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Introduction to Swiss Law

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Chapter 14
Criminal Law

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I. Sources of Swiss Criminal Law

A. Preliminary Note

This chapter is intended to be an introduction to Swiss criminal law for Anglo-Saxon readers.[1] Several comparisons will therefore be made with American and English law in order to highlight the characteristics of Swiss criminal law. The present introduction shall deal primarily with the principles set out in the General Part of the Swiss Penal Code (PC), whereas the Special Part, comprising definitions of offenses, will be only briefly dealt with. Indeed, finding definitions of offenses is not difficult, whereas putting them into context may be less straightforward for foreign readers. A particular challenge has been the revision of the General Part of the Swiss Penal Code, adopted by Parliament on 13 December 2002. The revised Penal Code (revPC) is likely to come into force by January 2005. The reform mostly concerns the system of sanctions, whereas the general rules about offenses, intent, justification etc. have only been slightly changed. In the following text reference will be made to:

- the existing PC for sections which have not changed and have not been renumbered,
- the revised PC (revPC) for rules which are substantially new,
- both the existing and the revised PC wherever sections have been renumbered, but not fundamentally changed.

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1. For this reason, sources will be given only if they are in English, or if they are highly specific. Otherwise, readers will find a list of introductory texts to Swiss criminal law at the end of this chapter.

F. Dessemontet and T. Ansay (eds), Introduction to Swiss Law, 245–268.

B. Constitutional Level

The Federal Constitution[2] contains a few fundamental rules with respect to criminal law and procedure. According to Article 123 I, the Confederation is competent to pass legislation in the field of substantive criminal law. In section 10 (first and third paras.), capital punishment, cruel, inhuman or degrading treatment and torture are without exception prohibited. Article 31 I guarantees the principle that no one should be deprived of his or her liberty except in cases provided by the law. The *nullum crimen nulla poena sine lege* rule is also set forth in section 1 of the PC. It is furthermore guaranteed by Article 7 of the European Convention on Human Rights (ECHR) which has been ratified by Switzerland in 1974. In practice, the ECHR is dealt with as a source of constitutional law.[3]

C. The Swiss Penal Code

1. Historical Background of the Swiss Criminal Law

Over many centuries, Switzerland's penal law was heavily influenced by the so-called continental *common law* which prevailed in vast parts of Europe at that time.[4] The first national penal code was passed in 1799 during the *Helvetic Republic* (1798–1802) when the country became a type of French protectorate. This code had been significantly influenced by the French Penal Code of 1791.[5] Although the *code pénal helvétique* was only in force for a short period of time, the influence of French criminal legislation (i.e. the *code Napoléon* of 1810) retained its importance long into the 20th century. When the country changed from a loose Alliance into a Confederation in 1848, criminal legislation was left to the cantons. The only federal criminal law passed in 1853 dealt with offenses against federal institutions, including high treason or assault against officers of the Federal Government. Military criminal law was another matter of federal legislation and models from the Swiss Regiments in the foreign service of the early 1800s survived until the 1920s.

The initiative to unify criminal law came originally from the Swiss Lawyers Association, at a period when other European countries had enacted major criminal codes (Germany 1871, Italy 1889, the Netherlands 1882) and when civil law underwent the same process of codification at national level (Switzerland 1881/1907, Germany 1900). After an unsuccessful first attempt, the Constitution (of 1874) was amended in 1898 to make criminal legislation a federal matter. Preparatory work had started in 1889 when the Federal Government entrusted Professor Carl Stooss of the University of Berne, with an inventory of the existing criminal law of the 25 cantons. Based on this comparative study of cantonal criminal legislation, the first draft of a Federal Code was submitted by Stooss in 1893–94. In 1918 the Federal Government finally submitted the official draft to Parliament. However, due to the World War I experience with a military criminal code heavily influenced by early 19th century models (and harsh penalties), the Parliament gave first priority to the reform of military penal legislation, and it only resumed debates on the PC in 1928 (after the final approval of the military penal code in 1927). After almost 9 years of debates, the code was submitted to a referendum where it was passed by a rather narrow majority on 21 December 1937. It came into force on 1 January 1942.

The Swiss Penal Code followed a rather independent line, integrating French, German, and Austrian models. In the great debates of the late 19th century among continental (and especially German) criminal law professors, the Swiss Code often opted for innovative (though mostly intermediate) solutions, which gave it some prestige and international recognition. Even before its official enactment in Switzerland, it was adopted in Peru – a fact which explains the links between Peruvian and Swiss universities.[6]

2. Amendments to the Definitions of Offenses since 1942

Since 1942, the Penal Code has been amended many times. These amendments have usually concerned the definition of offenses (in the Special Part of the PC), such as political offenses and libel (1950), the protection of private communication against undue intrusion, such as wire-tapping etc. (1968), the reshaping of offenses against the person, particularly in connection with kidnapping (1989) and the introduction of offenses of insider trading (1987) and money laundering (1990 and subsequently amended in 1994). In 1992, the chapter on sex offenses was considerably revised, extending the concept of rape (making, among other things, marital rape a crime) and offering more protection to vulnerable persons on the one hand, and, on the other hand, decriminalizing certain forms of sexual acts as well as consensual sexual relations between minors of a similar age. In 1994, all forms of criminal organizations were outlawed, and in 2000, statutes on corruption (even abroad) were considerably extended. In 1995, property offenses and other offenses against economic interests, such as fraud, computer offenses and forgery were subject to amendements. Concern about racism and xenophobia led to the adoption of a section (261-bis) in 1993 making racist propaganda, racist attacks on human dignity and the refusal of a publicly offered service on the grounds of racial discrimination an offense. Switzerland also ratified the International Convention on the Elimination of All Forms of Racial Discrimination. All in all, the impact of all these new offenses was rather limited. Whereas the revision of traditional (violent or property) offenses had little practical consequences, the rarity of convictions for money laundering, international corruption and for supporting criminal organizations[7] came as a surprise to many observers who used to see Switzerland as a safe haven for dirty money

2. Adopted on 18 April 1999. It replaced the Constitution of 1874.
3. See S. Trechsel, 'Der Einfluss der Europäischen Menschenrechtskonvention auf das Strafrecht und Strafverfahrensrecht der Schweiz', *ZStW* 100 (1988), 673.
4. M. Killias, *Précis de droit pénal général*, 2nd edn., Berne: Staempfli 2001, pp. 4–12.
5. M. Alkalay, *Das materielle Strafrecht der französischen Revolution und sein Einfluss auf Rechtsetzung und Rechtsprechung der Helvetischen Republik*, Zurich: Schultess 1984.
6. J. Hurtado Pozo, *Droit pénal*, 2 vols., Zurich: Schultess 1997/2002. This influence of Swiss criminal law on Peruvian legislation has resulted in many students from Peru coming to Swiss universities. José Hurtado Pozo even became professor of criminal law at the University of Fribourg.
7. C. Besozzi, *Organisierte Kriminalität und empirische Forschung*, Chur/Zurich: Ruegger 1997.

and dubious practises in international business.[8] These results are, however, rather consistent with international indicators on corruption and the shadow economy which consistently show Switzerland to be at the lower end of the scale.[9] The new statutes on illegal financial transactions (including insider trading) have had, however, a substantial effect on international legal co-operation.

3. Changes Affecting the General Part

Beyond these changes affecting the definitions of specific offenses, a few general principles and rules regulating sentencing were also amended over the decades. In 1971, the possibility of suspending custodial sanctions was extended in several respects, and a few embarrassing accessory penalties (such as depriving convicts of civil rights) were repealed. In connection with outlawing criminal organizations, the rules on the confiscation of assets were also considerably altered (1994). The law regulating criminal attempts had already been extended in 1982 to cover so-called preparatory acts; fearing uncontrollable side-effects. However, it was decided to criminalize such acts in connection with certain serious crimes (such as murder, robbery, or hostage taking) by creating a new offense (Art. 260bis), rather than by making all preliminary acts punishable (in the general part of the PC).

Beyond these limited changes, the Federal Government entrusted a former Professor of the University of Berne, Hans Schultz, with the task of preparing a draft for a new 'General Part' of the Swiss Penal Code. First presented in 1984, this draft was then debated for several years by an Expert Committee. It was submitted to the Parliament in 1999 and the two Chambers adopted the revised draft in a final vote on 31 December 2002. It mainly relates to sentencing issues which will be subject to a radical overhaul (see IV below).

4. The Interpretation of the Swiss Penal Code

As a basic rule it may be stated that the PC is to be interpreted just like any other law. There is, however, one fundamental exception to this rule: The principle of legality. Punishment may not be pronounced unless the person concerned has committed an offense which is expressly provided for by law. While analogy is quite indispensable as a technique of interpretative thinking, it may not be applied with a view to creating offenses not provided for by law.

In practice, the application of this rule creates considerable problems as it is hardly possible to draw a clear distinction between extensive interpretation and the creation of a new offense. In practise, interpretation is often made easier thanks to the equality of three official languages used in federal legislation (German, French, and Italian). With three texts, it is likely that ambiguities in one language can be removed by looking at the other two versions. One may also suspect that legislation enacted simultaneously in three languages is likely to be more thoroughly checked by parliamentary committees.

8. M.B. Clinard, *Cities with Little Crime: The Case of Switzerland*, Cambridge University Press 1978.
9. See the data in M. Killias, *Grundriss der Kriminologie – Eine europäische Perspektive*, Berne: Staempfli 2002, pp. 139–141.

D. Other Penal Legislation

In addition to the PC, numerous federal statutes contain criminal law provisions. Two of them are of a general nature, the others deal with specific matters, and list only certain accessory offenses.

1. The Military Penal Code (MPC)

The MPC of 1927 was drafted on the basis of preparatory work to the PC and has since been amended to maintain parallel wording throughout most of the General and a large portion of the Special Part. It applies primarily to persons doing service in the army, but also to civilians for certain offenses. Its scope of application, *ratione personae*, is widened in times of war. It is applied by military courts, a system which is likely to become the exception in today's Europe (where military courts were abolished in most continental countries). Among the specifically 'military' offenses, refusal to do military service (Art. 81 MPC) is often applied. Over many decades, several hundred young men were convicted of this offense every year. After the end of the cold war and following a certain loss of prestige of Switzerland's traditional army, it became possible to decriminalize conscientious objection. Conscientious objectors are now eligible for community service, although this is 50 per cent longer than an ordinary soldier's overall military training time.

2. The Administrative Penal Code

In 1974, the Confederation passed an Administrative Penal Code which sets out general rules for administrative offenses (e.g. against customs law and federal tax laws). As an exception in Swiss criminal law, it provides for the punishment of a judicial person if a fine of not more than CHF 5,000 is at stake and if investigating the individual responsible would require disproportionate efforts and costs.

3. Offenses set out in other Federal Laws

The list of offenses dealt with in the PC is determined by tradition rather than principle. Thus, a considerable number of offenses are to be found in other federal laws. Some of them are of considerable quantitative and substantive importance. Examples are traffic offenses, such as driving under the influence of alcohol and other substances, which are contained in the Road Traffic Act of 1958, and trafficking in illegal drugs according to the Narcotics Act of 1951. Overall, some 250 federal laws contain criminal offenses. The general principles, as codified in the General Part of the PC, also apply to offenses defined in other federal laws (Art. 333 PC).

E. Cantonal Legislation

Cantonal criminal legislation continues to exist alongside federal penal law (Art. 335 PC), although only in areas of marginal importance, such as petty offenses, violations

of administrative law, offenses in the context of civil proceedings (comparable roughly to 'contempt of court'), breaches of public order, hunting offenses and tax violations. In these areas, custodial sentences are imposed in exceptional cases only. As a rule, the General Part of the Swiss Penal Code also applies to cantonal criminal law.

F. Case Law

By far the most important case law on federal criminal law consists of the rulings of the Criminal Law Chamber (*Cour de cassation*) of the Federal Supreme Court (see Ch. 15, VIII B). As a rule, the PC is applied by cantonal courts in the first place, and the Federal Supreme Court acts only as a last court of appeal. Some cantonal courts of appeal also publish highlights of their case law. The case law is available on the internet.

G. Legal Doctrine

Finally, legal doctrine is also considered as a source of law in Switzerland. Judgments of the Federal Supreme Court often refer to scientific publications including textbooks and doctoral dissertations. The Federal Supreme Court also often refers to the legal doctrine of neighboring countries, especially Germany.

II. The Scope of Application of the Penal Code

A. As to Time

According to the *nullum crimen* principle, the retroactive application of legislation in criminal matters is strictly forbidden. It follows that, as a rule, the PC only applies to offenses which were committed after it came into force (Art. 2 I PC). The only exception is changes which are favorable to the defendant (Art. 2 II PC). The question, of course, remains as to what measures can be regarded as 'favorable' or 'more lenient'. As a general rule, this principle applies only to punishments, not to therapeutic measures which relate to the offender's rehabilitation.

B. Regarding the Place of the Offense

1. The Principle of Territoriality

In the first place, the Penal Code is applicable to all offenses committed on Swiss territory (Art. 3 PC). This includes, under certain circumstances, aircraft and vessels under the Swiss flag. The place where an offense is committed is determined by the place where the offender performed the act, but also the place where the criminal result was obtained (*Ubiquitätsprinzip/principe de l'ubiquité*, Art. 7 SPC/8 rev PC). If, for example, a German citizen sent a letter-bomb from Germany to Switzerland where it exploded causing bodily harm, the crime will fall under both the Swiss and the German Penal Code. This may lead to double jeopardy, since a foreign conviction concerning such an offense will not bar prosecution in Switzerland, unless the foreign authorities acted at the request of Switzerland. However, any punishment served abroad will be taken into account at the sentencing stage.

2. The Protection of the State principle

All offenses against the Swiss State, wherever and by whomever they are committed, fall under the PC, and a judgment by a foreign court will never be recognized (Art. 4), but the penalty served in a foreign country will be discounted.

3. The Passive and the Active Personality Principle

Offenses committed abroad against a Swiss national fall under the PC, if they are also punishable in the country where they were committed, and if the offender is arrested or handed over to Swiss authorities (Art. 5). If the offender has been convicted and the sentence has been completely served abroad, no second prosecution will take place in Switzerland.

The Penal Code is applicable to offenses committed by Swiss nationals abroad, if they are punishable in the country where they were committed (Art. 6). There will be no second prosecution in Switzerland if the offender has been put on trial and acquitted abroad, or if he has served a foreign sentence.

In the revised Penal Code, the active and the passive personality principle will be dealt with together (Art. 7). The offender will be punished in Switzerland according to Swiss penal law whenever the offense has been committed abroad, but extradition is not feasible.

4. Universal Jurisdiction

Finally, a limited number of offenses fall under the Swiss Penal Code wherever and by whomever they were committed. Examples are counterfeiting of money and trafficking in illegal drugs. Upon ratification of the European Convention on the Suppression of Terrorism, Article 6bis PC (Art. 6 rev PC) was adopted, providing for the applicability of Swiss penal law in cases where Switzerland is obliged to prosecute under international law. According to Article 5 of the revised PC, the universality principle will apply also to cases of sexual abuse of minors younger than 14 years, and to violent sexual acts against minors younger than 18 years.

C. Regarding the Offender

The Swiss Penal Code (Art. 8/9 revPC) is not applicable *ratione personae* to offenders falling under the Military Penal Code, nor to members of (national and cantonal) parliaments and governments for statements made in the course of parliamentary debate (for which these persons are immune to prosecution). Other cases of immunity,

concerning diplomats, parliamentarians, members of governments (outside parliamentary debate) and civil servants are only of a procedural character. The immunity can be lifted in which case the PC would apply.

III. General Rules on Offenses

The General Part of the Penal Code sets out the rules applicable to all offenses. Basically, they also apply to offenses set out in other federal and cantonal laws. These rules can be divided into two groups. The first group contains general elements of crime, such as criminal responsibility, illegality and justification, criminal attempt and participation in crimes. The second part deals with criminal sanctions.

A. Classification of Offenses

The Penal Code (Arts. 10, 103 revPC) follows the classical French system in that it distinguishes three categories of offenses. The relevant criterion is their gravity as expressed by the maximum penalty they carry. Thus, 'felonies' (*Verbrechen/crime*) are offenses carrying a custodial sentence of more than 3 years, 'misdemeanours' (*Vergehen/délit*) are offenses whose maximum penalty is no more than 3 years of custody, and 'contraventions' (*Uebertretung/contravention*) are petty offenses carrying detention of up to 3 months or a fine.

Originally, this division was also meant to reflect three degrees of first-instance-courts: jury, district court and single judge. In practice, however, the competence of the court is determined by the expected sentence rather than the theoretical maximum sentence.

While a set of special rules apply to contraventions (Arts. 103–109 revPC), the distinction between crimes and misdemeanours is of very little importance (see III I 3). Hereafter, the term custody will be used in a broad sense, and will include several categories of confinement.

B. Crimes of Omission

Two categories of crimes of omission are to be distinguished. Crimes of omission (strictly speaking) are offenses which consist of the omission of an act called for by law (*echte Unterlassungsdelikte/délits d'omission proprement dit*). Examples include the failure of the perpetrator to assist a person whom he or she has injured, the failure to act to help someone whose life is in mortal danger (Art. 128), or the unjustified omission to pay alimony (Art. 217 PC). Conduct of commission by omission (*unechtes Unterlassungsdelikt/délit d'omission improprement dit, délit de commission par omission*) is the omission to avert a criminal result. This category of offenses has been developed by doctrine and case law; it will be defined, but not changed, in the revised PC (Art. 11). The difficulty arises in defining the situations in which a person is under a special duty to actively intervene in order to avert the result (*Garantenstellung/position de garant*). Such a duty must, as a rule, originate in law, in a contract or from the fact that the defendant has himself provoked a dangerous situation.

C. Self-defense and Similar Defenses

As a rule, acts which constitute an offense under the Penal Code are unlawful. In some cases, however, a conflict of social interests may justify or, at least, excuse the defendant's behaviour.

1. Acts Required or Authorized by Law, Official Duty or Professional Duty

Law ought to be free of contradictions. Acts which are lawful by any statute cannot be punishable. Article 32 PC (Art. 14 revPC) expresses this principle by stating that acts which are required or declared lawful by law, do not constitute an offense. Professional organizations, such as the Bar Associations or Medical Associations, often adopt guidelines on good practise in critical areas, such as on the definition of death and the limits of medical duties. Although such guidelines adopted by private bodies cannot change the law, they usually reflect unwritten principles underlying legal thinking in the areas in question.

Article 32 (Art. 14 revPC) is also the legal basis for all kinds of interventions by the police and courts. Examples of practical importance are the laws authorizing arrest, detention and searches.

2. Self-defense

Article 33 PC (Art. 15 revPC) (*Notwehr/légitime défense*) declares any act of self-defense against an unlawful attack by any third party which is ongoing or immediate to be lawful. An act committed in self-defense may be directed against the body or any other interest of the aggressor, but must be proportionate to the seriousness of the attack (Art. 16 revPC). Unlike English law,[10] Swiss legislation provides for mitigating circumstances if an act of self-defense exceeds what might reasonably be considered as a proportionate response to the attack. This provides some explanation for the fact that 3 per cent of sentences for manslaughter are below one year of custody in Switzerland.[11] This relatively high proportion of exceptionally lenient sentences reflects the wide recognition of mitigating circumstances in cases where the use of force in self-defense may not have been entirely justified.

The rules of self-defense also apply to situations in which an act is aimed at defending a third party who happens to be threatened by an illegitimate attack. Self-defense is a general principle which, along with the duress defense, applies to

10. A. Ashworth, *Principles of Criminal Law*, 3d edn., Oxford University Press 1999, pp. 138–151.
11. *European Sourcebook of Crime and Criminal Justice Statistics 1999*, Strasbourg: Council of Europe, p. 152.

all areas of law. Swiss civil law also expressly recognizes the right of any person to infringe on the rights of other parties in cases of self-defense or in an emergency.[12]

3. Acts Committed in Situations of Necessity or Duress

According to Article 34 PC (Art. 17 revPC) acts performed in a situation of necessity *(Notstand/état de necessité)* are lawful (i.e. 'not punishable'). The duress defense is open whenever there is an immediate risk to life, safety, or any other interests of the acting person or a third party, if this risk has not been self-induced, if it cannot be prevented in any other way, and if one could not reasonably expect the defendant to abandon the interest at stake. Unlike self-defense which is justified by the unlawful attack of an offender, the necessity defense concerns situations where the risk to be prevented may not have been provoked by any third party fault. Therefore, the limits – particularly in terms of proportionality of the response – must be more carefully evaluated. The necessity defense is unavailable if the protected interests are of lesser value than those sacrificed. If the two conflicting interests are of comparable value, as in cases where one life is saved whereas another person's life is sacrificed, the duress defense does not, strictly speaking, apply, but the judge may consider the moral dilemna as a mitigating circumstance which might even justify the decision not to impose a punishment (Art.18 II revPC).

Although the necessity defense can also be invoked in cases where the act was committed to protect the interests of a third party, it never may serve as a justification for acts committed in the public interest. Under continental law, public agents (including police officers) have to respect civil rights of defendants and citizens. Were they entitled to invoke the necessity defense in situations where they tried to protect public interests, the limits resulting from laws on procedure and on the exercise of public force might easily be avoided. Therefore, bounty hunting or similar practises common in America would be considered criminal under Swiss law (see Ch. 15 VI B 4). Private citizens only have the right to stop and detain offenders (i.e. to enact a citizen's arrest) if they catch the offender in *flagrante delicto* (i.e. in the act of committing the offense) and only if they immediately call the police.

4. Defenses not Codified in the Penal Code

Article 1 PC (*nullum crimen sine lege*) does not prevent the admission defenses which are not expressly set out in the PC. Therefore, Swiss courts have always recognized several defenses which are not codified in any written law. The most important one in practise is the defense that the victim had given his/her consent to the act which might otherwise constitute an offense. The most prominent example is medical intervention which, without consent, constitutes an illegal bodily injury. Consent has to be given after due information on all relevant facts and risks. It can be revoked, or given under conditions (as in sports) which are to be respected. Nobody can legally consent to give away his or her life or freedom. Consent to serious bodily harm must serve some social value, as in the case of donating a kidney. Article 114 PC makes killing at the victim's request (euthanasia) an offense.

12. Art. 52 Swiss CO.

D. Criminal Responsibility

1. Age

In Swiss law children under the age of 7 are deemed to have no criminal responsibility and thus cannot be prosecuted. Moreover, special sentencing (and procedural) rules apply to children (7–14) and juveniles (15–18). Before the age of 15, the only available sentencing options are: cautioning, community work or disciplinary sanctions executed by the school, or education measures, such as educational supervision (probation), placement in a foster family or in an appropriate home. Between the ages of 15 and 18, custodial sentences can be imposed up to a maximum of one year.[13] Juveniles can also be placed in borstal-type homes for longer periods. When sanctions available for minors in Switzerland are examined in an international context, they appear to be among the most lenient in the Western World. This is particularly true since there are no exceptions allowing for juveniles to be treated as adults. Nowhere else does the fact of having committed an offense just before or just after reaching 18 have such dramatic implications. Even some special rules applying to offenders between the ages of 19 and 24 years (e.g., provision for committal to a borstal home) do not much mitigate the effects of the age-limit of 18 years. Based on a draft by Professor Martin Stettler of the University of Geneva, Parliament has adopted a new penal law for minors which may come into force in early 2005. It provides for a maximum custodial penalty of 4 years for offenders who are 16 or over at the time of the offence, thus reducing somewhat the importance of the 18 years age-limit.

2. The Insanity Defense

Article 10 PC makes insanity (*Unzurechnungsfähigkeit/irresponsabilité*) an absolute defense, and Article 11 provides for a mitigating circumstance if the defendant was not fully responsible for his act. (In the revised Penal Code, both situations will be treated together in Art. 19 revPC.) Insanity is defined as the temporary or permanent lack of capacity to understand the criminal nature of an act, or the inability to control one's behavior in accordance with one's mind. The criminal responsibility of the defendant is diminished if his capacity to understand or control his behavior was – at the time of the act – temporarily or permanently impaired. Several mental troubles have been recognized as causes of insanity, such as mental illness, feeble-mindedness and serious intoxication through alcohol or drugs. In practise, alcohol intoxication is presumed (though not necessarily assumed, since individual differences in tolerance are being recognized) beyond a blood-alcohol concentration of 0.30 per cent; between 0.20 and 0.30 per cent, partial insanity may be admitted by the court,

13. See M. Boehlen, *Kommentar zum Schweizerischen Jugendstrafrecht*, Berne: Staempfli 1975.

whereas lower levels of blood-alcohol concentration will not usually be considered to be a mitigating circumstance.[14]

Whenever the judge has some doubt about the (full) responsibility of the offender, he must call for a medical expert (in general, a psychiatrist) to examine the defendant (Art. 13 PC/Art. 20 rev PC). Although the judge is not legally bound by the expert's opinion, he or she may not reject his conclusions without good reason, for instance on the basis that the report is contradictory or otherwise flawed (see Ch. 15 V B 3). In such cases, he or she usually will ask for another expert's opinion.

The rules on insanity and diminished responsibility (Art.10–11 PC/Art.19 revPC) do not apply if the defendant had himself induced his condition in order to facilitate the commission of the offence, or while he could foresee committing an offence in this state (according to the *libera actio in causa* rule, Art. 12 PC). In practice, this means that a driver who, before starting to drink, might have been able to foresee that he would drive later that evening has no defense for insanity or reduced responsibility. In cases where the defendant had committed an offense after having induced his full insanity (through intoxication), he will be guilty of a minor offense (Art. 263) even if he did not anticipate committing an offense in that state. In comparison to the legislation in other European countries – such as Italy or France – which never consider alcohol or drug intoxication to be a mitigating factor and sometimes even consider it to be an aggravating circumstance, Swiss criminal law recognizes relatively widely mitigating circumstances for offenders whose responsibility was temporarily impaired due to excessive drinking or drug abuse.

E. Mens Rea

Swiss criminal law is based on the principle *nulla poena sine culpa*, also recognized in the European Convention of Human Rights (ECHR, Art. 6 II). This means that anyone who did not act with *mens rea*, i.e. with 'fault', either intentionally or negligently cannot be found guilty of an offense. Swiss criminal law distinguishes only two forms of guilt: criminal intent (*dolus*, *Vorsatz/intention*) and criminal negligence (*Fahrlässigkeit/négligence*). As a rule, unless the law expressly says otherwise, offenses are punishable only if committed intentionally (18 I PC). Offenses without fault (or strict liability) are unknown in Swiss criminal law. Strict liability is limited to tort where it plays an important role in traffic accidents.

1. Criminal Intent (*Dolus*)

A person acts intentionally when he or she commits an offense with full knowledge of all relevant facts and with intent. Knowledge must include all objective elements of the offense as defined by the PC. Intent is independent of the offender's motive and may include the so-called *dolus eventualis*, i.e. situations where the offender accepts the result of his act as inevitable although he does not really desire it (Art. 12 II revPC). This form of quasi-intent facilitates the proof of intent in situations where the offender acted and simply ignored the inevitable consequences of his behavior. If the risk was relatively high, the conclusion would be that he had 'accepted' (and, thus, willingly induced) the outcome.

14. See Ch. 4.

2. Criminal Negligence

Criminal negligence is defined in Article 18 III (Art. 12 III revPC) under two alternative forms. Conscious negligence (*luxuria*) is the form of guilt where the perpetrator is aware of the risk, but nevertheless acts hoping that the danger will not materialize. It is this hope which distinguishes *luxuria* from *dolus eventualis*. Unconscious negligence (*negligentia*) is the form of guilt where a person is not even aware of the risks his or her behavior might carry for third parties. In both cases, criminal negligence will be assumed only if the defendant could have foreseen, using reasonable precautions, the harmful consequences of the risks he created, and if he did not take the steps required to prevent the outcome. In assessing whether or not the measures taken were sufficient, reference will be made to general standards of precaution as well as to the defendant's personal circumstances. As a rule, the degree of required precaution will be determined by special legislation (such as the Road Traffic Act), *leges artis* (e.g. in cases of medical malpractice), as well as by general standards resulting from previous (bad) experience. Although courts are always at risk of considering risks as 'unreasonable' whenever the results are dramatic, it should be kept in mind that the concept of required reasonable precaution is ultimately dynamic, i.e. developing alongside the increasing standards of technology and accident prevention. Unlike Swiss civil law, criminal law does not distinguish between serious and ordinary negligence, although the sentence will, of course, reflect the degree of the defendant's fault. Similarly, the concept of *recklessness* is unknown in Swiss criminal law.

3. Error of Fact

As knowledge of all relevant facts is required in order to assume criminal intent or criminal negligence, a mistake as to the facts is of great practical importance in criminal proceedings. If a person commits an offense because he or she is ill-informed or has misinterpreted certain facts, he or she will be judged as if the facts were such as he or she had imagined (Art. 19 I PC/Art. 13 I revPC). However, ignoring or misinterpreting relevant facts may be considered to be negligent if the error might have been avoided by taking reasonable precautions. In this case, the defendant might be found guilty of an offense committed by negligence, if any such offense exists under the law (Art.19 II PC/Art.13 II revPC). As a general rule, all errors which are of an essentially *cognitive* nature will fall under Article 19 PC (13 § 2 revPC).

4. Error or Ignorance of the Law

Errors which are essentially of a *normative* nature will fall under Article 20 PC which deals with situations where the defendant ignored or misinterpreted the legal

(criminal) nature of the act. Unlike French, English and American law, which all start from the principle that no one should ignore the law, the Swiss criminal law (following the German model) has traditionally made allowances for such errors. However, this does not mean that anybody could easily invoke an error of this kind. In order to successfully invoke this defense, the defendant has to establish that the error resulted from good reason, such as being given incorrect information from a competent authority, or from the fact that the behavior in question had previously been tolerated by the authorities for some time. In addition, the defendant has to establish that he or she thought of acting lawfully, and not just of avoiding the risk of conviction on technical grounds. If the error was fully justified, the defendant will be fully excused, if not, the error may be considered as a mitigating factor. In practise, Article 20 is relatively often invoked by police officers who, e.g., fired at suspects in situations where the limits of legal police action are blurred, or whenever courts change the interpretation of the law in a sense which is unfavorable to the defendant who thought he or she was acting in accordance with legal practise and thinking. Given the limited discretion Swiss prosecutors have to drop prosecutions (see Chapter 15 IV B 3), many conflicts of this kind have to be settled through defenses based on substantive criminal law.

F. Specific Preconditions of Punishment

Normally an offense is punishable if the requirements as described by law (*actus reus*) have been met by the perpetrator, including the element of fault (*mens rea*). In some exceptional cases, however, further prerequisites must be fulfilled, which are independent of the behavior of the defendant. Thus, offenses in connection with bankruptcy are not punishable unless the perpetrator has been declared bankrupt (Arts. 163–167). Similarly, participation in acts of collective violence (Arts. 133–134) is only punishable if a participant has been wounded or killed, irrespective of whether the defendant himself contributed to that result.

By far the most important example of such a prerequisite is a formal complaint (*Strafantrag/plainte*) from the victim. Offenses only punishable on complaint (e.g. libel, simple assault and property offenses involving damage of less than CHF 300 or USD 230 (EUR 200), Art. 172ter PC) cannot be prosecuted unless the victim files a complaint within three months from the time that he or she learns about the offense and the identity of the suspect. Since prosecution is, as a rule, compulsory (see Ch. 15 IV C 1), making certain offenses, where personal interests are at stake, punishable only after a formal complaint is a way of taking the victim's priorities into account.

G. Periods of Limitation (Prescription)

Unlike Anglo-Saxon law, continental criminal law has only allowed, since the French Revolution, criminal prosecution within certain time-limits (*Verjährung/prescription*). These limits vary according to the seriousness of the offense. Under the influence of Anglo-Saxon legal thinking, these time-limits have been abolished for crimes against humanity such as genocide (Art.101 revPC). For ordinary crimes (felonies) for which the maximum penalty is more than three years, such as theft (Art. 139), fraud (Art. 146), rape (Art. 190 PC) or forgery of documents (Art. 251), prosecution is possible, according to a new amendment which came into force on 1 October 2002, if a conviction (before appeal) is secured within fifteen years following the commission of the offense (Art. 97 revPC). For offenses carrying a maximum penalty of no more than three years, the period of limitation is seven years, and for crimes for which a life sentence can be imposed, thirty years.

Similar rules apply with respect to the execution of sentences (Art. 99 revPC). Here, the time-limits range from a minimum of five years to thirty years for life sentences.

H. Criminal Attempt

Swiss criminal law distinguishes between two degrees of attempts: Completed attempts where the offender has completed the activity, and uncompleted ones where the line of action was interrupted before all steps were accomplished. In all cases of attempts, the judge has discretion to mitigate the sentence. In addition, there is also the category of impossible attempt. In the revised PC, all attemps will be regulated in the same Article 22.

1. Incomplete Attempts

An attempt is considered to be incomplete (*unvollendeter Versuch/tentative simple*) if the offender has started the criminal activity, but ceased before the offense had been completed (Art. 21). The main difficulty is in drawing the line between mere preliminary acts which, in general, are not punishable, and the beginning of the execution of the criminal act as such which constitutes a punishable attempt. According to doctrine and court practise, an attempt is assumed whenever, according to the offender's plan, he has reached the point of no return. In 1982, preparatory acts for some particularly serious crimes have been made punishable under the form of a special offense (see above I C 3). In cases where the offender abandoned the criminal project on his or her own initiative, the judge has unlimited discretion to mitigate the sentence, including abstaining from imposing any punishment.

2. Complete Attempts

An attempt is considered to be complete (*vollendeter Versuch/délit manqué*) whenever the offender has done everything he or she had planned to do in order to commit the offense, although the result which characterizes the offense may not have been achieved (Art. 22). If the perpetrator actively contributed to prevent the criminal result (*tätige Reue/repentir actif*), the judge has discretion to mitigate the sentence.

3. Impossible Attempts

An attempt is considered to be impossible (*untauglicher Versuch/délit impossible*) whenever the offense could technically not be committed against the object in

question, or with the means chosen by the offender (Art. 23 PC). This allows to punish offenders who thought committing the offense, without being able to achieve their criminal project because they acted while mistaking certain facts. In this sense, impossible attempts are a sort of inverse mistake of facts (Art. 19, see above). The judge has discretion to mitigate the sentence or, in special cases, may even abstain from imposing any punishment.

I. Participation

Of the several possible forms of participation in an offense (*Teilnahme/participation*) only two are expressly dealt with in the PC, namely incitement and aiding and abetting. There is no equivalent to 'conspiracy' in Swiss criminal law, although participation in a criminal organization or supporting organized crime became a special offense in 1994 (Art. 260ter). In certain cases, it is an aggravating circumstance to have acted as a member of a gang, e.g. in connection with theft or robbery (Art. 139 § 3.1, or Art. 140 § 3.1 PC). Participation is accessory to the principal offense. It is completed as soon as the principal offense has at least been attempted. In cases where the sentence will be aggravated or mitigated according to specific personal qualities or circumstances of the author, each participant will be punished according to his own acts and circumstances (Art. 26 PC/Art. 27 rev PC).

1. Co-offenders

Several persons committing an offense together, in such a way that each of them takes an equally important part in planning or performing the criminal act, are considered co-offenders (*Mittäter/coauteurs*). This is not dealt with in the PC, but has been developed by legal doctrine and case-law.

2. Indirect Offenders

An indirect offender (*mittelbarer Täter/auteur médiat*) is a person who compels another person to commit an offense or who, through deception, causes another person to commit an offense. The person subject to the deception will typically have no knowledge of or misconceive the relevant facts and thus act without *mens rea*. Examples include cases where a police officer arrested a person on the basis of suspicion which was fabricated by another party, or where an accountant enters false data into a company's books because he or she does not understand the true nature of certain operations. This is not codified in Swiss law, but has been developed by doctrine and case law.

3. Incitement

Instigation (*Anstiftung/instigation*) consists of any form of persuasion by which another person is led to commit an intentional offense (Art. 24 PC). The instigator is subject to the same punishment as the principal offender (*Haupttäter/auteur principal*). Attempted instigation is punishable if the offense which the instigator tries to suggest is a felony.

4. Aiding and Abetting

Complicity (*Gehilfenschaft/complicité*) is any form of assistance, including psychological support, of a principal offender before or while he or she is committing the offense (Art. 25 PC). The sentence for an accomplice will be the same as that for the principal offender, but with some mitigation. Assistance after the offense has been achieved is generally no longer punishable as complicity, but the offender may be punishable as an accessory after the fact, either for receiving stolen goods (Art. 160, *Hehlerei/recel*), for 'obstruction of justice' (Art. 305, *Begünstigung/entrave à l'action pénale*), or for money laundering (Art. 305bis).

5. Companies

Companies and other legal persons were traditionally not punishable under continental criminal law, since punishing an artificial construct was considered to be contrary to the principle *nulla poena sine culpa*, given that only individuals can act with fault. Under heavy international pressure, particularly from Anglo-Saxon countries where strict liability is not uncommon,[15] Switzerland and other continental countries have widened the possibilities to hold companies criminally liable. In an amendment to the PC which will become legally effective in 2004, companies may be held criminally liable if their internal organization did not allow determination of individual responsibilities in the decision-making process (Art. 102 revPC). Since cases like these may not be too frequent, things will probably not change very much. It should be noted, however, that the PC (in Art. 59) offers very wide possibilities to confiscate criminal profits regardless of the fault of the person or company who owns them (see below IV C). Therefore, the principle that criminal profits should not be left in the hands of criminals or their proxies is almost completely achieved under continental criminal law, although companies are not as widely punishable as under Anglo-Saxon law. It should also be noted that making shareholders (indirectly) criminally liable for offenses committed by the management may be unfair, particularly if they were unable to influence the internal decision-making process.

6. Offenses Committed by the Press

In order to preserve the freedom of the press, Article 27 PC/Article 28 revPC establishes specific rules as to the responsibility of participants. As a rule, the author of a text is solely responsible. However, the PC also protects the anonymity of an author. The editor's premises may not be searched in order to discover the identity. Instead, the editor or, if there is no editor, the printer may be held responsible. Nor can the

15. A. Ashworth, *op. cit.* (fn. 10), pp. 183–191.

media be compelled to disclose the identities of their sources, except in cases involving very serious offenses (Art. 27bis PC, Art. 28a revPC).

IV. Criminal Sanctions

The Penal Code, although based upon ideas which date from the end of the nineteenth century (see above C 1) provides for a large variety of criminal sanctions. The following information will be limited to sanctions against adult offenders (for minors, see above III D 1). The revised PC, which will probably come into force in 2005, will substantially change the system of sanctions. The main categories will remain custodial and financial penalties on one hand, and measures of security or rehabilitation on the other. In addition, community service may become one of the more frequently imposed sanctions.

A. Sanctions

According to the revised PC, sanctions will be day-fines, community service, and custodial sanctions.

Capital punishment is prohibited by the Constitution (Art.10 I) and by Protocol No. 6 to the European Convention of Human Rights, ratified by Switzerland in 1987. Although the death penalty was removed from the PC in 1942, executions were nevertheless allowed until 1992 under the Military Penal Code for a number of offenses committed in wartime; seventeen death sentences were executed during the Second World War.[16] In practise, the death penalty had already vanished under the former cantonal codes, although rare executions continued until 1940. This is perhaps one of the reasons why public opinion is, compared to other countries, very unfavorable towards capital punishment, as a series of surveys conducted over 20 years have shown.[17]

1. Custodial Sanctions

Traditionally, the Penal Code provided for three degrees of custodial sanctions: penal servitude (*Zuchthaus/réclusion*), imprisonment (*Gefängnis/emprisonnement*) and detention (*Haft/arrêts*). However the differences between these three degrees have gradually vanishd over the last 50 years. Therefore, the revised PC will only provide for one type of custodial sanction. The important innovation will be that its duration is to be of at least six months. This will dramatically change Switzerland's sentencing structure. Until now, short custodial sentences were the favored mechanism of disposal, contributing to one of the most lenient sentencing structures in Europe.[18] According to proponents of the reform (inspired largely by late 19th century debates), short custodial sentences are responsible for damaging the prospects of rehabilitation and therefore should be avoided whenever possible. Although the revised PC makes it possible to impose custodial sentences of less than six months, whenever the prospects that an 'alternative' sanction (fine or community service) will be successfully served are too slim, judges will, in the future, have to impose a fine on first-time offenders (except, of course, in the case of serious crimes carrying a custodial sentence of more than 6 months), followed by community service (in the case of repeat offenders), and, finally, custodial sanctions as a last resort. So far, custodial sanctions of up to 18 months were suspended in about 3 out of 4 cases. In the future it will be possible to suspend sentences of up to two years (Art. 42 revPC) whenever the risk of defendant re-offending seems reasonably moderate. This is, according to current practise, usually assumed if a defendant has no more than two previous convictions. In the future, it will also be possible (contrary to the current system) to suspend sentences *partially* (Art. 43 revPC). According to this system, the convict will have to serve one part of his term in custody, while another part will be suspended.

In the past, immediate short custodial sentences were often executed under the form of 'half-detention', meaning that the convict had to stay in prison overnight and at the weekend, but continued doing his usual job or community service during the day. These alternative ways of executing custodial sentences have reduced entries into institutions from approximately 12,000 per year in the 1980s to about 7,000 after 1995. Since sentences have become increasingly longer over the years, this drop has not translated into lower incarceration rates. Indeed, Switzerland's incarceration rate has remained around or below 90 per 100,000 population over the last 20 years. However, the drop of entries into institutions may have contributed to reducing the proportion of Swiss nationals in prisons, since they disproportionately used to serve short sentences for drunken-driving, drug abuse and other minor offenses. The proportion of foreign nationals in Swiss prison has increased, since 1988, from 33 per cent to 59 per cent in 2001.[19]

Prisoners having served two thirds of their custodial sentence have until now been eligible for conditional release or parole (Art. 38 para. 1.1 PC, *bedingte Entlassung/libération conditionnelle*). In the future, parole will be maintained and will be – 'exceptionally' – available after one half of the sentence has been served (Art. 86 I and Art. 4 revPC). This reform will certainly produce a short-term drop in the number of persons detained in institutions, at least if the 'exception' becomes more or less the rule. If this happens, however, judges are likely to react by taking earlier release into account when determining sentences.[20] It is, therefore, rather difficult to anticipate the precise effects of this reform on the size of the future prison

16. P. Noll, *Landsverräter, 17 Lebensläufe und Todesurteile, 1942–1944*, Frauenfeld/Stuttgart: Huber 1980.
17. M. Killias, *Grundriss der Kriminologie – Eine europäische Perspektive*, Berne: Staempfli 2002, p. 423.
18. *European Sourcebook* (*op. cit*, note 10), pp. 149–166. Sentences have remained remarkably stable over the last twenty years (M. Killias, M. Aebi, A. Kuhn and S. Rônez, 'Sentencing in Switzerland in 2000', *Overcrowded Times* 10/6–1999, pp. 1–20), as well as the (moderate) incarceration rate of approximately 90 per 100,000 (A. Kuhn, *Détenus: Combien? Pourquoi? Que faire?*, Berne: Haupt 2000).
19. M. Killias, *Grundriss*, *op. cit.* (note 17), p. 529.
20. A. Kuhn, *op. cit.* (note 18), p. 160; M. Killias, *op. cit.* (note 17), pp. 526–528.

population. Parolees can be put under the supervision of the Parole Board, although in practise this measure seldom restrains freedom of movement, usually taking the form of support from social workers. Unlike America where re-incarceration mostly occurs for parole violations, former prisoners hardly ever re-enter institutions unless they have been responsible for the commission of a new offense. Over a five year follow-up period, approximately 40 per cent of former inmates were sent back to prison for having committed a new offense.[21]

2. Fines

Until now, fines have been imposed in the form of fixed amounts and, depending on the judge's discretion, could vary between CHF 1 and 40,000 (approximately USD 30,000). According to the revised PC, the imposition of fines will be a two stage process (Art. 34 revPC): First, the judge will have to determine, according to the seriousness of the offense, the number of days to be 'served'; then, he or she will have to establish the defendant's daily net income. By multiplying the daily income by the number of days, he will determine the sum to be paid by the defendant. According to the new system, the minimum daily income may range from 1 cent to CHF 3,000 (approximately USD 2,300).

This new system is designed to bring the amount of the fine more in line with the defendant's financial situation (as in Finland, Germany, Austria and some other countries). Parliament was careful to set the maximum daily income high enough to include very wealthy defendants. Despite this, however, there is still the risk that many offenders who have no (known) income, may receive either ridiculously low or ridiculously high fines. In Germany, Austria and other countries which rely on this system, the number of defendants who end up 'paying' their fine by going to prison has reached embarrassing proportions. The effect has been to socially redistribute rather than to abolish short custodial sentences. It remains to be seen how the new Swiss system will be able to deal with these possible dilemmas.

Unpaid fines will continue to be converted into other sanctions. Under the new system, fines are first to be converted into community work, if the defendant can reasonably be expected to serve the sanction under this form. As a last resort, the fine will be converted into a confinement order, where the defendant will pay one day in prison per day-fine. In practise, however, judges will be able to avoid these complications by imposing custodial sentences of more than 6 months at the outset. Since virtually all offenses provide for a maximum penalty far beyond that limit (see IV D 1 below), there might be few technical obstacles to such a shift in the sentencing structure, as has been observed in Portugal, Greece,[22] and Spain after short custodial sentences were substituted with 'alternative' sanctions.

In the future, day-fines can be suspended under the same conditions as custodial sentences (Art. 42 revPC). The main condition will be that the offender's predicted risk of future offending is low. In practise, this is likely to be assumed whenever the offender has no more than two previous convictions.

21. R. Storz, *Rückfall nach Strafvollzug*, Berne: Federal Office of Statistics 1997.
22. A. Kuhn, *op. cit.* (note 18), pp. 45–49.

3. Community Service

Community service was introduced as an experimental form of executing short immediate custodial sentences in 1991. In one cantonal experiment (Vaud), offenders who had been sentenced to short custodial sanctions were even randomly assigned to either community service or imprisonment.[23] According to Article 37 revPC, community service will become the main sanction which judges will be able to impose whenever they feel that a penalty of less than 180 days (under the day-fine scheme or in custody) will be appropriate. In that case, four hours of community work will correspond to one day (in custody or to one day-fine). If the defendant does not serve his community work within two years, the sentence will be converted into a fine (calculated according to the day-fine system) or into an immediate custodial sentence. Community work is unpaid. It is to be performed under the supervision of the correctional service, whenever feasible in a hospital or any other institution serving the public interest. Community service can be suspended under the same conditions as custodial sentences or fines (Art. 42 revPC).

4. Electronic Monitoring

Electronic monitoring is currently only available in a few cantons as an experimental form of executing short immediate custodial sentences. This is likely to remain the case under the new system, since the revPC will continue to allow cantons to experiment with innovative sanctions (Art. 387 IV revPC). Currently, a controlled experiment (comparing electronic monitoring and community service) is ongoing in the French-speaking part of Switzerland.[24]

B. Measures against Persons

1. Therapeutic Measures and Incapacitation (Internment)

For adults of all ages, the Penal Code created special measures with a view to rehabilitating mentally ill or mentally impaired offenders (Art. 59 revPC), alcoholics and drug addicts (Art. 60 revPC) and young offenders who were under 25 years at the time they committed the offense (Art. 61 revPC). Some of these measures are non-custodial (Art. 63 revPC). The others will be pronounced in addition to a term of imprisonment; however, this term does not determine the time the offender spends in custody. The person must be interned in a specialized instiution (Art. 58

23. M. Killias, M. Aebi and D. Ribeaud, 'Does Community Service Rehabilitate better than Short-term Imprisonment? Results of a Controlled Experiment', *The Howard Journal of Criminal Justice* 39/1 (2000), 40–57.
24. M. Killias, M. Aebi and D. Ribeaud, 'Learning Through Controlled Experiments', *Crime & Delinquency* 46/2 (2000), 233–251.

revPC). The duration of confinement is five years for adults, four years for young adults below 25, and three years for alcohol or drug addicts (Arts. 59 IV, 60 IV, 61 IV revPC). However, this period can be extended to 6 years for young adults and alcohol or drug addicts, and indefinitely for adults. The precise duration of confinement will be largely determined by the (psychiatric) experts (Art. 62d revPC). In the event that it is shorter than the duration of the custodial sentence imposed, the defendant will have to serve the surplus before being eligible for parole (Arts. 57, 62b III revPC). Interestingly, the judge can impose a therapeutic measure (in custody, Art. 59 revPC) later, i.e. during the execution of a custodial sentence; this hardly seems compatible with the maxim of *res iudicata*, i.e. the principle according to which definitive decisions (including sentences) should not be reviewed later. If the defendant is found guilty of a violent or particularly serious crime (for which he might be sentenced to a maximum penalty of at least 10 years), and if it is likely that he might commit more similarly serious offenses in future, the judge can impose a measure of incapacitation (internment, Art. 64 revPC). The duration of this measure of confinement is not time limited; it just depends on the risks of future re-offending (Art. 64a revPC).

The recent reform has considerably reshaped therapeutic and incapacitative measures. It seems likely that such measures, which are, under the narrower conditions of existing law, only rarely used, will become quantitatively more important. It is also highly probable that these measures will result in an increase in the prison population.

2. Other Measures (Arts. 66–68 revPC)

If the offender has committed an offense in connection with his or her professional activities or his or her business, the judge may bar him or her from exercising this job or business for a period of up to five years, starting from the time he or she is released on parole (in the case of a custodial sentence). If the offense had been committed while the defendant was driving a car, the judge may revoke his or her driver's license for a period of up to five years. These measures can only be imposed in addition to an ordinary sanction (custody, day-fines, community service, or any of the incapacitative or therapeutic measures).

C. Measures against Objects

Objects which are the product of a criminal activity (for example, counterfeit money) which were used during the commission of an offense or which were designed for the purpose of committing an offense, may be confiscated if they constitute a danger to the safety of persons or to public security (Art. 58 PC/Art. 69 revPC, *Einziehung/confiscation d'objets*). According to Article 59 PC (70 revPC), the same rule applies to valuables. They can also be confiscated from third parties. This rule tries to make sure that neither an offender nor a third party will benefit from the commission of a crime.

D. Sentencing Rules

1. General Rules

As a rule, the Swiss Penal Code allows judges discretion in determining sentences. In some extreme cases, such as the making of false accusations (Art. 303), the sentence may vary from three days to twenty years of custody. Aggravating and mitigating circumstances merely serve to widen the frame. Under both the current and the revised PC, several simultaneous verdicts will not lead to separate sentences, but to one sentence which will be determined by the most serious offense. Irrespective of the number of additional offenses which the defendant has been found guilty of, the maximum penalty will be no more than 50 per cent higher than the ordinary maximum for the most serious offense (Art. 68 PC/Art. 49 I revPC). Sentencing decisions are not structured by guidelines, although some informal standards exist at local level for common offenses. By increasing the requirements concerning the reasons for the sentences, the Federal Supreme Court has, in recent years, tried to steer lower courts into being more consistent in their sentencing decisions. Article 50 revPC will even oblige judges to indicate not only the aggravating and mitigating circumstances that they considered, but also to indicate the weight given to each factor. This might lead, in the long term, to greater standardization of sentencing decisions.

2. Fault, Mitigating and Aggravating Circumstances

According to Article 47 revPC (formerly Art. 63), the sentence should reflect the seriousness of the defendant's motive, his past and his personal circumstances. The revPC abolishes the rules on aggravating circumstances (with the exception of the rule on plurality of verdicts, Art. 49 revPC), concentrating instead on mitigating factors (Art. 48 revPC). Whenever the judge finds that some mitigating factor should be considered, he will be free to set a sentence below the minimum provided by the SPC for the offense at stake (Art. 48a revPC).

E. The Execution of Custodial Sentences

Each canton is responsible for the execution of custodial sentences. The revPC merely imposes a limited number of general rules (Arts. 74–92 revPC). In general, both sentences and prison regimes are rather liberal in Switzerland – even in high security prisons.

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Chapter 15
Law of Criminal Procedure*

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I. Laws on Criminal Procedure

A. General Remarks

The former Federal Constitution, while vesting the competence to legislate in the field of substantive criminal law in the Confederation, left the competence with respect to criminal procedure with the cantons (Art. 64bis). The new constitution which came into force on 1 January 2000, gives the Confederation powers to unify the law on criminal procedure (Art. 123 para. 3). Since this new federal law on criminal procedure has not yet been adopted,[1] all 26 Swiss Cantons and half-cantons continue to use their own codes of criminal procedure. Although these codes share many common features, particularly in light of the growing influence of the European Convention of Human Rights, they vary according to their principle source of inspiration, with the French, German and old Austrian laws being the most influential models over the last two centuries. On the federal level, a Federal Code of Criminal Procedure (FCCrP), a Federal Code of Military Criminal Procedure and a Federal Administrative Penal Code regulate procedures before federal courts and authorities.

Over the decades, cantonal legislation in the field of criminal procedure has been considerably reshaped by federal laws passed in order to standardize the application

* This chapter is intended to be an introduction to Swiss criminal law for Anglo-Saxon readers. Therefore, several comparisons will be made with American and English due process rules in order to highlight the characteristics of Swiss criminal procedure. Sources will only be given if they are in English, or if they are highly specific. A list of introductory texts to Swiss criminal procedure will be given at the end of this chapter. The authors wish to thank Sarah Summer, LLB, assistant at the University of Zurich Law School, and Cynthia Tavares, Home Office Research, Development and Statistics Directorate, for their invaluable help with English.

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of the Swiss Penal Code (PC), as well as by principles developed by the Federal Supreme Court. Examples are the rules on the administration of evidence (Art. 249 FCCrP, *freie Beweiswürdigung/principe de la libre appréciation des preuves*) which oblige judges to give due consideration to all evidence which may be relevant (including, e.g. hearsay evidence) without any limitations resulting from formal rules (e.g. requiring witnesses to give evidence under oath). Also important is the principle that any cause might be subject to a re-trial in the event that new evidence is discovered which was not available at the first trial (Art. 397 PC/385 revPC), and the rule, developed by the Federal Supreme Court, according to which prosecutors (and the police) may not use their discretion in a way which might *de facto* 'decriminalize' conduct which constitutes an offense under federal criminal law (i.e. mainly the PC).[2]

The most important area of *de facto* unification of the law of criminal procedure is, without doubt, the protection of human rights. While the former Federal Constitution contained a very limited list of fundamental rights, the Federal Supreme Court created an impressive series of case law extending the protection of human rights. The European Convention on Human Rights, which sets out important procedural guarantees, particularly in Articles 5 and 6, and which Switzerland ratified in 1974, has further contributed to the unification of the rules on criminal procedure.[3]

B. Constitutional Level

1. The Federal Constitution

The new federal constitution contains due process guarantees which are almost identical to those set out in the European Convention on Human Rights. These include the guarantee of fair, speedy decision by independent judges in all procedures, a right to have all convictions reviewed on appeal, a right to counsel (including those persons deprived of financial resources), a right to a prompt hearing by a judge in case of pre-trial detention, and the presumption of innocence (Arts. 9, 29–32). Given this extensive catalogue of human rights, the cantonal constitutions (which contained most of these guarantees as cantonal principles for more than a century) are no longer of great relevance in this domain.

2. Readers should be aware that Swiss prosecutors have, even beyond this rule and compared to countries with the expediency principle (England, France, the Netherlands, the USA), very little powers to drop proceedings (for details, see IV B 3 below).
3. S. Trechsel, *Die europäische Menschenrechtskonvention, ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte*, Bern: Staempfli 1974; S. Trechsel, 'Der Einfluss der Europäischen Menschenrechtskonvention auf das Strafrecht und Strafverfahrensrecht der Schweiz', *Zeitschrift für die Gesamte Strafrechtswissenschaft* (German Criminal Law Review) 100 (1988), 673; R. Levi, 'Der Einfluss der Europäischen Menschenrechtskonvention auf das kantonale Prozessrecht, Erwartungen und Ergebnisse, *Zeitschrift für Strafrecht* (Swiss Criminal Law Review) 106 (1989), 225; L. Rouiller, 'L'effet dynamique de la Convention Européenne des droits de l'homme', *Zeitschrift für Strafrecht* (Swiss Criminal Law Review) 109 (1992), 233.

2. The European Convention on Human Rights (ECHR)

The ECHR is directly applicable by Swiss courts and may be considered to be a source of constitutional law. As a rule, it may be said that the Convention's guarantees coincide with those in Swiss constitutional law. As Switzerland has accepted the individual's right of petition (Art. 34 ECHR), issues of federal and cantonal criminal procedure may finally be brought before the Court in Strasbourg. In recent years, this has occurred quite frequently.

C. Statutes on Criminal Procedure

1. Federal Statutes

On the federal level, there are four statutes of major importance in the field of criminal procedure. The Federal Law on the Judicial System (FLJS, *Bundesgesetz über die Organisation der Bundesrechtspflege/loi fédérale d'organisation judiciaire*) contains basic rules of procedure for the Federal Supreme Court. The Federal Code of Criminal Procedure applies to offenses prosecuted by federal authorities, such as crimes directed against the Confederation, its institutions or a major national interest (Art. 340–340bis PC), as well as to appeals brought before the Federal Supreme Court in criminal matters (Arts. 268–278 FCCrP). The Federal Code of Military Criminal Procedure applies to cases dealt with by the military criminal justice system. The Administrative Penal Code deals with the prosecution of 'administrative offenses', such as offenses against customs laws and federal tax laws. It establishes an elaborate system of co-operation between administrative and judicial authorities with the defendant retaining the right to have his or her case reviewed in court (Art. 21 para. 2).

2. Cantonal Codes of Criminal Procedure

Cantonal codes of criminal procedure present a large variety both in form and content. While some of the smaller cantons (e.g. Zug) have codes of fewer than one hundred articles, some of the major cantons (e.g. Zurich, Vaud, Geneva) have very elaborate codes of over five hundred articles. As a rule, the codes tend to set out general rules in order to avoid repetition, thus attaining a volume of some three to four hundred articles. Unfortunately, there is no central edition of these texts, and it is quite difficult to keep track of the frequent amendments.

D. Case Law and Legal Doctrine

1. Case Law

Since the Swiss law of criminal procedure is so scattered, case law, with the exception of leading cases ruled by two sections of the Federal Supreme Court, is difficult

to locate. At this level, issues of interpretation of substantial criminal law are dealt with by the Criminal Law Chamber (*Kassationshof/Cour de cassation*), whereas issues of procedural law (related to due process and human rights) are dealt with by the Constitutional Law Chamber.

2. Legal Doctrine

Despite the lack of uniform legislation on criminal procedure, issues of criminal procedure and due process have found considerable interest among scholars over the last three decades. There are several excellent introductions to the law of criminal procedure, often written from a comparative perspective. In this sense, a large variety of rules and the necessity to develop a comparative perspective may have been a stimulating element. Variety also offers the opportunity of learning from the experiences of other cantons.

II. The Criminal Justice System

A. Prosecuting Authorities

The term 'prosecuting authorities' (*Strafverfolgungsbehörde/autorité de poursuite*) is used here in a broad sense: it includes the police (*Gerichtliche Polizei/police judiciaire*), investigating authorities (*Untersuchungsbehörde/autorité d'instruction*), prosecuting authorities in the narrow sense (*Anklagebehörde, Staatsanwaltschaft/ministère public*) and authorities of indictment (*Ueberweisungsbehörde, Anklagezulassungsbehörde/autorité de renvoi, autorité de mise en accusation*).

1. The Police

The police are generally the first authority to deal with an offence. It is their task to ascertain whether an offense was committed, to secure evidence and to discover the whereabouts of a suspect. Whereas, according to theoretical positions, they generally should not lead the investigation, in practise they do so because they are often in a much better position to conduct these operations.

2. The Investigating Authorities

In most cantons before 1950, the investigation used to be handled by a district governor (*Statthalter/préfet*), i.e. an executive authority whose origins date back to the *Ancien Régime*. Over the 19th century the French (and Austrian) system(s) of the investigating judge (*Untersuchungsrichter/juge d'instruction*) became more and more popular, particularly in the French-speaking cantons. At the same time, the cantons of Zurich and Basel adopted the German system of the *Staatsanwalt* (prosecutor) with one or more district prosecutors (*Bezirksanwalt/district attorney*). In many respects, these magistrates (often elected by the voters of the district) are comparable to American district attorneys, although they act under the authority of a cantonal prosecutor who is ultimately employed by the cantonal government. Since these investigating magistrates have powers to issue arrest and search warrants, the question came up whether they can be considered to be independent judges (in the sense of Art. 5 (3) ECHR). The European Court of Human Rights initially answered affirmatively,[4] but subsequently reversed this ruling in 1990.[5] Over the following years, all cantons changed their systems in order to comply with the requirements of the ECHR. In cantons with a French system (having independent investigating judges), no change was needed, whereas those with the District Attorney system had to provide for the possibility of an appeal to a court in all matters of arrest and warrants. The draft of the future federal code of criminal procedure will probably opt for the German *Staatsanwalt* model.

3. Cantonal Prosecutors

The institution of a public prosecutor originated in France and was introduced in Switzerland in the early nineteenth century. The organization and function of this authority varies across cantons. In every jurisdiction the public prosecutor (*Staatsanwalt/procureur district*), although appointed by the cantonal government, is expected to exercise his or her functions objectively and with due independence. In most cantons, the cantonal prosecutor (often called *Generalstaatsanwalt/procureur général*) supervises the activities of district attorneys. Usually, this magistrate has the ultimate power to drop prosecutions (*Einstellungsbeschluss/ordonnance de classement*). Once the investigation has been completed, he will present the case for the prosecution before courts.

4. The Authority of Indictment

With regard to the authority of indictment, a wide variety of solutions can be found. In several cantons (e.g. Berne, Thurgau, Neuchatel, Geneva), a special Bench of justices (*Anklagekammer/chambre d'accusation*) acts as the authority of indictment. Its powers are comparable to those of the American Grand Jury.

B. Trial Courts

During the 19th century, many cantons adopted the jury system which, at that time, was seen as a prerequisite to democracy. Over the 20th century, this optimistic view has widely faded away, and jury trials are increasingly seen as an unpredictable element in the criminal procedure. Therefore, today, in most cantons trials are conducted in district courts where between one and three professional judges sit with two to four lay judges. At the trial (*Hauptverhandlung/débats*), preliminary questions are dealt with first. Then the indictment is read out and the evidence is

4. ECtHR, *Schiesser v. Switzerland,* judgment of 4 December 1979, Series A, no. 34.
5. ECtHR, *Huber v. Switzerland*, judgment of 23 October 1990, Series A, no. 188.

heard – questions will at least be put to the defendant in order to ascertain the facts and his personal background. The file is made available to the judges and often constitutes the main piece of evidence. After the pleadings, the defendant has the right to make a final statement. The court then deliberates *in camera*. Finally, the verdict and the sentence (which is set during the same hearing) will be communicated, along with a summary of the court's considerations. The ruling with the full reasons, usually drafted by the court clerk and the presiding judge, will later be communicated in writing.

III. The Parties to the Criminal Proceedings

A. *Preliminary Observation*

The notion of 'parties to the proceedings' usually refers to two or more participants opposing each other in the pursuit of their individual interests. In Swiss criminal procedure, this term is regarded as inappropriate with regard to the public prosecution. In fact, the public prosecutor does not actually 'oppose' the defense, but his role is, not unlike an *amicus curiae*, to intervene in the sole interest of preserving law and justice. Prosecutors and the police all have the duty to also investigate facts which might be favorable to the defendant. If they fail to do so, they may be punishable under Article 312 PC ('abuse of powers'/*Amtsmissbrauch/abus d'autorité*).[6] Therefore, it is not unusual for prosecutors to file an appeal in the interest of the defendant, or to call for a new trial of a person who they later conclude (on the basis of new evidence) was indeed innocent. As a further consequence, the court will not be presented with files from the prosecutor and the defense counsel. Instead, all relevant documents collected during the investigation – no matter who introduced them into the case – will be presented to the court. In practise, however, the prosecution will generally be more sympathetic to the victim than to the defendant.

B. *The Defense*

By 'defense', we refer to both the defendant (*Beschuldigter, Angeschuldigter, Angeklagter/prévenu, inculpé, accusé*) and counsel (*Verteidiger/défenseur*).

1. The Defendant

The defendant's position in criminal proceedings is twofold. On the one hand, he or she is to be regarded as an active subject who benefits from the presumption of innocence. He or she has the right to be heard, but also the right to present evidence, to put questions to witnesses and to appeal. On the other hand, the defendant is also subject to investigatory measures, such as finger-printing, DNA analysis, and blood

6. There were several cases where prosecutors themselves were prosecuted and convicted for not having disclosed evidence which might have been favorable to the defendant (including mitigating circumstances).

test, and may also have to accept coercive measures such as arrest, pre-trial detention, searches or wire-tapping. Such interferences with fundamental rights must be based on the law and respect the limits of proportionality. The defendant is under no obligation to contribute to the prosecution, and no pressure may be applied in order to obtain statements. Devices such as the lie detector or methods like drug analysis are inadmissible irrespective of whether or not the defendant consents (see also VI, below). The defendant is neither obliged to answer questions nor to tell the truth.

2. Counsel

According to Article 6(3)(c) ECHR everyone subject to a criminal charge has the right to legal assistance by a counsel of his own choice. This right is generally granted in Switzerland, although not necessarily before the first police interrogation (on Miranda warnings, see V B 1). On the other hand, the defendant has no discretion to refuse legal assistance. In some cases, counsel may be imposed, for example if the prosecutor pleads orally before the court in person.[7] If the case is sufficiently complex or serious, e.g. if there is the likelihood that the defendant will receive an immediate custodial sentence, the accused person may be granted legal aid, i.e. he or she will be awarded a counsel, if possible of his or her own choice. These possibilities have been extended after a ruling of the European Commission and the Court of Human Rights which found the Swiss rules to be too restrictive.[8] It is the task of counsel to act solely in the legitimate interest of the client by watching over the legality of the proceedings and taking all lawful steps with a view to obtaining the best possible result. Ethical guidelines of bar associations will further define counsel's role; for example, telling a lie or presenting facts which a lawyer knows to be false is considered unethical. The defendant ought, at all times, to be in a position to consult his or her counsel in private. Swiss law is still not entirely satisfactory in this respect, as many cantons provide for limitations on this right immediately following arrest, a practise which has been found to be in violation of the Convention by the Strasbourg organs.[9]

Unlike American defense lawyers, Swiss lawyers usually do not conduct their own investigation, but they may request that the police (or the investigating judge or district attorney) examine hypothetical facts which might be favorable to the defense. Since the police and all magistrates (including courts) are in any case obliged to investigate evidence which might potentially be favorable to the defense, the role of defense lawyers is not as crucial in Swiss (and generally continental) criminal procedure as under Anglo-Saxon law, or in European civil proceedings. There are no rules of disclosure, since defense counsel have full access to the prosecutor's file from the early stages of the investigation;[10] on the other hand, defense lawyers are

7. In routine cases, prosecutors send the complete file to the court, but do not attend court hearings. It will then be the presiding judge's role to hear witnesses and the defendant.
8. ECtHR, *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A, no. 205.
9. ECtHR, *S. v. Switzerland*, judgment of 28 November 1991, Series A, no. 220; see also ECtHR, *Schönenberger and Dumaz v. Switzerland*, judgment of 29 June 1988, Series A, no. 137.
10. The right to see all relevant documents and to be present at all hearings of witnesses, experts and other parties during the pre-trial investigation has always been considered as part of the right to be heard or, more generally, as a prerequisite of *due process*.

expected to draw the prosecutor's attention to possibly favorable (or mitigating) circumstances in order to allow such facts to be investigated before trial. For this reason, the trial is not so controversial as it is under the Anglo-Saxon system. The only surprise may come from a witness who does not relate the expected story.

C. The Victim

While everyone has the right to report (*anzeigen/dénoncer*) an offense to the prosecuting authorities, only persons who have personally been victims of an offense have *locus standi* in criminal proceedings. In 1993, a law on the protection of victims came into force, considerably extending the position of victims of violence (in a broad sense) in all kinds of procedures. In particular, it offers victims wide legal remedies to press for the prosecution of suspects (and to oppose decisions not to prosecute). It protects victims in their role as witnesses (from undue interrogation in court or during a confrontation with the alleged offender), and it obliges criminal courts to hear related civil claims for damages.[11] Victims of offenses against the person are to be informed about all relevant steps of the procedure, and they are entitled to act as a party at the trial (this includes the right to appeal against any decision which might interfere with their right to civil compensation).[12]

IV. Governing Principles of Criminal Proceedings

A. Preliminary Observation

In criminal procedure, legal doctrine has identified a certain number of governing principles. In the present chapter, general principles governing procedure (B), and principles concerning trial hearings (C) will be presented.

B. General Principles

1. The 'Principle of Instruction'

The 'principle of instruction' (*Instruktionsmaxime, Ermittlunsgrundsatz/principe d'instruction*) – as opposed to the 'principle of negotiation'[13] – applies in criminal matters and imposes a duty on all authorities involved in criminal proceedings to search for the truth. As a result, even courts are not bound by the evidence brought before them by the 'parties'. Plea-bargaining is thus, with very few exceptions, excluded (see VII B below).

2. The Right to be Heard

No disadvantageous decision may be taken unless the person concerned has been offered an opportunity to explain his or her point of view (*rechtliches Gehör/droit d'être entendu*).

3. The Principles of 'Legality', 'Opportunity' and '*Ex-officio*'

As has been explained above (I A), offenses will be prosecuted as soon as the prosecuting authority reaches the conclusion that an offense might have been committed and irrespective of the victim's wishes. This is the German-style principle of 'legality' (or of compulsory prosecution) which is related to the '*ex officio*' principle. This principle implies that prosecution takes place without the consent of the victim or any other party. There are some exceptions to the '*ex officio*' principle, since a number of offenses directed against private interests are prosecuted upon complaint only (see Ch. 14 III F), and prosecution of certain political offenses requires the consent of the Federal Government (Art. 105 CCrP).

In the vast majority of Swiss cantons, prosecuting authorities are required by law to bring a charge whenever there are sufficient grounds to suspect a person of having committed an offense (*Legalitätsprinzip/système de la legalité des poursuites*). A prosecutor (or police officer) who drops proceedings despite the existence of sufficient ground to suspect a person of having committed an offense, will be punishable (as a kind of accessory after the fact) under Article 305 PC ('obstruction of justice'/*Begünstigung/entrave à l'action pénale*). Several convictions over the last years show that this is not a merely theoretical risk. The opposite principle of 'expediency' (*Opportunitätsprinzip/système de l'opportunité des poursuites*) which is to be found in Geneva (as well as in neighboring France) leaves the public prosecutor wide discretion to drop a charge (classement). Currently, the expediency principle is becoming increasingly popular, particularly within the revised PC, where Article 53 will permit the prosecution to drop charges after reparation and in connection with drug offenses (following the Dutch model, Switzerland is considering adopting a system of de-facto-decriminalization of the production, trade, and consumption of cannabis).

4. Accusatorial and Inquisitorial Elements in Swiss Procedure

In an accusatorial system, the tasks of prosecuting and of determining a case on the merits are strictly separated, while in the inquisitorial system the judge also investigates the facts. In Switzerland, pre-trial proceedings mostly follow the inquisitorial system, whereas the accusatorial model prevails at the trial stage. In practise, however, prosecutors do not usually appear at hearings (see III B 2 above), and the defendant as well as witnesses are primarily examined by the presiding judge.

11. In the event that the offender is unable to pay compensation, a comparatively generous compensation scheme has been set up in order to award all victims of violence reasonable amounts of damages.
12. For details, see M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Nijmegen 2000. According to this excellent overview of all European victim protection schemes, Switzerland's law seems to be among the most favorable to victims.
13. Called *Verhandlungsmaxime* or *Dispositionsmaxime*, or *principe des débats* in French (*quod non est in actis non est in mundo*) which prevails in civil procedure.

C. Trial Procedures

1. The 'Principle of Immediacy'

The 'principle of immediacy' (*Unmittelbarkeitsprinzip/principe de l'immédiateté*) requires evidence to be taken 'live' by the court (e.g. witnesses must be heard in person and no statements made during preliminary investigation may be read out). This principle prevails in jury trials, which, however, are rather exceptional in modern Swiss procedure. Other courts rely widely on evidence taken during the pre-trial stage of criminal proceedings. While, at first sight, this practise appears questionable,[14] it must be borne in mind that it applies mostly in cases where the defendant pleads guilty,[15] and that contested evidence (e.g. testimony which is challenged by the defendant) is usually presented again at trial. Furthermore, the defendant and his counsel have the right to be present whenever witnesses or experts are heard during the pre-trial investigation, and they can ask them any relevant questions.

Written proceedings are common in appeals, particularly if the higher court only has the power to review issues related to the interpretation of the law.

2. The Principle of Publicity

Whereas the preliminary investigation is not accessible to the public (with special rules governing the information of the media), the trial, according also to Article 6(1) ECHR, must be held in public. However, television and radio are not admitted to the court room. Under certain conditions, especially at the request of the victim, trials will not be public.

V. The Law on Evidence

A. General Rules

1. *Iura Novit Curia*

Evidence is required to convince the court of relevant facts and empirical principles. The law itself is not subject to proof (*iura novit curia*).

2. The Principle of Free Evaluation of Evidence

One of the binding federal rules of criminal procedure is the principle of the free evaluation of evidence (Art. 249 CCrP). This principle is a logical consequence of the focus on substantive truth (IV B 1). It means that the court should give due consideration to all sorts of evidence presented, and that no evidence should be barred on the grounds of formal rules, such as the rule that two concurring witnesses cannot lie, or that the defendant's wife cannot be heard as a witness. According to this principle, the reasonable conclusion reached by the court will be the base of its decision. In particular, the judge is in no way bound by a guilty plea, and defendants admitting to having committed an offense will have a full trial just as any other defendant. Evidence obtained unlawfully is not automatically barred at the trial, i.e. there is no general exclusionary rule under Swiss law. Illegally obtained evidence may indeed be taken into account if excluding it seems disproportionate in view of the interests at stake. For example, the European Court of Human Rights found no violation of Article 6 ECHR in a murder trial where the prosecution had presented a tape recorded in violation of privacy laws.[16] On the other hand, confessions brought about by torture or other unlawful means of pressure would definitely not be admitted. The 'fruit of the poisonous tree doctrine', although discussed in legal doctrine, is not applied by Swiss courts. One reason may be that police behavior, which the American Supreme Court tried to control through a wide interpretation of the exclusionary rule,[17] is kept in line through the risks of criminal prosecution of police officers who make illegal searches and arrests. Since such acts, if not justified by duty, are offenses (punishable under Arts. 183, 186 and 312 PC), police officers face a risk of criminal prosecution under the system of compulsory prosecution (legality maxim, see IV C 1 above).

3. The Presumption of Innocence

Article 6(2) ECHR (and Art. 32 I Federal Cons.) establishes the rule that 'everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law' (*Unschuldsvermutung/présomption d'innocence*). In practise, the principle of free evaluation of evidence serves the same purpose, since no defendant should be found guilty on the grounds of formal rules unless the evidence available suggests he or she is guilty.

B. Individuals as a Source of Information and Evidence

1. The Defendant

The right to be heard gives the defendant the opportunity to comment on all factual or legal aspects of his case. While defendants have an absolute right to remain silent, they can never take the oath and be a witness on their own behalf. As a consequence, they are allowed to lie and they cannot be punished for perjury. Given the rule that evidence is to be evaluated independently of formal rules, it is not unlikely that a court finds the defendant not guilty because of his/her own plausible explanations.

14. The case law of the European Court of Human Rights leads to the conclusion that this principle is in fact a requirement of 'fair trial,' see e.g. ECtHR, *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A, no. 238.
15. In such cases, American defendants will be directly sentenced without any hearing in court.
16. ECtHR, *Schenk v. Switzerland*, judgment of 12 July 1988, Series A, no. 140.
17. This is well illustrated in the opinions of the majority justices in *Miranda v. Arizona* (384 U.S. 436).

Miranda warnings are not required by the statutes of all cantons but the right can largely be deduced from the new Constitution (Arts. 31 II, 29 III).

2. Witnesses

Witnesses (*Zeugen/témoins*) are obliged to testify honestly or to face prosecution for perjury (Art. 307 PC) (i.e. intentionally lying in court), although the obligation to testify under oath is only imposed in a few cantons. The victim (even if he/she intervenes in the procedure as a party) can be compelled to testify in some cantons. Again, the rule on the free evaluation of evidence presented to the court eases the difference between the defendant (who cannot testify) and the victim as a witness. Any person (except those with close family ties to the defendant, doctors and other holders of professional secrets) can be compelled to testify; in the event that they refuse, they may be held liable for contempt of court. Bankers' secrecy is not a ground for refusing to testify. No one is obliged to disclose facts which might expose him to criminal liability. There are no 'crown witnesses' under Swiss law. The testimony is void if a witness was not warned, in advance, of his or her privileges, rights and duties.

As a rule, witnesses are questioned by the presiding judge while the parties only have a right to propose questions. Only in jury trials are witnesses cross-examined, but the presiding judges will only allow questions which are relevant to the case. Neither psychological pressure or rigorous 'Anglo-Saxon style' questioning nor the interruptions of the witness through objections are permitted. Victims of violence who have to appear in court as witnesses are entitled to the assistance of counsel. As a corollary of the 'soft' treatment of witnesses in court, preparation of their statement (in rehearsals) by attorneys or parties is unusual. Although not an offense, misbehavior of this kind would lead the court to award little credit to the witness' version of the facts.

3. Experts

In some cases, an expert is required in order to ascertain certain facts (e.g. the insanity of the defendant, Ch. 14 III D 2). As the expert must be impartial, he or she is usually appointed by the examining magistrate, normally after having consulted the parties. Experts usually present a written report. The court is not bound by their findings, but must give reasons if it does not follow their conclusions. In such cases, a second expert is usually called in. If the report is challenged by the prosecution or the defense, the expert might eventually be required to appear in court to answer relevant questions. Experts who knowingly present inaccurate conclusions may be punished for perjury (Art. 307 PC).

C. Technical Evidence

Scene of the crime inspections (*Augenschein/inspection locale*), analysis of fingerprints, DNA tests, blood tests and all other technical evidence (including ballistic evidence or examination of documents) is widely used in more complex cases. Usually, technical reports will be prepared in writing by police experts or specialized forensic science units.[18]

VI. Coercive Measures

A. Preliminary Observations

As suspects often see it in their own interest to frustrate the course of justice, coercive measures are necessary to secure evidence and to prevent the defendant from avoiding trial and eventually serving a sentence. Such coercive measures (*Zwangsmassnahmen/mesures de contrainte*) must be based on law, they must respect the principle of proportionality and they must not violate fundamental rights.

B. Arrest and Detention

1. Types of Deprivation of Liberty in Criminal Proceedings

Persons who, although summoned, do not appear at a judicial hearing can be arrested and brought to court by the police. Persons caught in the course of committing a crime or immediately after having committed a crime (*flagrant délit*) may be arrested without a warrant either by the police or by an individual (citizens' arrest). They must, however, be brought promptly before a judge (Art. 5 para. 3 ECHR, see Ch. 14). While those executing a citizens arrest must bring such an arrestee immediately to a magistrate (or the police), the police have to do so within an average period of 48 hours. Detention on remand (*Untersuchungshaft/détention preventive*) is usually ordered by an examining magistrate, after having been reviewed by a judge.

2. The Prerequisites of Detention on Remand

A person, against whom criminal prosecution is initiated, is not automatically arrested, nor automatically detained on remand. Exceptionally, pre-trial detention is ordered if there is reasonable suspicion, as well as a high risk, that the defendant might escape before trial (e.g. if he/she has no legal residence within the country), or that he or she might destroy relevant evidence (e.g. by influencing witnesses). A high risk of re-offending may, if there is strong suspicion, also justify pre-trial detention.

3. Limits on the Duration of Detention on Remand

According to Article 5(3) ECHR, detention on remand may not exceed a 'reasonable time'. In order to control the duration of detention on remand, the cantons have

18. In particular, the Forensic Science Unit of the Zurich City Police, and the Forensic Science Institute at the Lausanne University School of Criminal Justice.

instituted a variety of control systems. The Federal Supreme Court has ruled that pre-trial detention never should exceed the time to which an offender might reasonable be expected to be sentenced (if convicted).

4. Release on Bail

Although release on bail is generally provided for in Swiss legislation on criminal procedure, it is not really popular, except in Geneva. There is a general tendency to regard release on bail as the privilege of the wealthy. It should be kept in mind that arrests and pre-trial detention are exceptional in Switzerland, and that defendants who might otherwise be seen as eligible for bail may rather be released from pre-trial detention on substantial grounds. Bounty hunting is unknown and would be illegal under Swiss law (see Ch. 14 III C 3).

5. Judicial Control of Pre-trial Detention

Persons detained on remand have the right to have their detention reviewed by a judge (Art. 5(4) ECHR). In the last resort, such appeals can be brought before the Federal Supreme Court (see VIII B below).

6. The Right to Compensation

Time spent in detention on remand is usually deducted from the sentence (Arts. 69, 375 PC). If a defendant has been detained illegally, if he or she is acquitted or if the suspicion on which the detention was based eventually proves to have been ill-founded, he or she is eligible for compensation. In this respect, Swiss law clearly goes beyond the requirements of Article 5(5) ECHR.

C. Search and Seizure

Suspects and their home or office or any other place where relevant wanted objects or persons are presumably to be found may be searched. Objects of proof including loot may be seized wherever they are found. If the seizure concerns papers containing professional secrets, they may be sealed until the court decides whether and to what extent the interests of the prosecution prevail over the preservation of secrets.

D. Examination of Body and Mind

The defendant must submit to an examination of his or her body, including fingerprints, blood and DNA tests. In order to facilitate mental examination – with a view to ascertaining insanity, or assessing the need for security measures or treatment (see Ch. 14 IV B 1) – a defendant may be committed to a mental hospital.

E. Interference with the Right to Privacy

At times, efficient investigation requires secret surveillance of a suspect's private life. Prosecuting authorities are authorized by law to intercept postal and telecommunications to and from a defendant. Since defendants are not usually informed of such measures, they will need to be automatically reviewed by a higher ranking judicial authority (usually the authority of indictment, see above II A 4).

VII. Special Forms of Procedure

A. Private Prosecution

Actions for libel and slander, although based on criminal law (Arts. 173–177 PC), are sometimes dealt with under the form of civil proceedings, or by a special criminal procedure in which the prosecuting authorities do not take part.

B. The Penal Order: A Swiss Form of Plea Bargaining?

The penal order (*Strafbefehl/ordonnance de condamnation*) is the most common form of summary criminal procedure. The examining magistrate (investigative judge, or district attorney) or, in some cantons, the prosecutor, writes out a form on which the offense is summarily described, and a sentence (usually a fine, sometimes a short custodial sentence of up 6 months) is imposed. If the defendant does not agree, either with the verdict, with the legal interpretation adopted by the magistrate, or the sentence, he or she can insist on a full trial by completing a simple declaration at the bottom of the form. This system (which exists in many continental countries) has been described as the continental form of guilty plea.[19] Indeed, in common with guilty pleas, the defendant admits the facts as described in the penal order, he or she agrees with their legal qualification, and accepts the sentence. Unlike American defendants, Swiss defendants insisting on a full trial (usually before a lower court) do not run the risk of receiving a bigger sentence. It should also be kept in mind that this procedure is available only for routine minor offenses (often traffic violations) for which the prosecutor considers a minimal sanction appropriate. Penal orders are popular especially in countries where prosecution is compulsory; in France or in the Netherlands, where the expediency principle (see IV B 3 above) is widely used, prosecutors usually drop proceedings in such cases, sometimes after 'negotiating' with the defendant the payment of a 'fine' to the treasury or to a charity.

C. Proceedings in the Absence of the Defendant

If a defendant is absent without justification, a warrant will, in the first place, be issued for his or her arrest. If he or she cannot be brought to trial, judgment may be

19. J.H. Langbein, 'Controlling Prosecutorial Discretion in Germany', *The University of Chicago Law Review* 41 (1974), 439–467.

passed in his or her absence (*Kontumatialverfahren/procédure par défaut*) if the person had been heard at least once by the authorities. However, if the defendant is later arrested, he or she has the right to ask for a new trial (*Wiederherstellung/demande de relief*).

D. Proceedings against Children and Juveniles

Children and juveniles are prosecuted in different proceedings which have more to do with welfare and youth protection principles, than with general due process rules.

VIII. Remedies

A. Types of Legal Remedies in Criminal Proceedings

A full-fledged appeal (*Berufung/appel*) is the most comprehensive ordinary remedy. It means that the higher court (usually at the cantonal level) will fully review the case (in fact and in law). In practise, appeals are often limited to certain issues, such as the type and severity of the sentence. Usually, appeals are not possible if the trial has been before a jury or a higher (cantonal or federal) court.

Wherever a full appeal is not available, both the prosecutor and the defendant have the right to file a limited appeal where the higher court will only review certain legal issues (either of procedural or substantive law).

Before a verdict has been reached, the defendant and the prosecutor (and possibly also the victim and other interested parties) may file a petition limited to a specific issue, such as the decision to allow pre-trial detention, not to call certain witnesses, to confiscate an object (or document), or to drop the charges.

Legal remedies in criminal matters are subject to the prohibition of *reformatio in peius*. This means that in cases where only the defendant has filed an appeal, the previous decision may not be altered to his or her disadvantage. However, this rule does not apply when both parties appeal.

B. Appeals before the Federal Supreme Court

There are two different types of remedies by which final decisions of cantonal courts can be brought before the Federal Supreme Court.

One is called plea of nullity (*Nichtigkeitsbeschwerde/pourvoi en nullité*). It allows the Criminal Law Chamber of the Federal Supreme Court to review the interpretation of substantive criminal law, i.e. mainly of the PC. Through this form of appeal, the Federal Supreme Court has succeeded in overseeing the uniform interpretation of criminal law. It is open to the defendant, the prosecutor, and sometimes also to the victim.

The other remedy is called constitutional law appeal (*staatsrechtliche Beschwerde/recours de droit public*) which allows all issues of alleged violations of the Constitution (or the ECHR) to be brought before the Federal Supreme Court. In criminal proceedings, it allows the defendant to seek redress against any violations of due process, including the garantee of *in dubio pro reo*. It is only open to defendants and (sometimes) victims, but never to government agencies (such as prosecutors).

C. The Individual Application to the European Court of Human Rights

Once remedies are exhausted, particularly after an unsuccessful constitutional law appeal to the Federal Supreme Court, any person claiming that a decision violates his or her fundamental rights under the ECHR, may file an application to the European Court of Human Rights.

D. The Petition for Re-trial

While all the remedies mentioned above are subject to certain time limits, a petition for re-trial (*Wiederaufnahme/révision*) can be filed after a judgment has become final.

A petition for retrial can either be filed in favor of the (convicted) defendant, or against an acquitted person. Thus, Switzerland (as continental countries in general) does not proscribe double jeopardy (with the exception of Geneva). A new trial may be required if new evidence (which was not available at the first trial) may lead to a different conclusion, if the former trial was tainted by illegal means (e.g. perjury, bribery etc.) which, at that time, could not be brought to the attention of a higher court, or if a later ruling in the same case (e.g. on civil damages) contradicts the verdict (or an acquittal). Usually, a petition for a new trial must be filed within certain time limits once the relevant new facts have become known to the interested party.

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Chapter 16
Law of Civil Procedure

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I. Sources of Civil Procedure Law

Swiss civil procedure law is mainly cantonal. Each of the twenty six cantons and 'half cantons' institutes a Code of Civil Procedure (*Zivilprozessordnung/Code de procédure civile*) and a Code of Judicial Organization (*Organisationsgesetz, Gerichtsverfassungsgesetz/loi d'organisation judiciaire*). A new federal act on the jurisdiction in civil matters, however, has entered into force as of 2000 (see below VI.B). This is made possible through the Article 30 II of the Federal Constitution (accepted by referendum on 18 April 1999), which says that a person against whom a civil action is brought, has the right to have the case heard before the court of his domicile, if the federal law does not provide a different jurisdiction.[1]

The Swiss Code of Civil Procedure too applies to cases before the Swiss Federal Tribunal with primary jurisdiction only. The conditions under which this may happen are determined by Articles 41 and 42 of the Federal Statute on the Organization of the Federal Judiciary. The number of such cases is newly reduced in order to enable the Swiss Federal Tribunal to deal within a proper time with the great number of cases that are brought before it by means of appeal from the cantonal courts.

Important rules on procedure are also found in the Swiss Civil Code (CC), in the Code of Obligations (CO) and in other fundamental acts of civil law. Professor Wildhaber points out that 'in a very bold series of decisions the Federal Tribunal has declared that any application or interpretation of cantonal law which is so manifestly wrong as to be arbitrary or capricious amounts to an inequality before the law',[2] and therefore is a violation of Article 9 of the Federal Constitution. Additionally, the Federal Tribunal has found on several occasions that there are certain rules of law which at first sight might belong to the law of civil procedure, but that they find their sources in substantive law and therefore are to be followed by any cantonal jurisdiction. This problem might come to vanish in a few years time. On the basis of the

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1. See R.A. Surber, 'Art. 30 Abs. 2 BV', in: *Basler Kommentar (BSK) Gerichtsstandsgesetz*, 2001, 11–25.
2. L. Wildhaber, 'The Swiss Judicial System' in: *Modern Switzerland*, 1978, p. 318.

F. Dessemontet and T. Ansay (eds), Introduction to Swiss Law, 287–299.