

Chapter 1

Aim, Approach, and Methodology of the Study

1.1 Introduction

Public prosecutors have become of decisive importance due to the overloading of criminal justice systems. In fact, now prosecutors are responsible for making crucial decisions and in some cases—what was previously the responsibility of judges—even case-concluding decisions. The work of prosecutors is of significant importance in the way criminal proceedings are dealt with. This, in turn, can have an impact on the position of the individual in the criminal process and the fundamental principles of the states. By means of comparative analysis, lessons about the most effective practice for prosecutors can be identified.

Today, the comparative dialogue on the prosecutorial function is extremely topical on both sides of the Atlantic. Recently, a study that compares the powerful role of the American prosecutor with the role of European prosecutors has demonstrated that valuable lessons can be learned from a transnational examination of prosecutorial authority.¹ Another study funded by the Open Society Institute, Sofia, and Open Society Justice Initiative, New York has examined the prosecution services in nine countries² with a focus on prosecutorial accountability and independence with the purpose of enriching national debates in countries where the prosecution needs to be reformed.³ The most recent and comprehensive study examining prosecution services across Europe was first published in 2006.⁴ An extended follow-up version of this study was subsequently published in 2008 in a double issue of the *European Journal on Crime and Criminal Policy Research*.⁵ This

¹ Luna and Wade (2012).

² Bulgaria, Chile, England and Wales, France, Germany, Hungary, Italy, South Africa, United States.

³ Open Society Institute Sofia (2008).

⁴ Jehle and Wade (2006).

⁵ Wade and Jehle (2008).

research describes the results of an 11-nation study⁶ of how criminal justice systems have reacted to high crime rates. This study was the first to reveal the strong shift in power toward prosecutorial decision-making in the criminal process in Europe. Prior to this study, the few comparative studies on the public prosecution service generally fell short of explaining working practice, and statistical data were only rarely considered.⁷

In contrast to other European criminal justice systems, the Swiss legal system has only rarely been considered in comparative research. This may be due to the fact that, until 2011, every canton had its own code of criminal procedure and its own inquiry model, so that a detailed comparison of the Swiss criminal justice system with other legal systems was not always an easy task. One solution was to focus on a single canton.⁸ This situation now lies in the past. The first unified Swiss Criminal Procedure Code (CCrP)⁹ became legally effective on January 1, 2011 and resulted in the cantons' differing regulations being abolished. By examining the prosecutor's discretionary power between civil law and common law systems, the Swiss criminal justice system can provide new approaches to the discussion at the international level.

The present research aims to analyze the public prosecution service in the United States (U.S.) and in Switzerland from a comparative perspective and seeks to enrich the American understanding of Swiss prosecutors and vice versa. My focus will lie on the position, powers, and accountability of both prosecution services within their respective criminal justice systems. In particular, the organizational structure of the prosecution services and their relationship with the police are highlighted, the prosecutor's role within the criminal justice systems extensively discussed, and the way prosecutors are controlled respectively held accountable presented. This last point deals with external and internal supervision as well as civil, criminal and disciplinary liability of prosecutors. In this research, common features and differences between both systems will be highlighted. In Switzerland, until 2011, the inquiry models could basically be differentiated between those cantons following the system of an investigating judge (*Untersuchungsrichter*), inspired by the French legal system and those that have adopted the German system of the prosecutor (*Staatsanwalt*) with one or more district prosecutors. These prosecutors are in many respects comparable to U.S. district attorneys. The CCrP has opted for the German prosecutor model. Switzerland has largely been influenced by the French and the German legal systems, so that this research could not have been done without taking a look at the evolution and current situation of the prosecutorial role in those

⁶The first wave included England and Wales, France, Germany, the Netherlands, Poland, and Sweden. The second wave extended the research to Croatia, Hungary, Spain, Switzerland, and Turkey.

⁷See e.g. Arbour et al. (2000), Jescheck and Leibinger (1979), Marguery (2008), Tak (2005), and Vander Beken and Kilchling (2000).

⁸See e.g. Gilliéron and Killias (2008).

⁹Swiss Criminal Procedure Code of October 5, 2007 (Criminal Procedure Code, CCrP) (Status as of July, 1 2011); *Schweizerische Strafprozessordnung vom 5. Oktober 2007 (Strafprozessordnung, StPO) (Stand am 1. Juli 2011)*; SR 312.0.

countries. Thus, this study is completed by an overview of the prosecution institutions in France and Germany.

Legal comparison and empirical data reflecting actual working practice are the methods used in this research. In addition, comparative tables intend to provide a brief overview of key issues.

This research is divided into 11 chapters. This chapter describes the aim, approach and methodology of the study. Chapter 2 deals with the available methods to cope with overloaded criminal justice systems. In order to understand the legal environment in which the prosecutor operates, Chap. 3 is devoted to a description of the U.S. and Swiss criminal justice systems. Chapter 4 of this book outlines the origins of the public prosecutor in both countries. This comparative analysis shall identify and explain the differences of the public prosecutor's position in both criminal justice systems. The chapter ends with a brief description of the different inquiry models in place in Switzerland prior to the introduction of the CCrP and explains the current situation. The next two chapters constitute the core of this research. An entire chapter is devoted to public prosecutors in the United States and exhaustively describes their position, powers, and accountability. After a description of the structure and organization of the prosecution service at federal and state levels and an examination of the relationship between the prosecution service and the police, a special focus is put on the broad discretionary power of prosecutors. The prosecutor's charging decision being the heart of the prosecution function, the decision to charge, what charges to file, when to drop the charges, and whether or not to plea bargain, receive particular attention in this research.¹⁰ Because prosecutorial misconduct is a subject of scholarly concern, it deserves to be discussed. In line with this research, abuse of the charging function, misconduct in the plea bargaining process and in the grand jury are considered in greater detail. Reasons for misconduct, the frequency of prosecutorial misconduct, and available sanctions are outlined. This chapter ends by describing the mechanisms in place to control public prosecutors and the way they can be held accountable. The public prosecutor being an elected position in the United States, the effectiveness of the electoral process is particularly scrutinized. The next chapter is entirely devoted to the position, powers, and accountability of public prosecutors in Switzerland. The first section of this chapter describes the structure and organization of the prosecution service at federal and cantonal levels. The quality of cooperation between the police and prosecution being crucial for the success of criminal proceedings, the second section explains the relationship between the prosecution service and the police. Because the principle of legality was recently relaxed in favor of a moderate principle of opportunity, one section closely examines this new situation and evaluates the impact on the Swiss criminal justice system. A subsequent section is dedicated to prosecutorial decision-making, which includes the prosecutor's decision not to open proceedings, to open an investigation, to suspend an

¹⁰ In contrast to the other public prosecution systems analyzed in this research, prosecutorial decision-making is discussed in the section addressing prosecutorial discretion and not in a separate section.

investigation, to discontinue proceedings, and to charge. The Swiss criminal justice system has a number of alternative proceedings to relieve heavy caseloads. One section discusses the penal order proceedings and some critical points related to this summary proceeding. It also presents the abridged proceedings, a procedure largely inspired by American plea bargaining. The chapter ends with an analysis of how prosecutors are controlled and in how far they are held accountable. Chapters 7 and 8 offer an overview of the position, powers, and accountability of public prosecutors in Germany and France. Chapter 9 gives a summary overview of the main findings of the research. Chapter 10 addresses some specific problems identified in the U.S. criminal justice system and proposes solutions. Furthermore, it discusses the problems related to the increase of prosecutorial power and the lessons the Swiss legal system can learn from U.S. experience. The research ends with some concluding remarks.

1.2 Aim of the Study

Criminal justice systems are confronted with growing caseload numbers. As a consequence, it is not possible to give every defendant a trial. Methods must be found to reserve full trials to those cases that deserve to go that route and treat the vast majority of other cases in another way. Decriminalization and selective enforcement and prosecution are the main methods for coping with the caseload problem. Hence, in this context, the position of public prosecutors has changed dramatically. This study aims to examine and compare the national role and function of public prosecutors in the United States and Switzerland. The structure and organization of the public prosecution service, the relationship of the public prosecution service to the police, independence, and accountability of public prosecutors are important aspects that will be examined.

The selection of Switzerland and the United States for this research on public prosecutors is interesting for a multitude of reasons. Both countries share some common features, such as the federalist structure. Decentralization—inherent in a federal state—produces diversity. In the United States, state jurisdiction comprises 50 states. Within each state, each county or district has its own prosecutor's office with its own organization. Although, since January 1, 2011, Switzerland has a unified Criminal Code of Procedure (CCrP), each canton remains responsible for its organization. Democracy is an essential part of political life in both countries. In the United States, the prosecutor is an elected position at the state level and is therefore a highly political one. In Switzerland, the appointment methods vary between the cantons. Nomination of the chief prosecutor occurs either by executive power, parliament, or by another official authority.¹¹ Beside these similarities,

¹¹ See Sect. 6.1.2.2, paras 1–3 for nomination respectively appointment methods of the chief prosecutor.

Switzerland and the United States follow different approaches regarding the organization of the criminal procedure. The United States has an adversarial system, whereas Switzerland follows the inquisitorial system. The U.S. criminal procedure adheres to the opportunity principle, the Swiss criminal procedure basically works with the legality principle.

It can be assumed that, although theoretically the criminal justice systems of both countries seem to have an entirely opposite approach, in reality they are similar. This is mostly due to the fact that the overwhelming majority of cases are dealt with by way of alternative procedures. Today, Switzerland and the United States have an administrative criminal justice system.

The increasing workload of criminal justice systems will make prosecutorial discretion more and more necessary. Since the prosecutor's broad charging discretion has a long history in the U.S. criminal justice system, the Swiss criminal justice system can learn from the positive as well as from the negative aspects of the U.S. system. On the other hand, the U.S. criminal justice system can draw on positive experiences from the Swiss criminal justice system.

1.3 Approach

In order to understand how both criminal justice systems deal with an increasing caseload, this research on public prosecutors is done from a criminological and a legal point of view.¹²

From a criminological point of view, the prosecution service is considered an integral part of the criminal justice system. Under increasing pressure of having to deal with a growing number of criminal cases, prosecutors have become of crucial importance over the years. They have been given more and more power, mainly through the use of simplified proceedings. In some cases, they are even responsible for making case-concluding decisions, a function that was traditionally exclusively reserved for judges.

From a legal point of view, the shift of powers to public prosecutors raises questions with respect to the fundamental principles of the states. How are the accused person's legal rights guaranteed? What impact does such a shift have on procedural guarantees? What does this mean for the principles of legality and opportunity?

¹² In this research I will take the same approach as the one already used in the research carried out by Jehle and Wade (see Jehle 2006, p. 3).

1.4 Methodology of the Study

In contrast to the Swiss prosecution service, the U.S. prosecution service, depending on jurisdiction, is not only responsible for the prosecution of criminal cases, but also handles civil matters. Hence, prosecution services in the United States are generally divided into criminal and civil divisions. However, in this study, I will only consider the criminal division.

In the Swiss as well as in the U.S. legal system, the vast majority of criminal prosecutions are handled in the cantonal respectively the state court systems. Therefore, in order to understand the structure and organization of the public prosecution services in both criminal justice systems, my focus will lie on cantonal and state level prosecutions. For illustration purpose, the state of Minnesota (MN) in the United States and the cantons of Basel-City (BS), Zug (ZG), and Zurich (ZH) in Switzerland will be more closely presented. In these cantons, the inquiry model chosen by the CCRP was already in place, so that the statistical data of these cantons will be used in this research. For the sake of completeness, prosecutions at the federal level will be described succinctly.

In this comparative research on public prosecutors, the current state of literature in both countries is reviewed. In addition, actual statistical data reflecting the prosecutor's work and practice are included. This methodology allows identification of similarities and differences in the criminal justice systems being analyzed. It also helps to identify whether one legal tradition is moving toward another and to what extent.

The scientific literature consulted on public prosecution service in Switzerland includes in particular German-language books and papers. French-language literature is included as far as the opinions differ from those expressed in the German literature. The reader will not find many references to English language literature about the Swiss criminal justice system and the prosecution service since so far very little has been written in English about these topics.

Statistical data used in this research report on the number of cases received by prosecution services, the number of prosecutorial dispositions, and the number of proceedings that are dealt with by way of alternative procedures. In this way, common and divergent trends can be identified. However, the comparison of statistical data between both countries is subject to some limitations. In both nations, statistical data on the prosecutors' activities from the states respectively cantons are not annually published in a nationwide report, so that statistical information presented in this research may not always be representative of the whole country but may be the expression of local practices. This is the case in the United States, for instance, concerning the number of cases rejected at screening, which varies among the states. However, keeping this in mind, the presented data can still allow the detection of trends. While prosecution services in Switzerland always deal with felonies and misdemeanors, in the United States it may happen that, in some municipalities or cities, misdemeanors and petty offenses are not

prosecuted by district prosecutors but by city attorneys.¹³ This is the case in the state of Minnesota, for instance, the state more closely examined in this research. In this study, the data presented for the United States refer to felonies, those from Switzerland to felonies and misdemeanors. The decision to focus more on felonies in the United States than on low-level offenses is connected to the fact that academic literature tends to overwhelmingly focus on serious crimes and thus the data presented in this research presents the advantage of being compared to prior empirical research. Another reason for focusing on serious crimes has to do with the fact that obtaining detailed statistical data from the prosecutors' activities turned out to be more difficult than originally expected. The challenge was finding prosecution offices willing to provide information not necessarily accessible to the public. Especially Robert M.A. Johnson, former Anoka County Attorney was very open-minded and gave me access to all information I needed for the completion of this study. In contrast to the Swiss legal system, where alternatives are limited to certain minor offenses, plea bargaining in the United States is applied equally to felonies and misdemeanors. Thus, the exclusion of misdemeanors does not lessen the quality of the study.

In order to complete the picture of the position and power of European prosecutors and to show that strong powers of prosecutors in adjudicating criminal cases is not a uniquely U.S. problem anymore, this comparative research concludes with an overview of the prosecution institutions in Germany and France. In contrast to the United States and Switzerland, Germany and France have nationwide statistical data about the prosecutors' activities, which are accessible to the public and are published on an annual basis. This is an undeniable advantage in comparative research. The academic literature consulted includes English, German, and French-language books and papers.

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¹³ For the classification of criminal actions, see Appendix I.

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Public Prosecutors in the United States and Europe
A Comparative Analysis with Special Focus on
Switzerland, France, and Germany

Gilliéron, G.

2014, XXIV, 362 p. 5 illus., 1 illus. in color.,

ISBN: 978-3-319-04504-7