Pretrial Right to Counsel

A Proposal for Law Reform in Switzerland, Based on Canadian Experience

by

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To My Parents

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Abstract

This thesis deals with the question of whether the pretrial right to counsel as it exists in Switzerland meets the standard required for a fair trial, and whether this right ought to be further strengthened. Canadian law has defined the right to counsel in a comprehensive manner and therefore serves for the purposes of this thesis as a sound comparative model.

The pretrial right to counsel is enshrined in the Canadian *Charter of Rights and Freedoms* and ensures the accused is accorded a fair trial and can effectively exercise his legal rights. Current Swiss law, however, does not encourage accused persons to exercise the right to counsel, and counsel's participation during the pretrial investigation is very often limited.

Reform of the pretrial right to counsel under Swiss law is urgently needed in order to transform the right from a mere formality to a meaningful source of protection for the accused. Codes of practice must be devised so that the right to counsel becomes entrenched as an integral part of Swiss criminal procedure.

The thesis analyzes the pretrial right to counsel in both Canada and Switzerland, highlighting the contextual differences between common law and civil law traditions. It concludes with proposals for law reform in Switzerland which are informed by this comparative analysis.

List of Abbreviations

Adv. Q.	Advocate's Quarterly
AG	Canton Aargau
AGVE	Aargauische Gerichts- und Verwaltungsentscheide
AJP	Aktuelle Juristische Praxis, Lachen
Alta.	Province of Alberta
B.C.	Province of British Columbia
BE	Canton Bern
BGE	Bundesgerichtsentscheid
BJM	Basler Juristische Mitteilungen
BS	Canton Basel
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999.
C.A.	Court of Appeal
C.C.C.	Canadian Criminal Cases
C.R.	Criminal Reports
C.R.N.S.	Criminal Reports New Series
Can.Bar Rev.	Candian Bar Review
Co. Ct.	County Court
Cr.App.R.(S.)	The Criminal Appeal Reports (Sentencing)
Crim.L.Q.	Criminal Law Quarterly
DR	Décisions et Rapports de la Commission européenne des droits de l'homme
ECHR	European Convention on Human Rights
ed.	editor
EuGRZ	Europäische Grundrechte Zeitschrift#
ff.	and following pages
FR	Canton Fribourg
GR	Canton Graubünden
H.C.	High Court
H.C.J.	High Court of Justice
Man.	Province of Manitoba
McGill L.J.	McGill Law Jounal
Mich.L.Rev.	Michigan Law Review
N.B.	Province of New Brunswick
N.S.	Province of Nova Scotia
N.W.T.	Northwest Territories
Nfld.	Province of Newfoundland
Ont.	Province of Ontario
P.C.	Judicial Committee of the Privy Counsel (U.K.)

plädoyer	plädoyer, Magazin für Recht und Politik, Zürich
Pra.	Praxis des Bundesgerichts
Q.B.	Court of Queen's Bench
Que.	Province of Québec
R.G.D.	Revue Générale de Droit
recht	recht, Zeitschrift für juristische Ausbildung und Praxis, Bern
R.S.C.	Revised Statutes of Canada
S.,ss.	Section, sections
S.C.App.Div.	Supreme Court Appellate Division
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports
S.C.(T.D.)	Supreme Court Trial Division
SAR	Sammlung des aargauischen Rechts
Sask.	Province of Saskatchewan
Sask. L. Rev.	Saskatchewan Law Review
Sess. P.	Court of Sessions of the Peace
SG	Canton St.Gallen
SH	Canton Schaffhausen
SJZ	Schweizerische Juristen-Zeitung, Zürich
SO	Canton Solothurn
SR	Systematische Sammlung des Bundesrechts
StGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937
StPO	Strafprozessordnung
U.K.	United Kingdom
U.K.H.L.	House of Lords (U.K.)
U.S.	United States
ZH	Canton Zürich
ZR	Blätter für Zürcherische Rechtsprechung
ZStrR	Schweizerische Zeitschrift für Strafrecht

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A. Introduction

The rights of accused persons and particularly their protection from state authorities have always been an important concern in Swiss criminal proceedings. Safeguards similar to those in Canadian law may be found in Swiss criminal procedure codes. Thus, accused persons are presumed innocent until proven guilty by an independent and impartial adjudicator, they have the right to seek counsel's advice in the course of the whole proceeding, and they can remain silent if they wish to do so. These rights principally arise at the beginning of the second stage in the criminal investigation, which is carried out by a special examining magistrate. Disregarding these rights during previous inquiries by the police did not use to have grave consequences, because the police only assisted the special magistrate or were responsible for initial or urgent investigations.[1] The examining magistrate, on the other hand, was given the responsibility of gathering all other evidence necessary to determine the accused's guilt and to clarify legal uncertainties.[2] Over the last thirty years or so, however, the

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[1] R. Hauser & E. Schweri, *Schweizerisches Strafprozessrecht*, 4th. ed. (Basel/CH: Helbing & Lichtenhahn, 1999), at 334.

[2] Ibid.

procedural reality in Switzerland has changed. The main investigative tasks have been shifted from special examining magistrates to the police and the second investigative stage is often omitted entirely.[3] Those rights that were enacted to shield accused persons from the power of the examining magistrate were not affected by these changes, but still only apply at the second stage of a criminal investigation. As a result, the defence rights of accused persons have been silently curtailed.

The current endeavours of the federal legislator to amalgamate the 26 cantonal Criminal Procedure Codes to a federal one will be incomplete without a reconsideration of the rights of accused persons. The right to counsel, in particular, is fundamental because it ensures that accused persons are informed of their rights and advised on how to exercise them appropriately.[4] Although embodied in every cantonal procedure code, the right has never reached the same recognition in Switzerland as in North America. Often, defence counsel are regarded as a source of friction in the otherwise smooth course of criminal proceedings.[5] The group of experts who outlined the features

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[3] H. Utz, *Die Kommunikations zwischen inhaftiertem Beschuldigten und Verteidiger* (Basel/CH: Helbing & Lichtenhahn, 1984) at 26; U. Kohlbacher, *Verteidigung und Verteidigungsrechte unter dem Aspekt der "Waffengleichheit"* (Zürich/CH: Schulthess Polygraphischer Verlag, 1979) at 80; M. Schubarth, *Die Rechte des Beschuldigten im Untersuchungsverfahren, besonders bei Untersuchungshaft* (Bern/CH: Verlag Stämpfli & Cie, 1973) at 229; R. Hauser & E. Schweri, *supra,* note 1, at 327, E. Müller-Hasler, *Die Verteidigungsrechte im zürcherischen Strafprozess, insbesondere deren zeitlicher Geltungsbereich, unter dem Aspekt des fairen Verfahrens* (Entlebuch/CH: Huber Druck AG, 1998) at 82.

[4] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.).

[5] M. Pieth, *Strafverteidigung - wozu?* (Basel/CH: Helbing & Lichtenhahn, 1986) at 22; U. Kohlbacher, *supra* note 3, at 85. See also H. Baumgartner, "Wessen Komplize ist der Verteidiger" in H. Baumgartner & R. Schuhmacher, ed.,*Ungeliebte Diener des Rechts - Beiträge zur Strafverteidigung in der Schweiz* (Baden-Baden/D: Elster Verlag, 1999).

of the planned federal criminal procedure in a first report,[6] recognized the improper methods, such as threats or false promises, police agents sometimes apply in order to get a confession from suspects.[7] The experts suggested imposing a duty on the police to inform suspects of their rights.[8] Nevertheless, the authors refused to tolerate the presence of defence counsel during the interrogation of suspects by the police because this would not be in accordance with the procedural tradition in Switzerland.[9] Other features of the right to counsel were not even discussed in the report and likely remain as rudimentarily regulated as under the current law.

The purpose of this paper is to analyze the essential role of defence counsel especially at the pretrial stage of criminal proceedings and to explore why the refusal to allow counsel's active participation at this phase of the process amounts to a mockery of the accused's rights in Switzerland. An exploration of the Canadian law will offer a different perspective and assist in shaping a right to counsel in Swiss pretrial investigations that makes the right to a fair trial of accused persons and their right to be heard before Swiss authorities effective.

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[6] Département fédéral de justice et police, *De 29 à l'unité - Concept d'un code de procédure pénale fédéral* (Berne/CH: 1997).

[7] Département fédéral de justice et police, *supra*, note 6, at 124-125.

[8] Département fédéral de justice et police, *supra*, note 6, at 112 and 130. It is not clear, however, what the rights of the suspect will be at this stage of the proceeding. The report refers generally to the rights of the suspect before the judicial authorities (ibid.). According to the explanations on page 136, where the procedure before the examining magistrate is outlined, these rights would include among others: the right to silence, the right to contact counsel privately or to have counsel appointed, and the right to consult with counsel in private. It is stressed that these rights would be the basic defensive rights (p. 134).

[9] Département fédéral de justice et police, *supra*, note 6, at 112. Instead, the group of experts suggested involving an ombudsman to support the suspect.

To set the stage for a comparative analysis of the right to counsel as it is currently applied in Canada and Switzerland, an overview of the procedural reality in the two countries will be given. To begin, the two models of criminal proceedings, the adversarial and the inquisitorial system, will be outlined, followed by an inquiry into the role of defence counsel in both countries. These introductory remarks will be followed by a presentation of procedural principles that closely relate to the right to counsel and govern both, the adversarial and the inquisitorial tradition of criminal proceedings. All together, this information will provide a foundation on which the comparison of the right to counsel in the two procedural models can be based. Then, the current state of law on the right to counsel in the course of pretrial investigations in both Canada and Switzerland will be thoroughly described. Finally, a proposal for a modern approach to the right to counsel in pretrial investigations in Switzerland will be undertaken, encouraged by the Canadian concept of the right to counsel.

B. Procedural Background

I. Comparative Overview of Criminal Procedure in Canada and Switzerland

Canada's legal system is based on the English common law tradition. Criminal proceedings therefore follow the adversarial model. In Switzerland, which is a civil law country, the inquisitorial approach is applied. Both systems, however, try to achieve the same goal, which is to find the true perpetrator of a crime and to punish him proportionately, while protecting innocent people from wrongful conviction.[1] Pursuant to both models, two parties, the accused and defence counsel on the one hand and prosecuting counsel on the other, compete with each other in putting forth their case before an independent decision-maker. Proceedings under both systems are divided into a pretrial investigative phase carried out by the police or special authorities, and the trial and sentencing phase, which is directed by a judge or by a judge and jury.

Many differences between the two systems can essentially be put down to the fact that under the adversarial system the parties are responsible for the majority of procedural action, whereas under the inquisitorial model most activities are performed by

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[1] R. Hauser & E. Schweri, *Schweizerisches Strafprozessrecht*, 4th. ed. (Basel/CH: Helbing & Lichtenhahn, 1999), at 2; A. W. Mewett, *An Introduction to the Criminal Process in Canada*, 2d ed. (Toronto: Carswell, 1992) Preface; *Black's Law Dictionary*, New Pocket Edition, 1996, *s.v.* "criminal procedure". K. Creifelds, ed., *Rechtswörterbuch*, 11th ed. (München/BRD: C.H. Becksche Verlagsbuchhandlung, 1992) *s.v.* "Straf-prozess"; V. Delnon & B. Rüdy, "Untersuchungsführung und Strafverteidigung" ZStrR 106 (1989), 43 at 43.

state officials.[2] From a more particular perspective, three main differences are distinguishable. First, the adversarial system emphasizes the trial phase and the facts of the case are brought together at this stage of the proceeding.[3] Complex rules of evidence try to ensure that only reliable and relevant information on the criminal incident is brought before the decision-maker. Because of the strict exclusion of hearsay evidence, the results of the pretrial examination of the case by the police can not be taken into consideration in deciding the case, unless they are repeated in court and an opportunity for cross-examination is given.[4] In the inquisitorial system, on the other hand, a careful and often lengthy pretrial inquisition[5] carried out by the police and special examining magistrates is intended to ensure the correct determination of factual guilt.[6]

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[2] M. R. Damaska, *The Faces of Justice and State Authority, A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) at 3.

[3] P. Reichel, *Comparative Criminal Justice Systems - A Topical Approach* (Englewood Cliffs, NJ: Prentice Hall Career & Technology, 1994) at 152.

[4] The hearsay rule has been stated as follows: "Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein" (J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 173 with reference to definitions articulated by the Supreme Court of Canada in recent cases). In other words, statements, that were not made under oath but out-of-court and could not be challenged by cross-examination are considered untrustworthy and must be excluded (ibid. at 174). Hearsay statements are only those, however, that are offered to prove its content (I. Younger, "An Irreverent Introduction to Hearsay" (Address to the American Bar Association Annual Meeting, 11. August 1976; used in *R.* v. *Evans* (1993), 25 C.R. (4th) 46 at 52 (S.C.C.). If a second-hand statement is adduced in order to prove only that a statement was made by someone else, then the statement is admissible in evidence because whether or not the statement is true is not in issue does not need the special securities by oath and cross-examination (*R.* v. *Baltzer* (1974), 27 C.C.C. (2d) 118 at 143).

[5] "Inquisition" in this and the following sections is not to be confused with the "Spanish inquisition" in the Middle Ages. For the purpose of this paper it is important that the two pretrial stages of Swiss criminal proceedings are clearly distinguishable. "Inquiry" will consequently be used for the first pretrial stage for which the police are responsible, whereas "investigation" will be used for the second pretrial stage, carried out by examining magistrates. "Inquisition" will be used where the explanations refer to both police inquiry and investigation by the magistrate.

[6] E. Fairchild, *Comparative Criminal Justice Systems* (Belmont/CDN: Wadsworth, 1993), at 125; R. Salhany, *The Practical Guide to Evidence in Criminal Cases*, 5th ed. (Toronto: Carswell, 1998) at 198.

The goal of this examination is to determine whether an offence has been committed and whether the accused probably is the perpetrator. In other words, the conviction of the accused must be very likely in order to justify the continuation of the proceeding.[7] Only if these two tests are satisfied will the prosecutor take the case to court, otherwise, he will stay the proceeding.[8] At inquisitorial trials, the factual details of the offence are usually undisputed and the parties concentrate their arguments on legal questions or the details of the sentence.[9]

Second, the judge in an adversarial procedure remains very passive. The parties are responsible for developing and presenting their cases. The judge monitors the observance of the procedural rules, and, unless there has been a jury appointed, decides whose presentation was more convincing.[10] Judges in inquisitorial proceedings control the trial by leading the parties through the hearing.[11] Based on her knowledge of the file prepared by police and/or examining magistrate, the judge will question the accused and decide which witnesses need to be heard in court. The judge acts as special investigator who also has the power to decide the case. The parties are left to argue the interpretation that the court should give to those facts. [12]

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[7] R. Hauser & E. Schweri, *supra*, note 1, at 343.

[8] R.. Hauser & E. Schweri, *supra*, note 1, at 322.

[9] In inquisitorial criminal proceedings, trial hearing and sentencing, both take place before the court withdraws to discuss the verdict. The judges usually decide on the question of guilt of the accused and a proportional sentence for his conduct in the same meeting.

[10] P. Reichel, *supra*, note 3, at 153; M. Damaska, *supra*, note 2, at 3.

[11] R. Salhany, *supra*, note 6, at 198.

[12] P. Reichel, *supra*, note 3, at 154.

Third, although both procedural models are governed by the same basic principles, the role of the accused is not the same in the two systems. In the Canadian model, the accused and the prosecutor are seen as adversaries and therefore neither side is required nor expected to cooperate with the other party.[13] When the accused is tried according to the inquisitorial tradition, he is expected to participate actively in the inquiry into the crime.[14] He has a right to remain silent but if he speaks, he is expected to tell the truth.[15] The refusal to supply information to the investigator, on the other hand, can have procedural disadvantages for him.[16] Before embarking on a detailed analysis of the role of defence counsel the following brief outline of Canadian and Swiss criminal procedure will further clarify the adversarial and inquisitorial models under discussion.[17]

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[13] Some exceptions apply, however. Thus, the Crown has a duty to disclose all relevant information on the case to the accused (see discussion below, C.II.4.). The prosecutor is also obliged to present the facts and arguments of the case in fair manner (*Boucher* v. *R.* (1955), 20 C.R. 1 (S.C.C.); *R.* v. *Sugarman* (1935), 25 Cr. App. R. 109 (C.A.A.)).

[14] P. Reichel, *supra*, note 3, at 152.

[15] H. Walder, "Fehler bei der Durchführung von Einvernahmen", AJP 9/92, 1105 at 1107.

[16] False denials of the commission of the offense can result in a harsher sentence and higher legal costs. BGE 121 IV 204 and 118 IV 349 have established that a confession should result in a lower sentence.

[17] In Switzerland, each of the 26 cantons still has its own criminal procedure rules. The explanations of the course of the proceeding emphasize the procedural features that are known to all cantonal laws. However, for reasons of simplification, some expositions and terms refer explicitly to the law of the Canton Aargau (*Gesetz über die Strafrechtspflege* (Strafprozessordnung des Kantons Aargau) vom 11. November 1958 (Stand 1. März 1998; SAR 251.100).cited as StPO AG) as an example. This canton is both known to the author, who practices law there, and is typical of cantonal procedure.

1. The Canadian Adversarial Tradition

According to Canadian law, three groups of criminal offences are discernible. Since the proceedings slightly differ from each other depending on the kind of offence the accused is tried for, a classification of criminal offences shall be briefly outlined. To start with, summary conviction offences are the least serious offences and include less serious statutory offences and minor offences under the Criminal Code. The Criminal Code lays down a maximum punishment of six months imprisonment and/or a fine of two thousand dollars.[18] Additionally, a limitation period of 6 months applies within which the charge must be laid or the prosecution of the offender is no longer possible.[19]

Indictable offences form the second group of criminal offences. They include the most serious offences such as murder, possession of counterfeit money and drug trafficking. No limitation period is applicable.[20] Some indictable offences are only tried by the superior court of a province, others are in the absolute jurisdiction of the Provincial Court.[21] For the majority of indictable offences, however, the accused has a right to elect the mode of trial: before a Provincial Court without a preliminary inquiry, or before the Supreme Court judge alone with a preliminary hearing or before a Supreme Court judge and jury with a preliminary inquiry.[22] A proceeding for indictable offences in a supreme

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[18] S. 787 (1) Canadian *Criminal Code*, R.S.C. 1985, c. C-46.

[19] S. 786 (2) Criminal Code.

[20] This principle was adopted from the common law where it was held that a lapse of fine was no bar to a criminal prosecution by the King. See R.H. Salhany, *Canadian Criminal Procedure*, looseleaf, 6th ed. (Aurora/ON: Canada Law Book, 2000) at 2-2.

[21] Ss. 469 and 553 Criminal Code.

[22] S. 536(2) Criminal Code.

court requires that an indictment be issued.[23] The maximum punishment for indictable offences varies from one offence to another, but can be as long as life imprisonment for some offenses.[24]

The third group includes hybrid offences. Here the Crown Attorney has a choice whether to proceed by summary conviction or indictment.[25] Before the election is made, the proceeding follows the rules for indictable offences.[26] The Crown's decision will depend on the mode of trial he favours as well as whether the limitation period of six months has already expired.[27] If the Crown does not elect, the process will be continued as a summary conviction proceeding.[28]

1.1. Pretrial

a) Police Inquiry

The police start their inquiry of an alleged offence upon report by a private individual or based on their own discovery. The aims of any police inquiry are to confirm that a crime has been committed and to identify the suspected perpetrator.[29] In

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[23] See below B.1.c)

[24] See below, footnote 119.

[25] *R.* v. *Chin Mow* (1924), 42 C.C.C. 394 (B.C. S.C.).

[26] *Interpretation Act* R.S.C. 1985, c. I-21, s. 34(1)(a). R. v. Toor (1973), 11 C.C.C. (2d) 312 (B.C. S.C.).

[27] *R.* v. *Lartie* (1916), 25 C.C.C. 300 (Que. Sess. P.). The limitation period applies only if the Crown elects to proceed by way of summary conviction.

[28] *R.* v. *Dosangh* (1977), 35 C.C.C. (2d) 309 (B.C. C.A.). If the Crown elects to proceed by indictment, the accused's right to elect the trial court arises (536(2) Criminal Code) unless the offence falls within s. 553 and must be tried before the provincial court. No hybrid offence falls within s. 469 of the Code.

[29] A. W. Mewett, *supra,* note 1, at 9.

adversarial as well as inquisitorial criminal proceedings, the pretrial stage aims to identify and preserve the evidence available for the determination of the case at trial. The results of the pretrial investigative phase are applied differently, however. In adversarial proceedings, the information discovered by the police is relevant in order to decide whether a trial against the suspect will be justified as it would probably result in a conviction. When the chances of getting a conviction of the suspect are only minimal, the police will not continue the inquiry.[30] In inquisitorial pretrial investigations, on the other hand, all information gathered is written down in the dossier and eventually constitutes the evidence for the trial.[31]

The Canadian police possess considerable powers in order to conduct criminal investigations in an efficient manner. Thus, they can arrest and detain suspects,[32] and may search places and persons for the discovery of evidence and seize items found.[33] In order to ensure the accused's attendance at trial, instead of making an arrest, certain orders requiring the appearance at trial can be issued.[34] Police may also question the suspect and the remarks made may generally be rendered in evidence. However, the right to remain silent, strengthened by counsel's advice to remain mute, makes it more

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[30] *Ibid.*, at 10.

[31] This is mainly because of the disappearance of the principle of direct testimony in Swiss criminal proceedings. For details see discussion below, D.III.2.2.

[32] Ss. 494, 495 Criminal Code.

[33] Ss. 487 ff. Criminal Code.

[34] The rules in the Criminal Code about compelling the accused to appear in court have been drafted in a very complex and complicated way. In a nutshell, the police can ensure the accused's attendance at trial by means of appearance notices (ss. 496 and 501 Criminal Code), promises to appear or recognizances (s. 498(1)(g) - (h) Criminal Code). A judge can issue summons or arrest warrants for the same purpose (s. 507 -512 Criminal Code). For more information see T. Quigley, *Procedure in Canadian Criminal Law* (Toronto: Carswell, 1997) Chapter 9 at 221ff.

difficult for the police to obtain an incriminating statement from the accused in a lawful manner so that it will be admissible in evidence at trial.[35] The police are entitled to require the suspect's participation for impairment tests,[36] to provide bodily samples,[37] to pose for photographs or have fingerprints taken,[38] or to take part in a police lineup.[39]

The investigative actions by the police are not subject to the strict evidentary rules that apply at the trial phase. The police can use hearsay, opinion and character evidence as well as an improperly obtained confession from the accused in order to decide whether to prosecute.[40] The result of the police investigation can thereby give a wrong impression of the strength of the prosecution's case. It is possible that although a case seems clear at the police stage, there will not be enough admissible evidence to prove the suspect's guilt beyond a reasonable doubt as is required for conviction. If this is the case, the police can abandon the investigation and no charge is laid. If the information has already been laid or an indictment has been filed, the prosecutor can

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[35] The right to remain silent will be discussed below, C.II.3.

[36] S. 254 Criminal Code

[37] Ss. 256 and 487.05 Criminal Code

[38] *Identification of Criminals Act*, R.S.C. 1985, c.I-1,s.2.

[39] Questions may arise, however, whether the results of these investigation methods can be introduced as evidence at trial because they might violate the principle against self-incrimination. Prior to the recognition of the principle these investigative methods were clearly acknowledged by the courts (For example *R.* v. *S. (R.J.)* (1995), 36 C.R. (4th) 1 (S.C.C.), or referring to fingerprints: *R.* v. *Beare* (1988), 66 C.R. (3d) 97 (S.C.C.). Lately, however, there have been indications, that some of the methods may be found to violate the principle and might lead to a right to refuse the participation in such proceedings (*R.* v. *Milne* (1996), 48 C.R. (4th) 182 (Ont. C.A.) (Impairment test), *R.* v. *Dilling* (1993), 24 C.R. (4th) 171 (B.C. C.A.) (participation in a lineup)).

[40] J. Sopinka, S.N. Lederman & A.W. Bryant, *supra*, note 4, at 3; C.A. Wright, "The Law of Evidence: Present and Future" (1942), 20 Can. Bar Rev. 714 at 715.

withdraw the charge for good before a plea being taken,[41] or stay the proceeding at any time before the verdict has been rendered.[42] His decision will mainly depend on whether he expects to discover further evidence that supports the case against the accused within the time limit provided by staying the process.[43] If neither the police nor the prosecutor stop the proceeding before or during trial, the matter will fail before the judge and result in an acquittal because of lack of admissible evidence.

The police inquiry can have a deep impact on the personal freedom of the suspected offender. Since in the adversarial systems due process is of great importance, the suspect has a number of rights for his protection from the beginning of the investigation. Upon arrest or detention, the suspect must be promptly informed of the reasons for the arrest,[44] that he has the right to retain and instruct a lawyer,[45] and that he can test the legality of the custody by bringing an application for the writ of habeas

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[41] *R.* v. *Osborne* (1975), 25 C.C.C. (2d) 405 (N.B. S.C.); *R.* v. *Grocutt* (1977), 35 C.C.C. (3d) 65 (Alta. S.C.(T.D.)). If the prosecutor decides to withdraw the information after evidence has been heard on a preliminary inquiry, the proceedings will not be eliminated immediately but the preliminary hearing is to be completed and the court will discharge the accused or conclude in his committal. At this stage of the proceeding, only a stay ordered by the prosecutor would have immediate effects (*R.* v. *Mastroianni* (1976), 36 C.C.C. (2d) 97 (Ont. Prov. Ct.). After the accused entered a plea and the prosecutor tendered evidence, the proceeding may only be withdrawn with leave of the court (*R.* v. *Blasko* (1975), 29 C.C.C. (2d) 321 (Ont. H.C.J.).

[42] S. 579 (1) Criminal Code.

[43] The prosecutor can stay, or in other words, halt the proceeding for a maximum period of one year if the accused is charged with an indictable offence. For summary conviction matters the prosecutor must recommence the proceeding within the limitation period which is generally 6 months (S. 579 (2) and 786 (2) Criminal Code).

[44] S. 10 (a) *Canadian Charter of Rights and Freedoms*, Schedule B, Part I, Constitution Act, 1982, (R.S.C. 1985, Appendix II, No. 44).

[45] S. 10 (b) Canadian Charter.

corpus and will be released if the detention is unlawful.[46] Certain other rights arise as soon as the suspect is charged with a specific offence.[47]

The right to bail is a very important right of arrested individuals.[48] Upon arrest, the arrestee must be brought before a justice within 24 hours or as soon as a justice is available, in no case later than three days.[49] If the Crown (or the detaining police officer who swore out the information) fails to show cause for the need of security measures, the arrested individual must be released without conditions.[50] A remand of custody is only justified in restricted cases. Canadian legislation clearly favours release of the accused pending trial.[51] Thus, detention may be perpetuated in order to establish the identity of the suspect, to secure or preserve evidence, to prevent the continuation or repetition of the detained person's criminal behavior, or, where it is reasonable, to ensure the suspect's attendance at trial.[52] If neither a release nor a remand is appropriate, and the accused is only detained in order to guarantee his appearance at

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[46] S. 10 (c) Canadian Charter.

[47] S. 11 (a), (b) and (d) Canadian Charter constitute that the suspect must be informed of the charge, that he must be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, and that he must be tried within reasonable time.

[48] S. 11(e) Canadian Charter. The Canadian Criminal Code knows the release on bail as "judicial interim release", see title before ss. 515-523 of the Code.

[49] S. 503(1) and 516(1) Criminal Code. "Show cause hearings" may be adjourned for up to three days (S. 516 Criminal Code). This is actually normal if the Crown wants to keep someone in custody.

[50] S 515(5) Criminal Code. The onus of proof is reversed in certain cases. For instance, it's for the accused to show cause for his release if he is charged with an indictable offence or a bail abuse offence allegedly committed while awaiting trial on another offence, s. 515(6)(a) and (c) and if the accused is not a resident of Canada (s. 515(6)(b)).

[51] S. 515 of the Canadian Criminal Code contains several steps of different intrusive character between unconditional release and remand of custody. See also *R.* v. *Thompson* (1972), 18 C.R.N.S. 102 (B.C. S.C.).

[52] S. 515 (10) Criminal Code.

trial, the justice can decide to release the accused on bail.[53] The arrestee would be released from custody if he agrees either to pay a sum of money upon failure to attend trial or to deposit a sum of money that he would lose if he does not appear for trial. Alternatively, a third party, the surety, can vouch for the reappearance of the accused at trial.[54] The hearing is conducted expeditiously although evidence may be taken.[55] The decision whether to release on bail and under what particular conditions relies on several factors, such as the accused's likelihood to appear for trial, his financial means, his personal circumstances and the seriousness of the offence.[56]

b) Information

If the inquiry is completed successfully and the evidentiary basis is considered to be sufficient, the proceeding will be elevated to the next level. At this time, the suspect must be charged with a concrete offence. In order to lay this charge, an information must be sworn before a justice of the peace.[57] The information is a written allegation of what the suspect is charged with and will be tried for. It also serves as the legal foundation on

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[53] The justice has no such discretion in cases where the arrestee is accused of having committed an offences listed in s. 469 Criminal Code. Therein included is for example murder. In these cases, the accused must be ordered to be detained in custody until he is dealt with in court (s. 515 (11) Criminal Code). Only a superior court judge can release the accused (s. 522ff. Criminal Code).

[54] A. W. Mewett, *supra,* note 1, at 30. These "typical" restrictive measures can be combined almost freely. Thus, the accused can be released with or without sureties and with or without the actual deposit of the money. To this "ladder approach" of the law see s. 515(1)and (2) Criminal Code as well as T. Quigley, *supra,* note 34, at 254ff.

[55] A procedural overview is provided by T. Quigley, *supra,* note 34, at 251ff. Since the "show cause hearing" is not a trial, the court may rely on hearsay evidence (*Powers* v. *R.* (1972), 20 C.R.N.S. 23 (Ont. H.C.)).

[56] S. 518(1)(c) Criminal Code. See also *R.* v. *Lamothe* (1990), 77 C.R. (3d) 236 (Que.C.A.); *R.* v. *Nguyen* (1997), 10 C.R. (5th) 325 (B.C. C.A.).

[57] Only in the cases referred to in s. 577 of the Criminal Code a direct indictment is possible.

which the accused's appearance in court can be enforced.[58] In the majority of all cases a police officer is the informant who swears before a justice of the peace that he has "personal knowledge or reasonable and probable grounds for believing that the accused has committed the offence alleged in it".[59] However, private informants are also known to the Canadian system.[60]

There is no general time limit within which the information must be sworn.[61] In case of arrest, however, the accused must be charged within the 24-hour-period provided by section 503 of the Code in order to justify a remand of custody. For summary conviction offences, the information must be drawn up within six months following the date the offence was allegedly committed.[62] The justice receiving the information has no jurisdiction to make amendments or corrections.[63] Unclear counts in the information can be amended or quashed only by the trial judge.[64]

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[58] A. W. Mewett, *supra*, note 1, at 95

[59] S. 504 Criminal Code. Citation from T. Quigley, *supra*, note 34, at 359.

[60] S. 2 "prosecutor" and S. 504 Criminal Code establishes that "any one" can lay an information if the requirements are given. Also A. Mewett, *supra*, note 1, at 85. and at p. 11-13: Private individuals also have a right to initiate a prosecution against someone else - for example because the initiator is not satisfied with the police work done so far. The private individual swears before a justice of the peace that he has reasonable and probable grounds to believe that somebody else has committed a specific offence. The justice of the peace can hear other evidence but the alleged offender is not part of the process. If the justice is satisfied that a there are grounds to support a prosecution, she will issue process. If she is not satisfied, she will not authorize a prosecution.

[61] For exceptions see s. 505 Criminal Code.

[62] S. 786(2) Criminal Code.

[63] *Buchbinder* v. *Venner* (1985), 47 C.R. (3d) 135 (Ont. C.A.). The justice cannot refuse the information, where it complies with the requirements according to s. 504 Criminal Code.

[64] S. 601 Criminal Code. In *R.* v. *Moore* (1988), 65 C.R. (3d) 1 (S.C.C.) it has been established that an amendment should be preferred over quashing the information. The same rules also apply for indictments.

The informant takes the crucial position of the prosecutor up to the time when the Crown attorney intervenes.[65] Therefore, in many cases the police are not only responsible for the basic inquiries of the case but also act as prosecutor. However, the Attorney General (through the Crown attorney) has the power to intervene in all prosecutions. The informant automatically loses control of the proceeding at this time.[66] The power of the prosecutor to withdraw charges or to stay the proceeding has already been mentioned.[67]

c) Preliminary Inquiry

In most cases, the trial is based on the information. Only if the accused is charged with an indictable offence and elects to be or must be tried by a superior court judge with or without jury the information is but good for the preliminary inquiry.[68] For the subsequent trial in the superior court, an indictment must be issued.[69] The indictment is a charging document like the information, although not sworn before a justice but normally issued by a Crown Attorney as an agent of the Attorney General.[70]

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[65] A.W. Mewett, *supra,* note 1, at 86-87.

[66] A.W. Mewett, *supra,* note 1, at 87. Theoretically it would be possible for a private person to prosecute an accused even upon indictment. He would need, however, the written consent of the judge (S. 574 (3) Criminal Code).

[67] See supra, B.I.1.1.a).

[68] S. 469, 553, 536 (2) and (4) Criminal Code.

[69] Ss. 566 Criminal Code.

[70] B. Williston, "Trial Procedure", in J. Pink and D. Perrier, *From Crime to Punishment*, 4th. ed. (Toronto: Carswell, 1999) 181 at 183; T. Quigley, *supra,* note 34, at 359.

A preliminary inquiry is held in a provincial court or before a justice of the peace. Its main purpose it to determine whether the prosecutor has sufficient inculpatory evidence that justifies putting the accused on trial.[71] Weak cases ought to be detected in order to avoid trials in which a conviction is improbable. In practice, however, a second purpose is at least as important. The preliminary inquiry is also a crucial discovery tool for the defence.[72] Whereas the defence can choose whether to call evidence at the preliminary hearing, the prosecutor bears the onus of proving that the case against the accused is sufficiently strong.[73] Thus, the Crown must disclose at least parts of its evidence. Since the preliminary inquiry is conducted in the same way as a trial, the defence has an opportunity to cross-examine the Crown's witnesses.[74]

When an accused must stand trial after a preliminary inquiry, all documents and evidence in the case are sent to the Crown prosecutor who issues the indictment. Thus, the indictment is not a sworn document like the information, but is the same in other respects: the indictment appears in the same form as the information and also contains the allegations against the accused.[75] Both indictment and information must be drafted very precisely in order to inform the accused exactly what he is charged with and on which factual events the charge relies.[76] If the charge in the indictment or information

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[71] S. 548 (1) Criminal Code, *R.* v. *Patterson*, [1970] S.C.R. 409 (S.C.C.).

[72] *R.* v. *Skogman*, [1984] 2 S.C.R. 93 at (S.C.C.).

[73] S. 541 (5) Criminal Code.

[74] T. Quigley, *supra*, note 34, at 308; D. Stuart, *Charter Justice in Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1996) at 145.

[75] S. 2 Criminal Code describes "indictment" as including "information". Also T. Quigley, *supra*, note 34, at 359.

[76] A.W. Mewett, *supra*, note 1, at 97; B. Williston, *supra*, note 70, at 182;

does not disclose a specific offence known to law, it is insufficient. The court has the power to amend or quash the indictment or information at any stage of the proceeding.[77]

1.2. Trial and Sentencing

a) Pre-trial Conference

In complicated cases, it may be helpful to have a discussion involving the prosecutor, the accused or defence counsel and the judge in order to organize the upcoming trial hearing.[78] The matters that are dealt with at these conferences are manifold, but they basically concern pretrial motions such as applications for a change of venue, for a division of counts or for a publication ban, or to deal with evidentiary issues, and are aimed to narrow down the issues at trial. The discussions are held without prejudice to the parties, and in particular, the defence cannot be compelled to reveal its strategy or the evidence that it may call.[79]

b) Pleas

At the beginning of the trial hearing before the superior court, the accused is arraigned before the judge. In other words, the charge is read to the accused and he is

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[77] The indictment or information will only be quashed, however, if it cannot be amended because the document has been so poorly drafted that it fails to provide notice of the offence charged or because it does not disclose an offence known to law (*R.* v. *Moore* (1988), 65 C.R. (3d) 1 (S.C.C.)).

[78] S. 625.1 (1) Criminal Code.

[79] T. Quigley, *supra*, note 34, at 446.

asked to enter a plea.[80] If the trial is conducted in a provincial court, these steps will already have been previously taken.[81]

The plea is the formal response of the accused to the charge by the prosecutor.[82] The accused has five choices as how to plead.[83] First, he will plead guilty if he admits the facts and acknowledges the charge.[84] By pleading guilty, the accused relieves the prosecutor from proving the case against him and agrees that he is convicted without any trial.[85] The accused thereby abandons the procedural safeguards in his favour such as the right to silence or the right to full answer and defence.[86]To be valid, the guilty plea must be clear, unequivocal and made upon full understanding of its consequences.[87] Second, if the accused does not agree with the charge against him, he pleads not guilty.

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[80] *Black's Law Dictionary*, *supra*, note 1, *s.v.* "arraignement".

[81] T. Quigley, *supra*, note 34, at 381.

[82] T. Quigley, *supra*, note 34, at 381.

[83] S. 606 (1) Criminal Code.

[84] Or in other words, in "pleading guilty an accused admits having done that with which he is charged", as Dickson J. phrased it in *Adgey* v. *R.* (1973), 13 C.C.C. (2d) 177 (S.C.C.).

In practice, many cases are solved without a trial because the accused enters a plea of guilt. Often, this guilty plea is the result of a plea bargain, or in other words, of an agreement between the prosecutor and the accused according to which the accused pleads guilty in return for the promise of some benefit (G.F. Cole & C.E. Smith, *Criminal Justice in America* (Belmont/US: Wadsworth Publishing Company, 1996) at 31-32). The accused is usually charged with a crime carrying a lighter potential maximum sentene, thus limiting the judge's discretion in sentencing (G. F. Cole, *The American System of Criminal Justice*, 7th ed. (Belmont/US: Wadsworth Publishing Company, 1995) at 347). The trial judge will only refuse to accept the guilty plea if he thinks it to be inappropriate (S. 606 (4) Criminal Code and its interpretation in *R. v. Rowbotham* (1993), 85 C.C.C. (3d) 575). The accused hopes to obtain a lesser sentence by accepting the bargain, the prosecutor's motive is to avoid the extra delay, costs and efforts the conduct of a trial would cause additionally (*ibid.*) The plea bargain can result for example in a reduction of the charge or in a withdrawal of other charges, in a promise as to the type or severity of the sentence that will be imposed on the accused, in an agreement on which kind of procedure the accused will be tried, or in a promise not to oppose release on bail (G.A. Ferguson & D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform" (1974), 52 Can. Bar Rev. 497 at 513).

[85] *Adgey* v. *R.* (1973), 13 C.C.C. (2d) 177 (S.C.C.).

[86] *Ibid.*

Thereby, he compels the prosecutor to present sufficient evidence in order to prove the accused's guilt beyond any reasonable doubt.[88] If the case of the prosecution appears to be strong, the accused should raise his own defence, for example that he has an alibi for the time of the crime or that he suffers from a mental disorder. The accused must present enough evidence to make his defence plausible and to thereby raise a doubt about the Crown's case. The onus of proving that the defence's case is false switches then to the prosecutor.[89] Only if the accused claims to have suffered from mental disorder at the time of the offence, must he prove his allegation on a balance of probabilities in order to avoid a conviction.[90] Third, as to special pleas, the accused can enter the pleas of autrefois acquit or autrefois convict if he was previously acquitted or convicted respectively on the same factual foundation, or he can enter a plea of pardon, which is an act of mercy with the effect that the accused is deemed to have never committed the offence he has been charged with.[91]

c) Further Course of the Hearing

The trial hearing continues with the opening address by the prosecutor in which he summarizes the charge against the accused and explains how he intends to prove the accused's guilt. The prosecutor then calls his evidence consisting of witness

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[87] *Ibid.;* A. Mewett, *supra*, note 1, at 103 f.

[88] D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999) at 12 and 335.

[89] A. Mewett, *supra*, note 1, at 105.

[90] S. 16 (3) Criminal Code. The burden of proof may be reversed in some other instances. See R. Salhany, *supra*, note 6, Chapter 9;J. Sopinka, S.N. Lederman & A.W. Bryant, *supra*, note 4, chapters 3 and 4.

testimony or exhibits. The prosecutor's examination-in-chief of each witness is followed by the cross-examination by the defence. The cross-examination gives the defence an opportunity to elicit information from the witness that is favourable for the accused, or to attack the witness' credibility. If defence counsel raises new issues, the prosecutor is entitled to re-examine the witness, possibly followed by a re-cross-examination by defence counsel.[92] The prosecutor is obliged to present the facts and arguments of the case in an honest and fair manner, and to respect all procedural and evidentiary rules.[93] After all, it is not his main task to seek a conviction but to discover the truth about the criminal incident.

After the prosecutor indicates that he has introduced his entire case, the defence may make a motion to the trial judge to dismiss the case because the prosecution could not establish a case to meet. If the trial judge agrees and accepts the motion by the defence, he enters a directed verdict and acquits the accused.[94] If the prosecutor offers a case to meet, the defence may respond by making an opening address followed by calling exculpatory evidence. Although the defence is not obliged to do so, it normally will apply an active defence strategy rather than just remain silent.[95] If the defence

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[91] S. 607 (1) Criminal Code.

[92] T. Quigley, *supra*, note 34, at 458; R. Salhany, *supra*, note 6, at 227-28.

[93] *Boucher* v. *R.* (1955), 20 C.R. 1 (S.C.C.); *R.* v. *Sugarman* (1935), 25 Cr. App. R. 109 (C.A.A.).

[94] The standard for a directed verdict is high, though. See *United States* v. *Shephard* (1976), 34 C.R.N.S. 207 (S.C.C.). The decision is the trial judge's, also in jury trials: *R.* v. *Rowbotham* (1994), 30 C.R. (4th) 141 (S.C.C.).

[95] J. D. Embree, "The Adversary System of Justice" in J. E. Pink & D. C. Perrier, ed., *From Crime to Punishment*, 4th ed. (Toronto: Carswell, 1999) 189 at 194.

decides to call evidence, the procedure is identical to the Crown's presentation of evidence with reversed roles. The defence has the same discretion as the Crown as to how to present its evidence.[96]

After both sides have completed their cases, prosecution and defence each have the opportunity to make final argument. In their statement, every party discusses the evidence introduced in court and explains what favourable inferences for their own side can be drawn from it.[97] In a jury trial, the defence can only summarize the case presented in court and try to convince the jury of the conclusion to be drawn from these facts that favours the position of the accused. If a judge decides alone, then the final argument can also include explanations on the legal issues of the charge.[98] The trial ends with the final argument of prosecutor and defence counsel unless a jury decides on the guilt of the accused. If this is the case, the trial judge reviews the evidence and theory of both the prosecutor and defence counsel. She also instructs the jury on what the applicable law is and how the verdict must be reached, for example that it must be unanimous.[99] The trier of fact, which is either the trial judge or in a jury trial the jurors, then withdraws to deliberate the verdict.

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[96] T. Quigley, *supra*, note 34, at 461.

[97] A. Mewett, *supra*, note 1, at 129.

[98] T. Quigley, *supra*, note 34, at 464.

[99] A. Mewett, *supra*, note 1, at 129.

d) Jury Trials

In Canada, the suspect has a right to be tried by jury if he is charged with an offence punishable by five years' imprisonment or more.[100] Although jury trials are not held as often as generally assumed, a short outline of the procedural aspects shall be given.

The jury consists of 12 jurors who are selected prior to the trial hearing from a panel encompassing all potential jurors.[101] The selection process is subject to complex rules that cannot be discussed within the scope of this paper.[102] Also, the method of selecting a jury panel as well as the setting of the juror qualifications varies from one province to another.[103] If an impartial jury cannot be selected, the trial judge can order a change of venue and thereby transfer the trial to another court in some other locality within the province.[104]

The course of a jury trial corresponds to the hearing before a trial judge alone for the most part. The jury decides on questions of fact based on directions on the law received from the trial judge.[105] As mentioned earlier, the jurors must be unanimous in their verdict. Apart from that, only a few rules exist on how the jury is to arrive at its finding.[106]

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[100] S. 11 (f) Canadian Charter.

[101] S. 631 (5) Criminal Code.

[102] For a short overview see T. Quigley, *supra*, note 34, at 423-436.

[103] S. 626 Criminal Code.

[104] S. 599 Criminal Code.

[105] T. Quigley, *supra*, note 34, at 438.

[106] S. 653(1) of the Criminal Code empowers the trial judge to discharge the jury if it cannot come to an

e) Sentencing

If the accused is found guilty or pleads guilty, the sentence is passed in a second hearing. Although the trial stage is often acclaimed to be the most important in an adversarial proceeding, there are many important steps before the trial hearing takes place. Due to the large numbers of guilty pleas and the high rate of convictions resulting from the trials, the sentencing phase has been said to be of even greater importance than the trial itself.[107] Sentencing is in the responsibility of the trial judge alone, even in jury trials.[108]

Sentencing is an attempt to contribute to the respect for the law and the maintenance of a just, peaceful and safe society.[109] In order to achieve these purposes, the sanctions must be just and proportionate to the gravity of the offence and the degree of responsibility of the offender.[110] Furthermore, the following aggravating and mitigating factors must be taken into account:[111] the gravity of the offence and the circumstances of the individual case,[112] the harm done to the victim and whether or not the accused is

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unanimous verdict. If this is the case, the accused must be re-tried. Unanimity is only required in respect of the ultimate verdict but not of the individual pieces of evidence or the reasons for the verdict: *R.* v. *Thatcher* (1987), 57 C.R. (3d) 97 (S.C.C.).

[107] T. Quigley, *supra*, note 34, at 464.

[108] A. W. Mewett, *supra*, note 1, at 185; T. Quigley, *supra*, note 34, at 492.

[109] s. 718 Criminal Code. Depending on the individual case, these aims are approached by deterrence of the offender from committing further offences, his separation from society, assistance in his rehabilitation, and obliging him to make reparations for harm done to the victim (s. 718 Criminal Code). See also *R.* v. *McGinn* (1989), 49 C.C.C. 137 (Sask. C.A.). S. 718.2 Criminal Code sets out further principles for sentencing such as the principle that comparable cases demand a similar sentence (*ibid.* (b)), and the principle that less restrictive sanctions should be applied before imprisonment (*ibid.* (d) and (e)).

[110] S. 718 and 718.1 Criminal Code.

[111] S. 718.2 (a) Criminal Code.

[112] *R.* v. *Nash* (1949, 94 C.C.C. 356 (N.B. C.A.); *R.* v. *Wilmott*, [1967] 1 C.C.C. 171 (Ont. C.A.); *R.* v. *Hinch*

going to make a restitution or reparation, the personal circumstances of the offender such as his criminal record and general character,[113] his attitude after the commission of the crime,[114] as well as the probable influence of the kind of sentence on the accused.[115]

The conduct of the accused in his defence can also have a mitigating effect on the sentence.[116] Especially a plea of guilt by the accused is often rewarded by a mitigation of the sentence for the reason that the accused saves the community the expenses of a trial.[117] It is rather astonishing that despite the adversarial mode of the Canadian criminal process, the cooperation of the accused with the police may be rewarded with a mitigation of the sanction.[118] The trial judge can impose a penalty of imprisonment, fine or probation.[119]

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and Salanski, [1968] 3 C.C.C. 39 (B.C. C.A.).

[113] *R.* v. *Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.)

[114] *R.* v. *Hinch and Salanski*, [1968] 3 C.C.C. 39 (B.C. C.A.)

[115] Canada, Law Reform Commission, *Studies on Sentencing* (Ottawa: Information Canada, 1974) at 17.

[116] The right to full answer and defence requires that the conduct of the defence is ignored when it comes to considering the aggravating factors for sentencing (*R.* v. *Kozy* (1990), 58 C.C.C. (3d) 500 (Ont. C.A.), *R.* v. *Nastos* (1995), 95 C.C.C. (3d) 121 (Ont. C.A.). Deliberate attempts of the accused to mislead the court may not be taken into consideration when imposing the sentence. They are, however, relevant when determining the accused's degree of criminality and his general character and may reduce the weight of mitigating factors (*R.* v. *McWhinnie* (1981), 25 C.R. (3d) 342 (Alta. Q.B.), affd *loc. cit.*p. 343*n* (C.A.); *R.* v. *Dunbar* (1966), 51 Cr. App. R. 57 (C.A.); *R.* v. *Scott*, [1983] Crim. L. R. 568 (C.A.); *R.* v. *Doab*, [1983] Crim. L. R. 569 (C.A.)).

[117] *R.* v. *Johnston and Tremayne*, [1970] 4 C.C.C. 64 (Ont. C.A.); *R.* v. *Boyd* (1980), 2 Cr. App. R. (S.) 234 (C.A.),; *R.* v. *Skilton and Blackmore* (1982), 4 Cr. App. R. (S.) 339 (C.A.). A mitigation of the sentence may be refused, however, where the accused was inescapably caught in the commission of the crime (*R.* v. *Spiller*, [1969] 4 C.C.C. 211 (B.C. C.A.)).

[118] *R.* v. *Alfs* (1974), 17 C.L.Q. 247 (Ont. C.A.); *R.* v. *Kirby, Stewart and Cadwell* (1981), 61 C.C.C. (2d) 544 (Ont. Co. Ct.); or for England *R.* v. *Sivan* (1988), 87 Cr. App. R. 407 (C.A.) which outlines the factors of the cooperation that would justify a reduction of the sentence.

[119] Apart from life-imprisonment for certain offences, the maximum for jail-sentences is fourteen years. If not otherwise provided by law, the maximum sentence for indictable offences may not exceed five years (S. 743

If a guilty plea has been entered, or the trier of fact has found the accused guilty, a sentencing hearing must be held as soon as possible.[120] The judge already knows the circumstances of the case from the previous hearing. Especially where a guilty plea was entered, the prosecutor briefly outlines the case against the accused and all other aspects that ought to be taken into consideration for the sentence. The accused can respond, but the hearings are mostly held without much formality and evidence is seldom called.[121] However, the trial judge can require the production of evidence if this will assist him in determining a just sentence.[122] Different from the trial, hearsay evidence is also admissible.[123] When all the evidence has been heard, both sides are entitled to make sentencing submissions. The accused has the right to make a final statement before he is sentenced.[124] The trial judge passes the sentence based on all information received from the parties. When the judge has decided on the sentence,

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Criminal Code) and for summary conviction offences six months. (S. 787 (1) Criminal Code). Some offences also require a minimum sentence, for example a person who was convicted of first degree murder is not eligible for parole until he has served twenty-five years of his sentence (S. 745 (a) Criminal Code). There is no limitation on the amount of fines for indictable offences as long as the court is convinced that the offender is able to pay it (Ss. 718 (3), 734 (2) and 735 (1)(a) Criminal Code). For summary conviction offences the limit is two thousand dollars for individuals and twenty-five thousand dollars for corporations (S. 735 (2) Criminal Code). Every jail-sentence can be replaced by a fine (S. 734 (2) Criminal Code). By imposing probation, the passing of sentence is suspended and the offender is released under certain conditions. Probation is only possible if there is no minimum punishment prescribed by law (S. 731.1 Criminal Code).

[120] S. 720 Criminal Code. E.g. *R.* v. *Taylor* (1995), 104 C.C.C. (3d) 346 (Sask. C.A.); *R.* v. *Shea* (1980), 55 C.C.C. (2d) 475 (S.C. App. Div.); *R.* v. *Cardin* (1990), 58 C.C.C. (3d) 221 (Que. C.A.).

[121] The course of the sentencing process is regulated in ss. 721-29 of the Code.

[122] S. 723(3) Criminal Code. The judge must take into account any relevant information placed before him.

[123] S. 723(5) Criminal Code.

[124] S. 726 Criminal Code.

she must explain the terms of the sentence to the offender, and can give the reasons for her finding.[125]

2. The Swiss Inquisitorial Tradition

2.1. Pretrial

A criminal proceeding against a suspect is usually triggered by personal observations of police officers, or oral or written complaints of offences (sometimes accompanied by a demand for prosecution) by private individuals or a cantonal or federal authority. It may be that the police first conduct a superficial inquiry before initiating a formal inquiry for the alleged offence.

In Switzerland, the pretrial investigation of the crime shapes the proceeding in a more profound manner than in Canada, as the information gathered and written down in the dossier constitutes evidence introduced at trial.[126] The investigations apply not only to the factual issues of the offence but also to questions of guilt and queries of substantive criminal law. As will be seen, the defence has very important disclosure rights during the pretrial stage in order to ensure that the alleged offender knows what case he has to meet at trial.[127]

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[125] S. 726.2 Criminal Code.

[126] See *supra* B. 1.1. a).

[127] (*Akkusationsprinzip*). R. Hauser & E. Schweri, *supra*, note 1, at 198. The accused's right to disclosure will be discussed below, C.II.4.

Generally, the investigative stage is divided into two procedural steps: the inquiry, carried out by the police,[128] and the investigation, for which a special examining magistrate is responsible.[129] Different from Canadian law, where offences are divided into either indictable offences or summary conviction offences, according to Swiss substantive criminal law, all offences are classified into felonies, misdemeanours and petty crimes, depending on the level of their seriousness.[130] Although the Canadian system of classification also refers to the seriousness of the offence and indirectly to the range of a possible sentence, the classification also determines the mode of trial and the appeal procedure.[131] In Switzerland, the pretrial procedure applies to all offences and the further course of the proceeding is also generally the same.[132]

a) Inquiry

If the police are satisfied that an offence has been committed, a formal inquiry of the alleged crime is initiated. Its original purpose is to examine whether enough evidence

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[128] (*polizeiliches Ermittlungsverfahren*) E.g. §119-125a StPO AG.

[129] (*Untersuchungsverfahren*) E.g. § 126-135 StPO AG.

[130] Felonies (*Verbrechen*) are the most serious crimes and are punishable with imprisonment of at least one year and up to 20 years or for life (article 9 (1) and 35 *Schweizerisches Strafgesetzbuch* vom 21. Dezember 1937 (SR 311.0), cited as StGB). The perpetrator of a misdemeanour (*Vergehen*) can be punished with a fine or with imprisonment of at least 3 days but for a maximum period of time of 3 years articles 9 (2) and 36 StGB). Petty crimes (*Übertretungen*) can have a fine or imprisonment of at least one day but not more than three months (articles 101 and 39 StGB). For information on the range of fines, see below, fn. 187.

[131] R.H. Salhany, *supra*, note 20, at 1-4 and 1-5

[132] The alleged perpetrator of any offence is either tried before a court or will be involved in a shorter process where the examining magistrate is empowered to impose a sentence if he is convinced of the suspect's guilt (*Strafbefehlsverfahren*, see below, fn. 155).

exists in order to justify triggering a formal criminal process.[133] In the course of the inquiry, the police trace the suspected perpetrator, scrutinize the facts of the crime, and take possession of discovered evidence.[134] Sources of evidence typically consist of the interrogation of suspects and individuals who can give information about what happened[135] and the employment of forensic means of securing of evidence such as the analysis of finger- and footprints, DNA-testing of bodily samples, or alcohol-tests. To simplify the fulfillment of their tasks, the police have the power to arrest suspects, to search persons and their property and to seize possible exhibits they discover.[136]

The results of the police inquiry are written down and a dossier on the suspect is opened that will be passed from one scrutinizing authority to another in the course of the continuing proceeding until completion. This police file will eventually be the evidentary basis for the trial and sentencing. This may be considered as the key difference to the pretrial investigation carried out in Canada. Before Swiss courts, the principle of direct testimony, which demands that all evidence must be heard by judges at the hearing, has been reduced to a minimum.[137] Often, only the accused and essential witnesses get an

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[133] H. Hauser & E. Schweri, *supra*, note 1, at 326.

[134] § 1 StPO AG.

[135] (*Auskunftsperson*) Although these persons are asked to give true information on the relevant facts of the case, they are not yet considered to be witnesses and cannot be compelled to make a statement, nor are they punishable if found lying to the police (S. Trechsel, *Schweizerisches Strafgesetzbuch - Kurzkommentar*, 2d ed. (Zürich/CH: Schulthess Polygraphischer Verlag, 1997) at 981). The statements received will be part of the dossier and will have the same weight for the judicial consideration of the case as the testimony of witnesses received later on in the proceeding (R. Hauser & E. Schweri, *supra*, note 1, at 263).

[136] R. Hauser & E. Schweri, *supra*, note 1, at 329.

[137] (*Unmittelbarkeitsprinzip*) This has been broadly criticized by legal scholars, for example: M. Pieth, *Strafverteidigung - wozu?* (Basel/CH: Helbing & Lichtenhahn, 1986) at 19; V. Delnon & B. Rüdy, *supra*, note 1, at 64; H. Camenzind & J. Imkamp, "Delegation von Untersuchungshandlungen an die Polizei, dargestellt am Beispiel der Strafprozessordnung des Kantons Zürich" ZStrR 117/1999, 197 at 203.

opportunity to give their views in court.[138] The rest of the evidence is taken directly from the dossier on the case and with no real further chance to challenge it by the defence.[139] The suspect has hardly any means to become involved in or to influence the criminal investigation in his favour.[140] The rights of the accused, which will be discussed later, are not yet applicable at this stage of the proceeding.[141] When the modern cantonal codes were drafted mostly in the nine-teen fifties, sixties and seventies police inquiries were intended to be limited to a more general examination of the facts of the crime and to ignore further aspects such as questions of guilt or other legal issues.[142] A special procedural protection of the suspected person at this stage of the proceeding was obviously not thought to be necessary, because it was expected that errors and omissions during the inquiry could still be rectified during the investigation by the examining magistrate.

b) Investigation

The summary inquiry by the police is followed by a more formal investigation by a special examining magistrate.[143] The purpose of this second investigative stage is to

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[138] E.g. § 27 StPO AG.

[139] See discussion below, D.III.2.2.

[140] G. Piquerez, "Les droits de la défense dans le procès pénal suisse" in C. Robert & B. Sträuli, ed., *Procéedure pénale, droit pénal international, entraide pénale - Etudes en l honneur de Dominique Poncet* (Chêne-Bourg/CH: georg éditeur, 1997) 71 at 77 and 78, who describes the rights of the suspect as inexistent.

[141] Below, sections C and D.

[142] V. Delnon & B. Rüdy, *supra*, note 1, at 50 with reference to the procedure in the Canton Zürich, § 23 StPO ZH; R. Hauser & E. Schweri, *supra*, note 1, at 334.

[143] (*Bezirksamtmann, Untersuchungsbeamter*)

examine whether putting the suspect on trial is justified, or whether the proceeding must be abandoned for lack of evidence.[144] Contrary to the police, examining magistrates are obliged to investigate objectively and impartially, which means that they must gather evidence irrespective of whether it supports the case for the prosecution or for the defence.[145] In this second investigative stage, not only the investigation of the factual issues must be completed, but magistrates must also investigate questions of substantive law such as the question of guilt or grounds of justification for the otherwise criminal conduct.[146]

The investigation is not automatically triggered as soon as the police regard their tasks as fulfilled and hand the file on the suspect over to the magistrate, but only if the examining magistrate or counsel for prosecution believe it to be of substantial importance to supplement the police inquiry.[147] The investigation is not mandatory, despite the idea that the police should concentrate on the factual issues of the offence whereas the examining magistrate is responsible for the investigation of guilt, legal queries and factors that will have an impact on the length and form of the sentence.[148] If it is not initiated, the crucial, investigative stage of the criminal proceeding remains the responsibility of the police alone.

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[144] H. Utz, *Die Kommunikations zwischen inhaftiertem Beschuldigten und Verteidiger* (Basel/CH: Helbing & Lichtenhahn, 1984)at 25.

[145] § 127 StPO AG; D. Krauss, "Strafverteidigung - wohin?", recht 4/1999, 117at 118.

[146] H. Utz, *supra*, note 144, at 25.

[147] § 126 StPO AG.

[148] B. Brühlmeier, *Aargauische Strafprozessordung*, 2d. ed. (Aarau/CH: Keller Verlag, 1980) at 117; R. Hauser & E. Schweri, *supra*, note 1, at 334, H. Utz, *supra*, note 144, at 25.

The suspect has strong participation rights during the investigation by the examining magistrate. The file has to be disclosed to him and the suspect has the right to be represented by counsel, to make motions for further investigations and to be present when witnesses are questioned or other evidence is taken.[149] The examining magistrate, however, has a rather broad discretion to restrict these rights when he believes the purpose of the investigation may be undermined by the participation of the alleged offender.[150] In cases where no investigation is triggered, the suspect has hardly any possibility of intervening during the course of the police inquiry. Only before the police close their inquiry and hand the file over to the prosecutor, it must be disclosed to the suspect. Furthermore, the defence has the opportunity to file a motion for additional inquiries by the police.[151] Other participation rights of the suspect, such as his right to counsel, do not operate at all where the police alone are responsible for the investigation.[152]

c) Intermediate Proceedings

If the examining magistrate[153] is convinced that the investigation is complete, a final account is drawn up and the file is handed over to the prosecutor[154] who will decide

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[149] §§ 129-132, 134 StPO AG; R. Hauser & E. Schweri, *supra*, note 1, at 337 ff.

[150] This will be discussed below, D.III.2.4.

[151] B. Brühlmeier, *supra*, note 148, at 267.; H. Utz, *supra*, note 144, at 25.

[152] See below, D.III.1.1.

[153] Or the police where there is no investigation by the examining magistrate.

[154] (*Staatsanwalt*)

whether the case will be submitted to the court for trial or whether it should be abandoned because the original suspicion against the alleged offender has not been established.[155] If necessary, the prosecutor can return the file to the examining magistrate[156] for further investigation.[157]

If the pretrial inquisition is complete and a conviction of the suspect appears probable, the prosecutor submits the case to the court for trial by indictment.[158] The indictment is a written document and must satisfy strict rules as regards content. Not only must the suspect be named and the facts of the case described, but the indictment

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[155] §§ 136, 137 and 143 StPO AG. R. Hauser & E. Schweri (*supra*, note 1)show at 343 the decisions of the prosecutor in the Canton Zürich for the year 1992 as an example. In this year, 7931 cases were stayed after the pretrial inquisition, 7931 were directed in a special proceeding according to which a trial is only held if the accused appeals against the verdict the examining magistrate reached (*Strafbefehlsverfahren*) and in only 4979 cases a trial was launched.

In Switzerland, plea bargaining has not been instituted in order to relieve the courts of their workloads. Instead, in minor cases, the examining magistrate - if convinced of the suspect's guilt after a careful evaluation of the evidence found in inquiry and investigation- can directly impose a sentence on the suspect, thereby skipping the intermediate and the trial stage (*Strafbefehlsverfahren*, § 194 StPO AG; R. Hauser & E. Schweri, *supra*, note 1, at 371). If the suspect (or the prosecutor) does not agree with either the verdict or the sentence, he can demand that his case be forwarded to the court for trial (§ 197 StPO AG). The *Strafbefehl* is therefore actually a proposal for verdict and sentence by the examining magistrate which becomes effective if it is not challenged. Although highly efficient and necessary, this kind of proceeding is not without risk for the suspected offender (The following explanations refer especially to the law in the Canton Aargau, the problems may be less severe in other cantons). First, the examining magistrate decides himself, whether he is dealing with a minor case. He cannot simply refer to a list of minor offences for this purpose, but decides indirectly by contemplating a suitable sanction. If he is convinced that a fine of less than 40'000 Swiss francs or imprisonment of not more than one month is appropriate, he can speak the verdict and sentence (§ 5 StPO AG). The kind of offence here does not matter. It is clear, that this competence bestows the examining magistrate with great power. Second, many suspects who receive such a *Strafbefehl*, rather accept a wrongful conviction then take the ordeal of standing trial if the sentence is not too high (R. Hauser & E. Schweri, *supra*, note 1, at 372). Paying a fine of 500 Swiss francs can be cheaper at the end than risking to pay counsel's salary and court fees on top of the fine in case conviction and sentence are confirmed by the court. And third, as seen *supra*, the rights of the accused can be very limited during the police inquiry and the investigation by the examining magistrate (M. Schwitter, *Der Strafbefehl im aargauischen Strafprozess* (Aarau/CH: Sauerländer, 1996), at 22; B. Brühlmeier, *supra*, note 148, at 344.).

[156] Or to the police respectively.

[157] § 129 StPO AG.

[158] In some cantons the indictment goes to a special authority that will control its lawfulness before it is transmitted to the court. In the Canton Aargau no such authority exists and there is no remedy against the

must also specify all applicable sections of the Criminal Code, the evidence that will be presented, as well as a proposal of the sentence in case of a conviction.[159] The suspect now becomes the accused in the criminal proceeding. He receives a copy of the indictment in order to be informed that the case has progressed to court.[160] The forwarding of the indictment to the accused also serves disclosure purposes.

2.2. Trial and Sentencing

The prosecutor forwards the indictment together with the police record to the local district court.[161] In the Canton Aargau, in criminal matters, every district court is composed of a professional presiding judge[162] and four lay judges[163] who sit in a manner comparable to jurors but regularly over a number of years.[164] These lay judges are elected by the people usually for four years and get paid for their efforts.[165] The indictment and police record on the accused are first transmitted to the presiding judge.

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decision of the prosecutor to proceed the case. § 145 (3) StPO AG.

[159] §§ 143 and 144 StPO AG.

[160] § 145 (2) StPO AG

[161] § 145 (1) StPO AG.

[162] (*Gerichtspräsident*)

[163] (*Richter*)

[164] § 31 *Gesetz über die Organisation der ordentlichen richterlichen Behörden* vom 11. Dezember 1984 (SAR 155.100, cited as GOG AG).

[165] §§ 3(1) and 4(1) GOG AG.

She will study them carefully and then pass them on to her colleagues for their preparation for the trial.[166]

The trial[167] is divided into three stages: The hearing[168], the deliberation of the findings regarding the questions of guilt or innocence and the sentence, and finally the pronouncement of verdict and sentence. Different from its adversarial counterpart, the trial for the finding of the guilt and the sentencing are combined in inquisitorial proceedings. This explains, for example, the presence in the dossier of the accused's criminal record which is not normally admissible at the behest of the Crown at the Canadian criminal trial stage.

a) Hearing

The hearing is intended to provide a solid informational foundation on which the decision-maker can base its finding of the case. The hearing starts with a summary of the content of the indictment by the presiding judge. Then, the accused (or defence counsel on his behalf) and the prosecutor can object to the composition of the court (for example because one of the judges is related to the victim) or the legal venue.[169]

If the court considers itself legally competent and unbiased, the evidence is presented. In every trial, the accused must be questioned on the facts of the case and

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[166] § 147 StPO AG. For a discussion of the problems arising from the studying of the dossier prior to the trial, see Krauss, D. "Die Unmittelbarkeit des Hauptverhandlung im schweizerischen Strafverfahren, 2. Teil", recht 2/1987, 42 at 49ff.

[167] (*Hauptverhandlung*)

[168] (*Verhandlung*)

[169] § 154 StPO AG.

his personal background.[170] Then, eye-witnesses and expert witnesses give their testimony and other evidence can be presented by the prosecutor or by the defence. The presiding judge has exclusive power to conduct the trial.[171] She determines not only the course of the proceeding at the trial phase, but also what evidence will be heard. Contrary to Canada, in Switzerland it is also the presiding judge who questions the accused and the witnesses. The other judges, the prosecutor and defence counsel only have a right to suggest supplementary questions.[172]

If the evidentary side of the case is undisputed, evidence that has been heard in the pretrial investigative stage is not repeated in court in order to save time and costs. Only the interrogation of the accused must be repeated at the hearing.[173] The accused must therefore always attend the trial.[174] The prosecutor, on the other hand, is only obliged to be present at the trial if an important or serious crime is tried.[175] Since the presiding judge questions the accused and the perspective of the prosecutor is included in the file, his attendance is not necessary. Yet, where the prosecutor is absent, the outcome of the trial relies even more on the file on the accused drawn up in the course

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[170] § 156 (1) in combination with § 160 (1) StPO AG; B. Brühlmeier, *supra*, note 148, at 304, R. Hauser & E. Schweri, *supra*, note 1, at 357.

[171] (*Präsidialverhör*) § 152 StPO AG.

[172] Although the right to cross-examination has been established in the Canton of Aargau since 1960 (§ 156 ss. 2 StPO AG.), it has never been applied.

[173] § 27 StPO AG. See also below, D. III.2.6.

[174] As rare exceptions, proceedings against absentees are admissible; e.g. if the accused entitles the court to decide during his absence (§ 170 (e) StPO AG). In Canada, on the other hand, courts have no jurisdiction in indictable matters without the presence of the accused. See R. Salhany, *supra*, note 20, at 6-122.3 and 6-122.4; *R.* v. *Grimba* (1989), 56 C.C.C. (2d) 570 (Ont. C.A.).

[175] According to § 149 StPO AG this is the case if the prosecutor suggests the court to impose a jail-sentence of more than 18 months. R. Hauser & E. Schweri, *supra*, note 1, at 354.

of pretrial inquisition than is the case in ordinary proceedings.[176] Where the accused alleges the pretrial investigation or the additional evidence heard by the court to be one-sided, he has another possibility to make a motion for additional taking of evidence, this time addressed to the court.[177] If the judges agree, they will hear the suggested evidence themselves: the file is not sent back to the police or the examining magistrate for completion. If the judges dispute the one-sidedness of the file or their own taking of evidence, the accused must appeal against the final decision of the court. There is no remedy that would compel the lower court to comply with the motion of the accused.[178]

After the evidence has been heard (or if the court is going to base its decision on the police record after the questioning of the accused), the parties present their arguments. The prosecutor always speaks first, followed by defence counsel.[179] The prosecutor is required to argue objectively and must therefore summarize the incriminating as well as the exculpatory factors of the case to the court.[180] The accused

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[176] R. Hauser & E. Schweri, *supra*, note 1, at 321.

[177] § 156 (2) StPO AG. This right is also an aspect of the right to be heard: BGE 109 Ia 333; 106 Ia 162.

[178] Additional taking of evidence can be lawfully denied if the suggested evidence is clearly immaterial, if the evidence is illegal, if the accused's guilt is clearly proved by other evidence, or if the motion for additional inquiry has assumably been made as dilatory tactics. See R. Hauser & E. Schweri, *supra*, note 1, at 222-23.

[179] § 160 StPO.

[180] R. Hauser & E. Schweri, *supra*, note 1, at 130. If the evidence heard at trial indicates, that the accused is probably not the perpetrator, the prosecutor must suggest an acquittal to the court. If the court convicts the accused, the prosecutor can appeal against this verdict in favour of the accused. (Ibid.) § 3 (1) StPO AG establishes though that the prosecutor represents the state's claim for punishment at the trial (*Der Staatsanwaltschaft obliegt ... die Vertretung des staatlichen Strafanspruches vor Gericht*). In practice, however, the prosecutor always enumerates inculpatory and incriminating factors as a summary for the court for the determination of guilt, and aggravating as well as mitigating factors that must be taken into consideration for the sentence respectively.

has the right to make a final statement,[181] and then the court withdraws to reach a verdict.

b) Deliberation

The court deliberates verdict and sentence in camera. The public and the parties cannot attend the meeting.[182] As opposed to adversarial proceedings, the verdict and sentence are discussed at the same meeting.[183] However, the judges are prohibited from using information that was introduced by the parties for sentencing while determining whether the accused is guilty at all. The sentencing process itself is not governed by the law on criminal procedure but by the substantive criminal law. The accused's motives, his past as well as his personal circumstances must be taken into account when deliberating the sanction.[184] The sanction imposed must be commensurate to the accused's guilt, it must be similar to comparable cases and it must be reasoned by the judge.[185] Objectives of the sanction and factors that must be taken into consideration are

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[181] § 160 (5) StPO AG.

[182] § 161 StPO AG.

[183] The German word for decision, *Urteil*, includes both the decision on the question of guilt as well as on the sentence (K. Creifeld, *supra*, note 1, *s.v.* "Urteilsformel"). Therefore, the parties refer in their arguments to both, the question of guilt as well as the sentencing. Some cantons have adopted a bifurcated system according to adversarial proceedings, for example the Canton Bern (article 168 StPO BE), Schaffhausen (article 261 StPO SH) or Basel-Stadt (§ 134 StPO BS).

[184] Article 63 *Schweizerisches Strafgesetzbuch* vom 21. Dezember 1937 (SR 311.0, cited as StGB).

[185] S. Trechsel, "Strafzumessung bei Verkehrsstrafsachen, insbesondere bei SVG Art. 91 Abs. 1", in Rechtsprobleme des Strassenverkehrs (Bern/CH: 1975) 71 at 76.

similar to the ones Canadian judges must respect.[186] The court can impose imprisonment, fine and/or a number of "side-sanctions".[187]

The court is limited to the factual contents of the indictment by the prosecutor, but is not restricted to the prosecutor's legal interpretation of these facts.[188] The prosecutor, on the other hand, loses his power to amend the indictment or to discharge the accused as soon as it has been handed over to the court.[189]

Verdict and sentence are a majority decision. Dissenting opinions are usually not published since the judges decide collectively.[190] However, if the factual or legal circumstances of a case were very contentious and the minority opinion is very strong, the presiding judge may give the accused this information. This notice can be helpful to the parties in order to decide whether or not to appeal.

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[186] See *supra*, B.1.2.e). For a brief overview, see S. Trechsel, *supra*, note 135, at 275 ff.

[187] The maximum and minimum of the sanction is laid down in the provision that also describes the offence. The general maximal length of imprisonment is 20 years, however, life-imprisonment is also known in Switzeland for certain offences (article 35 StGB). If the sanction imposed does not exceed 18 months and if this seems appropriate, the accused can profit from probation (article 41 StGB). Under certain circumstances, the accused can also be released from prison early (articles 38 and 45 StGB). Fines are generally limited to the amount of 40'000 Swiss Francs (article 48 StGB). If the offender does not pay the fine within the time period given, the fine will be translated into imprisonment. One day in prison equals 30 Swiss Francs (article 49 StGB). As for "side-sanctions" (*Nebenstrafen*), foreign offenders are most likely to be deportated out of the country after having served their time and are not allowed to re-enter for often ten years (article 55 StGB). If the offence was committed in connection with impairment, the perpetrator can be prohibited from going to restaurants, pubs or bars where alcohol is served (article 56 StGB). Other "side-sanctions" are the revocation of custody rights over the children (article 53 StGB) or the offender is declared incapable of becoming an official and working for the state (article 51 StGB).

[188] § 163 StPO AG.

[189] § 160 (1) StPO AG.

[190] (*Kollegialitätsprinzip*), R. Hauser & E. Schweri, *supra*, note 1, at 361.

c) Pronouncement of Verdict and Sentence

Eventually, verdict and sentence are pronounced and the accused is given a short oral summary of the grounds as well as a legal instruction about his or the prosecution's right to appeal.[191] The full reasons are only written later by the court registrar[192] on petition of the defence or the prosecutor.[193] The same rules apply if the accused is acquitted. In this case, the prosecutor can appeal as soon as he gets the detailed reasoning.

II. Role of Defence Counsel

In both procedural systems, criminal law is not as highly regarded as other fields of legal work. Monetary reasons as well as the idea that counsel may share the unpopularity of the accused criminals that they defend have the consequence that in both systems, the accusatorial and the inquisitorial, not many lawyers decide to specialize exclusively in criminal law.[194] Therefore, often only young and inexperienced lawyers or those who accept criminal cases only occasionally are available to the person

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[191] § 166 StPO AG.

[192] (*Gerichtsschreiber*)

[193] § 168 StPO AG.

[194] P. Wice, *Criminal Lawyers - An Endangered Species*, (Beverly Hills: Sage Publications, Inc., 1978) at 29; G. F. Cole, *supra*, note 94, at 319; M. Pieth, *supra*, note 137, at 21; E. Müller-Hasler, *Die Verteidigungsrechte im zürcherischen Strafprozess, insbesondere deren zeitlicher Geltungsbereich, unter dem Aspekt des fairen Verfahrens* (Entlebuch/CH: Huber Druck AG, 1998) at 25.

arrested.[195] Prosecutors, on the other hand, enjoy a far higher status in the public eye. The general mistrust toward criminal lawyers by authorities and the public, not only in their work but also their person, has repeatedly been confirmed in Swiss legal literature.[196]

1. Canada

1.1. Defence Counsel as Adversary of the Prosecutor

Without defence counsel, the rights of the accused would probably be disregarded in the adversarial system. Although the prosecutor has a duty to conduct the trial against the accused in a fair manner,[197] and the trial judge can intervene into the gathering of the facts in certain cases,[198] this is not enough to protect the rights of the accused. In most cases even a legally trained accused could not maintain this position because he is lacking the necessary personal distance to the case in order to tackle his defence with an unprejudiced mind. Not to mention that the majority of accused persons who have not enjoyed a legal education are incapable of getting through the legal traps

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[195] E. Fairchild, *supra*, note 6, at 142; M. Pieth, *supra*, note 137, at 9.

[196] H. Müller, *Verteidigung und Verteidiger im System des Strafverfahrens* (Zürich: Schulthess Polygraphischer Verlag, 1975) for example, is seriously of the opinion, that defence counsel encourage accused persons to lie who would tell the truth and confess immediately if they were not held back by counsel (at 144). See also the article of H. Baumgartner where the author summarizes his own experiences as defence counsel (H. Baumgartner, "Wessen Komplize ist der Verteidiger" in H. Baumgartner & R. Schuhmacher, ed., *Ungeliebte Diener des Rechts - Beiträge zur Strafverteidigung in der Schweiz* (Baden-Baden/D: Elster Verlag, 1999) 231).

[197] *Boucher* v. *R.* (1955), 20 C.R. 1 (S.C.C.); *Chamandy* v. *R.* (1934) 61 C.C.C. 224 (Ont. C.A.); *R.* v. *Sugarman* (1935), 25 Cr. App. R. 109 (C.A.A.).

[198] For example when an accused who is not represented by counsel enters a plea of guilt, the trial judge is obliged to consider the appropriateness of the plea and whether the accused fully understands its

successfully. The adversarial tradition is calculated to involve a strong opponent for the prosecutor. The role of defence counsel is to protect the interests of her client and to ensure that the position of the accused is also taken into account at all procedural stages.[199]

Defence counsel is also considered an officer of the court and ethical restrictions apply to the manner in which she is allowed to conduct the defence for her client.[200] However, as opposed to inquisitorial proceedings, "the defence counsel's role is not to assist in the search for truth, but to verify the result of the search conducted by the Crown".[201]

1.2. Tasks of Defence Counsel

The working environment of criminal lawyers in both systems is divided between the private office and the courthouse. Due to the procedural differences, common law lawyers spend far more time in courtrooms than their colleagues who are active in inquisitorial proceedings.[202]

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consequences (*Adgey* v. *R.* (1973), 13 C.C.C. (2d) 177 (S.C.C.)).

[199] G.A. Martin, "The Role and Responsibility of the Defence Advocate" (1970), 12 Crim. L. Q. 376 at 383).

[200] *Rondel* v. *Worsley* (1967), [1969] 1 A.C. 191 (U.K.H.L.). E. g. Nova Scotia Barristers' Society, *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia* (Halifax: Nova Scotia Barristers' Society, 1990) at chapter 10.

[201] F.P. Hoskins, "The Players of a Criminal Trial" in J.E. Pink & D.C. Perrier, ed., *From Crime to Punishment*, 4th ed. (Toronto: Carswell, 1999) at 179; in similar words E. L. Greenspan & G. Jonas, *Greenspan: The Case for the Defence* (Toronto: Macmillan of Canada, 1987) at 59-60). Different opinion: M.H. Freedman, "Professional Responsibility of the Criminal Defence Lawyer: The Three Hardest Questions" (1966), 64 Mich. L. Rev. 1469 at 1482.

[202] P. Wice, *supra*, note 194, at 129.

In Canada, defence counsel can assert influence at several stages of the criminal proceeding against her client: upon stop and arrest of her client by the police, after the charge has been laid, at the preliminary inquiry, and of course at the trial and the sentencing, and upon appeal.[203] The majority of cases, however, are settled by plea bargaining.[204] Among the duties of defence counsel are the thorough investigation of the case, to keep her client informed, to discuss the possible outcome of the proceeding with her client, and to explain in easily understandable language the various options that are available to the client as well as the probable consequences of each choice.[205] Defence counsel may advise her client on how to plead. However, the ultimate decision remains with the client.[206] Defence counsel must follow the instructions of her client, unless they are unreasonable.[207] Defence counsel is responsible, however, for tackling the defence effectively, for example by intelligent choices of which evidence to call or how to challenge the prosecutor's case.

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[203] E.L. Greenspan, "The Future Role of Defence Counsel", (1986-87) 51 Sask. Law Rev. 199 at 211-212.

[204] P. Wice, *supra,* note 194, at 159; G. Cole, *supra,* note 94, at 18 and 346. Plea bargaining has been briefly discussed *supra*, fn. 94.

[205] F. Hoskins, *supra,* note 201, at 178; G.A. Martin, *supra,* note 199, at 388.

[206] *Adgey* v. *R.* (1973), 13 C.C.C. (2d) 177 (S.C.C.). Counsel should only advice to enter a plea of guilt after having conducted a thorough investigation of the case against her client (G.A. Martin, *supra,* note 199, at 386-87).

[207] An effective defence may make it necessary that defence counsel conducts the trial contrary to the wishes of her client. The attorney's duty to provide professional assistance and advice demand, that counsel does not refuse to continue to act without good reason (G.A. Martin, *supra,* note 199, at 383-387 with further references). To abandon the client knowing that he needs help would hardly be reconcilable with the ethical rules of the profession.

More obviously than in Swiss proceedings, the tasks of defence counsel are often proscribed by the financial resources of the client. Private investigations, as an example, are only used occasionally although they can be an efficient tool for the location and interviewing of witnesses for the defence. Generally, defence counsel relies primarily on the information received from police reports, discussions with the responsible officers and the preliminary hearing.[208] Section 10 (b) of the Canadian Charter vests the accused with the right to contact and be advised by counsel upon detention or arrest, which is often satisfied through first recommendations by defence counsel on the phone.[209] An American study showed that most criminal lawyers meet with their clients for the first time only after their pretrial release.[210]

Defence counsel are not only mouthpiece for the client, "fearlessly uphold[ing] the interest of his client without regard to any unpleasant consequences".[211] Defence counsel must represent their clients within the limits of the law[212] and are not allowed to assist the client in misleading the court or to knowingly allow the client to state falsehoods or deny true facts under oath.[213] No unfair or illegal means are allowed and

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[208] P. Wise, *supra*, note 194, at 144, 151 and 155.

[209] *R.* v. *Manninen* (1987), 37 C.R. (3d) 162 (S.C.C.).

[210] P. Wise, *supra*, note 194, at 143 and 144.

[211] G.A. Martin, *supra*, note 199, at 382.

[212] E.g. Canadian Bar Association, Code of Professional Conduct (Ottawa: The Association (1974), Nova Scotia Barristers' Society, *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia* (Halifax: Nova Scotia Barristers' Society, 1990); G. MacKenzie, *Lawyers and Ethics - Professional Responsibility and Discipline*, loosefeaf (Toronto: Carswell, 1999).

[213] E. L. Greenspan & G. Jonas, *supra*, note 201, at 59-60.

defence counsel must treat the court with courtesy, candour, fairness and respect at all time.[214] At the outset, all that defence counsel can do is to advise her client of her right to remain silent and to make sure that the prosecution discharges the burden of proof placed on it by law.[215] Defence counsel are not responsible if their clients decide to misuse the knowledge on the law and the development of the case provided by counsel, for example in order to commit perjury. Even if counsel have reason to believe that their client will be tempted to do so if informed, the duty to give proper legal advice has priority.[216]

2. Switzerland

2.1. Defence Counsel as "Organ of the Administration of Justice"

The position defence counsel hold in the Swiss inquisitorial model of criminal procedure is not as apparent as in the adversarial system, and defence counsel have been regarded as an "assistant to the judge"[217] or "organ of the administration of justice"[218] in several statutes, court decisions, textbooks and articles.[219] Nevertheless,

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[214] T. Quigley, *supra*, note 34, at 456. See also references *supra*, fn. 212.

[215] E. L. Greenspan & G. Jonas, *supra*, note 201, at 59-60. In rare cases, defence counsel may be able to persuade the Crown that it has not a sufficiently strong case or that the case should not be pursued for reasons of public policy.

[216] M.H. Freedman, *supra*, note 201, at 1478-1482.

[217] (*Gehilfe des Richters*)

[218] (*Organ der Rechtspflege*)

[219] For example § 14 (2) *Gesetz über die Ausübung des Anwaltsberufes (Anwaltsgesetz)* vom 18. Dezember 1984 (Lawyer's Act of the Canton Aargau), BGE 106 Ia 104; R. Hauser & E. Schweri, *supra*, note 1, at 151,

defence counsel are the counterpart of the state prosecuting authorities as in the adversarial tradition.[220] It is clear that defence counsel must be independent from any governmental authority in order to fulfil their legal tasks.[221]

2.2. Tasks of Defence Counsel

As in adversarial proceedings, defence counsel in inquisitorial systems provide their clients with the relevant legal knowledge, explain the consequences of a certain procedural conduct, and give advice which defence strategy would be the most effective. They must also monitor the lawfulness of the substantive and adjective law applied by the authorities, ensure that the rights of their clients are respected properly, and in case of a breach of any of these rights, invoke sanctions against the misconduct of the authority. In order to defend their clients effectively, defence counsel must judge incriminating evidence critically, present possible variations of the theory of the examining magistrate that are favourable to the position of the client, and search for exculpatory evidence that underlines the case for the defence.[222]

Under the current law, defence counsel have the most influence on the proceeding during the investigation. It is at this stage that the law provides the most opportunities for the accused to intervene and to influence the outcome of the

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H. Müller, *supra*, note 196, at 127 Fn 2 with further quotations.

[220] R. Hauser & E. Schweri, *supra*, note 1, at 151; P. Noll, "Die Strafverteidigung und das Disziplinarrecht der Rechtsanwälte" ZStrR 98 (1981) 179 at 179.

[221] BGE 106 Ia 104. Also § 1 *Gesetz über die Ausübung des Anwaltsberufes (Anwaltsgesetz)* vom 18. Dezember 1984.

[222] E. Müller-Hasler, *supra*, note 194, at 22 (with further quotations).

procedure.[223] It is important that counsel assist the examining magistrate in gathering exculpatory evidence by submitting appropriate motions. Private inquiries are permitted as long as defence counsel does not improperly influence the course of the proceeding.[224] Ideally, defence counsel inquire into possible evidence only summarily and proffers it then to the authority for detailed examination.[225]

Apart from this very important participation right of making motions before the examining magistrate to extend the inquisition in a certain direction, defence counsel can activate their clients' right to access to the record in order to get informed of the state of the investigation.[226] Defence counsel also have the right to be present when witnesses or (under more limited conditions) their clients are interrogated as well as to attend domiciliary or corporal inspections that are of interest to the investigation of the crime.[227] However, the examining magistrate can restrict all of these participation rights if he believes the purpose of the investigation, which is the solution of the criminal incident, to be in jeopardy by the active engagement of defence counsel.[228] Legal scholars disapprove of this severe restriction of the defensive rights authorized by law.[229] Indeed, it would be desirable if the law described the conditions under which the rights of the accused may be limited in a more precise manner. It seems that in practice the

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[223] See discussions below, C. and D.

[224] H. Müller, *supra*, note 196, at 141.

[225] *Ibid.* at 142.

[226] § 132 and 134 StPO AG.

[227] § 130 StPO AG.

[228] §§ 130, 132 StPO AG. M. Pieth, *supra*, note 137, at 22; H. Müller, *supra*, note196, at 143 and 145.

[229] See below, D. III. 2.3.

cooperation between counsel for defence and the investigative authorities still works out well, otherwise one would expect the criticism among Swiss lawyers to be louder. It is also possible, however, that Swiss defence counsel have learned to accept the denial of their clients' rights because available remedies hardly ever lead to an improvement of defence rights within a reasonable period of time.

C. Common Procedural Principles in Canada and Switzerland

In both the adversarial and the inquisitorial system, there are overwhelming efforts made in order to uphold general fairness in criminal proceedings. Irrespective of which system is chosen, universal procedural principles are inalienable in order to protect the private individual involved in the proceeding by redressing the imbalance in power between this person and the state authorities.[1] It has been discussed in the previous chapter that the Canadian adversarial tradition and the Swiss inquisitorial model of criminal procedure differ in the accentuation of the individual stages of the process. Whereas in Canada the trial is the most consequential stage, it seems that in Switzerland the pretrial investigation is at least as important as the actual trial. Despite these different ways to process criminal cases, both systems involve similar problems concerning the protection of the suspected offender by guaranteeing him a fair trial.

The fairness of criminal trials is upheld by many procedural principles that govern individual aspects of the right to a fair trial. A presentation of all of these principles would go beyond the scope of this thesis. Thus, only procedural principles that are linked to the right to counsel and play an essential role influencing its form shall be emphasized.

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[1] E. Fairchild, *Comparative Criminal Justice Systems* (Belmont, CDN: Wadsworth, 1993), at 121.

I. Principle of a Fair Trial

Although the term "fair trial" is often used in both systems, a clear definition does not seem to be available in either. Instead, the right is regularly illustrated by an enumeration and depiction of its several subrights.[2] These include, for example, the right to be presumed innocent until proven guilty beyond reasonable doubt, to be informed of the charge against oneself, to retain and instruct counsel, to have sufficient time to prepare the defence, to remain silent, and to be tried by an independent and impartial tribunal.[3]

The question of whether the criminal process has been conducted in a fair manner is quite distinct from the question of whether the tribunal's decision is correct.[4] Indeed, the right to a fair trial in criminal matters must not only be understood as a protection of the innocent from being convicted.[5] The principle of trial fairness is not only to safeguard the discovery of the truth in a criminal matter but also to lay down the manner in which the proceedings must be conducted. The accused[6] must not be treated

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[2] For example P. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough/ON: Carswell, 1997), at 1113-17; P. Perell, "Section 7 of the Charter, the Adversary System, the Fair Trial, and Truth", (1997) 19 Adv. Q. 393, at 414; Trechsel, S. "Die Verteidigungsrechte in der Praxis zur Europäischen Menschenrechtskonvention" ZStrR 96 (1979). 337 at 375ff; R. Hauser & E. Schweri, *Schweizerisches Strafprozessrecht*, 4th. ed. (Basel/CH: Helbing & Lichtenhahn, 1999), at 228; E. Müller-Hasler, *Die Verteidigungsrechte im zürcherischen Strafprozess, insbesondere deren zeitlicher Geltungsbereich, unter dem Aspekt des fairen Verfahrens* (Entlebuch/CH: Huber Druck AG, 1998) at 12ff..

[3] *R.* v. *Cohn* (1984), 42 C.R. (3d) 1 (Ont. C.A.). R. Hauser & E. Schweri, *supra*, note 2, at 227-229 (with references to jurisprudence and legislation).

[4] A. Grotrian, *Article 6 of the European Convention on Human Rights*, (Strasbourg/F: Council of Europe Press, 1994) at 41.

[5] As P. Perell concludes from *Stinchcombe* ((1991), 8 C.R. (4th) 277 (S.C.C.)) and *Seaboyer* ([1991] 2 S.C.R. 577 (S.C.C)), *supra*, note 2, at 417.

[6] It has been discussed, *supra*, B.I.2.1.c) that suspected offenders in Swiss proceedings are often not officially charged with a certain offence until several weeks or months after the criminal investigation against

merely as an object to be acted upon in the proceeding but be respected as an independent subject who can actively participate.[7] Thus, the right to trial fairness guarantees the safeguarding of human dignity in the course of criminal proceedings by restricting the state's powers in the proceeding, as well as bestowing upon the accused the possibility of participating and intervening in the proceeding against him.[8] The right to a fair trial implies an adequate judicial organization, expressed as the right to a fair and impartial tribunal, and lays down that the rules of procedure must be just, for example by respecting the principles of the presumption of innocence.[9] Hence, the right to a fair trial binds the state authorities but not the accused.[10]

In Switzerland, the right to a fair trial is an acknowledged but unwritten right under the federal constitution,[11] and is explicitly embodied in some cantonal legislation.[12] The term "fair trial" was introduced in 1974 when the European Convention on Human

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them has been initiated. In order to simplify the subsequent explanations in sections C., D. and E., the term "accused" will be used for all alleged offenders irrespective of whether an indictment has been issued.

[7] H. Packer, *The Limits of the Criminal Sanction* (Stanford/CA: Stanford University Press, 1968), at 157; E. Müller-Hasler, *supra*, note 2, at 17; M. Spaniol *Das Recht auf Verteidigerbeistand im Grundgesetz und in der Europäischen Menschenrechtskonvention* (Berlin/D: Duncker & Humblot, 1990) at 8 (who refers to BVerfGE 38, 105 at 111).

[8] For Example A. Häfliger, *Die Europäische Menschenrechtskonvention und die Schweiz* (Bern: 1993) at 145; N. Oberholzer, *Grundzüge des Strafprozessrechts* (Bern: 1994) at 162; M. Spaniol, *supra*, note 7, at 8 (with reference to BVerfGE 38, 105 at 111).

[9] J. Pradel, "La notion de Procès équitable en droit pénal européen", (1996) 27 R.G.D. 505 at 505.

[10] S. Trechsel, *supra*, note 2, at 339.

[11] The Swiss Federal Supreme Court acclaimed the right as an aspect of article 4 of the former constitution, which was in force until December 31, 1999. The individual aspects of the right are now written down in the articles 29-32 of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft* vom 18. April 1999 (SR 101), cited as BV).

[12] For example § 26 (2) StPO AG (*Gesetz über die Strafrechtspflege* (Strafprozessordnung des Kantons Aargau) vom 11. November 1958 (Stand 1. März 1998; SAR 251.100).

Rights[13] came into force for Switzerland.[14] Article 6 clause 1 of the ECHR entitles accused persons "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[15] Although the ECHR has been shaped by the English adversarial tradition of criminal procedure, it is clear that the Continental European countries, which basically all shaped their procedure according to the inquisitorial system, were not expected to switch to the adversarial mode, but that the inquisitorial system also provides a basis for trial fairness. The requirements of the right may differ, however.[16] Nowadays, the ECHR does not grant more protection for the accused than national Swiss law. The convention and especially the jurisprudence of the European Court of Human Rights have influenced the development of the Swiss law more in the past.[17] From time to time, the federal Supreme Court relies on the jurisprudence of the European Court of Human Rights when arguing its decisions.

Due to the different procedural models in European non-adversarial jurisdictions, discussions about the scope of the right to trial fairness mainly concern the temporal

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[13] *Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten* vom 4. November 1950, für die Schweiz in Kraft getreten am 28. November 1974, (SR 0.101); cited as ECHR.

[14] U. Kohlbacher, *Verteidigung und Verteidigungsrechte unter dem Aspekt der "Waffengleichheit"* (Zürich/CH: Schulthess Polygraphischer Verlag, 1979), at 7; E. Müller, *supra*, note 2, at 5.

[15] Art. 6 clause 1 ECHR.

[16] A. Grotrian, *supra*, note 4, at 41.

[17] The idea of a fair trial and the accompanying emphasize on the rights of accused persons are not the only influence by the ECHR. The principle of "in dubio pro reo", for example, was not acknowledged by the Swiss federal Supreme Court before section 6 letter 2 of the ECHR had been enacted for Switzerland. See S. Trechsel, *supra*, note 2, at 342 fn. 13.

area within which the rights of article 6 of the ECHR are operative.[18] Since the ECHR is oriented towards the adversarial system, and because of the importance of the hearing in these proceedings and the fact that evidence is taken at this stage, the rights of article 6 of the ECHR are unquestionably effective at the hearing stage in court.[19] Where the accused is tried according to the inquisitorial tradition, protection from overwhelming state power is needed earlier at the investigative stage before the hearing, since most evidence is taken then. The European Court of Human Rights has held that the right to a fair trial was likely to be impaired if the defence rights of the accused were limited during earlier stages of the proceeding and these pretrial phases were essential for the outcome of the process.[20] It seems that the court is moving towards an applicability of the right to a fair trial in the pretrial procedural stages.[21]

As for Canadian law, sections 7 and 11 (d) of the Charter guarantee accused persons "the right to present full answer and defence".[22] A fair trial has been defined as "a trial conducted with fairness to and with respect for the equality of all concerned".[23] Procedural fairness demands "an accusatorial and adversarial system of criminal justice

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[18] For example E. Müller-Hasler, *supra*, note 2, at 39 ff.; Trechsel, *supra*, note 4, at 389; M. Spaniol, *supra*, note 7, at 138 - each with numerous further references.

[19] E. Müller-Hasler, *supra*, note 2, at 10.

[20] Bricmont v. Belgium, DR 48 31 ff. (cited *ibid.*)

[21] A. Grotrian, *supra*, note 4, at 41; E. Müller-Hasler, *supra*, note 2, at 9 ff..

[22] *R.* V. *Seaboyer*, [1991] 2 S.C.R. 577.

[23] By Heureux-Dubé J. in *R.* v. *O'Connor*, (1995) 7 C.R. (4th) 1 (S.C.C.).

which is founded on respect for the autonomy and dignity of human beings".[24] Although section 7 of the Charter entitles accused persons to a fair hearing, it does not guarantee the most favourable procedure that could possibly be imagined.[25] The fairness of the criminal proceeding must be primarily assessed from the point of view of the accused, nevertheless the interests of the community and other involved parties must not be neglected either.[26] The different factors that can render a trial unfair have been discussed in several cases. For example, a criminal process is conducted in an unfair manner if the conviction of the accused is based on an improperly obtained confession,[27] if inadmissible evidence is admitted[28] or admissible evidence excluded[29], if the Crown does not disclose all information relevant to the conduct of the defence before the trial is held,[30] and (under certain circumstances) if access to private records in the possession of third parties is denied.[31]

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[24] *R.* v. *Swain* (1991), 63 C.C.C. (3d) 481 (S.C.C.).

[25] *R.* v. *Lyons* (1987), 61 C.R. (3d) 1 (S.C.C.).

[26] *R.* v. *E. (A. W.)*, [1993] 3 S.C.R. 155.

[27] *R.* v. *Hebert*, (1990) 57 C.C.C. (3d) 1 (S.C.C.).

[28] *Ibid.*; *Dersch* v. *Canada (Attorney General)*, [1990] 2 S.C.R. 1505.

[29] *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.).

[30] *R.* v. *Stinchcombe*, (1991) 8 C.R. (4th) 277 (S.C.C.).

[31] *R.* v. *O'Connor*, (1995) 7 C.R. (4th) 1 (S.C.C.).

II. Individual Aspects of Pretrial Fairness

As seen, an abstract definition of the right to a fair trial is not readily at hand. For a better understanding, the individual aspects of procedural fairness, particularly at the pretrial stage of the criminal process, briefly will be outlined in the following paragraphs from both Canadian and Swiss perspectives. This is essential in order to set the stage for the subsequent discussion of the right to counsel in each jurisdiction.

1. Right to Full Answer and Defence (Right to Be Heard)

Another right that is difficult to describe in general terms, because it brings together various different aspects of criminal procedure, is the right to full answer and defence, or the right to be heard as it is called in the inquisitorial system. In Canada, the right to full answer and defence is established in sections 7 and 11 (d) of the Charter and seems identical to the right to a fair trial.[32] One can therefore usefully refer to the explanations made above and to the individual aspects of trial fairness discussed below.[33]

In Switzerland, the right to be heard is the most important right of an accused and guarantees his right to participate in the process. It is rooted in article 29 (2) of the

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[32] *R.* v. *Potma* (1983), 31 C.R. (3d) 231 (Ont. C.A.), D. Stuart, *Charter Justice in Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1996) at 169. Besides, sections 650 (3) and 802 (1) explicitly contain the accused's right to make full answer and defence.

[33] D. Stuart, *supra*, note 32, at 144.

Swiss constitution and article 6 of the ECHR as well as in the cantonal law.[34] The right to be heard serves two purposes. First, it ensures that the interests of the accused are respected in the course of the process and furnishes the accused with broad participation rights.[35] Second, the right to be heard also simplifies the inquisition of the facts of the case and therefore serves public interests.[36] The right to be heard encompasses the right of the accused to be informed of the case against him and to explain his version of the events before the finding is made.[37] Furthermore, it includes the right to have sufficient time to prepare the defence,[38] the right to disclosure,[39] the right to be present when witnesses are testifying or other evidence is heard as well as to apply for additional questions to be asked or further evidence to be taken,[40] and the right to comment on the allegations against the accused before the court decides. [41] Contrary to Canadian law where a finding of guilt need not be accompanied by reasons, the right to be heard obliges the authorities to justify their findings by giving reasons for their

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[34] For example § 22 (1) and 23 (1) constitution of the Canton Aargau. Before the Swiss constitution was revised, the federal Supreme Court concluded the right to be heard from article 4 of the old constitution.

[35] BGE 122 I 55; R. Hauser & E. Schweri, *supra*, note 2, at 220.

[36] BGE 122 I 55, 118 Ia 19, 112 Ia 109, 106 Ia 5; H. Müller, *Verteidigung und Verteidiger im System des Strafverfahrens* (Zürich: Schulthess Polygraphischer Verlag, 1975) at 13.

[37] BGE 119 Ia 139. 115 Ia 11, 107 Ia 273.

[38] R. Hauser & E. Schweri, *supra*, note 2, at 221.

[39] (*Akteneinsicht*), BGE 122 I 158; 121 I 227, 113 Ia 4; 109 Ia 297. See below C.II.4.

[40] (*Teilnahmerecht*) BGE 119 Ia 422, 104 Ia 180; (*Recht auf Beweisanträge*) 115 Ia 11, 109 Ia 333, 106 Ia 162.

[41] (*Äusserungsrecht*) BGE 119 Ia 139, 118 Ia 109, 115 Ia 11.

decisions to the parties.[42] Each right of the accused triggers a corresponding duty of the authorities.

In both countries, the right to full answer and defence (or the right to be heard respectively) by itself would not have much effect on the process without the right to counsel. The two rights necessitate each other in order to be effective. The majority of alleged perpetrators lack the juridical, linguistic or psychological abilities necessary to resist the overwhelming power of the investigating and prosecuting authorities. Without the assistance of counsel, most accused persons would not be able to exercise their participation rights in a way that is the most favourable for their defence. On the other hand, support by counsel is meaningless, if no possibility for actual interference in the actions of the authorities exists. If this were the case, the accused would have no choice but to abide the process against him - with or without counsel's assistance.

2. Presumption of Innocence

In Canadian law, the *Charter* constitutes the presumption of innocence as another aspect of section 11 (d), which guarantees the accused who has been charged

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[42] BGE 117 Ia 3, 112 Ia 109. BGE 117 Ia 3 establishes the duty of the decision-maker to give reasons for the finding also for jury trials. For the Canton Aargau, § 168 (1) determines that the judges must explain the factual as well as the legal reasons for their verdict. This helps the accused to understand and possibly to accept the sanction better. It also assists in his decision whether or not to appeal the verdict (R. Hauser & E. Schweri, *supra*, note 2, at 225).

the right "to be presumed innocent until proven guilty according to law...".[43] The Supreme Court of Canada has consistently held that the prosecution must prove the guilt of the suspected offender.[44] Minimal standards of the principle are that the State bears the burden of proving the accused's guilt, that proof beyond a reasonable doubt is required for a conviction and that the method of proof is conducted in a fair and lawful manner.[45]

The principle of the presumption of innocence is also indisputably acknowledged in Switzerland, although its scope has not yet been clearly defined yet.[46] The maxim has its legal basis in article 32 subsection 1 of the Swiss constitution as well as in article 6 clause 2 of the ECHR.[47] The federal Supreme Court has recently clarified that the purpose of the principle is twofold. As a first aim, it sets the standard of how evidence must be evaluated.[48] This rule establishes that a conviction cannot be allowed to stand if the evidence heard allows any serious doubts about the facts of the case or the guilt of the accused respectively.[49] Secondly, the principle shifts the burden of proving the guilt

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[43] *Canadian Charter of Rights and Freedoms*, Schedule B, Part I, Constitution Act, 1982, R.S.C. 1985, Appendix II, No. 44.

[44] *Manchuk* v. *The King*, [1938] S.C.R. 341 (S.C.C.)

[45] *R.* v. *Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

[46] P. Nobel/A. Ritter, "Fair Trial - Ein Plädoyer für Waffengleichheit in prozessualer und medialer Wirklichkeit", in H. Baumgartner & R. Schumacher, ed., *Ungeliebte Diener des Rechts* (ZürichCH: Elster Verlag, 1999) 141 at 142 (with further quotations).

[47] Article 32 (1) BV says that every person is considered innocent until his or her final conviction (*Jede Person gilt bis zur rechtskräftigen Verurteilung als unschuldig*). Before the Swiss constitution was revised, the federal Supreme Court deduced the principle of presumption of innocence from article 4 of the former constitution, for example in BGE 120 Ia 31 at 35. It has also been established in cantonal criminal procedure codes, for example §§ 26, 28 (2) and 127 StPO AG.

[48] (*Beweiswürdigungsregel*) BGE 120 Ia 31 at 37.

[49] BGE 120 Ia 31 at 37.

of the accused person to the prosecution, or in other words, the suspected offender does not have to prove his innocence.[50] Ultimately, these two aspects of the right to be presumed innocent assist in avoiding wrongful convictions of innocent people.[51]

It is this second aspect of the principle of the presumption of innocence that sways the pretrial stage of the inquisitorial as well as the adversarial criminal process. It directs the state officials on how to proceed and to treat the accused in a decent and considered manner. The principle reflects the belief "that individuals are decent and law-abiding members of the community until proven otherwise".[52] The individual's freedom is to be preserved in the course of the proceeding and the State must meet its case "from sources other than the individual".[53] Therefore, all actions by the investigating and prosecuting authorities must be undertaken as if the suspect was innocent.[54] This state of affairs is significant for the pretrial right to counsel and other constitutional rights in both Canada and Switzerland, setting the stage for these further procedural safeguards in favour of the accused.

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[50] (Beweislastregel) BGE 120 Ia 31 at 37.

[51] V. Delnon & B. Rüdy, "Untersuchungsführung und Strafverteidigung" ZStrR 106 (1989) 43 at 47.

[52] *R.* v. *Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

[53] J.H. Wigmore, *Evidence in Trials at Common Law* (Boston/US: Little Brown, 1961) at 2251.

[54] R. Hauser & E. Schweri, *supra*, note 2, at 230; H. Packer, *supra*, note 7, at 161; A. Grotrian (who refers to the Commission of Human Rights), *supra*, note 4, at 43.

3. Concepts of Self-Incrimination and Right to Silence

The principle of the presumption of innocence would be without practical relevance, if the investigative and prosecuting authorities were allowed to compel the accused to give incriminating statements. Instead, Canadian law establishes that the accused and any other person have no legal obligation to speak to the authorities but can remain silent. The State principally has no lawful means to compel accused individuals to cooperate with its authorities.[55] The principle against self-incrimination is "the right of an accused not to be forced into assisting in his or her own prosecution" and it has been labeled as "the most important organizing principle in criminal law".[56] The principle against self-incrimination serves two key purposes. On one hand, it protects against unreliable confessions and the miscarriage of justice that can result from them. On the other hand, it protects the accused against abuses of power by the state.[57] Also, the principle against self-incrimination is the source of several other rules such as the confessions rules, the right to remain silent and the right to counsel.[58] The right is effective throughout the whole course of the proceeding.[59] However, it has its main

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[55] *Rothman* v. *R.*, (1981), 59 C.C.C. (2d) 30 (S.C.C.); *R.* v. *Esposito*, (1985) 49 C.R. (3d) 193 (Ont. C.A.); *R.* v. *Dedman* (1981), 59 C.C.C. (2d) 97 (Ont. C.A.), affirmed 46 C.R. (3d) 193 (S.C.C.). Any state action that coerces an individual to furnish evidence against him in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination (*R.* v. *S.(R.J.)* (1995), 36 C.R. (4th) 1 (S.C.C.)).

[56] *R.* v. *P(M.B.)* (1994), 29 C.R. (4th) 209 (S.C.C.).

[57] *R.* v. *White* (1999), 135 C.C.C. (3d) 321 (S.C.C.).

[58] *Ibid.*

[59] *R.* v. *Esposito* (1985), 49 C.R. (3d) 193 at 200-201 (Ont. C.A.).

remedial effect at the trial stage where the breach of the right can justify the exclusion of evidence.[60]

In Canada, the right to remain silent was already deeply rooted under common law in the voluntary confession rule.[61] This rule provided protection against the admission into evidence of incriminating statements made by the accused at the pretrial stage if they were made to a person in authority in an involuntary manner.[62] Involuntary statements under this rule included all remarks obtained from the accused "by fear of prejudice or hope of advantage exercised or held out by a person in authority"[63] or where the statement was not "the utterance of an operating mind".[64] Whether or not the accused spoke to a person in authority depends on the subjective belief of the accused: if he does not recognize, for example, that he is confessing to an undercover police officer, the statement will be admissible in evidence.[65] Nevertheless, the door for police tricks remained open and inculpatory statements could still be received.[66] It was also

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[60] *R.* v. *White* (1999), 135 C.C.C. (3d) 321 (S.C.C.).

[61] D. Stuart, *supra*, note 32, at 111; *R.* v. *Esposito* (1985), 49 C.R. (3d) 193 at 200-201 (Ont. C.A.).

[62] T. Quigley, *Procedure in Canadian Criminal Law* (Toronto: Carswell, 1997) at 133.

[63] *Ibrahim* v. *R.* [1914], A.C. 599 (P.C.).

[64] *Rothman* v. *R.* (1981), 59 C.C.C (2d) 30 (S.C.C.) For example, the accused is lacking an operating mind if he was semi-conscious or under hypnosis at the time of confessing. *Ward* v. *R.* (1979), 44 C.C.C. (2d) 498 (S.C.C.); *Horvath* v. *R.* (1979), 7 C.R. (3d) 97 (S.C.C.).

[65] *Rothman* v. *R.* (1981), 59 C.C.C. (2d) 30 (S.C.C.).

[66] In *Hebert*, however, the confession rule has been expanded and it is clear now that a 'voluntary' statement by the accused that was received through police trickery must be excluded if its admission would bring the administration of justice into disrepute. *R.* v. *Hebert* (1990), 77 C.R. (3d) 145 (S.C.C.).

held not to be important whether the accused had been informed of his right to remain silent.[67]

A decade ago, the Canadian Supreme Court recognized under section 7 of the Charter a broader right to refuse any cooperation with the police.[68] Along with the right to counsel[69] and the principle against self-incrimination[70], the new right to remain silent is to ensure that accused persons have a truly free choice of whether to speak to the authorities after their arrest or detention.[71] However, the protection of the accused is limited. The right to remain silent does not apply before detention because the accused is not yet in the control of the State, it does not affect voluntary statements made to persons other than persons in authority who pass the remarks on to the police, and the right is not violated where the undercover agents do not actively work on the accused to make a statement.[72] Furthermore, if the accused is fully informed of his rights after having retained counsel, the police can continue questioning the accused and persuading him to confess.[73] And as under the common law, there is no requirement that the police inform the accused of the right.[74]

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[67] *R.* v. *Boudreau*, [1949] S.C.R. 262 (S.C.C.).

[68] *R.* v. *Hebert* (1990), 77 C.R. (3d) 145 (S.C.C.).

[69] S. 10 (b) Canadian Charter.

[70] S. 11 (c) and 13 Canadian Charter.

[71] *R.* v. *Hebert*, at 183; D. Stuart, at 114-115. In *R.* v. *Esposito* ((1985), 49 C.R. (3d) 193 (ont. C.A.)) it was emphasized that the right to remain silent does not apply in every type of police questioning but only in a coercive environment.

[72] *R.* v. *Hebert*, at 189

[73] *R.* v. *Hebert*, at 188.

[74] D. Stuart, *supra*, note 32, at 120. For the United States, this police duty has been recognized for more than thirty years, see *Miranda v. Arizona*, 384 U.S. 436 (1966).

The principle against self-incrimination prohibits drawing adverse inferences from the failure to make a statement or from evidence of the failure to testify.[75] However, it has not yet been finally decided whether the right to silence also includes physical evidence or the results of physical tests, or whether it is limited to verbal statements by the accused. Principally, evidence of the refusal of the accused to participate in such tests is inadmissible,[76] but the Canadian courts have occasionally allowed that adverse conclusions are derived from the failure of an accused to comply with investigative tests.[77]

In Switzerland, on the other hand, the right of accused persons to remain silent seems to be a "secret" right although it has been generally recognized.[78] Not all of the cantonal criminal procedure codes establish the right of the accused not to be obliged to

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[75] S. 4(6) of the *Canada Evidence Act* (R.S.C. 1985, c. C-5) prohibits both the judge and the prosecutor from commenting on the accused's failure to testify. It also prevents from any warning to the jury not to draw any adverse inference from the accused's silence (*R.* v. *Vezeau* (1977), 28 C.C.C. (2d) 81 (S.C.C.)). Only defence counsel may make submissions to the jury on this issue and explain, for example, that the case against the accused must be made out by the Crown and that there is no duty upon the accused to testify (*R.* v. *Boss* (1988), 46 C.C.C. (3d) 523 (S.C.C.). Although the principle against self-incrimination prohibits that the accused's silence is used to strengthen the Crown's case that otherwise falls short of proving guilt beyond reasonable doubt (*R.* v. *Noble* (1997), 6 C.R. (5th) 1 (S.C.C.)) some exceptions apply. Thus, the failure to testify may be seen as the absence of an explanation which could raise a reasonable doubt on the Crown's case (*R.* v. *Lepage* (1995), 36 C.R. (4th) 145 (S.C.C.); J. Sopinka, S.N. Lederman, & A.W Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 845). Also, defence counsel of a co-accused is permitted to cross-examine the accused on his pre-trial silence when attacking his credibility. The right to remain silent of an accused may thus be infringed for the purpose of allowing full answer and defence of a co-accused. Careful instructions to the jury are necessary in this case (*R.* v. *Crawford* (1995), 37 C.R. (4th) 197 (S.C.C.)).

[76] *R.* v. *Shaw* (1965), 43 C.R. 388 (B.C. C.A.); *R.* v. *Fyfe* (1983), 7 C.C.C. (3d) 284 (N.W.T. C.A.).

[77] *R.* v. *Marcoux* (1975), 24 C.C.C. (2d) 1 (S.C.C.), *R.* v. *Sweeney* (No. 2) (1977), 35 C.C.C. (2d) 245 (Ont. C. A.).

[78] For example BGE 121 II 264, 112 Ib 456, 106 Ia 8; R. Hauser & E. Schweri, *supra*, note 2, at 249; M. Pieth, *Strafverteidigung - wozu?* (Basel/CH: Helbing & Lichtenhahn, 1986) at 15; H. Müller, *supra*, note 36, at 78 ff. and 143.

assist in the investigation and prosecution against him explicitly.[79] Furthermore, accused persons do not have to be informed of their right and a failure to do so by the police or the examining magistrate does not result in the exclusion of the statement.[80]

The protection against self-incrimination is expressed in the rule that the accused cannot be a witness in his own trial and he cannot be coerced to speak to the police or the magistrate.[81] The accused is not obliged to tell the truth and he may even cover over the marks of the crime, as long as he does not commit another offence thereby.[82] No adverse inferences may be drawn from the failure to assist the authorities in their investigative task.[83] Nevertheless, the refusal to supply information can have procedural disadvantages: a confession usually results in a lesser sentence.[84] Besides, the

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[79] For example article 42 (2) StPO of the Canton Uri, § 17a (1) and (2) StPO of the canton Schwyz, § 24 (1) and (2) StPO of the canton of Nidwalden, article 38 (1) and (2) StPO Schaffhausen. See also BGE 103 IV 10, 106 Ia 8.

[80] M. Pieth, *supra*, note 78, at 15; H. Camenzind & J. Imkamp, "Delegation von Untersuchungshandlungen an die Polizei, dargestellt am Besipiel der Strafprozessordnung des Kantons Zürich" ZStrR 117/1999, 197 at 204 at 206; R. Hauser & E. Schweri, *supra*, note 2, at 142. § 11 (1) StPO the canton Zürich obliges the examining magistrate to orient the accused of his right to remain silent. However, there is no such duty upon the police which tries to elicit incriminating statements from the accused before the examining magistrate becomes active. Only in the cantons of Bern and Freiburg the interrogating police officer is obliged to inform the accused that he may refuse to answer (articles 105 clause 2 and 208 (2) StPO BE, or article 156 StPO FR respectively).

[81] § 64 (1) and § 105 StPO AG. The accused is treated as a "person questioned for information" (*Auskunftsperson*). This means, that he is asked to give true information on the relevant facts but different from a witness, he will not be punished if found to be lying and can refuse to answer without consequences (S. Trechsel, *Schweizerisches Strafgesetzbuch - Kurzkommentar*, 2d. ed. (Zürich: Schulthess, 1997) at 981). Nevertheless, the statement of the accused has the same weight as the testimony of a witness.

[82] BGE 101 IV 315, 73 IV 239, 75 IV 179. Accused persons in Canadian proceedings have no such right. The right to remain silent does not include the right to lie to the authorities or to give them false information (*R.* v. *Richer* (1993), 82 C.C.C. (3d) 385 (Alta. C.A.), affirmed (1994), 90 C.C.C. (3d) 95 (S.C.C.)). Instead, the accused risks obstructing justice (s. 139 *Criminal Code*, R.S.C. 1985, c. C-46).

[83] R. Hauser & E. Schweri, *supra*, note 2, at 143.

[84] BGE 121 IV 204, 118 IV 349. In Canada, a plea of guilt by the accused has the same effect. See *supra*,

accused's conduct in the course of the process is taken into consideration for sentencing as an aspect of his personality.[85]

Although the principle against self-incrimination and the right to remain silent seem to show their effects mainly at the trial phase, the two rules also provide guidance on how to treat the accused during the pretrial stage: if the police are aware that certain evidence will not be admissible at trial, they may refrain from tricks and other unfair means to obtain it. As well as the right to full answer and defence and the presumption of innocence, the protection against self-incrimination is also inseparably linked to the pretrial right to counsel. Without the right to counsel, the accused would hardly be properly informed of his right to remain silent since there is no duty lying on the authorities to inform accused persons of their right in either country.[86] On the other hand, without the right of the accused to refuse any cooperation with the investigating and prosecuting authorities, the possibility for counsel of assisting in the accused's defence at the pretrial stage of the process would basically be limited to motivating the client to cooperate in order to avoid further disadvantages for the defence at trial. Looking at practice, it seems that in Switzerland, where the concept against self-incrimination has not been as broadly refined as in Canada, the possibility for counsel of having influence is indeed weakened in this sense.[87]

B.I.1.2.b).

[85] BGE 113 IV 57. Critical S. Trechsel, *supra*, note 81, at 283 note 14a and 14 b.

[86] *Supra*, C.II.3.

[87] Accused persons in Switzerland are not obliged but nevertheless expected to speak to the investigative

4. Right to Disclosure

In order to know what case the accused has to meet and to prepare to defend, he needs to know what evidence the prosecution has against him.[88] However, the right to disclosure provides the accused not only the opportunity to learn from the prosecutor about the case to be met at trial, but gives injustice a lesser chance by avoiding unnecessarily contested trials and surprises at trial.[89] Disclosure of the prosecution's case also helps to avoid delays by adjournments ordered to allow for time to prepare the defence.[90] Moreover, disclosure is a means of regulating the imbalance of investigative resources between prosecution and defence.[91]

In Canada, the statutory foundation of the right is very thin[92] and previously, preliminary inquiries in some proceedings on indictment were the only source where the defence could get an idea of the Crown's case.[93] The common law left pretrial disclosure

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authorities and to tell them the truth. False denials of the commission of the offense can result in a harsher sentence and higher legal costs.

[88] D. Krauss, "Umfang der Strafakte" BJM 2/1983. 49 at 56.

[89] T. Quigley, *supra*, note 62, at 274.

[90] As mentioned in *R.*. v. *Stinchcombe* (1991), 8 C.R. (4th) 277 (S.C.C.).

[91] *R.* v. *Brouillette* (1992), 78 C.C.C. (3d) 350 (Que.C.A.), leave to Supreme Court denied: (1993), 81 C.C.C.(3d) vi (note) (S.C.C.). In Switzerland, the right to disclosure is considered a requirement for the right to be heard (D. Krauss, *supra*, note 98, at 56).

[92] For example, ss. 581 and 583 Criminal Code require that the charge laid provides sufficient details of the alleged facts of the case, s. 587 Criminal Code determines when further particulars can be obtained. Under s. 603 Criminal Code, the accused has a right to receive copies of evidence after a preliminary inquiry, and s. 605 Criminal Code gives him the opportunity to obtain release of exhibits for testing purposes. And finally, s. 10 (1) of the Canada Evidence Act establishes the right at trial to obtain copies of prior statements of a witness for cross-examination.

[93] See *supra*, B. 1.1. c). Crucial in this context is the fact that preliminary inquiries are only held in the minority of criminal cases.

in the discretion of the prosecution alone, while at trial the court decided on discovery issues.[94] Finally, some provincial courts proceeded to regard the right to discovery as an aspect under s. 7 of the Charter,[95] and in 1991, the Supreme Court of Canada proclaimed a broad constitutional duty on the Crown to disclose all relevant information.[96] The role of the prosecutor is not about seeking a conviction at any price but to do justice.[97] Therefore, a general and comprehensive duty of the Crown to disclose all relevant information whether incriminating or exculpatory was recognized under s. 7 of the Charter. The Crown decides what is relevant, and also some other restrictions to the right apply. Thus, the duty to disclose arises only after the charge has been laid and only upon the explicit request of the accused.[98] Furthermore, evidentary rules referring to privilege issues must be respected and in order not to endanger an ongoing investigation, disclosure can be delayed.[99] Restrictions can also apply to protect witnesses and informers.[100] It is immaterial, however, whether or not the Crown intends

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[94] For example *R.* v. *Savion* (1980), 13 C.R. (3d) 259 (Ont. C.A.); *R.* v. *Doiron* (1985), 19 C.C.C. (3d) 350 (N.S. C.A.).

[95] *R.* v. *Bourget* (1987), 56 C.R. (3d) 97 (Sask. C.A.); *R.* v. *Eagles* (1989), 68 C.R. (3d) 271 (N.S. C.A.). However, the discovery remained limited to relevant matters at first. In *R. v. Woods (1989), 70 C.R. (3d) 45 (Ont. C.A.)*, the Ontario Court of Appeal concluded that s. 7 "guarantees the accused the right only to such disclosure from the Crown as is necessary to make full answer and defence. The disclosure given under the requirements of the Charter should be sufficient to fairly apprise the accused of the case to be met in sufficient time and substance to enable the accused to adequately prepare and defend that case".

[96] *R.* v. *Stinchcombe* (1991), 8 C.R. (4th) 277 (S.C.C.).

[97] *Chamandy* v. *R.* (1934), 61 C.C.C. 224 (Ont. C.A.); *R.* v. *Sugarman* (1935), 25 Cr. App. R. 109 (C.A.A.). R.E. Salhany, *The Practical Guide to Evidence in Criminal Cases*, 5th ed. (Toronto: Carswell, 1998) at 198.

[98] *R.*. v. *Stinchcombe*, at 290 (S.C.C.).

[99] D. Stuart, *supra*, note 32, at 150.

[100] *R.*. v. *Stinchcombe*, at 284-285 (S.C.C.).

to introduce the information as evidence at trial.[101] The Crown's discretion is reviewable by the trial judge at the initiation of the defence.[102] In order to justify non-disclosure, the Crown must demonstrate that the information is beyond its control or that it is clearly irrelevant or privileged.[103] If the issue of the relevance of the information sought is at stake, the defence must establish that the information is potentially useful to the accused in making full answer and defence.[104]

The duty of full disclosure includes the duty to obtain all material that is subject to disclosure from the police. The police have a corresponding duty to provide all information that is relevant and material to the case for the Crown.[105] There is no reciprocal obligation lying on the defence to disclose information to the Crown, since this would be contrary to the presumption of innocence and the principle against self-incrimination.[106]

In Switzerland, the right to disclosure is only one aspect of the right to be heard established in article 29 (2) of the federal constitution and article 6 of the ECHR.[107] In adversarial processes, the main purpose of the right to disclosure is for the defence to

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[101] D. Stuart, *supra*, note 32, at 150.

[102] *Ibid.*

[103] *R.* v. *Chaplin* (1995), 36 C.R. (4th) 201 (S.C.C.).

[104] *R.* v. *Egger* (1993), 21 C.R. (4th) 186 (S.C.C.); *R.* v. *Hutter* (1993), 86 C.C.C. (3d) 81 (Ont. C.A.).

[105] *R. v. L.A.T.* (1993), 84 C.C.C. (3d) 90 (Ont. C.A.); *R.* v. *V.(W.J.)* (1992), 14 C.R. (4th) 311 (Nfld. C.A.).

[106] *R.*. v. *Stinchcombe* (1991), 8 C.R. (4th) 277 (S.C.C.). See also *R.* v. *Brouillette* (1992), 78 C.C.C. (3d) 350 (Que. C.A.).

[107] (*Recht auf Akteneinsicht*) See *supra*, C.II.1.

get information on the case of the prosecution and the avoidance of surprises at trial.[108] In inquisitorial proceedings, access to the dossier is the foundation of all other participation rights. The trial and the finding are based on the dossier and the evidence discovered during the pretrial inquisition. Additionally, most participation rights of the accused are applicable before the trial. It is obvious that participation rights would be hollow and an effective defence impossible if the accused learned only at trial about the case against him.[109]

The ambit of the access to the record is not unlimited. Higher public interests or those of third parties must be respected.[110] According to cantonal procedures, access to the record can be denied if the investigation would be endangered, for example because the accused is expected to threaten or influence the contacted witnesses.[111] However, as soon as the pretrial inquisition has been completed, access to the record must be given in an unrestricted manner.[112] A conviction must not be based on secret parts of the dossier.[113] All discoveries made during the inquisition must be written down and included in the record, except for investigative results that are clearly irrelevant for the outcome of the process.[114] Documents or statements that are not disclosed to the defence for protection of other interests may not be used in order to reach a finding, unless the

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[108] T. Quigley, *supra*, note 62, at 274.

[109] H. Müller, *supra*, note 36 at 12-13.

[110] BGE 122 I 161.

[111] For example § 132 (1) StPO AG.

[112] BGE 101 Ia 18, § 134 StPO AG.

[113] BGE 109 Ia 297.

[114] BGE 115 Ia 99, R. Hauser & E. Schweri, *supra*, note 2, at 223 (with further citations). It is left to the police

accused was explained the main content of the document or statement and had an opportunity to comment on them.[115]

5. Rights of Appeal

Both the Canadian and Swiss jurisdiction bestow upon the accused the right to have a decision of a lower court reviewed by a superior court in order to ensure that the accused obtained a fair trial at first instance.[116] The right of appeal plays an important role for the features of the right to counsel. If there are only limited possibilities for a review of decisions of the first judicial instance, the safeguards guaranteeing a fair trial demand a more elaborated and insuperable right to counsel in order to ensure the fairness of the criminal process.

In Canada, the rules of appeal in criminal matters are highly complex and depend on several factors such as whether the appeal refers to a summary or an indictable offence, what the mode of trial was before the lower court, whether the verdict itself or

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or the examining magistrate to decide what information is relevant and which is not.

[115] BGE 115 Ia 304. Such other interests exist, for example, if the document contains information on other people. If the document is to be used as evidence, the parts of the document referring to the accused must be disclosed to the defence. With regard to the other parts, the defence must either receive a summary of their content or these parts must be covered in the dossier so that the judge cannot read them.

[116] Whereas the right to appeal determines in what procedural way the breach of the accused's rights must be proceeded, remedies, on the other hand, are concerned with the consequences for the evidence that was obtained through the breach of the accused's rights. S. 24(2) of the Canadian Charter gives the courts the duty to exclude unconstitutionally obtained cases in some cases. The requirements for exclusion will be discussed below, D.II. 1.4. regarding the right to counsel as established in s. 10(b) of the Charter. See also J. Sopinka & S.N. Lederman, & A.W Bryant, *supra*, note 75, chapter 9.

the sentence is ground for the appeal, and whether it is the prosecutor or the accused who wants to appeal,[117] Also, the procedure of appeal varies from province to province.[118] For the purpose of this paper, however, some general remarks about the right of appeal are sufficient.

An appeal lies from a trial decision only if a statute grants the right of appeal. Decisions other than final decisions (interlocutory decisions), for example, may only be appealed as grounds in an appeal from the final verdict.[119] Many appeals are automatic in the sense that the party appealing may launch it merely by alleging that the lower court applied the law wrongfully.[120] In other cases, the party needs permission to appeal from the upper court. Thus, leave must be obtained if the appeal is directed against the sentence imposed at trial,[121] or if it involves a question of fact rather than legal issues.[122] The appeal is based on the transcript of the trial evidence and oral and written submissions from counsel. Normally, no further evidence is heard.[123] The major concern for the appealing party lies in the fact, that Canadian courts do not have to reveal the reasons for their decisions.[124] Without any indication of how evidentary conflicts were

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[117] See ss. 675 and 676 Criminal Code.

[118] S. 678 (2) Criminal Code.

[119] *Duhamel* v. *R.* (1984), 43 C.R. (3d) 1 (S.C.C.).

[120] In certain instances, appeals by an accused are permitted on grounds of factual errors or mixed factual and legal errors.

[121] Ss. 675 (1)(b) and 676 (1)(d) Criminal Code.

[122] S. 675 (1)(b) Criminal Code.

[123] S. 682 and 821 Criminal Code.

[124] Judges sitting alone may give reasons. Juries, of course give only verdicts which are not explained. Indeed, the Thatcher case holds that juries can convict even if the jurors do not agree on why! See *R.* v. *Thatcher* (1987), 57 C.R. (3d) 97 (S.C.C.).

resolved or for what legal grounds the decision was made, it becomes very difficult for the party to prove the lower court's misinterpretation of the law or the facts. However, the Supreme Court of Canada has not made it a legal requirement for trial judges to give extensive reasons for their finding.[125] As for jury trials, section 649 of the Criminal Code makes it an offence for a juror to disclose information about the deliberations. Moreover, in jury trials where no reasons can be given for the verdict, inordinate emphasis in appeals is placed on the potential for error which may arise from erroneous instructions on the law or facts given by the judge in her charge to the jury.

With respect to Charter issues, the Charter itself does not determine how constitutional issues must be appealed and it has not even been decided whether there is a constitutional right of appeal in Charter issues at all.[126] So far, a decision by a trial judge or a superior court judge on a Charter application has been appealable as a ground in an appeal from the ultimate verdict, comparable to the appeal of interlocutory decisions.[127] The defence must object to the admission of evidence that was obtained as a consequence of a Charter violation, either before or at the time the Crown seeks to introduce it. Otherwise the trial judge can refuse to consider the Charter issue.[128] If the

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[125] *R.* v. *Burns* (1994), 29 C.R. (4th) 113 (S.C.C.), *R.* v. *Barrett* (1995), 38 C.R. (4th) 1 (S.C.C.), *R.* v. *R.(D.)* (1996), 48 C.R. (4th) 368 (S.C.C.).

[126] *Dagenais* v. *Canadian Broadcasting Corp.* (1994), 34 C.R. (4th) 269 (S.C.C.).

[127] *R.* v. *Mills* (1986), 52 C.R. (3d) 1 (S.C.C.). There are two exceptions. First, a special appeal process is set out in s. 784 of the Criminal Code for prerogative writ applications. Second, in exceptional cases a party may appeal a ruling under s. 52 of the Constitution Act, 1982 (enacted by the Canada Act 1982 (U.K.), c.11, Sched. B (R.S.C. 1985, Appendix II, No. 44) from a court of appeal to the Supreme Court of Canada even if that party had been partially successful in the court of appeal (*R.* v. *Laba* (1994), 34 C.R. (4th) 360 (S.C.C.).

[128] *R.* v. *Kutynec* (1992), 12 C.R. (4th) 152 (Ont. C.A.).

trial judge determines that there is no breach of a Charter right, defence counsel must await the final decision in order to appeal to the upper court.

In Switzerland, the procedure on appeal in criminal matters is not less complicated than in Canada. The cantonal court of appeal can review final and interlocutory decisions of the lower cantonal court in respect to legal and factual issues.[129] Additionally, there is also a complaint process for the control of procedural activities and inactivities of the police, the examining magistrate or the prosecutor during the pretrial stage of the proceeding. [130] Most decisions of these authorities can also be reviewed in law and fact. As a rule, no grounds for appeal must be filed.[131] It must be clear from the written submission of the party, however, which part of the previous decision is being challenged by the appeal or complaint.[132] There is no right of a general review of decisions. The appellant can base his appeal on "new" grounds that were not discussed before the lower court.[133] A hearing before the court of appeal is only held if the remedy is directed against the decision of the lower court and only if the accused is facing a sanction of more than 18 months imprisonment or in cases where the

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[129] § 217-223 StPO AG (*Berufung*).

[130] § 213-216 StPO AG (*Beschwerde*).

[131] § 218 and 214 StPO AG. Although § 218 demands explicitly, that the appellant must give grounds for appealing, the cantonal Appeal Court has decided that missing grounds do not make the appeal invalid (B. Brühlmeier, at 352 with reference to AGVE 1969, 119).

[132] § 208 (1) StPO AG.

[133] (*Novenrecht*) § 220 StPO AG. This right gives the appellant the opportunity to introduce new evidence, irrespective of whether it is his fault, that this evidence was not introduced at the previous trial. Higher court costs may arise, however (§ 220 (2) StPO).

prosecutors also chooses to appeal.[134] The upper court can order the repetition or a supplement of the presentation of the evidence.[135] It is common, however, that the decision of the Appeal Court is based on the police dossier alone.[136] If the defence alone has availed himself of an appeal, the previous decision may not be altered to the disadvantage of the accused (reformatio in peius). However, if the prosecutor has also appealed, there is nothing to prevent this result.[137]

The decisions of the upper cantonal court can usually be appealed to the Federal Supreme Court of Switzerland. For review of constitutional principles such as the right to be heard and its aspects or the rights based on the ECHR, a public-law appeal must be filed.[138] If the appeal is approved, the previous decision is quashed irrespective of whether or not the violation of the rights of the accused influenced the outcome of the case.[139] The formal requirements for a public-law appeal are high. The appellant must present the facts and explain which legal principles have been violated and in what manner.[140] He must also give a legal explanation that supports his point of view.[141] The

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[134] § 222 StPO AG.

[135] § 222 (2) and 216 (2) StPO AG.

[136] For example BGE 120 Ia 31 at 32 where a decision of the Appeal Court of the Canton Aargau that was based on the record, has been reviewed.

[137] § 210 StPO AG. It was held, that this principle is not effective in cases where a complaint was filed (AGVE 1967, 198).

[138] (*Staatsrechtliche Beschwerde*), article 189 (1)(a) of the Swiss Constitution and 84 (1)(a) and (b) *Bundesgesetz über die Organisation der Bundesrechtspflege* vom 16. Dezember 1943 (SR 173.110; cited as OG). Other kinds of appeal to the federal Supreme Court do not need to be explained for the purposes of this thesis.

[139] BGE 122 I 55; 122 II 469.

[140] BGE 117 Ia 395.

[141] BGE 117 Ia 395, 115 Ia 14.

public-law appeal must be directed against a final decision generally of the upper cantonal court. Interlocutory decisions are only appealable if they have an irreparable disadvantage on the accused that cannot be reversed by a favourable final decision.[142] The Federal Supreme Court reviews only legal issues and adopts the factual bases from the previous cantonal court. The facts of a case are only reviewed if the investigation by the cantonal authorities was glaringly and arbitrarily insufficient.[143] Many insufficiencies of the police inquiry or the investigation by the examining magistrate therefore remain uncorrected.

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[142] BGE 122 I 39, 116 Ia 184, 106 Ia 233.

[143] BGE 119 Ia 417, 115 Ia 386, 114 Ia 128.

D. Pretrial Right to Counsel

I. Purpose of the Pretrial Right to Counsel

The right to counsel provides the accused with an opportunity to contact a lawyer who will inform him of his legal rights and give advice on how he should respond to the allegations of the police in the most advantageous manner.[1] The general concern of the right is for fair treatment of the accused in the criminal process and to protect him against the risk of self-incrimination.[2] Furthermore, the right guarantees the accused to be informed of his constitutional rights.[3] It is evident that the protection of the accused is not derived from the person of the lawyer but from her professional experience. Counsel provides the legal knowledge and an objective perspective necessary for an effective defence and thereby places the accused in a position more equal to that of the prosecutor.[4] While most other procedural safeguards are applicable or show their effects only at trial, the right to counsel is of most practical relevance during the pretrial investigation.[5] The Canadian Charter prescribes that every detained person must be

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[1] Similar E. Ratushny, "The Role of the Accused", in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d. ed. (Toronto: Carswell, 1989) 451 at 462.

[2] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 at 18-19 (S.C.C.); *Clarkson* v. *R.*, [1986] 1 S.C.R. 383 at 394 and 396 (S.C.C.).

[3] R. v. Bartle (1994), *ibid.*, at 18-19.

[4] *Johnson* v. *Zerbst* 305 (U.S.) 458 at 462-463 (1938); M. Spaniol, *Das Recht auf Verteidigerbeistand im Grundgesetz und in der Europäischen Menschenrechtskonvention* (Berlin/D: Duncker & Humblot, 1990) at 10; R. Hauser & E. Schweri, *Schweizerisches Strafprozessrecht*, 4th. ed. (Basel/CH: Helbing & Lichtenhahn, 1999), at 146.

[5] E. Ratushny, *supra*, note 1, at 462; A. Mewett, *Introduction to the Criminal Process in Canada*, 2d ed. (Scarborough/ON: Carswell, 1992), at 22; A.M. Boisvert, "The Role of the Accused in the Criminal Process",

informed of his right to retain counsel without delay and must be given the opportunity to exercise this right.[6]

In Switzerland also, the right to counsel has generally been acknowledged by courts[7] and by legal scholars[8]. It has mainly been dealt with under the aspect of the principle of equality of arms which was also declared to be the "essence of the principle of a fair trial".[9] This principle "...implies that each party to the proceedings before a tribunal must be given a full opportunity to present its case, both on facts and in law, and to comment on the case presented by his opponent. This opportunity must be equal between the parties and limited only by the duty of the tribunal to prevent in any form an undue prolongation or delay of the proceedings."[10] The principle is not intended to impose absolute equality between the parties, but rather demands a balancing of opportunities to influence the course and outcome of the criminal proceeding.[11]

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in G.A. Beaudoin & E. Mendes, ed., *The Canadian Charter of Rights and Freedoms*, 3d. ed. (Toronto: Carswell, 1996), c. 11 at 22.

[6] S. 10 (b) Canadian Charter of Rights and Freedoms, Schedule B, Part I, Constitution Act, 1982, (R.S.C. 1985, Appendix II, No. 44). See also discussion below, D. II.1.2.a).

[7] The federal Supreme Court of Switzerland held that the right to counsel was an aspect of former article 4 of the Swiss constitution (now article 29 (2) BV): BGE 109 Ia 239.

[8] See E. Müller-Hasler, *Die Verteidigungsrechte im zürcherischen Strafprozess, insbesondere deren zeitlicher Geltungsbereich, unter dem Aspekt des fairen Verfahrens* (Entlebuch/CH: Huber Druck AG, 1998) at 108.

[9] For example R. Hauser & E. Schweri, *supra*, note 4, at 230; S. Trechsel, "Die Verteidigungsrechte in der Praxis zur Europäischen Menschenrechtskonvention" ZStrR 96 (1979). 337 at 377; U. Kohlbacher, *Verteidigung und Verteidigungsrechte unter dem Aspekt der "Waffengleichheit"* (Zürich/CH: Schulthess Polygraphischer Verlag, 1979) at 25.

[10] J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford: 1969) at 172 (referred to by S. Trechsel, *supra*, note 9, at 377 fn. 165).

[11] (*formelle Waffengleichheit*), U. Kohlbacher, *supra*, note 9, at 27; M. Spaniol, *supra*, note 4, at 11.

Although in order to be fully effective, the principle must be applicable to the whole course of the proceeding and not only at the hearing;[12] an unlimited right to counsel from the beginning of the criminal process has not found support from the Swiss legislator. The provisions that entitle the accused to retain counsel are undermined by broad discretionary powers of the investigative authorities during the pretrial inquisition.[13] Compared to the developments of the right to counsel in common law jurisdictions, the corresponding law in Switzerland is still in its infancy.

II. Canada

1. Current State of the Law

1.1. Trigger

The pretrial right to counsel established in section 10 of the Canadian Charter is not guaranteed upon every contact with the police but only to persons under arrest or detention.[14] The existence of the right to counsel therefore depends very much on the judicial interpretation of 'arrest' and 'detention'. A discussion of the conditions for the lawfulness of arrest or detention is therefore not necessary.

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[12] V. Delnon & B. Rüdy, "Untersuchungsführung und Strafverteidigung" ZStrR 106 (1989) 43 at 50 (with further references). For the Canadian perspective: E. Ratushny, *supra*, note 1, at 462.

[13] See below D.II.2.

[14] S. 10 (b) Canadian Charter. Those not arrested or detained may freely seek to consult their lawyers. It is the interference with autonomy and control produced by the detention or the arrest, which necessitates an explicit right to counsel.

a) Arrest

Arrest has been defined as the seizure of a person by a legal authority with permission to take this person into custody, for example in response to a criminal charge.[15] An arrest is accomplished by any physical restraint of the person sought to be arrested accompanied by a verbal announcement of the arrest.[16] The arrest can be attained by merely pronouncing words of arrest where the person addressed submits to the deprivation of his freedom and goes with the arresting police officer.[17] It is not necessary that the word 'arrest' be explicitly used, as long as the phrase used by the police reasonably conveys to the arrestee that he is under restraint.[18] An arrest may be made either with or without a warrant.[19]

b) Detention

Whether a person has been detained is more difficult to determine than whether a person has been arrested. The concept of detention is very broad and includes a variety of intrusive forms of restraint by the police. In a nutshell, detention occurs if a

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[15] G. F. Cole, *The American System of Criminal Justice*, 7th ed. (Belmont/US: Wadsworth Publishing Company, 1995), at 204; *Black's Law Dictionary*, New Pocket Edition, 1996, *s.v.* "arrest".

[16] *R.* v. *Whitfield* (1970), 9 C.R.N.S. 59 (S.C.C.).

[17] *Ibid.*

[18] *R.* v. *Latimer*, (1997), 4 C.R. (5th) 1 (S.C.C.).

[19] Especially those provisions establishing the right to arrest a person in order to ensure his attendance at trial demand that a warrant for arrest is issued (for example s. 512 (2) Criminal Code, R.S.C. 1985, c. C-46). On the other hand, police officers and certain other officials are entitled to arrest without warrant under certain circumstances, for example if arresting a person whom they witnessed committing a crime, whom they believe to have committed an indictable offence or who is about to commit a criminal offence (s. 494 and 495 Criminal Code).

police officer or other agent of the state exercised either a physical or a psychological control over the movements of a person by a demand which may have significant legal consequences and prevents or impedes access to counsel.[20] The element of compulsion can also arise from criminal liability for refusal to obey the demand.[21]

It is not decisive whether there was in fact a statutory or common law authority for the demand of the police officer, as long as the person concerned reasonably believes that there was no choice but to comply with the officer's demand. The pressure on the person approached remains the same, whether or not the official was legally entitled to demand the requested action. A person's compliance with the demand or direction of the police can realistically not be regarded as truly voluntary.[22] To give some examples, detention has been held to have occurred in cases where a person was under demand to accompany a police officer to the station for a breathalyzer test,[23] where a person was required to provide a roadside breath sample,[24] or where a person hospitalized after a motor vehicle accident was demanded a blood sample.[25]

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[20] *Thomsen* v. *R.* (1988), 63 C.R. (3d) 1 (S.C.C.); *R.* v. *Siemens* (1994), 30 C.R. (4th) 208.

[21] *R.* v. *Therens* (1985), 45 C.R. (3d) 97 (S.C.C.). *Thomsen* v. *R.* (1988), 63 C.R. (3d) 1 (S.C.C.). Regarding psychological detention see *R.* v. *Esposito* (1985), 49 C.R. (3d) 193 (Ont. C.A.); *R.* v. *Schmautz* (1988) 41 C.C.C. (3d) 449 (B.C. C.A.), affirmed (1990), 53 C.C.C. (3d) 556 (S.C.C.).

[22] *R.* v. *Therens* (1985), 45 C.R. (3d) 97 (S.C.C.); *R.* v. *Dedman* (1985), 46 C.R. (3d) 193 (S.C.C.) where it was held that *consent* to a demand of a police authority is only possible where the police clearly indicate that the accused has a choice.

[23] *R.* v. *Therens* (1985), 45 C.R. (3d) 97 (S.C.C.); *Rahn* v. *R.* (1985), 45 C.R. (3d) 134 (S.C.C.).

[24] *Thomsen* v. *R.* (1988), 63 C.R. (3d) 1 (S.C.C.); *R.* v. *Saunders* (1988), 63 C.R. (3d) 37 (Ont. C.A.); R. v. Baroni (1989), 49 C.C.C. (3d) (S.C.C); *R.* v. *Talbourdet* (1984), 39 C.R. (3d) 210. In *R.* v. *Bonogofski* (1987), 39 C.C.C. (3d) 457 (B.C. C.A.) it was clarified that not every time a detention occurs, where a driver pulls over and stops because he was called upon to do so by the police. Only where the purpose of the police activity is the investigation of a Criminal Code offence, and a request is made of the driver to perform certain

However, not all communications with the police reach the level of restraint of liberty required for detention within the meaning of section 10 (b) of the Charter.[26] Especially as regards psychological detention in respect to police questioning, the courts have encountered difficulties in determining the required degree of restraint. The caselaw is inconsistent, yet some factors for deciding whether the police have detained the person questioned have been articulated. Apart from the element of choice[27] or legal liability for refusal in case of non-compliance, it is decisive where the police questioning occurred and whether the person was given a choice where the interview would take place,[28] what precise language the police officer used in requesting the person to the police station, whether or not the person was escorted to the station or came by himself, and whether the person was arrested after the questioning or was allowed to leave.[29] Furthermore it is important what kind of questions were asked, whether the police believed the interviewee to be the perpetrator of the crime being

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physical tests, there the person is detained.

[25] *R.* v. *Harder* (1989), 49 C.C.C. (3d) 565 (B.C. C.A.).

[26] *R.* v. *Simmons* (1988), 66 C.R. (3d) 287 (Ont. C.A.). Routine questioning or random luggage searches by customs officials, for example, do not trigger the right to counsel. Neither does the request for identification to a pedestrian (R. v. Grafe (1987), 60 C.R. (3d) 242 (Ont. C.A.)).

[27] See also *R.* v. *Soares* (1987), 34 C.C.C. (3d) 402 (Ont. C.A.); *R.* v. *Saunders* (1988), 63 C.R. (3d) 37 (Ont. C.A.); *R.* v. *Bazinet* (1986), 51 C.R. (3d) 139 (Ont. C.A.), *R.* v. *Esposito* (1985), 49 C.R. (3d) 193 (Ont. C.A.); *R.* v. *Voss* (1989), 71 C.R. (3d) 178 (Ont. C.A.).

[28] It was assumed, that it would make a difference, whether the person is questioned at the police station or at home: *R.* v. *Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.); *R.* v. *Boutin*, (1989), 49 C.C.C. (3d) 46 (Que. C.A.).

[29] *R.* v. *Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.).

investigated, and whether the person questioned reasonably assumed that he was being detained.[30]

Some courts of appeal have adopted a simpler test in order to determine whether the person was detained. According to this approach detention occurs at the moment the police believe the person questioned to be a suspect and change their interrogation to "an examination with intent to charge him or her with the offence".[31] It has also been held that it was immaterial whether the person questioned felt that the only choice was to respond.[32] Even if the person was not given the impression that the suspicion of the police was directed at him, he was subject to the coercive power of the state and needed protection. The Supreme Court of Canada clearly rejected this test holding that psychological detention would necessitate the reasonable belief of the person being interviewed that there was no choice but to comply.[33]

The duration of the detention is not determinative of the existence of the right to counsel. It is especially not confined to situations of custody of such duration as to make the effective use of habeas corpus possible.[34] However, if the detention lasts for only a

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[30] *Ibid.*

[31] *R.* v. *Hawkins* (1992), 14 C.R. (4th) 286 (Nfld. C.A.). Similar *R.* v. *Mickey* (1988), 46 C.C.C. (3d) 278 (B.C. C.A.); *R.* v. *Keats* (1987), 60 C.R. (3d) 250 (Nfld. C.A.); *R.* v. *Belliveau* (1986), 54 C.R. (3d) 144 (N.B. C.A.); *R.* v. *Amyot* (1990) 78 C.R. (3d) 129 (Que. C.A.); *R.* v. *Siemens* (1994), 30 C.R. (4th) 208 (Man. C.A.)

[32] *R.* v. *Hawkins* (1992), 14 C.R. (4th) 286 (Nfld. C.A.).

[33] *R.* v. *Hawkins*, [1993] 2 S.C.R. 157 (S.C.C.); *R.* v. *Hicks* (1990), 73 C.R. (3d) 204 (S.C.C.). However, in *R.* v. *Grant* (1991), 7 C.R. (4th) 388 the Supreme Court found the accused to be detained only because the police suspected him to be the perpetrator. Unfortunately, no reasons were given for this decision. Legal scholars have generally welcomed the approach by the Newfoundland Court of Appeal. It has been appreciated that detention was decided not to depend on this person's subjective belief alone but more on factual grounds (D. Stuart, *Charter Justice in Canadian Criminal Law*, 2d. ed. (Toronto: Carswell, 1996) at 261; T. Quigley, *Procedure in Canadian Criminal Law* (Scarborough/ON: Carswell, 1997) at 93).

[34] *Thomsen* v. *R.* (1988), 63 C.R. (3d) 1 (S.C.C.).

very short time, the absence of the right to counsel can be justified, based on section 1 of the Charter.[35]

1.2. Scope

S. 10 (b) of the Charter guarantees the detained or arrested individual not only the right to retain and instruct counsel, but also the right to be informed of his right to counsel. Thus, an informational and an implementational group of police duties under s. 10 (b) can be distinguished.[36]

a) Informational Duties

As a first aspect of the right to counsel, the police have the duty to inform the detainee that he has the right to contact a lawyer. This information is clearly mandatory and a failure to inform constitutes a prima facie violation of s. 10 (b).[37] "The right to counsel is for the suspect the key which opens the door to all his or her other legal rights".[38] Given also that the subsequent implementational duties of the police are not triggered unless and until the detainee requests contact with counsel, the guidance given by the police must be clear and comprehensive in scope.[39] Only then can the

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[35] *Ibid.*

[36] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.).

[37] The person detained does not need to request the information D. Stuart, *supra,* note 33, at 261 and 268.

[38] *R.* v. *DeBot* (1989), 73 C.R. (3d) 129 (S.C.C.).

[39] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.).

detainee make a well-considered choice whether and how to exercise his other legal rights.

The right to counsel principally means that the detainee has access to counsel irrespective of his financial status. Therefore, the police must provide basic information about available services that provide free, preliminary legal advice.[40] The standard caution by the police must include directions on the existence and accessibility of duty counsel free of charge[41] and Legal Aid services[42].

The police are generally not obliged to assure themselves that the detained or arrested person understands the caution given.[43] Nevertheless, the police cannot mechanically recite the warning to the detainee but must take steps to facilitate the understanding of the rights.[44] Provincial courts have gone even further and proposed that it should be explained

> "in easily understood language, to an accused that he has the right to talk to a lawyer before and during questioning, that he has the right to a lawyer's advice and presence even if he cannot afford to hire one, that he will be told how to contact a lawyer, if he does not know how to do so and that he has the right to stop answering questions at any time until he has talked to a lawyer. To make certain that he understands his rights and to

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[40] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.); *R.* v. *Brydges* (1990). 74 C.R. (3d) 129 (S.C.C.); *R.* v. *Manninen* (1987), 37 C.R. (3d) 162; *R.* v. *Evans*, (1991), 4 C.R. (4th) 144 (S.C.C.); *R.* v. *Latimer* (1997), 4 C.R. (5th) 1 (S.C.C.).This general information on free legal assistance services is also in the interest of the police, since it is easier to give a standard caution than to judge the person's financial resources in every single case.

[41] Duty counsel services provide immediate but summary and temporarily restricted legal advice for every accused, irrespective of his financial status. Advice is usually given over the phone. *R.* v. *Brydges* (1990). 74 C.R. (3d) 129 (S.C.C.); *R.* v. *Prosper* (1994), 33 C.R. (4th) 85.

[42] Legal Aid services provide long term legal assistance to indigent accused persons who cannot afford a private lawyer. *R.* v. *Brydges* (1990). 74 C.R. (3d) 129 (S.C.C.); *R.* v. *Prosper* (1994), 33 C.R. (4th) 85.

[43] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.).

[44] *R.* v. *Evans* (1991), 4 C.R. (4th) 144 (S.C.C.).

> avoid equivocal and uninformed waivers, the explanation of the rights should, if possible, be written, as should any waiver of them."[45]

The police should take into account special circumstances relating to the linguistic, social and intellectual background of the detained or arrested person as well as his response to the information when deciding on whether or not additional explanations or repetitions are necessary.[46] However, according to today's law, the police are only under special obligations to give further explanations if an accused says that he does not understand the caution or if special circumstances indicate that the person may not understand the caution, such as intoxication, language difficulties or a known or obvious mental disorder.[47]

The information on the right to counsel must be given "without delay", or in other words, as soon as possible under the particular circumstances.[48] It was held that there is no delay if the police spend time for legitimate self-protection before informing the detained person of his rights.[49] The informational duty only arises at the initial detention or arrest and imposes no continuing obligation on the police to re-inform the individual

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[45] Justice Borins in *R.* v. *Shields* (1983), 10 W.C.B. 120 (Ont. Co. Ct.), cited in *R.* v. *Anderson* (1984), 39 C.R. (3d) 193 at 202 (Ont. C.A.).

[46] *R.* v. *Nelson* (1982), 3 C.C.C. (3d) 147 (Man. Q.B.).

[47] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.); *R.* v. *Evans* (1991), 4 C.R. (4th) 144 (S.C.C.); *R.* v. *Cotter* (1991), 62 C.C.C. (3d) 423 (B.C. C.A.); *R.* v. *Kennedy* (1995), 103 C.C.C. (3d) 161 (Nfld. C.A.); *R.* v. *Vanstaceghem* (1987), 58 C.R. (3d) 121 (Ont. C.A.); *R.* v. *Mohl* (1987), 56 C.R. (3d) 318 (Sask. C.A.). Similar conditions apply for the duty of the police to inform the detainee explicitly of his right to consult counsel in private, see R. v. Jackson (1993), 25 C.R. (4th) 265 (Ont. C.A.).

[48] *R.* v. *DeBot* (1989), 73 C.R. (3d) 129 (S.C.C.); *R.* v. *Taylor* (1990), 54 C.C.C. (3d) 152 (N.S. C.A.).

[49] *R.* v. *DeBot* (1989), 73 C.R. (3d) 129 (S.C.C.); *Strachan* v. *R.* (1986), 49 C.R. (3d) 289 (B.C. C.A.), affirmed (1988), 67 C.R. (3d) 87 (S.C.C.). This rule corresponds with s. 29 of the Criminal Code, where a person who arrests another is obliged to produce the arrest warrant upon request and inform the arrestee about the reasons for the arrest if it is feasible to do so.

concerned on each contact with the police.[50] However, where the focus of the questioning changes to a different matter, the police must give the caution again.[51] This would be the case when a different, unrelated, or considerably more serious offence than the one contemplated at the time of the warning is being investigated.[52]

b) Implementational Duties

Simply informing the accused of the right to counsel would not be of great assistance to the detained or arrested individual. Instead, the police must also provide the opportunity and the factual possibility of exercising this right. However, the implementational duties on the police are not absolute and do not arise or are suspended unless the detainee asserts the right and is reasonably diligent in exercising it.[53]

aa) Affording of a Reasonable Opportunity

When the detainee requests the assistance of counsel, the police officer is obliged to assist him in contacting counsel by giving him a reasonable opportunity to

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[50] *R.* v. *Hebert* (1990), 77 C.R. (4th) 145 (S.C.C.); *R.* v. *Pavel* (1989) 74 C.R. (3d) 195 (Ont. C.A.); *R.* v. *McLean* (1989), 71 C.R. (3d) 167 (Ont. C.A.); *R.* v. *Wood* (1994), 94 C.C.C. (3d) 193 (N.S. C.A.).

[51] *R.* v. *Black* (1989), 70 C.R. (3d) 97 (S.C.C.); *R.* v. *Young* (1992), 73 C.C.C. (3d) 289 (Ont. C.A.); *R.* v. *Paternak* (1996), 2 C.R. (5th) 119 (Alta. C.A.); *R.* v. *Hachez* (1995), 42 C.R. (4th) 69 (Ont. C.A.).

[52] *R.* v. *Evans* (1991), 4 C.R. (4th) 144 (S.C.C.).

[53] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.); *Tremblay* v. *R.* (1987), 60 C.R. (3d) 59 (S.C.C.); *R.* v. *Smith* (1989), 71 C.R. (3d) 129 (S.C.C.); Baig v. R. (1987), 61 C.R. (3d) 97 (S.C.C.); R. v. Anderson (1984), 39 C.R. (3d) 193 (Ont. C.A.); and discussion below, D.II.1.3.b).

exercise his right.[54] Whether a reasonable opportunity has been provided depends on all the circumstances surrounding the detention or arrest.[55] A reasonable opportunity to consult with counsel does not require the personal attendance of counsel.[56] In fact, the duty of the police often comes down to not much more than the duty to offer the detainee the use of a telephone.[57] However, if this phone call is abortive for any reason, a "reasonable opportunity" requires the chance to make other attempts to reach a lawyer.[58] After all, the right to counsel demands that there is a *real* opportunity to retain and instruct counsel.[59]

The detainee has the right to choose counsel provided that preferred counsel is available within a reasonable time.[60] Unless the investigation urgently needs to be pursued, for example because the evidence was otherwise lost, the detainee can be expected to call another lawyer.[61]

A "reasonable opportunity" does not impose a constitutional obligation on the state to provide free legal assistance for indigent detained or arrested persons.[62]

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[54] *R.* v. *Brydges* (1990). 74 C.R. (3d) 129 (S.C.C.).

[55] *R.* v. *Dubois* (1990), 74 C.R. (3d) 216 (Que. C.A.). The conduct of the detainee can also be taken into account, since he is obliged to exercise his rights with reasonable diligence (Below, D.II.1.3.b)).

[56] *R.* v. *Naugler* (1986), 27 C.C.C. (3d) 257 (N.S. C.A.).

[57] *R.* v. *Manninen* (1987), 37 C.R. (3d) 162 (S.C.C.).

[58] *R.* v. *Pavel* (1989) 74 C.R. (3d) 195 (Ont. C.A.). Justice Goodman cited Freedman C.J.M in *R.* v. *Louttit* (1974), 21 C.C.C. (2d) 84 (Man. C.A.): " The "one phone call" rule is a fiction propagated by Hollywood. Reasonable conduct by the police is always requried, and that may, in appropriate circumstances, require that a plurality of telephone calls be permitted." (at 86).

[59] *R.* v. *Mastin* (1991), 5 C.R. (4th) 141 (B.C. C.A.)

[60] *Leclair* v. *R.* (1989), 67 C.R. (3d) 209 (S.C.C.).

[61] *R.* v. *Smith* (1989), 71 C.R. (3d) 129 (S.C.C.).

[62] *R.* v. *Prosper* (1994), 33 C.R. (4th) 265 (S.C.C.).

However, Brydges[63] had the effect that many provinces now provide free preliminary legal advice upon request.[64] Besides, the right to a fair trial is also preserved by the obligation on the police to hold off further eliciting of information until the accused has been given a reasonable opportunity to consult with counsel. The impossibility of retaining free counsel is a factor of reasonableness and may delay the continuation of the police interrogation even more.[65]

bb) Guarantee of Privacy

The detained person must be provided the opportunity to contact and communicate with counsel without being overheard by the police.[66] The Supreme Court has dealt with this question under s. 2(c)(ii) of the Bill of Rights[67] and was especially concerned with the organizational aspects of the right to privacy and the possible misuse of the right by the detainee.[68] Among the provincial courts of appeal, however, an overwhelming majority are of the opinion that privacy is to be provided even without an explicit request by the detainee.[69]

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[63] *R.* v. *Brydges* (1990). 74 C.R. (3d) 129 (S.C.C.).

[64] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.). There is still no federal funding of duty counsel.

[65] *R.* v. *Prosper* (1994), 33 C.R. (4th) 85 at 108 (S.C.C.).

[66] See below, footnote 72.

[67] *Canadian Bill of Rights*, S.C. 1960, c. 44 (R.S.C. 1985, Appendix III.

[68] *R.* v. *Jumaga*, [1977] 1 S.C.R. 486 (S.C.C).

[69] *R.* v. *Gilbert* (1988), 61 C.R. (3d) 149 (Ont. C.A.); *R.* v. *Playford* (1987), 61 C.R. (3d) 101 (Ont. C.A.); *R.* v. *LePage* (1986), 54 C.R. (3d) 371 (N.S. C.A.); *R.* v. *Young* (1987), 38 C.C.C. (3d) 452 (N.B. C.A.); *R.* v. *Kennedy* (1995), 103 C.C.C. (3d) 161 (Nfld. C.A.); *R.* v. *McKane* (1987), 58 C.R. (3d) 130 (Ont. C.A.).

The right to privacy commences after the individual concerned has reached his lawyer and extends to the subsequent communication, so that the person can speak frankly and seek advice without fear.[70] The police do not have to actually witness the conversation between detainee and counsel in order to infringe the right to counsel. The right is violated as soon as the detained or arrested person reasonably believes that his consultation with counsel could be overheard by the police, since this belief can already intimidate him and hinder the detainee from speaking openly to his lawyer.[71]

The police are obliged to inform on the privacy aspect of the right to counsel only where it is obvious to the officer that the detained person does not understand that he has a right to consult counsel in private or where the person is concerned whether the right to privacy will be afforded.[72] Failure to inform on the privacy aspect of the right to counsel infringes s. 10 (b) of the Charter only in these cases.[73]

cc) Duty to Interrupt Questioning

After the police have "implemented" the right to counsel, an obligation arises to stop their investigation of the accused until he has a reasonable chance to get advice

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[70] *R.* v. *Standish* (1988), 41 C.C.C. (3d) 340 (B.C. C.A.).

[71] *R.* v. *Playford* (1987), 61 C.R. (3d) 101 (Ont. C.A.). However, if the police can show that the detainee was in fact able to communicate privately, s. 10(b) has not been violated.

[72] *R.* v. *Jackson* (1993), 25 C.R. (4th) 265 (Ont. C.A.).

[73] *Ibid.*

from counsel.[74] This duty applies to police questioning and other forms of eliciting evidence, and hinders the police from compelling the accused to participate in a process or to make a decision that could have an adverse effect on his position in the proceeding against him.[75] Of course, if the accused decides to speak to the police voluntarily before counsel arrives and the caution given was lawful, his statements will be taken into evidence.[76] There is some relief from the duty to refrain from further investigations in case of urgency,[77] before the police have gained control of the situation surrounding the arrest,[78] before physical evidence could be secured,[79] and before the accused has been searched for weapons.[80]

dd) No Defamation of the Reputation of Defence Counsel

The right to counsel further prohibits the police from denigrating the reputation of defence counsel.[81] Belittling of defence counsel by the police officer could undermine the

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[74] *R.* v. *Manninen* (1987), 37 C.R. (3d) 162 (S.C.C.); *R.* v. *Burlingham* (1995), 38 C.R. (4th) 265 (S.C.C.).

[75] *R.* v. *Burlingham* (1995), 38 C.R. (4th) 265 (S.C.C.) (Accepting a "deal"); *Leclair* v. *R.* (1989), 67 C.R. (3d) 209 (S.C.C.) (Participation in a police line-up).

[76] *R.* v. *Sims* (1991), 64 C.C.C. (3d) 403 (B.C. C.A.); *R.* v. *MacKenzie* (1991), 64 C.C.C. (3d) 336 (N.S. C.A.); *R.* v. *Smith* (1989), 71 C.R. (3d) 129 (S.C.C.).

[77] *Leclair* v. *R.* (1989), 67 C.R. (3d) 209 (S.C.C.). The two-hour limit for the obtaining of breathalyzer evidence has been considered to be a case of urgency: *R.* v. *Gilbert* (1988), 61 C.R. (3d) 149 (Ont. C.A.); *R.* v. *Dubois* (1990), 74 C.R. (3d) 216 (Que. C.A.); *Tremblay* v. *R.* (1987), 60 C.R. (3d) 59 (S.C.C.). However, it has also been established, that in cases where there is no legal aid service available to indigent accused persons, the two hour limit may not be decisive for the reasonableness of the opportunity provided to contact counsel (*R.* v. *Prosper* (1994), 33 C.R. (4th) 85 (S.C.C.)).

[78] *Strachan* v. *R.* (1986), 49 C.R. (3d) 289 (B.C. C.A.), affirmed (1988), 67 C.R. (3d) 87 (S.C.C.).

[79] *R.* v. *Gilbert* (1988), 61 C.R. (3d) 149 (Ont. C.A.).

[80] *R.* v. *DeBot* (1989), 73 C.R. (3d) 129 (S.C.C.).

[81] *R.* v. *Burlingham* (1995), 38 C.R. (4th) 265 (S.C.C.).

accused's confidence in his lawyer and probably result in the accused's abandonment of an actual consultation with counsel. Ultimately, the police would be rewarded for their inequitable conduct.

1.3. Limitations

a) Waiver

The accused person can abandon both the informational and the implementational component of the right to counsel. The requirements, however, are high.[82] To assume that a waiver is effective, the police must have a reasonable basis for believing that the accused fully comprehends his s. 10 (b) rights and the means by which those rights can be exercised, is aware of the effect of the waiver, and fully understands the consequences of giving up those rights.[83]

A waiver of the informational duty will be rare, since "a person who waives the right to be informed of something without knowing what it was that he had the right to be informed of can hardly be said to have possessed of 'full knowledge' of his rights".[84] As regarding the implementational aspects of the right to counsel, they can be waived even

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[82] *R.* v. *Prosper* (1994), 33 C.R. (4th) 85 at 108 (S.C.C.); *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.).

[83] *Clarkson* v. *R.* (1986), 50 C.R. (3d) 289 (S.C.C.); *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 at 24 (S.C.C.). It is not necessary that the accused is aware of all consequences concerning the waiver (*R.* v. *Borden* (1994), 33 C.R. (4th) 147 (S.C.C.)) or of the exact charge he is facing (*R.* v. *Smith* (1991), 4 C.R. (4th) 125 (S.C.C.)). The right to counsel requires only that the accused has enough information to allow him to make an informed choice about whether to seek counsel's advice or not (*Smith*, ibid.).

[84] *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 at 27 (S.C.C.). It was also held that the indication of the accused not to wish to hear the information would not per se constitute a valid waiver of the informational aspect.

implicitly.[85] The accused must have minimal intellectual capacity in order to waive his right to counsel effectively.[86] The waiver must be clear, unequivocal and voluntarily made. It must not be the result of any kind of compulsion.[87] If the accused asserted his right to counsel and the police still attempt to elicit statements from the accused before counsel arrives, any answer provided by the accused cannot be taken as an implicit waiver of his rights.[88] On the other hand, where an accused first wished to consult counsel and then indicates a change of mind and no longer requests legal advice, the police are obliged to re-inform the accused of the implementational duties triggered by the right to counsel.[89] The accused ought to be hindered from easily waiving his rights.

b) Obligation of the Accused to Reasonable Diligence

The right to counsel does not only impose duties on the police but demands that the accused exercise his rights with reasonable diligence. In apparent contradiction with the newer jurisprudence just described, some older cases hold that unless the accused clearly asserts his right, the implementational duties on the police are suspended.[90]

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[85] *R.* v. *Manninen* (1987), 37 C.R. (3d) 162 (S.C.C.); *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.).

[86] *R.* v. *Whittle* (1994), 92 C.C.C. (3d) 11 where it was held that the accused must at least be capable of communicating with and instructing counsel, understand the function of counsel and understand that he can dispense with counsel in order to waive the right.

[87] *R.* v. *Prosper* (1994), 33 C.R. (4th) 85 (S.C.C.).

[88] *R.* v. *Manninen* (1987), 37 C.R. (3d) 162 (S.C.C.).

[89] *R.* v. *Prosper* (1994), 33 C.R. (4th) 85 (S.C.C.).

[90] E.g. *R.* v. *Manninen* (1987), 37 C.R. (3d) 162 (S.C.C.); *Tremblay* v. *R.* (1987), 60 C.R. (3d) 59 (S.C.C.).

The meaning of "reasonable diligence" was not clearly defined. The courts have been sparing in interpreting what constitutes asserting the right to counsel. It seems, however, that reasonable diligence depends on the charge and the circumstances of the case,[91] the time of the day the accused must contact counsel,[92] and what physical and mental state he is in.[93] Nevertheless, the accused must be conceded a reasonable amount of time to consider his rights before the police are allowed to continue the questioning.[94]

1.4. Remedies

Infringements of the right to counsel must be sanctioned in order to force the police to respect their duties towards accused persons. Under Canadian law the usual remedy in criminal cases is the exclusion of the evidence that was obtained through the Charter violation.[95] The courts have gone through a long process to come to this conclusion, and the jurisprudence on this point is extensive.[96]

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[91] In *Leclair* v. *R.* (1989), 67 C.R. (3d) 209 (S.C.C.) it was stated that the immediate need for counsel upon the arrest imposes the obligation on the accused to assert his right speedily whereas more time would be available to the accused to choose and contact counsel when seeking the best lawyer to conduct a trial.

[92] There is no clear time span within which the duty of the accused to try to contact a lawyer would be suspended. In (*R.* v. *Smith* (1989), 71 C.R. (3d) 129 (S.C.C.) it was held that an accused had not been reasonably diligent when refusing to call his lawyer at 9:00 p.m. although his lawyer was presumably not in the office anymore. In *Leclair* v. *R.* (1989), 67 C.R. (3d) 209 (S.C.C.) the accused persons were unsuccessful in contacting counsel at 2:00 a.m. Here it was held, that the detainees were reasonably diligent in exercising their rights and that they were not obliged to contact a different lawyer.

[93] *R.* v. *Black* (1989), 70 C.R. (3d) 97 (S.C.C.).

[94] *R.* v. *Woods* (1989), 70 C.R. (3d) 45 (Ont. C.A.).

[95] S. 24 (2) Canadian Charter.

[96] See discussions in the pre-Charter cornerstone decisions of *R.* v. *Wray* (1970), 4 C.C.C. 1 (S.C.C.); *R.* v. *Hogan* (1975), 48 D.L.R. (3d) 427 (S.C.C.); and *Rothman* v. *R.* (1981), 59 C.C.C. (2d) 30 (S.C.C.). Besides,

The accused must prove on a balance of probabilities that his right to counsel was infringed or denied and that the evidence sought to be excluded was obtained as a result of the Charter violation.[97] Whether there is a sufficiently strong link between the Charter violation and the illegally obtained evidence must be decided on a case-by-case basis since no general guidelines apply.[98] A temporal link between the infringement and the evidence has generally been found to be sufficient. Only where this temporal connection is tenuous, a true causal nexus must be established in order to pass the test.[99] However, unconstitutionally obtained evidence is only excluded if in view of the circumstances its admission would bring the administration of justice into disrepute.[100]

The administration of justice is brought into disrepute where the admission of the evidence obtained through the infringement of the Charter rights would impinge upon the

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s. 24(2) was clearly intended to exclude evidence only in rare cases (see D. Stuart, supra, note 33, at 477, with further quotations) and also some Courts of Appeal showed difficulties in accepting the exclusionary rule according to the new s. 24(2) of the Charter (for example *R.* v. *Collins* (1983), 33 C.R. (3d) 130 (B.C. C.A.) where it was stated that the exclusion of evidence was not a means to discipline the police (at 144) and that a regular exclusion of evidence would not help to keep the administration of justice in high regard (at 149) or *R.* v. *Hamill* (1984), 41 C.R. (3d) 123 (B.C. C.A.) where it was held that the exclusion of relevant evidence would "suppress the truth" (at 148)). Although the Ontario Court of Appeal was less skeptical towards the exclusionary consequence of Charter breaches (*R.* v. *Manninen* (1983), 37 C.R. (3d) 162 (S.C.C.)) the strong dissent of Zubler J. in *R.* v. *Duguay* (1985), 45 C.R. (3d) 140 (Ont. C.A.), affirmed (1989), 67 C.R. (3d) 252 (S.C.C.), influenced decisions by other Court of Appeals (*R.* v. *Strachan* (1986), 49 C.R. (3d) 289 (B.C. C.A.); *R.* v. *Brown* (1987), 33 C.C.C. (3d) 54 (N.S. C.A.); *R.* v. *Spence* (1988), 62 C.R. (3d) 293 (Man. C.A.)). Finally, the Supreme Court of Canada confirmed its enthusiasm about the remedy of exclusion stated in *R.* v. *Therens* (1985), 45 C.R. (3d) 97 in *Clarkson* v. *R.*., [1986] 1 S.C.R. 383 (S.C.C.) and *R.* v. *Collins* (1987), 56 C.R. (3d) 193 (S.C.C.) and lately in R. v. Stillman (1997), 5 C.R. (5th) 1 (S.C.C.).

[97] *R.* v. *Therens* (1985), 45 C.R. (3d) 97 (S.C.C.); *R.* v. *Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.).

[98] *Strachan* v. *R.* (1988), 67 C.R. (3d) 87 (S.C.C.)

[99] *Ibid.;* R. v. Goldhart (1996), 107 C.C.C. (3d) 481 (S.C.C.).

[100] S. 24 (2) Canadian Charter; *R.* v. *Collins* (1987), 56 C.R. (3d) 193 (S.C.C.); *R.* v. *Jacoy*, (1988) 66 C.R. (3d) 336 (S.C.C.).

fairness of the proceeding against the accused.[101] This may be the case if the evidence is conscriptive and could not have been discovered without the Charter violation.[102] Evidence is conscriptive where the accused is unlawfully compelled to incriminate himself by means of a statement, the use of the body, or the production of bodily samples.[103] Discoverability, on the other hand, is concerned with whether the violation of the accused's rights was necessary to obtain the evidence.[104] The trial is not rendered unfair if the evidence could have been otherwise discovered, either because there was an independent, lawful source for the information, or because the discovery was inevitable.[105] Other factors, such as the seriousness of the Charter breach or the impact of the exclusion on the repute of the administration of justice can be ignored.[106] Only where the accused has not been conscripted against himself, the admissibility inquiry must focus on these issues.[107] Once the test according to s. 24 (2) is met and the admission of the evidence tends to render the trial unfair, the judge has a duty to exclude the unconstitutionally obtained evidence.[108]

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[101] *R.* v. *Collins* (1987), 56 C.R. (3d) 193 (S.C.C.); *R.* v. *Jacoy*, (1988) 66 C.R. (3d) 336 (S.C.C.).

[102] *R.* v. *Collins* (1987), 56 C.R. (3d) 193 (S.C.C.).

[103] This includes derivative evidence found as a result of the conscriptive evidence, whether real or testimonial in nature. *R.* v. *Stillman* (1997), 5 C.R. (5th) 1 (S.C.C.). For a short overview and examples see D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d. ed. (Toronto: Irwin Law, 1999) at 220-226).

[104] *R.* v. *Feeney* (1997), 115 C.C.C. (3d) 129 (S.C.C.).

[105] *R.* v. *Feeney* (1997), 115 C.C.C. (3d) 129 (S.C.C.); R. v. Stillman (1997), 5 C.R. (5th) 1 (S.C.C.).

[106] R. v. Stillman (1997), 5 C.R. (5th) 1 (S.C.C.); similar the Ontario Court of Appeal in R.. v. Hachez (1995), 42 C.R. (4th) 69, where it has been established that trial fairness was the controlling factor in deciding s. 24(2) Charter admissibility. The *Collins* test according to which the seriousness of the violation and the effects of excluding the evidence has thereby been overruled. A good summary of this test can be found in *R.* v. *Jacoy*, (1988) 66 C.R. (3d) 336 at 344-345 (S.C.C.).

[107] R. v. Frazer (1996) 112 C.C.C. (3d) 571 (B.C. C.A.).

[108] *R.* v. *Therens* (1985), 45 C.R. (3d) 97; *R.* v. *Collins* (1987), 56 C.R. (3d) 193 (S.C.C.).

The remedy of exclusion was not meant to be a punishment of the police for misconduct but rather an attempt to affirm the fundamental values underlying the criminal process and to prevent the administration of justice from falling into disrepute.[109] However, the exclusion of relevant but unconstitutionally obtained evidence certainly aims at deterring police misconduct by the state, too.[110]

2. Assessment

Over all, Canadian law on the right to counsel gives the accused good protection upon his arrest or detention. It expresses judicial persistence in offsetting the imbalance between the state and the suspect from the very beginning of the criminal process. In Canada, it has been recognized that the individual is in jeopardy at this early stage of the proceeding and is in need of assistance by counsel. The rules regarding the admissibility of the results of the police inquiry as evidence at trial complete the protection of the accused.[111]

It seems to be reasonable to trigger the right to counsel at the time of arrest or detention since the power of the police over the accused arises at that moment. However, it is regrettable that no clear guidelines are available to Canadian police as to when this moment occurs in each individual case. The lenience of the courts in

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[109] *R.* v. *Collins* (1987), 56 C.R. (3d) 193 (S.C.C.); *R.* v. *Duguay* (1985), 45 C.R. (3d) 140 (Ont. C.A.), affirmed (1989), 67 C.R. (3d) 252 (S.C.C.); *R.* v. *Genest* (1989), 45 C.C.C. (3d) 385 (S.C.C.).

[110] *R.* v. *Burlingham* (1995), 38 C.R. (4th) 265 (S.C.C.).

[111] E. Ratushny, *supra*, note 1, at 462.

determining more obvious criteria ignores the oftentimes coercive reality behind police requests to answer questions and "indirectly encourages police to defer arrests until after interrogation without the need to advise of the right to counsel".[112] A clearer threshold for the triggering mechanism would assist in the equal treatment of similar cases and simplify the duty of the police to inform the accused correctly.

As regards the ambit of the right to counsel, the importance of the informational police duties should not be underestimated. Without thorough instruction the right to retain and instruct counsel would be a hollow one, because many accused persons would not know about the different aspects of the right or be in a position to exercise them in a favourable way. It is crucial that the police ensure that the accused has understood the caution, especially if the accused person declines assistance by counsel.[113] The usual impediments of comprehension caused by linguistic problems, impairment from alcohol or other drugs, excessive rage or bewilderment, or mental disorders are generally simple to recognize and can be easily tackled in a suitable manner. Thus, the police can consult an interpreter, must wait until the suspect is sober or has calmed down, or can seek assistance from a guardianship official or psychologist. Since these aids may be needed for the subsequent interrogation of the accused anyway, they ought not to cause much trouble. In borderline cases, the police may want to give the accused the caution in written form. The implementational duties lying on the police, on the other hand, have been defined in a more comprehensive manner and are

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[112] D. Stuart, *supra*, note 33, at 259.

[113] Full understanding of the right to counsel and its consequences is one requirement for a valid waiver. This guarantees that the accused person does not reject his right because of ignorance. See *supra*, fn. 83.

more apparent and therefore less problematic in their implementation. The duties to provide a reasonable opportunity and privacy to consult counsel as well as the prohibition to tarnish counsel's reputation are the basic features of the right to counsel guaranteeing the accused a real chance to obtain legal advice. The obligation to stop all further eliciting of evidence until the accused has received a reasonable opportunity to consult counsel works as an additional safeguard to keep the police' investigative efforts in check. Finally, the remedy of exclusion of evidence that was obtained in an unconstitutional manner is fair considering that the right to counsel does not offer great difficulty or cost to the police.[114]

III. Switzerland

1. Current State of the Law

Compared to Canada and other common law jurisdictions, the law on the right to counsel is still in its infancy in Switzerland. The existing rules are only very rudimentary and mostly govern the temporal aspects of the right to counsel, rather than issues of its content.[115] Likewise, the current discussions on the right to counsel among legal scholars and the committee of experts responsible for the creation of a federal code on

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[114] *R.* v. *Perras* [1986], 1 W.W.R. 429 (Alta.C.A.).

[115] Violations of the right to be heard and its individual aspects have no consequences if the unconstitutional conduct by the authority can be "undone" later in the process (BGE 116 Ia 95). Therefore, the federal Supreme Court of Switzerland has not had to decide yet, at what moment the right to counsel is exactly triggered (E. Müller-Hasler, *supra*, note 8, at 40).

criminal procedure basically revolve around the question of what is the moment at which the right should be available to the accused in order to be effectual.[116] Thus, many of the characteristics of the right to counsel must be elaborated from general legal principles such as the right to be heard.

1.1. Trigger

Although the cantonal Codes of Criminal Procedure commonly establish a right to consult counsel at any time of the proceeding, access to counsel is currently not as rosy as it might seem.[117] Instead, it appears that in most Swiss cantons the right to retain and instruct counsel does not show its effects until some time at the beginning of the second investigative stage of the criminal process carried out by the examining magistrate. The idea of "detention" is foreign to Swiss law and accused persons oftentimes remain with little legal assistance during the course of the police inquiry.[118] People not in police custody can seek counsel's advice in advance when being asked to come to the police station for an interview. Also indigent persons can simply go to a lawyer's office and instruct counsel. The lawyer chosen will apply for a refund of the fee for her assistance on behalf of her client.[119] Apart from some general advice, however, the possibility of counsel playing an active part in the investigation against her client are

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[116] See for example the recent doctoral thesis by E. Müller-Hasler, *supra*, note 8).

[117] E.g. § 57 StPO AG (Gesetz über die Strafrechtspflege (Strafprozessordnung des Kantons Aargau) vom 11. November 1958 (Stand 1. März 1998; SAR 251.100).

[118] D. Krauss, "Strafverteidigung - wohin?", recht 4/1999, 117 at 118.

[119] (*Gesuch um unentgeltliche Rechtspflege*)

very limited at this stage of the proceeding. According to the criminal procedure of the Canton Aargau, for example, the accused must be informed of his right to retain and instruct counsel at the beginning of the first police interrogation.[120] Nevertheless, the provisions that govern the possibilities of counsel interfering in the criminal process refer only to the second investigative stage before the examining magistrate, whereas no concrete participation rights for counsel are mentioned in the part of the Criminal Procedure Code that contains the rules for the police inquiry.[121]

For indigent accused persons in custody, the law is even less generous.[122] Despite § 57 StPO, the right to have free counsel appointed arises only at the beginning of the second stage of the investigation carried out by the special examining magistrate.[123] Under federal law, the right arises only at the beginning of the investigation by the examining magistrate.[124] The federal Supreme Court has not even acknowledged a special right to appointed counsel in cases where the accused is held in custody over a long period of time, if the proceeding has not reached the second investigative step yet.[125] The cantonal law may provide a better protection, however.[126] In

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[120] § 57 StPO AG.

[121] § 130-132, 134 StPO AG.

[122] According to § 57 StPO AG, accused persons in custody with sufficient financial means to afford a lawyer can insist on their right to consult counsel from the beginning of the investigation against them from the police investigation stage on. However, counsel's possibility to interfere is also very limited.

[123] ZR 96, 1997, Nr. 15; R. Hauser & E. Schweri, *supra*, note 4, at 149.

[124] R. Hauser & E. Schweri, *supra*, note 4, at 149.

[125] BGE 100 Ia 186. Although the examining magistrate is generally responsible for people in custody, he does not have to intervene into the police inquiry, § 126 StPO AG.

[126] In Basel, for instance, the examining magistrate will appoint counsel as soon as the accused has been held in custody for 48 hours (C. Boss, "Pikett-Anwalt der 48. Stunde" plädoyer 1/97, 11 at 12). In Zürich, on the other hand, duty counsel must be appointed *after* the first questioning by the examining magistrate (ZR

the Canton Aargau, duty counsel will be appointed after the accused has been held in custody for 14 days and will not be released thereafter, or earlier if he is confronted with a jail-sentence of at least three months.[127]

The European Convention on Human Rights does not provide better protection for the accused, either. The European Court of Human Rights has not clarified the temporal scope of the rights under the ECHR yet. The protection of article 6 clause 1 ECHR is only triggered after the accused has been "charged".[128] However, it has been held that a limitation of the defence rights during earlier stages of the proceeding may violate the right to a fair trial if these pretrial phases are essential for the outcome of the process.[129] The police inquiry is a procedural stage of such importance.[130] Besides, the European Court of Human Rights has also determined that the whole proceeding must be considered as a unity and a breach of the right may be revoked in a later stage of the process.[131] The court has declined so far, to acknowledge that the right to counsel is triggered at the beginning of the first police questioning.

91/92 (1992/1993), Nr. 55).

[127] § 58 StPO AG.

[128] This is not to be understood in a pure formalistic way. To be charged means here that the suspect has been informed by the responsible authority that he had been accused by somebody or is suspected for other reasons to have committed an offence (J. Frowein/W. Peukert, *Europäische Menschenrechtskonvention - EMRK-Kommentar*, 2. ed. (Strassburg/F: N.P. Engel Verlag, 1996), at Art. 6 N 48). This information does not have to be explicit. The protection is triggered as soon as the accused notices the investigation against him (M. Villiger, *Handbuch der Europäischen Menschenrechtskonvention* (Zürich CH: 1993), at N 391.).

[129] Bricmont v. Belgium, DR 48 31 ff., cited in E. Müller-Hasler, *supra*, note 8, at 10.

[130] W. v. Switzerland, DR 33, 21 ff., cited in E. Müller-Hasler, *supra*, note 8, at 10; and several legal scholars, cited *ibid.* fn. 39.

[131] Eckle v. Germany, GH in EuGRZ 1983, 371 ff. (cited according to E. Müller-Hasler, *supra*, note 8, at 9 fn. 34.).

1.2. Scope

Swiss courts and legal scholars have broadly neglected to define the ambit of the right to counsel and hardly any concrete rules exist to determine the individual duties placed on the police and possibly the accused. Also, there has been no distinction made between informational and implementational obligations of the authorities under Swiss law. However, in order to simplify a comparative analysis between Canadian and Swiss law, the outline of the current Swiss rules follows the structure of the explanations concerning the Canadian right to counsel.

a) Informational Duties

It has not clearly been determined yet whether the right to counsel under Swiss law includes the right to be informed. There is presumably no obligation upon the authorities to do so under article 6 clause 1 of the ECHR.[132] Likewise, the Swiss federal Supreme Court has not yet determined whether there is such a duty under the federal constitution, although legal scholars have generally acknowledged the corresponding right of the accused.[133] Some cantonal laws oblige the police or the examining magistrate to inform the accused at the beginning of the first questioning by the police[134]

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[132] Whether such article 6 clause 1 ECHR includes this duty is controversial among legal scholars (see E. Müller-Hasler, *supra*, note 8, at 107 fn. 173 and 174). The European Court of Human Rights has not decided this question yet (*ibid.*).

[133] According to E. Müller-Hasler, *supra*, note 8, 108.

[134] For example in the Canton Aargau, § 57 StPO AG.

or by the examining magistrate.[135] This "information" basically consists of the recounting of the provision in the cantonal procedure law. Police records on questionings reveal that the police in general properly inform of the right to counsel. However, there are no indications that the police also advise on how to exercise the right instantaneously. Apart from the mere statement that the right to counsel exists, the accused is not encouraged in any way to make use of his right.

Other comments in court decisions or juristic literature relating to the content of the information on the right to counsel provided by the state are missing. The assumption must be that there are no further informational duties lying on the police and the examining magistrate under current law in Switzerland.

b) Implementational Duties

The implementational aspect of the right to counsel has not been broadly discussed in Switzerland. Police records hardly ever reveal that an accused in fact wished to postpone or interrupt the interrogation in order to consult counsel. The assumption is that most accused persons seek counsel's advice only after they have been questioned by the police or the examining magistrate. It has been common belief that in order to get the accused to speak about the allegation as openly and comprehensive as possible, the investigative authorities must have the chance to interview suspects before they can retain counsel.[136] However, it might rather be the

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[135] For example in Zürich, § 11 (1) StPO ZH.

[136] R.Hauser,"Zur Teilnahme der Parteien in der Voruntersuchung", SJZ 71 (1975), at 346. Other opinion

view that a confession or at least some incriminating statements from the accused are easier to elicit if there was no previous consultation with counsel.[137]

Oral and written communications between the accused and counsel may in general not be monitored.[138] Otherwise, the rights of the accused against self-incrimination would be nullified and no relationship of personal trust between counsel and accused could arise.[139] But again, the investigating authorities often have the right to exclude privacy if they assume "the purpose of the investigation to be at risk".[140] Neither the federal constitution nor the ECHR bestow upon the accused the right to unrestricted consultation with counsel.[141] However, only visual but not acoustic monitoring of the communication between counsel and accused is permitted, and surveillance is only allowed if the consultations bear a concrete danger of collusion.[142] All postal communications between counsel and accused may not be monitored with respect to their content. The police may only open the letters in order to assure themselves that the envelope contains a letter from or to counsel.[143]

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e.g. H. Utz, *Die Kommunikation zwischen inhaftiertem Beschuldigten und Verteidiger* (Basel/CH: Helbing & Lichtenhahn, 1984); U. Kohlbacher, *supra*, note 9, at 54.

[137] Similar D. Krauss, *supra*, note 119, at 121, according to whom Swiss criminal procedures are directed towards an institutionalized pressure to confess (*institutionalisierter Geständnisdruck*).

[138] BGE 111 Ia 346; 106 Ia 224; 105 Ia 380.

[139] H. Utz, *supra*, note 136, at 32.

[140] § 131 StPO AG, § 18 (1) StPO ZH; BGE 119 Ia 505; A. Haefliger, "Die Grundrechte des Untersuchungsgefangenen in der bundesgerichtlichen Rechtsprechung" ZStrR 104 (1987) 257 at 270.

[141] BGE 119 Ia 505; Can v. Austria (1984),in EuGRZ 1986, 276 ff.

[142] BGE 121 I 164; A. Haefliger, *supra*, note 140, at 270; H. Utz, *supra*, note 136, at 55.

[143] BGE 106 Ia 224-225; H. Utz at 138-139.

As in Canada, there is no general right to have counsel present during the interrogation of the accused under Swiss law.[144] Some cantonal criminal procedures allow the presence of counsel at questioning carried out by the examining magistrate,[145] but there is no such right based on the Swiss constitution or the ECHR.[146] Nor is there a general right regarding the attendance of counsel at interrogations during the police inquiry.[147] Only in the Canton Solothurn, are the police obliged to allow counsel's presence during the interview of her client.[148]

The right to free legal advice has been elaborated in depth in Switzerland.[149] The federal Supreme Court has established that every accused who cannot afford counsel has a right to have counsel appointed by the examining magistrate or the trial judge

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[144] Due to the greater importance of the pretrial investigation by police and examining magistrate, such a right to have counsel present at the interviews is more urgent than in Canadian proceedings.

[145] For example article 245 StPO BE, § 104 StPO NW, § 95(4) SO, article 65 StPO SG, art. 76c (3) StPO GR.

[146] BGE 104 Ia 17. Nevertheless, some legal scholars attempt to derive such a right from article 6 clause 3 ECHR: These scholars are of the opinion that the ECHR would demand the trigger of he right at this moment also for inquisitorial proceedings since the ECHR is based on the adversarial mode of criminal procedure where the accused's right to counsel arises upon detention by the police (e.g. V. Delnon & B. Rüdy, *supra*, note 12, at 59; D. Poncet, *La protection de l'accusé par la Convention Européenne des Droits de l'Homme* (Geneva: 1977) at 167).

[147] BGE 94 I 625. In 118 Ia 133 the federal Supreme Court held that defence counsel was *principally* entitled to attend *all* interrogation of her client (at 136). However, this remark was made in connection with the calculating of the fee of duty counsel. It is doubtful that the Supreme Court intended to broaden the rights of accused persons.

[148] § 7 (2) StPO SO.

[149] The conditions of the right were developed as an aspect of article 4 of the former federal constitution as well as of article 6 clause 3 (b) ECHR, for example BGE 122 I 50, 115 Ia 105, 113 Ia 221, 102 Ia 91, 100 Ia 187. Now, the right is established in article 29 (3) of the revised Swiss constitution. A survey of the right to appointed counsel gives T. Graf, "Zum Anspruch auf Verteidigerbeistand" plädoyer 5/97, 21ff.

where the accused is facing a jail-sentence of more than 18 months.[150] If the accused risks to be convicted for a shorter jail-term, free counsel will only be appointed where the legal or factual side of the case is difficult.[151] There is no such right at all if the process is about a petty offence.[152] The required conditions given, the right to retain free counsel arises at the beginning of the investigation carried out by the examining magistrate and also applies to appeals or remedies.[153] This means in negative terms that the accused is usually not represented by counsel during the police inquiry (and including the first 14 days of custody!).[154] Accused persons who are not in custody, on the other hand, can consult a private lawyer at any time and can then put a motion to the authorities in order to get counsel paid by the State.[155] If counsel is appointed, her fees are paid by the state in case of a conviction and court costs are waived.[156] The role of duty counsel does not differ from the one of a privately hired counsel. Although paid by public means, counsel is under an obligation to the accused

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[150] BGE 116 Ia 304, 115 Ia 105. Cantonal law can be more generous. Under § 58 (1) (a) and (b) StPO AG duty counsel is appointed if the committed offence can be punished by a jail sentence of at least 6 months or the suspect is in custody for longer than 14 days.

[151] E.g. BGE 120 Ia 44-45.

[152] Under federal law, "petty offence" includes here all crimes that are punishable with fine only or with short jail-terms. The cantonal law can provide better protection.

[153] R. Hauser & E. Schweri, *supra*, note 4, at 149.

[154] See § 58 (1) (b) StPO AG. This view has been confirmed for the Canton Solothurn by two lawyers cited in D. Strebel, "Anwalt und Polizei am selben Tisch" plädoyer 3/99, 4 at 5-6.

[155] E. Müller-Hasler, *supra*, note 8, at 59.

[156] Art. 29 (3) BV, Art. 6 (3)(c) ECHR. If the accused is acquitted, the lawyer's fee must be refunded by the state in all cases and irrespective of whether counsel was privately hired or appointed by the examining magistrate or a judge. This is different to Canadian law, where the fee of privately hired counsel must be paid by the accused in any case. Court costs in cases of acquittal are also paid by the state in both countries.

only and must defend the accused conscientiously.[157] Wishes of the accused referring to the person of counsel are respected if appropriate.[158]

There seem to be no further obligations on the investigative authorities regarding the right to counsel. In particular, there is no duty to provide names and phone numbers of defence lawyers, or to appoint free counsel before the investigation under the responsibility of the examining magistrate is triggered or the time limits provided by law are met. It is no exaggeration to say that Swiss authorities do not facilitate the exercising of the right to counsel in any way.[159] The caution given is more the fulfillment of a formality than the promotion of a true offer to contact counsel.

1.3. Limitations

The fact that interrogations by police or examining magistrate are continued after the interviewee has been informed of the right to counsel, and that few accused wish to consult a lawyer immediately, indicates that the right to counsel cannot be an absolute one.[160] On the contrary, it seems that the threshold for waiver is very low. Since no explicit rules exist, the assumption is that an accused who does not insist on consulting counsel subsequent to the cautioning, waives his rights until explicitly demanding to

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[157] R. Hauser & E. Schweri, *supra*, note 4, at 150.

[158] § 61 (2) StPO AG.

[159] Even in the Canton Solothurn a modern law about the right to counsel could not bring much changes because the police does not support accused persons in retaining counsel. D. Strebel, *supra*, note 154, at 5; C. Boss, *supra*, note 126, at 12 (for the Canton Zürich).

[160] The right to be heard can be waived: BGE 101 Ia 313.

exercise it later on in the proceeding.[161] Statements made before the accused consulted counsel are included in the police record and admissible in evidence, unless the police did not inform correctly about the right to counsel.[162]

With regard to other constitutional principles, it has been established that the accused and counsel must exercise the rights within a reasonable period of time.[163] The same must apply to the right to counsel as an aspect of the right to be heard. The accused is expected to express his wish to seek a lawyer's advice clearly and in good time. However, since the right to counsel is a continuous one,[164] the accused who does not request to contact counsel immediately after he has been informed of this right does not waive his right to counsel - despite the requirement of timeliness. Rather, it might be more accurate to speak of a suspension of the right rather than of its waiver.[165]

1.4. Remedies

The consequences of a breach of the right to counsel are not discussed as such in the Swiss caselaw, but are rather conceptualized as a violation of the right to be

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[161] If the accused is not stubborn and persists on his right to see a lawyer, he won't get legal assistance (D. Strebel, *supra*, note 154, at 5).

[162] See below, D.II.1.4..

[163] ("*rechtzeitig*"), BGE 120 Ia 48; 118 Ia 465; 106 IV 91.

[164] It has been discussed *supra* that as a general principle, the accused has the right to seek counsel's advice at every stage of the process. E.g. § 57 StPO AG

[165] In respect to other constitutional rights, however, it has been held that the right of the accused is forfeited if not exercised timely.

heard.[166] This constitutional right is of "formal nature".[167] Accordingly, the decision by the authority that disregarded the accused's right must be overruled if the right to be heard has been breached. It is irrelevant whether the violation actually resulted in a different outcome of the process or whether the outcome is the same that could have been expected if the unlawful action by the state had not taken place.[168] Thus, the result of the questioning would not be admissible in evidence, irrespective of whether the missing of the warning has factual consequences on the outcome of the interrogation. However, the federal Supreme Court has established that the violation of the right can be undone in the proceeding on appeal if the accused has the same participation rights before the court of appeal as before the lower court.[169] The federal Supreme Court can thereby avoid specifying the exact time when the rights of the accused arise. Also, the acknowledgement of the possibility to "undo" violations has noticeably restricted the rights of the accused.[170]

For evidentary reasons, the accused must insist that his wish to exercise the right to counsel is written on the record. Without any notice in the dossier, it will be difficult to

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[166] E.g. BGE 120 Ia 48.

[167] (*formeller Natur*) BGE 122 I 55; 122 II 469, 120 Ib 383; R. Rhinow, H. Koller & C. Kiss, *Öffentliches Prozessrecht und Justizverfassungsrecht des Bundes* (Basel/CH: Helbing & Lichtenhahn, 1996) N. 325ff..

[168] BGE 115 Ia 10. The decision is only annuled if the defendant appeals against this decision, though: BGE 120 V 362.

[169] BGE 116 Ia 95, 114 Ia 314. Three conditions must be met. First, the court of appeal is entitled to monitor all aspects of the decision of the lower court. Second, the court of appeal must in fact monitor all aspects. Third, the accused must be given a true opportunity to exercise his right to be heard. Although this rule is somewhat unpleasant, it is more acceptable under the civil law model than it would be in common law proceedings. The Swiss right to appeal is quite broad since cantonal courts of appeal can review decisions of the lower courts with respect to legal and factual issues (See *supra*, C.II.5.). The disregarded rights can therefore often be made up for in the proceeding before the upper court. The ordinary stages of appeal are then restricted, though.

prevent the use of the interrogation as evidence. However, apart from "experienced" accused persons, individuals involved in criminal proceedings usually do not know about this requirement.

2. Assessment

Unlike explanations about the basic characteristics of the right to counsel, the insufficiency of its current form in Swiss law has raised the interest of legal scholars. It has been recognized that the protection provided by the current law is not sufficient for various reasons. First, the procedural reality has evolved from the one on which the criminal procedure was based because the importance of the police inquiry has increased significantly.[171] The objectivity of the examining magistrate that was intended by law is hindered for mainly psychological reasons.[172] There are also several problems occurring in relation to the recording of the interviews with the accused person.[173] Besides, the potential for the defence to influence the content of the file is very limited.[174] Nevertheless, the police record is the main source of evidence on which the court bases its decision; the principle of direct testimony has disappeared in many criminal

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[170] E. Müller-Hasler, *supra*, note 8, at 40-41.

[171] See discussion below, D,III.2.1.

[172] Subsequently, 2.3.

[173] Subsequently, 2.5.

[174] Subsequently 2.4.

proceedings.[175] The rights of the defence are admittedly elaborate at the trial stage where the principle of equality of arms is effectively applied.[176] But for reasons that will be discussed below, these participation rights are granted too late in the process to effectively ensure a truly fair trial for every accused person.

2.1. Increasing Police Powers

When most cantonal codes on criminal procedure were written in the second half of the twentieth century, the police were considered to be helpers of the examining magistrate, being responsible themselves alone for only "minor" inquiries such as search for the suspect offender and securing of evidence that was otherwise lost.[177] Nowadays, the police are often responsible for the whole pretrial investigation because of their better technical equipment and special investigative knowledge.[178] The examining magistrate only interferes in complicated and/or important cases.[179] The first interrogation of the accused is carried out by the police in most cases, and often, the examining magistrate does not intervene before the final interrogation just prior to the submission of the file to the prosecutor.[180] Due to these changes in the practice of

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[175] Subsequently, 2.2.

[176] See *supra*, B.I.2.2.a)

[177] R. Hauser & E. Schweri, *supra*, note 4, at 334; § 1 StPO AG; B. Brühlmeier, *Aargauische Strafprozessordung*, 2d. ed. (Aarau/CH: Keller Verlag, 1980) at 117.

[178] H. Utz, *supra*, note 136, at 26.

[179] E.g. § 126 and 2 (3) StPO AG.

[180] R. Hauser & E. Schweri, *supra*, note 4, at 327; U. Kohlbacher, *supra*, note 9, at 80; E. Müller-Hasler, *supra*, note 8, at 82 for the Canton Zürich. In the Canton Aargau this is a natural consequence since the legislator intended that the investigation by the examining magistrate was only optional and the prosecutor's

criminal procedure, the protection of the accused has lost much of its effectiveness in most criminal proceedings. The defence rights regularly arise in the second investigative stage but the police basically compile the file according to their own procedural and investigative views. Because of the key role of the police record for the final decision by the court, it is difficult to influence the outcome of the process at later stages.[181]

2.2. Disappearance of the Principle of Direct Testimony

The principle of direct testimony requires all evidence to be heard in court.[182] Applied strictly, it prohibits any decision of criminal cases on the basis of the file alone. However, legislation and legal practice are visibly drifting in the opposite direction.[183] At trial, the judge invites the accused to comment on the allegations against him and possibly asks additional questions. Defence counsel and prosecutor can ask the judge to have certain further questions put to the accused. Other evidence is often not heard again and the judges mostly rely on the file exclusively.[184] According to § 27 StPO AG,

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decision on whether or not to prosecute could be based on the results of the police inquiry, see B. Brühlmeier, *supra*, note 177, at 267; H. Utz, *supra*, note 136, at 26; M. Schubarth, *Die Rechte des Beschuldigten im Untersuchungsverfahren, besonders bei Untersuchungshaft*, (Bern/CH: Verlag Stämpfli & Cie., 1973) at 229.

[181] E. Müller-Hasler, *supra*, note 8, at 227; R. Hauser & E. Schweri, *supra*, note 4, at 321, U. Kohlbacher, *supra*, note 9, at 31; K. Peters, *Fehlerquellen im Strafprozess*, vol. 2, (Karlsruhe/D: 1972) at 195ff and 299.

[182] BGE 119 Ia 318.

[183] H. Utz, *supra*, note 136, at 26; M. Schubarth, *supra*, note 190, at 241.

[184] In most cantonal codes on criminal procedure there is no provision that would constitute an obligation on the judges to repeat the taking of evidence orally at trial. Also in cantons where the law imposes such a duty on the judges, the principle of direct testimony is subject of numerous exceptions and can thereby be by-passed (See D. Krauss, "Die Unmittelbarkeit des Hauptverhandlung im schweizerischen Strafverfahren, 2.

the court is allowed to rely exclusively on evidence taken during the investigative stages of the proceeding and is not confined to the evidence heard in court. In fact, § 27 demands only that the accused has to be heard in court and that *important* evidence needs to be examined by the judge.[185] However, also in cantons where the principle of direct testimony is applied in a broader manner, the impartiality of the judge is endangered by the previous study of the file.[186]

The untouchability of the police dossier has been criticized.[187] Apart from suggesting to the judge what other questions the accused should be asked, defence counsel does not have many other opportunities to influence the course of the trial. As during the investigation carried out by the examining magistrate, she can repeat her motions regarding which witnesses should be heard or what other evidence should be examined by the court. If the court does not accept her motions, counsel can only raise a reasonable doubt about the prosecution's case in her final argument and point out why the police record is unreliable.[188]

Teil" recht 2/1987, 42 at 45). Also, witness testimony is generally not held to be very reliable and the judge often refuses to have witnesses testifying again. Earlier statements made during the investigation are believed more dependable than their repetition later at trial. Then, defence counsel could challenge the witness only earlier during the investigation. There is no opportunity at trial to make up for missed questions.

[185] This rule does not apply in summary proceedings where the examining magistrate decides the case (see *supra*, B. fn. 148). In such a process, the finding can be based exclusively on the file and not even the accused must be heard again before his case is decided (B. Brühlmeier, *supra*, note 177, at 146.).

[186] H. Utz, *supra*, note 136, at 27. The federal Supreme Court of Switzerland held in a recent decision (although in a different context) that information can hardly be ignored after it is once received (Pra 2/1998 Nr. 25 at 167).

[187] V. Delnon & B. Rüdy, *supra*, note 12, at 27.

[188] U. Kohlbacher suggested already 20 years ago that a right be bestowed upon the defence to compel the court to comply with the motions regarding hearing of evidence (*supra*, note 9, at 139).

2.3. "Objectivity" of the Investigating Authorities

The examining magistrate is obliged by law to be independent and impartial. It is his duty to search for factual truth and gather evidence irrespective of whether it supports the case for the prosecution or the defence.[189] This obligation of neutrality according to Swiss law is broader than the Canadian disclosure duties on the Crown. The examining magistrate is obliged not only to reveal especially exculpatory evidence found, but also to actively seek for evidence favourable to the defence without the accused or counsel raising a respective defence.[190]

This bifurcation of tasks is likely to overwhelm the magistrate. From his position in the criminal proceeding as a "co-worker" of the prosecutor[191], it seems probable that he may neglect the search for exculpatory evidence in favour of gathering inculpatory evidence. And indeed, in practice, both police and examining magistrate take a rather suspicious position regarding the defence: counsel of the accused is often shown clearly that she is not considered to be any more trustworthy than the accused himself and the authorities are very sparing in cooperating with her.[192] Motions by counsel to supplement the investigation implicitly include the accusation that the magistrate did not do his job in

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[189] § 127 StPO AG; U. Kohlbacher, *supra*, note 9, at 27.

[190] See *supra*, C.II.4.

[191] This is admittedly phrased in a very casual manner. § 56 clause 2 StPO AG establishes that the prosecutor is a party during the investigation by the examining magistrate and at trial, just as the accused. During the police inquiry, however, the prosecutor is responsible for supervising the police (§ 1 clause 2 StPO AG). The examining magistrate also has some sort of supervision powers over the police (§ 1 clause 3 StPO AG, see also B. Brühlmeier, *supra*, note 177, at 115.This gives the prosecutor naturally preferential treatment and insider knowledge compared to the defence.

[192] M. Pieth, *Strafverteidigung - wozu?* (Basel/CH: Helbing & Lichtenhahn, 1986) at 22; U. Kohlbacher, *supra*, note 9, at 85. In the Canton Aargau, this impression is additionally intensified by the fact that examining magistrates are usually not legally trained professionals but mostly former policemen.

a satisfying manner.[193] Besides, the motion by the defence is only a proposal on how further evidence could be found but does not oblige the magistrate to become active.[194] In the event that the examining magistrate denies the necessity of the proposed investigative action, an appeal - where one is possible at all according to the cantonal procedure - consumes a lot of time and eventually prolongs the proceeding and possibly the length of custody for the accused.[195] However, officials are not to be personally blamed, as their prejudice is a consequence of the task the law imposes on them.[196] The investigator's job is done if all elements of the offence described by law are superficially established and might be proven. "Excuses" brought forward by the suspect are often shrugged off and not seriously pursued.[197]

The twofold task placed on the examining magistrate leads to conflicts among colliding interests.[198] This can only have negative consequences for the quality of a criminal investigation, since it is a rare person who is capable of accomplishing two tasks at the same time that oppose each other.[199] In Switzerland, the law assumes the

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[193] E. Müller-Hasler, *supra*, note 8, at 233; H. Müller, *Verteidigung und Verteidiger im System des Strafverfahrens* (Zürich/CH: Schulthess Polygraphischer Verlag, 1975), at 203. There is also the rumour, that too frequent "bothering" of the examining magistrate with motions for additional evidence taking can result in the magistrate's reluctance to appoint the lawyer in other cases.

[194] U. Kohlbacher, *supra*, note 9, at 138.

[195] See detailed critique by M. Pieth, *Der Beweisantrag des Beschuldigten im Schweizer Strafprozessrecht* (Basel/CH:Helbing & Lichthahn, 1984), at 288 f.
In cases where there is no investigation carried out by the examining magistrate but only by the police, the accused who thinks the inquiry to be one-sided has no direct remedy. He can only suggest that the examining magistrate interferes. If the magistrate refuses, the accused can apply, but again, not without further delaying the process (E. Müller-Hasler, *supra*, note 8, at 235).

[196] D. Krauss, *supra*, note 119, at 119; H. Utz, *supra*, note 136, at 25.

[197] Neither is the perspective of the victim.

[198] V. Delnon & B. Rüdy, *supra*, note 12, at 55.

[199] U. Kohlbacher, *supra*, note 9, at 50.

investigator will work against this principle. However, it is more likely that the police agent or examining magistrate will adopt a logical thesis about what he thinks happened and then try to prove it, instead of contemporarily investigating both, the incriminating and exculpatory side of an offence with equal attention as the law requires him to.[200] To expect a different attitude denies common sense.

2.4. "... as long as the purpose of the investigation is not at risk"

The examining magistrate has a broad discretion to limit the rights of the accused during the investigation if he assumes "interference" by the defence to "endanger the purpose of the proceeding".[201] This regulation results in an institutionalized mistrust of defence counsel who is understood as an impediment to the search for the truth.[202] Although the criminal process unquestionably aims at the detection of truth about the events leading to the investigated crime, this truth does not necessarily correspond with the authorities' "feeling" about what happened. The participation of the defence cannot be prohibited just because the contribution offered does not fit the pre-supposed picture. Instead, the defence must have the same opportunities to contribute to the search for

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[200] A study has shown that examining magistrates sometimes deny counsel's motions to gather certain other evidence because they are so convinced of their own "theory" about what happened and therefore brush counsel's efforts aside as a means of delaying the process (K. Peters, *supra*, note 191, at 299.).

[201] E.g. § 132 StPO AG; H. Müller, *supra*, note 193, at 19 and 66.

[202] H. Müller, *supra*, note 193, at 66; E. Brunetti, "Rolle und Funktion des Strafverteidigers in der Voruntersuchung der Tessiner Strafprozessordnung", in H. Baumgartner & R. Schuhmacher, ed., *Ungeliebte Diener des Rechts - Beiträge zur Strafverteidigung in der Schweiz* (Baden-Baden/D: Elster Verlag, 1999) 98 at 101 and 103 fn. 17.

truth.[203] Otherwise the investigative stage in Swiss proceedings closely resembles adversarial investigations where the police inquire unilaterally and only disclose the result of their efforts before trial. Besides, to decide of which collected tesserae the "truth" eventually consists is not part of the investigation but is the purpose of the criminal trial.[204] A limitation on the exclusionary powers of the examining magistrate might remind these authorities of their neutral position in the criminal proceeding.

2.5. Shortcomings of the Police Record

The dossier or case file is drawn up during the investigation by police and examining magistrate and thus mainly consists of the prosecution's version.[205] The statements made by the accused are immortalized in these records - for use in the subsequent trial. The accused is asked to read the transcript and to make corrections where necessary.[206] Despite this precaution, the file is not as infallible as it may seem. The correctness of the record is primarily jeopardized because of translation problems from Swiss German to Standard German and from ordinary language to officialese. A

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[203] Pieth suggests that in order to reach true "equality of arms", the accused must be given the unconditional right to make motions with respect to the gathering of evidence (M. Pieth, "Braucht das bernische Strafverfahren ein Beweisantragsrecht des Beschuldigten?", ZBJV 124 (1988) 579 at 586.). Even authors who follow the general call for safeguarding the investigation's purpose acknowledge that a criminal proceeding that refuses the accused his right to be heard cannot reach its goal of finding a just verdict. They recognize further that it would be wrong to consider the right to be heard simply as an expression of mercy to the accused (H. Müller, *supra*, note 193, at 13).

[204] Similar M. Pieth who emphasizes that the investigation must be of open nature in order to take all possible aspects into consideration (*supra*, note 195, at 288 f.)

[205] V. Delnon & B. Rüdy, *supra*, note 12, at 65.

third level of translation occurs where the accused does not speak the official language and an interpreter must join in.[207] The interrogation of the accused is usually held in Swiss German and the police agent or the examining magistrate must translate the statements to Standard German.[208] As with every other translation from one language to another, small changes to the statement are unavoidable due to personal preferences in phrasing. Besides, the answers received by the interviewer are not written down word for word but phrased in officialese, and summaries are common.[209] For the accused, it is often not easy to recognize the difference between the record and the actual statement, not to mention the impossibility of understanding the true meaning of technical words. I have concluded, from my own studies of police files, that interrogating officials use legal terms, although sometimes not fully understanding their juristic subtleties.[210] It is clear that this can seriously alter a statement, and an accused who does not happen to be legally trained is not capable of noticing the fine differences of meaning between the recorded phrases and his true statement. Equally important,

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[206] H. Walder, "Fehler bei der Durchführung von Einvernahmen" AJP 9/92, 1105 at 1111.

[207] H. Utz, *supra*, note 136, at 24.

[208] Swiss German is a spoken language only.

[209] M. Pieth, *supra*, note 192, at 36; H. Walder does not think it to be necessary that the police record contains everything (*supra*, note 206, at 1111).

[210] After graduating from law school, I worked for the examining magistrate in Zofingen for three months as an articling student. I was primarily responsible for summarizing the results of investigations in a final report that was handed over to the prosecutor who decided whether the case had to be prosecuted or to be abandoned. Later, I was an articling student in a small law firm. There, I was responsible for several clients against whom a criminal proceeding had been triggered. I also represented two of them in court.

when judging the value of the police record, is the fact that many accused persons possess limited intellectual abilities, or as foreigners, have linguistic problems.[211]

In addition to these linguistic problems, the investigative authorities have the means to misrepresent the dossier by not including certain witness statements or other documents when opening the dossier to the defence or omitting them from the dossier altogether.[212] In addition, improperly asked questions or threats by the interviewer are not written down in the file. This makes it difficult to prove that statements were obtained in an improper manner. Similarly, answers by the accused of which the interviewer does not approve may be "forgotten".[213] Finally, other police tactics are likely to influence the answers of the accused and are therefore unlawful. This is the case, for example, where the interrogation is too long, the interviewing police officer or examining magistrate gets upset and assails the accused with impatient and angry remarks, suggestive or trick questions are put to the accused, the interviewer deceives about some incriminating evidence that has allegedly been found or wrongfully promises that the accused will be released if committing the crime[214]

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[211] H. Utz, *supra*, note 136, at 24.

[212] In a case before the district court Rheinfelden/AG where I was assisting the defence lawyer peripherally as an articling student, the documentation on the preparation of the prosecution to invite a secret witness from South America and the courts approval thereof was not included in the file on the main accused person, but only in the one of a co-accused. For a general overview, see D. Krauss, "Der Umfang der Strafakte", BJM 2/1983, 49ff.

[213] H. Walder, *supra*, note 206, at 1108.

[214] For a general overview see H. Walder, *supra*, note 206, at 1108-10. These examples, of course, could be characterized as "fear of prejudice, hope of advantage or oppression" for the purposes of common law confessions rules and excluded from evidence in Canada.

Despite all these possible inadequacies of the police record, the judges are known for quibbling over tiny details of wording.[215] Moreover, trial judges tend to give more evidential weight to information gained from pretrial interrogations than to statements made in the courtroom.[216] First statements are obviously believed to be more truthful than later testimony. This is mainly because the recollection of the events is still fresh and the accused has no time to make a story up.[217] It is also common knowledge that mistakes that were made during the pretrial investigation are hardly ever corrected later at trial.[218]

2.6. Suspects Frequently Taken into Custody

The police can take the suspected perpetrator in custody in order to secure the carrying out of the criminal proceeding and the subsequent execution of the sentence.[219] The alleged offender can be taken into custody only under certain conditions. First, there must be concrete grounds for the suspicion of the authorities, the conviction of the alleged offender must be probable.[220] Additionally, there must be risk of absconding[221],

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[215] V. Delnon & B. Rüdy, *supra*, note 12, at 65; M. Pieth, *supra*, note 192, at 37; H. Baumgartner, "Wessen Komplize is der Verteidiger?", in H. Baumgartner & R. Schuhmacher, *Ungeliebte Diener des Rechts* (Zürich/CH: Elster Verlag, 1999), 231 at 234.

[216] M. Pieth, *supra*, note 192, at 20. This is the reverse of the common law position, at least in theory.

[217] ZR 57 (1958) 26. With regard to the value of repetitions of witness testimony at trial, see D. Krauss, "Die Unmittelbarkeit der Hauptverhandlung im schweizerischen Strafverfahren, Teil 1", recht 3/1986, 73 at 86-87.

[218] E. Müller-Hasler, *supra*, note 8, at 227; R. Hauser & E. Schweri, *supra*, note 4, at 321, U. Kohlbacher, *supra*, note 9, at 31; K. Peters, *supra*, note 191, at 299.

[219] BGE 97 I 52; 96 IV 46. "Custody" (*Untersuchungshaft*) in this chapter includes every incarceration during the pretrial stages of the proceeding: M. Forster, "Rechtsschutz bei Strafprozessualer Haft" SJZ 94 (1998), 2 at 3.

[220] (*Dringender Tatverdacht*) M. Schubarth, *supra*, note 190, at 61-62; R. Hauser & E. Schweri, *supra*, note

risk of collusion[222] or risk of continuation of the criminal behaviour by the accused.[223] Foreigners are often taken in custody when suspected of having committed a crime. Within approximately 24 hours after the arrest, the examining magistrate must decide whether the accused is to be remanded or must be released after having heard him.[224] After fourteen days, a commission of the cantonal Court of Appeal must judge whether the conditions for custody are still met. This gives the police a clear opportunity to continue their investigation without interference by the accused for two weeks. During this time, the police most often concentrate on the search for incriminating evidence that will justify the arrest and possibly its remand.[225] Witnesses who may support the accused's case, on the other hand, may be neglected. Since foreign accused persons usually cannot afford a lawyer, they remain in prison without any assistance for two full weeks. As discussed above, free counsel must only be appointed if custody is prolonged after this time period.[226]

4, at 281. According to § 67 (1) StPO AG custody is generally limited to offences that are punishable with imprisonment.

[221] BGE 117 Ia 70; 108 Ia 67; 107 Ia 6.

[222] BGE 117 Ia 260; 90 IV 69.

[223] EUGRZ 1992. 556 E. 4; BGE 105 Ia 31. In the Canton Aargau, in addition to these reasons for custody, it is also permitted to take a person in custody who is accused of having committed a very serious offence such as murder or robbery (§ 67 (1) clause 3 StPO AG).

[224] Under the law of the Canton Aargau, the examining magistrate must decide on the first workday following the arrest (§ 71 StPO AG).

[225] H. Utz, *supra*, note 136, at 29; D. Krauss, *supra*, note 217, at 79.

[226] § 58 (b) StPO AG. The group of experts drafting a federal Criminal Code suggested to expand this period to one month (see Département fédéral de justice et police, *De 29 à l'unité - Concept d'un code de procédure pénale fédéral* (Berne CH: 1997) at 115). *Supra*, D.III.1.1. and 1.2.b).

The grounds for the original arrest or the remand must be given in detail to the accused since being taken into custody is a grave intrusion of one's personal freedom.[227] In practice, however, the warrant of arrest or remand often lacks any real explanation, saying for instance, that there is a risk of collusion but not specifying which evidence is endangered or for what reasons.[228] Due to the professional comradeship between the police and the examining magistrate, it is understandable that magistrates tend to be more favourable towards the needs of the police than those protecting the freedom of an alleged offender.

Accused persons who are taken into custody need counsel's assistance most in order to receive a fair trial. Custody has serious consequences for the life of the accused as well as on the criminal process. Studies have shown, for instance, that if the accused has been in custody for a longer term, the risk of being convicted and receiving a harsh sentence increases.[229] And although the arrest may not be used to force the accused into a confession, it undoubtedly can have an effect of "attrition" on the accused's will to resist police pressure.[230] In addition, the accused will have limited opportunity to prepare his defence while in custody. Counsel is necessary primarily in order to monitor the lawfulness of the custody. Furthermore, her attendance at some of the "questioning

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[227] M. Forster, *supra*, note 219, at 2

[228] *Ibid.*

[229] M. Schubarth, *supra*, note 190, at 50. An unofficial reason for this might be the attempt to preserve the reputation of the administration of justice and to avoid compensation for keeping the accused in custody for too long by sentencing him to a jail-term of at least the duration of the pretrial custody.

[230] BGE 101 Ia 50; H. Utz, *supra*, note 136, at 29; M. Schubarth, *supra*, note 190, at 48f.

sessions" of her client will help to ensure that the interrogations proceed in a more relaxed manner and that the accused gets the chance to explain the exculpatory aspects of the allegations against him. The attendance at interrogation also guarantees that counsel is informed of the true nature of the case from a very early stage of the proceeding, and can suggest further investigative actions by the police in a timely way. The mistrust of defence counsel by the state is inappropriate and must cease. By taking the accused into custody, most risks for the investigation, such as the risk of collusion or the risk that the accused disapears, are already prevented.[231]

2.7. Counsel's Positive Influence on the Accused

Another, probably underestimated, function of defence counsel is to attempt to stop the accused from false denials of the commission of the offense. From such actions, the accused will receive a speedier trial and a less severe sentence. Practice has shown that suspects who are in fact guilty often refrain from groundless denials after being informed by counsel of the consequences of their conduct.[232] The effect of counsel's recommendation may be similar as the one of a guilty plea in a Canadian process.[233] In Switzerland, a trial is held despite the accused's confession, which is only one piece of evidence among others that point to the accused's guilt, but is not binding

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[231] R. Hauser, "Abhöranlagen in Untersuchungsgefängissen", SJZ 1-1986, 253 at 257.

[232] V. Delnon & B. Rüdy, *supra*, note 12, at 53; U. Kohlbacher, *supra*, note 9, at 85; H. Utz, *supra*, note 136, at 23; D. Strebel, *supra*, note 154, at 5; C. Boss, *supra*, note 126, at 12.

[233] See *supra*, B.I.1.2.b).

on the trial judges.[234] Although the state may be relieved of the obligation of producing a complete chain of evidence, the prosecution must prove that the confession is credible and voluntarily made.[235] At least theoretically, the judges can still acquit the accused if not convinced of his guilt.[236] Likewise, the confession is not formally binding on the accused and he can reverse it at trial.[237] If the accused confesses, counsel need only speak to the sentence in her final argument, stressing especially the accused's assisting the police.

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[234] ZR 90 (1991) Nr. 30.

[235] R. Hauser & E. Schweri, *supra*, note 4, at 216 and 248.

[236] Despite the confession, the accused is innocent if he is not responsible for the offence or his conduct was justified.

[237] The court can nevertheless base a conviction on the originally given confession if it appeared to be credible (R. Hauser & E. Schweri, *supra*, note 4, at 216).

E. Proposals for Swiss Reform and Conclusion

In sections B and C of this thesis the basis for a comparison of Canadian and Swiss law was laid. Section D demonstrated that the reluctance of the Swiss legislator to reform the current form of the right to counsel, by introducing a more meaningful rule, has been based on wrong premises and is not justified. At this point we proceed to examine how the right to counsel under current Swiss law should be modified in order to embody the principle of a fair trial.

I. Summary

1. Applying Canadian Concepts to Swiss Law

The Canadian experience with respect to the pretrial right to counsel is a valuable basis from which a corresponding right under Swiss law can be developed. Although the two countries process criminal matters according to different models, the procedural reality and the resulting problems are astonishingly similar. In both countries, an inquiry into the facts precedes the court hearing. The extent and purpose of this pre-examination are, however, different. In Canada, the police inquiry is intended to discover the possible perpetrator and to decide whether it would be justified to put this person on

trial.[1] In Switzerland, on the other hand, police and perhaps examining magistrate are also responsible for compiling a dossier with all relevant evidence on which the case can be decided.[2] Although judges in Swiss criminal proceedings are entitled and indeed obliged to undertake their own investigations where appropriate, additional inquiries are often omitted for whatever reasons. The role of Swiss judges thereby comes close to that of their Canadian colleagues who refrain from active participation in the fact-finding process and base their decision on evidence that the parties have presented.[3]

A comparison between common law and civil law criminal justice traditions is not as dramatic as it first seems. Swiss scholars have often taken a glimpse at common law rules in order to find new ways to tackle domestic legal problems.[4] In addition, the signing of the European Convention on Human Rights, which is based primarily on the common law tradition, has been accepted as a matter of course.[5] Its application so far has shown that adversarial and inquisitorial systems share many of the most demanding legal problems. As the procedural realities of the two systems have converged, adopting each other's approaches suggests itself more and more often.

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[1] A. W. Mewett, *An Introduction to the Criminal Process in Canada*, 2d ed. (Toronto: Carswell, 1992) at 9-10.

[2] *Supra*, D.III.2.2.

[3] Contrary to their Canadian colleagues, Swiss judges still actively "lead" through the hearing by deciding which evidence is heard and putting the questions to the accused and witnesses.

[4] The Swiss lawyer J. J. Rüttimann was sent to London already in 1836 in order to learn about English criminal law.

[5] E. Müller-Hasler, *Die Verteidigungsrechte im zürcherischen Strafproyess, insbesondere deren zeitlicher Geltungsbereich* (Entlebuch/CH: Huber Druck AG, 1998), at 5; R. Hauser & E. Schweri, *Schweizerisches*

2. Deficiencies under current Swiss law

In Switzerland, the safeguards the law formerly established for accused persons have been curtailed by the developments in legal practice in criminal matters. In many cases, the rights are not triggered at all because the investigation by the examining magistrate is skipped in favour of an extensive police inquiry.[6] Despite numerous circumstances that are likely to misrepresent the actual facts in the dossier, the courts seldom go to the trouble to hear evidence again in court or explore other sources of evidence not already investigated by police or the examining magistrate. Instead, judges tend to cling to the wording of the dossier.[7] However, even where the second phase of the pretrial inquisition is carried out, the rights of accused persons are still not as elaborate as the principle of a fair trial would demand. The objectivity or neutrality of examining magistrates intended by law has not been translated into practice, for institutional as well as for psychological reasons.[8] Finally, the examining magistrate's discretionary powers to exclude the accused or defence counsel from participation whenever the "purpose of the investigation" is believed to be endangered, has been drafted in too broad a manner.[9]

Strafprozessrecht, 4th. ed. (Basel/CH: Helbing & Lichtenhahn, 1999), at 13.

[6] *Supra*, D.III.2.1.

[7] *Supra*, D.III.2.2.

[8] *Supra*, D.III.2.3.

[9] *Supra*, D.III.2.4.

Generally, several aspects of Swiss criminal procedure mentioned here need to be re-examined. The principle of direct testimony, for example, ensures that the decision-maker gets a lively impression of the different aspects of the case and thereby fosters rectitude in the decision-making process. This principle should not be limited to the point where judges just take the dossier and entirely build their decision on it. It may also be necessary to consider an amalgamation of the two stages of police inquiry and investigation by examining magistrates into one pretrial investigation phase, and to allocate the duties of investigation to police and magistrate in a new way. The previous sections have shown that the right to counsel is a further aspect of Swiss criminal procedure that needs to be re-assessed. The subsequent section will appraise how far the Canadian concept can be followed in Switzerland to obtain a right to counsel that complies with the needs of accused persons in Swiss criminal proceedings. First, a proposal for a modern right to counsel under Swiss law is presented.

II. Proposal for a Modern Right to Counsel under Swiss Law

1. Proposal for a Code Provision

At this point, a proposal for a law provision on the pretrial right to counsel of accused person in Swiss criminal proceedings shall be put forth. The proposed section is intended to find its way into the planned federal Code of Criminal Procedure for Switzerland. However, since the enactment of the federal code is still years away, the

offered article may also be integrated in cantonal procedure codes that currently establish no sufficient protection of accused persons in respect to legal assistance.

Pretrial Right to Counsel in Criminal Proceedings

(1) Accused[10] persons have the right to retain and consult with counsel at any time during the pretrial investigation carried out by police or examining magistrate. Accused persons must be informed of their right and of how to exercise it at the beginning of first questioning[11]. Police and examining magistrates questioning accused persons shall make reasonable efforts to ensure that such persons have understood the information provided to them.

(2) Accused persons must be given a reasonable opportunity to exercise their right. In particular, privacy for the consultation must be provided. If necessary, police or examining magistrates must assist the accused in finding and contacting counsel.

(3) Counsel must be appointed for indigent accused persons who cannot afford a lawyer, if the accused wishes the assistance of counsel.

(4) Accused persons are obliged to exercise the right to counsel in a timely manner or the right may be presumed to have been waived.

(5) A violation of the pretrial right to counsel may result in the inadmissibility of the evidence obtained from the breach.

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[10] "Accused" is to be translated with *Beschuldigter/prévenu* since no specific charge has been laid at this early stage of the proceeding. Besides, the commission of experts responsible for drafting a federal criminal code has suggested to use these terms throughout during the whole course of the process (Département fédéral de justice et police, *De 29 à l'unité - Concept d'un code de procédure pénale fédéral* (Berne CH: 1997) at 89.

[11] Questioning is to be translated with *Einvernahme/interrogatoire*.

2. Commentary

2.1. Trigger

In Canada, the right to counsel arises upon arrest or detention of an accused.[12] The determination of when a person is in detention has caused particular difficulties. So far, the protection of section 10(b) of the Charter arises as soon as a person reasonably believes he or she has no choice but to comply with a police demand. It has been acknowledged that police control over a person can be of a physical or a psychological nature.[13] The concept of detention is foreign to Swiss law. In Switzerland, the idea that a driver who has been stopped on the road for a breathalyzer test is read a caution is associated with movie fiction rather than with daily Swiss police routine. Due to different fact-finding methods at trial, the use of an incriminating remark the accused made outside of a formal interrogation is not as likely to influence the outcome of the trial as the same statement would in a Canadian process. The Swiss police agent who heard the statement is unlikely to be called as a witness at trial but may possibly make a passing reference to the statement in the report about the circumstances of the police operation.[14]

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[12] S. 10(b) *Canadian Charter of Rights and Freedoms*, Schedule B, Part I, Constitution Act, 1982, (R.S.C. 1985, Appendix II, No. 44).

[13] *R.* v. *Therens* (1985), 45 C.R. (3d) 97; *Thomsen* v. *R.* (1988), 63 C.R. (3d) 1 (S.C.C.); *R.* v. *Voss* (1989), 71 C.R. 178 (Ont. C.A.); *R.* v. *Schmautz* (1988), 41 C.C.C. (3d) 449 (B.C. C.A.), affirmed (1990), 53 C.C.C. (3d) 556 (S.C.C.). Detention includes therefor a varity of confrontations between police and citizens. See e.g. R. E. Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, 6th ed. (Scarborough/ON: Carswell, 1994) at 69-73 for examples of detention with regard to police questioning.

[14] The police officer may try to elicit a repetition of the statement during the first formal interrogation of the accused. The report of an interrogation is usually signed and thereby confirmed by the interviewee. This increases the evidentary value of the statement compared to its retelling in the report on the police

According to the early jurisprudence of some Canadian provincial Courts of Appeal, the right to counsel should arise as soon as the police consider the person interrogated to be a suspect.[15] This approach cannot be suggested for Switzerland either, since it bestows upon the police a wide discretion to determine the moment the right to counsel is triggered. It would not be easy for the police to determine the moment in which their duties regarding the right to counsel arise.[16] Deliberate misuse of the discretion by the police would be very difficult to prove.

The most obvious and practical solution under Swiss law is to set the trigger of the right to counsel at the beginning of the first formal questioning of the accused.[17] These questionings are qualified interrogations in the sense that they take place at the police station and the police can compel the interviewee's attendance for the questioning.[18] The proposed right to counsel does not apply to previous stages of the investigation such as urgent measures for securing of evidence[19] or undercover police-work. These stages can proceed as under current Swiss law.

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operation.

[15] *R.* v. *Hawkins* (1992), 14 C.R. 286 (Nfld. C.A.). See also *supra*, D. fn. 31.

[16] How "much" conviction would be needed that the interviewee is a suspect?

[17] § 57 StPO AG (*Gesetz über die Strafrechtspflege* (Strafprozessordnung des Kantons Aargau) vom 11. November 1958 (Stand 1. März 1998; SAR 251.100)already establishes this. In the report of the commision of experts responsible for the planned federal Criminal Code it has been emphasized in bold font that the equality of arms must be granted from the very beginning of the process (Département fédéral de justice et police, *supra*, note 10, at 93). However, some pages later the experts say that the principle is only valid at trial stage (ibid, ad 96-97).

[18] Under the law of the Canton Aargau, only the examining magistrate is entitled to bring a person forward for interrogation, § 51 (1) StPO AG. For the federal criminal procedure it has been suggested that the police were equipped with the power to collect the person and bring him or her to the station (see Département fédéral de justice et police, *supra*, note 10, at 111).

[19] For instance a house search or a breathalyzer test.

It does not make a difference whether a police agent or the examining magistrate carries out this first interrogation. In both cases the obtained statements become evidence, irrespective of who put the questions to the accused.[20] There are several advantages to this solution. First, police and magistrates are already accustomed to informing the accused of his rights at this point.[21] The law reform would not bring any novelties in this respect. Second, the duty to inform arises at a clearly defined moment. The investigating official would know exactly when his duties are triggered. Confirmation of the information would be included in the report on the questioning and no evidentary difficulties would arise as to whether or not the accused was informed of his rights. Third, the right to counsel is triggered early enough in order to avoid serious disadvantages for the accused as he chooses to speak to the police or the magistrate after he has been made aware of and given the opportunity to exercise his rights.

2.2. Scope

Under current Canadian and Swiss law, the individual aspects of the right to counsel can be split into an informational and an implementational group of rights, or duties of the investigator respectively. In Canada, the scope of the right to counsel has been refined in a more detailed manner than in Switzerland.[22] Under current Swiss law it

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[20] The reports on both kinds of interrogation are included in the dossier on the accused.

[21] § 57 StPO AG

[22] *Supra*, D.II.1.2

seems clear that the accused has the right to legal assistance by counsel.[23] However, there are no specified rules as to how the right can be exercised or what duties are imposed on the police or the examining magistrate in order to facilitate the exercising of the right. In Canada, on the other hand, the police' first duty is to inform accused persons of their rights without delay.[24] If an accused wishes to contact counsel, further obligations on the police arise. The Canadian police must at least offer the accused the use of a telephone and provide phone numbers in the event that the accused does not know where to call.[25] The opportunity to consult counsel includes the right to privacy so that the communication between counsel and accused cannot be overheard.[26] Most important, the police are not allowed to continue the interrogation of the accused until he has been given such an opportunity to retain and instruct counsel if he wishes to exercise that right.[27]

a) Informational Duties

The majority of accused persons need to be informed of their rights in order to make appropriate use of them.[28] The future law in Switzerland must oblige the

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[23] E.g. Département fédéral de justice et police, *supra*, note 10, at 96.

[24] S. 10(b) Canadian Charter.

[25] R. v. Manninen (1987), 37 C.R. (3d)162; *supra* D.II.1.2.b)aa).

[26] E.g. *R.* v. *Standish* (1988), 41 C.C.C. (3d) 340 (B.C. C.A.). *Supra*, D.II.1.2.b)bb).

[27] *R.* v. *Manninen* (1987), 37 C.R. (3d) 162 (S.C.C.); *R.* v. *Burlingham* (1995), 38 C.R. (4th) 265 (S.C.C.). *Supra*, D.II.1.2.b)dd).

[28] It has been shown that insufficient information and a negative attitude of the police or the examining magistrate towards the partaking of counsel in the inquisition influences the frequency with which accused persons wish counsel's assistance. See C. Boss, "Pikett-Anwalt der 48. Stunde" plädoyer 1/97, 11ff. who drew this conclusion after a comparison of the experiences made in the cantons Basel and Zürich.

investigative authorities to sufficiently explain to accused persons not only the existence of their right to consult counsel but also how the right can be exercised. The information must include explanations of every implementational component of the right to counsel. In particular, the accused must be told that he can use the phone and the regional phonebook, and that the police will help him find a lawyer if he does not know one.[29]

Under Canadian law, the police are under no duty to ensure that the accused understood the warning given. On the other hand, the right to counsel cannot easily be waived since only an accused who fully understands the right and its effects can dispense with the protection of section 10(b) of the Charter.[30] The threshold for waiver is quite low under current Swiss law. Unless the conditions of waiver are also modified, it is necessary that police and examining magistrates inform accused persons in easily understandable language and enquire if the individual accused person understood the caution. Otherwise the right to counsel will be breached. The accused's understanding cannot simply be assumed. If the accused remains silent when being asked whether he understood the provided information, he is not necessarily expressing that the warning was clear. "There must be something affirmative from the suspect showing his understanding."[31] The police report on the giving of the information and the subsequent answer of the accused will bring certainty for both sides.

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[29] Systems where duty counsels are on call are rare in Switzerland (They exist for example in Zürich and Basel). However, the police usually have a list of lawyers who do criminal cases. An comprehensive list is annually published by the Swiss Association of Lawyers (*Schweizerischer Anwaltsverband*).

[30] *R.* v. *Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.).

[31] W. J. Schafer, *Confessions and Statements* (Springfield/Il: Charles C Thomas, 1968) at 37.

b) Implementational Duties

aa) Affording a Reasonable Opportunity

What is understood by "affording a reasonable opportunity" for the accused to exercise his right to counsel under Canadian law must also apply in Swiss proceedings. In particular, the police must actively support the accused in finding the desired lawyer. This may commonly include the provision of a telephone, a list of regional defence lawyers and a phonebook. If the accused does not know who to call, the police agent must be obliged by law to give names and phone numbers of defence lawyers. Where the accused person is impecunious, police or examining magistrate should generally appoint selected counsel so that a relationship of personal trust quickly develops.[32]

Also, where the accused person speaks a foreign language, no special measures are necessary compared to the present situation. An interpreter is required for the interrogation and he can also assist the accused in retaining and communicating with counsel. A conversation on the phone in these cases may be rather awkward. However, since foreigners must often remain in custody, counsel may prefer to attend the questioning in order to prevent an unjustified remand and other serious mistakes in course of the early process that will be difficult to correct later.[33] Today it is usual that

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[32] In Switzerland, police or examining magistrate retain counsel for poor accused persons in custody where the requirements for free legal assistance are given. This is different than in Canada, where impecunious accused persons are provided charge-free phone-numbers of Legal Aid Services and a telephone, but the police do not choose counsel for the accused. The accused's wish regarding the person of counsel should be respected, for example, if selected counsel represented the accused in previous matters and no problems occurred. The requirements of free legal assistance in Swiss criminal proceedings have been discussed *supra*, D.III.1.1. and 1.2.b).

[33] These frequent problems under current Swiss law have been discussed *supra*, D.III.2.4 and 2.5.

counsel visits her client in prison as soon as she has been appointed, in order to get the first information on the case. Usually the police give her photocopies of the record of previous questioning of the accused. Under the new law on the right to counsel, this first meeting between counsel and accused would be brought forward. The costs for a second translator and further delay of the process could thereby be avoided.

bb) Guarantee of Privacy

There is a concern for privacy of the communication between counsel and the accused under both Canadian and Swiss law. It is obvious that the right to counsel can only be useful to the accused if the conversation with counsel is not overheard by the investigative authorities.[34] Otherwise, the accused risks either incriminatng himself if he chooses to speak frankly or receiving inappropriate legal advice if he withholds important information from counsel. The current rules can be maintained in Switzerland. Thus, it will be legitimate to visually monitor the meeting of counsel and accused as long as the communication cannot be overheard.[35] After all, it is the content of the communication that must be protected.

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[34] See *supra*, D.II.1.2.b)bb) and D.III.1.2.b).

[35] E.g. BGE 121 I 164.

cc) Duty to Interrupt Questioning

Under Canadian law the police must refrain from further questioning until the accused has had an opportunity to contact counsel once he has asserted the right.[36] Current Swiss law does not impose such a duty for the investigating authority.[37] The reform of the right to counsel must address this issue. It is important that the application of the right to counsel does not remain the mere formality it is under the current law. In Canada, the investigation is interrupted as soon as the right to counsel has been triggered.[38] Applied to a possible Swiss right to counsel, this means that the investigator cannot start the interrogation of the accused until the latter has exercised or waived his right.

The questioning needs to be interrupted until the accused can exercise his right. This should not needlessly complicate or restrict the investigation. However, it has not yet been proven that interrogations held immediately after a traumatic event such as an arrest or the criminal act produce more reliable statements than such received after the passage of a reasonable period of time. The importance of the accused's statements for the outcome of the case, on the other hand, as well as the enormous risk of misrepresentation of the true statements in the record have been widely acknowledged.[39] It has also been shown that counsel can prevent accused persons from

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[36] *R.* v. *Burlingham* (1995), 38 C.R. (4th) 265 (S.C.C.); *Leclair* v. *R.* (1989), 67 C.R. (3d) 209 (S.C.C.).

[37] *Supra*, D.III.1.2.b).

[38] The investigative action must not be stopped in case of emergency, before the police have gained control of the situation surrounding the arrest, before physical evidence could be secured and before the accused has been searched for weapons (See D.II.1.2.b)cc)).

[39] E.g. M. Pieth, *Strafverteidigung - wozu?* (Basel/CH: Helbing & Lichtenhahn, 1986) at 35 and *supra*,

falsely denying their guilt.[40] A passing interruption of the questioning therefore seems appropriate where necessary.

In contrast to Canadian law, the suspension of the investigation until counsel can be obtained does not refer to other sources of evidence that presuppose the accused's participation (such as breathalyzer tests). Since the Swiss right to counsel is preferably triggered at the beginning of first questioning, some investigative actions such as breathalyzer testing must necessarily be undertaken before counsel is retained. In Swiss criminal proceedings, counsel cannot legally give any other advice than to participate in the testing because the accused risks being charged with another offence[41] and a longer sentence for hindering the investigation. Swiss criminal proceedings are aimed at the detection of the factual truth.[42] The public has no patience for people who obviously committed a crime but are released by reason of "technicalities". Keeping in mind the devastating risks which may flow from questioning,[43] the lack of legal assistance during these tests appears as a reasonable compromise balancing the interests of the public on the one hand, and those of accused persons on the other.

D.III.2.5.

[40] *Supra*, D.III.2.7.

[41] *Strassenverkehrsgesetz* vom 19. Dezember 1958 (Stand 4. August 1998), article 91 (3).

[42] H. Müller, *Verteidigung und Verteidiger im System des Strafverfahrens* (Zürich/CH: Schulthess Polygraphischer Verlag, 1975) at 3ff.

[43] *Supra*, D.III.2.5.

dd) Positive Attitude by Investigative Authorities

The accused's request to consult with counsel must not be defied in any way. The police agent or examining magistrate must not only assist the accused in finding and contacting counsel, but must also adopt a positive attitude that demonstrates he supports and understands the accused's wish to consult with counsel. An attitude of disapproval on the part of the interviewing official could prevent an insecure accused from retaining counsel for fear of reprisals. Similarly inappropriate is intimidation of the accused by other means, for example by denigrating the reputation of defence counsel.

ee) Right to Appointed Counsel

The availability of free legal advice and assistance under today's law generally offers sufficient protection for indigent accused persons in the light of the right to a fair trial.[44] Some changes are appropriate regarding the temporal ambit of right to free counsel, though. Whereas poor accused persons who have not been arrested can contact counsel of their choice at any time, individuals in custody usually wait for several days until counsel is appointed under current Swiss law.[45] The principle of trial fairness demands that the law provide for basic defence measures irrespective of the financial resources of the accused. Pursuant to a revised right to counsel, counsel for indigent

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[44] *Supra*, D.III.1.2.b).

[45] *Supra*, D.III.1.2.b).

persons in custody will have to be appointed as soon as the accused wishes to retain counsel, and an accused who can afford counsel would have the right to retain one.[46]

ff) Presence of Counsel at the Interrogations

Neither under Swiss nor Canadian law do accused persons have an absolute right to have counsel present during interrogation. In Canada, presence of counsel at questioning does not seem to be an issue for legal scholars.[47] In practice, accused persons who have not been arrested and who can afford to pay a lawyer can use their right to silence as a means of pressure in order to receive permission to have counsel present during the interrogation.[48] Counsel who attends the questioning of her client risks, however, being called as a witness in the trial against her client. Since police records of the questioning cannot be used directly as evidence at a Canadian trial, general advice from counsel to her client to remain silent will usually protect the accused enough.[49] In Switzerland, the situation is different. Reports on questioning are a very important direct source of evidence admissible at the hearing, although they are seldom

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[46] Procedural problems arising because of unavailability of counsel will have to be addressed in practice. Lawyers who do defence work may want to establish some kind of a duty counsel system as it exists, for example, in most Canadian provinces and in the Canton Basel or Zürich (*Pikett-Dienst*). The individual lawyer would be relieved from being "on call" for 24 hours a day and the decision on which lawyer shall be appointed will be left to the organization of defence counsel and not to the preference of the police or investigating magistrate.

[47] At least my research did not reveal such a concern.

[48] My attention was drawn to this possibility in two conversations with Canadian lawyers.

[49] The confessions rules apply (*supra*, C.II.3.). However, the police officer who leads the questioning can be called as a witness and use the records to refresh his memory.

truly reliable. Presence of counsel during the interrogation of the accused could counteract some of the current sources of falsehood. Counsel could monitor whether the record corresponds with the statements by the accused, and also make sure that questions are asked the answers to which may exonerate the accused. Under Swiss law, very broad privilege rules prevent defence counsel from being called as a witness in the trial of her client.[50]

There is the risk, however, that the dossier will become even more "untouchable" than it is today. Due to counsel's opportunity to prevent inappropriate questioning methods and to request corrections during the interrogation, some might believe that the other rights of the defence would lose importance. This view is surely incorrect. The participation rights of the defence need to be expanded, and not simply be shifted from one procedural stage to another. The right of the accused to have counsel present during the interrogation does not replace the right to file motions for additional evidence taking during the pretrial inquisition or later at trial stage. The defence must also maintain the possibility of challenging records later at trial. This right is crucial whether or not counsel attended the questioning since misunderstandings can occur or questions might be forgotten despite counsel's presence. A further reduction of the principle of direct testimony by attaching more importance to the dossier than other sources of evidence suggested by the parties would undermine the function of the courts to a great

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[50] For example § 98 StPO AG. A privilege of comparable scope has been suggested for the future federal criminal code; see Département fédéral de justice et police, *supra*, note 10, at 104. The denial of the lawyer's suitableness for taking the witness-stand is also clear from the rule that counsel is not allowed do anything that is against the interests of her client (BGE 106 Ia 104, and for cantonal law see §§ 14 (2) and 15 *Gesetz über die Ausübung des Anwaltsberufes (Anwaltsgesetz)* vom 18. Dezember 1984).

extent. Eventually, the whole process of collecting evidence would rest in the responsibility of the police and possibly examining magistrate alone. However, there is no justification for delegating more important tasks in the truth-finding process from well-educated judges to officials who enjoyed little or no legal training.[51]

It has been said that presence of counsel during the first or subsequent police interrogation of the accused would favour the defence side, since police agents lack legal training and could be overwhelmed by counsel's control.[52] This fear is not justified for several reasons. First, members of the police are trained in interrogating people. In police school, students are taught how questioning must be conducted, what attitude is inappropriate or even illegal, and what risks incorrect questions bear.[53] Schedules of law students, on the other hand, do not include this kind of training. Contrary to police agents, lawyers also lack the opportunity to improve their skills by daily experience since many lawyers in Switzerland deal with criminal cases only occasionally.[54] Third, if police agents can be put off so easily, one must seriously doubt the quality of police interrogations. Since police reports make most of the evidence the police must have the

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[51] It has been pointed out that examining magistrates in the Canton Aargau have not graduated from law school such as judges, prosecutor and defence counsel. In other Swiss cantons, the requirements for applying candidates may be different.

[52] See E. Brunetti, "Rolle und Funktion des Strafverteidigers in der Voruntersuchung der Tessiner Strafprozessordnung", in H. Baumgartner & R. Schuhmacher, ed., *Ungeliebte Diener des Rechts - Beiträge zur Strafverteidigung in der Schweiz* (Baden-Baden/D: Elster Verlag, 1999) 98 at 111; D. Strebel, "Anwalt und Polizei am selben Tisch" plädoyer 3/99, 4 at 4.

[53] At least students of the police school of the Canton Aargau are trained in conducting an interrogation in lawful manner and what risks careless phrasing of questions bears. Urs Winzenried, head of the criminal investigation department of the Canton Aargau and teacher at the police school hands out reading material to his students on this topic. Unfortunately, the excerpts given to me by a former student do not reveal their source. See also Kantons- und Stadtpolizei Zürich, *Wie vermeide ich Konflikte, Sich selbst besser kennen - andere besser verstehen* (Zürich/CH: Kantonspolizei Zürich Hausdruckerei, 1982)

[54] M. Pieth, *supra*, note 39, at 21; E. Müller-Hasler, *supra*, note 5, at 25.

abilities necessary for questioning that meet the standards of a fair trial.

Finally, every lawyer in Switzerland who does criminal defence work knows that a friendly liaison with investigative authorities is more effective than assailing the authority of the official in charge. Besides, in the Canton Solothurn where counsel is allowed to attend police questioning of her client, the professional qualifications of police agents has increased as a result the new experience.[55]

2.3. Limitations

a) Timeliness

The current rules under Swiss law about "reasonable diligence" of the accused in exercising his rights can be maintained.[56] In the light of a speedy course of the proceeding accused persons should decide whether they wish counsel's advice and possibly her presence rather quickly. However, accused persons must be given enough time to reflect on the consequences of their decision carefully. Although "timeliness" must be decided in the circumstances of each individual case, the courts should define some general guidelines. Of course, the accused's decision is not final and assistance of counsel can be requested later in the process. Statements made in the meantime would be admissible in evidence, assuming other aspects of the proposed article have been complied with.

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[55] D. Strebel, *supra*, note 52, at 4.

[56] Under current law, accused persons are obliged to exercise their rights clearly and within a reasonable period of time. BGE 120 Ia 48; 118 Ia 465; 106 IV 91.

b) Waiver

The possibility of a waiver must also be maintained. After all, the right to counsel establishes the *right* to consult counsel and not the *obligation* to do so.[57] Consideration might be given, however, as to whether assistance of counsel ought to be mandatory where the accused is in custody. The correctness of the investigation is difficult to guarantee otherwise.[58]

As under Canadian law, a waiver can only be assumed if the accused was correctly informed of all aspects of the right and if he clearly understood the warning. Since police and examining magistrate under the proposed Swiss law have a duty to ensure that the accused comprehended the caution, the standards for waiver could be lower than in Canada. Because of this duty, however, a waiver of the informational component of the right is not possible. The investigator will hardly be able to explore the accused's understanding without previously explaining the right to counsel. The failure to inform will therefore always result in the potential availability of a remedy.

2.4. Remedies

In the case of a violation of the right to counsel, the current law allows for the remedy of exclusion of evidence for the accused unless the procedural disadvantages

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[57] Some authors who are against the retaining of counsel early in the course of the criminal process seem to forget this (Especially H. Müller, *supra*, note 42, at 20).

[58]. U. Kohlbacher, *Verteidigung und Verteidigungsrechte unter dem Aspekt der "Waffengleichheit"* (Zürich/CH: Schulthess Polygraphischer Verlag, 1979) at 67; H. Utz, *Die Kommunikations zwischen inhaftiertem Beschuldigten und Verteidiger* (Basel/CH: Helbing & Lichtenhahn, 1984) at 30; M. Schubarth, *Die Rechte des Beschuldigten im Untersuchungsverfahren, besonders bei Untersuchungshaft* (Bern/CH:

for the accused caused through the violation can be undone later on in the proceeding.[59] Whether the federal Supreme Court should abandon the general idea that violations of constitutional rights can be undone later in the proceeding, is beyond the scope of this thesis. A breach of the proposed right to counsel by police or examining magistrate, however, cannot be undone later in the process. The pretrial inquisition is a stage of great importance for the ultimate court decision and it has been discussed in depth why legal assistance should generally be available to accused persons from the beginning of the criminal process.[60]

On the other hand, current Swiss law does not render inadmissible all evidence that was gathered in an improper manner. Instead, evidence is only excluded if it is likely to jeopardize the detection of the historical truth.[61] This is hardly the case where rules were violated that regulate trivialities or mere administrative aspects of the criminal proceeding.[62] If the evidence was obtained by violation of an important procedural principle, it is not as obvious whether the public interest in the prosecution of crimes, or the interest in trial fairness and protection of the accused's rights deserve priority. The evidence obtained through a breach of the accused's procedural rights must generally

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Verlag Stämpfli & Cie, 1973) at 224, share this opinion.

[59] E.g. BGE 116 Ia 95.

[60] *Supra*, D.III.2.

[61] R. Hauser & E. Schweri, *supra*, note 5, at 243ff. Torture, other cruel interrogation methods or leading questions, for example, would result in an exclusion of the evidence obtained since these techniques are likely to produce evidence that misrepresent the historical facts (*Ibid*, at 250).

[62] Such rules are, for instance, regulations that establish the kind of clothes judges must wear, or that female suspects may only be searched by a female police agents but not by male agents. If the judge wears a red suit instead of a black one, or if a male police agent unlawfully searches a female suspect and finds drugs on her, the detection of the factual truth is not at risk (R. Hauser & E. Schweri, *supra* note 5, at 244 and 180).

be inadmissible.[63] The remedy of exclusion must also apply to evidence that may be discovered due to the unlawfully obtained evidence.[64] However, it will be difficult to ignore such evidence that was indeed secured as a result of the improperly obtained statements and thus confirms their reliability.[65] Other criteria such as the seriousness of the committed crime or the gravity of the violation of the accused's rights should also be considered but are not decisive in themselves.[66] Where the right to counsel of a person accused of a petty offence has been breached, the public's interest in the prosecution of the crime is not great and does not outweigh the safeguarding of the accused's right. Where a person is alleged to have committed a serious crime, however, the right to counsel should still prevail over continuation of the prosecution in the interests of the public. Although it is important to find and punish the perpetrator, the accused's protection may not be abandoned since this proceeding has more serious consequences in the long run than the one involving a petty offence.

The remedy of exclusion proposed for Swiss law has been intentionally drafted in a more confined manner than the exclusionary rules under s. 24(2) of the Canadian Charter.[67] The accentuation of the factual truth in Swiss criminal matters and the risk that the public lose their trust in the administration of justice if individuals who provably

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[63] H. Walder, "Rechtswidrig erlangte Beweismittel im Strafprozess" ZStrR 82 (1996), 37 at 44 and 52.

[64] For example, where the improperly obtained statement in which the hiding-place of the weapon used in the crime was revealed, leads to the actual finding of the weapon at the alleged spot. See also discussion in H. Walder, *supra*, note 63, at 45-47.

[65] This is because the inquisitorial tradition aims at detection of the factual or historical truth, different from the adversarial system that is concerned about legal truth. H. Walder, *supra*, note 63, at 47.

[66] R. Hauser & E. Schweri, *supra*, note 5, at 243-244.

[67] The exclusion of evidence under s. 24(2) of the Charter has been discussed *supra*, D.II.1.4.

committed a crime are let off do not allow to exclude evidence as often as in Canada. The exclusion of evidence is a measure against the risk of wrongful convictions but is not a proper method to discipline the investigative authorities.[68]

It is not possible to offer a final solution at this point. Instead, it is necessary to decide for every individual case whether the public interests justify a violation of the accused's right to counsel. However, where the evidence has been found inadmissible, the incriminating statements must be removed from the dossier.[69]

III. Some Closing Remarks

The role of the defence is as important as that of the prosecution in criminal proceedings in general, and during the pretrial inquisition of a case in particular.[70] The defence rights of accused persons must be triggered at the beginning of the police inquiry in order to guarantee an effective protection.[71] Unlimited written and oral communications between counsel and accused are necessary at every stage of the proceeding.[72] It has often been revealed that investigative authorities sometimes apply measures that are likely to influence the accused's freedom of will and thereby his

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[68] Similar concerns were stated in *R.* v. *Collins* (1983), 33 C.R. (3d) 130 (B.C. C.A.).

[69] ZR 74, 1975, Nr. 78.

[70] R. Hauser, "Abhöranlagen in Untersuchungsgefängnissen" SJZ 16/17 (1986), 253 at 254.

[71] H. Utz, *supra*, note 58, at 27; U. Kohlbacher, *supra*, note 58, at 82; M. Schubarth, *supra*, note 58, at 228ff.

[72] H. Utz, *supra*, note 58, at 34 with a number of further references, some of which date back as far as to 1907!

statements.[73] Finally, it is also common knowledge that errors made during the pretrial investigative stage are hardly ever discovered in the later course of the proceeding and therefore remain uncorrected.[74]

The extent to which the dossier is used may somewhat be linked to the principle of direct testimony.[75] Yet, even if the legislator expands the principle of direct testimony in comparison to its current withered form, the dossier will remain important, for instance in order to refresh the memory of forgetful witnesses. The reliability of the dossier must be guaranteed as long as it plays a consequential role in the proceeding.[76] As shown above, equal participation rights for prosecution and defence best accomplish this.

The mistrust of defence lawyers in Switzerland, on the other hand, is unreasonable and must be fought. Only persons who have been called to the bar are admitted to defend persons in criminal cases. The personal reputation of these lawyers has usually been screened twice, once during the articling year and a second time

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[73] Département fédéral de justice et police, *supra*, note 10, at 124-125; H. Utz, *supra*, note 58, at 38. H. Walder presents an astonishing variety of different possibilities to direct accused persons' statements in his article "Fehler bei der Durchführung von Einvernahmen" AJP 9/92, 1105-1114.

[74] E. Müller-Hasler, *supra*, note 5, at 227; R. Hauser & E. Schweri, *supra*, note 5, at 321; K. Peters, *Fehlerquellen im Strafprozess*, vol. 2, (Karlsruhe/D: 1972) at 299.

Under Canadian jurisdiction too, wrongful convictions stemmed from police investigative malpractice: E.g. *R.* v. *Marshall* (1983), 57 N.S.R. (2d) 286 (N.S. C.A.); *R.* v. *Morin* (1995), 37 C.R. (4th) 395 (Ont. C.A.), leave to appeal refused (1995), 119 D.L.R. (4th) vi (S.C.C,); Reference Re *Milgaard* (1992), 135 N.R. 81 (S.C.C.), *Milgaard* v. *Kujawa* (1995), 118 D.L.R. (4th) 653 (Sask. C.A.)

[75] Thus, many Swiss legal scholars suggest either the bringing forward of the defence rights to the police inquiry or the extension of the principle of direct testimony. E.g. H. Camenzind & J. Imkamp, "Delegation von Untersuchungshandlungen an die Polizei, dargestellt am Beispiel der Strafprozessordnung des Kantons Zürich" ZStrR 117/1999, 197 at 204; S. Trechsel, "Die Verteidigungsrechte in der Praxis der Europäischen Menschenrechtskonvention" ZStrR 96 (1979) 337 at 391.

[76] D. Krauss, "Die Unmittelbarkeit der Hauptverhandlung im schweizerischen Strafverfahren, 1. Teil" recht 3/1986, 73 at 86-87).

before being admitted to the bar exam.[77] Additionally, the canons of professional ethics and the "lawyers' act" make sure that only persons of integrity are allowed to assist accused individuals in their defence.[78] The fear that defence counsel likely become accomplices of their clients is vastly and unreasonably exaggerated.[79] It is time that the valuable tasks lawyers accomplish are respected and find their expression in the law.

The right to counsel is not meant to shield guilty persons from conviction and punishment. Instead, it aims at ensuring trial fairness by providing professional assistance and advice.[80] As early as in 1863 (!) a Swiss jurist stated that the right of accused persons to be advised by a lawyer from the very beginning of the criminal process was among others a guarantee for the mistakenly accused that could not be replaced by any other form of protection.[81] It would be appropriate if his suggestion and that of many other Swiss legal scholars were to finally gain the legislator's attention and

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[77] Articling students who want to represent clients in court must show that their reputation is good. When being admitted to the cantonal bar exam, this proof must be repeated. Students who do not start law school immediately after graduating from high school must prove their integrity even an additional time in order to be admitted to university. For example § 7 (1) *Gesetz über die Ausübung des Anwaltsberufes (Anwaltsgesetz)* vom 18. Dezember 1984.

[78] R. Hauser, *supra*, note 70, at 254.

[79] R. Hauser& E. Schweri, *supra*, note 5, at 155.

[80] G.A. Martin, " The Role and Responsibility of the Defence Advocate" (1970), 12 Crim. L. Q. 376 at 382; A.M. Boisvert, "The Role of the Accused in the Criminal Process", in G.A. Beaudoin & E. Mendes, ed., *The Canadian Charter of Rights and Freedoms*, 3d. ed. (Toronto: Carswell, 1996), c. 11 at 22.

[81] J.J.Rütimann, ZSR a.F. 12 (1864) 24 (as cited in R. Hauser, "Zur Teilnahme der Parteien in der Voruntersuchung", SJZ 22/71 (1975) 341 at 344 fn. 15).

were to be genuinely pondered in course of the current efforts to constitute a federal Code of Criminal Procedure for Switzerland.

Appendix - Selected Primary Sources

S. 10 of the Canadian Charter[1]

Everyone has the right on arrest or detention

(a) to be informed properly of the reasons therefore;

(b) to retain and instruct counsel without delay and to be informed of that right.

S. 24 of the Canadian Charter

(1) Anyone whose rights or freedoms, as guarantee by this Charter, have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1) a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

S. 6 of the European Convention on Human Rights[2]

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the

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[1] *Canadian Charter of Rights and Freedoms*, Schedule B, Part I, Constitution Act, 1982, (R.S.C. 1985, Appendix II, No. 44).

[2] *Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten* vom 4. November 1950, für die Schweiz in Kraft getreten am 28. November 1974, (SR 0.101).

private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 29 of the Federal Constitution of the Swiss Confederation[3]

General Procedural Rights

(1) Every person has the right in legal or administrative proceedings to have the case treated equally and fairly, and judged within a reasonable time.[4]

(2) The parties have the right to be heard.[5]

(3) Every person lacking the necessary means has the right to free legal assistance, unless the case appears to be without any chance of success. The person has moreover the right to free legal representation, to the extent that this is necessary to protect the person's right.[6]

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[3] *Bundesverfassung der Schweizerischen Eidgenossenschaft* vom 18. April 1999 (SR 101)

[4] (*Jede Person hat in Verfahren vor Gerichts- und Verwaltungsinstanzen Anspruch auf gleiche und gerechte Behandlung sowie auf das Beurteilung innert angemessener Frist*)

[5] (*Die Parteien haben Anspruch auf rechtliches Gehör*)

[6] (*Jede Person, die nicht über die erforderlichen Mittel verfügt, hat Anspruch auf unengetliche Rechtspflege,*

Article 32 of the Federal Constitution of the Swiss Confederation

Criminal Procedure

(1) Every person shall be presumed innocent until the person is subject to a conviction having force of law.[7]

(2) Every accused person has the right to be informed as soon as possible and in full detail of the accusations. The person must have the opportunity to exercise his or her means of defence.[8]

(3) Every convicted person has the right to have the judgement reviewed by a higher court. The cases where the Federal Supreme Court sits as a court of sole instance are reserved.[9]

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wenn ihr Rechtsbegehren nicht aussichtslos erscheint. Soweit es zur Wahrung ihrer Rechte notwendig ist, hat sie ausserdem Anspruch auf unentgeltlichen Rechtsbeistand.)

[7] *(Jede Person gilt bis zur rechtskräftigen Verurteilung als unschuldig.)*

[8] *(Jede angeklagte Person hat Anspruch darauf, möglichst rasch und umfassend über die gegen sie erhobenen Beschudigungen unterrichtet zu werden. Sie muss die Möglichkeit haben, die ihr zustehenden Verteidigungsrechte geltend zu machen.)*

[9] *(Jede verurteilte Person hat das Recht, das Urteil von einem höheren Gericht überprüfen zu lassen. Ausgenommen sind die Fälle, in denen das Bundesgericht als einzige Instanz urteilt.)*

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3. Statutes

3.1 Canada

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3.2. Switzerland

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Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (SR 101)

Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950, für die Schweiz in Kraft getreten am 28. November 1974, (SR 0.101)

Gesetz über die Ausübung des Anwaltsberufes	*(Aargauisches Anwaltsgesetz)* vom 18. Dezember 1984 (SAR 291.100)
Gesetz über die Organisation der ordentlichen richterlichen Behörden	vom 11. Dezember 1984 (SAR 155.100).
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