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
Criminal Law / Criminal Procedure

- Doctorate and habilitation in Basel and Lucerne (2004 and 2013)
- LL.M University of Cambridge, Trinity Hall College (2005)
- Chair for Criminal Law and Criminal Procedure

Prof. Dr. iur. Marc Thommen
Civil Procedure

- Mag.iur./Dr. iur. University of Vienna/Austria
- Researcher Hans-Kelsen Institute, Vienna
- Habilitation University of Zürich
- Chair for Swiss and International Civil Procedure and Comparative Private Law

Prof. Dr. iur. Tanja Domej
Introduction to Swiss Criminal Law

1. General Information

2. Substantive Criminal Law

3. Criminal Procedure
Translated Codes

Federal Constitution of the Swiss Confederation

Swiss Criminal Code

Swiss Criminal Procedure Code

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

Date: 27 Oktober 2017
Time: 13.00-14.00h
Appear: 12.30h
Room: HAH-E11
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 through:
- Constitutio Criminalis Bambergensis (1507), Johann von Schwarzenburg
- Constitutio Criminalis Carolina (CCC/1532) as subsidiary legal source
Anna Göldi (1734-1782)

- 13 June 1782: Anna Göldi(n) last person executed/beheaded for witchcraft in Europe.
- Employed as a maid by Johann Jakob Tschudi, a rich physician and politicion in Glarus.
- Suspected to have put needles in the milk of Tschudi’s daughter.
Code Pénal de la République Helvétique 1799

- Helvetic Republic (1798): New Criminal Code, based on French Code Pénal (1799), imposed by Napoléon

General Napoléon Bonaparte
Mediation (1803-1814)

- Act of Mediation (1803)
- Restoration (1814)
- Back to CCC
Swiss Confederation 1848

- 1848 First Swiss Constitution
- 19th Century: Cantonal Criminal Codes
Carl Stooss (1849-1934)

- Studies at University of Berne (CH), Leipzig (Ger) and Heidelberg (Ger)
- "Father" of the Swiss Criminal Code (1937)
Carl Stooss (1849-1934)

- 1888: Mandate by the Federal Council of Switzerland to draft a Criminal Code
- 1890-93: Comparison of all 25 Cantonal Criminal Codes
- 1894: First draft CC
Carl Stooss (1849-1934)

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

Swiss Criminal Code of 21 December 1937
Swiss Criminal Law

Criminalistics

Criminology

Philosophy of Criminal law

Criminal Law

Enforcement of Sentences and Measures

Substantive Criminal Law (Swiss Criminal Code)

General Part
Art. 1-110

Specific Part
Art. 111-332

Third Part: Introduction of Code

Organisation of Criminal Justice Authorities

Federal Code of Criminal Procedure

Criminal Liability
Art. 1-33

Sanctions (sentences/measures)
Art. 34-73

I. Principles
II. Trial Rules
III. Parties
IV. Evidence

V. Coercive Measures
VI. Prelim. Proceed.
VII. Principal Proceed.
VIII. Special Proceed. ...
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
Substantive Criminal Law

Secondary Criminal Law
– Road Traffic Act
– Narcotics Act
– Foreign Nationals Act
– Therapeutic Products Act
– Customs Act
– VAT Act
– etc.
Substantive 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“
Art. 3 Juvenile Criminal Law Act of 20 June 2003

This code applies for persons between 10 and 18 years...
General Provisions on Criminal Liability that apply to all offences

- Territorial Application
- Crime Categories
- Intention/Negligence
- Excuses/Defences
- Law on 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
2. Commencement of applicability of the Code
3. Territorial scope of application
   - Felonies or misdemeanours in Switzerland
   - Felonies or misdemeanours against the state committed abroad
   - Felonies committed abroad processed in terms of an international obligation
   - Other offences committed abroad
   - Place of commission
   - Personal scope of application

Art. 1
Art. 2
Art. 3
Art. 4
Art. 5
Art. 6
Art. 7
Art. 8
Art. 9

Art. 10
Art. 11
Art. 12
Art. 13
Art. 14
Art. 15
Art. 16
Art. 17
Art. 18
Art. 19
Art. 20
Art. 21
Art. 22
Art. 23
# Crime categories

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

Criminalistics

Criminology

Philosophy of Criminal Law

Criminal Law

Enforcement of Sentences and Measures

Substantive Criminal Law (Swiss Criminal Code)

General Part Art. 1-110

Specific Part Art. 111-332

Third Part: Introduction of Code

Criminal Procedure

Organisation of Criminal Justice Authorities

Federal Code of Criminal Procedure

I. Principles
II. Trial Rules
III. Parties
IV. Evidence
V. Coercive Measures
VI. Prelim. Proceed.
VII. Principal Proceed.
VIII. Special Proceed. ...
Carl Stooss (1849-1934)

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

Sentences
- Monetary penalties
- (Community service; until 2017)
- Custodial sentences
- Suspended sentences
- Determination of the sentences

Measures
- Indefinite incarceration
- Therapeutic Measures
- Employment ban
- Driving ban
- Forfeiture etc.
Dual System of Sanctions

- **Retribution**
  - Sentences

- **Prevention**
  - Measures
**Measures**

**Protective measures**
- Therapy
- Isolation
- Indefinite detention Art. 64

**Other measures**
- personal
- Good behaviour bond Art. 66
- Expulsion Art. 66a ff.
- Prohibition from carrying out a specific activity, contact prohibition and exclusion order Art. 67 ff.
- Disqualification from driving Art. 67e
- Publication of the judgment Art. 68

**Sentences**
- Monetary penalty Art. 34
- Custodial sentence Art. 40 f.
- Fines Art. 106
- Inpatient treatment of mental disorders Art. 59
- Inpatient treatment of addiction Art. 60
- Inpatient measures for young adults Art. 61
- Outpatient treatment Art. 63
- Retrospective in-patient measure Art. 65 Abs. 1
- Retrospective indefinite detention Art. 65 Abs. 2

**Other sanctions**
- Good behaviour bond Art. 66
- Expulsion Art. 66a ff.
- Prohibition from carrying out a specific activity, contact prohibition and exclusion order Art. 67 ff.
- Disqualification from driving Art. 67e
- Publication of the judgment Art. 68

**Custodial sentence**

**Other measures**
-material
- Confiscation of Dangerous Goods Art. 69
- Asset Forfeiture Art. 70 ff.
- Use for the benefit of the person harmed Art. 73

* Community service is no longer a separate type of sentence. However, all sentences up to 6 months can be converted into community service (Art. 79a).
Art. 47 – Principles of Sentencing

The court determines the sentence according to the culpability of the offender...
Art. 56 – Therapeutic Measures and Internment

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

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

Title One: Offences against Life and Limb

1. Homicide
   - Intentional homicide
   - Murder
   - Manslaughter
   - Homicide at the request of the victim
   - Involuntary and unwitting homicide
   - Infanticide
   - Homicide through negligence

2. Abortion
   - Illegal abortion
   - Legal abortion
   - Contraception by physicians
   - Abandoned
   - Abused

3. Assault
   - Self-defence
   - Common assault
   - Female genital mutilation
   - Assault through negligence
   - Acts of aggression

4. Endangering the life or health of another
   - Abandonment
   - Failure to offer aid in an emergency
   - False alarm
   - Endangering life
   - Assault
   - Bravado
   - Attack
   - Representation of acts of violence
   - Administering substances capable of causing injury to children
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”
How do the different parts work together?

Article 111 SCC

„Any person who kills a person intentionally... is liable to a custodial sentence of not less than five years”
How do the different parts work together?

Article 111 SCC

„Any person who kills a person intentionally... is liable to a custodial sentence of not less than five years”
Introduction to Swiss Criminal Law

1. General Information

2. Substantive Criminal Law

3. Criminal Procedure
Criminal Procedure

History
Criminal Procedure – before 2011

More than 50 codes
- 26 cantonal codes of criminal procedure
- 26 cantonal regulations on Juvenile Justice
- Procedural code on Federal Criminal Justice (1934)
- Administrative criminal procedure code (1974)
- Criminal procedure code of the Swiss Military (1979).
Criminal Procedure – before 2011

– Prosecutorial Systems, Investigative Magistrate (Verhörrichter), Juge d’instruction etc.

– Federal Supreme Court set out a common minimal standard of procedural rules
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 supervision of the public prosecutor (Art. 15 II CCP)
Criminal Procedure

Swiss Criminal Procedure Code of 5 October 2007
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.
Organisation of Criminal Justice Authorities

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.
Administration of Criminal Justice

- Federal Supreme Court
  - Lausanne / Lucerne
- Cantonal High Court
- Federal Criminal Court Bellinzona
- Federal Administrative Court St. Gallen
- Federal Patent Court Saint-Gall
- District Court
Swiss Criminal Law
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
Criminal Proceedings

Preliminary Proceedings
- Act
  - Police Inquiries
- Opening
  - Prosecutorial Investigation
- Charges
- Summons
- Preparations
- Court Hearings
- Verdict

Principal Proceedings
Police (Art. 306 ff.)

- Secure evidence
- Find suspects
- Examination hearings
The Public Prosecutor

- Formal head of the investigation (Art. 16)
- Duty to investigate the incriminating and 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 (Art. 113 I)

District Court Judge, Zürich
Simone Nabholz
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 under the Federal Act on Support to Victims of Crime (2007)
- Special rights that apply only to «victims» and not «aggrieved persons»
Private Claimants

- Either a victim or the aggrieved person can become private claimant
- Must “opt-in” to obtain this status:
  - 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.).
- Specific rights in participation in trial afforded to private claimants, as compared to victim/aggrieved person
- Private Claimant is a party to the proceedings (Art 104)
Victims (Art. 116)

Aggrieved persons (Art. 115)

Private Claimants (Art. 118 ff.)
The accused and the private claimant may appoint a legal advisor to safeguard their interests (Art. 127) at any time (Art. 158).

Private claimant’s lawyer represents the harmed individual’s interests.

Private claimant’s lawyer can contest dropping of charges by prosecutor, or ask for a specific sentence to be imposed.

Niklaus Tamm, Attorney
Lawyers

- 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)

Tanja Knodel, defence counsel
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 he did every year he passed in front of the house of pensioner X.
- The cows ate the grass, trampled on the flowers and sh... in X.’s garden.
«Aiming at cows» (2014) - Facts

- X. (furious) got his revolver, «aimed at the cows» and threatened to shoot them...
Aiming at cows – Proceedings 1/4

Police investigation:

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

Cantonal Police of St. Gallen
Aiming at cows – Proceedings 2/4

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

- Threatening behaviour (Art. 180 CC); offence against Weapons Act
- Sentence: CHF 1000.- fine and suspended monetary penalty of 90 daily penalty units at CHF 360.--
- X. objected to penalty order
Aiming at cows – Proceedings 3/4

- Public Hearing at Court of first instance.
- X. denies use of revolver
- Farmer declares himself as a private claimant
- The defence counsel of X. requires acquittal in dubio pro reo
- Court confirms conviction and sentence
Aiming at cows – Proceedings 4/4
Introduction to Swiss Criminal Law

1. General Information

2. Substantive Criminal Law

3. Criminal Procedure
Swiss Criminal Law

Discussion
Discussion

1. Trekking in the Nude
2. Dudley and Stephens
Treking in the Nude

Discussion
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 birthday suit — he’s one of a growing number of
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»
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 converted the sentence into 6 months of imprisonment.

Home Secretary William Harcourt
<table>
<thead>
<tr>
<th>Elements of crime</th>
<th>Objective element (actus reus)</th>
<th>Mental element (mens rea)</th>
<th>Wrongfulness Unlawfulness of act</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Offender</td>
<td>Intention</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Object of offence</td>
<td>Knowledge</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Act</td>
<td>Will</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Result of offence</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Causality</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justification</td>
<td>Self-defence</td>
<td>Knowledge (of threat)</td>
<td>Legal responsibility of actor</td>
</tr>
<tr>
<td>General defence</td>
<td>Necessity</td>
<td>Will (to defend)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Consent</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Legitimate interests</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Culpability</td>
<td>Criminal incapacity/Insanity</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Mistake of law</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Appropriateness</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Culpability of Dudley and Stephens

– Legitimate act in a situation of necessity (Art. 17 SCC)?
  • Subsidiarity
  • Defence of superior interests

– Mitigatory act in a situation of necessity (Art. 18 SCC)?
Art. 17 – Necessity (justification)

Any person who carries out an act that carries a criminal penalty in order to save a legal interest of his own or of another from immediate and not otherwise avertable danger, acts lawfully if by doing so he safeguards interests of higher value.
Art. 18 – Necessity (Mitigation)

1 Any person who carries out an act that carries a criminal penalty in order to save himself or another from immediate and not otherwise avertable danger to life or limb, freedom, honour, property or other interests of high value shall receive a reduced penalty if he could reasonably have been expected to abandon the endangered interest.
Art. 18 – Necessity (no culpability)

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

Prof. Dr. iur. Marc Thommen