I. Critical Analysis of Representative Suits as an Input for access to Justice

A. Utility:

The intention of our legislature in enacting such a provision and making more liberal amendments to it in 1976 is to encourage such types of suits. Such a provision is in fact unknown to most of the countries of the world which are civil law countries. In India too, the primary and initial requirement of Order 1 of the C.P.C. is to have the parties joined by themselves either as plaintiffs or defendants. Rule 8 is carved out as an exception. Further, in 1976 a major amendment was made so as to clarify and liberalise thereby that same interest is not same cause of action. Further, now even the Court is given suo motu power to make a suit as a representative suit. Undoubtedly, the intention of the legislature is to encourage these kinds of suits.

Following are major advantages of this kind of a suit:

(1) Social, Economic and Political Justice:

Preamble to the Constitution of India enshrines social, economic and political justice
to Indian people. 2 Part III of the Constitution gives fundamental rights to Indian citizens.3 Art. 38 and 39A. of the Constitution make it a duty of the state to provide for equal social economic and political justice to Indian people 4

Yet, even after about 40 years of the Constitution coming in force masses in this country are far away from justice and access to it. N.A.Palkhiwala has dedicated his book "We the People" to his countrymen saying: 5

"To my countrymen, who gave unto themselves the Constitution but not the ability to keep it, who inherited a resplendent heritage but not the wisdom to cherish it, who suffer and endure in patience without the perception of the impotential".

Representative suits can help in bringing about justice and greater access to justice for the Indian masses. In the words of Justice Masodkar of the Bombay High Court:

"There may be several persons who remain silent under oppressed conditions and aggressions of their rights and yet one amongst them may shout for justice on behalf of all. Law permits the cause of others to be represented in such type of action so that justice is done and injustice is banished". 6

Class suit has been envisioned as a form of political action. Class action is clearly the kind of "organised pressure" which is often needed to
force into public and judicial view the widespread evils of a system, a place or a person. It is the judicial analogue to the mass demonstrations on the streets. To use the words of Krishna Iyer:

"Our current processual jurisprudence is not of individualistic Anglo-American mould. It is broad based and people oriented and envisions access to justice through "class actions", "public interest litigation" and Representative proceedings". Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations is an affirmation of participative justice in our democracy".

(2) Greater access to justice:

At times we come across poor quality of service or poor quality of product, government inaction or lawlessness. Normally, as individually fighting for the same is not economically feasible and possible we ignore the same. But, if we use the tool of representative suits and if there are other people who have similar experience, a suit which may be economically unfeasible individually, can become viable due to collectivisation of resources. The need for such a tool is very much there as with market economies growing in the world, such a tool can be a check on scrupulous people
who may calculate only the individual loss and on that basis continue with their exploitation and/or illegal practices thinking that no one will take them to the courts of law.

A trader for example can get a significant competitive advantage by minor cheating. The lie would cost a single consumer little, but can reap large profits to the trader when multiplied to many such transactions. In a class actionless world no individual consumer would spend his time, money and energy for recovery of a small sum due to him. The right without a remedy results in a society where class actions are not used.

The U.S. Supreme Court has observed in *Deposit Guaranty Nat'l Bank v. Roper*,

"The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they employ the class-action device".

(3) Collectivisation of resources of a group:

In a representative suit resources of a group are gathered together. It will result in lesser burden on a single person and sound collectivisation
of resources. Morally, also when a group is behind a representative he will be strengthened. They can engage highly competent and innovative lawyers, examine expert witnesses and see to it that trial is conducted in the best possible manner. All parties can share the expenses as well as fruits of the litigation.

(4) Economies of time, money and energy:

Representative Suits can save time, money and energy of the plaintiffs, defendants and even the Court, a much needed function. But, for this provision persons having same interest would be required to file separate suits, defend them separately and the courts would be required to take separate trials and give separate judgements. Instead, the courts can try similar suits jointly. But, then in the absence of a provision of representative suit or its use, similar suits filed by different parties at different times are tried separately, sometimes even without knowing that a similar suit has been decided. The notice requirement of a representative suit can do away with this difficulty as everyone who wants to join has to join. Even if he or she does not join, the decision will nevertheless be binding on them.
Obviously therefore, less time would be required. Further, as separate court fee and lawyer's fees need not be paid less money will be spent. Lastly, it is only those who want to act as representatives need give their energy and that too only once. This can however benefit the entire class and the class can very well choose its representatives and give collective resources to them plus some payment for acting as representative. Payment may not be essential as the representative himself too is an affected person and in fact mere fact that a group is behind him will give him a lot of support to fight the case.

In a recent decision, the Madras High Court remarked:

"The provisions of 0.1 R.8 of C.P.C. are designed to save time and expense and to ensure a convenient trial of questions in which a large body of persons are interested while avoiding at the same time multiplicity of suits and consequent harassment to parties."

Sometimes, it is a formidable task to enumerate the names of several hundred litigants and to serve notices on all of them. Sometimes, the class is a fluctuating body. In such situations, for example, people belonging to a particular religion or a Bhopal type situation can be taken care of by following the procedure of representative suits. In such situations a public notice will be allowed.
(5) Uniformity of decisions as to persons similarly situated:

Representative suit is also in the interest of judicial discipline and will help to preserve the system of precedents. All the questions which are similar to the plaintiffs and defendants will be decided at once and will be binding on the entire class. Further due to the applicability of the principles of *re judicata*, the same questions can't be reagitated by members of the same class who were represented. A single binding class action, will spare the legal system the agony of endless trials and the embarrassment of inconsistent results.

(6) Deterrence on illegal behaviour

As, if a class succeeds in getting what it wants, the effect is going to be wide, far reaching and financially heavy. Representative Suits can well act as deterrent to illegal behaviour of corporations, public officers etc. For example, if compensation by way of damages is awarded to a class of people who have suffered due to use of a consumable item say for e.g.a soap, the manufacturer may have to pay huge compensation if the product has been widely used. It will also
affect his credibility and reputation in the market. This will of course have a deterrent effect on him and others. It will aid the legitimate business enterprises by curtailing illegitimate competition. The very existence of this device and its regular use can even result in settlements out of court or through court considering its effects on the defendant. The Agent Orange case described above is the best example.

(7) Enforcement of government policies and laws

As we have seen in the U.S., Congress as well as the state legislatures have themselves authorised use of class action while passing certain laws. Thus, it is realised that if a particular type of behaviour is to be prohibited, people themselves can do so if they are given this tool of class action. Again, even inclusion of authorisation of this tool can have an effect on the target behaviour. Thus, class action can reduce the work of government bureaucracy and they can become the tool for enforcement of government policies and laws.

(8) Development of substantive law:
Many a times it is the substance which follows the procedure. Once we know that group rights can be enforced or defended in this manner, we may think of different areas of substantive laws where this weapon can be used. The experience in United States is that class action has led to the development of substantive law which due to limitations of an individual would not have developed. Legal thinking is always influenced by the procedure.

B. Risks: It is general experience that any legal device can be used for good and just objectives and misused too by scrupulous people. At the outset, therefore it may be borne in mind that such a legal device is never inherently bad. It is people who sometimes make it so. In a representative suit too this risk is there and it is particularly high considering it's far reaching effects.

We may find that people may come forward to file frivolous suits if this device is encouraged. High litigation and false litigation can result in break-down of the mutual faith in society, encroachment of the judiciary in other branches of the government, obstacle to various
activities which are for the welfare of the people, increase in the costs of products etc. The concept of insurance against law suits which has grown in the U.S. due to high litigation and high stakes is another outcome of such a litigation.¹²

But then this risk is there in any type of such a legal device. Examples of misutilisation and criticism of PIL have been reported and seen.¹³ What is required are sanctions and proper screening by the Courts. The sanctions very much exist in the form of award of compensatory costs and other costs, suits for defamation, suits for damages etc. in our legal system. Responsible and careful lawyering and strong judiciary can enforce these sanctions sternly as a check on misutilisation of this legal device. Further, it is also possible to fix ceilings on the maximum amount of damages that can be awarded in a class action suit.¹²

All in all, if we consider the advantages of class action, it is certain that it has great potential of increasing access to justice of people which is a need of such a nature that even with the above risks this legal device needs to be encouraged.
Footnotes on Critical Analysis of Representative Suits as An Input for Access to Justice

(1) Supra. Prof. Cappalli's article.

(2) the text of Preamble to the Constitution of India:
We, the People of India having solemnly resolved to constitute Indian into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

Justice, social, economic and political Liberty, of thought, expression, belief, faith and worship, Equality of status and of opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. In our Constituent Assembly this 16th day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution.

(3) See Art.12 to 35, Indian Constitution.


Art. 38: State to secure a social order for
the promotion of welfare of the people: (1) The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social economic, and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocation.

Art. 39A: Equal justice and free legal aid:
The State shall secure that the operation of the legal system promotes justice, in a basis of equal opportunity, shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

(5) Nani Palkhiwala: We the people, Strand Book Stall, 1984
(6) AIR 1976 Bom. 401 (403)
(7) In re Agent Orange product liability litigation, 100 F.R.D. 718 (E.D.N.Y. 1983) at 723).

(8) AIR 1981 SC 298 at p. 317

(9) 445 U.S. 326(1980)

(10) AIR 1993 Mad.51 (Feb)

(10A) See generally, 59 Am. Jur. 2d Sec.51 Parties.


For a fuller discussion of this aspect see the next chapter of the thesis.

(14) See Prof. Cappalli's article Supra.