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Criminal procedure

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DOI: <https://doi.org/10.24921/2018.94115924>

Posted at the Zurich Open Repository and Archive, University of Zurich

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Book Section



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Originally published at:

Thommen, Marc (2018). Criminal procedure. In: Thommen, Marc. Introduction to Swiss Law. Berlin: Carl Grossmann Verlag, 395-426.

DOI: <https://doi.org/10.24921/2018.94115924>

Marc Thommen

Criminal Procedure

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I. Criminal Procedure Code

The first section of this chapter examines the constitutional framework within which the laws on criminal procedure in Switzerland operate (1.) and gives a brief history of criminal procedural laws in Switzerland, before embarking on an examination of the key developments en route to the eventual codification of the unified Swiss Criminal Procedure Code in 2011 (2.). Finally, the Code's layout and provisions are analysed (3.).

1. CONSTITUTIONAL FRAMEWORK

Switzerland is a federal republic. All competencies that are not vested in the confederation are exercised by the cantons (Article 3 Constitution).¹ Criminal law and criminal procedure were traditionally a key legislative area for the cantons: neither the Constitution of 1848 nor the one of 1874 provided for centralised legislative powers. However, towards the end of the 19th century pressure mounted on parliament to draw up a criminal code to deal with the substantive criminal offences for all of Switzerland. On 13 November 1898, the confederation became entitled to legislate in the field of substantive criminal law.²

From this point, it would be a further 102 years before the confederation finally obtained the power to legislate in the field of *criminal procedure*. Throughout the 20th century, there were more than 50 different codes of criminal procedure applicable in Switzerland: 26 cantonal codes of criminal procedure, 26 cantonal regulations on Juvenile Justice, the procedural code of 1934 on Federal Criminal Justice, the administrative criminal procedure code of 1974, and the criminal procedure code of the Swiss Military in 1979. This variety of procedural rules proved to be extremely inefficient in practical terms:

1 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch (<https://perma.cc/M8UJ-S369>).

2 For details on the enactment of the Swiss Criminal Code of 21 December 1937, SR 311.0, see the chapter on Criminal Law, pp. 369; see for an English version of the Swiss Criminal Code www.admin.ch (<https://perma.cc/4QS4-CWQ5>).

for example, it made the prosecution of interstate and transnational (organised) crime very difficult. Further, many of the existing procedural codes stood increasingly at odds with the jurisprudence of the European Court of Human Rights and the Swiss Federal Supreme Court. At the turn of the millennium, it was clear to everyone that criminal procedural law needed to be standardised on a national level. The reform of the Swiss Justice System was put to popular vote and approved in a landslide victory on 12 March 2000.³ This cleared the way for the drafting of Swiss criminal and civil procedure codes.

Before embarking on a discussion of the legislative process leading to the adoption of a unified code of criminal procedure, it should be noted that despite such a development, there are three domains the cantons retain full responsibility. These areas are the *organisation* of the courts, the *administration* of justice in criminal cases and the *execution* of sentences and measures (Article 123 II Constitution). Firstly, the cantons remain responsible for establishing their own court system. For example, they can decide whether they want *district* courts to be responsible for settling criminal and civil cases for a specific area (as is the case in the canton of Zurich) or a *cantonal* criminal court with an exclusive jurisdiction in criminal matters (as is the case in Lucerne and Basel Stadt). They can also set up rules on the eligibility of judges. For example, federal law does not preclude the existence of lay judges.⁴ This means that cantons retain the power to allow laymen on the bench: many cantons do so, although Zurich has recently banned them. Regarding the regulation of juries, the federal rules on the main hearings at court do not contain provisions on jury selection and/or instruction. Thus, trial by jury, which used to be quite widespread, is almost entirely excluded today.⁵ Nevertheless, the canton of Ticino still continues to hold jury trials. Further, the cantons can decide whether they want to allow the publication of dissenting opinions.

Secondly, the administration of criminal justice lies in the hands of the cantons: although the Swiss Criminal Code of 21 December 1937 is an act of the *federal* parliament, it is administered by *cantonal* courts. There are only

3 86.4 % of the voters and all cantons approved the reform. The turnout was at 42 %.

4 NADINE ZURKINDEN, National characteristics, fundamental principles, and history of criminal law in Switzerland, in Ulrich Sieber/Konstanze Jarvers/Emily Silverman (eds.), National Criminal Law in a Comparative Legal Context, Vol 1.1, Berlin 2013, pp. 205, p. 221.

5 "A jury is not explicitly prohibited but is probably inadmissible due to a lack of provisions governing the division of tasks within the court and a lack of special procedural provisions", ZURKINDEN, p. 221.

a handful of very serious crimes⁶ against national interests prosecuted by the Attorney General of Switzerland and tried by the Federal Criminal Court in Bellinzona.

Finally, the cantons are mainly responsible for the execution of the (dual) system of sanctions:⁷ in the executing of *sentences*, the cantons have to provide penitentiary institutions, a system for the collection of monetary penalties and fines, and probation offices. For the execution of *measures*, the cantons must install suitable institutions to treat those with addictions and mental deficiencies. Indefinite incarceration is usually executed in high-security sections of regular prisons. Such a penitentiary system is too expensive for every canton to be expected to individually create one. The cantons have therefore united their efforts in several inter-cantonal agreements (“concordats”⁸).

2. LEGISLATION

As mentioned, by the end of the 20th century it was becoming increasingly clear that there was a need to standardise criminal procedure in Switzerland. Thus, in 1994, a commission of experts was established with the set purpose of exploring the possibility of creating a unified criminal procedure. In 1997 they produced their completed report, entitled “From 29 to 1”. They proposed to unify 29 of the existing criminal justice codes for *adults* (26 cantonal criminal codes of procedure, the procedural code on Federal Criminal Justice and the administrative and military criminal codes of procedure) in one federal code of criminal Procedure. The commission decided to postpone the unification of procedural legislation on Juvenile Justice for the time-being.

In 1999, one year before the confederation obtained the power to regulate criminal procedure on a national level, the Federal Council mandated NIKLAUS SCHMID, professor of criminal law at the University of Zurich, to draw up a Federal Code of Criminal Procedure.⁹ The commission's idea of

6 For the crimes under federal jurisdiction see Articles 23 and 24 Criminal Procedure Code

7 See the chapter on Criminal Law, pp. 377.

8 See the chapter on Constitutional Law, p. 399.

9 In defiance of the commission's proposed postponement of this issue, the Federal Council also decided to proceed with unifying the codes on Juvenile Justice. Thus, the President of the Juvenile Justice Court of Valais, JEAN ZERMATTEN, was commissioned to draft a Swiss Juvenile Justice code.

integrating the administrative and military criminal procedure codes was overruled.

From 2001–2003, the two preliminary drafts were submitted to a national consultation procedure (Article 3 Consultation Procedure Act).¹⁰ Almost everyone welcomed the idea of unification. The most controversial issue was that of who should be in charge of the preliminary proceedings: should it be the sole responsibility of the prosecutor or should it also involve investigative judges or magistrates? In relation to this particular issue, the Government proposed in its dispatch¹¹ of 21 December 2005 that the Federal Assembly should introduce a purely prosecutorial system, meaning that the preliminary proceedings would indeed be the sole responsibility of the prosecutor's office. This proposal was followed by Parliament. Subsequently, after less than one year of debates Parliament passed the Swiss Criminal Procedure Code on 5 October 2007. It entered into force on 1 January 2011.¹²

The nationwide standardisation of criminal procedure under the Swiss Criminal Procedure Code of 2011 was an important step in the right direction in many ways. For defence counsels, it has become a lot easier to represent defendants in other cantons. They now only have to be familiar with one, unified law of criminal procedure. This means a better standard of representation for accused persons; their interests will be better protected. The unification has also sparked a national academic debate about different aspects of Swiss criminal procedure. Before the unification, hardly anything was published on cantonal procedure codes, meaning that lawyers and judges looking for an answer to a particular legal problem would not have much literature to rely on. This seriously hindered discussion of the topic, which to some extent hindered progress or change, although the Supreme Court was making great efforts to introduce progressive measures into the cantonal procedure codes.

Still, today there remains much room for progress. The *organisation* of the criminal justice authorities and the *execution* of sanctions, which are

10 Federal Act on the Consultation Procedure of 18 March 2005 (Consultation Procedure Act, CPA), SR 172.061; see for an English version of the Consultation Procedure Act www.admin.ch (<https://perma.cc/6MCM-KXYG>); see for legislative procedure the Chapter Swiss Legal System, pp. 27.

11 The term “dispatch” (German: *Botschaft*; French: *message*) is the term used by the Swiss government for explanatory reports to draft legislation; resembling a White Paper in the UK; see Chapter Swiss Legal System p. 28.

12 The Swiss Juvenile Criminal Procedure Code was adopted on 20 March 2009 and entered into force on 1 January 2011 (SR 312.1).

currently still areas in which the cantons have exclusive competence, need to be harmonised on a national level. The administrative and military criminal codes are out-dated, too; it is unfortunate that the Federal Council dropped the idea of standardising these back at the turn of the millennium.

The two biggest contemporary challenges in terms of legislation on criminal procedure, however, lie outside the subject's traditional realm. Firstly, with the threat of terrorism constantly evolving and increasing, one key challenge is the need to bring police and secret service legislation (both on a cantonal and federal level) in line with criminal procedure legislation. For example, can information from police-intercepted phone calls be handed over to the criminal justice authorities, considering the fact that such information may have been intercepted before there was any adequate level of suspicion against a person? Secondly, administrative laws provide for many sanctions that have traditionally not been regarded as criminal penalties: for example, federal agencies can ban bank managers from their profession (Article 33 Financial Market Supervision Act)¹³ or close down pharmaceutical firms (Article 66 Therapeutic Products Act).¹⁴ These sanctions clearly meet the standard of 'criminal charges' as assessed in case law dealing with Article 6 I ECHR.¹⁵ Hence, the procedures which lead to these sanctions being imposed must also meet criminal procedure standards (e.g. *nemo tenetur*).¹⁶

13 Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 (Financial Market Supervision Act, FINMASA), SR 956.1 ("[1.] *If the Swiss Financial Market Supervisory Authority (FINMA) detects a serious violation of supervisory provisions, it may prohibit the person responsible from acting in a management capacity at any person or entity subject to its supervision. [2.] The prohibition from practising a profession may be imposed for a period of up to five years.*").

14 Federal Act on Medicinal Products and Medical Devices of 15 December 2000 (Therapeutic Products Act, TPA), SR 812.21 („[1.] *The Agency may take all administrative measures necessary to enforce this Act. 2 In particular it may: c. close down establishments.*").

15 In assessing the applicability of the criminal aspect of Article 6 ECHR, the case of *Engel and Others v. the Netherlands*, App no 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, ECtHR 8 June 1976, provides three relevant criteria at paragraphs 82–83: the classification of the act in domestic law; the nature of the offence; and the severity of the penalty that the person concerned risks incurring. The first criteria is only a starting-point for the Court's examination – even if the conduct is not classified as criminal in the domestic law, the Court will still delve behind this classification to examine the actual substance of the offence and make its own independent assessment.

16 For „*nemo tenetur*“ see pp. 412.

3. CONTENT¹⁷

The Swiss Criminal Procedure Code contains 457 Articles. They are divided up into 12 parts. The Swiss Juvenile Criminal Procedure Code has roughly the same structure but is much shorter (54 Articles). It is conceptualised as a *lex specialis*: if a specific problem is not regulated in the Juvenile Criminal Procedure Code, the Swiss Code of Criminal Procedure applies.

Part 1 (Articles 1–11) regulates *basic principles* of criminal procedure such as fairness, independence, speediness, ex officio investigation, mandatory prosecution and prosecutorial discretion, presumption of innocence, in dubio pro reo, or double jeopardy.

Part 2 (Articles 12–103) regulates the *criminal justice authorities* (police, prosecution, and courts). As mentioned, the legislator decided to establish a *prosecutorial system*. The preliminary proceedings are therefore led solely by the prosecutor (Article 61 lit. a). There is no (independent) investigative

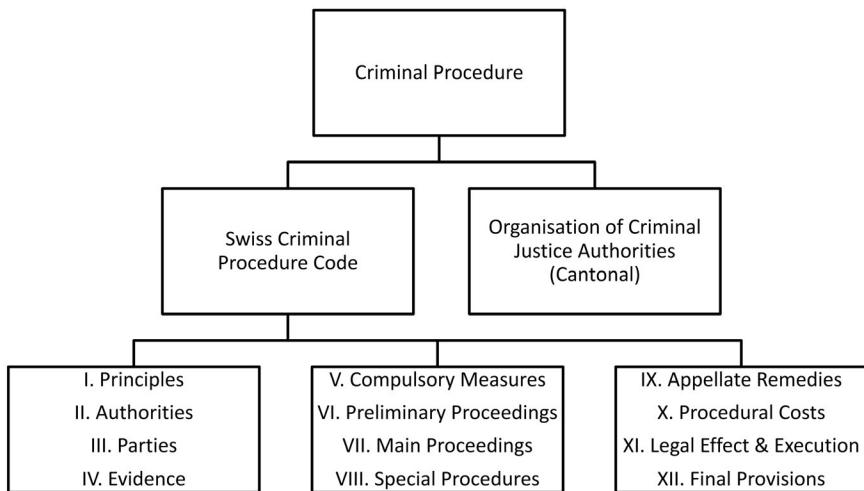


Figure 1: Criminal Procedure Laws

¹⁷ In the following text, where Articles are mentioned without referencing their source of law, they are located in the Swiss Criminal Procedure Code of 5 October 2007 (Criminal Procedure Code, CrimPC), SR 312.0; see for an English version of the Criminal Procedure Code www.admin.ch (<https://perma.cc/6S55-6MBC>).

judge or magistrate in charge of the proceedings. Some intrusive investigative measures, such as detention on remand or wire-tapping of phones, have to be ordered or approved by a judge at the “compulsory measures court” (Article 18 I) but the actual investigation is still conducted by the prosecutor. Trial cases are handled by the courts of first instance (Article 19). Their decisions can be taken to the court of appeal (Article 21). The appeal to and the proceedings of the Swiss Federal Supreme Court are regulated in the (separate) Federal Act of 17 June 2005 on the Federal Supreme Court. Part 2 also contains provisions on the cantonal/federal jurisdiction (Articles 22 et seqq.), recusal (Articles 56 et seqq.), or disciplinary measures (Article 64) as well as general procedural rules (oral and public proceedings, language, written records, service of decisions, time limits, and file management).

Part 3 (Articles 104–138) defines the *parties* and the *other persons* involved in the proceedings (witnesses, experts, defence counsels, etc.). The parties are the accused, the private claimant and the prosecutor (Article 104). The *accused* is a person suspected, accused of or charged with an offence (Article 111). The *accused* is the technical term used for the defendant. The *private claimant* is a harmed person who voluntarily participates in the criminal proceedings (Article 118). There are three categories of harmed persons: (1) the aggrieved: a person whose rights have been directly violated by the criminal offence (Article 115), e.g. a defrauded person; (2) the victim: an aggrieved person whose bodily, sexual or psychological integrity was directly affected by the criminal offence (Article 116), for example a person raped and/or seriously injured; (3) the private claimant: both the aggrieved person and the victim can declare that they want to participate as a private claimant in the proceedings (Article 119). The private claimant is not merely an accessory participant to the proceedings but a party on equal standing with the accused. Private claimants have access to the files, can participate in hearings with the accused, appoint their own legal adviser, or request that evidence be taken (Article 107). They can file their civil claims in the criminal proceedings (Article 122). They even have a say in the prosecution and conviction of a defendant (“criminal claim”, Article 119 II lit. a). For example, they could request that specific charges be pursued: the parents in the case of the teenagers killed in the deadly car race discussed in the chapter on criminal law could have requested that the defendants be charged with intentional killing (Article 111 Criminal Code) rather than negligent killing (Article 117 Criminal Code).

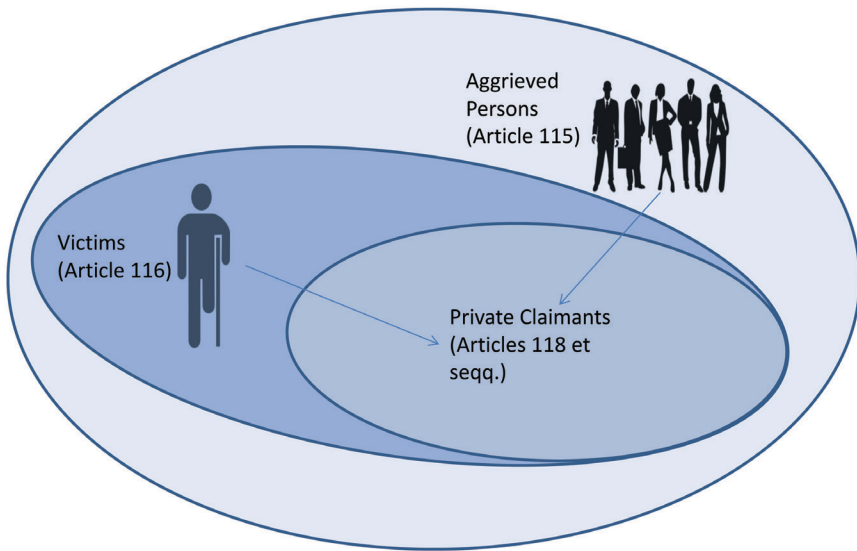


Figure 2: Categories of Harmed Persons

The *prosecution* only becomes a party to proceedings at the eventual court hearing. During the preliminary phase, the prosecution is the head of proceedings (Article 61 lit. a). This shifting of roles from the head of the proceedings into a party to the proceedings is a particularity of the prosecutorial system. In some of the previous cantonal systems, an independent magistrate was in charge of the preliminary proceedings and the prosecution was a party throughout the preliminary and principal proceedings.

Part 4 (Articles 139–195) of the Federal Code of Criminal Procedure contains the rules on *evidence*. Criminal justice authorities can rely on any lawful evidence deemed suitable to determine the truth (Article 139). Evidence shall not be taken in relation to facts which are insignificant, obvious, well known to the criminal justice authorities, or which have already been sufficiently proven in law (Article 139 II). The ‘sufficiently proven’ clause is problematic. It allows criminal justice authorities to engage in a so-called anticipated assessment of evidence. For example, prosecutors or judges can refuse a request to hear a witness for the defence at any time if they have already decided on the facts on the basis of the file (Article 318 II). This makes it much harder for the defence to tell their side of the story and could potentially conflict with Article 6 III lit. d ECHR which guarantees the defendant’s right to “examine or have examined witnesses against him and to obtain the attendance and

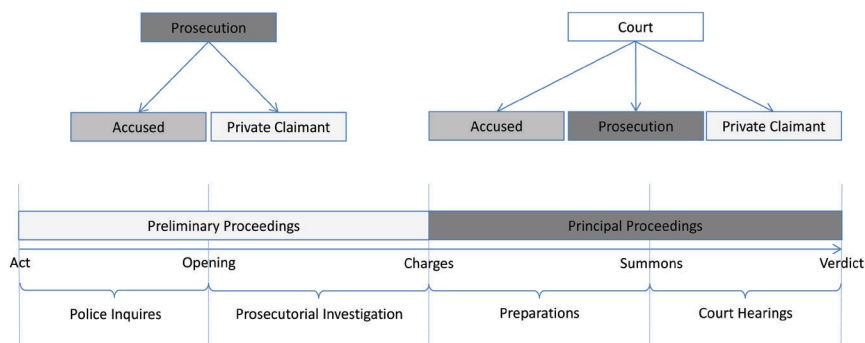


Figure 3: Role of the Prosecution in the Proceedings

examination of witnesses on his behalf under the same conditions as witnesses against him.” However, in this regard it should be noted that generally the European Court of Human Rights leaves it to the national courts to assess the relevance of the evidence which defendants request to bring forth.¹⁸

Parties have certain rights regarding the taking of evidence under *Part 4*. Most importantly, they have the right to be present when evidence is taken (Article 147 I). Private claimants and co-defendants can participate in every hearing of the accused,¹⁹ and vice versa. This rule was meant to enforce the participatory rights of the parties. There are however practical problems to be solved: what if 250 persons have been defrauded in a Ponzi scheme and all of them want to participate in the interrogation of the accused? Or what if co-defendants attend the hearing of the accused, then adjust their own statements to avoid criminal liability? Thus, the Supreme Court has allowed for some narrow exceptions to the right to participation.²⁰ These restrictions do not apply to the defence coun-

18 The fundamental aim of Article 6 III lit. d ECHR is to ensure full “equality of arms” rather than mandating the examination of every witness on the defendant’s behalf (*Perna v. Italy*, App no 48898/99, ECtHR, 6 May 2003, paragraph 29). However, when a request by a defendant to examine witnesses is sufficiently reasoned, not vexatious, relevant to the subject matter of the accusation, and could potentially have strengthened the accused’s position, relevant reasons for dismissing such a request must be given by the authorities (*Polyakov v. Russia*, App no 77018/01, ECtHR, 29 January 2009, paragraphs 34–35).

19 Article 147 I guarantees that parties have the right to be present when the public prosecutor and the courts take evidence and to put questions to the persons being questioned.

20 See BGE 139 IV 25; this case held that in cases with more than one accused person, the accused person may be excluded from participating in the questioning of the co-accused where there is a concrete risk of collusion. However, a mere abstract danger of collusion does not justify the exclusion of the accused from participating. See also BGE 140 IV

sel's presence in police examination hearings: he or she may always be present from the very beginning of the police investigation (Article 159 II).

Part 4 also sets out the rules for the proper taking of evidence. It is prohibited to obtain evidence through coercion, violence, threats, promises, deception or through any measures that interfere with a person's freedom of will (Article 140 I). Hence, neither drugs nor polygraphs may be administered, not even when the individual consents to their use (Article 140 II).

Regarding the exclusion of evidence, Article 141 sets out three pivotal rules in this area. Firstly, evidence obtained through coercion (torture etc.) is *strictly* inadmissible (Article 140 I), as is evidence that the Swiss Code of Criminal Procedure explicitly declares to be inadmissible. For example, statements given by the accused without a prior caution of his or her right to remain silent are declared inadmissible by Article 158 II. Secondly, evidence obtained in a *criminal manner* or in violation of rules protecting the *validity* of the evidence shall not be used, unless its use is essential to prosecuting serious criminal offences (Article 141 II). If the police forge a search warrant, for example, then any evidence obtained during the search would have been obtained in a *criminal manner*, as forgery of a document by a public official is a criminal offence (Article 317 Criminal Code). 'Validity rules' are designed to protect fundamental rights of the accused: if a witness is not cautioned to tell the truth, for example, then "*the examination hearing is invalid*" (Article 177 I). Such evidence is *generally* inadmissible, unless, as stated above, it is needed to secure the conviction of a serious crime. Courts having to review such evidence must conduct a balancing exercise:²¹ the private interests of the accused have to be

172: this case established that the right of accused persons to participate in evidence-gathering does not apply to separate proceedings against other accused persons (where the other accused persons were involved in the same criminal incident but are being tried wholly separately as opposed to as a co-accused).

21 Strangely, the fact that the evidence could have been obtained legally is viewed to be an argument in favour of its admissibility. Inadmissibility would, however, be a far more logical sanction: if evidence can be obtained lawfully then it should be obtained lawfully. See the same argument in the context of the fruit of the poisonous tree doctrine by JOHN D. JACKSON/SARAH J. SUMMERS, *The Internationalisation of Criminal Evidence, Beyond the Common Law and Civil Law Traditions*, Cambridge 2012, pp. 191 ("*Clearly, it could equally be argued that the fruit of the poisonous tree ought not be relied upon as evidence in such circumstances precisely because the authorities could have obtained the evidence lawfully.*"). The test formally required by the Supreme Court jurisprudence of whether evidence could have been legally obtained did not make it into the new Code and can henceforth be disregarded.

weighed against the public interest in finding the truth and securing a conviction for the relevant crime. The graver the alleged crime, the more the public interest will prevail.²² Finally, evidence “*obtained in violation of administrative rules shall be usable*” (Article 141 III). ‘Administrative rules’ are designed to guarantee the smooth administration of criminal proceedings. Their violation has no consequence. The provision on the search of mobile phones has - not very convincingly - been qualified as an administrative rule.²³

The Swiss Code of Criminal Procedure contains no statutory exclusion of *hearsay evidence*.²⁴ Whilst Article 169 of the Swiss Civil Procedure Code²⁵ forbids such evidence, indirect evidence is admissible in criminal procedure and can be assessed freely by the criminal justice authorities (Article 10 II).

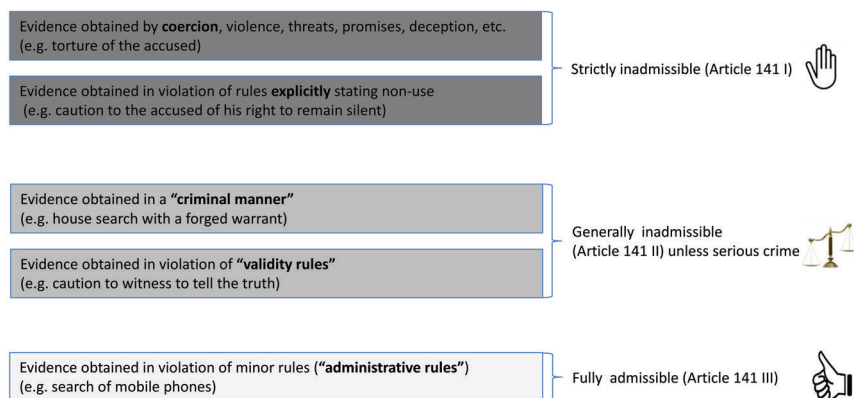


Figure 4: Evidence Exclusion

²² BGE 130 I 126.

²³ BGE 139 IV 128.

²⁴ STEFAN TRECHSEL/SARAH J. SUMMERS, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 322.

²⁵ Swiss Civil Procedure code of 19 December 2008 (Civil Procedure Code, CPC), SR 272; see for an English version of the Civil Procedure Code [www.admin.ch](https://perma.cc/99QZ-BZ8T) (<https://perma.cc/99QZ-BZ8T>).

The rules on evidence exclusion set out in *Part 4* are unconvincing. One key concern is the fact that illegally obtained evidence can be used if a serious crime is at issue (Article 141 II). For the accused, this means that the bigger the crime he is accused of, the smaller his chances of a fair trial.²⁶ This is problematic considering the possibility that severe sentences and thus a more severe deprivation of liberty will be imposed for more serious crimes; one would hope that in such cases, the trial and investigative process should be as fair and reliable as possible. Moreover, it is very hard in practice to draw a clear line between validity and administrative rules. This means that the defining of these terms is overly open to judicial discretion, leading to little protection for the accused. For example, the duty to obtain a search warrant has been viewed as an administrative rule in the past,²⁷ even though house searches clearly involve a strong interference with the accused's privacy interests. This demonstrates the ease of interpreting the category of rule (validity or administrative) to the detriment of the accused's interests, and means the administrative rules lose their deterrent effect to an extent.²⁸

Part 5 (Articles 196–298d) determines the permissible coercive measures criminal justice authorities can resort to. Coercive measures are procedural actions of the criminal justice authorities which interfere with fundamental rights. They have multiple purposes, including: (a) to secure evidence (searches of premises/records/persons, post-mortems, DNA analysis, seizure, covert surveillance of communication, of whereabouts and of banking connections, and undercover operations); (b) to ensure the presence of persons in the proceedings (summons, arrest, detention on remand, bail) and (c) to ensure that the final decision can be enforced (seizure of assets, security detention). Most of the coercive measures available under *Part 5* can be ordered by the prosecution. Some measures that strongly interfere with fundamental rights have to be ordered by a judge at the “compulsory measures court”, for example, detention on remand or DNA mass screening. Some measures like surveillance of telecommunications or undercover operations must

26 MARC THOMMEN/MOJAN SAMADI, *The Bigger the Crime, the Smaller the Chance of a Fair Trial?*, in *European Journal of Crime, Criminal Law and Criminal Justice* 24 (2016), pp. 65, p. 65.

27 The consequences of unlawful searches are controversial – the evidence thus obtained has also been viewed as fully usable, see Judgement of the Federal Supreme Court BGE 96 I 437 (von Däniken versus the Canton of Graubünden).

28 For a comprehensive overview of the debate over the admissibility of evidence, see THOMMEN/SAMADI.

at least be approved retroactively by such a court. Interestingly, the search of premises, a very intrusive measure, can be ordered by the prosecution alone without any need for court approval. The only explanation for this is that the power to order searches has traditionally belonged to the prosecution. The prosecutor can also order the freezing of assets without judicial approval. However, the accused and other persons affected by the freezing can take the order to court.

The remaining parts of the Swiss Code of Criminal Procedure are less pertinent in the context of this chapter and as such will not be discussed in any depth. *Part 6* (Articles 299–327) sets out the rules for the preliminary proceedings (police inquiries, opening and dropping prosecutorial investigation, charges). *Part 7* (Articles 328–351) regulates the principal proceedings at first instance (examination of the charge, hearing, taking of the evidence, pleadings, judgement) and *Part 8* (Articles 352–378) specifies the special proceedings available (summary penalty order, abridged and in absentia proceedings, proceedings in cases of insanity, non-conviction-based confiscation proceedings). *Part 9* (Articles 379–415) sets out the legal remedies available to various parties (complaints, appeals, retrials). *Part 10* (Articles 416–436) regulates the costs of the proceedings and compensation, while *Part 11* (Articles 437–444) sets out the rules of enforcement. Finally, *Part 12* (Articles 445–457) is the provision on the implementation of the Code.

II. Principles

Criminal procedures in Switzerland are constrained by a set of principles laid out by the Swiss Code of Criminal Procedure. Firstly, the state has a monopoly on criminal justice (Article 2). Further, human dignity and fairness must be respected (Article 3). Criminal justice authorities are independent and only bound by the law (Article 4), and must investigate and proceed without undue delay (Article 5). According to the accusation principle, courts cannot start criminal proceedings themselves; charges have to be brought to them by the prosecution (Article 9). Courts assess evidence freely (Article 10 II), not following specific rules but their ‘conviction intime’.²⁹ Court hearings are public and verdicts must be pronounced publicly (Article 69). In the following paragraphs, three other fundamental principles will be examined.

1. EX OFFICIO INVESTIGATION

The Swiss criminal justice system is traditionally viewed as possessing an inquisitorial structure.³⁰ The criminal justice authorities, i.e. the prosecution and the courts, cannot rely on the facts presented to them by the parties but have to inquire into the “material” truth *ex officio*. They have to investigate exculpatory and incriminatory circumstances with equal care (Article 6 II). Whether it is suitable to delegate the task of investigating exculpatory evidence to the prosecution, whose institutional duty is to obtain as many

29 Defined as the judge’s “inner or personal conviction” in KARIM A.A. KHAN/CAROLINE BUISMAN/CHRIS GOSNELL, *Principles of Evidence in International Criminal Justice*, Oxford 2010, p. 36.

30 Critical on the inquisitorial-accusatorial divide: SARAH J. SUMMERS, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford 2007, pp. 179, s.a. pp. 3 (“*The Enduring legacy of the Inquisitorial/Accusatorial Divide*”); detailed criticism by JACQUELINE HODGSON, *French Criminal Justice: a Comparative Account of the Investigation and Prosecution of Crime in France* Oxford 2005, p. 241 (“*Given these different theoretical procedural constructions ... it becomes more difficult to speak of ‘the trial’ in a way that makes sense across jurisdictions.*”).

convictions as possible, is a highly debated issue. The *courts*, on the other hand, preside over the parties. They are in a much better position to weigh arguments for and against the accused's guilt. The problem with this is that this role is not properly exercised until the case comes to court; by this point, the accused may already be at a disadvantage because of the "cherry-picking" of evidence by the prosecutor. Due to the inquisitorial structure of the proceedings, witnesses in the Swiss system are questioned by the President of the court: they are not subjected to cross examination by the parties. Another much debated issue is, of course, whether criminal proceedings can ever actually be expected to reveal the "whole truth". Apart from the epistemological dilemma that there is no objective truth untainted by subjective interpretation, criminal proceedings are also practically ill-suited to find the truth: the defendant may remain silent or even lie,³¹ and the criminal justice authorities only have limited means and resources available to them in order to investigate the material facts.

2. MANDATORY INVESTIGATION

The prosecution of known or suspected criminal acts is mandatory (Article 7). The rationale behind mandatory investigation is equality of treatment: no one shall escape criminal liability, regardless of personal characteristics or circumstances. However, there are certain minor offences that are prosecuted only on complaint, e.g. acts of aggression (Article 126 Criminal Code), common assault (Article 123 I Criminal Code), or criminal damage (Article 144 I Criminal Code). A prosecution only takes place, if the person who was harmed requests that the person responsible be prosecuted by filing a complaint (Article 30 I Criminal Code). Unless otherwise indicated in the Specific Part of the Criminal Code, all offences are prosecuted *ex officio*.

In Switzerland, there is only very limited prosecutorial discretion to not open an investigation or drop charges (Article 8). Prosecution can be discontinued if defendants have already been severely affected by their acts³² for example, this was the case where a defendant's careless driving resulted in

31 That an accused person may lie to the criminal justice authorities is not entirely uncontested. Some authors suggest that in principle there is a right to lie; however this is limited by the criminal prohibitions on false accusation (Article 303 Criminal Code).

32 Article 54 Criminal Code: *"Effect on the offender of his act - If the offender is so seriously affected by the immediate consequences of his act that a penalty would be inappropriate,*

the death of her husband and grave injuries to her children.³³ Charges can also be dropped if reparations are made to the victim for any losses.³⁴ This exception is problematic because it conflicts with the equality of treatment rationale behind mandatory investigation: by allowing charges to be dropped where reparations have been made, Switzerland makes an exception to criminal liability that is available only to those wealthy enough to properly compensate victims.

Another part of the rationale behind obliging the prosecutor to pursue all charges was a concern to limit the arbitrational powers of the prosecution. This lack of prosecutorial discretion seems to leave very little room for plea bargaining. Prosecutors can, however, offer leniency in sentencing in exchange for, for example, a confession.³⁵ Such deals are often struck in abridged proceedings (Articles 358 et seqq.).

Of course, even though the prosecution is *legally* bound to investigate all crimes brought to their attention they can, *de facto*, refrain from opening an investigation. This is particularly possible in cases with no immediate victim party to the proceedings (for example, eco-crimes or drug-selling) as there is no one to contest the abandonment of the investigation.

3. NEMO TENETUR SE IPSUM ACCUSARE

No man is bound to accuse himself. This principle is enshrined in Article 113 I. In Switzerland, the privilege against self-incrimination encompasses not only a right to remain silent but also a right to refuse to co-operate with the criminal justice authorities. The accused cannot be obliged to actively hand over items or assets which are demanded by the authorities (Article 265 II lit. a). However, this does not give the accused the right to resist legal coercive measures. Thus, he or she must allow the criminal justice authorities to seize such

the responsible authorities shall refrain from prosecuting him, bringing him to court or punishing him."

33 BGE 119 IV 280.

34 Article 53 Criminal Code: "*Reparation; If the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if: a. the requirements for a suspended sentence (Art. 42) are fulfilled; and b. the interests of the general public and of the persons harmed in prosecution are negligible.*"

35 A confession as to the facts suffices; there need not be a guilty plea in the strict sense of the term, i.e. a declaration of one's own guilt.

items or assets themselves. Obviously, the accused is protected from being forcefully coerced (for example, through torture) to provide evidence or to confess (Article 140 I). One area where the *nemo-tenetur* principle is in severe need of further implementation is in the auxiliary criminal law. For example, in Switzerland, citizens were under a legal obligation (backed up by fines) to cooperate in tax evasion proceedings. In *J.B. v. Switzerland*, the applicant had been fined CHF 4'000 under the administrative law for failing to provide information about his taxes. The European Court of Human Rights ruled that this provision violated the applicant's right not to incriminate himself.³⁶ Since this ruling, Switzerland has officially modified its tax legislation to align with the European Court of Human Rights case law.³⁷

³⁶ *J.B. v. Switzerland* App no 31827/96, ECtHR, 3 May 2001, at paragraphs 63 et seqq.

³⁷ The new provision is Article 57a of the Tax Harmonisation Act of 14 December 1990, SR 642.14.

III. Institutions and Procedure

The criminal justice institutions and procedure can best be understood when following the course of a standard case. A case involving a pensioner, a farmer and a herd of cows will be discussed to shine light on how the procedural rules actually work in practice. Following this, the extent to which the Swiss criminal procedural rules comply with requirements set by the Constitution and the ECHR will be examined, focusing on three key problem areas in this regard.

On 17 June 2014, a farmer in the eastern Swiss mountains drove his cattle herd down from his alp. As he had done several times before, he passed in front of pensioner X's house. The cows ate X's grass and lavender and trampled over the meticulously groomed flowers. X, enraged, retrieved his revolver, aimed it at the cows and threatened to shoot them.

On the same day, the farmer filed a complaint at the local police station. Whilst doing so, he himself was questioned by the police. The farmer's filing of the complaint triggered the preliminary proceedings (Article 303). The preliminary proceedings are divided up into two stages:³⁸ the police inquiries and the investigation by the prosecutor (Article 299). The preliminary proceedings are led overall by the prosecution (Article 61 lit. a). The police are subject to the supervision and instructions of the prosecutor (Article 15 II). From the moment the complaint was filed by the farmer, X became "the accused" (Article 111). Through the filing of a complaint, the farmer automatically acquired the status of a private claimant (Article 118 II).

On the day after the incident, the prosecutor ordered a search of X's house, which led to the seizure of several firearms and a box of ammunition. It was during this search that X learned that a preliminary investigation had been opened against him (Article 309) for threatening behaviour (Article 180 Criminal Code) and illegal bearing of a weapon (Article 33 I lit. a Federal Weapons Act).³⁹ X was interrogated by the police (Article 307 II and Article

³⁸ See Figure 2, p. 404.

³⁹ Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997 (Federal Weapons Act), SR 514.54.

312 I) – he denied the use of a firearm. He could have requested that a legal-aid defence counsel be appointed, if he had lacked the necessary finances to provide his own. However, a counsel would most probably not have been appointed for this case, as it was a trivial one (Article 132). In serious cases, for example when the accused is facing a prison sentence of more than one year, a defence counsel *must* be appointed, even against the accused’s will (Article 130). In our case, X could at any time have hired a defence counsel himself and insisted that he or she be present from the first police inquiry (Article 159 II).⁴⁰

The written records of the inquiry were handed over to the prosecutor. If the prosecutor had thought it necessary, he could then have interrogated the accused: this decision is entirely within the prosecutor’s discretion. During all interrogations the private claimant and his legal adviser could have participated both purely in presence and more actively by asking questions (Article 147 I and Article 312 II). Equally, the accused and his counsel could have assisted in the prosecution’s interrogation of the private claimant and requested that additional questions be posed to him.

When the prosecution considered the investigation to be complete, it had three possibilities: (1) to discontinue the proceedings and close the case, (2) to bring charges or (3) to issue a summary penalty order. In approximately 90 % of all cases that are not closed, the prosecution issues a penalty order. This is a judgment drafted by the prosecutor with a maximum sentence of six months of imprisonment (Article 352). It contains the prosecutor’s summary assessment of the facts and their legal interpretation of the situation. In fact, if the defendant confesses to the police or if there is sufficient “objective” evidence, there need not be any prosecutorial investigation at all (Article 309 IV). On 9 September 2014, the prosecution served its penalty order to X. He was found guilty of threatening behaviour and illegal bearing of a weapon and sentenced to 90 units of monetary penalty at CHF 350.– each. The penalty was suspended with a probation period of two years. Further, he was sentenced to an unconditional fine of CHF 1’000.–. The weapon was confiscated and the costs of the proceedings were imposed on X.

Once the penalty order was issued, X had the choice to either accept it or to file an objection within ten days. Had X accepted – as about 90 % of all accused persons do – the penalty order would have come into force as a conviction,

40 Note that ECtHR case-law stipulates that as a rule, legal assistance must be provided from the moment the suspect is taken into custody “*and not only while being questioned*” (Dayanan v. Turkey, App no 7377/03, ECtHR, 13 October 2009, paragraph 32).

without any judicial participation (Article 354 III). On 15 September 2014, however, X objected. When an objection is filed the prosecutor hears the accused himself (Article 355 I). In many cases, this is the first time the accused deals with the prosecutor in person. On 1 October 2014, X was questioned by the prosecutor in the presence of the farmer (the private claimant).

The prosecutor then has to choose between upholding the penalty order, issuing a new one, closing the investigation or bringing charges. In our case the prosecutor decided to uphold the penalty order. On 14 October 2014, he transferred the case to court. The penalty order thus constituted the indictment (Article 356 I).

With the indictment, the preliminary proceedings against X came to an end (Article 318 I). The principal proceedings at the court of first instance were commenced. From that point onwards the court was in charge of the proceedings (Article 328 II). The prosecution became a mere party to the case (Article 104 I lit. c). The court examined and admitted the charges (Article 329 I) and scheduled the principal hearing (Article 331). At any point, the court could have asked the prosecution to modify or amend the charge (Article 333 I). From 15 October 2014, X was given access to the file for ten consecutive days. Both parties may then request that more evidence is taken, for example they may request that a particular witness be heard. The presiding judge decides whether to grant this request. A refusal cannot be challenged (Article 331). On 27 November 2014, X filed a motion to take additional evidence. The court turned down this request, anticipating that this would not affect their conclusion on whether or not the revolver had been used, thereby engaging in an anticipated assessment of evidence.⁴¹

Courts of first instance are usually composed of three judges and a clerk. If the prosecution applies for less than two years of imprisonment – as occurred in this case and most cases in practice – then the case may be heard by only one judge (Article 19 II). As mentioned, federal law does not provide for jury trials, meaning trial by jury is a very rare occurrence in Switzerland. X's case was assigned to Judge FREDERIK MÜLLER, district court of Toggenburg.

The principal hearing took place on 14 January 2015. X was joined by his defence counsel (Article 336). The prosecution has to appear at court if it has requested a prison sentence of more than one year or if the court orders its

41 See Judgment of the Federal Supreme Court 6B_495/2016 of 16 February 2017, consideration 1.3.3.

participation (Article 337). The private claimant may be ordered to appear at the main hearings (Article 338). In X's case, both were ordered to appear at court. The court hearing was public (Article 69).

At court, it is only mandatory for the judge to interrogate the accused (Article 341 III). Private claimants, witnesses and experts may be heard – this will occur at the judge's discretion (Article 343). For all four of them, the court relies heavily on the written records of their prior interrogations conducted the preliminary proceedings (Article 343). These statements do not have to be repeated at court. The hearings are conducted by the president of the court or by the judge in charge (Article 341 I). Hence, there is no cross-examination by the parties. The parties can submit additional questions to the president, who then decides whether or not to pose this question to the person interrogated (Article 341 II). After the taking of the evidence, the parties plead in the following order: prosecution, private claimant, the accused or his or her defence counsel (Article 346). The accused always has the last word (Article 347), ensuring he or she is able to fully respond to all accusations which have been levelled against him or her.

After the hearings, the court retires to deliberate in private. The clerk participates at the deliberations as an adviser (Article 348). The court has to reach its verdict by a simple majority in cases involving a panel of judges (Article 351). Panels of judges can consist of three or five members. Only a few cantons allow judges who disagreed with the verdict to write a dissenting opinion.⁴² In cases where there is an acquittal, the court grants the acquitted person compensation and reparation, which is done by the court *ex officio* (Article 429). In cases where there is a conviction, the court determines the sanction (penalty and/or measure)⁴³ and imposes the costs of the proceedings on the convicted person (Article 426). In the case of X, Judge MÜLLER reached his verdict on the day of the hearing. X was found guilty of threatening behaviour and illegal bearing of a weapon. He was sentenced to 40 units of monetary penalty at CHF 350.—each. The penalty was suspended and the probation period set at two years. X's revolver and ammunition were confiscated. The costs of the proceedings (CHF 3'150.—) were imposed on X.

Judge MÜLLER delivered his verdict publicly, giving his reasons in a brief oral statement (Article 84). Written reasoning of the judgment has to be provided

⁴² See Article 134 of the Constitution of the canton of Vaud.

⁴³ For this dual system of sanctions see Chapter Criminal Law, pp. 377.

if a sentence of more than two years has been imposed, if a party requests it, or if a party lodges an appeal (Article 82). X appealed his conviction. Hence, written reasons had to be provided.

The judgment of first instance can be appealed by all parties (Articles 381 et seqq.). On 16 January 2015, X lodged his appeal. The cantonal court of St. Gallen turned it down on 8 January 2016. X then took the appellate judgment to the Federal Supreme Court in Lausanne (Articles 78 et seqq. Federal Supreme Court Act).⁴⁴ The Supreme Court decided that the cantonal court had applied the Criminal Code correctly. X's property rights were infringed by the farmer. X was thus in a situation of necessity (Article 18 Criminal Code). However, the use of his revolver had been wholly disproportionate and therefore the justification of necessity did not apply. The Supreme Court further ruled that the anticipated assessment of the evidence had not been arbitrary. Thus, the cantonal court had not violated the Constitution. It rejected X's complaint on 16 February 2017. The judgment of the cantonal court was upheld.

Most provisions of the Swiss Criminal Procedure Code are in line with the Constitution and the ECHR. Some individual provisions, however, need to be reconsidered.

Firstly, the practice of anticipated assessment of evidence is problematic. It allows prosecutors to adhere to the police's assessment of the facts and courts to take the prosecutor's stand without the accused ever having a real chance to "tell his side of the story", or have any substantial involvement in the process.⁴⁵ This state of affairs violates the right of the accused to be heard.

A second problem is the fact that courts are currently not strictly bound by the charges brought to them. Instead, they can at any time ask the prosecutor to amend or change the indictment. This is problematic in terms of the separation of the investigative and adjudicative powers;⁴⁶ the court interferes with the investigative stage when they engage in this practice. Further, this power works to the detriment of the defence, for while the prosecutors are provided with an opportunity to amend a poor indictment, the defence does not get a second chance to amend poor pleadings.

The third and possibly the most persistent problem is that of the summary penalty order proceedings. Although defendants can *de iure* take their order

⁴⁴ Federal Supreme Court Act of 17 June 2005, SR 173.110.

⁴⁵ For the associated problems of this state of affairs, see pp. 404.

⁴⁶ The independence of the judiciary is regulated in Article 30 I Constitution: "Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court."

to court, in over 90 % of all cases they are *de facto* adjudicated by prosecutors. Therefore, it should be mandatory for the prosecution to interrogate the accused in person before issuing a penal order. Currently, prosecutors are not even bound to open an investigation; they can issue a penalty order solely on the basis of the police record and have it served to the accused (Article 309 IV). In such a case, it is not guaranteed that the addressee learns about his or her conviction or properly understands its dimensions. This is problematic in terms of ECHR compliance. Article 6 III lit. a ECHR requires that the accused be “*informed promptly ... of the nature and cause of the accusation against him.*”⁴⁷ Penalty orders are not explained to the accused in plain terms, nor are they ever translated. This latter issue clearly violates Article 6 III lit. e ECHR, which provides that everyone charged with a criminal offence must “have the free assistance of an interpreter if he cannot understand or speak the language used in court.”⁴⁸

A more fundamental concern about the summary penalty order must also be addressed. The overwhelming majority of all convictions are now handed down by prosecutors under the summary penalty order procedure: thus, Swiss criminal procedure needs a general overhaul. The procedural principles discussed above were all drawn up with the principal court proceedings in mind, and thus were not properly tailored to apply to special proceedings. However, today, the summary penalty order proceedings are no longer “special proceedings”;⁴⁹ instead, they have become the true “principal proceedings”.⁵⁰ Therefore, Switzerland’s principles of modern criminal procedure should now be tailored to better address these summary proceedings, to ensure that the rights of the accused are always properly respected.

47 In this respect, the information must be actually received by the accused; a legal presumption of receipt is insufficient (C v. Italy, App no 10889/84, 56 DR 40). In Switzerland there is in fact a very broad presumption of service. Article 88 IV states: “*Decisions to take no proceedings and summary penalty orders are deemed to be served without publication being required.*”

48 The ECHR provisions on the right to a fair trial are also applicable to the pre-trial proceedings; “*Certainly the primary purpose of Article 6 ... is to ensure a fair trial by a ‘tribunal’ ... but it does not follow that Article 6 has no application to pre-trial proceedings*” (Imbrioscia v. Switzerland, App no 13972/88, ECtHR 24 November 1993, paragraph 36; Pisano v. Italy, App No 36732/97, ECtHR, 27 July 2000, paragraph 27; diff. TRECHSEL/SUMMERS, p. 31.

49 See title of Part 8, Articles 352 et seqq., (“*Part 8 Special Procedures, Chapter 1 Summary Penalty Order Procedure, Contravention Procedure*”).

50 See title of Part 7, Articles 328 et seqq., (“*Title 7 Main Proceedings of First Instance*”).

IV. Landmark Cases

The Federal Supreme Court in Lausanne is Switzerland's highest court. Its role in the field of criminal procedure has shifted considerably since the enactment of the Federal Code of Criminal Procedure in 2011. Before, the Supreme Court had jurisdiction over 26 different cantonal codes. Its main task was to set up common minimal standards regarding the rights of different parties for all the different codes. Because these codes were issued by the cantons, the Supreme Court had the power to nullify them. For example, in 1976, the directive on the police prisons of the canton of Zurich was partly nullified. The rules had not allowed prisoners to use their bed during the day and only allowed prisoners a walk in the open air every third day; as such, they were found to violate fundamental rights guaranteed by the Constitution.⁵¹

Nowadays, criminal procedure is regulated by a *federal* code. Because the Federal Supreme Court is bound by the laws of the Federal Parliament (Article 190 Constitution) it may not nullify provisions of the Swiss Code of Criminal Procedure, as it could do before with cantonal procedural codes. Its main task is therefore to guarantee a consistent application of the Federal Code of Criminal Procedure throughout the cantons of Switzerland. As the following cases will show, the jurisprudence of the European Court of Human Rights has an even greater influence in the field of criminal procedure than in that of substantive criminal law. In particular, the Strasbourg rulings on the right to liberty (Article 5 ECHR) and the right to a fair trial (Article 6 ECHR) have had a deep impact on the criminal procedure rules of various member states.

1. SCHENK V. SWITZERLAND⁵²

One earlier case that had a strong influence on the rules which apply today surrounding the exclusion of evidence was that of PIERRE SCHENK. This case was decided years before the introduction of the Federal Criminal Code of

⁵¹ BGE 102 Ia 279.

⁵² Schenk v. Switzerland, App no 10862/84, ECtHR, 12 July 1988.

Procedure, but the principles developed under this case are still followed in the procedural laws of Switzerland today.

SCHENK was suspected of having hired a hitman to kill his wife. The hitman, instead of executing his mission, had secretly taped a phone conversation with SCHENK and handed it to the investigating authorities. The tape was subsequently used as the main (but not sole) piece of evidence in the eventual trial against SCHENK, where he was convicted for attempted instigation to murder. Secretly recording an individual is a criminal offence in Switzerland under Article 179^{ter} Criminal Code. The question for the Supreme Court, when it considered SCHENK'S case on appeal, was whether illegally obtained evidence could be used in a criminal trial. The Federal Supreme Court, considering this issue, held:

*"To conclude ... that any evidence derived from unauthorised tapping must never ... be used in evidence would be to adopt too dogmatic a position and would often lead to absurd results ... In such a case it is necessary to balance ... the interest of the State in having a specific suspicion confirmed ... and ... the legitimate interest of the person concerned in the protection of his personal rights".*⁵³

The Supreme Court considered in the case of SCHENK that the public interest in having the truth established overrode SCHENK'S privacy interests. Thus, they ultimately upheld his conviction for attempted instigation to murder, although the evidence had been obtained in an illegal manner. SCHENK took his case to the European Court of Human Rights, requesting a declaration that his right to a fair trial under Article 6 I ECHR had been violated. However, after examining the trial process as a whole, the European Court of Human Rights concluded SCHENK had not been deprived of his right to a fair trial. Important considerations which influenced this conclusion were the fact that SCHENK'S defence rights had not been disregarded and that the tape had not been the only piece of evidence used to secure his conviction.

SCHENK is the leading case on the exclusion of illegally gathered evidence. The Supreme Court, as quoted above, stated that when courts assess the admissibility of evidence they must weigh the public interest in truth-finding and securing a conviction for the relevant crime against the accused's privacy rights. This balancing approach was approved by the European Court

⁵³ BGE 109 Ia 244 consideration 2b, cited in *Schenk v. Switzerland*, App no 10862/84, ECtHR, 12 July 1988, paragraph 30.

of Human Rights when they heard SCHENK's case. It also later became statutory law in Switzerland: as was discussed earlier in the discussion about Part 4 of the Swiss Code of Criminal Procedure rules on exclusion of evidence,⁵⁴ evidence gathered "in a criminal manner" is generally excluded, unless it is needed for the conviction of a serious crime (Article 141 II). Consequently, illegally obtained evidence can be used if a serious crime is at stake. The worrying implications of this provision were outlined earlier: it means that even when procedural rules matter the most – in serious cases where there is the possibility of a severe sentence being imposed after a finding of guilt – they are still unlikely to be heeded. Further, it acts to remove any incentive the criminal justice authorities may have to comply with procedural rules.

2. HUBER V. SWITZERLAND⁵⁵

Another case, decided in 1990, that had an influence on criminal procedural law was that of Huber v. Switzerland. Again, this case was decided before the enactment of the Federal Code of Criminal Procedure, and thus dealt with a cantonal criminal procedure regulation.

The facts of the case were that members of the "Hell's Angels" gang were suspected of having brought German prostitutes to Zurich, and subsequently forcing them to marry Swiss nationals who received payments in turn. These women were then forced into prostitution in Switzerland. The District Attorney of Zurich believed that JUTTA HUBER was one of these women. On 11 August 1983, he questioned her as a witness. She admitted making a living from prostitution but denied any ties to the "Hell's Angels". At the end of the hearing, the District Attorney remanded her in custody on suspicion of having given false evidence. She was not released until a further eight days had passed. The District Attorney then indicted her. At trial, her lawyer argued that there had been two key failures by the authorities to respect HUBER's rights; in particular those guaranteed by the ECHR. Firstly: *"anyone who is detained ... must be brought promptly before a judge ... This never happened in the present case."* Secondly, there was a lack of independence at issue: *"the person who remanded the accused in custody, District Attorney J., is now also prosecutor."*

⁵⁴ See pp. 406.

⁵⁵ Huber v. Switzerland, App no 12794/87, ECtHR, 23 October 1990.

Unlike the Swiss courts, the European Court of Human Rights shared the view of the defence lawyer, concluding that Article 5 III ECHR had been violated. The District Attorney, who had ordered the detention of HUBER on remand at the preliminary stage of the proceedings, had become party to the trial by taking on the role of the prosecution. He was thus no longer “independent of the parties”⁵⁶. Following this judgment, the canton of Zurich had to change its Code of Criminal Procedure, delegating the task of approving detention on remand to the President of the District Courts.⁵⁷ Today, this task is vested in the “compulsory measures courts”.⁵⁸

3. CHAMP-DOLLON⁵⁹

A had been detained on remand on suspicion of large scale cocaine trafficking, and was held for 478 days at the ‘Champ-Dollon’ detention facility near Geneva. For 199 days (157 of which were consecutive), he shared his three-man cell with five other inmates (the space amounted to 3.83m² per person). During that entire period he was confined to his cell for 23 hours per day. A claimed that such conditions of detention were inhuman and degrading, under Article 3 ECHR.

In its decision, the Swiss Federal Supreme Court relied heavily on the criteria set out by the European Court of Human Rights. If detainees are confined to a space of less than 3m² per person, the lack of space in itself will constitute a violation of Article 3 ECHR. If individual space ranges from 3–4m² per person, other detention conditions are considered in order to establish whether there has been an Article 3 ECHR violation, such as (day)light, ventilation, temperature, sanitary facilities, time spent outside of the cell, health conditions (for example the prevalence of tuberculosis), the quality of nutrition, and the overall duration of the detention.

The Federal Supreme Court held that the Champ-Dollon prison has been heavily over-crowded for many years. The sanitary facilities, ventilation, light, and nutrition were deemed to meet the minimal standards. However, the fact that A had been detained for 157 consecutive days in a heavily overcrowded

⁵⁶ Huber v. Switzerland, App no 12794/87, ECtHR, 23 October 1990, paragraphs 42 et seqq.

⁵⁷ Cantonal Act of 1 September 1991 for the amendment of the Cantonal Code of Criminal Procedure (OS 51/851 et seqq.), in force since 1 July 1992.

⁵⁸ Article 220 I: “Remand begins when it is ordered by the compulsory measures court.”

⁵⁹ Judgment of the Federal Supreme Court 6B_456/2015 of 21 March 2016

cell with virtually no time outside this confinement led the court to declare that the conditions violated the national and inter-national rules on detention. Despite the successful outcome of this judgement for the applicant, there have since been numerous cases concerning the continuing severe overcrowding in Champ-Dollon, including a 2016 case where the Federal Supreme Court held that the detention standards violated Article 3 ECHR.⁶⁰

4. KRISTALLNACHT⁶¹

In June 2012, a Swiss case which has come to be known as Kristallnacht surfaced.⁶² ALEXANDER MÜLLER, a local politician of the conservative Swiss People's Party in Zurich, posted a series of tweets on the social media platform "Twitter" which made derogatory comments against Muslims. The most infamous quote was: "*Maybe we need another Kristallnacht ... this time for mosques*". In the aftermath of this widely publicised post, MÜLLER had to resign from his party and leave political office. He lost his job as a credit analyst and was indicted and ultimately convicted for racial discrimination (Article 261^{bis} Criminal Code). In order to avoid further exposure at trial, MÜLLER successfully demanded that the press coverage of the hearing be restricted. The District Judge of Uster in Zurich issued an order that forbade the media from publishing his name, picture, and any other personal details (age, residence, employer, and the web address of his blog). Anyone who contravened this order would be subject to a fine of CHF 1'000. Two journalists objected to this order and took a case all the way up to the Federal Supreme Court. They argued that the order infringed the freedom of the media (Article 17 Constitution).

The Federal Supreme Court held that the freedom of the media is a pivotal part of free speech in a democratic society. Although trials are open to the

60 See also the article 'Prison overcrowding in Champ-Dollon: Federal Supreme Court judgements and an alarming medical study' (Source: Humanrights.ch, 18 May 2016, <https://perma.cc/3XZK-BZVG>).

61 BGE 141 I 211.

62 "Kristallnacht" refers to "*the occasion of concerted violence by Nazis throughout Germany and Austria against Jews and their property on the night of 9–10 November 1938*". It's a German word that translates literally "*to 'night of crystal', referring to the broken glass produced by the smashing of shop windows*" (source: Oxford Dictionary, <https://perma.cc/2B73-EXMZ>).

public, in practice not everybody is able to attend hearings. Therefore, the media has an essential role as a bridge of communication between the state and the general public. This information task can only be fulfilled if the media is not unjustifiably restricted in its reporting. Fundamental rights can only be restricted if: (1) there is a sufficient legal basis, (2) there is an overriding public interest and (3) the restrictions are proportionate. The Constitution explicitly provides in this regard that the essence of fundamental rights is sacrosanct, emphasising the fact that restrictions of rights are not allowed lightly (Article 36 Constitution).

The Supreme Court found that a sufficient legal basis for imposing preventive restrictions on the media was missing. In doing so, they examined Article 70 III, which states that courts can require that media reports of hearings meet specific conditions. However, this rule only applies when the general public is excluded from a trial: this was not the case here. The Court also found that there was no legal basis for this order in the cantonal laws. Thus, the order was found to be unconstitutional. The Supreme Court failed to hold that the District Court's decision had seriously violated the freedom of the media, thus reducing the impact of the Supreme Court ruling. Moreover, in this case the restrictions were unwarranted, for the defendant continues up to this day to behave in a contradictory manner to his supposed wish for total privacy; he consistently publishes posts under his full name, with pictures of himself included. By behaving as such, he seems to somewhat renounce his privacy rights.

Selected Bibliography

- JACQUELINE HODGSON, *French Criminal Justice: a Comparative Account of the Investigation and Prosecution of Crime in France* Oxford 2005
- JOHN D. JACKSON/SARAH J. SUMMERS, *The Internationalisation of Criminal Evidence, Beyond the Common Law and Civil Law Traditions*, Cambridge 2012
- KARIM A.A. KHAN/CAROLINE BUISMAN/CHRIS GOSNELL, *Principles of Evidence in International Criminal Justice*, Oxford 2010
- SARAH J. SUMMERS, English translation of the Swiss Federal Code of Criminal Procedure, in Andreas Donatsch/Thomas Hansjakob/Viktor Lieber (eds.), *Kommentar zur Schweizerischen Strafprozessordnung (StPO)*, Zurich, 2010
- SARAH J. SUMMERS, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford 2007
- MARC THOMMEN/MOJAN SAMADI, The Bigger the Crime, the Smaller the Chance of a Fair Trial?, in *European Journal of Crime, Criminal Law and Criminal Justice* 24 (2016) pp. 65
- STEFAN TRECHSEL/MARTIN KILLIAS, Law of Criminal Procedure, in Francois Dessemontet/Tugrul Ansay, (eds.), *Introduction to Swiss Law*, 3rd edition, The Hague 2004, pp. 269
- STEFAN TRECHSEL/ SARAH J. SUMMERS, *Human Rights in Criminal Proceedings*, Oxford 2006
- NADINE ZURKINDEN, National characteristics, fundamental principles, and history of criminal law in Switzerland, in Ulrich Sieber/Konstanze Jarvers/Emily Silverman (eds.), *National Criminal Law in a Comparative Legal Context, Introduction to National Systems*, Vol 1.1, Berlin 2013, pp. 205