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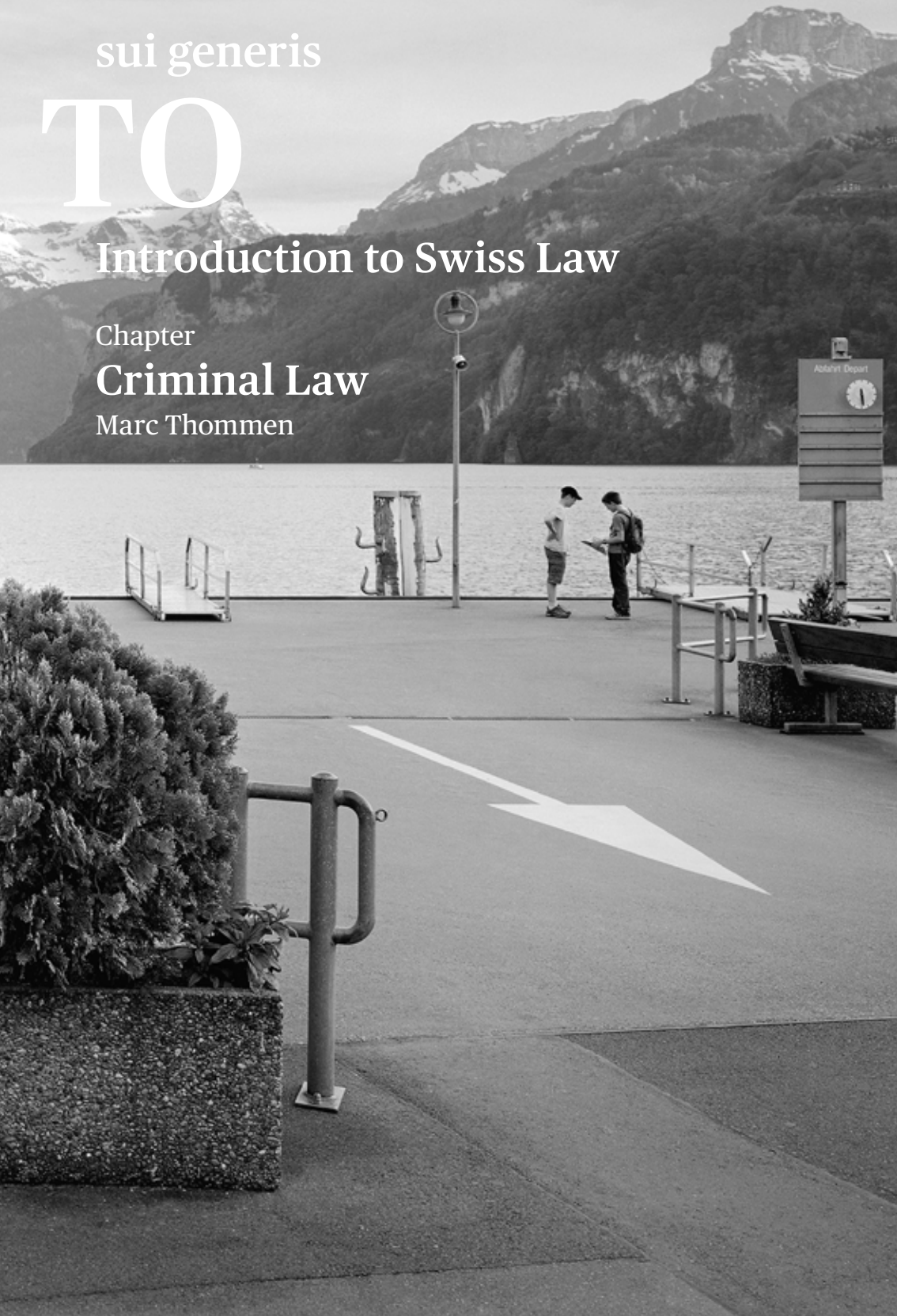
Introduction to Swiss Law

Chapter

Criminal Law

Marc Thommen



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I. Criminal Code

The first section of this chapter sets out a brief history of the codification of criminal law across Switzerland (1.). Subsequently, the gradual development of the criminal code applicable today, as designed by CARL STOOSS, is examined (2.). The content and form of the current criminal code will then be outlined (3.), before some particularities of the code are analysed in more detail: namely, the dualism of sanctions (4.), the death penalty in Swiss law (5.) and the regulations on assisted suicide and euthanasia (6.).

1. History

The first comprehensive codification of criminal law in Switzerland–the *Code pénal de la République helvétique* 1799–was inspired by the ideals of the French Revolution,[1] such as sentencing equality and the abolishment of general confiscations.[2] After the decline of the Helvetic Republic in 1803, the cantons reinstated their own criminal codes. The Canton of Fribourg, for example, reintroduced the *Constitutio Criminalis* of Emperor Carl V of 1532 ("Carolina").[3]

The Switzerland we know today was founded in 1848 in the aftermath of the *Sonderbund* war. The Protestants prevailed in that war. However, the founding fathers of the Swiss Constitution took the interests of the defeated Catholics cantons into account when creating the Constitution. Hence, it was not a central Swiss Republic but the *Swiss Confederation* that emerged following the end of the civil war.

One of the main features of the federal system as founded in 1848 was the autonomy of the 25 cantons:[4] the cantons kept their legislative independence and thus their own criminal codes. Considering the size of the cantons (for example,

1 STEFAN TRECHSEL / MARTIN KILLIAS, Criminal Law, in: Francois Dessemontet / Tugrul Ansay, (eds.), Introduction to Swiss Law, 3rd edition, The Hague 2004, pp. 245, p. 246.

2 General confiscation was the practice to seize all the assets of a person–often a political rival–upon conviction and thereby ruining them economically.

3 NADINE ZURKINDEN, National characteristics, fundamental principles, and history of criminal law in Switzerland, in: Ulrich Sieber / Konstanze Jarvers / Emily Silverman (eds.), National Criminal Law in a Comparative Legal Context, Vol 1.1, Berlin 2013, pp. 205, p. 295.

4 There were 25 cantons at this point in time. In 1979 Jura became the 26th Swiss canton.

even today the Canton of Glarus has a population of only 40,000 inhabitants), the existence of numerous criminal codes proved to be very inefficient.

2. Legislation

At the end of the 19th century the Swiss Lawyers' Association pushed for a nationwide codification of the criminal law. The Swiss Federal Council asked CARL STOOSS, a professor of criminal law at the University of Bern, to issue a draft. In 1893 he published the first draft of the Swiss Criminal Code. At that time, nobody anticipated that the legislative procedure would take a record-breaking 50 years to complete. On 21 December 1937, the highly controversial Swiss Criminal Code was finally adopted. Its opponents claimed that a unified codification for Switzerland undermined cantonal autonomy in the crucial field of criminal law. Further, Catholic groups opposed the Code because it legalised (medically warranted) abortions.[5] The Code's abolition of the death penalty was also a contested issue.[6] On 3 July 1938, a slim majority of 53.5% of the electorate approved the new Criminal Code in a referendum. The Code officially came into force on 1 January 1942.

3. Content

In the Swiss criminal law of today, there are three types of offences: felonies, misdemeanours and contraventions. *Felonies* are offences that carry a custodial sentence of more than three years, the maximum custodial sentence usually being 20 years. Some felonies (e.g. murder, aggravated hostage taking) carry a life sentence (Article 40).[7] *Misdemeanours* are offences that carry a custodial sentence not exceeding three years or a monetary penalty (Article 10). Monetary penalties are composed of penalty units. The quantity of the units (a maximum of 180; Article 34 I) reflects the culpability of the offender, while the amount charged per unit reflects the offender's financial situation (normally CHF 30–3,000, Article 34 II). Finally, *contraventions* are criminal acts that are punishable only with a fine (Article 103). The maximum fine is usually CHF 10,000 (Article 106).

5 ZURKINDEN, p. 296 with further references.

6 ZURKINDEN, p. 296 with further references.

7 In the following text, a reference to an "Article" which does not specify the source of law is a reference to the Swiss Criminal Code of 21 December 1997, SR 311.0; see for an English version of the Swiss Criminal Code www.fedlex.admin.ch (perma.cc/V8MH-MMRB).

The Swiss Criminal Code contains 392 Articles. It is divided into three books. *Part I* (Articles 1–110) largely sets out the *general provisions* on criminal liability (omissions, intention and negligence, justifications ("defences"), guilt, responsibility, attempt and participation) and sanctions (e.g. custodial sentences, monetary penalties, suspension of sentences, parole, therapeutic measures and indefinite incarceration). For example, there are two types of intention in Swiss criminal law: Article 12 encompasses both direct intent and conditional intent. Direct intent is possessed when the offender both knows that a particular consequence is possible and wants this consequence to occur.[8] Conditional intent, or *dolus eventualis,* is possessed when the offender deems it possible that a certain outcome will ensue and accepts that, if it does, harm will occur.[9]

The Swiss legislator's inclusion of this general part, setting up the common elements of crime and sentencing, was inspired by a long-established tradition. The Italian Renaissance jurist TIBERIO DECIANI (1509–1582) is credited with being the first to coin the idea of splitting up criminal codes into general and specific parts in his *Tractatus Criminalis* of 1590. Criminal codes which came before this, such as the Carolina (1532), had only contained specific, casuistic provisions. The move towards including both general and specific parts allowed criminal codes to be kept much shorter. Having general rules removes any gaps in criminal liability that would otherwise have to be determined by analogy. Further, by predetermining liability in a general manner, the legislator hoped to minimise the influence of courts and academics on the interpretation of the criminal codes.

Part II covers the specific provisions (Articles 111–332): it establishes criminal offences which protect individual interests such as life and limb (murder, assault), property (theft, fraud), honour (defamation), liberty (coercion, hostage taking, unlawful entry) or sexual integrity (rape, exploitation, pornography, sexual harassment). Further, it contains criminal offences which protect collective interests such as the family unit (incest, bigamy), public safety (arson), public health (transmission of diseases), public order (rioting, criminal organisations, racial discrimination), prevention of genocide and war crimes, trading interests (counterfeiting, forgery), national security (high treason, espionage), judicial interests (false accusation, money laundering, perjury) and state interests (abuse of public office, bribery).

Part III (Articles 333–392) deals with the introduction and application of the Swiss Criminal Code.

8 ANNA PETRIG / NADINE ZURKINDEN, Swiss Criminal Law, Zurich / St. Gallen 2015, p. 69.

9 PETRIG/ZURKINDEN, p. 70; see below pp. 426, Landmark Case 3 Deadly Car Race.

Many criminal provisions exist outwith the Criminal Code: for example, road traffic offences, drug crimes, and illegal use of weapons all form part of specific federal codes.[10] In practice, these laws are highly relevant, in particular road traffic offences.[11]

4. Dualism of Sanctions

Sanctions are the consequences imposed for criminal acts. In Switzerland there are two main categories of sanctions: sentences and measures. Sentences (monetary penalties, custodial sentences and fines) are retributive in nature. They are mainly backward-looking: their aim is to reprimand and punish offenders for their wrongdoing. Measures, on the other hand, are preventive in nature. Thus, they are predominantly forward-looking. They are designed to protect society from dangerous offenders either by curing them of any mental deficiencies or addictions (therapeutic measures) or by permanently incapacitating them (indefinite incarceration).

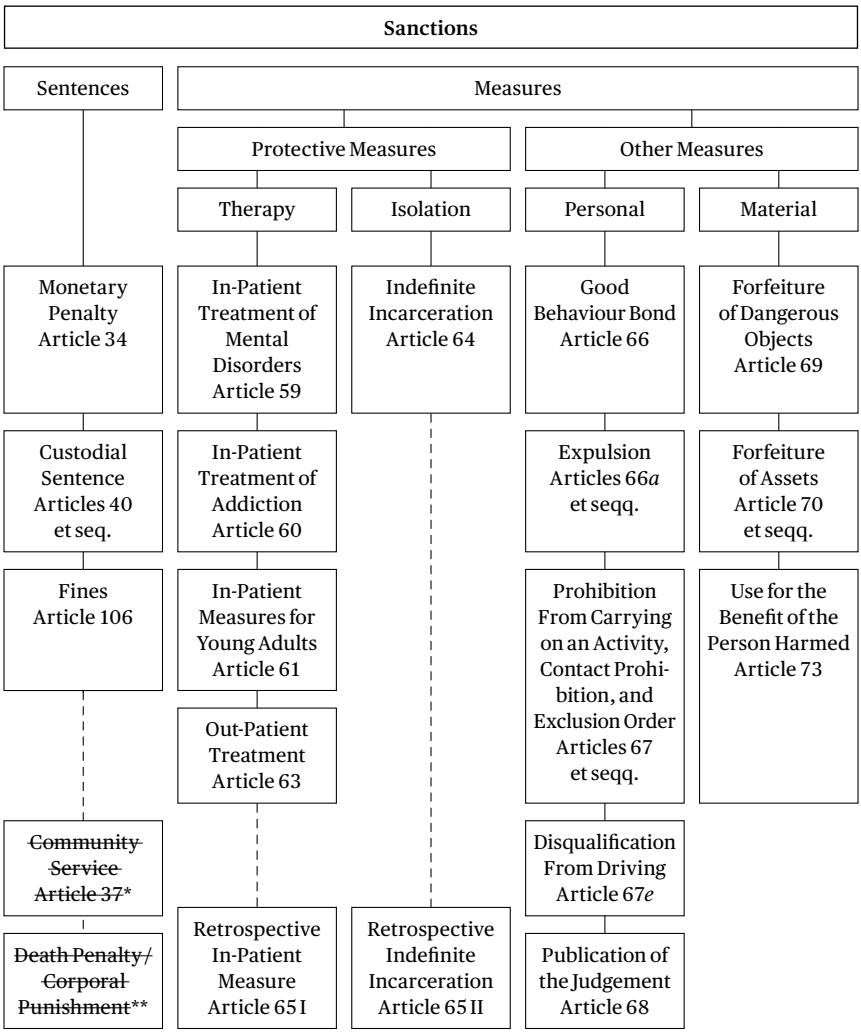
The dual system of sanctions was CARL STOOSS' invention. The idea received universal acclaim, and other jurisdictions soon followed the approach.[12] The new concept was successful because it appeased the debate over the legitimacy of criminal punishment. Scholars had fought over this idea throughout the 18th and 19th century: what gives the state the right to inflict harm upon offenders? There were three possible answers: (1) criminals deserve it, i.e. theories of just deserts; (2) punishment will teach criminals a lesson about their own behaviour and thus deter future offending, i.e. specific prevention; (3) a system of criminal punishment will also deter wider society from offending, i.e. general prevention.[13]

10 Federal Act on Road Traffic of 19 December 1958, SR 741.01; Federal Act on Narcotics and Psychotropic Substances of 3 October 1951 (Narcotics Act, NarcA), SR 812.121; see for an English version of the Narcotics Act www.fedlex.admin.ch (perma.cc/8VTQ-QHW4); Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997 (Weapons Act, WA), SR 514.54; see for an English version of the Weapons Act www.fedlex.admin.ch (perma.cc/NY9Q-Q2BG).

11 In 2019, there were 56,521 convictions of adults for road traffic offences, which is around 53% of all 107,047 convictions of adults (source: Federal Statistical Office [perma.cc/QS9M-ALUL]). In 2020 the number of cases dropped significantly, which is probably linked to the Covid-19 pandemic.

12 ZURKINDEN, p. 304.

13 General prevention was championed by PAUL JOHANN ANSELM RITTER VON FEUERBACH. He opposed special prevention because tying punishment to the offender's future likelihood of reoffending (rather than connecting punishment to the past criminal act) would leave the offender's punishment entirely at the discretion of the judge. This could lead to perverse outcomes: for example, someone who had repeatedly



* Community Sevice is no longer a separate type of sentence. However all sentences up to six months can be converted into community sevice (Art. 79*a*).

** The death penalty was abolished when the Swiss Criminal Code came into force on 1 January 1942, see I.5, pp. 416.

Figure 1: Dual System of Sanctions

committed petty theft could, under this principle, be imprisoned for life due to the statistical likelihood that they would steal again. In FEUERBACH's opinion, however, it was permissible to try to educate and deter the general public through punishment.

Just deserts theories of punishment are only concerned with retribution for past acts. They are also called *absolute* theories because they assert that punishment does not serve any future societal goals. In contrast, special and general prevention are known as *relative* theories because punishment must always relate to a future societal goal (deterrence, safety etc.).

These fundamentally different views on punishment led to the development of two opposing schools of thought. The *classical* school spear-headed by KARL BINDING (1841–1920) advocated that punishment should only be concerned with retribution. Sentences are imposed because offenders need to get their just deserts for their crimes. Contrastingly, the *modernists* championed (special) prevention as the main goal of criminal punishment. One of their strongest advocates, FRANZ VON LISZT (1851–1919), asserted that punishment must achieve at least one of the following goals: to rehabilitate ("heal") offenders, to "scare them straight" or to permanently incapacitate them.

Both schools had legitimate points: the classical school rightly pointed out that theories of prevention treated offenders as mere objects rather than autonomous human beings, by trying to shape them into a form more in line with societal standards (special prevention) or by making an example out of them to deter criminality in the wider public (general prevention). Simultaneously, the modernists were also right to assert that punishment cannot be entirely detached from wider effects: it must also serve societal ends like the reintegration of offenders. Therefore, the modernists advocated for the use of new instruments in the criminal law, like the use of fines, parole, educational prison schemes, pedagogical rather than punitive sanctions for young offenders, and of course protecting society from dangerous offenders through incarceration or internment.

CARL STOOSS' landmark achievement was to accommodate both schools' beliefs in his dual system of sanctions, formalised in the Criminal Code.[14] Sentences serve the purpose of retribution, while measures serve societal ends like reintegration or maintaining safety.

5. Death Penalty

The most controversial sanction is capital punishment. Today, the death penalty is prohibited (Article 10 I Constitution).[15] In 2002, Switzerland ratified

14 ZURKINDEN, p. 304.

15 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.fedlex.admin.ch (perma.cc/7ARN-UVSH).

Protocol No. 13 to the ECHR, which requires the abolition of the death penalty in all circumstances.

Throughout the Middle Ages and into modern times, the death penalty was commonly employed in Switzerland. Switzerland also holds the unfortunate record of being the last country in Europe to have executed a person for witchcraft: on 13 June 1782 ANNA GÖLDI[16] was beheaded immediately after the council of Glarus convicted her of witchery. She had "confessed" under torture.[17]

Later, both the *Code Pénal* of 1799 and the cantonal criminal codes of the early 19th century provided for the death penalty in the case of crimes like murder, aggravated robbery or arson. Beheading by sword or guillotine was the most common means of execution. Under the influence of Enlightenment thinkers like BECCARIA and VOLTAIRE, the Federal Constitution of 1848 banned the death penalty for political crimes. In the following decades, several cantons abolished it entirely.[18] Further, in 1874, Article 65 of the Federal Constitution established a total ban. This prohibition only lasted for a couple of years, however. After a series of murder cases in the late 1870s, it was revoked by popular vote. Henceforth, the death penalty, once again, was only forbidden as punishment for political crimes. This led to several cantons reintroducing capital punishment.[19]

In developing the current Swiss Criminal Code, there was fierce debate over whether to include the death penalty. Ultimately, the decision was taken to establish a blanket ban. The federal legislator took this decision in 1937, even though the Constitution would have permitted the use of the death penalty as punishment for all crimes but political ones up until 2000.[20]

For the cantons, the enactment of the Swiss Criminal Code voided any provisions allowing the death penalty (Article 336 lit. b Criminal Code of 1937).

16 Due to differing accounts of this case, it is unclear on whether ANNA's last name was GÖLDI or GÖLDIN.

17 ANNA GÖLDI was employed as a maid by JOHANN JAKOB TSCHUDI, a rich physician and politician in Glarus. She was accused of having put needles in the milk of TSCHUDI's daughter, although later examinations of the case suggest that TSCHUDI may have been conducting an extra-marital affair with GÖLDI and that this may have been the actual cause of the accusation of witchcraft.

18 Including Fribourg, Neuchatel, Zurich, Ticino, Geneva, Basel-Stadt, Basel-Landschaft, and Solothurn.

19 Appenzell Innerrhoden, Obwalden, Schwyz, Zug, St. Gallen, Lucerne, Valais, Schaffhausen, and Fribourg.

20 Switzerland ratified the "Second Option Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty" on 16 June 1994. This protocol obliges state parties to take all necessary measures to abolish the death penalty within their jurisdiction, during both war and peacetime. Switzerland implemented the protocol into the revision of the Swiss Federal Constitution of 20th November 1996, but the Constitution did not formally come into force until 1 January 2000.

However, in the time between Parliament's decision to abolish the death penalty (21 December 1937) and the official enactment of the Swiss Criminal Code (1 January 1942), two more convicted murderers were executed by cantonal authorities. The last execution mandated under civic jurisdiction was that of HANS VOLLENWEIDER, an offender who had killed a young policeman. In the early morning of 18 October 1940, at the prison of Sarnen in Obwalden, he ascended the scaffold. His execution was highly controversial: even the policeman's widow had requested a pardon.

Furthermore, the Federal Criminal Code of the Military provided for the death penalty until 1992. During and after World War II, 35 persons were sentenced to death for military crimes such as high treason and 17 of them were executed. In September 1944, WALTER LAUBSCHER and HERMANN GRIMM were tried for espionage. They had disclosed military defence positions (bunkers and canons) to Germany. The military tribunal found them guilty of treason and sentenced them to death. On 7 December 1944, they were executed by a military firing squad in a forest at Bachs near Zürich.

As mentioned above, on 3 May 2002, Switzerland ratified Protocol No. 13 to the ECHR, thereby committing to banning the death penalty in all circumstances without the possibility of derogation. It is not totally clear, however, that this Protocol would prevent Switzerland from re-introducing the death penalty entirely. Some argue that the Swiss Constitution could be modified by a popular initiative (Article 139 Constitution) in a way that explicitly and intentionally violates Protocol No.13, which would allow Switzerland to reintroduce the death penalty.[21]

Aside from the legal aspects, public debate over the use of the death penalty continues. In 1985, a popular initiative[22] "to Save our Youth" was launched proposing the reinstatement of the death penalty for those convicted of selling hard drugs. The committee, however, failed to collect the necessary 100,000 signatures. In 2010, the family members of a murder victim started a popular initiative entitled "Death Penalty for Murder with Sexual Abuse". It turned out that this was just a PR-stunt to raise awareness for victims of such a crime, and their families. Nevertheless, it once again sparked huge controversy.

21 This sort of argument employs the so-called *Schubert* exception, which is discussed in the chapter on International Relations, pp. 152: Where the Federal Assembly has intentionally enacted legislation which violates a treaty obligation, the authorities shall apply the federal act. The *Schubert* exception does not apply in the case of treaties which guarantee fundamental rights, however, such as the ECHR and the Free Movement Agreement (see as some examples DFC 125 II 417, DFC 131 II 352 and DFC 142 II 35); the rights conferred by such instruments must be respected in all cases.

22 Then Article 121 II Constitution of 1874; today: Article 139 Constitution.

6. Euthanasia / Assisted Suicide

A further particularity worth discussing is the Swiss regulation of euthanasia and assisted suicide. Regarding suicidal persons themselves, CARL STOOSS had stated in 1894: they *"deserve pity, not punishment"*. Thus, attempted suicide was not criminalised under Swiss Law. It was, however, at the time of drafting the Criminal Code, a matter of some controversy whether the removal of criminal liability should be widened to apply to persons who aid and abet suicide.

The legislator decided that helping someone to die out of compassion and empathy should not constitute criminal wrongdoing. *Assisted suicide* was therefore legalised in certain circumstances through Article 115 e contrario: any person who, *for selfish motives,* incites or assists another person to commit suicide is liable to a custodial sentence of up to five years or to a monetary penalty. Criminal liability is thus only warranted if the incitement or assistance to suicide is driven by selfish motives, for example, the possibility of financial gain. Due to this regulation, a physician who provides a person who wishes to commit suicide with a lethal dose of sodium pentobarbital is not liable under Article 115. Nor are organisations such as Exit or Dignitas that provide comfort and assistance in suicide, as long as they operate on a non-profit basis. However, family members who help their loved-ones to commit suicide, even by simply accompanying them to an organisation like Dignitas, are often not protected by this provision: due to their likely position as heirs to the suicidal individual, they risk being deemed to have acted for selfish motives even if, in reality, they were spurred by compassion.

Passive euthanasia is also permitted under Swiss criminal law. This is a situation where death ensues from a deliberate decision *not* to intervene or pursue life-saving measures and this "failure" to act corresponds with the will of the person concerned. For example, a person with a heart attack who has refused cardiopulmonary resuscitation (CPR), or an elderly person with pneumonia who refuses to be treated with antibiotics, or discontinuing the parenteral nutrition of a person in coma, where this is what the coma patient herself would have wished. According to the prevailing opinion, the switching off of ventilation in paraplegic persons willing to die also falls under passive euthanasia.

Generally under Swiss law, a deliberate failure to save someone's life can lead to criminal responsibility for homicide by omission (Articles 111 et seqq.).[23] This only applies when the person failing to act is under a statutory or contractual obligation to safeguard the victim's life (Article 11): for example, the victim's physician or spouse. However, in the circumstances outlined

23 Liability can also ensue from Article 128 *("Any person who fails to offer aid to another [...] who is in immediate life-threatening danger, in circumstances where the person could reasonably have been expected to offer aid, shall be liable").*

above which constitute passive euthanasia, criminal responsibility is not incurred. In such a case, the obligation to safeguard life is outweighed by the fact that intervening against the patient's will would in itself constitute a crime (for example, assault or coercion).

Swiss law, however, does not permit *active euthanasia*. This encompasses situations where a person's death is caused by a willful *act,* where this act was requested by the person. An example would be the administration of a lethal injection to a person who wishes to die.[24] Assisted suicide and active euthanasia can be distinguished according to who is in control of the death-inducing event. When administering a lethal injection, the doctor acts, whereas when taking a lethal dose of sodium pentobarbital, the person who wants to die is in control of what happens.

Actively killing someone is a crime under Swiss law, even if the "victim" explicitly asks to be killed. According to Article 114 *("Homicide at the request of the victim"),* any person who—for commendable motives, and in particular out of compassion—causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence of up to three years or to a monetary penalty. When this rule was drafted in the early 20th century, the legislators decided that *"the principle that all life is untouchable"* prevented them from legalising consensual killings. There is, however, a substantially reduced sentence; killing someone who has given their consent is only categorised as a misdemeanour.[25]

There are two key problems with the law's absolute prohibition on active euthanasia in Switzerland. Firstly, contrary to what the legislators of the early 20th century claimed to be the case, life is not regarded as "untouchable" under Swiss law. This is illustrated by the law on passive euthanasia or the legality of killing in self-defence (Article 15). Secondly, a line must be drawn between what is considered "active" and "passive", but this is not always simple. For example, there is an inherent problem with the prevailing view in Switzerland that turning off a life-sustaining machine at the patient's request does not constitute an *active* killing punishable by Article 114. The rationale is that removing any life-sustaining measures is morally equivalent to never beginning them in the first place—which Swiss law permits. However, switching off or unplugging a machine is clearly an *active* behavior. Rather than redefining certain acts so that they are classified as omissions to prevent any criminal liability attaching under Article 114, active euthanasia should be legalised.

24 Judgement of the Bezirksgericht Dielsdorf/ZH, 15 December 2003 (No. GG030076).

25 See further: MARC THOMMEN, Consent, in: Pedro Caeiro / Valsamis Mitsilegas / Sabine Gless (eds.), Elgar Encyclopedia of Crime and Criminal Justice, Cheltenham/Northampton, 2023 (forthcoming; preprint available at [perma.cc/Y955-AGGS]).

II. Principles

This section discusses key principles of the Swiss legal system. Two of the main principles in Swiss criminal law are legality (1.) and no punishment without culpability (2.).

1. Nulla Poena Sine Lege

Swiss criminal law is dominated by the *principle of legality*. Article 1 states that behaviour may only be sanctioned (i.e. through sentences and measures) where this is explicitly provided for in the law.[26] Article 1 thus encompasses two principles. Firstly, there is the principle of *nullum crimen sine lege:* no act or omission shall be considered a crime unless the law explicitly states as such. For example, today there is no rule in the Swiss criminal code prohibiting homosexual acts.[27] Thus, courts cannot declare them illegal. Secondly, Article 1 contains the principle *nulla poena sine lege:* no penalty without law. This principle stipulates that all sanctions imposed for criminal acts must be provided for in the law. For example, the death penalty has been abolished in Switzerland. This means that in Switzerland no one can be sentenced to death, even for the most heinous crime.

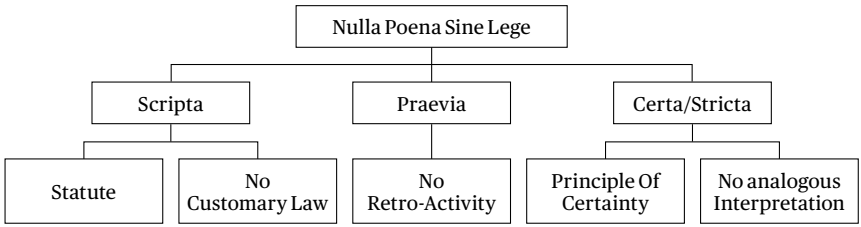


Figure 2: Principle of Legality

26 The title of Article 1 *("No penalty without a law")* in the "official" translation by the Swiss Government is incorrect; recte: no sanction without law.

27 The Swiss Criminal Code of 21 December 1937 abolished the criminal liability of homosexuality between adults and introduced an age of consent of 20 years, as opposed to 16 years in the case of sexual acts between opposite-sex partners. With the criminal law reform of 1990, the age of consent was lowered to 16 years.

The *nulla poena sine lege* principle has been refined into a set of sub-principles that have a strong impact on the practical application of the criminal law.

The first sub-principle of nulla poena sine lege is the nulla poena sine lege *scripta* principle: no penalty without *written* law. First, all crimes must be laid down by a *formal* act of Parliament (statute). An ordinance by the Federal Council will not suffice. Second, this principle precludes the creation or existence of customary criminal law. For example, several cantonal criminal codes used to prohibit extramarital sexual relations. The Swiss Criminal Code, however, does not explicitly classify extramarital sex as a criminal offence. Thus, a court could not convict an adulterer on the grounds that adultery is forbidden under customary law in Switzerland.

The second sub-principle is the nulla poena sine lege *praevia* principle: no penalty without *pre-existing* law. In general, criminal law may not be applied retroactively (Article 2 I) unless the new provision is more lenient (Article 2 II). For example, since 1 October 2002, abortions have been legalised in all circumstances during the first 12 weeks of the pregnancy (before this, abortions were only permitted for medical reasons). Because the new 12-weeks-rule is milder, it could be applied retroactively.

The third sub-principle is the the nulla poena sine lege *certa/stricta* principle, which demands that the elements of a crime and the sanctions which apply to it be *clearly defined*. Potentially affected persons must get a fair warning: they must know exactly what the consequences of their actions will be. An example of a provision which infringes this principle is Article 303, which imposes an unspecified monetary or custodial sentence for false accusations. An offender can face any sentence from three units of monetary penalty to 20 years of imprisonment. The nulla poena sine lege *certa/stricta* principle also prohibits criminal law from criminalising behaviours based on analogy. For example, Article 215 prohibits bigamy: this prohibition could not be extended to cohabitation by analogy to meet a case where a woman has two boyfriends at a time.

2. Nulla Poena Sine Culpa

"Punishment without guilt is nonsense, barbarism", wrote ERNST HAFTER, one of the early and influential criminal law scholars in Switzerland, in 1946. The principle *nulla poena sine culpa* (no punishment without culpability) is crucial to Swiss criminal law. In fact, to understand the notion of *culpa ("Schuld")* is to understand the concept of Swiss criminal law itself. *Schuld* has many different meanings; it can be used interchangeably to convey notions like culpability, guilt, blame, fault, and responsibility.

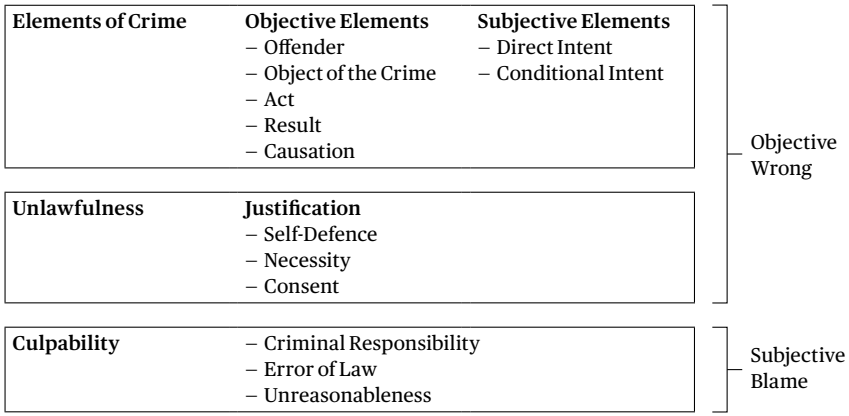


Figure 3: Criminal Liability

Criminal liability in Swiss law is a three-stage concept: all three stages of the test must be met for criminal liability to apply. First, the objective and subjective elements of the crime must be established: has the victim been killed by the defendant (objective element; *"actus reus"*)? Did the defendant kill the victim intentionally (subjective element; *"mens rea"*)? Second, there is a consideration of whether the act was unlawful. Did the defendant kill in legitimate self-defence? Was a theft of food warranted by the necessity to survive? Did the masochist consent to violent sexual practices? Third, the culpability of the offender has to be assessed: can the defendant be blamed for the act? Perpetrators can only be held responsible for their unlawful acts if they were able to both grasp the demands imposed on them by legal rules and act accordingly (Article 19).

Culpability can be excluded on three different grounds. The first ground is the defendant's lack of *criminal responsibility*. If wrongdoers are unable to understand the wrongfulness of their act they cannot be criminally held to account. An example would be an offender who has a severely low IQ, although notably this ground is rarely accepted by courts. Children under the age of ten are legally excluded from criminal responsibility (Article 3 Juvenile Criminal Law Act).[28] Their inability to fully assess wrongfulness is presumed by law. Criminal responsibility is also excluded if a person can assess wrongfulness but is unable to act accordingly. This is the ground which most often applies to exclude culpability in practice: an inability to control one's actions despite knowing they are wrong. This ability to restrain oneself may be absent in some

28 Juvenile Criminal Law Act of 20 June 2003, SR 311.1.

manifestations of paranoid schizophrenia. Further, it can be absent where the defendant is under the influence of extreme emotions and acts in the heat of the moment. The typical example of the latter is where the defendant commits an assault just after discovering that his/her partner is having an affair.

The second ground for the exclusion of culpability is an *error of law*. Again, in this situation the person is not aware of the wrongfulness of their act. Yet here the reason for this failure is not a mental deficiency: instead, it is that they are unaware or have an incorrect understanding of the relevant law. However, the standard is high. An error of law will only successfully exclude culpability if the perpetrator both did not and, crucially, could not have known that he or she was acting unlawfully. In a famous case from 1978, a 19-year-old Sicilian immigrant had sex with a 15-year-old Swiss girl. He successfully claimed that he did not know the concept of the legal age of consent. He had thought that sexual intercourse with a minor was only punishable if he had no intention to marry his sexual partner.[29] It is highly questionable whether the Federal Supreme Court would still rule today that this man *could* not have known that his act was illegal.

Thirdly, culpability is excluded if the wrongdoer could not have been reasonably expected to act lawfully. An example of when this *unreasonableness* standard can be met is where a perpetrator kills a person to save his or her own life. Had the famous English *R v. Dudley and Stephens* case of 1884[30]—where three shipwrecked sailors killed and then ate a cabin boy to avoid starvation—been judged in Switzerland, the defendants would have to have been acquitted. Though the killing was unlawful, it would have been considered excusable under Swiss law to end the boy's life in such extreme circumstances, meaning the defendants would not have met the culpability test. They could not reasonably have been expected to sacrifice their own lives by not killing and eating the cabin boy.

29 DFC 104 IV 217.

30 R v. Dudley and Stephens (1884) 14 QBD (Queen's Bench Divison) 273 DC.

III. Landmark Cases

The Federal Supreme Court in Lausanne is Switzerland's highest court. Its criminal law division was formerly known as the *Court of Cassation*. In dealing with criminal law, its main task is to secure the consistent application of the Swiss Criminal Code throughout Switzerland. In the following paragraphs, some landmark criminal law rulings of the Federal Supreme Court will be discussed.

1. Rolling Stones[31]

In the evening of 21 April 1983, two men (A and B) were on their way home from their cabin in the Toss river valley near Zurich. They spotted two big stones (individually weighing 52 kg and 100 kg) at the top of a slope so steep that the bottom was not visible. They decided to roll these stones down the slope. A pushed the 52 kg stone down the hill, whilst B pushed the heavier, 100 kg stone. One of these stones struck and killed a fisherman at the foot of the slope. However, it could not be established which of the two stones had killed him, and therefore who–A or B–had been responsible for the death.

When the case came before the Supreme Court, the judges held that A and B were criminally liable as co-offenders for negligent homicide. Until this ruling, the notion of co-offending had been strictly limited to intentional crimes. This appeared to be logical because the conventional view of co-offending generally requires a conspiracy: at least two persons who embark on a common criminal pursuit. In the "rolling stones" case there was no joint decision (conspiracy) to kill the fisherman. However, by deciding to roll the stones down the slope, A and B jointly engaged in a grossly negligent behaviour that caused the death of the fisherman. The Supreme Court ruling was an attempt to overcome problems of evidence, by employing the tools of the substantive criminal law.[32]

31 DFC 113 IV 58.

32 In agreement that the Supreme Court's reasoning was flawed, PETRIG/ZURKINDEN argue that it would have been better to hold A and B liable for negligent, parallel perpetration by omission–this presupposes A and B are each in "guarantor" position to one another, due to the fact they both created a risk (i.e. they would have incurred criminal liability for failing to prevent each other from rolling the stones down the hill), p. 124.

2. Domestic Tyrant[33]

X was a very poorly integrated immigrant from Kosovo. She was married to Y, whom she had five children with. Y constantly abused X: he beat her with the cable of a vacuum cleaner, he threw a butcher's knife at her, he banned her from leaving the house and tore up her passport. In January 1993, he told their eldest daughter that her mother was going to die that year. On 15 March 1993, Y showed his wife a revolver he had bought to kill her with. He then put it under his pillow and went to sleep. At one o'clock in the morning, X took the revolver and shot Y dead while he was sleeping.

The Supreme Court ruled that X had acted in a state of excusable necessity to end her suffering. The killing of her husband was unlawful (Article 113–manslaughter): there was no legal justification for her actions. She had not acted in legitimate self-defence (Article 15) for Y was not imminently about to attack her. However, she did not act culpably (Article 18–excusable act in a situation of necessity). She was excused because her life was in danger and she saw no other way out.[34]

This 1995 case seems to send out a very strong message against the perpetrators of domestic violence. However, its applicability should not be overinterpreted. X's situation was extreme: the law would normally still expect victims of abuse to seek help before resorting to such an act.

3. Deadly Car Race[35]

In the late evening on 3 September 1999, two motorists who had never met before and who were both driving a Volkswagen Corrado started a car race on a cross-country road near Lucerne. As the two drivers were approaching the village of Gelfingen at a speed of approximately 130km/h, one driver sought to overtake the other. He subsequently lost control of his car, which veered onto the sidewalk and hit two teenagers who were killed instantly.

Both drivers were convicted of homicide (Article 111) and sentenced to 6.5 years of imprisonment. The Federal Supreme Court upheld this conviction. For the first time in a binding precedent, persons responsible for a fatal car accident were convicted of homicide with conditional intent *(dolus eventualis).* Up until that case, even accidents caused by gross carelessness were

33 DFC 122 IV 1.

34 See unreasonableness standard, p. 424.

35 DFC 130 IV 58.

always classified as criminal negligence. The Supreme Court held that not only did the drivers know that their behaviour was extremely dangerous, but that by putting achieving victory in the race above everything else, they had willingly accepted a deadly outcome.

From a retributive point of view the decision can be understood. The maximum penalty at that time of three years for a negligent double homicide simply did not seem to fit the crime. From a dogmatic point of view, however, the ruling is highly problematic. The drivers *knowingly* incurred an extremely high risk by engaging in a car race. But the Court made a large leap from here: the fact that the drivers knew of the risk led the Court to the conclusion that they had accepted the fatal outcome. To draw a straight inference from what someone *knew* to what someone *wanted* has far-reaching consequences for criminal liability in general. It is highly unlikely that the drivers *wanted* to kill the teenagers, or even that they were indifferent to such an outcome.[36] It is much more likely that they (wrongly) trusted their driving skills and hoped for a lucky outcome.[37] In other words, they willingly accepted the *risk* of death, but they did not accept the actual outcome of death. Thus, they should have been convicted for life endangerment (Article 129) which holds a maximum prison sentence of 7.5 years.[38]

4. Hiking in the Nude[39]

On a warm and sunny Sunday afternoon in autumn 2009, X (45 years old) was hiking in the nude through the mountains of Appenzell Innerrhoden. He walked by a fire pit where a family with young children was resting. One woman who observed him filed a report with the local police.

Article 19 of the relevant cantonal code which regulated *"indecent behaviour"* provided that *"any person publicly displaying indecent behaviour is liable to a fine"*. The Federal Supreme Court first considered whether the Canton of Appenzell Innerrhoden had exceeded its legislative powers by legislating on indecent behaviour, given that the Federal Parliament has exclusive legislative competence in the field of sexual offences. The Court found that

36 As is required for the offender to possess conditional intent, see p. 423.

37 See DFC 133 IV 9.

38 According to Article 129, this crime can mandate a custodial sentence not exceeding five years or a monetary penalty. In cases of multiple endangerment or when committed in combination with other offences, this maximum sentence can be elevated by 150%, i.e. it can be up to 7.5 years (see Article 49).

39 DFC 138 IV 13.

because hiking in the nude did not qualify as a sexual offence under federal jurisdiction, like exhibitionism (Article 194), pornography (Article 197) or sexual harassment (Article 198), the cantonal legislator was entitled to legislate on indecency. Secondly, the Court considered whether the notion of "indecent behaviour" in Article 19 of the cantonal code was sufficiently clear to satisfy the *nulla poena sine lege* principle. They held that the provision was sufficiently clear, finding that hiking in the nude was obviously indecent behaviour.

Both elements of the Court's assessment are questionable. In terms of the canton's competence to legislate on indecent behaviour, the Federal Parliament has generally restricted sexual offences to harmful behaviour (rape, sexual harassment, etc.). Although Parliament made some specific exceptions (e.g. exhibitionism, pornography) to this general rule, this was arguably the federal legislator setting the outer limit for the criminalisation of immoral conduct. Following this logic, there was no basis for a cantonal rule on indecent behaviour: Appenzell Innerrhoden had acted outwith their legislative competence ("ultra vires").

As to the Court's ruling that Article 19 was sufficiently clear to satisfy the principle of *nulla poena sine lege,* they missed the key point. The question was not whether hiking in the nude *could* be classified as indecent behaviour, but whether such a classification was foreseeable given the broad and changeable notion of "indecency". If the legislator wants to ban hiking in the nude, they should issue an unambiguous rule, for example: "Any person who displays nudity in public is liable to a fine." This would protect the vital principle of legal certainty.

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INTRODUCT SWISS LAW

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