

January 2010

# Civil Procedure Reform in Switzerland and the Role of Legal Transplants

Samuel P. Baumgartner  
University of Akron, samuel8@uakron.edu

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: [http://ideaexchange.uakron.edu/ua\\_law\\_publications](http://ideaexchange.uakron.edu/ua_law_publications)



Part of the [Civil Procedure Commons](#), and the [Comparative and Foreign Law Commons](#)

---

## Recommended Citation

Samuel P. Baumgartner, *Civil Procedure Reform in Switzerland and the Role of Legal Transplants*, in *Common Law, Civil Law and the Future of Categories* (Janet Walker & Oscar G. Chase eds., forthcoming).

This is brought to you for free and open access by The School of Law at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Publications by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

# Civil Procedure Reform in Switzerland and the Role of Legal Transplants

Samuel P. Baumgartner\*

I. INTRODUCTION.....	1
II. THE CURRENT REFORM EFFORT AND ITS BACKGROUND .....	3
III. THE NEW CODE .....	7
IV. REASONS FOR THE DEARTH OF INTERNATIONAL BORROWING IN THE NEW CODE	17
V. CONCLUSION .....	25

## I. INTRODUCTION

In response to the general theme of this volume, I begin my contribution by noting that I have always been skeptical of the strong forms of the convergence thesis in comparative law. That is, I doubt that the differences between civil law and common law are crumbling, soon to be confined to the dustbin of history, or that the legal systems across the world will shortly be left with few distinctive characteristics.<sup>1</sup> Of course, there is bound to be some convergence of rules and approaches across legal cultures as various forms of international interaction increase. Transnational actors, power politics, and exposure to foreign approaches, among other things, all may cause a legal system to

---

\* Associate Professor, University of Akron School of Law. All translations are my own.

<sup>1</sup> See e.g. B.S. Markesinis, ed., *The Gradual Convergence* (Oxford: Oxford University Press, 1994); Ugo A. Mattei, Luisa Antonioli & Andrea Rossato, “Comparative Law and Economics” in Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics*, vol. 1 (Cheltenham: Edward Elgar, 2000) 505, at 508-14.

adopt solutions and approaches from abroad.<sup>2</sup> But there are likely to be plenty of countervailing causal processes at work in law reform, and civil procedure reform is no exception.<sup>3</sup> Moreover, as Alan Watson's work nicely demonstrates, there have been whole-scale legal transplants long before the advent of globalization.<sup>4</sup> Thus, the presence of transplants in procedural reform does not necessarily indicate that we are inevitably moving towards convergence.

I also think, however, that the differences between civil law and common law procedure have frequently been overdrawn. Juxtaposing the two systems provides many insights, to be sure. Civil law and common law countries, respectively, share a considerable history of ideas, concepts, and institutions. That common history, however, is not equally strong in all countries, and it began to diverge at various points in time for different jurisdictions.<sup>5</sup> Moreover, the advent of the constitutional state and, later, the modern welfare state brought with it other formative influences, some of which are shared across the civil law / common law divide.<sup>6</sup>

From this perspective, it should come as no surprise that the current procedural reform project in Switzerland—the creation of the first Federal Code of Civil Procedure in Swiss history—shows few signs of bringing Swiss civil procedure, traditionally seen as part of the civil law family, any closer to common law concepts and approaches. The thrust of the reform has been to create a single, unified code of civil procedure by

---

<sup>2</sup> Cf. Samuel P. Baumgartner, "Transnational Litigation in the United States: The Emergence of a New Field of Law" (book review essay) (2007) 55 Am. J. Comp. L. 793, at 799-801.

<sup>3</sup> See e.g. Ralf Michaels, "Two Paradigms of Jurisdiction" (2007) 27 Mich. J. Int'l L. 1003.

<sup>4</sup> See Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens: University of Georgia Press, 1993).

<sup>5</sup> See e.g. Rudolf B. Schlesinger *et al.*, *Comparative Law*, 6th ed. (New York: Foundation Press, 1998), at 257-63, 281, 283-313.

<sup>6</sup> See e.g. William B. Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?" (1995) 143 U. Pa. L. Rev. 1889, at 1987-88, 2046-65.

combining the best features from the various cantonal codes.<sup>7</sup> Foreign rules and approaches, however, have remained largely off the table.

In this chapter, I shall paint the landscape of procedural reform in Switzerland and use the product of that effort to inquire into the reasons why the reformers in that country chose to forego virtually any adoption of foreign concepts or approaches, whether from civil law or common law origins. In doing so, I hope to contribute to our understanding of the forces that oppose, as well as the forces that promote, convergence in procedural reform.

## II. THE CURRENT REFORM EFFORT AND ITS BACKGROUND

The current civil procedure reform in Switzerland is part of a much larger package to reform procedural law and the federal judiciary. This package includes the creation, for the first time in Swiss history, of a federal code of civil procedure, a federal code of criminal procedure, a lower federal criminal court, and a lower federal administrative court.<sup>8</sup> This is quite an extensive reform package by any standard. Although many of these reforms have been proposed for a very long time, they never came to fruition. Change finally arrived in 2000, however, with the strong vote of the Swiss populace in favor of a constitutional amendment giving the federal government the power to implement the above-mentioned reforms.<sup>9</sup> Such popular support in favor of federal power in this area is a relatively new phenomenon, however.

Since 1848, Switzerland has been a parliamentary democracy with a federal form of government. Governmental power is shared by the federal government and the twenty-six

---

<sup>7</sup> See e.g. Christoph Leuenberger, “Die neue schweizerische Zivilprozessordnung” in Thomas Geiser *et al.*, eds., *Rechtliche Rahmenbedingungen des Wirtschaftsstandortes Schweiz* (Zürich: Dike, 2007) 601, at 602 [Geiser *et al.*, *Rahmenbedingungen*].

<sup>8</sup> See “Justizreform” in *Bundesamt für Justiz*, online: <[http://www.bj.admin.ch/bj/de/home/themen/staat\\_und\\_buerger/gesetzgebung/justizreform.html](http://www.bj.admin.ch/bj/de/home/themen/staat_und_buerger/gesetzgebung/justizreform.html)> [“Justizreform”].

<sup>9</sup> *Ibid.*

cantons (or states). The 1848 Constitution provided for relatively little federal power outside of foreign affairs, monetary policy, and tariffs.<sup>10</sup> But various groups, encouraged by nationalist events in neighboring Germany and Italy, soon proposed the adoption of a new constitution that would have significantly increased the areas of federal power—including in criminal and private law and procedure.<sup>11</sup> However, the proposal was rejected by popular vote in 1872, due to opposition in both conservative catholic and anti-federalist French-speaking cantons.<sup>12</sup> A scaled-back proposal for a new constitution with only modest increases in federal powers was adopted in 1874 and amended in 1898. Since then, substantive private law and criminal law have been a matter of federal legislative power.<sup>13</sup> Civil and criminal procedure and the organization of the courts, on the other hand, remained the province of state law.<sup>14</sup> Moreover, the federal judiciary has been limited to a federal Supreme Court, which acts as a limited constitutional court and as a final arbiter on questions of substantive federal law.<sup>15</sup>

Not surprisingly, the resulting differences in civil procedure and court organization in the various cantons produced difficulties in the quickly growing class of cases that cross state borders. Hence, attempts to introduce a unified national system of civil procedure

---

<sup>10</sup> *Bundesverfassung der Schweizerischen Eidgenossenschaft* (September 12, 1848), reproduced in Wilhelm Fetscherin, ed., *Repertorium der Abschiede der Eidgenössischen Tagsatzungen aus den Jahren 1814-1848*, vol. 2, 764 (Bern: K.J. Wyss, 1876), arts. 13-59.

<sup>11</sup> See e.g. Thomas Sutter, *Auf dem Weg zur Rechtseinheit im schweizerischen Zivilprozessrecht* (Zürich: Schulthess, 1998), at 4-38.

<sup>12</sup> See e.g. Ulrich Häfelin & Walter Haller, *Schweizerisches Bundesstaatsrecht*, 2d ed. (Zürich: Schulthess, 1988), at 17.

<sup>13</sup> See *Bundesverfassung der Schweizerischen Eidgenossenschaft* (May 29, 1874), AS 1, 1 (1875), art. 64 (providing for federal power in some areas of private law, including the law of obligations and intellectual property); Constitution of 1874, as amended on November 13, 1898, AS 16, 885, 888 (1898) arts. 64(II) & 64bis(I) (providing for federal power in all areas of substantive private and criminal law).

<sup>14</sup> *Ibid.*, arts. 64(III) & 64bis(II). There is one important exception: The procedure for enforcing money judgments and uncontested monetary claims, including bankruptcy law, was a matter of federal law as well. See art. 64(I).

<sup>15</sup> *Ibid.*, arts. 110-114. The role of the Court as a constitutional court is limited primarily because of its inability to declare federal statutes void as unconstitutional. See art. 113(III).

were made on a number of occasions. None of them, however, came to fruition. The rejection of the 1872 proposal cast a long shadow.<sup>16</sup> Moreover, straw polls among various bar groups over time indicated that judges and litigators quite liked the existing system with different procedural rules in different cantons.<sup>17</sup>

Another problem that soon manifested itself was the lack of uniformity in enforcing federal substantive law. As proceduralists across the globe know, there is no clear dividing line between substantive and procedural law, and avowedly procedural rules frequently have substantive consequences.<sup>18</sup> The Federal Supreme Court thus began a slow but steady process of creating federal common law in the guise of ensuring uniform application of federal substantive law. By the end of that process, the Court had managed to declare many a traditional area of state procedure entirely a matter of federal substantive law, including *res judicata*, *lis pendens*, declaratory and preliminary relief, and group litigation rights.<sup>19</sup> Catching on to the problem, the federal legislature began to adopt traditionally procedural rules in federal substantive legislation, most prominently rules on personal jurisdiction, burden of proof, evidence, costs, and speed of proceedings.<sup>20</sup> This proliferation of federal rules accelerated during the second half of the twentieth century, culminating in the adoption of a new federal *Act on Private International Law*<sup>21</sup> in 1987. In that Act, federal lawmakers adopted an exhaustive set of

---

<sup>16</sup> See e.g. Sutter, *supra* note 11, at 55-72.

<sup>17</sup> See e.g. Frank, Sträuli & Messmer, *Kommentar zur Zürcherischen ZPO*, 3d ed. (Zürich: Schulthess, 1997), at 13; *ibid.*, at 62.

<sup>18</sup> See e.g. Stephen B. Burbank, “Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy” (2006) 106 Colum. L. Rev. 1924, at 1926-27.

<sup>19</sup> See e.g. Oscar Vogel & Karl Spühler, *Grundriss des Zivilprozessrechts*, 8th ed. (Bern: Stämpfli, 2006), at 68-71; Stephen Berti, *Zum Einfluss ungeschriebenen Bundesrechts auf den kantonalen Zivilprozess im Lichte der Rechtsprechung des Schweizerischen Bundesgerichts* (Zürich: Schulthess, 1989). Regarding group litigation rights, see e.g. Samuel P. Baumgartner, “Class Actions and Group Litigation in Switzerland” (2006) 27 Nw. J. Int’l L. & Bus. 301, at 316-26 [Baumgartner, “Class Actions”].

<sup>20</sup> See e.g. Vogel & Spühler, *ibid.*, at 62-67.

<sup>21</sup> *Bundesgesetz über das internationale Privatrecht* of December 18, 1987, SR 291 [*Private International Law Act*].

rules on personal jurisdiction and the recognition and enforcement of foreign judgments in international cases, in addition to a new choice of law regime.

By the late 1980s, it was clear to any Swiss lawyer that there was, in fact, a substantial body of federal procedural law. Apart from the question whether the constitutional preservation of the power to make procedural law for the states had been undermined, this had significantly weakened the argument that an adoption of federal procedural rules was neither feasible nor necessary.<sup>22</sup> But it took the ratification of the Lugano Convention<sup>23</sup> to precipitate change. The Lugano Convention sets uniform rules on personal jurisdiction, *lis pendens*, and the recognition of judgments in cross-border cases involving EC and EFTA member states. Ratification of the Lugano Convention had the jarring effect that, in some situations, cantonal courts were required to treat foreign litigants better than litigants from other cantons.<sup>24</sup> Moreover, the adoption of the Lugano Convention and the new *Private International Law Act* further increased the difficulty for litigants to locate the applicable procedural law in the thicket of international treaties, proliferating federal statutes, state civil procedure codes, federal common law, and state practice.<sup>25</sup> The clear vote in favor of an updated and streamlined federal constitution by the Swiss populace in 1998 gave the final impetus to put before the people a constitutional amendment providing for federal power in civil and criminal procedure. That amendment was adopted in 2000.<sup>26</sup>

Given the experience with the Lugano Convention, the first piece of federal legislation passed under the new federal power was an act that entirely federalized the

---

<sup>22</sup> See e.g. Frank, Sträuli & Messmer, *supra* note 17, at 15-16.

<sup>23</sup> *Convention on jurisdiction and the recognition of judgments in civil and commercial matters*, 1988 O.J. (L 319) 40 [Lugano Convention].

<sup>24</sup> See e.g. Frank, Sträuli & Messmer, *supra* note 17, at 16.

<sup>25</sup> See e.g. Adrian Staehelin, Daniel Staehlin & Pascal Grolimund, *Zivilprozessrecht* (Zürich: Schulthess, 2008), at 15; Fridolin M.R. Walther, *Die Auslegung des schweizerischen Zivilprozessrechts, insbesondere des Bundesgesetzes über den Gerichtsstand in Zivilsachen* (Bern: Stämpfli, 2002), at 132-33.

<sup>26</sup> See *supra* text accompanying note 8.

law of personal jurisdiction.<sup>27</sup> In addition, the Justice Department impaneled a committee of experts to draft a new federal code of civil procedure. The Committee presented its work product in June of 2003.<sup>28</sup> After a public comment period, the Federal Council (the executive) presented an adapted version of the Committee's draft to Parliament. Parliament adopted the final version of the Code on December 19, 2008.<sup>29</sup> The deadline for a possible referendum passed on April 16, 2009. Thus, the new Code is planned to enter into force in January of 2011.

### III. THE NEW CODE

From the beginning, the Committee's primary task was to create a code of civil procedure that would break the long spell of shipwrecked unification proposals. The Justice Department thus carefully selected committee members to ensure representation from bench and bar as well as from academia; from small firms as well as from large; from French- and Italian-speaking regions as well as from German; from Catholic as well as from Protestant areas; and so on. Accordingly, the Committee never considered adopting truly novel approaches—including foreign ones—that would not mesh easily with traditional Swiss procedural concepts.<sup>30</sup> Similarly, the Committee knew better than to model its work on the code of a single canton. Instead, it attempted to draw from all cantonal codes of civil procedure, although more so from the recently reformed ones.<sup>31</sup> In addition, the Committee decided to restate the federal statutory and common law rules that had developed over time to preempt state procedural law in domestic cases.<sup>32</sup>

---

<sup>27</sup> *Bundesgesetz über den Gerichtsstand in Zivilsachen* of March 24, 2001, SR 272.

<sup>28</sup> See *Schweizerische Zivilprozessordnung (ZPO), Bericht zum Vorentwurf der Expertenkommission*, June 2003, online: <[http://www.bj.admin.ch/etc/medialib/data/staat\\_buerger/gesetzgebung/zivilprozess.Par.0006.File.tmp/vn-ber-d.pdf](http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0006.File.tmp/vn-ber-d.pdf)>, at 6 [Begleitbericht].

<sup>29</sup> *Schweizerische Zivilprozessordnung* of December 19, 2008, BBI 2009, at 21 [ZPO or Code].

<sup>30</sup> See *Begleitbericht*, *supra* note 28, at 15.

<sup>31</sup> *Ibid.*

<sup>32</sup> See e.g. Hans-Peter Walter, "Auf dem Weg zur Schweizerischen Zivilprozessordnung" (2004) 100 *Schweizerische Juristenzeitung* 313, at 319. On those rules, see *supra* notes 18-20 and accompanying text.



The end result, after adoption by Parliament, is a Code that should look familiar to all Swiss lawyers, although they may find surprises in the details. With 408 relatively brief articles, the Code is considerably shorter than its counterparts in surrounding countries. It achieves this, in true Swiss tradition,<sup>33</sup> by eschewing much technical language and complex conceptual elaboration, as well as by leaving various details for practice to develop.

The Code begins with a general part, specifying the scope of application and dealing with issues common to all kinds of proceedings, such as personal jurisdiction in domestic (as opposed to transnational) cases; recusal; joinder of parties and claims; calculation of amount in controversy; rules on costs; and general rules on conducting the proceedings and on taking evidence.<sup>34</sup> The Code then contains rules on ordinary proceedings, which begin with a written complaint and answer, followed by a preliminary hearing, a full-fledged main hearing, and judgment.<sup>35</sup> Following that, there are provisions for a number of special proceedings. These include simple (*e.g.*, less formal, more oral) proceedings for amounts in controversy of sFr. 30,000 (approximately US \$25,000) or less; summary proceedings (*e.g.*, for preliminary relief), in which only certain kinds of evidence are permitted or in which there is a lower standard of proof, or both; and family law proceedings, where the Code abandons many of its underlying classical liberal concepts in favor of increased judicial supervision in order to ensure equal treatment of the potentially weaker party.<sup>36</sup> The Code then contains rules on appeals and enforcement proceedings,<sup>37</sup> although the enforcement of money judgments remains the province of a

---

<sup>33</sup> See *e.g.* Franz Wieacker, *A History of Private Law in Europe*, trans. by Tony Weir (Oxford: Clarendon Press, 1995) at 389-91.

<sup>34</sup> ZPO, *supra* note 29, arts. 1-196.

<sup>35</sup> *Ibid.*, arts. 197-242.

<sup>36</sup> *Ibid.*, arts. 243-307.

<sup>37</sup> *Ibid.*, arts. 308-52.

much older federal law on debtor/creditor relations and bankruptcy.<sup>38</sup> Finally, there is a chapter on domestic arbitration.<sup>39</sup>

The drafters ensured that the new Code complies with international treaties ratified by Switzerland, including several Hague Conventions and, most importantly, the European Convention on Human Rights. Thus, some rights of the parties are more clearly defined under the Code than they may currently be in cantonal practice. For instance, the Code states a right of the parties to prove their respective cases,<sup>40</sup> as well as a privilege against self-incrimination.<sup>41</sup> Similarly, the judge will be obligated to disregard illegally obtained evidence unless she considers the interest in finding the truth to prevail.<sup>42</sup>

Apart from these clarifications required by international law, however, there are only two foreign imports in the Code. The first is a brief chapter on party- and judge-initiated mediation that was added to the Committee's proposed draft upon heavy lobbying by mediation firms from large cities.<sup>43</sup> The second is inspired by a provision in the Lugano Convention, itself based on procedures known in a number of European countries: the parties to a contract can have a promissory note drawn up and authenticated by a notary (a specialized lawyer in Switzerland).<sup>44</sup> The resulting note is enforceable like a court judgment, except that a few narrow defenses are permitted.<sup>45</sup> On the other hand, a request by a few members of Parliament to consider the introduction of class actions for labor, landlord-tenant, and consumer disputes received only scant attention from the

---

<sup>38</sup> Cf. *supra* note 14.

<sup>39</sup> ZPO, *supra* note 29, arts. 353-99.

<sup>40</sup> *Ibid.*, art. 152(1).

<sup>41</sup> *Ibid.*, art. 163(1)(a).

<sup>42</sup> *Ibid.*, art. 152(2).

<sup>43</sup> *Ibid.*, arts. 213-18. Most importantly, article 214(1) provides that: “[t]he court can recommend at any time that the parties consider mediation.”

<sup>44</sup> Lugano Convention, *supra* note 23, art. 50. On the profession of the notary in civil law jurisdictions such as Switzerland, see e.g. Schlesinger *et al.*, *supra* note 5, at 22-24.

<sup>45</sup> ZPO, *supra* note 29, arts. 347-52.

Committee, which brushed it aside with the comment that such a device is foreign to Swiss traditions.<sup>46</sup>

Thus, the new Swiss Code of Civil Procedure remains true to Swiss tradition and shows little evidence of transplants from other parts of the world (other than those mandated by international treaty). A large portion of the Code is rooted in what is usually considered civil law tradition. This is in evidence in the strict separation of private and public law litigation (the new Code only applies to the former);<sup>47</sup> judge-controlled litigation and taking of evidence;<sup>48</sup> the absence of juries;<sup>49</sup> the absence of common law-style rules of evidence;<sup>50</sup> the absence of motion practice;<sup>51</sup> clear delimitation of judicial power;<sup>52</sup> de-novo appeals; and a small litigation package (limited joinder of parties and claims, no US-style discovery, and a narrow bite of *res judicata*).<sup>53</sup> The Code also continues the established European tradition of generally charging court costs and the winner's attorney's fees to the losing party.<sup>54</sup>

---

<sup>46</sup> See Begleitbericht, *supra* note 28, at 15, 45-46. For more background on the decision to avoid introducing class actions in the new Code, see Baumgartner, "Class Actions," *supra* note 19, at 309-16.

<sup>47</sup> See *e.g.* Baumgartner, "Class Actions," *ibid.*, at 307-08.

<sup>48</sup> See *e.g.* Martin Kaufmann, "Beweiserhebung durch das Gericht vs. Beweiserhebung durch die Parteien" in Geiser *et al.*, *Rahmenbedingungen*, *supra* note 7, 657, at 657-58.

<sup>49</sup> In the late 19th and early 20th centuries, there were proposals for introducing a civil jury in various cantons. The Canton of Zurich actually did introduce a civil jury in 1874, but abolished it again in 1911. See *e.g.* R.C. van Caenegem, "History of European Civil Procedure" in Mauro Cappelletti, chief ed., *International Encyclopedia of Comparative Law*, vol. 16 (Tübingen, J.C.B. Mohr (Paul Siebeck), The Hague: Mouton, New York: Oceana, 1973) 95.

<sup>50</sup> *Cf.* Schlesinger *et al.*, *supra* note 5, at 443-45.

<sup>51</sup> *Ibid.*, at 435-36.

<sup>52</sup> See *e.g.* Baumgartner, "Class Actions," *supra* note 19, at 321.

<sup>53</sup> On these matters, see *e.g.* Samuel P. Baumgartner, "Related Actions" (1998) 3 *Zeitschrift für Zivilprozess International* 203, at 210. In a slight deviation from the depiction in the text, the Code does extend the *appel en cause*, a limited form of third-party complaint, from the French-speaking cantons to the rest of Switzerland. See ZPO, *supra* note 29, arts. 81-82.

<sup>54</sup> *Ibid.*, arts. 104-12.

At the same time, however, the new Code displays a number of features with a long history in at least some cantonal codes that may be surprising to those who have been fed the usual diet of descriptions of civil law procedure. First, most Swiss judges have, for centuries, been selected in some form of public or parliamentary election.<sup>55</sup> After all, one of the major reasons that the various Swiss states sought independence from Habsburg from 1291 on was their unwillingness to be subject to far-away judges imposed by the empire.<sup>56</sup> Although judicial elections in most cantons are usually a matter of internal party politics and, thus, rarely involve public election campaigns, the possibility of not being reelected or reappointed after the usual 4- or 6-year service period,<sup>57</sup> although rare, is real.<sup>58</sup> Despite this feature, there is, in some cantons, a tradition of a career judiciary of sorts in the sense that many lower-level judges begin their careers as long-term judicial clerks. From there, they are then elected to a judgeship. In other cantons, a considerable number of judges, especially at the appellate level, come to office with at least some practical experience outside the judiciary. Since the new Code is leaving the organization of the judiciary largely to the cantons,<sup>59</sup> none of this is likely to change.

Along similar lines, there are a few cantons that never gave up the early Germanic tradition of public deliberation and vote of the courts at both the first instance and the

---

<sup>55</sup> In three cantons, at least some of the lower-level judges are appointed by the state's highest court, rather than elected. See *e.g.* Alfred Bühler, "Von der Wahl und Auswahl der Richter" in Heinrich Honsell *et al.*, eds., *Festschrift für Heinz Rey zum 60. Geburtstag* (Zürich: Schulthess, 2003) 521, at 533.

<sup>56</sup> Similarly, the newly independent states soon worked to remove themselves from the jurisdiction of the far-away judges imposed by the Catholic Church. On all this, see Emil Schurter & Hans Fritzsche, *Das Zivilprozessrecht des Bundes* (Zürich: Rascher, 1924), at 5-29.

<sup>57</sup> In a number of cantons, the larger political parties use specialized committees to vet a candidate's professional quality. See *e.g.* Vogel & Spühler, *supra* note 19, at 87.

<sup>58</sup> A few recent instances in which cantonal and federal judges either almost failed or did fail to be reelected because of unpopular decisions have led to renewed questions about whether this system adequately protects judicial independence. See *e.g.* Stephan Gass, "Wie Sollen Richter und Richterinnen gewählt werden? Wahl und Wiederwahl unter dem Aspekt richterlicher Unabhängigkeit" (2007) 16 *Aktuelle Juristische Praxis* 593.

<sup>59</sup> ZPO, *supra* note 29, art. 3.

appellate levels. All cantons have, however, since been required by federal law to provide the parties with a written judgment and opinion in cases that can be appealed to the Federal Supreme Court.<sup>60</sup> Moreover, written opinions in Switzerland follow the civil law tradition of stating only the opinion of the entire court, without any dissents or concurrences. Yet, in some cantons, deliberation and vote still occur on the bench in the presence of the parties and any members of the public who wish to observe the proceedings.<sup>61</sup> However, since the cantons that follow the practice of the surrounding countries of secret deliberation and vote seem to feel equally strongly about the importance of their approach for the integrity of the judicial process,<sup>62</sup> the new Code leaves the matter up to the cantons to regulate.<sup>63</sup> The Code does, however, provide that the public is excluded from the entire proceedings in certain matters, including all family law cases.<sup>64</sup>

A third, perhaps unexpected, feature<sup>65</sup> of the new Code is the presence of a single, concentrated, oral hearing (*Hauptverhandlung, audience de jugement*).<sup>66</sup> I hesitate to call

---

<sup>60</sup> *Bundesgesetz über das Bundesgericht* of June 17, 2005, SR 173.110, art. 112.

<sup>61</sup> See e.g. *Gesetz betreffend die Zivilprozessordnung für den Kanton Bern* of July 7, 1918, BSG 271.1, art. 204 [Code of Civil Procedure of the Canton of Bern]; *Zivilprozessordnung* of Sept. 11, 1966, BGS 221.1, § 53 [Code of Civil Procedure of the Canton of Solothurn; *Code de procédure civile du canton de Neuchâtel* of Sept. 30, 1991, RSN 251.1, art. 333 [Code of Civil Procedure of the Canton of Neuchâtel].

<sup>62</sup> On the history behind this approach, see e.g. Kurt H. Nadelmann, “The Judicial Dissent: Publication v. Secrecy” (1959) 8 Am. J. Comp. L. 415.

<sup>63</sup> ZPO, *supra* note 29, art. 54(2).

<sup>64</sup> *Ibid.*, art. 54(3), (4).

<sup>65</sup> Cf. Benjamin Kaplan, “An American Lawyer in the Queen’s Courts: Impressions of English Civil Procedure” (1969) 69 Mich. L. Rev. 821, at 841:

What then is the grand discriminant, the watershed feature, so to speak, which shows the English and American systems to be consanguine and sets them apart from the German, the Italian, and others in the civil law family? I think it is the single-episode trial as contrasted with discontinuous or staggered proof-taking. This characteristic must greatly affect the anterior proceedings that culminate in trial.

<sup>66</sup> ZPO, *supra* note 29, arts. 228-34.

it a trial only because it is held without a jury and because the judge, in civil law fashion, remains in charge of the hearing and of the questioning of the witnesses. Again, this is nothing new. Some of the procedural codes of the cantons have provided for this kind of main hearing for a long time.<sup>67</sup> They therefore made a much clearer break with the seemingly endless series of evidentiary hearings in Romano-canonical procedure than did the *German Code of Civil Procedure* of 1877.<sup>68</sup> And they did so without relegating the taking of evidence to the pre-hearing *instruction*, as has been the case in French civil procedure since 1806.<sup>69</sup> In order for a concentrated oral hearing to work, these cantons have provided for some form of preliminary hearing beforehand, at which the judge encourages the parties to clarify their claims and attempts to identify, with the parties, the relevant pieces of evidence, including proposed witnesses.<sup>70</sup> If unexpected evidence

---

<sup>67</sup> Article 176(1) of the Code of Civil Procedure of the Canton of Bern, *supra* note 61, provides:

If [after the exchange of the pleadings] the instructing judge [*i.e.*, the panel member delegated to prepare the main hearing] considers the matter insufficiently clear to permit a judgment to be handed down at the time of the main hearing, he summons the parties and discusses the case with them in free conversation. He shall make use of his [power to ask questions not directly raised by the pleadings], especially by questioning the parties so as to clarify contested facts and to encourage them to amend their pleadings [with regard to alleged facts and proposed means of proof] accordingly.

<sup>68</sup> Zivilprozessordnung [German Code of Civil Procedure] of Jan. 30, 1877, 1877 RGBI at 83. In the United States, Justice Kaplan has coined the term “conference method” to refer to the series of evidentiary hearings under the German Code of 1877. See Benjamin Kaplan, “Civil Procedure – Reflections on the Comparison of Systems” (1960) 9 *Buff. L. Rev.* 409, at 410.

<sup>69</sup> See *e.g.* J. A. Jolowicz, “Civil Procedure in the Common and Civil Law” in Guenther Doekermach & Klaus A. Zieger, eds., *Law and Legal Culture in Comparative Perspective* (Stuttgart: Franz Steiner Verlag, 2004) 26, at 33-37.

<sup>70</sup> ZPO, *supra* note 29, art. 226. Unlike many of the cantonal provisions on which this approach is fashioned, article 226, as a matter of course, allows the court to conduct several preliminary hearings, at all of which evidence may be taken. It thus appears to permit judges from cantons that are used to the German-style “conference method” to continue that method to some extent. In Germany, in the meantime, the reform of 1976 required courts to attempt a single oral hearing whenever possible, which appears to have become reality at least in some courts. See *e.g.* Peter Gottwald, “Civil Procedure Reform in Germany” (1997) 45 *Am. J. Comp. L.* 753, at 761.

nevertheless turns up during the main hearing, it is, of course, possible to adjourn that hearing. In some cantons, the preliminary hearing is also the time for the judge, more or less gently, to suggest settlement—an approach that appears to have made it into the new Code.<sup>71</sup>

Fourth, there are a number of civil law jurisdictions that sustained the prohibition of party testimony from Roman Canonical procedure well into the twentieth century on the theory that party testimony is notoriously self-serving and, thus, useless as a means of proof.<sup>72</sup> Not so in a number of Swiss cantons, where parties as well as non-parties have long been subject to questioning by the judge. In those cantons, there remains a distinction between the testimony of non-parties and that of parties, whereby the latter usually cannot result in a perjury charge if a party has intentionally given factually incorrect answers.<sup>73</sup> Again, the assumption is that parties are likely to at least slant their testimony. Technically, the parties are thus not considered witnesses. Nevertheless, the drafters of these codes realized that there may still be considerable probative value in the testimony of parties.<sup>74</sup> The new Code adopts one form of this approach: The parties are to be told that they may be subject to a disciplinary fine of SFr. 2000-5000 (approximately US \$1500-3750) for false testimony.<sup>75</sup> However, since they are not technically witnesses, the parties cannot commit perjury, with one exception: the court may ask a party to respond to specific questions on pain of a perjury charge in the case of false testimony.<sup>76</sup> This is usually done where a point of fact in the knowledge of one party is particularly

---

<sup>71</sup> ZPO, *supra* note 29, art. 226(2).

<sup>72</sup> See *e.g.* Dagmar Coester-Waltjen, “Parteiaussage und Parteivernehmung am Ende des 20. Jahrhunderts” (2000) 113 *Zeitschrift für Zivilprozess* 269.

<sup>73</sup> See *e.g.* Vogel & Spühler, *supra* note 19, at 287.

<sup>74</sup> However, in some cantons, party testimony cannot be used to prove a fact in favor of that party. See *ibid.* In others, as well as in the new Code, it is entirely up to the court to determine the probative value of party testimony, whether or not it serves to support that party’s case. *Ibid.*, at 288; ZPO, *supra* note 29, art. 157.

<sup>75</sup> ZPO, *ibid.*, art. 191.

<sup>76</sup> *Ibid.*, art. 192.

important to the outcome of the case and the court has no other means to establish the truth of that fact.<sup>77</sup>

Another principle of German common law procedure with considerable staying power in Europe is the Roman law rule of *nemo contra se edere tenetur* (nobody can be required to produce a document against himself).<sup>78</sup> Accordingly, German procedure did not generally permit the judge to order a party to produce a document identified by the opponent as being relevant to prove its case until 2002.<sup>79</sup> Other European countries got rid of the doctrine only a few decades ago, and then only to some extent.<sup>80</sup> Again, some Swiss cantons abolished this approach long ago.<sup>81</sup> Along with these cantons, the new Code provides that both parties and non-parties have an obligation to provide evidence in their control.<sup>82</sup> Parties refusing to live up to that obligation face adverse inferences on the

---

<sup>77</sup> This is, of course, traceable to the old decisory oath under German common law, which represented the first step towards permitting party testimony, long before England and the United States permitted parties to testify. See *e.g.* Coester-Waltjen, *supra* note 72, at 274-76, 277-79. For a description of the decisory oath in English, see John Henry Merryman, *The Civil Law Tradition*, 3d ed. (Stanford: Stanford University Press, 2007), at 119-20; Jolowicz, *supra* note 69, at 34.

<sup>78</sup> Digest 2, 13, 1 (*Ulpian*).

<sup>79</sup> See *e.g.* Oscar Chase *et al.*, *Civil Litigation in Comparative Context* (St. Paul: Thomson West, 2007), at 222-26; Gerhard Walter, “The German Civil Procedure Reform Act 2002: Much Ado About Nothing?” in Nocolò Trocker & Vincenzo Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Torino: Giappichelli, 2005) 67, at 75-76.

<sup>80</sup> See *e.g.* Alphonse Kohl, “Roman Law Systems” in Mauro Cappelletti, chief ed., *International Encyclopedia of Comparative Law*, Vol. XVI: Civil Procedure, Chapter 6: Ordinary Proceedings in First Instance (Tübingen: J.C.B. Mohr (Paul Siebeck), The Hague: Martinus Nijhoff Publishers., 1984) 75.

<sup>81</sup> In the Canton of Bern, for instance, the law provides that parties and non-parties alike are required to divulge relevant documents in their possession. In the case of non-compliance by a party, the judge can make an adverse inference. In the case of non-compliance by a non-party, that non-party faces a fine or a prison sentence, and is liable to the party in whose favor the document was invoked for the damage incurred. *1918 Civil Code of the Canton of Bern*, *supra* note 61, arts. 235-38.

<sup>82</sup> ZPO, *supra* note 29, art. 160.



merits.<sup>83</sup> Non-parties who refuse to cooperate risk a fine as well as being held liable for the extra court costs arising from their behavior.<sup>84</sup>

A final feature of the new Swiss Code that may look familiar to common law lawyers, especially from the United States, is its strong emphasis on settlement. This feature, too, however, has a long tradition in Switzerland. In this case, the tradition goes back to the *French Code of Civil Procedure* of 1806<sup>85</sup> and preceding statutes passed right after the French Revolution. According to those statutes, the parties had to submit to conciliation in front of a justice of the peace before a lawsuit could be filed.<sup>86</sup> The idea soon caught on in Switzerland.<sup>87</sup> However, not all cantons adopted this approach. In Geneva, for example, the drafters of the *Code of Civil Procedure* of 1819<sup>88</sup> left pre-action conciliation voluntary. They did, however, permit the judge to suggest settlement at any time during the proceedings, well aware of the dangers of such an approach.<sup>89</sup> This approach, too, was soon adopted by many cantons. Thus, while most surrounding countries only briefly experimented with conciliation and other forms of alternative dispute resolution, and did not return to these matters until very recently in their

---

<sup>83</sup> *Ibid.*, art. 164.

<sup>84</sup> *Ibid.*, art. 167.

<sup>85</sup> Code de procédure civile of April 14, 1806, édition originale et seule officielle (Paris: Imprimerie Impériale, 1806).

<sup>86</sup> See e.g. Alain Wijffels, “France” in C.H. van Rhee, ed., *European Traditions in Civil Procedure* (Antwerpen: Intersentia, 2005) 197, at 197-99 [van Rhee, *European Traditions*].

<sup>87</sup> See e.g. Paul Oberhammer & Tanja Domej, “Germany, Austria and Switzerland” in van Rhee, *European Traditions*, *ibid.*, at 215, 218.

<sup>88</sup> Loi sur la procédure civile du canton de Genève of September 29, 1819, reproduced in C. Schaub & C. Brocher eds., *Loi sur la procédure civile du canton de Genève avec l’exposé des motifs par feu P.F. Bellot, professeur de droit* (Genève: A. Cherbuliez & Cie., Paris: Sandoz et Fischbacher, 4<sup>th</sup> ed. 1877).

<sup>89</sup> See e.g. C.H. van Rhee, “The Influence of the French Code de Procédure Civile (1806) in 19th Century Europe” in Loïc Cadiet & Guy Canivet, eds., *De la commémoration d’un code à l’autre: 200 ans de procédure civile en France* (Paris: Litec, 2006) 129, at 135 [van Rhee, “Influence”].

procedural laws,<sup>90</sup> both mandatory conciliation and judge-supervised settlement negotiations have been a mainstay in many of the Swiss procedural codes since the early nineteenth century.<sup>91</sup> Given the long Swiss tradition in this area, it is not surprising that the new Code generally requires the parties to bring their case before a “settlement authority” before they are permitted to file suit.<sup>92</sup> It is equally unsurprising that the Code permits the court to suggest settlement at the preliminary hearing stage.<sup>93</sup> From here, then, it did not require a leap of faith to equally permit the judge to bring up the possibility of mediation, an approach for which there is no Swiss tradition.<sup>94</sup>

As these examples demonstrate, the laws of various Swiss cantons have long shared more features with civil procedure in the United States and, to a lesser extent, with other common law countries, than traditional descriptions of civil law litigation systems would have one believe. Largely, this has been the result of developments unique to Switzerland rather than of borrowing from the common law. To me, this is simply further evidence that the distinction between common law and civil law procedure has been overdrawn.

#### IV. REASONS FOR THE DEARTH OF INTERNATIONAL BORROWING IN THE NEW CODE

With that in mind, it is not, perhaps, too surprising to learn that the only borrowing in the new Swiss Code of Civil Procedure is that imposed by international treaty law. Nevertheless, one may wonder why the drafters of the new Code failed to adopt any other

---

<sup>90</sup> See *e.g.* C.H. van Rhee, “Introduction” in van Rhee, *European Traditions*, *supra* note 86, 185, at 185-87; Walter, *supra* note 79, at 73-74.

<sup>91</sup> The effect of these provisions today depends a bit on how they are handled in practice. In some places, such as in the city of Bern, mandatory conciliation sessions are scheduled in 15-minute intervals, thus leaving little time for real settlement talks. Other courts have become incredibly successful in getting cases settled. Yet lawyers sometimes complain of judicial strong-arming.

<sup>92</sup> ZPO, *supra* note 29, arts. 197-212. As in the cantonal codes, there are exceptions for certain kinds of proceedings. See art. 198. In addition, the parties can agree to forego the conciliation proceeding in cases with an amount in controversy of sFr. 100,000 (approximately US \$80,000) or more. See art. 199.

<sup>93</sup> See *supra* note 71 and accompanying text.

<sup>94</sup> See *supra* note 43 and accompanying text.

features from abroad, while the European Community surrounding Switzerland is in the process of harmonizing various aspects of civil procedure, perhaps with the ultimate goal of unifying litigation procedure altogether. Obviously, it is difficult to know every reason leading to this omission. Having been on the inside of the lawmaking process in Switzerland for three years (although not with regard to this project) and having had conversations with a number of the members of the Committee of Experts who drafted the new Code over time, however, I will try to identify what I gather to be the major reasons for the drafters' inclination to shun borrowing.

First and foremost, the Committee's task was to overcome the long history of opposition to a federally unified code of civil procedure. For that purpose, the Committee had to tread carefully. Departing too much from the rules and concepts known in the various cantons simply would have put that mission in danger. Moreover, the Committee's chosen approach of steering clear of controversial new subject matter is in line with the requirements of Swiss consensus democracy: Switzerland is a multi-party democracy with a government that has been shared by representatives of the four leading parties in Parliament since 1959. No party has had control over either Parliament or the executive since 1891 or has even had a majority in either institution since 1954. The result has been a consensus approach to lawmaking that tends to disfavor bold, new ideas.<sup>95</sup>

The Committee tried to meet this challenge by drawing from the existing cantonal codes of civil procedure rather than by imposing new concepts or by adopting a single cantonal code.<sup>96</sup> That approach immediately brought to light a basic problem. Few Swiss lawyers have practiced under the procedural code of more than one canton, and few scholars have spent much time comparatively analyzing the procedural laws of the various cantons. Indeed, the only comprehensive inter-cantonal comparative study dates

---

<sup>95</sup> See e.g. Jürg Steiner, *Amicable Agreement Versus Majority Rule: Conflict Resolution in Switzerland*, rev. ed., trans. by Asger Braendgaard & Barbara Braendgaard, (Chapel Hill: University of North Carolina Press, 1974).

<sup>96</sup> See *supra* note 31 and accompanying text.

from the early 1930s,<sup>97</sup> and even it does not always go as deep as one might wish for the purposes of informed decision-making in law reform. As a result, the Committee spent most of its time learning about, and discussing, the comparative advantages of the procedural rules of the various cantons. Understandably, this left little time for international comparative analysis.

Thus far, the reasons for shunning foreign procedural imports described here—strong federalism, first unification in Swiss history, and consensus democracy—are somewhat unique to Switzerland. But there are other reasons that are more portable. Recall, for instance, that one of the tasks on the Committee’s plate was to consider whether to adopt a class action in matters of labour, landlord-tenant, and consumer disputes.<sup>98</sup> The Committee quickly disposed of that task by concluding summarily that class actions are foreign to Swiss traditions.<sup>99</sup> The Committee’s conclusion satisfied lawyers, academics, and political groups during the public comment period.<sup>100</sup> This sentiment was later shared during the debates in Parliament.<sup>101</sup> Thus, class actions never had a chance of being introduced into the new Code.

There are a variety of jurisprudential, doctrinal, and cultural reasons why class actions would be an uneasy fit for the current law of civil procedure in Switzerland.<sup>102</sup> The Committee briefly pointed to some of those reasons in its report.<sup>103</sup> But there was

---

<sup>97</sup> See Emil Schurter & Hans Fritzsche, *Das Zivilprozessrecht der Schweiz*, vol. II/1 (Zürich: Rascher, 1931), vol. II/2 (Zürich: Rascher, 1933).

<sup>98</sup> See *supra* note 46 and accompanying text.

<sup>99</sup> See Begleitbericht, *supra* note 28, at 15.

<sup>100</sup> See Zusammenstellung der Vernehmlassungen, *Vorentwurf für ein Bundesgesetz über die Schweizerische Zivilprozessordnung (ZPO)* (2004), online: <[http://www.bj.admin.ch/etc/medialib/data/staat\\_buerger/gesetzgebung/zivilprozess.Par.0004.File.tmp/ve-ber.pdf](http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0004.File.tmp/ve-ber.pdf)>, at 96-98.

<sup>101</sup> See *e.g.* 2007 AB Ständerat 498, at 499 (reassurance by Justice Minister Blocher that introduction of class actions was not envisioned in the draft Code).

<sup>102</sup> See *e.g.* Baumgartner, “Class Actions,” *supra* note 19, at 310-12, 320-23.

<sup>103</sup> See Begleitbericht, *supra* note 28, at 15.

something else: rejection of the perceived pathologies of US-style litigation. At the heart of this rejection is a deep unease with the way in which the jury trial<sup>104</sup>—a procedure steeped in equity,<sup>105</sup> anti-formalism, entrepreneurial lawyering, the prospect of punitive damages,<sup>106</sup> and the tendency towards the lawsuit as a business deal (which the aforementioned features support)<sup>107</sup>—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 who is right and who is wrong on the merits.<sup>108</sup> This unease emerged 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 US litigation system as arbitrary and unfair—interestingly unfairness primarily to defendants, but that view should not be surprising,

---

<sup>104</sup> See *e.g.* Felix Dasser, “Punitive Damages: Vom ‘fremden Fötzel’ zum ‘Miteidgenoss?’” (2000) 96 *Schweizerische Juristenzeitung* 101, at 102-103 (speaking of the aleatoric character of US jury decisions).

<sup>105</sup> 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” (2002) 80 *Wash. U. L.Q.* 835, at 841 [Baumgartner, “Human Rights”]. See also Stephen N. Subrin, “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective” (1987) 135 *U. Pa. L. Rev.* 909.

<sup>106</sup> Punitive damages are a major source of objection against the US litigation system in Switzerland and elsewhere. See *e.g.* Heinrich Honsell, “Amerikanische Rechtskultur” in Peter Forstmoser *et al.*, eds., *Der Einfluss des europäischen Rechts auf die Schweiz* (Zürich: Schulthess, 1999) 39, at 45-48; Ronald A. Brand, “Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far” (2005) 24 *J.L. & Com.* 181.

<sup>107</sup> See *e.g.* Sarah Rudolph Cole, “Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution” (2000) 51 *Hastings L.J.* 1199; Judith Resnik, “Procedure as Contract” (2005) 80 *Notre Dame L. Rev.* 593; and William B. Rubenstein, “A Transactional Model of Adjudication” (2001) 89 *Geo. L.J.* 371.

<sup>108</sup> See *e.g.* Baumgartner, “Human Rights,” *supra* note 105, at 843-46; Burkhard Heß, “Entschädigung für NS-Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten” (1999) 44 *Die Aktiengesellschaft* 145, at 149-50.

given the reports' provenance in the US tort reform movement.<sup>109</sup> This German scholarship has influenced Swiss thinking as well, especially in German-speaking Switzerland.<sup>110</sup> The perception that US courts were exercising their country's hegemonic power in dealing with foreign parties and foreign sovereignty concerns further supported the unease.<sup>111</sup>

In the late 1990s, objections to US-style class actions further intensified in Switzerland in reaction to 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.<sup>112</sup> Although the cases presented a number of difficult legal and factual questions, they were settled, after 18 months, for \$1.25 billion without a single legal ruling by the trial judge.<sup>113</sup> In the United States, lawyers often see this as an instance in which the class action device helped elderly Holocaust survivors receive what was rightfully theirs from intransigent Swiss banks.<sup>114</sup> In Switzerland, however, where considerable parts of the population had initially been sympathetic to the plaintiffs' claims, the episode was ultimately perceived as further evidence that power, including governmental power, is more important than the

---

<sup>109</sup> See Samuel P. Baumgartner, "Is Transnational Litigation Different?" (2004) 25 U. Pa. J. Int'l Econ. L. 1297, at 1340-41 [Baumgartner, "Transnational Litigation"].

<sup>110</sup> Cf. Honsell, *supra* note 106, at 45-52 (presenting a rather one-sided narrative of US tort law and procedure).

<sup>111</sup> See Baumgartner, "Transnational Litigation," *supra* note 109, at 1352-53.

<sup>112</sup> 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" (2002) 80 Wash. U. L.Q. 795. For an account by the chief US government negotiator in the matter, see Stuart Eizenstat, *Imperfect Justice, Looted Assets, Slave Labor and the Unfinished Business of World War II* (Jackson: Public Affairs, 2003), at 75-186.

<sup>113</sup> See *e.g.* Neuborne, *ibid.*, at 805-12.

<sup>114</sup> See *e.g.* Michael J. Bazylar, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York: NYU Press, 2003) at 293-301.

merits in resolving class actions in the United States.<sup>115</sup> Not surprisingly, then, the Committee mentioned, as a reason to reject the adoption of class actions in Switzerland, the perceived danger that “baseless claims would be filed for the sole reason of forcing the defendant into a settlement.”<sup>116</sup> More generally, this episode hardened the conviction of many in Switzerland that class actions and other features of US litigation are best avoided.

Most importantly, however, the lack of borrowing in the new Swiss Code of Civil Procedure is simply the result of inertia and conservatism in the traditional sense of the word.<sup>117</sup> Swiss lawyers, as lawyers in many other places, prefer the procedural rules they know over those they do not. That is not to say that Swiss lawyers consider their respective cantonal codes to be perfect. Indeed, the rate at which most cantons have engaged in procedural reform over the past two decades indicates that the opposite is true.<sup>118</sup> However, most of these reforms have been limited to fiddling with details and adapting cantonal codes to newly imposed federal law requirements. Bold changes are unlikely to find favor. Similarly, foreign approaches are viewed with suspicion. The reason is simple: few lawyers have the necessary knowledge about the ways in which foreign solutions work in the intertwined edifice of a foreign jurisdiction’s procedural law, let alone about the often unspoken jurisprudential assumptions that underlie the application of those solutions, assumptions that are the result of legal education and acculturation in practice.<sup>119</sup> The upshot is an unwillingness to consider foreign approaches unless there is a very good reason to do so.

---

<sup>115</sup> See *e.g.* Baumgartner, “Human Rights,” *supra* note 105, 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”).

<sup>116</sup> Begleitbericht, *supra* note 28, at 46.

<sup>117</sup> There is nothing particularly Swiss about this phenomenon. See Watson, *supra* note 4; Alan Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985), at 119.

<sup>118</sup> See *e.g.* Sutter, *supra* note 11, at 124-25.

<sup>119</sup> On this point, see Baumgartner, “Transnational Litigation,” *supra* note 109, at 1373-75.

One way to overcome this inertia, if perhaps not conservatism, is, therefore, to provide the necessary in-depth comparative background information on how a particular foreign rule or approach works. As I have suggested elsewhere, a powerful means for this purpose is the process of negotiating and ratifying treaties, as well as the learning that occurs through subsequent practice under those treaties.<sup>120</sup> In the present case, article 50 of the Lugano Convention requires member states to enforce a promissory note authenticated by a notary in another member state if the note conforms to the standards for such instruments under the law of the originating state.<sup>121</sup> Since Swiss law did not provide for such an enforceable note, the Swiss negotiators needed to make sure they understood this instrument and the way it operated in the countries from which such requests for enforcement would be forthcoming before committing to the Lugano Convention. They then had to explain the instrument to Parliament for purposes of ratification of the Convention. Once ratified, article 50, along with the other provisions, were explicated to the practicing bar by both negotiators and scholarly experts in the field.<sup>122</sup> Soon, monographs on the operation of article 50 and the instrument of the enforceable authenticated promissory note appeared.<sup>123</sup> In the end, the drafters of the new Code had sufficient information on that instrument to consider it worth adopting.

---

<sup>120</sup> See Samuel P. Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Transatlantic Lawmaking for Transnational Litigation* (Tübingen: Mohr Siebeck, 2003), at 58-62, 120-25.

<sup>121</sup> Generally, this means that the notary must draft the document as well as authenticate the signatures of the parties for the document to become directly enforceable. See e.g. Jan Kropholler, *Europäisches Zivilprozessrecht*, 8th ed. (Frankfurt: Verlag Recht und Wirtschaft, 2005), at 503-04.

<sup>122</sup> See e.g. Franz Kellerhals, "Vollstreckbare öffentliche Urkunden aus schweizerischer Sicht – Bemerkungen zur Ausgangslage" (1993) 1993 *Der Bernische Notar* 1; Monique Jametti-Greiner, "Die vollstreckbare öffentliche Urkunde" (1993) 1993 *Der Bernische Notar* 37; Andreas B. Notter, "Vollstreckbare öffentliche Urkunden" (1993) 74 *Zeitschrift für Beurkundungs- und Grundbuchrecht* 84; and Gerhard Walter, "Wechselwirkungen zwischen europäischem und nationalem Zivilprozessrecht: Lugano Übereinkommen und Schweizer Recht" (1994) 107 *Zeitschrift für Zivilprozess* 301, at 334-39.

<sup>123</sup> See e.g. Christian Witschi, *Die vollstreckbare öffentliche Urkunde nach Art. 50 Lugano-Übereinkommen in der Schweiz* (Bern: Stämpfli, 2000).



Another way to overcome inertia consists in forcing change from outside of a country's legal elite. Within the European Community, for example, the Commission has been pushing unification in one specific area of transnational litigation after another.<sup>124</sup> Similarly, the European Court of Justice has declared invalid a number of rules of domestic civil procedure that discriminate against residents of other member states of the Community.<sup>125</sup> This has led to a significant increase in research and scholarship in comparative procedure as well as to increased legislative activity in order to implement the required changes within the member states.<sup>126</sup> These forced changes have led to increased borrowing among the member states of the Community. They may even end in a European code of civil procedure, as some have suggested.<sup>127</sup> Of course, Switzerland is not a member state of the EC and, thus, has not actively participated in these changes. But it has ratified a number of international treaties in matters of procedure, which the drafters of the new Code had to implement.

Finally, during the public comment period of the proposed Code, none of the voices of public policy criticized the drafters for failing to borrow approaches from abroad.<sup>128</sup>

---

<sup>124</sup> See "Judicial Cooperation in Civil Matters," online: <<http://eur-lex.europa.eu/en/legis/latest/chap1920.htm>>.

<sup>125</sup> See *e.g.* *Hayes v. Kronenberger*, case C-23/95, 1997 E.C.R. I-1718; *Mund & Fester v. Hatrex International Transport*, case C-398-/92, 1994 E.C.R. I-467; *Hubbard v. Hamburger*, case C-20/92, 1993 E.C.R. I-3790. On these legislative and case law developments, see Gerhard Walter & Fridolin M.R. Walther, *International Litigation: Past Experiences and Future Perspectives* (Bern: Stämpfli, 2000), at 7-35.

<sup>126</sup> See *e.g.* Burkhard Heß, "The Integrating Effect of European Procedure Law" (2002) 4 *European Journal of Law Reform* 3; Astrid Stadler, "Das Europäische Zivilprozessrecht – Wie viel Beschleunigung verträgt Europa?" (2004) 24 *Praxis des internationalen Privat- und Verfahrensrechts* 2.

<sup>127</sup> See *e.g.* Walter & Walther, *supra* note 125, at 46. See also Konstantinos D. Kerameus, "Political Integration and Procedural Convergence in the European Union" (1997) 45 *Am. J. Comp. L.* 919, at 924-28 (describing efforts to unify civil procedure in Europe).

<sup>128</sup> There were two exceptions. The University of Geneva criticized the decision not to adopt a class action and the University of Zurich more generally lamented the obvious lack of international comparative work behind the proposed draft. See *Zusammenstellung der Vernehmlassungen*, *supra* note 100, at 97-98, 76. Neither, however, pushed its views further in the political process.

The one exception was that of mediation firms forcefully complaining about a lack of reference to mediation. In response, the drafters changed the proposed Code accordingly.<sup>129</sup> This suggests that politically active groups, too, can support or overcome standard inertia in this area. The fact that the conduct of transnational litigation by lawyers and judges in the United States led to an unwillingness in Switzerland to consider features of US civil procedure as worth emulating seems to further support this suggestion.<sup>130</sup>

## V. CONCLUSION

Today, examples of cross-border borrowing in procedural lawmaking are easy to find. In various European Union countries alone, academic publications are abuzz with comparative scholarship suggesting the adoption of this or that rule in domestic procedure. Even in England, which is not bound by article 65 of the *Treaty Establishing the European Community*<sup>131</sup> and the many reform proposals imposed by Brussels under its authority, the Wolf Committee was not shy to borrow from abroad to find solutions to identified problems with English civil procedure.<sup>132</sup> Taking a step back from these recent developments, however, it should be clear to anyone with a passing interest in the comparative history of litigation procedure that cross-border borrowing in this area is nothing new. It may even be as old as procedural law itself. Robert Millar, for instance, traces US discovery and other features of equity procedure to early Roman Canonical law on the European Continent, and other features of US procedural law to early Germanic procedure.<sup>133</sup>

---

<sup>129</sup> See *supra* text accompanying note 43.

<sup>130</sup> See *supra* text accompanying notes 102-116.

<sup>131</sup> Treaty Establishing the European Community, Consolidated Version, 2006 O.J. (C 321) 37.

<sup>132</sup> Lord H. Wolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996).

<sup>133</sup> See *e.g.* Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (New York: New York University Law Center, 1952), at 27-28, 201; Robert Wyness Millar, "The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure" (1937) 32 Ill. L. Rev. 261, at 266-76. For this

The interesting question, therefore, is not whether there is borrowing, but when and why it occurs. One plausible suggestion is that this is mostly a matter of ideas, whether or not those ideas respond to a specific need of a particular society.<sup>134</sup> But if so, why do some ideas travel, while others do not, or only to some countries? For instance, the 1806 Code of Civil Procedure of France,<sup>135</sup> however flawed, influenced a great number of procedural codes on the European Continent at the time.<sup>136</sup> Is this because the 1806 Code was shaped to some extent by ideas of the French Revolution? Or because it simply contained ideas whose time had come? If the latter, why was *it* widely borrowed from and not the 1667 Code Louis, on which it was largely based? From this perspective, it is interesting to look at the recent Swiss Code of Civil Procedure and ask about the reasons why its drafters largely shunned foreign influences—unless required or suggested by international treaty—and opted instead for inter-cantonal borrowing. To me, the Swiss example suggests that cross-border borrowing in civil procedure depends not only on the strength of ideas, but also on an understanding of how particular approaches work within the litigation system from which to borrow, as well as on the identity and the strength of the interests of politically active groups. Either way, the traditional inertia in this area can be overcome by externally forced change.<sup>137</sup>

Another thing I think the foregoing look at Swiss civil procedure demonstrates is that the distinction between common law and civil law systems has often been overdrawn. The frequent focus in the common law world on two or three “representative” civil law jurisdictions in the study of comparative procedure has helped to identify differences and to provide useful perspective. At the same time, however, it has led to generalizations that do not withstand further scrutiny. As demonstrated above, procedure and court organization in various Swiss cantons have long differed in considerable respects from

---

purpose, it helps to remember that early chancellors were clerics with a staff of clerics, all well versed with Roman Canonical Law. See von Caenegem, *supra* note 49, at 45.

<sup>134</sup> See Watson, *supra* note 4, at 100.

<sup>135</sup> See *supra* note 86.

<sup>136</sup> See *e.g.* van Rhee, “Influence,” *supra* note 89.

<sup>137</sup> See *supra* notes 124-127 and accompanying text.

the stories that usually emanate from the focus on two or three countries. Those different Swiss approaches seem to be more closely related to features of the US litigation system, although none of them were borrowed from the common law world. Those who study instances of convergence in procedural law may want to take this into account in defining their point of departure.