THE PROTECTION OF DIFFUSE, FRAGMENTED AND COLLECTIVE INTERESTS IN CIVIL LITIGATION IN SWEDEN

BY

PER HENRIK LINDBLOM

I. INTRODUCTION: A LESSON OF PLURALISM

In his comparative study "The Public Interest in Civil Litigation" Professor Mauro Cappelletti maintains "... that it would be foolish to rely upon any single governmental institution or exclusively on private initiative to solve a problem".[1] The same goes, indeed, for the subject presently under review. Obviously there are many, many ways of improving the protection of diffuse, fragmented and collective interests and the different means to do so ought not to be seen from a competitive, but rather from a complementary, point of view.

If *the state* is interested in an improvement of the kind just mentioned it may use *physical* (e.g. the location of industry harmful to the environment), *economic* (e.g. duties to be paid in connection with activities contrary to diffuse etc. interests), *pedagogic* (education and information) and *normative* (legal) means to control and direct its citizens[2] in this area of human coexistence. But even if we restrict ourselves to considering the normative part of possible public activity in this respect, the subject is far too wide to be dealt with in a paper of a reasonable size, if the ambition is to go into details.

The same goes for the *private* initiatives that could be contemplated when the protection of diffuse, fragmented and collective interests is at issue; even if we confine it to *procedural* methods—such as class actions, actions by organizations, test cases, joinder, third-party intervention, etc.—there is so much happening on the international scene that a comprehensive study is out of the question at the present time.

Moreover, there is no need to present a perspicuous comparative account of the subject since an excellent paper of that sort already exists.[3] However, small countries such as Sweden cannot expect to get much attention when it comes to comparative studies on that level. So, after all, perhaps there is a possibility that somehow, somewhere, sometime, someone will be interested in what

A considerable part of this paper consists of the author's report on the same subject to the VIIth International Congress on Procedural Law in Würzburg, September 1983. The general reports from this congress are published in *Effektiver Rechtsschutz und verfassungsmässige Ordnung*, Bielefeld 1983.

[1] In *Access to Justice*, vol. II, book 2, Milan 1978, pp. 769 ff.

[2] Cf. T. Eckhoff, *Statens styringsmuligheter*, Oslo 1984, pp. 29 ff.

[3] See M. Cappelletti and B. Garth, "The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation", in *Effektiver Rechtsschutz und verfassungsmässige Ordnung*, Bielefeld 1983, pp. 117 ff.

Sweden is doing to protect diffuse, fragmented and collective interests in civil litigation. Certainly, some parts of the subject—such as for instance the Ombudsmen, the Small Claims Courts and the Public Complaints Board—have already been presented to an international audience. This makes it possible to limit this paper to presenting some views on these subjects and to go into some further details when it comes to the other means available and under discussion when the protection of diffuse, fragmented and collective interests in civil litigation in Sweden[4] is at issue. After section *II. General problems and viewpoints* (private, public and diffuse interests; the purposes of procedure; civil and criminal proceedings; the developments in society; legislative techniques), *Party-connected solutions* (standing, joinder, third-party intervention, "the public and private attorney-general" methods such as procuratora, ministère publique, parens patriae, public actions, class actions, test cases and actions by organizations and, finally, legal aid and litigation expense insurance) will be discussed under *III. The role of the judge* is considered under *IV*, and section *V* consists of a discussion on *Special courts and special proceedings* (the Small Claims Courts, the Public Complaints Board, the Rent Tribunals, the Labour Court and the Market Court). The paper ends with *VI. Conclusions*.

II. GENERAL PROBLEMS AND VIEWPOINTS

1. *Private, public and diffuse interests; the purposes of procedure; civil and criminal proceedings*

It is, of course, a matter of public interest that not only interests that tend to be exclusively individual, but also more diffuse, fragmented, as well as collective interests are given protection in—and through—civil procedure. The actual functioning of a legally recognised interest is dependent on to what extent it can be accorded effectiveness in proceedings. Substantive rules that lack procedural channels are bound to remain paper tigers; the very definition of a legally recognised interest is that it can be determined and enforced through the intervention of the judiciary and the administration.

[4] For a more general presentation of Swedish civil procedure of today and access to justice in Sweden, see P.H. Lindblom, "Procedure", in S. Strömholm (ed.), *An Introduction to Swedish Law*, Stockholm 1981, pp. 95 ff., P.O. Bolding, "Access to Justice in Sweden", in *Access to Justice*, vol. I, book 2, Milan 1978, pp. 891 ff., J. Hellner, "The Consumers Access to Justice in Sweden", 40 *Rabels Zeitschtift* 1976, pp. 727 ff., and A. Victorin, "Some Observations on Measures to Promote Settlement Out of Court in Disputes over Rights according to Swedish Law", in H. Kötz and R. Ottenhof (eds.), *Les conciliateurs, la conciliation. Une étude comparative*, Paris 1983, pp. 133 ff.

Civil procedure—in Sweden as much as in many other countries—is built on the basis of an individualistic approach, and presupposes a relationship confined to two parties and marked by clearly opposing interests. And even though it is, naturally, also a matter of public interest that exclusively individual rights should be enforceable, society as such does not normally play an active role when it comes to litigation in such matters. The parties that are most concerned can freely be entrusted with the task of instituting proceedings and of providing the best possible basis for a substantially sound judgement. From the point of view of the parties, proceedings that function properly in this respect meet what is perhaps the most important requirement, namely that of solving the conflict in the particular case (*conflict resolution*). At the same time they will perform a function that is probably of primary importance to society, where they increase the quality of substantive rules of law by bringing about guidelines by which to direct the conduct of members of society in general (*behaviour modification*).[5]

The significance that, as a result, procedure has for the community is manifest also where the legal relationship in dispute may be deemed representative of the traditional two-party formula of the kind that constitutes the point of departure in the development of civil procedure.

As to the areas of the law where the delimiting lines are more diffuse, as seen from the point of view of the party interests involved—substantive legislation that is linked to a sphere of interests which is larger and harder to define than the traditional two-party relationship—the public interest in the proceedings is catered for in the same way: the procedure should serve both to solve the conflict and provide a general guideline for legal intercourse; here too, the procedural means—the rules on litigation—will transform the substantive regulations from recommendations into publicly sanctioned directives, from theory into reality.

In this situation, however, the community cannot assume the same passive attitude as in a typical two-party procedure of the kind mentioned above. The procedural machinery may have to be accommodated to the new situation, the proceedings should be reformed or amended so that the legal provisions will not remain only on paper but become living law. Protection of diffuse, fragmented and collective interests—in and through procedure—is at the same time protection of a *public* interest: the interest that proceedings may be instituted and conducted in a proper way, the interest of securing legal protection.

[5] See generally K. Scott, "Two Models of the Civil Process", 27 *Stanford Law Review*, pp. 937 ff. (1975), cf. F. Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Right", *Duke Law Review* 1973, pp. 1172-77, and O. Fiss, "Against Settlement", 93 *Yale Law Journal*, pp. 1075-90, 1085 (1984).

Let us now come back to the expression "diffuse, fragmented and collective interests". Under what circumstances does procedure affect interests of that kind? We have already linked the expression to situations where proceedings do not involve isolated two-party relations of the traditional type. The expression "diffuse, fragmented and collective" suggests that it is hard to define the extent of the sphere of interest so indicated, and that there is not really a single most concerned party who would, naturally, initiate proceedings whenever such interests are at risk. Several individuals, and indeed often a considerable number of them, are involved, and when it comes to litigation in such matters many more than just the litigant parties are likely to be affected. This may be the situation in, for example, consumer, environmental and labour cases as well as when it comes to litigation about the relationship between the individual and the state.

The interests may, moreover, be so split and, indeed, scattered that no individual is inclined to take up the case: everyone is waiting for someone else to take the initiative and institute proceedings. While many are affected, all of them wait for somebody else to accept the risk and the inconvenience involved in conducting proceedings; all wish to take advantage of the outcome but leave the fuss and the risks to others. And who can blame the individual who does not want to play the part of a David and fight a Goliath like a powerful corporation, the state, etc? There is normally a lack of balance between the parties when traditional procedure is used to protect a diffuse interest—the actual plaintiff is not helped by the fact that many are interested in the outcome of the proceedings.

It may be, furthermore, that many are involved, but not to exactly the same extent. All may then take a passive stand in the expectation that he who comes out as being the most concerned party will take the initiative. The latter may, however, not want to institute proceedings for reasons that will not always be fully apparent. He who is most disturbed by pollution caused by a particular factory may well be employed by that factory, or may be otherwise dependent on it, and may therefore be unwilling to take an initiative that could lead to production in that factory being prohibited.

But let us assume that proceedings are instituted after all. Obviously the proceedings pertain to diffuse, fragmented and collective interests in an environmental case such as the one discussed above. But there is no sharp borderline between this case and a strictly individualistic procedure of the traditional kind. You could talk about diffuse, fragmented and collective interests whenever the proceedings do not only relate to and affect the litigant parties, but others as well. When would this be the case?

The answer to this question—as much as to the question of how to define the notion of public interest—is primarily dependent on the social function one

wishes to attribute to procedure. Is it the purpose of procedure "just" to provide a means for solving individual disputes between the litigant parties, or would its main object be to ensure that justice is administered in such a way as to increase the quality of rules of substantive law?

If the latter is true, and if procedure does help to realize the aim that is behind legislation in the field of private law, it will necessarily be of interest to a far greater number of individuals than just those involved in the particular case in dispute. If it is assumed that procedure may have this particular function too, *all* proceedings will—as has just been explained—necessarily be of significance for many more than just the parties. And if the definition of proceedings that concern these "diffuse, fragmented and collective" interests should be that the number of people that will take an interest in their result is larger than the number of parties that are actually engaged in the proceedings, it may consequently be maintained that all proceedings do affect such interests. This goes for criminal as well as for civil proceedings. All those who own property have an interest in burglars being punished, all those who sell on credit have an interest in buyers being forced to pay, etc. Indeed, the possibility of having performance enforced is something that will be of interest even to the buyer himself, since it is more or less a condition for a sound credit system that the interests of the one who gives credit be protected.

While it can be maintained that all proceedings affect "diffuse, fragmented and collective interests" the expression would, however, lose its substance if used in that way: when a word denotes everything it does not mean anything (cf. culture, political)! Let us therefore return to the restricted meaning of "diffuse", etc., used at the beginning of this paper. But let us also remember that the protection of diffuse, fragmented and collective interests is of particular importance from a procedural point of view if behaviour modification is regarded as a major purpose of modern civil procedure.

Professor Per Olof Ekelöf has underlined the function of civil procedure in this last sense.[6] According to Ekelöf there is, however, a tendency to regard civil procedure foremost, and to a much too high degree, as a means by which to achieve a resolution of conflicts in the sense familiar in socio-political science. Access to justice is regarded as being a human right, to be put on a par with freedom of expression, the right to labour and to physical integrity, and procedure thus becomes a social benefit.[7]

[6] P.O. Ekelöf, "Civilrätt och civilrättsskipning", in *Festskrift till Jan Hellner*, Stockholm 1984, pp. 229 ff., and in *SvJT* 1981, pp. 109 ff.

[7] To view the procedural system as a "social welfare institution to which the individual may apply for assistance for whatever concerns him", is not a novelty. It found expression, for instance, in the Swedish doctrine of procedural law more than fifty years ago, cf. T. Engströmer, "Partsförhör i tvistemål", in *Förhandlingarna å det femtonde nordiska juristmötet*, bil. I, Stockholm 1931, p. 17.

In as far as it is the object of procedure to provide a remedy in each separate case, as opposed to the guideline function procedure has both in the individual case and in general, Ekelöf draws a parallel with the administration of justice in criminal matters and with the, now abandoned but previously common, view that it is the object of criminal proceedings to lead to a decision as to how the criminal may best be rehabilitated to a lawful and socially acceptable life. The idea that the administration of justice in criminal matters should be shaped so that lawful behaviour should be continued and criminal behaviour come to an end, was disregarded. This view, which appears to have been abandoned as far as criminal procedure is concerned, has now become a characteristic of the discussion on civil procedure. This does not, however, seem to exclude the proponents of the access to justice movement from regarding behaviour modification as an important purpose of modern civil procedure. The protection of diffuse, fragmented and collective interests is described as the second wave in the access to justice movement and presupposes a more active conception of civil litigation than merely conflict resolution in the individual case. Unlike Professor Ekelöf, the present author would maintain that most of the proponents of the access to justice movement are—more or less—in sympathy with Ekelöf's views on the purpose of procedure;[8] the opponents, on the other hand, seem to be concentrating on the conflict resolution model.

In this connection, Ekelöf makes an additional, interesting comparison between civil and criminal procedure. He reminds us of the fact that under earlier Swedish law the community did not take part in criminal procedure on the same scale as today, and he explains:

> Formerly one could rely upon the right of prosecution to which the injured party was entitled, since the crime was regarded as an infringement upon his honour and he would be given part of the fine to the payment of which the culprit was condemned. As the view of the relation between crime and penalty changed, and the private penalty was repressed by a public counterpart, this incitement for the injured party to initiate prosecution disappeared. As a consequence it became necessary to complement the individual right to prosecution by introducing a similar right (on the public level) for the community as such. A similar trend may nowadays be met within certain areas of civil procedure. Here procedure fails to exercise its guideline function because no proceedings are being instituted.[9]

[8] At least this goes for "the second wave" in the Access to Justice movement, the protection of diffuse, fragmented and collective interests. The same could probably be said about "the first wave"—legal services for the poor—but not about "the third wave", dispute processing and non-judicial alternatives. Cf. Fiss, *op.cit.* (*supra*, note 5), pp. 1075 ff.—One important tool when it comes to the protection of diffuse, fragmented and collective interests is the class action; here again it seems to me that the proponents are stressing behaviour modification as a task for civil litigation and the opponents are stressing the conflict resolution aspect of civil litigation.

[9] P.O. Ekelöf in *SvJT* 1981, p. 113. (Present author's translation.)

That no proceedings are being instituted is of course a particularly serious problem to those who attach weight to the guideline function of procedure, and this is exactly what is likely to happen whenever diffuse, fragmented and collective interests are at stake. Precisely when it is immaterial which of the parties concerned is going to institute proceedings, it may easily happen that none takes the initiative. And what is usually meant when it is said that proceedings touch upon diffuse, fragmented and collective interests is actually that one of the parties—or both—could well be replaced by somebody else, out of an often large and not easily definable number of interested individuals.

So, the protection of diffuse, fragmented and collective interests is of the utmost importance, not only if procedure is seen as a means of solving conflicts in the individual case, but at least equally if significance is attributed to behaviour modification. In either case, there is a basis for accommodating procedure to the newly emerged condition, and for compensating for the lessened willingness to initiate proceedings in various ways such as, e.g., by providing for the individual litigant to be sustained or even represented or replaced by the community in litigation. For this to be realized, inspiration may be derived from many areas.

Let us for a moment return to the comparison that was made with criminal procedure. One could, for instance, imagine that the plaintiff who has won his case would be granted a kind of "premium" on top of the sum of money involved in the trial. Once procedure has been attributed a positive guiding effect from the point of view of the community, it is not unreasonable for the state to bear such additional costs. Beyond this, however, it could also be envisaged that in legislation and civil procedure actions for breach of contract would, for instance, be made to extend to non-pecuniary damage as well, so that the plaintiff would be given the encouragement necessary to institute proceedings. In so doing, one would get very close indeed to a situation that would tend to "criminalize" a violation of contractual obligations, by adding a criminal dimension to what is essentially a breach of contract under private law, by introducing a "fine" where damages alone would be the answer by current Swedish standards. In e.g. American antitrust law, on the other hand, we can find statutes combining premium and fine methods in a system of "triple damages".

If it were left to the injured party to personally conduct proceedings and have access to the money destined for the fine, we would find ourselves back in the ancient Swedish law of criminal procedure explained by Ekelöf in the above quotation, but a system like that could also be used as a description of modern American antitrust law. If, on the other hand, the major part of the criminal proceedings were left to be conducted by public prosecutors whose task it would also be to claim damages on behalf of the injured party, we would

be right back in the situation existing in Sweden nowadays. And if no private civil proceedings are initiated to protect diffuse interests due to the lack of incitement for David to fight Goliath it may be necessary to create new modes of procedure, civil or criminal, commenced by prosecutors or public agencies in order to reach the desired level of behaviour modification. Just as criminal law became public law, civil law may in fact be doing the same[10]—at the same time civil procedure may become criminal and vice versa, while the interaction between private and criminal law may be more unavoidable tomorrow than it is today.[11]

In introducing these rough examples, the only intention is to indicate the, in itself, obvious fact that the protection of diffuse, fragmented and collective interests is something that does not exclusively come under civil procedure, and that, at least if seen in an historical perspective, the borderline between civil and criminal procedure is at best a vague one. Nor can any absolute or unambiguous distinction be made today between the two procedural systems. The same goes for a discussion on legal policy concerning the protection of diffuse, fragmented and collective interests. Criminal procedure should also be included in the discussion, in spite of the fact that sometimes the divisions applied in university programmes may tend to obstruct a broad perception of the area under review. And there is more to it than this: private as well as administrative law should actually be included as well. The following will, however, mainly concern civil procedure in its traditional meaning. How does Swedish civil procedure today supply the requirements discussed above? Is the legislation on procedure up to date with the developments in society?

2. *Developments in society and the Swedish code of judicial procedure; legislative techniques*

It should not be necessary to explain the course of the ever-growing importance that is to be attributed to the problem of the protection of diffuse, fragmented and collective interests. It would, indeed, also seem superfluous to explain this phenomenon, since the developments have, to all appearances,

[10] Cappelletti and Garth, *op.cit.* (*supra*, note 3), p. 124.

[11] A note of caution might, meanwhile, be added. In the area under discussion, however vague the borderline between civil and criminal law of procedure may be—particularly so if seen in an historical perspective—the actual switching from civil to criminal proceedings is more than a simple modulation to a related key. It is not just the technical differences between the two procedural systems that are likely to oppose problems. The deeply rooted differences between the two systems of substantive law involved will also have to be taken into account. Rules that belong to the largely open system of private law will have to be restructured if the standards contained in them were to be taken up in the rigid and in many ways tightly sealed system of criminal law.

been roughly the same in most countries and there is no shortage of enthralling —and indeed thrilling—accounts of the relation between the trends in society and in procedure in this respect.[12] Two factors of significance for an understanding of the conditions in Sweden—and possibly in other countries as well—should, however, be touched upon, both being relevant to legislation.

First, some observations on the connection—or rather the lack of connection —between political developments and legislation in the field of the Swedish code of judicial procedure. Then, a broad survey of the consequences that modern legislative techniques may entail as regards the protection of diffuse, fragmented and collective interests.

The Swedish Code of judicial procedure came into force in 1948, but rests, to an overwhelming degree, on basic ideas in the *travaux préparatoires* which date from the 'twenties and 'thirties. Even before the Code was formally introduced, it could be maintained that Swedish civil procedure was designed according to individualistic principles for a society with a liberally organized economy. If anything, the new Code contains an acknowledgement of that situation. In broad and simple terms one could argue that Sweden was presented with a Code of judicial procedure that reflected private capitalism, accommodated to the principle of free trade and to the requirements of protecting private ownership; procedure constituted a tool that the state put at the disposal of individual parties for them to settle whatever disputes might arise as to their various rights and obligations without any apparent interference on the part of other individuals or of public authorities.

So, under a Social Democratic government a decidedly liberal system of civil procedure was introduced in this country. This was followed by a period of nearly three decades of socialist administration, three decades during which, according to the party programme, there was to have been a dedicated effort to reform society along socialist lines. The socialist administration did, nevertheless, maintain the Code of judicial procedure virtually unamended. The basic individualistic feature of the Code, which regards procedure in matters of civil law as a "dual", has remained unshaken.

In 1977 a committee was set up and given the task of revising the Code of judicial procedure and of presenting proposals for reform. The directives for this committee do not contain any indications as to the need to modify the basic individualistic features of civil procedure. The directives were issued, to be sure, when the Social Democrats were already out of office and a non-socialist coalition had taken over. They had, however, been drafted earlier. Today

[12] See e.g. M. Cappelletti, "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study", in *Access to Justice*, vol. II, book 2, Milan 1979, pp. 769 ff., and papers quoted in Cappelletti and Garth, *op.cit.* (*supra*, note 3), p. 121, note 1.

the Social Democrats are back in power but no amendments to the directives to the committee in respect of the individualistic features have been made.

From the fact that the Code of judicial procedure has so far remained largely unaffected, one should not conclude that nothing has happened in the field of procedure during the past decades. The changes have, however, been brought about through separate legislation such as, for instance, the introduction of Small Claims Courts, the Public Complaints Board and a special court (the Market Court) for consumer cases of a prospective nature. This will be discussed later on. Here it is sufficient to point out that the developments have taken place primarily outside the field of common civil procedure, which, as a result, has gradually lost some of its predominant importance as a means by which to provide for the protection of diffuse, fragmented and collective interests.

In as far as *legislative techniques* are concerned, one may point out that the borderline between private and public law has become ever more blurred. Precisely where the protection of diffuse, fragmented and collective interests comes to the fore, such as, for instance, under environmental law, consumer law, landlord and tenant law and particular sections of labour law, this trend may sometimes lead to a situation which offers to the individual a catalogue of possible sanctions which is hard to perceive, consisting, as it does, of various remedies that are not always neatly harmonized. This situation, as well as the procedural consequences of the fact that the borderline between mandatory and non-mandatory law cannot always be drawn with any high degree of accuracy, has already been discussed above and will to some degree be dealt with further on.

Before leaving the present subject of legislative techniques, an additional aspect of significance for the subject under review has to be dealt with, i.e. the shift from a casuistic approach towards a more abstract approach in legislation, from legislation that contains a detailed catalogue of rights and obligations in various situations, towards statutes that merely contain outlines of legally accepted conduct in a broadly normative fashion.

The most important example of this is the growing practice in Sweden of making use of *general standards*, e.g. statutory provisions of a highly general character which leave the court a large amount of discretion in the assessment of the individual case. As a result of the legislative editing technique, there is an increasing need for judicial decisions that are likely to provide guidance, obtained, preferably, from courts judging at the highest level. The insufficient willingness to institute proceedings that may sometimes be noticeable when diffuse, fragmented and collective interests are at stake, is particularly undesirable where this legislative technique is applied.

The difficulty of predicting the outcome of proceedings is sharpened by legal

provisions which are broadly formulated, and by the tendency not to involve the courts in the law-shaping process. If there is reason to expect the proceedings to be continued all the way up to the highest judicial authority, readiness to institute proceedings will weaken even more, at least if such diffuse, fragmented and collective interests are at stake for which there is no substantial collective support to be found in organizations or in a joint representation of some other kind. The result may, for instance, be that collective rights of consumers will never be revealed in their full scope: the individual consumer abstains from litigation—or appeal—even when a decision by which his claim would be honoured might well be in line with the intentions that are behind the broadly-phrased substantive rules. If, as is the case in Sweden, consumers are virtually unorganized,[13] whilst industry is prepared to attribute essential significance even to individual cases, and to furnish financial resources accordingly (either through its organizations or separately) the result may be that judicial practice will show a distorted and imperfect picture of the content of the substantive rules.

Diffuse, fragmented and collective interests are thus given poorer protection than was actually intended.

III. PARTY-CONNECTED SOLUTIONS

If it is considered a problem that diffuse, fragmented and collective interests are not given protection in or through civil litigation the answer to the problem could be to use traditional methods as, e.g., to lower the standing threshold and to widen the rules on joinder and third-party intervention *or* to create new party constellations such as public actions, class actions, actions by organizations etc. in order to increase the number of proceedings. In the United States, for instance, both methods have been used in the areas of civil law and procedure under discussion here.[14] Now, what about the situation in Sweden?

1. *Standing to sue*

In modern Swedish law of procedure the concept of "standing to sue" (*talerätt* or *saklegitimation*) means a person's capacity to litigate on a given issue. If either of the parties lacks *locus standi*, the court must on its own motion dismiss the suit, without trying it on its merits.

[13] Cf. J. Hellner, *op.cit.* (*supra* note 4), p. 733, and A. Victorin, *op.cit.* (*supra*, note 4), p. 137.

[14] The development of the standing doctrine is discussed in, e.g., A. Chayes, "The Supreme Court 1981 Term. Foreword: Public Law Litigation and the Burger Court", 96 *Harvard Law Review*, pp. 8 ff., (1982), and J. Vining, *Legal Identity. The Coming of Age of Public Law*, New Haven and London 1978.

There are no provisions on standing in the Swedish Code of judicial procedure and consequently there is no precise definition of the procedural prerequisite. Though there are provisions on *locus standi* in other statutes, it is not always clear whether such provisions in effect constitute rules on *standing* in a procedural sense or whether they are rules of substantive law.[15] The problem is further complicated by the fact that there is no fixed terminology in this field. Thus the term standing (*talerätt*) is not always used in the same sense in legal writing on private law as it is in legal writing on procedural law. The usage of the courts also varies.

According to Swedish law and following the principal rule of the law of procedure, anyone who maintains that he has a claim against a person who for his part is bound to fulfil an obligation, is entitled to institute proceedings against the latter. For the plaintiff to have standing it is, consequently, sufficient that he maintains such a claim. If it should, at a later stage, become apparent that his claim lacks substance (for instance on the ground that the defendant owes his obligation to someone other than the plaintiff), the claim will certainly be dismissed. But such a decision is considered to be a dismissal on the merits and does not effect standing. In certain proceedings (e.g. proceedings on expropriation, paternity, as well as in divorce proceedings) it is, meanwhile, not enough for the plaintiff to limit himself to just asserting his claim. For him to be entitled to institute proceedings, he has to give proof of his possessing certain qualities (e.g. that he is one of those whose land was affected by expropriation, that he is one of the spouses in the marriage to which his claim related, etc.). If the plaintiff should fail to have any such quality, the court will dismiss the suit without trying it on its merits because of his lack of standing.

So, generally speaking, standing does not pose any problem: should the plaintiff lack the right he asserts he has, his claim will be dismissed without any need arising as to deciding whether or not lack of standing caused the proceedings to be broken off. It is, however, interesting to note that it is precisely when the protection of diffuse, fragmented and collective interests is involved that the question of standing has caused problems. In the report by the committee for the preparation of a draft for the Act on environment protection, it is maintained:

> As opposed to damages inflicted as a result of digging as well as to a number of other disturbances by which adjoining property is affected, pollution may entail personal inconvenience and general damage to property for a very large and indefinite number of people. It would, clearly, not be feasible to allow for anyone

[15] See P.H. Lindblom, "On the Distinction between Procedural and Substantive Law", 18 *Sc.St.L.*, pp. 110-49 (1974), at p. 142.

> who belongs to this group to act as if he were an owner of the property involved and to initiate proceedings in that pollution case. To this end it should be required, as before, that the party concerned has a certain legal connection with the real property that is affected as a result of the pollution. ... [T]his has resulted in the notion of *granne* (neighbour; he who lives in the vicinity of ... etc.) being restrictively defined accordingly. In legal practice under *vattenlagen* (the Act on water administration) a restriction of a similar kind finds expression.[16]

The assertion contained in the quotation that the granting of standing only to certain parties is in accordance with previous practice, is probably wrong. And it is still so that anyone may institute proceedings and claim compensation in an ordinary court in response to activities that are harmful to the environment, even if he owns no real property in the vicinity or has only lived there occasionally. The question of the plaintiff's right to compensation is examined without standing being made an issue.

So, standing does not constitute a procedural barrier to litigation in environmental cases in ordinary courts, at least not as long as the plaintiff is claiming compensation for damages. It is likely that claims for injunctions, e.g. an order prohibiting activities that are harmful to the environment, would be dealt with in the same way. When proceedings are instituted by someone who, on the whole, is not affected by the disturbances, the claim will be dismissed in a judgment on the merits of the case and the plaintiff's standing will probably not be made an issue, at least not at the court's own motion. If it turns out that the plaintiff is not disturbed enough to get an injunction this will not show up as a question of standing but as a question of the merits of the case.

It is of great practical significance to determine whether the fact that a plaintiff is losing his case (e.g. because he is held not to have been affected by the activities that are allegedly harmful to the environment) is regarded as being due to lack of standing or rather—and as a result of an appreciation of the merits of the case by standards of a totally different kind—to lack of substance. This is particularly so since, as has just been pointed out, under Swedish law the question of standing is of a procedural nature, to be dealt with in accordance with the special body of rules that pertain to procedural circumstances—rules which in many important respects are distinct from the rules that affect questions of substantive law.[17]

It would clearly be inappropriate for a condition for approval (leave) of the plaintiff's claim to be termed a question of standing if that condition was closely related to other issues of the case. In so doing one might easily run the

[16] *SOU* 1966:65, p. 307. (Present author's translation.)
[17] See Lindblom, *op.cit.*, at pp. 142 ff.

risk of judging by rules that pertain to procedure despite the substantive nature of the questions involved.[18]

It is necessary to have a clear picture of this background in order fully to appreciate the particular problems posed by Swedish law in connection with standing and the protection of diffuse, fragmented and collective interests. It is precisely in connection with these cases that the sphere of interest is hard to define, whilst, at the same time, problems are posed as to the definition of a distinct and independent criterion that would apply to the right to sue.

If, for instance, it were to be decided that only he who has "legally relevant connections" with the disturbed property were to have standing to sue in matters of pollution, nearly the entire case would be handled as a question of standing and as such by rules of procedural law which have been designed with a view to solving questions of procedure. Such rules are ill-suited to function as standards by which to determine whether a plaintiff's connection with the property is "legally relevant", or whether the property is "disturbed" on any meaningful scale, etc. This dilemma is probably typical of the area of the law where diffuse interests are at stake and is likely to have contributed to the growing tendency, apparent in legal practice as well as in the drafting work of the law committee concerned, to avoid any attempt at applying restrictions where standing is at issue.

Since it is not possible to restrict the circle of those who have standing to a limited group of people that are most affected, there is, consequently, a risk that both the defendant and the court may get involved in a host of procedures. As appears from the above given quotation, this risk has at times been deemed so great that the restricting of the circle of those who will have standing has actually been discussed. It is, meanwhile, interesting to note that such misgivings have appeared to be significantly excessive. In spite of the fact that attempts at delimiting the circle of those who are entitled to sue have largely been abandoned, the problem of too many proceedings being instituted in the field of, e.g., environment and consumer law, has not really been a risk.

As has been explained earlier, the opposite is true: the tendency to institute proceedings is particularly small in the area where diffuse, fragmented and collective interests should be protected. In Sweden many regard it a problem that so few judgments from which guidance might be derived are being given in precisely that area where the law is concerned with the protection of the environment and of consumer interests.

The discussion—which as we have seen was initially centred around the question of how the right to sue should be restricted so as to preclude excessive

[18] See Lindblom, "Kontinuitet och anakronismer. En studie i anslutning till miljöskyddslagens förarbeten", in *Rättshistoriska studier* (Serien II), vol. 5, pp. 204 ff. (1977).

litigation—has now switched to the point where it is focused on the question of in what way the right to sue could be further extended in order that the statutes in this area will be really effective. But lowering the standing threshold no longer seems to be a suitable avenue of approach since there is practically no threshold left, at least not for a private claim of the traditional individualistic kind.[19] The problems arise when standing is transferred to representation, i.e. when someone attempts to act not only on behalf of his own individual interest in the particular case but also as a public or private representative, a kind of attorney general, for an unorganized group. This will also be discussed later on under 3 and 4 *infra*. Before that, however, two traditional ways of acting together in civil litigation have to be taken up: joinder and third-party intervention. Has anything been done lately in these areas to facilitate the protection of diffuse, fragmented and collective interests in Sweden? How are the actual rules constructed?

2. *Joinder and third-party intervention*

(a) Whenever claims have been entered concurrently by a plaintiff against more than one defendant or by more than one plaintiff against one or more defendants, the claims shall be *joined* in a single action if they are supported on "essentially the same ground" (the Swedish Code of judicial procedure, 1948, ch. 14, sec. 2). This rule is mandatory for courts and parties alike but it very rarely comes up for implementation since it presupposes that the case results from one and the same legal relationship, for instance from one single contract.

Claims between the same or different parties may, however, also be joined in a single action in situations other than those just described if the investigation would benefit from such a joinder (ch. 14, sec. 6). This rule is also mandatory as far as the parties are concerned, whereas courts have the discretion to either join the actions or leave them to be adjudicated separately.

As regards the protection of diffuse, fragmented and collective interests, it is the latter rule that might be of interest here. It has indeed been applied in some cases, for instance where owners of bungalows that formed part of a housing project have instituted claims against the building contractor for damages due as a result of faults in the construction of the dwellings. In cases like this the more common approach is, however, to have one of the cases handled as a *test case* (in Sweden "pilot case") and for the other parties concerned to wait in the wings and postpone their actions till the outcome of the initial lawsuit has become clear. In this situation the "test pilot" acts as a

[19] Cf. A. Chayes, "The Role of the Judge in Public Law Litigation", 89 *Harvard Law Review*, pp. 1290 f. (1976).

kind of private attorney-general (see 3 below) and in Sweden there is no rule forbidding him to receive financial support from his "passengers" (the other parties concerned).

Mandatory rules on joinder of parties may under certain circumstances be an obstacle to—rather than a means of—protecting diffuse, fragmented and collective interests since a mandatory rule in this area may make the litigation unmanageable and time-consuming; avoidance of a multiplicity of suits, on the other hand, "... saves the parties from needless expense and vexation, economizes the time of judges and jurymen, and frees the dockets for the affairs of other litigants".[20] Thus, the birth of the class (representative) action in England in the Middle Ages is closely connected with mandatory equity rules on joinder; all persons affected had to be made parties and litigation became unmanageable when the individuals concerned were too numerous to be brought to court.

So a multiplicity of suits through joinder may be an advantage as well as a disadvantage when the protection of diffuse, fragmented and collective interests is at issue. In that respect the rule in ch. 14, sec. 6, of the Swedish Code of judicial procedure is well adapted to the needs in this area of law; joinder is possible but not mandatory, at least not as far as the court is concerned. And if the court has decided to join the claims between different parties and finds that the effect is unsuitable, the claims may—however joined at the beginning of the litigation—later be severed and processed separately if they do not rest on "essentially the same ground".

In this connection there is reason to go into the problem that has arisen as a result of the fact that a joinder of the parties—when such an arrangement is desirable from a public point of view, for the defendant or for at least some of the potential plaintiffs—will only be allowed if the court has the competence to enter upon all the cases involved; that is to say that the same court is the proper forum for each and every case concerned. Joinder of parties is after all only possible to the extent to which the cases concerned are examined by one and the same court.

Now suppose that a great many persons have suffered damage from a medicine that is sold all over the country. If the claimants want to join their claims they may enter lawsuits before, e.g., the *forum personae* of the defendants and ask for joinder under the rule discussed above. But suppose that they—or some of them—want to put pressure on the defendant (or suppose that the solicitors want to make more money) by repetitious litigation. This has been possible and has been somewhat of a problem in Sweden due to the fact that,

[20] Z. Chafee, *Some Problems of Equity*, Ann Arbor 1950, p. 149.

common intervention. A person who intervenes in the latter way cannot as such enter claims or pleadings of his own, but has only the possibility to bring up new evidence and to join in the discussion before the court so as to assist one of the parties.

A person who could be affected by the so-called conclusive authority of the judgment is entitled to such an intervention. This means that the judgment will *not* be binding (*res judicata*) in later proceedings where anyone who has intervened acts as a party, but that it may, nevertheless, be awarded some factual significance to the extent that it may affect the court's decision in questions of law as well as questions of fact. Judicial decisions will often have that factual impact, particularly when collective interests are involved.

Now, common intervention is held to be allowed to at least the same extent as mandatory joinder of parties that may take place following the rule in ch. 14, sec. 2, in the Swedish Code of judicial procedure. But the same does not apply in a situation when joinder would be allowed only following the rule in sec. 6, that is, when the claims do not rest upon essentially *the same* grounds but upon grounds *similar in character* (e.g. two house contracts in the same group-housing area or two travel contracts for the same tour). The Supreme Court has up until now been very restrictive (possibly with exceptions for organizations) about intervention in cases of that nature but there has also been some discussion in legal writing about whether the right to intervene should not be extended to cover situations like this, at least in particular cases.[23] As long as intervention is mandatory to the parties—they cannot refuse a third party's intervention as the question is one to be decided exclusively by the court—the attitude of the Supreme Court is understandable since an intervention may cause delay and complicate the proceedings for the parties. Intervention is probably never going to be an effective tool for the protection of diffuse, fragmented and collective interests. A certain extension of the actual rule—possibly with the permission of one or both parties as a requirement—could, however, transform intervention from a rather unimportant institute to at least a useful complement when it comes to the protection of diffuse, fragmented and collective interests.

3. *"Public attorney-general" methods*

If the private parties themselves fail to enforce a law in the area of diffuse, fragmented and collective interests it may be necessary to entrust the task to private or governmental bodies outside the traditional individualistic two-

[23] See, e.g., 1969 N.J.A. 211 and P.O. Ekelöf, *Rättegång II*, 5th ed., Stockholm 1977, pp. 181 f.

party formula. The private, non-governmental, method will be dealt with under 5 below; here some remarks on governmental methods will be made.

Legal writing on this subject, national and comparative, is immense and the reader's time will not be taken up by repeating what is written about American methods, such as the *parens patriae* doctrine, the role of the public prosecutors and the state attorney-generals, or their European counterparts, such as, e.g., the *procuratora* and the *ministère publique*.[24] As was stressed in the introduction, the purpose is only to present the means available and under discussion in Sweden today.

Under the present legal system a representative of the community has only in exceptional cases a right to intervene in private legal relations by conducting proceedings on behalf of a private party. The exceptions include the right of the *public prosecutor* to enter a claim in matters of divorce where bigamy has been committed, etc., and the right to sue enjoyed by the *barnavårdsnämnd* (child welfare committee) in paternity cases. These exceptions pertain to lawsuits in cases which parties are not allowed to settle between themselves.

Another important task for the public prosecutor is to claim damages for the *partie civil* in criminal actions; when a private claim is based upon an offence falling within the domain of public prosecution, the prosecutor, at the request of the injured person, has the duty to prepare and present together with the prosecution the injured person's claim, provided that it can be done without inconvenience and that the civil claim is not found devoid of merit. If the injured person desires to have his claim instituted together with the prosecution, he shall notify the investigating authority or the prosecutor of the claim and state the circumstances upon which the claim is based (ch. 22, sec. 2).

If the injured party does not want the public prosecutor to claim damages on his behalf, he can also have his claim handled as a civil action separated from the criminal case conducted by the public prosecutor.

This duty for the public prosecutor to claim damages on behalf of the injured person in criminal cases may be of importance as a way of protecting diffuse, fragmented and collective interests, e.g., when a crime has done harm to a wide and diffuse group of people, as for instance in environmental matters. Up until now, however, this possibility does not seem to have been used in situations like that but merely in traditional two-party constellations.

Phenomena like *ministère publique* and *procuratora* do not have true counterparts in Sweden. In this connection one would, in Sweden, usually think of the *ombudsman*. However, first of all mention should be made of the fact that the *justitiekansler* (the Swedish counterpart to the American attorney-general) has in some respects duties that are of interest in as far as the protection of diffuse,

[24] See M. Cappelletti, *op.cit.* (*supra*, note 12), pp. 769 ff.

fragmented and collective interests are concerned. The *justitiekansler* is a public official, appointed by the government, whose primary task consists of serving the government as its legal expert and acting as a representative for the government in trials against the government (e.g. claims for damages). Moreover, the *justitiekansler* is the prosecutor in trials involving the freedom of the press and has the right to prosecute judges and officials. To some extent he also exercises supervision over the Bar.

Of particular interest, as regards the present topic, is the task that has been entrusted to the *justitiekansler* in connection with the establishment of computerized personal registration. Leave to establish such a data register is given by a special authority, *datainspektionen* (the Data Inspection Board). Appeals against decisions of the Data Inspection Board are lodged with the government. According to an Act of 1975, the *justitiekansler* is entitled to conduct proceedings in order to safeguard the public interest in this connection.

Apart from the matters just mentioned the *justitiekansler* does not have any influence on the protection of diffuse, fragmented and collective interests. In Sweden there is no true counterpart of, e.g., the Anglo-American *parens patriae* doctrine, and the *justitiekansler* has no right to initiate proceedings in environmental cases such as the American state attorney-generals have.

Let us return to the now also internationally known institution of the *ombudsman*. The Swedish *justitieombudsman*, as well as the *näringsfrihetsombudsman* (freedom of commerce ombudsman), *pressombudsman* (who sees that the press observes a code of ethical standards) and *konsumentombudsman* (consumer ombudsman) have already been presented to an international public several times.[25] Certainly these four ombudsmen are of importance when it comes to the protection of diffuse, fragmented and collective interests in spite of the fact that they still are unable to act in a common court; their procedural capacity is restricted to certain special courts and agencies. (An exception should perhaps be made for the *justitieombudsman* in this respect.) The same goes for the fifth ombudsman who has now been added, the *jämställdhetsombudsman* (equal opportunities ombudsman)—an ombudsman who has the task of ensuring that the Act of 1979 on the equality between women and men at work is observed. The Act contains a ban on sex-discrimination in labour relations and furthermore includes the rule that active measures shall be taken so as to enhance equality.

Lawsuits concerning the implementation of the Act are dealt with by the Labour Court, and in such disputes the *jämställdhetsombudsman* is entitled to conduct proceedings on behalf of a private employee or applicant when the private person so allows and as long as the ombudsman considers that a

[25] See, e.g., M. Cappelletti, *op.cit.*, pp. 824 f., and papers mentioned in note 239 to that work.

judicial decision in the dispute would be of significance for the implementation of the law.

In some cases of this kind, the trade union to which the employee belongs will also be entitled to conduct proceedings. If so, the *jämställdhetsombudsman* will only be entitled to conduct proceedings if the trade union does not wish to do so. The *jämställdhetsombudsman* has so far exercised the right to act in the Labour Court only to a limited extent, but there have been some cases.

In an official report by a government investigation commission (*SOU* 1983:18) on legislation against ethnic discrimination in labour relations it is proposed that the *jämställdhetsombudsman* be given the task of conducting proceedings in the Labour Court on behalf of a private party who claims that he is subject to ethnic discrimination in labour relations. The report is still under discussion.

In as far as the *konsumentombudsman* is concerned, discussions are continuing on the question of whether he is to be allowed to conduct proceedings not only in the Market Court but also in common courts. In Professor P.O. Bolding's paper "Access to Justice in Sweden",[26] there is a discussion of the proposal to allow the consumer ombudsman to act in consumer cases in the common courts. The proposal has been elaborated by the present author at the request of the consumer ombudsman and Bolding's summary of the proposal is quoted here:

> In a memorandum appended to the Ombudsman's opinion, an inventory was made of possible ways by which the Ombudsman could be given power to litigate in such cases. Some alternatives were rejected after discussion. "Class actions" as used in the U.S.A. are hitherto unknown to Swedish law because, *inter alia*, the risk of res judicata complications was thought to be great. Similarly, it was not recommended that the Ombudsman be given the power to initiate cases concerning abstract or theoretical law matters in the form of declaratory or performance claims, because this method would conflict with the general principles of the Code of Judicial Procedure. Intervention, on the other hand, was a very weak institution which would afford no effective remedy. Since these and other alternatives were rejected, two further proposals were discussed and finally recommended.
>
> One proposal was the *power of attorney* method: The Ombudsman offers his services gratuitously to the party and receives from the party a letter of authority enabling the Ombudsman to litigate in a manner that seems appropriate to the general consumer interest.
>
> The other was the *transfer* method: The party transfers his civil right to the Ombudsman who, in turn, obliges himself to demand payment from the seller directly to the party. The memorandum ends with the suggestion that both the named methods could be used, the choice depending on the fact situation and the

[26] See P.O. Bolding, *op.cit.* (*supra*, note 4), pp. 891 ff.

> wishes of the individual consumer. Changes in the Code of Judicial Procedure would not be necessary except, perhaps, in regard to some of the rules concerning litigation costs.[27]

What then happened to that proposal? It was taken up in almost unamended form (although mention was made of a restriction to be applied to "the power of attorney method") in a report (*SOU* 1978:40) on the settlement of disputes in consumer matters and referred for consideration to various public and private authorities, institutions and organizations.

A considerable number of the authorities to which the preliminary draft was referred for advice, opposed the proposal. It was maintained, *inter alia*, that in industry opposition would probably be raised against being drawn into litigation and that for that reason the choice would be to seek a settlement with the opposing party. According to, *inter alia*, the Bar, the proposal entailed a risk of imbalance in the relation between the parties.

The arguments presented are hardly convincing. The result that those in industry will be inclined to settle out of court, may certainly impede the formation of precedents in judicial practice but may, nevertheless, contribute to consumer protection being better implemented in practice and thus to the protection of diffuse, fragmented and collective interests. The fear of a loss of balance between the parties in the few cases in which the consumer ombudsman would join presupposes that there is a balance today; in the present author's opinion there is rather an apparent imbalance nowadays in disputes between the individual consumer and the businessman (to the advantage of the latter).

The question as to the right of the consumer ombudsman to act before a common court of law is also politically coloured and fairly significantly so. It is not improbable that the matter may be brought up in a new setting under the present Social Democratic government. Mention should also be made of the fact that in Finland the consumer ombudsman nowadays has the possibility to conduct proceedings before a common court of justice in more or less the same way as has been proposed for Sweden.

4. *The "private attorney-general"*

Any straightforward analogies to *relator*, *class* or *public interest actions* are not to be found in Sweden and in the few cases in which such institutions have been brought up for discussion, the idea has, generally, been brushed aside on the

[27] P.O. Bolding, *op.cit.*, pp. 910f.—It is noteworthy that none of the proposed alternatives includes a guarantee that the ombudsman automatically is accorded own "standing" in the proper meaning of the word. He does have, on the other hand, standing in the Market Court, where he may conduct proceedings which do not, however, concern individual cases. See on this issue M. Eisenstein in *Access to Justice*, vol. II, pp. 503 ff., and *infra* under V.

ground that it is much too alien to Swedish legal tradition. Distant parallels are to be found, but they have too little significance to be taken up here. It may, however, be mentioned by way of example that in bankruptcy the outcome of litigation on disputed claims tends to be of immediate economic significance, also for the creditors who do not participate in the proceedings, in a way reminiscent of class actions. Class actions from a political point of view will not be discussed in this paper.[28]

Mention should also be made here of the fact that the above-mentioned government commission, which is to propose changes in the Code of judicial procedure and which submitted its first report (concerning first-instance procedure) in the spring of 1982 (*SOU* 1982:25-26), has by additional terms of reference been given the task of studying various possibilities of enhancing the formation of precedents on various questions of law, for instance by way of directly applying to the Supreme Court. To what extent such precedent proceedings would have to be conducted by an individual party, by an organization or a state organ, is, on the other hand, not mentioned and the committee has so far not published any discussion on the question. As was mentioned under II:2, the lack of precedents in the areas where diffuse, fragmented and collective interests are at issue is probably of particular harm to the weaker party.

Where modes of individually conducted proceedings affecting diffuse, fragmented and collective interests are at issue, the *test-case* method is of course of significance. Some remarks have been made on the test-case method under III:2. It should be added here that it is not possible to bind anyone but the parties with *res judicata* in a test case; a judgment does not bind anyone but the parties as long as the parties in litigation could not have achieved a similar restraint along the lines of private law. This is true of cases amenable to out-of-court settlement and cases that pertain to the protection of diffuse, fragmented and collective interests will practically always belong to that category.

However, the lack of far-reaching *res judicata* should not prevent a diffuse group of injured persons from choosing the test-case method; it is more of a disadvantage to the defendant who may have to fight claim after claim on practically the same issues.

From the defendant's and the court's viewpoint a test-case method should be combined with far-reaching possibilities to *stay the proceedings* in similar cases against the will of the other claimants. Due to ch. 32, sec. 5, of the Swedish Code of judicial procedure the court may, however, stay proceedings only when it is of extraordinary importance for the determination of an action that

[28] The present author hopes to come back to the subject in a book to be published during 1986.

the question *sub judice* in another court proceeding or in a proceeding of another kind be determined first, or when another impediment to adjudication of considerable duration is encountered. And this is not considered to be the case, at least not always, when the protection of diffuse, fragmented and collective interests is at issue. However, the new limitations on the possibility of getting legal aid in these situations may have a similar effect.[29]

The concept of "private attorney-general" has in the United States been used to motivate exceptions to "the American rule" on litigation costs: the winning party is not normally granted compensation for counsel but if the litigation is of importance to a great number of people the plaintiff has in some cases, and nowadays due to some statutes, been regarded as a kind of "private attorney-general" and granted reimbursement of his litigation costs.[30] In Sweden there is no need for such a concept since the winning party normally is granted full recovery for counsel ("the English rule"). Due to the Small Claims Act, however, the situation is the same as in the United States; there is normally no possibility of getting reimbursement for counsel in cases of this kind. As will be discussed under section 5 *infra*, this is a problem since the protection of diffuse, fragmented and collective interests often deals with claims that are individually small but which in total represent a very large sum.

In as far as, in the present context, the question of granting standing to *organizations* is concerned ("the Organizational Private Attorney-General") the situation existing in respect of the labour courts comes to the fore. Here it is certainly the rule in many cases that the individual is allowed to conduct proceedings merely because the labour organization concerned has declared that it has no interest in joining in.[31]

In such cases proceedings will often be about the interpretation of collective agreements, and what is at stake will consequently be of immediate significance to a wider circle of people whose interests may be involved; the proceedings affect a *collective* interest in the proper sense of the word.

In as far as diffuse and fragmented interests are concerned in the field where, for instance, the protection of consumers and the environment is the issue, the "corporative" method does not, on the other hand, hold the same prominent position. Contrary to the situation in for instance the Federal Republic of Germany and France, standing is not accorded to organizations which do not have an immediate and proper interest of their own in the case to which the proceedings pertain.

[29] See *supra* II: 3.
[30] See *Alyeska Pipeline Service Company* v. *The Wilderness Society*, 421 US 241 (1975).
[31] Cf. P.O. Bolding, *op.cit.* (*supra*, note 4), pp. 901 f., and J. Hellner, *op.cit.* (*supra*, note 4), pp. 729 ff.

This, at least, is the case where proceedings before the common courts are concerned. Questions of *environmental protection* are, however, also dealt with by administrative authorities. In Sweden it is up to the *länsstyrelser* (county administrative boards), and in certain cases to the so-called *koncessionsnämnden* (a committee charged with the task of deciding—either definitively or in the form of opinions—on the granting of licences), to examine the licensing of activities that are apt to affect the environment. In this connection developments have recently begun to take shape to the effect that organizations are allowed to "intervene" on a significantly larger scale than previously (and there are some—but not as significant—signs of a similar development in the common courts as far as common intervention by organizations is concerned). It is certainly not so that organizations are given the right to sue in the sense that they act as full parties and on an equal footing with those directly involved in the proceedings, but they are given the opportunity—and indeed the incentive—to attend the (pre-trial) deliberations, to express opinions on various questions and to contribute in various respects, by submitting explanations.

Against decisions on the environment made by the county administrative boards and the licensing committees in matters of licensing, appeal may be lodged with *regeringsrätten* (the Supreme Administrative Court). In this court the organizations are entitled to act as attorneys and assist parties in the conduct of proceedings, even if they are not otherwise allowed to act as parties proper.

In the field of *consumer protection* the situation is different. Most of the merchants who deal with consumers are members of trade associations but there are no powerful private organizations of consumers in Sweden.[32] This makes it impossible to use the "organizational private attorney-general method" in this field of the law and has probably been one of the main grounds for such innovations as the consumer ombudsman, the Market Court, the Public Complaints Board and the Small Claims Courts.[33]

Organizations influence the protection of diffuse, fragmented and collective interests not only by acting from the courtroom floor but also by having representatives sitting in as judges in, e.g., the Labour Court and the Rent Tribunals.

[32] Cf. *supra*, note 4.

[33] Cf. J. Hellner, *op.cit.*, pp. 733 ff.—There is a discussion going on about the possibility of expanding the right of organizations to act as parties and to be heard in the Market Court in certain situations, but this only applies to the organizations of merchants, cf. *SOU* 1983:40, pp. 17 f. On the other hand, the trade unions can act in the Market Court as representatives for the consumer interest, but this right has been used only a couple of times.

5. *Legal aid, litigation expense insurance and the tendency to litigate*

As was pointed out under III: 1 *supra*, when it comes to the protection of diffuse, fragmented and collective interests the problem does not seem to be that too many but that too few actions are brought to the courts. On the international scene efforts have been made to break this trend by lowering the standing threshold and by creating new public and private party-constellations.

However, the protection of diffuse, fragmented and collective interests is, as is protection of almost every kind, also a question of financial resources and this goes for public as well as private initiatives in this field. Access to justice presupposes access to money, and lack of money is one of the major—if not the major—obstacles to the protection of diffuse, fragmented and collective interests. This is particularly so when the claims are individually small but amount to a considerable sum in total, as for instance is often the case in class action situations in the United States.[34] The defendant is prepared to back up his defense with a good deal more money than a potential individual single plaintiff who does not have as much to win as the defendant has to lose; the sum in question awarded to the plaintiff will probably not cover his own litigation expenses.

As has been stressed before, that problem does not arise in ordinary cases in Sweden since the winning party normally receives full reimbursement for his litigation costs from the losing party. But when the Small Claims Act is applicable—and of course this is often the case when it comes to diffuse interests—the plaintiff is in the same situation as in the U.S.A. However, it seems to be uncertain whether the opposite rule would stimulate the plaintiff. The Swedish—as well as the English, Canadian and Australian—experience illustrates that the opposite rule does not seem to alter the situation; the positive effects of the possibility of being reimbursed for your own litigation costs are outweighed by the risk of having to pay your opponent's costs if you lose; the tendency to litigate does not seem to be stimulated by either the American or the Swedish (English) rule on litigation expenses. However, a third solution is possible and has been suggested in the above-mentioned reform proposal (*SOU* 1982:25-26) for consumer cases: it is proposed that the consumer receive full compensation if he prevails. If the merchant is the winning party but the consumer had "a reasonable cause" to initiate proceedings, each party should pay his own expenses. The proposal has not yet led to legislation.

The financial barriers to starting proceedings can be removed or lowered in

[34] See, e.g., *Eisen* v. *Carlisle & Jaquelin*, 52 FRD 253.

many ways. Public or private funds aiming to support useful litigation are one way, but apart from the legal aid system, litigation funds are of no significance in Sweden today. Economic support by organizations is another method and this is of at least some importance (e.g. in the environmental field) in Sweden. But when it comes to consumer protection, on the other hand, such support is not given to the consumers but to the merchants and thus is rarely a tool for the protection of diffuse, fragmented and collective interests.

No, legal aid and litigation expenses insurance are the only means of general importance in Sweden today as far as the economic aspects of litigation are concerned. This is not the place for a presentation of the Swedish system of legal aid and litigation expenses insurance.[35] But it should be noted that the tendency in Sweden is to make considerable cuts in the granting of money to the legal aid system. Such cuts have already been made and in an official report by a government commission of enquiry[36] into legal aid in the future, proposals are made for a further cut of 40 (out of roughly 200) million SEK.

Today even persons with a considerable income may receive legal aid and this system will probably be valid in the future as well. But the economic support from the state funds is scaled to the income of the litigant; a high school teacher, for instance, with an income of about 100,000 SEK and with two children to support will have to pay a maximum of about 3,000 SEK out of his own litigation expenses to the legal aid system, the rest is paid by the legal aid system. And since the legal aid system does not cover the losing party's obligation to pay the adversary's litigation expenses the financial risk of going to court is considerable.

The legal aid system is, however, very often supplemented by litigation expenses insurance covering a certain percentage of the remaining costs, including the losing party's obligation to pay the adversary's cost.

When it comes to the proceedings in the Small Claims Courts legal aid is normally not granted but litigation expenses insurance may cover part of the costs. A certain financial risk still remains, but the financial barriers to the protection of diffuse, fragmented and collective interests are certainly lowered by the legal aid and litigation expenses insurance systems.

Since neither legal aid, nor legal expenses insurances, nor the Small Claims Act have appreciably increased the number of cases taken to court, one may ask whether the general assumption that the cost of litigation is of dominating importance for the inclination (or rather disinclination) to go to court may not

[35] See on that subject J. Hellner, *op.cit.* (*supra*, note 4), pp. 739 f., and P.H. Lindblom, *op.cit.* (*supra*, note 4), pp. 127 ff., with references in note 11. Litigation expenses insurance is discussed in P. Jonsson, D. Lindmark, C.M. Roos, *Rättsskyddsförsäkringen—synad i fogarna*, Lund 1982.

[36] *SOU* 1984:66.

be a mistaken one; perhaps other factors—e.g. dislike of contention and nervousness at the prospect of taking part in court proceedings—are more powerful. It may be, and probably is, the case that the high cost of litigation causes people to abstain from it. But there do seem to exist other barriers, barriers which are of at least equal importance or which, at any rate, will act as an equally effective deterrent when the cost factor has been eliminated.[37] It should also be mentioned that the protection of diffuse, fragmented and collective interests probably does not concern only—or even primarily—poor people who are very likely to get legal aid but also middle-income and wealthy people who can run a considerable personal financial risk when going to court.

IV. THE ROLE OF THE JUDGE

In Sweden the trend is quite clearly in the direction of a more active role for the courts in matters of both, what in Germany are called *formelle* and *materielle Prozessleitung*. But this reflects a general tendency and it would be an exaggeration to say that the protection of diffuse, fragmented and collective interests has played any prominent part in this connection.

A question which has recently come up for discussion is, nevertheless, whether the role of the judge should be the same, irrespective of whether or not the proceedings pertain to a question that comes under mandatory rules of private law.

Within the area of the law that deals with the position of consumers—as well as in the area of tenancy—where diffuse, fragmented and collective interests will often be involved, quite a number of Swedish provisions are to be found which are mandatory in the sense that they apply even if the parties would have concluded a contract that is contrary to such rules. But in proceedings on such questions the court will, nevertheless, be entirely bound by the stand taken by the parties. The judge is not free to apply the factual circumstances; in cases amenable to out-of-court settlement the judgment may not be based upon circumstances not alleged by a party as the foundation of his cause (the Swedish Code of judicial procedure, ch. 17, sec. 3).

However, should the judge draw attention of the parties to such (out-of-court) mandatory provisions and so encourage them to entertain claims and objections that would otherwise not have materialized? In the above-mentioned proposal for a reform of the Code of judicial procedure (*SOU* 1982:25-26) the opinion is expressed that the active role to be accorded to the judge in this respect should not amount to more than would be the case if an

[37] P.H. Lindblom, *op.cit.* (*supra*, note 4), p. 106, and A. Victorin, *op.cit.* (*supra*, note 4), pp. 133 f.

area of the law were involved where the rules would not be mandatory in nature.

The present author cannot share this opinion.[38] The judge should be particularly active when sitting in a case that involves a legal relationship which is subject to mandatory law. There may, otherwise, be the risk that the substantive rules will remain a dead letter, in spite of the fact that the legislator, by making the rules mandatory, has particularly stressed the significance to be attached to their effectiveness in practice.

In private law, mandatory law is often directed towards levelling out an imbalance between parties; the weaker party needs to be backed up through mandatory rules in order to prevent the stronger party from taking advantage of his privileged position in questions of, *inter alia*, professional know-how and legal expertise. Since in contract situations, for instance, a consumer will often act without the help of a legally trained attorney, the freedom to draw up contracts is limited so as to prevent him from giving up—often unknowingly —interests that, according to the legislator, are to be deemed well-founded in law.

However, the support given by the legislator in this respect is granted so to speak in silence and there is a great risk that the one who is meant to be so supported does not realize what claims he is entitled to make. This is true even when the dispute is brought up for trial, since in proceedings of the present kind the weaker party will often fail to be assisted by an attorney. In order that the procedure will effectively function so as to render guidance to social behaviour, and in order that the rules of private law shall really have an impact in practice, the role of the court should, in the present author's opinion, include its active intervention where rules of substantive law of the kind just mentioned come into play. However, the need for such active intervention should of course be balanced against the risk that the proceedings expand to unnecessary proportions or that the judge would be regarded as being partisan. The judge should be obliged to point out the relevant rules and issues but should, on the other hand, be bound by the dispositions of the parties if they choose not to entertain claims and objections pointed out by the law.

V. SPECIAL COURTS AND SPECIAL PROCEEDINGS, REFORM PROPOSALS

Under II:2 it is pointed out that the developments in Swedish procedure during recent decades have primarily taken place outside the Code of judicial procedure (1948) and that common civil individualistic procedure at the

[38] See my written statement in *SOU* 1982:26, pp. 616 ff.

general courts has subsequently lost some of its predominant importance as a means by which to provide for the protection of diffuse, fragmented and collective interests.

A main part of this development is the creation of a number of special courts and proceedings such as the Labour Court, the Market Court and the Housing Court as well as special bodies such as the Rent Tribunals, the insurance boards and the Public Complaints Board. These courts and institutions have been discussed and presented in English several times and I refer to these papers for details.[39]

The Small Claims Courts are not special courts in the true meaning of the word since this procedure is utilized by the common courts (in non-family matters when the plaintiff's claim does not exceed about 10,000 SEK). But the proceedings are to a great extent informal; the main principles in the Code of judicial procedure—orality, immediateness and concentration—have largely been superseded by expediency and the parties are supposed to conduct their case themselves without the help of counsel.[40] In this respect the proceedings in small claims are to be categorized as special proceedings.

Both the Public Complaints Board and the Small Claims Act have been the object of serious criticism in Sweden, the Public Complaints Board for, *inter alia*, the—in principle—written procedure which does not make it possible to hear witnesses and for being less rapid than the proceedings in the Small Claims Courts. The Small Claims Courts, on the other hand, have been criticized for not being used in the way intended: only about a quarter of the cases are consumer disputes and three quarters of the "consumer cases" are taken to the court not by consumers but by industrialists and tradesmen. And in spite of the fact that counsel is not paid for either by the losing party or by legal aid it cannot be anything but a disappointment that counsel appear in only about 60 per cent of the cases and almost always for the tradesmen.

The facts that only a comparatively small number of consumers have instituted actions under the Act and that the parties have to such a large extent evidently considered it necessary to engage counsel must, as mentioned earlier, be a disappointment to many of those who welcome the Small Claims Act. However, representatives of industry and commerce have also criticized the Act: contumacious debtors are becoming aware that it will cost the creditor several hundred Swedish crowns—which will not be defrayed—to recover his debt, and not infrequently they adapt their payment or offer of payment

[39] For a presentation, see P.O. Bolding, *op.cit.* (*supra*, note 4), J. Hellner, *op.cit.* (*supra*, note 4), pp. 728 ff., P.H. Lindblom, *op.cit.* (*supra*, note 4), pp. 99, and A. Victorin, *op.cit.*, pp. 140 ff. (labour relations), and pp. 145 ff. (landlord and tenant relations). The Swedish Small Claims Act is discussed by M. Eisenstein, *op.cit.* (*supra*, note 27), and by P.H. Lindblom, *op.cit.*, pp. 114 ff.

[40] P.H. Lindblom, *op.cit.*, p. 119.

accordingly. Some creditors consider that it is no longer worth going to court to recover amounts smaller than 1,000 SEK and consequently the granting of small credits will probably be subjected to further restrictions. The question whether this is a desirable development is left to the reader to answer.

However, although the Small Claims Act has to some extent proved a disappointment to some groups, it has won praise in other quarters, not least among the judges who have applied it. Many of the judges who have been asked how far they have succeeded in putting the Act into practice, have—not really surprisingly—affirmed that the Act has made it possible for them to deal with small claims in a flexible and appropriate way and, in fact, that everything has run like clockwork. Other judges, however, have taken the view that, broadly speaking, the same results could have been achieved by applying the rules of the Code of judicial procedure (*inter alia*, those providing for a simplified main hearing) and that these rules—critized though they often are for being too full of details and too rigid—nevertheless offer far-reaching possibilities of adapting the procedure to what appears appropriate in the individual case. And in an official report[41] the above-mentioned special commission has proposed that the rules in the Small Claims Act should be incorporated in the Code of judicial procedure, a proposal that is combined with new flexible rules for the common procedure in the general courts. Hence, the tendency today seems to be to try to regain importance for the common courts and the Code of judicial procedure; a discussion is coming up about the possibility of abolishing certain special courts and boards. In this way it might be possible for the common courts and the Code of judicial procedure to regain some importance as means of protecting diffuse, fragmented and collective interests in civil litigation.

VI. CONCLUSIONS

Professor M. Cappelletti and Professor B. Garth have maintained that a comparative study suggests an increase in pluralism and a greater role for the courts in protecting diffuse interests. But this creates problems since an individualistic paradigm remains the basis for modern civil procedure at the same time as the social welfare state has resulted in new rights aimed at groups and collectives of a diffuse character; a great range of compromises between the requirements of new interests and the individualistic tradition may therefore be necessary.[42]

[41] *SOU* 1982: 25-26.
[42] M. Cappelletti and B. Garth, *op.cit.* (*supra*, note 3), pp. 156 and 158 f.

An adaption to the new situation may, however, take the shape of a creation of new courts and procedures instead of an accommodation of the traditional procedural models to the new situation. This seems to be what has happened in Sweden: litigation at the general courts because of the Code of judicial procedure does not play a dominant role in the protection of diffuse, fragmented and collective interests today; new courts, institutions and proceedings have been created to meet the new needs. The present author thinks it would be a mistake, however, to see this as the beginning of the end for litigation of the traditional kind. There will always be a need for a procedure of the traditional individualistic two-party type, and to replace the existing procedure with a totally new one—better suited to the protection of diffuse, fragmented and collective interests—would be to create a new problem at the same time as the existing one is solved.

However, a scattered court system is not to be recommended. Therefore a flexible Code of judicial procedure giving the judge and the parties the possibility of solving conflicts of the traditional as well as the new type within the general courts would be preferable. But flexibility cannot solve the entire problem and therefore compromises may be necessary after all.

When it comes to party-connected solutions to create better protection for diffuse, fragmented and collective interests neither the "public" nor the "private attorney-general" methods have been of great importance in Sweden. An exception should possibly be made for the "ombudsmen"—expecially the consumer ombudsman—but as long as this ombudsman does not have the possibility of acting in the common courts the Swedish innovation cannot be named as a radical mode of protecting diffuse, fragmented and collective interests in civil litigation. A right to enter the common courts would be a kind of public action, but the situation today is that public as well as class or organizational actions at the general courts are totally unknown.

According to Swedish law and legal tradition the judge does not have any "law-making power" in the sense he has in common-law countries. And in spite of the fact that the legislative technique—characterized by an increased use of statutory provisions of a highly general character—forces the judge to create new law and standards at least in private law, new procedural needs have to be satisfied by statutory law. Class or public actions or a refined test-case method cannot be created or developed in case law.

This is not the place to state if there is a need for procedural innovations of the kind just mentioned to protect diffuse, fragmented and collective interests in civil litigation in Sweden today, or if we already have reached a level of "legal overkill" in this area of the law. But it can always be maintained that if we want to preserve the importance of civil procedure—as a means of conflict resolution and behaviour modification—we do have to adapt the law of

procedure to developments in society. That is not easy, but it would be even harder to adapt the modern welfare state to an outmoded individualistic conception of civil procedure.[43] If we succeed in finding the appropriate methods and compromises for the new collective needs, diffuse and fragmented interests may not have to be considered as "diffuse" or "fragmented" any longer.

[43] Cf. P.H. Lindblom, "Tes, antites och syntes—perspektiv på processrätten", *SvJT* 1984, p. 800.