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Criminal Law

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I. Criminal Code

This first section is intended to introduce and explain the development of the Swiss Criminal Code, starting with a brief history of the codification of criminal law across Switzerland (1.). Next, the gradual development of the criminal code we have today, designed by Carl Stooss, is examined (2.). The content and form of this current criminal code will be outlined (3.), before some particularities of the code are analysed in more detail: namely, the dualism of sanctions (4.), the death penalty in Swiss law (5.), and the regulations on assisted suicide and euthanasia (6.).

1. History

The first comprehensive codification of criminal law in Switzerland – the *Code pénal de la République helvétique 1799* – was inspired by the ideals of the French Revolution, such as equality in sentencing and the abolishment of general confiscations.[1] However, this codification was not to last for long: after the decline of the Helvetic Republic in 1803, the cantons regained their right to create and apply their own criminal codes. The canton of Fribourg, for example, reintroduced the Constitutio Criminalis of Emperor Carl V of 1532 ("Carolina");[2] this Code provided on one hand for some brutal forms of punishment such as drawing and quartering, on the other hand it had once been quite modern for it also "advanced" individual rights and protected suspects from excessive legal arbitrariness (e.g. no torture without probable cause, no leading questions, compensation if tortured illegally, etc.). Of course, in the 19th century the Carolina was hopelessly outdated.

1 Stefan Trechsel/Martin Killias, Criminal Law, in Francois Dessemontet/Tugrul Ansay, (eds.), Introduction to Swiss Law, 3rd edition, The Hague 2004, pp. 245, p. 246.

2 Nadine Zurkinden, National characteristics, fundamental principles, and history of criminal law in Switzerland, in Ulrich Sieber/Konstanze Jarvers/Emily Silverman (eds.), National Criminal Law in a Comparative Legal Context, Vol 1.1, Berlin 2013, pp. 205, p. 295.

The Switzerland we know today was founded in 1848 in the aftermath of the *Sonderbund* war, which was a civil war between Catholic and Protestant cantons. The seven Catholic cantons who formed the *Sonderbund* opposed the impending centralisation of Switzerland as they feared that their interests would be marginalized by the majority of Protestant cantons. It was the Protestants that prevailed in the *Sonderbund* war, but it is the lasting legacy of the Swiss founding fathers – and especially of the president of the constitutional convention ULRICH OCHSENBEIN – that the interests of the defeated were also taken into account, when drafting the Constitution which followed this conflict. Hence, it was not a central Swiss Republic but the *Swiss Confederation* that emerged at this point.

Figure 1: Ulrich Ochsenbein, 1811–1890[3]

One of the main features of this federal system founded in 1848 is the autonomy of the 25 cantons:[4] the cantons kept their legislative independence. So even after Switzerland was founded as a modern federal state, the cantons retained their own criminal codes. Considering the size of the cantons (for example, even today the canton of Glarus has a population of only 40'000 inhabitants) this variety of criminal codes proved to be very inefficient. Therefore, the Swiss Lawyers Association held, at its general assembly of 1887,

3 Source: Britannica (https://perma.cc/EC7V-CTE4).

4 There were 25 cantons at this point in history. The canton which was added later is that of Jura, which acceded to the Federation in 1979, becoming the 26th Swiss canton.

that an *"efficient and successful fight against crime is not possible as long as the fragmentation of cantonal criminal codes persists."*[5]

2. Legislation

Following this declaration by the Swiss Lawyers Association, the Swiss Federal Council asked Carl Stooss, a professor of criminal law at the University of Bern, to draw up a comparative compendium of all the cantonal criminal codes. In 1892, Carl Stooss published his comparative analysis. He pointed out that the foundations of Swiss criminal law were *"quite cosmopolitan"*, drawing from Romanic and German sources. While the French influence of the Code pénal of 1799 persisted in the cantons of the Romandie (western, French-speaking part of Switzerland), the codes of the central and eastern (German-speaking) cantons were more inspired by the Austro-Hungarian codification.

Interestingly, three cantons were missing in Carl Stooss' compilation: Uri, Unterwalden and Appenzell Innerrhoden. The reason for this was that these small cantons had no formal criminal codes, only a few written sources of law at that time. Fribourg, as mentioned, still relied on the "Carolina". Carl Stooss' compilation of the cantonal codes focused on what was viewed as the core of the criminal law (murder, assault, theft, fraud, rape, etc.). The minor "police offences" (vagrancy, begging, alcoholism, gambling, and lottery) were not covered. The cantonal rules on the death penalty became a part of the compilation even though capital punishment was already highly controversial by this time.

In 1893, Carl Stooss published his first draft of the Criminal Code. At that time, nobody anticipated that the legislative procedure would take a record-breaking 50 years to achieve completion. Up until 1916, three commissions of experts deliberated on various drafts of the code. In 1918, the Swiss Federal Council handed its dispatch[6] to Parliament. It was another ten years before the Federal Assembly entered the debate in 1928; following

5 This is an own translation of a quote from Carl Stooss' 1890 comparative compendium on cantonal criminal codes, p. IX (https://perma.cc/S2EE-LT6M).

6 The term "dispatch" (German: *Botschaft*; French: *message*) is the official term used by the Swiss government for explanatory reports to draft legislation; resembling a White Paper in the UK; see Chapter Swiss Legal System, p. 28.

this, they actually spent a further ten years deliberating the Code. Finally, on 21 December 1937, the still highly controversial Swiss Criminal Code was adopted. The opponents claimed that a unified codification for Switzerland undermined cantonal autonomy in the crucial field of criminal law. Catholic groups also opposed the Code because it legalised (medically warranted) abortions.[7]

The Code's abolition of the death penalty was also still a controversial issue.[8] The Code thus had to be submitted to a referendum. On 3 July 1938, a slim majority of 53.5 % of the electorate approved the new criminal code. The Code officially came into force on 1 January 1942.

3. Content[9]

In the Swiss criminal law of today, there are three types of offences: felonies, misdemeanours, and contraventions. *Felonies* are offences that carry a custodial sentence of more than three years, the maximum custodial sentence usually being 20 years. Some felonies (e.g. murder, aggravated hostage-taking) carry a life sentence (Article 40). *Misdemeanours* are offences that carry a custodial sentence not exceeding three years or a monetary penalty (Article 10). Monetary penalties are composed of penalty units. The quantity of the units (a maximum of 180; Article 34 I) reflects the culpability of the offender, while the amount charged per unit reflects the offender's financial situation (currently CHF 30 – 3'000, while allowing courts the possibility of lowering this minimum to CHF 10 where special financial circumstances exist; Article 34 II). Finally, *contraventions* are criminal acts that are punishable only with a fine (Article 103). The maximum fine is usually CHF 10'000 (Article 106).

7 Zurkinden, p. 296 with further references.

8 Zurkinden, p. 296 with further references.

9 In the following text, where Articles are mentioned without referencing their source of law, they are located in the Swiss Criminal Code of 21 December 1997, SR 311.0; see for an English version of the Swiss Criminal Code www.admin.ch (https://perma.cc/4QS4-CWQ5).

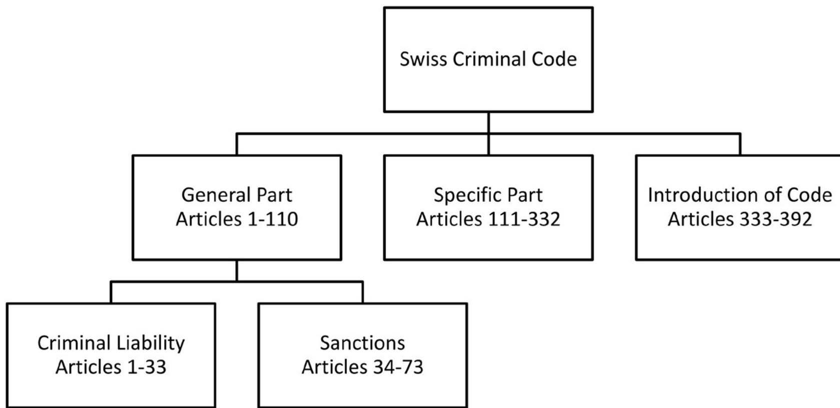

Figure 2: Structure of the Swiss Criminal Code

The Swiss Criminal Code contains 392 Articles. It is divided up into three books.

Part I (Articles 1–110) mainly regulates the *general provisions* on criminal liability (omissions, intention and negligence, justifications, guilt, responsibility, attempt, and participation) and sanctions (e.g. custodial sentences, monetary penalties, suspension of sentences, parole, therapeutic measures, and indefinite incarceration). For example, there are two types of intention in Swiss criminal law: these are contained in Article 12. Article 12 encompasses both direct intent and conditional intent. Direct intent is possessed when the offender both knows that a particular consequence is possible and wants this consequence to occur.[10] Conditional intent, or *dolus eventualis*, is possessed when the offender realises that the consequence is possible and accepts this risk – albeit not necessarily wanting the harm to occur. In this sort of case, the offender is indifferent about whether or not the harm will occur.[11]

The Swiss legislator's decision to introduce a general part that sets up the common elements of crime and sentencing followed a long tradition. The Italian Renaissance jurist Tiberio Deciani (1509–1582) is credited with being the first to coin the idea of splitting up criminal codes into general and specific parts in his Tractatus Criminalis of 1590. Criminal codes which were created before this, such as the Carolina (1532), only contained specific, casuistic

10 Anna Petrig/Nadine Zurkinden, Swiss Criminal Law, Zurich/St. Gallen 2015, p. 69.
11 Petrig/Zurkinden, p. 70.

provisions. The move towards including both general and specific parts allowed criminal codes to be kept much shorter. By creating general rules for all crimes, the legislator also better fulfilled the nulla poena sine lege principle;[12] having general rules removes any gaps in criminal liability that would otherwise have to be filled by analogy. Further, by predetermining liability in a general manner, the legislator hoped to minimize the influence of courts and academics on the interpretation of criminal codes.

Part II covers the specific provisions (Articles 111–332): it establishes criminal offences which protect individual interests such as life and limb (murder, assault), property (theft, fraud), honour (defamation), liberty (coercion, hostage taking, unlawful entry) or sexual integrity (rape, exploitation, pornography, sexual harassment). In addition, criminal offences which protect collective interests such as families (incest, bigamy), public safety (arson), public health (transmission of diseases), public order (rioting, criminal organisations, racial discrimination), genocide and war crimes, trading interests (counterfeiting, forgery), national security (high treason, espionage), judicial interests (false accusation, money laundering, perjury), and state interests (abuse of public office, bribery) were also included.

Part III (Articles 333–392) deals with the introduction and application of the Swiss Criminal Code.

Many criminal provisions exist outwith the Criminal Code: for example, road traffic offences, drug crimes, and illegal use of weapons all form part of specific federal codes.[13] In practice, these laws are highly relevant, in particular road traffic offences.[14]

12 A key principle in Swiss law, meaning “no penalty without law” (see pp. 385.).

13 Federal Act on Road Traffic of 19 December 1958, SR 741.01; Federal Act on Narcotics and Psychotropic Substances of 3 October 1951 (Narcotics Act, NarcA), SR 812.121, see for an English version www.admin.ch (https://perma.cc/BU2C-495F); Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997, SR 514.54.

14 In 2016, there were 57’518 convictions of adults for road traffic offences, which is 52 % of all 109’116 convictions of adults (source: Federal Statistical Office: https://perma.cc/QP23-E83X).

4. Dualism of Sanctions

Sanctions are the consequences imposed for criminal acts. In Switzerland there are two main categories of sanctions: sentences and measures. Sentences (monetary penalties, custodial sentences, fines) are retributive in nature. They are mainly backward-looking: their aim is to reprimand and punish offenders for their wrongdoing. Measures, on the other hand, are preventive in nature. Thus, they are predominantly forward-looking: they are designed to protect society from dangerous offenders by either curing them of any mental deficiencies or addictions (therapeutic measures) or by permanently incapacitating them (indefinite incarceration).

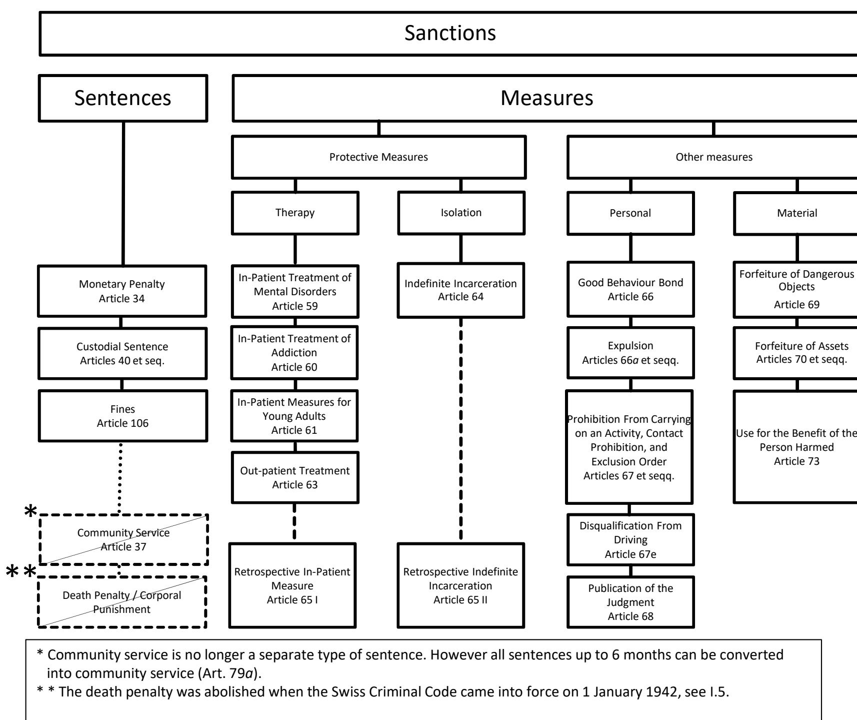

Figure 3: Dual System of Sanctions

This dual system of sanctions was CARL STOOSS' invention. The idea received universal acclaim, and other jurisdictions soon followed the approach.[15]

CARL STOOSS' new concept was successful because it appeased one of the fiercest debates to occur in criminal law: the debate over the legitimacy of criminal punishment. Scholars fought over this idea throughout the 18th and 19th century. What gives the state the right to inflict harm upon offenders? There were three possible answers: (1) They deserve it, i.e. just desert.[16] (2) It will teach them a lesson about their behaviour and thus deter future offending, i.e. special prevention.[17] (3) The threat and enforcement of criminal punishment will deter wider society from offending as well, i.e. general prevention.[18]

Just desert theories of punishment are only about retribution for past acts. They are also called *absolute* theories because they assert that punishment does not have to serve any future societal goals. In contrast, special and general prevention are known as *relative* theories because punishment always has to relate to a future societal goal (deterrence, safety etc.).

These fundamentally different views on punishment led to two opposing schools of thought. The *classical* school around KARL BINDING (1841–1920) advocated that punishment can and must only be concerned with retribution. Sentences are imposed because offenders need to get their just deserts

15 ZURKINDEN, p. 304

16 Just desert/retribution was the starting point of the absolute theories of punishment purported by IMMANUEL KANT and GEORG FRIEDRICH WILHELM HEGEL. These theories were known as "absolute" because punishment was *absolved* from serving any future societal goals. Such theorists strictly viewed punishment as a retributive act against the offender. Punishment was thus viewed as a necessary act of communication to demonstrate the condemnation of an autonomous agent who had chosen to break the law.

17 Special prevention was advocated by CHRISTOPH CARL STÜBEL and KARL VON GROLMAN. They argued for a criminal law system that should effectively prevent the offender from reoffending.

18 General prevention was championed by PAUL JOHANN ANSELM RITTER VON FEUERBACH. He opposed special prevention because tying punishment to the offender's future likelihood of reoffending (rather than connecting punishment to the past criminal act) would leave the offender's punishment entirely at the discretion of the judge. This could lead to perverse outcomes: for example, someone who had repeatedly committed petty theft could, under this principle, be imprisoned for life due to the statistical likelihood that they would steal again. In FEUERBACH'S opinion, however, it was permissible to try to educate and deter the general public through punishment.

for their crimes. Contrastingly, the *modernists* championed (special) prevention as the main goal of criminal punishment. One of their strongest advocates, Franz von Liszt (1851–1919), opposed the idea of having retribution as a sole focus in his main oeuvre, 'Purpose in Criminal Law' (1882). There, he asserted that punishment must achieve at least one of the following goals: to heal offenders, to scare them straight, or to permanently incapacitate them.

Both schools had legitimate points: the classical school rightly pointed out that theories of prevention turned offenders from autonomous human beings into mere objects, by shaping them as people into a form that better meets societal needs (special prevention) or by making an example out of them to deter criminality in the wider public (general prevention). The offender is used as a means to an end and is not respected as an autonomous moral agent. Simultaneously, the modernists were also right to assert that punishment cannot be entirely detached from its effects: it must also serve societal ends like the reintegration of offenders. Therefore, the modernists advocated for the use of new instruments in the criminal law, like the employment of fines, parole, educational prison schemes, pedagogical rather than punitive sanctions for young offenders, and the protection of society from dangerous offenders.

Carl Stooss' landmark achievement was to accommodate both schools' beliefs in his dual system of sanctions, formalised in the Criminal Code.[19] Sentences should serve the purpose of retribution, while measures must serve societal ends like reintegration or maintaining safety.

5. Death Penalty

The most controversial sanction is capital punishment. Today, the death penalty is prohibited (Article 10 I Constitution).[20] In 2002, Switzerland ratified Protocol No 13 to the ECHR, concerning the abolition of the death penalty in all circumstances.

19 Zurkinden, p. 304.

20 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

Throughout the Middle Ages and into modern times, the death penalty was commonly employed in Switzerland. It also holds the unfortunate record of being the last country in Europe to have executed a person for witchcraft: On 13 June 1782 Anna Göldi[21] was beheaded immediately after the council of Glarus had convicted her of witchery. Of course, she had only confessed under torture.

Later, both the Code pénal of 1799 and the cantonal criminal codes of the early 19th century provided for the death penalty in the case of crimes like murder, aggravated robbery, or arson. Beheading by sword or guillotine was the most common means of execution. Under the influence of enlightenment thinkers like Beccaria and Voltaire, the Federal Constitution of 1848 banned the death penalty for political crimes. In the following decades, several cantons[22] entirely abolished it. Further, in 1874, Article 65 of the Federal Constitution issued a total ban. Yet, unfortunately, this prohibition only lasted for a couple of years. After a series of murder cases in the late 1870s, the ban on the death penalty was revoked by popular vote. Henceforth, the death penalty, again, was only forbidden for political crimes. This led to several cantons reintroducing capital punishment.[23]

In the making of the Swiss Criminal Code, the death penalty was subject to fierce debate, but the ultimate decision was to ban it in all cases, for all crimes. This decision was made in 1937 by the federal legislator, even though up until 1999,[24] the Constitution would have allowed the death

21 Anna Göldi was employed as a maid by Johann Jakob Tschudi, a rich physician and politician in Glarus. She was accused of having put needles in the milk of Tschudi's daughter, although later examinations of the case suggest that Tschudi may have been conducting an extra-marital affair with Göldi and that this may have been the actual cause of the accusation of witchcraft. Differing recollections of this case are unclear on whether Anna's last name was Göldi or Göldin.

22 Including Fribourg, Neuchâtel, Zurich, Ticino, Geneva, Basel Stadt, Basel Landschaft, and Solothurn.

23 Appenzell Innerrhoden, Obwalden, Schwyz, Zug, St. Gallen, Lucerne, Valais, Schaffhausen, and Fribourg.

24 Switzerland ratified the "Second Option Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty" on 16 June 1994. This protocol obliges state parties to take all necessary measures to abolish the death penalty within their jurisdiction, during both war and peace time. Switzerland implemented the protocol into the revision of the Swiss Federal Constitution of 20th November 1996, but the Constitution did not formally enter into force until 1 January 2000.

penalty to be used as the means of punishment for all crimes except political ones.

For the cantons, the enactment of the Swiss Criminal Code meant that their provisions on the death penalty would become invalid (Article 336 lit. b Criminal Code of 1937). However, in the time between Parliament's decision to abolish the death penalty (21 December 1937) and the official enactment of the Swiss Criminal Code (1 January 1942), two more convicted murderers were executed. The last execution mandated under civic jurisdiction was that of Hans Vollenweider, an offender who had killed a young policeman. In the early morning of 18 October 1940, at the prison of Sarnen in Obwalden, he ascended the scaffold. This execution was highly contested: even the widow of the policeman had asked for a pardon. Furthermore, the Federal Criminal Code of the Military allowed the death penalty until 1992. During and after World War II, 35 persons were sentenced to death for military crimes such as high treason, and 17 of them were executed.

As mentioned above, Switzerland has now, as of 3 May 2002, ratified Protocol 13 of the ECHR, thereby committing to banning the death penalty in all circumstances without the possibility of derogation. There is not, however, total clarity regarding the extent to which this Protocol would prevent Switzerland from re-introducing the death penalty. Some argue that the Swiss Constitution could be modified by a popular initiative (Article 139 Constitution) in a way that explicitly and intentionally violates Protocol 13, which would allow Switzerland to reintroduce the death penalty.[25]

Aside from this legal issue, public debate over the use of the death penalty continues. In 1985, a popular initiative[26] "to Save our Youth" was launched to reinstate the death penalty for selling hard drugs. The committee, however,

25 This sort of argument makes use of the so called *Schubert* exception, which is discussed in the chapter on International Relations on pp. 179.). The case establishes that where the Federal Assembly has intentionally enacted legislation which violates the treaty obligation, the authorities shall apply the federal act. The *Schubert* exception does not apply in the case of treaties which guarantee fundamental rights, such as the ECHR; the rights conferred by such instruments must be respected in all cases. However, there has been no explicit decision as of yet regarding whether the Schubert exception would apply to a conflict between a treaty, even one which guarantees fundamental rights, and the Constitution.

26 Then Article 121 II Constitution of 1874; today: Article 139 Constitution.

failed to collect the necessary 100'000 signatures. In 2010, the family members of a murder victim started a popular initiative entitled "Death Penalty for Murder with Sexual Abuse". It turned out to actually be a PR-stunt to raise awareness for victims of such a crime, and their families. Nevertheless, it once again sparked huge controversy.

6. Euthanasia / Assisted Suicide

A further particularity worth discussing is the Swiss regulation on euthanasia and assisted suicide. Regarding suicidal persons themselves, as Carl Stooss had stated already in 1894: they "*deserve pity, not punishment.*" Thus, attempted suicide is not a crime under Swiss Law. It was, however, at the time of drafting the Criminal Code, a matter of some controversy whether this removal of criminal liability should also be stretched to cover persons who aid and abet suicide.

The legislator decided that helping someone to die out of compassion and empathy should not constitute criminal wrongdoing. The legality of *assisted suicide* results from Article 115 e contrario: any person who, *for selfish motives*, incites or assists another person to commit suicide is liable to a custodial sentence of up to five years or to a monetary penalty. Criminal liability is only warranted if the incitement or assistance to suicide is driven by selfish motives: for example, the possibility of financial gain. Due to this regulation, a physician who provides a person who wishes to die with a lethal dose of Natrium-Pentobarbital (NaP) is not liable. Nor are organisations such as Exit or Dignitas that provide comfort and assistance in suicide, as long as they operate on a non-profit basis. However, family members who help their loved-ones commit suicide, even by simply accompanying them to an organisation like Dignitas, are put at risk by this provision: due to their likely position as heirs to the suicidal individual, they might be viewed as having acted for selfish motives even if, in reality, they were spurred by compassion.

Passive euthanasia is also allowed by Swiss criminal law. This term refers to situations in which death ensues from a deliberate decision not to intervene or not to pursue life-saving measures, where the failure to act corresponds with the will of the person concerned. For example, when a person with a heart attack has refused CPR, or an elderly person with

pneumonia refuses to be treated with antibiotics, or the parenteral nutrition of a person in coma is discontinued, where this is what the coma patient himself would have wished. Generally under Swiss law, a deliberate failure to save someone's life can lead to criminal responsibility for homicide by omission (Articles 111 et seqq.).[27] This applies only when the person failing to act is under a legal or contractual obligation to safeguard the victim's life (Article 11). Physicians or spouses would generally have such an obligation. However, in the circumstances outlined above, criminal responsibility is not incurred. Their general obligation to act to safeguard life is outweighed by the fact that intervening against the patient's will in such a case would in itself constitute a crime (for example, assault or coercion).

Active euthanasia is not permitted by Swiss criminal law. This term refers to situations where a person's death is caused by a wilful *act*, where this act was requested by the person. An example would be the administration of a lethal injection to a person who wishes to die.[28] Actively killing someone is a crime under Swiss law, even if the "victim" explicitly asks to be killed. According to Article 114 ("Homicide at the request of the victim"), any person who for commendable motives, and in particular out of compassion, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence of up to three years or to a monetary penalty. When this rule was drafted in the early 20th century, the legislators decided that *"the principle that all life is untouchable"* prevented them from legalising consensual killings. There is, however, a substantially reduced sentence; killing someone who has given their consent is only a misdemeanour.

There are two key problems with the law's absolute prohibition on active euthanasia in Switzerland. Firstly, contrary to what the legislators of the early 20th century claimed to be the case, it is clear that life is not "untouchable" under Swiss law. This is illustrated by, for example, the law on passive euthanasia or the legality of killing in self-defence (Article 15). Secondly, it is highly controversial whether turning off a life-sustaining

27 Liability can also ensue from Article 128 (*"Any person who fails to offer aid to another … who is in immediate life-threatening danger, in circumstances where the person either could reasonably have been expected to offer aid."*).

28 Judgement of the Bezirksgericht Dielsdorf/ZH, 15 December 2003 (Nr. GG030076).

machine is to be viewed as an active behaviour punishable by Article 114. It has been argued that such an action simply allows the person's health condition to kill them, rather than the removal of the machine being the cause of death.[29] Further, arguably removing any life-sustaining measures is morally equivalent to never beginning them in the first place – which Swiss law permits. Today, the debate on whether the active killing of persons who are unable to kill themselves can be justified rages on.

29 As was argued in the famous British case of Airedale National Health Service Trust v Bland (1993) 1 All ER 821 by the House of Lords, concerning the removal of life-sustaining treatment from a 17 year old boy in a persistent vegetative state: e.g. see Lord Goff at 867.

II. Principles

This section discusses key principles followed in the Swiss legal system. Two of the main principles in Swiss criminal law are the principle of legality (1.) and the principle of no punishment without culpability (2.). The principle of legality contains many sub-principles which will be further analysed; subsequently, the notion of culpability itself in Swiss law is examined.

1. Nulla Poena Sine Lege

Swiss criminal law is first of all dominated by the *principle of legality*. Article 1 states that sanctions (i.e. sentences and measures) may only be imposed for a behaviour that the law explicitly threatens with punishment.[30] Article 1 thus encompasses two principles. Firstly, there is the principle of nullum *crimen sine lege:* no act or omission shall be considered a crime unless the law explicitly says so. For example, today there is no rule in the Swiss criminal code prohibiting homosexual acts.[31] Thus, they are not a crime and courts cannot declare them illegal. Secondly, Article 1 contains the principle nulla *poena sine lege:* no penalty without law. This principle stipulates that all sanctions imposed for criminal acts must be provided for in the law. For example, the death penalty has been abolished in Switzerland. This means that no one in Switzerland can be sentenced to death, even for the most heinous crime.

30 The "official" translation of Article 1 by the Swiss Government is incorrect in many ways: "No penalty (recte: sanction) without a law. No one may be punished (recte: no sanctions may be imposed) for an act (recte: or omission) unless it has been expressly declared to be an offence (recte: by the law)."

31 The Swiss Criminal Code of 21 December 1937 abolished the criminal liability of homosexuality between adults and introduced an age of consent of 20 years, as opposed to 16 years in the case of sexual acts between opposite-sex partners. With the criminal law reform of 1990, the age of consent was lowered to 16 years.

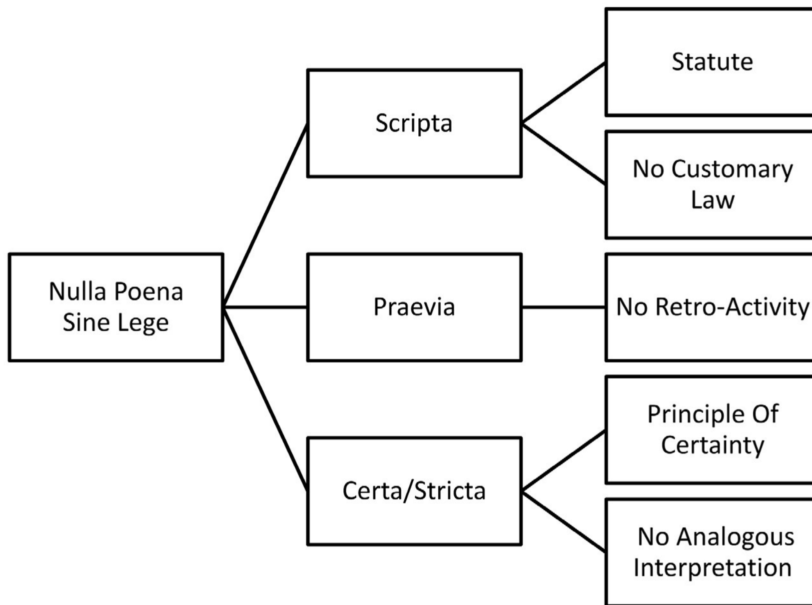

Figure 4: Principle of Legality

The nulla poena sine lege principle is commonly used as a pars pro toto term which encompasses the nullum crimen principle as well. The nulla poena sine lege principle has been refined into a set of sub-principles that have a strong impact on the practical application of the criminal law.

The first sub-principle of nulla poena sine lege is the nulla poena sine lege *scripta* principle: no penalty without *written* law. This principle precludes the creation or existence of customary criminal law; all crimes must be laid down by a formal Act of Parliament. For example, several cantonal criminal codes used to prohibit extra-marital sexual relations: such a prohibition could not be reintroduced today by declaring it a customary criminal rule.

The second sub-principle is the nulla poena sine lege *praevia* principle: no penalty without *pre-existing* law. In general, criminal law may not be applied retroactively (Article 2 I) unless the new provision is more lenient (Article 2 II). For example, since 1 October 2002, abortions have been completely legalised during the first 12 weeks of the pregnancy (before this, abortions were only permitted for medical reasons). Because the new 12-weeks-rule is milder, it could be applied retroactively.

The third sub-principle is the the nulla poena sine lege *certa/stricta* principle, which demands that the elements of a crime and the sanctions which apply to it be *clearly defined*. Addressees of rules must get a fair warning: they must know exactly what the consequences of their actions will be. An example of a provision which infringes this principle is Article 303, which imposes an unspecified monetary or custodial sentence for false accusations. An offender can face any sentence from 3 units of monetary penalty to 20 years of imprisonment. The nulla poena sine lege *certa/stricta* principle also prohibits criminal law operating on the basis of analogies. For example, Article 215 prohibits bigamy: this prohibition could not be extended to cohabitation by analogy, to meet a case where a woman has two boyfriends at a time.

2. Nulla Poena Sine Culpa

"Punishment without guilt is nonsense, barbarism", wrote Ernst Hafter, one of the early and influential criminal law scholars in Switzerland, in 1946. The principle *nulla poena sine culpa* (*keine Strafe ohne Schuld;* no punishment without culpability) is crucial to Swiss criminal law. In fact, to understand the notion of *Schuld* is to understand the concept of Swiss criminal law itself. *Schuld* has many different meanings; it can be used interchangeably to convey notions like culpability, guilt, blame, fault, and responsibility.

Criminal Liability

Elements of Crime	Objective Elements - Offender - Object of the Crime - Act - Result - Causation	Subjective Elements - Direct Intent - Conditional Intent	Objective Wrong
Unlawfulness	Justification - Self-Defence - Necessity - Consent		
Culpability	- Criminal Responsibility - Error of Law - Unreasonableness		Subjective Blame

Figure 5: Criminal Liabilty

Criminal liability in Swiss law is a three-stage concept: all three stages of the test must be met in order for criminal liability to apply. First, the objective and subjective elements of the crime (*Tatbestandsmässigkeit*) have to be established: has the victim been killed by the defendant (objective element; "*actus reus*")? Did the defendant kill the victim intentionally (subjective element; "*mens rea*")? Second, the unlawfulness (*Rechtswidrigkeit*) of the act has to be determined. Did the defendant kill in legitimate self-defence? Was a theft of food warranted by the necessity to survive? Did the masochist consent to violent sexual practices? Third, the culpability (*Schuld*) of the offender has to be assessed. Can the defendant be blamed for the act? Perpetrators can only be held responsible for their unlawful acts if they were able to both grasp the demands imposed on them by legal rules and act accordingly (Article 19).

Culpability can be excluded on three different grounds. The first ground is the defendant's lack of *criminal responsibility*. If wrongdoers are unable to understand the wrongfulness of their act they cannot be held to account. An example of this is when the offender has a severely low IQ. However, it should be noted that this ground is not often accepted by courts. Children under the age of ten are legally excluded from criminal responsibility (Article 3 Juvenile Criminal Law Act)[32]. Their inability to fully assess wrongfulness is presumed by law. Criminal responsibility is also excluded if a person is able to assess wrongfulness but is unable to act accordingly. In most cases where culpability is excluded, it is under this ground of inability to control one's actions despite knowing they are wrong. This ability to restrain oneself may be absent in some manifestations of paranoid schizophrenia. Further, it can be absent where the defendant is under the influence of extreme emotions and acts in the heat of the moment. The typical example of this latter sort of case is where the defendant, just previously to committing an offence of assault, has found out that his/her partner is conducting an affair.

The second ground for the exclusion of culpability is an *error of law*. Again, in this situation the person is not aware of the wrongfulness of their act. Yet the reason for this failure is not a mental deficiency: instead, it is missing or incorrect information about the law. However, the standard is high. Error of law is only accepted as grounds for excluding culpability if the perpetrator both did not and, crucially, could not have known that he or she was acting unlawfully. In a famous case from 1978, a 19-year-old Sicilian immigrant had sex with a 15-year-old Swiss girl. He successfully claimed that he did not know

32 Juvenile Criminal Law Act of 20 June 2003, SR 311.1.

the concept of the legal age of consent. He had thought that sexual intercourse with a minor was only punishable if he did not intend to marry his sexual partner.[33] It is highly questionable whether the Federal Supreme Court would still rule today that this man *could* not have known that his act was illegal.

Thirdly, culpability is excluded if the wrongdoer could not have been reasonably expected to act lawfully. An example of when this *unreasonableness* standard can be met is where a perpetrator kills a person in order to save his or her own life. Had the famous English *R v. Dudley and Stephens* case of 1884[34] – where three shipwrecked sailors killed and then ate a cabin boy to avoid starvation – been judged in Switzerland, the defendants would have had to be acquitted. Though the killing was unlawful, it would have been excusable under Swiss law to end the boy's life in such extreme circumstances, meaning the defendants would not have met the culpability test. They could not reasonably have been expected to sacrifice their own lives, by not killing and eating the cabin boy.

There is one hugely intriguing problem regarding culpability which remains unsolved. If culpability is about blaming someone for having acted unlawfully, then it must be established that this person *could* have acted differently. In other words, culpability hinges on free will; there can be no culpability without freedom of will. If, as some believe, our actions are predetermined, then we cannot be blamed for having "chosen" to do something illegal. The current state of knowledge allows us neither to prove nor disprove freedom of will. Currently, the notion that any perpetrator could have chosen to behave otherwise is therefore merely presumed as an "inevitable fiction" in (Swiss) criminal law.

33 BGE 104 IV 217.

34 R v. Dudley and Stephens (1884) 14 QBD (Queen's Bench Divison) 273 DC.

III. Landmark Cases

The Federal Supreme Court in Lausanne is Switzerland's highest court. Its criminal law division was formerly known as the *Court of Cassation*. In dealing with criminal law, its main task is to secure the consistent application of the Swiss Criminal Code throughout Switzerland. In the following paragraphs, some landmark rulings of the Federal Supreme Court will be discussed.

1. Rolling Stones[35]

In the evening of 21 April 1983, two men (A and B) were on their way home from their cabin in the Töss river valley near Zurich. They spotted two big stones (individually weighing 52 kg and 100 kg) at the top of slope so steep that the bottom was not visible. They decided to roll these stones down the slope. A pushed the 52 kg stone down the hill, whilst B pushed the heavier, 100 kg stone. One of these stones struck and killed a fisherman at the foot of the slope. However, it could not be established which of the two stones had killed him, and therefore who – A or B – had been responsible for the death.

When the case came before the Supreme Court, the judges held that A and B were criminally liable as co-offenders for negligent homicide. Up until that ruling, the notion of co-offending was strictly limited to intentional crimes. This seemed logical because the conventional view of co-offending generally requires the existence of a conspiracy: at least two persons who embark on a common criminal pursuit. However, in the "rolling stones" case there was no joint decision (conspiracy) to kill the fisherman. By deciding to roll the stones down the slope, A and B jointly engaged in a grossly negligent behaviour that caused the death of the fisherman. The Supreme Court ruling was an attempt to overcome problems of evidence, by employing the tools of the substantive criminal law.[36]

35 BGE 113 IV 58.

36 Concurring that the Supreme Court's reasoning was flawed, Petrig/Zurkinden argue that it would have been better to hold A and B liable for negligent, parallel perpetration

2. Domestic Tyrant[37]

X was a very poorly integrated immigrant from Kosovo. She was married to Y, whom she had five children with. Y constantly abused X: he beat her with the cable of a vacuum cleaner, he threw a butcher's knife at her, he banned her from leaving the house and tore up her passport. In January 1993, he told their eldest daughter that her mother was going to die during the course of that year. On 15 March 1993, Y showed his wife a revolver he had bought in order to kill her. He then put it under his pillow and went to sleep. At one o'clock in the morning, X took the revolver and shot Y dead while he was sleeping.

The Supreme Court ruled that X had acted in a state of excusable necessity to end her suffering. The killing of her husband was unlawful (Article 113 – manslaughter): there was no legal justification for her actions. She had not acted in legitimate self-defence (Article 15) for Y was not imminently about to attack her. However, she did not act culpably (Article 19 – excusable act in a situation of necessity). She was excused because her life was in danger and she saw no other way out.[38]

This 1995 case seems to send out a very strong message against domestic violence. However, its applicability should not be over-interpreted. X's situation was extreme: the law would normally still expect victims of abuse to call for help before resorting to such an act.

3. Deadly Car Race[39]

In the late evening on 3 September 1999, two motorists who had never met before and who were both driving a Volkswagen Corrado started a car race on a cross-country road near Lucerne. As the two drivers were approaching the village of Gelfingen at a speed of approximately 130km/h, one driver sought to overtake the other. He subsequently lost control of his car, which veered onto the sidewalk and hit two teenagers who were killed instantly.

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by omission – this presupposes A and B are in "guarantor" position due to the fact they both created a risk (i.e. they would incur criminal liability for failing to prevent each other from rolling the stones down the hill), p. 124.

37 BGE 122 IV 1

38 See unreasonableness standard, p. 389.

39 BGE 130 IV 58.

Both of the drivers were convicted of homicide (Article 111) and sentenced to 6.5 years of imprisonment. The Federal Supreme Court upheld this conviction. For the first time in a binding precedent, persons responsible for a fatal car accident were convicted of homicide with conditional intent (*dolus eventualis*). Up until that case, even accidents caused by gross carelessness were always classified as criminal negligence. The Supreme Court argued that not only did the drivers know that their behaviour was extremely dangerous, but that by putting achieving victory in the race above everything else, they had willingly accepted a deadly outcome.

From a retributive point of view the decision can be understood. The maximum penalty of 3 years for a negligent double homicide just did not fit the crime. From a dogmatic point of view, however, the ruling is highly problematic. The drivers *knowingly* incurred an extremely high risk by engaging in a car race. But the Court made a large leap from here: the fact that the drivers knew of the risk led the Court to the conclusion that they had accepted the fatal outcome. To draw a straight inference from what someone *knew* to what someone *wanted* has far-reaching consequences for criminal liability in general. It is highly unlikely that the drivers *wanted* to kill the teenagers, or even that they were indifferent to such an outcome.[40] It is much more likely that they (wrongly) trusted their driving skills and hoped for a lucky outcome.[41] In other words, they willingly accepted the *risk* of death, but they did not accept the actual outcome of death. Thus, they should have been convicted for life endangerment (Article 129) which allows a maximum prison sentence of 7.5 years.[42]

4. Hiking in the Nude[43]

On a warm and sunny Sunday afternoon in autumn 2009, 45-year-old X was hiking in the nude through the mountains of Appenzell Innerrhoden. He walked by a fire-pit where a family with young children was resting and past a

40 As is required for the offender to possess conditional intent, see p. 375.

41 See BGE 133 IV 9

42 According to Article 129, this crime can mandate a custodial sentence not exceeding five years or a monetary penalty. In cases of multiple endangerment or when committed in combination with other offences, this maximum sentence can be elevated by 150 %, i.e. it can be up to 7.5 years (see Article 49).

43 BGE 138 IV 13.

Christian rehabilitation centre for people with drug-addictions. A woman who observed him filed a report with the local police.

Article 19 of the relevant cantonal code which regulated *"indecent behaviour"* provided that *"any person publicly displaying indecent behaviour is liable to a fine."* The Federal Supreme Court first considered whether the Canton of Appenzell Innerrhoden had exceeded its legislative powers by legislating on indecent behaviour, considering the fact that the Federal Parliament has exclusive legislative competence in the field of sexual offences. The court found that because walking in the nude did not qualify as exhibitionism, sexual harassment, or pornography, the cantonal legislator possessed the power to legislate on indecency. Secondly, the Court considered whether the notion of "indecent behaviour" in Article 19 was sufficiently clear to satisfy the *nulla poena sine lege* principle. They held that the provision was sufficiently clear, deeming walking in the nude as obviously indecent behaviour.

Both of the Court's assessments are questionable. When considering the issue of the canton's competence to legislate on indecent behaviour, it should be noted that the Federal Parliament generally restricted sexual offences to harmful behaviour (rape, sexual harassment, etc.). Parliament made some specific exceptions (e.g. exhibitionism, pornography) to this general rule: this can be interpreted as the federal legislator setting the outer limit for the criminalisation of immoral conduct. Hence, following this view, there was no room for a cantonal rule on indecent behaviour: Appenzell Innerrhoden had acted out-with their legislative competence. Regarding the Court's ruling that Article 19 was sufficiently clear to satisfy the principle of *nulla poena sine lege*, here they missed the key point. The question was not whether hiking in the nude *can* be classified as indecent behaviour, but whether such a classification was foreseeable given the broad and changeable notion of "indecency". If the legislator wants to ban walking in the nude, they must and should issue an unambiguous rule, for example: "Any person who displays nudity in public is liable to a fine."

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