

Comparative Criminal Procedure

**Carolina Academic Press
Comparative Law Series**

Michael Louis Corrado
Series Editor

*Comparative Constitutional Review
Cases and Materials*
Michael Louis Corrado

Comparative Law: An Introduction
Vivian Grosswald Curran

Comparative Consumer Bankruptcy
Jason Kilborn

Comparative Law of Contracts
Alain Levasseur

Comparative Criminal Procedure, Second Edition
Stephen C. Thaman

*Comparative Human Rights Law, Vol. 1:
Expression, Association, Religion*
Arthur Mark Weisburd

*Comparative Human Rights Law, Vol. 2:
Detention, Prosecution, Capital Punishment*
Arthur Mark Weisburd

Comparative Criminal Procedure

A Casebook Approach

Second Edition

Stephen C. Thaman

SAINT LOUIS UNIVERSITY
SCHOOL OF LAW

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2002, 2008
Stephen C. Thaman
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Thaman, Stephen, 1946-

Comparative criminal procedure : a casebook approach / by Stephen C. Thaman. -- 2nd ed.

p. cm. -- (Comparative law series)

Includes bibliographical references and index.

ISBN-13: 978-1-59460-500-0 (alk. paper)

ISBN-10: 1-59460-500-9 (alk. paper)

1. Criminal procedure--Europe--Cases. 2. Criminal procedure--European Union countries--Cases. I. Title. II. Series.

KJC9405.T52 2008

345'.05--dc22

2007044851

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

To the memory of two beloved fatherly friends on whose premises I wrote parts of this book:

Robert Jacques de Trey
(London, April 26, 1912–
Bodega Bay, California, August 7, 2000)

German Mikhaylovich Makarov
(Poselok Togul, Altay, December 31, 1927–
Magnitogorsk, Russia, May 31, 2000)

Contents

Chapter One Criminal Law and Its Procedures	3
I. Introduction	3
A. The Flagrant Crime	4
Assises de la cour des Bourgeois (Ch. CCLIX)	4
§ 16 Constitutio Criminalis Carolina (German Empire, 1532)	5
Questions	6
B. The Circumstantial Evidence or “Who-Done-It?” Case	7
Regulations Regarding Exculpation of William I (England, Late 11th Century)	7
Law II of Edmund (England, 10th Century)	9
§§ 23, 25–27 Constitutio Criminalis Carolina (German Empire, 1532)	10
Questions	11
C. The Secret Victimless Crime	12
Livre de Jostice et des Plets I, 3, § 7 (France, 12th Century)	12
Entick v. Carrington (English Court of Common Pleas, 1765)	14
Questions	15
D. A Brief History of European Criminal Procedure	16
E. Outline of the Book	20
Selected Readings (History & Theory)	21
Selected Readings (Comparative, Country-Related)	21
Chapter Two The Criminal Investigation: Procedures and Participants	23
I. The Continuing Role of the Victim in Prosecuting Criminal Cases	23
A. The Institution of Private Prosecution	23
Decision of December 8, 1906 (Placet) (French Supreme Court)	23
§ 100 LECr (Spain)	25
§ 105 LECr (Spain)	25

Questions	27
Selected Readings	27
B. The Institution of Popular Prosecution	28
Art. 125 Const. (Spain)	28
§101 LECr (Spain)	28
§270(1) LECr (Spain)	28
Decision No. 241 of December 21, 1992 (Spanish Constitutional Court)	28
Questions	30
II. The Role of the Police Before	
Initiation of Formal Criminal Proceedings: The Police Inquest	30
§282 (para. 1) LECr (Spain)	30
§286 LECr (Spain)	31
III. The Formal Criminal Investigation	32
A. The Search for Truth and the Compilation of the Investigative Dossier	32
§80 CPP (France)	32
§§81 (paras. 1–2,4) CPP (France)	32
Questions	36
Selected Readings	36
B. Confrontation and Adversarial Rights during the Preliminary Investigation	36
1. The Right to Be Present with Counsel	36
§118 LECr (Spain)	36
2. The Right to Make Evidentiary Motions	37
§82-1(paras. 1–2) CPP (France)	37
3. Proceedings to Preserve or “Anticipate” Evidence	38
§392(1) CPP (Italy)	38
§394 CPP (Italy)	39
§401 (1–3,5) CPP (Italy)	39
§403(1) CPP (Italy)	39
4. Identification Procedures	40
5. The Adversarialization of the Preliminary Investigation	40
§25 LOTJ (Spain)	41
§27(1) LOTJ (Spain)	41
Questions	42
Relevant U.S. Case Law	42
IV. Avoiding the Preliminary Investigation	43
§449 (1–5) CPP (Italy)	43
Questions	44

Chapter Three Search and Seizure: Search for Truth and Protection of Privacy	45
I. Police Powers of Investigation, Search and Seizure during the Police Inquest	45
A. Temporary Investigative Detentions	45
Decision of July 12, 1995 (Spanish Supreme Court)	45
§§ 1.4, 2.2, 2.3 PACE, Code of Practice A (England)	46
Questions	47
Relevant U.S. Case Law	47
B. Police Power to Arrest in Flagrant Cases	48
§ 380(1) CPP (Italy)	48
§ 381 (1,4) CPP (Italy)	48
Questions	49
Relevant U.S. Case Law	49
C. Definition of a Flagrant Crime	49
Decision of March 29, 1990 (Spanish Supreme Court)	49
D. Police Powers to Search in Situations of Flagrancy and Incident to Arrest	51
§ 352(1) CPP (Italy)	51
Decision No. 303 of October 25, 1993 (Spanish Constitutional Court)	52
Questions	53
Relevant U.S. Case Law	53
E. Consent Searches	54
§ 5 PACE Code of Practice B (England)	54
Decision of July 8, 1994 (Spanish Supreme Court)	55
Questions	55
Relevant U.S. Case Law	56
II. The Requirement of Judicial Authorization for Invasions of Privacy	56
A. The Special Protection of Dwellings	56
1. The Requirement of a Warrant	56
Art. 13(1,2) Const. (Germany)	56
§ 98 StPO (Germany)	56
2. The Requirement of Probable Cause	57
Decision of June 28, 1994 (Spanish Supreme Court)	57
Questions	59
Relevant U.S. Case Law	59
3. Procedural Safeguards Required during the Search	59
Decision of October 30, 1992 (Spanish Supreme Court)	59

Decision of November 14, 1992 (Spanish Supreme Court)	60
Questions	61
Selected Readings	61
B. The Protection of Confidential Communications	61
1. Intercepting Private Conversations	61
Decision No. 49 of March 26, 1996 (Spanish Constitutional Court)	61
§ 266 CPP (Italy)	64
§ 267(1–3) CPP (Italy)	64
§ 268 (4,6) CPP (Italy)	65
Decision of June 25, 1993 (Spanish Supreme Court)	66
Questions	68
Relevant U.S. Case Law	69
Selected Readings	69
2. Right to Privacy in the Identity of One’s Conversation Partners	69
Decision No. 81 of March 11, 1993 (Italian Constitutional Court)	69
Questions	71
Relevant U.S. Case Law	71
3. Informant-Citizen Taping and Interception of Communications	72
Decision of June 14, 1960 (German Supreme Court)	72
Decision of July 5, 1988 (Italian Supreme Court)	73
Decision of October 8, 1993 (German Supreme Court)	76
Questions	77
Relevant U.S. Case Law	78
C. The Limits on Police Undercover Activity in the Proactive Investigation of Crime	78
Teixeira de Castro v. Portugal (European Court of Human Rights) (June 9, 1998)	78
Questions	80
Relevant U.S. Case Law	80
Selected Readings	80
D. Seizure and Reading of Private Writings	81
Entick v. Carrington (English Court of Common Pleas 1765)	81

Decision of February 21, 1964 (German Supreme Court)	82
Questions	83
Relevant U.S. Case Law	83
Chapter Four The Defendant as a Source of Evidence: The Privilege against Self-Incrimination	85
I. Police Interrogations Before the Initiation of Criminal Proceedings	85
A. Privilege against Self-Incrimination and Right to Counsel during Police Interrogation	85
1. The Requirement of Admonitions (“Miranda Rights”)	85
Decision of October 29, 1992 (German Supreme Court)	85
Decision of May 21, 1996 (German Supreme Court)	87
§ 64(3)(a,b)(3-bis) CPP (Italy)	88
§ 350 CPP (Italy)	88
§§ 10.1, 10.5 Code of Practice C. PACE (England)	90
Questions	90
Relevant U.S. Case Law	91
2. When Must Police Give a Suspect the Miranda-Type Admonitions?	91
Decision of February 27, 1992 (German Supreme Court)	91
Decision of May 31, 1990 (German Supreme Court)	92
§ 63 CPP (Italy)	93
Questions	94
Relevant U.S. Case Law	94
3. The Problem of Undercover Interrogation	94
Regina v. Bryce (English Court of Appeals) (1992)	94
II. The Prevention of Involuntary Confessions	96
§ 136a StPO (Germany)	96
Decision of February 16, 1954 (German Supreme Court)	97
Decision of April 28, 1987 (German Supreme Court)	98
Decision of November 25, 1997 (Court of Appeal of Frankfurt/Main, Germany)	99
Regina v. Fulling (English Court of Appeal) (1987)	101
Questions	102
Relevant U.S. Case Law	102
III. The Formal Interrogation of the Accused during the Preliminary Investigation	103
§ 65 CPP (Italy)	103

Questions	104
Selected Readings	104
Chapter Five Determining the Admissibility of Evidence at Trial	105
I. Exclusion of Illegally Gathered Evidence	105
A. From Nullities to Non-Usability	105
§ 170 CPP (France)	105
§ 171 CPP (France)	105
§ 174 (para. 3) CPP (France)	106
Decision of July 9, 1993 (Spanish Supreme Court)	106
§ 191 CPP (Italy)	109
B. The Proportionality Test of Exclusion	110
Decision of February 27, 1992 (German Supreme Court)	110
Decision of February 21, 1964 (German Supreme Court)	112
C. Case-by-Case Fairness Test: The English Approach	114
Regina v. Samuel (English Court of Appeal) (1987)	114
D. Presumption of Innocence and Equality of Arms:	
The Spanish Approach	115
Decision No. 49 of March 26, 1996	
(Spanish Constitutional Court)	115
Art. 24(2) Canadian Charter of Rights and Freedoms	117
Questions	118
Relevant U.S. Case Law	118
E. Fruits of the Poisonous Tree	118
Decision of June 5, 1995 (Spanish Supreme Court)	118
Decision of February 22, 1978 (German Supreme Court)	119
Regina v. McGovern (English Court of Appeal) (1990)	121
Decision of March 27, 1996 (Italian Supreme Court)	122
Questions	124
Relevant U.S. Case Law	124
II. Admissibility of Evidence and the Right to Confrontation	125
A. The Transformation of the Inquisitorial	
“Written” Trial	125
Decision of July 18, 1884 (French Supreme Court)	125
Kostovski v. The Netherlands (European Court of	
Human Rights) (November 20, 1989)	126
Delta v. France (European Court of Human Rights)	
(December 19, 1990)	129
B. Admissibility of Statements of Unavailable Witnesses	131

Decision of March 5, 1993 (Spanish Supreme Court)	131
Regina v. Cole (English Court of Appeal) (1989)	132
Questions	135
Relevant U.S. Case Law	135
C. Admissibility of Prior Statements to Impeach or Contradict a Testifying Witness	135
Decision No. 52 of February 23, 1995 (Spanish Constitutional Court)	135
Decision of November 3, 1982 (German Supreme Court)	136
Questions	137
D. Anonymous Witness Testimony	137
Kostovski v. The Netherlands (European Court of Human Rights) (November 20, 1989)	137
Doorson v. The Netherlands European Court of Human Rights (March 26, 1996)	140
Questions	142
Relevant U.S. Case Law	142
E. The Admissibility of Hearsay as Corroborative Evidence	143
Decision of March 31, 1989 (German Supreme Court)	143
Chapter Six Procedural Economy:	
Avoiding the Trial with All Its Guarantees	147
I. Different Procedures for Different Substantive Crimes:	
Avoiding Trials with Lay Participation	147
Regina v. Canterbury et al. (English Divisional Court) (1982)	148
Questions	150
II. Procedural Encouragement of Confessions to Avoid or Simplify the Trial	151
Decision of August 28, 1997 (German Supreme Court)	151
Decision of June 10, 1998 (German Supreme Court)	156
III. Accepting the Prosecution's Pleadings: A Way around the Guilty Plea for Lesser Crimes	158
Decision No. 313 of July 3, 1990 (Italian Constitutional Court)	159
Decision of February 19, 1990 (Italian Supreme Court)	162
§ 655 LECr (Spain)	164
IV. Submitting the Case on the Investigative Dossier:	
Return of the Written Inquisitorial Trial?	165
Decision of November 21, 1991 (Italian Supreme Court)	166
V. Significance of Alternative Procedures	168

Questions	168
Suggested Readings	169
Chapter Seven The Trial	171
I. Presumption of Innocence and Burden of Proof	171
A. Presumption of Innocence and Right to Remain Silent	171
1. The Use of a Defendant’s Silence as Evidence of Guilt	171
Murray v. United Kingdom (European Court of Human Rights) (February 8, 1996)	171
Decision of October 26, 1965 (German Supreme Court)	177
Questions	178
Relevant U.S. Case Law	179
B. Role of the Trial Judge: Investigator of the Truth, Impartial Evaluator of the Evidence, or Impartial Guarantor of a Fair Adversarial Trial?	179
1. The Judge’s Power to Question Witnesses and Introduce Evidence	179
Decision of October 10, 1991 (Italian Supreme Court)	179
Decision of March 26, 1993 (Italian Supreme Court)	180
Regina v. Foxford (Northern Ireland Court of Appeals) (1974)	182
Regina v. Roncoli (English Court of Appeal) (1997)	183
§683 LECr (Spain)	184
§310 CPP (France)	184
2. The Judge as Investigator and Evaluator of the Evidence	185
Decision No. 145 of July 12, 1988 (Spanish Constitutional Court)	185
Decision No. 455 of December 30, 1994 (Italian Constitutional Court)	186
Decision of April 20, 1999 (Russian Constitutional Court)	187
Questions	190
Relevant U.S. Case Law	191
II. The Evaluation of the Evidence and Rendering of Judgment	191
A. Who Evaluates the Evidence?	191
Regina v. Consett Justices, Ex Parte Postal Bingo Ltd. (Queen’s Bench, England) (1966)	191
B. Evaluating the Evidence in a Flagrant Case: Circumstantial Evidence of Mental State	193

Decision of February 9, 1957 (German Supreme Court)	193
Case of Otegi (Guipuzcoa Regional Court, Spain) (Verdict of March 6, 1997)	195
Otegi Case: Decision of March 11, 1998 (Spanish Supreme Court)	199
§ 339 (1–5) UPK (Russia)	201
Case of Kraskina (Ivanovo Regional Court, Russia) (Verdict of March 10, 1995)	203
Decision of June 7, 1995 (Kraskina Case) (Russian Supreme Court)	204
§ 353 CPP (France)	205
§ 63(1)(d) LOTJ (Spain)	206
C. Evaluating the Non-Flagrant Case Based on Circumstantial Evidence	206
Regina v. Turnbull (English Court of Appeal) (1976)	206
Case of Monika Weimar. Decision of November 6, 1998 (German Supreme Court)	209
Decision of November 17, 1983 (German Supreme Court)	214
D. Was There a Crime Committed? The Evaluation of the Credibility of Witnesses	216
Decision of January 1, 1988 (German Supreme Court)	217
Decision of December 17, 1997 (German Supreme Court)	219
E. Concluding Remarks	220
Questions	220
Relevant U.S. Case Law	221
Selected Readings	222
Case Register	223
Statutes and Other Texts	229
Appendix	233
Glossary	265
Index	275