benefit of deterrence seems of particular importance because it has the effect of 'cost internalisation' and therefore is in line with the 'polluter pays principle'. If a class action permits the imposition of the full costs of industrial pollution on a defendant the incentive to modify the amount of the pollution that the business generates by the installation of pollution control machinery might be even more effective than statutory imposition of a duty to prevent pollution. Court decisions have effects on society that go well beyond what is regarded as 'precedents'; the case for the environment could be 'won' whether or not the actual case before the courts is 'lost', when publicity is given to the circumstances. The communities could be mobilised with class actions, and environmental problems could therefore be addressed more meaningfully and effectively.

With the constitutional acknowledgement of the class action device South Africa has to challenge the traditional model of jurisdiction. However, class actions - as well as public interest actions - offer a further possibility to include individuals and organisations in the mechanism of protection of the environment and the enforcement of environmental law. South Africa has the opportunity to use the American and Indian experience for their own development of a mass litigation procedure with a clear theory of courts and litigation process, so that the

constitutional foundation of a new environmental law era should not only stay written promise.

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