## **Anna Petrig**

Dr. iur., LL.M., Attorney-at-Law

#### Nadine Zurkinden

Dr. iur.

# **Swiss Criminal Law**



# Table of contents

Prei	ace and acknowledgements	111
Con	tents	VII
List	of abbreviations	XIII
Sele	cted bibliography	XIV
Part	1: Introduction and overview of Switzerland's political and legal systems	1
<b>§</b> 1	A gateway to Swiss criminal law	1
<b>§</b> 2	A word on Switzerland and its criminal justice system	3
Part	2: The basics of Swiss criminal law	9
<b>§</b> 1	Criminal law and criminal norms	9
§ 2	Criminal justice authorities and criminal proceedings	32
§ 3	Fundamental rights and international human rights	37
Part	3: Criminal offences, criminal liability and consequences	s 43
<b>§</b> 1	Criminal offences	43
<b>§</b> 2	Determining criminal liability	54
§ 3	Consequences of criminal liability: punishments and measures	128
Part	4: International criminal law	137
<b>§</b> 1	Rules on the territorial application of criminal law	137
§ 2	International criminal law stricto sensu	158
§ 3	Transnational criminal law	162
<b>§ 4</b>	Transnational cooperation in criminal matters	163
Part	5: A practical guide to Swiss criminal law	175
<b>§</b> 1	Finding legislation	175
§ 2	Finding travaux préparatoires	178

Table of	content	ts			
			 	 	 _

Tern	ninology – thesaurus/index	187
<b>§ 4</b>	Finding doctrine	183
§ 3	Finding case law	180

### **Contents**

Preface	e and acknowledgements	П
Table o	of contents	V
List of	abbreviations >	(III
Selecte	d bibliography	⟨IV
Part 1:	Introduction and overview of Switzerland's political and legal systems	1
§ 1 A	A gateway to Swiss criminal law	1
§ 2 A	A word on Switzerland and its criminal justice system  1. Territory, people and languages 2. Federalism in the realm of criminal law and justice 3. Legislative, executive and judicial branches	3 4 4 5
Part 2:	The basics of Swiss criminal law	9
3	Criminal law and criminal norms  The concept of criminal law  Constitutional law: basic parameters  b) Legislation: the main source  c) International and European law: of growing importance  d) Customary and judge-made law: complementing roles  e) Judgments: effects similar to legal norms  Form, wording and interpretation of criminal norms  a) Principle of legality in constitutional and criminal law  b) Form: written laws  c) Wording: requirement of certainty  d) Interpretation: limitations and prohibition of analogy  Criminal law's (expanding) scope of application	18 19 19 21 23
4	a) Personal scope of application  aa) Natural persons  bb) Corporations	27 27 28

		b) Temporal scope of application	28
		aa) The rule: prohibition of retroactivity	29
		bb) The exception: principle of the milder law	30 31
		c) Territorial scope of application	
§ 2		iminal justice authorities and criminal proceedings	32
	1.	The rule: cantonal jurisdiction	32
		a) Preliminary proceedings	32
		b) Main proceedings at first instance	33
		c) Appellate remedies	33
	2.	The exception: federal jurisdiction	34
§ 3	Fu	ndamental rights and international human rights	37
	1.	Protection from unjustified state interference	37
	2.	Limitations and guidance for the legislature	40
Part	3:	Criminal offences, criminal liability and consequences	43
<b>§</b> 1	Cr	iminal offences	43
	1.	Conduct qualifying for punishment	43
	2.	Categories of offences	46
		a) The punishment: felonies, misdemeanours,	
		contraventions	47
		b) The scale of gravity: aggravated and extenuated	
		offences	49
		c) The state of mind: intentional and negligent offences	49
		d) The violation of a duty: offences of commission	
		and omission	50
		e) The conduct: conduct and result offences	51
		f) The impact: harm and endangerment offences	52
		g) The duration: instantaneous and continuing offences	52
		h) The offender: common and special offences	53
		i) The prosecution: offences prosecuted ex officio	
		and on complaint	54
§ 2	De	termining criminal liability	54
	1.	, , , , , , , , , , , , , , , , , , , ,	55
		a) Human conduct	56
		b) Objective and subjective definitional elements	57
		c) Unlawfulness	5.8

	d)	Cul	pabi.	lity	59
	e)	Add	itior	nal prerequisites of criminal liability	60
	f)	Con	clus	ion	61
2.	De	term	inin	g criminal liability: the test	
	for	inte	ntio	nal offences	62
	a)	Inte	ntio	nal offences of commission	62
		aa)	Case	es	62
		bb)	Ove	rview	62
		cc)	Obj	ective definitional elements	63
		dd)	Sub	jective definitional elements	68
			` '	Intent	68
				Impact of mistake on intent	71
			(iii)	Further subjective elements	73
		ee)	Unl	awfulness	73
			(i)	Self-defence and defence of others	74
			(ii)	Necessity	77
			(iii)	Consent	78
				Presumed consent	80
			(v)	Acts permitted by law	81
			(vi)	Subjective elements of grounds of	
				justification and mistakes	83
		ff)		pability	84
				Criminal capacity	84
			(ii)	Awareness of the unlawfulness of the	
				conduct	86
				Grounds of excuse	88
				nclusion	90
	b)	Inte	ntio	nal non-genuine offences of omission	91
		,		rview	91
				ective definitional elements	92
		,		jective definitional elements	95
				awfulness	95
				pability	96
				nclusion	97
	c)			ed intentional offences	99
		aa)		empted offences of commission	100
			` '	Preliminary questions	100
			(iii)	Definitional elements of the offence	100

		(iii) Impossible attempt due to a serious lack	
		of judgment	101
		(iv) Unlawfulness and culpability	102
		(v) Withdrawal	103
		(vi) Conclusion	103
		bb) Attempted offences of omission	106
	3.	Determining criminal liability: the test for negligent	
		offences	107
		a) Negligent offences of commission	107
		aa) Overview	107
		bb) Preliminary question	108
		cc) Objective definitional elements	108
		dd) Unlawfulness	111
		ee) Culpability	111
		b) Negligent offences of omission	112
	4.	Determining criminal liability: the test for participants	115
		a) Participation in intentional offences of commission	115
		aa) Perpetrators	115
		(i) Direct perpetrators	116
		(ii) Indirect perpetrators	116
		(iii) Co-perpetrators	117
		bb) Accessories	118
		(i) Inciters	119
		(ii) Accomplices	119
		cc) Sanctions	120
		dd) Necessary participation	122
		b) Participation and non-genuine offences of omission	122
	_	c) Participation in negligent offences of commission	123
	5.	Determining criminal liability: the test for offences	
		involving corporations	124
§ 3		onsequences of criminal liability: punishments	
		d measures	128
		Theories of sanctions	129
	2.	Criminal sanctions	130
		a) The dual-track system of sanctions	130
		b) Punishments	131
		c) Measures	132

			Contents					
		d) Children, juveniles and young adults	132					
	2.	Sentencing	133					
	3.	Enforcement of sentences and measures	135					
Part	4:	International criminal law	137					
§ 1	Ru	ales on the territorial application of criminal law	137					
	1.	General jurisdictional rules of the Criminal Code	138					
		a) Territoriality principle	140					
		b) Active and passive personality principles	144					
		c) Protective principle	146					
		d) Universality principle	147					
		aa) For particularly serious offences	147					
		bb) For specific offences against minors abroad	148					
		e) Representation principle	150					
		aa) Duty to prosecute	150					
		bb) Rejected extradition request	151					
	2.	Taking foreign law into account	152					
		a) Double criminality requirement	153					
		b) Principle of the milder law	154					
	3.	Taking foreign judgments into account	155					
		a) Principle of extinction	156					
		b) Principle of imputation	156					
		c) Principle of enforcement	157					
	4.	Hierarchy between general jurisdictional provisions	158					
§ 2	In	ternational criminal law stricto sensu	158					
	1.	Substantive criminal law	159					
	2.	Prosecuting international core crimes	160					
	3.	Cooperation with international courts	161					
§ 3	Tra	ansnational criminal law	162					
§ 4	Tra	Fransnational cooperation in criminal matters						
	1.	Mutual administrative assistance	164					
	2.	Mutual legal assistance	168					
	3.	Cooperation with the EU specifically	171					
Part	5:	A practical guide to Swiss criminal law	175					

Finding legislation
1. Federal legislation and international law

**§** 1

175 175

#### Contents

	2. Cantonal legislation	178
§ 2	Finding travaux préparatoires	178
§ 3	Finding case law	180
	1. Judgments of the Federal Supreme Court	180
	a) Leading cases	180
	b) Non-leading cases	181
	2. Judgments of cantonal courts	183
§ 4	Finding doctrine	183
Tern	ninology – thesaurus/index	187