

Switzerland has the traditional Austro-German representative association procedures. Debate on adoption of other models, given the opportunity of the introduction of a first federal Code of Civil Procedure, reveals considerable cautious conservatism toward reform.

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Switzerland

1. Introduction

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Switzerland is a parliamentary democracy¹ with a federal form of government. Power is shared by the federal government and the twenty-six cantons (or states). While private law has been a matter of federal legislative power since 1898, civil procedure and the organization of the courts remained the province of state law.² Only in 2000, with the adoption of a new federal constitution and its immediate amendment, did the federal government receive the authority to legislate in the area of civil procedure.³ Since then, the Swiss government and legislature have been drafting a new federal code of civil procedure that is intended to displace the existing cantonal codes,⁴ with the intention that the new code will be in force in 2010.⁵ The drafting of this new federal code, an enterprise similar in importance to the promulgation of the Federal Rules of Civil Procedure in the United States in 1938, presents an invaluable opportunity to rethink the premises underlying the cantonal codes and their effectiveness in practice and to create a modern system for civil litigation. In the tradition of Swiss consensus democracy, however (Steiner 1974, 4; Lijphart

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1999, 31-41), the drafters have largely steered clear of any revolutionary changes, including in the area of group litigation.

Before moving on to specific group litigation devices, it is worth describing a few basics. First, as in other civil law countries, there is a sharp separation in Switzerland between private and public law and between judges adjudicating civil litigation on one hand and administrative cases on the other (Schlesinger et al. 1988, 300-301). This is important because entire classes of claims that proceed in civil court in the United States, where there are no specialized administrative courts in the civilian sense (Langbein 1985, 852), are considered public law cases and thus are litigated in administrative courts in Switzerland (Baumgartner 2001, 119-20).

Second, there is no U.S.-style discovery. Similarly missing are other features of equity procedure, such as extensive judicial discretion (and power), the possibility of complex party and claim structures, and an unfettered ability to fashion new remedies (the latter two are less true in administrative courts) (Baumgartner 1998, 210; 2003, 85-86). The result is a relatively lean and thus comparatively less expensive litigation package (Murray 1998) that should be kept in mind when judging the loser-pays rule for costs. Third, some of the claims that might proceed in class action litigation in the United States are pursued through the criminal process in Switzerland, where the victims of alleged criminal behavior are given the right to participate, including the power to force a criminal prosecution against the will of the prosecutor and to appeal an acquittal (Bommer 2003). Finally, in civil, administrative, and civil proceedings, indigent litigants have a constitutional right to have their court costs waived and an attorney assigned at the expense of the state.

2. Existing Group Action Devices and Planned Reforms

2.1. *Class actions*

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 (Romy 1997). Moreover, thirty 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.⁶ Neither proposal has been successful, however.

The suggestion to introduce new forms of representative litigation in mass torts and mass disaster cases arose in the wake of a large industrial accident at a chemical plant in Basel in 1988. The suggestion became part of an extensive tort reform package in the 1990s. Ultimately, however, the Federal Council dropped the entire project from its legislative agenda due to severe budgetary constraints.⁷ The proposal to consider the introduction of class actions for labor, landlord-tenant, and consumer disputes, on the other hand, was passed on to the Committee of Experts drafting the new federal code of civil procedure. Without much discussion, however, the Committee decided to refrain from introducing a U.S.-style class action

practice into its draft code, noting that such a device is foreign to Swiss traditions.⁸ This decision was largely greeted with satisfaction by lawyers, academics, and political groups.⁹ The subsequent draft submitted by the executive to Parliament thus remained firmly opposed to the introduction of a class action device.¹⁰ The parliamentary debate thus far reveals a determination to stay the course.¹¹ 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, anytime soon. The impression is given that the matter was never seriously considered by the Committee. The reasons for this cavalier treatment and the possible difficulties with the introduction of class actions in Switzerland have been analyzed elsewhere (Baumgartner 2007, 310-16). Suffice it to say that U.S.-style class actions and U.S. litigation more generally are not currently popular in Swiss legal circles.

2.2. *Association suits* (Verbandsklagen)

a. General requirements and standing to sue. The only true representative litigation device in Swiss civil procedure 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.¹² In a 1947 case, the Federal Supreme Court extended the area of application of that decision as a matter of federal common law. The Court 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).¹³

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.”¹⁴ As a result, the common law *Verbandsklage* is limited to claims of harm to one's person. This limitation is not as narrow as it may at first seem. Article 28 protects from any unlawful¹⁵ 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 privacy to defamatory statements and other slights of one's honor (Hausheer and Aebi-Müller 2005). 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 (Röthlisberger 2003, 187).

In a subsequent case, the Court held that associations were limited to claiming declaratory relief and an injunction to stop violating the defendants' Article 28 rights.¹⁶ Claims for damages, however, would have to be brought by the individual members of the association. 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 or she can assert in court. 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. Based on that same reasoning, the Court later held that the filing of a *Verbandsklage* by an association will not toll the applicable statute of limitations on the claim of the individual in whose interest the action is filed.¹⁷

Incorporating these limitations pronounced by the Supreme Court, the federal legislature has made the *Verbandsklage* available in a number of substantive areas in addition to violations of Article 28 of the Civil Code and unfair competition. These include trademark law,¹⁸ gender discrimination,¹⁹ the codetermination rights of employees, and the rights of dispatched workers from the European Union.²⁰

b. Procedure and preclusive effect of judgment. Despite being part of federal civil procedure for some sixty years, the *Verbandsklage* has largely been neglected by Swiss proceduralists. Similarly, all but one 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, no further rules deal specifically with association suits. Thus, it seems fairly clear that a *Verbandsklage* follows the same cantonal rules of civil procedure as do individual lawsuits. In particular, this means that attorneys' fees and court costs are based on a small percentage of the amount in controversy, as directed by cantonal fee schedules. It also means that, contrary to the American rule, the costs are generally paid by the losing party. Finally, it is clear that the court does not supervise settlements or the settlement process.

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, the Supreme Court indicated disagreement with the assumption underlying one of defendant's arguments 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. 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.

c. Practical importance. Assessing the *Verbandsklage*'s operation in practice is not an easy task. Not only has the law of the *Verbandsklage* remained underresearched, but statistical data on its use are largely unavailable. My own research in the database of published Supreme Court cases yielded ten opinions involving

association suits between 1947 and 2008 (including the two discussed above), four of them handed down between 1995 and 2000. In all but one of these cases, the standing of the association to sue was at issue.

This is a small number considering that the Court decides between 600 and 700 private law cases per year,²¹ of which between 87 and 120 are published.²² No matter what one's preferred procedural values, it is difficult to determine whether this shows that the system works as it should without further empirical studies.

d. Law reform. The Committee of Experts originally proposed to extend the *Verbandsklage* to all substantive areas, thus abolishing the limitation to Article 28 of the Civil Code and to substance-specific federal statutes.²³ This decision was heavily criticized, primarily by conservatives and business interests.²⁴ The draft of the executive, now adopted by one chamber of the legislature, thus returns to a narrower right to a *Verbandsklage*.²⁵ 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.

Under this proposal, the authorization of the association to represent its members is no longer limited to economic interests. Similarly, there is no longer a requirement that each member of the association have standing in the case at hand.²⁶ At the same time, the association must be of national or regional importance, a limitation intended partly to exclude association suits by local unions.²⁷ At any rate, distinct provisions in substance-specific federal statutes would remain controlling.²⁸

2.3. Association suits in administrative procedure (*Verbandsbeschwerde*)

The *Verbandsbeschwerde* is the counterpart to the *Verbandsklage* in Swiss administrative procedure. It permits an association to challenge a decision in which an administrative agency applies law to a specific case, first within the agency and then before an administrative tribunal, including the Federal Supreme Court. The requirements are generally the same as for the *Verbandsklage*. 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 (Kummer 1984, 66). In administrative procedure, by contrast, anybody with a legitimate interest can challenge a governmental decision first in intergovernmental proceedings and then in administrative court.²⁹ The interest is legitimate if the plaintiff has a personal interest in the decision that is stronger than that of the population at large (Gygi 1983, 158). 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. Equally, competitors are considered to have standing to challenge the decision to license new entrants. 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. It is perhaps partly because of this difference in standing that the *Verbandsbeschwerde*, as opposed to the *Verbandsklage*, has been used extensively in practice. In the past fifteen years alone, the Federal Supreme Court has published more than fifty decisions involving administrative association suits.

2.4. *Shareholder litigation*

In a small but important group of actions, *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. However, the same principle has long been applied to suits by individual shareholders of a corporation against decisions at the corporation's shareholder meetings (Kummer 1984, 103-4). 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.³⁰ In this sense, 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.³¹

Finally, in the new Act on Mergers and Acquisitions of 2003, the federal legislature introduced an additional remedy for aggrieved shareholders in merger and acquisition cases. Rather than bringing an action to declare the shareholder decision sanctioning the merger or acquisition void—which the courts have been extremely reluctant to grant—minority shareholders can sue for damages for any losses incurred by disadvantageous treatment arising from the transaction.³² 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. Moreover, 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.³³ Thus, the suing plaintiff truly acts as a representative of the others.

2.5. *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. To my knowledge, all state procedural codes provide for the

joinder of 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 (Vogel and Spühler 2006, 143-48).

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.³⁴ Others allow it in cases in which voluntary joinder would have been permissible. Even in those states, however, consolidation is limited to common hearings, including evidentiary hearings, and scheduling (Habscheid 1990, 152).³⁵ As with voluntary joinder, the combined lawsuits remain independent with different outcomes possible.

There is no available statistical evidence on the use of joinder and consolidation devices in Switzerland. A search in the database for published Supreme Court cases turned up forty-nine joinder cases during the past fifty years. It appears that 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. Joinder of parties, including voluntary joinder, too, appears to be more prevalent in public law cases, yet only occasionally involving larger groups of litigants.

2.6. *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. For that purpose, the defendant agrees with the claimants that a test case brought by one of the claimants will be binding between the defendant and all claimants. The judgment in the test case does not have *res judicata* effect for or against the claimants not formally parties to the litigation (Spitz 2005, 125).³⁶ Moreover, some have raised the question whether the contractual obligation to accept the judgment as binding is judicially enforceable (Schaller 2004, 183). This may explain why the use of this device has thus far mostly been limited to a few cases against the federal government. 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 trying (Walter 2001, 374).

3. Conclusion

Switzerland has a limited array of group litigation devices, most of which appear to remain infrequently used in practice. Unfortunately, the drafters of the first federal code of civil procedure have failed to take the opportunity to rethink the premises and effectiveness of the current rules, especially in the mass context. As a result, Switzerland is likely to continue with a traditional and thus limited array of group litigation devices.

Notes

1. Although elected by the legislature, “the 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” (Steiner 1974, 43).

2. Constitution of the Swiss Confederation of May 29, 1874, art. 64 (as amended on November 13, 1898).

3. Constitution of the Swiss Confederation of April 18, 1999, art. 122 (as amended on March 12, 2000).

4. For a more detailed account and extensive sources, see Baumgartner (2007) and Walther (2005). Unlike in the United States, most bills in Switzerland—as in many other civil law countries—are drafted by the executive. For larger projects, writing 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.

5. 2007 Amtsblatt Ständerat 498, 500 (Statement by State Councillor Wicky).

6. Motion 98.3401, Jutzet Erwin, Einführung der Sammelklage im Arbeits-, Miet- und Konsumentenrecht.

7. See Bundesamt für Justiz, Haftpflichtrecht: Was ist bisher geschehen? <http://www.bj.admin.ch/bj/de/home/themen/wirtschaft/gesetzgebung/haftpflicht.html>.

8. Schweizerische Zivilprozessordnung, Bericht zum Vorentwurf der Expertenkommission (Begleitbericht) 15, 45–46 (2003).

9. Vernehmlassungsbericht ZPO 96-98 (2004). The only critical voice came from the University of Geneva. See *id.*

10. Botschaft zur schweizerischen Zivilprozessordnung, June 28, 2006 (Botschaft), BBl 2006, 7221, 4.

11. 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 Amtsblatt Ständerat 498, 499.

12. Bundesgesetz über den unlauteren Wettbewerb of September 30, 1943, art. 2(3), *superseded by* Bundesgesetz gegen den unlauteren Wettbewerb of December 19, 1986, SR 241, art. 10(2)(b).

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

14. Zivilgesetzbuch, SR 210, art. 28(1).

15. “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.” *Id.*, art. 28(2).

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

17. Federal Supreme Court, decision of December 17, 1985, 111 II 358, 364–66.

18. Bundesgesetz über den Schutz von Marken und Herkunftsangaben of Aug. 28, 1992, SR 232.11, art. 56.

19. Bundesgesetz über die Gleichstellung von Frau und Mann of March 24, 1995, SR 151.1, art. 7. 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.*

20. Bundesgesetz über die Information und Mitsprache der Arbeitnehmerinnen und Arbeitnehmer in den Betrieben of December 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 October 8, 1999, SR 823.20, art. 11.

21. Numbers taken from the yearly reports of the Court for the years 2000 to 2005.

22. Numbers calculated from the Supreme Court Reporter (BGE/ATF) for the years 1983 to 2005.

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

24. See Vernehmlassungsbericht at 7, 230–37.

25. See Botschaft at 212.

26. See 2007 Amtsblatt Ständerat 509–10 (statement of State Councillor Bonhôte).

27. See 2007 Amtsblatt Ständerat 510 (statement of Justice Minister Blocher).

28. See Botschaft at 212.

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

30. Code of Obligations, art. 706(5).
31. *Id.*, arts. 754-60.
32. Bundesgesetz über Fusion, Spaltung, Umwandlung und Vermögensübertragung of October 3, 2003, SR 221.301, art. 105(1).
33. *Id.*, art. 105(2).
34. The Bernese Code of Civil Procedure, for example, did not contain such a provision until it was so amended in 1995.
35. *Id.*
36. To avoid the running of the statute of limitations, all claimants may file suit individually, immediately requesting a stay, pending resolution of the test case (Spitz 2005, 125).

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