The origins and roles of class action laws across the world:

What types of problem do they deal with, and what safeguards do they have?

Rebecca Money-Kyrle

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Introduction

This presentation draws on theoretical and methodological aspects of a comparative study of collective action laws and procedural safeguards. Subject jurisdictions in the study include the 27 European member states, Canada, USA, Australia, several Latin American jurisdictions, Israel, South Africa, Indonesia and others.[1] RMK's intended conference presentation had two objectives: to explore theoretical aspects of collective actions (including class actions); and to discuss methodological challenges of the comparative study, and associated problems in drawing on research results to inform debate over safeguards in a European collective action framework.

Background

Damages for competition law breaches, and consumers' collective compensatory redress, have been two separate items on the European Commission's policy agenda for several years. DG Comp, SANCO and DG Justice have joined forces in a 'coherent approach' to collective redress. Publication of an EU Framework for Collective Redress is expected during 2013, as directed by the European Parliament Resolution of February 2012.[2] The resolution rejected a US opt-out model: '..Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions'.[3] Based on that Resolution, the European Framework will only likely permit 'opt-in' actions, and will contain a raft of procedural safeguards. Punitive damages and contingency fees have been effectively removed from the picture by the terms of the resolution, which also emphasises that protecting rights to participate in proceedings are essential. Safeguards will most likely incorporate judicial admissibility criteria. Other important recommendations include control

[1] RH Money-Kyrle, *Collective Actions: A Comparative Study* (forthcoming publication, Hart 2013).
[2] European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089 (INI)).
[3] Ibid paragraph 2.

on representative litigants, compensation based on actual damage, access to evidence, loser pays, no third party funding, no *erga omnes* judgement, and encouragement of ADR. Many of these principles are part and parcel of normal civil procedure rules in European common law and civil systems. What procedural laws and rules (safeguards) in the European Framework would best protect these principles? Any comparative examples used to inform the procedural design should be consistent with the European conceptual approach. This is complicated by the fact that there is no universal legal definition of 'class' or 'collective' action.

Definitions and types

Litigation procedures in different jurisdictions for mass or multiple claims are given different names, but the nomenclature does not necessarily signify clear policy goals, procedural design or safeguards. Moreover, in some jurisdictions, traditional civil procedure rules have been interpreted to accommodate complex demands of modern mass litigation (for example 'partie civile' proceedings in the Belgian case). In terms of public civil actions, the 'actio popularis' mechanism, and public interest judicial or constitutional review procedures have, in some civil jurisdictions, also been interpreted flexibly to accommodate changing demands for mass justice, whereas in others, similar traditional rules have retained a highly restrictive interpretation and application.

Whilst every single model of collective action process examined in the study has unique features, or a unique combination of procedural safeguards, many of the procedural rules commonly found are ubiquitous in most civil procedure systems. These include rules on jurisdiction, standing, capacity of representative, restriction on types of rights (by sector or legal class), admissibility and certification, evidence and witnesses, forms of relief, extent and enforcement of judgment, appeal rights, funding and legal costs. Some, or all, of the above are exceptionally modified within class or collective action procedures. Only a small category of procedural safeguards are more or less only associated with class, collective or group litigation procedures, such as rules on opt-in or opt out, definition of group or class members and sub-groups, and special rules on the effect and enforcement of judgment. So, definitions and types according to legal doctrine will not readily provide a clear basis for comparing similarity and difference. It is also necessary to investigate conceptual and theoretical justifications and norms.

Theory

The European Framework ought first to have a clear conceptual foundation, with identifiable fundamental norms clearly identified. What are the fundamental norms which the European Framework ought to protect?

Access to Justice

Access to Justice is frequently cited as a goal. Cappelletti coined the term 'massification' to describe a modern phenomenon. As commerce has globalised, mass transnational markets have emerged; a single negligent act may potentially harm thousands or millions of individual consumers. Traditional national civil justice systems are not designed to provide

effective access to justice for mass harm events. Cappelletti saw access to justice evolving in 3 successive, but overlapping, 'waves' to accommodate mass claims: state funding (legal aid); introduction of class or collective action procedures; and mediation and ADR techniques for collective redress. The evolution of civil justice in the European context is seeing those three stages of evolution. However, Cappelletti's concept is essentially procedural. What about the fundamental substantive norms? This will depend on conceptual understandings of 'justice', punishment and redress. As discussed below, different theoretical concepts of justice invite starkly contrasting procedural design and safeguards.

Liberal Justice

Most European civil justice systems are grounded on liberal theories. Safeguarding liberal norms would likely render an op out collective action procedure unacceptable because it would undermine principles of individual autonomy and moral agency. Civil remedies ought to be morally justified by a duty to correct harmful wrong-doing. Deterrence is not wholly absent from liberal concepts of redress and punishment but wider social goals of a deterrent effect of punishment (consequentialist or utilitarian norms) should not trump fundamental norms of individual moral autonomy and culpability. Deterrent or punitive sanctions will ordinarily be restricted to criminal harms. In a collective action procedure, to safeguard liberal norms, the class ought to consist of identifiable individuals with similar legal claims or defences, pursuant to an opt-in mechanism. Rules should protect individual rights of access to the court. There must be strict safeguards to protect 'absent' class members who elect to delegate to a representative litigant. Settlement ought not to impose unjustified denial of autonomy over a legal person's claim, almost certainly requiring individual consent to compromise. In theory, safeguards should ensure that quantum reflects harm caused by an unlawful act. Only in exceptional circumstances would aggravated or punitive civil damages be justified if a liberal conceptual approach is adopted. Final judgment should only be binding on the parties/group members who have opted in. There would need to be exceptional justificatory reasons for any departure from those liberal norms.

Consequentialist, utilitarian and communitarian approaches

An 'ends-justifying-the-means' approach which aims to deliver *some* redress to the largest possible category of potential claimants suggests utilitarian, consequentialist theories of justice defining the ultimate norms. Communitarian theoretical approaches to the class action, allowing a community group to take action to enforce public or regulatory norms, are closely linked with consequentialist approaches.[4] Utilitarian and consequentialist theories appeal to the interest of the majority. Utility, the overriding norm, is the measure or thing which will make the majority of people most happy. The state's primary role is to secure group, class, majority or the wider social or public interests over minority interests. Deterrent and symbolic, and even pre-emptive sanctions are morally justified, so long as the consequence is the better protection of majority interests (deterring future wrong-doing, regardless of past culpable acts). Deterrent sanctions (punitive damages) can be

[4] Samuel Issacharoff and Geoffrey P Miller, 'Will Aggregate Litigation Come to Europe?' (2009) 62 Vand L Rev 179, 209.

conceptually justified even if causation and harm is not strictly proven. Regulatory and economic justifications for the class action are closely linked to consequentialist and utilitarian concepts of justice. The class action is seen as a regulatory device, for private enforcement of public goods.[5] This conceptual approach is not far removed from the predominant enforcement policy of the Commission with respect to breaches of competition law (deterrence), and has infused aspects of the debate on the proposed introduction of a European collective action mechanism.

Safeguards in a consequentialist collective redress system *ought* to incorporate procedural rules to prioritise group interests. Key elements of due process (access to court, access to evidence, a right to be heard etc) can be abrogated if this serves utility, economy and efficiency and the wider social interest. This factor alone is the most powerful conceptual justification for a European Framework which might require member states to implement procedures for collective *redress* without any formal legal action, process, or appeal mechanism. Sanctions and penalties ought to be deterrent (punitive damages) without any *necessary* moral requirement for proof of culpability and harm on an individual basis. There is no normative barrier to judgment having *erga omnes* effect, and no fundamental moral requirement for settlement to be subject to individual consent.

The problem with such a consequentialist approach is that it regards community, and not individual citizens, as the 'foundational democratic unit'. The class is posited as an indivisible unit, but it does not resolve conflicts between that, and the actual constitution of the class or group founded on underlying individual private rights.[6] So, at the heart of the US opt-out class action is an inherent conceptual inconsistency with liberal justice theories (as explained above) *and* consequentialist, communitarian and regulatory approaches. A European Framework ought not to import those conceptual anomalies, given the fundamental constitutional importance in many national civil justice systems of individual autonomy.

Social Justice and Capabilities

A less rigid dichotomy between individual autonomy, and public and communitarian utility might be found in a social justice conceptualisation of rights realisation. Amartya Sen's and Martha Nussbaum's 'capability' approach to social justice draws on development and economics paradigms.[7] The capabilities approach considers the realisation of civil, political, social and economic rights in an unequal world: 'to secure a right to citizens in these areas is to put them in a position of capability to function in that area'.[8] Liberty and social justice are regarded as the *capacity* to enjoy individual freedom. Personal security is conceptualised to encapsulate access to the basic necessities to sustain life (water, food, shelter, health care).

[5] Kalven H and Rosenfield M, 'The Contemporary Function of the Class Suit' (1941) 8 Uni Chi L Rev 684.

[6] Redish MH and Berlow CW, 'The Class Action as Political Theory' (2007) 85 Washington University Law Review 753.

[7] Sen A, Development as Freedom (Oxford University Press 2001).

[8] Nussbaum 'Capabilities as fundamental entitlements: Sen and Social Justice' Feminist Economics 9(2 – 3), 2003, 33 – 59, 37.

A social justice and capabilities approach to the class or collective action would be morally grounded on the good of facilitating substantive rights realisation in an unequal world. This, conceptually, admits various possible solutions to the 'problem' of mass harm, depending on context, including for example individual, private attorney general or public models. This theory accommodates both public (development goals) and private (rights realisation) normative elements. Whether to allow opt in or out should be justified by underlying aims and contextual factors. By definition, the capabilities approach requires collective action procedures to be designed in light of demographic, social, economic, political and legal context. Thus, such an approach is potentially inconsistent with the very notion of a harmonising framework applicable to 27 member states, each with highly particular demographic, political, economic, constitutional, social and cultural facets. It also requires discussion of the legal basis of development and economic goals.

Substantive rights and interests

The European Union, along with other international and regional treaty organisations, recognises different types of 'fundamental' rights, including development and economic rights, some of which are individual, others of which are diffuse or indivisible in nature. The latter types of rights are not found in many national constitutional systems grounded on traditional liberal norms. Civil and political rights are consistent with liberal justice, characteristically individualistic. These rights include property rights, and legal rights protecting a person's physical and psychological autonomy, and rights of political engagement (freedom of expression and association, for example). Procedural rights of access to the court, and rights to a fair trial, are the primary instrumental rights which should enable individuals to enforce their rights. These rights are invariably reflected in constitutional 'bill of rights' in liberal democracies-for example under the constitutions of the USA, France, Germany, Switzerland, and many others; such constitutional models have been exported across the post-colonial world. Those fundamental civil and political rights provide the foundational justification for private laws regulating for example property, contract, tort, as well as for public regulatory norms in a civil society. These individualistic civil and political rights are often referred to as 'first generation' human rights, and are protected in international and regional treaties.[9]

'Second generation' fundamental rights are economic, social and cultural rights; these evolve from Benthamite (utilitarian) and Marxist concepts of right, interest and community, and are given protection in international law, for example pursuant to the International Covenant on Economic, Social and Cultural Rights.

More recently, a third category of 'solidarity' rights has gained recognition. This category of rights is defined with reference to community interests which a society or section of it enjoys by virtue of demographic, geographic, socio-economic and other determinants. In public international law, third generation solidarity rights include minority rights, heritage and linguistic community rights, environmental protection, and other community-based

[9] ICCPR 1966.

interests. Some constitutional schemes which have been reformed recently as part of a transitional process from autocracy to democracy have incorporated these third generation rights (for example, South Africa, and various Latin American jurisdictions).

This rights discourse has also spawned a categorisation of two types of collective action, mostly found in the Latin American jurisdictions, but also in Spain and Portugal: the homogenous collective action and the diffuse collective action, the latter being defined and identified on the basis of an community of indivisible interests and closely linked to the evolution of third generation rights in international law. Unlike the US class action based on an aggregation of individual private rights, a diffuse claim can only be predicated on 'collective' and indivisible (third generation) types of legal interest, which are inherently and inextricably community based. The class consists of indivisible interests so an 'opt in' process is anathema to the foundational concept of the action. Even opt outing out is problematic unless a parallel individual right can also be asserted.

Turning to the European context, whilst constitutional rights in member states are inmost cases generally limited to civil and political rights, the Lisbon Treaty recognises first, second and third generation rights. These include equality, cultural, religious, and linguistic diversity; disability and minority rights, and a further category defined as 'solidarity rights (third generation). Solidarity, or third generation, rights include workers protections, collective bargaining and action, family rights, social security, health care, access to services of general economic interest, environmental protection and consumer protection. What remains unexplored in any depth in the European discourse on a Framework for Collective Redress is whether the Commission seeks to enable enforcement of individual private rights and/or consumer solidarity rights as expressed in the Lisbon Treaty and Charter of Fundamental Rights. Some have asserted that 'consumer protection' invokes diffuse interests.[10]

If consumer rights, as diffuse and indivisible rights, are what the Commission seeks to safeguard in its forthcoming Framework, then the opt-*in* process advocated by the European Parliament presents a conundrum. Conceptually, many of the safeguards that ought to be present in a diffuse collective action model are inconsistent with the EP's stance. The nature of diffuse rights dictates that the class or collective ought to be predicated on indivisibility, incorporating a descriptive account not based on individual identity or right. It follows that individual capacity legitimately to control public bodies or officers, or non-governmental organisations, which may be afforded legal standing, is inherently limited. Safeguards ought then to include legal and regulatory controls over representative parties. The 'loser pays' principle advocated in the Resolution will likely act as a complete deterrent to public interest bodies pursuing claims which are not predicated on identifiable individual rights, so if such a collective action model is to have any practical effect, it ought to include provisions for litigation funding which do not undermine the integrity and public standing of representative organisations. The absence of identifiable

[10] Norbert Reich, 'Protection of Consumers' Economic Interests by the EEC' (1992) 14 Sydney Law Review 23.

legal rights constituting the class means that relief could only possibly be generic to the class. Indivisible diffuse rights are consistent with *erga omnes* effect of the judgment.

Methodological challenges

To produce robust and meaningful research results, it is imperative that a logical and consistent method is adopted in any comparative study. Methodologically, a comparative study of collective actions in different jurisdictions is complicated. First, whilst the objective is to identify similarities and differences in procedural design, there must be some base line common denominators to ensure that the comparison is meaningful. A functional methodological approach may appear to be the most obvious: subject jurisdictions should be studied to establish similarities and differences in the civil procedure mechanisms whose function is to enable management of mass claims. However, the definitions and functions of 'collective action', and the safeguards which are justified by the underlying norms, are subject to conflicting and contrasting variation. Moreover, laws are subject to different generic rules of interpretation and application, depending on the constitutional context. This latter point means that some division of subject jurisdictions into 'legal families' is required. Again, whilst broad parameters for the subdivision of jurisdictions into comparator groups may be established (common law jurisdictions, civil law jurisdictions), within those groups there are important differences influencing civil procedure. For example, England and Wales, a common law jurisdiction with no written constitution, and subject to overriding EU laws in many areas, cannot be easily compared to the US, which has a written constitution and a federal system of laws. Within the civil law family of European jurisdictions, there are also significant variants, with some of the Nordic nations having adversarial characteristics which are alien to some of the Napoleonic systems. Other European civil jurisdictions incorporate elements of case precedent as a source of law.

The above not only limits some aspects of the comparative study, but is also highly instructive with regard to any influence that national systems may have on the design of a European Framework. It is simply illogical to expect that a 'one-size-fits-all' collective redress mechanism will be interpreted and applied within the highly variable civil law systems of the 27 member states to produce uniform levels of access to justice for consumers.