

Group Litigation in Switzerland

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I. Introduction

Switzerland is one of the many countries that do not currently have an American-style class action.¹ Suggestions to examine the possibility of introducing such a procedural vehicle have met with considerable opposition.² Some of the reasons for that opposition are grounded in reactions to litigation in the United States.³ More broadly, however, there seems to be a general unease with civil litigation involving more than the traditional plaintiff and defendant and an occasional individual joined out of an urgent need, such as to extend *res judicata* effect to a co-heir or business partner. Below, I explore the most important reasons for that unease. I will do so first by analyzing the proposals to introduce an American-style class action and their rejection. I will then take a closer look at the group litigation devices that already exist in Swiss procedure. They include devices to let similarly situated individuals sue together (joinder of parties), to have an organization sue for its members with similar rights (*Verbandsklage* and *Verbandsbeschwerde*), and to allow a court to consolidate claims arising out of the same controversy. Moreover, there is certain shareholder litigation that results in judgments that are binding on all or an extended group of shareholders. As my analysis below demonstrates, however, even these devices have been interpreted narrowly by the courts and used with little aggressiveness by litigants.

At the same time however, these existing devices do not seem to satisfy all of the litigants' needs in practice. In several cases, litigants have begun to use test cases.

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¹ See, e.g., Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L L. 369, 369 (2001). Technically, this changed in 2004 with the introduction of a class-action-like device with a very limited area of application. See *infra* text accompanying notes 234-236.

² See *infra* text accompanying notes 22-34.

³ See *infra* text accompanying notes 61-78.

Other plaintiffs have simply created ad-hoc associations for the purpose of gaining leverage in pursuing their claims in shareholder litigation. Moreover, in partial response to these practical needs, there has been a proliferation of federal statutes introducing or extending circumscribed group action rights in specific subject areas during the last decade. At the same time, political opposition has arisen against group action rights in administrative proceedings involving environmental protection claims.

Few in Switzerland have undertaken the task of examining in depth whether the resulting patchwork of group litigation devices suffices to meet the procedural values underlying the current system or, indeed, what exactly those values are and whether they are adequate for 21st century Swiss society. This is unfortunate since Switzerland is currently in the process of drafting the first federal civil procedure code in its history, a unique opportunity, it would seem, to reexamine the premises of the existing procedural system.

I will first sketch the respective lawmaking powers of the federal and state governments in Part II. In Part III, I will then explicate the various group litigation devices available and explore the reasons for the reluctance to expand on those devices in the current effort to draft a federal code of civil procedure, including by introducing an American-style class action. Moreover, due to the absence of empirical data on the use of existing group litigation devices in Switzerland today, I have undertaken to get at least a preliminary sense of the usage rates and the kinds of cases involved in such litigation by sifting through the published decisions of the Swiss Supreme Court. The results of that research are included in Part III.

II. The Setting

Switzerland is a parliamentary democracy⁴ with a federal form of government. Governmental power is shared by the federal government and the 26 cantons (or states). Private law has been a matter of federal legislative power at least since a constitutional amendment extended that power to all areas of private law in 1898.⁵ Civil procedure and the organization of the courts, however, remained the province of state law.⁶ Only in 2000, with the adoption of a new federal constitution and its immediate amendment, did the federal government receive the power to legislate in the area of civil procedure as well as in private law.⁷ Since that change, the Swiss government and legislature have been working on a new federal code of civil procedure that is intended to displace the existing cantonal codes.⁸ The 2003 draft of the Committee of Experts appointed by the executive resulted in the criticism of numerous proposed provisions.⁹ With that feedback in mind, the Federal Council, the Swiss executive, then reworked the proposed code and transmitted it to Parliament in

⁴ One could quibble with this characterization to the extent that the executive, the Federal Council, does not entirely serve at the pleasure of the legislature. Although elected by the legislature, “[t]he members of the council are elected individually for a fixed term of four years, and according to the Constitution, the legislature cannot stage a vote of no confidence during that period.” JÜRIG STEINER, *AMICABLE AGREEMENT VERSUS MAJORITY RULE: CONFLICT RESOLUTION IN SWITZERLAND* 43 (1974).

⁵ Constitution of the Swiss Confederation of May 29, 1874, art. 64(II) (as amended on Nov. 13, 1898). I say “at least” because subsection (I) of that Article already provided for federal power in various areas of private law, including the law of obligations and intellectual property. However, the Constitution of 1848, on which the 1874 Constitution is based, left all legislation in private law to the states.

⁶ *Id.* at subsection (III) (as amended on Nov. 13, 1898). There is one important exception: The power to fashion procedural rules for enforcing money judgments and uncontested monetary claims, including bankruptcy law, is in the hands of the federal government. The application and enforcement of those rules, however, remain with cantonal authorities. *Id.* at subsection (I).

⁷ Constitution of the Swiss Confederation of April 18, 1999, art. 122 (as amended on March 12, 2000). In an unusual arrangement, the amendment is not to enter into force until so decided by the federal legislature. This is intended to happen together with the entering into force of the new civil procedure code. See Bundesbeschluss über die Justizreform of Oct. 8, 1999, ch. III; Fridolin M.R. Walther, *Die Schweiz und das europäische Zivilprozessrecht – quo vadis?*, 124 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT [hereinafter ZSR], II, 301, 307, n.31 (2005).

⁸ In fact, then-Minister of Justice Koller impaneled the Committee of Experts that produced the first draft in 2003 on April 26, 1999, almost a full year before the new federal power over civil procedure was approved by popular referendum. See Schweizerische Zivilprozessordnung, Bericht zum Vorentwurf der Expertenkommision 6 (2003), available at http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0006.File.tmp/vn-ber-d.pdf [hereinafter: Begleitbericht].

⁹ The reactions to the project that were directed to the Justice Department are collected in a 956-page Document called Zusammenstellung der Vernehmlassungen, Vorentwurf für ein Bundesgesetz über die Schweizerische Zivilprozessordnung (ZPO) (2004), available at http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0004.File.tmp/ve-ber.pdf [hereinafter Vernehmlassungsbericht].

2006,¹⁰ where the bill has since been debated by the upper chamber, the Council of States.¹¹ The intention is to set the new code of civil procedure in force in 2010.¹²

In the meantime, any analysis of Swiss procedural law must take into account the current system of 26 different state procedural codes, each with its own interpretations by the relevant state courts. Fortunately for the analyzing scholar – and to the frustration of some cantons – federal lawmakers have increasingly included procedural provisions in substantive statutes.¹³ The Federal Supreme Court, until a few years ago the only federal court in the country, has followed suit by displacing state procedural law step by step with federal common law in areas as important as personal jurisdiction and *res judicata*, so as to assure the enforcement of substantive federal law.¹⁴ Group actions represent one area in which both federal statutes and federal common law have proliferated.

A somewhat different distribution of power between the federal and state governments exists in the area of administrative procedure. As in other civil law countries, there is a sharp separation in Switzerland between private and public law and, more importantly, between judges adjudicating, and scholars studying, civil litigation on the one hand and administrative cases on the other.¹⁵ Yet, any

¹⁰ Botschaft zur schweizerischen Zivilprozessordnung of June 28, 2006, BBl 2006, 7221, available at <http://www.admin.ch/ch/d/ff/2006/7221.pdf> [hereinafter Botschaft].

¹¹ See 2007 AB Ständerat 498 (Session of June 14, 2007); 2007 AB Ständerat 633 (Session of June 26, 2007).

¹² See 2007 AB Ständerat 498, 500 (Statement by State Councillor Wicky).

¹³ See, e.g., OSCAR VOGEL & KARL SPÜHLER, GRUNDRISS DES ZIVILPROZESSRECHTS UND DES INTERNATIONALEN ZIVILPROZESSRECHTS IN DER SCHWEIZ 20-24 (8th ed. 2006); Hans Peter Walter, *Bundesprivatrecht und kantonales Zivilprozessrecht, Tendenzen der Rechtsprechung*, 1995 BASLER JURISTISCHE MITTEILUNGEN 281 (1995).

¹⁴ See, e.g., VOGEL & SPÜHLER, *supra* note 13, at 22; STEPHEN BERTI, ZUM EINFLUSS UNGESCHRIEBENEN BUNDESRECHTS AUF DEN KANTONALEN ZIVILPROZESS IM LICHT DER RECHTSPRECHUNG DES SCHWEIZERISCHEN BUNDESGERICHTS (1989).

¹⁵ See, e.g., RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 300-01 (5th ed. 1988). Administrative litigation in Switzerland almost exclusively involves cases in which a public agency applies law and/or administrative rules to an individual situation. As part of that litigation, the plaintiff can argue that an administrative rule violates constitutional or statutory law (or federal law in a state administrative case). Administrative rulemaking itself, however, is not generally subject to judicial review. Cf. Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1289-96 (1994), much of whose description of German administrative procedure is fairly accurate for that of Switzerland as well. See, e.g., FRITZ GYGI, BUNDESVERWALTUNGSRECHTSPFLEGE

consideration of group actions, in which plaintiffs tend to represent a stronger public interest than in individual civil claims,¹⁶ should involve discussion of administrative procedure as well as civil litigation.¹⁷ This is particularly true since entire classes of claims that proceed in civil court in the United States, where there are no specialized administrative courts in the civilian sense,¹⁸ would be considered public-law cases and thus be litigated in administrative courts in Switzerland and other civil law countries.¹⁹ Much of the U.S. civil rights litigation, for example, would fall into this category. For these reasons, it is important to point out that the federal government has had the power to regulate administrative procedure and the organization of the administrative judiciary to adjudicate cases involving federal administrative law for quite some time.²⁰ Naturally, as far as state administrative law is concerned, state procedural law prevails.²¹ Thus, in Switzerland, the separation between public and private law is not only important for purposes of identifying the competent court

227-28 (2nd ed. 1983). However, administrative rules themselves may be the subject of a constitutional appeal to the Federal Supreme Court to the extent they directly impact individuals and if those individuals may not be reasonably expected to wait for an appealable decision applying the regulation by the agency in question. *See, e.g.*, WALTER KÄLIN, DAS VERFAHREN DER STAATSRECHTLICHEN BESCHWERDE 142-44 (2d ed. 1994).

¹⁶ *See, e.g.*, Reinhard Greger, *Verbandsklage und Prozessrechtsdogmatik – Neuere Entwicklungen in einer schwierigen Beziehung*, 113 ZEITSCHRIFT FÜR ZIVILPROZESS [hereinafter ZZZ] 399, 399 (2000).

¹⁷ *See, e.g., id.* at 412.

¹⁸ *Cf.* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 852 (1985) (noting that in Germany, administrative law courts as well as other specialized courts “siphon off business that Americans would expect to see in the ordinary courts”).

¹⁹ *See, e.g.*, Samuel P. Baumgartner, *Class Actions in der Schweiz?*, in AUF DEM WEG ZU EINEM EINHEITLICHEN VERFAHREN 111, 119-20 (Benjamin Schindler & Regula Schläuri eds., 2001). In the United States, the term „public law litigation“ is well known at least since the late Professor Chayes drew attention to it in 1976. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1312 (1976). The difference to Switzerland is that such litigation for the most part is not conducted in distinct public law courts in the United States. Moreover, at least Professor Chayes cast his net wider by including in his definition of public law litigation suits brought by private individuals against other private groups and individuals. *See id.* at 1284.

²⁰ *See* Constitution of the Swiss Confederation of May 29, 1874, arts. 103 (as amended on Oct. 25, 1914) & 114bis (as amended on Feb. 20, 1938).

²¹ To complicate matters, the implementation of a considerable number of substantive federal administrative statutes have been delegated to the cantons. In such instances, adjudication has long been by cantonal authorities and administrative courts, but usually with an opportunity for judicial review by a federal administrative tribunal. *See, e.g.*, GYGI, *supra* note 15, at 25-27. The reorganization of the federal judiciary at the beginning of 2007 did not change this general approach. For details see, for example, Christoph Auer, *Auswirkungen der Reorganisation der Bundesrechtspflege auf die Kantone*, 107 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS- UND VERWALTUNGSRECHT [hereinafter ZBL] 121 (2006).

(civil or administrative), it also determines the extent of federal legislative power vis-à-vis the states.

III. Existing Group Action Devices and Planned Reforms

1. Class Actions

As indicated above, Swiss law does not currently provide for a class action device. A number of Swiss academics have argued that the country could learn from U.S. class action practice to adopt more adequate procedural rules for mass tort cases.²²

Moreover, 30 Members of Parliament requested in 1998 that the Federal Council, the Swiss executive, consider the adoption of class actions for labor, landlord-tenant, and consumer law disputes.²³ Neither of these proposals has gone very far, however.

In 1988, in the wake of the Schweizerhalle accident, in which a large volume of water contaminated with agricultural chemicals was washed from a Sandoz plant in Schweizerhalle by Basel into the Rhine River, severely contaminating the river water downstream, the Justice Department appointed a group of experts to study a possible reform of federal tort law.²⁴ The group was given the specific task, among others, to

²² See, e.g., ISABELLE ROMY, LITIGES DE MASSE 235-320 (1997); Emil W. Stark & Stefan Knecht, *Einführung einer Zwangsgemeinschaft für Geschädigte bei Massenschäden?*, 97 ZSR I 51 (1978); Pierre Tercier, *L'indemnisation des préjudices causés par des catastrophes en droit suisse*, 109 ZSR II 497 (1990).

²³ Motion 98.3401, Jutzet Erwin, *Einführung der Sammelklage im Arbeits-, Miet- und Konsumentenrecht*; Baumgartner, *supra* note 19, at 112. Unlike in the United States, most bills in Switzerland – as in many other civil law countries – are drafted by the executive. While legislators have few staffers, if any, available to them, the executive, in particular the Justice Department, employs a significant number of capable lawyers, many of them with academic ambitions or already in academia, whose main job is legislative drafting. For larger projects, putting together the first draft is usually a task assigned to an ad-hoc committee of experts, composed of leading academics and practicing lawyers in the area of concern. See Bundesgesetz über die Bundesversammlung of December 13, 2002, art. 141; Regierungs- und Verwaltungsorganisationsgesetz of March 21, 1997, art. 7; Walter Buser, *Das Vorverfahren der Gesetzgebung*, 85 ZBL 145 (1984). For a brief description in English of the legislative process in Switzerland see *How Is a New Law Enacted?*, at <http://www.admin.ch/ch/e/gg/index.html>.

²⁴ See Pierre Widmer & Pierre Wesner, *Revision und Vereinheitlichung des Haftpflichtrechts*, Erläuternder Bericht 15-17 (1999), available at <http://www.bj.admin.ch/etc/medialib/data/wirtschaft/gesetzgebung/haftpflich.Par.0002.File.tmp/vn-ber-d.pdf>. The water was used to fight a fire that had broken out after an explosion at the plant. That explosion brought back memories of the deadly explosion of a chemical plant in Bhopal, India, in 1984 and made many Swiss fear that in a future accident of this kind, the effect might be much worse.

evaluate the necessity of distinct procedural rules for mass tort cases.²⁵ In its final report, the group suggested the introduction of various possible forms of group litigation in mass tort cases and recommended drafting a separate law on catastrophe litigation, such as Schweizerhalle, which it distinguished from mass torts.²⁶ The first tort reform draft of 1999, however, failed to follow up on any of these proposals, and, as part of rather severe budgetary measures, the Federal Council decided in 2003 to drop the entire tort reform project from its legislative agenda.²⁷

The proposal to consider the introduction of class actions for labor, landlord-tenant, and consumer disputes²⁸ was passed on to the committee of experts drafting the new federal code of civil procedure.²⁹ Without much discussion, however, the committee decided to refrain from introducing a U.S.-style class action into its draft code, noting that such a device is foreign to Swiss traditions.³⁰ This decision was largely greeted with satisfaction by lawyers, academics, and political groups.³¹ The subsequent draft submitted by the executive to parliament thus remained firmly opposed to the introduction of a class action device.³² The parliamentary debate thus far indicates a willingness to stay the course.³³ Hence, it is unlikely that the American-style class action will make an appearance in Swiss law, including in the new federal code of civil procedure, any time soon.³⁴

²⁵ *See id.* at 17.

²⁶ Bericht der Studienkommission für die Gesamtrevision des Haftpflichtrechts 190-95 (1991) (copy on file with author).

²⁷ *See* Bundesamt für Justiz, Haftpflichtrecht: Was ist bisher geschehen?, at <http://www.bj.admin.ch/bj/de/home/themen/wirtschaft/gesetzgebung/haftpflicht.html>. On the role of the executive in the legislative process see *supra* note 23.

²⁸ *See supra* text accompanying note 23.

²⁹ Motion 98.3401, Jutzet Erwin, Antwort des Bundesrates (on file with author).

³⁰ *See* Begleitbericht, *supra* note 8, at 15, 45-46.

³¹ *See* Vernehmlassungsbericht, *supra* note 9, at 96-98. The only critical voice directed against that decision came from the University of Geneva. *See id.*

³² Botschaft, *supra* note 10, at 4.

³³ The only reference to class actions in the parliamentary debates thus far has been a passing reminder by Justice Minister Blocher that the introduction of class actions is not envisioned. *See* 2007 AB Ständerat 498, 499.

³⁴ *But see infra* text accompanying notes 234-236.

Why this reluctance? As in many other jurisdictions that have contemplated the adoption of a class action device,³⁵ proponents of such a device in Switzerland face considerable doctrinal, jurisprudential, cultural, and economic objections. Among them are a traditional focus on the individual nature of a claim;³⁶ limitation of judicial power vis-à-vis the legislature,³⁷ thus disallowing the large-scale judicial discretion necessary to manage complex litigation;³⁸ strong emphasis on the litigants' right to be heard, which would need to be slighted in complex cases;³⁹ different respective roles of judges and attorneys;⁴⁰ lack of American-style fee structures and entrepreneurial lawyering,⁴¹ and the many practical changes that would be necessary to introduce a class action device. Moreover, there is a clear preference for legislation rather than litigation to deal with new social problems, including mass torts.⁴² This preference is perhaps more realistic in a country in which legislators still spend most of their time legislating (rather than running for re-election) and are not usually afraid of taking a

³⁵ See, e.g., Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT'L L. 157, 159-60 (2001).

³⁶ Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 269-70 (1993); Greger, *supra* note 16, at 399 and *infra* text accompanying notes 110-121. While civil procedure is conceptually limited to individual claims, enforcing the public interest is primarily considered a matter of the criminal process, see, e.g. Cappalli & Consolo, *id.*, so much so that the victims of alleged criminal behavior, as private attorneys general, are allowed in several Swiss cantons, as well as in some other civil law jurisdictions, to force a criminal prosecution where the public prosecutor fails to bring one and to appeal an acquittal, among other things. See, e.g., Felix Bommer, *Warum sollen sich Verletzte am Strafverfahren beteiligen dürfen?*, 121 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 172 (2003); Beth van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 145-46 (2001).

³⁷ The main concern is to cabin judicial power in countries in which the judiciary has historically been part of governmental repression rather than representing a bulwark against it. See, e.g., SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANSATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* 85-86 (2003) and *infra* text accompanying notes 110-121.

³⁸ See, e.g., Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 COLUM. J. TRANSNAT'L L. 259, 300-06 (1995).

³⁹ See, e.g., Cappalli & Consolo, *supra* note 36, at 219.

⁴⁰ See, e.g., David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 752-55 (1986).

⁴¹ See, e.g., Harald Koch, *Non-Class Group Litigation under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 365 (2001); Harald Koch, *Die Verbandsklage in Europa*, 113 ZVP 413, 426-27 (2000).

⁴² See, e.g., Walter, *supra* note 1, at 376; Entwurf für ein Kernenergiehaftpflichtgesetz, BBl 2007 5455, proposed art. 25(1) (proposed statutory provision, according to which Parliament would regulate the necessary relief in cases of nuclear mass accidents).

clearly defined position on the issues of the day.⁴³ Moreover, the legislative process is considered to derive particular legitimacy from the presence of direct-democratic mechanisms such as the referendum⁴⁴ and the initiative.⁴⁵ Finally, given these and other differences, the question of how much of a need there really is for class actions cannot easily be answered in the same fashion as in the United States.⁴⁶

The report of the committee of experts mentions some of these issues. It points out that, in the Swiss procedural tradition, the right to conduct a proceeding is closely connected to one's claimed substantive right.⁴⁷ And the committee displays considerable unease with the prospect of judicial supervision of the litigants' attorneys.⁴⁸ The report also alludes to the problem that class litigation may result in a

⁴³ The federal legislation attempting to tackle new social problems is considerable. Its proliferation is particularly notable in the area of consumer protection. To take one example, frequent reports of travel arrangements turning sour without the customers of the organizers receiving adequate compensation from either the organizer or their travel agency led the Swiss Parliament to adopt the Federal Act on Organized Travel, Bundesgesetz über die Pauschalreisen, of June 18, 1993, SR 944.3. Among many other provisions, the Act contains stiff liability provisions. *See id.*, Arts. 14-16. Further, travel organizers and travel agents must keep a guaranty fund large enough to guarantee the payment of any damages to any and all customers. *See id.* at Art. 18. However, such provisions are not fool proof as the recent bankruptcy of a Zurich area travel organizer showed: The organizer had bilked the guaranty fund in order to stay afloat. The ombudsman of the travel industry then got the insured's travel insurance to offer customers of the bankrupt a 27% cash payment plus 13% in travel coupons of prepaid travel money in exchange for an undertaking not to sue. *See, e.g.*, <http://www.beobachter.ch/artikelfree.asp?Session=BFF1C49B-700A-473F-8323-44EF0111E515&AssetID=8829>.

⁴⁴ Every piece of federal legislation is subject to a popular referendum when requested by a certain number (currently roughly one percent) of the voting-age population or by the governments of eight cantons within three months of passage by the legislature. If enough such signatures are gathered, the legislation is adopted when a simple majority of those voting approve. Constitution of the Swiss Confederation of April 18, 1999, Arts. 141(1) & 142(2).

⁴⁵ The constitutional vehicle of the initiative permits a certain number of voters, currently roughly two percent of the voting-age population, to propose a constitutional amendment, which must be put to a popular vote. The amendment is adopted when a simple majority of those voting plus a simple majority of those voting in the majority of cantons approve. *Id.* at Arts. 138, 139 & 142(2). The Swiss populace thus has the opportunity both to vote down legislation passed by its parliament and to take action when the parliament has failed to legislate. Obviously, gathering the relevant number of signatures among voters, particularly within the three-month window set for the referendum, may pose a challenge. This is where trade associations, NGOs, and small political parties can exercise some leverage.

⁴⁶ *See, e.g.*, Samuel P. Baumgartner, *Debates over Group Litigation in Comparative Perspective*, 2 INT'L L. FORUM 254, 255-57 (2000) (conference review essay).

⁴⁷ *See* Begleitbericht, *supra* note 8, at 15.

⁴⁸ *Id.* at 46.

level of complexity that is difficult, if at all possible, to manage.⁴⁹ What is missing in the report, however, is any serious analysis of these issues. Instead, the committee simply concludes that the traditional procedural vehicles, including suits by associations, “are by far sufficient.”⁵⁰ This is unfortunate. Not only are there good arguments to meet most of these concerns.⁵¹ There is also the powerful argument that, as we have moved from an individualistic to an industrial society, civil procedure needs to provide class proceedings as well as individual litigation for the effective and efficient enforcement of laws and individual rights.⁵² To be sure, there are good arguments against the introduction of a class action device in Switzerland or at least for its limitation to certain issue areas.⁵³ But given the importance of the (new) Swiss procedural code for the enforcement of substantive law and individual rights, access to justice, efficiency, equality, and fairness – the process values usually stated at the beginning of civil procedure textbooks in Switzerland⁵⁴ – one would have expected more careful analysis.

Apparently, there are other reasons for such cavalier treatment. First, as the report of the committee mentions, its members wanted to avoid, as much as possible, importing

⁴⁹ *Id.* See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1312 (1976):

A critical question for research is whether [the potential of the judicial system] is or can be exploited to produce a party structure that is adequately representative in light of the consequences of public law litigation without introducing so much complexity that the procedure falls of its own weight.

⁵⁰ *Id.* at 45-46.

⁵¹ See, e.g., Baumgartner, *supra* note 19, at 119-28; Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 321-23, 344-54, 363-72 (2003); Per Henrik Lindblom, *Group Actions: A Study of the Anglo-American Class Action Suit From a Swedish Perspective*, in GROUP ACTIONS AND CONSUMER PROTECTION 7 (Thierry Bourgoignie ed., 1992) and *infra* text accompanying notes 122-133.

⁵² See, e.g., Cappalli & Consolo, *supra* note 36, at 219-21; Rowe, *supra* note 35, at 157-58.

⁵³ See, e.g., Baumgartner, *supra* note 19, at 122-28.

⁵⁴ See, e.g., WALTHER J. HABSCHIED, SCHWEIZERISCHES ZIVILPROZESS- UND GERICHTSORGANISATIONSRECHT 1-3 (2nd ed. 1990); MAX KUMMER, GRUNDRISS DES ZIVILPROZESSRECHTS 3-7, 13-14 (4th ed. 1984); VOGEL & SPÜHLER, *supra* note 13, at 5-8. For a valuable collection of readings on process values in the United States see, for example, ROBERT COVER & OWEN FISS, *THE STRUCTURE OF PROCEDURE* (1979). Oddly, the commentary accompanying the latest proposal of the new federal code discusses the tension among these process values without taking a position on how best to resolve them. Instead it simply concludes with the catchy slogan: The new Code of Civil Procedure: Familiar, Innovative, and Ready for the Future (*vertraut, innovativ und zukunftsgerichtet*). Botschaft, *supra* note 10, at 13.

any new procedural devices from abroad.⁵⁵ In the committee's view, merging 26 different state procedural codes into one consistent federal code was difficult enough.⁵⁶ Given that some have fought for this new federal code for decades,⁵⁷ however, one would have expected a more visionary approach, including some in-depth (international) comparative analysis.⁵⁸ This is particularly true because the European Community, whose member states surround Switzerland, has been on a course of harmonizing various aspects of procedure, including to some extent in the area of group litigation.⁵⁹ In the committee's defense, one does need to point out that avoiding anything controversial is a tried-and-true approach within the Swiss political system of consensus democracy.⁶⁰

Second, the committee report mentions the perceived danger that "baseless claims would be filed for the sole reason of forcing the defendant into a settlement."⁶¹ In Switzerland and elsewhere in Europe, this is an often-heard complaint about U.S. class action proceedings, indeed about U.S. litigation in general.⁶² It reveals a deeper

⁵⁵ See Begleitbericht, *supra* note 8, at 15.

⁵⁶ *Id.*

⁵⁷ See generally THOMAS SUTTER-SOMM, AUF DEM WEG ZUR RECHTSEINHEIT IM SCHWEIZERISCHEN ZIVILPROZESSRECHT (1998) (expounding efforts to unify civil procedure in Switzerland since 1872).

⁵⁸ Apparently the Swiss Executive recognized this and has abandoned this rhetoric. Now the draft claims to be at the cutting edge of international developments by introducing enforceable notary documents from the Romanist and Latin countries and by putting a stronger emphasis on mediation. Botschaft, *supra* note 10, at 3-4. That change in rhetoric has not, however, been accompanied by better comparative analysis with regard to group and class action litigation. The "comparative" analysis in the latest draft is even shorter and relies primarily on an article in the Financial Times, describing the perceived pathologies of American class action litigation, to prove the lack of need for the device.

⁵⁹ See, e.g., Baumgartner, *supra* note 19, at 112-13; Burkhard Heß, *Neue Rechtsetzungssakte und Rechtsetzungsmethoden im europäischen Justizraum*, 124 ZSR, II, 183 (2005).

⁶⁰ See, e.g., AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 31-41 (1999); STEINER, *supra* note 4. Lijphart uses ten elements to distinguish a consensus democracy from a majoritarian democracy: executive power-sharing in broad coalition cabinets; executive-legislative balance of power; multiparty system; proportional representation; interest group corporatism; federal and decentralized government; strong bicameralism; constitutional rigidity; judicial review; and central bank independence. Switzerland meets all of these except the requirement of judicial review: The Supreme Court may not review the constitutionality of federal legislation. *Id.*

⁶¹ Bericht, *supra* note 8, at 46.

⁶² See, e.g., Burkhard Heß, *Die Anerkennung eines Class Action Settlement in Deutschland*, 55 JURISTENZEITUNG 373, 374 (2000); Heinrich Honsell, *Amerikanische Rechtskultur*, in DER EINFLUSS DES EUROPÄISCHEN RECHTS AUF DIE SCHWEIZ 39, 48 (Peter Forstmoser et al. eds., 1999); Regina Kiener & Raphael Lanz, *Amerikanisierung des Schweizerischen Rechts – und ihre Grenzen*, 119 ZSR 155, 155 (2000).

reason for opposing the adoption of class actions in Switzerland and elsewhere: outright rejection of U.S.-style litigation.⁶³ At the heart of this rejection, as the committee's concern about strike suits shows, is a deep unease with the way in which the jury trial,⁶⁴ a procedure steeped in equity,⁶⁵ anti-formalism,⁶⁶ entrepreneurial lawyering,⁶⁷ the prospect of punitive damages,⁶⁸ and the tendency toward the lawsuit as a business deal that these features support⁶⁹ result in a litigation system in the United States in which power (including judicial power), money (who has it and who does not), and tactics seem to be more important in the outcome of litigation than a finding of who is right and who is wrong.⁷⁰ This unease was underscored in the 1980s and early 1990s when what the Germans call the "judicial conflict" with the United States resulted in extensive depictions in German law journals of the U.S. litigation system as arbitrary and unfair – interestingly, unfair primarily to defendants, but that should not be surprising given the reports' provenance in the U.S. tort reform movement.⁷¹ This German scholarship seems to have influenced the thinking of Swiss scholars, especially in German-speaking Switzerland.⁷² The perception that U.S.

⁶³ See, e.g., Rowe, *supra* note 35, at 159 (noting that the "perceived extremes to which Americans have taken things ... can turn off those in whose traditions such practices are anathema").

⁶⁴ See, e.g., Felix Dasser, *Punitive Damages: Vom "fremden Fötzel" zum „Miteidgenoss“*, 96 SCHWEIZERISCHE JURISTENZEITUNG 101, 102-03 (2000) (speaking of the aleatoric character of U.S. jury decisions).

⁶⁵ I am referring here to the "enormous flexibility and latitude of U.S. procedure – including its ability to create new remedies, judicial discretion, liberal pleading, the availability of the class action device, and the ability of the parties to join every conceivable claim" as well as to discovery. Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835, 841 (2002). See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

⁶⁶ See, e.g., BAUMGARTNER, *supra* note 35, at 11-12. On American anti-formalism see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 32-299 (1995).

⁶⁷ See, e.g., Cappalli & Consolo, *supra* note 36, at 220; Heß, *supra* note 42, at 145.

⁶⁸ See, e.g., Honsell, *supra* note 62, 45-48.

⁶⁹ See, e.g., Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001).

⁷⁰ See, e.g., Baumgartner, *supra* note 65, at 843-46; Heß, *supra* note 42, at 145, 149-50.

⁷¹ See Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1340-41 (2004).

⁷² See, e.g., Honsell, *supra* note 62, 45-52 (presenting a very one-sided narrative of U.S. tort law and procedure).

courts were exercising their country's hegemonic power in dealing with foreign parties and foreign sovereignty concerns further supported the unease.⁷³

In the late 1990s, objection to U.S.-style class actions was further intensified in Switzerland by the Holocaust Assets Litigation, in which several classes of Holocaust survivors sued the major Swiss banks for conversion of their families' bank accounts during and after World War II and for other misdeeds.⁷⁴ Although the cases presented a number of difficult legal and factual questions, from the procedural (personal jurisdiction, forum non conveniens, proof of title) to the substantive (applicable law, statute of limitations, preemption by treaty), they were settled, after 18 months, for \$1.25 billion without a single legal ruling by the trial judge.⁷⁵ This seemed to confirm that power is more important than the merits in resolving class actions in the United States.⁷⁶ For the Swiss public and those involved in procedural reform, it did not matter that the most important power play in that dispute took place outside of the courtroom by U.S. government officials,⁷⁷ the chairman of the Senate Banking Committee,⁷⁸ and the legislatures and administrative agencies of a few important U.S. states.⁷⁹ This is important not only because large parts of the Swiss population had originally been favorably inclined towards the plaintiffs' claims.⁸⁰ Together with the unease about the U.S. litigation system described above, this power play reinforced the impression "that what matters for the outcome is not the rule of law, but the

⁷³ See, e.g., Baumgartner, *supra* note 71, at 1352-53.

⁷⁴ For an account of that litigation by one of its protagonists see Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795 (2002). For an account by the chief U.S. government negotiator in the matter see STUART EIZENSTAT, *IMPERFECT JUSTICE, LOOTED ASSETS, SLAVE LABOR AND THE UNFINISHED BUSINESS OF WORLD WAR II* 75-186 (2003).

⁷⁵ See, e.g., Neuborne, *supra* note 74, at 805-12 (describing filing, settlement negotiations, and settlement in that litigation).

⁷⁶ See, e.g., Baumgartner, *supra* note 65, at 847 (noting that "when the \$1.25 billion settlement became public, a great number of editorialists, members of Parliament, and other protagonists of public opinion berated the Swiss banks for selling out to the "blackmail" from overseas"). That the defendants did not even raise some of these issues, from what I understand partly to avoid extensive discovery and the testing of the trial judge's patience, only supported this perception.

⁷⁷ See, e.g., EIZENSTAT, *supra* note 74, at 46-186; Neuborne, *supra* note 74, at 797 (describing diplomacy as the second leg of the litigation).

⁷⁸ See, e.g., EIZENSTAT, *supra* note 74, at 61-69, 136 & 171-76.

⁷⁹ See *id.* at 156-61.

⁸⁰ See, e.g., Baumgartner, *supra* note 65, at 846.

relative power of the litigants and of the governments that they are able to mobilize.”⁸¹ The resulting suspicion of American procedure and American law seems to suffice for most Swiss reformers today to dismiss the viability of the class action out of hand when they could take the device and its application in the United States as the basis for a deeper reflection on process values in Switzerland and how well those values are served by the existing system.

2. *Association Suits* (Verbandsklagen)

a) *General Requirements and Standing to Sue*

Although there is no class action device, less far-reaching group litigation devices have been in existence in Switzerland for quite some time. Probably the best known such device is the association suit (*Verbandsklage* in German). The Swiss legislature first introduced the *Verbandsklage* in the area of unfair competition, granting associations that are authorized by their bylaws to pursue the economic interests of their members to bring claims of violations of the Unfair Competition Act on behalf of those members.⁸² However, associations are limited to claim declaratory relief and injunctions to stop the alleged violations.⁸³

While the Unfair Competition Act was being drafted, the Federal Supreme Court recognized a similar right of trade associations to seek a judgment declaring a registered patent invalid if that is in the economic interest of the association’s members.⁸⁴ A few years later, in a 1947 case, the Court extended the area of application of that decision as a matter of federal common law. In that case, the Court allowed the Swiss Association of Barbershop Employees to challenge a provision in the bylaws of the Basel Association of Barber Masters to refrain for six months from hiring a barber who had worked with an Association member within 500 meters of

⁸¹ Baumgartner, *supra* note 65, at 845.

⁸² See Bundesgesetz über den unlauteren Wettbewerb of Sept. 30, 1943, art. 2(3), *superseded by* Bundesgesetz gegen den unlauteren Wettbewerb of Dec. 19, 1986, SR 241 [hereinafter Unfair Competition Act], art. 10(2)(b).

⁸³ *Id.*

⁸⁴ Federal Supreme Court, decision of Feb. 27, 1940, 66 II 62.

the new employment site.⁸⁵ Although every barber in the city of Basel was potentially affected and thus had standing to sue, the Court reasoned, few would do so as long as they stayed with the same employer.⁸⁶ That was so, the Court said, because of the financial risk of litigation and because of the danger for the claimant to be singled out and never to be hired by a Basel barber again.⁸⁷ It thus held that an association can bring suit on behalf of its members if:

- the association’s claim pursues an interest of all those among whose numbers the association recruits its members;
- the association is authorized, by its bylaws, to pursue the economic interests of its members; and
- all of the association’s members would themselves have standing to sue (i.e. they are the holders of the claimed right).⁸⁸

The Court reasoned that this right of the association to sue arises out of Article 28 of the Swiss Civil Code, which allows everyone “whose person is being harmed unlawfully” to sue “anyone who participates in the harmful act.”⁸⁹ As a result, the common law *Verbandsklage* is limited to claims of harm to one’s person. At first, it looked like there was a further limitation to the area of labor law since the Court based its decision in doctrinal terms on the strong representative role that substantive federal labor law had assigned to labor associations (both unions and trade associations) in disposing over its members’ personal rights.⁹⁰ But later decisions made clear that such is not the case.⁹¹

The limitation of the association suit to claims of harm to one’s person is not as narrow an area of application as it may at first seem. Article 28 protects from any

⁸⁵ Federal Supreme Court, decision of May 20, 1947, 73 II 65.

⁸⁶ *Id.* at 72.

⁸⁷ *Id.*

⁸⁸ *Id.* at 69-72.

⁸⁹ Zivilgesetzbuch, SR 210 [hereinafter Civil Code], art. 28(1).

⁹⁰ 73 II at 70.

⁹¹ Federal Supreme Court, decision of Sept. 27, 1977, 103 II 294, 302 (“That these decisions concerned labor matters does not change their fundamental importance”).

unlawful⁹² interference with the integrity of one's personhood, from physical and psychological harm to one's body to limitations on one's freedom to do what one wants – including the freedom to exploit one's abilities economically – to interference with one's privacy⁹³ to defamatory statements and other slights of one's honor.⁹⁴ Nevertheless, it is a limitation that is significant, excluding association suits in both contract cases and the majority of negligent tort actions, namely those in which the alleged negligent act was not per se unlawful.⁹⁵

Thirteen years later, the Court had an opportunity to revisit the association suit in another labor dispute.⁹⁶ This time a Geneva trade association had entered into a labor contract with a national trade union on the conditions of employment of electricians.⁹⁷ Among the contract's provisions was a requirement that the fund of the Geneva trade association pay employed electricians 100 percent of their salary during national holidays, when the electrical shops would be closed.⁹⁸ A local Geneva trade union approached the Geneva trade association with a request for a contract with the same conditions.⁹⁹ The trade association refused, having been told by the national trade union that it would otherwise withdraw from its contract. In the meantime, the local trade union paid its members the holiday salary that they were not receiving due to

⁹² „The infringement is unlawful if it is not justified by the consent of the harmed, by a prevailing public or private interest, or by statute.” Civil Code, art. 28(2).

⁹³ On the very different views on, and legal protections of, privacy in Europe and the United States, respectively, see, for example James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

⁹⁴ See, e.g., HEINZ HAUSHEER & REGINA AEBI-MÜLLER, *DAS PERSONENRECHT DES SCHWEIZERISCHEN ZIVILGESETZBUCHES* 158-89 (2005). On the historical and philosophical development of the law of protecting the person in the German Civil Code (BGB), much of which influenced art. 28 of the Swiss Civil Code, see, for example, Whitman, *supra* note 93, at 1180-88.

⁹⁵ See, e.g., THOMAS RÖTHLISBERGER, *ZIVILRECHTLICHE PRODUKTBEOBACHTUNGS-, WARN- UND RÜCKRUFPLICHTEN DER HERSTELLER* 187 (2003) (noting that association suits will hardly ever be permissible in product liability cases for lack of violation of the personal rights of all members of an association).

⁹⁶ Federal Supreme Court, decision of January 19, 1960, 86 II 18.

⁹⁷ In Switzerland, as in many other continental European countries, labor contracts are negotiated and entered into between unions and trade associations, the latter negotiating in the name of all member employers, rather than between unions and individual companies as is usually the case in the United States.

⁹⁸ 86 II at 19-20.

⁹⁹ *Id.* at 20.

the strong-arming of the national union.¹⁰⁰ The local union then sued both the national union and the Geneva trade association, seeking a repayment of the holiday salaries.¹⁰¹ The plaintiff's primary argument was that it was suing in the name of its members, whose holiday pay it had merely advanced. The Supreme Court, however, held that the plaintiff did not have standing. While the three requirements set up by the Court in its 1947 decision were met, associations were limited to claiming declaratory relief and an order to cease violating the defendants' Article 28 rights, the Court held. Claims for damages, however, would have to be brought by the individual members of the association.¹⁰²

This is so, the Court reasoned, because the right to bring a claim for damages is a personal right of the creditor, which only he can assert in court.¹⁰³ Allowing an association to claim that right in court, possibly against the creditor's will, would violate his right to dispose of his personal claims.¹⁰⁴ That, the Court opined, would amount to a transfer of the creditor's right against his will.¹⁰⁵ Moreover, the Court continued, the association in a *Verbandsklage* always pursues a right that is distinct from the rights of its individual members, one that is grounded in the common interest of the members and others equally situated.¹⁰⁶ Thus, to the extent that the association pursues such a common interest, such as the interest of all Geneva electricians to have both the labor and management defendant stop interfering with their right to contract, it can do so without interfering with the individual rights of its members.¹⁰⁷ But to the extent it intends to advance the rights of individual electricians to receive damages, it is precluded from doing so.¹⁰⁸ Moreover, the Court said, not all

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 21-24. The plaintiff nevertheless won in the Supreme Court on its alternative theory that it had given its members the holiday pay in *negotiorum gestio*, which it could claim as *its own right* against the defendants. *See id.* at 25-27. On *negotiorum gestio* see, for example, John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817 (1961); Duncan Sheehan, *Negotiorum Gestio: A Civilian Concept in the Common Law?*, 55 INT'L & COMP. L.Q. 253 (2006).

¹⁰³ 86 II at 22.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

of the Geneva electricians had such a claim to begin with, since some of them were represented by the national trade union and thus already were parties to the contract that gives them holiday compensation.¹⁰⁹

To understand the Court's reasoning, it is important to remember the strong foundation of 19th century German Pandectism,¹¹⁰ which to some extent has influenced the Swiss civil law,¹¹¹ in Kantian concepts of free will¹¹² as well as Pandectism's concern with cabining judicial power.¹¹³ In this view, legal rights allow each individual to exercise his free will and thus "fully to realize his potential as an individual: to give full expression to his peculiar capacities and powers."¹¹⁴ The

¹⁰⁹ *Id.*

¹¹⁰ Pandectism was the jurisprudential school that, beginning in the 1840s, continued Friedrich Carl von Savigny's work of painstakingly organizing Roman law, mainly Justinian's Digest, scientifically penetrating it so as to achieve a highly formalist hierarchical system, within which every legal concept has a clearly defined meaning. The effort was carried by a variety of underlying purposes, among them a positivist-inspired endeavor to prove law a science independent of the other social sciences and an attempt to constrain judges in applying the law by a conceptual edifice that would impose one correct interpretation of the law to be deduced by knowledge of the precise meaning of the concepts used by the legislature. *See, e.g.*, FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 430-68 (2d ed. 1967); Gerhard Dilcher, *Der rechtswissenschaftliche Positivismus*, 61 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 497 (1975). While Pandectism's strict formalism was unable to survive later criticism, it has nonetheless left a lasting mark on the method of making and applying law in Germany and in other civil law countries. It has had a particularly strong influence on the law of procedure in the German-speaking countries of continental Europe. *See, e.g.*, FRIDOLIN M.R. WALTHER, *DIE AUSLEGUNG DES SCHWEIZERISCHEN ZIVILPROZESSRECHTS, INSBESONDERE DES BUNDESGESETZES ÜBER DEN GERICHTSSTAND IN ZIVILSACHEN (GERICHTSSTANDSGESETZ)* 79 (2002); Peter Gottwald, *Argumentation im Zivilprozeßrecht*, 93 *ZZP* 1, 4-8 (1980).

¹¹¹ I say "to some extent" because most cantons and localities in Switzerland resisted German-style full reception of Roman law. *See, e.g.*, EUGEN HUBER, *SYSTEM UND GESCHICHTE DES SCHWEIZERISCHEN PRIVATRECHTS*, IV, 114-21 (1893). Similarly, the drafters of the cantonal civil codes and, later, of the Swiss Civil Code, attempted to stay clear of some of Pandectism's conceptualist language in favor of a style that was easier for the then-numerous lay judges to understand. Yet, the German Historical School and Pandectism clearly influenced the drafters of the Civil Code and Code of Obligations as well as later scholarly and judicial interpretations of those codes. *See, e.g.*, WIEACKER, *supra* note 110, at 443; Ingeborg Schwenzer, *Rezeption deutschen Rechtsdenkens im schweizerischen Obligationenrecht*, in *SCHULDRECHT, RECHTSVERGLEICHUNG UND RECHTSVEREINHEITLICHUNG AN DER SCHWELLE ZUM 21. JAHRHUNDERT* 80 (Ingeborg Schwenzer ed., 1999).

¹¹² *See, e.g.*, William B. Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 *U. PA. L. REV.* 1889, 1997-2004, 2074 (1995).

¹¹³ *See supra* note 110.

¹¹⁴ Whitman, *supra* note 93, at 1181. The Pandectists thus defined a right as *Willensherrschaft*, *see, e.g.*, ANDREAS VON TUHR, *DER ALLGEMEINE TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS* I, 56-58 (1910), thus assigning „the individual will an area in which it can control independently of any other will.“ FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* I, 333 (1840). On the philosophical history of this concept of right and the formal equality it was to serve in a hitherto aristocratic German society see, for example, Ewald, *supra* note 112, at 2065-74.

exercise of those legal rights must be in the control of the individual and can be limited only by the legislature.¹¹⁵ Conversely, no individual can be forced to exercise his rights or to exercise them at a particular time.¹¹⁶ The procedural equivalent to this concept is what in German is called *Dispositionsmaxime* (roughly “principle of free disposition”):¹¹⁷ Every individual claiming a particular right must have full control of the decision whether, when, and to what extent¹¹⁸ to claim that right in court and if so, whether to prosecute the claim all the way to trial, agree to a settlement, or abandon prosecution altogether.¹¹⁹ This principle fits nicely with the classical liberal concepts underlying the procedural codes of German-speaking Europe: The judge should exercise his power – state power – only to the extent that the parties so request.¹²⁰ All this should be easy to understand, although it may be difficult to believe for those who have been subjected to careless talk about the “inquisitorial” nature of civil litigation in civil law countries and the resulting assumption of an all-powerful judge.¹²¹

¹¹⁵ On the significance of the French Revolution’s postulates on this concern about limiting the power of judges in German-speaking Europe see, for example, WIEACKER, *supra* note 110, at 465.

¹¹⁶ In fact, as von Tuhr points out, assigning individuals the right to exercise their will means giving them the power to exercise or not to exercise that will any time they wish. See VON TUHR, *supra* note 114, at 57.

¹¹⁷ See, e.g., KUMMER, *supra* note 54, at 80-81.

¹¹⁸ Thus, *ne eat iudex ultra petita partium* (the judge may not award more or something different than asked for by the parties). *Id.* at 81.

¹¹⁹ *Id.*

¹²⁰ See, e.g., Carl Baudenbacher, *Der Zivilprozeß als Mittel der Wirtschafts- und Sozialpolitik*, 102 ZSR 161, 162-66 (1983); Gerber, *supra* note 40, at 769. Cf. ADOLF WACH, VORTRÄGE ÜBER DIE REICHS-CIVILPROCESSORDNUNG 2 (1896) (referring to the “lack of interest of the state and its organ, the judge, in the litigation”). This includes imposing the limitation that only evidence that is likely to be of probative value may be gathered so as to protect individuals, including the parties, from unnecessary intrusion into their constitutionally protected privacy by the state (via the judge). See, e.g., BAUMGARTNER, *supra* note 37, at 84-85; Gerber, *supra* note 40, at 763 (noting that “[m]ere speculation of a party that a witness may say something relevant to the litigation process is not enough to trigger the use of state power”).

¹²¹ “Whoever first characterized the continental European system as ‘inquisitorial’ did a profound disservice to constructive legal thought.” Hearings Before the Commission on Revision of the Federal Court Appellate System, second phase, vol. I, at 205 (1974) (statement of Judge Friendly). A logical corollary to the *Dispositionsmaxime* flowing from this ideational background is the *Verhandlungsmaxime*, which holds that the development of the facts is the responsibility of the parties. Accordingly, only facts alleged by the parties may be made the basis of the court’s judgment; only facts actually in dispute may become the subject of evidence-gathering; and only evidence proffered by the parties may be gathered by the court, while proffered evidence must be so gathered unless the judge considers the proffering party’s allegation proven. See, e.g., KUMMER, *supra* note 54, at 76-77; Gerber, *supra* note 40, at 754. That, together with the limitations of judicial power discussed above, leaves little of the inquisitorial procedure with which German and other jurisdictions had experimented

Of course, Pandectist concepts were not the only ones to influence the Swiss Civil Code and its interpretation. Germanic communitarian institutions and ideas also found their way into the Code,¹²² as did a somewhat more relaxed attitude toward judicial law-making. In particular, Article 1(2) of the Code provides that if the Code provides no rule for a particular question of law, “the judge shall ... decide according to the rule that he would promulgate were he a legislator.”¹²³ Moreover, Rudolph von Jhering’s ideas about law as legal protection of social interests (and later about law as a means to achieve social ends) have influenced the Code’s interpretation to some extent,¹²⁴ although they have not nearly had the impact that the Legal Realists, who borrowed some of Jhering’s ideas,¹²⁵ had in the United States.¹²⁶ Finally, the classical liberal concept of civil procedure was challenged in the late 19th century by the Austrian proceduralist Franz Klein, who argued in favor of a more “social” procedure, and proved influential in early 20th century changes to procedural codes in Switzerland and Germany as well as Austria.¹²⁷ Chief among those changes in Switzerland is the federal requirement of judicial supervision of settlements in specific cases of public interest, mainly those involving the interest of the child and of

in the 18th and earlier centuries. Cf. Gerber, *supra* note 40, at 768 (arguing that “[t]he German system is also based on the adversarial principle”).

¹²² On the influence of Germanic institutions in Germany and Switzerland see, for example, WIEACKER, *supra* note 110, at 403-16.

¹²³ Article 1 of the Civil Code provides in full:

- (1) The *Gesetz* (legislated law) applies to all questions of law on which it contains a provision according to its plain language or by interpretation.
- (2) If no provision can be gleaned from the *Gesetz*, the judge shall decide according to customary law and, where there is no customary law, according to the rule that he would promulgate were he a legislator.
- (3) In doing so, he shall follow well-tried (*bewährte*) scholarship and practice.

¹²⁴ On Jhering and his development from a Pandectist to a rebel against Pandectism in the mid- to late 19th century see, for example, WIEACKER, *supra* note 110, at 450-53. As Wieacker points out, Jhering first saw a right as the power of the will (*Willensmacht*), as the Pandectists (*see supra* note 114), but a power bestowed to achieve protected social interests and later in life went further to see law simply as a means of exercising power and satisfying interests. *Id.* at 451.

¹²⁵ See, e.g., Ewald, *supra* note 112, at 2083.

¹²⁶ See, e.g., Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50 (W. Edmundson & M. Golding eds., 2005).

¹²⁷ See, e.g., Baudenbacher, *supra* note 120, at 167-72; Satter, *Das Werk Franz Klein's und sein Einfluss auf die neueren Prozessgesetze*, 60 ZZP 272 (1937).

the weaker spouse in divorce proceedings, and a judicial duty to probe whether the parties really intend what they declared in their answer and complaint.¹²⁸

On this basis, then, it is understandable that the Swiss Supreme Court had no problem utilizing its judicial power pursuant to Article 1(2) of the Civil Code to extend the *Verbandsklage* to claims of violations of Article 28 of the Code, finding that Article 28 provided no clear answer as to who should have the right to sue;¹²⁹ using policy arguments to back up its decision;¹³⁰ and recognizing an interest of the group as distinct from the interest of individual members of the association to have the group's rights enforced by the association.¹³¹ Thirteen years later, however, the Court retreated to the Pandectist concept of personal rights to limit the available relief.

There is, of course, a difference in these conceptual terms between an association's claim for declaratory relief and its claim for damages: A declaratory judgment in favor or against the association conceptually affected the rights of the individual barber employees no less or no more than a declaration in favor of one of them alone would have affected the rights of the others. A judgment for damages on behalf of all members, however, would have adjudicated the individual members' alleged right to damages once and for all.¹³² Yet, it seems odd that the Supreme Court retreated from its relatively bold use of Article 1(2) and from its policy argument that association members would not have the means or the economic power to sue individually, an argument that would support an association suit for damages as well. Moreover, the slight weakening of the *Dispositionsmaxime* in more recent procedural reforms¹³³ makes one wonder how conceptually unthinkable it really is to transfer the rights of individual members to sue to an association (or a class representative for that matter). Apparently the extension of group rights had gone far enough as a matter of policy, including the Kantian-liberal ideals underlying Swiss civil law and procedure.

¹²⁸ See, e.g., KUMMER, *supra* note 54, at 81; Gerber, *supra* note 40, at 754-55.

¹²⁹ See 73 II at 68-69.

¹³⁰ See *supra* notes 86-87 and accompanying text.

¹³¹ See 73 II at 71.

¹³² See *supra* notes 103-105 and accompanying text.

¹³³ See *supra* text accompanying notes 127-128.

Perhaps, the Court was simply trying to align the outcome with the declared policy of the legislature in the Unfair Competition Act.¹³⁴ Moreover, there are other reasons against allowing the association to claim damages on behalf of its members, such as the fact that each member's claim for damages may be different and a fear of over-deterrence. Accordingly, the Court's limitation of association suits to declaratory relief and orders to stop violating the defendants' Article 28 rights has been well received and was quickly adopted by the federal legislature when extending the *Verbandsklage* to other substantive areas.¹³⁵

With this limitation on available remedies, the *Verbandsklage* was, at least for a while, fairly well received by the federal legislature. As a result, the *Verbandsklage* is available today in a number of substantive areas in addition to violations of Article 28 of the Civil Code and unfair competition as discussed above. In the areas of trademark and unfair competition law, consumer organizations “of national or regional importance” are given the right to sue to enforce the relevant statutes to the extent they affect consumer interests in addition to allowing associations to sue in favor of the economic interests of their members;¹³⁶ the Federal Act on the Equal Treatment of Men and Women allows organizations that have as their declared aim the achievement of gender equality or the representation of employee interests to bring claims alleging gender discrimination,¹³⁷ and both the Federal Act on the Codetermination Rights of Employees and the Federal Act on Dispatched Workers from the EU give trade associations and unions the right to enforce the Acts’

¹³⁴ Cf. 86 II at 23 (referring approvingly to Article 2(3) of the Unfair Competition Act and its limits on available relief in association suits as well as to policy arguments made in the legislative process in support of those limits).

¹³⁵ See, e.g., FRANK/STRÄULI/MESSMER, KOMMENTAR ZUR ZÜRCHERISCHEN ZPO 150-51 (3d ed. 1997); VOGEL & SPÜHLER, *supra* note 13, at paras. 92a-92b.

¹³⁶ Bundesgesetz über den Schutz von Marken und Herkunftsangaben of Aug. 28, 1992, SR 232.11, art. 56; Bundesgesetz gegen den unlauteren Wettbewerb of Dec. 19, 1986, SR 241, art. 10(2)(b). To the extent that these statutes enable consumer organizations to sue, they do so without requiring their members to have standing individually.

¹³⁷ Bundesgesetz über die Gleichstellung von Frau und Mann of Mar. 24, 1995, SR 151.1, art. 7 [hereinafter Gleichstellungsgesetz]. Pursuant to this statute, the association can sue in its own name, but is required to cooperate closely with the employees involved in the alleged discrimination. *Id.*

obligations on behalf of individual companies and employees in court.¹³⁸ Finally, in a 1977 opinion, the Federal Supreme Court interpreted the federal Antitrust Act of 1962 to permit the *Verbandsklage* in antitrust matters. The legislature subsequently confirmed this holding by writing it into the Antitrust Act of 1985, but then deleted the *Verbandsklage* provision in the Antitrust Act of 1995. Since then, there has been somewhat of a debate over the question whether the deletion was meant to abolish the *Verbandsklage* in antitrust matters (the majority view) or whether it represents a legislative error with the result that the 1977 holding of the Supreme Court again controls.¹³⁹

In all these instances, as discussed above, the *Verbandsklage* is limited to declaratory relief and orders to stop unlawful behavior. Damages and other injunctive relief can be pursued only by individuals, possibly with the practical advantage¹⁴⁰ of a finding of unlawfulness in a preceding association suit.¹⁴¹ Moreover, based on reasoning building on the individualism theme developed above,¹⁴² the Supreme Court has held that the filing of a *Verbandsklage* will not toll the applicable statute of limitations on the claim of the individual in whose interest the action is filed.¹⁴³

b) Procedure and Preclusive Effect of Judgment

Despite being part of federal civil procedure for some 60 years, the *Verbandsklage* has largely been neglected by Swiss proceduralists. In books and courses on civil procedure, the subject is usually treated as a brief add-on to discussions on standing

¹³⁸ Bundesgesetz über die Information und Mitsprache der Arbeitnehmerinnen und Arbeitnehmer in den Betrieben of Dec. 17, 1993, SR 822.14, art. 15(2). Bundesgesetz über die minimalen Arbeits- und Lohnbedingungen für in die Schweiz entsandte Arbeitnehmer und –nehmerinnen und flankierende Massnahmen of Oct. 8, 1999, SR 823.20, art. 11.

¹³⁹ See, e.g., Regula Walter, *Kommentar zu Art. 12, in KOMMENTAR ZUM SCHWEIZERISCHEN KARTELLGESETZ* paras. 33-37 (Erich Homburger et al. eds., 1997); FRANK/STRÄULI/MESSMER, *supra* note 135, at 151. The legislative history is anything but clear on this. See Walter, *id.* at para. 35-36.

¹⁴⁰ As I note below, the judgment in the association suit does not have res judicata effect between the defendant and the individual members of the association. See *infra* text accompanying notes 144-154.

¹⁴¹ See, e.g., FRANK/STRÄULI/MESSMER, *supra* note 135, at 151.

¹⁴² See *supra* text accompanying notes 103-121.

¹⁴³ Decision of Dec. 17, 1985, 111 II 358, 364-66.

and the ability to sue.¹⁴⁴ Similarly, all but one¹⁴⁵ of the published court decisions pertain to the question of whether the requirements have been met to proceed with a *Verbandsklage* in the first place. As a result, there are no further rules dealing specifically with association suits. Thus, it seems fairly clear that a *Verbandsklage* follows the same cantonal rules of civil procedure as do individual lawsuits. At a general level, this particularly means that attorneys' fees and court costs are based on a small percentage of the amount in controversy, as directed by cantonal fee schedules.¹⁴⁶ It also means that, contrary to the American Rule of costs, the costs are generally paid by the losing party.¹⁴⁷ Finally, it is clear that there is generally no court supervision of settlements and the settlement process.¹⁴⁸

Less clear, given the dearth of judicial decisions and academic commentary, are the precise *res judicata* effects of a judgment in an association suit. In the decision in which it extended the device to the law of personality in 1947,¹⁴⁹ the Supreme Court briefly addressed the defendant's argument that letting the association of barber employees proceed with a *Verbandsklage* would disadvantage it because a judgment in the defendant's favor would not bar members of the plaintiff association to bring individual lawsuits on the same claim later.¹⁵⁰ The Court did not indicate disagreement with the argument's assumption that a judgment in an association suit, whether in favor of the plaintiff or the defendant, would have no binding effect between the defendant and individual members of the association. Instead it reasoned that a judgment in favor of the plaintiff, declaring the Basel barber's by-law provision against hiring employees from colleagues within 500 meters illegal, would result in the ineffectiveness of that provision and thus make it unnecessary for other barber

¹⁴⁴ See, e.g., FRANK/STRÄULI/MESSMER, *supra* note 135, at 150-51; VOGEL & SPÜHLER, *supra* note 13, at paras. 92a-92b.

¹⁴⁵ See *supra* text accompanying notes 142-143.

¹⁴⁶ See, e.g., Verordnung über die Anwaltsgebühren of June 10, 1987, ON 215.3, § 2 (Canton of Zurich); Dekret über die Anwaltsgebühren of Nov. 6, 1973, BSG 168.81, art. 10 (Canton of Bern). Note, however, that one of the federal statutes mentioned above mandates that no court costs may be assessed in such cases. Gleichstellungsgesetz, *supra* note 137, art. 12(2).

¹⁴⁷ See, e.g., VOGEL & SPÜHLER, *supra* note 13, at 294-97.

¹⁴⁸ See *supra* text accompanying notes 118-120, 129.

¹⁴⁹ See *supra* text accompanying notes 85-90.

¹⁵⁰ 73 II at 72-73.

employees to sue individually.¹⁵¹ Conversely, the Court reasoned, in case of a judgment in favor of the defendant, individual barber employees would hardly want to take the risk of trying alone what their association was unsuccessful with as a group.¹⁵²

The assumption, then, is that the judgment in a *Verbandsklage* has res judicata effect between the suing association and the defendant, but not between the defendant and individual members of the association. This seems to be supported by the Supreme Court's insistence that the association is pursuing a public interest distinct from the individual interests of its members.¹⁵³ However, it could be viewed as conceptually inconsistent with the notion of a few authors that the association acts in behalf of its members.¹⁵⁴ But since neither those authors, nor the courts, as far as I know, have addressed the issue of res judicata head on, the assumption underlying the Supreme Court's 1947 case is probably the rule in Switzerland. As the Court also points out in that decision, however, the judgment in a *Verbandsklage* is likely to have binding effects between defendant and individual members (and between defendant and other associations) *as a practical matter* because neither may want to risk new litigation on the same claim, most likely with the same outcome.

c) Operation in Practice and Importance

If the res judicata effects of the *Verbandsklage* remain somewhat unclear, assessing the device's operation in practice comes close to a guessing game. Not only has the law of the *Verbandsklage* remained under-researched. Statistical data on its use are largely unavailable. Since the judicial statistics of the cantons do not distinguish group claims from other litigation,¹⁵⁵ one interested in learning more about the practical relevance of the device would have to engage in costly empirical research in

¹⁵¹ *Id.* at 73

¹⁵² *Id.*

¹⁵³ See *supra* text accompanying note 106.

¹⁵⁴ See, e.g., KUMMER, *supra* note 54, at 67.

¹⁵⁵ See, e.g., Verwaltungsbericht des Obergerichts des Kantons Bern für 2003, available at http://www.jgk.be.ch/site/og_statistiken_og_03_d.pdf (Supreme Court of the State of Bern, Switzerland).

26 cantons. Short of that, I will rely here on published opinions, largely those of the Federal Supreme Court, to get a sense of the frequency with which the device is used in practice. This is rather risky business, not least because some Cantons hardly publish any of their judicial opinions at all.¹⁵⁶ But at least review by the Supreme Court is of right rather than by certiorari,¹⁵⁷ thus removing any bias that might arise from a certification process. Moreover, the Court claims to publish all decisions of substantial importance, as a result of which one might predict to see a larger percentage of association suits – which often are of substantial importance by most Swiss lawyers’ assessment – in the collection of published opinions than in the population of all Supreme Court opinions.¹⁵⁸

In the Supreme Court, I have found ten opinions involving association suits between 1947 and 2007 (including the two discussed above),¹⁵⁹ four of them handed down between 1995 and 2000 and none, not even downloadable unpublished opinions,¹⁶⁰ since. In all of these cases, the standing of the association to sue was at issue,¹⁶¹ which the Supreme Court, with the exception of the damages claim discussed

¹⁵⁶ Cf. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 604 (2004) (“Both my own empirical work and that of many others have long ago persuaded me that the picture of a legal landscape that emerges from published opinions, at whatever court level, is very probably distorted. . . . The distortion is likely to be particularly serious when published appellate decisions are used as a basis for inference about experience at first instance, and when, therefore an appeal bias is added to the publication bias”); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 116 (2001) (“Today, a scholar who studies only published opinions from the United States Courts of Appeal does so at his or her peril”).

¹⁵⁷ There are a number of requirements for a case to be appealable to the Supreme Court. Simplifying slightly, until December 31, 2006, any case with a value in controversy of sFr. 8,000.- or more (\$ 6,400) could be appealed although there were cases where there was no minimum value in controversy. For the most part, however, the Court could (and still can today) only – but fully – review the application of federal law by the cantonal courts, which includes, as one may remember, substantive private law as well as constitutional law. *See supra* text accompanying note 5; Bundesgesetz über die Organisation der Bundesrechtspflege of Dec. 16, 1943, Arts. 43-67. On January 1, 2007, the requisite value in controversy rose to sFr. 15,000 (\$12,000) in labor matters and sFr. 30,000 (\$24,000) in all other cases. Below that value, a case may newly be appealed to the Supreme Court in cases involving an important question of federal law, among other exceptions. *See* Bundesgesetz über das Bundesgericht of June 17, 2005, SR 173.110, art. 74.

¹⁵⁸ Moreover, the Court has made roughly three quarters of its unpublished opinions available on the Internet since 2000, allowing for somewhat of a check on what the Court “publishes” and what it does not.

¹⁵⁹ *See supra* text accompanying notes 85-135.

¹⁶⁰ *See supra* note 158.

¹⁶¹ There is one exception. *See supra* note 143 and accompanying text.

above,¹⁶² decided in favor of the plaintiff association. In addition to the two cases discussed above,¹⁶³ there were five more, for a total of seven, in the area of labor law. In one of these cases, the association sued for the removal by the defendant corporation of surveillance cameras installed to supervise its employees.¹⁶⁴ The other four labor cases involved the enforcement of union contract provisions and the right of employees to be consulted before a mass-layoff.¹⁶⁵ Of the remaining three non-labor cases, two involved the Unfair Competition Act,¹⁶⁶ and one antitrust law.¹⁶⁷

This is a small number considering that the Court decides between 600 and 700 private law cases per year,¹⁶⁸ of which between 87 and 120 are published.¹⁶⁹ No matter what one's preferred procedural values, it is difficult to assess whether this shows that the system works as it should without further empirical studies. The relative increase in labor-related association suits between 1995 and 1999 may have originated in one of the most severe downturns of the post-World War II economy in Switzerland. Going out on a limb a bit more, one may further speculate from the relatively small number of association suits and from the fact that all of them have been decided in favor of the plaintiff associations since 1960 that associations and their lawyers have not exactly attempted to utilize the *Verbandsklage* aggressively. Along the same lines, advocates of gender equality have complained that the *Verbandsklage* has yet to be used to enforce federal comparable-worth legislation passed in 1995,¹⁷⁰ despite survey data showing large parts of income inequality in

¹⁶² See *supra* text accompanying notes 96-109. As noted in note 102, however, the plaintiff association still won that case because the Supreme Court decided it represented its own claim based on *negotiorum gestio*.

¹⁶³ See *supra* text accompanying notes 85-135.

¹⁶⁴ Decision of Nov. 8, 1988, 114 II 345.

¹⁶⁵ Decision of Jan. 11, 1999, 125 III 82; decision of April 21, 1997, 123 III 176; decision of April 27, 1995, 121 III 168; and decision of Dec. 17, 1985, 111 II 358.

¹⁶⁶ Decision of May 2, 2000, 126 III 239 (adjudicating a suit by a trade association to protect an internet domain name); decision of June 13, 1967, 93 II 135 (involving a claim that professional titles used by certain architects and engineers amounted to unfair competition).

¹⁶⁷ Decision of Sept. 27, 1977, 103 II 294 (involving a claim of illegal vertical restraints in the market of distributing motion pictures).

¹⁶⁸ Numbers taken from the yearly reports of the Court for the years 2000-2005.

¹⁶⁹ Numbers taken from the Supreme Court Reporter (BGE/ATF) for the years 1983-2005.

¹⁷⁰ Cf. *supra* note 137 and accompanying text.

private industry and government jobs alike.¹⁷¹ Some have speculated that this may be due to the relatively limited financial power of gender-equality NGOs compared to the unions and trade associations that have successfully brought association suits in the labor and unfair competition areas.¹⁷² It is indeed true that the plaintiff association risks footing the bill of a lost case in a country in which the loser must pay the winner's attorney's fees and in which contingent fees are unethical.¹⁷³ Given that the Swiss litigation systems are relatively lean and based more on law than on equity,¹⁷⁴ this is not as daunting a proposition as it would be in the United States.¹⁷⁵ Yet, the potential costs remain considerable. This is particularly problematic in comparable-

¹⁷¹ See, e.g., Florence Aubry Girardin, *Egalité salariale et décisions judiciaires: questions pratiques de point de vue de la justice*, 14 AKTUELLE JURISTISCHE PRAXIS [hereinafter AJP] 1062, 1062 (2005); Margrith Bigler-Eggenberger, *Art. 4 Abs. 2/8 Abs. 3 BV – Eine Erfolgsgeschichte?*, 106 ZBL 57, 76 (2005); Sabine Steiger-Sackmann, *5 Jahre Gleichstellungsgesetz – 5 Jahre Lohngleichheit?*, 10 AJP 1263, 1267 (2001). Whether the absence of association suits means that women have been deprived of a procedure to enforce their federal right to salaries of comparable worth is, however, a different question. A Web Site of women's organizations compiling all lawsuits by women under the new federal legislation in German-speaking Switzerland lists 157 comparative-worth cases filed since 1995 as of July 31, 2006. This includes a number of association suits in administrative court. See *infra* text accompanying notes 177-**Error! Bookmark not defined.** 36 of these cases resulted in a judgment for plaintiff and 31 in a judgment for defendant; 55 cases were settled either during formal court proceedings or, more frequently, during the free consultation hearings before the consultation agencies that may informally hear the case prior to a formal court filing according to the 1995 legislation; nine cases remain to be decided, and in 26 the outcome is unknown. In the latter category, the case descriptions occasionally indicate that the plaintiff decided not to pursue her claim beyond the consultation stage. Yet, for most of these cases there is no such indication. Thus, I decided to code them separately rather than as cases won by defendants. Finally, 65 of the cases listed involved private suits and 92 administrative or public law proceedings. The Web Site is available at <http://www.gleichstellungsgesetz.ch/>. At the very least, this demonstrates that quite a few women have been able and willing to pursue their rights in court – although a disproportionate number of them are or were in government jobs (see also *infra* 177-**Error! Bookmark not defined.**) – and that the success rate of those suing has been considerable. However, whether current procedural mechanisms prevented others with valuable claims from suing and whether, indeed, those mechanisms are to blame for the inadequate enforcement of federal law in this area cannot be answered without further empirical study.

¹⁷² See, e.g., Steiger-Sackmann, *supra* note 171, at 1267.

¹⁷³ See *supra* note 146 and accompanying text.

¹⁷⁴ See *supra* note 65 and accompanying text; Samuel P. Baumgartner, *Related Actions*, 3 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 203, 210 (pointing to an underlying “procedural philosophy that views a civil proceeding more as an efficient adjudication of the plaintiff's claim than as an equitable resolution of a dispute” as a result of which there is a “more limited party and claims structure” in Switzerland and other civil law countries than there is in the United States). One may add the more limited nature of evidence-gathering as another reason for lower litigation costs. See *supra* notes 120 & 121 and *infra* text accompanying notes 255-257.

¹⁷⁵ Cf. Baumgartner, *supra* note 46, at 256 (“[T]o what extent would class actions level the playing field in countries in which comparatively low costs of litigation, fee shifting, and legal aid operate to make the system available to enforce relatively low monetary claims and in which the quality of the attorney is not as important to guide the client through a process based on law as it is in one steeped in equity?”).

worth cases, where the outcome is highly fact-dependent and where opinions vary greatly as to what amounts to discrimination.¹⁷⁶

It is also interesting that while there have been no association suits against private companies asserting a violation of the comparable-worth principle,¹⁷⁷ there has been some group litigation initiated by associations against state and city governments in the administrative courts.¹⁷⁸ Is this because the state for institutional reasons is expected to be less likely to retaliate against litigating employees than a private firm?¹⁷⁹ Or does it have to do with the design of the litigation process itself?¹⁸⁰ For example, is the difference in usage rates of the association suit in civil versus administrative court due to the availability of the basic hiring criteria and salary information for comparable government jobs, thus compensating for the lack of American-style discovery in administrative (but not in civil) proceedings?¹⁸¹ Without larger empirical studies, it is impossible to do more than speculate on why this is so.

d) Law Reform Proposals

¹⁷⁶ See, e.g., Federal Supreme Court, decision of Oct. 5, 1999, 125 II 530 (discussing at great length the factors relevant to the decision whether a 25% salary differential between kindergarten teachers, almost exclusively female in Switzerland, and grade school teachers, among whom men are better represented, is justified); Bigler-Eggenberger, *supra* note 171, at 78-79.

¹⁷⁷ There have, however, been individual suits by women against private employers, three of which made it to the Supreme Court. See decision of Dec. 22, 2003, 130 III 145 (upholding sFr. 200,000 (roughly \$ 165,000) judgment for back pay); decision of Jan. 19, 2001, 127 III 207 (remanding for further evidentiary hearings); decision of Sept. 14, 1999, 125 III 368 (denying relief).

¹⁷⁸ See, e.g., Decision of Oct. 5, 1999, 125 II 530 (association suit by kindergarten teachers in Zurich); decision of Dec. 18, 1998, 125 I 71 (same by nurses at state hospitals in Bern). On these administrative proceedings see *infra* text accompanying notes 192-213.

¹⁷⁹ See, e.g., Jeanne Ramseyer & Corina Müller, *Bewährt aber noch zu wenig bekannt: Überblick über die Resultate der Evaluation des Gleichstellungsgesetzes*, 15 AJP 1331, 1332 (2006) (reporting survey evidence according to which most women are afraid to bring a discrimination suit for fear of being terminated and statistic according to which 84 % of claimants in private discrimination suits and 55% of claimants in administrative discrimination suits no longer worked with the defendant at the time of judgment).

¹⁸⁰ For more on this see *infra* text accompanying notes 208-213.

¹⁸¹ See, e.g., Ramseyer & Müller, *supra* note 179, at 1333 (presenting survey evidence according to which the finding of information often presents a problem when a potential plaintiff suspects wage discrimination). *But see* 127 III at 210-11 (indicating that plaintiff was able to have the (private) corporate defendant compelled to divulge its confidential salary policy, among other pertinent evidence, in cantonal proceedings).

Despite this lack of empirical information, the law reformers appear to know precisely what is needed in the proposed Federal Code of Civil Procedure. They are confident that there currently is no need for a class action device in Switzerland.¹⁸² At the same time, they originally proposed to extend the *Verbandsklage* to all substantive areas,¹⁸³ thus abolishing the limitation to Article 28 of the Civil Code and to substance-specific federal statutes.¹⁸⁴ This decision was heavily criticized, primarily by conservatives and business interests.¹⁸⁵ The draft of the Executive, now adopted by one chamber of the legislature,¹⁸⁶ thus returns to a narrower right to a *Verbandsklage*.¹⁸⁷ The draft lists the requirements for the standing of the association as follows:

- The association must have national or regional importance and
- it must, by its bylaws, be authorized to represent the interests of certain groups of people.¹⁸⁸

Under this proposal, the authorization of the association to represent its members is no longer limited economic interests. Similarly, there is no longer a requirement that each member of the association have standing in the case at hand.¹⁸⁹ At the same time, the association must be of national or regional importance, a limitation intended partly to exclude association suits by local unions.¹⁹⁰ At any rate, however, distinct provisions in substance-specific federal statutes remain controlling.¹⁹¹

In defense of the drafters, I hasten to add that empirical research has not thus far played much of a role in procedural law reform in Switzerland. While this helps

¹⁸² See *supra* note 50 and accompanying text.

¹⁸³ See Schweizerische Zivilprozessordnung, Vorentwurf der Expertenkommission, art. 79(1), available at http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0001.File.tmp/entw-zpo-d.pdf.

¹⁸⁴ See *supra* text accompanying notes 89-94, 136-141.

¹⁸⁵ See Vernehmlassungsbericht, *supra* note 9, at 7 & 230-37.

¹⁸⁶ See 2007 AB Ständerat at 510.

¹⁸⁷ See Botschaft, *supra* note 10, at 212.

¹⁸⁸ *Id.*

¹⁸⁹ See 2007 AB Ständerat at 509-10 (statement of State Councillor Bonhôte). For the requirements under current federal common see *supra* text accompanying notes 87-88.

¹⁹⁰ See 2007 AB Ständerat at 510 (statement of Justice Minister Blocher).

¹⁹¹ See Botschaft, *supra* note 10, at 212.

explain the lack of concern for such research in the current reform, however, it does not make the quality of law reform decisions based on anecdotal evidence any better.

2. *Association Suits in Administrative Procedure (Verbandsbeschwerde)*

The *Verbandsbeschwerde* is the counterpart to the *Verbandsklage* in Swiss administrative procedure. It allows an association to challenge a decision in which an administrative agency applies law to a specific case, first within the agency, then before an administrative tribunal, including the Federal Supreme Court.¹⁹² The requirements are the same as for the *Verbandsklage*, although the prerequisites for association suits involving state administrative law before state administrative tribunals follow state rules that may vary.¹⁹³ However, one significant difference between civil and administrative procedure affecting the admissibility of the *Verbandsbeschwerde* relates to standing. In civil proceedings, only the person who claims to be the owner of the allegedly infringed right has standing to sue.¹⁹⁴ In administrative procedure, by contrast, courts and statutes have followed Jhering's views of law as the protection of legitimate interests.¹⁹⁵ Thus, on the federal level, anybody with a legitimate interest can challenge a governmental decision first in intergovernmental proceedings and then in administrative court.¹⁹⁶ The interest is legitimate if the plaintiff has a personal interest in the decision that is stronger than that of most anybody else.¹⁹⁷ In deciding whether a particular interest is legitimate, the courts have taken a pragmatic approach. Thus, home owners are routinely allowed to challenge construction permits granted to neighbors on the grounds that they violate zoning laws or environmental statutes.¹⁹⁸ Equally, competitors are considered

¹⁹² Current procedural statutes distinguish between an administrative appeal and a constitutional appeal to the Federal Supreme Court, depending on whether the appellant claims a violation of federal (statutory) administrative law or federal constitutional law. The *Verbandsbeschwerde* has been available in both. *See, e.g.*, decision of Feb. 11, 1972, 98 Ib 63; decision of February 3, 1967, 93 I 125.

¹⁹³ *See, e.g.*, 93 I at 128.

¹⁹⁴ *See, e.g.*, KUMMER, *supra* note 54, at 66.

¹⁹⁵ *See supra* text accompanying notes 124-126.

¹⁹⁶ Bundesgesetz über das Verwaltungsverfahren of Dec. 20, 1968, SR 172.021, art. 48(a); Bundesgesetz über die Organisation der Bundesrechtspflege of Dec. 16, 1943, SR 173.110, art. 103(a).

¹⁹⁷ *See, e.g.*, GYGI, *supra* note 15, at 158.

¹⁹⁸ *See, e.g.*, Federal Supreme Court, decision of Oct. 15, 1986, 112 Ib 409; decision of Oct. 27, 1978, 104 Ib 245.

to have standing to challenge the decision to license new entrants.¹⁹⁹ On the other hand, those who live too far away to be suffering any direct negative effects of a planned project are not considered to have standing to challenge a building permit.²⁰⁰ By virtue of this more open-ended standing requirement in administrative procedure, the requirement that the individual members of the association have standing to sue may be easier to meet for the *Verbandsbeschwerde* than it is for the *Verbandsklage*.²⁰¹

It is perhaps partly for this reason that the *Verbandsbeschwerde*, as opposed to the *Verbandsklage*, has been used extensively in practice. In the last fifteen years alone, the Federal Supreme Court has published over 50 decisions involving administrative association suits. In terms of substance, they run the gamut, including trade and consumer organizations challenging the decision of the federal Food and Drug administration to allow Monsanto to sell food ingredients made from genetically modified soybeans²⁰² to local unions and trade associations complaining about a decision of the Transportation Department to allow retailers in Swiss train stations to remain open irrespective of cantonal closing-time regulations²⁰³ to attacks by environmental groups against construction permits allowing the building of roads, stadiums, military training facilities, and other large projects.²⁰⁴ Indeed, the latter have been frequent enough to allow the Zurich Liberal Democrats to collect a sufficient number of signatures to force a popular vote on their constitutional proposal to limit association suits by environmental organizations.²⁰⁵ As indicated above,

¹⁹⁹ See, e.g., Federal Supreme Court, decision of May 2, 1975, 101 Ib 87.

²⁰⁰ See, e.g., Federal Supreme Court, decision of Apr. 30, 1985, 111 Ib 290 (plaintiff living one kilometer away from planned interstate highway has no standing to challenge the decision to build it); decision of Dec. 19, 1978, 104 Ib 381 (individuals who do not live near a farmhouse planned to be demolished may not sue with a claim that the demolition violates federal legislation protecting historical buildings).

²⁰¹ But see *supra* note 136.

²⁰² See decision of Sept. 10, 1997, 123 II 376.

²⁰³ See decision of Sept. 30, 1993, 119 Ib 374.

²⁰⁴ See, e.g., decision of Dec. 3, 2004, 131 II 81 (soccer stadium); decision of April 8, 2003, 129 II 331 (local airport); decision of Dec. 28, 1998, 125 II 50 (military training facility); decision of Aug. 19, 1998, 124 II 460 (interstate highway); decision of April 21, 1997, 123 II 337 (commercial building complex); decision of June 21, 1995, 121 II 224 (commercial building complex).

²⁰⁵ The executive has decided to support this initiative to the extent that it seeks to eliminate the *Verbandsbeschwerde* against projects that have been approved by the legislature or by popular vote. See, e.g., *Kehrtwende der Regierung by der Verbandsbeschwerde*, Swissinfo online, May 2, 2007. On the initiative see *supra* note 45.

Verbandsbeschwerden also include appeals by gender equality organizations of salary decisions of state and city governments²⁰⁶ and many others.²⁰⁷

Why this extensive use of the *Verbandsbeschwerde* as opposed to the *Verbandsklage*? Apart from the possible explanation of more lenient standing requirements in administrative proceedings, governmental decisions have a tendency to affect more individuals than decisions of private persons. Moreover, cases against the government are litigated in administrative court, where the procedure is somewhat more “inquisitorial”²⁰⁸ and the government is subject to charges that cannot be leveled against a private employer, such as that its actions are not covered by legislation?²⁰⁹ Or are judges and attorneys in administrative litigation, where more complex party structures have always been a feature, simply more comfortable with multiparty litigation than are judges and attorneys in civil litigation? My own tabulation of mostly individual comparable-worth suits filed between 1997 and 2006 suggests that the latter hypothesis has less explanatory power than those previously mentioned in the area of workplace discrimination, for the same picture emerges in individual litigation: Among 157 such cases filed in German speaking Switzerland, 92 (including a few association suits) were filed in the administrative courts, while 65 (none of them association suits) were filed in the civil courts.²¹⁰ Thus, despite the fact

²⁰⁶ See *supra* text accompanying notes 177-178.

²⁰⁷ See, e.g., decision of April 20, 2005, 131 I 291 (suit by association of home owners against state property tax increase); decision of March 9, 2005, 131 I 198 (appeal by local association of pharmacists of decision of state of Solothurn to allow general practitioners to dispense pharmaceuticals in less restricted fashion than pharmacists); decision of Oct. 25, 2004, 130 II 514 (suit by association of television viewers against state-run television station for giving masked opponents of World Economic Forum in Davos airtime without questioning their views or backgrounds); decision of July 28, 2004, 130 I 290 (suit by various associations claiming illegal interference by the Zurich government with a popular referendum on the adoption of changes to the Zurich Code of Criminal Procedure by sending voters a one-sided description of what is at stake).

²⁰⁸ In particular, the court may order the release of evidence not proffered by the parties. See, e.g., GYGI, *supra* note 15, at 208-10. Cf. *supra* note 121. At least in theory, however, the latter is true in private labor litigation as well. See Code of Obligations, art. 343(4); Gleichstellungsgesetz, *supra* note 137, art. 12(2).

²⁰⁹ See, e.g., decision of Sept. 29, 1995, 121 I 230 (holding that legislation in the Canton of Zug requiring doctors at state hospitals to turn in a part of their profits gained from private practice at the hospital to the state was sufficient for the relevant state agency to charge such doctors 35% of such profits because the legislation itself set a numerical limit of 40%).

²¹⁰ See *supra* note 171.

that roughly 90 percent of the Swiss population works for private employers,²¹¹ the cases filed against federal and state governments outnumbered the private cases by 1,5:1.

It would help to have some empirical information on whether these or other features of the litigation process explain why the association suit is utilized frequently in administrative and constitutional courts, but not in the civil courts. If so, it would further help to have empirical knowledge on whether there is a need to adapt civil procedure accordingly or whether the administrative courts take care of most of the need for group litigation in Swiss society.²¹² For that purpose, it is not helpful that civil procedure and administrative procedure are applied by different judges and researched by different scholars.²¹³ Yet, it is research that needs to be done if one wants to understand whether the current approaches to group litigation in Switzerland are adequate.

3. *Shareholder Litigation*

A discussion of group litigation in Switzerland would be incomplete without a look at a small but important group of actions whose *res judicata* effects extend beyond the parties. This sort of action (*Gestaltungsklagen*) has been significant primarily in status matters, where a decree on a person's status, such as marital status or paternity, must be effective in relation to everyone else.²¹⁴ However, the same principle has long been applied to suits by individual shareholders of a corporation against decisions at the corporation's shareholder meetings.²¹⁵ Thus, a decree voiding a decision by the shareholders as illegal will nullify that decision not only with regard to the plaintiff but in relation to all remaining shareholders as well.²¹⁶ In this sense,

²¹¹ See BUNDESAMT FÜR STATISTIK, TASCHESTATISTIK DER SCHWEIZ 12 (2006).

²¹² See, e.g., Baumgartner, *supra* note 19, at 126-27.

²¹³ See *supra* text accompanying note 15.

²¹⁴ See, e.g., KUMMER, *supra* note 54, at 103-04.

²¹⁵ *Id.* at 104.

²¹⁶ See Code of Obligations, art. 706(5) ("The judgment voiding a decision of the shareholder meeting has effect for and against all shareholders"). According to subsection 1 of Article 706, the judge is to void such a decision if it violates the law (in practice, primarily provisions protecting certain shareholders) or the corporation's bylaws.

the suing shareholder acts as the representative of the others, although rarely in the interest of all of them. Similarly, although not a *Gestaltungsklage*, a derivative suit, in which a shareholder sues the officers or the members of the board for violating their fiduciary duties, has the effect of a damages judgment that is to be paid to the corporation and thus indirectly favors all shareholders.²¹⁷

It is said, however, that this type of shareholder litigation has been too risky to initiate²¹⁸ because the Swiss Supreme Court held early on that the amount in controversy is to be determined by the value of the litigation to the corporation rather than on the basis of the value of the shares of stock owned by the plaintiff.²¹⁹ This raises the threshold considerably in a legal system in which court costs and attorneys fees in litigated cases are determined largely on the basis of the value in controversy.²²⁰ In order to lower the risk for potential plaintiffs, the federal legislature thus tempered the loser-pays rule as part of the corporate law reform of 1992. Since then, the trial court has had to distribute attorney's fees discretionally between plaintiff and defendant if the plaintiff loses the case.²²¹

Some have argued that this change insufficiently tempers the risks for potential plaintiffs since the fees to be paid can still be significant²²² and, more importantly, since the plaintiff has no idea what the court's discretion will bring at the time of

²¹⁷ See Code of Obligations, arts. 754-60.

²¹⁸ Since the costs generally follow the event, *see supra* note 147, this is truly a risk: If the plaintiff wins, the court costs and his own attorneys' fees will be borne by the losing corporation. Thus, the situation is different from the small claim in the United States, where bringing the claim may be economically useless whether the plaintiff wins or loses.

²¹⁹ See, e.g., Andreas Casutt, *Rechtliche Aspekte der Verteilung der Prozesskosten im Anfechtungs- und Verantwortlichkeitsprozess*, in *FESTSCHRIFT FÜR PETER FORSTMOSER* 79, 80-81 (1993). Again, it would be helpful to know whom precisely this does in fact disadvantage in practice. As far as number of lawsuits, I have been able to find 38 published Article-706 cases by the Supreme Court alone for the period from 1954-2006, most of them involving suits by minority shareholders. 33 of these decisions were decided before the big reform of corporate law of 1992, which was meant to render such suits less financially risky to file. *See infra* text accompanying note 221.

²²⁰ See *supra* note 146 and accompanying text.

²²¹ See Code of Obligations, arts. 706a(3) & 756(2) (both as amended Oct. 4, 1991).

²²² See, e.g., Federal Supreme Court, decision of Oct. 12, 2004, 4P.208/2003 (upholding decision in which the trial court estimated the value in controversy at sFr. 10-20 million (\$8-16 million) and determined plaintiff's share of defendant's attorney's fees to be sFr. 160,000 (\$128,000)).

judgment.²²³ Again, some empirical insight would be helpful here for purposes of law reform. Apparently, however, there seems to be enough of a problem here that some plaintiff groups have taken action. In 1989, for example, an association of Nestlé shareholders, the purpose of which had been the monitoring of the company's economic and social ethics, changed its bylaws to include as its objective the pursuit of the economic interests of its members.²²⁴ This allowed the association to bring a suit against Nestlé, challenging the corporation's shareholder decision to issue 175,000 new shares without allowing existing shareholders the right to preferential purchase of those shares,²²⁵ while distributing the costs of the litigation equally among the association's members.²²⁶ The association itself owned one share of Nestlé stock.²²⁷ As a result, the association formally represented its own interests as a shareholder rather than those of its members, thus avoiding the problem that neither Swiss law nor the law of the Canton of Vaud provides for association suits in this area.²²⁸ This is a smart way for a group of like-minded shareholders to share the risks and costs of this kind of litigation; I have been told that the strategy has been used since. It is one way to get around the lack of a true group-litigation device in this area, for which there is obviously a need.

The federal legislature has apparently recognized the problem. In the new Act on Mergers and Acquisitions of 2003,²²⁹ it introduced an additional remedy for aggrieved shareholders in merger and acquisition cases.²³⁰ Rather than bring an action to declare the shareholder decision sanctioning the merger or acquisition void – which the courts have been extremely reluctant to grant²³¹ – minority shareholders can sue for damages for any losses incurred by disadvantageous treatment arising from the

²²³ See, e.g., Casutt, *supra* note 219, at 83.

²²⁴ Federal Supreme Court, decision of June 25, 1991, 117 II 290, 291.

²²⁵ *Id.*

²²⁶ Among these costs was an order by the district judge of Vevey requiring the plaintiff to post a sFr. 500,000 (\$400,000) bond. See Federal Supreme Court, decision of Feb. 22, 1990, 116 II 94, 95.

²²⁷ See 117 II at 291.

²²⁸ See *supra* text accompanying notes 89-94, 136-141.

²²⁹ Bundesgesetz über Fusion, Spaltung, Umwandlung und Vermögensübertragung of Oct. 3, 2003, SR 221.301 [hereinafter Fusionsgesetz].

²³⁰ Fusionsgesetz, *supra* note 229, art. 105.

²³¹ See, e.g., PETER BÖCKLI, SCHWEIZER AKTIENRECHT 354 (3d ed., 2004).

transaction.²³² In this litigation, the court costs and the attorney's fees of the plaintiff in case of a loss must be borne by the acquiring corporation, thus removing the plaintiff's risk of having to pay for the defendant's attorney's fees.²³³

More interestingly, the judgment for damages in such a case is valid in favor of all shareholders equally situated, whether or not they participated in the litigation.²³⁴ Thus, the suing plaintiff truly acts as a representative of the others. In this sense, this limited action in the area of mergers and acquisitions is in fact a class action.²³⁵ Apparently, the legislature felt that, despite what the procedural reformers say today,²³⁶ there is indeed a need for such a device in this particular area of law. More likely, the drafters recognized the need for the device without noticing that what they were introducing is in fact a very limited class action.

4. Joinder of Parties and Consolidation by the Court

While the *Verbandsklage*, the *Verbandsbeschwerde* in federal court, and the shareholder suits discussed above are primarily or exclusively controlled by federal law, joinder, intervention, and consolidation devices have largely remained a matter of state law.²³⁷ To my knowledge, all state procedural codes provide for the joinder of

²³² Fusionsgesetz, *supra* note 229, art. 105(1).

²³³ *Id.*, art. 105(3). *But see id.*, second sentence: "In special circumstances, the court may charge the costs of the proceedings against the plaintiffs." According to the explanatory report, this provision is primarily intended to target frivolous lawsuits. *See* Botschaft zum Bundesgesetz über Fusion, Spaltung, Umwandlung und Vermögensübertragung, BBl 2000, 4337, 4488.

²³⁴ Fusionsgesetz, *supra* note 229, art. 105(2). Whether a judgment in favor of the defendant has res judicata effect against all other shareholders equally situated is not clear to me given the language of the provision ("The judgment has effect for all shareholders...") Does this mean only *for* all shareholders, not *against* them?) and the lack of any legislative history on this point. However, this question may have little practical relevance. The action must be brought within two months of the publication of the merger decision. *See* Fusionsgesetz, *supra* note 229, art. 105(1). By the time a judgment is entered, that deadline will long have passed for another claimant to bring suit on the basis of the same merger decision.

²³⁵ *See* BÖCKLI, *supra* note 231, at 355.

²³⁶ *See supra* text accompanying note 50.

²³⁷ I say "largely" because recent federal legislation on personal jurisdiction provides for jurisdiction in cases of joinder of defendants wherever the court has jurisdiction over one of the defendants. *See* Bundesgesetz über den Gerichtsstand in Zivilsachen of March 24, 2000, SR 272, art. 7(1). Naturally, the provision requires a federal interpretation of what is required for a joinder to lead to the application of Article 7(1). *See, e.g.,* Franz Kellerhals & Andreas Güngerich, *Art. 7, in KOMMENTAR ZUM BUNDESGESETZ ÜBER DEN GERICHTSSTAND IN ZIVILSACHEN* 47, 53-54 (Franz Kellerhals et al. eds., 2d ed. 2005).

parties. Usually, they require that the joined parties claim, or are defendants with regard to, the same or similar set of facts or legal rights.²³⁸ The most important distinction the codes make here is between mandatory and voluntary joinder.²³⁹ Joinder is mandatory where, as a matter of substantive law, a group of individuals holds a right or owes a duty jointly so that only the group can validly dispose of the right or fulfill the duty.²⁴⁰ This concept has its roots in both Roman and Germanic law²⁴¹ and includes claims by and against the community of heirs regarding the rights on the inheritance that is formed as a matter of law among all heirs of the deceased,²⁴² the owners of community property,²⁴³ and claims by a simple association.²⁴⁴ The procedural effect of this indivisible property is that these groups must sue or be sued together.²⁴⁵ The claim by or against them is then effectively treated as a single lawsuit resulting in one uniform judgment or settlement for or against all.²⁴⁶

Voluntary joinder, on the other hand, is joinder based on the same (or, in some cantons, a related)²⁴⁷ factual claim or right.²⁴⁸ Thus, it is possible for a plaintiff to sue all those she considers to be jointly and severally liable, for all holders of the same insurance policy to challenge a specific interpretation of a provision in that policy, or for all those harmed by the same alleged tort to sue the defendant together.²⁴⁹

²³⁸ See, e.g., VOGEL & SPÜHLER, *supra* note 13, at ch.5.

²³⁹ See, e.g., HABSCHIED, *supra* note 54, at 151.

²⁴⁰ *Id.* at 153.

²⁴¹ On the influence of Germanic law on the Swiss Civil Codes *see supra* note 122 and accompanying text. In Pandectist thought, this limited number of group rights was not considered an exception to the individualistic nature of rights. The group was simply conceived of as the individual holding the group right. See, e.g., VON TUHR, *supra* note 114, at 78-80.

²⁴² See Civil Code, art. 602.

²⁴³ See *id.*, art. 215

²⁴⁴ See Code of Obligations, art. 544. The “simple association” is an unincorporated association of individuals pursuing a common purpose. Code of Obligations, art. 530(1).

²⁴⁵ See, e.g., VOGEL & SPÜHLER, *supra* note 13, at ch.5.

²⁴⁶ See, e.g., KUMMER, *supra* note 54, at 158. This is the result of viewing the group as an individual holder of a single right. See *supra* note 241.

²⁴⁷ See, e.g., Zivilprozessordnung für den Kanton Bern of July 7, 1918, BSG 271.1 [hereinafter BEZPO], art. 37; KUMMER, *supra* note 54, at 156.

²⁴⁸ See, e.g., VOGEL & SPÜHLER, *supra* note 13, at ch.5.

²⁴⁹ See, e.g., KUMMER, *supra* note 54, at 156. The latter two examples may go too far in those cantons that limit voluntary joinder to cases in which the plaintiffs’ claim must arise out of the *same* rather than merely *related* facts and legal rights. See, e.g., HABSCHIED, *supra* note 54, at 152.

While this may seem like group litigation, however, it is so only to a limited extent. First, it is not representative litigation because only those who sue or are sued actually participate in it. Second, as a result of the individualist precepts underlying the state procedural codes,²⁵⁰ each party is treated individually, thus conducting her own lawsuit. Hence, the judgment may differ as to each individual party; each party may decide to settle or to abandon the suit without prejudice to the others; and each party may decide whether or not to appeal, again without prejudice to the right to appeal of the others.²⁵¹ In some cantons, it is further the practice of the courts to keep separate dossiers for every single party.²⁵² Moreover, voluntary joinder is usually limited to cases within the same subject-matter jurisdiction.²⁵³ At the same time, however, allegations and suggestions of a line of evidence-gathering of one litigant may benefit the others in some jurisdictions.²⁵⁴

In sum, voluntary joinder may result in some efficiency by having the same court decide similar claims and by consolidating the taking of evidence – which, as one may remember, is much less extensive in a system in which the gathering of evidence is controlled by the judge²⁵⁵ who is also the finder of fact²⁵⁶ and where lines of inquiry must meet a high standard of materiality.²⁵⁷ It may also be beneficial for claimants to pursue their cases together for a number of practical reasons, including an attempt to avoid inconsistent judgments regarding the same set of operative

²⁵⁰ See *supra* text accompanying notes 110-121.

²⁵¹ See, e.g., KUMMER, *supra* note 54, at 157.

²⁵² See, e.g., ROMY, *supra* note 22, at 242; JEAN-MARC SCHALLER, *FINANZ-ANALYSTEN-RECHT* 180 (2004).

²⁵³ See, e.g., VOGEL & SPÜHLER, *supra* note 13, at ch.5.

²⁵⁴ See, e.g., KUMMER, *supra* note 54, at 158. *But see* HABSCHIED, *supra* note 54, at 152 (arguing that allegations and proffers by one party do not affect the others in Zurich).

²⁵⁵ See, e.g., Gerber, *supra* note 40, at 753-54. *But see supra* notes 120-121 and accompanying text.

²⁵⁶ Thus, the American trial judge must be more generous in determining the relevancy of proffered evidence than his German [and Swiss] colleague, who does not need to account for the fact that the attorneys need to persuade a lay jury rather than the judge himself. Furthermore, the separation of what in Germany [and Switzerland] is the process of taking evidence before the court into a phase of gathering the facts (discovery) and into one of presenting it to the jury at trial, a separation that is due to the need for a continuous jury trial, the attorneys must be allowed to discover evidence for an entire case before trial. Thus, issues of relevancy for purposes of discovery on the one hand and for purposes of admissibility at trial on the other do not converge as they do in Germany [and Switzerland].

BAUMGARTNER, *supra* note 35, at 81-82 (footnotes omitted).

²⁵⁷ See *supra* note 120 & 256; Gerber, *supra* note 40, at 762-63.

facts.²⁵⁸ However, given that voluntary joinder results in many essentially independent lawsuits, the efficiency gains are limited.²⁵⁹ So are other potential benefits and drawbacks of representative litigation, so often discussed today.²⁶⁰

While there is agreement among the state procedural codes on the basics of joinder, the same is not true with regard to the consolidation of related proceedings by the court. Some states do not provide for such consolidation at all.²⁶¹ Others allow it in cases in which voluntary joinder would have been permissible.²⁶² Even in those states, however, consolidation is limited to common hearings, including evidentiary hearings, and scheduling.²⁶³ As with voluntary joinder, the combined lawsuits remain independent with different outcomes possible.

Again, there is no available statistical evidence on the use of joinder and consolidation devices in Switzerland. Similarly, any empirical research on how well these devices work in practice and whether and to what extent they meet the needs of litigants and the judicial system is impossible to find. To get at least some sense of the practical significance of these devices, I again took a look at the published

²⁵⁸ See, e.g., Federal Supreme Court, decision of Dec. 31, 1998, 125 III 95, at 97. Thus, the plaintiff or plaintiffs can use voluntary joinder to avoid one of the drawbacks of the lean litigation package in Swiss procedure. See *supra* note 174 and accompanying text; Baumgartner, *supra* note 174, at 210 (noting that “as part of the same philosophy [of viewing a civil proceeding as an efficient adjudication of the plaintiff’s claim rather than equitable resolution of a dispute, the] *res judicata* effects are more limited than in common law jurisdictions, particularly the United States”).

²⁵⁹ See, e.g., ROMY, *supra* note 22, at 243. The current rules do not necessarily compel this result. For the United States, for example, Professor Burbank observes:

In the materials on party joinder and consolidation, students are repeatedly exposed to the substantive implications of joinder and led to consider the extent to which efficiency concerns cause courts to bend the requirements of procedural rules, to pursue dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable, and, alternatively, to pursue dubious substantive strategies that enable packaging.

Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (book review).

²⁶⁰ See, e.g., DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000); Burbank, *supra* note 259; John H. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); John H. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Allen Erbsen, *From “Predominance” to “Resolvability:” A New Approach To Regulating Class Actions*, 58 VAND. L. REV. 995 (2005); Charles Silver, *“We’re Scared to Death:” Class Certification & Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

²⁶¹ The Bernese Code of Civil Procedure, for example, did not contain such a provision until it was so amended in 1995. See BZPO, *supra* note 247, art. 38(2) (as amended).

²⁶² See, e.g., HABSCHEID, *supra* note 54, at 152.

²⁶³ *Id.*

decisions of the Supreme Court in civil litigation during the last 50 years. This research turned up only one case in which a court had consolidated separately filed suits.²⁶⁴ There were, however, 49 joinder cases, 27 of which involved mandatory joinder. The remaining 22 cases with voluntary joinder, however, almost all hemmed to a very narrow pattern of group litigation, involving only a handful of litigants, usually two or three. Moreover, most of the parties were joined to avoid inconsistent judgments,²⁶⁵ which is partly a result of the relatively narrow bite of *res judicata* in Switzerland.²⁶⁶ And in a few instances, family members sued together in a case affecting them all.²⁶⁷ Only in three cases did a few unrelated individuals sue a defendant without primary concern for inconsistent results,²⁶⁸ and in one of them, it appears that the three plaintiffs had chosen their attorney together.²⁶⁹

Thus, it appears that voluntary joinder is used only for very narrow purposes and that consolidation is rare in civil litigation. Again, things look different in administrative cases. There, consolidation is more common, particularly in proceedings involving claims of neighbors and others challenging the same construction permit.²⁷⁰ Joinder

²⁶⁴ Decision of Jan. 9, 1960, 86 II 59 (noting consolidation in lower court of three independently filed suits by tenants against the same landlord).

²⁶⁵ *See, e.g.*, decision of Nov. 13, 2000, 127 I 92 (suit by individual and his partly-owned corporation against bank and trustee for misappropriation of co-owned funds); decision of Dec. 1, 1998, 125 III 95 (complaint by Lego and its Swiss distributor against an alleged patent infringer); decision of Apr. 2, 1991, 117 II 204 (suit claiming unfair competition against parent and subsidiary); decision of June 19, 1981, 107 III 91 (suit by creditors in bankruptcy against alleged debtor); decision of July 10, 1979, 105 Ia 193 (bankruptcy trustee suing four members of the board and auditor of failed company for violation of fiduciary duty); decision of Dec. 21, 1961, 87 II 355 (suit by heirs challenging bequest).

²⁶⁶ *See supra* note 259.

²⁶⁷ *See, e.g.*, decision of Sept. 30, 2005, 131 III 667 (suit by surviving spouse and children of man killed in traffic accident with tramway against city of Geneva and city-owned tramway company); decision of Dec. 3, 1984, 110 II 505 (suit by 17-year old and thus minor skier harmed by ski accident, his father, and his health insurance company against operator of air-tram company); decision of Nov. 14, 1974, 100 II 453 (claim by couple and their two children against federal military insurance arising out of traffic accident caused by intoxicated driver of military vehicle).

²⁶⁸ Decision of April 23, 1996, 122 III 229 (three home owners suing Canton of Vaud for allegedly causing nearby river to overflow); decisions of May 21, 1974, 100 II 134 (heirs of recently deceased owner and two neighbors suing Canton of Obwalden for causing flooding and dirt avalanches onto their respective farmland); decision of January 23, 1962 (suit by union and various trade associations against low-price competitor alleging unfair competition).

²⁶⁹ *See* 100 II at 134.

²⁷⁰ *See, e.g.*, decision of Aug. 13, 1973, 99 Ib 200 (aggregated suits of many individuals and an association against decision to build interstate highway).

of parties, including voluntary joinder, too, appears to be more prevalent in public law cases, yet only occasionally involving larger groups of litigants.²⁷¹

It would be interesting to know the reasons for the narrow use of voluntary joinder and for the virtual absence of consolidation in civil, but not administrative, cases. It may be that parties and judges feel that these devices introduce too much complexity, and thus too much cost,²⁷² into the litigation to be worth the limited benefits. Perhaps lawyers and judges in civil cases are not sufficiently comfortable with a larger litigation package or at least it is far from their radar screen.²⁷³ Or it may be that Swiss legal education with its emphasis on teaching legal doctrine produces few lawyers that are intent on testing the rules for the benefit of their clients.²⁷⁴ And again, lawyers and judges in administrative cases may just be more comfortable with multiparty litigation to begin with.²⁷⁵ It would be useful for the reformers engaged in fashioning a new federal Code of Civil Procedure to gain some empirical knowledge on this score.

5. Test Cases

One way in which litigants and courts in Switzerland have attempted to achieve efficiency gains and uniformity of result recently is through the use of test cases, also known as “pilot suits” or “model suits.” For that purpose, the defendant agrees with the claimants that a test case brought by one of the claimants will be binding between

²⁷¹ See, e.g., decision of Aug. 14, 2002, 129 III 18 (suit by German and Swiss association of book sellers challenging decision of the federal competition commission finding illegal vertical restraint); decision of Nov. 9, 2001, 128 II 90 (suit by a few neighbors and neighboring township against rezoning decision to allow airport to build airport restaurant); decision of Nov. 27, 1974, 100 Ib 404 (suit by twelve land owners against state decision to expropriate a strip of their respective land for the building of a power line); decision of Dec. 19, 1968, 94 I 525 (suit by 47 citizens challenging as biased the question posed to voters in a referendum to change the state constitution).

²⁷² Cf. Burbank, *supra* note 259, at 1466-87 (engaging costs of complex litigation).

²⁷³ See *supra* text accompanying note 174.

²⁷⁴ Cf. Baumgartner, *supra* note 174, at 210 (“Most Swiss attorneys I have spoken to . . . have never thought of testing the domestic stay provision to its full extent simply to serve their client’s interest.”). On the emphasis in continental European law teaching – which, as one may remember, goes back some 900 years – on lecturing, teaching doctrine, and scientific concepts see, for example, Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363, 1364-70 (1968); John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 869-75 (1975).

²⁷⁵ See *supra* text accompanying notes 208-213.

the defendant and all claimants.²⁷⁶ The first such case in the civil courts occurred in the late 1980s when a considerable number of Swiss vegetable farmers incurred great losses as a result of the nuclear explosion in Chernobyl, after which many Swiss consumers, in the wake of media reports of increased radioactive residue in vegetables, refused to buy leafy greens. The federal government, faced with a large number of claims by the affected farmers under the Nuclear Liability Act,²⁷⁷ entered into a test-case contract with the claimants with regard to the question of government liability.²⁷⁸ After the courts found the federal government to be liable, the latter negotiated settlements with all individual claimants for a total of sFr. 8.7 million (\$6.96 million).²⁷⁹

The judgment in the test case does not have *res judicata* effect for or against those claimants not formally parties to the litigation.²⁸⁰ Moreover, some have raised the question whether the contractual obligation to accept the judgment as binding is judicially enforceable.²⁸¹ This may explain why the use of this device has thus far mostly been limited to a few cases against the federal government.²⁸² Apparently the federal government is sufficiently likely to abide by the agreement in case of a judgment against it for the claimants to accept the risk of trying²⁸³ (and sufficiently unconcerned about the ability of the other claimants to succeed in the face of an

²⁷⁶ See, e.g., Philippe Spitz, *Das Kartellzivilrecht und seine Zukunft nach der Revision des Kartellgesetzes* 2003, 2005 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 113, 125 (2005).

²⁷⁷ Kernenergiehaftpflichtgesetz of March 18, 1983, SR 732.44. Article 16(1)(d) of that Act provided at the time that the federal government would pay, up to a certain limit, damages for harm occurring in Switzerland as a result of a nuclear accident abroad. The provision has since been amended to require that damages be unobtainable from the foreign operator of the nuclear facility.

²⁷⁸ See Federal Supreme Court, decision of June 21, 1990, 116 II 480, 482-83.

²⁷⁹ See, e.g., Schweizerische Depeschagentur (sda), dispatch of Dec. 17, 1990.

²⁸⁰ See, e.g., Spitz, *supra* note 276, at 125. In order to avoid the running of the statute of limitations, all claimants may file suit individually, immediately requesting a stay, pending resolution of the pilot litigation. *Id.*

²⁸¹ See, e.g., SCHALLER, *supra* note 252, at 183.

²⁸² *But see* Federal Supreme Court, decision of March 19, 1993, 119 Ib 46 (mentioning suit by employees challenging decision of Zurich pension fund in early 1980s).

²⁸³ See, e.g., Walter, *supra* note 1, at 374.

unfavorable judgment). It may also be that the same factors that favor the use of other group litigation devices in the administrative courts are at play here.²⁸⁴

A look at the case law of the Supreme Court shows that there have been six published decisions involving test cases since 1990, three of which concerned a single case.²⁸⁵ Another two decisions involved a somewhat related vehicle: the ability of an administrative agency in a case with more than 20 plaintiffs “with the same interest” to order plaintiffs to name a representative pursuant to Article 11a of the federal Administrative Procedure Act,²⁸⁶ in which case there is true representative litigation with the ensuing judgment binding on all parties. The first decision involved another instance of a mass claim for damages against the federal government,²⁸⁷ the second a federal antitrust investigation, in which the book sellers investigated for price fixing subsequently challenged the federal antitrust commission’s finding in court.²⁸⁸

In sum, test cases are relatively new and experience with them is limited. So is the discussion of difficult questions about the effects this approach has on the right of

²⁸⁴ See *supra* text accompanying notes 202-211. Technically, the Chernobyl case was litigated in the civil courts as a result of statutory provisions based on an outdated theory that conceived of monetary claims against the government as civil in nature. See, e.g., FRITZ GYGI, VERWALTUNGSRECHT 36-37 (1986). However, it involved an area of law that is today considered a matter of public law and has thus usually been handled by public law experts. *Id.* Accordingly, federal law now provides that damages claims against the federal government must be brought in administrative proceedings. See Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördenmitglieder und Beamten of March 14, 1958, SR 170.32, art. 10 (as amended on Oct. 4, 1991).

²⁸⁵ See decision of Aug. 14, 2006, 132 III 661 (suit by gypsy organization against IBM for aiding and abetting genocide by Nazi Germany); decision of decision of Nov. 22, 2005, 132 II 47 (suit by private telecommunications company challenging the federal Telecommunications Agency’s decision to limit the provision of certain telecommunications services, including last-mile access, to recently half-privatized government telecommunications company); decision of Nov. 30, 2004, 131 II 13 (same); decision of March 13, 2001, 127 II 132 (same); decision of June 28, 1999, 125 II 385 (suit challenging salary classification of physical therapists, 75% of whom are women, by Canton of Solothurn as violating federal requirement of comparable worth); decision of June 21, 1990, 116 II 480, 482-83 (Chernobyl, see *supra* note 278 and accompanying text).

²⁸⁶ Bundesgesetz über das Verwaltungsverfahren of Dec. 20, 1968, art. 11a (as amended on Oct. 4, 1991).

²⁸⁷ Decision of Jan. 18, 2000, 126 II 63 (claim by numerous cattle farmers alleging that the government had failed to take the necessary measures to prevent the spread of Bovine Spongiform Encephalopathy, thus causing the precipitous drop in beef prices suffered by the plaintiffs).

²⁸⁸ Decision of Aug. 14, 2002, 129 II 18.

individual claimants to pursue their own litigation strategies,²⁸⁹ on the taking of evidence for the entire class,²⁹⁰ and on settlement,²⁹¹ among many other effects of representative litigation²⁹² that concern Swiss proceduralists in the class action context.²⁹³

6. Jurisdiction in Mass-Tort Litigation

As a remnant of earlier proposals to provide for some sort of class or group litigation in mass tort cases,²⁹⁴ the Swiss legislature provided for an exclusive basis of personal jurisdiction for all claims arising out of the same mass tort when federalizing the law of jurisdiction in 2001. Article 27 of the Federal Act on Personal Jurisdiction²⁹⁵ requires that all claims in such cases be brought at the place where the alleged tort was committed or, if that place is unknown, at the domicile of the defendant.

This provision thus attempts to identify a single court with personal jurisdiction, while leaving the remaining questions on how to proceed with mass tort claims for the states. As we now know, the states do not have a class action device,²⁹⁶ nor would an association suit be available in most mass tort cases.²⁹⁷ Moreover, few cantons allow for the aggregation of individual, but related lawsuits by the court, and those that do may nevertheless require the court to keep individual dossiers.²⁹⁸ Furthermore, it is questionable whether mass tort plaintiffs would ever meet the written²⁹⁹ or unwritten³⁰⁰ joinder requirements of most state codes. What is left, then, is the judicial economy gained by having the same court adjudicate individually all lawsuits

²⁸⁹ See, e.g., Steiger-Sackmann, *supra* note 171, at 1267.

²⁹⁰ See, e.g., Spitz, *supra* note 276, at 125.

²⁹¹ See, e.g., Astrid Stadler, *Referat, in* VERHANDLUNGEN DES 62. DEUTSCHEN JURISTENTAGES IN BREMEN 1998, II/1, 36, 44 (1998) (asserting that test cases cannot be settled).

²⁹² See, e.g., FLORIAN JACOBY, *DER MUSTERPROZESSVERTRAG* (2000).

²⁹³ See *supra* text accompanying notes 35-49.

²⁹⁴ See *supra* text accompanying notes 24-26.

²⁹⁵ Bundesgesetz über den Gerichtsstand in Zivilsachen of March 24, 2000, SR 272.

²⁹⁶ See *supra* text accompanying notes 18-35.

²⁹⁷ See *supra* text accompanying notes 89-94.

²⁹⁸ See *supra* text accompanying notes 260-263; SCHALLER, *supra* note 252, at 180.

²⁹⁹ See *supra* notes 247-249 and accompanying text.

³⁰⁰ See *supra* text accompanying notes 264-269.

arising out of the same set of operational facts. But not even that is guaranteed, since the statute does not order the states to have the same judges sit on those cases.

The provision does, however, create considerable uncertainty both by using the new term “mass tort” without defining it and by relying on the place where the tort was committed, which may be notoriously difficult to determine.³⁰¹ In short, the provision may create more harm than good. Not surprisingly, the proposed federal Code of Civil Procedure intends to abolish it.³⁰² To my knowledge, the provision has not yet been applied in practice.

IV. Conclusion

Switzerland is currently in the process of drafting its first federal code of civil procedure, an enterprise similar in importance to the promulgation of the Federal Rules of Civil Procedure in the United States in 1938. This is a great opportunity to reflect on the usefulness of existing state procedure codes, indeed to engage the premises underlying those codes and their effectiveness in practice. Reconsideration of existing procedural devices and process values is particularly important in the area of group litigation. For it is in this area that there has always been some tension between existing devices and the individualist concepts underlying the codes.³⁰³ Moreover, reforms have occurred interstitially and limited to certain subject-matter areas, largely through federal legislation and federal common law.³⁰⁴ This has resulted in a patchwork of federal and state rules and principles, the effectiveness of which has never been carefully assessed.³⁰⁵ Indeed, most group litigation devices have remained relatively marginal in both civil procedure courses and procedural scholarship in Switzerland,³⁰⁶ although not necessarily in practice.³⁰⁷

³⁰¹ See, e.g., THOMAS MÜLLER & MARKUS WIRTH, GERICHTSSTANDSGESETZ 692-96, 701-02 (2001).

³⁰² Botschaft, *supra* note 10, at 49-50.

³⁰³ See *supra* text accompanying notes 110-135.

³⁰⁴ See *supra* text accompanying notes 136-141.

³⁰⁵ See, e.g., *supra* text accompanying notes 144-153.

³⁰⁶ See *supra* text accompanying notes 144 & 155-158.

³⁰⁷ See *supra* Parts II.2.c and II.3.

Unfortunately, it is in the area of group litigation that the reformers have decided to forego introspection, opting instead to write the current patchwork of federal and state statutory and common law into the code so as to promote easy adoption in a country controlled by consensus politics.³⁰⁸ The work of various scholars in specific areas of substantive law suggests that this may be bad policy.³⁰⁹ The same goes for litigants in practice, who search for avenues to improve access to justice, efficiency, and consistency of result either within existing procedural devices, or by creating new ones, such as association suits in shareholder litigation or test cases.³¹⁰

What is interesting from a comparative perspective, however, is that the reluctance of the Swiss law reformers to expand upon existing group litigation, let alone to introduce an American-style class action, is based on more than consensus politics. At the ideational level, Kantian liberal-individualist precepts have led to a strong emphasis of the procedural ideal of enforcing individual substantive rights with dispatch.³¹¹ The resulting litigation package in the Swiss procedure codes is comparatively slim.³¹² Group litigation inevitably introduces complexity and cost and thus is in tension with this ideal.³¹³ Representative litigation is even more so because it allows some individuals to enforce other people's rights, whether or not they agree.³¹⁴ This is further in tension with the classical liberal ideal of limiting governmental intervention because it leads to enforcement action by the government (through litigation) against private individuals where there may not have been any

³⁰⁸ See *supra* text accompanying notes 28-78 & 182-187.

³⁰⁹ See, e.g., BRIGITTE KURZEN, E-HEALTH UND DATENSCHUTZ 217 (2004) (arguing that representative litigation such as class actions and test cases could improve number of suits to enforce legislation protecting personal information from illegal dissemination); DIETER ZOBL & STEFAN KRAMER, SCHWEIZERISCHES KAPITALMARKTRECHT 435 (2004) (noting that because financial harm to individual investors is often low and individual proof of causation potentially costly, securities fraud cases are likely to remain rare in Switzerland); Spitz, *supra* note 276, at 125 (proposing legislative integration of test case litigation in antitrust matters so as to improve clarity on issues of evidence-gathering, costs, and enforcement); Steiger-Sackmann, *supra* note 171, at 1267 (arguing that the availability of test cases and *Verbandsklage* are insufficient to guarantee women access to court so as to effectively enforce their rights under comparable-worth legislation).

³¹⁰ See *supra* text accompanying notes 224-228 & 276-284.

³¹¹ See *supra* text accompanying notes 110-121.

³¹² See *supra* text accompanying notes 174 & 266.

³¹³ See *supra* text accompanying notes 47-49.

³¹⁴ See *supra* text accompanying notes 115-119.

before.³¹⁵ Moreover, due to its complexity, representative litigation may require a stronger judicial role than traditional liberal ideals allow.³¹⁶

But things are more complex. Old German communitarian ideals have also influenced substantive Swiss law, and notions of “social civil procedure” have led to a few changes in the procedural codes that give the judge some powers to support the weaker party in litigation.³¹⁷ The question is whether this admittedly limited alternative influence has been strong enough to support an expansion of group litigation in the future.³¹⁸ More importantly, the same German communal ideals have led to the notion of the social state, which has had a strong influence on public law in Switzerland as well as in Germany.³¹⁹ As a result, the public interest is no longer enforced in criminal proceedings alone, but (in the form of social, economic, and environmental legislation) in administrative tribunals as well. Hence, the traditional liberal separation between civil procedure as the place where individual rights are enforced and public law procedure where public interests are enforced has remained strongly influential.³²⁰ But the public law side of the equation has expanded drastically from the protection of private property and public health to the promotion of social and environmental causes and market regulation.³²¹ Moreover, administrative procedure with its more lenient standing requirements has allowed a larger group of potential claimants to sue and thus enforce this newly conceived

³¹⁵ See *supra* text accompanying note 120.

³¹⁶ See *supra* text accompanying notes 48 & 110-121.

³¹⁷ See *supra* text accompanying notes 122-128; note 175.

³¹⁸ See *supra* text accompanying note 145.

³¹⁹ On the development of German medieval communal ideals into the notion of the social state (*Sozialstaat*) by Otto von Gierke and other Germanist scholars influenced by Johann Gottfried Herder's ideas of national identity in the 19th Century see, for example, Ewald, *supra* note 112, at 2055-61.

³²⁰ See *supra* text accompanying notes 15-21, 177-**Error! Bookmark not defined.** & 192-213.

³²¹ I intentionally list market regulation separately because the Swiss model of a social market economy, written into the federal constitution in 1947 (see Constitution of the Swiss Confederation of May 29, 1874, arts. 31-31^{quater} (as amended July 6, 1947)), has resulted in considerably more economic regulation than the American model of a free market economy. The ordo-liberal concepts developed by the Freiburg School in Germany, on which this model is based, has been ably presented by Professor Gerber. See David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe*, 42 AM. J. COMP. L. 25 (1994).

public interest.³²² The question is whether public law litigation in the administrative courts is sufficient to enforce this public interest.

On an institutional level, a rule-based legal education and the traditional expectations of judges as efficient adjudicators and of attorneys as professionals and officers of the court may make both uncomfortable with complex litigation and efforts to engage in social engineering in the civil process and thus explain the relatively limited use of existing group and joinder devices in practice.³²³ Legislators, on the other hand, still take their business seriously,³²⁴ although some would certainly argue that the emergence of American-style public relations have made serious inroads on the quality of the legislative discourse. In addition, due to the presence of direct democratic institutions, the legislative process is considered to have particular legitimacy to deal with complex social issues.³²⁵ Conversely, Swiss culture has not yet come “to regard litigation as a fact, however unpleasant, of everyday life.”³²⁶ As a result, the notion of effecting social change through the civil litigation system has remained foreign to many in Switzerland.³²⁷

There is also the question of how much of a social need there is for group litigation, especially class action litigation, in a country in which shared values outside of the law guide the behavior of individuals and corporations alike.³²⁸ Similarly, a denser level of social and environmental regulation than in the United States and the ability of individuals to challenge or enforce that regulation in administrative court, including through association suits, may reduce the need for enhanced group litigation devices in Swiss civil procedure.³²⁹ At the same time, however,

³²² See *supra* text accompanying notes 194-201.

³²³ See *supra* text accompanying notes 270-275.

³²⁴ See *supra* text accompanying notes 42-43.

³²⁵ See *supra* text accompanying notes 44-45.

³²⁶ Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1476 (1991) (book review).

³²⁷ See *supra* text accompanying notes 42-46 & 273-275.

³²⁸ See, e.g., Marco Verweij, *Why Is the River Rhine Cleaner than the Great Lakes (Despite Looser Regulation)?*, 34 LAW & SOC. REV. 1007 (2000).

³²⁹ See, e.g., Baumgartner, *supra* note 19, at 123. On a related note, the proliferation in Switzerland of offices of ombudsmen and –women, created by governments, businesses, and trade associations to give consumers an opportunity to be heard, taken seriously, and perhaps receive the relief they desire may

globalization and the opening of national markets have put pressure on the short-term bottom line of Swiss businesses and, in turn, on the federal legislature to become more business friendly.³³⁰ As a result, there may be more of a need for group litigation to enforce the public interest in the future.

Finally, the rejection of a class action device is partly the result of reactions to litigation practice in the United States and the perceived pathologies thereof. To some extent, this is due to true concern with differences observed in American law and practice, including concern with a litigation system steeped in equity and its recent tendency to result in dispute resolution *simpliciter*.³³¹ Partly, however, it is the result of the influence of the U.S. tort reform movement during a time when German businesses attempted to receive help from their government against lawsuits pending in the United States, a time during which U.S. courts fashioned an approach to transnational litigation that paid little attention to legitimate foreign sovereignty concerns, thus evoking protective reflexes in Germany and Switzerland.³³²

One would hope, however, that the Swiss law reformers can overcome their anti-American instincts in this area sufficiently to engage in informed procedural comparison. In doing so, it should be obvious that a procedural system based on the ideal of enforcing individual rights is unlikely to produce the same complexity, cost, and potential for negotiations outside the shadow of the law³³³ as one steeped in

have relieved the pressure for litigation-related solutions to consumer problems if the success stories of those institutions are to be believed. *See, e.g.*, Ombudsstelle Kommunikation und Umwelt, Jahresbericht 2003, available at http://www.omk.ch/download/jahresbericht_2003.pdf (dealing with concerns about radiation by wireless telecommunications services); Schweizerischer Versicherungsverband, Ombudsstelle, at <http://www.svv.ch/index.cfm?id=629> (Swiss insurers); Stadt Zürich, Beauftragte für Beschwerdefälle: Ombudsfrau, Bericht 2005, available at http://www.stadt-zuerich.ch/internet/ombudsstelle/home/jahresberichte.ParagraphContainerList.ParagraphContainer0.ParagraphList.0012.File.pdf/Ombudsfrau_Bericht2005.pdf (city of Zurich); Verband öffentlicher Verkehr, Jahresbericht 2004, Ombudsstelle öffentlicher Verkehr, available at http://www.ombudsstelle.ch/jahresbericht_2004.pdf (public transportation). *See also supra* note 43.

³³⁰ *See, e.g.*, Baumgartner, *supra* note 19, at 123.

³³¹ *See supra* text accompanying notes 64-70. “[T]he alternatives in current fashion represent a logical terminus in the progression from law in the sense that Justice Harlan described it, through equity, to dispute resolution *simpliciter*.” Burbank, *supra* note 259, at 1486.

³³² *See supra* text accompanying notes 72-81; Baumgartner, *supra* note 71, at 1317-38.

³³³ *See, e.g.*, Subrin, *supra* note 65, at 989 (noting that when civil procedure insufficiently “confine[s] and focus[es] the law so that one may predict results,” bargaining “is in the shadow of a shadow”).

equity when group litigation devices are expanded.³³⁴ At the same time, the Swiss reformers need to consider carefully whether their liberal, rights-based procedure along with fee shifting and the lack of contingent fees has something to do with the limited use of existing group litigation devices in civil practice versus their rather extensive use in administrative tribunals and, if so, whether that is desirable.³³⁵ In short, there is plenty of work ahead for the Swiss reformers in the area of group litigation. I hope they will perform their task well.

³³⁴ See, e.g., Gidi, *supra* note 51, at 321:

It is not correct, however, to say that, in the context of a civil law system, class action proceedings are necessarily expensive and burdensome for the defendant, or that they permit high recoveries and large legal fee awards. These effects are the result of the background American legal system as applied to class action procedure.

³³⁵ See *supra* text accompanying notes 177-**Error! Bookmark not defined.** & 192-213.

Annex: Relevant Swiss Provisions Translated into English

Proposed Federal Code of Civil Procedure (draft of June 2006)

Article 87: Verbandsklage

- (1) Associations and other organizations of national or regional importance may, in their own name, claim the violation of the personal rights of other persons or groups of persons if they are authorized by their bylaws to represent the interests of those persons or groups of persons.
- (2) The association can request the court
 - a. To enjoin an impending violation
 - b. To order an existing violation removed
 - c. To declare an activity to be in violation of the law if that activity continues to have violating effects
- (3) Special federal statutes in this matter remain controlling.

Bundesgesetz gegen den unlauteren Wettbewerb of Dec. 19, 1986 [Unfair Competition Act]

Article 9

- (1) Whoever has been threatened or impeded in his relationship with his customers, in his credit or professional reputation, or in his business or other business interests by unfair competition may request the judge to
 - a. Enjoin an impending violation
 - b. Order an existing violation removed
 - c. To declare an activity to be in violation of the law if that activity continues to have violating effects
- (2) He can especially request that the judgment be made known to other persons or be made public
- (3) ...

Article 10

- (1) ...

- (2) The following can also sue under Article 9, subsections (1) and (2):
- a. Professional and economic associations that are authorized to represent the economic interests of their members by their bylaws.
 - b. Organizations of national or regional importance that have as their goal, as expressed by their bylaws, the representation of consumer interests.
 - c. The federal government, if ...

Bundesgesetz über den Schutz von Marken und Herkunftsangaben of August 28, 1992 [Trademark Act]

Article 52: Declaratory Action

Whoever proves a legal interest in the matter can request that the judge declare that a right under this Act exists or fails to exist.

Article 55: Action to Have Defendant Perform Certain Act

(1) Whoever is being harmed or violated in his right to a trademark or a designation of origin can request that the judge:

- a. Enjoin an impending violation
- b. Order an existing violation removed
- c. Order the defendant to disclose where he obtained the objects that violate the trademark or designation of origin.

(2) Claims for damages, damages for pain and suffering, and the return of ill-gotten gains according to the law of obligations remain unimpeded by these provisions.

(3)

Article 56: Actions by Associations and Consumer Organizations

- (1) The following can file claims according to articles 52 and 55(1) if such claims concern designations of origin:
- a. Professional and economic associations that are authorized by their bylaws to pursue the economic interests of their members
 - b. Organizations of national or regional importance whose purpose, according to their bylaws, is to look out for consumer interests.
- (2) The same organizations are authorized to sue under Article 52 if claim involves a guaranty trademark or a collective trademark.

Bundesgesetz über die Gleichstellung von Frau und Mann, March 24, 1995 [Act Ordering the Equality of Woman and Man]

Article 7

- (1) Organizations that, according to their bylaws, are to further the equality of men and women or that are to represent the interests of employees and that have been in existence for at least two years can request in their own name that the judge declare that a discrimination exists if the litigation is likely to impact a large number of employees. Such organizations must give the afflicted employees an opportunity to be heard before approaching a mediating agency or filing a complaint.
- (2) Other than that, the rules governing complaints by individuals apply equally to claims by organizations.