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

www.rwi.uzh.ch/thommen
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: 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

<table>
<thead>
<tr>
<th></th>
<th>Correct</th>
<th>Wrong</th>
</tr>
</thead>
<tbody>
<tr>
<td>Answer A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Answer B</td>
<td></td>
<td></td>
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<tr>
<td>Answer C</td>
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<tr>
<td>Answer D</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Answer E</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- 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

<table>
<thead>
<tr>
<th></th>
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<th>Wrong</th>
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<tbody>
<tr>
<td>Answer A</td>
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<tr>
<td>Answer C</td>
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<td>Answer D</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Answer E</td>
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</tbody>
</table>

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

Question / Statement

<table>
<thead>
<tr>
<th>Answer</th>
<th>Correct</th>
<th>Wrong</th>
<th>+1</th>
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<tbody>
<tr>
<td>Answer A</td>
<td></td>
<td>X</td>
<td>+1</td>
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<tr>
<td>Answer B</td>
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<td>X</td>
<td>+1</td>
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<tr>
<td>Answer C</td>
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<tr>
<td>Answer D</td>
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<td>X</td>
<td>+1</td>
</tr>
<tr>
<td>Answer E</td>
<td></td>
<td>X</td>
<td>+1</td>
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</table>

Perfect solution: 5 Points

Criminal Law
# Exam

## Question / Statement

<table>
<thead>
<tr>
<th>Answer</th>
<th>Correct</th>
<th>Wrong</th>
<th>Points</th>
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<tbody>
<tr>
<td>Answer A</td>
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<td>2 Points</td>
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<tr>
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<td>Answer C</td>
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<td>-1</td>
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<td>Answer D</td>
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<td>0</td>
<td></td>
</tr>
<tr>
<td>Answer E</td>
<td>X</td>
<td>+1</td>
<td></td>
</tr>
</tbody>
</table>

Criminal Law
Introduction to Swiss Criminal Law

1. General Information

2. Substantive Criminal Law

3. Criminal Procedure
Overview Swiss Criminal Law

- Criminalistics
- Criminology
- Philosophy of law
- Criminal Law
  - Substantive law (Swiss Criminal Code)
    - General Part (GP)
      - GP I – Criminal liability
    - Specific Part (SP)
      - GP II – Sanctions (sentences/measures)
  - Procedural criminal law
    - Law of the enforcement of sentences and measures
      - Organisation of Criminal Justice Authorities
      - Swiss Criminal Procedure Code
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
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)
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
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)

- 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 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
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

Criminalistics

Criminology

Philosophy of law

Criminal Law

Substantive law
(Swiss Criminal Code)

General Part (GP)
Art. 1-110

Specific Part (SP)
Art. 111-332

Third Part:
Introduction of Code

Law of the enforcement of sentences and measures

Procedural criminal law

Organisation of Criminal Justice Authorities

Swiss Criminal Procedure Code

GP I – Criminal liability
Art. 1-33

GP II – Sanctions (sentences/measures)
Art. 34-73
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- Criminal Law
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    - GP I – Criminal liability Art. 1-33
    - GP II – Sanctions (sentences/measures) Art. 34-73
  - Specific Part (SP) Art. 111-332
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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
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
   - Offences against minors abroad
   - Offences committed abroad prosecuted in terms of an international obligation
   - Other offences committed abroad
   - Place of commission
4. Personal scope of application

Title Two: Criminal Liability
1. Felonies and misdemeanours:
   - Definition
   - Commission by omission
2. Intention and negligence:
   - Definitions
   - Error of fact
3. Lawful acts and guilt:
   - Act permitted by law
   - Legitimate self-defence
   - Mitigatory self-defence
   - Legitimate act in a situation of necessity
   - Mitigatory act in a situation of necessity
   - Absence of legal responsibility due to a mental disorder and diminished responsibility
   - Doubt as to legal responsibility
   - Error as to unlawfulness
4. Attempts:
   - Criminal liability for attempts
   - Withdrawal and active repentance
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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

Sanctions

Sentences
- Monetary penalty Art. 34
- Community Service Art. 37
- Custodial sentence Art. 40 f.
- Fines Art. 106
- Death penalty Leopold punishment

Measures
- Protective measures
  - In-patient measure
  - Treatment of mental disorders Art. 59
  - Treatment of addiction Art. 60
  - Measures for young adults Art. 61
  - Out-patient treatment Art. 63
- Indefinite detention Art. 64
- Retrospectiv in-patient measure Art. 65 Abs. 1
- Retrospectiv indefinite detention Art. 65 Abs. 2

Other measures
- Good behaviour bond Art. 66
  - Prohibition from carrying on an activity, contact prohibition and exclusion order Art. 67
  - Disqualification from driving Art. 67c
  - Publication of the judgment Art. 68
- Forfeiture of
  - Dangerous assets Art. 69
  - Assets Art. 70 ff.
- Personally
- Materially
- Use for the benefit of the person harmed Art. 73
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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.)
- ...
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
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»
§ 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“
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GP I – Criminal liability Art. 1-33
GP II – Sanctions (sentences/measures) Art. 34-73
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”
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)
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.
The terrible tale of the sea—horrible sufferings

From Illustrated Police News, 20 September 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.
# Elements of Crime

## Elements of Crime

<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>
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</thead>
<tbody>
<tr>
<td>• Offender</td>
<td>• Offender</td>
<td>• Intention</td>
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<tr>
<td>• Object of offence</td>
<td>• Object of offence</td>
<td>• Knowledge</td>
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<tr>
<td>• Act</td>
<td>• Act</td>
<td>• Will</td>
<td></td>
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<tr>
<td>• Result of offence</td>
<td>• Result of offence</td>
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<tr>
<td>• Causality</td>
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## Justification

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<tr>
<td>• Necessity</td>
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<tr>
<td>• Consent</td>
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<tr>
<td>• Legitimate interests</td>
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## Culpability

<table>
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<td>• Criminal incapacity/Insanity</td>
<td>• Criminal incapacity/Insanity</td>
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<tr>
<td>• Mistake of law</td>
<td>• Mistake of law</td>
</tr>
<tr>
<td>• Appropriateness</td>
<td>• Appropriateness</td>
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</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 cupably)
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Criminology

Philosophy of law

Criminal Law

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Swiss Criminal Procedure Code

GP I – Criminal liability

GP II – Sanctions (sentences/measures)
Code of Criminal Procedure – History

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
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 Enquiries (Art. 306 ff.)
  - Opening of an investigation

- Investigation by the public prosecutor
  - Summary penalty order (Art. 352 ff.)
  - Charge against the accused (Art. 324 ff.)
  - Stay of proceedings (Art. 314 ff.)

- Main Hearing (Art. 328 ff.)

- Judgment (Art. 351)

Appellate 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 exculpating 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)
Aggrieved persons (Art. 115)

Victims (Art. 116)

Private Claimants (Art. 118 ff.)
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.
«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
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\textsuperscript{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)

**Strictly excluded**
(Article 141 I CCP/CH)

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

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

**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)

**Not excluded**
(Article 141 III CCP/CH)

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

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