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
Introduction to Swiss Criminal Law

1. General Information

2. Substantive Criminal Law

3. Criminal Procedure
Translated Codes

Federal Constitution of the Swiss Confederation

Swiss Criminal Code

Swiss Criminal Procedure Code

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

Date: 27 Oktober 2016
Time: 08.30-09.30 am
Appear: 08.00
Room: KOL-F-180
Mode: Multiple Choice
Materials:
- Open Book
- No electronic devices allowed
Introduction to Swiss Criminal Law

1. General Information

2. Substantive Criminal Law

3. Criminal Procedure
Substantive Criminal Law

History
Modern Era (15th/16th century)

Reception of Roman Law: Constitutio Criminalis Carolina (CCC) as subsidiary legal source (1532)
Enlightenment (17th / 18th Century)

- 1782: Anna Göldin last person executed for witchcraft in Europe
- Helvetic Republic (1798): New Criminal Code, based on French Code Pénal (1799)
- Restauration (1803): Back to CCC

Jean-Jacques-François Le Barbier, The Declaration of the Rights of Man and of the Citizen in 1789
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)

- 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\textsuperscript{bis} Const.: «The Confederation is responsible for legislation in the field of criminal law»
- 1918: Federal Council dispatch and 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

Criminalistics

Criminology

Philosophy of Criminal law

Criminal Law

Enforcement of Sentences and Measures

Substantive Criminal Law (Swiss Criminal Code)

General Part Art. 1-110

Specific Part Art. 111-332

Third Part: Introduction of Code

Criminal Procedure

Organisation of Criminal Justice Authorities

Swiss Criminal Procedure Code

Criminal Liability
Art. 1-33

Sanctions (sentences/measures)
Art. 34-73

Sanctions
(sentences/measure)
Art. 34-73
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
- etc.
Substantive Criminal Law

Prohibitions of the secondary criminal law
- Road Traffic Act
- Narcotics Act
- Foreign Nationals Act
- Therapeutic Products Act
- Customs Act
- VAT Act
- etc.
Cantonal 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“
General Part I – Art. 1-33 CC

General Provisions on Criminal Liability that apply to all offences
- Territorial application
- Crime Categories
- Intention (mens rea)
- Excuses, defences
- Law of attempts
- Participation/Complicity
## Crime categories

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<th>Severity</th>
<th>Sanction</th>
<th>example</th>
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<tr>
<td>Felonies</td>
<td>Custodial sentence of more than 3 years (Art. 10 Abs. 2)</td>
<td>Intentional homicide (Art. 111)</td>
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<tr>
<td>Misdemeanours</td>
<td>Custodial sentence not exceeding 3 years or monetary penalty (Art. 10 Abs. 3)</td>
<td>Assault (Art. 123)</td>
</tr>
<tr>
<td>Contraventions</td>
<td>Fine (Art. 103)</td>
<td>Minor assault (Art. 126)</td>
</tr>
</tbody>
</table>
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.
Art. 13 SCC – Error of fact

2 If the person concerned could have avoided the error had he exercised due care, he is liable to prosecution for his negligent act provided the negligent commission of the act is an offence.
Carl Stooss (1849-1934)

Dual system of sanctions
(Sentences and Measures)
Law of criminal sanctions

Sentences
- Monetary penalties
- Community service
- 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
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...
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.)

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Book Two: Specific Provisions

Title One: Offences against Life and Limb

1. Homicide
   Intentional homicide
   Murder
   Manslaughter
   Homicide at the request of the victim
   Inciting and assisting suicide
   Infanticide
   Homicide through negligence
   Art. 113
   Art. 114
   Art. 115
   Art. 116
   Art. 117

2. Abortion
   Illegal abortion
   Legal abortion
   Art. 118
   Art. 119
   Repeated
   Art. 120
   Art. 121

3. Assault
   Serious assault
   Common assault
   Female genital mutilation
   Assault through negligence
   Art. 122
   Art. 123
   Art. 124
   Art. 125
   Art. 126

4. Endangering the life or health of another
   Abandonment
   Failure to offer aid in an emergency
   False alarm
   Endangering life
   Repeated
   Art. 127
   Art. 128
   Art. 129
   Art. 129
   Art. 130–132

   Branding
   Attack
   Art. 133
   Art. 134
   Art. 135
   Art. 136

   Administrating substances capable of causing injury to children
   Art. 137

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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”
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”
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“
Introduction to Swiss Criminal Law

1. General Information

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3. Criminal Procedure
Criminal Procedure

Swiss Criminal Procedure Code of 5 October 2007
Swiss Criminal Law

- Criminalistics
- Criminology
- Philosophy of Criminal law
- Criminal Law
- Enforcement of Sentences and Measures
  - Criminal Procedure
    - Organisation of Criminal Justice Authorities
    - Swiss Criminal Procedure Code

Substantive Criminal Law (Swiss Criminal Code)
  - General Part
    - Art. 1-110
      - Criminal Liability
        - Art. 1-33
      - Sanctions (sentences/measures)
        - Art. 34-73
  - Specific Part
    - Art. 111-332
  - Third Part: Introduction of Code
Criminal Procedure

History
Criminal Procedure – before 2011

- 26 Codes of Criminal Procedure
- Prosecutorial Systems, Investigative Magistrate (Verhörrichter), Juge d’instruction etc.
- Federal Supreme Court laid out a common minimal standard
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 public prosecutor’s supervision (Art. 15 II CCP)
Criminal Procedure

Swiss Criminal Procedure Code of 5 October 2007
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- General Part Art. 1-110
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Criminal Liability Art. 1-33
Sanctions (sentences/measures) Art. 34-73

- Organisation of Criminal Justice Authorities
- Swiss Criminal Procedure Code

Criminal Procedure
Organisation of Criminal Justice Authorities

Cantonal Code on the organisation of Civil and Criminal Justice Authorities.
Swiss Criminal Law

Criminalistics
Criminology
Philosophy of Criminal law
Criminal Law
Enforcement of Sentences and Measures

Substantive Criminal Law
(Swiss Criminal Code)

General Part
Art. 1-110
Criminal Liability
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Sanctions
(sentences/measures)
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Third Part:
Introduction of Code

Criminal Procedure

Organisation of Criminal Justice Authorities

Swiss Criminal Procedure Code
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
Typical Criminal Procedure

1. Police Enquiries (Art. 306 ff.)
   - Opening of an investigation

2. Investigation by the public prosecutor
   - Summary penalty order (Art. 352 ff.)
   - Charge against the accused (Art. 324 ff.)
   - Stay of proceedings (Art. 314 ff.)

3. Main Hearing (Art. 328 ff.)

4. Judgment (Art. 351)

5. Appellate Proceedings
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 exculpating circumstances with equal care (Art. 16 II)
- Becomes party to the trial proceedings, once the charges are brought before court (Art. 104 I c)
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
Lawyers

- The accused and the private claimant may appoint a *legal advisor* to safeguard their interests (Art. 127) at any time (Art. 158)
- 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)
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 through the Federal Act on Support to Victims of Crime (2007)
Private Claimants

- 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.).

- Private Claimant is a party to the proceedings (Art 104)
Aggrieved persons (Art. 115)

Victims (Art. 116)

Private Claimants (Art. 118 ff.)
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
Farmer drove his herd of cattle down from his alp.

As every year he passed in front of the house of pensionar X.

The cows ate the grass, trampled the flowers and sh... in X.’s garden.
«Aiming at cows» (2014) - Facts

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

Discussion
Discussion

1. Schenk vs. Switzerland
2. Trekking in the Nude
3. Spaming
4. Dudley and Stephens
Schenk v. Switzerland

Discussion
Schenk v. Switzerland (ECtHR, no. 10862/84)

- Pierre Schenk was suspected of having hired a hitman to kill his wife
- The hitman, instead of executing his mission, secretly taped a phone conversation with Schenk and handed it to the investigating authorities
- Secret taping is a criminal offence in Switzerland (Art. 179\textsuperscript{ter} SCC)
- The tape was used as the main piece of evidence in the conviction of Schenk
Art. 140 - Prohibited methods of obtaining evidence

In the course of obtaining evidence, the use of coercion, violence, threats, promises, deception and any methods, which could interfere with a person’s cognitive thought or free will, shall be prohibited.
Art. 141 – Use of unlawfully obtained evidence

1 Evidence obtained in violation of Article 140 shall not be used in any case. This rule shall also apply to any evidence, which this Statute designates as not usable.

2 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 used, unless its use is essential to solving serious criminal offences.

3 Evidence obtained in violation of administrative rules shall be usable.
The 5 Levels of Evidence Exclusion in Swiss Law

- Evidence obtained by coercion, violence, threats, promises, deception etc. (i.e. torture of accused) — Strictly excluded (Article 141 I CCP/CH)
- Evidence obtained in violation of important rules explicitly stating non-use (i.e. caution to the accused of his right to remain silent) — Generally excluded (Article 141 II CCP/CH) unless serious crime
- Evidence obtained in a «criminal manner» (i.e. house search with forged warrant) — Generally excluded (Article 141 II CCP/CH) unless serious crime
- Evidence obtained in violation of “validity rules” (i.e. caution to witness to tell the truth) — Generally excluded (Article 141 II CCP/CH) unless serious crime
- Evidence obtained in violation of minor rules (“administrative rules”) (i.e. search of mobile phones) — Not excluded (Article 141 III CCP/CH)
Questions

– How would Schenk v. Switzerland be solved in your jurisdiction?
Treacking in the Nude

Discussion
Treking in the Nude

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 suit: he’s an artist, and he’s in the process of creating a unique visual record of his travels through Switzerland’s mountains.
Cantonal Criminal Law

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

BGE 138 IV 13
Die Kantone sind gestützt auf Art. 335 Abs. 1 StGB befugt, das "Nacktwandern" im öffentlichen Raum unter Strafe zu stellen (E. 3).

Eine Norm, welche demjenigen Strafe androht, der "öffentlich Sitte und Anstand grob verletzt", ist hinreichend bestimmt (E. 4).

Das "Nacktwandern" kann willkürlich als grobe Verletzung von Sitte und Anstand qualifiziert werden (E. 5).

Der Tatbestand setzt nicht voraus, dass der "Nacktwanderer" auf einen Menschen trifft, der dadurch in seinem Anstandsgefühl verletzt wird (E. 6).

Verletzung des Grundrechts der persönlichen Freiheit verneint (E. 7).

Verbotsirrtum verneint (E. 8).

Keine Strafbefreiung wegen fehlenden Strafbedürfnisses (E. 9).
Les cantons sont légitimés par l’art. 335 al. 1er CP à réprimer la "randonnée naturiste" sur le domaine public (c. 3).

Une norme, qui menace de sanction celui qui porte "une atteinte grossière aux mœurs et aux convenances sur le domaine public", présente un degré de précision suffisante (c. 4).

Il n’est pas arbitraire de considérer la "randonnée naturiste" comme constitutive d’une atteinte grossière aux mœurs et aux convenances (c. 5).

L’état de fait ne présuppose pas que le "randonneur naturiste" rencontre un tiers dont le sens des convenances s’en trouverait blessé (c. 6).

Pas de violation du droit fondamental à la liberté personnelle (c. 7).

Pas d’erreur sur l’illicéité (c. 8).

Pas d’exemption de peine pour absence d’intérêt à punir (c. 9).

JdT 2012 IV p. 263
Cantonal Criminal Law

§ 7 CC/Zürich
«Any person who in a state of intoxication is publicly displaying indecent behaviour is liable to a fine»
Spaming

Discussion
This is what happens when you reply to spam email
James Veitch
Art. 146 – Fraud

Any person who with a view to securing an unlawful gain for himself or another wilfully (recte: maliciously) induces an erroneous belief in another person by false pretences or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests, is liable to a custodial sentence not exceeding five years or to a monetary penalty.
Qualifizierte Täuschung

1. «Arge List»
   – Deceptive Business Practice
   – Elaborate Lies
   – Simple Lies, if verification
     – impossible
     – unreasonable
     – uncommon
     – intercepted

2. Victim’s responsibility
Dudley & Stevens

Discussion
Case Study: 
*R v Dudley and Stephens (1884)*

Michael Sandel:  
[https://www.youtube.com/watch?v=kBdfcR-8hEY](https://www.youtube.com/watch?v=kBdfcR-8hEY)  
Starting at 29min 25sec
R v Dudley and Stephens (1884)

The Mignonette

Captain Dudley

1. Mate Stephens

Sailor Brooks

Rescue Boat

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 turned the sentence into 6 months of imprisonment.

Home Secretary William Harcourt
## Elements of Crime

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<th>Elements of Crime</th>
<th>Objective element (actus reus)</th>
<th>Mental element (mens rea)</th>
<th>Wrongfulness Unlawfulness of act</th>
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<td></td>
<td>Offender</td>
<td>Intention</td>
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<td>Object of offence</td>
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<td>Act</td>
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<td>Result of offence</td>
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<td>Justification</td>
<td>Self-defence</td>
<td>Knowledge (of threat)</td>
<td>Legal responsibility of actor</td>
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<td>General defence</td>
<td>Necessity</td>
<td>Will (to defend)</td>
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<td>Mistake of law</td>
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<td>Appropriateness</td>
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</table>
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 cupably)
Swiss Criminal Law
Swiss Criminal Procedure

Prof. Dr. iur. Marc Thommen