

# Introduction to Swiss Law

## Criminal Law and 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

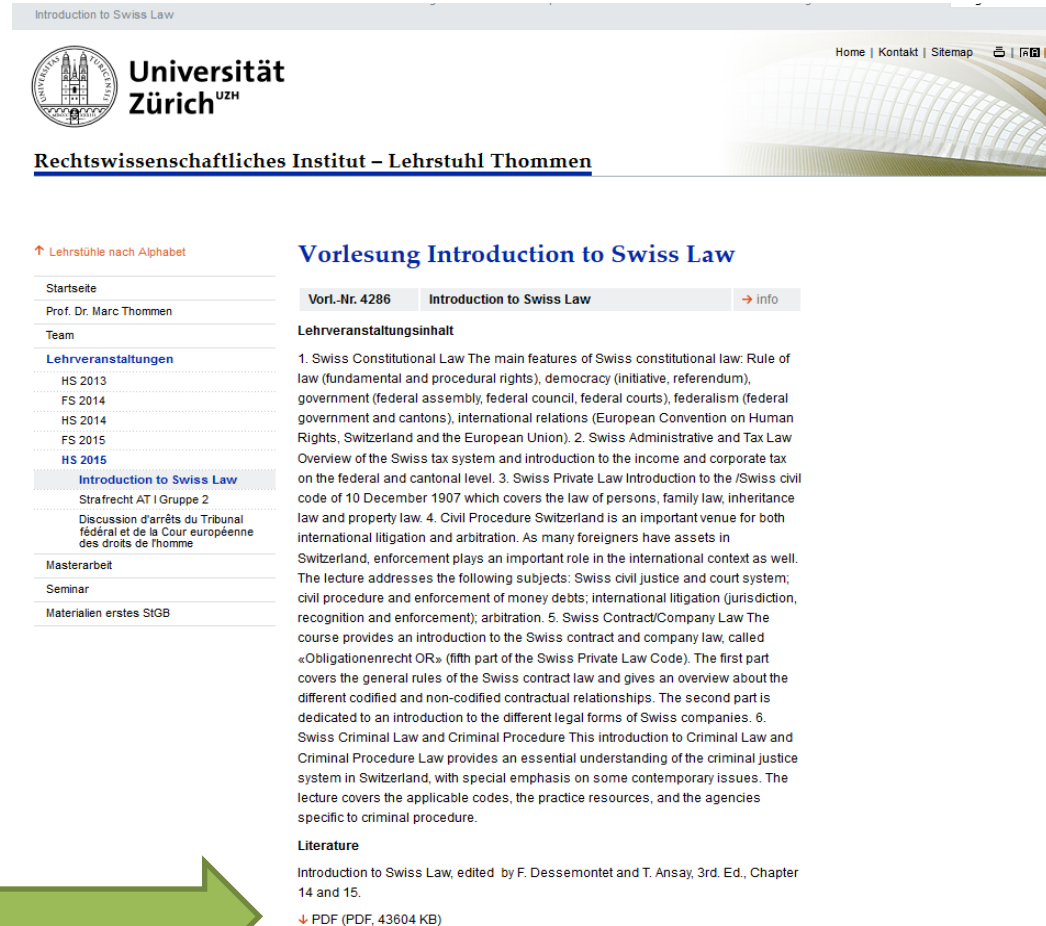
2. Substantive Criminal Law

3. Criminal Procedure

# Literature


DESSEMONTET FRANÇOIS/ANSAY  
TUĞRUL, Introduction to Swiss  
Law, 3rd. Ed., Chapter 14/15.

[www.rwi.uzh.ch/thommen](http://www.rwi.uzh.ch/thommen)



Introduction to Swiss Law

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 **Universität  
Zürich** UZH

**Rechtswissenschaftliches Institut – Lehrstuhl Thommen**

↑ [Lehrstühle nach Alphabet](#)

Startseite  
Prof. Dr. Marc Thommen  
Team

**Lehrveranstaltungen**

- HS 2013
- FS 2014
- HS 2014
- FS 2015
- HS 2015
- Introduction to Swiss Law**
- Strafrecht AT | Gruppe 2
- Discussion d'arrêts du Tribunal fédéral et de la Cour européenne des droits de l'homme
- Masterarbeit
- Seminar
- Materialien erstes STGB

**Vorlesung Introduction to Swiss Law**

Vorl.-Nr. 4286 Introduction to Swiss Law → info

**Lehrveranstaltungsinhalt**

1. Swiss Constitutional Law The main features of Swiss constitutional law: Rule of law (fundamental and procedural rights), democracy (initiative, referendum), government (federal assembly, federal council, federal courts), federalism (federal government and cantons), international relations (European Convention on Human Rights, Switzerland and the European Union). 2. Swiss Administrative and Tax Law Overview of the Swiss tax system and introduction to the income and corporate tax on the federal and cantonal level. 3. Swiss Private Law Introduction to the Swiss civil code of 10 December 1907 which covers the law of persons, family law, inheritance law and property law. 4. Civil Procedure Switzerland is an important venue for both international litigation and arbitration. As many foreigners have assets in Switzerland, enforcement plays an important role in the international context as well. The lecture addresses the following subjects: Swiss civil justice and court system; civil procedure and enforcement of money debts; international litigation (jurisdiction, recognition and enforcement); arbitration. 5. Swiss Contract/Company Law The course provides an introduction to the Swiss contract and company law, called «Obligationenrecht OR» (fifth part of the Swiss Private Law Code). The first part covers the general rules of the Swiss contract law and gives an overview about the different codified and non-codified contractual relationships. The second part is dedicated to an introduction to the different legal forms of Swiss companies. 6. Swiss Criminal Law and Criminal Procedure This introduction to Criminal Law and Criminal Procedure Law provides an essential understanding of the criminal justice system in Switzerland, with special emphasis on some contemporary issues. The lecture covers the applicable codes, the practice resources, and the agencies specific to criminal procedure.

**Literature**

Introduction to Swiss Law, edited by F. Dessemontet and T. Ansay, 3rd. Ed., Chapter 14 and 15.

↓ PDF (PDF, 43604 KB)



# 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](http://www.rwi.uzh.ch/thommen) for further information.

# Exam

Date: 8 Oktober 2015

Time: 13.00-14.00

Appear: 12.30

Room: KOL-G-217

Mode: Multiple Choice

Materials:

- Open Book
- Computers not allowed



# Exam

## Question / Statement

	Correct	Wrong
<b>Answer A</b>		
<b>Answer B</b>		
<b>Answer C</b>		
<b>Answer D</b>		
<b>Answer E</b>		

- 5 possible answers for each question/statement
- All can be correct/incorrect
- Tick correct/incorrect
- If unsure: leave blank
- In this example, answers B and E are correct, A, C and D are incorrect

# Exam

## Question / Statement

	Correct	Wrong
Answer A		
Answer B		
Answer C		
Answer D		
Answer E		

- Correct answer:  
+1 point
- Wrong answers:  
-1 point
- No answer:  
neutral → 0 Point



# Exam

## Question / Statement

	Correct	Wrong
Answer A		X
Answer B	X	
Answer C		X
Answer D		X
Answer E	X	

+1

+1

+1

+1

+1

**Perfect solution:  
5 Points**

# Exam

## Question / Statement

	Correct	Wrong
Answer A		X
Answer B	X	
Answer C	X	
Answer D		
Answer E	X	

+1

+1

-1

0

+1

**2 Points**

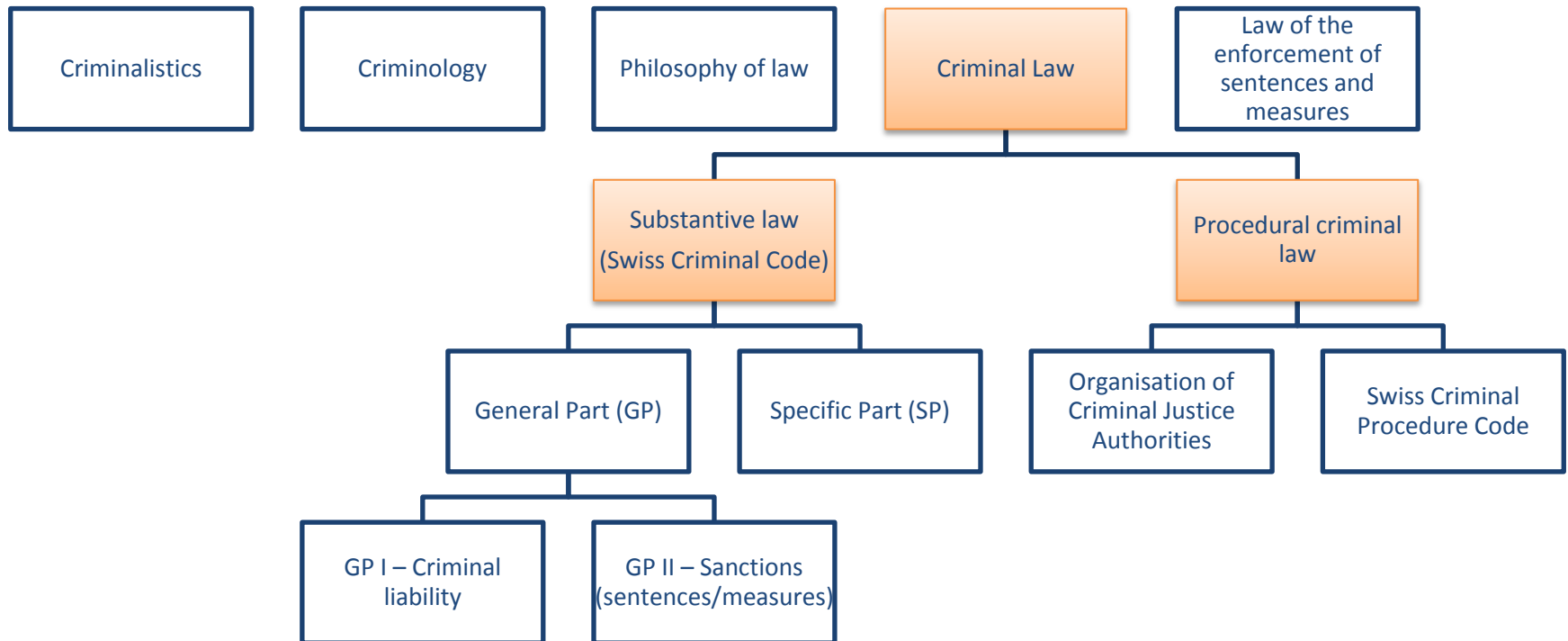
# Introduction to Swiss Criminal Law

1. General Information

2. Substantive Criminal Law

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# Overview Swiss Criminal Law



# 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)
- Restoration (1803): Back to CCC



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

# 18th-19th Century

## Special Prevention:

- Punishing is about incapacitation
- Preventing offenders from offending again
- Goal: Make society safer
- Criterion: Dangerousness of offender



Karl Ludwig Wilhelm von Grolman (1775-1829)  
«Grundsätzen der Criminalwissenschaft» (1798 )

# 18th-19th Century

«Theorie des  
psychologischen Zwangs»

- Criterion for sanction is not future danger but past offence
- Punishing is about the deterrence of the general public (general prevention)



Paul Johann Anselm von Feuerbach (1775-1833)



# 18th-19th Century

Absolute penal theory:

- Punishing is merely about retribution
- The offender is no *means* to a societal end
- The punishment is honouring the offender as a moral agent



Immanuel Kant  
(1724-1804)

# Carl Stooss (1849-1934)

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



Carl Stooss (1849-1934)

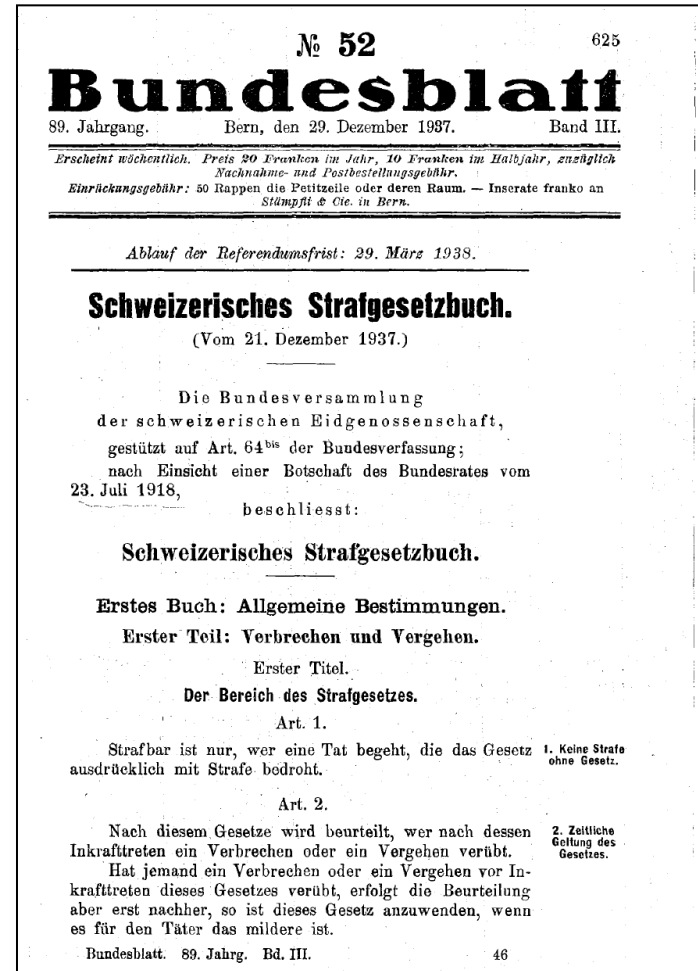
# Carl Stooss (1849-1934)

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



# Carl Stooss (1849-1934)

- 1898: Article 64<sup>bis</sup> Const.:  
«The Confederation is responsible for legislation in the field of criminal law»
- 1918: Federal Council dispatch and official draft of CC to Parliament
- 21 December 1937: Parliament accepts Swiss Criminal Code
- 1 January 1942: Enactment
- 54 years of legislation!

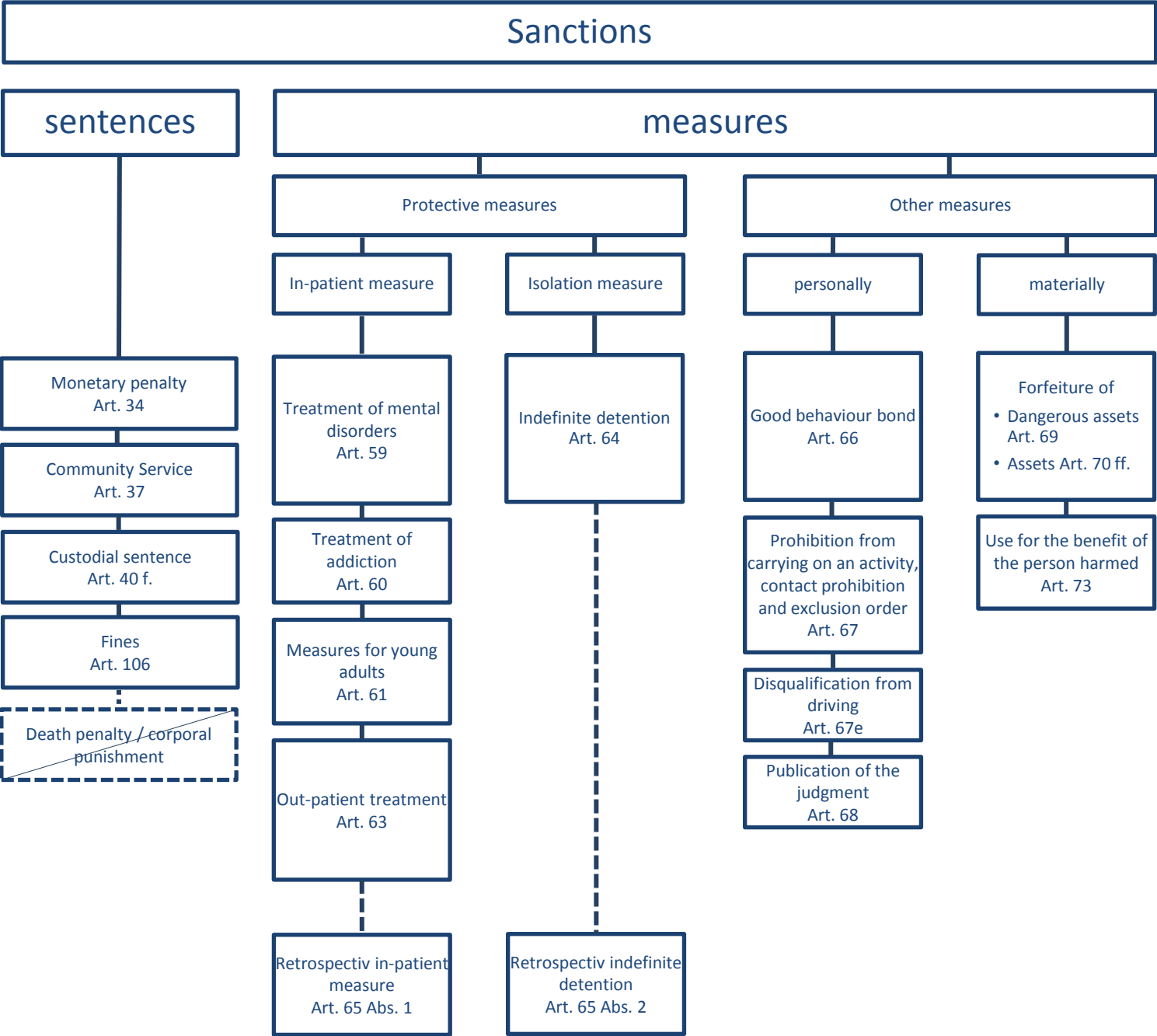


# Carl Stooss (1849-1934)

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



Carl Stooss (1849-1934)



# Art. 47 – Principles of Sentencing

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

It takes account ... the effect that the sentence will have on his life.



## Art. 56 – Therapeutic Measures and internment

A measure is ordered if:

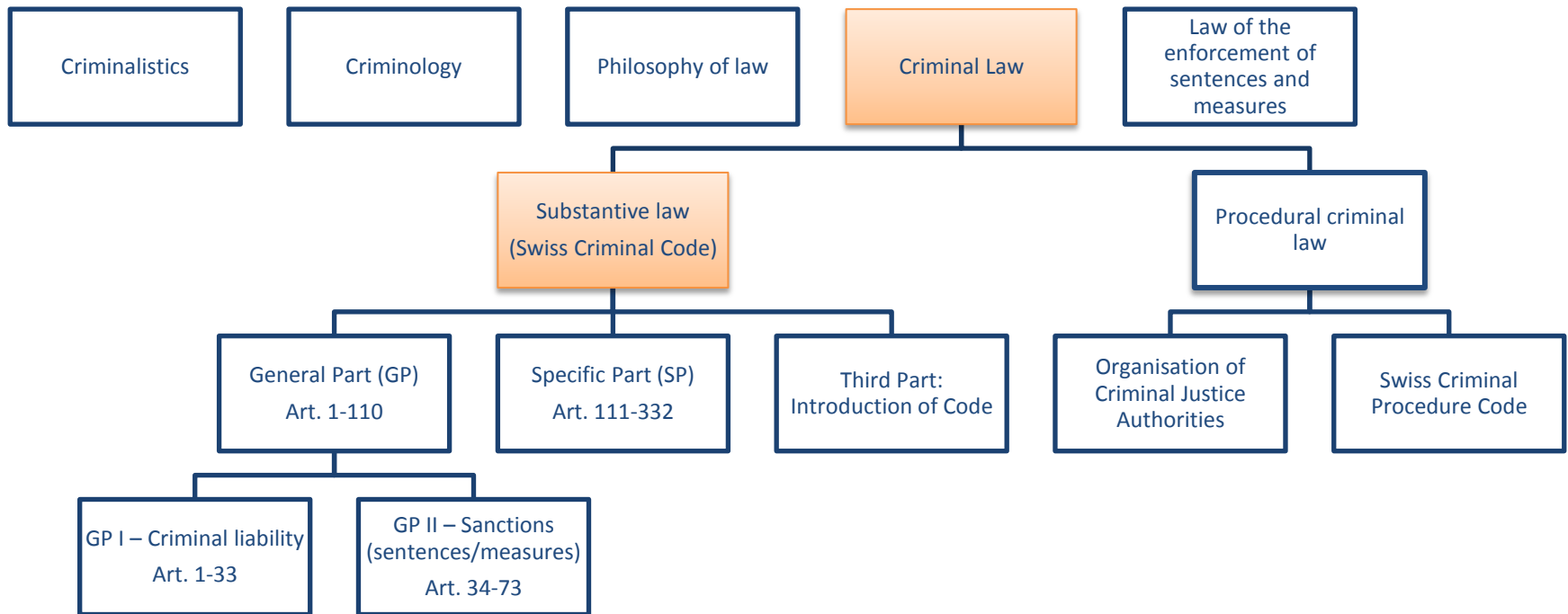
- a. a penalty alone is not sufficient to counter the risk of further offending by the offender;
- b. the offender requires treatment or treatment is required in the interest of public safety; and

...

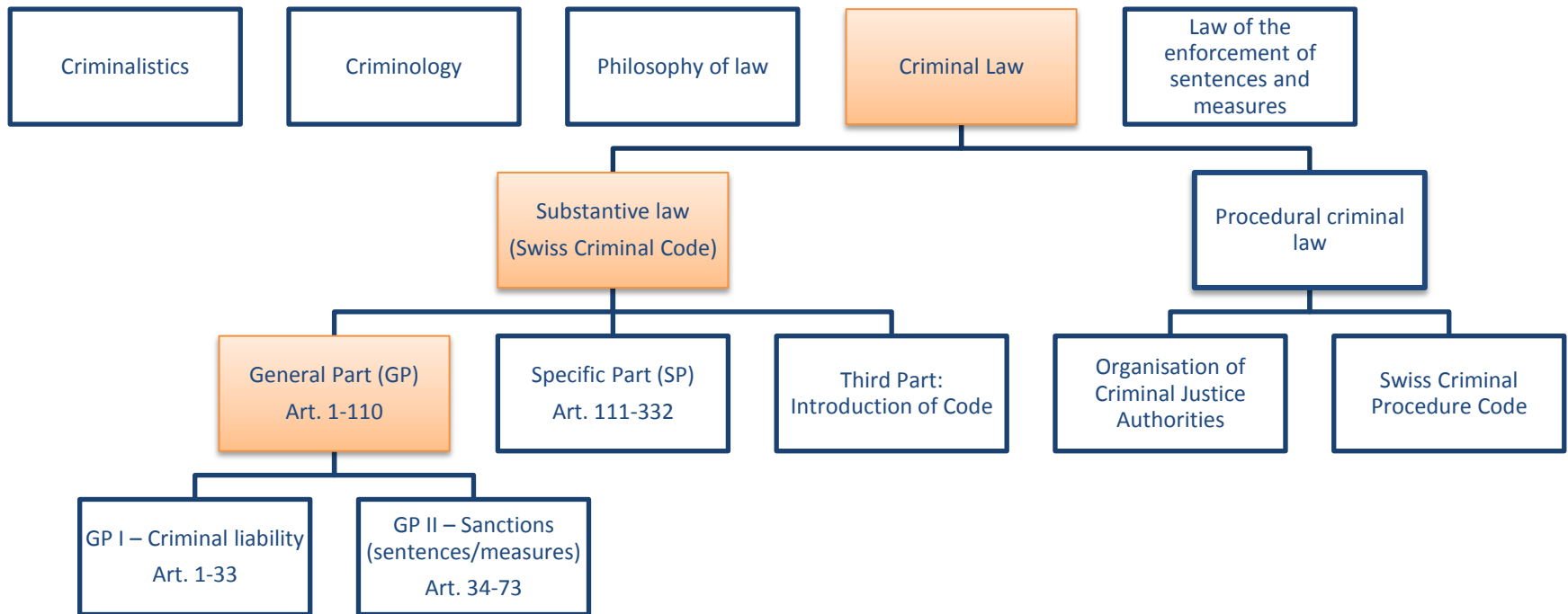




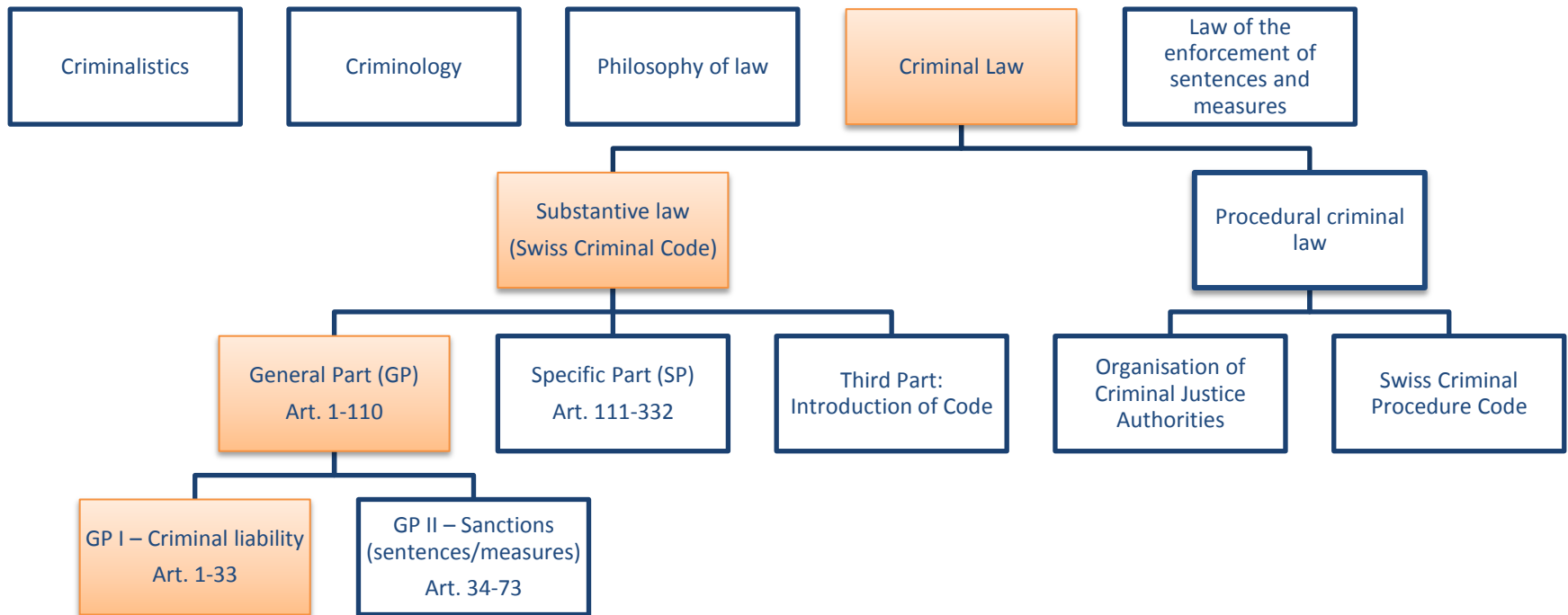
# Overview Swiss Criminal Law



# Overview Swiss Criminal Law



# Overview Swiss Criminal Law



# General Part I – Art. 1-33 CC

## General Provisions on Criminal Liability that apply to all offences

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

### Book One: General Provisions

#### Part One: Felonies and Misdemeanours

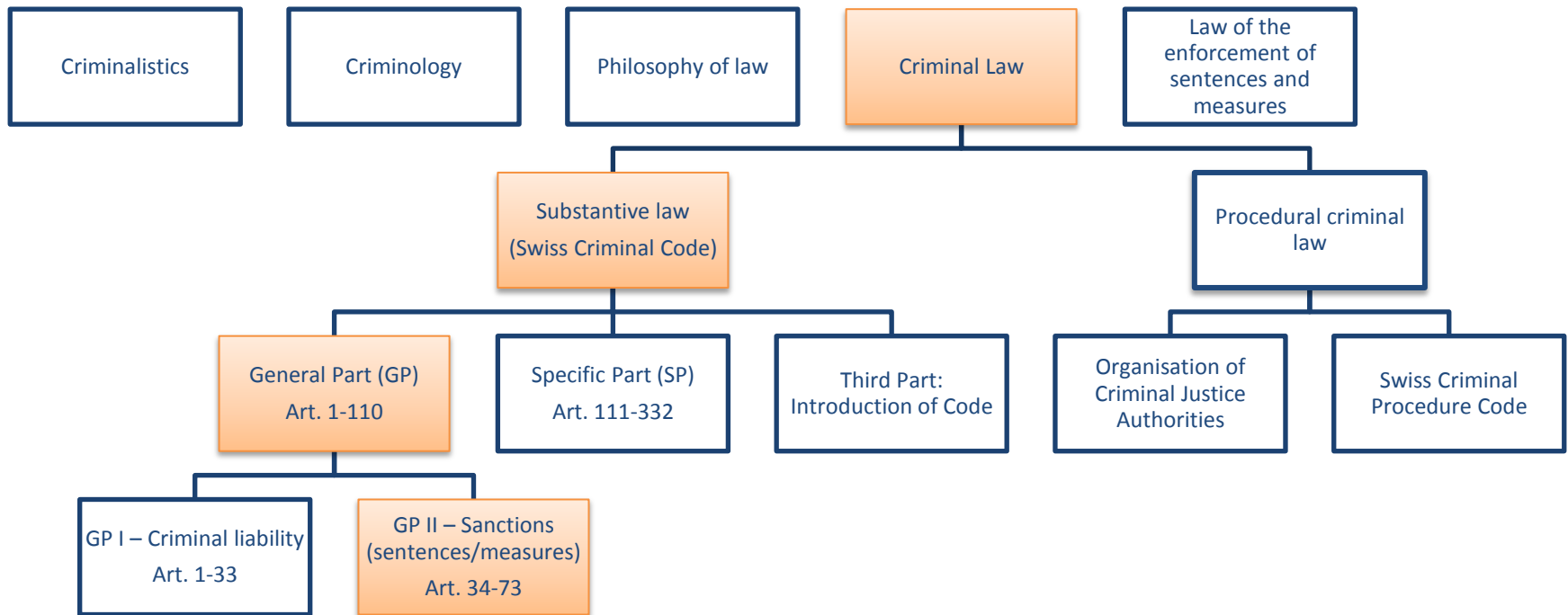
##### Title One: Scope of Application

- |                                                                              |        |
|------------------------------------------------------------------------------|--------|
| 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 |

# Overview Swiss Criminal Law



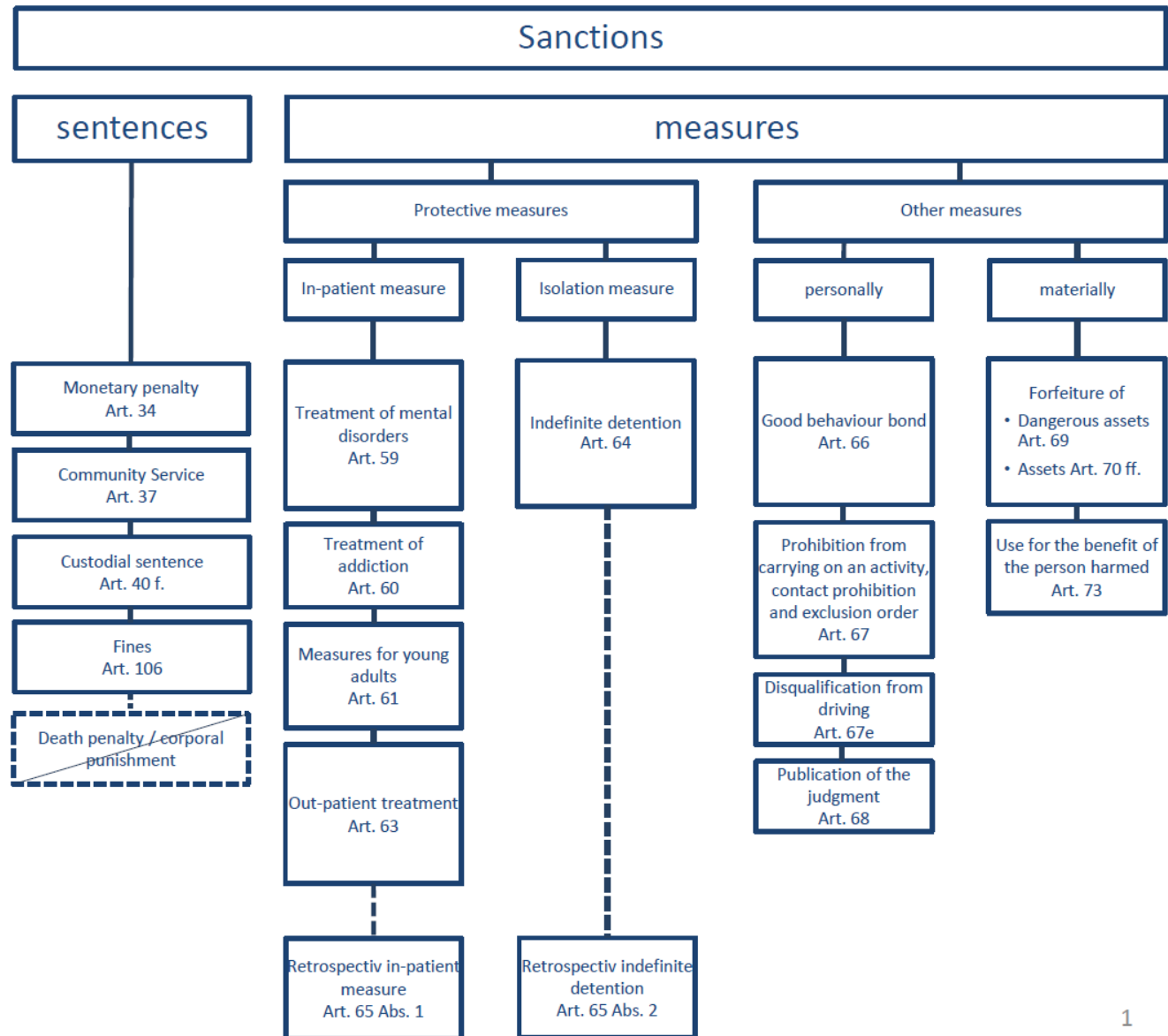
# General Part II – Art. 34-73 CC

## Law of criminal sanctions

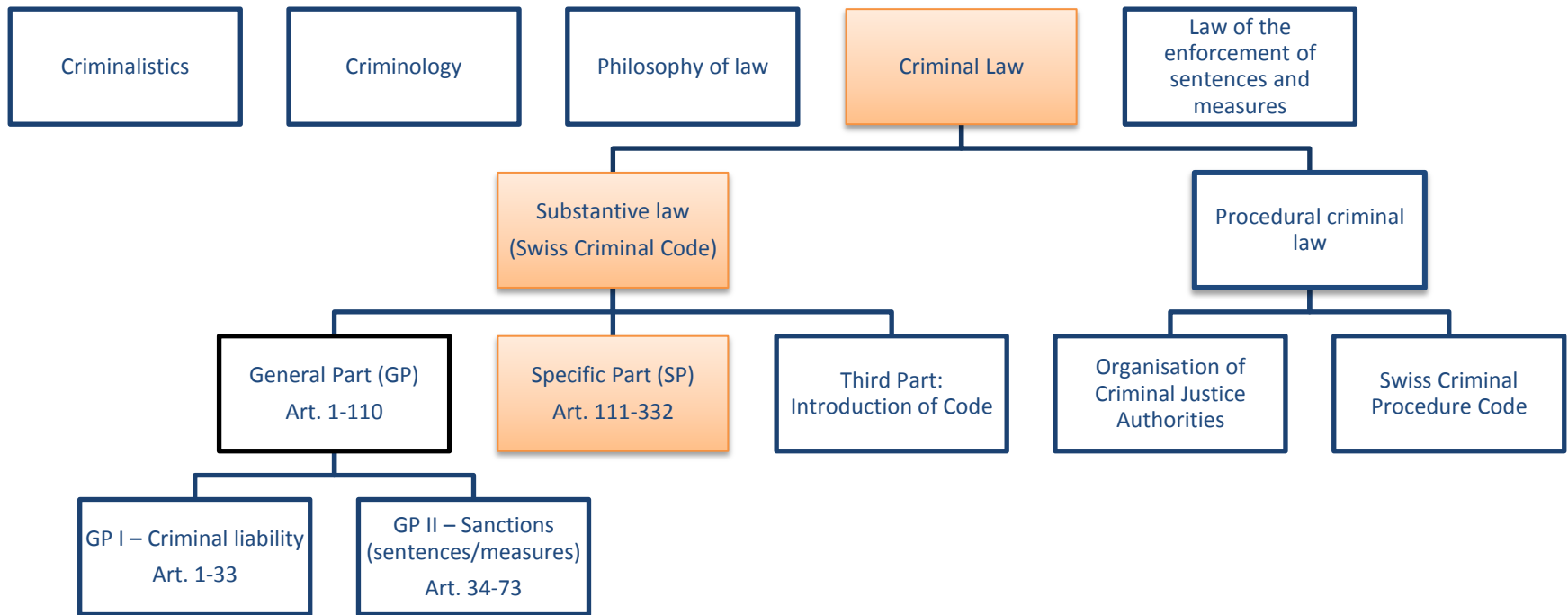
- Sentences
  - Monetary penalties
  - Community service
  - Custodial sentences
  - Suspended sentences
  - Determination of the sentences
- Measures
  - Indefinite incarceration
  - Therapeutic Measures
  - Employment ban
  - Driving ban
  - Forfeiture etc.



# General Part II – Art. 34-73 CC



# Overview Swiss Criminal Law





# Specific Part – Art. 111-332 CC

## Criminal Acts:

- Offences against Life and Limb (Art. 111 ff. )
- Offences against Personal Honour (Art. 173 ff.)
- Offences against Liberty (Art. 180 ff.)
- Offences against Sexual Integrity (Art. 187 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 <sup>bis</sup>
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

# Criminal Acts

- SCC Prohibitions
  - Homicide, Murder, Manslaughter
  - Assault
  - Offences against property
  - Offences against liberty
  - Sexual offences
  - etc.
- 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



# Cantonal Criminal Law

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



BGE 138 IV 13

# Cantonal Criminal Law

## § 7 CC/Zürich

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



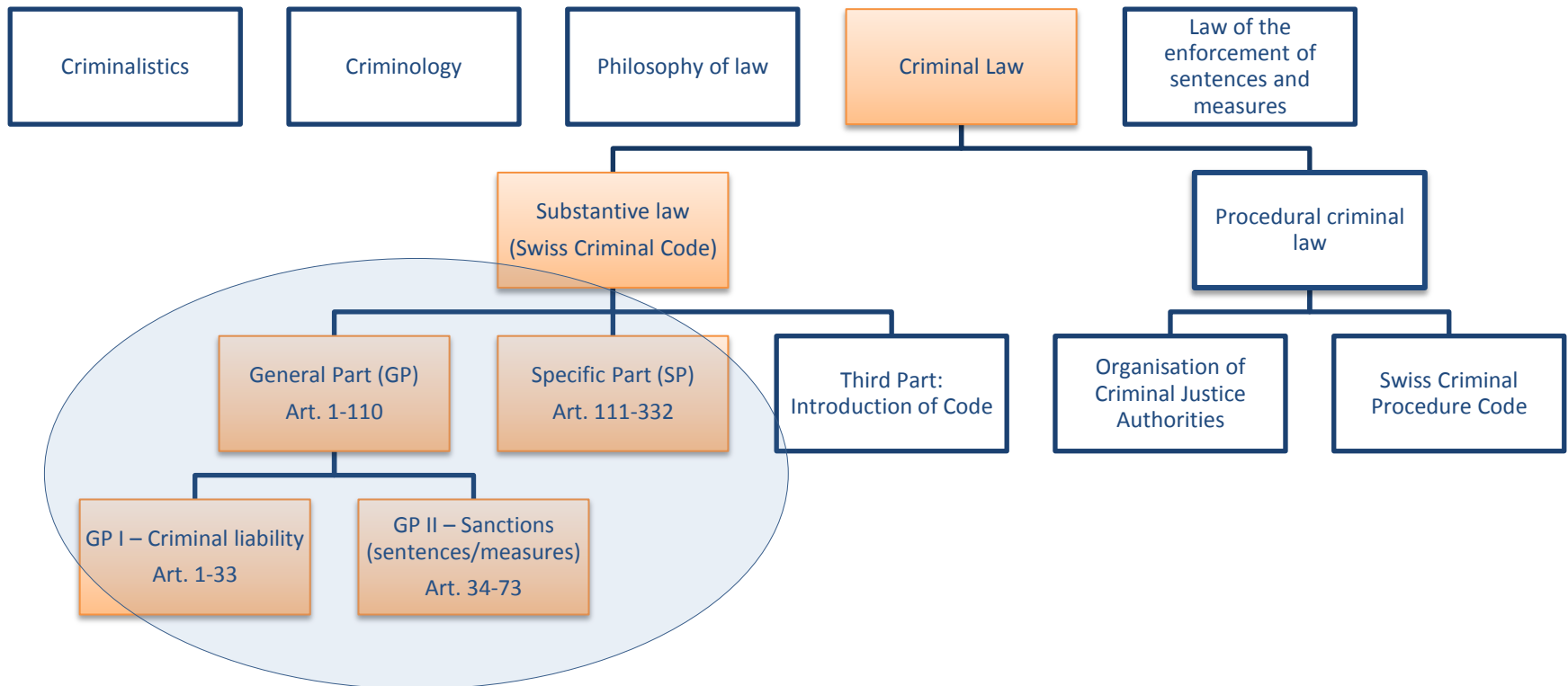
## Cantonal Criminal Law

### § 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“



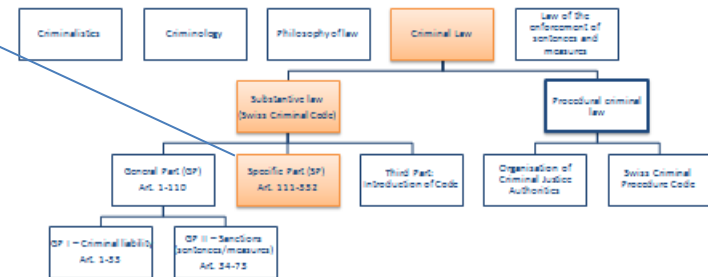
# Overview Swiss Criminal Law



# How do the different parts work together?

Article 111 SCC  
 „Any person who kills a person intentionally, but without fulfilling the special requirements of the following articles, is liable to a custodial sentence of not less than five years”

## Overview Swiss Criminal Law



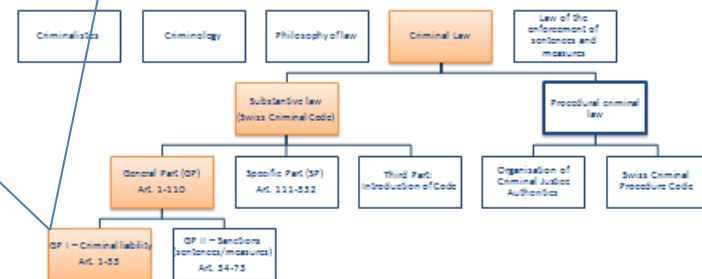
# How do the different parts work together?

“Any person who kills a person intentionally, [...] is liable to a custodial sentence of not less than five years”

If: elements of crime (actus reus and mens rea)



## Overview Swiss Criminal Law





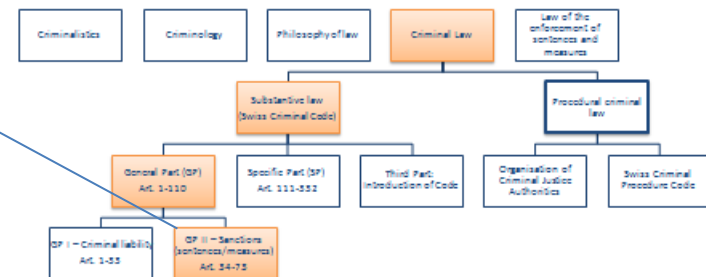
# General Provisions

“Any person who kills a person intentionally, [...] is liable to a custodial sentence of not less than five years”

If: Elements of crime (actus reus and mens rea)  
 then: legal consequence



## Overview Swiss Criminal Law



# Case Study:

## *R v Dudley and Stephens (1884)*

Michael Sandel:

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

Starting at 29min 25sec



From *Illustrated Police News*, 15 November 1884.







# *R v Dudley and Stephens (1884)*



The Mignonette



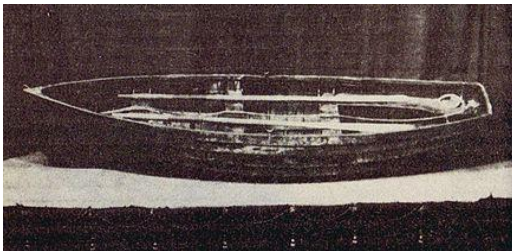
Captain Dudley



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

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

# 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)

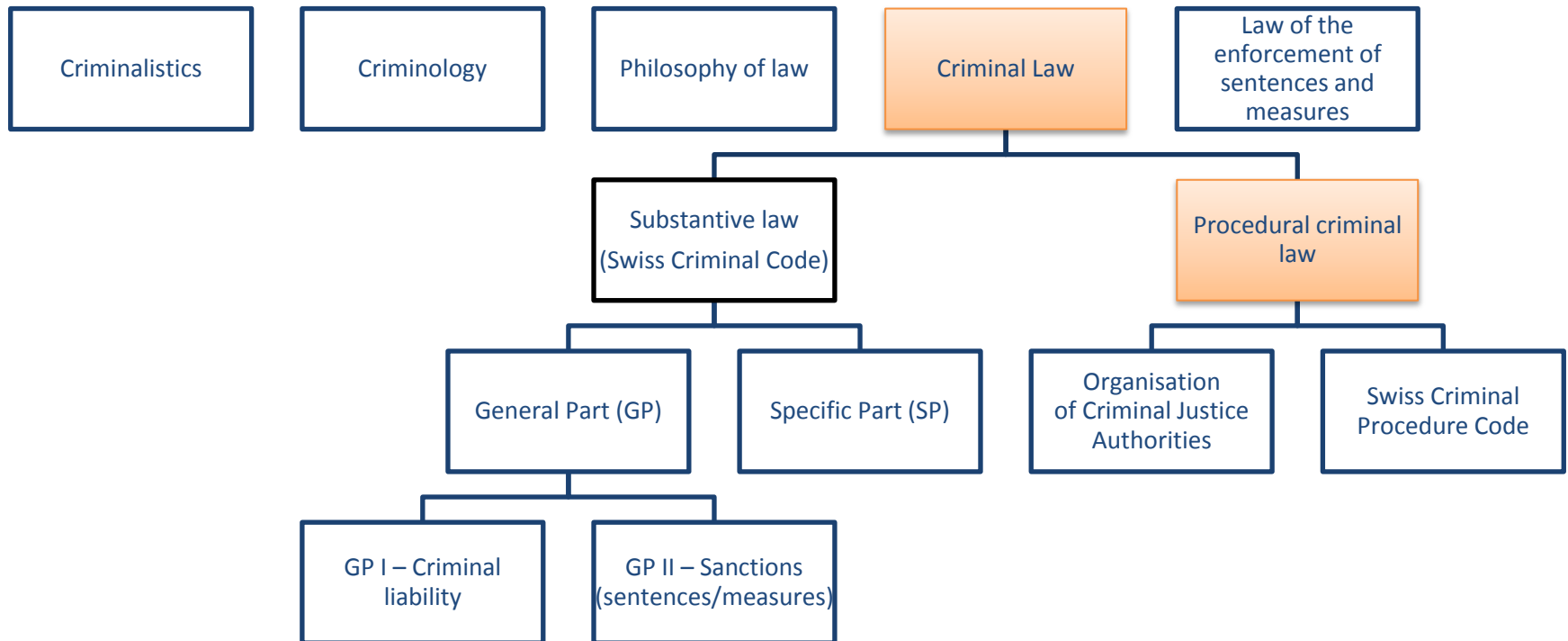
2 If the person concerned could not have been reasonably expected to abandon the endangered interest, ~~he does not commit an offence.~~  
(recte: does not act culpably)



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# Code of Criminal Procedure – History

## Before 2011

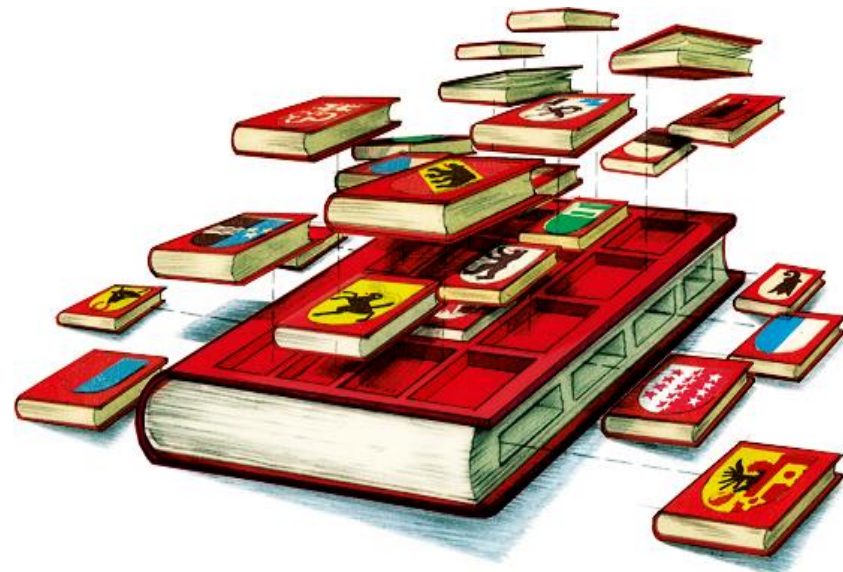
- 26 Codes of Criminal Procedure
- Prosecutorial Systems, Investigative Magistrate (Verhörerichter), Juge d’instruction etc.
- Federal Supreme Court laid out a common minimal standard



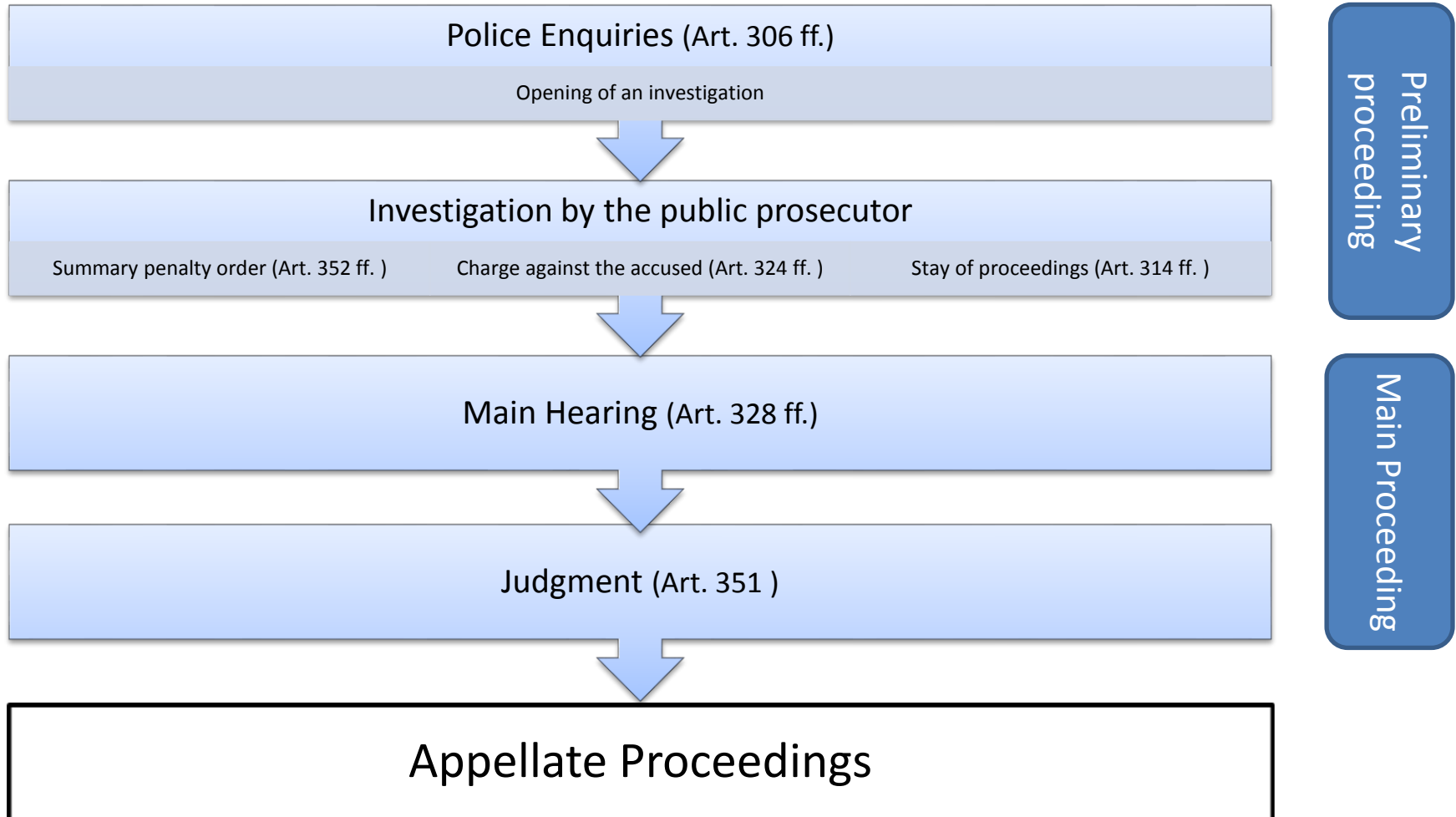
# Code of Criminal Procedure – History

## Since 1 January 2011

- Federal Code of Criminal Procedure (CCP) 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)



# Typical Criminal Procedure



# 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).





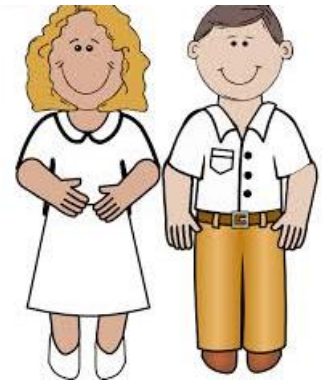
# The victim

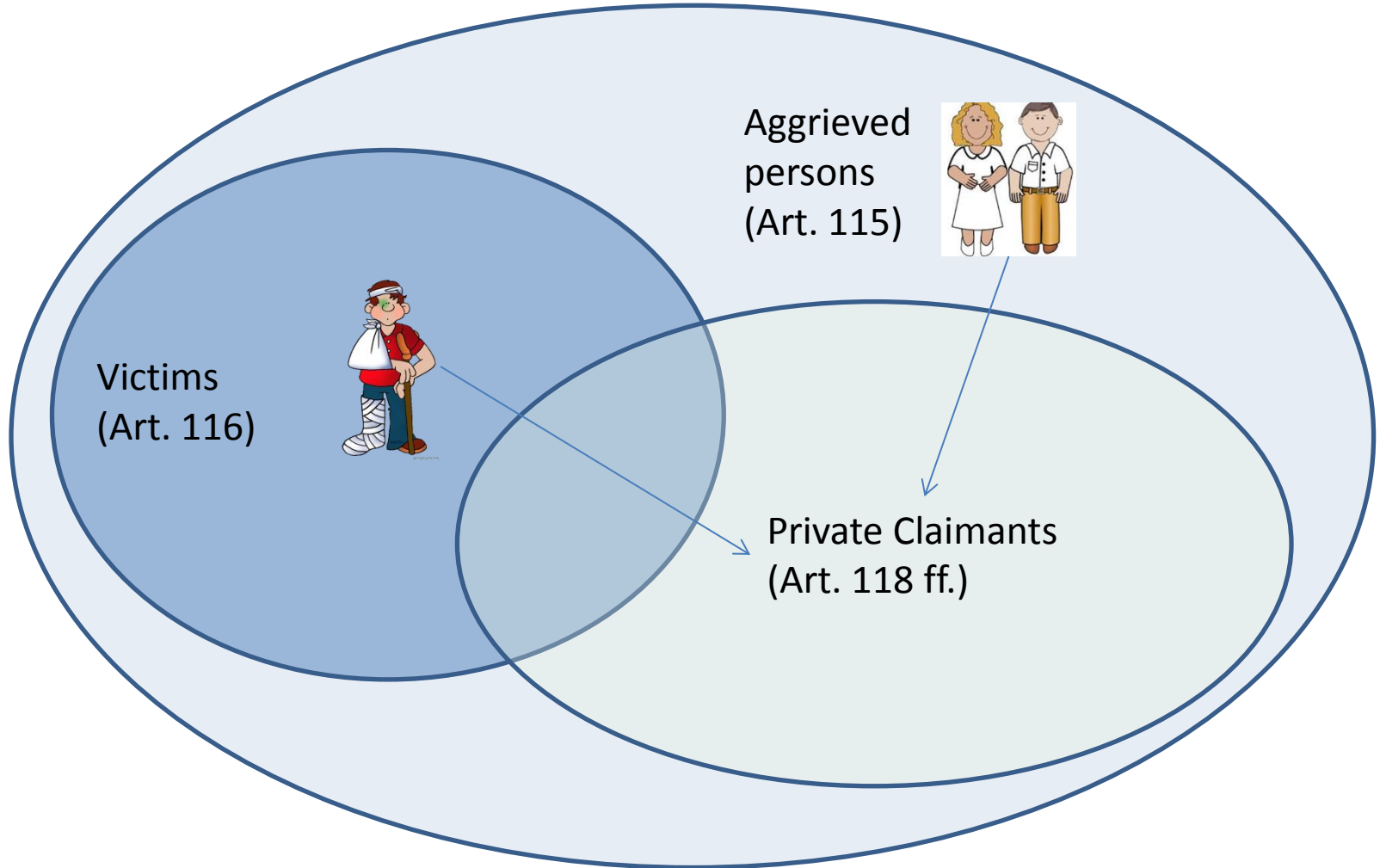
- Victim is a person who suffered physical, sexual or mental harm from an offence (Art. 116 )
- Status: Special protection and rights through the Federal Act on Support to Victims of Crime (2007)



# Private Claimants

- A private claimant is a person who (allegedly) 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»

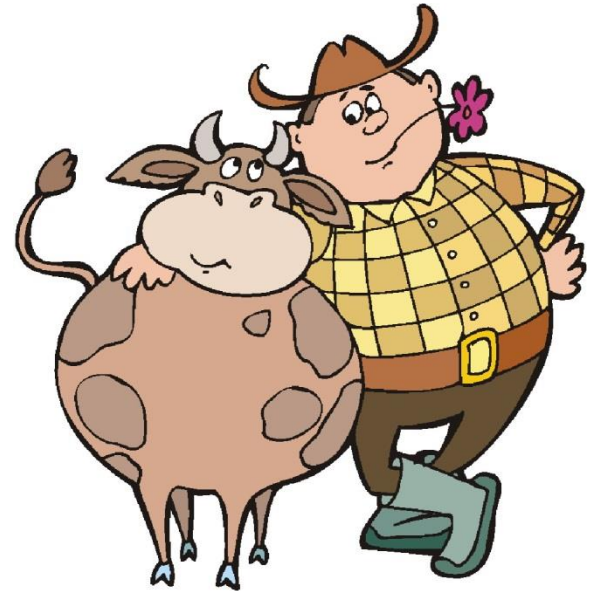
## First court of appeal

- Zurich (Canton):  
«Obergericht»

## Federal Supreme Court

- «Bundesgericht»  
Lausanne

# «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.



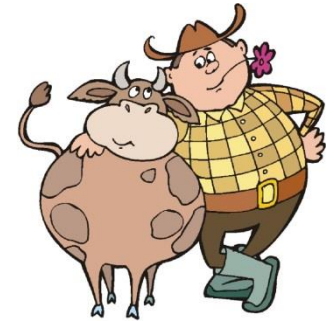
Lütisburg/SG

# «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) and 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)



## 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<sup>ter</sup> 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?



# Introduction to Swiss Criminal Law

## 1. General Information

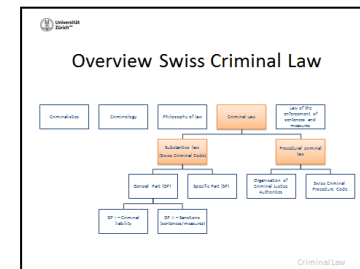
Exam

Question / Statement

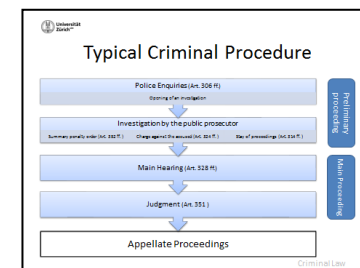
	Correct	Wrong	
Answer A		X	+1
Answer B	X		+1
Answer C	X		-1
Answer D			0
Answer E	X		+1

2 Points

## 2. Substantive Criminal Law



## 3. Criminal Procedure



# Introduction to Swiss Law

## Criminal Law and Criminal Procedure

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