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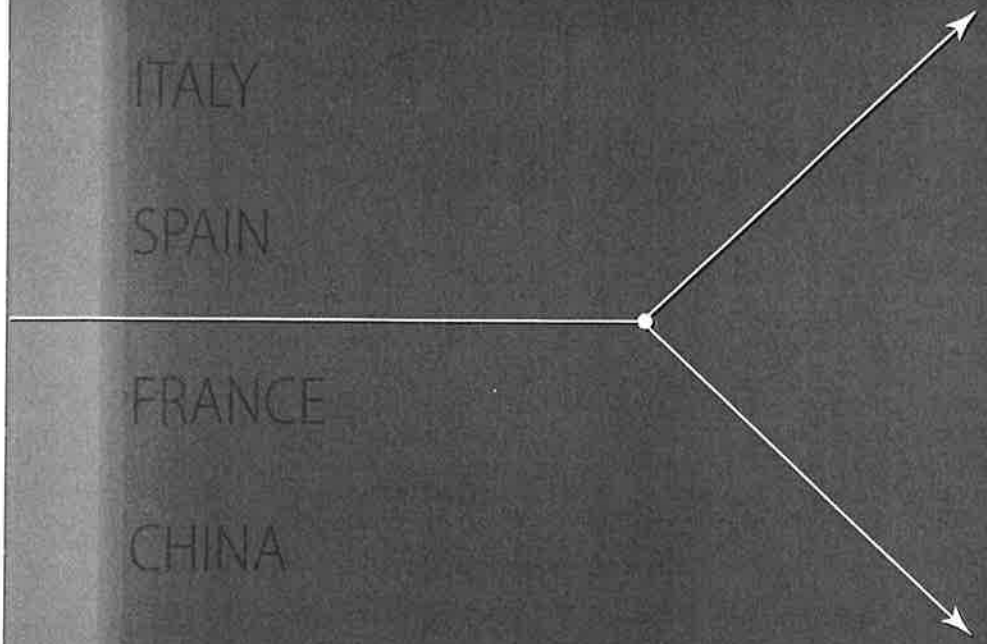

DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT

Discretionary Criminal Justice in a Comparative Context

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Chapter Eight

Water Always Finds Its Way—Discretion and the Concept of Exclusionary Rules in the Swiss Criminal Procedure Code

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1 Introduction

Switzerland lies in the heart of Europe—or rather continental Europe—not only geographically, but also with regard to its legal traditions and institutions. The Swiss legal system is heavily influenced by French heritage rooted in Napoleon's reforms in criminal procedure, which have been absorbed by the francophone districts of Switzerland and all over Europe, as opposed to the more German-oriented features that have prevailed in the German-speaking parts of Switzerland.[1] The Swiss Confederation, which is composed of 26 cantons, is inhabited by people who strongly identify with the local level of government. It is well known for its adherence to direct democracy, including the political right to popular initiative, which allows the people to request the complete or partial revision of the Federal Constitution.

The Swiss criminal justice system reflects these features in various ways. Quite a few elements of Swiss criminal law have been introduced or reforms triggered by way of 'popular initiative' (*Volksinitiative*); many aspects of criminal procedure do indeed cater to local needs and ambitions. This reality is most clearly illustrated by the fact that, until three years ago, Switzerland had 26 different criminal procedure codes (some drafted in French, some in German, some bilingual, and a few in Italian—depending on the official language(s) of the respective canton), as well as three federal codes. One must keep in mind that the size of the Swiss territory is only 15,940 square miles, or 41,285 square kilometres, and has approximately eight million inhabitants.

The co-existence of so many different criminal procedure codes required a high degree of tolerance in the Swiss criminal justice system—when enacting the rules, the legislature would leave room for discretion and often avoided rigid rule setting. In the past, the competent authorities thus often had discretion in how to handle certain aspects of criminal proceedings. However, when the harmonised Swiss Criminal Procedure Code [CPC] entered into force in January 2011,[2] criminal proceedings—including the gathering and use of

1. Hauser & Schweri 1997, p. 9–12.

2. Swiss Criminal Procedure Code of 5 October 2007 [CPC], SR 312.0, available at <http://www.admin.ch/ch/e/rs/3/312.0.en.pdf> (last visited 8 Sept. 2014). The lapse of time

evidence, and related exclusionary rules—became heavily regulated. The lack of rule-setting by the legislature is surprising since exclusionary rules must ultimately reflect an appropriate balance between the various interests involved in a given situation;[3] these rules are also of high practical relevance because they may exclude crucial evidence and lead to a person's acquittal, which may be the only appropriate approach in cases where the evidence must be disregarded as unreliable. The rules in the CPC reflect a 'one size fits all' approach built on strict rules intended to govern fact-finding, but as the old saying goes: Water always finds its way.

Taking into account the evolution of exclusionary rules, both in Switzerland and globally,[4] we start with the hypothesis that it is very difficult or even impossible to establish a rigid legal framework for exclusionary rules, one which will not be diluted in one way or the other by the police, the courts, or the legislature itself. This is especially true when the criminal law tradition lends itself to rather pragmatic solutions, as was the case in Switzerland and maybe still is. We will thereby keep the overarching question of the conference topic in mind: How do the peculiarities of adversarial or inquisitorial criminal law systems influence the concept of exclusionary rules? What role does discretion play as regards the exclusion of evidence? Exclusionary rules in the Swiss CPC are of particular relevance to this question, since, currently, the code sets strict exclusionary rules and also establishes a 'fruit of the poisonous tree' doctrine intended to exclude tainted evidence (*Fernwirkungsverbot*). Such provisions are more typical for adversarial proceedings, not for the inquisitorial criminal procedure found in the Swiss system.[5] According to our hypothesis, this will trigger problems in the application of these rules.

Against this background, the following questions will be discussed: How do law enforcement authorities, judges, and other competent organs react to these rigid rules? Will 'water find its way'? Put differently: Will the strict rules be applied in all situations, following the letter of the law, or will practitioners find a way around these rules? Will law enforcement authorities adapt these rules in practice in such a way that they eventually—and without legislative amendments—allow for more discretion?

In this paper, we will first clarify the legal framework and implications of exclusionary rules in the Swiss criminal justice system and consider the rationale behind the Swiss conception of exclusionary rules. Subsequently, we

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between the publication and the adoption date is due to peculiarities of Swiss legislation.

3. Delmas-Marty & Spencer 2002, p. 602 f.
4. Thaman 2013.
5. Art. 6 CPC; Riedo & Fiolka 2011, no. 1 ff.

will present the concrete rules on the exclusion of evidence in Switzerland, focusing on whether the rules of the CPC adopted three years ago are to be interpreted strictly or whether they provide discretion to the judges. After this rather theoretical approach, we will examine some case law on the application of these rules and analyse how exercising discretion has affected the development of exclusionary rules. In other words, does the 'water' of discretion find its way around the rigid rules of the CPC?

2 Terms and Rationale behind the Concept of Exclusionary Rules in Swiss Law

Before turning to the concept of exclusionary rules under Swiss law, it is important to clarify some commonly used terms that may have different meanings in other legal systems. Not only the terminology but also the rationale behind the concept of exclusionary rules in Swiss law greatly impact on the application of such rules, thus the following definitions are provided.

'Discretion,' as defined by Swiss law and used in the Swiss CPC, refers to the competence of a given authority to decide a question that the legislature deliberately left open. It is thus left to the respective competent authority to choose between different legal consequence or to decide whether there should be any legal consequences at all.[6] With regard to exclusionary rules, 'discretion' thus means that it is for the court to decide whether the violation of legal norms in obtaining evidence calls for any procedural sanctions, such as the exclusion of evidence from the case file, or whether such action is without consequence in the respective criminal proceeding.

'Exclusionary rules,' primarily defined in Swiss law by Articles 140 and 141 CPC, deal with the use of unlawfully gathered evidence in criminal proceedings. While certain exclusionary rules, such as Article 141 (1) CPC, leave no room for the discretion of judges, others, such as Article 141 (2) CPC, provide courts with some degree of discretion.[7]

The rationale behind the concept of exclusionary rules in Swiss law refers to basic standards of human rights. The collection and subsequent use of illegally gathered evidence may amount to a violation of the right to a fair trial, according to the Swiss Federal Supreme Court, which in turn refers to the ju-

6. Häfelin, Müller & Uhlmann 2010, p. 99.
7. For example, see Pieth 2012, p. 166–169.

risprudence of the ECtHR.[8] The right to have certain evidence excluded from the case file can thus be seen as a component of defence rights, like the privilege against self-incrimination, or as a manifestation of the presumption of innocence.[9] In its older case law, the Swiss Federal Supreme Court further stated that evidence gathered in violation of the suspect's right to privacy or right against self-incrimination must be excluded, as this would perpetuate infringement of the suspect's human rights.[10] However, these rights are not absolute and can be limited as long as the proceedings as a whole remain fair.[11] Accordingly, the Swiss Federal Supreme Court allows for a balancing of interests when deciding on the admissibility of evidence, which is reflected by Article 141 (2) CPC.[12] This sums up the balancing approach, an approach that is generally foreign to criminal law yet typical in human rights law, as well as demonstrating how discretion plays an important role in the court's search for justice.

In addition to the protection of the individual, exclusionary rules also protect the fact finding process itself, which amounts to a public interest. This is based on the insight that evidence gathered through torture, coercion, or similar methods frequently fails to reflect the actual truth, but rather depicts how the witness or suspect evaded pressure.[13] Accordingly, such unreliable evidence should not be used to convict the accused. This is most prominently reflected in Article 141 (1) CPC. Finally, and in contrast to other inquisitorial systems, Swiss doctrine acknowledges exclusionary rules as a form of procedural sanctions. 'Procedural sanctions,' as defined by Swiss law and referred to in Swiss criminal procedure law, are a means to impose legal consequences on prosecution authorities who engage in unlawful conduct during criminal proceedings. Hence, their aim is to prevent future human rights violations.[14]

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8. ECtHR 12 July 1988, *Schenk* v. *Switzerland*, A 140, para. 45 ff.; ECtHR 12 May 2000, *Khan* v. *United Kingdom*, Reports 2000-V, para. 34 ff.; ECtHR 25 September 2001, *P.G. and J.H.* v. *United Kingdom*, Reports 2001-IX, para. 76 ff.; BGE 129 I 85/ 1P.396/2002 of 13 November 2002, E. 4.1, p. 88 <http://www.bger.ch>; BGE 131 I 272/ 1P. 570/2004 of 3 May 2004, E. 3.2.1, p. 274 <http://www.bger.ch>.

9. BGE 130 I 126/ 1P.635/2003 of 18 May 2004, E. 2.1, p. 129; BGE 131 I 272/ 1P. 570/2004 of 3 May 2004, E. 3.2.3.2., p. 276 <http://www.bger.ch>.

10. BGE 120 Ia 314, p. 318 <http://www.bger.ch>.

11. ECtHR *Schenk* v. *Switzerland*, para. 46.

12. BGE 131 I 272/ 1P. 570/2004 of 3 May 2004, E. 4.1.2, p. 278 f.; BGE 130 I 126/ 1P.635/2003 of 18 May 2004, E. 3.2, p. 132 <http://www.bger.ch>.

13. Ruckstuhl 2006, p. 20.

14. Fornito 2000, p. 57; Gless 2011, no. 27; Godenzi 2011, p. 322, 336; Dencker 1977, p. 52.

The allusion to procedural sanctions may at first glance be surprising since Swiss criminal procedure is of a primarily inquisitorial character, with finding the material truth as one of the main goals of criminal procedure.[15] This goal is also reflected in Article 6 (2) CPC, which places an obligation on the prosecution to gather exculpatory evidence as well as incriminating. Thus, the idea of sanctioning one side for misconduct in the gathering of evidence, a practice which derives from the adversarial system of the United States, raises the question of whether it can be adapted to an inquisitorial criminal system at all. This question has been a subject of controversial debate in various countries.

One position—mainly held in Germany, which also has an inquisitorial criminal procedure system—basically rejects the idea of disciplining prosecution authorities as they are not party to the criminal proceeding, unlike in adversarial traditions such as those of the United States. Accordingly, it is considered sufficient to sanction an official's unlawful conduct in disciplinary proceedings (*Disziplinarverfahren*) or criminal proceedings. However, to let a potentially guilty suspect walk free, in the worst case scenario, because of facts that cannot be disclosed due to the wrongdoing of an official not party to the proceedings is generally considered incompatible with the inquisitorial system of criminal procedure.[16] Such reasoning, however, rests on the presumption that tainted evidence may be reliable—a flawed presumption in cases of duress or actual torture, for instance.

The other position, which is the majority view in Swiss doctrine, acknowledges that, in principle, exclusionary rules have a secondary effect as an instrument to discipline the prosecution authorities.[17] It is common knowledge that the prosecution authorities' compliance with procedural rules is more likely if they know that evidence could potentially be excluded in later proceedings if they act in violation of these standards.[18] This idea is reflected in older case law where, for example, the Supreme Court of the Canton of Berne stated that an illegally recorded tape was inadmissible and that the actions of the prosecution authorities was to be strongly condemned, lest undue methods become a habit.[19] However, according to Fornito, this approach gives primacy

15. Art. 6 CPC; Riedo & Fiolka 2011, no. 1 ff.

16. For an overview, see Dencker 1977, p. 52 f.; Fornito 2000, p. 59.

17. Gless 2011, no. 6; Höhener & Vest 2009, p. 104; Eicker & Vest 2005, p. 891; Albrecht 2007, no. 34 to Art. 23 BetmG, p. 186.

18. Fornito 2000, p. 59.

19. Straf- und Anklagekammern des bernischen Obergerichts, judgment of 21 February 1949, ZBJV 82 (1952), p. 86; for similar present-day arguments, see Höhener & Vest 2009, p. 104.

to the preventive character of exclusionary rules over the actual sanctioning of the prosecution, although it is indeed named for the latter.[20]

According to the Swiss understanding, which champions a partly disciplinary approach, not every rule on the exclusion of evidence is a procedural sanction, only those that try to remove any incentive for prosecutors to overstep the limits of legality. One example is the exclusionary rule sanctioning situations where obligatory court authorisation has not been requested or provided, such as in instances of telephone surveillance, since the purpose of such authorisation is to limit excessive use of this enforcement measure. Since evidence gathered without court authorisation could be declared inadmissible, the prosecution has no incentive to violate these rules and will instead abide by them.[21] However, some other rules on the exclusion of evidence pursue other goals, such as the protection of family life through the right to refuse to give testimony, and are not considered to be procedural sanctions.

In sum, procedural sanctions, as explained by scholars in the context of the Swiss criminal justice system, are not primarily intended to be of a penalising nature but rather a preventive one. In light of this, procedural sanctions do not interfere with the otherwise inquisitorial character of the Swiss criminal procedure system, but instead safeguard the rule of law. However, it is important to point out that exclusionary rules have always been a controversial topic in Switzerland,[22] as in other jurisdictions. The somewhat paradoxical consequence of exclusionary rules and the ensuing dilemmas have been famously described by American lawyer Wigmore: 'Our way of upholding the Constitution is not to strike at the man who breaks it but to let off somebody else who breaks something else.'[23]

3 Exclusionary Rules—The Legal Framework

Having elaborated on the rationale of exclusionary rules as described by Swiss courts and scholars, we now turn to the exclusionary rules as laid down in the Swiss CPC. A blanket rule for exclusionary rules is found in Article 141; the

20. Fornito 2000, p. 59; Gless 2011, no. 27.

21. See Fornito 2000, p. 59; with references to Müller & Schefer 2008, p. 1001; Joset & Ruckstuhl 1993, p. 355 ff. (criticising the former practice of paying 'success' fees to undercover agents).

22. For instance, see Fornito 2000, p. 38–68.

23. Wigmore 1904, Section 2184, no. 35.

legislature intended to explicitly regulate the exclusion of certain types of evidence and thereby to limit the discretion formerly held by judges in this regard.

3.1 Relevant Statutes—General Legal Framework

The core provision governing the gathering of evidence through prohibited methods, Article 140 CPC, reads as follows:

(1) The use of coercion, violence, threats, promises, deception and methods that may compromise the ability of the person concerned to think or decide freely are prohibited when taking evidence.
(2) Such methods remain unlawful even if the person concerned consents to their use.

The relevant provision regarding exclusionary rules, Article 141 CPC, is entitled 'Admissibility of unlawfully obtained evidence,' but it operates by stipulating conditions of inadmissibility:

(1) Evidence obtained in violation of Article 140 is not admissible under any circumstances. The foregoing also applies where this Code declares evidence to be inadmissible.
(2) Evidence that criminal justice authorities have obtained by criminal methods or by violating regulations on admissibility is inadmissible unless it is essential that it be admitted in order to secure a conviction for a serious offence.
(3) Evidence that has been obtained in violation of mere administrative regulations is admissible by legislative dictum, see Article 141 para 3 CPC.
(4) Where evidence that is inadmissible under paragraph 2 has made it possible to obtain additional evidence, such evidence is not admissible if it would have been impossible to obtain had the previous evidence not been obtained.
(5) Records relating to inadmissible evidence shall be removed from the case documents, held in safekeeping until a final judgment has concluded the proceedings, and then destroyed.

In the following, we will focus on paragraphs 1, 2 and 4 of Article 141 CPC, as they contain a strict and, at the same time, relative approach to the exclusion of evidence. While discussing paragraph 1, we will also consider Article 289 (6) CPC, which is another explicit provision on non-admissibility contained in the CPC, which governs the authorisation procedure for undercover investigations.

According to Article 289 (6) CPC, the deployment of an undercover investigator requires authorisation of the compulsory measures court (*Zwangs-*

massnahmegericht). If authorisation is not granted, the public prosecutor must end the deployment immediately and destroy all records. No findings made during such an action may be used.[24] As discussed later, this provision has, nevertheless, been implemented in a different manner than what the wording suggests.

3.2 *Identifying Relevant Situations and Procedural Sanctions*

Reading through the provisions of the CPC, one gets the impression that the legislature was eager to carefully regulate the exclusion of evidence. At first glance, therefore, it may appear difficult to answer the overarching question of this paper: 'What role does discretion play when it comes to the question of exclusion of evidence in an inquisitorial criminal law system?'

Does—or rather, when does—Swiss law provide the competent authorities with discretion, and when does it allow for the procedural sanction of exclusion of evidence? In considering this question and looking for examples where discretion is granted, one must keep in mind the challenge of explaining the function and implications of procedural sanctions in an inquisitorial system, especially with the preventive character that Swiss law attaches to them. We will see that the rules laid down in the CPC have special features that introduce strict exclusionary rules and the so-called 'fruit of the poisonous tree' doctrine (*Fernwirkungsverbot*)—both typical features of adversarial proceedings, not of an inquisitorial system like in Switzerland. As we initially hypothesised, we will see if this triggers problems in the application of these rules in practice.

3.2.1 *No* Discretion Provided—Article 141 (1) CPC

By reading the Swiss law, we can conclude that there is no discretion granted in situations governed by Article 141 (1) CPC: When evidence is obtained in a manner that *the CPC itself declares to be inadmissible*, a decision to use the evidence is not subject to discretion. Such a prohibition applies when explicitly banned methods of evidence gathering are used, namely with the 'use of coercion, violence, threats, promises, deception and methods that may compromise the ability of the person concerned to think or decide freely.'[25]

Another setting in which Article 141 (1) applies is regulated by Article 289 (6) CPC. According to this provision, mentioned earlier, records stemming

24. Art. 289 (6) CPC *in fine*.
25. Art. 140 (1) CPC; for further information, see: Pieth 2012 p. 167.

from an undercover investigation carried out without proper authorisation must be destroyed. Findings from an unauthorised undercover investigation may not be used. Hence, the legislature has adopted a clear rule: The authorities cannot take advantage of information gained by improper undercover investigations and no discretion is granted. By declaring any evidence acquired in this manner inadmissible, this absolute exclusionary rule aims to prevent the gravest kinds of misconduct by the prosecution authorities, such as torture, coercion, and serious infringements of the right to privacy, as well as utter defiance of legal orders. It can thus be qualified as a procedural sanction.

3.2.2 *Some* Discretion Provided—Article 141 (2) CPC

Discretion may be granted where authorities obtain evidence in a way that violates certain rules on admissibility, but not in a way referenced by an explicit exclusionary rule. These are situations that arise under Article 141 (2) CPC. Indeed, the legislature might have had such situations in mind when phrasing the title of Article 141 CPC: 'Admissibility of unlawfully obtained evidence.' Whereas the wording of the provision might initially suggest the admissibility of all evidence gained in violation of the legal requirements, such an assumption is incorrect.

The rule practitioners and courts are left with does indeed allow for the admission of unlawfully obtained evidence, but only in certain cases; the exceptions to inadmissibility are stated in strong words and only take effect to help establish the truth in criminal trials for grave breaches of law. This becomes clear when reading the authentic German version of Article 141 (2) CPC, not the officially provided, but non-authentic, English translation: '*Beweise, die Strafbehörden in strafbarer Weise oder unter Verletzung von Gültigkeitsvorschriften erhoben haben, dürfen nicht verwertet werden, es sei denn, ihre Verwertung sei zur Aufklärung schwerer Straftaten unerlässlich.*'

The English version, provided by the Swiss government, reads:

> Evidence that criminal justice authorities have obtained by criminal methods or by violating regulations on admissibility is inadmissible unless it is essential that it be admitted in order to secure a conviction for a serious offence.[26]

However, it ought to be translated as:

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26. English translation available at <http://www.admin.ch/opc/en/classified-compilation/20052319/index.html> (last visited 8 Sept. 2014).

> Evidence obtained by the criminal justice authorities in a criminal manner or in violation of rules protecting the validity of the evidence shall not be admitted *unless its use is essential to solving serious criminal offences.*[27]

From this translation, it follows that the legislature intended to provide some discretion to the competent authorities in cases where the admissibility of evidence is essential to securing the public interest in a complete clarification of facts and, if possible, to proving the guilt of an offender. If, however, other interests prevail, such as the interests of the defence where the defendant's rights were curtailed disproportionately, the evidence must be excluded.[28] Accordingly, Article 141 (2) CPC gives some discretion to the judges.

3.2.3 Leeway in Decision-Making, but *No* Discretion—Article 141 (4) CPC

With regard to discretion, a rather vague situation arises under Article 141 (4) CPC, which sets out the so-called 'fruit of the poisonous tree' doctrine (*Fernwirkungsverbot*). According to this doctrine, evidence stemming from unlawfully obtained evidence is also inadmissible, 'if it would have been impossible to obtain had the previous evidence not been obtained.' Following up on previous case law, the Swiss courts have stated that an exception to the 'fruit of the poisonous tree' doctrine arises when the secondary evidence could have been obtained without the primary evidence.[29]

Still, the exact meaning of this principle remains unclear. Do the courts grant themselves the discretion to decide whether it would have been possible to obtain the secondary evidence without the illegally obtained evidence? Reading the statute and the legislative material, it is clear that the legislature did not intend to grant the courts the power to balance competing interests and decide accordingly. Rather, the intention was to clarify the following scenario: The courts shall determine whether, in a certain situation, the investigating authorities might have obtained the (tainted) piece of evidence by way of an unobstructed path. If so, the legislature would want the evidence to be admitted. This curious caveat raises a number of interesting questions with re-

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27. Emphasis added by the authors; for the translation provided by Summers for Art. 141 CPC, see Donatsch, Hansjakob & Lieber 2010, p. 607.

28. Gless 2011, nos. 78–84; Pieth 2012, p. 169.

29. See BGE 138 IV 169/ 6B_805/2011 of 12 July 2012, E. 3.3.2, with further references <http://www.bger.ch>; Gless 2010, 159.

gard to procedural sanctions, yet they are unrelated to discretion; Article 141 (4) CPC merely gives the courts some room to decide a factual question.

As in situations governed by Article 141 (1) CPC, the law is not entirely clear with regard to which exclusionary rules entail a *Fernwirkungsverbot*, because Article 141 (4) CPC merely stipulates:

> Where evidence that is inadmissible *under paragraph 2* has made it possible to obtain additional evidence, such evidence is not admissible if it would have been impossible to obtain had the previous evidence not been obtained.[30]

Inadmissibility under Article 141 (2) CPC however is the weaker provision when compared to inadmissibility under Article 141 (1) CPC. The latter prohibits the use of coercion, violence, threats, promises, deception, and other forms of duress.

Although the law does not explicitly state what happens with evidence obtained through another form of evidence that is inadmissible because prohibited methods were used, it is undisputed in doctrine that inadmissible evidence according to Article 141 (1) CPC may lead to a *Fernwirkungsverbot* in some form. However, whether this should be absolute or include the caveat explained above (probability of obtaining the secondary evidence without the primary tainted evidence) is subject to debate. The argument for an absolute *Fernwirkungsverbot* relies on the lawmaking process: Originally, Article 141 (4) CPC was drafted to include the situations of paragraph 1 *and* 2. It is reasoned that, since the legislature excluded paragraph 1 situations from the relative *Fernwirkungsverbot* of paragraph 4, it must entail an absolute *Fernwirkungsverbot*.[31] The other side accepts that the wording and drafting history of Article 141 (4) CPC suggest an absolute *Fernwirkungsverbot* for paragraph 1 situations, but argues that this interpretation would lead to unacceptable results. They opine that letting a guilty person walk free, even when incriminating evidence exists that would have been discovered anyway, contradicts the fundamental sense of justice. Accordingly, situations described in paragraph 1 should trigger a relative *Fernwirkungsverbot* as well.[32] To date, the Swiss Federal Court has explicitly left this question open.[33]

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30. Emphasis added.
31. Häring 2009, p. 250–251; Sollberger 2008, p. 126; Gless, 2011, no. 90.
32. Bénédict & Treccani, no. 39; Vetterli 2012, p. 466.
33. BGE 138 IV 169/ 6B_805/2011 of 12 July 2012, E. 3.2. <http://www.bger.ch>.

3.3 *Exclusionary Rules in Swiss Criminal Law—Interim Conclusion*

The CPC establishes a strict legal framework regarding the exclusion of evidence. While there are some situations where the legislature did not provide the courts with any discretionary power (Article 141 (1) CPC), the law allows for a balancing approach in others (Article 141 (2) CPC). Consequently, there are some cases where discretion is explicitly granted to the courts regarding the exclusion of evidence.

In contrast, the law leaves no room for discretion with regard to the question of a *Fernwirkungsverbot* of illegally gathered evidence. Whether the secondary evidence could have been obtained independently from the primary, illegally obtained evidence is a factual question, and does not entail the use of discretion.

Exclusionary rules on evidence pursue different goals. In Swiss doctrine, they are seen as procedural sanctions to punish unlawful conduct by the prosecution authorities, among other goals. However, this disciplinary element is mainly based on preventive arguments, in order to preclude future misconduct by prosecution authorities and thus violations of the basic rights of suspects. The prosecution is not seen as a party to the proceedings that suffers a disadvantage, but exclusion of evidence is seen as removing any incentive for prosecution authorities to overstep the limits of legality. By viewing procedural sanctions in this way, it seems possible to reconcile them with the inquisitorial character of the Swiss criminal procedure system.

4 Water Always Finds Its Way? Recent Case Law and Legal Reform

Is it feasible to have a regime of strict exclusionary rules, or are exclusionary rules something that 'water' always finds its way around? Looking at recent case law and legal reforms, our hypothesis is that when the law does not leave enough room for discretion in sensitive issues, judges will circumvent the rigid rules and reintroduce discretion.

4.1 *Undercover Investigations v. Enquiries—The Emergence of a New Instrument*

One colourful example of the complex problems associated with a strict regulation approach and its fragility are undercover activities. As demonstrated

above in the example of Article 289 (6) CPC, the Swiss legislature has taken a very strict approach to the admissibility of information gathered during an unauthorised undercover investigation—knowing that the matter is highly controversial.

4.1.1 The Case Law 'Pulls a Trigger'

Case law on the matter of exclusionary rules has given rise to controversial debate. In analysing some of these decisions, we will keep in mind the question laid down at the beginning of this paper: Do courts exercise discretion even where there would be none according to the strict wording of the relevant provisions? Did the courts create room for discretion, and, if so, how?

Even before the adoption of the CPC, controversial debate about the modalities of exclusionary rules took place, triggered by a case involving a police officer who used the internet to contact possible paedophiles:[34]

On 17 August 2005, X, using the pseudonym 'Jérôme', contacted a person called 'Manuela_13' in the Bluewin chat room 'kidstalk'. During the chat, the 26-year-old X confronted 'Manuela_13' with various comments, questions and demands of a sexual nature. After about one hour of chatting, he proposed to go to Zurich for a meeting with 'Manuela_13', to pet her genitals and to 'do it all'. They arranged to meet the next day at 11 a.m. at the Zurich main station. X showed up at the arranged meeting point. However, he did not meet a 13-year-old girl but policemen, who had used the pseudonym 'Manuela_13' to investigate paedo-sexual criminals. During a search of X's home residence, they also found child pornography on X's computer. As a result, the police opened an investigation against X on charges of alleged child molestation and child pornography.

Even before the adoption of the CPC, formal undercover investigations were strictly governed by specific law (including an exclusionary rule for unauthorised action),[35] whereas police enquiries did not exist as a tool for investigation,[36] but were still practiced in some cantons in the absence of appropriate rules. Naturally it was—and still is—difficult to draw the line between formal investigations and mere internet patrol by the police. This line, however, is crucial in order to decide whether an exclusionary rule applies or not, as the consequences that arise depend on which side of the line an action falls.

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34. BGE 134 IV 266/ 6B_777/2007 of 16 June 2008 <http://www.bger.ch>.

35. Bundesgesetz über die verdeckte Ermittlung (BVE) [Federal Law on Undercover Investigation], <http://www.admin.ch/opc/de/federal-gazette/2003/4465.pdf> (last visited 8 Sept. 2014).

36. But the legislature provided such basis in December 2012.

Thus, even though doctrine and case law rendered evidence gathered through an unauthorised undercover investigation inadmissible, an alternative opened to let water flow freely.[37] Since the boundary between unauthorised undercover investigations and mere 'police undercover enquiries' were vague, law enforcement agencies had an incentive to use the latter tool to investigate, or, rather, pre-investigate, an alleged crime. Evidence gained from such enquiries was inadmissible, unless one could argue that a mere undercover enquiry did not fall within the ambit of the strict rules for undercover investigations, and thus did not trigger an exclusionary rule. Therefore, those who wanted to keep the gate open to gain information, allowing evidence gathering by the police without triggering an exclusionary rule, argued for limited application of the strict rules. Ignoring the intent of the legislature and using the lack of an explicit definition of an undercover investigation (as distinct from an undercover police enquiry), they argued that the rigor of the rules governing undercover investigations was a compelling reason to have a high threshold for defining a formal undercover investigation. For instance, one suggestion was that only the establishment of a 'legend' for an undercover agent (such as a false passport) was seen a sufficient indicator of an undercover investigation.[38] All measures falling short of such a threshold, as the argument went, are mere police enquiries—no rules apply and there would be no exclusion of the information gathered.

Following this line of argumentation, any investigation would simply have to be classified as an 'enquiry' to avoid the strict rules on inadmissibility of evidence associated with undercover investigations, thus opening up a loophole for the investigating authorities when making contacts with suspects.

In the case described above, the investigating authorities thus argued that their actions did not have to be authorised by a court because it was an undercover enquiry rather than an undercover investigation governed by strict rules. The Swiss Supreme Court, however, did not adopt this line of reasoning. In a well-known decision, BGE 134 IV 266, which was handed down before the adoption of the CPC but in application of well-established principles that were the same as those laid down in current CPC, the Court boldly stated that any action where a policeman, who is not recognisable as such, initiated contact with

37. Art. 18 (5) Bundesgesetz über die verdeckte Ermittlung (BVE), *supra* note 35.

38. Parlamentarische Initiative, Präzisierung des Anwendungsbereichs der Bestimmungen über die verdeckte Ermittlung, Bericht der Kommission für Rechtsfragen des Nationalrates vom 3 February 2012 [Parliamentary initiative, specifying the scope of application of the Covert Investigations Act, Review of the National Council Legal Affairs Committee 3 February 2013], < http://www.admin.ch/opc/de/federal-gazette/2012/5609.pdf>, p. 5612.

a suspect must be qualified as an undercover investigation, requiring court authorisation in order to produce valid evidence.[39] With this leading case, the Supreme Court thus closed the loophole undermining the protection of accused persons by declaring evidence obtained through unauthorised chat conversations, and thus the pornography found at X's house found during the search, to be inadmissible.[40]

4.1.2 The Situation after the Adoption of the CPC

The controversial debate around the matter of exclusionary rules, however, did not stop after this decision, nor did it stop after the adoption of the CPC with its general and strict exclusionary rules. In fact, the enactment of new rules gave rise to renewed demands for discretion, as the following decision shows:

X, a police official, was suspected of embezzling finds of valuables. To verify the suspicion, an undercover policeman handed a bag to X while he was in charge of lost & found at the police station. The bag contained, amongst other things, 150 Swiss Francs. The bag had allegedly been found by some tourists. As X was filling out the standard form, she did not account for the 150 Swiss Francs. Later, her superiors confronted X with these facts. Thereafter, X confessed and pleaded guilty to embezzling the 150 Swiss Francs, as well as of another 550 Swiss Francs, which she had previously taken. During the trial, the question arose whether X's confession was tainted and thus inadmissible.[41]

When the Supreme Court handed down its judgment on 23 August 2011,[42] the CPC had only been in force for nine months. Although its rules appeared to be quite similar to the previous law,[43] it was at first unclear which police actions fell under the scope of 'undercover investigations' strictly regulated by Arts. 285-298 CPC and which could be considered mere police enquiries for which no court or other authorisation was necessary. Again, the Swiss Supreme Court had to decide whether a gate should be opened, one allowing for unauthorised police action beyond the rules of the CPC.

The court resisted the temptation to reintroduce room for discretion, but notably specified its earlier case law when clarifying that undercover investigations are established with the criterion of 'making contact with the suspect,' which requires a specific action by the undercover agent that must somehow be connected to the offence committed. In the case concerning the dishonest police-

39. BGE 134 IV 266/ 6B_777/2007 of 16 June 2008, E. 3.5–3.7 <http://www.bger.ch>.
40. BGE 134 IV 266/ 6B_777/2007 of 16 June 2008 <http://www.bger.ch>.
41. BGer 6B_141/2011 <http://www.bger.ch>.
42. BGer 6B_141/2011 <http://www.bger.ch>.
43. See supra note 35.

woman, the Swiss Supreme Court held that this criterion was not fulfilled. It followed that any evidence obtained through this intervention was admissible because it did not amount to a formal undercover investigation and therefore did not have to fulfil its rather strict requirements.[44]

In both cases, the law on its face did not leave any room for discretion to the Court. The Court, however, could have disregarded the wording of the black letter law by introducing a new category of 'undercover enquiry' and thus made room for discretion, yet the Swiss Supreme Court did not introduce any way around the strict law. Still, what are the consequences flowing from this law-abiding approach of the Supreme Court?

4.1.3 The Pressure to Change the Law

The above case law was not well received by the Swiss public. Therefore, in 2008, following the Swiss Supreme Court's case concerning the investigation of the alleged paedophile,[45] a parliamentary initiative was submitted, requesting a definition and differentiation of the concepts of 'undercover investigation' and 'undercover enquiries' and the introduction of a legal option to use evidence resulting from the latter.[46] In implementing this initiative, Articles 285a and 298a CPC were adopted, which define both 'undercover investigation' and 'undercover enquiries':

> Article 285*a* CPC: In an *undercover investigation*,[47] police officers or persons temporarily appointed to carry out police duties make contact with persons under false pretences by using a false identity (cover) supported by documents with the aim of gaining the trust of those persons and infiltrating a criminal environment in order to investigate particularly serious offences.
> Article 298*a* CPC: (1) In *undercover enquiries*,[48] police officers deployed for short periods in such a way that their true identity and function remains concealed attempt to investigate felonies and misdemeanours and to do so enter into or pretend that they wish to enter into fictitious transactions.

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44. BGer 6B_141/2011, E. 2.3 and 2.4 <http://www.bger.ch>.
45. BGE 134 IV 266/ 6B_777/2007 of 16 June 2008 <http://www.bger.ch>.
46. Parlamentarische Initiative, Präzisierung des Anwendungsbereichs der Bestimmungen über die verdeckte Ermittlung, Bericht der Kommission für Rechtsfragen des Nationalrates vom 3 February 2012, supra note 38, p. 5610 ff.
47. Emphasis added.
48. Emphasis added.

(2) Undercover agents are provided with a cover within the meaning of Article 285a. Their true identity and function is disclosed in the case files and at hearings.

This amendment to the Swiss Criminal Procedure Code entered into force on 1 May 2013,[49] reintroducing discretion for the Swiss police. Hence, if water does not find its way through jurisprudence, it may well find its way through politics.

4.2 *Fruit of the Poisonous Tree—Not So Deadly after All...*

Another example of the complex problems associated with a strict regulatory approach, and of its fragility, is the recently adopted 'fruit of the poisonous tree' doctrine in Swiss law, as laid out in Article 141 (4) CPC. The legislature did not intend to give discretion to judges in this matter; instead they sought a strict rule, but with allowance for evidence that could have been obtained independently from the tainted evidence in question. The test applied on the basis of Article 141 (4) CPC is this: Would it have been possible to obtain the secondary evidence without the primary, illegally obtained evidence? This proviso, however, runs the risk of opening a gate for discretion, water to run around the strict law, as shown in the following decisions:

In the first case, X was suspected of being a drug dealer, selling 500 g of cocaine to A and B. The police suspected A of also being involved in drug dealing and therefore ordered legal surveillance (tapping) of her telephone. In the course of this surveillance, they also recorded calls between A and X., thus realising that X was high-ranking drug dealer. Upon the arrest of X, the police found about 250 g of cocaine at her home. After being confronted with the witness statement of A, she pleaded guilty to various drug offences. Before the court, however, X claimed that any evidence against her was inadmissible because the telephone surveillance that led to her arrest was only authorised to monitor A. She asserted that any accidentally obtained evidence in crimes of other persons was unusable. Furthermore, she argued that any ensuing evidence (the drugs found at her home and her confession) were a consequence

49. See Bundesrat, Press Release, 'Verdeckte Ermittlung und Fahndung klar geregelt [Undercover Investigation and Enquiry Clearly Defined]', 15 Feb. 2013, <http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/<\h>\d>2013/2013-03-151.html>.

of her initial arrest based on the telephone surveillance and thus, as 'fruits of the poisonous tree', were inadmissible as well.[50]

In this case, it was agreed that the evidence from the telephone surveillance as such was inadmissible according to the applicable law. The controversy related to the so-called 'fruit of the poisonous tree' doctrine (*Fernwirkungsverbot*), on which the Supreme Court had to take a stance for the first time since the adoption of the CPC. The Court conceded that, when discussing the admissibility of evidence, there is, on the one hand, an interest in the compliance of investigating authorities with the rules on gathering evidence. On the other hand, it conceded that there is a public interest in determining the substantive truth and punishing guilty persons while clearing innocent ones. It pointed out that both interests must be given sufficient weight when discussing the 'fruit of the poisonous tree' doctrine. After discussing different stances taken by scholars on the doctrine, the Court held that evidence flowing from inadmissible evidence must also be excluded from the case file if the original, invalid evidence was a *conditio sine qua non* for gathering the subsequent evidence.[51] This leads to a crucial issue: The effect of the test established by the Supreme Court hinges on the definition, or rather application, of the *sine qua non-criterion*.

When applying this rule in BGE 133 IV 329, the Court held that because X was having regular contact with A and that this would have drawn the attention of the police to her irrespective of the incriminating phone calls leading to the discovery of the drugs. Furthermore, the Court argued that X made her guilty plea mainly because of A's witness statement and not because of the phone recordings. Accordingly, the Court found that the subsequent evidence could have been obtained without the primary, illegally obtained evidence, and that it was therefore admissible.

This approach of the Supreme Court must be criticised. To decide whether there should be a *Fernwirkungsverbot* for certain evidence, one has to look solely at the concrete circumstances *before* the investigating authorities continue their investigation based on unlawfully obtained evidence. It is crucial to establish, and stick to, an *ex ante* perspective when considering whether evidence in a certain situation could have been detected and obtained independently from illegally obtained evidence. The deciding authority must avoid an *ex post* perspective in order to construct a theoretical option that could have possibly led to lawful obtainment of the secondary evidence. The decisive cri-

50. BGE 133 IV 329/ 6B_170/2007 of 9 October 2007 <http://www.bger.ch>.
51. BGE 133 IV 239/ 6B_170/2007 of 9 October 2007, E. 4.5 <http://www.bger.ch>.

terion is whether, in a particular case, there is a practical and likely possibility that, irrespective of the illegally obtained evidence, the investigating authorities would have discovered the evidence in question.[52]

The consequences of such an approach become even more apparent in BGE 138 IV 169,[53] which gave the Supreme Court another chance to define its understanding of the 'fruit of the poisonous tree' doctrine:

On 26 April 2010, Swiss border control stopped X as he attempted to enter the country. The Swiss authorities had received information from the Slovenian police about a suspicion that X was transporting drugs. A thorough search of X's car led to the finding of approximately six kilograms of heroin of a purity grade of eight per cent, which had been hidden in a fire extinguisher. X was ultimately sentenced to 39 months imprisonment. The Slovenian information concerning X apparently stemmed from unauthorised Slovenian telephone surveillance. X's defence argued that the evidence obtained by Swiss border control was inadmissible as a consequence of the 'fruit of the poisonous tree' doctrine.

Again, there was a common understanding that the evidence directly obtained through the illegal telephone surveillance by the Slovenian police was inadmissible. However, it was unclear whether the subsequent evidence obtained through the car search, which originated with the illegal telephone surveillance, was admissible or not. The question of the degree of probability that the subsequent evidence would have been found was disputed in the case. Relying on the aforementioned formula, Swiss scholars discussed whether, or rather what level of, probability of encountering subsequent evidence should determine the admissibility of subsequently obtained evidence.[54] The Supreme Court set the threshold somewhere in between extremes, holding that the secondary evidence was only independent from the first if there was a hypothetical *high probability* that the secondary evidence would have been discovered without the first. The Court emphasised that the evaluation must be made in every single case, effectively giving discretion to the courts.[55] In fact, when deciding the border control case (BGE 138 IV 169), the Supreme Court did not examine from an *ex ante* perspective whether evidence in the specific situation could have been detected and obtained independently from the illegally obtained evidence, but balanced the conflicting interests of law enforcement, the defendant, and civil liberties.[56] Afterwards, it held that controls at the bor-

52. Gless 2011, no. 97.
53. BGE 138 IV 169/ 6B_805/2011 of 12 July 2012 <http://www.bger.ch>.
54. For instance, see Pieth 2012, p. 172; Häring 2009, p. 252.
55. BGE 138 IV 169/ 6B_805/2011 of 12 July 2012, E. 3.3.2 <http://www.bger.ch>.

ders were—despite the existence of the Schengen Area—nothing unusual, and it was therefore considered highly probable that the discovery of the drugs *could* have occurred without the illegal telephone surveillance. Accordingly, the evidence was declared admissible. It did not give any consideration to the actual situation regarding the controls at the internal Schengen border.

The two above cases illustrate that, although the legislature did not give any discretion to the judges when deciding the 'fruit of the poisonous tree' question, the Swiss Supreme Court created discretion by introducing a new test, vague terms, and the requirement of evaluation on a case-by-case basis. In this way, the Supreme Court succeeded in reintroducing flexibility where it considered it necessary, irrespective of the strict set of legal regulations.

5 Findings

The development of Swiss case law on the application of exclusionary rules suggests that water does indeed 'find its way.' The wording of the rather strictly formulated rules on the exclusion of evidence, which were introduced with the CPC for the very purpose of regulating fact-finding in criminal proceedings in a more unyielding manner, was not and is still not always respected. Instead, courts have found a way around these new rules as soon as they considered the regime too rigid for practical needs.

Furthermore, some of the case law analysed in this paper demonstrates that courts—instead of abiding by the new rules—have tended to adhere to established doctrine, or even established or invented new terminology, in order to follow a path that allows more discretion. This can be seen, for instance, in the tests for determining whether invalid evidence is a *conditio sine qua non* for finding subsequent evidence admissible, in a rather peculiar interpretation of Article 141 (4) CPC. In some cases, the courts even disregarded the wording of relevant provisions, which they considered too inflexible for different situations of evidence gathering.

Such an approach may appear rather unusual for a jurisdiction with a strong civil law tradition and built on Montesquieu's famous dictum that judges are 'only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor.'[57] The case law on exclusionary rules, however, rejects the legal heritage of continental Europe and illustrates

57. Montesquieu, Esprit des Lois (1777), Liv. XI. Chap. VI., p. 327: '*la bouche, qui prononce les paroles de la loi, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur*'.

the wish for discretion and the freedom to use procedural sanctions only where they are considered necessary by judges in a given case.

Whether one finds this approach wise likely depends on the general assessment of judicial discretion versus strict statutory rules, which is a classic conflict in all legal systems. While civil law traditions tend to strict rules in many fields of law, they do allow for wide discretion when confronted with questions of exclusion of evidence. This likely stems from a commitment to the principle of free assessment or evaluation of evidence in criminal proceedings (*freie richterliche Beweiswürdigung in Strafsachen*), which grants discretion to judges when weighing different pieces of evidence. Civil law criminal proceedings, which are presided over and decided by professional judges, are dominated by the ideal of free choice of evidence on the part of a powerful judge, prosecutor, or investigator. This, however, entails the risk that judges will form a hypothesis that threatens their impartiality when looking at the possible evidence, and will use discretion to narrow the pool of evidence by not bringing the proper evidence into the proceedings or broaden it by allowing evidence that should have been excluded.[58] In contrast, the common law tradition allows parties to add to the pool of evidence in principle, yet the proceedings are bound by a set of exclusionary rules that aim to prevent evidence gathered against the black letter of the law from being brought before a judge. Accordingly, the court enjoys no discretion when deciding if a piece of evidence is admitted in proceedings, which in turn does not allow for the specific interests of a case to be balanced.[59]

Ultimately, the question of whether exclusionary rules ought to be subject to discretion may be one of political opinion and views shaped by tradition. For better or worse, Swiss jurisprudence has abided by the strict rules in certain situations, but it has given priority to a balancing of interests in some individual cases, opining that the legislature can never truly foresee the colourful situational variations that occur in real life.

Beyond that, the Swiss example suggests that a well-intended, strict rule may even trigger an opposing trend and eventually result in a different outcome if the austere regime cannot stand up against pressures for discretion. This may be the lesson learned from the most recent reform of Swiss procedural law. The recent amendment to the CPC now explicitly allows for 'undercover enquiry' by the police due to a parliamentary initiative that came about due to public pressure. This is a prominent example of how public opinion works,

58. Jackson & Summers 2012, p. 368–369.
59. Jackson & Summers 2012, p. 367–368.

since the formally endorsed legislature originally wanted to provide this competence to judicial bodies only. One could make the case that when the law does not allow for sufficient discretion in a certain situation, water will not only find its way but it may well create a flood—one in which a populist approach waters down the well-intended, strict rules.

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Abbreviations

AJP	Aktuelle Juristische Praxis [Current Legal Practice]
Art./Arts.	Article/Articles
BetmG	Betäubungsmittelgesetz [Narcotics Act]

BGE	Bundesgerichtsentscheid [Decision of the Federal Supreme Court]
BGer	Schweizerisches Bundesgericht [Swiss Federal Supreme Court]
CPC	Criminal Procedure Code
CPP	Code de procédure pénale
E.	Erwägungen [considerations of the court]
StPO	Schweizerische Strafprozessordnung [Swiss Criminal Procedure Code]
v.	versus
ZBJV	Zeitschrift des Bernischen Juristenvereins [Review of the Bernese Lawyers'Association]
ZStrR	Schweizerische Zeitschrift für Strafrecht [Swiss Review of Criminal Law]