

# Class Actions, Collective Actions And Group Litigation: A Status Report

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# The Conference Includes Reporters from Around the World

- Africa
- North and South America
- Central and East Asia
- Middle East
- Central, Northern & Western Europe

# 29 Countries Are Represented

- Africa
  - South Africa
- North and South America
  - Argentina, Brazil, Canada, Chile, U.S.
- Central and East Asia
  - Australia, China, Indonesia, Malaysia, Japan, Russia, Singapore, Taiwan
- Middle East
  - Israel
- Central, Northern and Western Europe
  - Austria, Denmark, England, Finland, France, Germany, Italy, Norway, Poland, Portugal, Spain, Sweden, Switzerland, EU

*AVAILABLE AT [www.law.stanford.edu/classactionconf](http://www.law.stanford.edu/classactionconf)*

# Country Reporters Used A Common Protocol

- Overview of legal system
- Availability of collective & group litigation mechanisms
  - Historical background
  - Policy objectives
  - Political controversies
- Procedural Rules
  - Standing & representation
  - Procedural rights
  - Funding
  - Remedies
- Rules “in action”
  - Empirical data

# Outline

- Overview of procedures
- Observations on patterns & trends
- Public policy dilemmas & their resolutions

# Caveats

- Preliminary & tentative summary
  - Not all reports reviewed
  - No opportunity yet to talk with reporters
- Perspective reflects experience with U.S. class actions, which influenced
  - Protocol design
  - Information highlighted this morning
  - Identification of key policy questions

# Overview of Procedures

- What procedures are available, for whom, under what circumstances?
- What remedies?
- At what cost?
- Consequences to date?

# Representative Litigation Is Common (And Often Not New)

- In most countries, associations may bring representative actions on behalf of “social” interests
- Requirements for representative associations differ
  - In some jurisdictions, must be licensed or certified
  - In others, must meet statutory requirements
  - In most, must pre-exist litigation
  - In a few jurisdictions, ad hoc groups of individual plaintiffs meet association requirements
- Some jurisdictions rely heavily on government agencies to bring representative actions

# Representation By Individuals or Ad Hoc Groups Is Spreading...

- Until recently, limited to Australia, Canada & U.S
- Now also: Chile, Denmark, Israel, Japan, Malaysia, Netherlands, Norway, Portugal, Singapore, South Africa, Sweden, Switzerland, Taiwan

## ...But Is Often Limited

- To one or a few areas of law: e.g. consumer actions, Chile; environment, product defect, securities, Portugal
- To a stage of litigation: e.g. settlement, Netherlands
- To certain defendant types: e.g. generally not government, Malaysia; not when allowing class action against defendant might harm public, Israel
- With regard to remedies: e.g. injunctive or declaratory relief
- Usually must meet some other threshold requirements:
  - Number of claims
  - Common issues of fact or law
  - Sometimes: Preferable procedure to the alternatives

# Non-Representative Group Proceedings (Other Than Joinder) Are Uncommon

- Best developed in England
  - Group litigation order (GLO) allows for coordinated proceedings with test cases
- Available in U.S. federal courts for pre-trial
  - Multi-district litigation (MDL) allows for coordinated pretrial preparation, usually leading to settlement
- In some jurisdictions, mass joinders (e.g. Japan, U.S.)
- In some jurisdictions, “test” cases and intervention creates something similar to GLO (e.g. Germany)

## In Representative Actions By Associations, Few Procedural Protections

- If association has standing to sue on behalf of members to protect social interest, no further regulation of proceedings
  - Outcome binds only association & defendant
  - Value of outcome for subsequent individual proceedings varies

# In Individually Representative Actions, Procedural Protections Vary

- Individual representatives often but not always approved by court
- Notice of proceedings usually but not always required
  - Sometimes performed by court
  - Often relies on Internet
- “Opt-in” favored over “opt-out”
  - Great variation as to how (and when) individuals join or exclude themselves from representative proceedings
  - And therefore in whom is bound by outcome

## In Representative Litigation, Most Common Remedy Is Definition of Rights

- Representative litigation by associations is almost always limited to injunctive or declaratory relief
- Representative litigation by individuals can usually (but not always) obtain damages
- Representative litigation by government agencies can sometimes obtain damages

# Funding Rules Determine How Representative Actions Are Conducted

- Outside the U.S., two-way costs prevail
  - Sometimes surety is required of representative plaintiff(s)
- Risk of adverse costs sometimes mitigated by
  - Judicial limitations or waivers of fees
  - Legal insurance
  - (Less frequently) legal aid
  - Third-party payors

## Although Representative Litigation Is Widely Available, In Most Countries It Is Uncommon

- Most individually represented actions are relatively new
  - Experience limited to a handful of cases
- With regard to representative actions by associations, reporters say:
  - Inability to obtain damages limits attraction of suit
  - Expense & especially risk of adverse costs put litigation out of reach of associations

# Representative Litigation Can Flourish Under Many Regimes

- Where individually represented actions are the norm, annual caseloads range from several hundred (Canada) to several thousand (U.S.)
- In some countries, associations bring hundreds of cases annually (Germany)
- In some countries, government agencies bring large numbers of cases

# Number of Non-Representative Group Litigation Cases Is Modest

- In U.S., about 50 “litigations” collected for pretrial annually
  - Currently, about 75,000 cases in consolidated proceedings
- In England, about 50 GLOs from 2001-2005
- In Germany, a few “model” cases to date

# Empirical Data Are Lacking

- No countries keep official track of representative actions
- No systematic data on wins & losses or damages paid
- No systematic data on method of dispositions (settlement or adjudication)

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# Whether Civil or Common Law Regime Does Not Explain Policy Towards Representative Actions

- Civil and common law regimes are continuing to converge with regard to
  - Adversarial processes
  - Exchange of evidence
  - Orality
- More critical for representative & group litigation are
  - Active judges & judicial case management
  - Orientation towards settlement
  - Commitments to individualized process

## Other System Design Features Are Correlated With Representative Action Policy

- Allocation of institutional roles regarding regulation, compensation for harm, human rights protection
  - Judiciary vs. executive or legislative branches
- Within courts, assignment of issues & claims to administrative tribunals, civil or criminal courts
  - ADR procedures & compensation schedules may fit more comfortably within administrative tribunals

# Representative Action Provisions Often Embedded in Statutory Law

- Consumer protection and securities law frequent locus for representative actions
- Provisions subsequently extended to other areas
- End-point is trans-substantive procedure

# Political Debate Over Representative Actions Is Dominated By Interest Group Politics...

- In virtually every country the line-up of proponents & opponents is the same:
  - Consumer (and often environmental & human rights) advocates favor expanding representative actions
  - Business interests oppose
    - Especially those who have been sued in the U.S.
- Judges in some countries support, in others oppose
- Bar is often divided

# ...By Stereotypes of U.S. Class Action Policy & Practice...

- Widespread perceptions of U.S. often founded on misinformation or misunderstanding
  - U.S. is overrun by class actions
    - Actual number of class actions filed annually is about 8500, small percentage of all civil cases
  - Class actions are only about money
    - Class actions play an important role in rights protection
  - Class action lawyers get all of the money
    - Percentage of dollar settlements paid to lawyers varies dramatically
    - Litigation (or its threat) often leads to changes in corporate practice
  - Class actions depend on contingency fee lawyers
    - Fees in class actions are awarded by judges

# ...And By Concerns About Protecting Individual Rights

- In some countries, class actions are seen as violating European Convention on Human Rights guarantee of a right to “fair & public hearing”
- In countries with individually representative litigation, concerns about individual rights shape opt-in v. opt-out debate
  - Resolution of this debate sometimes results in rules that limit class actions (so as not to violate individual rights) but then don’t offer much procedural protection to those who are bound by the action

# Funding Rules Designed to Discourage Representative Litigation

- Risk of adverse costs may be borne solely by representative plaintiffs
  - In some instances, all plaintiffs contract to share
  - In a few jurisdictions, all plaintiffs required to share, pro rata
- In many jurisdictions, court may not award prevailing plaintiff attorney additional fees for extra expenses or risk

# Combining Traditional Fee Rules With Representative Litigation Has Perverse Effects

- In some jurisdictions, expense & risk leads to non-implementation of new representative actions
  - May be intentional
- In other jurisdictions, the nature of the representative regime is changed by fee rules
  - E.g. from opt-out to “closed classes” in Australia
- In some jurisdictions, while fee regimes constrain lawyers they don't restrain third-party payors
  - Class members may get *less* than they would were class action lawyers rewarded for assuming risk of adverse costs

# Outline

- Overview of procedures
- Observations on patterns & trends
- **Values in tension**

# Designing Representative Action Regimes Requires Hard Value Choices

- Expanding access to justice vs. protecting society from litigation costs
  - Turning to courts to deter and redress mass harms
  - Concern about overuse leads to restrictive procedures & funding limitations
- Preserving rights of parties vs. promoting efficient resolution
  - Concern that representative litigation denies parties autonomy
  - Limitations on standing & remedies impedes efficient resolution of mass claims
- Preserving individual rights *principles* vs. preserving rights *in practice*
  - “Opt-out” procedures disfavored as denial of rights
  - Alternatives may not offer real rights protection

# Conference Agenda Organized Around Key Issues

- Standing & representation
- Funding
- Resolution
- Remedies
- Public policy choices