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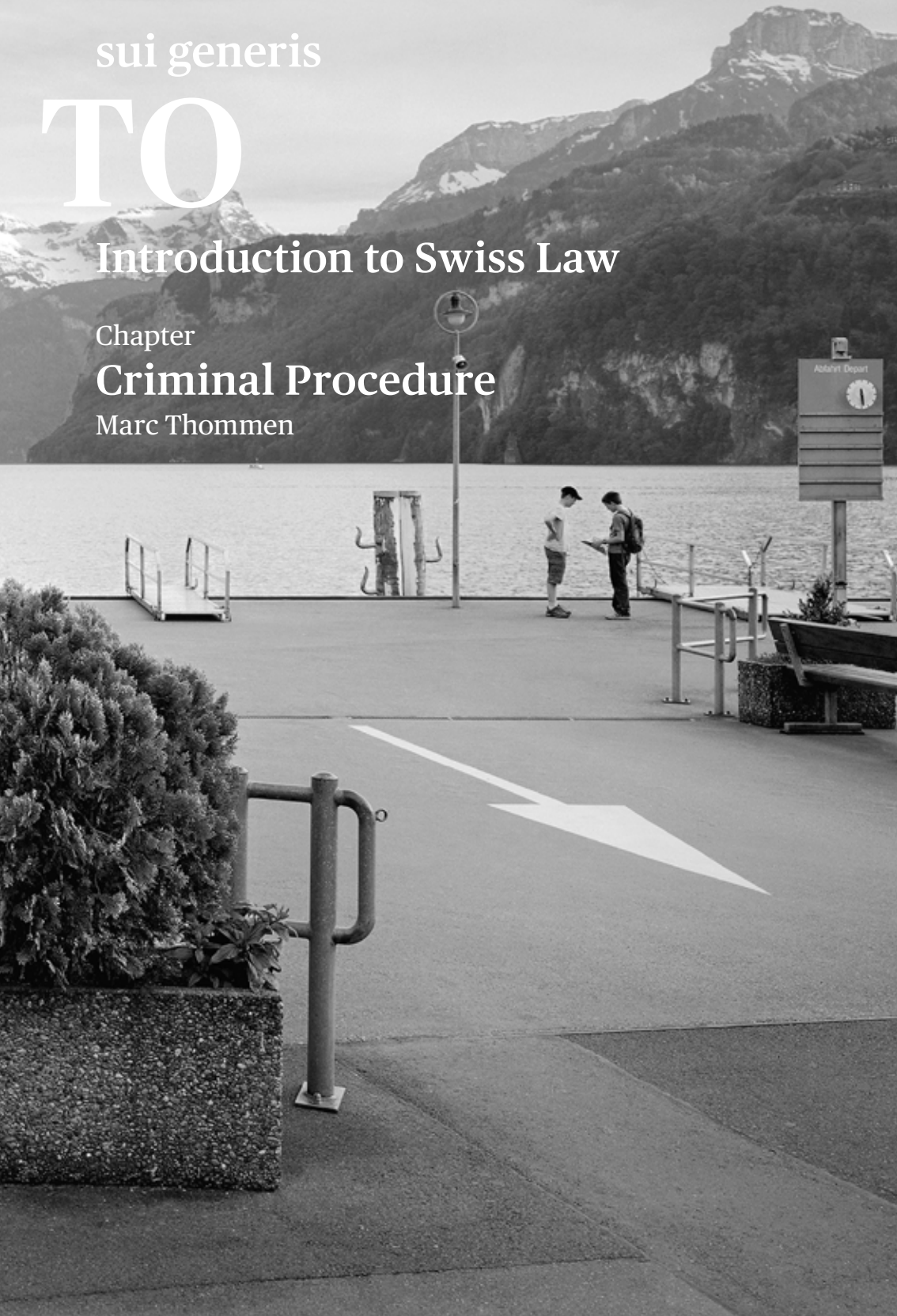
Introduction to Swiss Law

Chapter

Criminal Procedure

Marc Thommen



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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 law 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

Criminal law and criminal procedure were traditionally a key legislative area for the cantons: neither the Constitution of 1848 nor 1874 provided for centralised legislative powers.

Throughout the 20th century, more than 50 different codes of criminal procedure existed in Switzerland. This variety of procedural rules proved extremely inefficient in practical terms: 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. 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 therefore put to popular vote and approved in a landslide victory on 12 March 2000.[1]

2. Legislation

In the early 1990s, a government commission proposed the unification of the existing criminal justice codes into one Federal Code of Criminal Procedure. In 1999, the Federal Council mandated NIKLAUS SCHMID, professor of criminal law at the University of Zurich, to draw up a Federal Code of Criminal Procedure. From 2001-2003, the preliminary draft was submitted to a national consultation procedure. Almost everyone welcomed the idea of unification. The most controversial issue was whether the preliminary proceedings should

1 86.4% of the voters and all cantons approved the reform. The turnout was 42%.

exclusively be led by a prosecutor or also involve investigative judges. Finally, the government proposed a purely prosecutorial system. This proposal was supported by Parliament. Subsequently, Parliament passed the Swiss Criminal Procedure Code on 5 October 2007. It entered into force on 1 January 2011.[2]

The nationwide standardisation of criminal procedure under the Swiss Criminal Procedure Code of 2007 was an important step in the right direction in many ways. For criminal defence lawyers, it became a lot easier to represent defendants in other cantons. The unification also sparked a national academic debate about Swiss criminal procedure.

Still, there remains much room for progress today. The cantonal *organisation* of the criminal justice authorities and the *execution* of sanctions must be harmonised on a national level. The Administrative and Military Criminal codes are also outdated.

The two biggest contemporary challenges in terms of legislation on criminal procedure, however, lie outside the traditional realm of the subject. Firstly, the always evolving and increasing threat of terrorism has presented the challenge of bringing police and secret service legislation in line with criminal procedure legislation. For example, one issue is whether phone calls that have been intercepted by secret service agencies can be handed over as evidence to the criminal justice authorities. Secondly, administrative laws provide for many sanctions that have traditionally not been regarded as criminal penalties: for instance, federal agencies can ban bank managers from practicing (Article 33 Financial Market Supervision Act)[3] or close pharmaceutical firms (Article 66 Therapeutic Products Act)[4]. These sanctions clearly meet the standard of "criminal charges" as developed in case law dealing with Article 6 I ECHR.[5] Hence, the procedures which lead to these sanctions being imposed should also meet criminal procedure standards.[6]

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

3 Federal Act on the Swiss Financial Market Supervisory Authority of 22 Juni 2007 (Financial Market Supervision Act, FINMASA), SR 956.1; see for an English version of the Financial Market Supervision Act www.fedlex.admin.ch (perma.cc/GF2U-WF7D).

4 Federal Act on Medicinal Products and Medical Devices (Therapeutic Products Act, TPA), SR 812.21; see for an English version of the Therapeutic Products Act www.fedlex.admin.ch (perma.cc/8CE5-Z27B).

5 See ECtHR, Engel and Others v. the Netherlands, App no 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, paragraphs 82–83.

6 Such as "nemo tenetur", see p. 442.

3. Content

The Swiss Criminal Procedure Code contains 457 Articles and is divided up into 12 parts.[7]

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 and double jeopardy.

Part 2 (Articles 12–103) regulates the *criminal justice authorities* (police, prosecution, and courts). As mentioned above, the legislator established a *prosecutorial system*. The preliminary proceedings are led by the prosecutor (Article 61 lit. a). There is no (independent) investigative judge or magistrate in charge of the proceedings. Some measures, such as detention on remand or the wiretapping of phones, must be ordered or approved by a judge at the "compulsory measures court" (Article 18 I). Trial cases are handled by the courts of first instance (Article 19). Their decisions can be challenged at the court of appeal (Article 21).

Part 3 (Articles 104–138) defines the *parties* and the *other persons* involved in the proceedings. 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 *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 have a say in the prosecution and conviction of a defendant ("criminal claim", Article 119 II lit. a). They can also choose to file a "civil claim" against the defendant within the criminal proceedings (Article 122), to allow both criminal and civil liability to be

7 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.fedlex.admin.ch (perma.cc/4NX9-XK6Y).

determined in the same court proceedings. For example, 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)[8] rather than negligent killing (Article 117 Criminal Code).[9] The parents could also have filed a claim for civil damages in these criminal proceedings. The criminal court would then have decided these claims (Article 124).

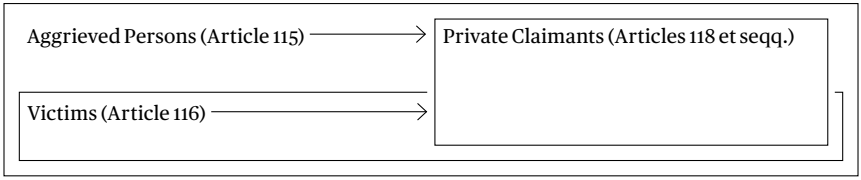

Figure 1: Private Claimants

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 is a particularity of the prosecutorial system (see Figure 2).

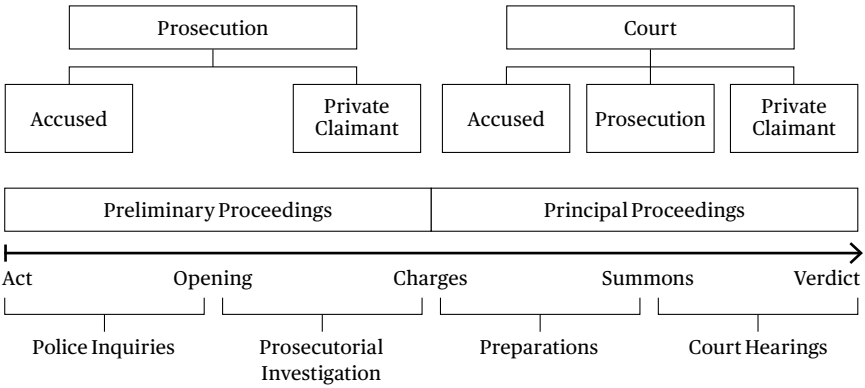

Figure 2: Role of the Prosecution in the Proceedings

8 Swiss Criminal Code of 21 December 1997, SR 311.0; see for an English version of the Criminal Code www.fedlex.admin.ch (perma.cc/V8MH-MMRB).

9 See chapter on Criminal Law, pp. 426.

Part 4 (Articles 139–195) contains the rules on *evidence*. Criminal justice authorities can rely on any lawfully obtained evidence deemed suitable to establish 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 made up their minds based on the files of the proceedings (Article 318 II). This makes it much harder for the defence to tell their side of the story. The rule is in potential conflict with Article 6 III lit. d ECHR which guarantees the defendant's right to *"examine or have examined witnesses against him".*[10]

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,[11] and vice versa. 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? In response to these potential practical issues, the Supreme Court has allowed for some narrow exceptions to the right to participation.[12] These restrictions do not apply to the defence counsel's right to be present in police interrogations (Article 159 II).

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

10 According to ECtHR, Perna v. Italy, App no 48898/99, 6 May 2003, paragraph 29, the aim of Article 6 III lit. d ECHR is to ensure "equality of arms" rather than mandating the examination of every witness on the defendant's behalf. In ECtHR, Polyakov v. Russia, App no 77018/01, 29 January 2009, paragraphs 34-35 the Court held that 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.

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

12 DFC 139 IV 25: The Court held that an accused person may be excluded from participating in the questioning of their co-accused where there is a concrete risk of collusion. See also DFC 140 IV 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.

when the individual consents to their use (Article 140 II). The Swiss Code of Criminal Procedure, in contrast to the Swiss Civil Procedure Code (Article 169), contains no statutory exclusion of *hearsay evidence.*[13]

Regarding the exclusion of evidence, Article 141 sets out three pivotal rules. 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 rendered 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 prosecute a serious criminal offence (Article 141 II). If the police forge a search warrant, for example, then any evidence obtained during the search is obtained in a *criminal manner,* given that 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, then *"the examination hearing is invalid"* (Article 177 I). Such evidence is *generally* inadmissible unless it is needed to secure the conviction of a serious crime. The courts must conduct a balancing exercise in this context:[14] the private interests of the accused must be 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.[15] 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 is–fairly unconvincingly–viewed to be an administrative rule.[16]

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

14 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. However, the test formerly established by the Supreme Court of whether evidence could have been legally obtained did not make it into the new Code and can therefore henceforth be disregarded.

15 DFC 130 I 126.

16 DFC 139 IV 128.

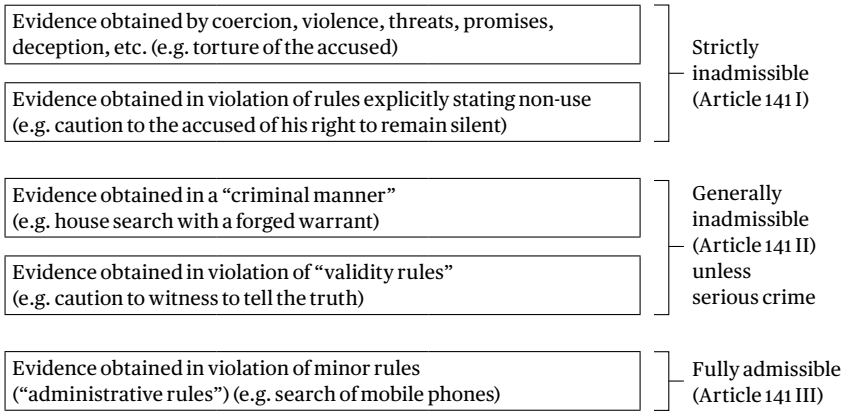

Figure 3: Evidence Exclusion

The rules on evidence exclusion need to be reconsidered. One key concern is the potential for illegally obtained evidence to be allowed into the courtroom if a serious crime is at issue (Article 141 II). For the accused, this means that the bigger the crime (and therefore the more serious the consequences for the individual accused), the smaller the chances of a fair trial.[17] Moreover, it is very hard to draw a clear line between validity rules and administrative rules. For example, the duty to obtain a search warrant has been viewed as an administrative rule in the past,[18] even though house searches clearly involve a strong interference with the accused's privacy interests.

Part 5 (Articles 196–298*d*) determines the 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, or 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 coercive measures can be ordered by the prosecution. Some measures that strongly interfere with fundamental rights must be ordered by a judge at the "compulsory measures

17 MARC THOMMEN / MOJAN SAMADI, The Bigger the Crime, the Smaller the Chance of a Fair Trial?, European Journal of Crime, Criminal Law and Criminal Justice 24(1) 2016, pp. 65 (perma.cc/GB2F-D4ST).

18 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 DFC 96 I 437 (von Daniken v. the Canton of Graubünden).

court", for example, detention on remand or mass DNA screening. Some measures like surveillance of telecommunications or undercover operations must at least be retroactively approved 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 (either prior or retroactive). 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. The accused and other persons affected by the freezing order can at least challenge the order in court.

Part 6 (Articles 299–327) sets out the rules for the preliminary proceedings (police inquiries, the opening and dropping of prosecutorial investigations, 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 (penal order, abbreviated 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 procedure in Switzerland is 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 must be brought to them by the prosecution (Article 9). Courts assess evidence freely (Article 10 II), following not specific rules but their *"conviction intime".*[19] Court hearings are public and verdicts must be pronounced publicly (Article 69). In the following paragraphs, three fundamental principles will be examined.

1. Ex Officio Investigation

The Swiss criminal justice system is traditionally viewed as possessing an inquisitorial structure.[20] The criminal justice authorities (police, prosecution and courts) must inquire into the "material" truth ex officio. They must investigate exculpatory and incriminatory circumstances with equal care (Article 6 II). Whether it is acceptable to delegate the task of investigating exculpatory evidence to the prosecution is a highly debated issue. The *courts,* on the other hand, preside over the parties. They are in a much better position to consider and weigh arguments for and against the accused's guilt. The problem, however, is that by the time the case comes to court the accused may already be at a disadvantage because of the prosecutor "cherry-picking" evidence. 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.

19 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.

20 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")* and JACQUELINE HODGSON, French Criminal Justice: a Comparative Account of the Investigation and Prosecution of Crime in France, Oxford 2005, p. 241.

2. Mandatory Investigation

The prosecution of criminal acts is mandatory (Article 7). 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 a complaint has been filed (Article 30 I Criminal Code).

There is only very limited prosecutorial discretion to not open an investigation or to drop charges (Article 8). Prosecution can be discontinued if defendants are considered to have already been sufficiently punished by the consequences of their actions:[21] an example was a defendant whose careless driving resulted in the death of her husband and grave injuries to her children.[22] Charges can also be dropped if reparations are made to the victim for any losses.[23] This exception is problematic due to its inherent inequality of treatment: escape from criminal liability is available only to those wealthy enough to properly compensate their victims.

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, especially in cases with no immediate victim (for example, eco-crimes or drug-selling).

3. Nemo Tenetur Se Ipsum Accusare

No one *(nemo)* is bound *(tenetur)* to accuse him- or herself *(se ipsum accusare),* Article 113 I. The privilege against self-incrimination encompasses the right to remain silent as well as the right to refuse co-operation 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 items or assets themselves. Obviously, the accused is protected from being coerced to provide evidence or to confess (Article 140 I).

21 Article 54 Criminal Code.

22 DFC 119 IV 280.

23 Article 53 Criminal Code.

III. Institutions and Procedure

The institutions of criminal justice and criminal procedure can best be understood by following the course of a typical case both in the preliminary (1.) and principal proceedings (2.). Subsequently, the extent to which the Swiss criminal procedural rules comply with the requirements of the Constitution and the ECHR will be examined (3.).

1. Preliminary Proceedings

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.

The same day, the farmer filed a complaint at the local police station and was questioned by the police. The filing of the complaint started the preliminary proceedings (Article 303). They are divided up into two stages:[24] the police inquiries and the investigation by the prosecutor (Article 299). The preliminary proceedings are led 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) and the farmer automatically acquired the status of a private claimant (Article 118 II).

The day after, 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).[25] X was interrogated by the police (Article 307 II, Article 312 I) and he denied the use of a firearm. He could have requested that a legal aid defence counsel

24 See Figure 2, p. 436.

25 Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997 (Weapons Act, WA), SR 514.54; see for an English version of the Weapons Act www.fedlex.admin.ch (perma.cc/NY9Q-Q2BG).

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 fairly trivial crime (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). Alternatively, 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).[26]

The written records of the inquiry were then handed over to the prosecutor. If the prosecutor had thought it necessary, he could then have interrogated the accused. 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 penal 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. The requirements for issuing a penal order are either that the defendant has confessed to the police or that there is sufficient "objective" evidence as to the defendant's guilt (Article 352 I). On 9 September 2014, the prosecution served its penal order to X. He was found guilty 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 a fine of CHF 1,000. X's weapon was confiscated and he was ordered to pay the costs of the proceedings.

Once the penal 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 penal order would have come into force as a conviction, 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 private claimant (farmer).

The prosecutor then had to choose between upholding the penal order against X, issuing a new one, closing the investigation or bringing charges. In this case, the prosecutor decided to uphold the penal order and therefore the case was transferred to court. The penal order thus constituted the indictment (Article 356 I).

26 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"* (ECtHR, Dayanan v. Turkey, App no 7377/03, 13 October 2009, paragraph 32).

2. Principle Proceedings

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 against X (Article 329 I) and scheduled the principal hearing (Article 331). From 15 October 2014, X was granted access to the court file for ten consecutive days. 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 as to whether the revolver had been used.[27] This refusal cannot be challenged (Article 331).

Courts of first instance are usually composed of three judges and a clerk. If the prosecution applies for less than two years of imprisonment the case may be heard by only one judge (Article 19 II). 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 must appear at court if it has requested a prison sentence of more than one year or if the court orders its participation (Article 337). The private claimant may be ordered to appear at the main hearings (Article 338). In X's case, both the prosecution and the private claimant were ordered to appear at court. The court hearing was open to the public (Article 69).

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

After the hearing, the court retires to deliberate in private. The court must reach its verdict by a simple majority (Article 351). Only a few cantons allow judges who disagreed with the majority verdict to write a dissenting opinion.[28]

27 See Judgment of the Federal Supreme Court 6B_495/2016 of 16 February 2017 c. 1.3.3.

28 See Article 134 of the Constitution of the Canton of Vaud.

In case of an acquittal, the defendant is compensated ex officio (Article 429). In cases where there is a conviction, the court determines the sanction (penalty and/or measure)[29] and orders the convicted person to pay the costs of the proceedings (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). It is only mandatory to produce written reasoning for the judgment in three circumstances: where a sentence of more than two years has been imposed; where a party requests it; or where a party lodges an appeal (Article 82).

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).[30] The Supreme Court decided that the cantonal court had applied the Criminal Code correctly. X's property rights had been infringed by the farmer. X was therefore in a situation of necessity. 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[31] 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.

3. Constitutionality

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

29 For this dual system of sanctions see chapter on Criminal Law, pp. 414.

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

31 See above, pp. 437 and below, pp. 446.

chance to "tell his side of the story" or have any substantial involvement in the process.[32] This violates the accused's right to be heard.

Secondly, 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;[33] the court's practice here is an interference with the investigative stage. 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.

Third, penal order proceedings need to be improved. Although defendants can *de iure* take their penal order 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. The Swiss Code of Criminal Procedure allows penal orders to become final without being served ("fictitious service"). If a penal order is served fictitiously, it is not certain that the person concerned is aware of his conviction. Nevertheless, the sentence becomes legally binding ten days after this "service". It is obvious that these *"secret convictions"* violate the European Convention on Human Rights. According to Article 6 ECHR, only those who know that they are about to be convicted can validly waive their right to a judicial review. The right to be informed of charges is also violated (Article 6 III lit. a ECHR). Therefore, penal orders cannot be served fictitiously. Whenever possible, they should be handed and explained to the accused in person.

Very rarely are penal orders explained or translated to the accused. This clearly violates the right to "have the free assistance of an interpreter" (Article 6 III lit. e ECHR).[34]

32 For the associated problems of this state of affairs, see pp. 437.

33 The independence of the judiciary is regulated in Article 30 I Constitution (Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.fedlex.admin.ch [perma.cc/7ARN-UVSH]).

34 For an extensive analysis, see MARC THOMMEN, Penal Orders and Abbreviated Proceedings, in: Pedro Caeiro / Valsamis Mitsilegas / Sabine Gless (eds.), Elgar Encyclopedia of Crime and Criminal Justice, Cheltenham/Northampton 2023 (forthcoming; preprint available at [perma.cc/J8UZ-PLLF]). The ECHR provisions on the right to a fair trial are also applicable to the pre-trial proceedings, ECtHR, Imbrioscia v. Switzerland, App no 13972/88, 24 November 1993, paragraph 36; ECtHR, Pisano v. Italy, App No 36732/97, 27 July 2000, paragraph 27; diff. TRECHSEL/SUMMERS, p. 31.

IV. Landmark Cases

As the following cases will show, the jurisprudence of the European Court of Human Rights has had—and will no doubt continue to have—great influence in the field of criminal procedure.

1. Schenk v. Switzerland[35]

A case that had a strong impact on the exclusion of evidence was that of PIERRE SCHENK. This case was decided years before the introduction of the Federal Criminal Code of 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 trial. SCHENK was convicted for attempted instigation to murder. Secretly recording an individual is a criminal offence in Switzerland under Article 179ter Criminal Code. The question for the Supreme Court, when it considered SCHENK's case, was whether illegally obtained evidence could be used in a criminal trial. It held: *"To conclude… that any evidence derived from unauthorised tapping must never… be used… 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".*[36]

The Court found 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 conduct of

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

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

the trial as a whole, the European Court of Human Rights concluded SCHENK had not been deprived of his right to a fair trial.

SCHENK is the leading case on the exclusion of illegally gathered evidence. The balancing test that the Supreme Court introduced was approved by the European Court of Human Rights. It later became statutory law in Switzerland.[37]

The worrying implications of this balancing exercise, which can allow illegally obtained evidence to be used if a serious crime is at stake, have been discussed above. A further concern with this approach is that it somewhat removes the incentive for the criminal justice authorities to comply with procedural rules.

2. Huber v. Switzerland[38]

In this case members of the "Hell's Angels" motorcycle gang were suspected of having brought German prostitutes to Zurich and arranging their marriage to 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."*

The European Court of Human Rights shared the view of the defence, concluding that Article 5 III ECHR had been violated. The District Attorney, who had ordered the detention 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".[39] Following this judgment, the

37 See pp. 437.

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

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

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.[40] Today, this task is vested in the "compulsory measures court".[41]

3. Champ-Dollon[42]

"A" had been detained on remand on suspicion of large-scale cocaine trafficking. He was held for 478 days at the "Champ-Dollon" detention facility near Geneva. For 199 days total (157 of which were consecutive), he shared his three-man cell with five other inmates (the space amounted to 3.83m^2 per person). During that entire period, he was confined to his cell for 23 hours per day. He claimed that such conditions were inhuman and degrading (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 3m^2 per person, the lack of space will in itself constitute a violation of Article 3 ECHR. If individual space ranges from 3–4m^2 per person, other detention conditions are considered 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 minimum standards required to ensure respect for A's human rights. However, the fact that A had been detained for 157 consecutive days in a heavily overcrowded cell with virtually no time outside of this confinement led the court to declare that the conditions violated the national and international 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.[43]

40 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.

41 Article 220 I.

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

43 See also the article "Prison overcrowding in Champ-Dollon: Federal Supreme Court judgements and an alarming medical study" www.humanrights.ch (perma.cc/3XZK-BZVG).

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