Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study

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GOVERNMENTAL AND PRIVATE ADVOCATES FOR THE PUBLIC INTEREST IN CIVIL LITIGATION: A COMPARATIVE STUDY

Mauro Cappelletti

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I suggest that there is something fundamentally wrong in our legal system . . . If a man's pocket is picked, the government brings a criminal suit, and accepts responsibility for its prosecution. If a man loses his life's savings through a breach of a contract, the government accepts no such responsibility. Shouldn't the government perhaps assume some of the burden of enforcing what we call "private rights"?

. . . I do suggest that we should consider whether it is not feasible to provide impartial government officials—who are not court employees, and who act on their own initiative—to dig up, and present to the courts, significant evidence which one or the other of the parties may overlook or be unable to procure.†

The last ones to see clearly society's interests are generally those who are paid to do so.‡

This article examines the means by which public and group interests are represented in civil proceedings throughout the
Vescovi’s report dealt with a number of other Latin American countries in addition to Uruguay.

An eleventh report covered Japan (Dr. C. Suzuki, Tokyo), where strong influences of French and German elements are still apparent in so far as the role of the Ministère public in civil litigation is concerned.

The common-law world was represented by three national reports, covering Australia (Dr. G.D.S. Taylor, Clayton, Victoria), England (Master I.H. Jacob, London), and the United States of America (Professor J.N. Hazard, New York). In addition, a fourth report covered Scotland (Professor J.M. Thomson, Birmingham) and a fifth, Quebec (Professor Michèle Rivet, Quebec). To be sure, the civil-law tradition maintains strong roots in Quebec, Canada; and Scotland is, to say the least, an anomalous member of the common-law world. It should be noted, however, that from both reports there emerges a greater resemblance to common-law solutions than to those prevailing in France and, generally, in the civil-law world.

The socialist world was covered by five national reports, on Bulgaria (Professor Z. Stalev, Sofia), Czechoslovakia (Professor V. Steiner, Prague), Hungary (Professor L. Névai, Budapest), Poland (Professor J. Jodlowski, Warsaw), and Yugoslavia (Professor S. Triva, Zagreb). Professor Stalev’s report also briefly discusses most of the other socialist countries of Eastern Europe.

Also, I was fortunate to receive five remarkable reports that discuss very important areas of the “developing world”: Ethiopia (Professor J. Harrison, Addis Ababa), Ghana (Justice N.A. Ollennu, Accra), India (Advocate-General and Hon. Professor L.M. Singlivi, New Delhi), Kenya (Justice J. Spry, Nairobi), and Tanzania (Justice G.C.M. Onyuki, Dar es Salaam). The last four countries bear strong influences of the common-law approach to the problems treated in this article; Ethiopia, on the other hand, appears to have a mixture of civil- and common-law influences. In addition, I have used an article by P. Gulphe, Le rôle du ministère public en matière civile, in 2 REVUE SÉNÉGALAISE DE DROIT 32 (1968), although it was not specifically prepared for the Congress. It covers Senegal, whose approach is patterned after the French.

Only a few of the national reports have been published; the rest are on file both at the Institute of Comparative Law of the University of Florence and at the International Academy of Comparative Law.

On file both at the Florence Institute and at the law library of Stanford University are three unpublished research papers prepared for me in the spring of 1974 by Stanford law students working at the Florence Institute under a special externship program of Stanford Law School: N. Havranek, Representation of Group, Collective and Public Interests by Associations and Organizations in Civil Litigation: Western and Eastern Europe and the Soviet Union; A. Nicholson, “Italia Nostra” and Problems of Standing in Italian Public Interest Litigation in the Environmental Sector; and R. Whidden, The Ministère Public and the Attorney General as Advocates for the Public Interest. Also at the Florence Institute are three unpublished research papers that have been prepared by members of the Institute: A. De Vita, La tutela giurisdizionale degli interessi “collettivi” in diritto francese (1974); V. Grementieri, Memorandum sugli aspetti internazionali della protezione degli interessi collettivi (1974); and N. Trocker, La tutela dell’ “interesse pubblico” nel diritto processuale tedesco (1974). Another unpublished paper was prepared for me at Stanford by A.M. Paul, entitled Judicial Protection of Intermediate Societies in the United States (1974).

In addition, information on specific topics has kindly been provided by several colleagues, whom I wish to mention and thank especially: Mr. C.R. Halpern of the Center for Law and Social Policy in Washington, who submitted a paper, on file at the Florence Institute, entitled Some Observations on Developments in the United States Regarding Representation of Public Interests in Civil Litigation (June 1974); Professor A. Homburger of Buffalo and Professor H. Kötz of Constance, who were the Reporters at a conference of the German “Gesellschaft für Rechtsvergleichung” held in Hamburg in September 1973, on the subject “Private Suits in the Public Interest” (see Homburger, Private Suits in the Public Interest in the United States of America, 23 BUFFALO L. REV. 945 (1974); H. Kötz, Klingen Privater im öffentlichen
and its analogues, the Attorney General in the common-law countries and the Prokuratura in the socialist world. The Ministère public is, and has been through its centuries-long history, an insti-

Interesse (to be published in "Arbeiten zur Rechtsvergleichung"; cited in this article from the manuscript); Professor T. Kojima of Tokyo, who submitted a paper, on file at the Florence Institute, entitled Private and Public Elements in [Japanese] Civil Litigation (July 1974); Professor V.K. Puchinski of Moscow, who prepared two memoranda dated May 4, 1974 and June 7, 1974, both of which are on file at the Florence Institute; Professor P.H. Sand of the Environment Law Office of the Food and Agriculture Organization of the United Nations, who kindly submitted to me a copy of his unpublished report, entitled Legal Means To Control and Avoid Trans-Frontier Pollution, which was prepared for the Colloquium of the International Association of Legal Science on "Environmental Problems in Developing Countries" (Mexico City, August 1974); and Dr. P. Thery of Paris, who submitted a paper, on file at the Florence Institute, entitled L'évolution récente de la jurisprudence et de la législation [française] en matière d'actions collectives.

Major lacunae, of course, still remain in the coverage of this study. My efforts to secure ad hoc reports covering such major countries as the Soviet Union, China, and Indonesia have been unsuccessful. As a substitute for a special report on the Soviet Union, however, I have used—in addition to the valuable information provided by Professor Puchinski of Moscow—the chapters on "Participation of the Procurator in Soviet Civil Proceedings" and "Participation in Soviet Civil Proceedings of Organs of State Administration, Trade Unions, State Institutions, Enterprises, Social Organizations, and Individual Third Parties," authored by M.A. Vikut for the treatise GRAZDANCKI PROKESU 108 (K. Judel'son ed. 1972) (Moskva, Juridicheskaja Literature). I have also used the chapters under almost identical titles by N.S. Shakarian in the treatise DERECHO PROCESAL CIVIL SOVIÉTICO (M. Gurvich ed. 1971) (transl. from Russian by M. Lubán) (México, Instituto de Investigaciones Jurídicas). In addition, I have used the doctoral dissertation by A. Ferrucci, La Prokuratura nel diritto sovietico (University of Florence 1968) (unpublished manuscript on file at the Florence Institute). As for Indonesia, A.B. Nasution, Director of the Institute of Legal Aid of Indonesia and a courageous fighter for the plight of the poor against public and private abuse, had kindly accepted my invitation to prepare a report. In the meantime, however, he has been jailed for political reasons.

Although the article has derived enormous benefit from the national reports and the additional materials mentioned above, it does not purport to be a conglomeration, or a summary, of the information they provide. I have tried to utilize this unique wealth of information not for an abridged country-by-country description, but rather for both a comparative analysis of "typical solutions" emerging from the national reports and other materials, and an evaluation of such solutions. While I am greatly indebted to the national reporters and to the other scholars who have been of assistance in my research, I alone bear all responsibility for any errors incurred in the choice of solutions that I thought to be significant, successful, promising, or otherwise "typical" enough to deserve description, analysis, and evaluation.

2. See, e.g., Bekaert, La mission du ministère public en droit privé, in 2 MÉLANGES EN L'HONNEUR DE JEAN DABIN 419 (1969) (Bruxelles/Paris, Bruylant/Sirey). The author writes:

[U]nder the Ancien Régime [the right of action of the Ministère public] allowed him "to bring suit whenever the public authority thought a public interest was involved." . . .

"Through this officer, the King saw everything, knew everything, was present everywhere. He watched over the enforcement of the laws, the behavior of the judges, the conduct of all citizens . . . ."

The Ministère public acted therefore in defense of the "interests of the King," gathered [and embodied] in a vague whole which did not involve all the meanings that we attribute today to the needs of the public good. These interests included at the same time the interests of the royal domain, of the ordre public, and even that ancient right coupled with a duty of protection, the
tutional method for assuring that the "public interest"—or the "collective" or "general interest," or the "social concern"—is adequately represented in civil litigation. Yet, other solutions have been utilized—to some extent, even in France—in lieu of (or in addition to) the Ministère public for providing adequate representation of meta-individual interests in civil proceedings.\(^6\)

\(^6\) "mundium," which the King exercised over the incompetents, and for their own welfare.

Id. at 434-35 (emphasis original) (footnotes omitted).

3. This language is used, for instance, in the Italian C. PRO. CIV. art. 70, ¶ 3. See also P. Herzog & M. Wesser, CIVIL PROCEDURE IN FRANCE 121-22 (1967) (The Hague, Nijhoff); W. Kralik, Die Wahrung öffentlicher Interessen im Österreichischen Zivilverfahren 1 (unpublished Austrian report, see note 1 supra); C. Suzuki, The Role of the "Minister Public" in Civil Proceedings in Japan 1, 10 (unpublished Japanese report, see note 1 supra); Hazard, The Role of the Ministère Public in Civil Proceedings, in LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION 209, 226 (J. Hazard & W. Wagner ed. 1974) (Brussels, Etablissements Emile Bruylant) (United States report) ("a means of representing the public interest in civil matters"). For the Socialist countries, see text at note 112 infra. In Spain, the basic legislative provision concerning the Ministère public (Ministerio Fiscal) speaks, in one breath, of "public interest," "ordre public," and "social interest." See V. Fairen Guillén, Le rôle du ministère public dans le procès civil espagnol 1 (unpublished Spanish report, see note 1 supra).

4. See, e.g., Bekaert, supra note 2, at 420, 432, 447-49. Bekaert views the evolution of the Ministère public as a transformation from a "representative of the executive power" to a "natural defender of the collective interest." Id. at 420. But see Krings, Le rôle du ministère public dans le procès civil, in RAPPORTS BELGES AU IXe CONGRÉS INTERNATIONAL DE DROIT COMPARÉ 139, 166 (1974) (Bruxelles, Centre Interuniversitaire de Droit Comparé) ("intérêt général is a "vague and confused notion"). I wonder, however, whether other concepts, such as ordre public, see Décret Impérial No. 5251, April 20, 1810, art. 46, 12 BULLETINS DES LOIS DE L'EMPIRE FRANCAIS, 4e Série 291, 301, are less vague and open to debate than intérêt général. See Bekaert, supra, at 420, 448. Perhaps only concepts such as ordre public, public interest, and the ancient "interests of the King," see note 2 supra, are broad and vague enough to reflect the transformations that characterize any living society. It would be a mistake to try to define them in abstracto, once and forever. See note 87 infra and accompanying text.

Concerning the role of the Ministère public in civil litigation, any of these concepts seems adequate to indicate that, although civil proceedings usually involve private law, there are some cases in which a public interest, or even the ordre public, is involved. Certain legal systems may see a public interest and/or an ordre public element in cases involving, for instance, problems of nationality, personal status and family, or the correct and uniform interpretation of the law by certain appellate courts. Others may see that interest involved in different areas, for instance, bankruptcy proceedings. Given the tremendous social significance of such contemporary mass phenomena as labor conflicts, pollution, chaotic urban development, and unfair competition and marketing, should not a modern legal system recognize a strong public interest aspect, or even an element of ordre public, in the observance of labor, environmental, urban development, and marketing regulations? This is, I believe, the central question in coming to grips with contemporary realities. See Bekaert, supra, at 420: "Today . . . the legislature orders the Ministère public to intervene in some matters which previously involved only private interests."
In fact, our contemporary world presents at least three typical solutions to this societal problem. Somewhat arbitrarily, I denominate them as follows:

(1) The “public (governmental) attorney general.” The French Ministère public, the Soviet Prokuratura, and the Anglo-American attorney general are the most representative species; the Swedish Ombudsman may be considered, in part, another interesting example.

(2) The individual “private attorney general.”1 Relator, class, and public-interest actions in the common-law world are the foremost examples, but other examples of exceptional interest have emerged, and are growing, elsewhere.

(3) The organizational “private attorney general.” Certain social organizations or organized groups act as representatives of public, collective, and group interests in civil litigation. Most modern nations present this growing phenomenon to some degree.

This article discusses each of these three typical solutions, with somewhat greater attention given to the first. The conclusions to be drawn from this comparative study may have particular relevance for an appraisal of current developments in the United States. Two recent Supreme Court decisions, Zahn v. International Paper Co.8 and Eisen v. Carlisle & Jacquelin,9 have placed severe limitations on the class action. Without entering the debate as to whether these decisions were correct, they clearly place a greater burden on more traditional institutions—such as state and federal attorneys general—to represent public and group interests in court.10

7. For the source of this term, see text at note 165 infra.

8. 414 U.S. 291 (1973) (class action may be maintained only if each unnamed member of the class has the requisite amount in controversy, regardless of whether the named class members have satisfied the amount in controversy requirement).

9. 417 U.S. 156 (1974) (rule 23(c)(2) requires that individual notice be sent, at the plaintiff's expense, to all class members who can be identified through reasonable effort).

10. Some commentators have in fact advocated that restrictions be placed upon the use of class actions on the basis that, with more funding, the attorneys general and administrative agencies would help fill the gap. See, e.g., Labowitz, Class Actions in the Federal System and California: Shattering the Impossible Dream, 23 BUFFALO L. REV. 601, 636 (1974).
This article raises serious doubts as to whether attorneys general will be able effectively to fill this void. The Ministère public—the civilian analogue of the attorney general—possesses very broad power to commence and intervene in civil cases on behalf of the public interest. In France, Belgium, and Italy, for instance, the Ministère public has the power to participate in any suit in which he recognizes an element of public interest or ordre public; yet in areas where the public interest is in great need of a forceful representative—as in consumer and environmental protection matters—the Ministère public has done very little. Virtually insurmountable organizational, educational, and psychological barriers stand in the way of his becoming the effective champion of newly emerged collective interests. 14

To be sure, the attorney general does not share some of the shortcomings of the Ministère public. The latter is a career officer in a hierarchical, bureaucratic structure that tends not only to insulate him from contemporary problems affecting the public, but also to hamper actions he does take. 15 But the possibly greater efficiency of the attorney general must be weighed against the heavy cost of being more subject to political interference, 16 which may stifle his efforts to protect the public interest, particularly in areas where powerful special interest groups are involved. Furthermore, attorney general offices are frequently understaffed and underfunded. 17 If a choice must be made between prosecuting a common crime and instituting a civil (or even a criminal) suit against a business engaged in unfair consumer practices, for example, it is the former action that probably will be brought. 18 The class action, on the other hand, requires neither the initiative of a public official subject to political pressure nor any disbursement from the public coffers, other than for court time. In fact, while critics of the class action have suggested that attorneys are the main beneficiaries of the class suit, 19 they usually neglect to point out that at least the public interest is being represented (if the suit has merit) and that this representation is being provided without substantial cost to the public.

11. See text at notes 83-85 infra.
12. See text at note 83 infra.
13. See text at note 86 infra.
14. See sections IA2, 3 infra.
15. See text at notes 81-82 infra.
16. See notes 159-60 infra and accompanying text.
18. See note 204 infra.
This is not to suggest that the class action is the only adequate answer to ensuring that public and group interests are ably represented in civil proceedings. Rather, the thrust of this article, drawn from the experience of so many nations, is that the activity of attorneys general and their analogues must be supplemented, both at the governmental level (by highly specialized administrative agencies, for instance) and at the level of private initiative (by individuals and groups).

I. THE PUBLIC (GOVERNMENTAL) ATTORNEY GENERAL

A. The Ministère Public

One solution to the problem of adequate representation of the public interest in civil cases, used in France for several centuries and adopted in many other countries, is a special office of public attorneys, now called the Ministère public or Parquet. One of its main tasks is to commence or, more frequently, to intervene in civil cases.

20. See, e.g., 1 M. VELLANI, IL PUBBLICO MINISTERO NEL PROCESSO 18-19 (1965) (Bologna, Zanichelli) (Italy); V. Fairen Guilleén, supra note 3, at 7 (Spain); C. Suzuki, supra note 3, at 1, 15 (Japan); E. Vesovi, El Ministerio Público en el Proceso Civil 4, 6-8, 11 (unpublished Uruguayan report, see note 1 supra) (Uruguay and other Latin American countries, including Brazil); Habscheid, Le rôle du ministère public dans le procès civil, in DEUTSCHE LÄNDERBERICHTE ZUM IX. INTERNATIONALEN KONGREß FÜR RECHTSVERGLEICHUNG 176, 176-77 (1974) (Tübingen, J.C.B. Mohr) (German report).

The French institution itself may have had more ancient origins (probably the Roman Procuratores Caesaris and Advocati fisci). Cf. M. VELLANI, supra, at 19; E. Vesovi, supra, at 6.

21. This article is not directly concerned with the role of the Ministère public in criminal cases, the prosecution of which is that office’s principal function in most countries. Cf. notes 186, 204 infra. Nor is it concerned with the Ministère public’s nonjudicial tasks, such as surveillance over penitentiaries, asylums, and the insane. See, e.g., Vigoriti, The Role of the “Ministère Public” in Civil Proceedings: Italy, in ITALIAN NATIONAL REPORTS TO THE NINTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 269, 274 n.16 (1974) (Milano, Giuffré Editore).

We are interested here only in civil litigation, where the Ministère public’s role is, on the whole, merely supplementary and his participation infrequent. For example, in one typical region of Italy—Tuscany—only about one per cent of the workload of the Ministère public’s officers is spent on civil litigation. Vigoriti, supra, at 284. The German Reporter informs us that in his 12 years of practice as an attorney, he has never encountered the Ministère public in a civil case, Habscheid, supra note 20, at 178, and the Austrian Reporter gives us precise statistical data that amply demonstrate the same point. W. Kralik, supra note 3, at 11, 13. The Mexican Reporter contrasts the “hypertrophy” of the functions of the Ministère public in criminal litigation with his “scarce relevance” in civil litigation. S. Ofiate, supra note 3, at 4, 10. Harrison informs us that in Ethiopia “there are practically no examples” of participation of the Ministère public in civil litigation, notwithstanding the fact that the Civil Code and the Code of Civil Procedure authorize such participation in a number of matters, such as declarations of death, absence and insanity, appointment or removal of guardians or tutors; and, in general, civil status, incapacity, marriage, and bankruptcy. J. Harrison, Notes on the Office of the Ministère Public in Ethiopia 1 (unpublished Ethiopian report, see note 1 supra). Professor Harrison indicates that the Ministère public’s office Is understaffed; the office has slightly more than 100 officers, most of whom have no legal education, for a population of 25 million. Id. at 3-4.
sometimes with the powers of a full-fledged party (partie principale), and sometimes with powers somewhat similar to those of an amicus curiae (partie jointe).  

1. Origins, Historical Development, and Traditional Roles

The Ministère public is rooted in thirteenth- and fourteenth-century France. Private litigants then were represented in court by procureurs and avocats, a distinction reminiscent of the dichotomies between avoués and avocats in modern France and solicitors and barristers in modern England. Even the King had to retain a procureur and an avocat as his counsel when he wanted to defend his "private interest" in court. These procureurs du roi and avocats du roi (or gens du roi) were originally called procureurs spéciaux and avocats spéciaux, because their appointment was made ad hoc for one or more specified proceedings; later, when they became the general representatives of the Crown in all proceedings involving the Crown's interests, they were called procureurs généraux and avocats généraux. With the gradual expansion and consolidation of the monarchy, the Crown's interests were progressively identified with the interests of the country.

By the sixteenth century, this "publicization" of the Crown's attorneys brought about a collateral development that has left its mark on the present institution: the integration of the procureurs.
généraux and avocats généraux with the judiciary rather than with the normal attorneys. In fact, the procureurs généraux and avocats généraux became permanent public officers attached to the courts ("au près des Tribunaux"), acting as the delegates of the King, by whom they were appointed. Their role was midway between that of the judges and that of the parties (and the parties' lawyers); their status was midway between that of the judiciary and that of the executive. Like the judges, they were (and are) members of the magistrature, although called "magistrats debout" (standing judges) rather than "magistrats assis" or "magistrats du siège" (sitting judges), to indicate that they made (and make) their arguments "standing" before the "sitting" court. They also were (and are) called Parquet, to indicate that, when arguing in court, they did (and do) not sit on the bench but rather, like private attorneys, stand on the floor or parquet.

Whereas the Parquet's function in criminal litigation was broad, in civil litigation its role was essentially "protecting the weak and safeguarding the public welfare." These areas of concern were comprehensively defined by an ordinance of 1493, which required the gens du roi to take an oath to "safeguard the rights of the crown, punish crimes, protect widows and orphans, and conduct themselves as good officers of the crown." Practically speaking, the Ministère public's participation in civil litigation was limited to intervention as a "partie jointe" in cases involving the protection of minors, widows, absentees, and incompetents and generally in cases concerning the validity of marriages, legitimacy, and adoptions—in sum, instances that involved the protection of the "weak" and reflected a strong, direct commitment of the "state" in certain areas. Within these limits, the Ministère public's mission and usefulness apparently were not contested, as confirmed by the fact that the institution, in so far as its noncriminal role was concerned, happily survived the cataclysms of the bourgeois Revolution.

To be sure, the pre-Revolutionary role of the Ministère public was not entirely confined to the subject matters just mentioned.

26. See, e.g., I. Vellani, supra note 20, at 122.
28. Id. at 2.
29. Id.
Another task—no less important, although less openly recognized—was to act as a royal surveillant over the judges.\(^{34}\) Even today one function of the Ministère public in Belgium is to serve as an “intermediary” between the executive and the judiciary\(^{35}\) and as a guardian against judicial abuse.\(^{36}\)

Another traditional role of the Ministère public in France, Italy, Belgium, and a number of other countries is to ensure that the courts correctly and uniformly apply the laws, principally by participating in appellate proceedings for the review of errors of law committed by the lower courts. In France, Belgium, and Italy (although not in Germany),\(^{37}\) an amicus curiae appearance (“intervention par voie d'avis”) by the Ministère public attached to the Supreme Court of Cassation is required in civil proceedings before that court;\(^{38}\) in Belgium and Italy (although not in France),\(^{39}\) the Ministère public not only argues in open court but also participates, albeit with no vote, in the in camera deliberations of the Court of Cassation.\(^{40}\)

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34. See, e.g., I. M. VELLANI, supra note 20, at 123-24, 185-86. This task was particularly important vis-à-vis those judges, especially the Parlementaires, who tried to maintain a high degree of independence from the sovereign. Cf. Habscheid, supra note 20, at 179.

35. Krings, supra note 4, at 162.

36. Id. at 151, 163. For instance, the Ministère public is required to participate in proceedings concerning the disqualification of a judge for such reasons as relationship, friendship, or a common interest with one of the parties. See id. at 150. The same is true for France, see J. Jegu, supra note 23, at 11, and for other countries. See, e.g., E. Vescovi, supra note 20, at n.34 (Uruguay). The significance of this function should not be overlooked. In Italy, for instance, the conservative side of the political spectrum has been strongly complaining that the judiciary has become an uncontrollable ivory tower ever since the 1948 Constitution severed the ties between the Ministère public and the executive. See note 50 infra. As a remedy, the suggestion has repeatedly been made that the Ministère public should be subjected again, to some degree, to the authority of the political branches of government. Cf. Vigoriti, supra note 21, at 273-74.

37. See Habscheid, supra note 20, at 176, 184.

38. See J. Jegu, supra note 23, at 14 (“Oral conclusions [closing arguments] are always used in proceedings before the Court of Cassation. . . . In these proceedings the conclusions of the Ministère public constitute a remarkable contribution that has often been the starting point of new trends in case law”); Krings, supra note 4, at 142 (“In the proceedings before the Court of Cassation the Ministère public gives his advice in all cases in the form of conclusions”); Vigoriti, supra note 21, at 282-83 (usefulness of such participation by Ministère public questionable). See also M. Cappelletti & J. Perillo, CIVIL PROCEDURE IN ITALY 273 (1965) (The Hague, Nijhoff); P. Herzog & M. Weser, supra note 3, at 122, 444-45, 493. In Belgium, the presence of the Ministère public was required even at the hearings before the Cours d'appel; in most cases this participation proved to be both useless and burdensome, however, and accordingly the Code judiciaire of 1967 abolished this requirement. Krings, supra, at 162 n.29.


40. C. PRO. CIV. art. 380 (Italy); CODE JUDICIAIRE art. 1109 (Belgium). This remnant of the past has been challenged as violative of the parties' right to a fair hearing. The European Court of Human Rights, in a much criticized decision, Delcourt Case,
Moreover, in France, as in Italy, Spain, and Belgium (although not in Germany), the Ministère public attached to the Court of Cassation may file an autonomous recourse "dans l'intérêt de la loi" ("in the interest of the law") against judgments that the parties can no longer attack due to the lapse of time. Even if the Ministère public's attack is upheld, however, the lower court's decision remains binding on the parties; the only purpose of the "recourse in the interest of the law" is to prevent the perpetuation of erroneous judicial precedents in the legal system at large. Since judicial decisions, especially those of lower and intermediate courts, have little precedential value in civil-law countries, this additional power of the Ministère public is rarely exercised and of little practical significance.

2. Limitations and Ambiguities

The ambiguity of the role and status of the Ministère public remains a typical feature of the institution. There is still a great temptation to consider the officers of the Ministère public as mere "agents of the executive, at the risk of violating the principle of separation of powers," notwithstanding that these officers "are


To be sure, the Ministère public at the French, Belgian, and Italian Courts of Cassation is not a party in any real sense of the word. Rather, as stated by the European Court of Human Rights in the Delcourt case, he is "an auxiliary and legal advisor" of the supreme national court, vested with a "quasi-judicial function." However, since he is not even a full-fledged member of the Court, it is hard to see why, after having openly argued in court, he should be allowed to argue again in camera, in the absence of the parties. See Vigoriti, supra note 21, at 282-83.

41. See Habscheid, supra note 20, at 184.
42. See, e.g., CODE JUDICIAIRE art. 1090 (Belgium).
44. See, e.g., Vigoriti, supra note 21, at 279, 288. Cf. V. Fairen Guillén, supra note 3, at 4; E. Vescovi, supra note 20, at 12, 13.
45. J. Jegu, supra note 23, at 3. See also, e.g., R. DAVID & H. DEVRIES, THE FRENCH LEGAL SYSTEM 20 (1958) (New York, Oceana) ("a hierarchy of public officials who are agents of the executive and yet, as part of the magistrature, are appointed and classified as judges"); M.-L. RASSAT, supra note 23, at 247-48. Cf. G. Suzuki, supra note 3, at 15 (participation of the Ministère public in civil litigation a "residue of the time when the separation of powers was not established yet"); Bekaert perhaps somewhat
magistrates subject to the same requirements for admission, the same obligations and disqualifications as the ‘sitting’ magistrates.” 46 This ambiguous status is further evidenced by the fact that in the course of their careers, judges can—and not infrequently do—switch from the Parquet to the bench 47 and vice versa. 48 This situation creates a strong “unité d’esprit” among the “sitting” and the “standing” magistrates, which in turn promotes a de facto independence of the Parquet from the executive. 49 For several reasons, however, this independence is quite limited and not firmly rooted in the law. 50

First, the organization of the Parquet is strictly hierarchical. The offices of the Ministère public form a unit for the entire nation, 51 and each of its numerous members is under the direction and control of his superior, up to the Procureurs Généraux at the Cours d’Appel. 52

optimistically stresses the fact that, unlike the situation more than one and a half centuries ago, the Ministère public is today generally regarded as independent and no longer as a mere “representative of the executive power.” Beksaet, supra note 2, at 420, 433.

46. J. Jegu, supra note 23, at 4. See also P. Herzog & M. Wesen, supra note 3, at 121. For analogies in other countries, see V. Fairen Guillén, supra note 5, at 8 (Spain); W. Kralik, supra note 5, at 12 (Austria); S. Ofiate, supra note 5, at 2-3 (Latin America); E. Vescovi, supra note 20, at 22, 26-27 (Latin America); Habscheid, supra note 20, at 178-180 (Federal Republic of Germany); Krings, supra note 4, at 144 (Belgium). “Scholars illustrate the strange position of the officers of the Ministère public by noting that at the same time they are both ‘civil servants,’ which explains their subordination to the executive branch, and judges, which allows them a certain degree of independence.” M.-L. Rassat, supra note 23, at 247-48.

47. R. David & H. Devries, supra note 45, at 21; J. Jegu, supra note 23, at 5. Movement is probably even more frequent in Germany, see Habscheid, supra note 20, at 180, and in Italy, see Vigoriti, supra note 21, at 270. A somewhat similar situation exists in Uruguay. See E. Vescovi, supra note 20, at 25.


49. J. Jegu, supra note 23, at 5.

50. Id. at 6 (“The independence of the Ministère public vis-à-vis the central government . . . is not expressly provided for in the written law”). For the situation in Belgium, see Krings, supra note 4, at 143-47. The situation is different in Italy, however, since the 1948 Constitution prescribes a large degree of independence for the Parquet vis-à-vis the executive. See Vigoriti, supra note 21, at 270. This constitutional mandate was, of course, a reaction to abuses under fascism. See C. Giannattasio, in 2 Commentario sistematico alla Costituzione italiana 191, 197 (P. Calamandrei & A. Levi ed. 1950) (Firenze, Barbera).

51. See M.-L. Rassat, supra note 23, at 82-85; J. Jegu, supra note 23, at 5. The same is also true for Belgium, see Krings, supra note 4, at 139, and for Spain. See V. Fairen Guillén, supra note 5, at 1, 5, 7. A similar situation exists in Germany, see Habscheid, supra note 20, at 178-79; in Austria, see W. Kralik, supra note 5, at 12; and in Japan. See C. Suzuki, supra note 5, at 5. For most practical purposes, this also holds for Italy, see Vigoriti, supra note 21, at 272-73 & n.19, but not for Uruguay. See E. Vescovi, supra note 20, at 23-24.

52. There is one Procureur Général for each of the French Cours d’appel (intermediate appellate courts); his senior assistants are called Avocats Généraux. P. Herzog & M. Wesen, supra note 3, at 120 & n.47. For analogues in other countries, see Hab-
the *Procureur Général* at the *Cour de Cassation*,\(^53\) and, at the top of the structure, the Minister of Justice (*Garde des Sceaux*). Thus, a member of the Cabinet "has authority over the *Procureurs Généraux* and, through them, over all officers of the *Ministère public*."\(^54\)

Second, the members of the *Parquet* do not have the security of "sitting" judges. While the "sitting" magistrates enjoy the guarantee of *inamovibilité*—meaning that, under normal circumstances, no one has authority to transfer a judge without his consent—the members of the *Parquet* are subject to transfer from one court to another.\(^55\) Only in the most dictatorial civil-law countries, however, can an officer of the *Ministère public* be dismissed from office at the will of the executive.\(^56\)

The ambiguous status of the *Parquet* is, one might say, the clever result of a centuries-long compromise, best reflected by some additional features of the *Ministère public*’s status of hierarchical semi-independence. For one thing, while the Minister of Justice can give "instructions" to a *Procureur Général*, he cannot act in the latter’s

scheid, *supra* note 20, at 179 (Germany); Krings, *supra* note 4, at 139-40 (Belgium); Vigoriti, *supra* note 21, at 272 (Italy).

53. The *Procureur Général* has a rather large staff of *Avocats Généraux* and other *Parquet* officers. P. Hazoo & M. Weser, *supra* note 3, at 120. For analogues in other countries, see V. Fairen Guillén, *supra* note 3, at 7-8 (Spain); Krings, *supra* note 4, at 141 (Belgium); Vigoriti, *supra* note 21, at 272 (Italy). For similarities in the Federal Republic of Germany, see Habscheid, *supra* note 20, at 179.

54. J. Jegu, *supra* note 23, at 5. Substantially the same is true for Spain, see V. Fairen Guillén, *supra* note 3, at 7; for Austria, see W. Kralik, *supra* note 3, at 12; for Latin America, see S. Ofiate, *supra* note 3, at 2-3; E. Vescovi, *supra* note 20, at 22; for Germany, see Habscheid, *supra* note 20, at 179; and for Belgium. See Krings, *supra* note 25, at 145-46.

It has been recognized, however, that in France "[i]n actual practice, interference of the Minister of Justice in the work of the members of the *ministère public* is quite unusual, especially in civil matters." P. Hazoo & M. Weser, *supra* note 3, at 121. As for Italy, while the hierarchical structure of the *Parquet* keeps the lower officers dependent upon the *Procuratori generali*, the ties of the latter to the Minister of Justice have been severed. See note 56 *supra*.

55. See J. Jegu, *supra* note 23, at 6. The same is true for Germany, see Habscheid, *supra* note 20, at 180, and for Belgium. See Krings, *supra* note 4, at 145. Professor Krings, however, states that in fact transfers never occur without the officer’s consent; even though in Belgium appointments are not for life, thereby making the officers of the *Parquet* theoretically subject to dismissal from their office, Krings, *supra*, at 143, in fact "they are dismissed only for disciplinary reasons duly established, and after an official hearing which, according to the law, must respect the party’s right to be heard [les droits de la défense]." Krings, *supra*, at 145. But see M.-L. Rassat, *supra* note 23, at 49-51, where a bleaker picture is given with regard to France.

56. Cf. J. da Silva Lopes, Communication au sujet du ministère public dans le procès civil brésilien I-2 (unpublished Brazilian report, *see* note 1 *supra*). As a rule, in Continental Europe both judges and *Ministère public* officers are appointed for life; dismissal is extremely rare and must be based on disciplinary proceedings strictly regulated by law. See, e.g., Habscheid, *supra* note 20, at 180. Cf. note 55 *supra*. 
place.\textsuperscript{57} The same is true for the relationship between a \textit{Procureur Général} and the \textit{Procureur de la République}.\textsuperscript{58} Moreover, an act by an officer of the \textit{Parquet} is not without legal effect merely because of the failure of the officer to follow his superior's instructions; sanctions are available, but only at the disciplinary level.\textsuperscript{59} This relative independence is magnified with regard to oral arguments. A pre-Revolutionary adage, still valid, proclaims that "\textit{la plume est servie, mais la parole est libre}," meaning that, although the officers of the \textit{Ministère public} are obliged to follow the instructions of their superiors when they prepare and file written papers, "[a]t the hearing, they regain total independence in their oral arguments and conclusions."\textsuperscript{60} This proud if illogical\textsuperscript{61} affirmation of at least a limited degree of independence for the \textit{Ministère public} was consecrated in the Gaullist decree of December 22, 1958, on the reorganization of the French judiciary.\textsuperscript{62}

3. \textbf{Obstacles to Transformation}

For about a century the state has been extending its commitment into areas far beyond those of personal status, capacity, and family. In fact, at least one of the traditional areas, marriage, has undergone a partial de-publicization in modern times.\textsuperscript{63} Litigation in matters of

\begin{itemize}
\item[57.] See J. Jegu, supra note 23, at 6.
\item[58.] See id. The \textit{Procureur de la République} is the head of the \textit{Parquet} at all \textit{Tribunaux de grande instance} (superior courts of first instance); his assistants are called \textit{substituts}. P. Herzog & M. Weser, supra note 3, at 120.
\item[59.] See J. Jegu, supra note 23, at 6. Cf. P. Herzog & M. Weser, supra note 3, at 121; M.-L. Rassat, supra note 23, at 49-51; Krings, supra note 4, at 146-47.
\item[60.] J. Jegu, supra note 23, at 6. See P. Herzog & M. Weser, supra note 3, at 121. For a more detailed analysis, see M.-L. Rassat, supra note 23, at 119-35.
\item[61.] On the illogical character of the rule expressed by the pre-Revolutionary adage, see, e.g., M.-L. Rassat, supra note 23, at 159-40, 248. It is impossible not to share the skepticism of Whidden: "The ancient adage . . . is an expression of [the] idea that the members of the \textit{Ministère public} are government functionaries when in their own offices, but servants of justice when in court. It is hard to imagine the mental gymnastics that would be required if such were truly the case." R. Whidden, supra note 1, at 11.
\item[63.] This process is reflected, for instance, in recent French legislation. Jegu remarks that "article 8 of the Decree of July 20, 1972 [introducing new provisions in civil procedure] seems to reduce the number of cases in which the \textit{Ministère public} can intervene. In particular, the fact that divorce and separation suits have been filed need no longer be communicated to the \textit{Ministère public} . . . ." J. Jegu, supra note 23, at 13. As for Germany, Professor Habscheid informs us that the \textit{Ministère public}'s role in divorce proceedings is totally insignificant. Habscheid, supra note 20, at 178 n.3. The same is true for Austria. See W. Kralik, supra note 3, at 10. Similar
civil rights, labor, social assistance, antitrust, unfair competition, consumer protection, securities regulation, environmental protection, and urban development have forcefully emerged as major candidates for public concern and state control. As stated by Master Jacob:

"We may be said to be on the threshold of a vast new expanse of "interests" which will become the subject of legal control, and which will very likely in due time greatly increase the volume of civil proceedings containing an element of public interest, so that the balance and the character of civil proceedings would change from the system where the private interest of litigants pre-dominates to one where the public interest will play the primary part."

Unless the Ministère public can adapt itself to these new tasks, it will prove incapable of meeting the real public needs of our time.

The ambiguity of the status and role of the Ministère public represents a first obstacle to that kind of evolution and adaptation. On the one hand, the Ministère public is too much of a judge—too much "above the crowd"—to be psychologically and educationally suited to becoming the champion of local, economic, religious, racial, or other communities, let alone "classes." The Ministère public "could not be the spokesman of a class, a group of citizens or group interests." This unsuitability for partisan advocacy has become so accentuated and officially recognized that—contrary to his historical origins—as a rule the Ministère public does not serve as an attorney for the state, or for other public entities such as local municipalities (communes). In France, these entities are represented in court by a normal attorney.


64. Cf., e.g., P. Bolding, Protection of the Public Interest in Civil Litigation in Sweden 1, 5 (unpublished Swedish report, see note 1 supra). See also note 2 supra.

65. I. Jacob, supra note 63, at 92.

66. Krings, supra note 4, at 166.

67. J. Jegu, supra note 23, at 7. See also Krings, supra note 4, at 147, 165-66.

68. There are a few exceptions in France. See J. Jegu, supra note 23, at 7, 11.

69. The same is true for countries other than France. In Italy and Spain, for instance, that task has been entrusted to a special body of state attorneys (Avvocati dello Stato, Abogados del Estado) entirely separate from the office of the Ministère public. M. CAPELLATI & J. FERULLO, supra note 35, at 64-65; V. FAURE Guillén,
On the other hand, the Ministère public is too much of an executive officer to be institutionally and organizationally suited to becoming the champion of constitutional or otherwise prominent interests that need protection against abuses by the political branches of government. In fact, when in the nineteenth century Continental Europe recognized the fundamental principle that administrative action must be subject to judicial review—a major achievement of legal civilization in which France was the great pioneer—no right to commence, or even to intervene in suits against the executive was entrusted to the Ministère public. Rather, standing to attack the legality (vires) of administrative action before the Conseil d'État and other administrative courts was conferred upon the private person aggrieved by the challenged action. The direct and personal interest of the injured person thus becomes the motivation for his becoming involved in what is, in a sense, a public-interest suit.\textsuperscript{71}

The Ministère public thus appears inherently unsuited to becoming the forceful promoter of the type of group, class, and public-interest actions that are most important in modern societies.\textsuperscript{72} Rather, the Ministère public's main responsibility has remained

\textsuperscript{70} See P. Herzog & M. Weser, supra note 3, at 123; J. Jegu, supra note 23, at 7. A similar situation exists in Germany. See Habscheid, supra note 20, at 180-81.

A different solution, however, has been adopted in Mexico. See S. Oñate, supra note 3, at 4-5.

A different development in Japan is worth noting. After World War II, under American influence, see C. Suzuki, supra note 5, at 16, a law was passed that authorizes the Minister of Justice to make use of the Ministère public's officers as attorneys for the state (or other governmental entities) in civil cases. To this end, the “public procurators” act as “subordinate agents” of the Minister of Justice and are organized in a “Litigation Division, legal affairs bureaux and district legal affairs bureaux” within the department of the Minister of Justice. Id.

A similar situation exists in Germany. See Habscheid, supra note 20, at 180-81.

71. See, e.g., R. David & H. Devries, supra note 45, at 39. To be sure, there is attached to the Conseil d'État an office of Commissaires du Gouvernement, which bears some resemblance to the Parquet; the same is also true, for instance, for the German office of the Oberbundesanwalt, which is attached to the Federal Administrative Court and modeled after the French institution. See E. Rehbinder, H. Burgbacher & R. kneuper, Bürgersache im Umweltrecht 26 (1972) (Berlin, Schmidt). The Commissaires du gouvernement “are appointed by governmental decree from among members of the Conseil d'État.” R. David & H. Devries, supra, at 39. They “present their objective, independent arguments in administrative matters, just as the representatives of the ministère public do in the ordinary law courts and, like the latter, despite their title they do not represent governmental interests but frequently advocate annulling of administrative measures. The governmental department concerned normally is represented by its own legal counsel.” Id. See also M.-L. Rassat, supra note 23, at 254. The fact remains, however, that the private parties alone, and not the Commissaires, may commence proceedings to review the legality of administrative action; the same is true both in Germany and Italy.

Professor Vigoriti goes so far as to propose the elimination of any role of the Ministère public in civil litigation, basing his view on the ambiguities and inefficiency of that institution. Vigoriti, supra note 21, at 288. See text at note 249 infra.
criminal prosecution, a role in which the "historic compromise" makes a great deal of sense. It is very important that the prosecutors have some degree of independence vis-à-vis the government, and impartiality vis-à-vis the accused; that they be professionally akin to judges rather than to lawyers; and that they not be psychologically trained and selected in view of their becoming the champions of any partisan cause. Their "cause" is two-headed: to prosecute criminal conduct, and to assure both fairness in the prosecution and an impartial, judicial-like check on police abuses.

The key to the French Ministère public's success is that he is not a partisan party. To borrow (for a somewhat different meaning) the incisive terminology of my eminent former colleague, Louis Jaffe of Harvard, the Ministère public is, par excellence, a "non-ideological" plaintiff. Or, in Professor Krings' words, the Ministère public is "an element that provides balance and measure, a guarantee against arbitrariness." His "neutral" duty is to argue for the innocent accused, not to maintain and "win" an ungrounded prosecution. Indeed, he is not even a plaintiff in a full sense, let alone an ideological plaintiff; rather, even when the Ministère public prosecutes, he remains an "auxiliary" of the judge, the court's assistant and objective advisor, an "impartial party."

The centuries-long development of the French Parquet is the expression of a highly refined legal civilization. Much could be learned, especially in the United States, by a thorough comparison between the Ministère public and the prosecutorial officers of the common-law countries. While I recognize great merit in the French

73. "The main function of the Ministère public is to find and to prosecute criminals." M.-L. Rassat, supra note 23, at 2. Cf., e.g., Vigoriti, supra note 21, at 274-15, 294, 287.
75. Krings, supra note 4, at 162. Rassat quotes Merlin's definition of the Ministère public as an "organ of the law, as 'impassive as the law.'" M.-L. Rassat, supra note 23, at 253.
77. See, e.g., Bekaert, supra note 2, at 435.
78. See, e.g., V. Fairen Guillén, supra note 3, at 10. See id. at 10 n.23 for a bibliography of the often rather academic discussion on whether the Ministère public is a true party.
79. Presumably, most conclusions from such a comparison would not turn in favor of the American institution. For instance, things as unacceptable (to most Europeans) as widespread selective enforcement of the criminal law and plea bargaining are out
institution, however, I have strong doubts that it could be easily adapted—in fact, that it should be adapted—to a new and greatly expanded role in civil litigation, requiring its participation in areas far beyond the traditional cases of personal status, capacity, and family. Unlike the emerging public interest litigation, these traditional cases pose the problem of representing the “public” interest in a perspective much akin to that of criminal prosecution. They do not require a “fighter,” a partisan “champion,” an “ideological” plaintiff. Rather, like criminal prosecution, they require an objective and neutral plaintiff, more reminiscent of an auxiliary of the judge than of a real party.80

There are other, perhaps no less telling, obstacles to an adaptation of the Parquet, resulting from the structure of the Parquet’s organization and the “career” of its personnel. The Parquet is, as we have seen, a unitary, nationwide, bureaucratic public agency. Without profound structural changes, I doubt that such a machinery could prove flexible enough to come to grips with such new, variable, and highly specialized problems as marketing regulations, unfair competition, and environmental protection—let alone labor or racial conflicts.81 Even if the machinery should prove flexible enough, the fact remains that the Ministère public’s training and expertise are essentially legal. He may be a very valuable bridge between an attorney and a judge, but he certainly is not a suitable mediator between law and society. The structure of the organization in which the Ministère public lives does not provide him with any more knowledge and direct expertise than any normal citizen about the problems of our urban, industrial, and “conflictual” civilization. In fact, being a member of a “career judiciary”—with all of the advantages and the shortcomings of this typically Continental, bureaucratic institution82—makes him, on the average, even more insulated from these problems of life than a businessman, a labor unionist, a builder, or even a normal advocate.


80. Continental terminology recognizes this fact by calling most of these cases “voluntary” (or “noncontentious”) proceedings, that is, proceedings that do not involve a real dispute. The same is true for Japan, see C. Suzuki, supra note 3, at 1, 9-13, and, more generally, for the civil-law world.

81. Cf., e.g., S. Ofiate, supra note 5, at 8, 12-13.

82. Like all members of the magistrature, the officers of the Parquet are law graduates who entered the judiciary at a young age as a life career. See, e.g., J. Jegu, supra note 23, at 4-5. Of course, this fact makes judges and members of the Ministère public in Continental Europe very different persons from their Anglo-American counterparts. See note 159 infra.
The doubts manifested above concerning the suitability of the Ministère public, as a career member of the judiciary, for a substantial role in representing newly emerged public and community interests in civil litigation seem confirmed by the following empirical considerations.

Since 1913 in France (and since 1881 in Belgium), the courts have adhered to the principle that, in addition to the right to participate in cases specifically indicated by legislation, the Ministère public has a general droit d'action. This means that he has the right to bring to court any civil case in which, in his evaluation, an important element of ordre public is directly at stake. If such a case already has been commenced by others, the Ministère public apparently has the right to join as a full-fledged party. The Italian Code of Civil Procedure of 1940 went even further, giving the Ministère public the power to intervene in—but not to commence—all civil cases in which he recognizes a public interest.

83. These cases cover, essentially, the traditional matters of personal status, infants, incompetents, marriage, filiation, and adoption. See the lists in P. Herzog & M. Weser, supra note 3, at 123, and J. Jegu, supra note 23, at 10-11 (France); Krings, supra note 4, at 149 n.18 (Belgium). See Krings, supra, at 150, for the list of cases, covering essentially these same areas, in which at least an amicus curiae appearance of the Ministère public is compulsory. For the situation in Senegal, one of the African legal systems directly influenced by France, see Gulphe, supra note 1, at 35-38.

84. See Bekaert, supra note 2, at 425-26, 427 n.1, 435, 435-37 (and the court decisions cited therein), 447-48 (prevailing doctrine has long opposed such an extension of the Ministère public's powers). See also P. Herzog & M. Weser, supra note 3, at 123-24; M.-L. Bassat, supra note 23, at 5-6; J. Jegu, supra note 23, at 9-10; Krings, supra note 4, at 142, 143-49. Jegu informs us that the long controversy between the courts and doctrine has now become moot, for a French decree explicitly gives the Ministère public the power ("il peut") to bring suit "for the defense of the ordre public whenever there are circumstances that directly and primarily endanger the ordre public." Jegu, supra, at 10, quoting Decree No. 12-684 of July 20, 1972, art. 7, [1972] J.O. 7860, [1972] J.C.P. III No. 39368 bis. This power is, of course, in addition to those cases “specifically established by law” in which the Ministère public is statutorily required, or allowed, to bring an action to court. See text at note 83 supra.

85. Cf. Bekaert, supra note 2, at 425; Krings, supra note 4, at 156.


In addition to the power mentioned in the text, the Italian Ministère public—like his French and Belgian counterparts—has the power (or the duty) to commence (or to intervene in) cases specifically indicated by legislation. As in the other civil law countries (including Spain and Latin American countries, see J. da Silva Lopes, supra, at 5-7; V. Fairén Guillén, supra note 3, at 12-13, 16-17; S. Oñate, supra note 3, at 6-8, 10; E. Vescovi, supra note 20, at 14 & n.36, 20), these cases involve, above all, the usual matters: status of persons, bankrupts, incompetents and minors, and marriage and family. C. Proc. Civ. art. 70 (Italy); Vigoriti, supra note 21, at 270-77, 285. When the Ministère public intervenes in cases that he could have commenced by
"Ordre public" and "public interest" are, of course, vague and flexible concepts. Since the Ministère public has ample discretion himself, he has the same powers as the principal parties. In cases that he could not have commenced, he still has extensive procedural powers. He may, for instance, introduce evidence, make motions, present written and oral arguments, and in certain cases, even appeal; however, he is not allowed to go beyond the scope of the cause of action and the prayer for relief that have been specified by the principal parties.

C. Pao, Civ. art. 72 (Italy). See Vigoriti, supra, at 200. For analogues in France and Belgium, see P. Hesbaye & M. Wissen, supra note 3, at 122 & n.58; J. Jegu, supra note 23, at 13, 15. Krings, supra note 4, at 154-55, 163-65. The Italian Ministère public rarely exercises his power to intervene, however, and even when he does, he feebly exercises his procedural powers:

- During the proof-taking stage, the activity of the pubblico ministero is minimal.
- [He] almost never intervenes during the final hearing.
- Even when he intervenes, he refrains from using his powers and instead leaves the [private] parties absolutely free to handle the case as they see fit.
- [As for his written conclusions, he] usually . . . limits himself to requesting a judgment either for or against the plaintiff, generally in not more than a couple of sentences at the end of the record of the hearing. Exceptions to this practice infrequently occur.

Vigoriti, supra, at 285-86. An even more radical, though short-lived, development occurred in Nazi Germany in 1941. See Habscheid, supra note 20, at 178, 194. See also C. Suzuki, supra note 3, at 2-3; E. Vescovi, supra, at 30 & n.77. A statute of July 15, 1941, gave the Ministère public the power "to represent state and societal interests" in any civil case. The statute also gave him the power to attack before the Supreme Court (Reichsgericht), by means of an extraordinary recourse, civil judgments violative of ordre public;

- Having learned from the political abuses committed by a politicized, inquisitorial Ministère public ("Staatsanwalt") acting as the long arm of a dictatorial executive, post-WWII Germany drastically reduced the role of the Ministère public in civil litigation to a very few matters expressly established by law (essentially, only matrimonial and incompetency matters). See Habscheid, supra, at 176-77, 181-84. See also Hazard, supra note 3, at 209 & n.3. Even in these matters, the role of the Ministère public in the Federal Republic of Germany is, in fact, minimal. In Professor Habscheid's words, the participation of the Ministère public in proceedings involving divorce and other family matters "has hardly any significance"; such participation is not compulsory and rarely occurs. Habscheid, supra, at 178 n.5, 181-82. For analogues in Austria, see W. Kralik, supra note 3, at 1, 3-11. Japan did not follow the German and Italian path in expanding the role of the Ministère public to all civil cases involving a public interest, but rather continued to limit his role to cases specifically enumerated in statutes. C. Suzuki, supra, at 3. Moreover, after World War II that role, already limited, has gradually become even narrower.

- In these matters, the Ministère public's participation, which is usually not a requisite for entering a valid decision, is infrequent and ineffective.


87. See note 4 supra. In the words of Jegu, "[I]n civil matters the concept of ordre public is difficult to define because, since it includes all the interests of society, it changes, as society itself, according to time and place." J. Jegu, supra note 23, at 8. Attempting to give a less vague definition, he adds that "all actions that are likely to endanger the general organization of the state and of public services, the social or economic equilibrium of the country, and the integrity, liberty and dignity of the human person, are considered to be against the ordre public in private law." Id. Vigoriti states:

The question arises, what constitutes such a public interest sufficient to warrant
in determining the scope of these concepts in concrete cases, he doubtless would have the power to act in cases involving the most fundamental problems of modern societies, such as civil liberties, frauds in commerce and industry, and environmental pollution. "To grant the Ministère public the right to bring suit in the interest of ordre public is to give him a power whose definition changes as a function of time and space and whose scope is always variable." Yet it frequently has been complained that the Ministère public rarely takes any initiative in these fundamental areas, even where he could initiate a criminal suit, and not merely participate in a civil suit. "Experience has sufficiently demonstrated that, in these types of cases, the Ministère public is too often inclined not to act," writes one French author with regard to racial defamation.

88. Cf., e.g., Vigoriti, supra note 21, at 281-82 (footnotes omitted). See also S. Oifate, supra note 3, at 9. For a multi-disciplinary discussion by a number of authors, see Nnones V: The Public Interest (C. Friedrich ed. 1980) (New York, Atherton Press) (yearbook of the American Society for Political and Legal Philosophy).

89. Bekaert, supra note 2, at 436. Bekaert clarifies that "due to its flexibility and the changeable nature of its contents, the concept of ordre public has succeeded in finding a place in the political, economic, and social structures of the past." Id. at 448. Professor Bekaert's thesis, however, is that this notion is no longer able to reflect the needs of society. Therefore, he proposes that the Ministère public's droit d'action should be expanded to include all cases in which a "general" or "collective" interest is at stake. In all these cases the Ministère public should have the power (and duty) to commence proceedings, or to intervene with all the prerogatives of a full-fledged party (Partie principale). The problem with this thesis is its failure to consider whether the institution would be capable of making effective use of the increased powers entrusted to it. The Italian experience seems to demonstrate that a mere change in the wording of the law—from "ordre public" to a more general concept of "public interest"—does not per se bring about any real change. See note 92 infra and accompanying text.


Another author makes a similar complaint with regard to commercial frauds after taking note that the repression of such frauds by special public agents is inadequate, due to the insufficient number of such agents, he remarks that "[t]he Ministère public, in contrast, is generally not inclined to bring a criminal suit on his own initiative in matters that are so foreign to the concerns of traditional justice." Cahiers-Auloy, Les ventes agressives, 1970 Recueil Dalloz Sirey, Chronique 37, 39.

91. M.-L. Rassat, supra note 23, at 220-21:

It is well known . . . that the Ministère public often refrains from prosecuting those violations that only slightly upset ordre public when the evidence concerning the elements of the violation is awkward. This happens for almost all violations of commercial legislation and, particularly, of corporate legislation, since in order to prove such violations, much expert evidence on accounting is
The disappointment, then, of an American observer can hardly be blamed. He notes that, although the definition of _ordre public_ is very broad and could potentially serve as the basis for the initiation of suits in many areas of social significance, the _Ministère public_ has in fact taken a conservative attitude. . . . [His] activity in civil litigation mainly involves the protection of individuals unable to protect their own interests (e.g., minors without parents, incompetents, and absentees) or the control of personal status and family law transactions (e.g., correction of vital statistics, adoption, and divorce). These are matters of importance to the individuals involved, of course, and also to the state; they are not, however, the areas of the law which present much challenge either to the legal system or to society in general. . . .

The Italian experience is no better, and perhaps even worse. The broad wording of article 70 of the 1940 Code of Civil Procedure has not prompted the _Ministère public_ to expand to any discernible needed, which is complicated and expensive; therefore, they prefer to leave the burden upon the injured party.

Still another French author concludes that the legal protection of the environment can be made effective only by allowing citizen and group actions in addition to, or in lieu of, action by public agents:

Official declarations often emphasize the need for the citizens, who are directly concerned with the degradation of their surroundings, to supplement at every level the initiative of public officers. While the policy of prevention and repression is substantially the sphere of public officials, the reparation of damages primarily concerns . . . those who suffer them . . . .

. . . In order to substitute effectively for the public powers and to watch over the enforcement of laws that, in the present administrative situation, are too often not enforced, environmental protection groups could be legally granted the same power to sue that, for instance, has been granted to the anti-alcoholic associations ("associations de lutte contre l'alcoolisme") or to family associations ("unions d'associations familiales").


Another French commentator speaks in even stronger terms:

[It is] enough to mention, for instance, the case of false advertising, where the inactivity of the _Parquet_ gives consumers the impression that any advertising can be done with impunity, or the case of industrial pollution. To the contrary, the civil actions brought by trade unions for violations of regulations for the protection of employees has built up a body of case law that guarantees the enforcement of the law; the effectiveness of these laws could have been seriously threatened by the absence of criminal suits by the _Parquet_ if some groups had not been granted a civil action in this matter to insure that a criminal action is initiated.

Bihl, _L'action "syndicale" des associations_, 93 _Gazette du Palais_, Doctrine 525, 527 (1975). For a discussion of this procedure, see note 204 infra.

Finally, a Belgian author—a law professor and former _Procureur Général_—wrote in 1963 that the _droit d'action_ of the _Ministère public_ in all civil cases involving an element of _ordre public_, was more a theory than a reality: "But, let us admit it, what has come into practice is only the fact that a communication is made [by the judge] to the _Ministère public_ (calling attention to the filing of lawsuits involving a public interest); but the _Ministère public's_ passivity in defending collective interests is often bewildering." Beklaert, _supra_ note 2, at 441.

91. R. Whidden, _supra_ note 1, at 14. Whidden cites a few cases in which the _Ministère public_ has shown a more active posture. Id. at 15. For instance, in 1956 the
degree his role in civil litigation, a role once again traditionally limited to such matters as personal status, incompetency, insanity, family, marriage, and bankruptcy. Even provisions that expressly grant to the Ministère public the power to initiate or to intervene in cases involving less traditional matters have remained “law on the books,” rarely (if ever) applied. For instance, article 2409 of the 1942 Codice civile gives to both the shareholders representing at least one tenth of a corporation’s capital and the Ministère public the power to set in motion proceedings to redress serious irregularities on the part of the corporation’s administrators. A field inquiry by Professor Vigoriti has shown that some officers of the Italian Parquet are not even aware of their power in a field of such great importance. Whereas proceedings promoted by “ten per cent shareholders” are not rare, proceedings commenced by the Ministère public are virtually unknown.

French Ministère public initiated suit against a firm that had illegally converted an apartment building into an office building. The court granted him standing to compel reconversion, holding that housing matters were affected with public interest because of a shortage caused by the war. Ministère public v. Société d’armement maritime et de transports, [1956] D.S. Jur. 632 (with note by R. Lindon). In an older case, the Cour de cassation upheld the bringing of an action by the Ministère public to impose a civil fine on a landlord who had violated a law requiring the posting of a notice whenever an apartment became vacant. Ministère public v. Chambronty, [1931] D.H. Jur. 329. In an even older case, the Ministère public brought suit to annul an agreement between a worker and his employer; since the agreement was contrary to legislation on work-related injuries, there was deemed to be a “general interest” to protect and therefore the action was held to be within the Ministère public’s power. See 3 A. Sachet, Traité théorique et pratique de la législation sur les accidents du travail 21 (8th ed. 1937) (Paris, Sirey).

92. The hope of a substantial increase of the Ministère public’s role in civil litigation, shared by many when the Code of Civil Procedure went into force in 1942, “has never been realized; in fact, the participation of the [pubblico] ministero in civil litigation seems, with rare exceptions, only an empty formality.” Vigoriti, supra note 21, at 287.

93. Even in these matters, only rarely does the Ministère public commence a civil case, and when he intervenes in a case commenced by the private parties, in practice his role remains minimal. Vigoriti, supra note 21, at 285-86. See note 86 supra.

94. They are reminiscent of the very important—and much more flexible—“shareholders’ derivative actions” in common-law countries. See note 280 infra.

95. [O]ne question [submitted by the Italian Reporter to a number of officers of the Ministère public in Tuscany] requested information concerning suits brought by the [pubblico] ministero to control corporate behavior. In theory, this activity of the [pubblico] ministero is a very important aspect of his role in civil cases, since corporate behavior affects not only the property of all the stock-holders but the entire economy. The answers to the question indicated that such actions are never undertaken, because officers of the [pubblico] ministero lack the technical expertise necessary to deal with such matters and because . . . they fear becoming an instrument of merely private interests. Vigoriti, supra note 21, at 285.

Another less traditional field into which Italian legislation has attempted to expand the Ministère public’s role has been labor disputes. The law in force from 1942 until December 15, 1973, established the duty of the Ministère public to par-
B. The Prokuratura in the Socialist Countries

Professor John N. Hazard, the noted Sovietologist, recalls that it was Lenin, in 1922, who “created an Office of the Procurator with the right to intervene in civil suits.” Lenin’s logic in doing so is quite understandable. As explained by Professor Jodlowski, in a socialist system droit civil, the subject matter of civil litigation, can no longer be considered merely private law. On the contrary, it always involves public and social interests that cannot be left to the sole initiative and disposition of private parties. As a consequence, in addition to strong judicial control, the participation of a “public party” in socialist civil litigation frequently is thought essential.

Experience has demonstrated this compulsory intervention to be both useless and unduly burdensome—a mere delaying device. The Ministère public is neither an expert in labor problems nor a welcome and willing participant in labor disputes. Only a radical change both in his training and in the structure of his office could possibly make his participation of some worth. Cf. S. Ofiate, supra note 3, at 12-13.

This is, perhaps, what Belgian legislation recently recognized when a special branch of the Parquet was attached to labor courts. See Krings, supra note 4, at 139-41 (“[T]he Ministère public includes two different branches: the general office of the Parquet and the [special] office for labor matters”). For a similar solution in Uruguay, see E. Vescovi, supra note 20, at 27-28. In social security matters and cases based on violations of labor regulations, an amicus curiae appearance (“intervention par voie d’avis”) of the Ministère public is required in Belgium. Krings, supra, at 150-51, 153-54, 156, 159, 161-62, 164. Krings states that this requirement is an innovation of the Code judiciaire of 1967, which has thus expanded the participation of the Ministère public into an area in which traditionally “the members of the Parquet had very little knowledge even if they were supposed to prosecute criminal infractions” in that same area. Id. at 161.

In France, on the other hand, a decree of July 10, 1970, has expanded the participation powers of the Ministère public without creating branches specially trained in the new areas. The Procurateurs de la République (the Parquet’s officers attached to the superior courts of first instance or Tribunaux de Grande Instance) can now appear before all courts of first instance, including commercial and labor courts (Tribunaux de commerce, Conseils des Prud’hommes). See J. Jegu, supra note 23, at 4.


96. Hazard, supra note 3, at 209. See also Z. Stalev, The Prokuratura 3 n.1 (unpublished Bulgarian report, see note 1 supra).


98. Although the need for such participation may have been present even in the pre-socialist state, it was limited to a few areas of droit civil—in particular, some aspects of family law and the law of persons. In the socialist state, however, this form of “publicization” has grown immensely to include, above all, the law of property and all legal-economic relations, that is, the bulk of droit civil. It is interesting to note that in Poland, whereas the procurator is granted a general power to bring suit “in all cases involving property rights with no exception,” he has no such general power in family cases that do not involve property rights. In these latter cases “he can bring a suit only in the instances specifically provided by statute,”
It is a matter of fact, however, that Lenin's logic did not create an entirely new institution. The Soviet institution is rooted in the pre-Revolutionary Russian procuracy,\(^9\) which, in turn, was manifestly influenced by the French *Ministère public*.\(^{100}\) This French derivation is even clearer, and openly recognized, with respect to the *Prokuratura* offices of the other socialist countries of Eastern Europe.\(^{101}\) Indeed, many characteristics typical of the Western *Parquet* reappear, in part, in the socialist institution. Among these similarities are (1) the unitary and centralized structure of the *Prokuratura*,\(^{102}\) the offices of which are all hierarchically organized\(^{103}\) and subject to the directives of the Soviet Procurator General, or the Chief Procurator of each of the other socialist countries;\(^{104}\) (2) the independence of the Procurator General and his subordinate officers from both the executive and the judicial branches of government, including the Council of Ministers and the Minister of Justice,\(^{105}\) although not from the legislative branch;\(^{106}\) and (3) the nature of the

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\(^{100}\) Cf. id. at 241; A. Ferrucci, *supra* note 1, at 5, 12.


\(^{104}\) See Jodlowski, *supra* note 97, at 89; Vikut, *supra* note 1, at 111. Compare text at notes 52-53 supra.

\(^{105}\) See text at note 134 infra. In this regard there is a resemblance to post-World War II developments in Italy, see notes 38 and 50 supra, but a notable deviation from the original French scheme, see text at notes 54-65 supra, and also a profound difference from the Anglo-American attorney general. See section 1C infra, especially notes 156-60 and accompanying text. See also Z. Stalev, *supra* note 96, at 1 & nn.1, 3. Also, unlike their civilian counterparts, the socialist procurators are not members of the judiciary; nevertheless, there is a functional link between judges and procurators. See id. at 1 nn.3, 6. Compare note 46 supra and accompanying text.

\(^{106}\) In the Soviet Union and the other socialist countries of Eastern Europe, the *Prokuratura* is subordinated to the Soviet and its Presidium (or, in the People's De-
Prokuratura's function, which, in principle, is not advocacy of a partisan interest but impartial supervision of the scrupulous observance of the law by individuals, social organizations, courts, and administrative agencies.

At the same time, it is clear that the socialist institution presents very radical changes vis-à-vis its Western model, epitomized by a remarkable potential expansion of the socialist Prokuratura's role in civil litigation. Again in Professor Hazard's words:

In both Western and Eastern Europe a state official currently has the duty to represent society's interests not only in criminal matters but also in civil suits.

While the institution is little used in Germanic systems, although existing as an optional method of protecting social interests in matrimonial contests and suits to deprive an individual of legal capacity because of insanity, feeble mindedness, drunkenness, or spendthrift tendencies, it is still a vital force in France and in states where the French legal influence has been dominant. It is even more prominent in countries of Eastern Europe where emphasis upon the ever-present concern of procurators for social interests emerging in the civil proceedings of private parties makes the Office of the Procurator General of the U.S.S.R. and his counterparts in the Marxist socialist states an institution of considerable importance in the conduct of a civil law suit.

A glance at the basic legislative texts in force in the Soviet Union and in most of the European People's Democracies confirms that, in theory at least, the socialist analogue of the Ministère public has grown to almost unlimited proportions. His power to commence or intervene in civil cases whenever dictated by "public interest" con-
siderations has gone far beyond those Western developments described above. For instance, section 29 of the Soviet Union's Principles of Civil Procedure provides:

The procurator has the right to commence an action or intervene in a case at any stage if this is required to protect State or public interests or the rights and legally protected interests of citizens.

The procurator must participate [in civil cases] where the law so provides or where the court considers it to be necessary.

Where the procurator appears in a case, he familiarizes himself with the materials [of the case], makes objections, presents evidence, takes part in the examination of the evidence, makes applications, states his conclusions on questions arising in the course of the trial and on the substance of the case generally, and takes other procedural steps laid down by law.

In addition, article 44, paragraph 2, of the Soviet Union's Principles grants the Prokuratura a virtually unlimited right to appeal court decisions, whether or not the Prokuratura participated in the lower court's proceedings.

112. Cf. Z. Stalev, supra note 96, at 1-2 & n.10; Jodlowski, supra note 97, at 87-88, 96, 98; Névai, supra note 101, at 121 ("the safeguard of the public interest [is] the core of the Procurator's participation in civil procedure"), 123.

113. See section IA4 supra.

114. When the Prokuratura brings suit on behalf of a citizen (or of a social organization), the latter is joined, or is given an opportunity to join. See Jodlowski, supra note 97, at 93 & n.3. The res judicata effects bind both the state (a new action by the Prokuratura would be inadmissible) and the citizen (or the social organization). However, if the latter has been denied an opportunity to join due to lack of adequate notice of the proceeding, he can have the judgment vacated. Z. Stalev, supra note 95, at 5-6 n.14. See also Jodlowski, supra, at 95-96.

115. Law of the U.S.S.R. No. 526, enacting the Principles of Civil Procedure of the Soviet Union and the Union Republics § 29, in 7 LAW IN EASTERN EUROPE 299, 306 (Z. Szirmai ed. 1963) (A. Kiralfy transl.) ( Leyden, Sythoff). This federal statute established standards for the various Union Republics to follow in recodifying their laws of civil procedure. For instance, section 41 of the Code of Civil Procedure of the Russian Soviet Federative Socialist Republic (R.S.F.S.R.), in force since October 1, 1964, copies word for word section 29 of the Principles, with the following additional sentence at the end of paragraph 3: "The abandonment by the procurator of an action brought by him does not deprive the person in whose interest the action was brought of the right to demand an examination of the case on its merits." See 11 LAW IN EASTERN EUROPE (1966), supra, at 168. The codes of civil procedure of the other socialist countries of Eastern Europe contain similar provisions. See, e.g., CODE OF CIVIL PROCEDURE art. 35, 23 BULLETIN OF CZECHOSLOVAK LAW 187, 193 (1950); V. Steiner, Le rôle du Ministère public dans le procès civil, pasion (unpublished Czechoslovakian report, see note 1 supra).

116. 7 LAW IN EASTERN EUROPE, supra note 115, at 310. The provision is repeated in section 282, paragraph 2, of the R.S.F.S.R. Code of Civil Procedure: "The procurator [in addition to the parties and other persons taking part in the case] may also lodge a protest against an unlawful or ill-founded judgment of a court whether or not he participated in the case in question." 11 LAW IN EASTERN EUROPE (1966), supra, at 221. For analogues in other socialist states, see, for example, Z. Stalev, supra note 95, at 2; V. Steiner, supra note 115, at 8-9; Jodlowski, supra note 97, at 97.
Even with regard to the traditional role of the Ministère public in ensuring that the courts correctly apply the laws, the Prokuratura reveals a remarkable growth vis-à-vis its Western counterparts. The recourse "in the interest of the law," which is rarely exercised and of minimal practical importance in the West, has become a very important means of attacking final judgments of lower courts in the Soviet Union and other socialist countries, including Yugoslavia. An extraordinary appeal can be brought before the highest courts by the Prokuratura to assure that judges do not deviate from "Socialist legality"; unlike the situation in France, Italy, and other Western countries, the appeal also affects the parties in the case.

Clearly, the potential exists for the Prokuratura to play a role that extends far beyond the traditional matters of marriage and family, infants, bankrupts, absentees, and incompetents. Even for the French, Belgian, and Italian institutions, however, such potential—albeit to a lesser degree—has existed for many years; yet we have seen that it is optimistic, to say the least, to proclaim the French institution (in Professor Hazard's words) "a vital force" in civil litigation. The question then arises whether the Marxist socialist countries have more forcefully implemented in actual practice the Prokuratura's theoretical role.

The answer seems, in part at least, negative. Even the "more prominent" socialist analogue of the Western Ministère public is apparently far from being a really vital institution in so far as most civil proceedings are concerned.

In his study on the People's Democracies, submitted to the 1971 Florence Conference of the International Association of Legal Science, Professor Staley, the leading socialist expert, stated that while

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117. See text at notes 37-43 supra.
118. See text following note 43 supra.
119. See Triva, supra note 101, at 80.
120. The private parties in the case are not entitled to bring this extraordinary recourse. See, e.g., Triva, supra note 101, at 80-81. In addition to the Prokuratura, the recourse can also be brought by the President of the Supreme Court. R.S.F.S.R. CODE OF CIVIL PROCEDURE §§ 319-20, 11 LAW IN EASTERN EUROPE (1966), supra note 115, at 240. See Vikut, supra note 1, at 113; Néval, supra note 101, at 124 (Hungary). In Poland, the Minister of Justice is also empowered to bring the recourse. See Jodlowski, supra note 97, at 98.
121. See text at note 42 supra.
122. See, e.g., Néval, supra note 101, at 125. In Hungary, the decision of the Supreme Court affects the parties only when the extraordinary appeal is brought by the Chief Procurator within one year from the time that the judgment below has become final and enforceable. Id.
123. Hazard, supra note 3, at 209.
124. Id.
the Prokuratura’s virtually unlimited right “to bring actions [in court] in defense of the rights of the citizens and socialist organizations” is “an important feature” of the civil procedure of several socialist countries, this could not be said of the German Democratic Republic, Rumania, and Yugoslavia, where the Prokuratura has a right to bring suit “only in the cases provided by law.”125 As in most Western European nations, such cases almost exclusively concern annulments of marriages, declarations of incompetency, and, more generally, the legal status of persons.126 Even in those socialist countries where the Prokuratura has the unlimited right to commence or intervene in actions affecting the public interest,127 this right is rarely exercised. For instance, only “about [0.3%] of all [civil] actions in Bulgaria are [initiated] yearly by the Prokuratura,”128 and even this usually occurs

125. Stalev, Fundamental Guarantees of Litigants in Civil Proceedings: A Survey of the Laws of the European People’s Democracies, in FUNDAMENTAL GUARANTEES, supra note 21, at 355, 384. See also Triva, supra note 101, at 72-76. Triva states that the solution adopted in Yugoslavia in 1946 was to empower the Prokuratura to bring suits “in all civil matters,” as well as to intervene “in every judicial proceeding.” Id. at 74. These broad powers were drastically reduced, first in 1954 and again in 1965, as a “reflection of [the] political and legal evolution of the Yugoslav socialist state,” the “gradual abandonment of . . . administrative and centralist management of the State and of the economy,” and a “trend towards self-managing socialism . . . , greater decentralization [and] autonomy.” Id. at 72. As a result, the Prokuratura’s tasks were “gradually reduced to the primary function of criminal prosecution,” with some additional powers “to protect the public interest” in civil matters “strictly enumerated by the law.” Id. These matters, in turn, were gradually reduced in number to allow “working organizations, social institutions, and citizens to freely determine [their] mutual rights and duties.” Id.

126. See Z. Stalev, supra note 96, at 5 n.10. See also Névai, supra note 101, at 128-29, 191; Triva, supra note 101, at 75-78.

127. E.g., Hungary, see Névai, supra note 101, at 125-27, and, of course, the Soviet Union. See Vikut, supra note 1, at 109-10.

128. Stalev, supra note 125, at 384. Due to a clerical error, the figure given at page 384 is 0.05%, but it has been corrected (for the year 1972) as 0.3%. See Z. Stalev, supra note 96, at 5 n.10. In addition, Stalev notes that the Prokuratura intervenes in “less than 1%” of all civil cases. He concludes that “[o]ne can see therefore how far from the reality are the voices of some proceduralists in the West according to whom the participation of the Prokuratura displaces the initiative of the parties in civil proceedings . . . .” Z. Stalev, Supplement to Bulgarian Report at 2 (Jan. 25, 1974).

As for Poland, Professor Jodlowski provides figures that increase rapidly in the years from 1968 to 1972: 746 cases were commenced by the Polish Prokuratura in 1968, 2,794 in 1970, 5,619 in 1971 and 5,405 in 1972, out of a total of between 400,000 and 500,000 civil cases initiated annually (thus, about 1% in 1972, up from about 0.2% in 1968). In addition, the number of noncontentious cases initiated by the Prokuratura has increased from 745 in 1970 to 1,276 in 1972 (from about 0.3% to about 0.6% of the total). There has been, however, a decrease in the number of interventions in civil cases; from 7,837 in 1970 to 6,834 in 1972. Jodlowski, supra note 97, at 99-100.

Professor Névai confirms for Hungary the meager figures found for other socialist countries. Névai, supra note 101, at 126 (“[T]he number of interventions by the Procurator is insignificant as compared with the [total] number of civil suits . . . . What is essential here is not the number of the interventions . . . but the policymaking significance of the socialist institution”) (emphasis original). See also id. at 128, 197-98, where Névai notes a drop in the frequency of the Prokuratura’s partici-
only "when the interested party is unable to defend his rights." 129
As in the West, the typical example is "an infant represented by a negligent parent or tutor." 130

Thus, the overall impression is that, notwithstanding its ample powers to commence or intervene in civil cases, the socialist Prokuratura makes use of these powers more frequently in the traditional fields of personal status and capacity, family, and marriage than in fields that more closely reflect the basic needs and interests of contemporary societies. As authoritatively reported by Professor Né vai, for instance, in Hungary "more than one half of the actions instituted by the Procurator" are in the field of "legal status of persons." Another portion concerns socialist property rights, whereas "[o]nly a small number" challenge "decisions and resolutions of the public administration." 131

As with the Ministère public, so for the Prokuratura I must hasten to say that the above conclusions are not meant to detract from the institution's practical importance. 132 The Prokuratura's eminence in the criminal field is not contested. Also uncontested is the usefulness of delegating to a state attorney the task of defending participation in civil cases during recent years, particularly since the political and economic reforms of 1968.

For Czechoslovakia, Professor Steiner informs us that in 1972, out of a total of 603,466 civil cases, the Prokuratura participated in 10,266. V. Steiner, supra note 115, at 18.

129. Stalev, supra note 125, at 384-85 n.71. This information has been substantially confirmed to me by in loco inquiry and personal discussion with experts, including leading procurators, in Czechoslovakia, Hungary, Poland, and Bulgaria.

130. See also Z. Stalev, supra note 96, at 1-2 & n.10, where these additional examples are given: "nonfulfillment of obligations for alimony; damages caused on socialist property; [and] unlawful dismissal of workers." The author concludes that, in addition to cases of annulment of marriage, declaration of incompetency, and the like—cases in which normally even the Western Ministère public has a power to participate—"usually the Prokuratura exercises its power [only] when the bearer of the violated right is unable to [defend himself] (minor represented by a negligent parent or guardian, socialist organization having claims for damages against its manager, etc.)."

131. Cf., e.g., Jodłowski, supra note 97, at 94-95, 97; Né vai, supra note 101, at 128-29; Triva, supra note 101, at 76, 85; Vikut, supra note 1, at 111-12. The powers of the Prokuratura seem also to be used with some frequency (1) for the protection of "social property" (cf. Jodłowski, supra, at 98; Né vai, supra, at 129; Vikut, supra, at 111-12), (2) in labor disputes, especially those concerning dismissal of workers, see note 130 supra, and (3) as a safeguard of the citizens' rights to housing, especially against administrative abuses. See A. Ferrucci, supra note 1, at 175-77, 200, and the Russian bibliography cited therein.

132. Né vai, supra note 101, at 129. It is also interesting to note that in Czechoslovakia the Prokuratura is not authorized to participate in proceedings before the labor tribunals and the courts of commercial arbitration. V. Steiner, supra note 115, at 13-14.

133. H. Bersman, supra note 99, at 238, considers the Soviet Prokuratura to be "in many ways . . . the most important institution of the whole system."
and representing in court the “weak” as well as the most basic societal unit, the family. Moreover, it is very significant that in the socialist countries the Prokuratura has maintained a high degree of independence from both the executive and the judiciary. The hierarchical structure of the Prokuratura culminates in a Procurator General who is connected with, but independent from, the Supreme Court; he is also independent from the Council of Ministers and its departments, although not from the Soviet and its Presidium, nor from the omnipotent Party. In this way, the Prokuratura, to which every citizen may address petitions, has been able to assume the significant role of controlling both executive and judicial illegality and abuses.

The fact remains, however, that not even this “prominent” socialist institution seems suitable for assuming, let alone monopolizing, the representation in court of certain basic, though relatively new, societal interests—interests that, at the same time, can hardly be left to the exclusive initiative of private individuals acting by and for themselves. Like his Western counterpart, the socialist procurator lacks specialization and motivation in such fields as marketing, urban development, and pollution; like that of the Parquet, the Prokuratura’s bureaucratic structure can hardly be flexible enough to act promptly and efficiently in these rapidly changing areas. Only specialized agencies can as well as individuals and organizations ideologically motivated to act not merely for themselves but for a community, can provide an effective solution. The Prokuratura, like the Western Ministère public, may be of great use in channeling and controlling the efforts of other entities and individuals, but it cannot substitute entirely for them. Perhaps even more than other countries, the

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134. See notes 105-66 supra and accompanying text; Z. Stalev, supra note 96, at 1 & nn.3-4; Jodlowski, supra note 97, at 88; Névaï, supra note 101, at 119-20. See also H. Berman, supra note 99, at 246; Hazard, supra note 3, at 210-11.

135. Névaï states that the Prokuratura must base its activities upon “the policy of the Hungarian Socialist Workers’ Party,” since the Party’s policy “has to prevail in all spheres”; however, the Party cannot give “instructions . . . to the Procurators” in their handling of “concrete matters.” Névaï, supra note 101, at 120. Similar statements are made about the Soviet Union. Shakarian, supra note 1, at 114, 119. See also H. Berman, supra note 99, at 247; W. Gellhorn, Ombudsman and Others 349 (1966) (Cambridge, Mass., Harvard University Press).

136. See, e.g., H. Berman, supra note 99, at 238-40, 244-46.

137. See section IE infra.

138. See section II infra.

139. Interestingly, the Presidium of the Supreme Soviet of the R.S.F.S.R., in a decree of October 26, 1965, complained that “[p]olice agencies, the procuracy, and the courts are not taking all the necessary measures with regard to violators of the [1960] Law on nature conservation.” 9 Soviet Statutes & Decisions 24, 27 (1972). In the same
socialist countries must have learned the heavy costs of bureaucratieal centralization. This may explain why recent socialist legislation—especially (but not exclusively) in countries, like Yugoslavia, Poland, and Czechoslovakia, that have made serious decentralizing efforts—gives a potentially large role to social organizations as "participants" in civil litigation, in addition to private parties and the Prokuratura. ¹⁴⁰

A further dramatic growth of the role of such organizations might well represent "the future" of socialist legal systems,¹⁴¹ and of modern conceptions of civil procedure within those systems.

C. The Anglo-American Attorney General

The common-law analogue of the French Ministère public and the Socialist Prokuratura is the office of the attorney general in England, the United States, Canada, Australia, and other common-law nations.¹⁴² One may doubt, however, whether the common-law attorney general is more than a merely formal analogue of the Continental European institutions.

This doubt proves well-founded at least in so far as the United States is concerned. As described by Hazard, the role of the American attorney general in civil litigation is very modest, especially (but not...
only) at the federal level.\textsuperscript{148} His role is essentially restricted to sporadic appearances as amicus curiae in "matters of very narrow and easily identified interests of the federal state";\textsuperscript{144} interestingly, these matters do not include most of the traditional areas of interest of the European Ministère public.\textsuperscript{145} Even in constitutional cases involving such important matters as racial discrimination, school desegregation, and reapportionment, the federal Attorney General appears only from time to time, on his own motion or on the court's request, to argue and present evidence on the side of one or another civil litigant.\textsuperscript{146} It is doubtful that civil litigation has ever been the arena in which the Attorney General has initiated, or in fact promoted, any landmark civil rights cases,\textsuperscript{147} notwithstanding the efforts of such

\textsuperscript{143} Hazard, supra note 3, passim, especially at 212-13, 217-18.

\textsuperscript{144} Id. at 213. As for the state level, the participation of state attorneys general in civil litigation to protect a "public interest" has occurred, particularly in cases involving usury and charitable trusts, and whenever issues of constitutionality of state laws arise in civil proceedings. Id. at 219-25. In some states the attorney general is allowed to bring, or to intervene in, antitrust cases to dissolve monopolies and cases concerning regulation of the sale of securities to avoid frauds. Id. at 225-26. Hazard, however, cites only a few, old examples of such lawsuits, so that one may wonder whether the attorneys general have ever played any effective role in these fields, except perhaps in connection with criminal violations. The same conclusion may be inferred with regard to environmental protection, a field in which Hazard mentions only one old instance of a suit brought by a state attorney general against a copper producer to forbid emission of fumes containing more than the permissible percentage of sulphur. Id. at 220 & n.41, citing Georgia v. Tennessee Copper Co., 240 U.S. 650 (1916). Whidden recognizes that "[s]tate attorneys general have generally done little as advocates for the public interest in civil litigation." R. Whidden, supra note 1, at 28. The facts that, for instance, "in Illinois there were only 22 appearances [of the state attorney general in civil cases] in the twenty years between 1938-1958," Hazard, supra, at 219, and that, in general, "[t]he offices of the State Attorneys General are not large," id., may sufficiently demonstrate the modest role of these offices in civil litigation.

\textsuperscript{145} Id. at 218. For England, see note 151 infra.

\textsuperscript{146} Id. at 215-17 (citing cases). "By statute the Congress has authorized the Attorney General 'to intervene for the presentation of evidence ... and for argument on the question of constitutionality' in any federal suit in which the United States or an agency, officer or employee thereof is not a party if the constitutionality of the Act of Congress affecting the public interest is questioned." Id. at 215-16 & n.28, quoting 28 U.S.C. § 2403 (1970). See Fed. R. Civ. P. 24(c).

\textsuperscript{147} 2 T. Emerson, D. Harper & N. Dorsen, Political and Civil Rights in the United States 1518-20 (5th ed. 1967) (Boston, Little, Brown & Co.). The authors indicate that
activist Attorneys General as Robert F. Kennedy and Ramsey Clark. In addition, a criminal prosecution instituted by an American attorney general provides a victim with no framework in which to sue for restitution or damages derived from the crime, because, unlike in France, Belgium, Italy, and other civil-law countries, no joinder of a criminal and civil proceeding is possible, as a rule, in the United States. Hence, even in this indirect way, the attorney general has no “public interest” role in connection with civil litigation.

The situation in England, Australia, and other common-law...

148. Cf. Hazard, supra note 3, at 216-17, and the two interesting cases described therein. Halpern states that “[t]he attorney general could not be said to be on the cutting edge of new developments in the representation of public and group interests in civil litigation. More often, he is to be found representing government agencies against allegations that they have been insufficiently effective in guarding the public interest. In the Wyatt case [Wyatt v. Stickney, 544 F. Supp. 375, 377 (M.D. Ala. 1972), affd. sub. nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)], the role of the attorney general is notable in large part because it is unusual.” C. Halpern, supra note 1, at 7. (In Wyatt—a class action brought in a federal court on behalf of all of the residents of the public mental institutions of Alabama, seeking to require that state to improve the residents’ conditions—the United States Department of Justice participated as an amicus curiae in support of the plaintiffs.)

149. See M. Cappeletti, J. Merryman & J. Perillo, The Italian Legal System 113 & n.9 (1967) (Stanford, Cal., Stanford University Press); F. Herzog & M. Wexler, supra note 3, at 136; Krings, supra note 4, at 141. See also R. David & H. Devries, supra note 45, at 56; note 204 infra.


151. Note that in England, one typical function of the Continental Ministre public has been assumed not directly by the Attorney General, but by a special law officer, the Queen’s Proctor, who operates under the direction (more formal than real) of the Attorney General. (Significantly, the word “proctor” comes from procurator or procureur.) The Queen’s Proctor represents the Crown in divorce courts and has a duty to expose collusion. See J. Edwards, The Law Officers of the Crown 152-53 (1969) (London, Sweet & Maxwell); J. Jacob, supra note 63, at 29-32. Jacob informs us, however, that “[s]ince 1969 . . . by reason of the fundamental changes in the divorce laws,
nations seems similar to that prevailing in the United States. There, too, the principal roles of the Attorney General are out of court (as a minister of the Crown and a legal advisor of the Crown and its ministers) and in criminal prosecutions—not in civil litigation.\textsuperscript{152} Even if, in theory, the Attorney General has a broad dual capacity in civil litigation—to be the representative of the Crown as well as the representative of a vaguely defined “public interest”\textsuperscript{153}—his infrequent participation in civil proceedings is usually as a merely nominal party in “relator actions” involving the public interest.\textsuperscript{154}

Even from a structural point of view, there is a great difference between the common-law institution and the Continental European institutions. Historical research might well demonstrate that, as the title would suggest, the French archetype was imported into England and, through England, to the rest of the common-law world.\textsuperscript{155} The

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152. The same is true for Quebec, \textit{see} Rivet, \textit{supra} note 63, at 248, and even more so for India, \textit{see} L. Singhvi, Representation of Public Interest in the Indian Legal System 2-4 (unpublished Indian report, \textit{see} note 1 \textit{supra}), and for Kenya, where civil proceedings instituted by the Attorney General, or by individuals (“relators”) acting in his name and with his consent, are “extremely rare” and “of more academic interest than practical importance.” J. Spry, \textit{supra} note 151, at 1-3. \textit{See also} G. Onyiuke, \textit{supra} note 151, at 2-3.


154. \textit{See} section IIA1 \textit{infra}.

155. In the thirteenth century, the King of England employed counsel—king’s attorneys and serjeants, corresponding to the French \textit{procureurs} and \textit{avocats du roi}—to defend his interests in court, just as any other civil litigant. In the fifteenth century, this task was entrusted to a single attorney, who was empowered to appoint deputies; the holder of this permanent office was called the Attorney General. So far, the similarity to the developments in France seems remarkable. \textit{See} section IIA1 \textit{supra}. By the sixteenth century, however, a great divergence occurred; the Attorney General developed
fact remains, however, that thereafter the institution underwent different and, on the whole, less fundamental developments in England and her legal heirs. The attorneys general and their subordinate officers form a department of the executive, of which they have remained mere members, agents, or representatives. Being the "attorneys of the Crown" or of the executive, they generally are responsible for conducting any litigation to which the Crown, the executive, or any government department is a party, and are subject to change with any change of government. In Professor Hazard’s description, these officers . . . are in no sense “magistrates” as their counterparts in Western Europe are said to be, nor are they creations of the legislature responsible solely to it, as are the Procurators General of Eastern Europe. They are not “judges” in the sense of the word commonly accepted in the constitutional system of the United States, for they enjoy none of the independence accorded the judicial power . . . .


156. See, e.g., L. Jacob, supra note 63, at 20; G. Taylor, supra note 151, at 2-3; Hazard, supra note 5, at 211-12. This connection between the executive and the attorney general is best illustrated by the fact that in many common-law countries the attorney general, far from being a high member of the judiciary, is a member of the cabinet, roughly corresponding to the Minister of Justice in civilian countries. This applies also to Quebec. See Rivet, supra note 63, at 237. In the United States, however, there are interesting variations at the state level; most of the fifty state attorneys general are elected (only four of them are appointed by the state governors). See Hazard, supra, at 218.


158. See, e.g., L. Jacob, supra note 63, at 20. Contrast with the Ministère public, notes 55-56 supra and accompanying text.

159. Even less are they “career magistrates” in the Continental European sense of that expression. See text following note 80 supra. This lack of tenure may further detract, of course, from the attorney general’s independence. At the same time, however, the fact that he is not a lifetime “career” member of the judiciary may make him less bureaucratic than his Continental European counterpart. Thus, under favorable political circumstances, the attorney general may more likely reveal that kind of dynamic activism that is necessary for the effective protection of nontraditional public interests. But we must recognize that in the common-law world such activism is virtually confined, by law and tradition, to criminal prosecution, even though through criminal prosecution some attorneys general have made significant contributions in these new areas.

160. Hazard, supra note 3, at 210-11. The profound difference between the relative independence of the civilian Parquet (especially in its recent developments outside France, see note 50 supra) and the executive dependence of the prosecutorial officers in the United States has been brought to the world’s attention by the Watergate affair. There seems to be no serious doubt that the United States Chief Executive has the power not only to select and appoint (“by and with the advice and consent” of the Senate, U.S. Const. art. II, § 2), but also to dismiss (with no control by the Senate) a federal prosecutor. Cf. Hazard, supra, at 212. This idea of executive dependence is so
It may well be that the Parquet, the Prokuratura, and attorneys general have the same historical matrix: the ancient French Procureurs Généraux. It may also be correct to say that all three are “means of representing the public interest in civil matters,” and thus, that the difference among them is one of degree—one of frequency of intervention and amount of power—rather than one of function. As Professor Hazard sums up:

The contrast... is to be found largely in the degree of concern in civil matters exhibited by the officer [the American Attorney General, the French Ministère public, or the Soviet Procurator General] representing the public. In the United States it is assumed that... the state official need intervene only if there be a direct state or public interest that would not be represented without the Attorney General's participation.

...[T]he French-type official appears in court often to advise the judge of his considered view in many types of situations. The Attorneys General in the United States have no such broad function. The federal Attorney General is concerned with problems only if some constitutional issue or some federal action is involved, and the State Attorneys General likewise have limited functions, although their inheritance from the English law gives them duties to protect borrowers from usury, beneficiaries from the maladministration of a public trust, and the public generally from nuisances, and from monopolies in the economic sphere. The position in the United States seems to be that private citizens should protect their own interests unless as a class they are clearly incompetent, as with illiterate borrowers and members of minorities, or can show no special damage to themselves.

Professor Hazard's final statement, however, leads to the conclusion that, even if the common-law institution may be considered the formal analogue of the Prokuratura and the Ministère public, at deeply ingrained in America as to allow the absurd situation of a Chief Executive selecting and appointing the special prosecutor in charge, in every real sense, of investigating possible criminal activities committed by the Chief Executive himself. It is little wonder that, in such a situation, the special prosecutor encountered not a few obstacles.

In the civil-law world, the power of the chief executive to dismiss officers of the Ministère public ad nutum is accepted only in such dictatorial regimes as that presently governing in Brazil. Cf. J. da Silva Lopes, supra note 56, at 1-2.

161. Hazard, supra note 3, at 226. Taylor distinguishes two roles of the attorney general: representation of the Crown in litigation and representation of the public interest. G. Taylor, supra note 151, at 2-3. The two roles do not necessarily coincide, and it seems possible—although not without some complications—that the attorney general can represent the public interest against the government. Id. at 3-4.


163. But see note 144 supra.

164. Hazard, supra note 3, at 226.
least one fundamental difference exists. In the common-law world, and most particularly in the United States, the function of representing the public and community interest in civil litigation is exercised only in minor part by the attorneys general and their subordinate officers. The real, powerful, and successful—if not uncontroversial—common-law counterpart to the Continental institutions is what more than thirty years ago a great American jurist called the “private Attorney General.”165 This often-repeated definition can apply both to the class and public-interest suitor (especially in America)166 and to the relator suitor (especially in England).167

D. The Ministère Public, the Prokuratura, and the “Active Role” of the Judge

The “active role” of the judge has become a momentous problem in civil procedure.168 Does the function of the Ministère public and his analogues (especially the Prokuratura) go hand in hand with judicial activism? Or does it, on the contrary, reduce or eliminate the need for judicial activism? Time and again we have heard of the need for—as well as the risks involved in—expanding the judicial role and encouraging judicial activism. For many years a growing number of countries have overcome those fears and, after balancing costs and benefits, have fostered “activism” in lieu of the traditional passivity or “neutrality” of the judge. This trend has been particularly marked in small-claims proceedings169 and in proceedings involving labor disputes.170

Judicial activism is now fully accepted in all of the socialist countries,171 but also in many civil-law nations (from Austria since

166. See section II.A2 infra.
167. See section II.A1 infra.
168. Indeed, the International Academy of Comparative Law chose this as one of the two topics discussed at its Ninth Congress (Tehran, 1974).
169. In a perfect system of legal aid, there would be effective access to courts and parties would be equal without the need to resort to judicial activism. However, such a system may be unreasonably expensive in so far as small claims are concerned. In fact, representation by legal counsel has even been partially forbidden in some systems, to reduce costs in small-claims cases. Hence, the growing trend is to turn to judicial activism as a substitute for legal representation in such cases. See Jolowicz, The Active Role of the Court in Civil Litigation, in M. Cappelletti & J. Jolowicz, Public Interest Parties and the Active Role of the Judge in Civil Litigation 155, 249-63 (1975) (Milan/Dobbs Ferry, N.Y., Giuffre/Oceana) (general report for Section II.C.2. of the Ninth Congress of the International Academy of Comparative Law, Tehran, 1974).
170. See generally M. Cappelletti, Giustizia e società 285-331 (1972) (Milano, Edizioni di Comunità).
the end of the nineteenth century, to most of Central Europe and, more recently, France and Italy)\textsuperscript{172} and in a growing number of "developing" nations.\textsuperscript{173} Even in common-law countries, the "sacred" principle of adversariness has long been subject to the corrosive acid of criticism—and even of scorn. Who does not remember Roscoe Pound's contemptuous attack against the American "sporting theory" of civil litigation?\textsuperscript{174}

Judicial activism, of course, is a multi-dimensional term. It may simply mean that the judge has powers and responsibilities to assure an orderly, speedy, effective unfolding of the proceeding (what German terminology would call \textit{formelle Prozessleitung}). A more radical meaning, however, is that the judge's powers and responsibilities go beyond the "formal" control of the proceeding to encompass also (1) the search for the truth and (2) the determination of the scope of the litigation (traditionally governed by the parties' allegations and prayer for relief).

So long as the powers of the judge and judicial activism are limited to the formal unfolding of the proceeding, they have no direct impact on the substantive law involved. The parties are still the "masters" of the content of the litigation, deciding whether and on which grounds to litigate, and what and how much relief to request from the court. While such judicial activism can be termed "publicization" of the law of procedure (in the sense that the formal unfolding of the case is no longer left to the exclusive disposition of the private parties), the subject matter of the case remains private.

This phenomenon of procedural publicization has occurred, to a greater or lesser extent, in many of the civil-law countries of Europe. Austria was the forerunner in 1895.\textsuperscript{175} As for the common-law world, there is evidence that centuries-long tradition has favored a certain measure of judicial control.\textsuperscript{176} At any rate, it is clear that the modern

\begin{itemize}
  \item[173.] See, e.g., M'Baye, \textit{supra} note 21, at 795-96 (Senegal).
  \item[175.] See M. Cappelletti, \textit{Procédure orale et procédure écrite} 58 (1971) (Milan/Dobbs Ferry, N.Y., Giuffre/Oceana); Cappelletti, \textit{supra} note 172, at 854.
\end{itemize}
tendency is “away from the extreme position which would render the judge a passive umpire.”

Socialist countries and, to a lesser degree, other parts of the world have gone further, however. “Publicization” has been proclaimed as an all-encompassing trend. “We acknowledge nothing as ‘private,’” said Lenin. Accordingly, judicial control has been extended beyond the mere unfolding of the case to encompass a search for both the “objective truth” and the “just” scope of the litigation. Under this conception, civil litigation is the forum for contests in which a public element is always present, and potentially even prevailing.

The judge has a duty to see that this prevailing public element is not sacrificed by the parties’ egoism, negligence, weakness, or ignorance. Hence, the judge may go beyond the parties’ allegations of facts and take evidence ex officio; he may award more than the amount requested; he may refuse to accept an agreement or conciliation between the parties; in certain cases, he may even commence proceedings on his own motion and file appeals.

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177. F. James, Civil Procedure 7 (1965) (Boston, Little, Brown & Co.). See also id. at 4.


179. Jodlowski, supra note 97, at 87.

180. Section 14, paragraph 1, of the R.S.F.S.R. Code of Civil Procedure of 1964 provides that “[t]he court is bound, without restricting itself to the materials and explanations produced [by the parties], to take all steps provided by law for the all-round, full and objective elucidation of the true facts of the case and the rights and duties of the parties.” 11 Law in Eastern Europe (1966), supra note 115, at 161 (footnote omitted). See generally Gwiazdomorski & Cieslak, La preuve judiciaire dans les pays socialistes à l’epoque contemporaine, in 19 Recueils de la Société Jean Bodin, La preuve 49, 68-73 (1963) (Bruxelles, Editions de la Librairie Encyclopédique).

181. Section 195 of the R.S.F.S.R. Code of Civil Procedure, entitled “Right of the court to go beyond the limits of the demands in the action,” reads as follows: “Depending on the circumstances elucidated in the case, the court may go beyond the limits of the demands made by the plaintiff, if such is necessary for the defense of the rights and legally protected interests of State institutions, enterprises, collective farms and other co-operative and public organisations, or citizens.” 11 Law in Eastern Europe (1966), supra note 115, at 209. See the commentary by Levshin, in Nauchno-Prakticheski Kommentarii K GPK RFSR 227 (R. Kallistratova & V. Puchinskii ed. 1965) (Moskva, Juridicheskaia Literatura).

182. Section 54, paragraph 2, of the R.S.F.S.R. Code of Civil Procedure provides that “[t]he court will not accept the withdrawal of his action by a plaintiff, or a concession of the action by the defendant, and will not approve a friendly settlement by the parties, if such steps violate the law or the rights or legally protected interests of any person.” 11 Law in Eastern Europe (1966), supra note 115, at 167. This article and analogous provisions in the socialist countries have been interpreted to mean that the judge will not approve party agreements if, although not contrary to binding rules, they conflict with the “equitable interest of the parties.” Nevé, The Authority of the Court in Conducting Proceedings Under the Hungarian Law of Civil Procedure, in Studies in Jurisprudence for the Sixth International Congress of Comparative Law 79, 95 (1962) (Budapest, Akadémiai Kiadó).

Clearly, the philosophical basis of this latter development is profoundly different from that underlying merely procedural publicization. Nevertheless, a common element can be seen in the fact that in both phenomena, public control is thought necessary to supplement, or substitute for, private initiative.

In theory, at least, the existence of a connection between judicial activism (in both its forms) and the role of the Ministère public (and his analogues) in civil litigation is difficult to deny. Whether judicial activism gives the judge responsibility for the efficient unfolding of the proceedings, the just determination of their contents, or both,\textsuperscript{188} it reflects a public (governmental) concern in civil litigation. It would be perfectly conceivable to substitute a “public party” in place of judicial activism to act as a representative of the public interest with respect to either the speedy and orderly unfolding of the case or the just determination of its merits or both.\textsuperscript{188}

Conversely, the lack of a meaningful role for such a public party in many countries may be explained by the fact that the judge’s role and authority in those countries are so great as to obviate the need for outside assistance. In the words of Professor Hazard:

[A leading comparativist, René David,] has sought to explain the absence of an instrument of state intervention in civil proceedings as the result of the strength of the common law judge. In one of his books he suggests that the English judge is so strong that he requires no buttressing by another institution, while the weaker role of the Continental judge is strengthened by the presence of an official of

\textsuperscript{184} R.S.F.S.R. CODE OF CIVIL PROCEDURE § 320, Nos. 2, 4, 5, 6, 11 LAW IN EASTERN EUROPE (1969), supra note 115, at 240.

\textsuperscript{185} To be sure, the second phenomenon usually includes the first, as in the socialist countries. On the other hand, comparative analysis reveals that there are many procedural systems in which the first phenomenon is not accompanied by the second. See, e.g., F. JAMES, supra note 177, at 3-8.

\textsuperscript{186} An analogous phenomenon occurred long ago in criminal procedure. In ancien régime France, and similarly in other civil-law countries, the court—in addition to the Ministère public and private persons (the victims)—could commence ex officio criminal prosecutions. The adage was that “tout juge est procureur général.” R. DAV\textsuperscript{187}I & H. DEVRIES, supra note 45, at 56-57; M.-L. RASSAT, supra note 23, at 27-30, 163, 201. The elimination of this prosecutorial power of the courts was one of the major changes of the liberal Revolution, based on the theory of separation of powers and the conception that prosecution is the province of the executive. R. DAV\textsuperscript{187}I & H. DEVRIES, supra, at 56-57; M.-L. RASSAT, supra, at 33. In Italy, the lower courts of first instance (Pretori) still have the prosecutorial initiative in proceedings before them. The Pretori’s jurisdiction is limited to minor criminal offenses. G. PRO. PEN. art. 31, 74.
the state authorized to give advice as to the state's interests in a case involving private litigants.187

Along the same line of thought, one could explain the substantially lesser role of the Ministère public in Central European countries188 than, say, in France, Belgium, and Italy189 by the fact that the Austrian and German civil judge has for more than half a century been granted far-reaching powers to control the unfolding of the case (formelle Prozessleitung) and even, in part, the contents of the litigation (so-called "materielle Prozessleitung").190

Similarly, one could surmise that the Marxist socialist countries went unnecessarily far when they greatly expanded not only the role of the Prokuratura, but also that of the judiciary, entrusting to both the procurator and the judge broad powers to commence, and/or to control the scope and unfolding of civil cases. One could infer that the reason why, in practice, the Prokuratura's participation in civil litigation is so much less frequent than one would expect191 is that judicial activism makes the demand for such participation much less pressing. One could even dare to suggest192 that de-privatization of law, including substantive law—an unavoidable development in mass-economy societies—should be accompanied by a growing participation in civil litigation of a "public party" (such as the Ministère public or the Prokuratura),193 but that judicial activism, especially if

188. See Habscheid, supra note 20, at 176, 184-85; Hazard, supra note 3, at 209; note 86 supra and accompanying text. For Austria, see the telling statistical data in W. Kralik, supra note 3, at 11.
189. At least for Italy, however, the large role envisaged for the Ministère public in civil litigation has remained merely law on the books, not corresponding to actual practice. See note 21 supra.
190. In the German report the thesis is repeatedly stated that, whereas civil litigation as a rule is "the private affair of the parties," when public interests are involved in a civil proceeding it is for the judge, not for a state attorney, to protect them. Habscheid, supra note 20, at 176, 184-85. The Austrian Reporter also repeatedly emphasizes the role of the judge in the protection of public interests in civil litigation. W. Kralik, supra note 3, at 3, 5.
191. See section 1B supra, especially note 128 and accompanying text.
193. See the suggestion made by Judge Frank:
I do not suggest that courts . . . conduct their own investigations through their own employees. I do suggest that we should consider whether it is not feasible to provide impartial government officials—who are not court employees, and who act on their own initiative—to dig up, and present to the courts, significant evidence which one or the other of the parties may overlook or be unable to procure.
it extends beyond the mere formal unfolding of the litigation, need not be a concomitant of such growing participation. 194

A strong argument can be made in support of this last point. In the words of Belgian Professor and honorary Procureur Général Hermann Bekaert, the judge is not the right person to choose as a defender of either the "collective interests" or the interests of those persons who are "socially, physically, or economically weak": 195

"[The judge] is neither enlightened nor equipped to accomplish this defense; the law confines the judge 'to the boundaries established by the pleadings . . . .' The fundamental principle of our civil procedure is that with few exceptions, 'the judge acts only if requested.' " 196

Professor Bekaert's recommendation is to turn with renewed confidence to the old institution—the Ministère public. 197 The Ministère public's powers to participate in civil litigation as a full-fledged party (partie principale) should be greatly expanded. He should be made the general public representative and defender of the "intérêts collectifs" in civil litigation, 198 taking the place of a much too dangerous, and unnecessary, judicial activism. The participation of a public party would in no way impair judicial impartiality, whereas judicial activism would permanently hang like a Damoclean sword over that impartiality. 199

Professor Bekaert's recommendation, however, has one weakness. He does not examine whether the Ministère public's background and training, the organization and structure of his office, and his career, are suitable for harboring and nourishing the kind of "interested zeal" —"le zèle d'une personne intéressée"—that is a necessary element of

194. Cf. E. Vescovi, supra note 20, at 12 (with reference to P. Calamandrei).
195. Bekaert, supra note 2, at 444.
196. Id. at 444-45. Bekaert then quotes approvingly the following forceful statements from an 1823 work by J.D. Meyer:
Leaving the care of public and general interests to the judge is contrary to the idea of judges' functions, is outside their sphere, and is dangerous due to inevitable abuses; it would require of him greater than usual attention. We forget that impartiality and the strict enforcing of the laws represent all the rights and the duties of the judge. It is expecting too much [of him] to charge the judge with the care of unpleaded interests, for we would then expect him to perform the function both of the judge and the attorney. Each one of these functions, however, requires the entire attention of one person. It is expecting too much from the strength of his character because we would expect him to combine the zeal of an interested person and the neutrality of justice; it is expecting too much from his morality because we would entrust him with unlimited power and we would expose him to the deadly temptation of abusing it.
Id. at 445, quoting J. Meyer, 6 ESPRIT, ORIGINE ET PROGRES DES INSTITUTIONS JUDICIAIRES 292, 290, 257 (1823) (La Haye).
197. See also Krings, supra note 4, at 163.
199. See M. Cappelletti, supra note 192, at 24 n.39. See also J. Frank, supra note 151, at 98.
that enlarged role. Changing the wording of legislation to allow the Ministère public to participate in all cases involving a "public" or "collective" interest is, as we have seen, a useless or at best a largely insufficient attempt.\textsuperscript{200} To be effective, the change should reach much deeper. It should give the Ministère public competence in highly specialized, nonlegal matters, whereas he, like his socialist\textsuperscript{201} and common-law analogues, is essentially a lawyer; it should give him responsiveness and flexibility, whereas he, like the socialist procurator, is a member of a bureaucratic and centralized machinery; it should give him deep and lasting contacts with society, and with social policies and politics, whereas he is a magistrat, the member of a class that traditionally—and very justifiably—has tended toward independence, autonomy, and isolation.\textsuperscript{202} In sum, to become suitable for the new task, the French model of a "public party" should be so radically transformed as to become an entirely different entity—a public agency or, more exactly, a number of decentralized public agencies, so specialized and organized as to be able to take care of all of the varied aspects of modern life that involve vital interests of contemporary societies. We will see that a trend in this direction has in fact emerged in a number of countries,\textsuperscript{203} but that even in this radically changed form, the "public (governmental) party" has so far been unable successfully to assume the entire burden of representing public and group interests in civil litigation.\textsuperscript{204}

\textsuperscript{200} See section IA\textsuperscript{4} supra.

\textsuperscript{201} For example, in Hungary the requirements for becoming an officer of the Prokuratura include graduation from law school, completion of a two-year period of legal practice, and passing an examination (which also qualifies the candidate for the judiciary). Néval, supra note 101, at 120.

\textsuperscript{202} See section IA\textsuperscript{3} supra. "Since the Ministère public is considered a judge, charged above all with the duty to defend the law, he must have an essentially serene function. Even if he is a party to the suit, his fundamental character makes him closer to the judges who decide the case, with whom he participates in the rendering of the judgment; his function is more akin to judging than to litigating." M.-L. Rassat, supra note 23, at 161.

\textsuperscript{203} See section IE infra.

\textsuperscript{204} The conclusions in this section force us, once again, to recognize that the Ministère public's real role is, and seems destined to remain, essentially in the field of criminal prosecution and civil matters akin to criminal proceedings. See notes 21, 80 supra and accompanying text. In this field—but not in civil litigation—the French institution, even more than its common-law analogue, see section IA\textsuperscript{3}, especially text at note 79 supra, is of great value. The Ministère public is independent and "judge-like" enough to offer a good chance of conducting an objective prosecution, an attainment much less likely to occur in societies in which the prosecutor has close ties to the police, the executive, and local, national, or party politics. In the criminal area, the "interested zeal" is not the Ministère public's, but rather the police's concern.

At this point, a brief note should be added concerning the Ministère public's role in criminal prosecution. Like its civil counterpart, criminal litigation is in a process of radical change due to modern societal transformation. Many traditional crimes, of course, still have their place in criminal courts, but our mass-production and consump-
E. Other Governmental Agencies

1. In General

The growing need for governmental intervention in highly specialized fields of social organization and economic development is a
tion "civilization" has brought about the emergence of a new and more sophisticated,
less vulnerable type of criminal—the violator of the criminal aspects of regulations
concerning such matters as securities, antitrust, urban development, and pollution.
At the same time, the emergence of a new sensitivity to the social aspects of civil
rights is bringing to the criminal courts another new type of criminal—the violator
of the rights of groups, classes, races, and sects, rather than merely the rights of
isolated individuals. The traditionalists' conception is incisively described by R. Daveu
& H. DeVauta, supra note 45, at 56: "Although in theory it is unquestionably a branch
of public law—since theft, murder and assault are not merely offenses against the victim
but also against the State—criminal law is nevertheless... a subject for privatistes
rather than publicistes... The whole approach is that of the private law." This
might be true for the traditional crimes, but not for the new crimes mentioned above,
which reflect a radically changed conception of criminal law in modern societies. Hence
a new question emerges: Is the Ministère public a suitable prosecutor for these new
types of crimes? Should the answer be an unqualified yes, then we should qualify our
negative conclusions concerning the suitability of the Ministère public to be the pro-
tector of the new and vital "intérêts collectifs." At least in so far as violations of such
interests involve (as they not infrequently do) criminal sanctions, the Ministère public
would appear to be a suitable vindicator. Such a conclusion would be excessively op-
timistic, however.

French experience in this matter is uniquely enlightening. In France, unlike in
many other nations, the Ministère public does not in a full sense "monopolize" crimi-
nal prosecution; in at least one important instance, a criminal proceeding can be
instituted without his initiative. The victim who brings an action civile for damages
caused by criminal conduct "can request the juge d'instruction to institute criminal
proceedings." Id. at 56-57. See C. Proc. Pén. arts. 85-91. (The situation is even more
radical in Spain, where a criminal suit can be brought by any citizen, even if he is
not the victim of the alleged crime. See V. Fairen Guillén, supra note 3, at 6, 11 n.25.
Mexico and other Latin American countries are at the other end of the spectrum,
since only the Ministère public is empowered to institute criminal proceedings. See S.
Oñate, supra note 3, at 4 & n.7.) The French procedure permits the "setting in mo-
tion" of a criminal prosecution without, and even against, the Ministère public's
will. See C. Proc. Pén. art. 88; M.-L. Rassat, supra note 23, at 204, 233, 239. Various pro-
visions, however, are designed to prevent abuse of the citizens' right to initiate crim-
nal cases. For instance, the private party ("partie civile") may be obliged to provide
security for costs (article 88), and may be punished for bringing charges known to be
false (article 91).

Time and again it has been proved that, in connection with newly emerged col-
clective interests, the Ministère public's initiative is frequently deficient and must be
supplemented by that of the victim. The Ministère public is quick enough to prosecute
traditional crimes, essentially "individual" in nature, such as murder, theft, and assault.
He is not so quick, however, to act against less traditional, essentially "collective"
crimes, such as racial defamation, fraudulent commercial advertising, abuses in the
sale of securities, invasion of green areas by unauthorized or illegally authorized build-
ings, or pollution by business concerns. Ample documentation of this attitude is pro-
vided in note 44 supra. This applies also, in part, to the police, who are likewise
selected and trained primarily for the discovery and prevention of the traditional
crimes. Most prosecutorial action is dependent, of course, upon the activities of the
police.

Once again, it seems that the Ministère public's limited (essentially legal) specializa-
tion, his relative social insulation, his participation in a heavy, centralized, bureaucratic
machinery—in sum, his very nature as an officer of the Parquet—hinder his being a
sensitive, prompt, and effective advocate of nontraditional, newly emerging public
interests. Mutatis mutandis, similar conclusions can be drawn with respect to the
basic feature of modern societies. Yet, as has been seen, the Ministère public (and his Anglo-American and socialist analogues) lacks expertise in and sensitivity to these highly specialized, nonlegal matters. This fact is one of the basic weaknesses of the Ministère public in representing public interests in court.

To remedy that weakness, there has been a proliferation of specialized branches within the office of the Ministère public (and the attorney general).205 In addition, there has been an even greater analogues of the Ministère public. Not all of these reservations are applicable to the common-law attorney general, see notes 82, 159 supra, but the attorney general pays heavy costs for this possible superiority in efficiency in that he is much more subject to political interference. See section 1A3 supra.

No one could categorically state that the necessary sensitivity that, by and large, has been missing so far will not emerge in the future. Most human minds take time to become aware of new social needs. But even if future generations of Ministères publics bring a new sensitivity and awareness to their office, delay in modernization will remain an especially acute problem for this hierarchical organization in which career magistrates assume leading positions through seniority. In a rapidly changing society, an organization such as the Parquet is destined to be too traditionalist to be the best possible champion of nontraditional rights. This is why the power of an aggrieved person to initiate criminal prosecution—as an alternative to the initiative of the Ministère public—a power already frequently exercised and susceptible of further development, is a very fortunate feature of French law. Through this alternative, the valuable, but insufficient, institution of the Parquet can find precious substitution, assistance, and stimulus from the persons directly and zealously interested. One important argument made against the further enlargement of the victim's power to initiate prosecutions is that such enlargement would destroy the discretion, left (to some extent) with the French Parquet, not to prosecute a case if practical evaluations so suggest. See generally M.-L. R.AssAT, supra, at 39, 85-103, 162-65, 215-41; H. SOLES & R. PERRY, I DROIT JURIDIQUE PRIVÉ 220 (1961) (Paris, Sirey); A. De Vita, supra note 1, at 19. The validity of this argument is doubtful, however. In some other countries, such as post-World War II Italy, an important development has been to make prosecution a nondiscretionary obligation for the Ministère public—even a constitutionally proclaimed obligation (under article 112 of the Italian Constitution)—in all cases in which there is reasonable evidence of the commission of a crime. See Vigoriti, supra note 21, at 275. Making prosecution a nondiscretionary duty was considered both an important guarantee for the equal treatment of all citizens and a restraint upon prosecutorial and executive abuses; it was also regarded as an additional guarantee of the Ministère public's independence from his hierarchical superiors, and even more so from the political branches of government, or from other pressures of any kind. See, e.g., Giannattasio, La magistratura, in COMMENTARIO SISTEMATICO ALLA COSTITUZIONE ITALIANA 130 (P. Calamandrei & A. Levi ed. 1980) (Firenze, Barbera). For German analogues, see W. Heyne, THE ADMINISTRATION OF JUSTICE IN THE FEDERAL REPUBLIC OF GERMANY 71, 109 (1971) (Press and Information Office of the Federal Government of Germany). See also K. DAVIS, supra note 79, at 191-95, 224, 230-31.

205. For a European example, see note 95 supra and accompanying text. The phenomenon mentioned in the text is particularly important in the United States. There are various divisions within the U.S. Attorney General's office, including an Antitrust Division and a Civil Rights Division. See generally L. HUSTON, THE DEPARTMENT OF JUSTICE 54-109 (1967) (New York, Praeger). The Civil Rights Division includes the Office of Institutions, which has responsibility for protecting the constitutional rights of residents of mental institutions, prisons, and juvenile detention centers. For instance, the Office of Institutions recently brought suit against the State of Maryland regarding conditions in a state institution for the mentally retarded. (Information kindly provided by Mr. C.R. Halpern of the Center for Law and Social Policy in Washington, D.C.)
proliferation of specialized separate agencies entrusted, *inter alia*, with tasks akin to those of a *Ministère public*, that is, commencing or intervening in civil cases. Examples are countless: from the *Jugendamt* in the Federal Republic of Germany\(^{206}\) and the Child Welfare Committees in Sweden\(^{207}\) to the *Finanzprokuratur* in Austria,\(^{208}\) the *Avvocatura dello Stato* in Italy,\(^{209}\) and the *Ombudsman* in Scandinavian and other nations;\(^{210}\) from the Queen’s Proctor, the Public Trustee,\(^{211}\) the Director-General of Fair Trading,\(^{212}\) and the Race

Apparently, there is also increasing specialization in the offices of the state attorneys general. For instance, the office of the Michigan Attorney General has 21 divisions. Note, *supra* note 17, at 1053. On the other hand, as reported by Professor Rivet, in Canada, or at least in Quebec, the office of the Attorney General “is not a structure that permits specialization of its officers.” Rivet, *supra* note 63, at 249.

206. In Germany, a specialized public agency called the *Jugendamt* (Youth Office)—rather than the normal *Ministère public*—represents juveniles in court on such matters as their education, protection, and assistance. See Habscheid, *supra* note 20, at 176-77.

Among other German agencies that have a role in noncriminal litigation, mention should be made of the so-called “representatives of the public interest” (“Vertreter des öffentlichen Interesses”), who correspond, in some of the German Länder (including Bavaria and Baden-Württemberg) to the Oberbundesanwalt at the federal level. See note 71 *infra*. A major duty of these *Land* officers is to represent the regional government in proceedings before the administrative courts, that is, in proceedings usually instituted by private persons to challenge the legality of regional administrative action. Their title is rather misleading, however, since they tend to consider themselves as merely the attorneys of the defendant—the *Land* and its agencies. These officers lack not only the power (*inter alia*, they cannot commence cases), but also the specialization and the independence necessary to fulfill the role of real champions of the public interest. See E. Rehbinder, H. Burghacker & R. Knipper, *supra* note 71, at 142-44.

207. See P. Bolding, *supra* note 64, at 3-5. In Sweden, the role of the Public Prosecutor (*Ministère public*) in civil matters is even more limited than in the Federal Republic of Germany. See note 86 *supra*. His role is virtually limited to cases of nullity of marriage and *patria potestas*, and is “of very little practical importance.” P. Bolding, *supra*, at 3. Representation of public interests in and out of court is, instead, the task of a number of specialized agencies, of which the Child Welfare Committees are an example. *Id.* at 3-5.

208. See W. Kralik, *supra* note 3, at 1-2, 12; note 69 *infra*.

209. See note 69 *infra*.

210. See section IE2 *infra*. Also to be noted in Sweden is a Nature Conservation Board for the protection of the environment. See P. Bolding, *supra* note 64, at 7. As an additional measure, individuals, whether directly or indirectly aggrieved, may apply to the “land courts” for injunctions against activities detrimental to the environment. *Id.*


212. See I. Jacob, *supra* note 63, at 17-18, 53-58. The Director General of Fair Trading is an office created in 1973. Its function is to take proceedings before the Restrictive Practices Court against monopolistic practices and restrictive trading agreements that are “contrary to the public interest,” with a view, *inter alia*, to protecting consumers.
Relations Board in England to the Legal Services Corporation and a number of other governmental agencies in the United States; from countless "organs of State administration" and "State institutions and enterprises" in the Soviet Union and the other socialist nations to such recent entities as the Registrar of Restrictive Trade Agreements in India and the Environmental Protection Council in Ghana.

213. See id. at 17-18, 39-42. Like the Director General of Fair Trading, the Race Relations Board is a new institution created to represent certain matters of public interest in civil proceedings. The Race Relations Board has the task of bringing civil proceedings against various categories of acts of racial discrimination that the law makes "unlawful" but not criminal. Based on the Race Relations Act of 1965, such proceedings, like penal proceedings against criminal acts of discrimination, "could only be brought by the Attorney-General." Id. at 39. The Race Relations Act of 1968, however, "shifted the responsibility for enforcing its provisions by civil proceedings from the Attorney-General to the Race Relations Board," id. at 40, which originally was merely an agency for promoting conciliation. Id. at 39. Jacob indicates that this "significant change of policy . . . may perhaps be due to the desire to avoid the Executive branch of Government being or appearing to be too closely involved or identified in the enforcement of the law affecting racial discrimination. The Race Relations Board has thus been constituted . . . as an agency for conciliation and for law enforcement." Id. at 40. One may wonder, though, whether there was not also another reason for that change of policy, namely, the need to entrust the enforcement of racial legislation to a specialized agency to avoid the proven ineffectiveness of the Attorney General in newly emerging areas of law.

Interestingly, although the Race Relations Board may claim damages on behalf of the victim of the unlawful act of discrimination, the victim himself may not bring proceedings; the right to go to court is the monopoly of the Board. Id. at 41-42.


215. E.g., the Environmental Protection Agency, the Food and Drug Administration, the Securities and Exchange Commission, and the Federal Trade Commission. Within their respective areas, these administrative agencies have the power to participate in civil cases, although their primary role is in administrative regulation. Advocacy before other administrative agencies and in court, on the other hand, would represent a major aspect of the role envisaged for the proposed Consumer Protection Agency, which is likely to be established soon by Congress. See H.R. 2709, 94th Cong., 1st Sess. (1975). This new agency would become a sort of American consumer ombudsman. See C. Halpern, supra note 1, at 15-18; section IIB2 infra.


217. See section IIB2 infra.

218. The Indian Monopolies and Restrictive Trade Practices Act, 1959, has empowered the Registrar of Restrictive Trade Agreements to act as an "advocate of public interest" by investigating and bringing proceedings against restrictive trade agreements and practices. The adjudicatory body is the Monopolies and Restrictive Trade Practices Commission, which operates under the Code of Civil Procedure. In addition to the
While the need for specialization may be fulfilled by these more articulate solutions, other problems are left unresolved. Even governmental agencies that operate in specialized areas tend to assume a bureaucratic psychology and a hierarchical structure that often makes their intervention too rigid and centralized to be effective. The American experience with the Office of Economic Opportunity's (OEO) Legal Services Program is illustrative. Although the Program—especially during its glorious years between 1965 and 1970—had achieved a balance between centralization and localization, preserved a sufficient degree of autonomy from governmental interference, and displayed remarkable motivation and aggressiveness, the danger of centralization and dependence on political pressures still remained. Fighting against that danger at times absorbed a large portion of the Program's energies; indeed, centralization, at the state if not at the federal level, might well prevail with the Program's forthcoming transformation into a public corporation. 220

Moreover, the creation of governmental agencies to deal with new social problems and needs usually requires legislative action, which, as a rule, is very slow to materialize and sometimes even slower to adapt to concrete experience. Perhaps with the sole, but brief, exception of the OEO Program, no governmental agency has achieved the same degree of imagination, impetus, and promptness in dealing with welfare, consumer, environmental, or civil rights problems as have the individuals and spontaneous organizations that have been encouraged 221 to represent public interests in court. Once again private initiative, even with all of its inherent risks and its need for checks against possible abuses, reveals remarkable advantages vis-à-vis governmental regimentation. 222

Registrar, who has a staff of professional and administrative officials, complaints to the Commission can also be brought by trade and consumers' associations or by a group of no less than 25 consumers. See L. Singhvi, supra note 152, at 8-10.

219. Instituted by the Ghanaian Environmental Protection Council Decree 1974, the Council is entrusted with a number of tasks designed to safeguard the quality of the environment and to promote environmental education. In Justice Ollennu's authoritative opinion, the Council is also endowed with the power to conduct civil litigation for environmental protection. N. Ollennu, Representation of Public, Collective and Group Interests In Civil Litigation 5-6 (unpublished Ghanaian report, see note 1 supra).


221. See note 365 infra.

222. Charles Halpern, a leading American expert in public interest problems, writes that in the United States "there has been considerable disillusionment with governmental agencies with a broad mandate to regulate corporate behavior . . . in the public interest. These agencies, many of which were begun in the New Deal years, are now perceived as being 'captured' and being too responsive to the industries which they are intended to regulate, and too unresponsive to the interests of the general public."
In fact, most Western experts seem to have reached a consensus, at least in recent times, that the public administration acting alone cannot adequately deal with the "public interest" aspects of the growing economic, social, and environmental problems of modern societies. In the United States, for instance, the administrative agencies themselves are the first to recognize that, due in part to a personnel shortage, they cannot substitute entirely for the initiative of individuals and private groups in the protection of the public interest in such fields as securities and antitrust regulation. Modern political science, both in Germany and the United States, recognizes that

in a system of pluralistic democracy, it is difficult to organize efficiently and make politically virulent such diffuse societal interests (das breitgestreute Allgemeininteresse) as the public's health, the protection of the environment, traffic safety, and the protection of consumers. This is the reason why such interests are not taken seriously enough by the public administration in its everyday action.

These conclusions should not be interpreted to mean that we should discard, as useless tools, governmental agencies in such fields as civil rights, welfare, securities regulation, and environmental and consumer protection. Private initiative alone, no matter how encouraged, would be too haphazard and open to distortion if it were not subject to official control and supplementation. However, private individuals and groups should be allowed and encouraged to make their contribution in areas too vital to be monopolized by armies of indifferent governmental bureaucrats. Pietro Verri—Beccaria's great inspirer—summed up this observation with a sentence that should hang over the doors of most public officers as a reminder against the dangerous illusion that there exist ever-vigilant governmental guardians of the public interest: "Les derniers qui voyent

C. Halpern, supra note 1, at 5. See also id. at 17; Weinstein, Some Reflections on the "Abusiveness" of Class Actions, 58 F.R.D. 299, 304-05 (1973).

223. The same can be said for Japanese experts. See T. Kojima, supra note 1, at 18, 21. Cf. note 139 supra (Soviet Union).

224. Professor Kötz gives ample documentation of this consensus. H. Kötz, supra note 1, at 16-17 & n.36, 25, 31-32 & n.59.

225. Id. at 32 & n.60 (with bibliographical references).

226. To give one concrete example, the U.S. Clean Air Act of 1970, 42 U.S.C. §§ 1857a et seq. (1970), while giving to the Administrator of the Environmental Protection Agency, inter alia, powers akin to those of a specialized "governmental Attorney General," see note 215 supra, also "assigns an important role to individual citizens in enforcing a strong federal policy against air pollution. Generally, any citizen may sue any polluter, including governmental agencies, for a failure to comply with the Act without demonstrating any direct personal harm resulting from the pollution." Homburger, supra note 1, at 394. See also note 371 infra and accompanying text.
clair les intérêts de la société sont pour l'ordinaire ceux qui sont payés pour les voir." 227

2. The "Mediator" or Ombudsman

One governmental agency, the ombudsman, deserves special attention. The task of this particularly interesting agency is, in part, to assure that community and public interests have "access to justice."

From its roots in Sweden and Finland, the ombudsman has successfully expanded not only to Denmark and Norway but also, more recently, to a rapidly growing number of non-Scandinavian countries, including New Zealand (1962), Great Britain (1967), Quebec (1968), and other provinces of Canada. 228 France, too, recently has been reached by this great wave, 229 as have some jurisdictions in the United States, 230 some regions in Italy, 231 and some states in India. 232 In the Federal Republic of Germany, a Commissioner for Military Affairs

227. "The last ones to see clearly society's interests are generally those who are paid to do so." Verri, Penseés détachées, in MILANO IN EUROPA 138 (M. Schettini ed. 1963) (Milano, Cino del Duca).

228. See, e.g., Legrand, Une institution universelle: l'Ombudsman, 25 REVUE INTERNATIONALE DE DROIT COMPARÉ 851-61 (1973), and the extensive bibliography therein. See also P. Bolding, supra note 64, at 5-7; I. Jacob, supra note 65, at 90; Rivet, supra note 63, at 250-51. Interestingly, Professor Rivet closes her report with a strongly negative appraisal of the role of Quebec's Attorney General in civil litigation, and a strongly positive appraisal of the role performed by Quebec's Ombudsman in the past few years: "With the Protecteur du citoyen, Quebec is avant-garde. Whereas the public interest is very badly protected by the Ministère public in civil suits, and whereas collective interests are very difficult to protect before the courts, the citizen at least feels that he is now protected against the state . . . ." Id. at 251.

229. Statute No. 73-6 of Jan. 3, 1973, [1973] J.O. 164, [1973] J.C.P. III No. 4097 (creating a mediator). The mediator is appointed for a nonrenewable six-year term by the Council of Ministers (article 1), rather than by Parliament as in most other countries. This provision has been strongly criticized as endangering the mediator's independence from the executive. Once appointed, however, the mediator cannot be dismissed except through an "impeachment" procedure (article 2). As in England, see, e.g., I. Jacob, supra note 65, at 90, citizens' complaints are not directly submitted to the mediator, but rather to members of Parliament who may forward them to the mediator (article 6). The role of the French mediator in court proceedings is quite limited; it is essentially restricted to disciplinary and criminal cases against agents of the public administration (articles 10, 11). For a critical appraisal, see, for example, Amson, L'institution du médiateur: un coup d' dépé dans l'eau, 47 LA SEMAINE JURIDIQUE, JURIS-CLASSIQUE PERIODIQUE No. 2547 (1973).


231. Provisions for the institution of an ombudsman are included in the constitutions of the regions of Tuscany, Liguria, and Latium. See, e.g., Bartolini, Difensore civico, MONDO ECONOMICO, June 8, 1974, at 20-22.

232. Included are the states of Maharashtra and Rajasthan. See L. Singhvi, supra note 152, at 15-16.
has been introduced. Recently, proposals have been made by authoritative sources to introduce a European ombudsman to promote the protection of human rights at the European level.

Although there are numerous differences among the various types, a few basic features characterize the ombudsman everywhere. First, he is an independent and nonpartisan functionary of the state (or governmental subdivision) that he is supposed to oversee; second, his task is to examine complaints brought by citizens or (as in England and France) by members of Parliament about maladministration or other injustices; and third, he has broad powers to investigate, to criticize, to make cases of maladministration and injustices known to the public and to the governing bodies of the state, and in certain instances even to present complaints to the courts.

Only in these last instances, of course, is the ombudsman directly relevant to this discussion. In so far as he brings or intervenes in law suits on behalf of public or community interests called to his at-


234. See, e.g., Written communication submitted by the International Institute of Human Rights (Rene Cassin Foundation) of Strasbourg, in COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY, PARLIAMENTARY CONFERENCE ON HUMAN RIGHTS 82, 84 (1972) (Strasbourg). See also statements of F. Ermacora, id. at 88; B. Fittermann, id. at 88-89; R. Dupuy, id. at 111.

The final resolution of the Parliamentary Conference on this point states:

The European Parliamentary Conference on Human Rights . . . considers . . . [a]s regards the effective protection of human rights in the member States of the Council of Europe: . . . that even the best traditional systems of legal protection are often ineffective since they can only be invoked a posteriori and often after considerable delay, and even then without being able to remedy the inertia of the administration; consequently, it is necessary to consider favourably the establishment of an organ authorized to receive and examine individual complaints, with a right of access to the files of government departments, functioning on the lines of the Ombudsman as known in the Scandinavian countries.

Id. at 112-13.

The same recommendation was made in 1974 in Paris at a meeting of the ombudsmen of various European countries. See Bartolini, Un ombudsman per l'Europa, Monso Economicos, May 11, 1974, at 27-28. At the United Nations level, considerable attention has been given to instituting an ad hoc organ for the protection of human rights. A resolution was adopted by the Economic and Social Council of the United Nations at its meeting on June 6, 1969, but the General Assembly has not yet made a decision. See R. Clarke, A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (1972) (The Hague, Nijhoff).

235. Recently, even large private institutions—for example, Stanford University—have introduced a "mediator" whose tasks are analogous to those of an ombudsman.

236. See, e.g., D. Rowat, THE OMBUDSMAN PLAN: ESSAYS ON THE WORLDWIDE SPREAD OF AN IDEA 147 (1973) (Toronto, McClelland); Legrand, supra note 228, at 853. See also P. Bolding, supra note 61, at 6-7; Dominick, Report on the Theme: How Can the Existing Protection of Human Rights Be Strengthened?, in COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY, supra note 224, at 64, 72.
tention, his role is much akin to that of a public attorney general initiating or intervening in civil or criminal cases.\footnote{237} It must be recognized, however, that this is neither the principal nor the usual role of the ombudsman. Rather, his primary function is served prior to litigation and out of court; he is a mediator—an alternative to or a substitute for litigation and, as such, a bridge between individuals and groups, on the one hand, and the governing "power" on the other. Indeed, one important aspect of this institution is that it can provide a forum for the grievances of persons who are unable to surmount the psychological, financial, legal, or other barriers to going to court. Thus, the ombudsman's great potential is to eliminate, or at least reduce, the public's diffuse feelings of isolation, alienation, and impotence vis-à-vis the bureaucratic machinery of the modern state.

One very interesting development has been the expansion of the ombudsman's role to consumer and environmental problems, and even the creation of specialized ombudsman positions for such problems.\footnote{238} A valuable example is offered once more by Sweden, where a new ombudsman was created in 1970.\footnote{239} Called the "consumer ombudsman" (konsumentombudsman),\footnote{240} the office is composed of twenty-five members—the consumer ombudsman, a deputy ombudsman, and a technical staff of attorneys, economists, marketing experts, and an information officer.\footnote{241} The duty of this agency is to watch over

\footnote{237. The fact that a "justitieombudsman" has been effectively operating in Sweden for more than 150 years may explain, in part, the lack of any need (with only unimportant exceptions) to entrust the public prosecutors' offices with the additional task of pursuing public interests other than the prosecution of crimes. See note 237 \textit{supra}. Cf. P. Bolding, \textit{supra} note 64, at 3, 5-6.}

\footnote{238. The creation of specialized ombudsman positions for environmental problems, acting either within or apart from governmental agencies dealing with environmental matters, was recommended by an international conference held in Bonn, Germany, on August 22-24, 1973. See R. Buxbaum, Report of Conference on Comparative Legal and Institutional Aspects of Public Interest Activity in the Environmental Sector 10 (n.d.) (unpublished manuscript).}

\footnote{239. See P. Bolding, \textit{supra} note 64, at 5-6. Another ombudsman, called the "näringst-frihetombudsman" ("freedom of commerce ombudsman"), was created in 1954 by the Restrictive Trade Practices Act to enforce Swedish antitrust law. See Sheldon, \textit{Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control}, 22 \textit{Am. J. Comp. L.} 17, 28 (1974). A third ombudsman, established in 1959 and called "pressombudsman," sees that the press observes a code of ethical standards. See Graetz, \textit{Les chevaliers de la consommation}, \textit{Journal de l'Europe}, Nov. 6, 1973, at 26-27. These ombudsmen are all in addition to the original "justitieombudsman" in existence since 1809. See note 237 \textit{supra}.}

\footnote{240. A similar institution has been operating in Norway since 1973, and the Danish Parliament is presently considering the creation of a consumer ombudsman. See Bartolini, \textit{supra} note 231, at 28; Graetz, \textit{supra} note 239, at 26. An analogous proposal was made in 1972 in the Belgian Senate. \textit{Id.} at 28. For the United States proposal, see note 215 \textit{supra}. In Japan, there are "consumer grievances advisers" whose "activities are very much like those of an Ombudsman, though there is no institutional guarantee of their independence." T. Kojima, \textit{supra} note 1, at 25.}

\footnote{241. See Sheldon, \textit{supra} note 239, at 29.
improper marketing and advertising; one of its powers is to bring suits before the special, newly created Market Court (marknadshofstol). An additional function of the consumer ombudsman was established by a statute of April 1971, concerning standard form contracts. If terms in such contracts are considered unfair to consumers, the consumer ombudsman, either upon his own motion or upon informal requests from outside sources, can apply to the Market Court to forbid the use of such terms. If the ombudsman refuses to apply, the application can be made “by an association of tradesmen, consumers or employees” — an interesting acknowledgement that not even a highly specialized “public attorney general” should monopolize the representation of collective interests by excluding private initiative in the commencement of court proceedings.

II. Other Solutions in Outline

Once the shortcomings of the traditional “public attorney general” have been recognized, the problem remains to find other solutions to supplement, integrate with, or substitute for it. Once more, comparative analysis can prove fruitful.

Human imagination has designed innumerable methods of providing public and collective interests with access to justice. One important means is to entrust representation in court of such interests to private individuals and organized groups or associations whose


243. P. Bolding, supra note 64, at 6-7. For a detailed analysis see Sheldon, supra note 239, at 17-67, especially at 41; for a translation of the statute, see id. at 68. The Market Court has the power to issue injunctions under penalty of fine “where such measure is in the public interest.” See id. at 40-41 (section 1 of the statute).

244. See Sheldon, supra note 239, at 41, 68 (section 3 of the statute). See also P. Bolding, supra note 64, at 6-7. Sheldon explains that, while the kind of association envisaged by section 3 is “not required to be in any way representative or to have special qualifications, it must have legal capacity and represent its members in their status as entrepreneurs, consumers or employees.” Sheldon, supra, at 41. Individual consumers, however, have no standing to take a case to the court. Id.

245. Another Swedish example of combination of governmental and private initiative has already been mentioned. See note 210 supra.

Section 7 of the statute discussed in the text contemplates an even more complex combination of efforts, since it leaves with the Public Prosecutor the task of “instituting proceedings before the ordinary courts in regard to the imposition of fines.” Sheldon, supra note 239, at 68. Thus, we have the following combination: Both (1) the consumer ombudsman and (2) a private association can bring complaints before the Market Court; (3) the Market Court can issue injunctions prohibiting, under penalty of fine, further use of certain contract terms; in case of noncompliance, (4) the Ministère public institutes a proceeding for the imposition of the fine, but he does so only upon notification by (5) the consumer ombudsman or (6) any other person who had applied to the Market Court for the injunction.
institutional goals encompass those interests. In the words of Professor Vigoriti:

It seems pointless to maintain in the judicial system an institution [the Ministère public] whose ambiguities make it unable to serve its intended role, and one which has been deprived of any practical relevance. One can think of other and better methods of protecting the public interest in the right application of the law. For example, judges could be given stronger investigatory powers; and, as in certain areas of labor law and of administrative law, standing to sue or to intervene to protect the public interest could be given to individuals and associations whose institutional goals include such an interest. It is submitted that such measures would protect the public interest more realistically and more effectively than is now the case under the useless aegis of the p[ubblico] m[inistero].246

Professor Vigoriti, I believe, has gone too far in his total condemnation of the traditional institution.247 The fact remains, however, that additional tools need to be utilized. One such tool is a liberal conferral upon private individuals of standing to sue in the community's or group's interest; another is a liberal grant of standing to the groups themselves or to associations concerned with the interest of those groups. I will briefly describe some typical examples of both methods.

A. The Individual "Private Attorney General"

1. Relator Actions in England and Other Common-Law Countries

As we saw above,248 the attorney general's role in civil litigation is, de facto, a modest one in common-law countries. This situation, however, is not the result of limitations imposed by law. In theory, the attorney general's role, although ill-defined by statutory and case law,249 could potentially be very broad, including a duty "to promote the interest of all sections of the community and to prevent the wrongdoing of one, resulting in the injury to the general welfare."250

As a consequence, the attorney general may have standing to demand compliance with the law in most civil matters involving the general

246. Vigoriti, supra note 21, at 288.
247. A similar condemnation is made by the Japanese and the Mexican Reporters. See S. Ofiate, supra note 3, at 11-13; C. Suzuki, supra note 3, at 15. See also T. Kojima, supra note 1, at 1-2 et passim.
248. See section IC supra.
Indeed, the attorney general is at the same time "the official representative of the Crown in litigation and the representative of public interest." In this latter capacity, he is entitled to bring suit "whenever the law has been broken, whether by a public or a private body or person."

It may be because this broad role of the attorney general has remained merely theoretical that England and some other common-law countries have relied on an institution with great potential for representing the public interest in civil litigation. This institution—quite vital, for instance, in Australia—is the relator action. Through this action, an individual who himself lacks standing to bring suit in the public interest can do so in the name and with the fiat of the Attorney General:

In English law questions of title to sue in actions of public concern are obviated when proceedings are brought in the name of the Attorney-General on the relation of a member of the public, who need satisfy only the Attorney-General that he has a real grievance. This procedure has been much used to review the legality of local authority activities; to secure relief in cases of infringement of a public right, e.g. public nuisance; and to secure the proper administration of public and charitable trusts.

251. See id. See also id. at 11-12. Jacob indicates that a narrower view prevails in England. I. Jacob, supra note 65, at 22-23. But see id. at 49-53, 67-69. Jacob expresses the opinion that "the right of intervention by the Attorney-General . . . in civil proceedings either as a party or as amicus curiae should be greatly extended to all cases in which there is or may be an element of public interest involved." Id. at 94.

252. G. Taylor, supra note 151, at 2. See also I. Jacob, supra note 63, at 20-21.

253. G. Taylor, supra note 151, at 19.

254. See id. at 7-8 and the interesting examples mentioned therein.

The institution does not exist in Scotland. See Scottish Law Commission, supra note 142, at 48; J. Thomson, supra note 142, at 4 & n.17. It exists, but is very rarely used, in Kenya. See J. Spry, supra note 151, at 1-2. As for India, Advocate General Singhvi informs us that section 91 of the 1908 Indian Code of Civil Procedure—which allows civil actions concerning public nuisances to be brought by either the Advocates General (the attorneys general for the Indian states) or by relators acting with the Advocate General's written consent—"has . . . tended to fall into desuetude because . . . the Advocates-General do not have any investigating staff of their own and generally do not have either the time or the motivation to commence action under Section 91." Furthermore, "the relators often find the procedure slow, cumbersome and ineffec
tual." L. Singhvi, supra note 152, at 4. No more effective is section 92 of the Indian Code, which provides for suits to be brought by the Advocates General or relators in matters involving charitable or religious trusts. See id. at 6-7.

255. However, if such grievance consists of the violation of the suitor's own rights, he has standing to sue for his own personal interest, rather than in the public interest and in the name of the Attorney General, and thus does not need the Attorney General's fiat. See G. Taylor, supra note 151, at 7-8. See also S. De Smith, supra note 249, at 387 ("the relator need not show any personal interest in the subject-matter of the suit, for the proceedings [are] the Attorney-General's"). 401 ("it is immaterial that the relator may have no personal interest in the proceedings beyond that of any member of the public"). 401-03.

256. Scottish Law Commission, supra note 142, at 48.
A private citizen generally does not have standing to sue to protect the public from illegal activity.257 The Attorney General, however, has such standing because he represents the Crown in its role as parens patriae.258 This power of the Attorney General, originally developed in equity, was for a long time restricted to public nuisance cases.259 It is now exercised to restrain illegal conduct in a wide range of situations of great concern,260 either by the Attorney General himself or, much more frequently, by private citizens in relator actions.261 For example, suits for injunctions can be brought to restrain land developers who have not obtained the requisite permission from the local planning authority.262 More generally, conduct injurious to the public welfare can be restrained,263 and “[p]rohibitions and restrictions [can be obtained] directed towards public health and comfort and the orderly arrangement of municipal areas . . .”.264 The relief, of course, must “benefit . . . the public or at least a section of the public,”265 and not only particular individuals.

As we already mentioned, the private plaintiff must obtain the fiat, or consent, of the Attorney General before he can institute a relator action. The granting or withholding of consent is discretionary.266 Although this discretionary power presents the danger that the Attorney General, “being a politician,” may deny his permission for political or partisan reasons,267 it may avoid the corresponding danger of having frivolous suits brought in the name of the Attorney

257. See S. De Smither, supra note 249, at 401, 405, 407-10.
258. Id. at 401-02.
259. In addition, his power covered cases concerning marriage, incompetents, charities, and public trusts, that is, the traditional areas of concern for the sovereign as "parens patriae." See S. De Smither, supra note 249, at 385-87, 402. Cf. I. Jacob, supra note 63, at 22; G. Taylor, supra note 151, at 20. Once more, the similarity to the civil-law world is apparent. See sections IA!, 2 supra.
260. See S. De Smither, supra note 249, at 403.
261. See id. at 387, 400-01, 406. "[A]ctions begun by the Attorney-General in the public interest . . . are rare except in cases where the Attorney-General allows an action to be brought in his name by an individual who is personally interested." Jolowicz, supra note 169, at 182. See also I. Jacob, supra note 63, at 50: "[I]n practice the Attorney-General seldom acts ex officio and he more generally acts on the complaint, or as it is said, on the relation of a person or body interested."
262. Cf. S. De Smither, supra note 249, at 404.
263. See id. at 404-05.
264. G. Taylor, supra note 151, at 12, quoting Cooney v. Ku-Ring-Gai Corp., 114 Commw. L.R. 582, 603 (1963) (Monzie, J.). Other examples include a ratepayer suing as relator against the building of a new town hall without compliance with the relevant statute, and a riparian landowner suing as relator against diversion of water from a river. See id. at 8.
265. Id. at 12. See S. De Smither, supra note 249, at 404.
266. Cf. S. De Smither, supra note 249, at 401; I. Jacob, supra note 63, at 50-51.
267. See G. Taylor, supra note 151, at 7, 20.
General.\textsuperscript{268} Nor is this latter hazard merely a remote possibility. One Australian judge went so far as to speak of his “apprehension” concerning “the invasion of the civil courts by bands of self-appointed moral vigilantes using the name of the Attorney-General.”\textsuperscript{269} The danger of political abuse in turn is avoided in those jurisdictions where the granting of the fiat is almost automatic if a reasonable case is presented.\textsuperscript{270}

Even though relator actions are almost invariably prosecuted entirely by the private plaintiff, the Attorney General retains control over the whole proceeding.\textsuperscript{271} The relator is, and remains, “merely a representative member of the public,” whereas the Attorney General is “the legal representative of the public.”\textsuperscript{272} In Dr. Taylor’s words:

> The Attorney-General’s interest in the case does not end with the issuing of his fiat. He maintains theoretical control of the action throughout . . . . Thus, he can at any time decide to take over the conduct of the case from the relator’s lawyers . . . . This scarcely ever happens.\textsuperscript{273} All further pleadings in the case are delivered to him and his approval must be sought for amendments to the statement of claim upon which he issued his fiat. Finally, his approval must be obtained for any settlement of the action out of court.\textsuperscript{274}

A most interesting aspect of relator actions is the combination of private initiative and governmental control. It seems fair to conclude that this institution is potentially a very important instrument in assuring judicial protection of public and group interests in the common-law world.\textsuperscript{275} Indeed, the hypothesis can be ventured that

\textsuperscript{268} See, e.g., id. at 7.

\textsuperscript{269} Attorney-General v. Huber, 2 S.A.S.R. 142, 165 (F.C. 1971) (Bray, C.J.), quoted in id. at 11.

\textsuperscript{270} G. Taylor, supra note 151, at 7.

\textsuperscript{271} If there is an arguable point of substance, then that is enough. In Victoria it is not the practice for the Attorney-General to concern himself with whether he wants the plaintiff to win for political or other reasons. However, in other jurisdictions this practice has not been adopted. There will obviously be political issues canvassed under the umbrella of a relator action, but, since this is often the only way in which many actions can be brought before the courts it is undesirable that the Attorney-General should concern himself with more than the existence of an arguable point of substance.

\textsuperscript{272} G. Taylor, supra note 151, at 7.

\textsuperscript{273} The same is true in England. See I. Jacob, supra note 65, at 401.

\textsuperscript{274} G. Taylor, supra note 151, at 8. See also S. De Smith, supra note 249, at 401.

\textsuperscript{275} Provided, of course, that the “suspicion about the Attorney-General’s impartiality and that the process of obtaining a fiat is too cumbersome or expensive,” raised by Taylor at the close of his excellent report, proves unfounded. G. Taylor, supra note 151, at 20. As for expense, the suspicion seems well-grounded, at least in England. S. De Smith, supra note 249, at 401, informs us that “[o]riginally the main function of the relator was to pay the costs if the actions . . . were dismissed. This
it is, in part, because of the lack (or nonuse) of relator actions in the United States that there has been in that country a tremendous growth of class and public-interest actions in recent times, whereas this phenomenon is unknown elsewhere.

2. Class and Public Interest Actions in the United States and Other Common-Law Countries

Whereas relator actions still require the intervention, by fiat, of the governmental attorney general, class and public-interest actions allow a private suitor, in his capacity as a member of the public at large or a smaller class, to sue as a "private attorney general" in the interest of the public or the class. No governmental consent is required, except in so far as the court may have discretion in determining whether the suit is maintainable as a class action.

Developments concerning class and public-interest actions, especially important in the United States, are too complex and too

is still one of his functions, for although the Crown has been generally liable since 1933 for costs in civil proceedings to which it is a party, the definition of civil proceedings for this purpose excludes relator actions." See also I. Jacob, supra note 63, at 52 & n.120.

276. Only a few references to the relator action may be found in the American cases, and most American treatises do not even mention it. Corpus Juris Secundum, for example, which usually contains a plethora of citations, refers to only two state court decisions involving relator actions, the more recent being a California case, Brown v. Memorial Natl. Home Foundation, 329 F.2d 118, 162 Cal. App. 2d 513 (1968), cert. denied, 358 U.S. 943 (1959). See 76 C.J.S. Registration of Land Titles 625 n.21 (Supp. 1974). It seems fair to say that even in those American jurisdictions where the action is not entirely unknown, its use is extremely rare.

277. Taylor writes that "[t]he Australian system is based upon the proposition that an individual can sue only for wrongs done to him personally. It follows from this that an individual cannot sue where the wrong done is not to him but to the public at large." G. Taylor, supra note 151, at 18. The above proposition, however, can stand "only because the Attorney-General will always have standing to vindicate the public interest. Should it happen that the Attorney-General in a jurisdiction persistently refuses to act [either directly or through relator suitors], it could be that a merely nominal interest would be permitted to the plaintiff citizen." Id. at 14. See also note 285 infra and accompanying text.

278. For the source of this terminology, see note 165 supra and accompanying text.

279. Although representative or class actions are of much greater frequency and importance in the United States, they are also well-known in England. See I. Jacob, supra note 63, at 77-80. However, Master Jacob recognizes that class actions are rarely used in England, id. at 78-79, and takes a position in favor of a great expansion of the present modest scope of class actions in that country. Id. at 94. The same is true for a number of other countries, including Canada, see, e.g., Kazanjian, Class Actions in Canada, 11 Oscocee Hall L.J. 397 (1973); Australia, see G. Taylor, Defense of the Public Interest in Civil Litigation 38-39 (unpublished memorandum prepared upon commission by the Australian Attorney General in answer to a request concerning new legislation); India, see L. Singhvi, supra note 152, at 14-15; Ghana, see N. Ollenu, supra note 219, at 1; and Kenya. See J. Spry, supra note 151, at 2. Class actions are not used, however, outside the common-law systems or systems influenced by the common law. M. CAPPELLI T & J. FERULLO, supra note 35, at 124-25 (Italy); N.
much in flux to be summarized here. Suffice it to note that, even

TROCKER, PROCESSO CIVILE E COSTITUZIONE, PROBLEMI DI DIRITTO TEBERCO E ITALIANO
437-38 (1974) (Milano, Giuffré) (Germany); T. Kojima, supra note 1, at 16 (Japan); H. Köt, supra note 1, at 21-28 (Germany); W. Kralik, Supplement to Austrian Report 1 (Austria); S. Ofiate, supra note 8, at 11-12 (Latin America); Kazanjian, supra, at 397 n.1. (Canada). Kojima informs us, however, that the introduction of the "American device" in Japan "is strongly advocated by several scholars." T. Kojima, supra, at 16, 18-23. For a discussion of some reasons for this difference between the common law and other legal systems, see note 380 infra and accompanying text.

280. There are at least two elements shared in common by class and public-interest actions: "Both present to the Court issues which are larger than the individual interest of the litigant who appears in court; and both seek to assure a just resolution of the controversy by genuine adverseness and adequate protection of the interests represented." Homburger, supra note 1, at 397. On the other hand, there are also basic differences between the two. Inter alia: (1) "Public interest actions are concerned with the implementation and enforcement of rights vested in the general public or a segment of it"; usually, although not always, "they challenge an alleged unconstitutional or illegal exercise of power by the political branches of the government." Id. On the other hand, "[m]any class actions owe their 'public' character not to the subject matter of the litigation, which may be strictly private, but to the mass effect of the judgment and the impracticability of maintaining separate actions." Id. Moreover, (2) "[c]lass actions proceed on the theory, or . . . fiction, that all persons affected by the litigation are before the court, either in person or by representation," even if "the class representatives are self-chosen or, in defendants' classes, chosen by plaintiff." Thus, it is required in class actions that the parties present in court adequately represent the class, that their claims "typify those of all members of the class," and that there are no "practicable alternatives for mass litigation." Hence, a decision for or against the class representatives binds all members of the class so far as the class has been adequately notified and represented. On the other hand, the public-interest plaintiff "does not purport to represent any particular individual," but "acts as a spokesman for the public at large or a segment of it." And no problems of notice or res judicata arise, for, "[i]f plaintiff succeeds, the benefit of the judgment accrues automatically to the general public through injunctive, declaratory or other relief, restraining or invalidating the governmental action"; whereas "if the government prevails, . . . stare decisis rather than res judicata should discourage a renewed attack by another public interest plaintiff." Id. at 387-88. To oversimplify: The thrust behind the growth of class actions is a liberal conception of representation, whereas the thrust behind the growth of public-interest actions is an unprecedented loosening of the requirement of locus standi (which combines, grosso modo, the civilian notions of legitimatio ad causem or qualité and causa petendi or intérdit). Cf. N. Havranek, supra note 1, at 6-7. The policy underlying the first phenomenon is to give otherwise unprotected group interests access to justice, whereas underlying the second is the policy of favoring "effective citizen participation in guarding the public against illegal exercise of governmental power." Homburger, supra, at 389. (For a telling example of public-interest actions sanctioned by legislation, see note 226 supra.) Of exceptional interest is a recent congressional committee study "intended to fulfill the need for reliable quantitative data on class actions so that the Congress will be able to make an informed decision on the merits of the many arguments surrounding them." Senate Comm. on Commerce, 93d Cong., 2d Sess. Class Action Study, 3 (Comm. Print 1974) [hereinafter Class Action Study].

In addition to class and public-interest suits, Professor Homburger also discusses shareholders' derivative actions as a third type of "private litigation in the public interest." Homburger, supra, at 379-85. Stormily contested only 30 or 40 years ago—no less than class and public-interest actions have been in the last 10 years or so—shareholders' derivative actions are today "firmly entrenched in the American system." Id. at 381, 405. Even in England, where class actions are rare, "the minority shareholders' action (sometimes called the derivative shareholders' action)" is "quite common or frequent." I. Jacob, supra note 65, at 79. These actions are based on the equitable idea that every shareholder is allowed "to establish himself as representative
though these important, if controversial, actions have historical antecedents in English law,\(^{281}\) they represent a marked deviation from principles longstanding in the law of procedure of most nations—within and without the common-law world.

These principles foreclose access to the courts to persons, natural and legal, who do not hold a personal interest in the case or who do not sue for the protection of their own rights.\(^{282}\) "The general of the corporation" in the enforcement of "substantive rights of [the] corporation against its own management and others," if "the regular corporate functionaries do not act, usually because they themselves are the wrongdoers or because the majority in control of the corporate affairs does not want them to act." Homburger, supra, at 379. Not infrequently, derivative actions proceed in the form of class actions, but, unlike class actions, "there is no requirement in a derivative suit that the shareholders be too numerous to be joined." Id. at 380. The "public interest aspects" of derivative actions are apparent. In Homburger's pregnant description, apart from much needed protection of the rights of large groups of small investors, the interests of consumers, corporate employees and creditors and the economic well-being of the nation demand sound corporate management. The trend toward corporate control of the national economy, the progressive separation of corporate ownership from corporate control and the enlargement of powers wielded by management accentuate the public importance of a remedy designed to hold corporate fiduciaries accountable for their conduct.

Id. at 380-81.

It may be interesting to contrast this American development with the backward situation in a country such as Italy. The 1942 Codice civile requires a majority vote at a shareholders' meeting before a civil liability action can be brought against the corporation's administrators (article 2393); and only in case of "serious irregularities" on the part of the administrators may either shareholders representing no less than one tenth of the corporation's capital, or the Ministère public, see text at note 95 supra, file a complaint with the court. This complaint may or may not bring about the commencement of a civil proceeding against the administrators (article 2409). See M. CAPPELLETTI & J. PERILLO, supra note 38, at 125. The situation in Germany is no better. See Aktiengesetz § 147 (1965); B. CROSFIELD, AKTIENGESELLSCHAFT, UNTERNEHMENSKONZENTRATION UND KLEINAKTIONÄR 208, 220-22, 238-310 (1968) (Tübingen, Mohr) (including a detailed comparison with American derivative suits); H. Kötz, supra note 1, at 24-25.

281. Class actions were known to English Chancery practice as far back as the 17th century. Professor Chafee called them an "off-shoot" of the broad and flexible equity rule which required the joinder of all persons materially interested in the subject of the litigation. Representation of a class by one or more of its members implemented that rule when actual joinder was impracticable and also unnecessary because of the similarity of the claims or defenses involved. Homburger, supra note 1, at 347. See also I. Jacob, supra note 63, at 77; Kazanjian, supra note 279, at 399-418. As for the history of public-interest actions, see Homburger, supra, at 389-90, and references therein.

282. Not a few civilian codes expressly forbid the maintenance of a suit for the protection of third persons' rights, unless otherwise allowed by statute (a very rare case). See, e.g., C. Pro. Civ. art. 81 (Italy). In Germany, however, with certain limitations, judicial interpretation has allowed the so-called gewillkürte Prozesstandschaft, that is, the power of the holder of a substantive right to assign to a third person the right to bring a civil suit on the former's behalf. This makes it possible, for instance, for all of the members of an association (whether incorporated or not) to assign to the association the right to sue on behalf of their interests. See a comparative discussion in N. TROCKER, supra note 279, at 200-04, 708-09. See also H. Kötz, supra note 1, at 26 & n.50. A similar possibility, while still denied by the Italian courts, see N. TROCKER, supra, at 201-02, exists in Japan. See T. Kojima, supra note 1, at 11, 21. Such a possibility is foreclosed not only in Italy, but also, for example, in France.
principle of justiciability in court actions is that the parties must have an interest in the proceedings. Moot questions and the intervention of busybodies are to be discouraged. This applies equally where the interests of the public at large are infringed. . . . [Only] . . . the Attorney-General will always have standing to vindicate the public interest. 283 Under these longstanding principles, a person can sue only for wrongs done to him personally. If a person is injured by conduct that also affects the public, he lacks standing to sue unless he can show "some special right . . . over and above rights enjoyed by the public in general or by all members of a particular class to which he (the plaintiff) belongs." 284 As Dr. Taylor has noted, "[t]he traditional approach that the Attorney-General can act for the public hampers any advance away from [these] long-standing rules." 285

The struggle between the maintenance of these traditional rules and the growth of class and public-interest actions reflects perhaps the most heated ideological struggle of our century—between solitary individualism and laissez-faire, on the one hand, and a social conception of the law, the economy, and the state's role, on the other. Ideo-

283. G. Taylor, supra note 151, at 14. The author illustrates this point with an actual court decision that held that the mere fact that the plaintiff was a consumer did not give him standing to attack an agreement on sugar between the State of Queensland and the Commonwealth government. Thus, even though the agreement in fact substantially increased the cost of sugar to the plaintiff "and other consumers in Australia," it affected "the public generally and the plaintiff has no interest in the subject matter beyond that of any other member of the public: he has no private or special interest in it." The court concluded that "great evils would arise if every member of the Commonwealth could attack the validity of the acts of the Commonwealth whenever he thought fit; and it is clear in law that the right of an individual to bring such an action does not exist unless he establishes that he is 'more particularly affected than other people.'" Id., at 15-16, quoting Anderson v. Commonwealth, 47 Commw. L.R. 50, 51-52 (1992) (emphasis added).

284. Id. at 18.

285. Id. Dr. Taylor admits, however, that in Australia liberal granting of the Attorney General's fiat in relator actions—to "every individual who has a point of substance to argue"—makes such an "advance" less urgent. Id. at 18-19.
logical struggles, of course, tend to become loaded with value judgments. Class and public-interest suitors—the “ideological plaintiffs”—are labeled by some as sheer “busybodies” or even “bands of self-appointed vigilantes,” whereas others view them as the true champions of the common cause.

Apart from personal preferences, what matters here is the lesson to be derived from comparative analysis. The conclusion seems inescapable that, in our mass production, mass consumption, and mass urbanization society, the days of civil litigation as a merely two-man battle are numbered. In Justice Douglas’ strong words:

I agree . . . that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem de minimis but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility or a homeowner whose assessment is slowly rising beyond his ability to pay.

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

Clearly, then, the ideological plaintiff reflects a vital need of our age of mass interests and group action. While his emergence may possibly be delayed and hindered, he cannot long be kept from the forefront of civil litigation.

B. The Organizational “Private Attorney General”

If private “ideological plaintiffs” cannot associate and fight as an organized group, even the liberal grant of standing to such individuals may prove to be an insufficient solution to the problem of hav-

286. See text at note 269 supra.
287. Homburger, supra note 1, at 360-61.
289. See, e.g., T. Kojima, supra note 1, at 9.
ing meta-individual interests adequately represented. Union creates strength. For example, only when individual workers starting in the second half of the last century could associate into effective, powerful unions was a relatively even balance reached in the class struggle for labor rights. Similarly, only when individual consumers or small savers associate will they have effective protection against production, marketing, and banking abuses. The same is true for other basic needs of modern societies; everyone knows, for instance, of the impact of civil rights associations in the United States, especially during the glorious years of the Warren Court.

Kalven and Rosenfield described this development with deep insight a long time ago:

The employee who is entitled to time and a half for overtime, the stockholder who has been misled by a false statement in a prospectus, the rate-payer who has been charged an excessive rate, the depositor in a closed bank, the taxpayer who resists an illegal assessment, or the small business man who has been the victim of a monopoly . . . finds himself inadvertently holding a small stake in a large controversy. The type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims . . .

Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement . . . This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.

The problem of fashioning an effective and inclusive group remedy is thus a major one. 200

I have used the term “organizational private attorney general” to denote a private (nongovernmental) organization that represents public or collective interests. Such organizations are but another aspect of the “private attorney general” discussed above in its individual form. Indeed, the class plaintiff—perhaps the most typical example of the private attorney general—frequently has been a private association or group, not a single individual or an aggregate of

nonorganized individuals; and the same is true for both the relator and the public-interest plaintiff. The importance of the associative element in this area is so great as to deserve separate treatment.

1. *In the Western World*

Krings, having admitted that the Ministère public is not a suitable representative of collective interests in civil litigation, suggests that “we should leave these matters to the appraisal and the initiative of the groups that have formed, and are forming, themselves for this purpose.” Indeed, in many nations representation of collective interests by social organizations has been a growing phenomenon for a number of years.

At least in Continental Europe, the traditional approach, which stems from the Enlightenment and the French Revolution, was one of blunt exclusion; this approach still prevails in many court decisions and the more traditionally oriented doctrine. Professor Habscheid describes (and approves) the approach as follows:

[T]he Ministère public is . . . the only guardian of public interests. Since civil litigation is considered the private affair of the parties,

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291. See some of the typical examples of relater actions given by G. Taylor, supra note 151, at 8.
292. See, e.g., the cases mentioned by Homburger, supra note 1, at 393 & nn.230-32.
293. “It is necessary that the Ministère public . . . give impartial opinions and that he be able to keep a distance from so-called collective interests, which in fact might represent only one part of the ‘collectivity.’” Krings, supra note 4, at 166.
294. Id. The author continues by saying that, if a suit is brought by such organizations, it might be possible for the Ministère public “to take a position free from every partisan interest.” But the “initiative” should not be his. Id.

Contrary to Professor Krings’ proposal (quoted in the text) is that of the Uruguayan Reporter. E. Vescovi, supra note 20, at 4-5. Professor Vescovi’s thesis is that all public and collective interests should be represented in court by the Ministerio público or similar governmental institutions, rather than by social groups, because the interests of such groups do not necessarily coincide, and may even conflict, with the general societal interest. He therefore proposes that the intervention and initiating powers of the Ministère public be increased and the Parquet’s organization correspondingly strengthened. Also, he approvingly describes the solution of socialist nations, which confers broad powers upon the Prokuratura (while also leaving ample openings to social organizations, see section IIB2 infra). There is, of course, a core of truth in Professor Vescovi’s position, since the danger that the general interests might be misrepresented by sectorial groups is very real. Opening the doors of judicial (or even legislative and administrative) proceedings to so-called public-interest groups is risky if no adequate controls are available to check abuses detrimental to either the individual or the public interests, or both. On the other hand, it seems that there are two weaknesses in Professor Vescovi’s thesis. First, increasing the Ministère public’s powers is itself a very risky development, because it carries the dangers inherent in an unwieldy, potentially oppressive, bureaucratic machinery. Second, the real problem is choosing between dynamic pluralism and an institution, like the Ministère public, that may not be sensitive enough to problems that, although affecting substantial social groups, are not “public” in the absolute sense of belonging
other official or quasi-official institutions are not allowed. This is true also for any kind of social group. We trust completely the judge who, in enforcing the laws, will guarantee that the public interest recognized by the legal order is respected. Other interests of the state or of society can never be protected by courts.\footnote{Habscheid, \textit{supra} note 20, at 176.}

This rigidly individualistic position was perfectly acceptable one and a half centuries ago. In fact, the French Revolution represented the victory of both the private citizen and the unitary state against all those “intermediate societies” that, under the \textit{ancien régime}, constituted the very structure of feudalism. As forcefully described by Max Rheinstein:

Pre-industrial societies have been composed of groups rather than individuals. The state was an aggregate not so much of individuals as of clans or “houses” . . . . When in Europe the modern state developed out of the once universal system of feudalism, the monarchs were rulers over groupments of seigneuries, towns, guilds, and above all, families.

With eighteenth century Enlightenment the individualizing view of society began to be preponderant. In the French Revolution the new ideology became official. The nation was to be \textit{une et indivisible}. The state was now clearly conceived to be composed of individual citizens. The intermediate groups of manor, guild, estate, province were swept away; the municipalities were made subdivisions of the state government. [Only] one group, intermediate between the state and its individual citizens was left intact: the family.\footnote{Rheinstein, \textit{The Family and the Law}, in \textit{4 International Encyclopedia of Comparative Law} 3, 15 (A. Chloros ed. 1974) (Tübingen/The Hague, Mohr/Mouton).}

This solitary dualism—the individual citizen and the state—was soon to reveal its own dangers, however. Intermediate societies, even if susceptible to degeneration (as indeed occurred under the \textit{ancien régime}), might prove to be powerful instruments for checking and balancing excesses of both oppressive statism and atomistic individualism. Faced by a dictatorial government, the lone individual is powerless; correspondingly, faced by myriads of unorganized individuals, a government can hardly maintain a democratic rule of law, let alone implement economic and social-welfare programs. Many a country in Continental Europe and other areas of the civil-law world
has learned these two sad lessons. Indeed, sudden and painful shifts from dictatorial to powerless regimes (and vice versa) have characterized for numerous decades the political history of many heirs of the great bourgeois Revolution. The lack of strong, organized, democratic "intermediate societies" has undoubtedly been a factor in those tragic events. Thus, a gradual reemergence of new *corps intermédiaires* was, and still is, both inevitable and desirable.

This phenomenon, hardly discernible until the second half of the last century, has reached major dimensions in post-World War II Continental Europe. The trade unions were, of course, among the first powerful "intermediate societies" to emerge in the new industrial state. Once again, the isolated individual strived to unite—to "break his chains"—and thus to build up his power. The nineteenth-century "liberal" and "laissez-faire" state reacted in varied manners to this "return to the past." The labor movement was, at times, ignored, condemned, or absorbed. Only more recently has the "social state" or "sozialer Rechtsstaat" recognized both the existence and the autonomy of that movement. Thus, a pluralistic ideal was affirmed over both the pure dualism (state/individual) of the liberal state and the monistic statism of the liberal state's degeneration—fascism.

A similar discourse could be repeated for political parties and other societal organizations. Very recently, however, other "intermediate societies" have begun to emerge. New "classes" of "weak" individuals—such as racial and religious minorities, the poor, consumers, environmentalists—have begun to unite in order to protect themselves against the actual or potential oppressors of our time: not only the state and its departments, but also corporate power and the blind tyranny of majorities.

To follow the landmark steps of this development as they are reflected in the law of civil procedure of the various countries would be a most fascinating task. I will refer only to a few developments in France, Germany, and Italy, recognizing that a basic trend is fol-

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297. In France, for instance, it was not until 1884 that the legality of trade unions was clearly established. Statute of March 21-22, 1884, [1884] D.P. IV 129. See H. Solus & R. Perrot, *supra* note 204, at 223.

298. Condemnation and absorption went hand in hand under the Fascist regime, which forbade autonomous labor unions and "governmentalized" official labor unions—thus integrating these into the regime's monistic ideology. See, e.g., F. Rescigno, *Persona e Comunità* 23 & n.26 (1966) (Bologna, Mulino).

owed by many of the Continental countries even though numerous differences exist among them.300

The first step was to attribute a “legal personality” to partnerships, professional associations, and like entities. While their personality was, of course, a legal fiction, the fiction nonetheless preserved the principle that only individual “persons”—natural or legal—can participate in the legal and judicial process.

Two major problems, however, arose: (1) when nonrecognized, unincorporated, de facto partnerships, associations, and other groups, wanted to participate, and (2) when organizations, incorporated or not, sought access to the courts not merely to protect themselves against “personal and direct” prejudice affecting “their own rights and legitimate interests,”301 but rather to protect either the individual rights of their members302 or the “collective interests” of a class or group that the organization purported to represent.303

Germany provides an interesting demonstration of the gradual evolution in Europe of a response to the first problem.304 Full denial of “procedural capacity” to an unincorporated association, albeit perfectly consistent with the rigorous logic of “legal nonexistence” of de facto entities, proved to be an easy way for such an entity to escape liability—clearly an undesirable result. Hence, the law’s first step was


301. For instance, an association (perhaps a political party) might claim damages for the destruction or pillage of its premises by political adversaries. See H. SOLIS & R. PERROT, supra note 204, at 219; Perrot, supra note 300, at 100.

302. See note 282 supra.

303. An example would be an association of doctors, claiming to represent the general interests of the medical profession, that brings suit against persons abusively exercising that profession. See H. SOLIS & R. PERROT, supra note 204, at 220; Perrot, supra note 300, at 100.

304. As for France, where the situation reveals not a few similarities to that in Germany, see, for example, A. De Vita, supra note 1, at 24-25, 30-33, and references therein. In Italy, an important development occurred with the Codice civile of 1942. Articles 36, 41, 1131, 2266, and 2297-98 of that Code as well as article 75, paragraph 4, of the 1942 Code of Civil Procedure, have granted full procedural capacity to associations, committees, condominiums, and partnerships, even though devoid of legal personality. See M. CAPPELETTO & J. PERILLO, supra note 38, at 121-22. The situation in Japan is similar to that in Italy. Article 46 of the Japanese Code of Civil Procedure grants capacity to sue and be sued to unincorporated associations. See T. Kojima, supra note 1, at 22.
to affirm the association’s liability, allowing the holders of rights against the association to sue it. This situation was (and still is) called “halbe Prozessfähigkeit” (“half procedural capacity”), because the association can be a defendant, but not a plaintiff. To be sure, the logic underlying this ambiguous status is not very strong, and even less satisfying have been some of its practical results. Indeed, one interesting chapter in the history of modern German law is the gradual attenuation—even based, most recently, on constitutional grounds—of the doctrine of the halbe Prozessfähigkeit.

As for the second problem, I shall mention only three representative developments in France and one in Italy.

In 1913, the French Cour de cassation, in a landmark decision of its Chambres réunies, put an end to a long controversy concerning the capacity of the syndicat professionnel to act in court as the representative of the “collective interest of the association.” This capacity was allowed by the Court, a result later confirmed by statute. A large breach was thus opened in the longstanding principle that one can sue only to protect “his own” rights and legitimate inter-

305. ZPO § 50 II.

306. One aspect of this development is briefly examined in note 282 supra. Another is a judicial evolution in recent years that Professor Habscheid defines as “a judicial construction contra legem.” W. Habscheid, Supplement to German Report 2-3 (n.d.). The Federal Court of Germany has recognized that labor unions and political parties have full procedural capacity (that is, to sue, as well as to be sued). Thus, the Court has treated them as if they were legal persons even though they are unincorporated, and therefore lack “legal personality.” It should be noted, however, that this judicial evolution did not deviate from the “Hohfeldian” doctrine, see notes 315-16 infra, that suit can be brought only for the protection of the plaintiff’s own and personal rights. W. Habscheid, supra, at 3.


308. Trade unions and employers’ organizations are included in this term. Moreover, much of what is said in the text concerning “syndicats professionnels” also applies to “ordres professionnels,” that is, the associations of all of the members of certain professions or arts (for instance, the bar association). The reasoning is that because membership in the “ordres professionnels” (which have legal personality) is obligatory, they are deemed sufficiently representative of the collective interest of the profession—indeed, “they are one and the same thing as the profession”—to merit standing to protect that interest even in the absence of specific legislation. For example, the bar association may bring suit for damages against defamation of the lawyers’ profession. H. SOLUS & R. PERROT, supra note 204, at 239-41; Perrot, supra note 300, at 105.

309. C. TRAVAIL, liv. III, art. 11. (“[Unions] can, before every court, exercise all the rights belonging to a partie civile concerning situations that involve a violation, whether direct or indirect, of the collective interest of the profession they represent.”) See H. SOLUS & R. PERROT, supra note 204, at 226; A. De Vita, supra note 1, at 15-23 (detailed analysis).
ests against "direct and personal" prejudice. Today, for example, actions are frequently brought by labor unions to enforce labor legislation providing for such matters as weekly rest, paid vacation, and minimum salary.310

In a series of decisions that can be traced to arrêts of July 23, 1918, and November 25, 1929,311 the Cour de cassation has affirmed the standing of associations de défense, that is, associations formed for the very purpose of more effectively defending a common interest of their members. One way to fulfill that purpose is to exercise collectively a right of action belonging to each member individually.312

The French "loi Royer" of 1973 opened new possibilities for consumer associations to sue in cases of "direct or indirect prejudice to the collective interest of consumers."313 The same loi also created a series of checks to prevent abuse of this power. In particular, general requirements are to be established by executive decree to assure that consumer associations adequately represent, on the national or local level, the groups in whose behalf they purport to act. Interestingly, the Ministère public must give his advice on whether those requirements are met in the particular case—a new, ingenious example of simultaneously adopting both the private (organizational) and the official (governmental) "attorney general" solutions to come to grips with a vital problem of our time.314

Abandoning, in part, a strictly "Hohfeldian"315 doctrine affirmed by a long line of precedents,316 the Italian Consiglio di Stato (the su-

311. See H. Solus & R. Perrot, supra note 204, at 236 n.l; A. De Vita, supra note 1, at 35; Perrot, supra note 300, at 104.
312. For example, the inhabitants of a village may form a league to oppose the installation of a factory that would pollute the air in their vicinity; or a group of electricity users may associate to fight certain abuses.
Another noteworthy step in the same line of development is the loi of July 1, 1972. By this loi, every association "that has been duly registered at least five years before the time of the facts," and whose statutory objective is to fight racism, has standing to bring an action civile, see note 294 supra, in criminal proceedings concerning racial defamation. See N. Havranek, supra note 1, at 7 & n.14; P. Thery, supra, at 22-23.
314. Other examples also have been encountered in this article. See, e.g., note 245 supra and accompanying text.
315. See Jaffe, supra note 74, at 1033, where the Hohfeldian plaintiff is defined as one who "is seeking a determination that he has a right, a privilege, an immunity or a power"; in other words, one who seeks judicial protection merely for his own personal rights and legal interests.
316. With some attenuation, see, e.g., note 282 supra, the Hohfeldian doctrine
The supreme administrative court affirmed in 1973 the standing of "Italia Nostra," a private, nationwide association of about 20,000 members, to challenge the lawfulness of a local government's resolution authorizing the construction of a road through a park. The stated purpose of the association is the preservation of Italy's artistic and environmental heritage—clearly a general public interest, and not a "personal" interest "owned" by the association. The clamorous annulment by the Consiglio di Stato of the local government's resolution upon the challenge brought by "Italia Nostra" may well represent a badly needed turning point from a long period of unchecked spoliations of the Italian environment and artistic heritage.

These are but examples of a general and growing trend in much of Western Europe—the supplementation, or integration, of governmental intervention with private initiative in safeguarding emerging collective interests, and the channeling of such initiative into associative forms. Indeed, it seems a fair hypothesis that the expansion in civil-law systems of the procedural capacity of associations may prove, in part, to be an effective substitute for the lack of such devices as relator and class actions in those systems.

Of course, many adaptations are required in Western Europe, and more generally in civil-law countries, to strengthen this trend. A new conception of droit d'action is only one facet of the needed change. As Roger Perrot, a noted French authority, puts it: "In the nineteenth century the theory of the civil action was developed in a

still prevails in the German courts, especially in the administrative courts. See Oberverwaltungsgericht Lüneburg, Decision of Oct. 23, 1969, 23 Neue Juristische Wochenschrift 773 (1970); Verwaltungsgerichtshof Mannheim, Decision of Feb. 23, 1972, 25 Neue Juristische Wochenschrift 1101 (1972). Both decisions denied standing to incorporated environmental associations that challenged administrative resolutions concerning urban planning. The courts held that the associations were not "personally damaged" by those resolutions, since none of "their own rights" were violated. See the discussion in N. Trocker, supra note 1, at B-1 to -3 and references therein. See also H. Kötz, supra note 1, at 35-36. An important departure, but not yet at the supreme (federal) court level, is the "sensational" decision by the Bayerischer Verwaltungsgerichtshof of February 2, 1973. [1973] Bayerische Verwaltungsblätter 211. The Bavarian administrative court granted standing to an incorporated environmental association that requested a court order staying the construction of a hotel; this decision parallels the "Italia Nostra" case discussed in the text. See N. Trocker, supra, at B-4.

318. See A. Nicholson, supra note 1, at 1-9, 29-24.
319. See Cohn, Parties, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 127 (M. Cappelletti ed.) (publication forthcoming).
320. This observation seems to apply also to Japan. Cf. T. Kojima, supra note 1, at 9-16 et passim.
It was normal, therefore, that the growth of groups of every kind, which is the mark of our modern economy, has involved many problems of adaptation.  

Other difficulties are less theoretical. Some are ingrained in the structure and mentality of a career judiciary, which by its nature views with fear, distrust, and even disdain the “politicization” of civil proceedings brought about by their evolution into arenas for collective contests, rather than merely for private disputes. Other difficulties are caused by the very complexity of pluralism. How much easier it was in the good old days when civil proceedings were private affairs, and the judge was a passive umpire; in the rare instance when the public interest was involved in a civil dispute, its representation was entrusted to the sole care of a simple, trustworthy, official body—the Ministère public. Participation by spontaneous groups and associations, of course, raises problems that are not as simple. For instance, once one group incorporates into its charter the goal of protecting a certain interest, and gains standing in court to do so, should other groups be denied standing to represent that same interest? The logic of pluralism obviously would suggest a negative answer; otherwise a judicial monopoly in effect would be granted to the first group, thereby excluding groups that possibly might be more capable of representing the interest. Yet, pluralism may result in the anomalous situation in which two or more subjects “own,” and sue for, the same interest. Moreover, how organized, how large, how “serious,”

321. Perrot, supra note 300, at 106.
322. See H. Kötz, supra note 1, at n.73 (German discussions indicate problem “not insolvable”); A. Nicholson, supra note 1, at 24-26.
323. The problem of the “internal democracy” of intermediate societies—the core of which is to achieve a satisfactory balance between autonomy and a degree of official control (judicial, executive, legislative, and even constitutional and international)—is one of the most challenging, yet least analyzed, issues in modern legal scholarship. Cf. Bettermann, Zur Verbandsklage, 85 ZEITSCHRIFT FUR ZivilPROZESS 133, 137-38 (1972). Also of crucial importance is public (societal) confidence and control. As Professor Kojima ably puts it, “[the strength of organizations] depends upon . . . support from a broad segment of . . . citizens . . . . [Organizations] have to be ‘clean,’ so that from the beginning ethical standards must be established. This is of utmost importance, because public confidence is their major asset.” T. Kojima, supra note 1, at 13-14.
324. A recent decision of the Italian Constitutional Court is noteworthy in this context. Corte costituzionale, Decision No. 54 of March 6, 1974, [1974] Foro. Ital. I. 963, 19 Giur. Cost. 199 (1974). One of the questions raised concerned the constitutionality of article 28 of the important law of May 20, 1970 (No. 300) (“Statuto dei diritti dei lavoratori”). This article grants standing to “the local branches of national labor unions” to bring suit against management for unfair labor practices intended to impede or limit the free exercise of labor unions’ activities, including strikes. The issue was whether the grant of standing only to unions of a national size was a violation of the liberty of association and equal treatment clauses of the Constitution. The Court upheld the challenged statute, holding that it is not unreasonable for the
and how "representative" should a group be before it is granted standing to protect a collective interest? Should legislation determine all of the requirements, thereby avoiding possible arbitrariness and unequal treatment of the various groups? Or should the determination be more flexible, based upon the concrete and unforeseeable circumstances of each case? If the latter solution is chosen, should the determination be made by the judge,326 the administration, or perhaps by someone midway between the two, such as the Ministère public? Also, what about the relief available? Suppose that a group, perhaps an association de défense, recovers a certain amount of damages from a polluting factory. Should the amount be divided among the members of the association? Or among all the unnamed members of the collectivity directly or indirectly represented by the association? Or should more flexible and more practicable solutions be devised—and by whom? There also remains the problem of how to satisfy procedural guarantees if standing, and the effects of decisions, are expanded beyond their traditional confines. Should every member of a certain community be given notice of litigation involving the interests of that community? If not, can the res judicata effect of a judgment nevertheless extend to every member of the community?327

The gravity of these and other problems is undeniable. They cannot be solved by a single new and simple formula; only experience can provide the bases for new solutions—and comparative analysis may act as a catalyst in this process. Suffice it to say that, as difficult as these new problems may be, the trend toward group representation

325. The problem of identifying the "serious" plaintiff is particularly acute once we abandon the traditional rule that standing belongs only to persons directly affected in their own rights. "The court, not being a representative institution, not having initiating powers and not having a staff for the gathering of information, must rely on the parties and their advocates to frame the problem and to present the opposing considerations relevant to its solution." Jaffe, supra note 74, at 1037. Professor Jaffe, however, rightly rejects the argument that this correct premise justifies the maintenance of the traditional limitations on standing. The "ideological" plaintiff, even if he is not suing for the protection of his own rights, may be and usually is no less "serious" and "effective" an advocate of the cause for which he sues than the "traditional plaintiff." Id. at 1037-38. See also H. Kötz, supra note 1, at 35 & n.72.

326. See, e.g., the suggestion of E. Rehender, H. Burgbacher & R. Knieper, supra note 71, at 153-57. A preliminary, summary examination of the merits—similar to that used in Germany for the "constitutional recourse" ("Verfassungsbeschwerde") or for the granting of legal aid—should allow the court to dismiss in limine claims that are manifestly unfounded. See also H. Kötz, supra note 1, at 97 & n.77.

will grow unabated if it is true that (1) governmental intervention proves insufficient, and (2) only by associating can the individual gain the economic and social strength, acquire the technical expertise, and nourish the motivation necessary to undertake the new task. The twentieth century is not a time for solitary Don Quixotes, but for armies of more organized, if less romantic, cavaliers.

To conclude with a glance at the common-law world, it should be noted that England and her legal heirs had a historical development quite different from that discussed at the beginning of this section. Certain excesses of the French bourgeois revolution did not reach the common-law countries. In fact, intermediate groups, tainted on the Continent as vestiges of "feudalism" and the "ancien régime," continued to play a significant role in the common-law systems. State/individual dualism as reflected on the Continent by the profound cleavage between the "public" and the "private"—the first referring only to the state and the second only to isolated individuals—remained largely foreign to those systems. This difference even has linguistic overtones. The word "public" has a different legal connotation in English than the corresponding words generally have in French, German, Spanish, or Italian, a connotation that includes the interests of intermediate groups as well as the general public interest represented by the state.

These historical differences have influenced the development of civil procedure in the common-law countries. I have already men-

328. Litigation brought either by associations or by a large number of plaintiffs "dramatizes the case," increases "publicity and pressure of public opinion," and makes judges "more responsive"; also, "it makes retaliations by the adversary more difficult." T. Kojima, supra note 1, at 9-10.

329. It is not only a matter of idealistic motivation. For instance, the financial prejudice caused to an individual consumer by violations of marketing regulations is often insufficient to encourage him to bring suit; this is not so if multiple claims can be raised jointly. Furthermore, this problem must also be seen from a macroeconomic point of view. The societal benefits derived from small consumer actions individually brought and separately decided are outweighed by the societal costs involved in the time and effort expended by the judges, parties, experts, and witnesses.


332. See Webster's New International Dictionary of the English Language 1836 (5d ed. 1971) ("public" defined to include "a group of people distinguished by common interests or characteristics").

333. It should be noted that certain procedural difficulties encountered on the Continent in attributing procedural capacity to nonrecognized (hence, under jus strictum, nonlegal) entities were easily and satisfactorily solved in the common-law
tioned, for instance, the fact that in these countries, many relator, class, and public-interest actions have been brought not by isolated individuals, but by organized (even if formally unincorporated) groups. These private groups have established themselves as the "chevaliers" of whole classes of unnamed persons institutionally in need of organized, collective defense (and not, like their medieval predecessors, as the "chevaliers" of individuals oppressed by abusive power and injustice—poor or sick persons, women, absentees, or infants).

2. In Socialist Countries

Protection of citizens' rights and respect for legality were not, of course, primary concerns of the Soviet legal system during the Stalinist era. Khrushchev's attempts to change that situation are well-known. In his famous speech at the Twentieth Congress of the Communist Party in 1956, he indicated that high priority was to be given to those concerns. In the following years, he repeatedly indicated that the change should be accomplished, in part, by a transfer of functions from state agencies to social organizations. Stronger evidence could hardly be required of the insufficiency, even in socialist nations, of the monistic, statist approach represented by the Prokuratura and the other governmental agencies encountered above.

A move against excessive bureaucratic centralization was thus unchained. Its reflections in the field of civil procedure are very clear.

334. See text at notes 291-92 supra.
335. See the title of Dr. Graetz's study, supra note 239.
336. In the United States, for instance, the long list of such twentieth-century cavaliers includes, to mention only the most well-known: the National Association for the Advancement of Colored People and the Urban League (which pioneered in the use of litigation to further group interests in the field of racial equality and civil rights); the National Welfare Rights Organization (in the field of poverty); the Sierra Club, the Wilderness Society, and the National Wildlife Federation (in the environmental area); and the Consumers Union, Nader's Public Citizen, and the Consumer Federation of America (in the consumer field). See C. Halpern, supra note 1, at 4-5, 9-10.
340. See sections IB, E supra.
That hesitation, obstacles, and great caution stood in the way of the implementation of that move is equally clear, although we lack precise empirical and statistical data concerning these developments.\footnote{341}

That move, nevertheless continues. Its motto was and is the “participation”\footnote{342} of individuals and social organizations—or, in more ideological terms, “the necessity of drawing the public into the fight to strengthen Socialist legality and order.”\footnote{343} In civil litigation, that motto’s implications are, among others:

1. The reintroduction of a degree of adversariness. Thus, judicial activism and the role of the Prokuratura should supplement, but not wholly displace, party initiative. As was repeated again and again at the latest Congress of the civil proceduralists of the Soviet Union and the Eastern European nations,\footnote{344} the parties should not be in a status of “procedural incompetency.”

2. Allowing third (private) parties and unofficial organizations either to commence proceedings on behalf of others or, at least, to participate in amicus curiae capacities.

Sweeping legislative reform has taken place in the Soviet Union and the People’s Democracies, especially since 1962. Most of the new codes include interesting innovations concerning these two points. I shall touch upon the second point, which more directly concerns us here.

Section 30 of the 1962 Principles of Civil Procedure of the Soviet Union and the Union Republics provides that:

In the cases provided by law claims may be brought by State administrative bodies, trade unions, State institutions, enterprises, collective farms, and other co-operative and public organizations or private citizens in defence of the rights and legally protected interests of other persons.

State administrative bodies in the cases provided by law may be

\footnote{341. See notes 347, 353 infra.}
\footnote{342. An entire issue of Droit Polonais Contemporain, published by the Polish Academy of Sciences, is dedicated to “participation.” See 17/18 Droit Polonais Contemporain (1972). The volume contains articles on the various facets of the people’s participation in the administration of justice, including an article by J. Jodlowski, \textit{La participation des représentants de la société à l'administration de la justice en Pologne}, id. at 5, and another by T. Misiuk, \textit{La participation à la procédure civile des organisations sociales et de leurs représentants dans les affaires de particuliers}. Id. at 57.}
\footnote{343. “Provisions of the Programme of the CPSU [Communist Party of the Soviet Union], and decisions of Congresses of the CPSU concerning the necessity of drawing the public into the fight to strengthen socialist legality and order, are the realization of Lenin’s ideas.” V. Puchinskii, Memorandum of May 4, 1974, supra note 1.}
\footnote{344. The Congress was held in East Berlin in November 1971. I attended with a few Western proceduralists; unfortunately, the proceedings were not published.}
joined as parties by the court or intervene in proceedings on their
own initiative to state conclusions on the case in furtherance of the
obligations laid upon them and in defence of the rights of citizens
and the interests of the State.

The State administrative bodies mentioned in this section, institu­
tions and enterprises, in the persons of their representatives, and
the private citizens referred to in the present article may familiarise
themselves with the materials of the case, make objections, give ex­
planations, present evidence, take part in the investigation of evi-
dence, make applications, and take other procedural steps provided

by law. 345

Section 36, paragraph 1, of the same Principles states:

Representatives of public organisations and collectives of workers
who are not parties to a case may be permitted by a ruling of the
court to appear at a trial in order to expound to the court the
opinions of the authorities within those organisations or collectives
regarding the case being tried. 346

Other socialist countries have substantially similar provisions. For
instance, articles 32 to 35 of the 1963 Czechoslovakian Code of Civil
Procedure authorize "national committees" both to commence and
to intervene in civil cases, and permit "all social organizations" to
intervene in cases that are connected with their institutional func­
tion. 347 As indicated by Professor Steiner, this function includes the
protection of minors and the fair assignment of housing, in the case
of the national committees (which, in fact, have a local character),
and a variety of matters such as physical and mental education, in the
case of the social organizations. Thus, as Professor Steiner observes,
all these entities have a role in civil litigation that "is analogous to
that of the Prokuratura," except for the rather thin difference that

345. 7 LAW IN EASTERN EUROPE, supra note 115, at 306. Note the almost literal
repetition of the provisions governing the powers of the Prokuratura in civil litigation.
See text at notes 114-15 supra. Section 30 of the Principles is repeated in section 42 of
the R.S.F.S.R. Code of Civil Procedure of 1964, with only the addition (at the end of
the first paragraph) of the following sentence: "The abandonment by such organs or
citizens of an action brought by them does not deprive the person in protection of
whose interest the action was brought, of the right to demand an examination of the
case on its merits." 11 LAW IN EASTERN EUROPE (1966), supra, at 168-69. Note again the
analogy to the Prokuratura. See note 115 supra.

346. 7 LAW IN EASTERN EUROPE, supra note 115, at 308.

347. V. Steiner, supra note 115, at 1, 15-16. In the supplement to his report, Pro­
fessor Steiner informs us that no statistical data presently exist concerning the fre­
cquency of the participation of national committees and social organizations in civil
litigation. V. Steiner, Supplement to Czechoslovakian Report, March 4, 1974.

In addition, article 26 of the Czechoslovakian Code allows labor unions and co­
operatives to represent in court any one of their members. A similar provision can be
found in section 44 of the R.S.F.S.R. Code of Civil Procedure. 11 LAW IN EASTERN
EUROPE (1966), supra note 115, at 169-70.
the Prokuratura's function is to protect "social interests of a general character, i.e., concerning the whole society," whereas the national committees and the social organizations are concerned with the interests of a given territory and a given group, respectively.348

A few comments are appropriate at this point. First, it is not always clear in socialist countries whether a "social organization" may be a spontaneous association or whether it is invariably an official (governmental) body, in which case it is yet another kind of specialized, but still governmental, "attorney general."349 The code provisions quoted above link such entities as "State administrative bodies" and "enterprises," and "labor unions" and "collectives of workers," all of which appear to be quite "public" in nature in those countries. It seems fair to question, for instance, whether on the basis of section 36 of the Soviet Principles a group of workers, spontaneously and unofficially organized, might send their representative to present the group's opinion to the court. An affirmative answer is probable, however, at least in the Soviet Union and limited to an appearance of an amicus curiae nature,350 in view of the basic informality of civil procedure in that country. As put by an American observer,351

persons present [at civil trials] are regularly given permission to speak in conduct-related cases. Observers have commented on the informality of Soviet trials . . . . Trials on local circuit are expected regularly to involve active participation of some if not most of those present as spectators. Such participation is not limited to

348. V. Steiner, supra note 115, at 1, 15-16. For analogues in other socialist countries, see J. Jodłowski, Supplement to Polish Report, Jan. 20, 1974; N. Havranek, supra note 1, at 11-24, 32-35; Z. Stalev, Supplement to Bulgarian Report, Jan. 25, 1974; Néval, supra note 101, at 116-17. Particularly interesting are articles 61 to 63 of the 1964 Code of Civil Procedure of Poland (governing the participation in civil litigation of the "social organizations of the working people"), and the commentaries by J. Jodłowski, La nouvelle codification de la procédure civile en Pologne, 11/12 DROIT POLONAIS CONTEMPORAIN 5, 21-22 (1969), and by Misiuk, supra note 942, at 51-56.

349. See section IE supra.

350. A positive answer, limited to the provision contained in section 36 of the Principles, is given by Professor Puchinski in his Memorandum of May 4, 1974, supra note 1, at 4: "These groups of persons need not be legally incorporated bodies . . . . Any stable group of workers organized in the place of their employment or residence may send their representative to the court . . . . in any civil case if they think this participation expedient. Of course, the opinion [of the group] is not binding on the court . . . . If the court finds the opinion . . . . unsatisfactory, it must give its reasons." On the other hand, in his Memorandum of June 7, 1974, supra note 1, at 1-2, Professor Puchinski informs us that only "public organizations," which are "legally incorporated bodies" and whose formation has received governmental approval, can sue or be sued.

comment on questions of fact on which the spectator has personal knowledge, nor to comment on the character of the defendant . . . . Comments on judicial practice reveal that in some instances persons present have been heard as representatives of the local group. 862

Second, it should be noted that in the Soviet Union, as indicated by section 30 of the Principles, commencement of civil cases by social organizations is allowed only in the instances specified by statute; 863 without legislative authority, only amicus appearances may be allowed by the court. 864 In Poland, the Code of Civil Procedure itself determines the areas in which “social organizations” are allowed to commence or to intervene in civil cases “on behalf of the citizens.” Such participation is limited for the most part to labor disputes and maintenance claims; furthermore, only those “social organizations” included in a list drawn up by the Minister of Justice are allowed so to participate. 865 The official, or quasi-official, character of such organizations is apparent. This character is confirmed by article 62 of the Polish Code, which makes applicable to those organizations the provisions governing the Prokuratura’s power to commence or intervene in civil cases. 866 Clearly, strong obstacles stand in the way of that

862. The author continues by saying, however, that such informal representation of a group is discouraged, since “only officially recognized representatives of a group are considered to have the capacity to present its opinions.” Id. Note, however, that O’Connor’s point is that there must be a duly recognized representative of a group (whether or not the group itself is recognized), whereas our question is whether a group that is not officially recognized may appear in court. This distinction seems to be implicit, for instance, in article 63 of the Polish Code, which provides that a social organization may be allowed to intervene “in order to present to the court its opinion related to the case, which opinion must be expressed in a resolution or declaration of its governing organs properly authorized to that effect.” Polish Code of Civil Procedure art. 63.

863. As in Czechoslovakia, see note 347 supra, it appears that statistical data concerning the frequency of civil cases brought by social organizations in the Soviet Union are largely nonexistent. Professor Puchinskii indicates that “there are not a lot of such actions.” V. Puchinskii, Memorandum of June 7, 1974, supra note 1, at 4. This paucity is due partly to the fact that litigation is very informal and inexpensive, and therefore individuals have easy access to court and rarely need to have social organizations substitute for them, and partly to the sweeping powers of the Prokuratura, which can always sue, so that “hardly anything is left for the social organizations.” Id.

864. 7 LAW IN EASTERN EUROPE, supra note 115, at 308 (section 36 of the Principles). See text at note 346 supra. Section 36 appearances are not so rare as commencement of actions by social organizations, occurring in perhaps as many as two per cent of all civil cases. V. Puchinskii, Memorandum of June 7, 1974, supra note 1, at 5-6.

865. POLISH CODE OF CIVIL PROCEDURE art. 61, ¶ 1; interview with Professor W. Berutowicz, Polish Minister of Justice, in Warsaw, April 2, 1974. Professor Jodlowski indicates that the following social organizations are included in the list: labor unions, invalids’ associations, and the women’s league. J. Jodlowski, supra note 348, at 1. For further details, see Misiuk, supra note 342, at 58.

866. For the similar situation in the Soviet Union, see, for example, Shakarian, supra note 1, at 128-27, 152.
kind of attenuation of the monopoly of state organs that was contemplated by the Soviet leadership during the Khrushchev years.

Third, even under the most liberal interpretation of the above provisions, it seems doubtful that individuals and social organizations would have the authority to represent in court not merely the “rights and legitimate interests” of third persons (as well as their own), but also such diffuse, collective interests as, for instance, those concerning the environment.\footnote{See Z. Stalev, supra note 348, at 1: “[A]s a rule, actions raised by the Prokuratura or by social organizations . . . regard individual cases and not a group of persons. The public interest involved in the individual case [merely] consists in the social importance of rights or violations . . . [that are] the subject matter of the individual case or in the possible preventive effect of the action for the future in similar situations.” See also J. Jodłowski, supra note 348, at 1: “The suits brought by social organizations . . . also directly at the protection of individual rights and interests of private persons, and not the protection of collective and group interests.” Only the amicus appearances made pursuant to article 63 of the Polish Code (which is similar to section 36, paragraph 1, of the Soviet Principles, quoted in the text accompanying note 346 supra) can be based upon a concern for “collective interest” or “group interest,” rather than, or in addition to, a concern for the parties’ rights. Id.\footnote{Professor Puchinskii, Memorandum of May 4, 1974, supra note 1, at 2, mentions various recent statutes in the Soviet Union concerning the protection of the environment, and informs us that “[t]hese statutes . . . have established criminal, administrative, and civil liability for violations.” He also indicates that the “[c]ourts’ activity is of great importance for the protection of soil, forestry, river basins, air, and the animal and vegetable kingdoms. The Supreme Court of the USSR constantly calls to the attention of juridical organs the need to observe strictly legislation relating to the protection of nature.” Id. Compare the interesting discussion in N. Havranek, supra note 1, at 19-24 and references therein.\footnote{See Sand, The Socialist Response: Environmental Protection Law in the German Democratic Republic, 3 ECOLOGY L.Q. 451, 463-69, 488 (1973). See also J. Jodłowski, supra note 348, at 3 (administrative and criminal sanctions against illegal pollution are frequently applied in Poland).\footnote{The principle of “democratic centralism” emphasizes centralized administrative policy-making; as a consequence, reconciliation of various group interests takes place at the center rather than in the court system.\footnote{Professor Jodłowski, supra note 346, at 2-3, doubts that under Polish law a social organization could bring a civil suit for pollution, except for the direct and actual damage done to the property of the organization (e.g., an organization of fish-breeders damaged by a river’s pollution illegally caused by a factory). Even if the social organization is on the Minister’s list, this is not one of the areas in which public-interest litigation by social organizations is allowed by article 61, paragraph}
with or disrupt such planning. As paradoxical as it may appear, the Soviet principle that all powers are embodied in one central, supreme organ—the Supreme Soviet and its Presidium (and, of course, the omnipresent Communist Party)—has repercussions similar to those of the Western principle of separation of powers (and its companion ideology of individualistic liberalism). A dogmatic application of the separation principle has nurtured in the West—and especially in the civil-law half of the West—the ideal of a judge who merely and "neutrally" applies the law (essentially legislation). We have seen that such a judge's sympathies were, and are, with the "Hohfeldian" plaintiff, who brings to court discrete and individualized rights, and not with the "ideological" plaintiff, who would bring to court aggregate, collective, "politicized" interests and concerns. Similarly, a dogmatic implementation of the Soviet centralization principle (pursuant to which priorities are centrally decided, often as much as five years in advance), appears to leave no room for a socialist judge to participate actively in a pluralistic policy-choosing and law-making process. Under both ideologies, large-scale socio-economic priorities are not to be established by the courts.

Notwithstanding this conclusion, innovation in the socialist countries since the early 1960's has been substantial and promising. The

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1 of the Code. See note 355 supra and accompanying text. Also, as in the West, the governing principle is that—apart from the broad powers of the Prokuratura and from the other exceptions established by law—no one, individual or organization, has standing to sue except for the protection of "his own personal rights." See also N. Havranek, supra note 1, at 19-21, who refers, inter alia, to Soviet legislation that entirely withdraws certain types of disputes in the environmental sector from the competence of the courts; the resolution of such disputes is entrusted to administrative agencies or Ministries. See, e.g., WATER CODE OF R.F.S.F.R. of June 30, 1972, art. 83, in 9 SOVIET STATUTES & DECISIONS 129, 157 (1972-1973).

19. See V. Steiner, supra note 347, at 3: "In the Socialist nations, where no conflict exists between the interests of society at large and those of groups or classes of citizens, the need for judicial protection of group or class interests, such as the interests of consumers, is unknown. Specific needs—local, regional, or sectorial, i.e., of certain categories of citizens or workers—are considered and satisfied directly within the structure of the organs of State or other social organs, not by the courts" (emphasis added). See also Z. Stalev, supra note 348, at 2: "Under socialist conditions the need for class actions does not exist . . . In case of violations affecting many people . . . the immediate state or party action for compensation of all injuries by special funds, or for payment by the responsible enterprises (state or cooperative), makes aimless judicial actions . . . ."

Clearly, then, the role of judicial action vis-à-vis other state action is quite deemphasized. As observed by Sand, supra note 359, at 487, "the development of environmental law in East Germany has occurred mostly through statutory and quasi-statutory enactments, rather than by judicial decisions." The same is true for the other countries in Eastern Europe. Sand speaks of the "relative freedom" of the socialist governments "from obstructive litigation." Id. at 488. Compare also the complaint by the Presidium of the Supreme Soviet of the R.S.F.S.R., quoted in note 139 supra.
new codes offer new potentials; the beginning of a trend toward what
has been called in the West the "private attorney general"—individual
and organizational—is discernible even in the East.363

C. The Growth of the Individual and Organizational
"Private Attorney General" in the
Contemporary World

One fascinating aspect of the "private attorney general" approach
is that, contrary to what one might at first believe, it reflects an idea
recurring again and again in the history of mankind. The legal pro-
tection of the infant, the widow, the old, the poor, and, more gen-
erally, the "weak," though monopolized in certain epochs by state
institutions such as the Ministère public—in his capacity as the attor-
ney of the sovereign or parens patriae—more often than not has been
left to the initiative of private individuals and spontaneous organiza-
tions. Living in what we call, perhaps too ambitiously, the modern
welfare state, we tend to look down upon those ages and societies in
which "charity" and "chivalry," not governmentally organized "social
security," were the basic answers to the problem of assuring protec-
tion to the oppressed—"os femmes, os pauvres et os orphelins, ou os
faibles gens ou à cels qui ne savent demander los droiture."364 Yet we
should not too quickly forget the enormous potential of such moral
and intellectual forces. Nor should we too quickly forget that gov-
ernmental solutions are themselves administered by individuals who,
if they lack moral and intellectual motivation, become the kind of
bureaucrats whom we have learned to distrust. The answer—admit-
tedly difficult to implement—is to combine solutions, encouraging
individual and organizational championship for the public interest365
in addition to governmental intervention and control.366

363. See text at notes 140-41 supra.
364. "To women, to the poor, and to orphans, or to weak people or those who
know not to demand their rights." The phrase can be found in the Livre de justice
et de plet of 1209. See Cappelletti & Gordley, Legal Aid: Modern Themes and Varia-
365. There are many ways to encourage such championship, including tax exemp-
tion of public-interest law firms, see note 367 infra; the shifting of litigation costs in
favor of public-interest parties, see, e.g., Wyatt v. Stickney, 344 F. Supp. 373, 387, 395
(M.D. Ala. 1972), afld. sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); or
the assumption, under certain circumstances, of these costs by the state (as was sug-
gested by the German Arbeitskreis Umweltrecht in a proposed federal statute regul-
lating participation of environmental associations in the administrative and judicial
processes, see N. Trocker, supra note 1, at B-6); the liberalization of standing require-
ments, and, more generally, the adoption of liberal legislation on citizen and group
actions (Popularklagen and Verbandsklagen) as well as on class and public-interest
actions. Always most important, of course, is the courts' attitude. See C. Halpern, supra.
Many more examples of individual and organizational “private attorneys general” could be added to those described above. Indeed, it seems clear that we are living in a time in which new public needs of unprecedented dimensions demand a renewed rise and growth of public-interest champions.367

Choosing almost at random from the innumerable examples available in all parts of the world, and leaving aside the many possibilities of private amicus curiae appearances,368 the following actions


368. The participation of amici curiae deserves a separate chapter in a complete study on representation of public and group interests in civil litigation. We have seen in section I, supra, that in many cases the Ministere public and his analogues, or other governmental agencies, participate merely as advisors or parties jointes, rather than as full-fledged parties or parties principales, in civil litigation. Similar participation is increasingly possible for private individuals and organizations not only in common-law systems (particularly in the United States, and especially at the appellate court level), but also, although to a much lesser degree, in the civil-law and socialist countries. Consider the comparative discussions in N. Havranek, supra note 1, at 28-35 and references therein; Criscuoli, Amicus Curiae, 27 Rivista trimestrale di diritto e procedure civille 187 (1975). As for English law, consider I. Jacob, supra note 63, at 71-74. For two examples of this trend, see article 425 of the Italian Law of Aug. 11, 1973, No. 533, [1973] Gaz. Uff. No. 237 at 6282, 6284-85 (amicus appearance of labor unions in individual labor disputes); and section 36, paragraph 1, of the 1962 Principles of Civil Procedure of the Soviet Union and Union Republics, quoted in text at note 346 supra.

The trend is discernible even at the international level. Recently, the Court of Justice of the European Economic Community (E.E.C.) allowed an amicus appearance of the Unione Nazionale Consumatori, an Italian private association of consumers, in a case brought by eleven sugar producers (six of whom are Italian) against a resolution of the E.E.C. Commission imposing sanctions against them. The Unione, which favored the maintenance of those sanctions, was allowed to appear in view of the facts that (1) the Unione was sufficiently representative of the interests of Italian consumers, and (2) consumers are certainly interested in the correct application of unfair competition and antitrust provisions enacted by the Community. Société Anonyme Générale Sucrière v. E.E.C. Commission, 9 Raccolta 1405 (European Court of Justice 1973). See V. Grementieri, supra note 1, at 8-9.
can be brought by any person (natural or legal) who is a member of a national, local, or other community, even if he is not directly and personally aggrieved: in Bavaria\textsuperscript{369} and Ghana,\textsuperscript{370} against legislation that is violative of certain constitutional freedoms; in the United States, against violations of federal clean air legislation;\textsuperscript{371} in Sweden, against activities detrimental to the natural environment;\textsuperscript{372} in Italy, against certain violations of urban development regulations;\textsuperscript{373} in the Federal Republic of Germany, against certain violations in the field of unfair competition and consumer protection;\textsuperscript{374} and in Italy,\textsuperscript{876} India,\textsuperscript{376} and Tanzania,\textsuperscript{377} against irregularities in political elections.

\textsuperscript{369} A \textit{Popularklage} (\textit{actio popularis} or citizen action) can be brought before the Bavarian Constitutional Court by anyone, whether a natural or a legal person, against \textit{Land} legislation violative of the Bill of Rights contained in the Bavarian Constitution of 1946. This citizen action was created by section 54 of the Bavarian law of July 22, 1947, No. 72, on the Bavarian Constitutional Court. See generally M. \textsc{Cappelelli}, \textit{La giurisdizione costituzionale delle libertà} 69-72 (1959) (Milano, Giuffrè); \textsc{C. Leufer}, \textsc{E. Gerner}, \textsc{K. Schweiker} \& \textsc{H. Zacher}, \textit{Die Verfassung des Freistaates Bayern} 42 (2d ed. 1970) (München, Beck). The effect of decisions of the Constitutional Court declaring the unconstitutionality of \textit{Land} legislation is retroactive and binding on everyone. \textsc{M. Cappelelli}, supra, at 71, and references in n.234.

\textsuperscript{370} See \textsc{N. Ollennu}, supra note 219, at 4, referring to articles 2(1), (2) of the (now suspended) 1969 Constitution of Ghana. These provisions would allow any citizen, even if not personally aggrieved, to bring suit in the public interest against enactments violative of the Constitution before the Supreme Court acting in its original jurisdiction.


\textsuperscript{372} The presence of at least an "indirect detriment," however, is required for an individual to have standing. Letter from Professor \textsc{P.O. Bolding} to the author, July 29, 1974. See note 210 supra.


\textsuperscript{374} See \textsc{N. Trocker}, supra note 279, at 204-15 and the legislative and bibliographical references therein; \textsc{H. Kötz}, supra note 1, at 28. \textit{But see W. Habscheid}, supra note 306, at 5-4.

\textsuperscript{375} Law of Dec. 23, 1966, No. 1147, [1966] Gaz. Uff. No. 329 at 6594 (allowing citizens to challenge in court the regularity of local elections; in these proceedings, the \textit{Ministère public} must be heard at the trial). For a detailed analysis, see \textsc{Borghesi}, \textit{Diritto soggettivo e azione popolare nella legge 23 dicembre 1966, n. 1147}, 26 \textit{Rivista trimestrale di diritto e procedura civile} 542 (1972). The author discusses the general (\textit{ultra parties}) effects of the decisions rendered in such proceedings. Id. at 598-618.

\textsuperscript{376} See \textsc{L. Singhvi}, supra note 152, at 15, citing Kanglu Baula Kotwal v. Chief Executive Officer, [1955] All India Rptr. Nagpur 49 (full bench). On another but no less interesting topic, a 1965 Indian case held that "residents of a locality, whose health is affected by existence of foul smell emanating from a bone factory, are entitled to approach the High Court and question the validity of an order which renewed the
All of these examples, as well as analogous developments emerging at the international level, are innovations introduced since World War II; they reflect a general trend in modern legislation. Even though this trend, for a number of reasons, is stronger in common-law countries (and especially in the United States) than elsewhere in the world, and even though everywhere such public-interest suits


377. See G. Onyiuke, supra note 151, at 4-5. In addition to the citizens "who voted or had a right to vote," the challenge before the High Court of Tanzania can also be brought by the Attorney General; both national and local elections can be so challenged. See id. at 5 (Elections Act of 1970).

378. See, e.g., COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY, supra note 234, at 27 (discussing the necessary protection of the "entirely new right" to a healthy and clean environment, which is emerging as one of the most fundamental needs of individuals and societies), 66-67, 83 (discussing the possibility that even persons and associations not personally aggrieved may have recourse to the European Commission on Human Rights to challenge governmental violations of the individual and social rights guaranteed by the Convention). As Dean C. Dominice observes, "[t]he [European] Commission appears to have envisaged that possibility in the preamble to its decision in case No. 113/55 ("... whereas it is permissible for ... even a third party to submit an application to the Commission insofar as the alleged violation is prejudicial to him ... or when the victim himself is unable to take action to claim his rights." Convention Year-Book, Vol. I, p. 162)."

For a general discussion of the topic mentioned in the text, see V. Grementieri, supra note 1, at 3-6 et passim. For interesting developments in the field of trans-frontier pollution, see P. Sand, supra note 1, at 18-25.

379. For the German example mentioned above, see text at note 374 supra, the statement is only partially correct. The German statute on unfair competition (Gesetz gegen den unlauteren Wettbewerb) was enacted in 1909. In section 13, paragraph 1, it allows all merchants, even if not directly and personally aggrieved, as well as merchants' associations, to bring suit against violations in the field of unfair competition. Only in 1965, however, was this power to sue extended to consumer associations. Gesetz gegen den unlauteren Wettbewerb § 13, § la. See Hadding, Die Klagebefugnis der Mitbewerber und der Verbände nach § 13 Abs. 1 UWG im System des Zivilprozessrechts, 25 JURISTENZEITUNG 305 (1970).

380. See, e.g., T. Kojima, supra note 1, at 1, 5, 16, 18-20, 22, 32 et passim; H. Kötzt, supra note 1, at 24 et passim. This point should be the subject of a special study. I shall limit myself here to mentioning some of the principal reasons why class and public-interest actions face greater obstacles in civil-law systems than in the United States: a different legal education, and correspondingly, a different (and more passive) bench and bar; the lack of large law firms and public-interest law firms capable of undertaking the great commitment frequently required in these actions; a narrower and less flexible range of both judicial remedies and sanctions (including contempt of court); the lack, or insufficiency, of discovery devices, so important in many class actions, especially those against large corporations; and, more generally, a different conception of the respective roles of legislation and adjudication in the law-making process. Also very important is the fact that economic and societal complexities are more accentuated in the United States than elsewhere in the world—including Great Britain and other common-law nations—thus making more urgent the need for class and public-interest actions in America. H. Kötzt, supra, at 21-22, also attributes fundamental importance to the contingent fee system prevailing in the United States; he thinks that, since such a system is clearly unacceptable in Europe, class actions will
as citizen actions or actiones populares still remain the exception, a progressive loosening of the traditional locus standi requirements is discernible in many countries within and without the common-law family. Furthermore, nowhere has such loosening produced either the oft-predicted flooding of the courts with too numerous or capricious cases or a paralysis of administrative or corporate action.

Indeed, the liberalizing of standing requirements is but one aspect of an even more general and powerful trend that is apparent in the contemporary world—the "publicization" of civil litigation. Civil litigation is becoming more and more the arena in which public, collective, and group interests are intermingled with, and often prevail over, the private interests of the individual parties. It is inherent in the structure of a mass-economy society that cases involving only two individuals become comparatively less numerous and, above all, less important, while cases involving groups, classes, and the public at large rapidly increase in frequency and significance. Hence, the traditional view of civil litigation as a merely private affair is no longer acceptable.

This powerful trend has at least three dimensions. First, public

never find favorable ground there. See also T. Kojima, supra, at 18. Professor Kötz's conclusion, however, seems too absolute. Financial encouragements for the class suitor and his lawyers can be devised without resorting to a fee system that, in fact, is hardly suitable for exportation. Cf. note 365 supra.

381. This is true especially, but not only, in litigation against the political branches of central or local government. See, e.g., the "Italia Nostra" Case, discussed in text at notes 315-18 supra. See also the important development in some civil-law countries discussed in note 282 supra, and the interesting references to Germany, the United States, and France in H. Kötz, supra note 1, at 52-53 & nn. 61-68, 35. Also for Germany, see E. Rembinder, supra note 366, at 17-18. For significant developments in England, see I. Jacob, supra note 63, at 54-56.

Professor Vescovi speaks of a general phenomenon of "colectivización de la legitimación," that is, collectivization of standing; he laments, however, that this phenomenon is in an embryonic stage in Latin America, where traditional individualistic conceptions still largely prevail. E. Vescovi, supra note 20, at 3-4. See also S. Ohate, supra note 3, at 11-12.

382. For evidence concerning the United States and Germany, see H. Kötz, supra note 1, at 36 & n.74. See also the statistical data contained in CLASS ACTION STUDY, supra note 280, at 4-6 et passim. Italian experience with the actio popularis in cases of electoral irregularities, see note 375 supra and accompanying text, fully confirms the statement in the text.

383. See H. Kötz, supra note 1, at 37-38.

384. For a recent comparative discussion, see N. Trocker, supra note 279, at 439-40, 709-10 et passim. See also T. Kojima, supra note 1, passim. As for the United States, only after 1880 did an individualistic conception of civil procedure as a two-individual litigation prevail; but the shift was to be reversed, at least in part, in our century. Cf. J. Frank, supra note 154, at 89-107 (ch. VII: "The 'Fight' Theory versus the 'Truth' Theory"); ch. VII: "The Procedural Reformers"; R. Pound, 2 JURISPRUDENCE § 78, at 407-46 (1959) (St. Paul, West).
(governmental) entities have become increasingly involved in civil litigation. The Ministère public and its analogues are but a minor aspect of this first dimension; much more important has been the slow and painful overcoming of obstacles and taboos concerning litigation against the state and its departments. One of these taboos—that “the Crown can do no wrong”—has only recently fallen in England. Another, even stronger taboo—that a court decision against the executive would represent a breach of the principle of separation of powers—survived for almost one century before it was definitively destroyed by administrative agencies that, like the French Conseil d'État or the Italian Consiglio di Stato, little by little transformed themselves into true courts. Yet another taboo—that Parliament is sovereign and no court should be entitled to review its enactments—still survives in such otherwise pioneering countries as England and France, although the movement away from it has become one of the gigantic forces of recent decades in the five continents. The second dimension has been an increase in judicial activism—a phenomenon analyzed above. The third is representation of group, collective, and public interests by individuals and spontaneous organizations—private initiative and motivation employed in the service of the public benefit.

III. CONCLUSION: A LESSON OF PLURALISM

A premise of the preceding discussion is that in modern societies new general, collective, “public” needs and interests have been forcefully emerging. Such needs and interests are an outgrowth of the most basic characteristics of our twentieth century “civilization.” Whether we like it or not, modern societies are characterized by mass production, mass commerce and consumption, mass urbanization, and mass labor conflicts, all of which require regulation. These new, pressing needs and interests must find access to the courts. Indeed, it would be utterly unreasonable to afford the most

385. On the maxim that “the king can do no wrong” and its only too recent demise, see H. WADE, ADMINISTRATIVE LAW 277-313 (3d ed. 1971) (Oxford, Clarendon Press).
387. This movement is analyzed comparatively in M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971) (Indianapolis, Bobbs-Merrill).
388. See section 1D supra.
389. See section 1A3 supra.
390. While as a rule access to ordinary courts is desirable, to some extent special
sophisticated kind of legal protection—judicial protection—only to
the more traditional needs and interests, such as private property
rights, and to deny it to the new societal needs and interests that are
quickly becoming vital to the very survival of human civilization.

For a number of reasons, the "public attorney general"—the
Ministère public\(^{391}\) and his formal analogues, the socialist Prokura-
tura\(^{392}\) and the attorney general in the common-law world\(^{393}\)—is not
suitable for undertaking the entire immense task of representing
these new public needs and interests in court. Comparative experi-
ence has shown that there are insurmountable obstacles—educational,
structural, and "career" obstacles,\(^{394}\) among others—to adapting that
traditional institution to the new task.

This conclusion should not be taken to mean that the "public
attorney general" cannot play a meaningful role even in these new
areas. This role, however, should be essentially limited to prosecut-
ing criminal violations of regulations concerning such matters as
production, consumption, labor, and urbanization. Yet it is very
doubtful that the "public attorney general" should be granted a
monopoly even in the criminal area.\(^{395}\) It seems that the French
experience with the action brought by the partie civile contains
very promising elements that may be successfully employed else-
where.\(^{396}\)

In so far as civil litigation is concerned, the insufficiency of the
"public attorney general" solution is beyond doubt. This insufficiency
has been demonstrated even in those legal systems that give the
Ministère public (or his analogues) broad power to commence (or to
intervene as a full-fledged party in) any civil case involving a "social,"
"collective," or "general public" interest.\(^{397}\)

One important method of supplementing, or substituting for,
the Ministère public (and his formal analogues) has been the institu-
tion of special branches within, or specialized governmental agencies
outside, the Ministère public's office. Such branches and agencies
have the task of representing in court specific general or group inter-
courts may very well be advisable for controversies in areas requiring highly specialized
competence.

391. See section 1A supra.
392. See section 1B supra.
393. See section 1C supra.
394. See section 1A3 supra.
395. See note 204 supra.
396. See note 204 supra.
397. See section 1A4 supra.
ests that require particular training and expertise. The Swedish Consumer Ombudsman is a prime example; another example in the same area may soon be provided by the United States Consumer Protection Agency.

Another important method has been to encourage individuals and/or spontaneously organized groups to represent vital community interests in court, conferring upon them the role of individual and organizational “private attorneys general.” Of course, the assumption of such a role by individuals and groups poses a number of problems of a constitutional and procedural nature. The major problems are (1) standing; (2) notice and, more generally, guaranteeing an adequate opportunity to be heard to all those who will be affected by the judicial decision; (3) the extent to which a judgment may bind absent parties; and (4) empowering the judge to utilize adequate remedial devices to make both possible and effective his intervention in matters so different from traditional civil litigation.

As difficult as these problems are, an answer to them must be found, because no adequate alternative exists for the protection of the supremely vital interests involved. Traditional notions of standing must be revised; new remedies must be designed; and the

398. See section IE supra.
399. See text at notes 239-45 supra.
400. See note 215 supra.
401. See section IIA supra.
402. See section IIB supra.
403. See especially text at notes 320-29 supra.
404. The notion of “fluid class recovery” is a good example. See Homburger, supra note 1, at 371-73; CLASS ACTION STUDY, supra note 230, at 23 & nn. 215-16. Critics, of course, saw the “fluid class recovery” as “creating a new substantive antitrust remedy,” Homburger, supra, at 372, but it is clear that an effective system of class actions cannot exist if the judge is limited to the remedial devices typical of the traditional two-individual conception of litigation.

405. One powerful means to this end is the expansion of traditional conceptions of “rights,” “human rights” and such new “public” rights as the right to health, clean air and landscape, beauty, dignity, and security must be recognized and protected by the courts, even though these rights are not “owned” by any one individual but belong to all alike. Cf. R. Buxbaum, supra note 238, 1st app. (“Topical Outline for Technical Conference on Comparative Legal Aspects of Public Interest Activity in the Environmental Sector”), sections IIA.1.d, IIA.2.d-e; T. Kojima, supra note 1, at 23. This development, of course, is and will be encountering strong resistance, because it represents a revolutionary deviation from a long-standing individualistic conception of rights and civil litigation. Such deviation is unavoidable, however, if the democratic ideal of citizens’ participation in the modern “promotional” and welfare state is not to remain empty.

406. The innovations must begin with mandamus and injunctive remedies, and adequate sanctions in case of nonobservance. Such remedies are insufficiently available, or not available at all, to noncommon-law judges, especially against the public administration. Cf. R. Buxbaum, supra note 238, at 7 & 1st app., section IIA.2.c.
fundamental guarantee of a “day in court”—certainly an essential tenet of every civilized system of justice\textsuperscript{407}—must be assured by developing appropriate standards for “adequate representation” of the group, the community, or the public at large, in such a manner as to make reasonable the extension of the effects of the judgment to all those who are thus represented.\textsuperscript{408} All of these changes are, of course, easier to outline on paper than to implement in the unforeseeable circumstances of particular cases. This is the reason why, at this early stage of doctrinal analysis, case law evolution—yet another form of judicial activism—is more promising, perhaps, than abstract legislative intervention, at least in those countries in which law-making is no longer considered to be the exclusive province of formal legislation.

What lesson is to be learned from the comparative effort of a worldwide team of national reporters\textsuperscript{409} and other experts who have provided the basis for this article? I believe that the lesson is one of pluralism.\textsuperscript{410} The needs of our time are so complex and demanding that it would be foolish to rely upon any single governmental institution to solve them.\textsuperscript{411} The state itself, let alone one of its institutions, is unable to meet all of those needs. Nor can they be met by a proliferation of governmental agencies or departments within or without the Ministère public’s office (or that of its analogues).

Exclusive reliance on the private initiative of individuals, however, would also be foolish. The “ideological plaintiff” is, in many

\textsuperscript{407} I do not know of a stronger affirmation of that guarantee than the couplet by Seneca:
\textit{Qui statuit aliquid parte inaudita altera, aequum licet statuterit, baud aequus fuit.}
("Anyone who has made a decision without hearing the other party was unjust even if the decision was a just one.") Medea, lines 199-200.

\textsuperscript{408} On the other hand, in consideration of the public interests at stake, the too rigid conception of the inalterability of res judicata—which prevails particularly in civil-law countries, see, e.g., M. Cappelletti, J. Merryman & J. Perillo, supra note 149, at 156-57—should be revised. Interestingly, section 4 of the Swedish Act of April 30, 1971, No. 112, which prohibits improper contract terms, see text at notes 243-44 supra, provides that “[i]n spite of any decision which has been made in regard to the issuance of an injunction [prohibiting the use of certain contract terms], the same matter may be reconsidered where subsequent special reasons.” See Sheldon, supra note 239, at 43, 68.

\textsuperscript{409} See note 1 supra.

\textsuperscript{410} See E. Reh binder, supra note 366, at 18.

\textsuperscript{411} Similarly, at the international conference mentioned in note 238 supra, the majority of the participants agreed that to meet the needs of adequate environmental protection, “a mix of forms would have to be established.” These forms should include “adversary [judicial] procedures” along with “ombudsmen and other quasi-governmental mechanisms,” and even “active lobbying.” R. Buxbaum, supra note 238, at 14.
cases, more an ideal than a reality, albeit an ideal that ought to be encouraged. Undoubtedly, too many gaps would remain if the whole task were left to the haphazard existence, and to the will and whims, of spontaneous "champions" of the common good.

"Private" and "governmental" action should supplement each other. In addition, and most importantly, groups, communities, organizations—even at the international level—should be encouraged to enter the arena of mankind's fight for survival. Pluralism is necessary to fill most, if not all, of the gaps. Indeed, pluralism may be the only effective way to reconcile the two conflicting ideas—Judge Frank's perhaps too optimistic suggestion and Pietro Verri's skeptical admonition—that I have chosen as the challenging mottos of this article.