



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

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

Swiss Criminal Code

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

Swiss Criminal Procedure Code

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

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

Exam

Date: 27 Oktober 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)

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)



Carl Stooss (1849-1934)

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



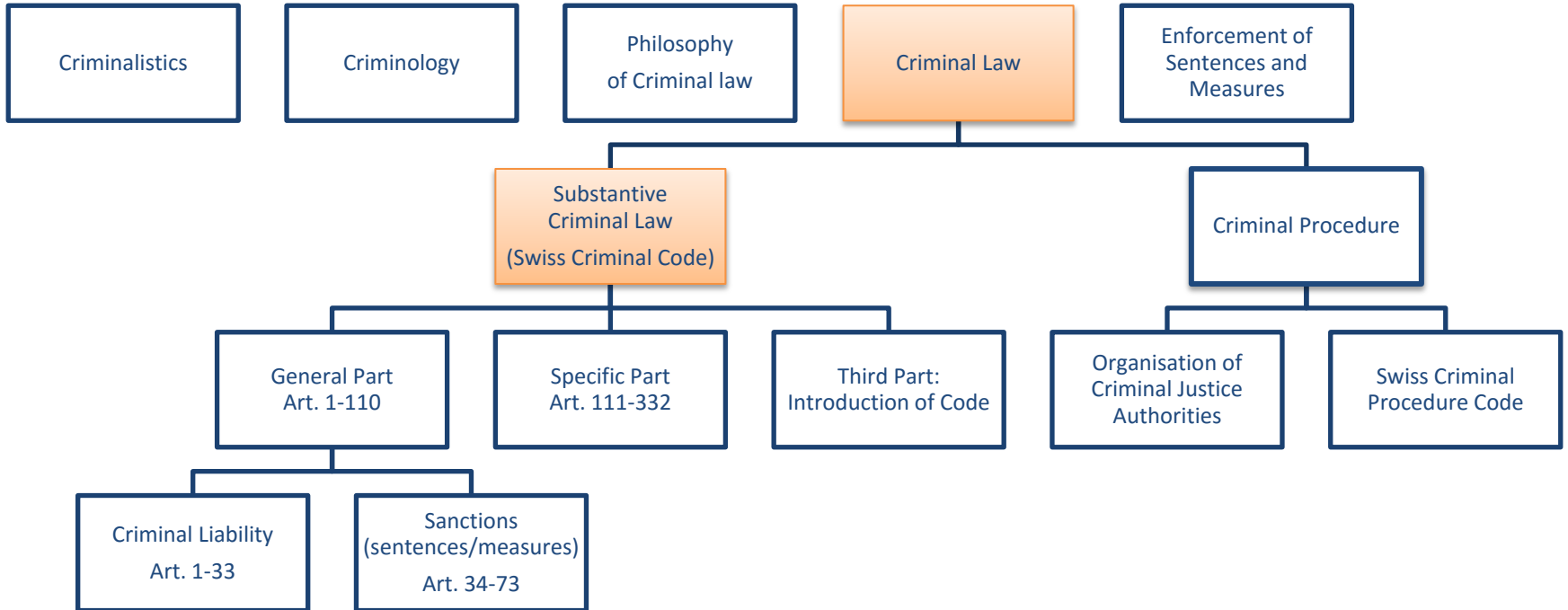
Carl Stooss (1849-1934)



Substantive Criminal Law

Swiss Criminal Code of 21 December 1937

Swiss Criminal Law



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.



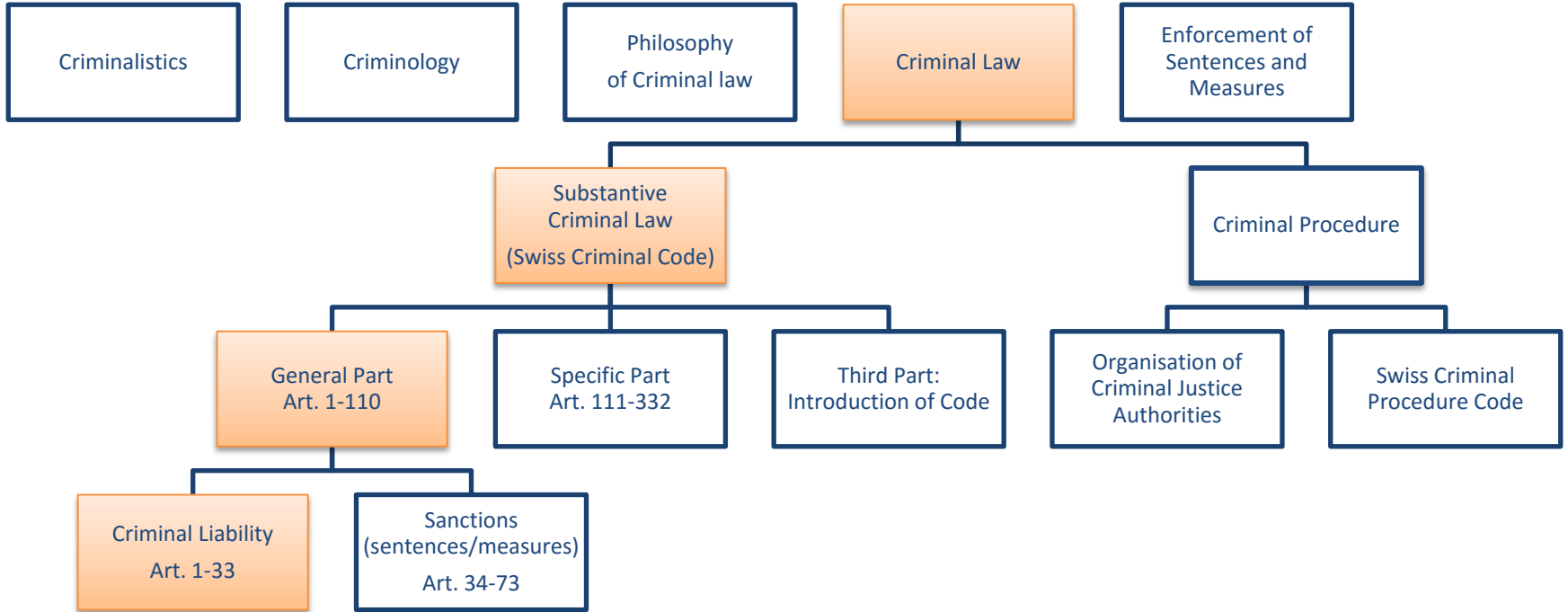
Cantonal Criminal Law

§ 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“



Swiss Criminal Law



General Part I – Art. 1-33 CC

General Provisions on Criminal Liability that apply to all offences

- Territorial application
- Crime Categories
- Intention (mens rea)
- Excuses, defences
- Law of attempts
- Participation/Complicity

Table of contents

Book One: General Provisions

Part One: Felonies and Misdemeanours

Title One: Scope of Application

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

Title Two: Criminal Liability

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

Crime categories

Severity ↑

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

Art. 13 SCC – Error of fact

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

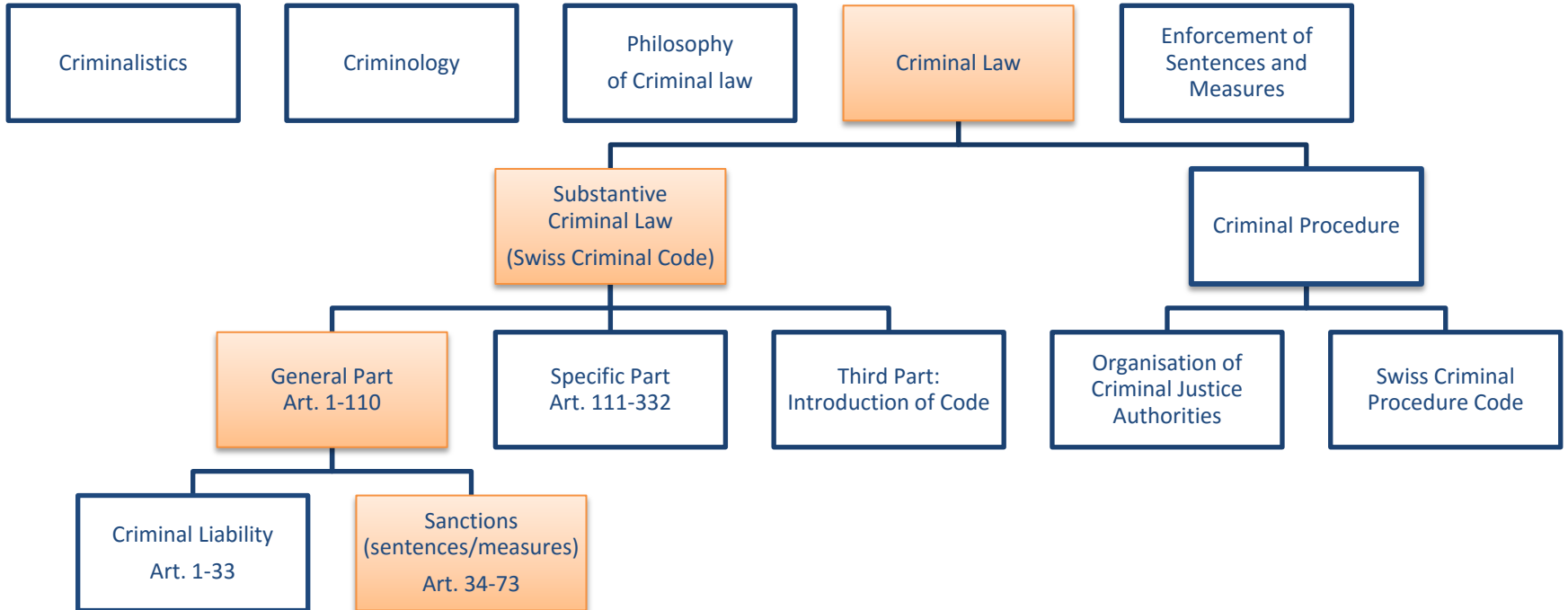


Art. 13 SCC – Error of fact

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.



Swiss Criminal Law



Carl Stooss (1849-1934)

Dual system of sanctions
(Sentences and Measures)



Carl Stooss (1849-1934)

Law of criminal sanctions

Sentences

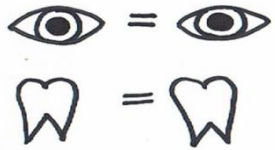
- Monetary penalties
- Community service
- Custodial sentences
- Suspended sentences
- Determination of the sentences

Measures

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



Dual System of Sanctions



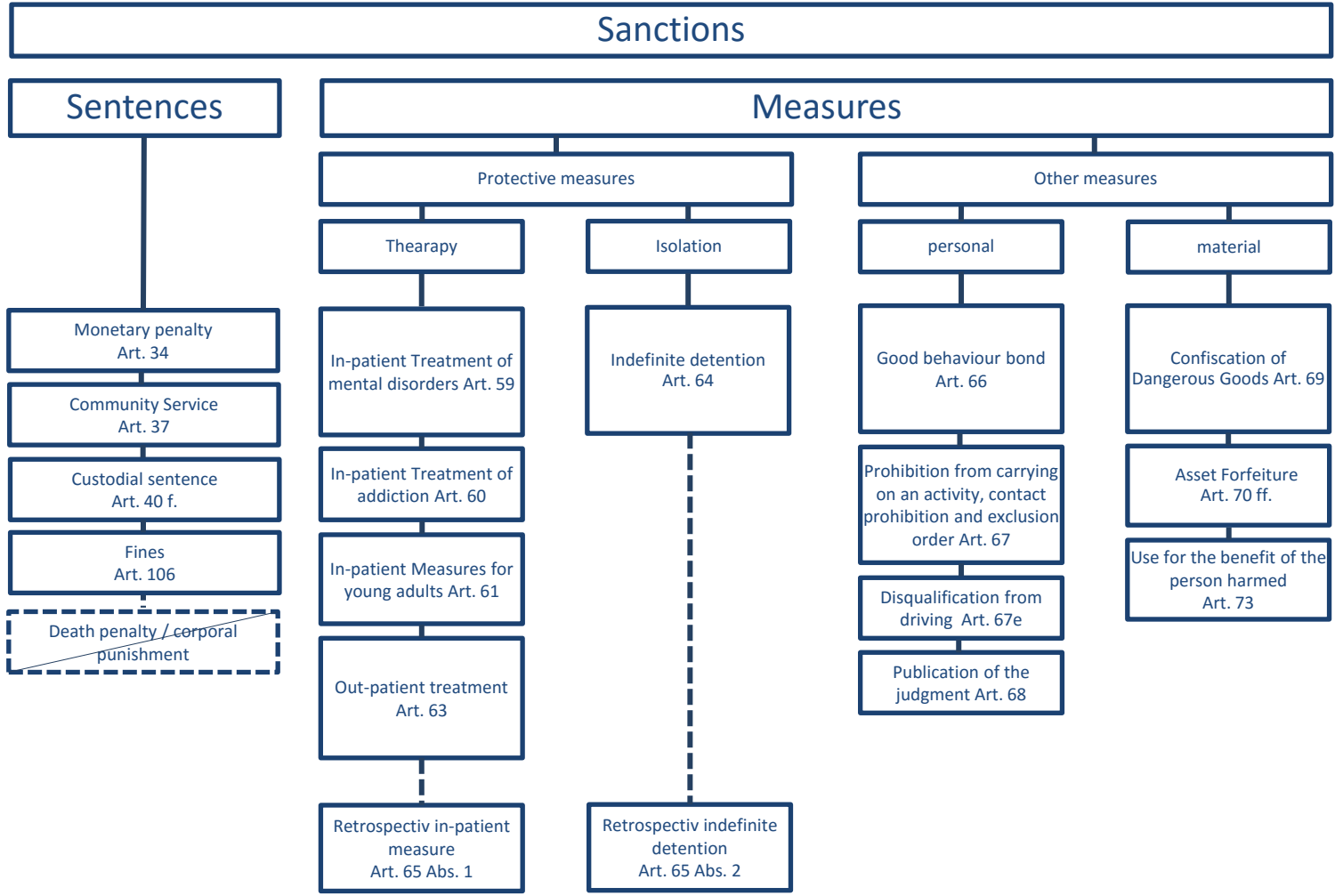
Retribution

Prevention

Sentences

Measures





Art. 47 – Principles of Sentencing

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

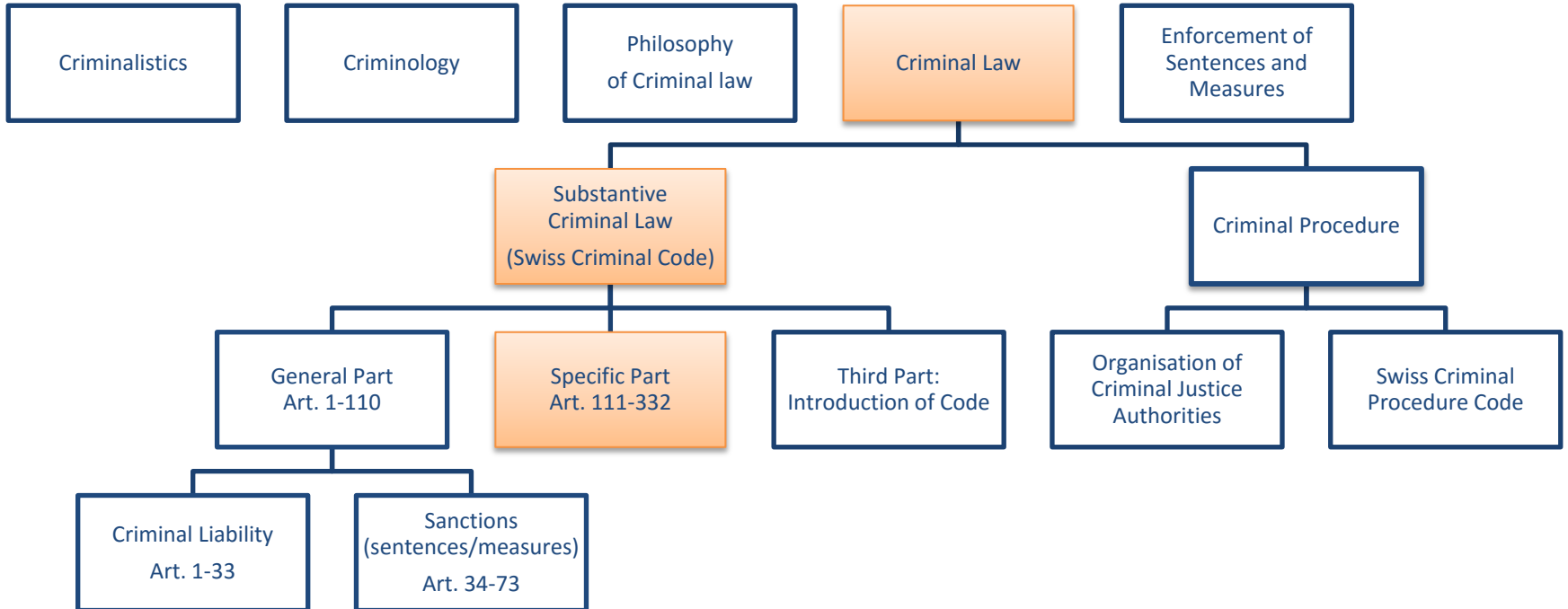


Art. 56 – Therapeutic Measures and internment

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



Swiss Criminal Law



Specific Criminal Acts

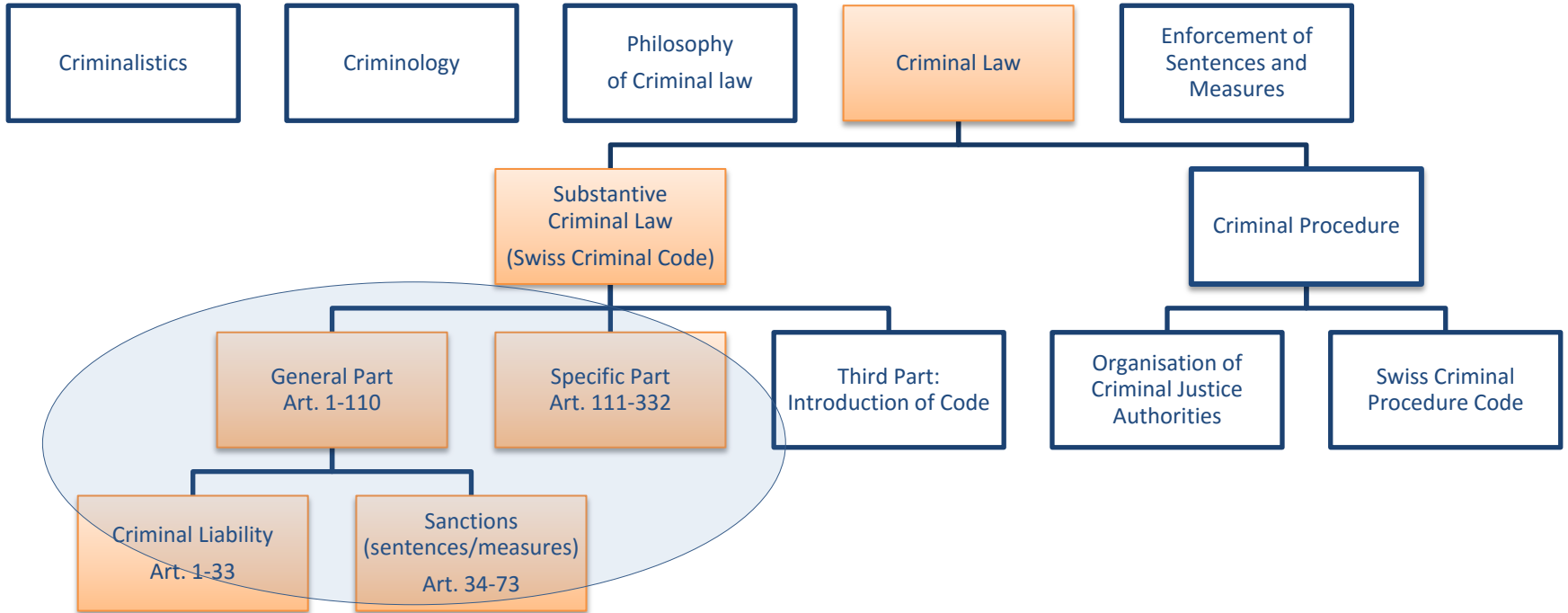
Life and Limb (Art. 111 ff.)
 Property (Art. 137 ff.)
 Personal Honour (Art. 173 ff.)
 Liberty (Art. 180 ff.)
 Sexual Integrity (Art. 187 ff.)
 Family (Art. 213 ff.)
 Public (Art. 221 ff.)
 Counterfeiting of Money (Art. 240 ff.)
 Forgery (Art. 251 ff.)
 Public Order (Art. 258 ff.)
 Genocide, Crimes against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

Book Two: Specific Provisions

Title One: Offences against Life and Limb

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

Swiss Criminal Law



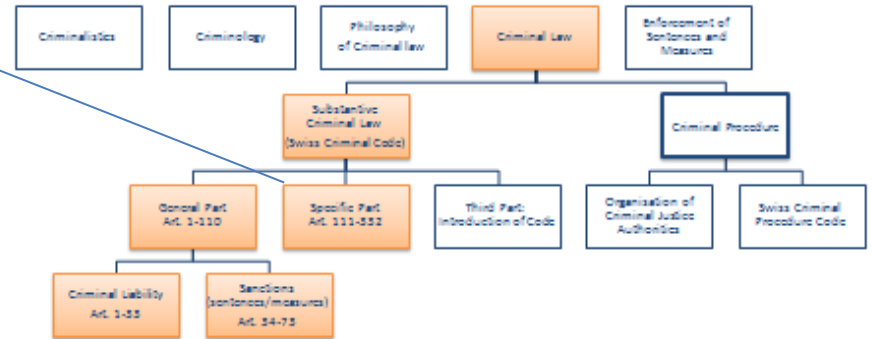
How do the different parts work together?

Article 111 SCC

„Any person who kills a person intentionally...

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

Swiss Criminal Law



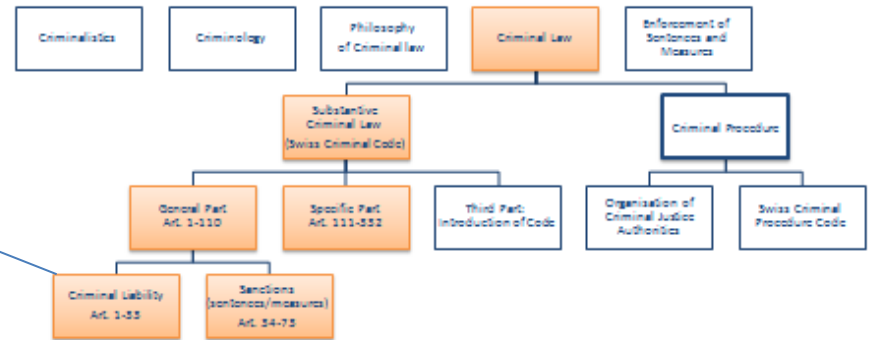
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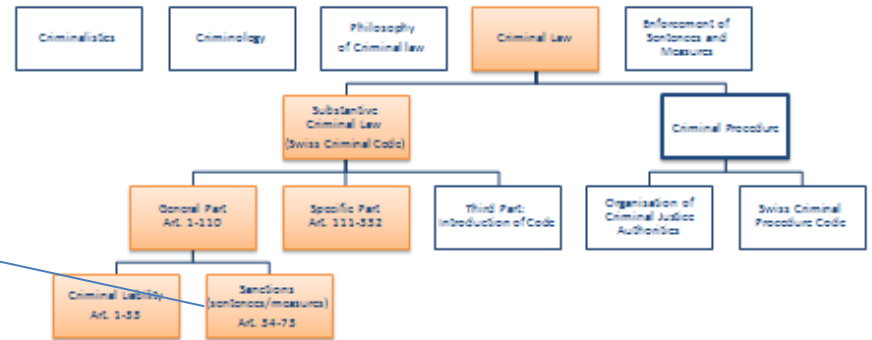
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Swiss Criminal Law





Introduction to Swiss Criminal Law

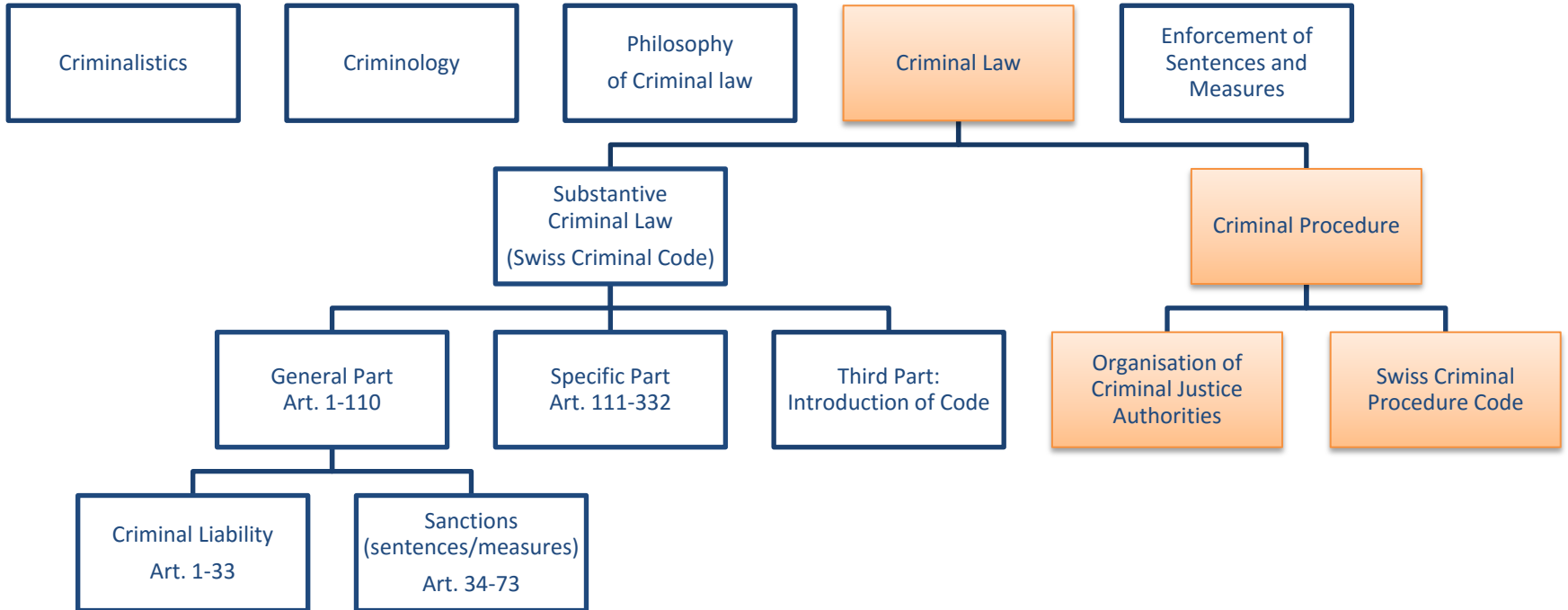
1. General Information
2. Substantive Criminal Law
3. Criminal Procedure



Criminal Procedure

Swiss Criminal Procedure Code of 5 October 2007

Swiss Criminal Law





Criminal Procedure

History

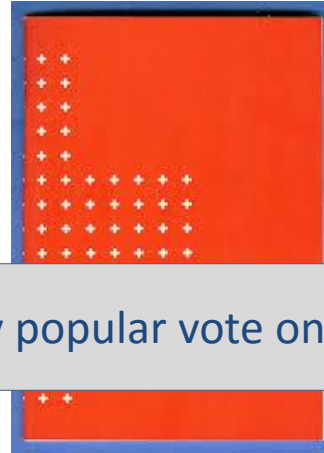
Criminal Procedure – before 2011

- 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

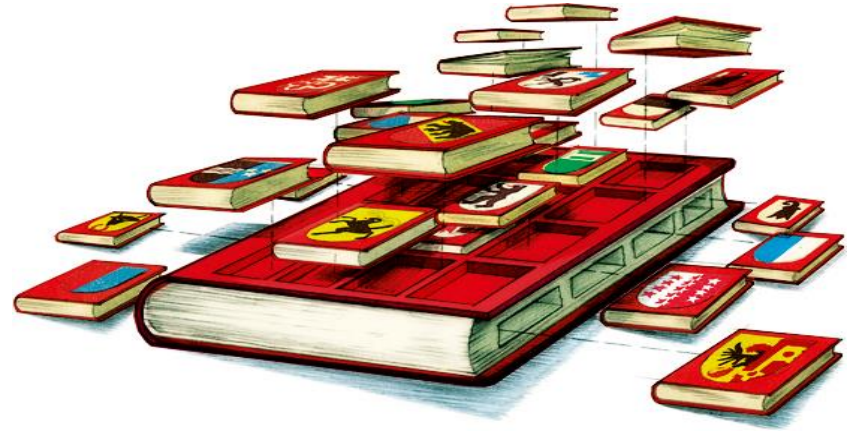
“The Confederation is responsible for legislation in the field of criminal law and the law of criminal procedure”.



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)

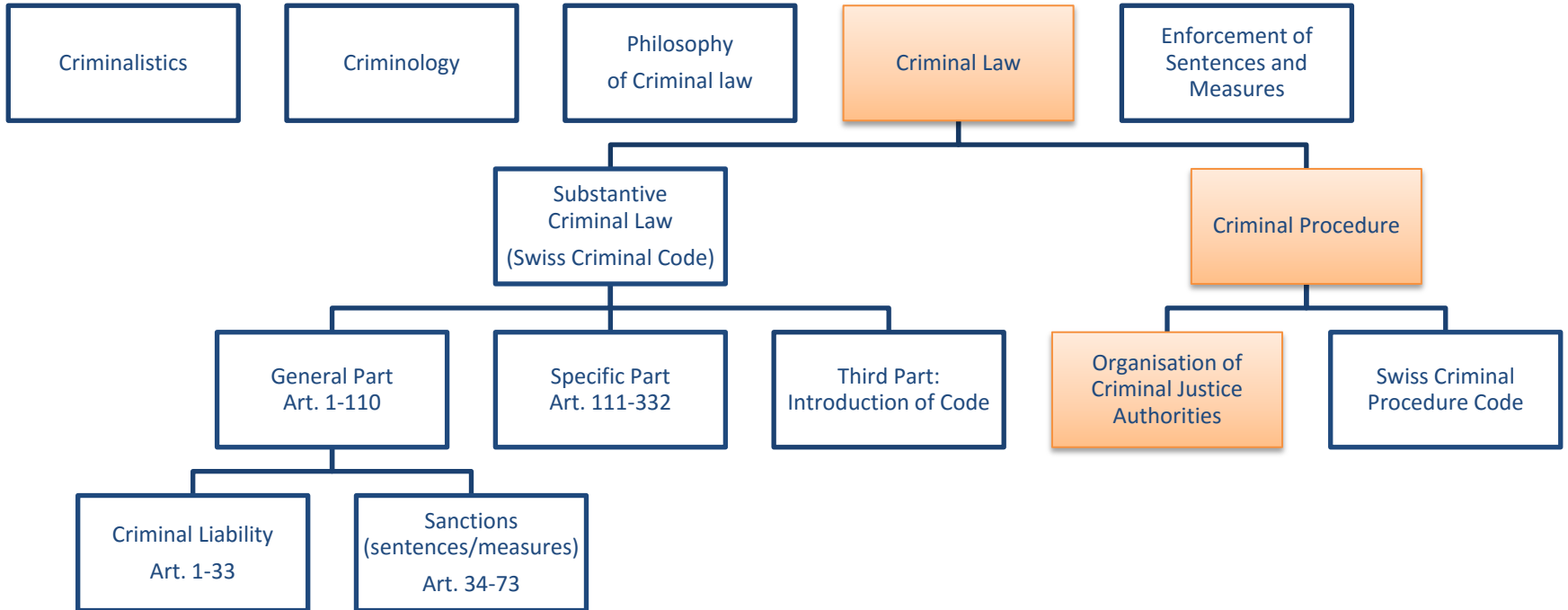




Criminal Procedure

Swiss Criminal Procedure Code of 5 October 2007

Swiss Criminal Law

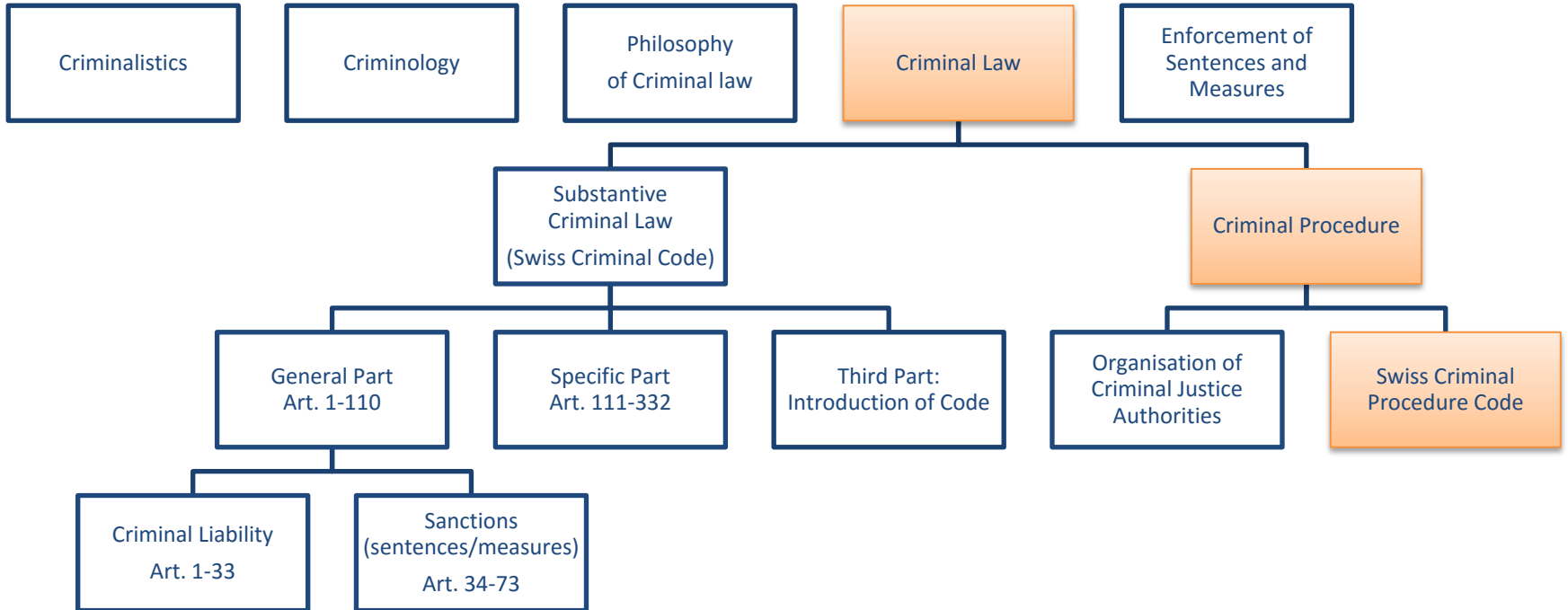


Organisation of Criminal Justice Authorities

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



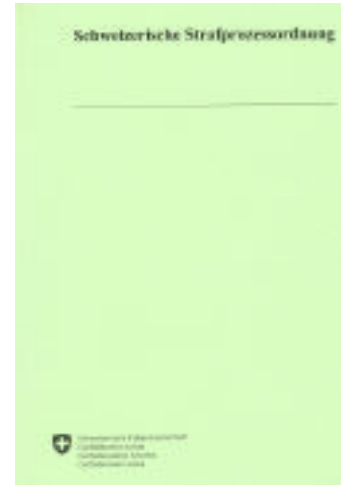
Swiss Criminal Law



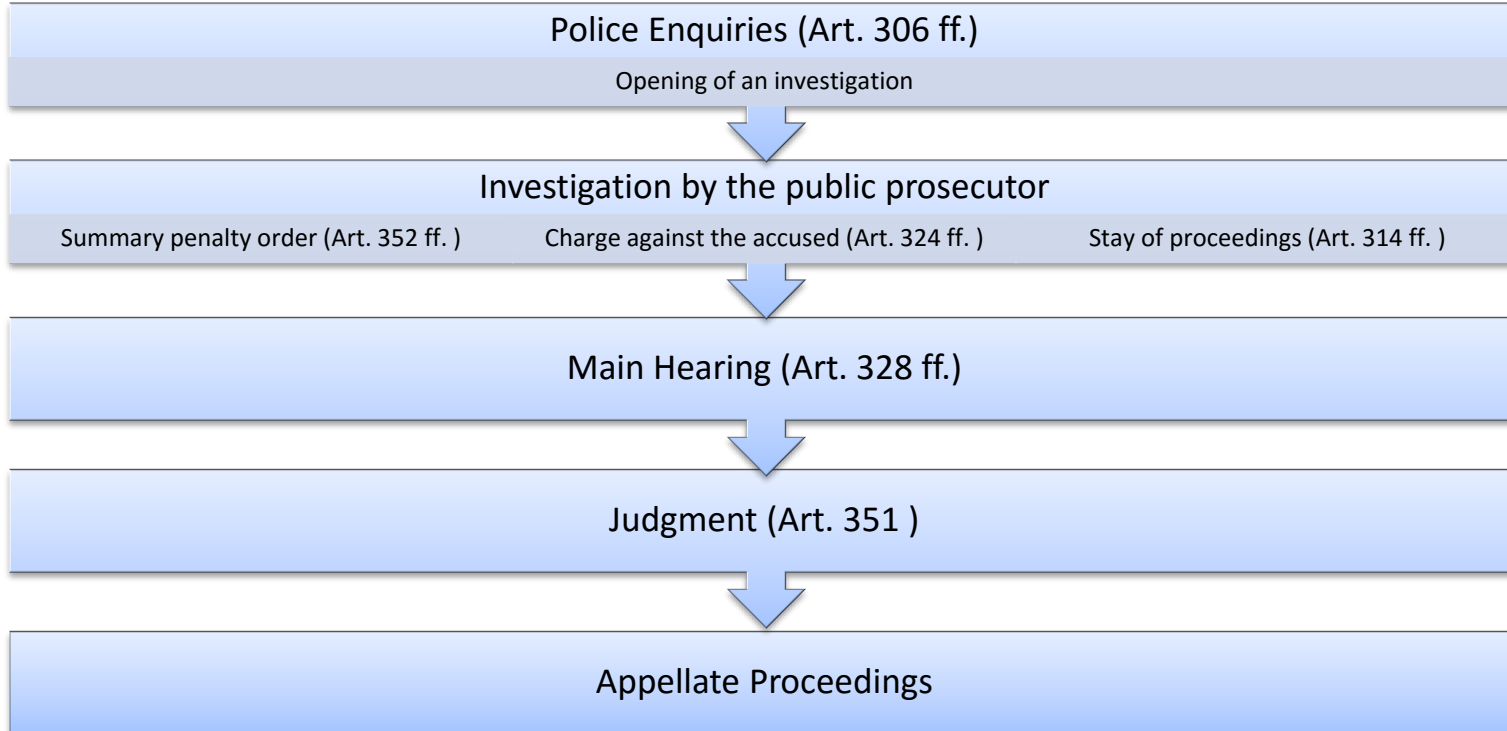


Swiss Criminal Procedure Code of 5 October 2007

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



Typical Criminal Procedure

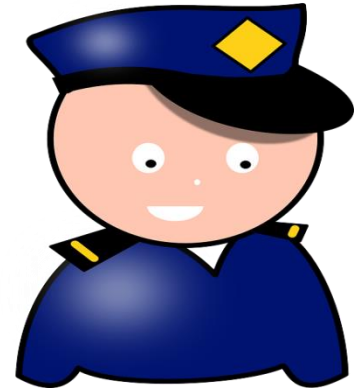


Preliminary
proceeding

Main
Proceeding

Police (Art. 306 ff.)

- Secure evidence
- Find suspects
- Examination hearings



The Public Prosecutor

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



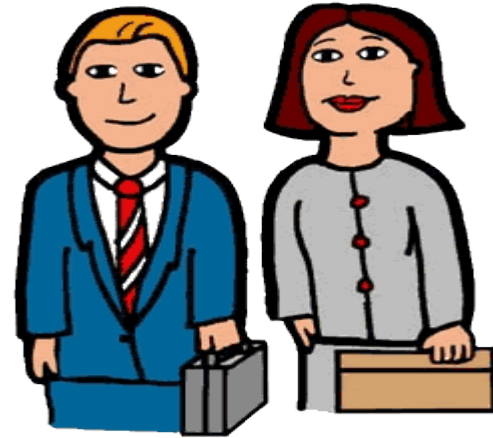
The Accused

- 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

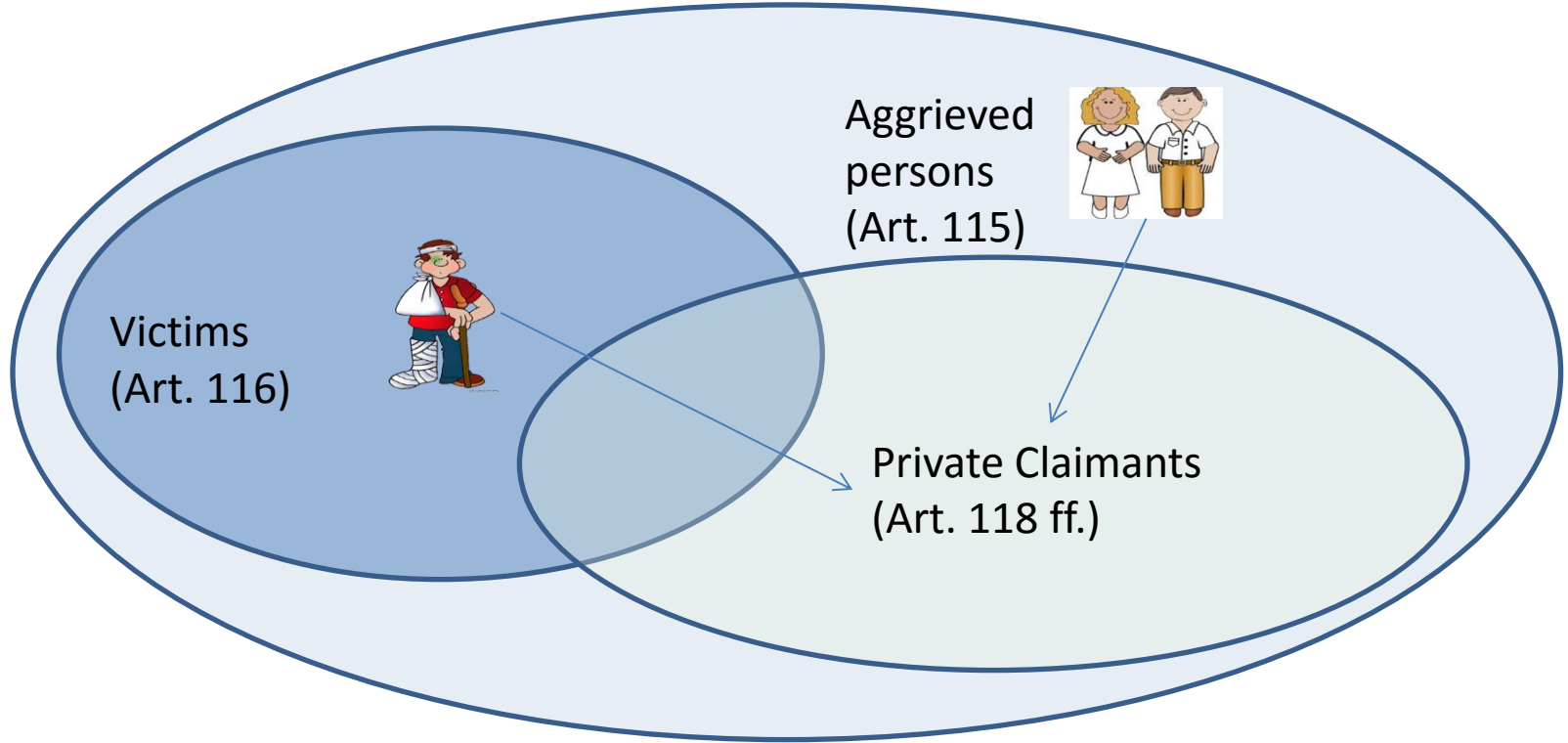
- Victim is a person who suffered physical, sexual or mental harm from an offence (Art. 116)
- Status: Special protection and rights through the Federal Act on Support to Victims of Crime (2007)



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)







Appeal

Cantonal investigating authority

- Police
- Public Prosecutor

Court of first instance

- Zurich (City):
«Bezirksgericht»

First court of appeal

- Zurich (Canton):
«Obergericht»

Federal Supreme Court

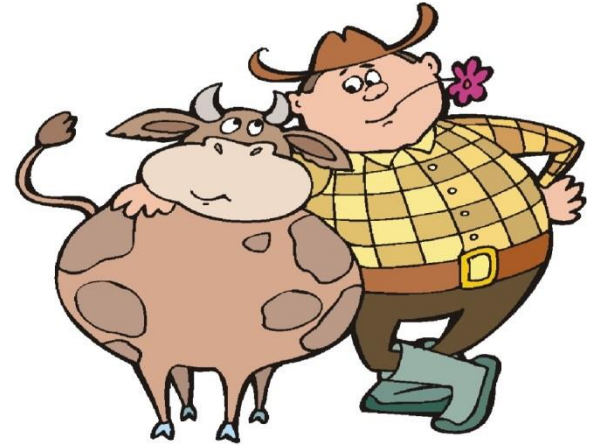
- «Bundesgericht»
Lausanne



Criminal Procedure

Cases

«Aiming at cows» (2014) – Facts



«Aiming at cows» (2014) - Facts

- Farmer drove his herd of cattle down from his alp
- As 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.



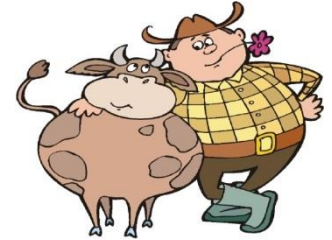
Lütisburg/SG

«Aiming at cows» (2014) - Facts

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



Pensioner X.



Farmer

Aiming at cows – Proceedings 1/4

Police investigation:

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



Cantonal Police of St. Gallen

Aiming at cows – Proceedings 2/4

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

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



Untersuchungsamt Gossau



Aiming at cows – Proceedings 3/4

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



Kreisgericht Toggenburg

Aiming at cows – Proceedings 4/4

Court or appeal
(Kantonsgericht St. Gallen)



Federal Supreme Court,
«Bundesgericht»



European Court of Human
Rights (ECtHR)



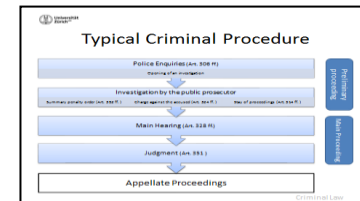
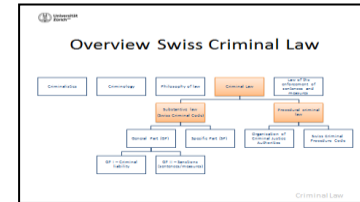
Introduction to Swiss Criminal Law

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Exam

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

} **2 Points**





Swiss Criminal Law

Discussion



Discussion

1. Schenk vs. Switzerland
2. Trecking 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^{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.

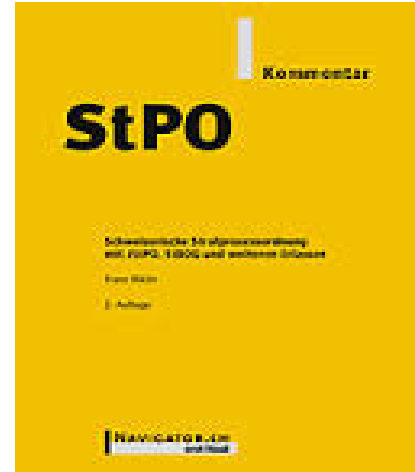


Art. 141 – Use of unlawfully obtained evidence

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)

Evidence obtained in violation of important rules **explicitly** stating non-use
(i.e. caution to the accused of his right to remain silent).

Evidence obtained in a «**criminal manner**»
(i.e. house search with forged warrant)

Evidence obtained in violation of “**validity rules**”
(i.e. caution to witness to tell the truth)

Evidence obtained in violation of minor rules (“**administrative rules**”)
(i.e. search of mobile phones)

Strictly excluded
(Article 141 I CCP/CH)

Generally excluded
(Article 141 II CCP/CH)
unless serious crime

Not excluded
(Article 141 III CCP/CH)





Questions

- How would Schenk v. Switzerland be solved in your jurisdiction?



Trecking in the Nude

Discussion



Trecking in the Nude

POSTCARD FROM GENEVA

Another Reason to Visit Switzerland: Hiking in the Nude

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



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

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



Cantonal Criminal Law

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



BGE 138 IV 13

Cantonal Criminal Law

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 willkürfrei 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).



BGE 138 IV 13

Cantonal Criminal Law

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



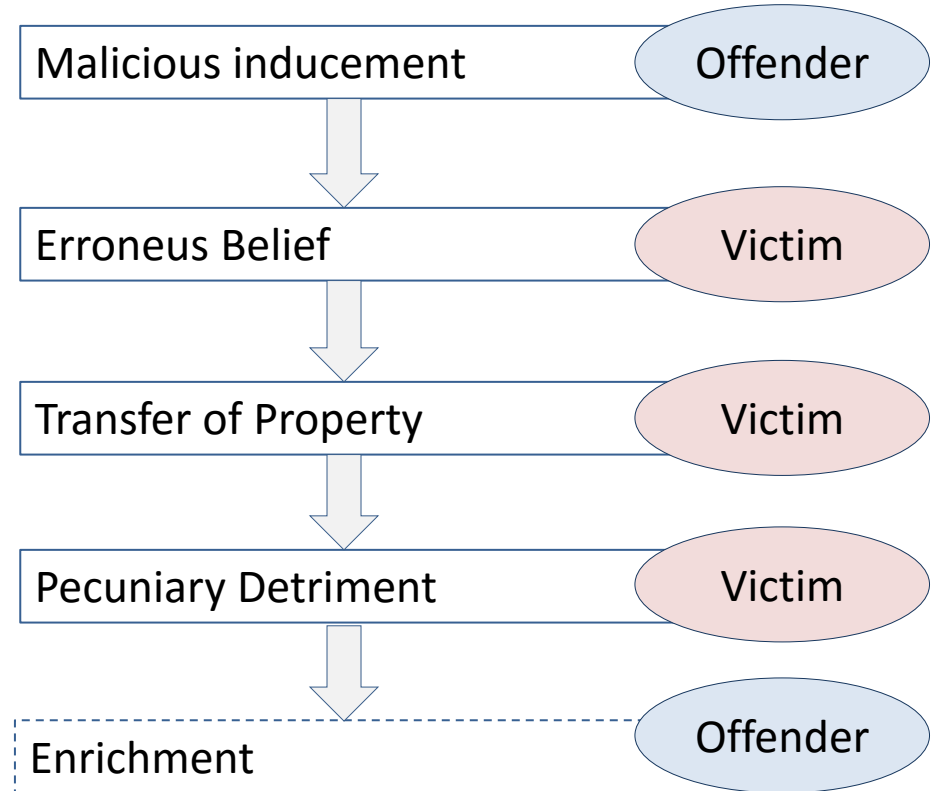
James Veitch



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)

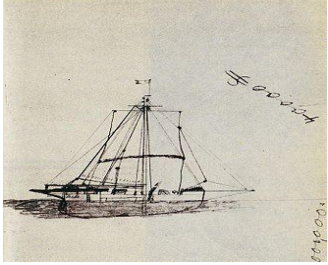


Michael Sandel:

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

Starting at 29min 25sec

R v Dudley and Stephens (1884)



The Mignonette



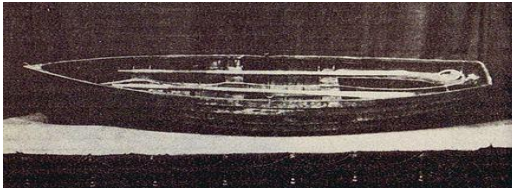
Captain Dudley



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

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

Culpability of Dudley and Stephens

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



Art. 17 – Necessity (justification)

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



Art. 18 – Necessity (Mitigation)

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



Art. 18 – Necessity (no culpability)

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





Swiss Criminal Law

Swiss Criminal Procedure

Prof. Dr. iur. Marc Thommen