

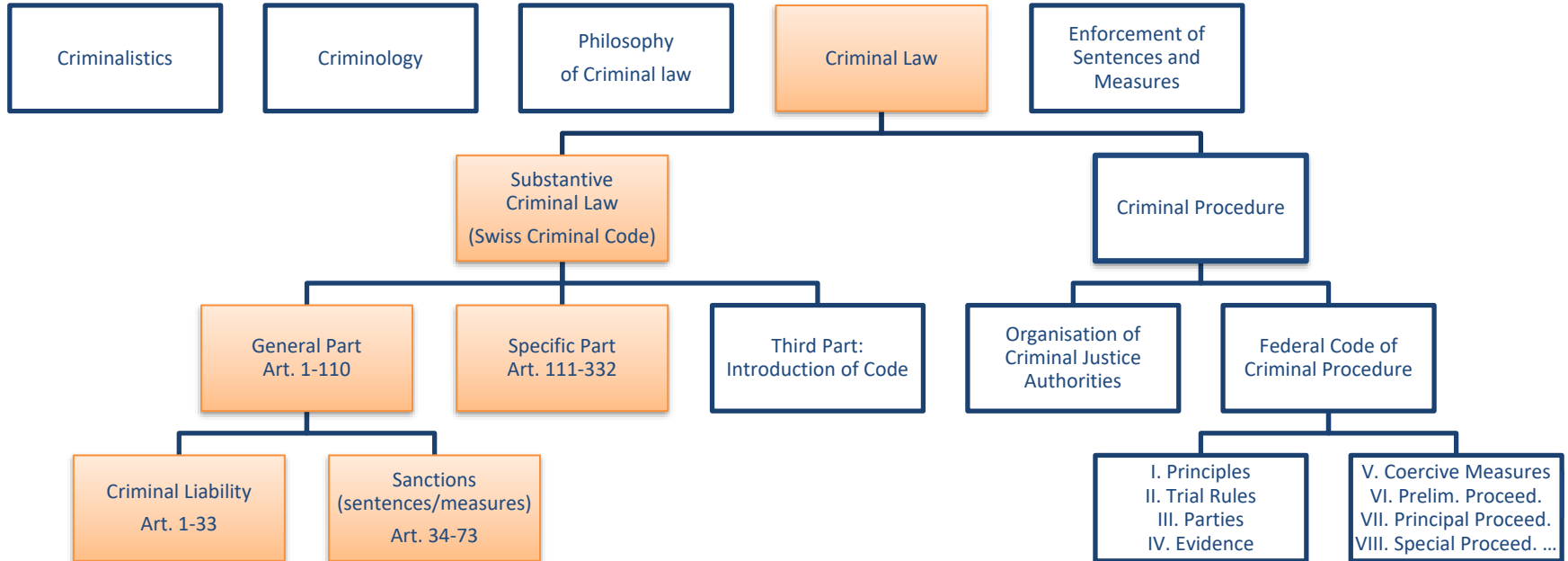


Universität  
Zürich <sup>UZH</sup>

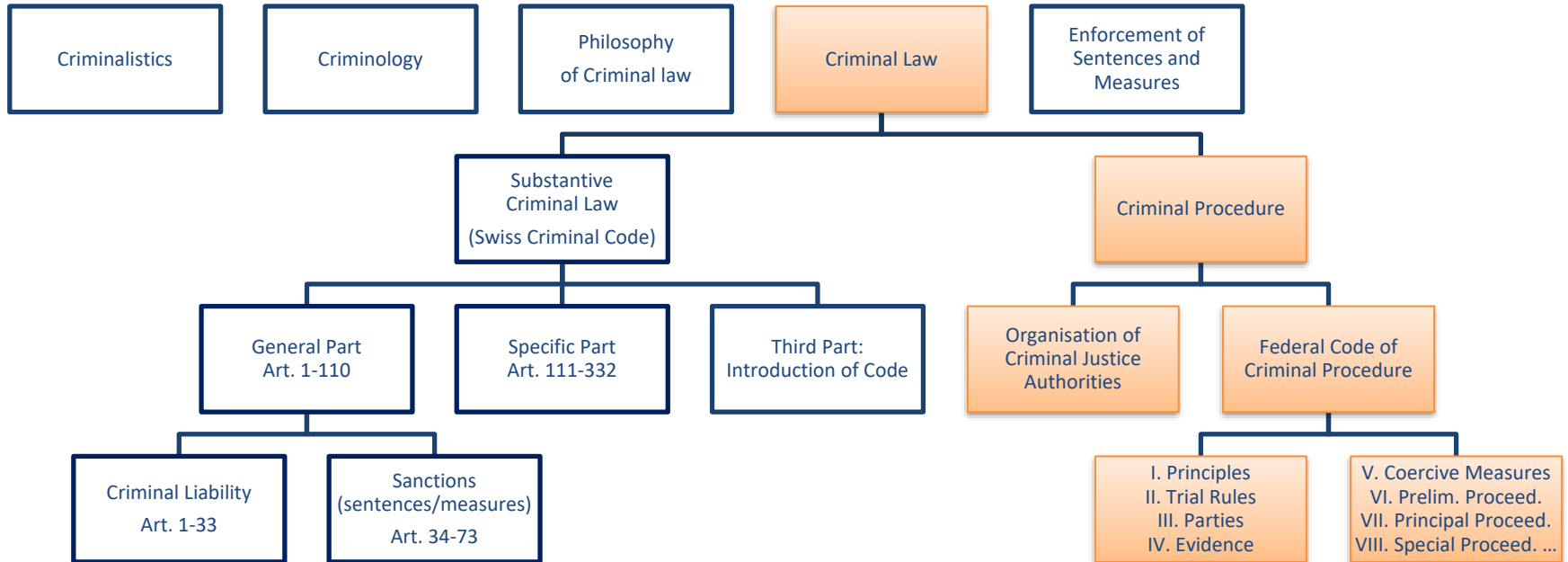
# Swiss Criminal Procedure

Marc Thommen

# Swiss Criminal Law



# Swiss Criminal Law





# Criminal Procedure

History



# History (1848-1999)

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





# History (1848-1999)

- Different Systems: Prosecutors, Investigative Magistrates, Juge d'instruction etc.
- Federal Supreme Court set out a common minimal standard of procedural rules.





## History (2000)

### Art. 123 I – Swiss Constitution

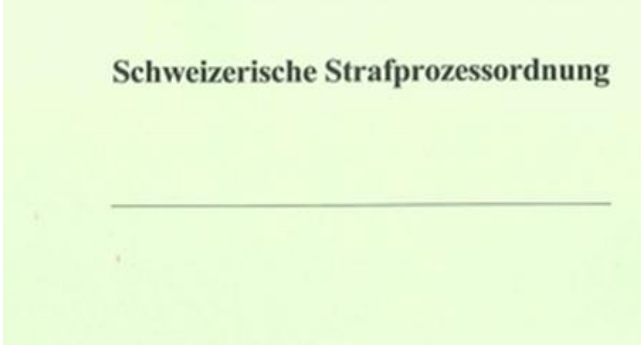
The Confederation is responsible for legislation in the field of criminal law and the law of criminal procedure.





# History (since 2000)

Federal Code of Criminal  
Procedure of 5 October 2007,  
in force 1 January 2011

The image shows the cover of a book titled 'Schweizerische Strafprozessordnung'. The cover is a solid light green color. The title is printed in a black, sans-serif font at the top. Below the title, there is a thin horizontal line.

Schweizerische Strafprozessordnung

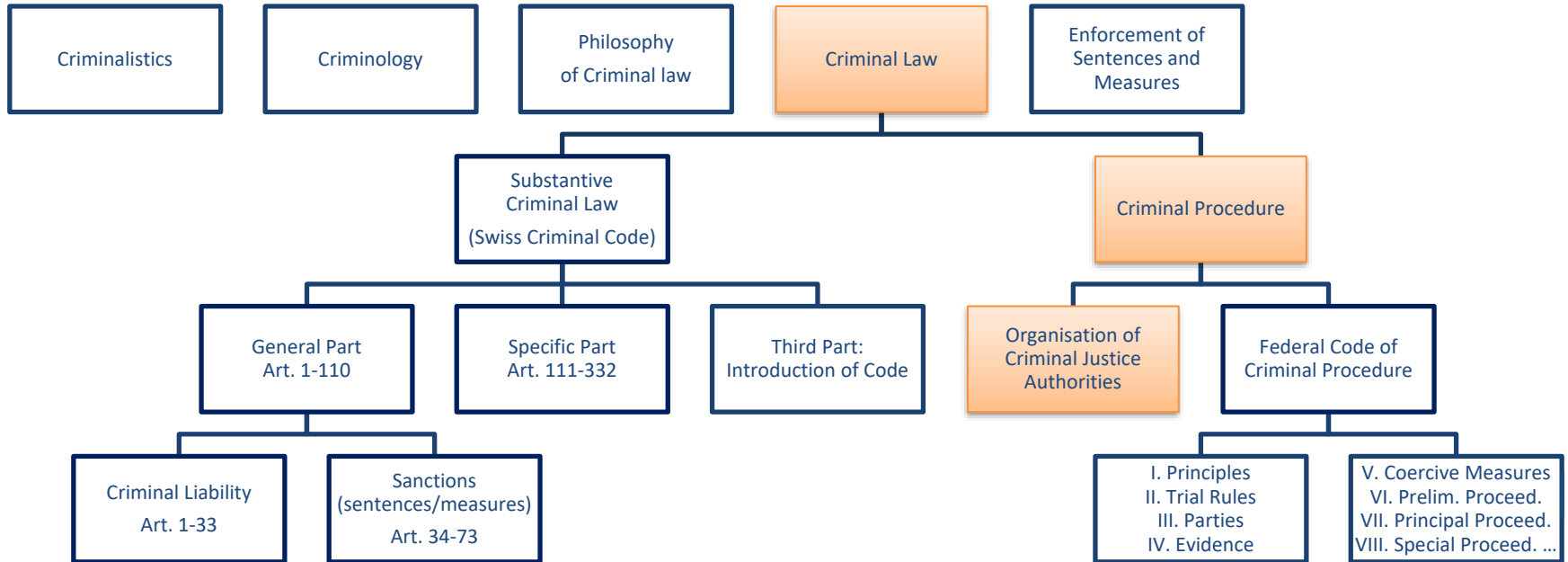




# Criminal Procedure

Organisation of Criminal Justice Authorities

# 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.





## 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.

1. Organisation of Courts
2. Administration of Justice
3. Execution of Sanctions



# 1. Organisation of Criminal Justice Authorities

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

211.1

**Gesetz  
über die Gerichts- und Behördenorganisation  
im Zivil- und Strafprozess (GOG)**

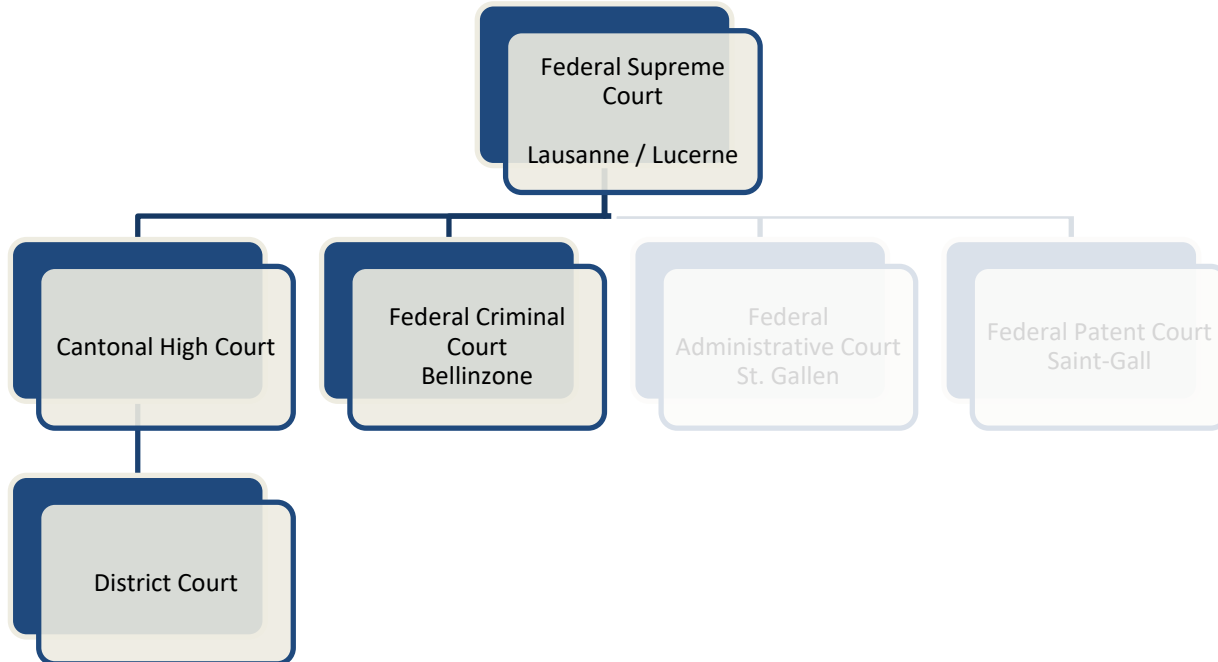
(vom 10. Mai 2010)<sup>1,2</sup>

*Der Kantonsrat,*

nach Einsichtnahme in den Antrag des Regierungsrates vom 1. Juli 2009<sup>3</sup> und in den geänderten Antrag der Kommission für Justiz und öffentliche Sicherheit vom 18. März 2010<sup>4</sup>,

*beschliesst:*

## 2. Administration of Criminal Justice



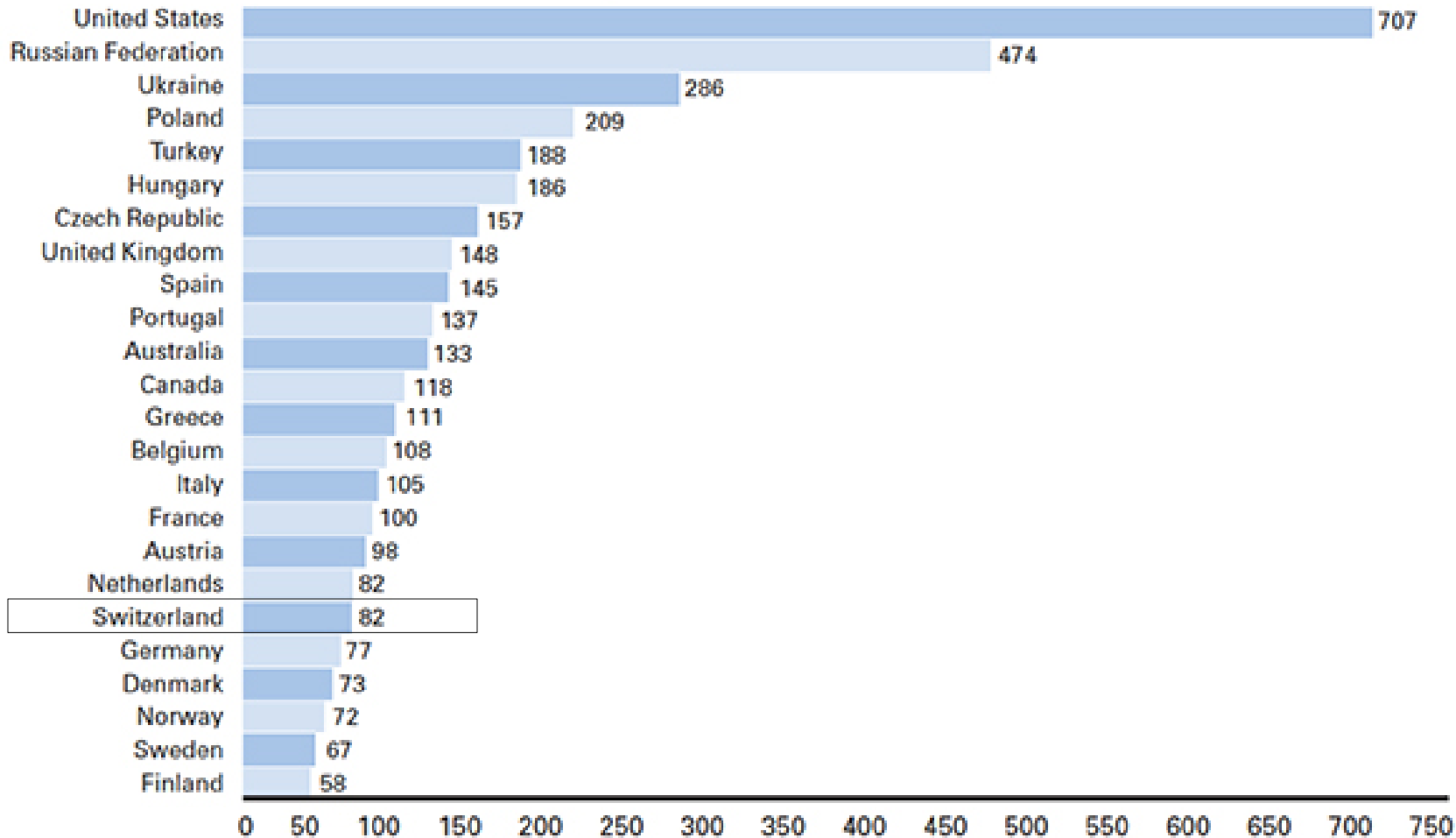


### 3. Execution of Sanctions

Cantons provide prisons and institutions for therapeutic and isolation measures.



## Incarceration rates per 100,000







## Foreigners in Swiss Population

22.1%

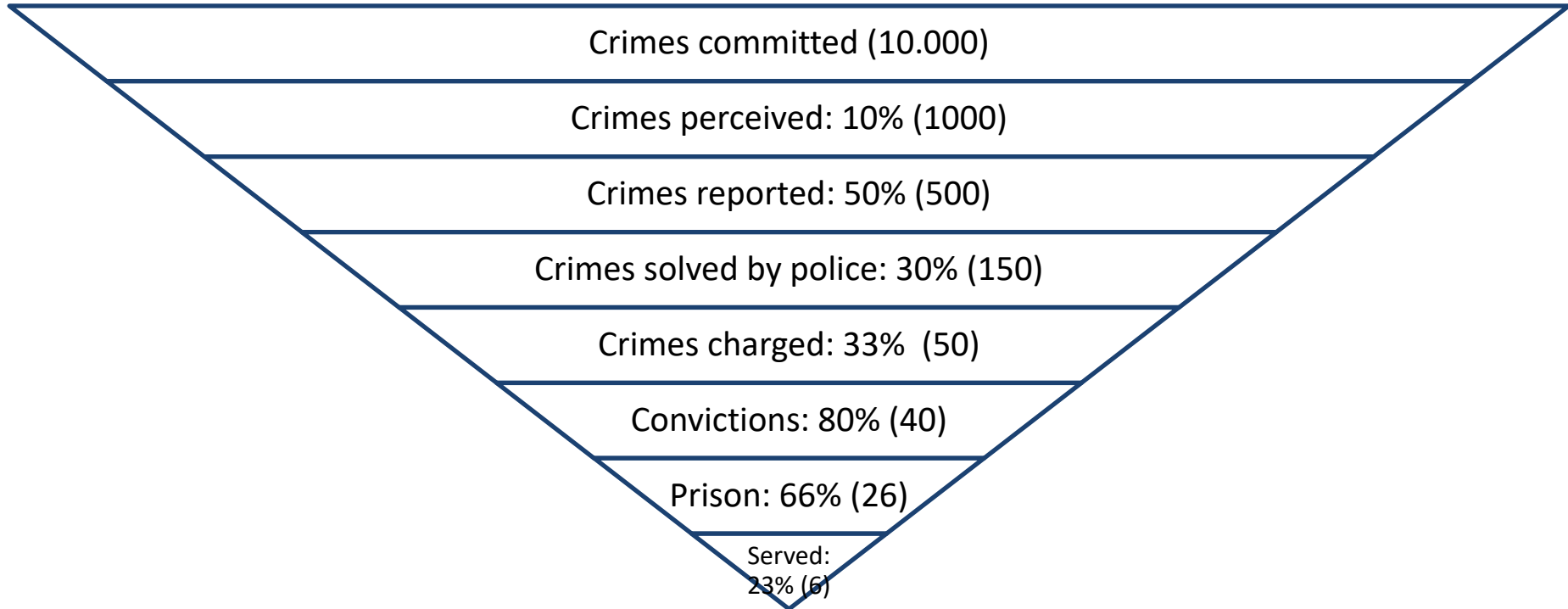


## Foreigners in Swiss Prison Population

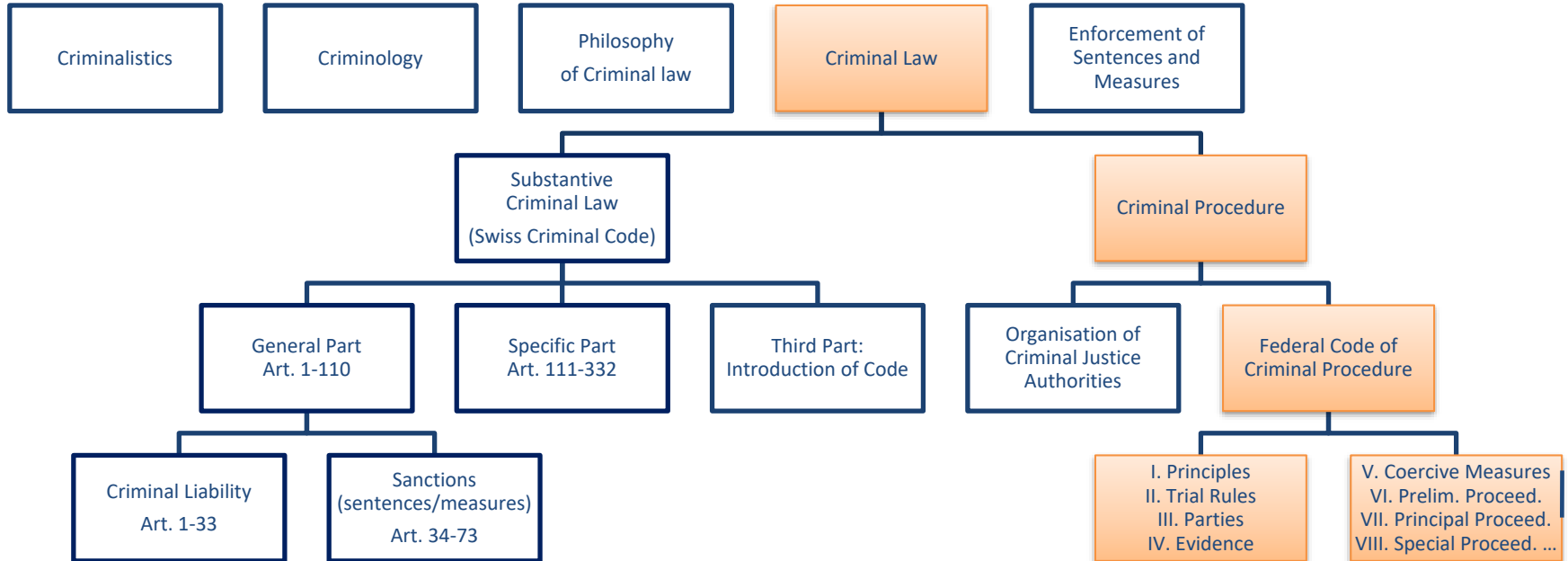
71.6%



# «Sanction-Strainer»



# 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
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- Title 5 Compulsory Measures
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- Title 8 Special Procedures
- Title 9 Appellate Remedies
- Title 10 Procedural Costs
- Title 11 Legal Effect and Execution of Decisions

## **Swiss Criminal Procedure Code**

**(Criminal Procedure Code, CrimPC)**

of 5 October 2007 (Status as of 1 March 2019).

*The Federal Assembly of the Swiss Confederation,*

on the basis of Article 123 paragraph 1 of the Federal Constitution<sup>1</sup>, and  
having considered the Federal Council Dispatch dated 21 December 2005

*decrees:*



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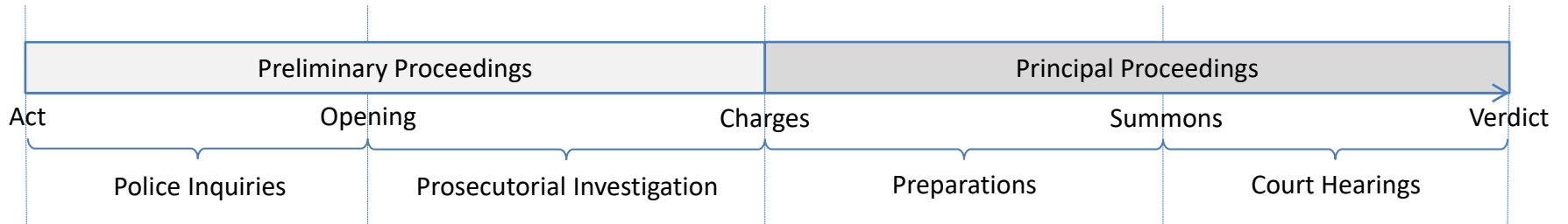
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having considered the Federal Council Dispatch dated 21 December 2005

*decrees:*



# Criminal Proceedings



# Art. 6 – Principle of substantive truth

1 The criminal justice authorities shall investigate ex officio all the circumstances relevant to the assessment of the criminal act and the accused.

2 They shall investigate incriminating and exculpatory circumstances with equal care

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*decrees:*

# Art. 7 – Obligation to prosecute

1 The criminal justice authorities are obliged to commence and conduct proceedings that fall within their jurisdiction where they are aware of or have grounds for suspecting that an offence has been committed.

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# Art. 12 – Prosecution authorities

The prosecution authorities are:

- a. the police;
- b. the public prosecutor;
- c. Authorities (contraventions)

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# The Public Prosecutor

- Formal head of the investigation (Art. 16)
- Becomes party to the trial proceedings once the charges are brought before court (Art. 104 I c)



Marcel Scholl, Prosecutor



# Police

- Secure evidence
- Find suspects
- Examination hearings





## Art. 13 – Courts

The following bodies have judicial powers in criminal proceedings:

- a. Coercive Measures Court
- b. Court of First Instance
- c. Complaints Authority
- d. Court of Appeal

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*decrees:*



# The Judge

- Head of the main Court hearings, “inquisitorial” system: active questioning, truth-seeking by judge
- Coercive measures (detention on remand, secret surveillance, undercover agents...)



District Court Judge, Zürich  
Simone Nabholz



# Swiss Criminal Procedure Code of 5 October 2007

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# Art. 104 – Parties

1 Parties are:

- a. the accused;
- b. the private claimant;
- c. in the main hearing and in appellate proceedings: the public prosecutor.

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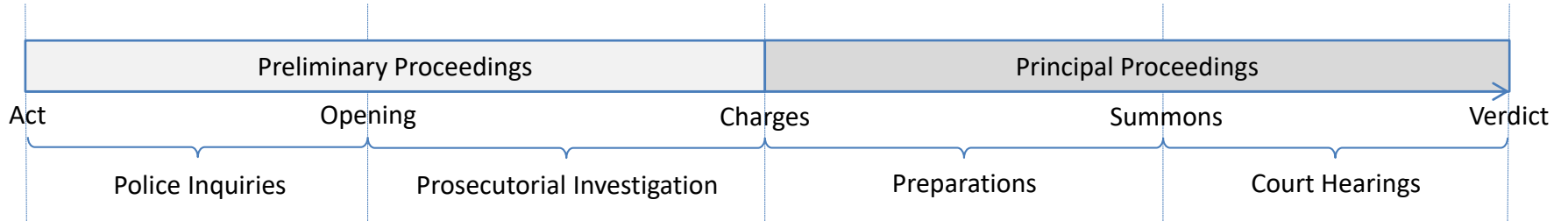
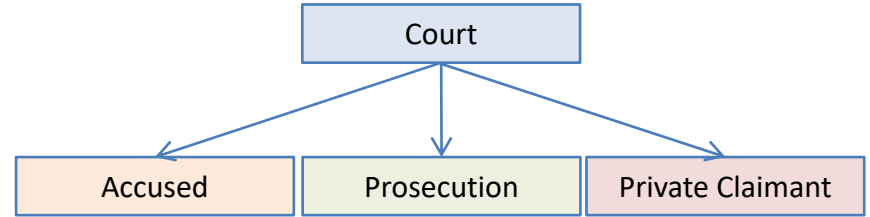
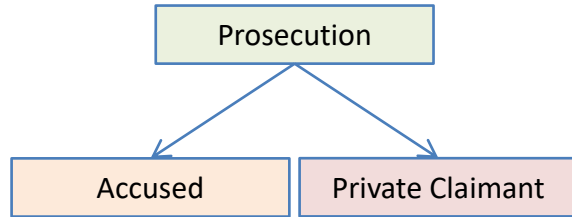
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# Parties



# 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)
- Gives statements at court

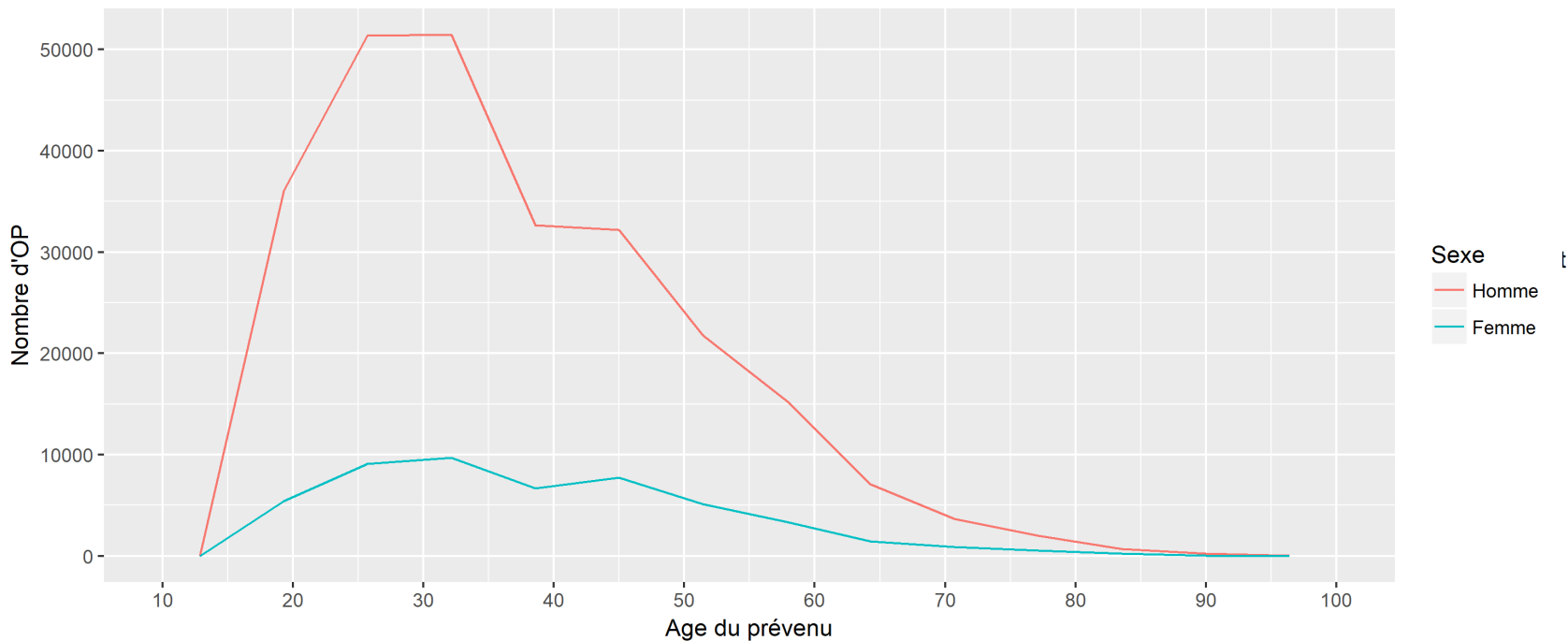


Carl Hirschmann



# Penal order convictions by age and sex

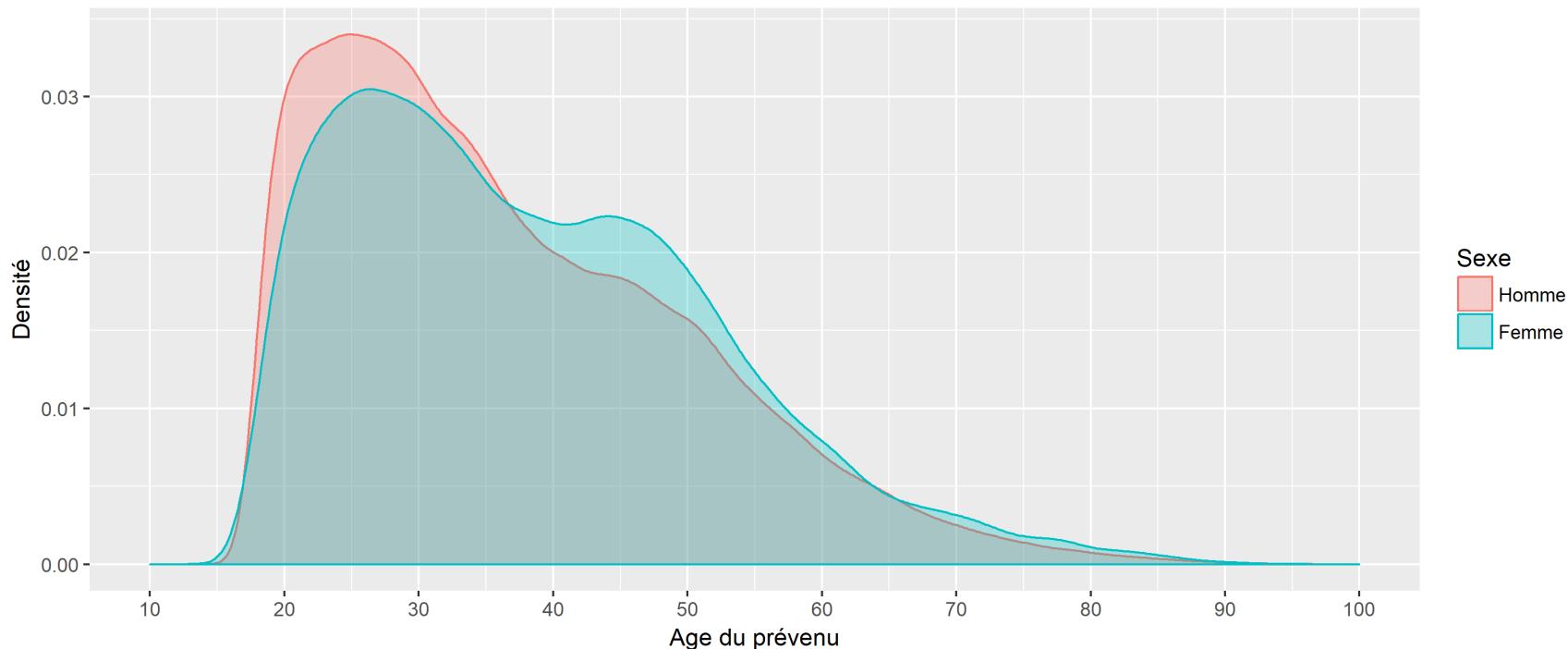
Dispersion des âges par sexe



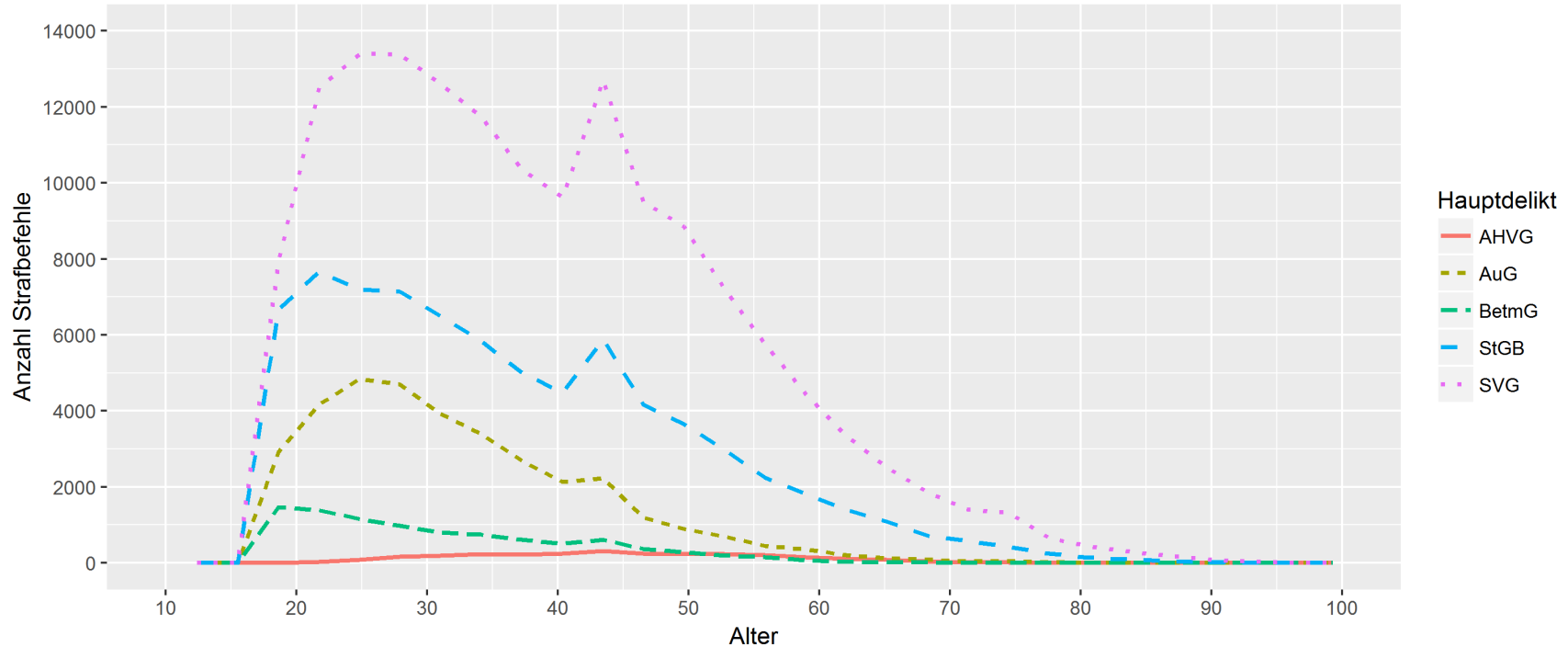


# Density of PO-Convictions by age and sex

Dispersion des âges par sexe



# Penal Order Convictions by age and federal laws





## Art. 113 Status [of the accused]

The accused may not be compelled to incriminate him or herself. In particular, the accused is entitled to refuse to make a statement or to cooperate in the criminal proceedings.

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# Art. 113 Status [of the accused]

Does the accused person have a right to lie?

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# Art. 104 – Parties

## 1 Parties are:

- a. the accused;
- b. the private claimant;
- c. in the main hearing and in appellate proceedings: the public prosecutor.

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## Art. 115 – The aggrieved person

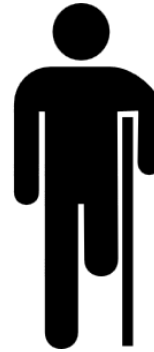
An aggrieved person is a person whose rights have been directly violated by the criminal offence.

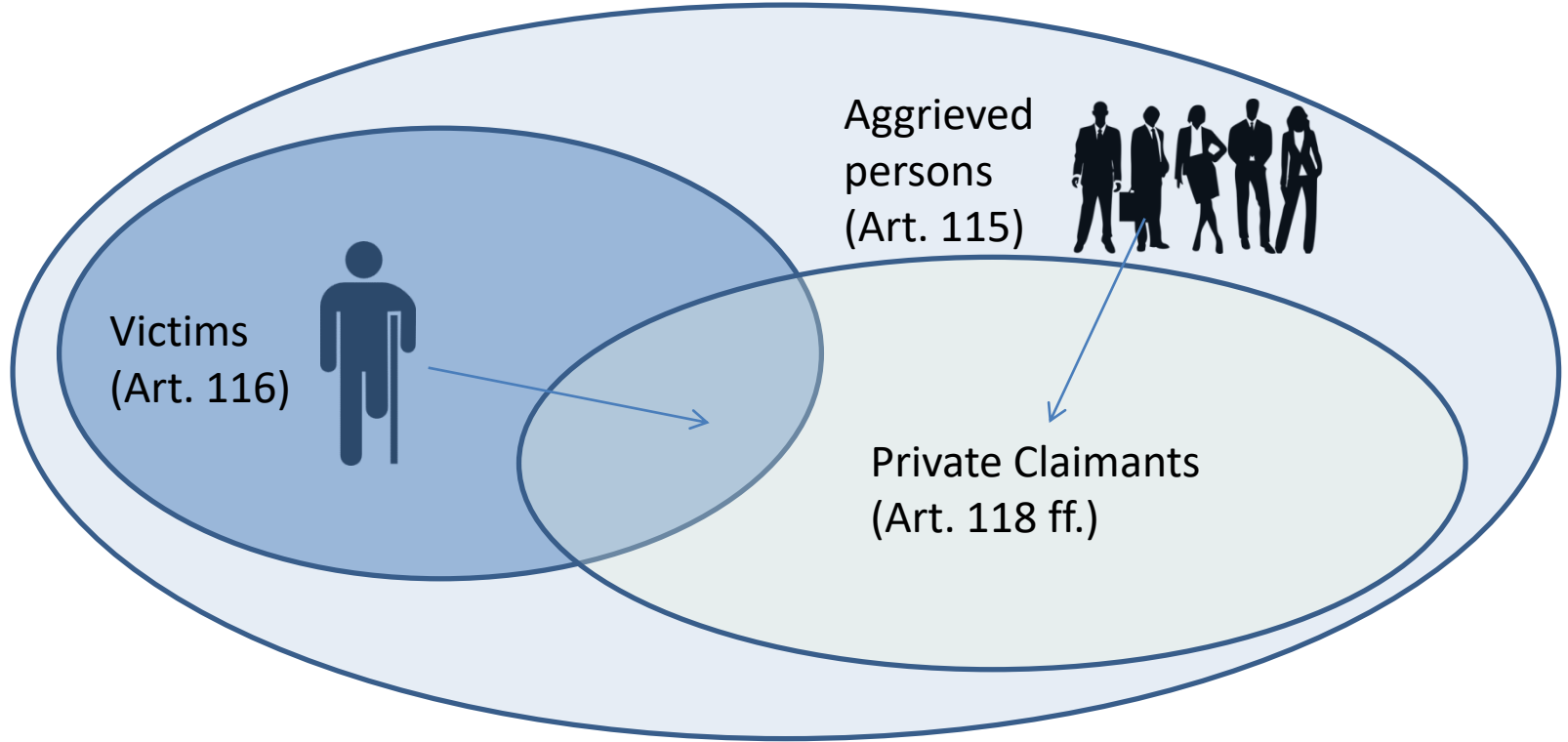




# The victim

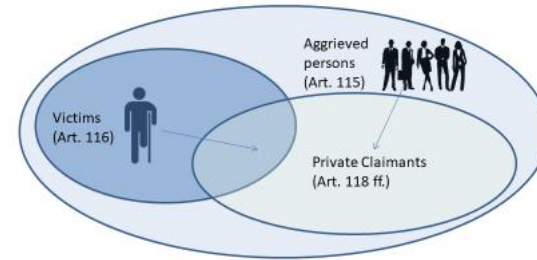
- Victim is a person who suffered physical, sexual or mental harm from an offence (Art. 116 )
- Status: **Special** protection and rights under the Federal Act on Support to Victims of Crime (2007)
- Special rights that apply only to «victims» and not «aggrieved persons»





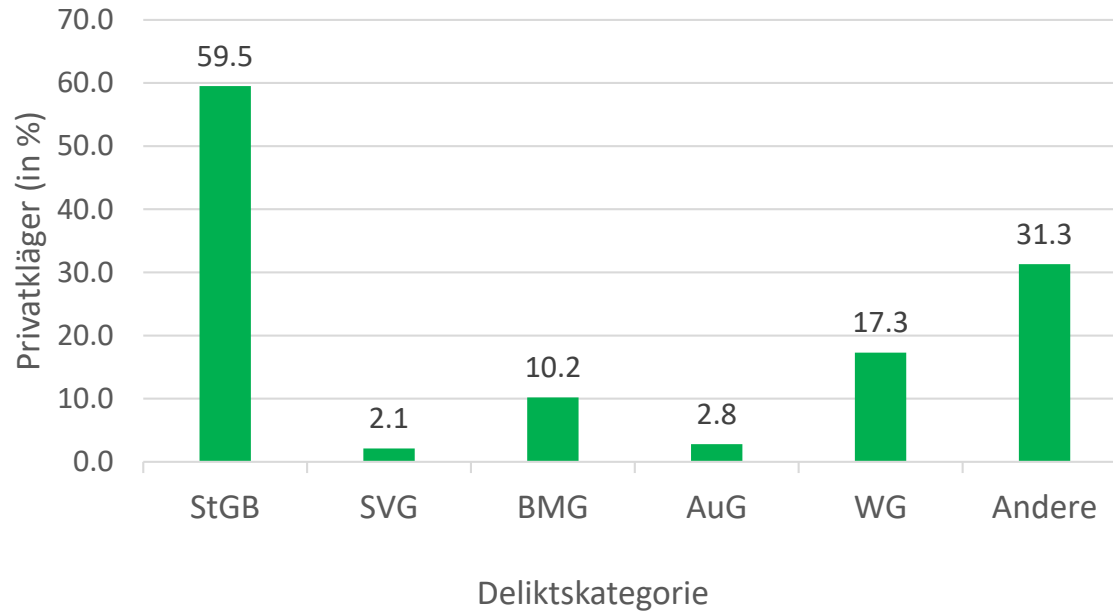
# Private Claimants

- Be present at hearing of accused
- See evidence
- Plead to charges
- Demand compensation





# Private Claimants

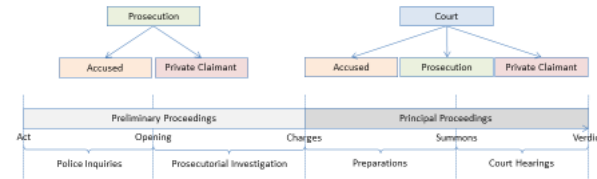


# Art. 104 – Parties

1 Parties are:

- a. the accused;
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- c. in the main hearing and in appellate proceedings:  
the public prosecutor.

## Parties





## Art. 127 – [Legal advisors]

The accused, the private claimant and the other people involved in the proceedings may appoint a legal advisor to safeguard their interests.

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*decrees:*





# Art. 158 – Cautioning at the first examination hearing

1 The police or prosecution shall inform the accused that :

- a. preliminary proceedings have been instituted...
- b. that he/she may refuse to make statements or to participate
- c. that he/she is entitled to appoint defence counsel or where appropriate to request a legal aid defence counsel;
- d. that he/she may request an interpreter.

2 Examination hearings which take place despite the fact that this information was not first provided shall not be used.

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*decrees:*



# Legal advisors



Accused appoints  
Defence counsel  
(Art. 128/129)



Victim/family appoints  
legal counsel  
(Art. 128/129)



# Art. 130 – Mandatory appointment of defence counsel

The accused **must** be represented by defence counsel if accused:

- a. detained on remand for more than 10 days;
- b. faced with a prison sentence... of more than a year;
- c. is unable, due to physical or mental condition or for other reasons, to sufficiently safeguard procedural interests;
- d. prosecutor appears in person at Court ...

## Swiss Criminal Procedure Code

(Criminal Procedure Code, CrimPC)

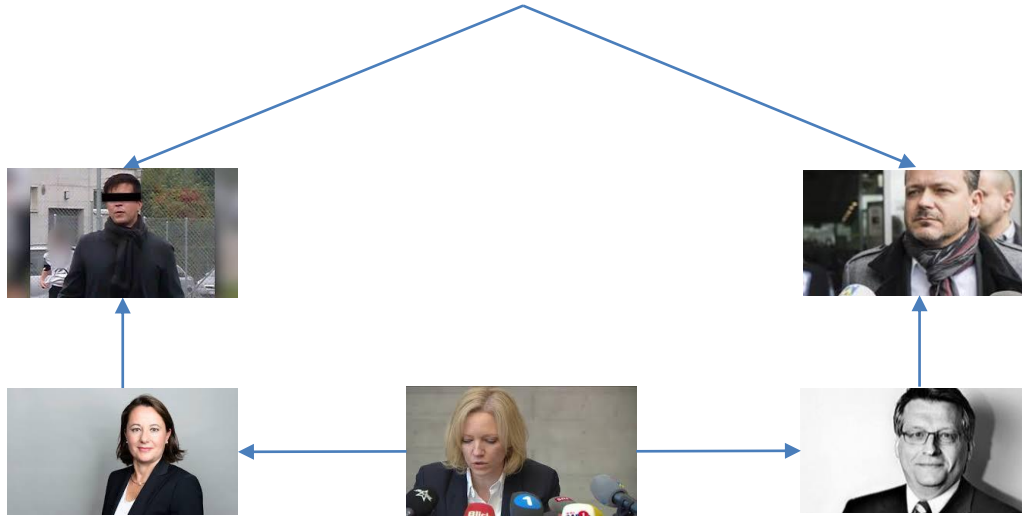
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*decrees:*

# Legal aid (defence) counsel



Prosecutor  
Appoints legal  
aid counsel



## Art. 132 – Legal aid defence counsel (on demand)

1 The person in charge of the proceedings shall **grant** legal aid if... the accused does not have **sufficient funds** and defence counsel is necessary to safe-guard his or **her interests**.

3 A case will, at any rate, no longer be considered to be trivial, if a sentence of imprisonment of more than **4 months**... is to be expected.

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## Art. 131 – (ex officio) appointment of defence counsel

...If the conditions for the mandatory appointment of defence counsel are fulfilled at the initiation of the preliminary proceedings, then defence counsel shall be appointed **after the first examination hearing** conducted by the prosecution and in any event before the initiation of the investigation.

3 If evidence is taken or heard before defence counsel was appointed... the evidence ... shall only be valid, if the accused waives the opportunity to have the evidence heard or taken again.

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*decrees:*



## Art. 139 – Basic principles [of evidence]

1 The criminal justice authorities shall, in determining the truth, use all lawful evidence deemed by science and experience to be suitable.

2 Evidence shall not be led in relation to facts which are insignificant, obvious, well known to the criminal justice authorities, or which have already been sufficiently proven in law.

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## Art. 139 – Basic principles [of evidence]

1 The criminal justice authorities shall, in determining the truth, use **all lawful evidence** deemed by science and experience to be suitable.

No ban on hearsay

2 Evidence shall not be led in relation to facts which are insignificant, obvious, well known to the criminal justice authorities, or which have already been **sufficiently proven in law**.

Anticipated assessment of evidence



## Art. 140 – Prohibited methods of obtaining evidence

1 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.

2 Such methods shall also be illegal, even if the person concerned has consented to their use.

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## 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.

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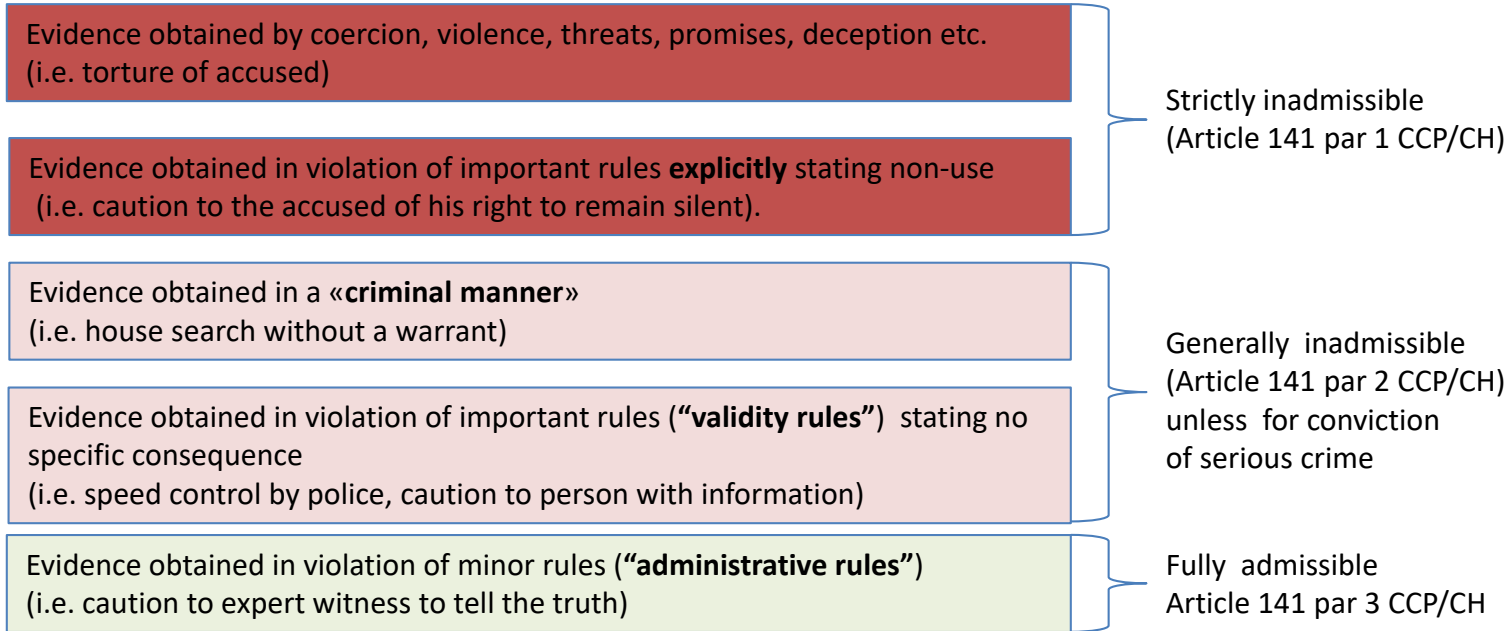
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# The 5 Levels of Evidence Exclusion in Swiss Law



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

28 February 1981 advertisement placed in France Soir:

"Seeking former legionnaire ... for occasional assignments, offer with telephone number, address and curriculum vitae to RTZ 81... CH Basel 2."



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

- Schenk chose Richard Pauty.
- June 19, 1981: Pauty informs Josette Schenk that he has been ordered by her ex-husband to kill her.
- Together they inform the examining magistrate.



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

- Pauty stated that Schenk would contact him soon to give him details of the assassination and USD 40,000.
- Pauty installed a cassette recorder on the telephone in his mother's Paris apartment.



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

- 26 June 1981, 9.30 a.m.:  
Schenk calls Pauty.
- Pauty tapes conversation then  
informs Inspector Messerli  
about the recording.
- June 30, 1981: Recording is  
presented to Mrs. Schenk for  
identification.





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

- Schenk is arrested on 30 June 1981 and then confronted with Pauty.
- On 1 July Schenk is released.
- On 3 February 1982 proceedings stayed.



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

- The public prosecutor successfully challenges stay of procedure.
- August 13, 1982: Schenk is sentenced to 12 years.



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

- Secretly taping somebody is a criminal offence in Switzerland (Art. 179<sup>ter</sup> SCC)
- The tape was used as the main piece of evidence in the conviction of Schenk.





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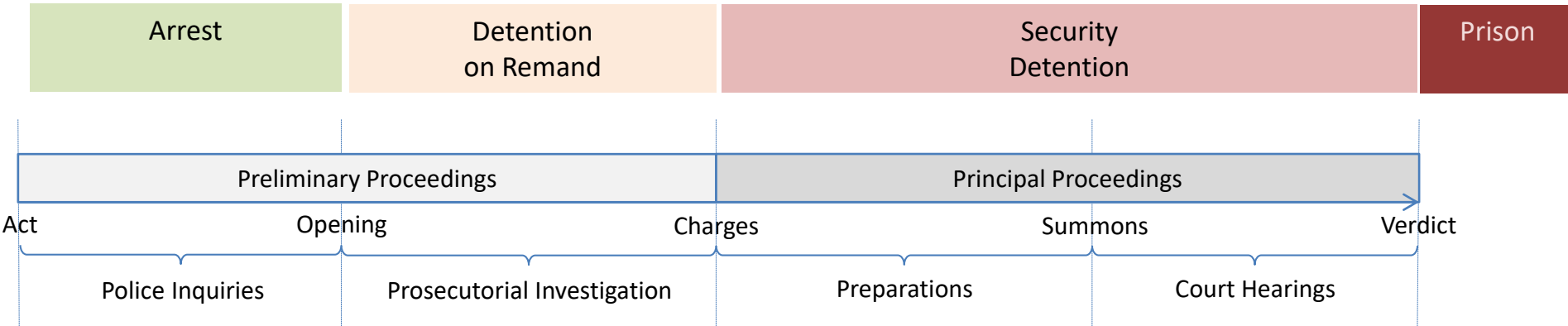
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# Deprivation of Liberty





## Art. 221 – Requirements [detention on remand]

1 Detention on remand and security detention shall only be legitimate if the accused person is strongly suspected of having committed a crime or an offence and there is a serious risk that he or she:

- a. will evade the criminal proceedings...;
- b. will manipulate people or interfere with evidence...; or
- c. will commit serious crimes or offences [again].

2 Detention shall also be legitimate if there are serious reasons to fear that a person will act on his or her threats to commit a serious crime.

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*decrees:*



# Art. 226 Decision Court for Coercive Measures

1 The Court responsible for Coercive Measures shall determine the issue without delay and within 48 hours of receipt of the claim at the latest.

4 In its decision, it may... set a maximum duration for the detention on remand [3 months]

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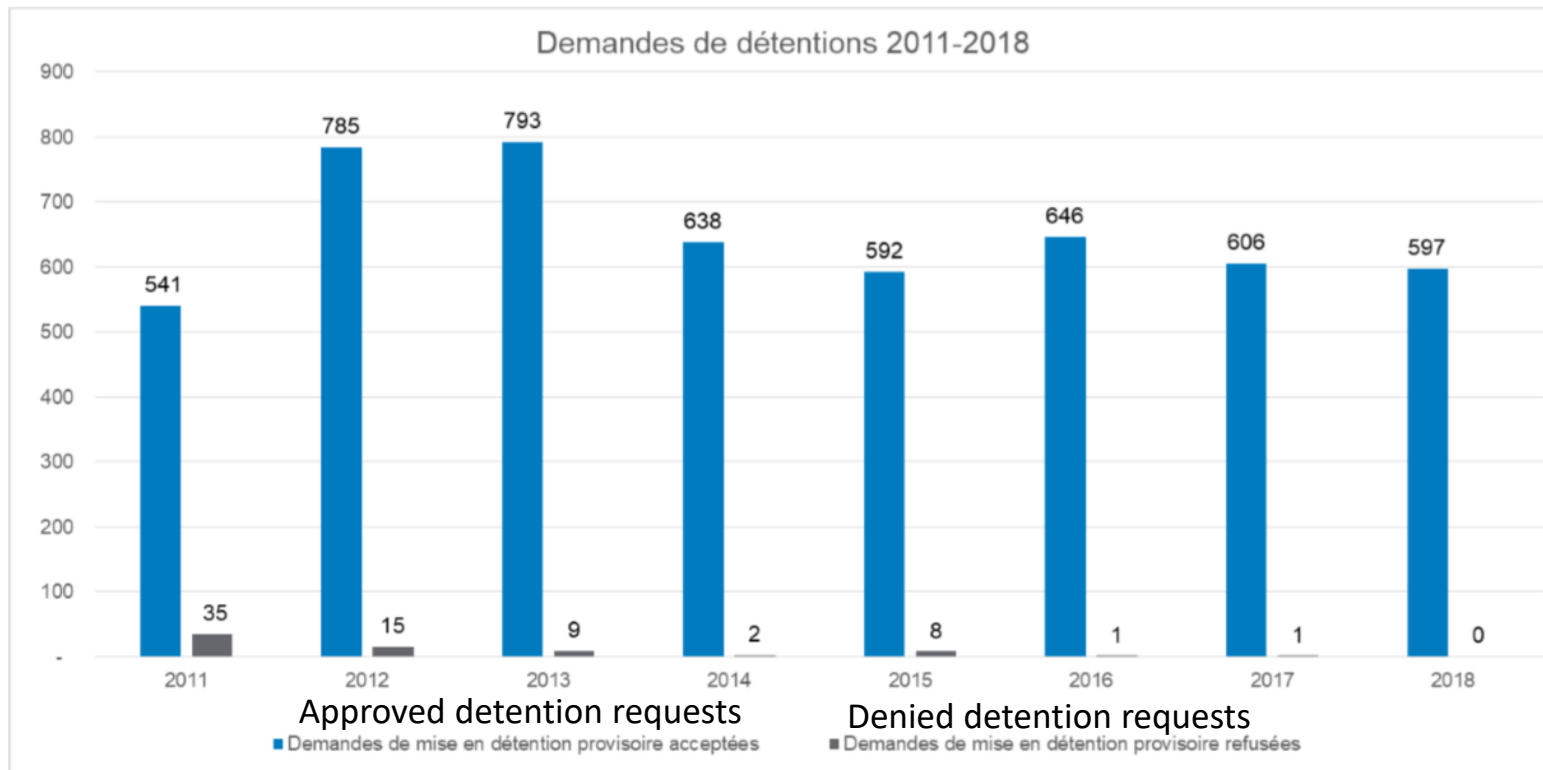
on the basis of Article 123 paragraph 1 of the Federal Constitution<sup>1</sup>, and having considered the Federal Council Dispatch dated 21 December 2005

*decrees:*

# L'effet désocialisant de la détention préventive : un mal nécessaire ?

## II. La détention préventive – rappel du cadre et des conditions

detention requests 2011-2019





## Art. 227 – Extension of detention on remand

7 The extension of the detention on remand shall be authorised for a period of up to three months at a time, in exceptional cases for a period of up to six months.

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(Criminal Procedure Code, CrimPC)

of 5 October 2007 (Status as of 1 March 2019).

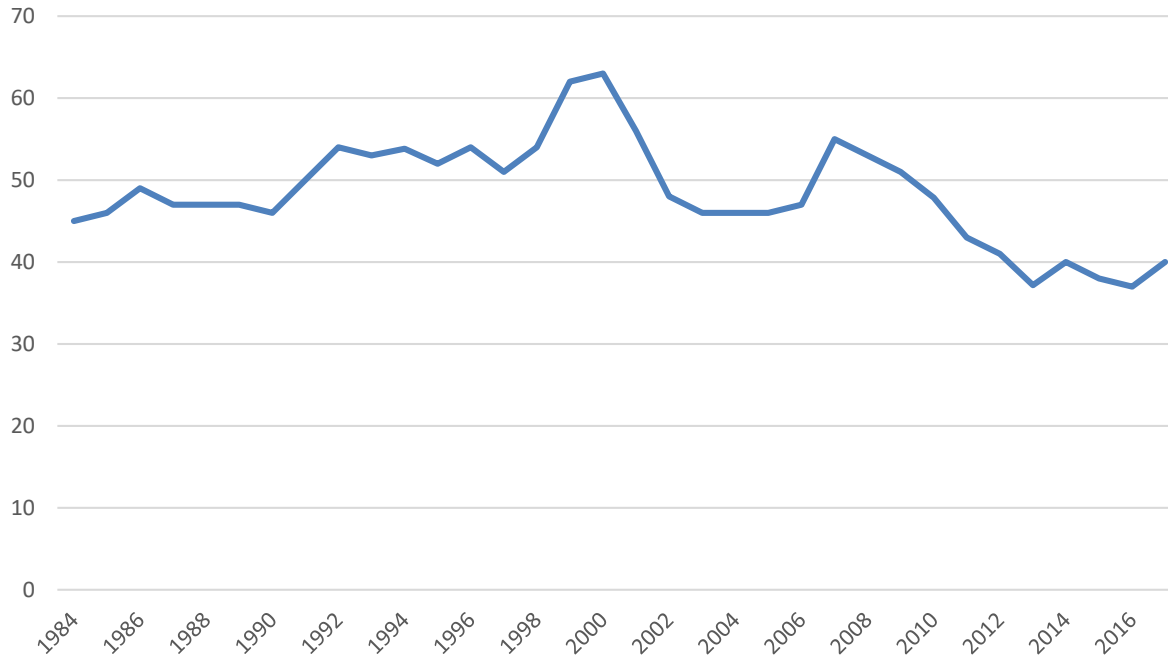
*The Federal Assembly of the Swiss Confederation,*

on the basis of Article 123 paragraph 1 of the Federal Constitution<sup>1</sup>, and  
having considered the Federal Council Dispatch dated 21 December 2005

*decrees:*



Average detention time in days





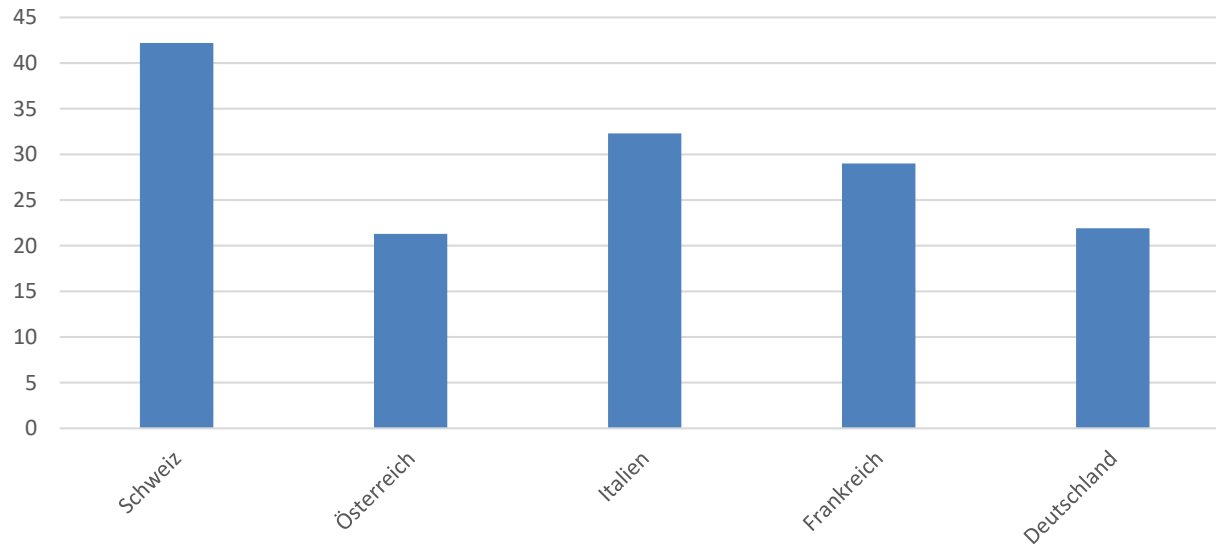
## Pretrial detention in Switzerland (2017)

107'932 convictions  
19'995 (18,5%) pretrial detention.  
14'896: up to 2 days  
1'396: 3-30 days  
1'297: 1-3 months  
1069: 3-6 months  
822: 6-12 months  
515: more than one year





## Percentage of prisoners in remand or security detention in the prison population





# 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

## **Swiss Criminal Procedure Code**

**(Criminal Procedure Code, CrimPC)**

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having considered the Federal Council Dispatch dated 21 December 2005

*decrees:*















# Cattle case

Police investigation:

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



Cantonal Police of St. Gallen

# Cattle case

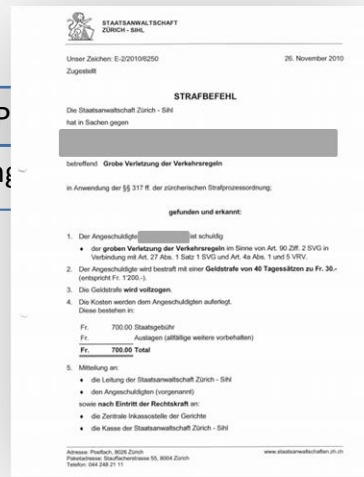
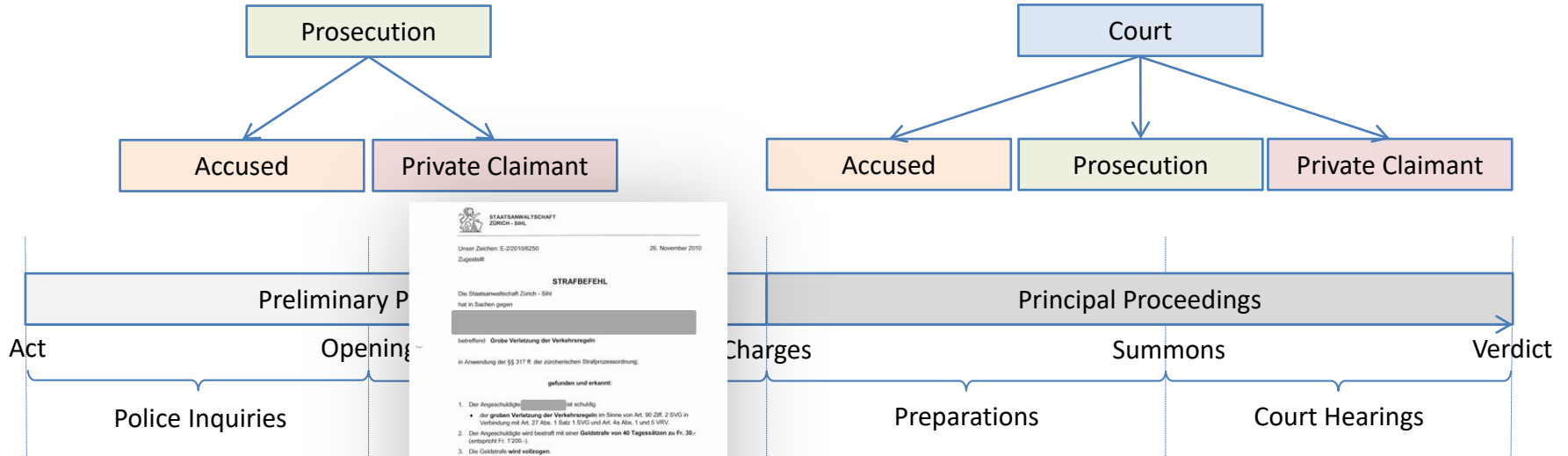
Public Prosecutor, penal order:

- Threatening behaviour
- Violation of Weapons Act
- Monetary penalty (90 units at CHF 360.– = CHF 32.000.–)
- X. objected to penalty order



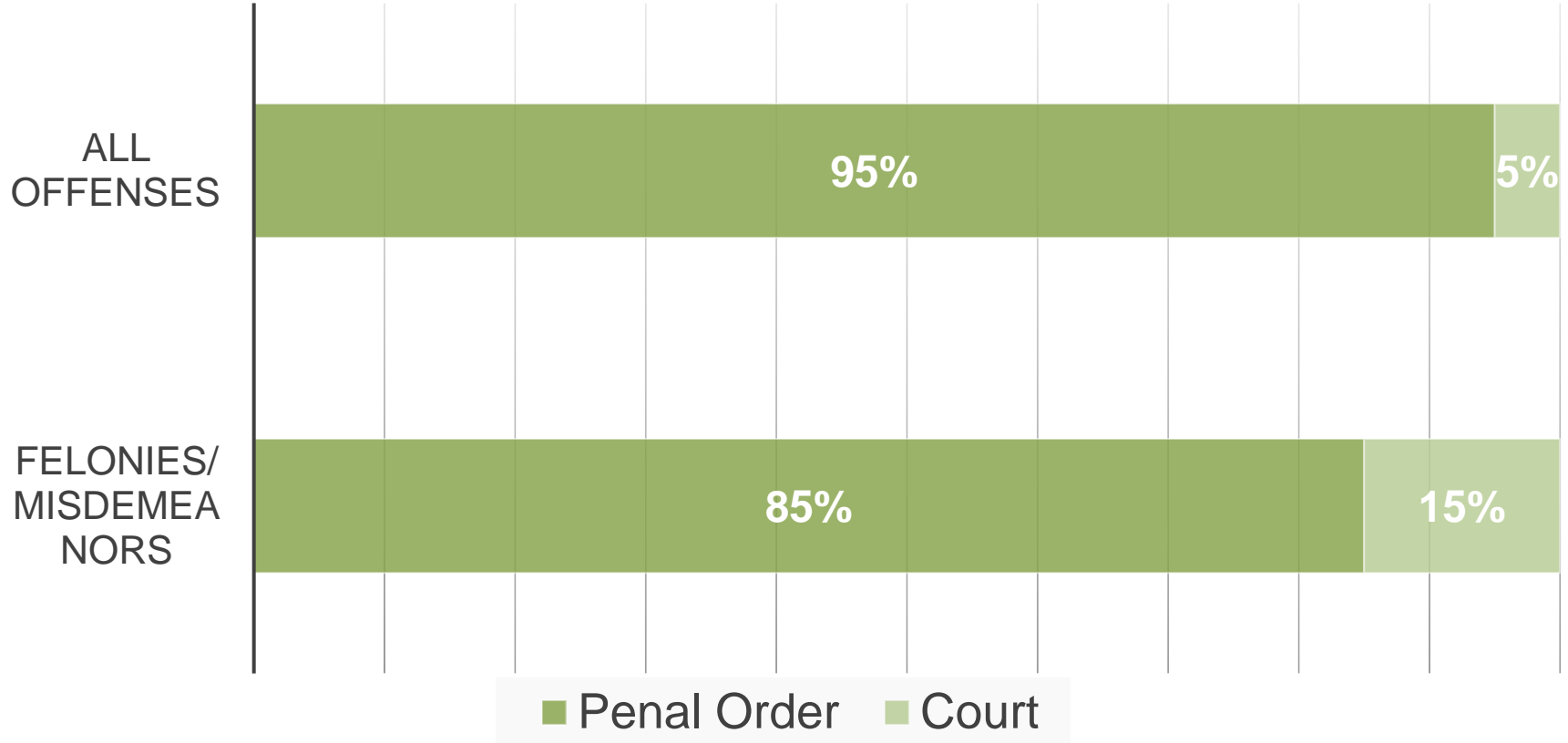
Untersuchungsamt Gossau

# Swiss Criminal Proceedings





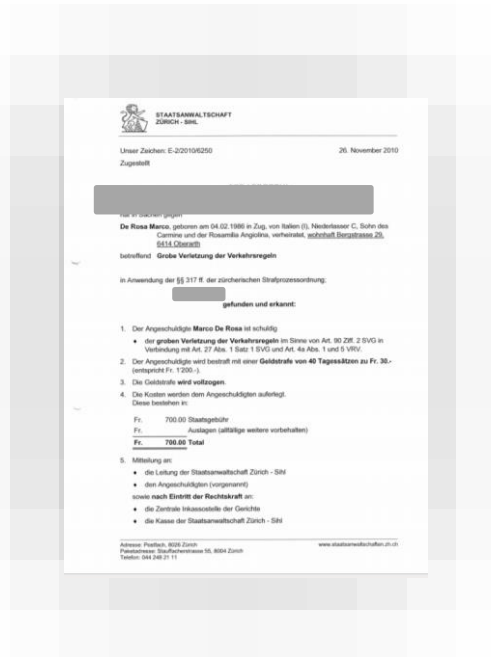
# Ratio Penal Orders/Trials



# Art. 352 CCP – Penal Order

If the accused person has ...  
confessed to the facts of the case or  
if the circumstances have been  
otherwise sufficiently resolved, then  
the prosecution shall issue  
a penal order if it considers... that  
one of the following sentences suffices:

- a fine;
- a monetary penalty
- ...
- up to 6 months of imprisonment.





# Art. 352 CCP – Penal Order

If the accused person has ...  
**confessed** to the facts of the case or  
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the prosecution shall issue  
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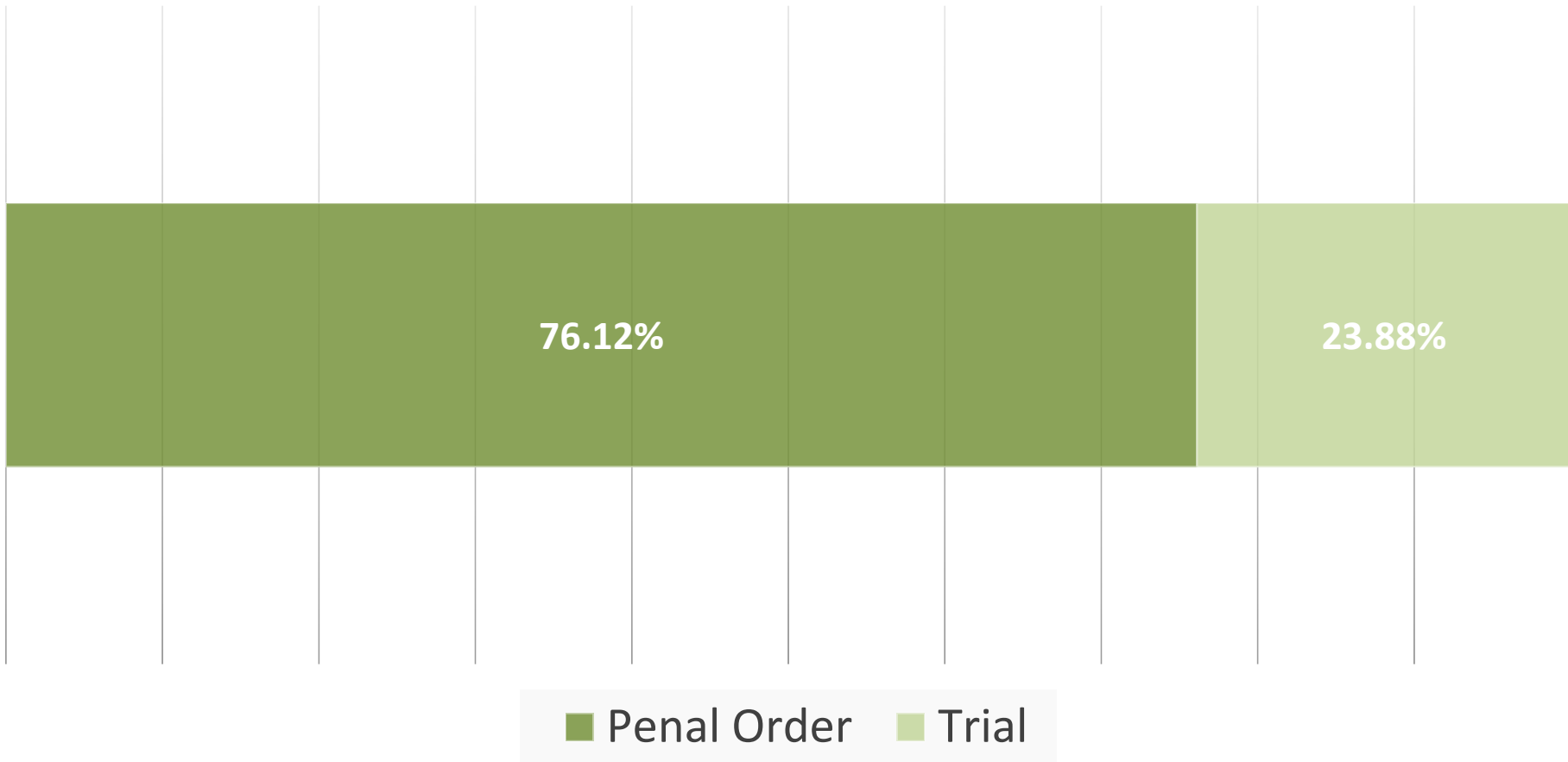
# Art. 352 CCP – Penal Order

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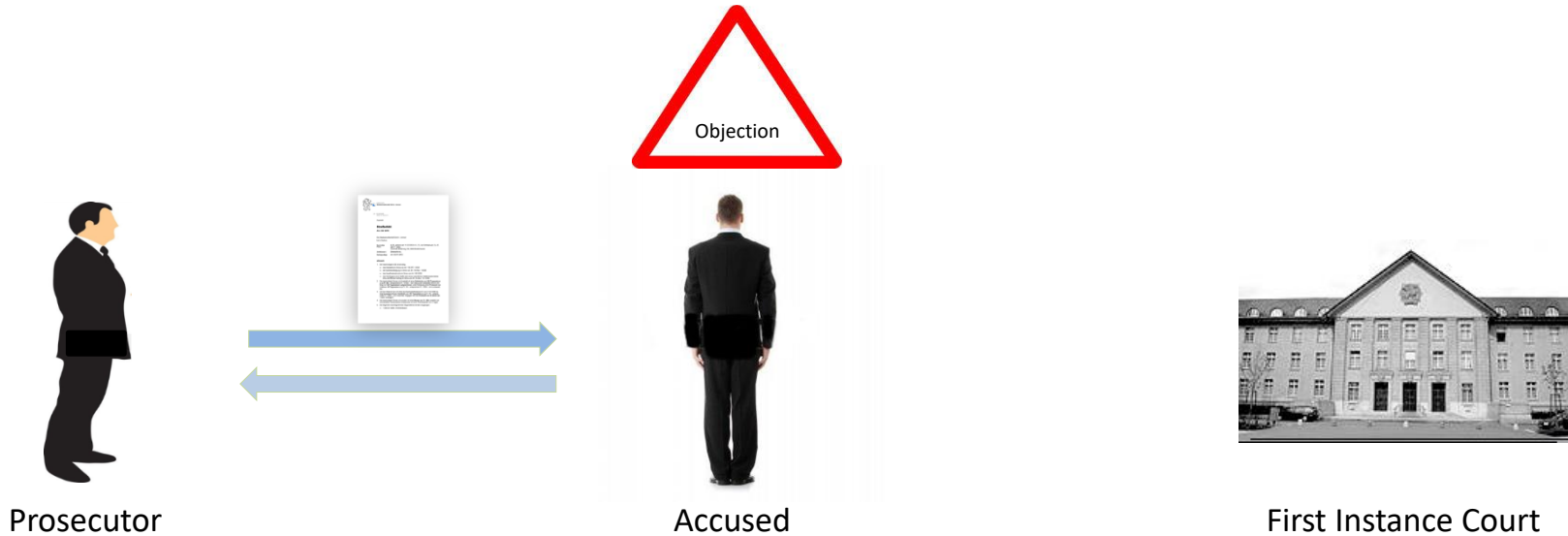
- a fine;
- a monetary penalty
- ...
- up to **6 months of imprisonment.**



# Custodial Sentences (n=2090)



# Course of Penal Order Proceedings



# Course of Penal Order Proceedings



Prosecutor

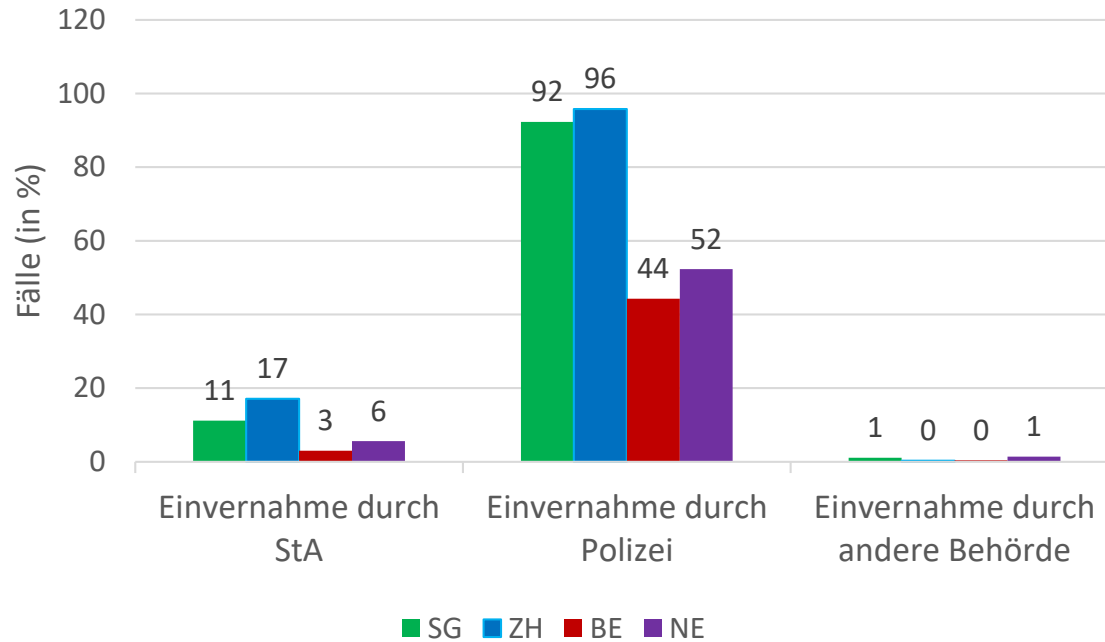
355 I CPP1 If an objection is filed, the public prosecutor shall gather the additional evidence

Accused

First Instance Court



# Examination hearings





# Art. 355 CPP – Procedure after Objection

Prosecutor decides to

- a. Uphold penal order
- b. Abandon proceedings
- c. Issue new penal order
- d. Bring charges at court





# Art. 355 CPP – Procedure after Objection

Prosecutor decides to

- a. Uphold penal order
- b. Abandon proceedings
- c. Issue new penal order
- d. Bring charges at court

# a. Uphold Penal Order



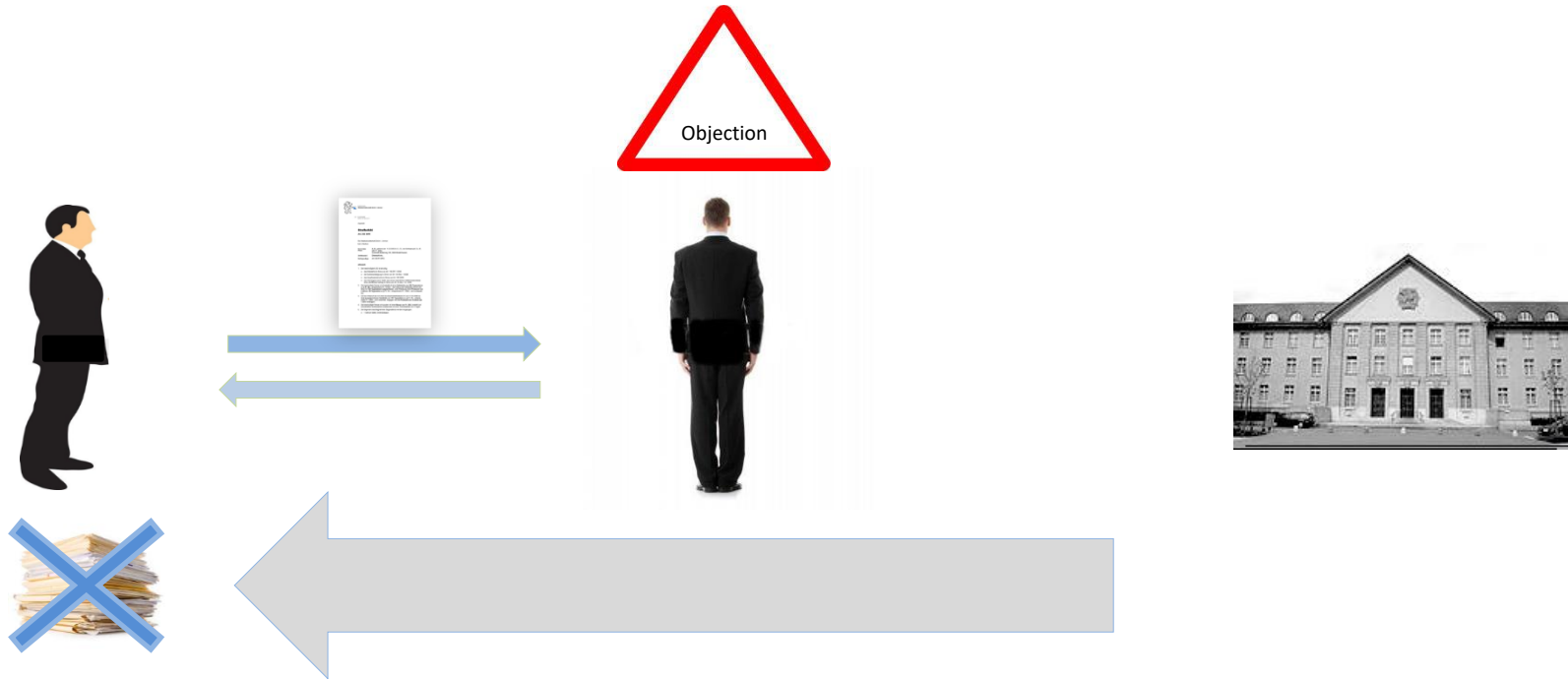


# Art. 355 CPP – Procedure after Objection

Prosecutor decides to

- a. Uphold penal order
- b. Abandon proceedings**
- c. Issue new penal order
- d. Bring charges at court

## b. Abandon Proceedings



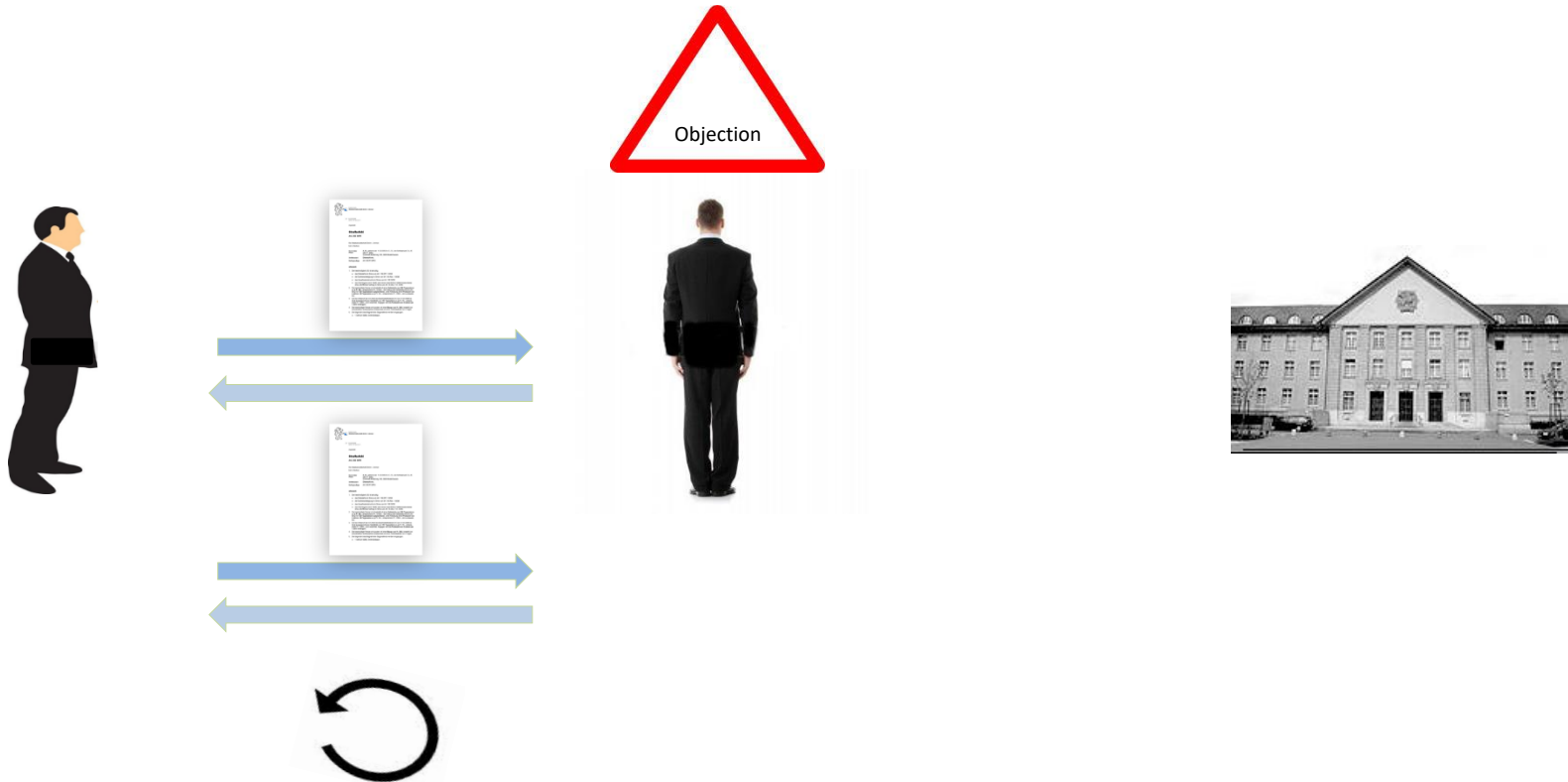


# Art. 355 CPP – Procedure after Objection

Prosecutor decides to

- a. Uphold penal order
- b. Abandon proceedings
- c. Issue new penal order**
- d. Bring charges at court

## c. Issue new penal order



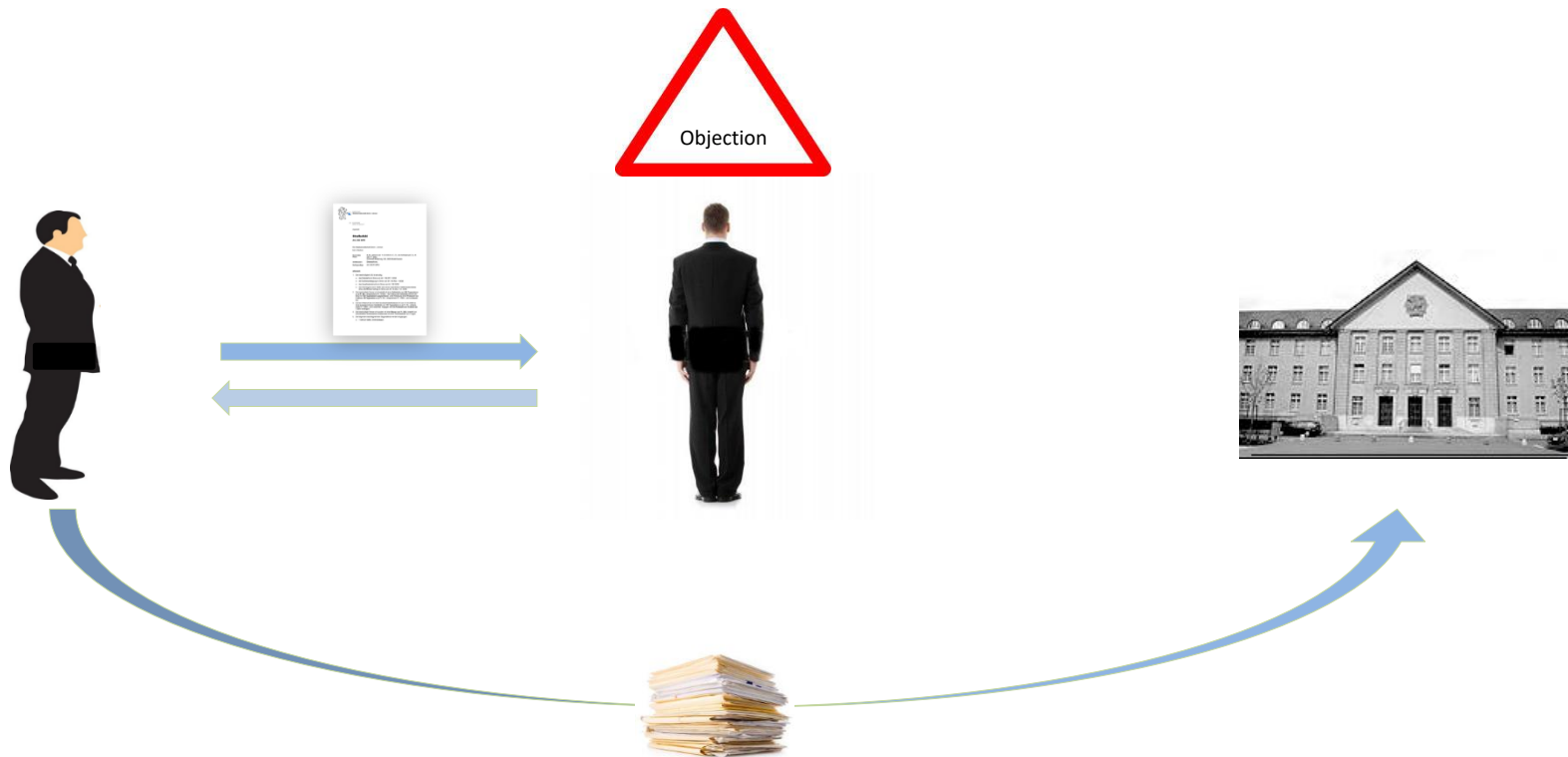


# Art. 355 CPP – Procedure after Objection

Prosecutor decides to

- a. Uphold penal order
- b. Abandon proceedings
- c. Issue new penal order
- d. Bring charges at court

## d. Bring charges at court



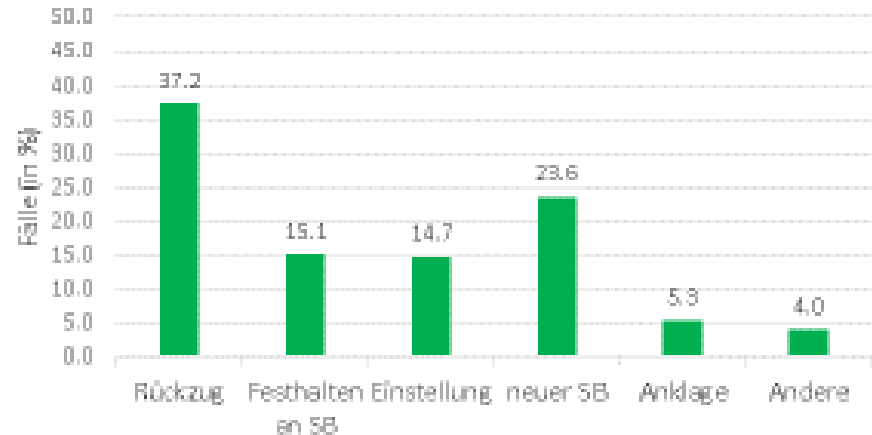


# Art. 355 CPP – Procedure after Objection

Prosecutor decides to

- Uphold penal order
- Abandon proceedings
- Issue new penal order
- Bring charges at court

## Procedure after objection (SG)





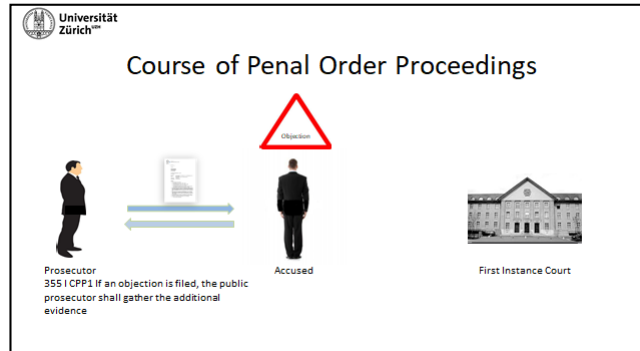
# Penal Orders – Criticism

1. Right to be heard
2. Right to counsel
3. Separation of powers
4. Right to translation
5. Material truth
6. «Test balloon» dilemma



# Penal Orders – Criticism

1. Right to be heard
2. Right to counsel
3. Separation of powers
4. Right to translation
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6. «Test balloon» dilemma

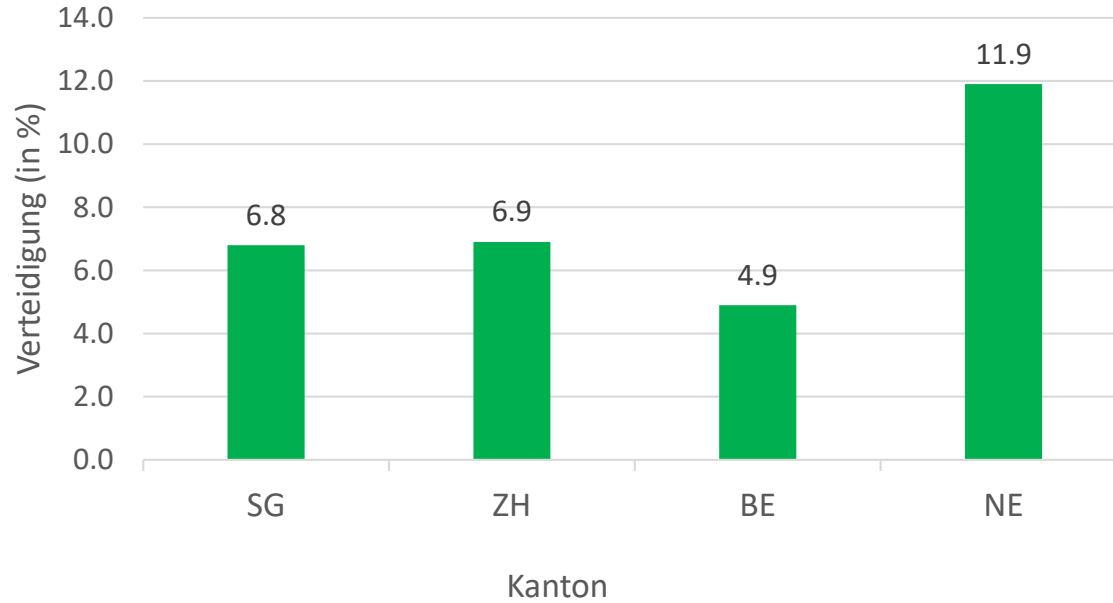


# Penal Orders – Criticism

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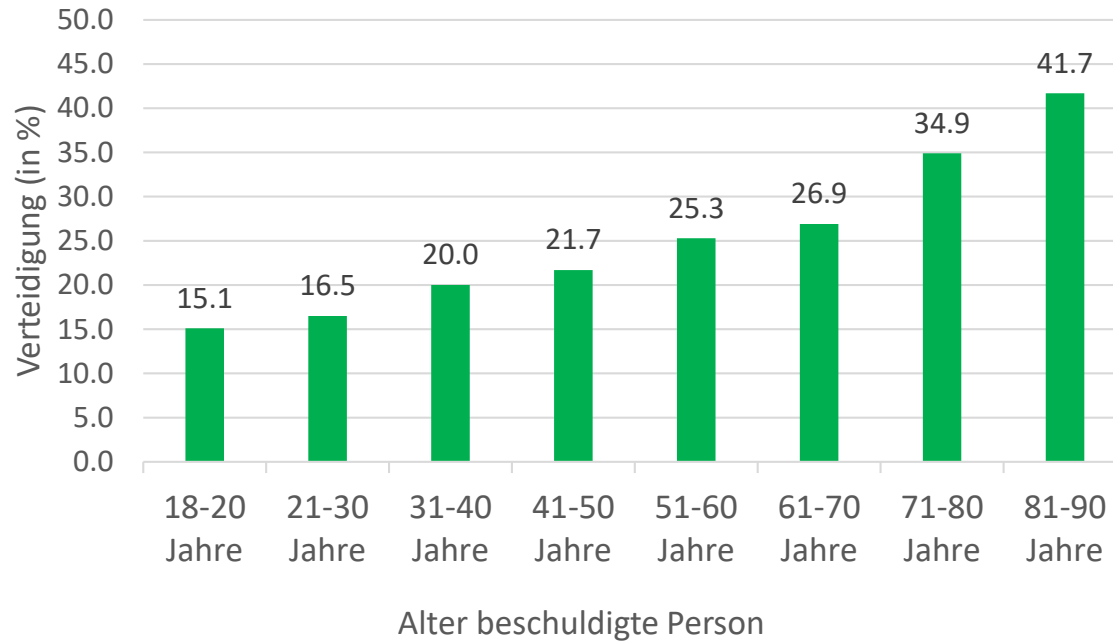


# Defense counsel



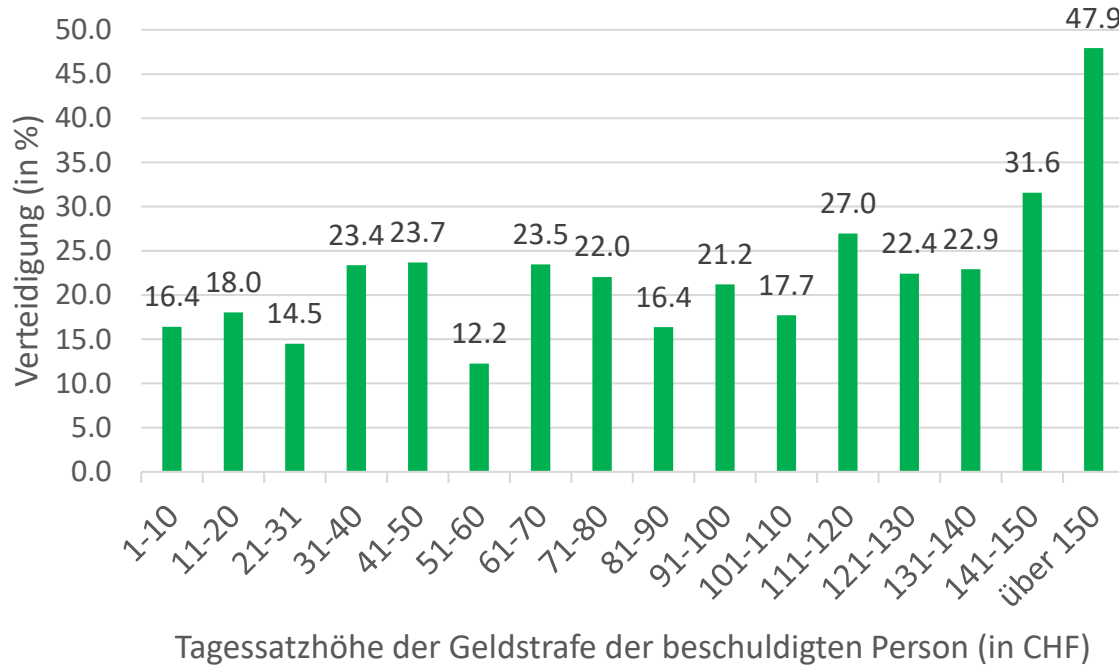


# Defense counsel by age





# Defense counsel by financial means of accused





# Penal Orders – Criticism

1. Right to be heard
2. Right to counsel
3. Separation of powers
4. Right to translation
5. Material truth
6. «Test balloon» dilemma







# Penal Orders – Criticism

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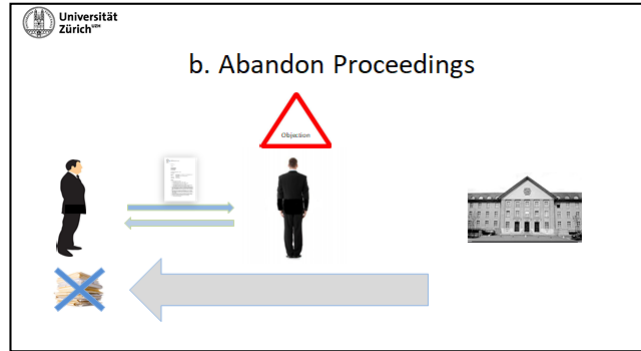
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# Penal Orders – Criticism

1. Right to be heard
2. Right to counsel
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6. «Test balloon» dilemma



# Cattle case

District Court,  
Toggenburg



Court of Appeals,  
Kantonsgericht St. Gallen



Federal Supreme Court,  
Bundesgericht Lausanne



European Court of Human  
Rights (ECHR)





Universität  
Zürich <sup>UZH</sup>

# Swiss Criminal Procedure

Marc Thommen