# GROUP ACTIONS IN SWEDEN: REFLECTIONS ON THE PURPOSE OF CIVIL LITIGATION, THE NEED FOR REFORMS, AND A FORTHCOMING PROPOSAL

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## I. INTRODUCTORY REMARKS

The post-industrial society of today is characterized in several respects by social, industrial, commercial, and environmental structures, which are different from those that existed when the legislation in many fields was created. In Sweden this is true in particular when it comes to rules within the field of procedural law. The Swedish Code of Judicial Procedure was enacted in 1948, and although it has been reformed several times since then, the procedural rules are still to a great extent shaped without sufficient regard for the fact that the circumstances of contemporary society are different from those that applied when the Code was enacted.[1]

Thus, contemporary society has given rise to new forms of needs and claims that were unknown fifty years ago. For instance, developments in the consumer and environmental fields have given rise to claims that, since they affect so many people in the same way, would be better addressed at the group level rather than at the more traditional individual level. It is not possible to satisfy the needs of consumers and the environment solely by provisions that give private citizens a means of exacting sanctions should they be subject to a violation of their rights. Further legal rules are called for in order to



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1. *See, e.g.,* Per Henrik Lindblom, *Rättegångsbalken 50 år – en saga och sex sanningar* [*The Swedish Code of Judicial Procedure – One Fairy-tale and six True Stories*] Svensk juristtidning [SvJT] 496 (1999).

permit the common processing of mass claims and to protect public consumer and environmental interests.

Examples of new types of claims are those that derive from rather generally formulated social goals or rights, for example, the right to a healthy environment and to protection from discrimination or unconstitutional contravention of civil rights. These are issues concerning rights and claims held in common by all citizens or by large sections of the population.

It is not, however, only in situations of this kind that group interests, which are difficult to define and protect, arise. Other situations such as an accident, a dangerous product, dishonest business methods, or a discharge from an environmentally dangerous activity, may also injure many persons in a similar manner, thereby creating a temporary group of people with similar claims against a particular company or public utility.

The question of access to justice for modern mass claims raises a number of new procedural issues and problems. This is due not only to the fact that these kinds of claims affect large interest groups, but also because they are sometimes based on very pronounced social and political considerations. The legal review of these claims involves balancing a broad spectrum of interests. The claims, consequently, do not lend themselves to being arranged within individual procedural models formulated decades ago.

Problems associated with litigation apply to new as well as traditional kinds of claims. The difficulties of seeking redress are connected to both the content of the substantive law and to economic, psychological, cognitive, and social obstacles affecting the individual claimant facing a party who may, in several respects, be stronger.[2] This problem may be virtually insurmountable, as the system of procedural rules is aimed at satisfying traditionally narrow two-party disputes. On top of this, the effectiveness of proceedings is inadequate in certain areas, even in relation to litigation between equal parties.

In the past ten to fifteen years, issues concerning citizens' access to the machinery of justice have been afforded greater attention and interest by lawyers, political commentators, politicians, and other members of Swedish society. Group actions and other forms of representative actions have come to be viewed in Sweden, as in other countries, as a means of strengthening access to justice for claims that

2. *Cf.* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 239-46 (1989).

are held in common with**,** or are similar for, a large number of people.[3]

Thus, proposals to introduce group actions or to investigate the possibilities for such reformatory measures have been put forward several times.[4] Of great importance in this context is the fact that in June 1991 the Swedish Government appointed Professor Lindblom to lead a commission with the task of examining whether there is a manifest need to improve access to justice for group claims.[5] The Commission was to assess the possibility of introducing rules, as a complement to the traditional rules of judicial procedure, for group actions in situations concerning claims that are common to large groups of people. In January 1995 the Commission presented its extensive report.[6]

The Report was sent out for review to more than sixty official and private entities, for example, courts, the Bar Association, the Consumer Ombudsman, and non-governmental organizations. Reactions varied. Not surprisingly, there was strong support for reform from representatives for consumers and the environment, while those

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3. The most experienced observer in this field is Per Henrik Lindblom, Professor of Civil and Criminal Procedure at Uppsala University. *See, e.g.,* PER HENRIK LINDBLOM, Grupptalan. En studie av det amerikanska classactioninstitutet ur ett svenskt perspektiv [Group Actions. The Anglo-American Class Action from a Swedish Perspective] (With a Summary in English) (1989)(on file with Author); Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805 (1997).

4. *See generally* Statens Offentliga Utredningar [Reports of the Government Commissions] SOU 1989:14, Part II, Mångfald mot enfald – Lagstiftning och rättsfrågor [Diversity or Uniformity]; SOU 1993:27, Miljöbalk - förslag till åtgärder för ett framtida miljöskyddsarbete [The Environment Code]; SOU 1993:59, Ny Marknadsföringslag [New Marketing Practices Act]; SOU 1993:7, Löneskillnader och lönediskriminering – Om kvinnor och män på arbetsmarknaden, [Pay Differentials and Pay Discrimination]; Departementsstencil [Department Report] [Ds] 1993:16, Avgifter inom kommunal verksamhet – förslag till modifierad självkostnadsprincip [Charges and Levies for Municipal Services] (all on file with author). It may also be mentioned that the Swedish Parliament has, on several occasions, dealt with issues of representative actions by organizations in the field of environmental law. *E.g,.* Jordbruksutskottets betänkande [Department of Agriculture's Report] [JoU] 1980/81:21 and 1982/83:30. The Parliament has also considered the issue of group actions as a means of strengthening the effectiveness of the prohibition of discrimination in the Equal Opportunities Act. *E.g.,* Proposition [Government Bill] [Prop.]1993/94:147 and Arbetsmarknadsutkottets betänkande [Committee on Labour Market Report] [AU] 1993/94:17. *Cf.* SOU 1978:40, Tivstelösning på konsumentområdet [The Resolution of Disputes in the Field of Consumer Protection]; SOU 1994:14 Konsumentpolitik i en ny tid [Consumer Policy in the New Age](all on file with author).

5. The Commission consisted of several representatives for business life, non-governmental organizations, and public entities.

6. *See* Gupprättegång Del A-C, SOU 1994:151[Class Action Part A-C, SOU 1994:151]. The Report is in three parts and contains almost 1,500 pages (on file with author).

representing industry were against the introduction of group actions into Swedish law.

The criticism focused on three main issues, namely, the interest of the members of the group of claimants, of the defendant, and of the courts.[7] Thus, the critics' concern was that group actions would deprive the individual members of the group of their right to a day in court.[8] Under this argument, group actions are viewed to be unconstitutional. Furthermore, critics said that group actions would force an individual defendant to accept unjust settlements.[9] In this way, it is argued**,** group actions will create a risk of legal blackmail.[10] Finally, the critics said that the courts would overflow with group actions—although there is no need for such actions—and thereby hinder other judicial activity in the courts.[11]

The Swedish Ministry of Justice took the responses into consideration, and in the late summer of 1999, the Ministry of Justice decided to move on and convert the Commission's proposal into legislation. The proposed Act, however, was considered much too extensive,[12] partly explained by the fact that the Commission also chose to regulate issues that occur infrequently in practice. Therefore, in November of last year, the Author of this Article was asked by the Ministry of Justice to review the Commission's proposal. In March 2000, I presented to the Ministry of Justice a revised draft legislation.[13] According to a statement made by the Government in a

7. *See* Per Henrik Lindblom, *Grupptryck mot grupptalan* [Group Pressure against Group Action] SvJT 85 (1996) (on file with author).

8. *See id.* at 97.

9. *See id.*

10. *See id*. at 101.

11. These arguments are well known all around the world and are put forward whenever a proposition of introducing group actions or improving existing rules on group procedure is presented. But the fact that the arguments are repeated over and over again does not make them stronger. On the contrary, experience from, *inter alia***,** Canada and Australia shows that the fear of legal blackmail and a floodgate effect on the courts is ill-founded and far from verified in practice. This was confirmed by reports by Professor Garry D. Watson and Dr. Peter Cashman presented at the Conference, "Debates Over Group Litigation in Comparative Perspective," Geneva, July 21-22, 2000. *See* Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001); S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289 (2001).

12. The draft legislation presented by the Commission contains nearly 100 sections.

13. In the new proposal the Act is reduced to 49 sections (not yet published, on file with author).

paper presented before the Swedish Parliament in April 2000,[14] new legislation on group actions may be introduced in the beginning of 2001. This was confirmed in a proposition made to the Parliament in September 2000.[15]

The main purpose of this Article is to present the proposed legislation as it stands today. However, I would like to begin with some views on the underlying need for a group action reform. Therefore, in the next two sections I will discuss the purpose and function of the legal system and civil proceedings, as well as various barriers to access to justice for mass claims.

## II. SOME REMARKS ON THE PURPOSE AND FUNCTION OF THE LEGAL SYSTEM AND CIVIL PROCEEDINGS

In order to survive, every society requires that its members observe certain given behavioral patterns. A democratic social system is founded on people's desire and inclination to cooperate in order to achieve common, socially useful net benefits. In order to be accepted by the citizens, the rules of behavior must be directed towards common goals. The advantages gained by observance of given behavioral norms, together with the respective sanctions applicable upon breach of them, contributes to the maintenance of social institutions. In this way, guarantees are provided for the continued development of society in accordance with decisions made within a democratic political system.

In order to achieve these objectives, in many cases the behavioral norms need to be coupled with sanctions that will apply against those who fail to observe the provisions. Indeed, many people surely feel that they have a duty to submit to decisions made in a democratic process. Most people obey the law without considering the possible legal consequences of breaking the rules. For others, however, the threat of sanctions is an important factor influencing their choice among alternative forms of behavior. In many areas it is possible to show strong links between effective sanctions and the inclination to contravene rules. Compliance with the law is not promoted if it is not possible to impose sanctions for violations of rules. This may diminish the feeling of duty to obey legal rules; citizens lose confidence and, ultimately, their faith in the law.

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14. Regeringens skrivelser [Communication from the Government] [Skr.] 1999/2000:106, *available at* <http://www.justitie.regeringen.se/propositionermm/skrivelser/pdf/s19992000_106.pdf>.

15. Prop. 2000/2001:1 p 37 *available at* <http://www.finans.regeringen.se/propositionermm/bp01/pdf/BP2001.pdf>

For legal systems utilized to give effect to substantive law, it is a common requirement that they should be constructed in a manner that guarantees an effective and just intervention. The overall objective is to enforce and assure the content of the substantive legal rules. It may appear to be a banal truth, but it is nevertheless worth stating: a system of sanctions must be founded on the fundamental principle that an act or ordinance is passed with the view that its content shall be observed and that its sanctions are enforceable.

The machinery used to impose sanctions may be constructed in many ways. The alternatives include judicial or administrative examination and control, private or public boards, arbitration, etc. Public and private alternatives may prove equally effective in ensuring that a private person can enforce his rights, or in executing a means of compulsion. Although private alternatives to courts and other official operations may constitute efficient and effective instruments to uphold the rights of private persons, it is the State that must bear the responsibility of ensuring that citizens have access to enforceable forms of sanctions. It is difficult to conceive of a private administration of law based on anything other than the parties' voluntary submission to such examination. Therefore, there can hardly be any question of permitting private agencies to control the means of compulsion necessary for a completely effective sanctions system.

There is a risk that respect for the legal system will diminish if the legislator does not provide means for private persons to enforce their claims by compulsion. The inclination of a party to voluntarily submit to determination by a private alternative is probably dependent upon the options offered by the State. Furthermore, the possibility of enforcing a right by means of State compulsion is an important inducement to voluntary submission to another form of determination that offers a simpler and less expensive procedure.

The option of undertaking court proceedings is the most important dispute resolution alternative provided by the State. The courts have a constitutional base that affords them a special status in the administration of law and justice. Their procedures are founded on the principles of due process, whereby the court must be objective and impartial, and the decisions must be made uniform for similar cases. When acting judicially, the courts are not subject to State control, and they serve as the final means for ensuring that the rights of private persons are also upheld in relation to the State.

The procedural rules, and the actual proceedings, are thus of fundamental importance to the effectiveness of the substantive law. This

also applies to the possibility of compelling enforcement. The procedural system should be structured both in accordance with the requirement that the decisions be correct in substance, and also so that the procedure shall act as a behavior modifier. The litigation procedure should facilitate the resolution of a dispute in a manner that does not under-compensate or over-compensate any party,[16] while the decision of the court should discourage actions that violate the law. This, however, is not enough. A system of procedural rules should also provide satisfactory economical solutions to litigation. Further, it should provide the courts with the opportunity to establish case law and to develop the law, a function that the substantive law more and more frequently calls for, especially within the fields of consumer law and environmental law.

There is good reason to speak of a Swedish model in relation to the creation of systems to deal with legal conflicts. The tendency has largely been towards the specialization of the organs concerned with legal sanctions. The specialization has sometimes been within the courts' administration, and in other situations the establishment of special boards, agencies, etc., has affected it. In certain cases, endeavors have primarily been directed toward the resolution of disputes by voluntary agreements. The legal institutions have thus been concerned with providing supplementary assistance and developing the law.

The era of specialization seems, however, to have passed its peak in Sweden. Current developments tend toward more institutions being combined or in some other way coordinated with each other.[17] Simultaneously, work is under way to limit the functions of the courts so that they may devote more attention to their principal function, namely, the administration of justice in the true sense. Furthermore, the general courts have come to play a greater role in society as a result of Swedish membership in the EU.

## III. ACCESS TO JUSTICE FOR MASS CLAIMS

### A. The Concept of Access to Justice

The extent to which citizens have access to justice in a broad sense depends on the fulfillment of four principal tasks of civil procedure: conflict resolution, compensation, and access to justice (reparation);

16. It should here be noted that there are no punitive damages in Swedish law.

17. Thus, since January 1, 2000, decision-making in Swedish environmental law cases is essentially transferred from administrative agencies to newly installed environmental courts.

behavior modification (prevention—including deterrence); precedent-building, legal development, etc.; and procedural and social economy. It is only by the fulfillment of all these functions that the aims and purposes that underlie substantive law can be fully realized, thereby giving people access to justice.

Conflict resolution, compensation, and access to justice refer to the function of legal proceedings to protect, in individual cases, the interests and objectives manifested by substantive legal rules. They relate to the requirement that the system of rules should offer a real and equal opportunity for everyone to have legal conflicts resolved in an expert and impartial manner and to be able to enforce well-founded claims. Thus, a procedural system should provide an easily accessible decision-making organ and procedure that is expeditious, inexpensive, and simple.

Part of this also implies the protection and satisfaction of the public interest in accordance with the intention of the legislature and the social function of the law. Private and public interests often coincide and the satisfaction of one is also to the benefit of the other. Developments tend toward a merger of private and public interests.[18] Legal areas—substantive and procedural—that were once held apart are now integrated to a greater extent. State and municipal supervisory and control functions must be complemented with resources from private legal subjects. The task of protecting public interests and group interests becomes increasingly a matter for the individual as well (citizen enforcement).

At the general level, the procedural system, and the proceedings themselves, have the effect of controlling peoples' behavior in many ways. This effect is usually called behavior modification. By giving support to the underlying purpose of substantive legal rules, the process of administering justice plays a part in the whole of the legal system's influence on the evolution of morals. The prospect of being sued may also be a deterrent, in economic or other terms**,** both individually (for the unsuccessful defendant) and generally (for those who are or could be in a corresponding situation).

In order for the legal rules to operate as a behavior modifier, realistic prospects of turning the content of the rules into practical use are required. Those who rely on a normative command must have real access to an apparatus by which they may compel recognition of their

18. *See* ROBERTH NORDH, *Talerätt i miljömål* [*Legal Standing in Environmental Law*] (With a Summary in English), Chs. 16, 19 (1999)(on file with author).

rights. One cannot rely on everyone's feeling that they are under a moral duty to always obey the law.

The risk of being drawn into litigation thus plays an important role as an inducement to voluntarily comply with the rules laid down for the legal system. The procedural system is a fundamental element in the establishment of norms as a means of control. In themselves, the possibility of going to court and litigating have the effect of modifying behavior, both in individual cases and more generally. However, in order to affect prevention, it is not necessary that many cases be brought to the courts. The fact that there is access to effective procedural instruments has, in itself, a discouraging effect.

Another function of civil proceedings is to give rise to precedents, legal development, etc. Modern legislative technique, with its use of framework laws and general clauses, has brought with it a greater need for guidance by means of judicial precedents. It is often difficult for the legislative procedure to keep pace with scientific progress. Deficiencies in the legal system appear, and, as a consequence, protection afforded by the rule of law to private citizens is incapacitated. In a rapidly changing world it is important that, besides the legislature, there is a strong and independent institution that can carry legal development further, in harmony with the general development of society.

For these reasons it is important that the courts be able to direct the processes of precedent-building and supplementing legal rules. In this way, the development of the law and creation of new law is expected to occur within the framework of the judicial function.

The limitation of costs for the parties and the public is often of great importance to the procedural system's total functional success. An expensive and complicated litigation procedure obviously inhibits the propensity of private persons to litigate and, far too often, adversely affects the unsuccessful party to the litigation. Inadequacies in the enforcement of legal sanctions create an opportunity for behavior that conflicts with public objectives and interests. Behavior that may appear free of risk may have troublesome psychological effects. Unethical business practices or the non-observance of environmental requirements are regarded as necessary to the conduct of profitable operations. The breach of rules by others excuses one's own excesses. Enormous social costs, which are often extremely difficult to quantify, may be incurred as a result of the deterioration of the environment, unfair competition, etc.

## B. Ways of Strengthening Access to Justice

There are several measures that can be used to ensure that citizens have adequate access to justice.[19] Among these are rules on costs, legal aid, legal expenses insurance and other kinds of insurance, joined parties, test cases, state and private boards, and supervisory and monitoring activities, as well as penalization.

In recent decades, the procedural system in Sweden has been reformed on several occasions in order to make the process less complicated, curtail the formalities, and reduce the expense. In particular, the aim of reducing costs for the parties may be said to be the underlying goal for the so-called Small Claims Act of 1974, the provisions of which have now largely been incorporated into the Code of Judicial Procedure.[20]

Thus, in small claims cases there is a no-fee rule on costs.[21] This is an exception to the Code of Judicial Procedure's principal rule (the "English rule") on the distribution of costs. Within water law, the law relating to expropriation, and in certain other legal areas, further deviations from the principal rule have been introduced.[22] In a case concerning a permit or compensation, for example**,** the person presumed to be causing the loss bears the costs of both parties whether a permit is given or not.

Rules relating to alternative and unbalanced distribution of costs are effective instruments if one wishes to make it easier or more difficult for the private individual to go to court. However, studies show that it is almost exclusively companies that try to enforce small claims through court procedures, while consumers feel that they cannot go to court without counsel. Hence, consumers do not enforce small claims. Overall, one has to say that it is difficult to conclude that making exceptions to the rules on costs can function as a general measure to remedy the inadequacies of the system regarding access to justice in respect of group claims.

Legal aid affords private citizens the opportunity to litigate with reduced risk regarding costs. However, in recent years there have been

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19. *Cf.* ACCESS TO JUSTICE. THE FLORENCE ACCESS-TO-JUSTICE PROJECT. (Mauro Cappelletti ed., 1978-79).

20. Rättegångsbalk [Code of Judicial Procedure](1942:740).

21. *Id.* at Ch. 18 § 8a.

22. *See, e.g.,* Miljöbalk [Environmental Code] (1988:808) Ch. 25 § 2; Expropriationslag [Law on Expropriation] (1972:719) Ch. 7 § 1 and Lag om rättegång i arbetstvister [Law About the Procedure in Labor Law Disputes] (1974:371).

reforms in Sweden, which have reduced access to legal aid[23] and forced people to insure themselves privately against litigation costs. Furthermore, legal aid facilitates the pursuit of small claims only to a limited degree; the applicant has to contribute to his own costs in proportion to his income, and legal aid does not cover the counterparty's costs.[24] Litigation concerning group claims often results in substantial costs for counsel and for providing evidence. The defendant's assessment of a reasonable cost threshold is made from the standpoint of the aggregate amount he may have to pay to all members of the group. A considerable investment of resources may therefore be justified, the cost of which is also alleviated by tax deductions for costs incurred. For the plaintiff, the risks associated with costs may easily be so formidable that litigation does not appear to be a realistic alternative.

Legal expenses insurance offers better protection than legal aid in these respects, as it also covers the liability to pay the opponent's costs. However, in the case of minor claims involving complicated legal and evidential issues, the deductible is often a sufficient obstacle to the commencement of proceedings. Insurance indemnity is also usually limited to a certain sum, which limits the value of insurance in certain cases. Also, as a matter of principle, it is not satisfactory that access to justice for private citizens depends on whether or not they have legal expenses insurance, and on conditions attached to the insurance**,** such as the deductible and entitlement to legal representation. It is mainly due to these arguments that the recent legal aid reforms in Sweden, mentioned above, have been heavily criticized.[25] It must be a public responsibility to ensure that the economically weak are able to enforce their rights. Private financing alternatives may facilitate the suit and enforcement of claims by a private citizen, but these should not be a prerequisite.

Joinder of parties and test cases both provide a means of reducing costs to the advantage of the parties and the courts. Joined actions also result in the court's having a broader and more comprehensive information base for its decision, which increases the preventive and precedent-building effect of suits. None of these methods, however, is particularly suitable for claims that affect large groups of people, or for cases in which there are internal conflicts within the group. The formal

23. The main new reform is Rättshjälplag [Legal Aid Act] (1996:1619).

24. *See id.* §§ 15-20, 23-25.

25. *See, e.g.,* Leif Gustafson, 8 ADVOKATEN [THE LAWYER] 4-5 (1995); Britt Louise Marteleur-Agrell, 2 ADVOKATEN 3 (1996).

structure of the rules of procedure also involves certain limitations in the practical importance of this manner of proceeding.

Alternative dispute resolution (ADR) such as boards, mediation, and mini-trials fills an important role by offering an expeditious and simple procedure as an alternative to judicial examination. It reduces the burden on the courts in relation to a considerable number of disputes. The power of ADR is, however, limited in certain respects. The binding force of its decisions is often dependent on the free will of the parties, so as an effective remedy against disreputable behavior, ADR alone seldom constitutes a realistic alternative. Furthermore, as a matter of principle, the inadequacies in access to justice relating to compensation, prevention, or precedent-building, neither can nor ought to be remedied by measures outside the courts' administration. Extrajudicial institutions may supplement but should not replace judicial examination, which must remain the backbone of the system.

Government agencies occupy a strong position in safeguarding compliance with the law. As representatives of the public interest, the authorities have been involved in the influence and formation of legal developments made in several central legal areas. Their power to intervene and provide private individuals with support in civil legal disputes is, however, extremely limited in Sweden.[26] The effectiveness of the authorities' operations depends on access to state and municipal funds and qualified personnel. There is a risk that they will have neither the funds nor the qualified personnel required if they alone must continue to take care of common interests. Monitoring, inspection, supervision, and other similar activities that do not involve the exercise of public power must be distributed among several coordinated organs, both private and public. It is necessary to adopt a pluralistic view of the roles of individual persons and society in relation to the taking of measures to enforce the interests that the legal system seeks to safeguard.

Penalization is traditionally viewed as an effective means of control, but the effects are strongly questioned in contemporary public debate. The possibility in Sweden to attach small claims to prosecutions greatly facilitates the enforcement of small financial claims.[27] However, as a result of the stringent evidential requirements that should be main-

26. *See, e.g.,* Lag (1997:379) om försörksverksamhet avseende medverkan av konsument ombudsmannen i vissa tvister [Law (1997:379) About the Participation of the Consumer Ombudsman in Disputes of a Certain Kind].

27. *See* Code of Judicial Procedure, *supra* note 20, at Ch. 22.

tained, it is seldom that penalization constitutes a good foundation for claims for damages.

### C. The Need for Reforms

Many factors indicate that the procedural system does not always meet all of the demands made on it. All of the indications are that there is a significant number of legally well-founded claims which never obtain actual recognition. It is too troublesome and expensive for the private person to go to court, particularly for a claim of small value or to pursue a claim purely with the aim of creating a precedent. Social, psychological, and other extra-legal factors deter people from taking legal measures. Due to limited financial and staff resources, the authorities cannot intervene in all cases where it is justified. Procedural rules pose restrictions on or make it difficult for one party in litigation to act on behalf of others.[28] Further, if litigation concerning group claims is commenced, there are no effective means to deal with mass proceedings.

Access to legal aid and legal expenses insurance, rules for small claims cases, joined actions, and test cases have only partly remedied these defects in the system that limit access to justice for group claims. Extra-judicial mechanisms for the resolution of disputes and special insurance solutions do not offer a satisfactory alternative to examination by the court, yet they are important complements that, fortunately, reduce the burden on the courts in many matters.

Thus, there are many reasons that together give rise to gaps in the legal system and permit the occurrence of unchallenged violations of legal rights. For the private individual, this incapacity to respond leads to legal losses; in some cases these may be small, but in other cases they may be so large that they threaten the survival of private economies. Public interests, such as the equal treatment of all citizens, free competition on equal terms, and environmental conservation, suffer. Central fields of law are adversely affected by being starved of precedents, and they also lack development in the law and creation of law through judicial practice.

There is no evidence to suggest that the procedural system will fulfill its purpose more successfully in the future unless reform measures are taken. In fact, one may expect that demands to ensure effective ac-

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28. *See, e.g.,* PER HENRIK LINDBLOM, Processhinder. Om skillnaden mellan formell och materiell rätt inom civilprocessen, särskilt vid bristande talerätt [Procedural Hindrances. On the Distinction Between Procedural and Substantive Law, with Special Reference to the Question of Standing in Civil Procedure] 214-15 (1974); NORDH, *supra* note 18, at 424-25.

cess to justice for consumers will increase. European legal integration will, in some respects, probably result in a transition towards a new type of legislative technique in which judicial practice will play an increasingly important role. The restriction of state and municipal involvement to inspection and supervisory functions, together with a partial transfer from prior control to market control, presents a greater demand on citizens to respond. The internationalization of trade and other activities directed towards citizens gives rise to new legal questions, both substantive and procedural. Continued technological and other scientific development leads to further complexity and difficulties in understanding the causes underlying the circumstances from which rights and duties emanate. There will be an increased need for time-consuming and costly investigations to determine whether a legally well-founded claim exists.

The concept of the individualistic two-party dispute, which in principle forms the basis for all civil litigation, is ill-suited to combat the forms of mass encroachment resulting from modern society's tendency towards mass production, mass distribution, mass information, and mass consumption. It would be unrealistic to expect that everyone should have the opportunity to take legal steps to the extent necessary. Also, the traditionally structured system copes badly with claims in which legal encroachments affect many without giving rise to individual civil law claims and in cases where it is difficult to identify the people injured. Furthermore, there are no legal institutions in which procedural rules have been adapted to satisfy claims deriving from contemporary principles, such as the right of everyone to a healthy environment, healthy food, and the protection of civil rights. The inadequacies are not limited to the occasional loss of legal rights by citizens or the State. The fact that mass infringement of legal rights may pass unchallenged means that the procedural system does not satisfy its other functions of prevention, precedent-building, and creation of new law.

In conclusion, there exists, in today's society, a manifest need for reforms. Forms of safeguarding group actions other than those encompassed by traditional procedural mechanisms must be created.

In order to improve the present system with respect to providing public access to justice, it is necessary that all or at least the majority of people who have the same or similar claims be afforded a realistic opportunity to pursue and enforce their rights. It is not necessary that all legal infringements in society should be challenged. The fact is, however, that it is not possible to accomplish the desired modification of behavior if there is no means to correct or satisfy the main part of the

legal infringements that occur. Only when such means exist will the influence of sanctions provide an adequate deterrent.

Providing improved economic means to enable everyone to go to court is not always an adequate measure. Sometimes the passive reaction is the result of other legal and non-legal factors. Also, if the majority of injured parties were to commence proceedings, it would not be practically possible for the courts to deal with them within existing rules of procedure. The simultaneous reaction of a vast mass of injured parties would paralyze the administration of a district court.

It is thus not possible, within the framework of the existing system of litigation, to combine the need for mass action with the requirement of an expeditious, inexpensive, and uncomplicated procedure. Measures intended to facilitate individuals' reference to court or other tribunals are consequently not effective remedies in themselves**.** As is the case in several other legal systems, rules must be introduced into Swedish law that will permit representative actions in court.

This was the conclusion drawn by the Swedish Commission on Group Actions and is the stance taken by the Ministry of Justice in Sweden.[29] As mentioned above, the Swedish Government is at the moment considering a proposal for an Act on Group Proceedings with the intention of presenting a proposition for legislation before the Parliament in the beginning of 2001.[30]

In the next section, I will give a short presentation of the Swedish proposal as it stands today.[31]

## IV. THE SWEDISH PROPOSAL FOR AN ACT ON GROUP PROCEEDINGS

### A. The Institution of Proceedings, etc.

An action for a group shall be instituted in accordance with the Code of Judicial Procedure's rules concerning applications to commence actions.[32] The application shall be treated in the usual manner in relation to the Court's consideration of prerequisites to the institu-

29. *See supra* notes 14-15.

30. Just before this Article is to be published, the time for presenting a Government Bill has been postponed until the end of this year. *See supra* note 15.

31. Author has just recently (March 2001) been asked by the Ministry of Justice to make further considerations on some issues and present his views before this summer. It is essentially the issue of whether membership in the group shall be decided by an opt-in or an opt-out model that the Author has been asked to look further into.

32. *See* Code of Judicial Procedure, *supra* note 20, at Ch. 42.

tion of proceedings and issue of the summons, etc. Thus, there will be no rules on any special leave to commence proceedings (certification) as is common in other countries that have a system for group actions.[33]

It may transpire during the conduct of an ordinary case that a representative form of action would be a more appropriate procedural alternative. For example, a party who tries to pursue and enforce a claim may learn of others with the same or similar claims. In such cases there are good practical and principle-based reasons that could prompt plaintiffs to consider having their individual actions extended to become an action for the group. It is therefore suggested that the plaintiff be given the opportunity to make a special application to the court requesting that a suit be enlarged to a group action.

### B. Forum

The general forum rules of the Code of Judicial Procedure are based on the principle that the district courts are of equal competence.[34] The Swedish Commission suggested that this should also apply in the application of the Act on Group Litigation.[35] In the revised proposal, however, group litigation is concentrated in a few specialized courts. The reason for this is that many district courts are so small that they are not suitable to deal with group litigation. A group action would, in these courts, severely disrupt the handling of other proceedings.

### C. Standing

The proposal intends that it should be possible to commence individual group actions (class actions), public group actions, and organizational group actions.[36] Different organs will be able to complement and assist each other. The form that best suits the particular case may be selected.

Regarding the issue of which legal subjects should be afforded standing to pursue a group action, the proposal suggests that a person who is a member of the group may commence individual group actions (class actions).[37] This means that the plaintiff shall have standing to be a party to litigation with respect to one of the claims to which the action relates. It is considered that someone with a per-

33. *E.g.,* class actions in Ontario, Canada and New South Wales, Australia. *See* Watson, *supra* note 11; Clark & Harris, *supra* note 11.

34. *See* Code of Judicial Procedure, *supra* note 20, at Ch. 10.

35. *See* SOU 1994:151 Part B 95-96.

36. *See id.* at 104-05.

37. *See id.* at 105-06.

sonal interest in the case may be expected to expend the necessary time and effort to pursue his right and thereby the rights of the members.

It can be argued that this does not apply to a person who has only a small claim. On the other hand, if there is no such person willing to take action, small claims can be enforced by the use of public actions or organizational actions.

The organizational action means, as with the public group action, that someone is given standing to sue without the dispute in any way affecting the plaintiff's own legal interests. This is contrary to the normal requirement regarding standing. The need and suitability of the introduction of rules on organizational actions have been based on observations made by the Commission on the circumstances that exist in various fields.[38] The result is that the proposal on organizational actions is restricted to two areas of law, namely consumer law and environmental law. In the field of consumer law, a group action may be instituted by an affiliation of consumers or wage-earners in disputes with a tradesman relating to goods, services or other utilities offered by the tradesman, in the course of business, to consumers primarily for private use.

Within the field of environmental law, non-profit associations dedicated to nature conservation and environmental protection currently have the right to appeal judgments under the Environment Code without having a private interest in the case.[39] These organizations, together with professional federations in the fishing, farming, reindeer, and forestry industries, will be given the right to commence proceedings concerning injunctions and compensation for environmental impairment.[40] While the right to appeal judgments under the Environmental Code is restricted to organizations that meet certain conditions, the right to commence group actions will be open to all non-profit organizations having the objectives mentioned above.

An authority stipulated by the government may commence public group actions.[41] It is not considered possible to identify in advance the situations in which a state group action would be a more suitable alternative than an individual group action or an organizational action. It should therefore be left to the government to lay down, by administrative regulations, the extent to which an authority may commence group

38. *See id.* Part C, Appendix B.

39. *See* Environmental Code, *supra* note 22, at Ch. 16 § 13.

40. *Cf.* SOU 1994:151 Part B 108-09.

41. *Id.* at 116-17.

actions. The right of action shall not be primary nor exclude others from commencing proceedings.

D. Special Conditions for an Action

Group litigation is not intended to be a substitute for individual two-party litigation where the latter functions effectively and meets the purposes demanded. The representative action should be employed only where the need for legal procedural alternatives is not satisfied within the framework of the current procedural system or where action for or against a group may be expected to lead to tangible procedural economic benefits. Against this background it is necessary to impose certain special conditions for cases when an action for a group should be permitted.

One such requirement is that there should be a group that has been adequately defined with regard to the circumstances in the case. It is not considered necessary that the term "group" be defined in the Act. The extent to which the number of group members and their identity must be known will depend on the circumstances of the case, for example**,** on the nature of the claims, the demand for relief, and the cause of action.

Another prerequisite for an action is that the suit should be based on one or more facts or questions of law that are common or similar in the claims of all members of the group.[42] However, this does not mean that there cannot be facts that are specific for some members' claims or that common facts must outnumber individual facts.

In most situations it will be necessary to balance common issues against individual factors in order to decide whether a group action is suitable at all, and if it is more suitable than individual actions. The balancing must be based not on quantity but on quality. Emphasis must be put on issues such as the evidence, costs, and so forth that are linked to the test of the different kinds of facts.

A further requirement is that group litigation should be the best available procedural alternative;[43] this requirement is often called "superiority." When judging the pros and cons of group litigation compared to other alternatives, it is essential to separate different kinds of claims. While some claims are individually recoverable, others are individually non-recoverable or even nonviable.[44] There can

42. This prerequisite is often called commonality. *Cf.* SOU 1994:151 Part B at 55 f.

43. *Cf.* SOU 1994: 151 Part B at 66 f.

44. *See Developments in the Law: Class Actions*, 89 HARV. L. REV. 1319, 1356 (1976).

only be a comparison made to individual litigation if such litigation is a realistic alternative. In other cases**,** a group action will in practice be the only alternative available for an individual to enforce his right.

Furthermore, the commencement of group litigation should also require the court to consider whether and how the case may be dealt with effectively and purposefully. In this context, the practical problems that the court may face in allowing a group action to be commenced must especially be taken into consideration.

A special prerequisite is that the group's representative must be considered to be suitable to represent the group.[45] The judgment of the plaintiff's ability to represent the group shall be based on all circumstances that will or might affect his ability to ensure that each member of the group will have his claim tried as well as if he had litigated on his own. Of special importance is the requirement that the plaintiff has the means to pursue the case and that he has no personal interest that conflicts with the interests of the group.

The group representative is under a duty to protect the interests of the group in an adequate manner.[46] He shall, at the request of members of the group, provide information concerning circumstances of importance to the members' rights. On important issues he shall afford members the opportunity to express their views, provided this may be done without undue inconvenience.

As a further guarantee for the protection of group members in class actions and organizational actions, it is proposed that the proceedings be conducted by an attorney.[47]

## E. Membership in the Group[48]

An action for a group will automatically embrace all persons who fit the plaintiff's description of the group. Membership in the group will consequently not require any application to the court.

Those who are members of the group shall, by a personal notice or in some other suitable way, be informed about the action and provided with the opportunity to leave the group within a certain period after the commencement of the action (opt-out).[49] The time limit imposed

45. *Cf.* SOU 1994: 151 Part B at 118 f.

46. *See id.*.

47. *See id.* at 125 f.

48. As I mentioned above, I recently (March 2001) have been asked by the Ministry of Justice to make further considerations on this issue and it is today not possible to say whether there will be an opt-out or an opt-in model chosen or perhaps a mixture of them both.

49. *Cf.* SOU 1994: 151 part B p 162 f.

shall be fixed by the court at the same time as it advises the members of the group that a group action has been commenced. Members who retire from the group will not be bound by a future decision in the case.

The members of a group shall not be parties to the action unless they have intervened in the group litigation. This does not mean that a member shall be simply considered as any other person who is not a party. The very nature of the form of action means that members shall be regarded as parties, inter alia, with respect to recognition of pending actions (and a consequent bar on duplication of proceedings), evidential questions, and execution of the court's decision. Further, the court's determination enters into legal force vis-à-vis the members as if they had sued personally.

F. Individual Circumstances

In group litigation, issues relating to legal and evidential facts may arise which are of importance to certain, but not all, claims subject to the action. This does not of itself mean that the issues must be dealt with specially during the litigation. On the contrary, it is usual, when several cases are amalgamated, that facts are discovered which distinguish the cases, although this does not result in the court partitioning the proceedings. In the vast majority of cases it will be possible to deal with individual issues in a similar way within the framework of the group action.

Sometimes, however, an expeditious, inexpensive, and simple process of cases is promoted when individual issues in dispute are dealt with in a special manner. This can usually be achieved by limiting the action to an application for a declaratory judgment.[50] However, it ought also to be possible with an action brought for performance.[51]

Therefore, it is proposed that if the individually disputed issues are held in common or are similar for several members of the group, the court shall be empowered to appoint a special group representative to conduct the action on behalf of these members.[52] This would in effect mean that a subsidiary group would be established with its own group representative.

Another proposed method is that the court be empowered to adjourn the determination of a particular question or part of the matter and determine the remaining part of the case by what is called a "spe-

50. *See* Code of Judicial Procedure, *supra* note 20, at Ch. 13 § 2.

51. *See id.* § 1.

52. *Cf.* SOU 1994: 151 Part B at 200 f.

cial partial judgment."[53] The plaintiff or the group members shall be ordered to request trial of the postponed issue within a certain period. If this request is not presented, the action will be dismissed unless it is obvious that the suit is well-founded.[54]

## G. Suspension of Group Litigation

Group litigation may be suspended in two ways other than by the issue of judgment. The plaintiff's suit may be dismissed by reason of an impediment to the action that arises or is first observed when the process of the issue has commenced.[55] The plaintiff may also withdraw his action for the group.[56]

In such a situation, it would not be efficient to immediately suspend the court's examination of the claims encompassed in a group action. An abrupt conclusion of the process would result in serious procedural economic losses and other inconvenience. In order to prevent this, a rule should be introduced whereby the court's examination may continue, but in another form.

The rule essentially states that the court should afford members of the group the opportunity of entering into the proceedings and conducting the action for themselves regarding their representative claims. The court would thus be able to decide that a member's suit should be transformed into what is known as a small claim case.

## H. Settlement

The authority of the group representatives to act on behalf of the members of the group is strictly procedural. Representation does not mean that a member of the group assigns his respective civil law right to settle the subject of the dispute. However, a special exception to this fundamental principle is introduced whereby the group representative is empowered to make settlements with the opponent on behalf of the group.[57] The settlement will be binding for members of the group only on order of the court.[58]

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53. SOU 1994: 151 Part B at 317 f.
54. *See id.* at 624 f.
55. *See id.* at 212 f.
56. *See id*.
57. *See id.* at 295 f.
58. *See id*.

### I. Litigation Costs

In group litigation, the representative of the group will be the plaintiff. In that capacity, he will be entitled to an award of litigation costs by the opponent, but he also risks having to pay the opponent's costs if the group loses the case (the "English rule"). Thus, the rules for costs within the Code of Judicial Procedure will apply fully.

A group member shall bear the usual responsibility for the opponent's litigation costs only where the member has intervened in the litigation.[59] Otherwise, a group member should be made liable for litigation costs only under special circumstances, for example, if the member has caused unnecessary litigation or has been guilty of carelessness or neglect.[60]

It is also proposed that a group representative and an attorney shall have the opportunity to reach an agreement on fees, meaning that the fees for the attorney shall be determined having regard to the extent to which the group members' claims are satisfied. Such agreements are known as risk-agreements whereby fees are contingent on liability but, in contrast with U.S. practice, are not linked to the size of the award. The fee will be based on an hourly rate.

### J. Appeals

Briefly, the following rules concerning appeals in group litigation are proposed. A decision to allow a group action to commence may be appealed depending on the discretion of the court.[61] A judgment may be appealed on behalf of a group by the group representative or, if he does not appeal, by a member of the group subject to the appeal.[62]

## V. SUMMARY AND CONCLUSIONS

An efficient procedural system has to fulfill several functions that can be sorted into four main groups: reparation, prevention, precedent-building, and procedural economy. Deficiencies in these functions concerning the procedural protection of civil and public rights may lead to serious consequences.

The fact that well-founded claims are not being enforced can be explained by one or more of four major factors. One is that there is a disproportion between the value of the claim and the cost of enforc-

59. *See id.* at 411.

60. *Cf.* Code of Judicial Procedure, *supra* note 20, at Ch. 18 § 3, 6.

61. *Cf.* SOU 1994:151 part B at 143 f.

62. *See id.* at 335 f.

ing it by court procedure. Another reason is that due to economic, psychological, or other non-legal factors, the individual claim holder does not know that he has a claim, or he lacks the will and power needed to enforce his right. A third obstacle is that procedural rules and principles limit opportunities to act on behalf of someone else. A fourth factor is that the authorities have been given too much responsibility in relation to their financial and staff resources, while at the same time the individual citizens have become passive.

There are at least four alternative measures to fill the holes in the procedural protection of well-founded claims. One is to strengthen the authorities' financial resources and thereby increase public control. Another measure is to more strongly support alternative dispute resolution. A third alternative is to develop existing procedural methods for dealing with mass claims, such as joinder of parties and test cases, for example. A fourth solution is to introduce a representative action. Although none of these alternatives should be excluded, studies in Sweden and in other countries show that group action is the superior method for remedying inadequacies regarding access to justice for mass claims.[63] Group action has a great degree of flexibility. Thus, it may be structured according to the circumstances so that

a) compensation is offered to those whose rights have been encroached upon, but who do not have any realistic possibility of enforcing their rights,
b) the judicial system exercises a behavior modification function in cases where the aggregate injurious effects are extensive but the individual claims are small, so that no one is inclined to take upon themselves the burden of pursuing and enforcing them,
c) the courts have sufficient information to make the broad balancing of interests which are a prerequisite for them to fulfill their function in relation to precedent-building, the development of law and making of new law,
d) and common or similar issues in group actions relating to evidence and law are examined in an expeditious, inexpensive, and uncomplicated manner, in order that the courts and parties save time and costs.

63. *See generally* Grouped Proceedings in the Federal Court, Australian Law Reform Commission, Report No. 46 at 26-34 (1988); Report on Class Actions, Ontario Law Reform Commission, Vol. I-III 101-212 (1982).

This does not mean that group actions are the final solution to all problems in dealing with mass claims. However, the availability of group actions will manifestly improve the capacity of the procedural system to satisfy the problems presented by group claims.