



Swiss Criminal Law

Swiss Criminal Procedure

Prof. Dr. iur. Marc Thommen



Introduction to Swiss Criminal Law

1. General Information
2. Substantive Criminal Law
3. Criminal Procedure



Criminal Law / Criminal Procedure

- Law studies in Basel/Zurich, Switzerland (1995-2000)
- Doctorate and habilitation in Basel and Lucerne (2004 and 2013)
- LL.M University of Cambridge, Trinity Hall College (2005)
- Chair for Criminal Law and Criminal Procedure



Prof. Dr. iur. Marc Thommen



Civil Procedure

- Mag.iur./Dr. iur. University of Vienna/Austria
- Researcher Hans-Kelsen Institute, Vienna
- Habilitation University of Zürich
- Chair for Swiss and International Civil Procedure and Comparative Private Law



Prof. Dr. iur. Tanja Domej



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Translated Codes

Federal Constitution of the Swiss Confederation

<https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>

Swiss Criminal Code

<https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>

Swiss Criminal Procedure Code

<https://www.admin.ch/opc/en/classified-compilation/20052319/index.html>

See also www.rwi.uzh.ch/thommen for further information.

Exam

Date: 27 Oktober 2017

Time: 13.00-14.00h

Appear: 12.30h

Room: HAH-E11

Mode: Multiple Choice

Materials:

- Open Book
- No electronic devices allowed





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1. General Information
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Substantive Criminal Law

History

Modern Era (15th/16th century)

Reception of Roman Law
through:

- Constitutio Criminalis
Bambergensis (1507),
Johann von Schwarzenburg
- Constitutio Criminalis
Carolina (CCC/1532) as
subsidiary legal source



Anna Göldi (1734-1782)

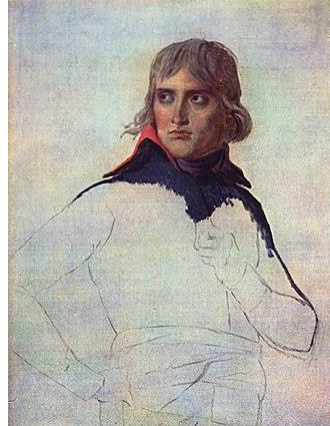
- 13 June 1782: Anna Göldi(n) last person executed/beheaded for witchcraft in Europe.
- Employed as a maid by Johann Jakob Tschudi, a rich physician and politician in Glarus.
- Suspected to have put needles in the milk of Tschudi's daughter.



Fictional portrait by Patrick Lo Giudice

Code Pénal de la République Helvétique 1799

- Helvetic Republic (1798):
New Criminal Code, based on
French Code Pénal (1799),
imposed by Napoléon



General Napoléon Bonaparte

Mediation (1803-1814)

- Act of Mediation (1803)
- Restoration (1814)
- Back to CCC



Swiss Confederation 1848

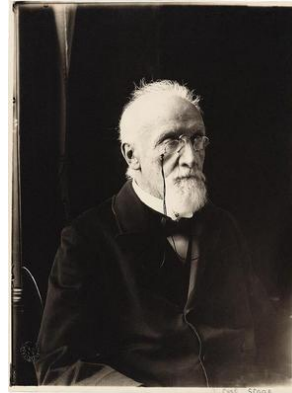
- 1848 First Swiss Constitution
- 19th Century: Cantonal Criminal Codes





Carl Stooss (1849-1934)

- Studies at University of Berne (CH), Leipzig (Ger) and Heidelberg (Ger)
- «Father» of the Swiss Criminal Code (1937)



Carl Stooss (1849-1934)

Carl Stooss (1849-1934)

- 1888: Mandate by the Federal Council of Switzerland to draft a Criminal Code
- 1890-93: Comparison of all 25 Cantonal Criminal Codes
- 1894: First draft CC





Carl Stooss (1849-1934)

- 1898: Article 64^{bis} Const.: «The Confederation is responsible for legislation in the field of criminal law»
- 1918: Federal Council dispatch an official draft of CC to Parliament





Carl Stooss (1849-1934)

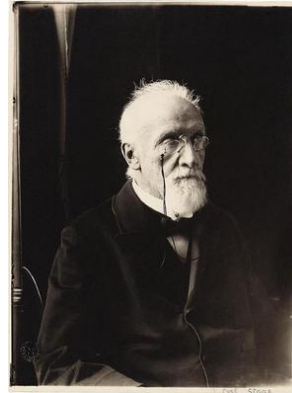
- 21 December 1937:
Parliament accepts
Swiss Criminal Code
- 1 January 1942: Enactment
- 54 years of legislation!





Carl Stooss (1849-1934)

- His dual system of sanctions (Sentences and Measures) had great influence on European Criminal Law



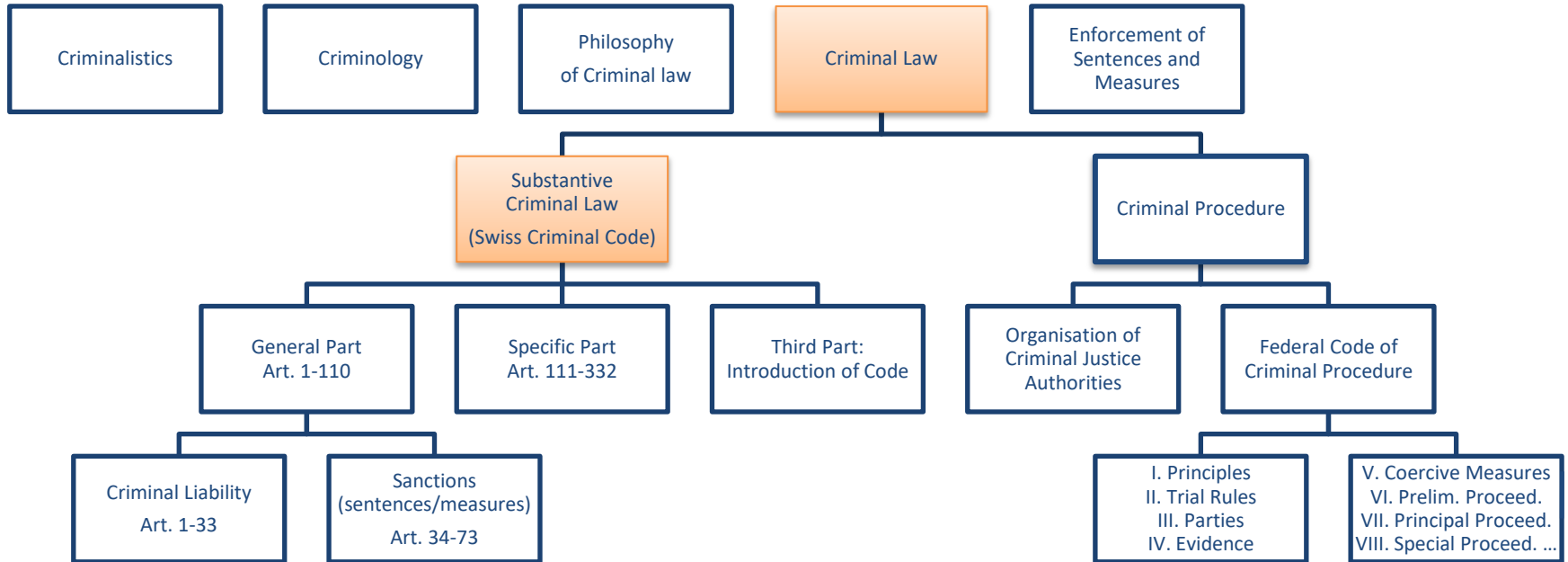
Carl Stooss (1849-1934)



Substantive Criminal Law

Swiss Criminal Code of 21 December 1937

Swiss Criminal Law



Art. 123 I – Swiss Constitution

“The Confederation is responsible for legislation in the field of criminal law and the law of criminal procedure”.



Substantive Criminal Law

- Homicide, Murder, Manslaughter
- Assault
- Offences against property
- Offences against liberty
- Sexual offences



Substantive Criminal Law

Secondary Criminal Law

- Road Traffic Act
- Narcotics Act
- Foreign Nationals Act
- Therapeutic Products Act
- Customs Act
- VAT Act
- etc.



Substantive Criminal Law

§ 13 CC/Lucerne

„Unwarranted Shooting:
Any person who – without
authorization – fires a gun
or detonates explosive
charges at a wedding is
liable to a fine“

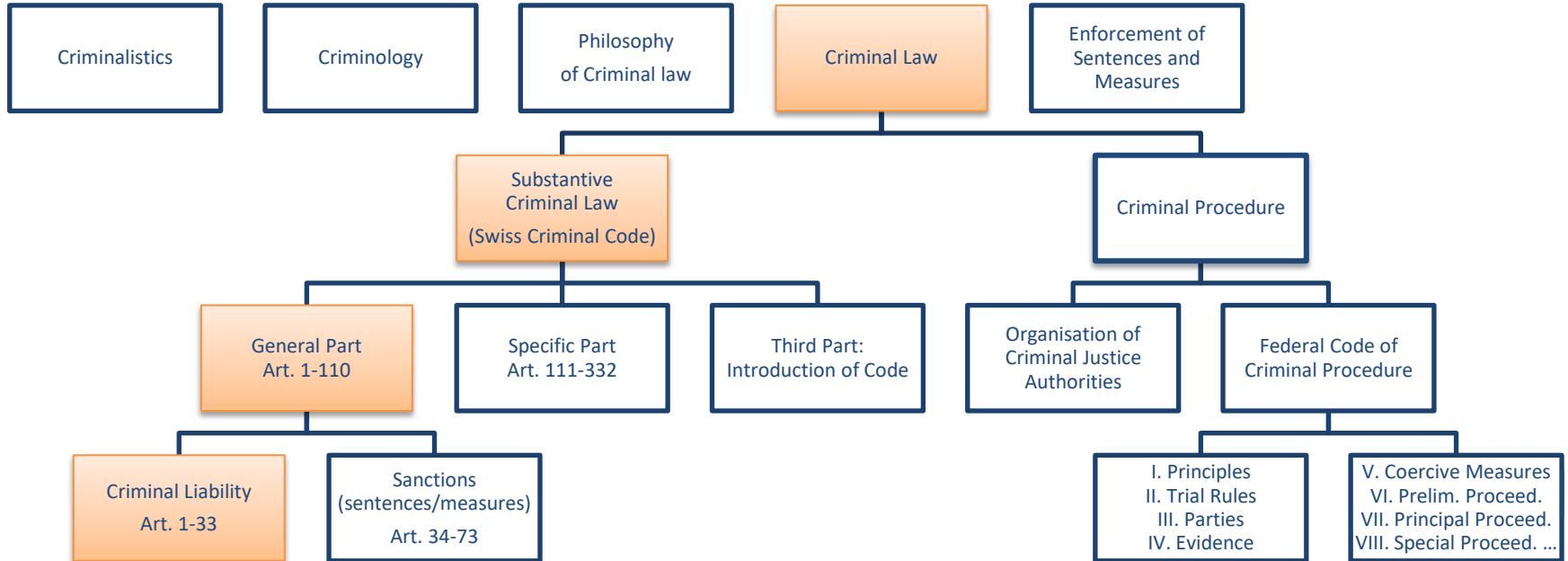


Art. 3 Juvenile Criminal Law Act of 20 June 2003

This code applies for
persons between 10 and
18 years...



Swiss Criminal Law



General Part I – Art. 1-33 CC

General Provisions on Criminal Liability that apply to all offences

- Territorial Application
- Crime Categories
- Intention/Negligence
- Excuses/Defences
- Law on Attempts
- Participation/Complicity

Table of contents

Book One: General Provisions

Part One: Felonies and Misdemeanours

Title One: Scope of Application

| | |
|--|--------|
| 1. No penalty without a law | Art. 1 |
| 2. Commencement of applicability of the Code | Art. 2 |
| 3. Territorial scope of application | |
| Felonies or misdemeanours in Switzerland | Art. 3 |
| Felonies or misdemeanours against the state committed abroad | Art. 4 |
| Offences against minors abroad | Art. 5 |
| Offences committed abroad prosecuted in terms of an international obligation | Art. 6 |
| Other offences committed abroad | Art. 7 |
| Place of commission | Art. 8 |
| 4. Personal scope of application | Art. 9 |

Title Two: Criminal Liability

| | |
|--|---------|
| 1. Felonies and misdemeanours | |
| Definition | Art. 10 |
| Commission by omission | Art. 11 |
| 2. Intention and negligence | |
| Definitions | Art. 12 |
| Error of fact | Art. 13 |
| 3. Lawful acts and guilt | |
| Act permitted by law | Art. 14 |
| Legitimate self-defence | Art. 15 |
| Mitigatory self-defence | Art. 16 |
| Legitimate act in a situation of necessity | Art. 17 |
| Mitigatory act in a situation of necessity | Art. 18 |
| Absence of legal responsibility due to a mental disorder and diminished responsibility | Art. 19 |
| Doubt as to legal responsibility | Art. 20 |
| Error as to unlawfulness | Art. 21 |
| 4. Attempts | |
| Criminal liability for attempts | Art. 22 |
| Withdrawal and active repentance | Art. 23 |

Crime categories

Severity ↑

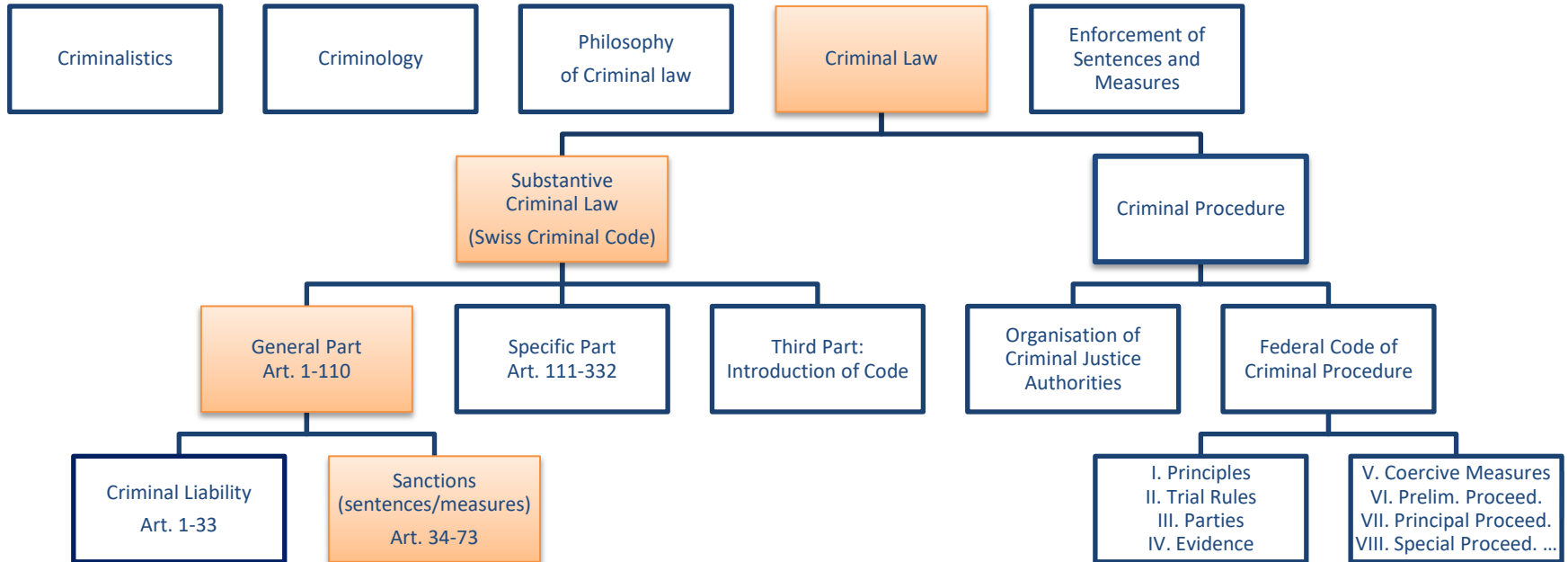
| | Sanction | example |
|----------------|--|------------------------------------|
| Felonies | Custodial sentence of more than 3 years (Art. 10 Abs. 2) | Intentional homicide (Art. 111) |
| Misdemeanours | Custodial sentence not exceeding 3 years or monetary penalty (Art. 10 Abs. 3) | Assault (Art. 123) |
| Contraventions | Fine (Art. 103) | Minor assault (Art. 126) |

Art. 13 SCC – Error of fact

1 If the person concerned acts under an erroneous belief as to the circumstances, the court shall judge the act according to the circumstances as the offender believed them to be.

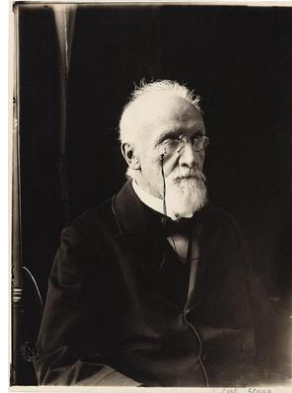


Swiss Criminal Law



Carl Stooss (1849-1934)

Dual system of sanctions
(Sentences and Measures)



Carl Stooss (1849-1934)



Law of criminal sanctions

Sentences

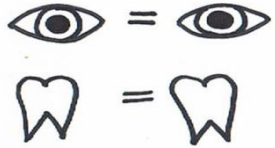
- Monetary penalties
- (Community service; until 2017)
- Custodial sentences
- Suspended sentences
- Determination of the sentences

Measures

- Indefinite incarceration
- Therapeutic Measures
- Employment ban
- Driving ban
- Forfeiture etc.



Dual System of Sanctions



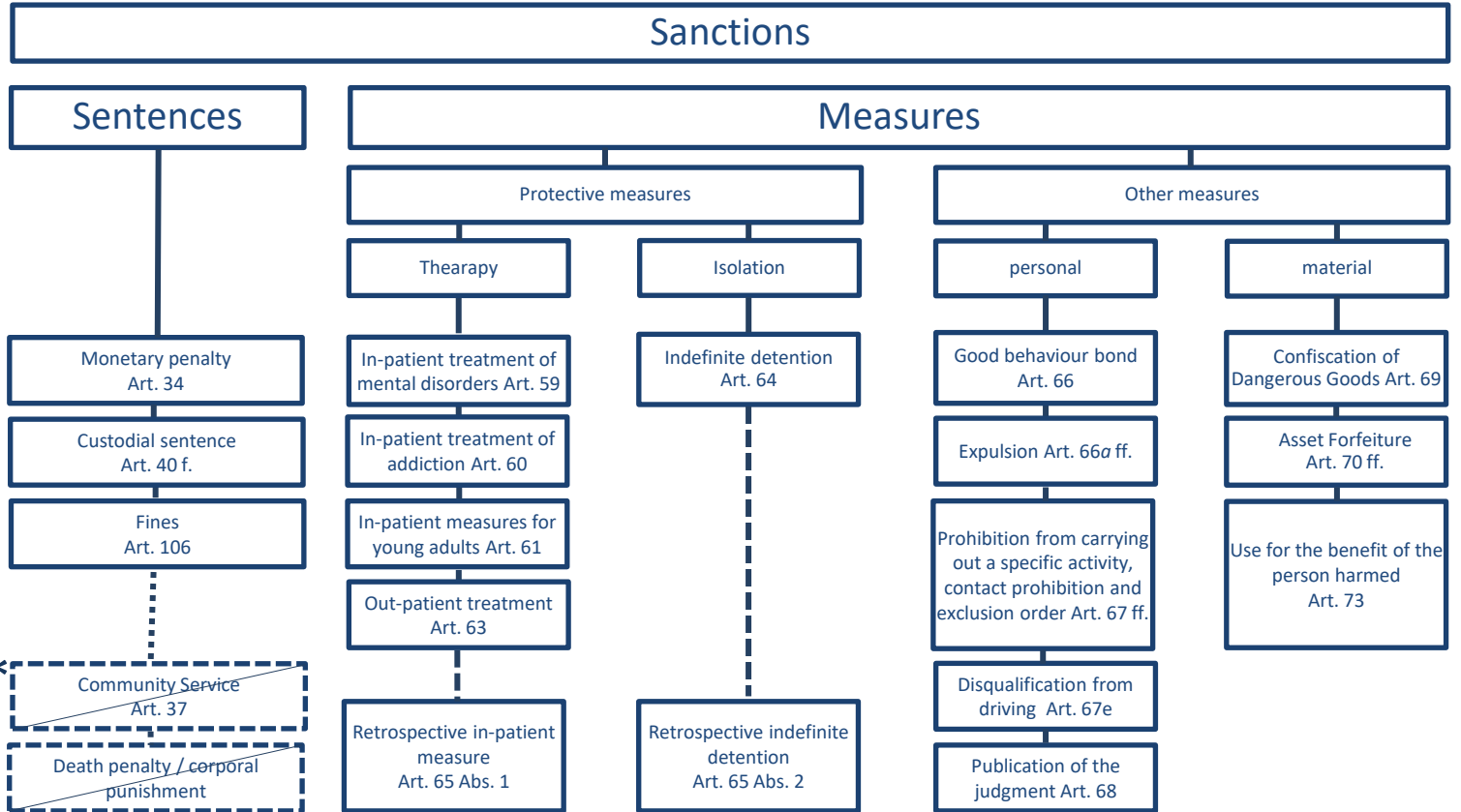
Retribution

Prevention

Sentences

Measures





* Community service is no longer a separate type of sentence. However all sentences up to 6 months can be converted into community service (Art. 79a).

Art. 47 – Principles of Sentencing

The court determines the sentence according to the culpability of the offender...

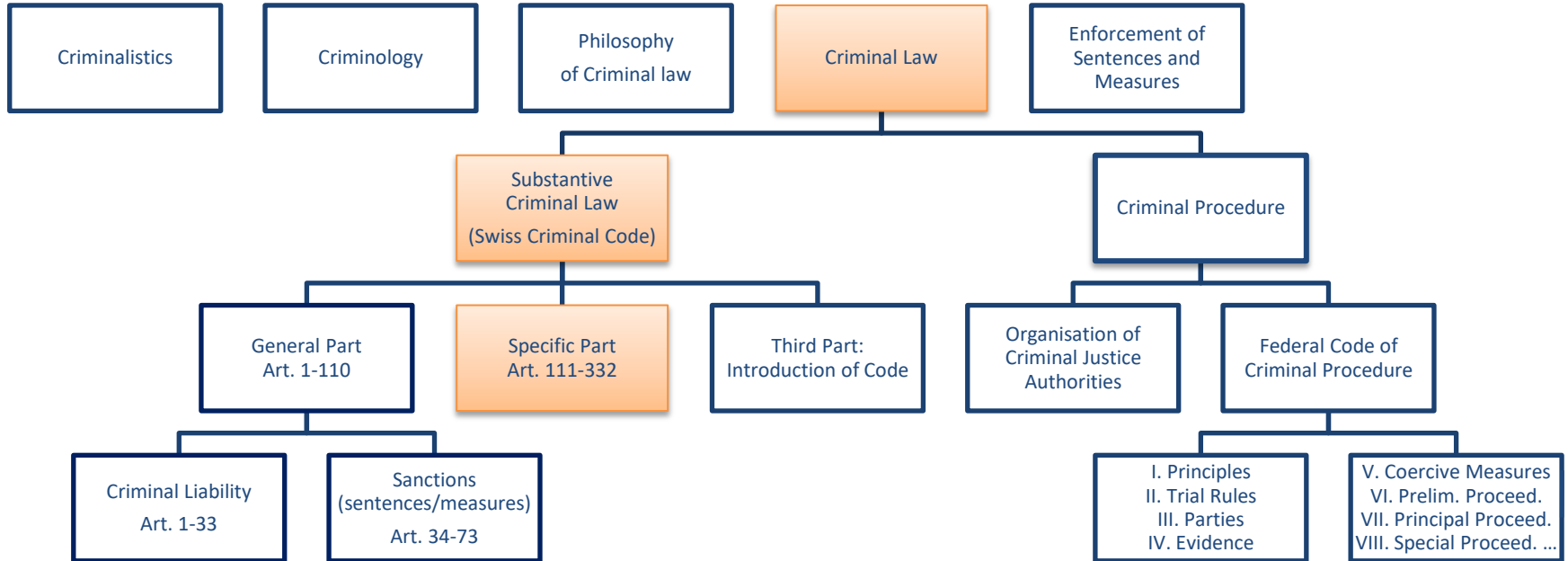


Art. 56 – Therapeutic Measures and Internment

A measure is ordered if a penalty alone is not sufficient to counter the risk of further offending by the offender...



Swiss Criminal Law



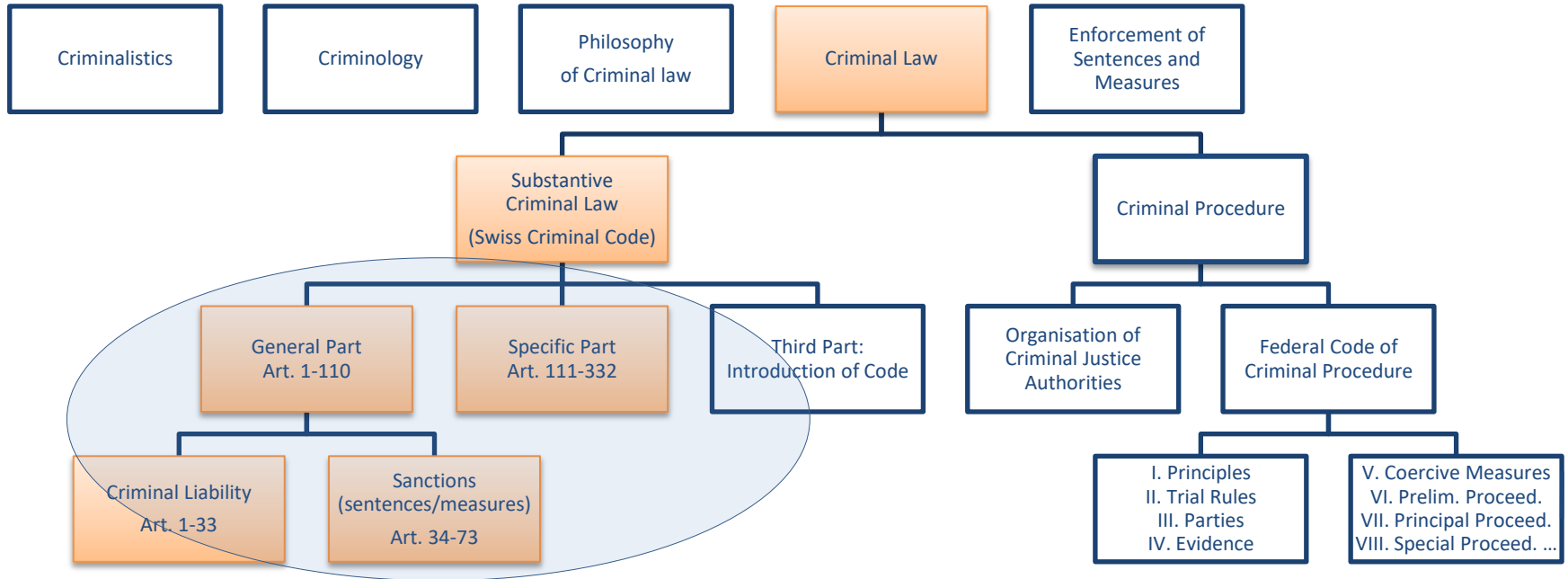
Specific Criminal Acts

Life and Limb (Art. 111 ff.)
Property (Art. 137 ff.)
Personal Honour (Art. 173 ff.)
Liberty (Art. 180 ff.)
Sexual Integrity (Art. 187 ff.)
Family (Art. 213 ff.)
Public (Art. 221 ff.)
Counterfeiting of Money (Art. 240 ff.)
Forgery (Art. 251 ff.)
Public Order (Art. 258 ff.)
Genocide, Crimes against Humanity, War Crimes (Art. 264 ff.)
State and National Security (Art. 265 ff.)
Will of the People (Art. 279 ff.)
Official Powers (Art. 285 ff.)
Foreign Relations (Art. 296 ff.)
Administration of Justice (Art. 303 ff.)
Offences against Official or Professional Duty (Art. 312 ff.)
Bribery (Art. 322ter ff.)

Title One: Offences against Life and Limb

| | |
|--|-----------------------|
| 1. Homicide | |
| Intentional homicide | Art. 111 |
| Murder | Art. 112 |
| Manslaughter | Art. 113 |
| Homicide at the request of the victim | Art. 114 |
| Inciting and assisting suicide | Art. 115 |
| Infanticide | Art. 116 |
| Homicide through negligence | Art. 117 |
| 2. Abortion | |
| Illegal abortion | Art. 118 |
| Legal abortion | Art. 119 |
| Contraventions by physicians | Art. 120 |
| <i>Repealed</i> | Art. 121 |
| 3. Assault | |
| Serious assault | Art. 122 |
| Common assault | Art. 123 |
| Female genital mutilation | Art. 124 |
| Assault through negligence | Art. 125 |
| Acts of aggression | Art. 126 |
| 4. Endangering the life or health of another | |
| Abandonment | Art. 127 |
| Failure to offer aid in an emergency | Art. 128 |
| False alarm | Art. 128 ^b |
| Endangering life | Art. 129 |
| <i>Repealed</i> | Art. 130–132 |
| Brawling | Art. 133 |
| Attack | Art. 134 |
| Representations of acts of violence | Art. 135 |
| Administering substances capable of causing injury to children | Art. 136 |

Swiss Criminal Law



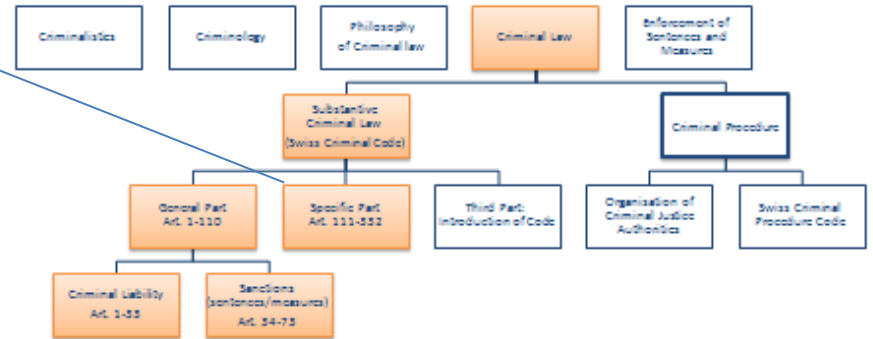
How do the different parts work together?

Article 111 SCC

„Any person who kills a person intentionally...

is liable to a custodial sentence of not less than five years”

Swiss Criminal Law



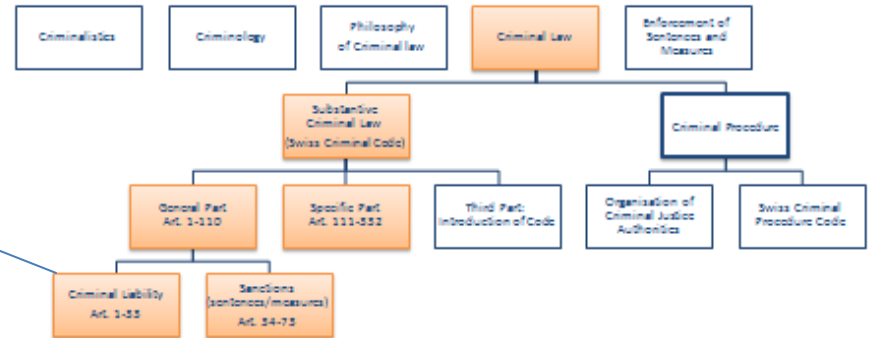
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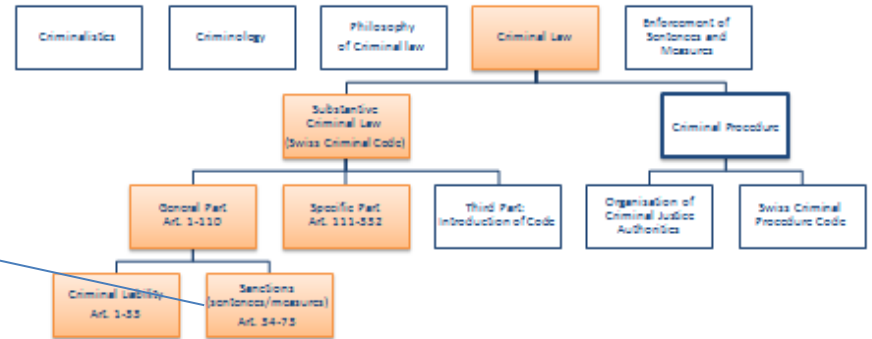
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Criminal Procedure

History

Criminal Procedure – before 2011

More than 50 codes

- 26 cantonal codes of criminal procedure
- 26 cantonal regulations on Juvenile Justice
- Procedural code on Federal Criminal Justice (1934)
- Administrative criminal procedure code (1974)
- Criminal procedure code of the Swiss Military (1979).



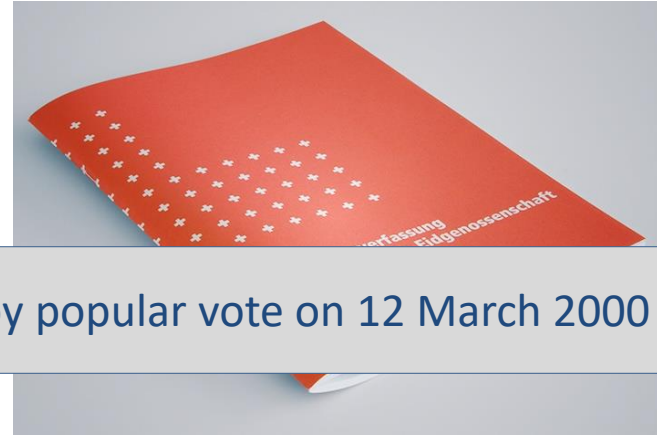
Criminal Procedure – before 2011

- Prosecutorial Systems, Investigative Magistrate (Verhörrichter), Juge d’instruction etc.
- Federal Supreme Court set out a common minimal standard of procedural rules



Art. 123 I – Swiss Constitution

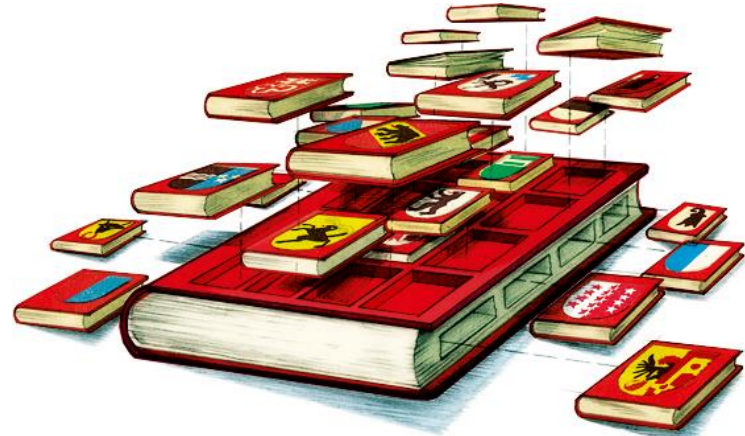
“The Confederation is responsible for legislation in the field of criminal law and the law of criminal procedure”.



Adopted by popular vote on 12 March 2000

Criminal Procedure – Since 1 January 2011

- Federal Code of Criminal Procedure entered into force
- No more juge d’instruction
- Investigation led by public prosecutor (Art. 12 CCP)
- Police are under the supervision of the public prosecutor (Art. 15 II CCP)

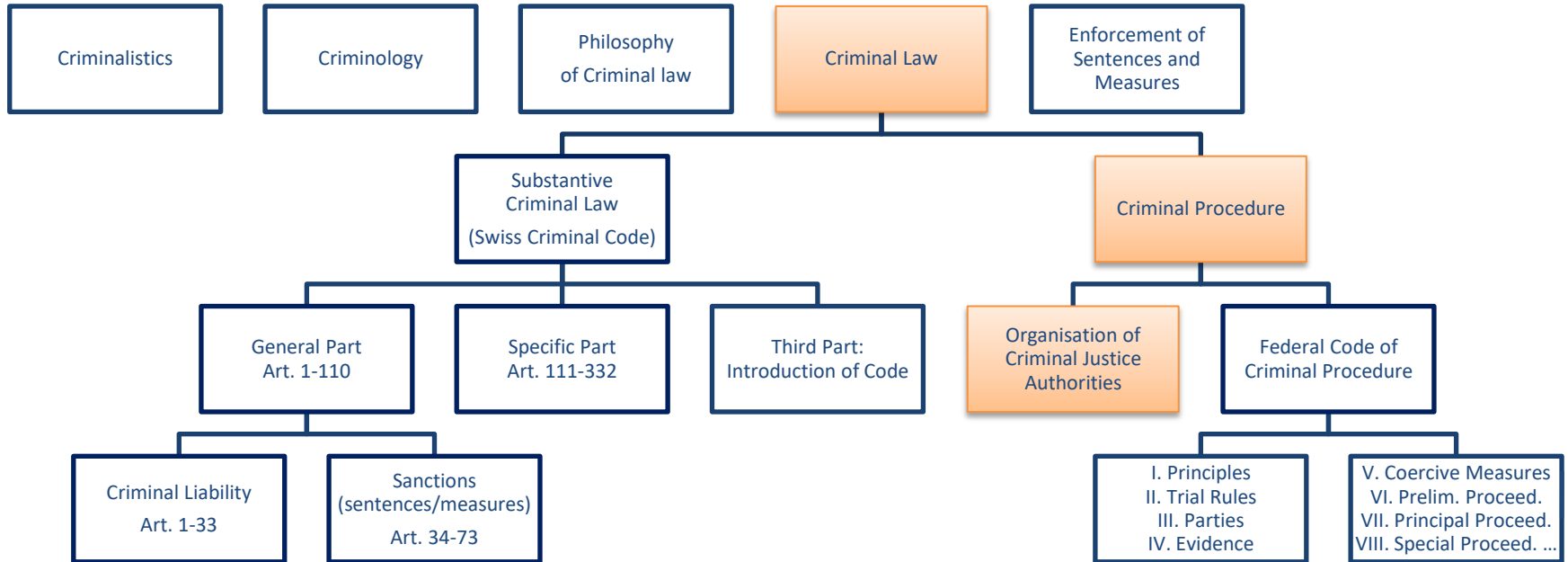




Criminal Procedure

Swiss Criminal Procedure Code of 5 October 2007

Swiss Criminal Law



Article 123 II – Constitution

The Cantons are responsible for the organisation of the courts, the administration of justice in criminal cases as well as for the execution of penalties and measures, unless the law provides otherwise.



Organisation of Criminal Justice Authorities

Cantonal Code on the
Organisation of Civil and
Criminal Justice
Authorities.

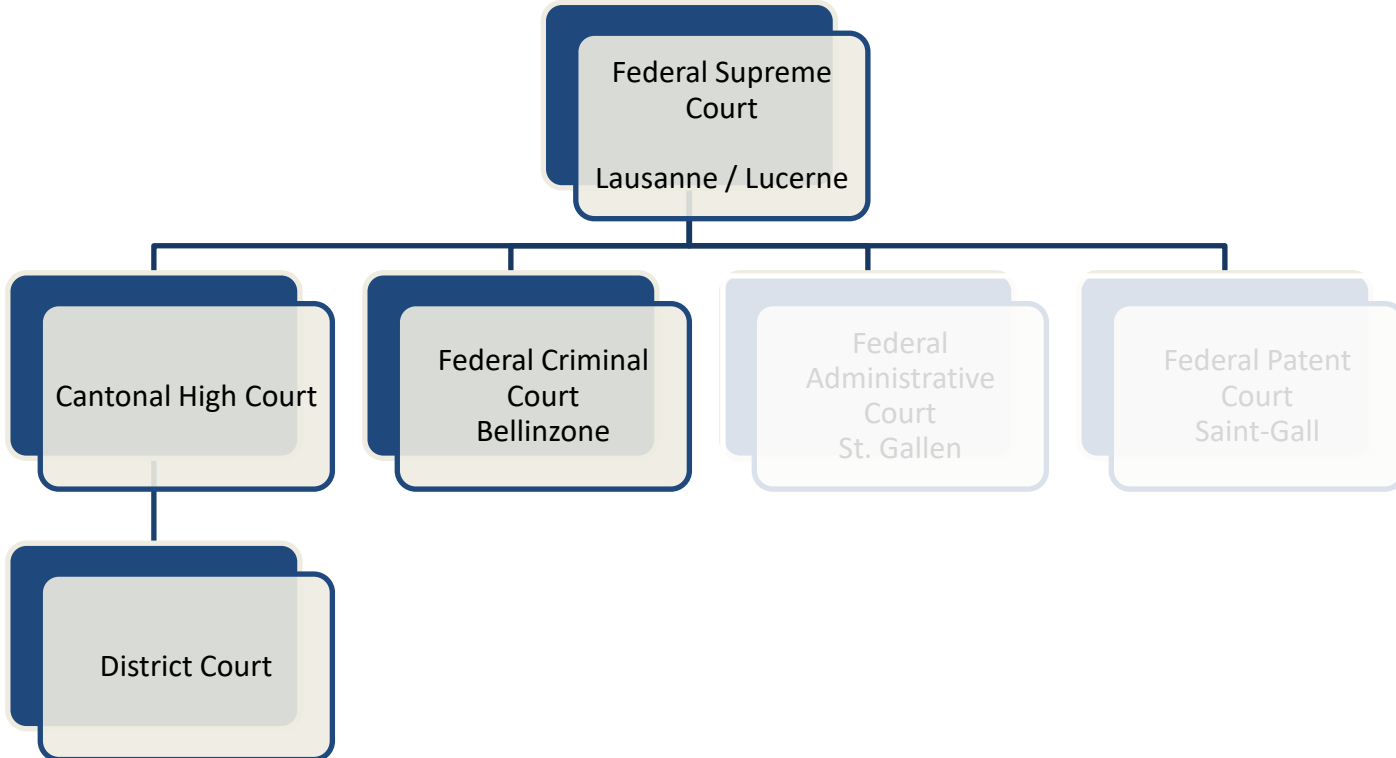


Article 123 II – Constitution

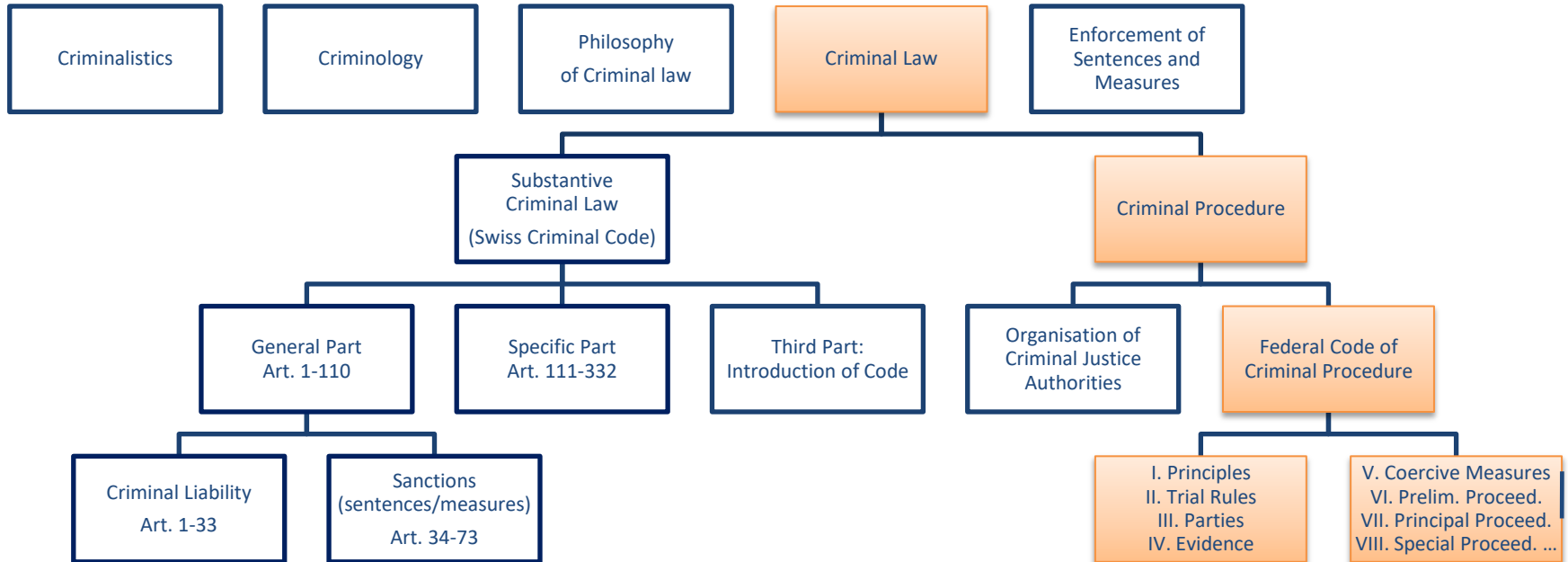
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Administration of Criminal Justice



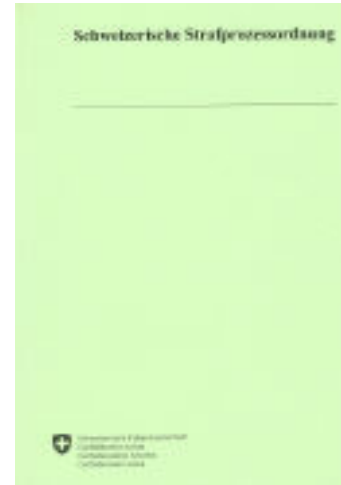
Swiss Criminal Law





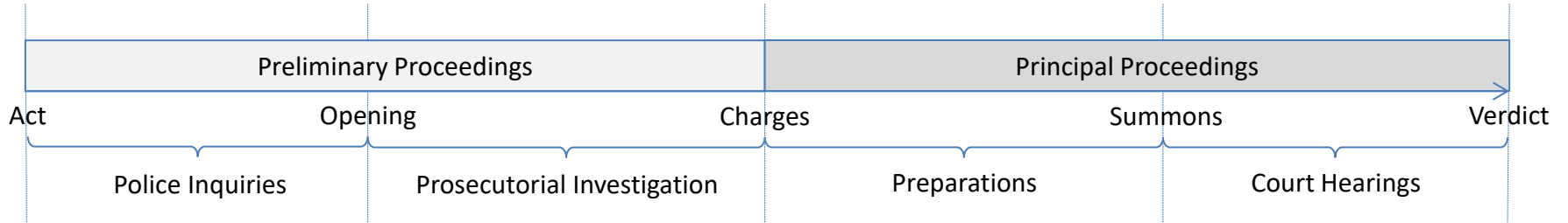
Swiss Criminal Procedure Code of 5 October 2007

- Title 1 Scope of Application and Principles
- Title 2 Criminal Justice Authorities
- Title 3 Parties
- Title 4 Evidence
- Title 5 Compulsory Measures
- Title 6 Preliminary Proceedings
- Title 7 Main Proceedings of First Instance
- Title 8 Special Procedures
- Title 9 Appellate Remedies
- Title 10 Procedural Costs
- Title 11 Legal Effect and Execution of Decisions

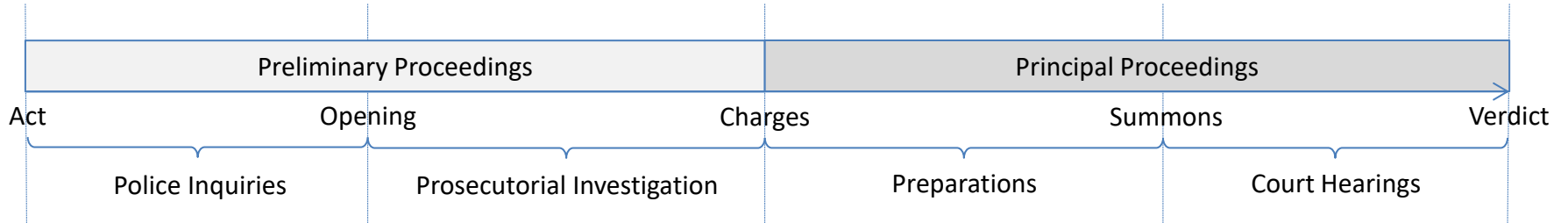
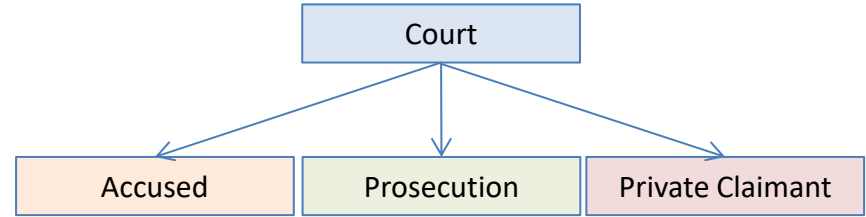
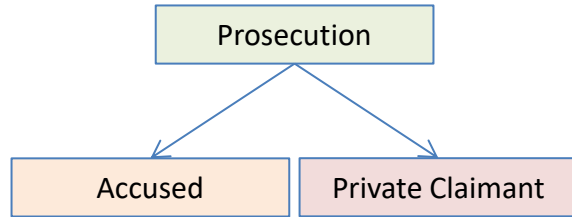




Criminal Proceedings



Parties



Police (Art. 306 ff.)

- Secure evidence
- Find suspects
- Examination hearings



The Public Prosecutor

- Formal head of the investigation (Art. 16)
- Duty to investigate the incriminating and exculpatory circumstances with equal care (Art. 16 II)
- Becomes party to the trial proceedings once the charges are brought before court (Art. 104 I c)



Head Prosecutor, St. Gallen
Thomas Hansjakob



The Accused

- the accused is a person suspected, accused of or charged with an offence (Art. 111)
- Party in the Criminal Proceedings (Art. 104 I)
- Nemo tenetur (Art. 113 I)



District Court Judge, Zürich
Simone Nabholz

The aggrieved person

An aggrieved person is a person whose rights have been directly violated by the criminal offence (Art. 115).





The victim

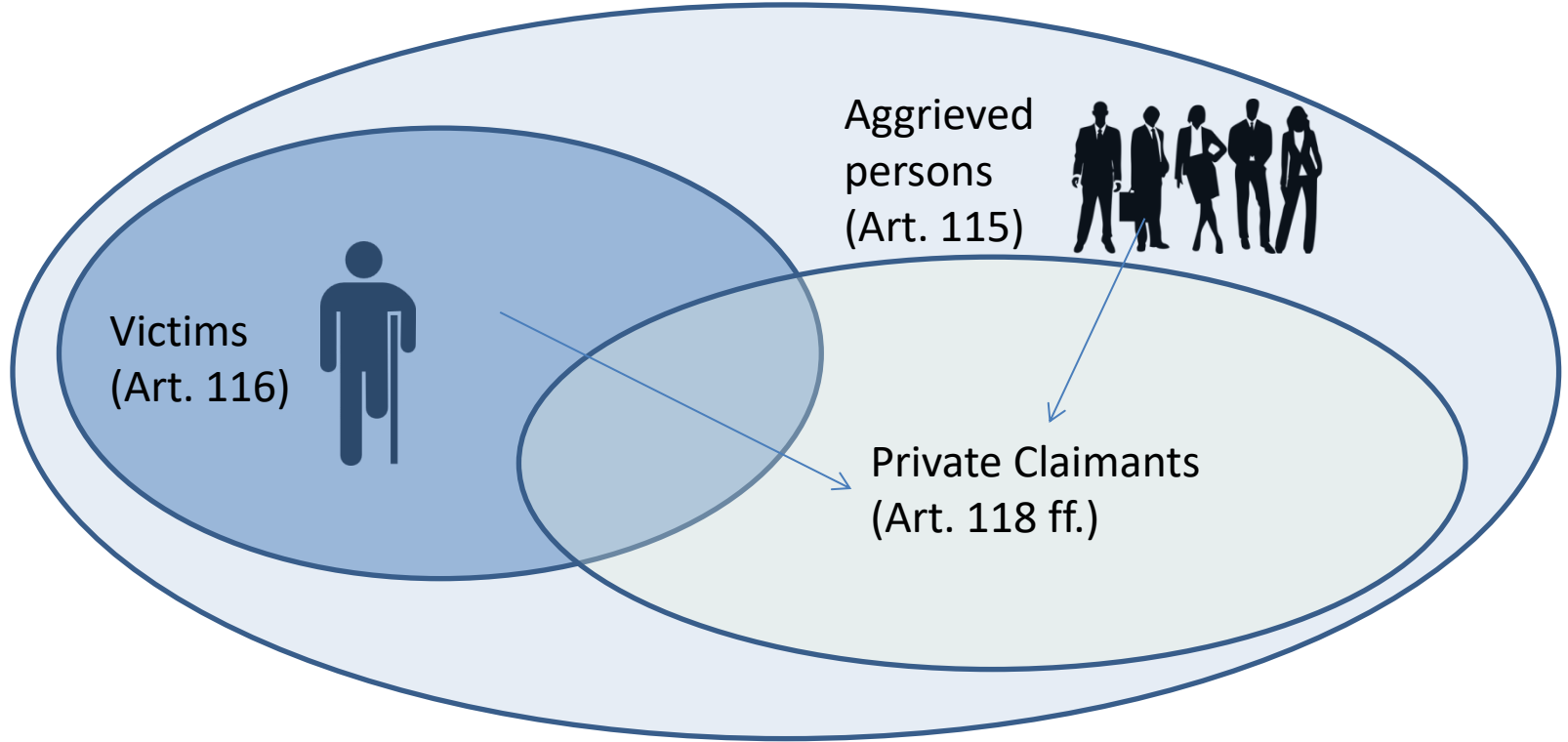
- Victim is a person who suffered physical, sexual or mental harm from an offence (Art. 116)
- Status: **Special** protection and rights under the Federal Act on Support to Victims of Crime (2007)
- Special rights that apply only to «victims» and not «aggrieved persons»





Private Claimants

- Either a victim or the aggrieved person can become private claimant
- Must “opt-in” to obtain this status:
 - A private claimant is a person who suffered harm from a criminal offence and who expressly declares that he or she wishes to participate in the criminal proceedings as a criminal and/or civil claimant (Art. 118 ff.).
- Specific rights in participation in trial afforded to private claimants, as compared to victim/aggrieved person
- Private Claimant is a party to the proceedings (Art 104)





Lawyers

- The accused and the private claimant may appoint a *legal advisor* to safeguard their interests (Art. 127) at any time (Art. 158)
- Private claimant's lawyer represents the harmed individual's interests.
- Private claimant's lawyer can contest dropping of charges by prosecutor, or ask for a specific sentence to be imposed



Niklaus Tamm, Attorney



Lawyers

- Legal advisor of the accused person: defence counsel (Art. 128)
- Defence counsel is either chosen by the accused (Art. 129) or appointed by the prosecutor !!! after the first hearing !!! (Art. 132)
- Mandatory appointment of defence counsel (Art. 130)



Tanja Knodel, defence counsel



Appeal

Cantonal investigating authority

- Police
- Public Prosecutor

Court of first instance

- Zurich (City):
«Bezirksgericht»

First court of appeal

- Zurich (Canton):
«Obergericht»

Federal Supreme Court

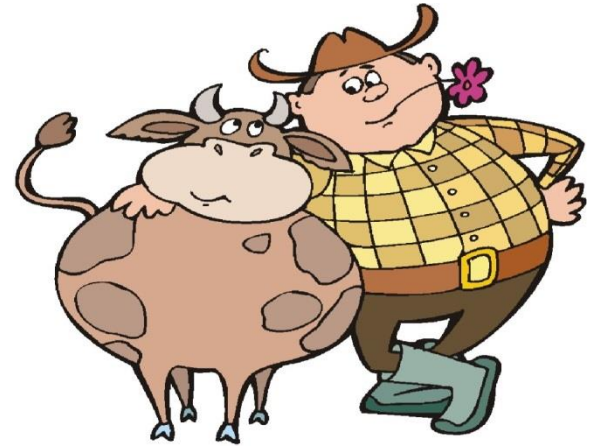
- «Bundesgericht»
Lausanne



Criminal Procedure

Cases

«Aiming at cows» (2014) – Facts



«Aiming at cows» (2014) - Facts

- Farmer drove his herd of cattle down from his alp
- As he did every year he passed in front of the house of pensioner X.
- The cows ate the grass, trampled on the flowers and sh... in X.'s garden.



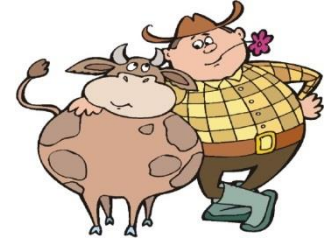
Lütisburg/SG

«Aiming at cows» (2014) - Facts

- X. (furious) got his revolver, «aimed at the cows» and threatened to shoot them...



Pensioner X.



Farmer

Aiming at cows – Proceedings 1/4

Police investigation:

- First examination hearing
- Search of premises
- Seizure of revolver



Cantonal Police of St. Gallen

Aiming at cows – Proceedings 2/4

«Untersuchungsamt Gossau»
(Public Prosecutor) issues a summary
penalty order (Art. 352 ff.):

- Threatening behaviour (Art. 180 CC); offence against Weapons Act
- Sentence: CHF 1000.- fine and suspended monetary penalty of 90 daily penalty units at CHF 360.--
- X. objected to penalty order



Untersuchungsamt Gossau



Aiming at cows – Proceedings 3/4

- Public Hearing at Court of first instance.
- X. denies use of revolver
- Farmer declares himself as a private claimant
- The defence counsel of X. requires acquittal in dubio pro reo
- Court confirms conviction and sentence



Kreisgericht Toggenburg

Aiming at cows – Proceedings 4/4

Court or appeal
(Kantonsgericht St. Gallen)



Federal Supreme Court,
«Bundesgericht»



European Court of Human
Rights (ECtHR)



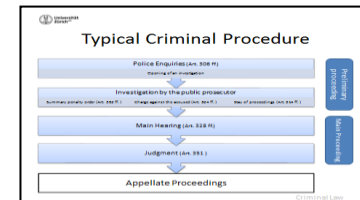
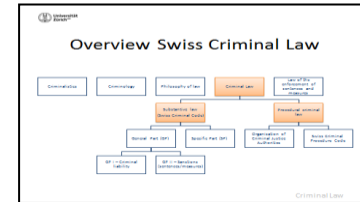
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Exam

| Question / Statement | Answer | Wrong | |
|----------------------|--------|-------|----|
| Answer A | | X | +1 |
| Answer B | X | | +1 |
| Answer C | X | | -1 |
| Answer D | | | 0 |
| Answer E | X | | +1 |

2 Points





Swiss Criminal Law

Discussion



Discussion

1. Trekking in the Nude
2. Dudley and Stephens



Trecking in the Nude

Discussion



Trekking in the Nude

POSTCARD FROM GENEVA

Another Reason to Visit Switzerland: Hiking in the Nude

By Helena Bachmann / Geneva | Tuesday, Mar. 24, 2009



Baby, it's cold outside. But the early-spring chill doesn't deter Thomas B. from taking a brisk walk along Appenzell's hilly trails to enjoy the green landscape of this rural canton in northeast Switzerland.

There's a good reason why Thomas, 24, doesn't give out his last name: he is concerned that his bosses at a nearby bank may not like his unconventional hiking attire, consisting of shoes, socks, a backpack — and nothing else. Thomas isn't just some nature nut in a birthday suit — he's one of a growing number of



Puistola Grottenpoesch

Cantonal Criminal Law

Art. 19 CC/Appenzell
Indecent Behaviour
«Any person publicly
displaying indecent
behaviour is liable to a
fine»



BGE 138 IV 13

Cantonal Criminal Law

§ 7 CC/Zürich

«Any person who in a state of intoxication is publicly displaying indecent behaviour is liable to a fine»





Dudley & Stevens

Discussion

Case Study:

R v Dudley and Stephens (1884)

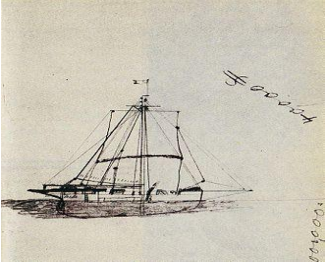


Michael Sandel:

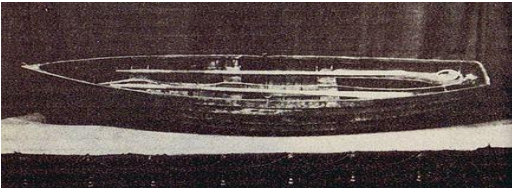
<https://www.youtube.com/watch?v=kBdfcR-8hEY>

Starting at 29min 25sec

R v Dudley and Stephens (1884)



The Mignonette



Rescue Boat



Captain Dudley



1. Mate Stephens



Sailor Brooks



Cabin Boy Richard Parker, 17



Questions

- How would you decide this case in your jurisdiction?
- Can you find any provision in the Swiss Criminal Code applicable to this case?

Proceedings & Ruling

- Necessity is not a defence to a charge of murder



The Queen's Bench Division
Lord Coleridge

Proceedings & Ruling

- Dudley and Stephens were sentenced to the statutory death penalty with a recommendation for mercy.
- On behalf of Queen Victoria, the Home Secretary later converted the sentence into 6 months of imprisonment



Home Secretary William Harcourt

Elements of Crime

| | | | |
|--|--|---|---|
| <p>Elements of crime</p> | <p>Objective element (actus reus)</p> <ul style="list-style-type: none"> • Offender • Object of offence • Act • Result of offence • Causality | <p>Mental element (mens rea)</p> <ul style="list-style-type: none"> • Intention • Knowledge • Will | <p>Wrongfulness Unlawfulness of act</p> |
| <p>Justification General defence</p> | <ul style="list-style-type: none"> • Self-defence • Necessity • Consent • Legitimate interests | <ul style="list-style-type: none"> • Knowledge (of threat) • Will (to defend) | |
| <p>Culpability</p> | <ul style="list-style-type: none"> • Criminal incapacity/Insanity • Mistake of law • Appropriateness | | <p>Legal responsibility of actor</p> |

Culpability of Dudley and Stephens

- Legitimate act in a situation of necessity (Art. 17 SCC)?
 - Subsidiarity
 - Defence of superior interests
- Mitigatory act in a situation of necessity (Art. 18 SCC)?



Art. 17 – Necessity (justification)

Any person who carries out an act that carries a criminal penalty in order to save a legal interest of his own or of another from immediate and not otherwise avertable danger, acts lawfully if by doing so he safeguards interests of higher value.



Art. 18 – Necessity (Mitigation)

1 Any person who carries out an act that carries a criminal penalty in order to save himself or another from immediate and not otherwise avertable danger to life or limb, freedom, honour, property or other interests of high value shall receive a **reduced penalty** if he could reasonably have been expected to abandon the endangered interest.



Art. 18 – Necessity (no culpability)

2 If the person concerned could not have been reasonably expected to abandon the endangered interest, ~~he does not commit an offence.~~
(recte: does not act culpably)





Swiss Criminal Law

Swiss Criminal Procedure

Prof. Dr. iur. Marc Thommen