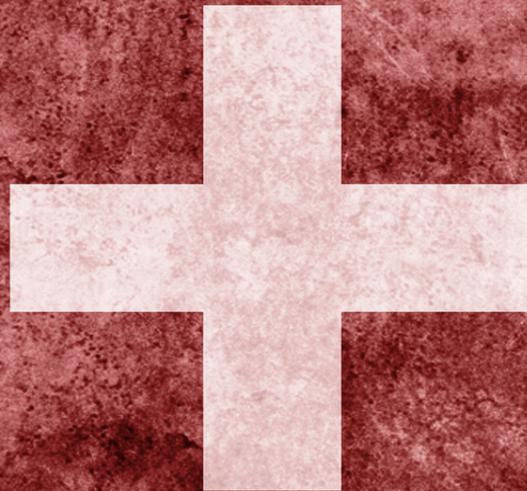




Abolition of Juries: The Switzerland Experience



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Editor Note: After reading Renée Lerner's article on the collapse of the civil jury system, we wondered what has happened after abolishing civil jury trials. Two Swiss scholars and an American scholar explain the experience of abolishing the civil trial in Switzerland.

I. Introduction

AMONG ITS MANY MEANINGS, the term "American Exceptionalism" has been used to characterize the United States as the epitome of liberty, fairness, and equality. It is sometimes used to suggest that the country is superior to all other nations past and present in terms of fundamental morality, statements often made by individuals without substantive scholarly knowledge of the history and political systems of other nations. Our preferred interpretation of the term is that it is an expression of national pride, loyalty, and patriotism rather than necessarily a fact-based assertion. In the introduction to his edited book on [American Exceptionalism](#), Michael Ignatieff (2005) has argued that there are many complex and ambivalent faces to the concept of exceptionalism.

One aspect commonly presented about American Exception-

alism is the fairness and protections of the justice system. A common saying about the jury system in America is that it is terribly flawed, but it is much better than anything else that we or anybody else has. At the same time, Marcus (2014) has argued that what is exceptional in the American civil law, compared to much of the rest of the world, is the compelling emphasis on procedure. Thus, he argues that in the USA, the most salient features are the relaxed burdens on plaintiffs along with extremely broad discovery in the context of the jury system.

In this paper we address briefly the typically identified flaws of the USA jury system and then turn to an alternative system, that of Switzerland, that has challenged this repeated assertion by having trials without juries, at least as we know them. The problems in the USA jury system are many, including emotionally driven verdicts in which peripheral and prejudicial processing of information seem legion. Verdicts in criminal cases sometimes are reversed on appeal or still later found to have been unequivocally incorrect.

In her recent article titled [What juries get wrong and why they'll never deliver true justice](#)^[1], Diane Frances points out

the poor judgment and emotionality, of juries, as well as the courtroom theatrics and media pressure on juries. She argues that juries ought to be replaced by panels of legal experts who would apply the law rather than being distracted by the theater often present in American jury trials. Indeed, as of this writing, [The Innocence Project](#)^[2] reports 330 persons convicted by juries who were exonerated through subsequent DNA testing. The [6th Amendment to the U.S. constitution](#) guarantees the right to trial by an impartial jury, but this simple statement does not delve into the myriad of problems in which impartial juries do not necessarily produce accurate and just verdicts.

The problems with juries are problems for all of us. The grand jury and petit jury systems in the United States have a number of problems in administering justice, and the closer one looks, the more glaring the problems appear. For example in the context of improving jury instructions – which are typically full of jargon, lengthy, and convoluted, Schwarzer (1981) observed the depth of concern about jury trials producing fair, informed verdicts. He noted, “Because the law has become more complex and the trials more lengthy, the issues submitted to jurors are often technical and foreign to their experience. As a result the juries’ capacity to serve as the repository of the people’s sense of justice, reason and fair play is being questioned” (pp. 731).

We are setting aside for the moment the benefits of juries to note that it is fair to observe that the criticisms of the American jury system have been sweeping, emotional, and frequent. What are the specific criticisms? In their review of the use of lay jurors, Shuman and Champagne (1997) concluded that

“First, experts testify to scientific, technical or other specialized knowledge with which jurors, not chosen because they possess any specialized knowledge, are unlikely to be familiar. Second, jurors, unlike judges, are not generally worldly, well educated, and trained in rigorous analytical skills necessary to assess critically the new, unfamiliar information that experts present. Third, lacking the requisite worldliness, education, and analytical skills, jurors resort to irrational decision making strategies that rely on considerations such as the expert’s appearance, personality, or presentation style to determine whether to believe an expert . . . What is so obviously important about these criticisms is that they do not come from occasional amateur courtroom observers but instead from respected jurists in reported cases (p. 251-252).

Nevertheless, Shuman and Champagne conclude with an optimistic view of the use of juries. Indeed, their positions accurately reflect what United States critics have to say. Jury problems are serious but can be mended. It is rare that cries for trashing the system are made and taken seriously: remember the 6th amendment. But that leads us to considering a national system of criminal justice in which juries were abolished. As in every cross-cultural comparison, many elements of the two national systems do not match fully, but let us now look at Switzerland.

II. The Swiss Jury System

Switzerland, like the United States, is a federal state. It consists of 26 federated states called cantons. The cantons of Switzerland historically arose in the 14th century and have many parallels to the individual states in the United States, in terms of having their own constitutions, courts, and legislatures, although all cantons are unicameral (i.e., there is only one legislative chamber). Similar to the United States, the cantons retain all sovereign powers unless delegated to or assumed by the Federal Government. While a [Swiss Criminal Code](#) was adopted by the Federal Parliament in 1937, the organization of the judiciary has always been the responsibility of the individual cantons, so that they could decide whether they wanted to implement a jury system or not. The idea of jury trials has, however, never prevailed, since most courts in Switzerland are composed of professional and lay judges (Gadola-Duerler & Payne, 1996). The jury system was mainly found in the cantons of Swiss Romande, the French-speaking part of Switzerland (Schubarth, 2014). This was probably due to its geographical proximity to France, by which it was originally introduced in the late 18th century after Napoleons victory (O’Brien, 1966/1967).

Since 1997, only 5 out of 26 Swiss cantons have had the institution of juries. At federal level, jury verdicts were rendered in some serious criminal offenses (i.e. high treason against the Confederation, insurgence and acts of violence against the federal authorities) subject to federal jurisdiction. Because federal jury trials played a minor role, the system was abolished in 2000 at federal level (Hauser, Schweri & Hartmann, 2005). In civil cases, jury trials have never been provided on any level of the government.

Since the second half of the 19th century, cantons where jury trials were guaranteed moved away from a pure jury trial where the jury has the power to determine guilt in the absence of a professional judge to a collaborative court model, where professional judges and lay jurors or lay assessors decide together about guilt or innocence of the accused and the punishment. Only in Geneva, the judge, although present during deliberation to answer questions, could neither issue advice nor vote on the verdict (Jackson & Kovalev, 2006/2007).

The number of professional judges and lay jurors were determined by cantonal law in each individual canton. The pool of prospective jurors was usually randomly selected by officials from the register of electors (Jackson & Kovalev, 2006/2007). In the canton of Zurich, for instance, the jury system consisted of 3 professional judges and 9 jurors who previously had been elected by popular vote into a pool of potential jurors. To be eligible for election as a juror, one had to have the right to vote (Swiss citizenship and at least 18 years of age) and one had to apply for the privilege of serving as a juror. Due to the enormous amount of time the jurors had to dedicate to each trial, it was mostly retired people who applied for the task (Hürli-mann, 2011). In the canton of Geneva, jurors were sitting in 2 different types of courts. The presiding professional judge was sitting with 6 jurors in the cour correctionnelle and with 12 ju-

rors in the cour d'assises (Jackson & Kovalev, 2006/2007). The cour correctionnelle judged criminal cases where the prosecutor requested a prison sentence under 5 years, while the cour d'assises handled criminal cases where the prosecutor asked for a prison sentence of more than 5 years.

In all cantons, prosecution and defense were usually each allowed to challenge 4 jurors without cause. Simple majorities on a jury could return convictions and acquittals. Juries were required to give explanations for their verdicts (Jackson & Kovalev, 2006/2007).

Jury trials were usually reserved for the most serious criminal cases such as homicide, murder, and robbery. In Zurich, Geneva, and Ticino, an accused pleading guilty might waive jury trial. In Zurich, the case would then have been judged by the criminal division of the cantonal supreme court, while in the others, 1 or 3 judges without lay jurors would have issued the verdict (Hauser, Schweri & Hartmann, 2005). Thus, jury trials were only rarely used. In Zurich, the jury court ruled on average 12 times annually (Supreme Court of the Canton of Zurich, 2011).

III. Abolition of the Swiss Jury System

Incompatibility of Jury Trials with the Swiss Code of Criminal Procedure

The introduction on 1 January 2011 of the first [Swiss Code of Criminal Procedure \(CCrP\)](#) replaced the 26 cantonal procedure codes, and had a crucial impact on the criminal procedures in place at that time in some cantons. The most important change was the choice of a single model of criminal procedure for the entire country. Prior to 2011, the inquiry models varied widely across the country concerning the prosecuting and investigating authorities. While some cantons followed the system of the examining magistrate, inspired by the French legal system, others had adopted the German system of the prosecutor with one or more district prosecutors (Federal Council, 2006). These prosecutors are in many respects comparable to U.S. district attorneys. The CCrP has opted for the German prosecutor model, and thus, the examining magistrate, previously used in some cantons, has been abolished.

Although criminal proceedings are now carried out in the same way throughout the country, the cantons remain responsible for the organization of the courts (article 123 para 2 [Swiss Federal Constitution](#)). Thus, cantons could theoretically still provide for jury trials. However, the rules governing the proceedings are not compatible with trials by juries. In fact, the law provides that the court should base its findings not only on evidential sources that it actually hears during the trial but also on evidence taken in the preliminary proceedings. This requires the court to be familiar with the evidence before the start of the trial and thus, infringes the principle of immediacy governing jury trials. Furthermore, the section about the conduct of the main hearing does not contain any special provision that would be necessary for jury trials. Because the law

is deemed to be exhaustive, such regulations cannot be introduced or maintained by the cantons (Federal Council, 2006). Finally, the CCrP provides a right to appeal against the judgment on grounds of law and fact. An entire review of facts is, however, not compatible with jury trials (Schubarth, 2014). Given this situation, the few remaining cantons where a jury system existed, decided to abolish it with the exception of the canton of Ticino, where in a referendum in November 2010, the people (with 52%) surprisingly voted for the support of the jury system.

“Jury Trials” in the Canton of Ticino?

The Ticino juror is called “assessori-giurati” and thus suggests that his or her position may be situated between a lay assessor (assessori) and a juror (giurati) (Kuhn et al., 2014). In the proceedings at first instance, he or she is sitting in the cour d'assises. This court is composed of 3 judges and 4 “assessors-jurors” and rules in criminal cases where the prosecutor requires the imposition of a prison sentence of more than 2 years. The appeal court is composed of 3 judges who are assisted by 4 “assessors-jurors” when the judgment of first instance has been issued by a court composed with “assessors-jurors” The “assessors-jurors”, (90 for the court of first instance and 60 for the appellate court) are elected by the cantonal parliament for a period of 10 years. They are distributed among the political parties in proportion to the votes obtained by the electoral list in the last election of the cantonal parliament. The jurors for a specific trial are selected at random in public session. Parties each may challenge 4 jurors. Once the composition of the court (i.e., the 3 judges and the 4 “assessor-jurors”) is established, the files of the case circulate among all its members, including the “assessors-jurors”. The Ticino “jury court” is obliged to give an explanation for its decisions. Given the peculiarities of the “assessor-juror”, Swiss scholars have come to the conclusion that the canton of Ticino has not maintained jury trials (Bommer, 2014; Kuhn et al., 2014).

IV. Swiss Criminal Procedure

Ordinary Proceedings

The Swiss criminal procedure model combines accusatorial and inquisitorial elements and thus, it is a mixed system of prosecution. Basically, preliminary proceedings are non-adversarial, written, and secret, while the trial stage is oral, adversarial, and public (Piquerez & Macaluso, 2011).

The investigation is assigned to the prosecutor, whose duty is to investigate incriminatory and exculpatory evidence with equal care. The written dossier prepared by the prosecutor is transmitted to the court if he or she considers that there is sufficient reason to suspect the accused person of committing the criminal offense and the prosecutor has not issued a penal order. The decision to bring charges cannot be challenged.

There is also no board of indictment that would independently review the charges brought by the prosecutor. The indictment is thus directly submitted to the court. However, the judge in

charge of conducting the proceedings (which is called *Verfahrensleitung*) has to examine whether the indictment and the files have been properly compiled and whether procedural requirements have been met and whether any procedural bars exist. This preliminary review is limited to a formal and summary examination of the indictment and the files. The judge in charge of conducting the proceedings has, among other tasks, to examine whether the described behavior constitutes a criminal offense. Neither the accuracy of the conclusion drawn by the prosecutor, nor whether the evidence would be enough to justify a guilty verdict has to be examined (Federal Council, 2006).

Usually, the criminal trials are open to the public and oral. The court is required to actively investigate the case and responsible to find the material truth. There is no cross-examination as such. However, parties may suggest to the judge additional questions to be asked. Expert witnesses are appointed by the prosecution, or by the court, after the decision to charge a defendant with a crime has been made. The court renders a verdict of “guilty” or “not guilty”. The law mandates cantons to provide for a two-instance judiciary system, so that judgments of the cantonal court of first instance can be appealed to the cantonal higher court. Finally, the case might be brought before a third instance, namely the Federal Supreme Court. At federal level, the Federal Criminal Court is the court of first instance for criminal offenses falling under federal jurisdiction such as money laundering, organized crime, and economic crimes. Its decision can normally be appealed to the Federal Supreme Court.

Depending on the seriousness of the crime and the respective cantonal organization, a single judge or a panel of 3 or 5 judges (*Kollegialgericht*) rules on cases at first instance. In the canton of Zurich for instance, a single judge adjudicates offenses for which the prosecutor requests a penalty of no more than one-year imprisonment. The court of second instance usually sits as a panel of 3 or 5 judges. At the federal level, judgments are generally issued by panels consisting of 3 or 5 judges, all of whom are trained lawyers and who have been elected by the Federal Parliament for a term of 6 years with possible re-election .

At the cantonal level, judges are elected either by the people, the cantonal parliament, the government, or by a particular voting committee upon nomination of the political parties represented in the cantonal government. Judges are elected for a period of 4 to 6 years, with possible renewal upon expiration of the term (Swiss Federal Supreme Court, 2013). A few cantons require the judges to have received legal education. In other cantons where legal training is not a prerequisite, it is de facto the case that lay judges are very rarely elected.

While lay judges rarely act as single judge, they often sit in mixed panels with at least 1 professional judge (Beutler, 2012). Since the introduction of the CCRP, there is a tendency to abandon or to reduce the participation of lay judges. This may be due to the ever-growing complexity of the law that makes

it difficult for lay judges to handle criminal matters. The more frequent law reforms and the complexity of the system of sanctions require lay judges to attend training courses with the consequence that lay judges are getting closer to professional judges (Arn, Kuhn & Saurer, 2011). Law clerks with legal training are always part of the court’s composition.

Alternative Proceedings

Penal Order

Today, the overwhelming majority of criminal cases are dealt with by alternative proceedings in which the prosecutor plays the central role. In the Swiss criminal justice system, penal order proceedings play a predominant role. The penal order proceeding is a simplified written procedure where the prosecutor reaches his decision mainly on the basis of the police files. There is no duty of the prosecutor to hear the accused person, and during the process, the defendant is usually not represented by a lawyer. The prosecutor issues a penal order if the accused person has accepted responsibility for the factual circumstances of the case, or if the circumstances have been otherwise sufficiently resolved, and provided that the sentence to be imposed does not exceed 6 months imprisonment. It is estimated that more than 90% of the convictions across Switzerland are based upon a penal order (Hutzler, 2010). In some cantons, this can even reach 98% (Gilliéron, 2014).

If the defendant refuses the order, he or she has 10 days to raise written objection. In the absence of an objection, the penal order becomes final and has the same effect as a judgment following a main hearing. The prosecutor is obligated to choose the penal order proceedings as soon as the legal requirements for the use of this alternative are fulfilled. This summary proceeding is a highly efficient way to deal with an increasing caseload. However, as a study by Killias, Gilliéron & Dongois (2007) has shown, this kind of summary proceedings is inclined to produce wrongful convictions.

Abridged Proceedings

The introduction of the abridged proceedings with the enactment of the CCRP has further enlarged the prosecutor’s power. This procedure is quite similar to the plea bargaining process under the U.S. system. Prior to the introduction of the CCRP, 3 out of the 26 cantons already implemented such an alternative procedure (Gilliéron, 2014). It allows the prosecutor to make a deal with the defendant provided that the defendant agrees to plead guilty and that the prosecution requests the imposition of a prison sentence not exceeding 5 years. If the case is heard by way of abridged proceedings, the defendant must be represented by a lawyer.

Informal negotiations are closed by an indictment that the prosecution transmits together with the files to the court of first instance. In contrast to ordinary proceedings, the court does not evaluate the legal circumstances of the case. The responsibility of the court is to determine whether the carrying out of abridged proceedings is lawful and appropriate, whether the

charge corresponds to the conclusions of the principal hearing and to the files, and whether the sanctions requested are reasonable. Although the prevailing legal opinion rejects the abridged proceedings for constitutional reasons (Gilliéron, 2014), the popularity of this procedure is steadily growing (Hürlimann, 2013). In the canton of Zug for instance, abridged proceedings accounted for 7-14% of the criminal proceedings subject to the ordinary procedure from 2011 to 2014 (Supreme Court of the Canton of Zug, 2013, 2015).

V. Swiss Civil Procedure: A Short Overview

Civil procedure is regulated by the Swiss Code of Civil Procedure, which entered into force on 1 January 2011. Prior to the enactment of the code, every canton had its own code of civil procedure. As in the criminal procedure, despite the unification of procedural rules, the organization of the judiciary remains a matter for the cantons (article 122 para 2 Swiss Federal Constitution). Federal law obliges the cantons to provide for a two-level judiciary system and grants the cantons the option to establish a specialized commercial court. The cantons of Zurich, Bern, St. Gallen, and Aargau have established such a court. This court is part of the cantonal higher court and acts as a court of first and single instance for commercial matters.

Many cantons have established specialized courts, such as labor and tenant law courts. Labor courts are composed of equal representatives from employers' and employees' organizations. In principle, a conciliation hearing before a conciliation authority takes place before the actual decision-making proceeding is conducted. The justice of the peace oversees the conciliation hearing either alone or with two assessors as laypersons. In the proceedings at first instance, depending on the value in dispute, a single judge or a panel of 3 judges, is responsible for judging the case. If the value in dispute is below 30,000 Swiss Francs^[3], the dispute is typically referred to a single judge, while cases where the value in dispute exceeds 30,000 Francs are referred to a panel of 3 judges. The higher courts generally sit as a panel of 3 or 5 judges. The main role of the higher court is to examine appeals against judgments of the first instance. As an exception, higher courts as sole instance are competent to decide disputes related to intellectual property law and cartel law, as well as disputes under the Collective Investment Act and Stock Exchange Act. Final cantonal court decisions may be appealed to the Federal Supreme Court provided that the value in dispute exceeds 30,000 Francs. The judges are elected in the same way as judges handling criminal matters.

VI. Conclusions

The abandonment of the jury system for criminal trials in Switzerland less than 5 years ago has been relatively trouble-free. Although the jury system in this country has never been applied to civil cases, the experience with criminal cases is instructive. The cantons in which lay juries had been used adapted well to the change. More consistency has been seen among the cantons. The flow of alleged offenders through the system has been

smooth and facilitated by the abandonment of the jury system.

What does it mean for the United States? Of course, caveats have to be offered: different countries, different cultures, markedly different historical backgrounds are just some of them. Furthermore, we may be certain that the sputtering, inconsistent, sometimes dead-wrong, sometimes really good jury system of the United States will continue to plod along, often getting it just right, and now and then totally missing the target.

Nevertheless, the Switzerland experience is instructive. With the abolishment of the jury system, the CCRP carried on the tendency that had already taken place in certain cantons. Mainly for reasons of consistency and fairness, such a system was discarded nationwide. And from what we can tell at this point, it has worked.

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- [1] Huffington Post, 10/05/2013
- [2] <http://www.innocenceproject.org/>
- [3] One Swiss Franc is approximately the value of one US dollar.