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National Criminal Law in a Comparative Legal Context

Volume 1.1

Introduction to National Systems

National characteristics, fundamental principles,
and history of criminal law

England and Wales, Scotland, Sweden, Switzerland

edited by

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Comprehensive summary of project

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National characteristics, fundamental principles, and history of criminal law in

England and Wales*

Susanne Forster

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SOU	Statens offentliga utredningar (Government official reports)
SvJT	Svensk Juristtidning (Swedish legal journal)
TemaNord	Publication of the Nordic Council of Ministers
TF	Tryckfrihetsförordningen (Freedom of Press Act)
UN	United Nations
USD	United States Dollar
YGL	Yttrandefrihetsgundlagen (Fundamental Law on Freedom of Expression)
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

National characteristics, fundamental principles, and history of criminal law in

Switzerland

Nadine Zurkinden

Contents

A. National characteristics

1. Geography

Depending on the point of reference, Switzerland lies in central or western Europe.[1] It is a landlocked country but is the source of a number of major rivers that flow into the seas surrounding Europe. It borders Italy, France, Germany, Austria, and Liechtenstein. With a total area of only 41,285 sq km, Switzerland occupies the 132nd place in a worldwide comparison.[2] It is thus bigger than Liechtenstein but still a very small country compared to its other neighbors that are double (Austria) to 13 times (France) its size.

The lowest point of elevation in Switzerland is in the southern canton of Ticino,[3] where the Lake Maggiore region lies at an altitude of 195 meters above sea level. With its 4,634 meters above sea level, the so-called Dufourspitze, in the southern canton of Valais, is the point of highest altitude.[4] Switzerland's diverse landscapes can be divided into three geographic regions: the Jura (12 % of the surface), the Plateau (23 % of the surface), and the Alps (65 % of the surface).[5] Two-thirds of Switzerland's population reside in the Plateau region.[6]

Bern has been the capital of Switzerland since 1848 when the first federal constitution was adopted.[7] Other major metropolitan areas are Zurich, Basel, Geneva, and Lausanne.[8]

2. Population

a) Population and demographics

In December 2011, the population was 7.95 million.[9] In 2013, Switzerland occupied the 95th position in a worldwide ranking.[10] The population density in 2011

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[1] Bundesamt für Statistik, Jahrbuch 2013, p. 550.
[2] Fischer Weltalmanach 2013, p. 400.
[3] For a list of cantons, see below 4.
[4] CIA World Factbook.
[5] *Gilgen*, Raumplanung, p. 120.
[6] *Lüthi*, Mittelland (Region), pp. 615–616.
[7] *Dändliker/Bandle*, Schweizergeschichte, p. 145.
[8] Bundesamt für Statistik, Bevölkerungsstand und -struktur.

was about 199 people per sq km.[11] In that same year, 71.6 % of the population ages 15 and above resided in German-speaking, 23.5 % in French-speaking, 4.5 % in Italian-speaking, and 0.4 % in Romansh-speaking regions.[12] Also in 2011, the urban population was 73.7 %, the rural population 26.3%.[13] About half of the urban population lived in or around five metropolitan areas: Bern, Zurich, Basel, Geneva, and Lausanne. The cities themselves ranged in population from about 126,000 (Bern) to 377,000 (Zurich).[14]

In 2011, 22.8 % of the population was made up of foreign residents. More than half of them were born or had been living in Switzerland for more than 15 years; 85.2 % of them were from European countries. The largest groups were Italians (15.9 %), Germans (15.2 %), Portuguese (12.3 %), and nationals of Serbia and Montenegro (6 %).[15] Population growth is driven primarily by immigration. The growth rate from 2010 to 2011 was estimated at 1.1 %.[16]

Switzerland is an aging society. In 2011, 17 % of its population was above age 65; this figure is expected to increase to 28 % by 2060.[17]

b) Language

The indigenous languages spoken and written across the country are referred to as "national" languages. In contrast, "official" languages are the languages used for official communication with the authorities of the Confederation and the cantons. According to Art. 4 of the Federal Constitution of the Swiss Confederation (*Bundesverfassung*, BV,[18] hereinafter Constitution), the national languages are German, French, Italian, and Romansh. The official languages of the Confederation are German, French, and Italian; Romansh is an official language of the Confederation in communication with persons who speak Romansh (Art. 70 para. 1 BV). The Constitution does not specify whether standard language only or also dialects are considered to be official languages. Traditionally, standard German, French, and Italian are used for written communication; dialect is only used in oral communication.[19] To preserve Romansh, an endangered language, its five traditionally spoken and written idioms were artificially unified in the standard language Romansh Grischun in 1982. The Confederation and the canton of Graubünden have used this language for official documents since 2001. However, Romansh Grischun remains controversial throughout the Romansh community.[20] Since it was created only recently, it cannot have supremacy over traditional Romansh idioms.[21] Native Romansh speakers still amounted to 15.6 % of the population in Graubünden in 2010.[22]

As a rule, German, French, and Italian are considered interchangeable.[23] Consequently, federal publications (e.g., legal texts and reports of the Federal Council) are released in all three languages.[24] Legal texts in German, French, and Italian are of equal status and are equally binding (Art. 14 para. 1 Publications Act, *Publikationsgesetz*[25]). This is important for the interpretation of legal provisions.[26] Federal procedures are conducted in one of the official languages. Federal judgments are not officially translated into the other official languages.

Each canton may decide its official language, taking the traditional distribution of language and indigenous linguistic minorities into account (Art. 70 para. 2 BV). The Confederation and the cantons have a duty to maintain the four national languages; therefore, the Confederation supports the multilingual cantons in the fulfillment of their special duties (Art. 70 paras. 3, 4 BV).[27] This is particularly the case for measures by the cantons of Graubünden and Ticino to preserve and promote Romansh and Italian (Art. 70 para. 5 BV).

In 2000, 9 % of the population had a mother tongue other than one of the national languages.[28] A variety of other languages originating from various European, Asian, and African countries are spoken in Switzerland.[29]

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[9] Bundesamt für Statistik, Jahrbuch 2013, p. 550.

[10] CIA World Factbook.

[11] Bundesamt für Statistik, Statistischer Atlas Schweiz.

[12] Bundesamt für Statistik, Bevölkerung.

[13] Bundesamt für Statistik, Jahrbuch 2013, p. 555.

[14] Bundesamt für Statistik, Statistical Data Switzerland 2013, p. 4.

[15] Bundesamt für Statistik, Jahrbuch 2013, p. 555.

[16] Bundesamt für Statistik, Statistical Data Switzerland 2013, p. 4.

[17] *Ibid.*, p. 5.

[18] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101.

[19] Ehrenzeller et al.-*Kägi-Diener*, Art. 70 BV, p. 1266, Rn. 17.

[20] Swissinfo, Controversy.

[21] Ehrenzeller et al.-*Kägi-Diener*, Art. 70 BV, p. 1266, Rn. 17.

[22] Bundesamt für Statistik, Statistischer Atlas Schweiz.

[23] In the following, original Swiss legal expressions in German and French are included in parentheses. Italian terms are omitted in the interest of simplicity. Translations and explanations of Swiss legal expressions can be found in the termdat-database of the Federal Chancellery at http://www.termdat.ch [last visited July 2013].

[24] Ehrenzeller et al.-*Kägi-Diener*, Art. 70 BV, p. 1266, Rn. 17. See also I.F.

[25] Bundesgesetz über die Sammlungen des Bundesrechts und das Bundesblatt (Publikationsgesetz) vom 18. Juni 2004/Loi fédérale sur les recueils du droit fédéral et la Feuille fédérale du 18 juin 2004 (Loi sur les publications officielles), SR/RS 170.512.

[26] See II.A.3.c.

[27] Ehrenzeller et al.-*Kägi-Diener*, Art. 70 BV, p. 1264, Rn. 13.

[28] *Lüdi/Werlen*, Sprachenlandschaft, p. 7.

[29] For more details, see *Lüdi/Werlen*, Sprachenlandschaft, p. 11.

Language is a delicate issue in Switzerland. Since 2004, there has been controversy over whether the first additional language taught in schools should be English or should instead be another one of the national languages.[30]

The literacy rate as measured by the reading and writing capabilities of members of the population ages 15 and over was 99 % in 2003. There is no difference between men and women.[31]

c) Religion

Christianity is the main religion in Switzerland: in 2010 38.6 % of the population was Roman Catholic, 28 % Protestant, 4.5 % Muslim, 0.2 % Jewish, and 20.1 % nondenominational.[32]

3. Economy

Even though Switzerland is almost entirely surrounded by countries of the European Union, it is not part of it and therefore does not share the Euro as a currency. Its currency is the Swiss Franc (CHF). Switzerland's gross domestic product (GDP) in 2011 was USD 629,230 million (CHF 585,102 million),[33] which corresponds to a GDP per capita of USD 79,524 (CHF 73,947).[34]

In 2010, 73.2% of the labor force was employed in the services sector, which includes insurance, banking, and trade and commerce as well as tourism. 23.4 % of the labor force was employed in the industrial sector, including machinery, electronics, metals, and chemical/pharmaceutical industries. 3.4 % were working in the agricultural sector.[35] In 2011, the gross national income was USD 634,972 million (CHF 590,441 million).[36]

In 2012, unemployment was 2.9 %. Differences between male and female unemployment rates were relatively small. Persons with a low level of qualification are affected more than other segments of the population.[37] At 5.5 %, the unemployment rate for foreigners was clearly higher than that for Swiss citizens (2.1 %).

[30] Ehrenzeller et al.-*Kägi-Diener*, Art. 70 BV, p. 1261, Rn. 3.
[31] CIA World Factbook.
[32] Bundesamt für Statistik, Statistical Data Switzerland 2013, p. 8.
[33] Bundesamt für Statistik, GDP – production approach.
[34] Bundesamt für Statistik, GDP per inhabitant.
[35] CIA World Factbook.
[36] Bundesamt für Statistik, GDP – income approach.
[37] Bundesamt für Statistik, Jahrbuch 2013, p. 558.

Finally, the unemployment rate for persons ages 15 to 24 is 3.2 %.[38] However, the unemployment rate of older persons is likely to increase as a result of a trend toward making those ages 50 and over redundant; experts see in this a consequence of globalization.[39]

4. System of government

– *Origins of Switzerland*

The official birth of the Swiss Confederation dates back to the Federal Charter of 1 August 1291, which was negotiated by the three cantons of Uri, Schwyz, and Unterwalden. This alliance soon grew on the basis of further treaties, and a treaty-based confederation evolved.[40] After developing as a great military power in the 14th and the 15th centuries, the Confederation adopted a policy of neutrality in the 16th century.[41] The aim was to avoid fragmentation and conflicting loyalties in the diverse and multicultural population.[42] As Switzerland was officially still attached to the Holy Roman Empire, it was not formally recognized by the international community until after the peace of Westphalia that ended the Thirty Years' War in 1648.[43] In 1798, Napoleon invaded Switzerland and created a centralized state. The centralization soon failed, however, and the federal structure was reintroduced.[44]

Switzerland's perpetual neutrality – still a very important principle of foreign policy today – and its borders were internationally recognized and guaranteed in the Treaty of Paris of 1815.[45] Subsequently, the idea of turning the confederation of states (cantons) into a Swiss nation took hold in certain circles; some conservative, agricultural, and Catholic cantons opposed the idea, however, and formed the so-called *Sonderbund*. This conflict led to a short civil war – the *Sonderbundskrieg* – in autumn of 1847.[46] The first federal constitution, adopted in 1848, was a compromise between the victors and the defeated of the civil war: partial centralization

[38] Statistical Data Switzerland 2013, p. 12.
[39] NZZ am Sonntag, 23 June 2013: p. 48.
[40] *Fleiner* et al., Swiss Constitutional Law, p. 22 § 2 Rn. 3; *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 1.
[41] *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 2.
[42] *Fleiner* et al., Swiss Constitutional Law, p. 27 § 3 Rn. 29.
[43] *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 2.
[44] *Fleiner* et al., Swiss Constitutional Law, p. 23 § 3 Rn. 10. For more details on this era, see also I.G.3.
[45] *Fleiner* et al., Swiss Constitutional Law, p. 23 § 3 Rn. 11 and p. 27 § 3 Rn. 30; *Jorio*, Wiener Kongress.
[46] *Aubert/Grisel*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 16.

was introduced but cantonal diversity was respected.[47] The state organization has not been amended significantly since.[48]

– *Political system and division of powers*

Switzerland is characterized by a *sui generis* political system.[49] It is described as a confederation (but similar in structure to a federal republic),[50] as a parliamentary *Bundesstaat*,[51] and as a consensus-oriented democracy.[52] The consensus-oriented democracy results from both the design of the institutions and from their operation.[53] Swiss governmental institutions were designed in such a way as to reflect the unique diversity and multiculturalism of the population.

Together, eligible voters and the cantons form the constituent power (*verfassungsgebende Gewalt/pouvoir constituant*; Preamble of the BV).[54] They can adopt and amend the Constitution.[55] The Constitution is based on the division (but cooperation) of powers of the legislative, the executive, and the judicial authorities as well as checks and balances between them; this organizational structure is not, however, explicitly mentioned in the Constitution.[56]

The Federal Assembly *(Bundesversammlung/Assemblée fédérale)* consists of two chambers of equal standing, the National Council *(Nationalrat/Conseil national)* and the Council of States *(Ständerat/Conceil des Etats)* (Art. 148 para. 2 BV). The National Council is made up of 200 elected members; these seats are allocated to the cantons according to their relative populations. The members of the National Council are elected directly by the people every four years (Art. 149 BV). The Council of States is composed of 46 members and represents the cantons (two representatives for each canton, one representative for each of the six former half-cantons.[57] The rules governing the election of the members of the Council of States are a cantonal matter (Art. 150 BV). The term of office is four years in all cantons.[58]

[47] *Fleiner* et al., Swiss Constitutional Law, p. 23 § 4 Rn. 13. For more information, see I.C.1.

[48] *Fleiner* et al., Swiss Constitutional Law, p. 24 § 4 Rn. 16–19. For a short overview on the development of the Constitution, see I.C.1.

[49] *Fleiner* et al., Swiss Constitutional Law, p. 59 § 1 Rn. 93.

[50] CIA World Factbook.

[51] Fischer Weltalmanach 2013, p. 400.

[52] *Fleiner* et al., Swiss Constitutional Law, p. 59 § 2 Rn. 94.

[53] *Ibid.*

[54] *Rhinow/Schefer*, Verfassungsrecht, p. 129, Rn. 622.

[55] *Ibid.*, pp. 93–94, Rn. 443.

[56] *Ibid.*, pp. 435–437, Rn. 2262–2271.

[57] For details on the former half cantons and their current status, see below.

[58] Ehrenzeller et al.-*Lanz*, Art. 150 BV, p. 2323, Rn. 8.

The Federal Assembly is the legislative authority (parliament). As it is explicitly referred to in the Constitution as the supreme authority of the Confederation (second only to the people and the cantons, Art. 148 para. 1 BV), Switzerland can be characterized as a so-called *Legislativstaat* – as opposed to an *Exekutivstaat*.[59] The Federal Assembly enacts federal acts *(Bundesgesetz/loi fédérale)* and ordinances *(Verordnung/ordonnance)* in order to establish binding legal rules (Art. 163 para. 1 BV) and may delegate legislative powers by federal act unless prohibited by the Constitution (Art. 164 para. 2 BV). Art. 164 para. 1 BV lists in exemplary fashion those provisions that must be enacted in the form of a federal act:

Art. 164 BV [Legislation]

[1] All significant provisions that establish binding legal rule must be enacted in the form of a federal act. These include in particular fundamental provisions on:

a. the exercise of political rights;

b. the restriction of constitutional rights;

c. the rights and obligations of persons;

d. those liable to pay tax as well as the subject matter and assessment of taxes and duties;

e. the duties and services of the Confederation;

f. the obligations of the Cantons in relation to the implementation and enforcement of federal law;

g. the organisation and procedure of the federal authorities.[60]

Further tasks of the Federal Assembly include foreign relations and international treaties, finance, appointments, supervisory control, evaluation of effectiveness, assignment of functions to the Federal Council, and the maintenance of good relations between the Confederation and the cantons (Arts. 166–173 BV).

The supreme governing and executive authority is the Federal Council (*Bundesrat/Conseil fédéral*; Art. 174 BV). The Federal Council is composed of seven members who are elected for a four-year term of office by the Federal Assembly following each general election to the National Council (Art. 175 paras. 1–3 BV). Members of the Federal Council may be re-elected for an unlimited number of terms. The Constitution explicitly states in Art. 175 para. 4 that the various geographical and language regions of the country should be appropriately represented in the Federal Council. Switzerland's multi-party system is also reflected in the Federal Council, whose members currently come from five different political parties. The Federal Council is a collegial body. This means that once a decision by the Federal Council is taken, individual members of the Federal Council should not

[59] Ehrenzeller et al.-*Mastronardi*, Art. 148 BV, pp. 2312–2313, Rn. 5–9 with further references.

[60] All translations of provisions of the Swiss Constitution in this chapter are taken from the unofficial translation provided by the Swiss Confederation.

raise dissenting opinions in public. The president of the Confederation chairs the Federal Council but is "only" seen as *primus/prima inter pares* (first among equals). The president and the vice-president are elected by the Federal Assembly from the members of the Federal Council for a period of one year (Art. 176 para. 2 BV). They cannot be re-elected for the following year, and the president cannot be elected as vice-president for the following year (Art. 176 para. 3 BV).

The Federal Council is in charge of the federal administration (Art. 178 para. 1 BV). Each member of the Federal Council is the head of one of seven departments (Art. 178 para. 2 BV). The powers of the Federal Council, which are set out in Arts. 180–187 BV, include decisions concerning the objectives of federal government policy, the right to initiate, enact, and implement legislation, finances, foreign relations, external and internal security, and maintaining relations between the Confederation and the cantons. Reform of the Federal Council – the only federal body that has remained basically unaltered since 1848 – is currently under discussion.[61]

– *Law-making procedure*

Law making in Switzerland is a complex matter that involves various "players." Enacted federal law is in order of priority the Constitution and federal legislation in the form of formal law *(Gesetz/loi)* or ordinances *(Verordnung/ordonnance)*.[62]

Revisions of the Constitution are possible at any time (Arts. 192–195 BV). Most revisions are initiated by the Swiss electorate by means of the so-called popular initiative (Arts. 138–140, 193, 194 BV). They may also be initiated by governmental institutions such as the parliament and the Federal Council (right implied by Art. 181 BV[63]). Most popular initiatives request a partial revision of the Constitution. The respective rules are found in Art. 139 BV.

Art. 139 BV [Popular initiative requesting a partial revision of the Federal Constitution in specific terms]

[1] Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution.

[2] A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed.

[3] If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part.

[61] For details on the reform project, see Ehrenzeller et al.-*Ehrenzeller*, Vorbemerkungen zu Art. 174–187 BV, pp. 2572–2578, Rn. 16–26. For the status of the reform project, see Regierungsreform.

[62] *Tschannen*, Staatsrecht §§ 44–47, pp. 537–607; *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 5. See also I.F.

[63] Ehrenzeller et al.-*Biaggini*, Art. 181 BV, p. 2670, Rn. 9.

[4] If the Federal Assembly is in agreement with an initiative in the form of a general proposal, it shall draft the partial revision on the basis of the initiative and submit it to the vote of the People and the Cantons. If the Federal Assembly rejects the initiative, it shall submit it to a vote of the People; the People shall decide whether the initiative should be adopted. If they vote in favour, the Federal Assembly shall draft the corresponding bill.

[5] An initiative in the form of a specific draft shall be submitted to the vote of the People and the Cantons. The Federal Assembly shall recommend whether the initiative should be adopted or rejected. It may submit a counter-proposal to the initiative.

The details on proceedings regarding popular initiatives in the Federal Assembly are set out in the Parliament Act (*Parlamentsgesetz*, ParlG[64]).

All significant federal provisions that establish binding legal rules must be enacted in the form of a federal act (Art. 164 BV). Federal acts must have a constitutional basis, that is, they must be based on a provision in the Constitution and they must not contradict the Constitution.[65] Law-making procedures may be initiated by individual voters, interest groups, members of parliament, the Federal Council, and the administration. The department with competence for the matter or a parliamentary commission prepares a first draft. An expert commission, a federal office, or an administrative working group may assist in the drafting.

During the consultation procedure *(Vernehmlassungsverfahren/procédure de consultation)*, the Federal Courts, the cantons, the political parties, umbrella organizations – representing, for example, the economy, cities or mountain regions – and other organizations with a particular interest in the matter may state their position and propose modifications. Thereafter, the Federal Council prepares the report to the Federal Assembly together with the draft and passes them on to the Federal Assembly. As soon as the new law is adopted by the two chambers of the Federal Assembly, the acts that are subject to a federal referendum are published in the Official Federal Gazette *(Bundesblatt/Feuille fédérale)*. If a federal referendum – not to be confused with a popular initiative (the successful outcome of which is a revision of the Constitution) – is requested, a popular vote is scheduled. If no federal referendum is requested or the law is accepted in the popular vote, it is included in the official compilation *(Amtliche Sammlung/Recueil officiel)*, published subsequently in the Classified Compilation of Federal Legislation *(Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral)*, and implemented.[66]

Ordinances may be enacted by the Federal Council, the Federal Assembly or the courts and are not subject to referendum.[67]

[64] Bundesgesetz vom 13. Dezember 2002 über die Bundesversammlung/Loi du 13 décembre 2002 sur l'Assemblée fédérale, SR/RS 171.10.

[65] *Tschannen*, Staatsrecht § 8, p. 148, Rn. 5

[66] *Fleiner* et al., Swiss Constitutional Law, p. 51 § 2 Rn. 79 with further references.

[67] *Rhinow/Schefer*, Verfassungsrecht, p. 518, Rn. 2684.

– *Judiciary*

The cantons are responsible for executing and implementing federal legislation and for organizing the courts that apply federal law. Therefore, the civil, criminal, and administrative courts of first and second instance are cantonal.[68] The final and last instance is the Federal Supreme Court *(Bundesgericht/Tribunal fédéral)*. The Federal Supreme Court is the supreme judicial authority (Art. 188 para. 2 BV). Switzerland's judiciary thus resembles a pyramid.

The Federal Administrative Court *(Bundesverwaltungsgericht/Tribunal administratif fédéral)* assesses objections against rulings of federal authorities. In some areas, cantonal decisions are also subject to the jurisdiction of the Federal Administrative court.[69] It can be the court of first, final, or only instance. In cases of federal jurisdiction in criminal matters, the Federal Criminal Court *(Bundesstrafgericht/Tribunal pénal fédéral)* is the court of first instance and the objections authority.[70] The Federal Supreme Court decides on appeals against decisions of the Federal Criminal Court.[71]

– *Cantons*

Switzerland is a federal state that consists of the Confederation, the cantons, and the municipalities.[72] The 26 cantons have their own sovereignty and autonomy. They are listed in Art. 1 BV: Zurich, Bern, Lucerne, Uri, Schwyz, Obwalden and Nidwalden, Glarus, Zug, Fribourg, Solothurn, Basel-Stadt and Basel-Landschaft, Schaffhausen, Appenzell Ausserrhoden and Appenzell Innerrhoden, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva, and Jura. Before the new Constitution of 1999 entered into force on 1 January 2010, there were six half cantons (Obwalden and Nidwalden, Basel-Stadt and Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden). When the new Constitution entered into force, these half cantons acquired the status of (full) cantons. The aim of this change was to clarify that these six entities are full members of the Confederation even if in some (exceptional) respects they enjoy a lesser legal status (e.g., only one representative in the Council of States).[73]

The allocation of duties to the Confederation and the cantons is set out in Arts. 3, 42, and 43 BV. In the case of a conflict, federal legislation is supreme (Art. 49 para. 1 BV). The cantons are responsible for all the areas not set out in the BV as

[68] *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 4.

[69] Bundesverwaltungsgericht.

[70] For an explanation of the objections authority, see 5.c. below.

[71] On criminal courts, see 5.c. below.

[72] For further information, see *Fleiner* et al., Swiss Constitutional Law, pp. 101–144; *Tschannen*, Staatsrecht §§ 15–26, pp. 233–367.

[73] *Tschannen*, Staatsrecht §16, pp. 241–242, Rn. 15–17.

tasks of the Confederation (Art. 3 BV). The wide range of cantonal responsibility includes police, education, and roads. Like the Confederation, the cantons are direct democratic systems. The voters may submit popular initiatives and vote on referenda.

The cantonal system of legislative, executive, and judicial branches is more or less equivalent to the federal system. Cantonal parliaments, however, comprise only a single chamber. In Basel-Stadt, for instance, the parliament is known as the Great Council *(Grosser Rat)*. It consists of 100 elected members. Elections are held every four years.[74] Each canton has a collegial executive authority consisting of five to seven members who are elected by the voters.[75] In Basel-Stadt, this institution is known as the Governing Council *(Regierungsrat)*. The Regierungsrat has seven members who are elected by the voters every four years. Finally, each canton also has its own judicial system. As stated above, cantonal courts have jurisdiction over cantonal but generally also over federal law.

5. Crime and criminal prosecution

a) Investigating authorities

The unified Code of Criminal Procedure (*Strafprozessordnung*, StPO[76]) entered into force on 1 January 2011, replacing all cantonal criminal procedure laws as well as the Federal Act on the Administration of Federal Criminal Justice. Prior to the entry into force of the unified Code, investigations in some cantons were conducted by an examining magistrate *(Untersuchungsrichter/juge d'instruction)*, in others by the public prosecution *(Staatsanwaltschaft/ministère public)*, and in still others by both an examining magistrate as well as the prosecution.[77] Today, the exhaustive list of law enforcement authorities found at Art. 12 StPO[78] no longer includes an examining magistrate.

The criminal process starts with preliminary proceedings. These consist of police inquiries (*polizeiliches Ermittlungsverfahren/procédure d'investigation de la police*, Arts. 306–307 StPO) and investigation proceedings (*Untersuchung durch die*

[74] Grosser Rat Basel-Stadt: http://www.grosserrat.bs.ch/media/files/great_council.pdf [last visited July 2013].

[75] *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 4; Schweizerische Bundeskanzlei, Kantonsregierungen.

[76] Schweizerische Strafprozessordnung vom 5. Oktober 2007/Code de procédure pénale suisse du 5 octobre 2007, SR/RS 312.0.

[77] See I.G.3.

[78] All translations of provisions of the Swiss Code of Criminal Procedure in this chapter are taken from the unofficial translation provided by the Swiss Confederation or from Donatsch/Hansjakob/Lieber-*Summers*.

Staatsanwaltschaft/instruction par le ministère public, Arts. 308–318 StPO). Police inquiries are preparatory but not independent in character.[79] Nevertheless, *de facto* the police have gained more and more power throughout recent decades.[80] Police inquiries are often carried out without the direct involvement of the prosecution.[81] The police may investigate criminal offenses on their own initiative, on the basis of reports from individuals and authorities, or when ordered to do so by the prosecution (Arts. 15, 306, and 307 StPO). In the course of their inquiries, the police establish the facts relevant to the criminal offense. Even though the police are subject to the supervision and instructions of the prosecution (Art. 15 para. 2 StPO) and are subject to documentation requirements (Art. 76 StPO), they are only required to inform the prosecution without delay in the case of serious criminal offenses and other serious matters (Art. 307 para. 1 StPO). In other cases, the police conclude their inquiries and thereafter pass a written report on to the prosecution together with other files (Art. 307 para. 3 StPO). The police may even refrain from making reports to the prosecution if there is clearly no reason to take further procedural steps and if no coercive measures or other formal investigative activities have been imposed or carried out (Art. 307 para. 4 StPO). The prosecution may issue instructions or assignments to the police or take control of the proceedings at any time (Art. 307 para. 2 StPO).

The prosecution may open an investigation (Art. 309 StPO) or order that proceedings not be opened (Art. 310 StPO). If an investigation is opened, the prosecution pursues criminal offenses and conducts the taking of evidence. The prosecution may entrust the police with further inquiries after the investigation proceedings have been opened (Art. 312 para. 1 StPO) and may suspend an investigation if certain conditions are fulfilled: suspended investigations can be resumed if the reason for the suspension no longer applies (Arts. 314, 315 StPO). Finally, the prosecution must either drop the proceedings (Arts. 319–322 StPO) or bring charges and argue in favor of the criminal charge (Arts. 16 para. 2; 324–327 StPO). If the prosecution brings charges, it must provide the court with the information necessary for it to assess the guilt of the defendant and impose a sentence (Art. 308 para. 3 StPO).

To balance the strong position of the public prosecution, which is the investigating and prosecuting authority,[82] a court has been established that is responsible for deciding whether or not coercive measures sought by the prosecution should be authorized. The members of the court responsible for deciding upon coercive measures may not act as trial judges *(Sachrichter/juge du fond)* in the same case (Art. 18 StPO).

[79] *Schmid*, Handbuch, p. 550, Rn. 1205.

[80] *Ibid.*, p. 550, Rn. 1206; see also *Pieth*, Strafprozessrecht, pp. 15–17, 61–64.

[81] *Schmid*, Handbuch, p. 555, Rn. 1217.

[82] *Schmid*, Handbuch, pp. 131–136, Rn. 350–359.

Switzerland has a federalized police and public prosecution structure. All police tasks under federal jurisdiction are dealt with by the Federal Office of Police. Criminal investigations are conducted by the Federal Criminal Police (a department of the Federal Office of Police). All police tasks under cantonal jurisdiction are dealt with by cantonal police corps. The public prosecution authority of the Confederation is the Office of the Attorney General *(Bundesanwaltschaft/Ministère public de la Confédération)*. It investigates and prosecutes criminal cases under federal jurisdiction. These are listed in Arts. 23 and 24 StPO (e.g., organized crime).[83] Cases under cantonal jurisdiction are prosecuted by cantonal offices of the public prosecution.

Police education is a cantonal matter. In the following, the educational and professional requirements for police officers are described on the basis of the canton of Basel-Stadt.[84] Admission to police training in Basel-Stadt usually requires Swiss nationality or a permanent residence permit (Art. 34 Foreign Nationals Act, *Ausländergesetz*, AuG[85]), a good reputation, and either a higher-level school-leaving certificate or a completed three- or four-year-apprenticeship or a completed two-year apprenticeship combined with several years of work experience. Furthermore, certain physical requirements must be fulfilled (e.g., height), and the candidate must be able to deal with physical and mental stress. Other requirements include a driving licence and good language skills, that is, speaking at least one language other than the mother tongue. All candidates must pass the qualifying examination in order to enter the program; upon completion of the program, participants must sit for a federal diploma examination.[86]

In 2012, 750,371 crimes were reported according to the police crime statistics gathered by the federal statistical office. Of these reported offenses, 611,903 involved offenses defined in the Criminal Code (*Strafgesetzbuch*, StGB[87]). The remaining reported offenses involved offenses defined in the Narcotics Act *(Betäubungsmittelgesetz)*[88] (92,862), the AuG (36,422), and in supplementary federal acts (9,184).[89] This corresponds to 78.9 Criminal Code crimes per 1000 residents.[90] The number of these reported crimes increased by 9 % compared to 2011. The clear-up

[83] See below 5.c.

[84] On the following requirements, see generally Polizei Basel-Stadt – Anforderungsprofil.

[85] Bundesgesetz vom 16. Dezember 2005 über die Ausländerinnen und Ausländer/Loi fédérale du 16 décembre 2005 sur les étrangers, SR/RS 142.20.

[86] Interkantonale Polizeischule Hitzkirch.

[87] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0.

[88] Bundesgesetz vom 3. Oktober 1951 über die Betäubungsmittel und die psychotropen Stoffe/Loi fédérale du 3 octobre 1951 sur les stupéfiants et les substances psychotropes, SR/RS 812.121.

[89] Bundesamt für Statistik, Polizeiliche Kriminalstatistik 2012, p. 12.

[90] *Ibid.*, p. 15.

rate in 2012 was 27.2 %.[91] Most reported Criminal Code crimes are offenses against property (73 %).[92] Compared to the previous year, the number of violent crimes reported in 2012 increased by 4 %.[93] In 2012, 43,521 of 81,682 accused persons were foreigners.[94]

b) Prosecuting authorities

While the public prosecution in cooperation with other institutions may play an active role in the investigation of crime, only the prosecution can bring charges before the relevant court (Art. 324 StPO).[95]

Educational requirements for cantonal prosecutors are a cantonal matter. In Basel-Stadt, for example, the positions of chief public prosecutor and those of managing prosecutors are publicized. Thereafter, the Great Council elects the chief public prosecutor and the managing prosecutors for a term of six years (§ 53 para. 1 Act on the organisation of the court of Basel-Stadt (*Gerichtsorganisationsgesetz Basel-Stadt*, GOG BS[96]). The chief public prosecutor and the managing prosecutors may be re-elected (§ 53a GOG BS). All other prosecutors are employed by the Governing Council according to the provisions in the cantonal staffing act (§ 53 para. 2 GOG BS). The cantonal staffing act requires candidates to bring appropriate professional and personal qualifications but does not provide more detail (§ 8 Personalgesetz BS[97]). Although a law degree and working experience in law enforcement are not clearly required by law, persons without these qualifications probably will not be elected or employed as prosecutors. Swiss nationality is not a requirement in Basel-Stadt.

On the federal level, the Attorney General and the Deputy Attorney General are elected by the Federal Assembly (Art. 20 para. 1 Criminal Justice Authorities Act, *Strafbehördenorganisationsgesetz*, StBOG[98]). Anyone eligible to vote in federal matters may be elected (Art. 20 para. 1[bis] StBOG). The other public prosecutors of the Office of the Attorney General are elected by the Attorney General (Art. 20 para. 2 StBOG). The term of office is four years (Art. 20 para. 3 StBOG).

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[91] *Ibid.*, p. 12.

[92] *Ibid.*, p. 9.

[93] *Ibid.*, p. 34.

[94] *Ibid.*, p. 25.

[95] See above 5.a.

[96] Gesetz betreffend Wahl und Organisation der Gerichte sowie der Arbeitsverhältnisse des Gerichtspersonals und der Staatsanwaltschaft, Gerichtsorganisationsgesetz Basel-Stadt, SG 154.100.

[97] Personalgesetz vom 17. November 1999, SG 162.100.

[98] Bundesgesetz vom 19. März 2010 über die Organisation der Strafbehörden des Bundes/Loi fédérale du 19 mars 2010 sur l'organisation des autorités pénales de la Confédération, SR/RS 173.71.

The federal statistical office releases police crime statistics that include the clear-up rate and conviction statistics. No statistics on the prosecution of crimes are provided.

c) Criminal courts

The cantons are responsible for the execution and implementation of federal legislation: As a rule, the first two judicial levels – with the exception of certain criminal cases that fall under federal jurisdiction (Art. 22 StPO) – are under cantonal jurisdiction.[99] The final level for cases begun in cantonal courts is the Federal Supreme Court *(Bundesgericht/Tribunal fédéral)*. Cases subject to federal jurisdiction from the very beginning also end up in the Federal Supreme Court. After all domestic remedies have been exhausted, application can be made to the European Court of Human Rights.

Cantonal court system

– *Cantonal courts of first instance*

The cantonal courts of first instance adjudicate all criminal offenses that do not fall within the competence of other authorities (Art. 19 para. 1 StPO). The cantons enjoy broad freedoms in the organization and composition of these courts. Courts of first instance may be composed of professional or lay judges or lay judges under the presidency of a professional judge. A jury is not explicitly prohibited but is probably inadmissible due to a lack of provisions governing the division of tasks within the court and a lack of special procedural provisions.[100] Only one provision in the Code of Criminal Procedure deals specifically with the composition of courts of first instance (Art. 19 para. 2 StPO). According to this provision, a court of first instance may consist of a single judge *(Einzelgericht/juge unique)* when the court is dealing with contraventions *(Übertretung/contravention)* or with less serious felonies *(Verbrechen/crime)* and misdemeanors *(Vergehen/délit)*.

In the canton of Basel-Stadt, for example, the Criminal Court *(Strafgericht[101])* is the court of first instance.[102] A single judge deals with cases in this court if the sentence foreseen in the Criminal Code is a fine (imposed for contraventions), a monetary penalty up to 360 daily penalty units *(Tagessatz/jour-amende)*, community service *(gemeinnützige Arbeit/travail d'intérêt général)*, or imprisonment up to twelve months. Three judges sitting together *(Dreiergericht)* deal with cases in-

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[99] *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 4.

[100] Niggli et al.-*Kipfer*, Art. 19, p. 214, Rn. 3.

[101] The official language of Basel-Stadt is German (§ 76 KV BS); therefore, the original expressions included in parentheses are in German only.

[102] For more details on the organization of the Criminal Court in Basel-Stadt, see *Gilliéron/Killias*, European journal on criminal policy and research, 2008, 339–340.

volving possible prison sentences of up to five years or a measure for treatment in an institution *(stationäre Massnahme/mesure institutionnelle)*. Finally, the so-called Chamber, which is competent to impose all punishments and measures (§ 35 GOG BS), deals with all other cases. The Chamber has five judges. As a rule, one of them functions as the presiding judge, and at least one of the associate judges must have a legal education; in special cases, there are two presiding judges (the second presiding judge is referred to as the "prefect" (*Statthalter*, § 12 para. 2 GOG BS).

Educational requirements of professional judges are a cantonal matter. A law degree is not necessarily required (democracy – rather than education – is emphasized), but more and more judges are in fact trained in the law.[103] In Basel-Stadt, presiding judges, prefects, and associate judges are elected by the voters for a term of six years (§ 44 para. 1 lit. d–f Constitution of the canton of Basel-Stadt, *Kantonsverfassung Basel-Stadt*, KV BS,[104] § 2 GOG BS). Substitute judges *(Ersatzrichter)* of the Criminal Court are elected by the Great Council (§ 89 para. 1 KV BS, § 3 GOG BS). All Swiss citizens ages 18 and above who have their political domicile in Basel-Stadt and who do not lack legal capacity may be elected associate judge or substitute judge for a term of six years (§ 40 para. 1 KV BS, § 7 para. 1 GOG BS). To be elected presiding judge or prefect there are additional requirements: a law degree, a doctoral degree in law, a notary or attorney's license, or membership in the Federal Supreme Court (§ 7 para. 2 GOG BS). Full-time and associate professors of the Faculty of Law of the University of Basel may be elected prefect, associate judge, and substitute judge even if they are not Swiss nationals (§ 7 para. 3 GOG BS).

– *Cantonal courts of appeal and objection*

Legal actions against actions of courts of first instance can be divided into appeals *(Berufung/appel)* and objections *(Beschwerde/recours)*. In some situations, however, it may be difficult to determine whether to proceed by way of appeal or by way of objection. As a result, some cantons – such as the canton of Basel-Stadt – have made use of the possibility of assigning the powers of the objections authority to the court of appeal (Art. 20 para. 2 StPO). If this choice is made, certain grounds for recusal must be respected (Art. 21 StPO).[105] In Basel-Stadt, the court of appeal is known as the *Appellationsgericht*.

Courts of appeal *(Berufungsgericht/cour d'appel)* rule on appeals against judgments of the court of first instance that partially or completely brought the proceedings to a close (Art. 21 para. 1 lit. a and Art. 398 para. 1 StPO). It also rules on applications for retrial (Art. 21 para. 1 lit. b StPO). The appeal may be used to contest violations of the law, incorrect establishment of the facts, and unreasonableness (Art. 398 para. 3 StPO). As a rule, the cantonal courts of appeal are the final domestic instance for questions of fact.[106]

[103] *Pieth*, Strafprozessrecht, p. 68.

[104] Verfassung des Kantons Basel-Stadt, SR 131.222.1/SG 111.100.

[105] *Oberholzer*, AJP 1/2011, 40.

The objections authority *(Beschwerdeinstanz/autorité de recours)* rules on objections against procedural acts, rulings, and decisions that cannot be challenged by way of appeal. These include procedural acts, rulings, and decisions taken by the court of first instance, by the police, the prosecution, and the criminal justice authorities responsible for prosecuting contraventions and, in certain cases, by the court deciding upon coercive measures (Art. 20 para. 1 StPO). The objection may be used to contest violations of law, incomplete or incorrect establishment of the factual circumstances of the case, and unreasonableness (Art. 393 para. 2 StPO).

As to the organization of courts of appeal, it is a matter of controversy whether they should all be "collegial" *(Kollegialgericht/tribunal collégial)* or whether single-judge courts should also be permitted.[107] In the canton of Basel-Stadt, appeals are dealt with by a collegial court (§§ 72 and 73 GOG BS); the collegial court can consist either of five members (two of whom are presiding judges) or of three members (with at least one presiding judge) (§ 63 para. 2 GOG BS). Objections can be dealt with either by a single judge or by a collegial court (implied by Art. 395 StPO).[108] In the canton of Basel-Stadt, objections are typically dealt with by a single judge (§§ 72 and 73a GOG BS).

The presiding judges and the associate judges of the court of appeal in Basel-Stadt are elected by the voters for a term of six years (§ 44 para. 1 lit. d–f KV BS, § 58 GOG BS). Eligibility requirements are the same as for judges of the courts of first instance (§ 7 GOG BS). Additionally, a candidate must have a certain amount of work experience or must fulfill one of a number of additional requirements (§ 59 para. 2 GOG BS). Full-time and associate professors of the Faculty of Law of the University of Basel may be elected judges of the court of appeal even if they are not Swiss nationals (§ 59 GOG BS).

[106] For the exception, see the remarks on the criminal objection before the Federal Supreme Court for cases begun in federal courts (Art. 105 BGG).

[107] Donatsch et al.-*Keller*, Art. 21, p. 146, Rn. 3. According to Niggli et al.-*Kipfer*, Art. 21, p. 219, Rn. 1 a single judge is not possible. He refers to Art. 19 para. 2 StPO *e contrario*.

[108] Niggli et al.-*Kipfer*, Art. 20, p. 216, Rn. 1.

– *Criminal objection before the Federal Supreme Court: final domestic review for cases begun in cantonal courts*

Decisions of the final cantonal instance[109] may be challenged before the Federal Supreme Court by means of a so-called criminal objection (*Beschwerde in Strafsachen/recours en matière pénale*, Arts. 78–81 Federal Supreme Court Act, *Bundesgerichtsgesetz*, BGG[110]). As a rule, two cantonal instances must have been involved before a criminal objection can be filed before the Federal Supreme Court (double-instance principle).[111] The Federal Supreme Court is the supreme judicial authority (Art. 188 para. 2 BV) and the final domestic instance. Criminal objections focus on *revisio in iure* (appeals on the law).[112] If a criminal objection is not possible, another way to reach the Federal Supreme Court is to claim a violation of constitutional rights (*Verfassungsbeschwerde/recours constitutionnel*, Arts. 113–119 BGG).

Federal court system

– *Federal court of first instance*

The Criminal Chamber *(Strafkammer/cour des affaires pénales)* of the Federal Criminal Court is the court of first instance for federal criminal cases. Federal jurisdiction in criminal matters is restricted to certain crimes. These include political crimes and offenses and crimes and offenses against federal interests (Art. 23 StPO)[113] as well as organized crime, the financing of terrorism, and economic crime (Art. 24 StPO). The federal prosecution may delegate cases under federal jurisdiction to the cantons (Art. 25 StPO). Like the cantons, the Confederation is free in the organization and composition of the court of first instance. Cases in the Federal Criminal Court are usually dealt with by a chamber of three judges (Art. 36 para. 1 StBOG). Cases involving less serious offenses are dealt with by the president of the chamber alone (or delegated by the president to another single judge) (Art. 19 para. 2 StPO, Art. 36 para. 2 StBOG).

– *Appeal and objection in federal criminal cases*

There is no proper court of second instance for appeals against judgments of the federal court of first instance (Criminal Chamber of the Federal Criminal Court)

[109] For an explanation of the final cantonal instance, see *Schmid*, Handbuch, pp. 748–749, Rn. 1637–1639

[110] Bundesgesetz vom 17. Juni 2005 über das Bundesgericht/Loi du 17 juin 2005 sur le Tribunal fédéral, SR/RS 173.110

[111] *Schmid*, Handbuch, pp. 748–749, Rn. 1637–1638 with examples of exceptions to the double-instance principle.

[112] *Pieth*, Strafprozessrecht, p. 269.

[113] *Schmid*, Handbuch, p. 157, Rn. 413.

(but see discussion of erroneous determination of facts below).[114] The Chamber of Objections *(Beschwerdekammer/Cour des plaintes)* of the Federal Criminal Court has jurisdiction over objections[115] (Art. 37 StBOG).

– *Criminal objection before the Federal Supreme Court: final domestic review for cases begun in federal courts*

Decisions of both chambers of the Federal Criminal Court may be challenged before the Federal Supreme Court by means of the criminal objection – the same remedy that may be used to challenge decisions of the final cantonal instances – if the respective requirements are met (Art. 78–81 BGG). The Federal Supreme Court also deals with retrials against decisions of the Federal Criminal Court (Art. 119a BGG).

As stated above, there is no federal court comparable to the cantonal courts of appeal designed to hear appeals on the facts from judgments of the Criminal Chamber. Nevertheless, an appeal on the facts directly to the Federal Supreme Court by way of a criminal objection is possible if the Chamber's determination of the facts is obviously erroneous or based on violations of federal, international, or cantonal law (Art. 105 BGG). The parliament believed that the decision not to create a second instance for appeals on facts would in the long run be more pragmatic and less costly; a minority did point out, however, that this was "anti-systemic."[116] However, in 2010, the parliament accepted a parliamentary motion that would empower the Federal Supreme Court to examine as a matter of course (and not exceptionally as in obviously erroneous cases as discussed above) the findings of fact of decisions of the Criminal Chamber of the Federal Criminal Court. Should the Federal Supreme Court conclude that the finding of facts was not done correctly, it would either find the facts itself or refer the matter back to the previous instance (Criminal Chamber of the Federal Criminal Court).[117] The motion has not yet been implemented in the Federal Supreme Court Act.

– *Election of federal court judges*

Judges of the Federal Supreme Court, the Federal Administrative Court, and the Federal Criminal Court are elected by the Federal Assembly for a term of office of six years and can be re-elected (Art. 145 BV). Persons who are eligible to vote on the federal level – namely, Swiss citizens ages 18 and above who do not lack legal

[114] On the rule of double instances in cantonal cases, see discussion above.

[115] On the notion of objection, see above discussion of the cantonal system.

[116] For the parliamentary debates, see Wortprotokoll zum Geschäft 08,066. Donatsch et al.-*Keller*, Art. 21, p. 146, Rn. 2; Niggli et al.-*Kipfer*, Art. 21, p. 219, Rn. 3. For an argument in favor of two proper instances, see *Krättinger*, Jusletter 14 May 2012.

[117] Erläuternder Bericht/rapport explicative, pp. 1–6.

capacity (Art. 136 para. 1 BV) – may be elected to the Federal Supreme Court (Art. 5 BGG). Even though a law degree is not required, *de facto*, only lawyers are elected.

Application to the European Court of Human Rights

When all domestic remedies have been exhausted, an individual may submit an application to the European Court of Human Rights claiming to be a victim of a violation of the European Convention on Human Rights (Arts. 34 and 35 ECHR).[118] The admissibility of a retrial following a judgment by the European Court of Human Rights is regulated in the Swiss Code of Criminal Procedure (Art. 410 StPO).

Statistics

In 2011, there were 94,561 convictions. 85.3 % of convicted persons were men, 14.7% were women. Foreigners made up 56 % and Swiss nationals 44 % of all persons convicted.[119]

d) Criminal penalties

The Criminal Code provides for diverse criminal penalties *(Sanktionen/sanctions)*.[120] They are divided into punishments *(Strafen/peines)* and measures *(Massnahmen/mesures)*.

The rules dealing with punishments are provided for in Arts. 34–55a and 106 and 107 StGB. Punishments are fines (imposed for contraventions), monetary penalties, community service, and custodial sentences. The duration of the custodial sentence normally is no less than six months; the maximum term is 20 years, if the law does not expressly provide for a life sentence (Art. 40 StGB). Some cantons have participated on a temporary basis in pilot projects that aim to replace short custodial penalties with electronic monitoring.[121] Suspended sentences *(bedingte Strafen/sursis à l'exécution de la peine)* may be combined with an unsuspended monetary penalty or with a fine (Art. 42 para. 4 StGB).

The rules dealing with measures are provided for in Arts. 56–73 StGB. There are three kinds of measures: therapeutic, indefinite incarceration, and other. The third category comprises personal measures (Arts. 66–68 StGB[122]) and factual measures (Arts. 69–73 StGB[123]). Personal measures require criminal liability to be executed.[124] They include the good behavior bond (*Friedensbürgschaft/cautionnement*

[118] Implemented in Switzerland SR/RS 0.101.

[119] Bundesamt für Statistik, Verurteilungen – Überblick.

[120] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, pp. 262–267.

[121] Bundesamt für Justiz, Electronic monitoring. See I.G.3.

[122] *Schwarzenegger* et al., Strafrecht II, p. 193.

[123] *Ibid.*, p. 201.

[124] *Ibid.*, p. 193.

préventif, Art. 66 StGB), the prohibition of practicing a profession (*Berufsverbot/interdiction d'exercer une profession*, Arts. 67 and 67a StGB), disqualification from driving (*Fahrverbot/interdiction de conduire*, Art. 67b StGB), and publication of the judgment (*Veröffentlichung des Urteils/publication du jugement*, Art. 68 StGB). Factual measures do not require criminal liability.[125] They include forfeiture of dangerous objects (*Sicherungseinziehung/confiscation d'objets dangereux*, Art. 69 StGB), forfeiture of assets (*Einziehung von Vermögenswerten/confiscation de valeurs patrimoniales*, Arts. 70–72 StGB), and use for the benefit of the person harmed (*Verwendung zu Gunsten des Geschädigten/allocation au lésé*, Art. 73 StGB). If the requirements for both a punishment and a measure are fulfilled, both sanctions are executed (Art. 57 para. 1 StGB). Custodial sentences are executed prior to an indefinite incarceration (Art. 64 para. 2 StGB). Other custodial measures are executed prior to the custodial sentence (Art. 57 para. 2 StGB).

In 2011, 9.4% of principal penalties imposed were custodial sentences, 87.2% monetary penalties, 3.4% community services, and 0.1% fines alone.[126] As far as measures are concerned, statistics are only kept on therapeutic measures and indefinite incarceration. Indefinite incarceration is quite rare: in 2011, one indefinite incarceration was imposed, and 429 of 430 imposed measures were therapeutic.[127]

e) Execution of custodial penalties

The execution of custodial penalties is a cantonal responsibility. General rules are found in Arts. 74–92 StGB.[128] Custodial sentences are executed in a series of progressive stages: entry phase, release on temporary license *(Hafturlaub/congé)*, open regime *(offener Strafvollzug/régime ouvert)*, external employment *(Arbeitsexternat/travail externe)*, external accommodation *(Wohnexternat/logement externe)*, and finally, release on parole *(bedingte Entlassung/libération conditionnelle)*.[129] There are 114 penal institutions in the custodial sector.[130] Most penal institutions fulfill several functions. They may be used simultaneously for the execution of both custodial penalties and custodial measures.[131] In contrast, therapeutic institutions must be operated separately from penal institutions (Art. 58 para. 2 StGB). Secure and open penal institutions (Art. 76 StGB) do not have to be managed separately.[132]

[125] *Ibid.*, p. 201.

[126] Bundesamt für Statistik, Verurteilungen – Überblick.

[127] Bundesamt für Statistik, Verurteilungen – Massnahmen.

[128] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 267.

[129] For more information on the successive stages of execution, see *Killias* et al., Grundriss AT, p. 243, Rn. 1414; *Schwarzenegger* et al., Strafrecht II, pp. 272–275.

[130] Bundesamt für Statistik, Prisons, detention – key figures.

[131] For an inventory of the establishments and their functions, see Bundesamt für Statistik, Katalog.

[132] Bundesamt für Statistik, Strafen und Massnahmen in der Schweiz, 9.

Penal institutions may be managed jointly by the cantons. They coordinate management of penal institutions with the help of three penal system agreements *(Strafvollzugskonkordat/Concordat sur l'exécution des peines et des mesures)*.[133] Most penal institutions have separate sections for men and women. There is one penal institution, in Hindelbank (Bern), that is exclusively for women.[134] Some penal institutions have begun building sections for senior citizens.[135] Institutions for young adults (ages 18 to 24) must be managed separately from other institutions and facilities under the Criminal Code (Art. 61 para. 2 StGB,). The Arxhof (Basel-Landschaft), Kalchrain (Thurgau), Uitikon (Zurich), and Pramont (Valais) are institutions for young adult men.[136] There is no such institution for young adult women.[137] The execution of punishments and measures for minors is governed by the Juvenile Criminal Law Act (*Jugendstrafgesetz*, JStG[138]), which entered into force in 2007. The cantons are obliged to build separate penal institutions to execute custodial penalties for minors. According to Art. 48 JStG, they must be built by 2017.

The prison population rate in 2012 was 83 offenders per 100,000 inhabitants. This corresponds to an occupancy rate of 94.6%.[139] In comparison to the prison population rate in other countries of the world, Switzerland was ranked number 162 (of 223) in 2013. In comparison to other European countries, Switzerland was ranked number 42 (of 57).[140]

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133 *Baechtold*, Strafvollzug, p. 64

134 *Ibid.*, pp. 199–203, Rn. 13–16. For statistics on women in prison and detailed rules on treatment of women in prisons, see *Von Braun*, Femmes.

135 *Baechtold*, Strafvollzug, pp. 204–205, Rn. 20–22.

136 *Ibid.*, p. 278, Rn. 32.

137 *Ibid.*

138 Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs, SR/RS 311.1.

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B. Comparative legal classification and international ties

1. Comparative legal classification

Swiss law can be associated with the Romano-Germanic[1] and the continental European[2] legal families. In the centuries before the law was codified, the criminal law was influenced by the so-called continental common law.[3] With the introduction of codification, written law became the primary and in criminal law for the most part the only source of law.[4] Art. 1 Swiss Criminal Code (*Strafgesetzbuch*, StGB[5]) is explicit in this regard:

> "No one may be punished for an act unless it has been expressly declared to be an offense by the law."[6]

Legal texts require interpretation, however, which is undertaken in courts judges. Consequently, case law (of national courts and the European Court of Human Rights) determines the shape of the current criminal law.[7]

In continental law systems, the law is codified. Codifications in a narrow sense – as opposed to special legislation *(Spezialgesetz/loi spéciale)*[8] – follow a highly systematic approach.[9] Scholars are entrusted with drafting important legal codes. Thus, codifications are significantly influenced by the scholarship of the time. Behind Swiss codifications are diverse ideologies that are the result of the country's diversity and multiculturalism.[10] Naturally, Swiss legal codes have been influenced by the criminal law theories of other countries.[11] Nevertheless, the first draft, in

[1] *David*, Systèmes de droit, p. 53, Rn. 53.

[2] *Killias* et al., Grundriss AT, p. 3, Rn. 107.

[3] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 246.

[4] *Forstmoser/Vogt*, Einführung, p. 486, Rn. 305; *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, pp. 195–196. See I.F.

[5] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0.

[6] All translations of provisions of the Swiss Criminal Code in this chapter are taken from the unofficial translation provided by the Swiss Confederation, available at http://www.admin.ch/ch/e/rs/311_0/index.html [last visited July 2013]. On the principle of legality, see II.A.

[7] *Stratenwerth*, Strafrecht AT, § 4, pp. 97–103, Rn. 28–36.

[8] In the following, original Swiss legal expressions in German and French are included in parentheses. Italian terms are omitted in the interest of simplicity. Translations and explanations of Swiss legal expressions can be found in the termdat database of the Federal Chancellery at https://www.termdat.ch [last visited July 2013].

[9] *Forstmoser/Vogt*, Einführung, p. 462, Rn. 174; *Killias* et al., Grundriss AT, pp. 14–15, Rn. 121.

[10] *Killias* et al., Grundriss AT, p. 13, Rn. 119.

[11] *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, p. 158. See I.G.

1893, of a unified Swiss criminal code – leaving aside the criminal code of the era of the Helvetic Republic – proved to be a mostly independent legislative achievement of high rank.[12] The Criminal Code was adopted on 21 December 1937 after further debates and redrafting and entered into force on 1 January 1942. It remained unique, integrating various approaches and opting for intermediate solutions.[13] It has even influenced the criminal law of other countries, such as Peru[14] and Greece.[15]

Swiss criminal procedure can be referred to as post-modern.[16] A goal of the recently unified Swiss Criminal Procedure Code, which replaced cantonal criminal procedure laws as well as the Federal Act on the Administration of Federal Criminal Justice,[17] is to achieve more efficiency while at the same time protecting the procedural rights of the parties.[18] Thus, accusatorial, adversarial, and inquisitorial influences in Swiss criminal procedure are blurred.[19] The preliminary proceedings *(Vorverfahren/procédure préliminaire)* are mainly influenced by inquisitorial elements, such as written form, secrecy, and a non-adversarial approach.[20]The summary penalty order procedure *(Strafbefehlsverfahren/procédure de l'ordonnance pénale)*, in particular, may be considered inquisitorial: it is regulated in Arts. 352–356 Code of Criminal Procedure (*Strafprozessordnung*, StPO[21]) and does not provide for a separation of the function of the prosecutor and that of the judge.[22] This is regarded as problematic, as most cases are dealt with by means of summary penalty orders.[23] Nevertheless, persons affected by such orders may file a written objection (*Einsprache/opposition*, Art. 354 StPO). If the public prosecution decides to stand by the order, it sends the files immediately to the court of first instance, which decides on the validity of the order and the rejection (Art. 356 StPO).

The inquisitorial elements of Swiss criminal procedure are further weakened as the Criminal Procedure Code provides for enhanced defense rights,[24] including the

[12] *Stratenwerth*, Strafrecht AT, § 1, p. 27, Rn. 16.

[13] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 247.

[14] *Ibid.*

[15] See Greece I.B.1.

[16] *Pieth*, Strafprozessrecht, p. 31.

[17] See I.G.3. and I.F.2.

[18] Botschaft StPO, p. 1109/Message StPO, p. 1083.

[19] *Hauser* et al., Strafprozessrecht, p. 13, Rn. 12; *Pieth*, Strafprozessrecht, p. 26.

[20] *Piquerez*, Procédure pénale suisse, p. 48, Rn. 141; *Zimmerlin*, Verzicht auf Verfahrensrechte, p. 10, Rn. 23.

[21] Schweizerische Strafprozessordnung vom 5. Oktober 2007/Code de procédure pénale suisse du 5 octobre 2007, SR/RS 312.0.

[22] *Schubarth*, Grossinquisitor, pp. 527–537.

[23] *Riklin*, in: Piermarco Zen-Ruffinen, p. 115 with further references and examples from several cantons.

[24] *Pieth*, Strafprozessrecht, p. 31.

joined the UN in September 2002. The principle of neutrality prevents Switzerland from becoming a member of a military alliance such as NATO.[45] In 1996, however, Switzerland became a member of the Partnership for Peace, a program that supports cooperation with NATO.[46]

Switzerland is a founding member of the Organization for Economic Cooperation and Development (OECD). The OECD put Switzerland on the grey list of uncooperative tax havens in April 2009, a move that has had a major effect on administrative assistance in tax matters.[47] Switzerland is also a member of the Organization for Security and Cooperation in Europe (OSCE).

Swiss criminal law is as well as the criminal law of other member states of the Council of Europe influenced not only by the case law of the European Court of Human Rights (ECtHR), that directly affects Switzerland[48] but factual also by the case law of the ECtHR, that affects other countries.[49] Insofar the ECtHR has a harmonizing impact on the (criminal) law of the member states of the Council of Europe. Even though Switzerland is not a member state of the European Union (EU), EU legal provisions also have some influence on Swiss criminal law via bilateral treaties between Switzerland and the EU – especially through the Schengen cooperation[50] – but also via the Council of Europe, which no longer just influences legal provisions of the EU but also copies provisions of the EU into its own legal framework. In this way, Switzerland adopts quasi EU-provisions which are not part of the Schengen-Acquis and which Switzerland would thus not be obliged to adopt such as for instance provisions on the creation of joint investigation teams.[51]

Switzerland is a founding member of the International Criminal Police Organization (Interpol).[52] As is not a member of the EU, it cannot belong to the European Police office Europol or the European Union's Judicial Cooperation Unit Eurojust.

[45] Sicherheitspolitischer Bericht 2010, pp. 5163–5164/Rapport sur la politique de sécurité 2010, p. 4712.

[46] For signatory countries of the Partnership of Peace, see http://www.nato.int/pfp/sig-cntr.htm [last visited July 2013].

[47] See I.B.2.b.

[48] Swiss cases of the ECtHR are available on the website of the Federal Supreme Court: http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm [last visited July 2013].

[49] On the impact of the ECHR (implemented SR/RS 0.101) on Swiss criminal law, see *Pieth*, ZSR 131 (2012) II, 285–293; *Trechsel*, ZStW 100 (1988), 667–711.

[50] See I.B.2.b.

[51] Art. 20 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ratified by Switzerland), which encompasses a provision for joint investigation teams, is a copy of Art. 1 Council Framework Decision of 13 June 2002 on joint investigation teams respectively of Art. 13 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

[52] See Interpol Member States at http://www.interpol.int/Member-countries/World [last visited July 2013].

Swiss authorities and the aforementioned agencies have adopted cooperation agreements.[53] Switzerland also cooperates with the European Anti-Fraud Office (*Office Européen de Lutte Anti-Fraude*, OLAF).[54]

b) Signature and ratification of international treaties and conventions

Switzerland has ratified various international treaties and conventions that have had an impact on criminal law. Following the monistic principle *(Monismus/monisme)*, ratified international law is an integral part of Swiss law. Self-executing provisions are directly applicable and do not need to be put in concrete terms by the legislature. Three conditions need to be fulfilled for a provision to be self-executing: it must directly regulate rights and duties of individuals; it must be sufficiently specific to constitute an appropriate legal basis for authoritative adjudication; and it must address the authorities responsible for applying the law.[55] These conditions are met in treaties on mutual legal assistance.[56] Non self-executing provisions such as those included in legal instruments of the UN[57] must be put in concrete terms by the legislature.

– *International humanitarian law*

International criminal law, of which provisions of international humanitarian law are an essential branch, is still an emerging area of law.[58] Switzerland has a humanitarian tradition and is the depositary state of the Geneva Conventions and its additional protocols. Even though international humanitarian law existed long before the modern conventions were ratified, *Henry Dunant* of Geneva launched modern humanitarian law. He witnessed countless wounded left to die after the battle of Solferino in 1859 and was shocked by the suffering of the wounded and the lack of help for them. In his book "A memory of Solferino," he proposed an international convention on the neutrality of field military hospitals and the creation of a permanent organization to provide practical aid to the war wounded. The first proposal led to the conclusion of the first Geneva Convention in 1864, which was in force for more than 40 years; the second proposal led to the foundation of the Red Cross in 1863.[59] The latter took the initiative for the Geneva Conventions I to IV,[60] which

[53] See 2.b. below

[54] See 2.b. below.

[55] BGE 120 Ia 1, 11 E. 5b; BGE 124 III 90, 91 E. 3a; *Fleiner* et al., Swiss Constitutional Law, pp. 43–44 § 1 Rn. 61; *Tschannen*, Staatsrecht § 9, pp. 156–158, Rn. 4–9.

[56] *Donatsch* et al., Internationale Rechtshilfe, p.16.

[57] *Ibid.*, p. 15.

[58] Botschaft Völkermord, pp. 5329–5331/Message génocide, pp. 4913–4915; Botschaft Römer Statut, p. 394/Message Statut de Rome, p. 362.

[59] *Gasser*, Einführung, pp. 11–13.

were concluded in 1949. The first and second additional protocol followed in 1977, the third in 2005.[61] Switzerland has also ratified the Convention on the Prevention and Punishment of the Crime of Genocide[62] and the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954[63] and its two protocols of 1954 and 1999.[64] It cooperates with international criminal courts[65] and took an active part in establishing the International Criminal Court (ICC);[66] it ratified the Rome Statute of the ICC in 2001.[67]

Switzerland's crime definitions have been influenced by various international agreements – including the Geneva Conventions and their additional protocols and the Genocide Convention – that oblige the individual states to criminalize certain actions. Even though the Rome Statute does not contain such direct obligations, it is in the interest of the individual states to avoid gaps in the law regarding the definition of criminal offenses that fall within the jurisdiction of the ICC in order to make sure that they retain primary responsibility.[68] The implementation of the Genocide Convention and the Rome Statute led to amendments of the Criminal Code, the Code of Criminal Procedure, the Military Criminal Code (*Militärstrafgesetz*, MStG[69]), the Military Criminal Procedure Code (*Militärstrafprozess*, MStP[70]), and the Federal Act on International Mutual Assistance in Criminal Matters.[71] Amendments to the Criminal Code include the introduction of provisions on genocide and crimes against humanity in new title twelve^{bis} and new titles twelve^{ter} (war crimes) and twelve^{quater} (common provisions for titles twelve^{bis} and twelve^{ter}).

[60] SR 0.518.12; 0.518.23; 0.518.42; 0.518.51. They were all ratified by Switzerland on 31 March 1950 and entered into force on 21 Oct. 1950. For data such as ratification dates of international treaties ratified by Switzerland, see the database of the Federal Department of Foreign Affairs: http://www.eda.admin.ch/eda/de/home/topics/intla/intrea/dbstv/index_t.html [last visited July 2011].

[61] First additional protocol: SR 0.518.521; second additional protocol: SR 0.518.522; third additional protocol: SR 0.518.523. The first and the second additional protocol were ratified on 17 Feb. 1982 and entered into force on 17 Aug. 1982. The third additional protocol was ratified on 14 July 2006 and entered into force on 14 Jan. 2007. See also *Gasser*, Einführung, pp. 16–20.

[62] SR 0.311.11, ratified on 7 Sept. 2000, entered into force on 6 Dec. 2000.

[63] SR 0.520.3, ratified on 15 May 1962, entered into force on 15 Aug. 1962.

[64] Protocol of 1954: SR 0.520.32, ratified on 15 May 1962, entered into force on 15 Aug. 1962; protocol of 1999: SR 0.520.33, ratified on 9 July 2004, entered into force on 9 Oct. 2004. For an overview of all conventions and protocols signed and ratified by Switzerland, see International Committee of the Red Cross at http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=CH#S [last visited July 2013].

[65] See the Federal decree on Cooperation with International Courts for the Prosecution of Serious Violations of Humanitarian International Law (Bundesgesetz vom 21. Dezember 1995 über die Zusammenarbeit mit den internationalen Gerichten zur Verfolgung schwerwiegender Verletzungen des humanitären Völkerrechts, SR 351.20, in force until 31 Dec. 2013) and the Federal Act on Cooperation with the International Criminal Court (Bundesgesetz vom 22. Juni 2001 über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, SR 351.6).

[66] Botschaft Römer Statut, p. 404/Message Statut de Rome, p. 372.

[67] SR 0.312.1, ratified on 12 Oct. 2001, entered into force on 1 July 2002.

[68] Botschaft Römer Statut, pp. 450–451/Message Statut de Rome, pp. 417–418.

[69] Militärstrafgesetz vom 13. Juni 1927/Code pénal militaire du 13 juin 1927, SR/RS 321.0.

[70] Militärstrafprozess vom 23. März 1979/Procédure pénale militaire du 23 mars 1979, SR/RS 322.1.

[71] On the amendments, see Bundesgesetz über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs, AS 2010 4963. On war crimes proceedings in Switzerland in general, see *Ziegler* et al., Kriegsverbrecherprozesse.

– *Human rights*

International human rights treaties and conventions have had an impact on Swiss criminal law as well. Switzerland has ratified the European Convention on Human Rights[72] as well as its additional Protocols 6, 7, 11, 13, and 14.[73] It has also ratified the International Covenant on Economic, Social and Cultural Rights,[74] the International Covenant on Civil and Political Rights,[75] the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[76] the Slavery Convention of 1926,[77] and the International Convention Against the Taking of Hostages of 1979.[78]

– *Terrorism, organized crime, and white collar crime*

Criminal law is also influenced by international treaties and conventions on terrorism, organized crime, and white collar crime. Switzerland has ratified conventions on crimes against air transportation,[79] on organized crime (such as the UN Convention against Transnational Organized Crime[80]), and on white collar crime (such as the OECD Convention on Combating Bribery of Foreign Officials in In-

[72] SR 0.101, ratified on 28 Nov. 1974 and entered into force the same day.

[73] Additional Protocol 6: SR 0.101.06, ratified on 13 Oct. 1987, entered into force on 1 Nov. 1987; additional protocol 7: SR 0.101.07, ratified on 24 Feb. 1988, entered into force on 1 Nov. 1988; additional protocol 11: SR 0.101.09, ratified on 13 July 1995, entered into force on 1 Nov. 1998; additional protocol 13: SR 0.101.093, ratified on 3 May 2002, entered into force on 1 July 2003; additional protocol 14: SR 0.101.094, ratified on 25 Apr. 2006, applied on a provisional base since 1 June 2009.

[74] SR 0.103.1, ratified on 18 June 1992, entered into force on 18 Sept. 1992.

[75] SR 0.103.2, ratified on 18 June 1992, entered into force on 18 Sept. 1992.

[76] SR 0.105, ratified on 2 Dec. 1986, entered into force on 26 June 1987.

[77] SR 0.311.37, ratified and entered into force on 1 Nov. 1930.

[78] SR 0.351.4, ratified on 5 March 1985, entered into force on 4 Apr. 1985.

[79] These conventions are found in the Classified Compilation of Swiss Federal Legislation with the numbers SR 0.748.710.1–SR 0.748.710.933.6, they were ratified and entered into force from 1970 to 2008.

[80] SR 0.311.54, ratified on 27 Oct. 2006, entered into force on 26 Nov. 2006.

ternational Business Transactions[81]). It has also ratified the UN Convention against Corruption.[82] The Council of Europe Convention on Cybercrime, which entered into force on 1 January 2012, has also influenced the Criminal Code and the Federal Act on International Mutual Assistance in Criminal Matters.[83] Switzerland has engaged in serious efforts to prevent money laundering since the 1980s. However, under Swiss law, it remains the case that only felonies can be predicate offenses to money laundering. As a result of international pressure, offenses are sometimes "upgraded" to felonies.[84]

Amendments to the Criminal Code concerning crimes in connection with terrorism or organized crime – especially Arts. 260ter and 260^{quinquies} StGB (criminal organization and financing terrorism) – have often been criticized for not being in accordance with Swiss criminal policy.[85] In addition, they have not had the desired effect domestically: there are hardly any convictions.[86] The provisions do, however, play a huge role in cases involving mutual legal assistance.

– *Mutual legal assistance and judicial cooperation in criminal matters*

Mutual assistance provisions are found mainly in the Mutual Assistance Act (*Rechtshilfegesetz*, IRSG[87]), in the Mutual Assistance Ordinance (*Rechtshilfeverordnung*, IRSV[88]), in the Federal Act on the State Treaty with the United States of America on Mutual Legal Assistance in Criminal Matters *(Bundesgesetz zum Staatsvertrag mit den Vereinigten Staaten von Amerika über gegenseitige Rechtshilfe in Strafsachen*[89]*)*, and in several bilateral agreements between Switzerland and

[81] SR 0.311.21, ratified on 31 May 2000, entered into force on 30 July 2000.

[82] SR 0.311.56, ratified on 24 Sept. 2009, entered into force on 24 Oct. 2009. On further international instruments to fight corruption and their impact on Swiss criminal law, see *Pieth*, ZSR 131 (2012) II, pp. 254–267.

[83] Botschaft Cyberkriminalität, pp. 4702–4743/Message cybercriminalité, pp. 4280–4318.

[84] *Pieth*, ZSR 131 (2012) II, pp. 245–254.

[85] *Forster*, ZStrR 4/2003, 441; Niggli/Wiprächtiger-*Fiolka*, Art. 260^{quinquies} StGB, pp. 1735–1736, Rn. 12; Trechsel/Pieth-*Trechsel/Vest*, Art. 260ter StGB, p. 1186, Rn. 2.

[86] The convictions regarding Art. 260ter StGB were analyzed by *Zanolini*, in: Mühlemann/Mannhart (eds.), Freiheit ohne Grenzen, pp. 227–258. Statistics may be downloaded: http://www.bfs.admin.ch/bfs/portal/de/index/themen/19/03/03/key/straftaten/delikte_im_einzelnen.html [last visited July 2013].

[87] Bundesgesetz vom 20. März 1981 über internationale Rechtshilfe in Strafsachen/Loi fédérale du 20 mars 1981 sur l'entraide internationale en matière pénale, SR/RS 351.1.

[88] Verordnung vom 24. Februar 1982 über internationale Rechtshilfe in Strafsachen/Ordonnance du 24 février 1982 sur l'entraide internationale en matière pénale, SR/RS 351.11.

[89] Bundesgesetz vom 3. Oktober 1975 zum Staatsvertrag mit den Vereinigten Staaten von Amerika über gegenseitige Rechtshilfe in Strafsachen/Loi fédérale du 3 octobre 1975 relative au traité conclu avec les Etats-Unis d'Amérique sur l'entraide judiciaire en matière pénale, SR/RS 351.93.

other countries. The Criminal Code and the Criminal Procedure Code include few provisions regarding mutual assistance in criminal matters. Even though extradition treaties between continental and common law states have existed for a long time, the aforementioned State Treaty with the United States was the first bilateral treaty between two such jurisdictions to cover mutual assistance. It successfully overcame difficulties regarding the differences in the criminal procedure of the two countries.[90] Switzerland has also ratified the multilateral Council of Europe Convention on Mutual Legal Assistance and its second additional protocol; it has not, however, ratified the first additional protocol, which enables mutual assistance for fiscal offenses.

Switzerland makes a distinction between tax evasion, which is only a contravention *(Übertretung/contravention)* and is sanctioned with a fine *(Busse/amende)*, and tax fraud, which is a misdemeanor *(Vergehen/délit)* and is sanctioned with imprisonment *(Freiheitsstrafe/peine privative de liberté)*.[91] According to Art. 3 para. 3 IRSG, the country only provides mutual legal assistance in cases of tax fraud (not in cases of tax evasion). The advocated extension of the Mutual Assistance Act to tax evasion and the discussion of the ratification of the respective additional protocols to the Mutual Legal Assistance Convention were suspended by the Federal Council in 2013. A new discussion of these matters will be coordinated with the upcoming revision of the criminal tax law and the implementation of recommendations promoted by the Financial Action Task Force,[92] an intergovernmental body that has developed a series of recommendations recognized as the international standard for combating money laundering and other threats to the integrity of the international financial system.[93]

Administrative assistance *(Amtshilfe/entraide administrative)* was not provided for enforcement of domestic laws concerning taxes in the framework of double tax agreements, either, except in the information exchange with the United States.[94] In order to get its name removed from the OECD's grey list of uncooperative tax havens, the Federal Council decided to adopt the standard on administrative assistance in tax matters in accordance with Art. 26 of the OECD Model Tax Convention and concluded new double tax agreements with various countries.[95] On 1 February 2013, the Federal Act on International Administrative Assistance in Tax

[90] *Schultz*, in: Eser/Lagodny, Principles, pp. 311–316.

[91] *Behnisch/Capus*, ZSR 129 (2010), 573, 578–588.

[92] www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2013/2013-02-200.html [last visited July 2013].

[93] http://www.fatf-gafi.org/pages/aboutus/ [last visited July 2013].

[94] *Behnisch/Capus*, ZSR 129 (2010), 576.

[95] Federal Department of Foreign Affairs, thematic domains with the OECD at http://www.eda.admin.ch/eda/en/home/topics/intorg/oecd/oecdfi.html [last visited July 2013].

Matters (*Steueramtshilfegesetz*, StAhiG[96]) entered into force. It does not provide for automatic information exchange, but it can approve group requests and not only individual request (Art. 4 para. 1 StAhiG). However, mutual assistance will be declined if the evidence of a foreign tax lawsuit was obtained illegally, for example, by buying a CD with illegally obtained data on names and account balances of alleged tax evaders (Art. 7 lit. c StAhiG).

Switzerland is not a member state of the European Union. However, it cooperates closely with the EU within the framework of two sets of bilateral treaties (a third set was under negotiation in 2013). As a Schengen member state, it is especially committed to a dynamic cooperation.[97] According to Art. 2 para. 3 Schengen Association Agreement (*Schengen-Assoziierungsabkommen*, SAA),[98] Switzerland is obliged to adopt the developments of the Schengen-Acquis. Furthermore, it undertakes to refrain from invoking its reservations and declarations made when ratifying the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters in so far as they are incompatible with the Schengen Association Agreement.[99] Switzerland can contribute during the decision-shaping phase of Schengen provisions; it cannot, however, participate in decision-making.[100] In recent years, the Council of Europe also started copying provisions of the EU which on this way become applicable in Switzerland as well, even if they were not part of the Schengen-Acquis.[101] Apart from the Schengen cooperation, Switzerland has also concluded an agreement with Europol[102] and an agreement with Eurojust, which entered into force in July 2011. Cooperation with OLAF is based on the agreement on the fight against fraud,[103] which was concluded in the framework of the bilateral treaties between Switzerland and the EU.

[96] Loi fédérale sur l'assistance administrative internationale en matière fiscale (SR/RS 672.5).

[97] For more information on the relationship between the EU and Switzerland, see *Pieth*, ZSR 131 (2012) II, pp. 268–273.

[98] Abkommen vom 26. Oktober 2004 zwischen der Schweizerischen Eidgenossenschaft, der Europäischen Union und der Europäischen Gemeinschaft über die Assoziierung dieses Staates bei der Umsetzung, Anwendung und Entwicklung des Schengen-Besitzstands (mit Anhängen und Schlussakte)/Accord du 26 octobre 2004 entre la Confédération suisse, l'Union européenne et la Communauté européenne sur l'association de la Confédération suisse à la mise en œuvre, à l'application et au développement de l'acquis de Schengen (avec annexes et acte final), SR/RS 0.362.31.

[99] Declaration by Switzerland on the application of the European Convention on Mutual Assistance in Criminal Matters and the European Convention on Extradition.

[100] *Gless*, in: Cassani et al., SZIER 1/2009, 58.

[101] See 2.a.

[102] *Zurkinden*, Zusammenarbeit der Schweiz mit Europol, pp. 259–285.

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C. Constitutional parameters of criminal law

1. Supra-statutory rules as repositories of criminal law principles

The fundamental law forming the legal foundation for all other legislation is the Federal Constitution of the Swiss Confederation (*Bundesverfassung*, BV, hereinafter the Constitution[1]). The Constitution derives from the first constitution of the modern Swiss state: the constitution of 1848. The constitution of 1848, in turn, was the result of diverse developments and a compromise between various approaches. It transformed the Federation of States into a Federal State[2] and adopted ideas of the Helvetic Republic (1798–1803), including national unity, a written constitution, Swiss citizenship, the sovereignty of the people, the separation of powers, the two-chamber parliament, the collegial government, and the protection of fundamental freedoms.[3] The organization of the state as established in the constitution of 1848 has remained the standard to this day.[4]

Federalism as established later during the Mediation (1803–1813), however, was definitive,[5] and some of the deficiencies of the constitution of 1848 (e.g., the lack of equality under the law for non-Christians) were addressed in the partial amendment of 1866.[6] Around this time, some of the cantons started to grant their people enhanced political rights.[7] In 1874, a total revision of the constitution was adopted: direct democracy was enhanced, more fundamental freedoms were granted, and the Confederation was granted more competences.[8] The constitution was amended frequently in areas such as the allocation of power between the cantons and the Confederation, political rights, and fundamental rights.[9] The goal of the total revision of 1999 was to update existing constitutional law and to undertake institutional alterations.[10]

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[1] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101.

[2] *Aubert/Grisel*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 16.

[3] *Kley*, Verfassungsgeschichte, p. 213.

[4] *Ibid.*, p. 232.

[5] *Ibid.*, p. 215.

[6] Ehrenzeller et al.-*Kley*, Geschichtliche Einleitung, pp. 11–12, Rn. 21.

[7] *Dändliker/Bandle*, Schweizergeschichte, pp. 153–155.

[8] *Aubert/Grisel*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 17; *Fleiner* et al., Swiss Constitutional Law, p. 24 § 4 Rn. 16.

[9] Botschaft Bundesverfassung, pp. 17–19/Message constitution, pp. 16–19. For information concerning the power to amend the Constitution, see I.A.4.

[10] Botschaft Bundesverfassung, pp. 8–10/Message constitution, pp. 8–10.

The current Constitution is amended fairly often by popular initiative *(Volksinitiative/initiative populaire*[11]*)*.[12] Nonetheless, Switzerland is said to have one of the most stable political systems in the world.[13] Characteristics of the Constitution are the rule of law, the federal principle, the welfare state, and the democratic principle.[14] Art. 2 BV[15] describes the aims of the Swiss Confederation as follows:

Art. 2 BV [Aims]

[1] The Swiss Confederation shall protect the liberty and rights of the people and safeguard the independence and security of the country.

[2] It shall promote the common welfare, sustainable development, internal cohesion and cultural diversity of the country.

[3] It shall ensure the greatest possible equality of opportunity among its citizens.

[4] It shall be committed to the long-term preservation of natural resources and to a just and peaceful international order.

Violations of the Constitution by decisions of cantonal or lower level Confederation authorities may be challenged before the Federal Supreme Court *(Bundesgericht/Tribunal fédéral)*. However, legislative acts (ordinances, regulations) of the Federal Council may only be challenged in connection with an actual dispute arising from the application of the act. Federal acts as formal legislative acts of the Federal Assembly are intentionally not subject to any judicial control in order to ensure that judges cannot invalidate a law based on the parliament's interpretation of the Constitution or a law adopted by the people by way of referendum.[16] Several attempts to introduce constitutional jurisdiction have been unsuccessful; such an attempt was declined most recently by the parliament in 2012.[17]

As Switzerland follows the monistic principle, international law that has been ratified is an integral part of national law.[18] Binding international law *(zwingendes Völkerrecht/droit international contraignant)* takes precedence over the Constitution (Arts. 139 para. 3, 193 para 4 and 194 para. 2 BV). Other international law must be respected by the Confederation and the cantons (Art. 5 para. 4 BV). As a rule, international law has precedence over federal acts and ordinances, but its precedence over the Constitution is disputed.[19] To avoid conflicts between national and international law, national law must be interpreted in accordance with international law *(Grundsatz der völkerrechtskonformen Auslegung/principe de l'interprétation conforme)*.[20]

International law affects primarily the Constitution's fundamental rights.[21] Switzerland joined the European Convention on Human Rights (ECHR)[22] and has also ratified the International Covenant on Economic, Social and Cultural Rights[23] and the International Covenant on Civil and Political Rights.[24] Many of the fundamental rights granted in these international conventions were adopted formally by the Constitution of 1999.[25]

2. Fundamental rights and freedoms and the criminal law

Title Two of the Constitution (and the ECHR) guarantee a series of fundamental freedoms *(Freiheitsrechte/libertés fondamentales)*.[26] They include the following:

- Human dignity (Art. 7 BV);
- Right to life and to personal freedom (Art. 10 BV, Arts. 2–5 ECHR and its additional protocols 6 and 13);
- Right to privacy (Art. 13 BV, 8 ECHR);
- Right to marry and to have a family (Art. 14 BV, Arts. 8 and 12 ECHR);
- Freedom of religion and conscience (Art. 15 BV, Art. 9 ECHR);
- Freedom of expression and of information and freedom of the media (Arts. 16 and 17 BV, Art. 10 ECHR);
- Freedom to use any language (Art. 18 BV);

[11] In the following, original Swiss legal expressions in German and French are included in parentheses. Italian terms are omitted in the interest of simplicity. Translations and explanations of Swiss legal expressions can be found in the termdat database of the Federal Chancellery at www.termdat.ch [last visited July 2013].

[12] For an overview of successful popular initiatives, see Bundeskanzlei at http://www.admin.ch/ch/d/pore/vi/vis_2_2_5_3.html [last visited July 2013]. For more on popular initiatives, see I.A.4.

[13] *Fleiner* et al., Swiss Constitutional Law, p. 24 § 4 Rn. 18.

[14] Botschaft Bundesverfassung, pp. 14–17/Message constitution, pp. 14–16.

[15] All translations of provisions of the Swiss Constitution in this chapter are taken from the unofficial translation provided by the Swiss Confederation, available at http://www.admin.ch/ch/e/rs/c101.html [last visited July 2013].

[16] *Aubert/Grisel*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 24.

[17] For arguments in favor of constitutional jurisdiction, see, e.g., *Looser*, Jusletter 21 May 2012.

[18] See I.B.2.b.

[19] Ehrenzeller et al.-*Odendahl*, Bundesverfassung und Völkerrecht in Wechselbeziehung, pp. 36–37, Rn. 46; *Epiney*, Jusletter 18 March 2013; *Herzig*, Jusletter 8 April 2013.

[20] Botschaft Bundesverfassung, p. 135/Message constitution, p. 137; BGE 117 Ib 367, 373 E. 2e, 2f; *Tschannen*, Staatsrecht § 9, pp. 168–169, Rn. 36–39.

[21] Ehrenzeller et al.-*Odendahl*, Bundesverfassung und Völkerrecht in Wechselbeziehung, p. 38, Rn. 50.

[22] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1951. Implemented in Switzerland SR/RS 0.101.

[23] Implemented in Switzerland SR 0.103.1.

[24] Implemented in Switzerland SR 0.103.2.

[25] Botschaft Bundesverfassung, pp. 34, 44, 47, 73/Message constitution, pp. 34, 44, 47, 74.

[26] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, pp. 110–229, Rn. 335a–737.

- Academic freedom and freedom of artistic expression (Arts. 20 and 21 BV, Art. 10 ECHR);
- Freedom of assembly (Art. 22 BV, Art. 11 ECHR);
- Freedom of association and right to form professional associations (Arts. 23 and 28 BV, Art. 11 ECHR);
- Freedom of domicile (Art. 24 BV);
- Protection against expulsion, extradition, and deportation (Art. 25 BV, Art. 3 ECHR);
- Guarantee of ownership (Art. 26 BV);
- Economic freedom (Art. 27 BV).

Fundamental freedoms may be restricted if the conditions set out in Art. 36 BV are met:

Art. 36 BV [Restrictions on fundamental rights]

[1] Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

[2] Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.

[3] Any restrictions on fundamental rights must be proportionate.

[4] The essence of fundamental rights is sacrosanct.

3. Other supra-statutory norms relevant to criminal law and criminal procedure

Additional supra-statutory norms and fundamental rights relevant to criminal law are the right to equality before the law and other general guarantees *(Rechtsgleichheit und weitere rechtsstaatliche Garantien/égalité juridique et autres garanties générales)*.[27]

Equality before the law (Art. 8 BV) prohibits discrimination. However, discrimination may be justified if there are qualified objective reasons and if the discrimination is proportionate.[28] The prohibition of discrimination according to Art. 14 ECHR is only applicable in the framework of the rights and freedoms set forth in the ECHR.[29] The protection against arbitrary state conduct and the principle of good faith (Art. 9 BV) cannot be restricted.[30] Procedural guarantees (Arts. 29–32 BV, Arts. 5, 6, 7 and 13 ECHR)[31] include the right to equal and fair treatment, the right to be heard, the right to free legal assistance for people without sufficient means, and the right to have one's case determined by a judicial authority that is legally constituted, competent, independent, and impartial. Court hearings and the delivery of judgments usually are public.

[27] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, pp. 231–290, Rn. 738–906.

[28] Ehrenzeller et al.-*Schweizer*, Art. 8 BV, p. 202, Rn. 48; *Kiener/Kälin*, Grundrechte, pp. 362–363.

[29] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, p. 232, Rn. 742.

[30] *Ibid.*, p. 98, Rn. 303b; *Kiener/Kälin*, Grundrechte, pp. 337 and 344.

In addition, the Constitution encompasses the following specific criminal procedural guarantees: no one may be deprived of his or her liberty other than in the circumstances and in the manner provided for by law (Art. 31 para. 1 BV); persons deprived of their liberty have the right to be notified without delay in a language they can understand of the reasons for the detention and to be informed of their rights (Art. 31 para. 2 BV); persons in pre-trial detention have the right to be brought before a court without delay (Art. 31 para. 3 BV); and finally, a person who has been deprived of his or her liberty by a body other than a court has the right to have recourse to a court at any time, whereby the legality of the detention must be decided as quickly as possible by the court (Art. 31 para. 4 BV). The criminal procedural guarantees set out in Art. 32 BV include the presumption of innocence, the right of the accused to be notified as quickly and comprehensively as possible of the charge brought against him or her, the right of the accused to be given the opportunity to assert his or her rights to a proper defense, and the right of every convicted person to have his or her conviction reviewed by a higher court (with the exception of cases in which the Federal Supreme Court sits at first instance).

Some procedural guarantees, such as the independence and impartiality of a court, cannot be restricted. Others, such as access to files, may be restricted as long as the restrictions comply with Art. 36 BV.[32]

Most of the fundamental rights are relevant to the Criminal Code (*Strafgesetzbuch*, StGB)[33] and the Code of Criminal Procedure (*Strafprozessordnung*, StPO).[34] The execution of punishments and measures, in particular, always constitutes limitations on fundamental freedoms.[35] Art. 74 StGB explicitly states that "the human dignity of the prison inmates or of the inmates of an institution for the execution of measures must be respected. Their rights may only be limited to the extent that that is required for the deprivation of their liberty and their co-existence in the penal

[31] For more on these rights, see I.D.4.

[32] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, pp. 279–280, Rn. 869–869d; *Kiener/Kälin*, Grundrechte, pp. 407–408.

[33] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0.

[34] Schweizerische Strafprozessordnung vom 5. Oktober 2007/Code de procédure pénale suisse du 5 octobre 2007, SR/RS 312.0.

[35] *Schwarzenegger* et al., Strafrecht II, pp. 2–5.

institution."[36] The death penalty is prohibited according to Art. 10 para. 1 BV. Torture and any other form of cruel, inhuman or degrading treatment or punishment are prohibited according to Art. 10 para. 3 BV. These prohibitions are absolute. As a consequence, Switzerland does not extradite individuals to countries that apply the death penalty unless the country guarantees that in the particular case the death penalty will not be proposed, imposed, or executed, and it is certain that the country will comply with its guarantee.[37] The right to life according to Art. 2 ECHR also requires an effective judicial system including criminal provisions with a deterrent effect.[38] Further obligations for an effective punishment and deterrence of rape result from Arts. 3 and 8 ECHR.[39] Examples of the relevance of fundamental rights to criminal procedure are also found easily: The freedom to use any language according to Art. 18 BV, for instance, facilitates the mounting of an effective defense.[40] The influence of the ECHR led to an expansion in the unified Code of Criminal Procedure of the rights of the suspect in preliminary proceedings *(Vorverfahren/procédure préliminaire)*.[41]

Several constitutional norms are put into concrete terms by legislation. According to Art. 123 BV, the Confederation is responsible for legislation in the field of substantive criminal law as well as in the field of procedural criminal law. However, the Confederation did not gain legislative power for the latter until recently.[42] Additional constitutional norms relevant to the StGB and the StPO are the principle of legality (Arts. 5 para. 1 and 31 para. 1 BV, Art. 7 ECHR; Art. 1 StGB; Art. 7 StPO)[43] and the principle of proportionality (Art. 5 para. 2 BV; e.g., Art. 56 para. 2 or Art. 70 para. 2 StGB; e.g., Arts. 200, 269 para. 1 lit. c, or Art. 282 para. 1 lit. b StPO).

According to Art. 162 para. 2 BV, the law may provide for immunity. Members of parliament, for example, have some privileges which may spare them from prosecution (Arts. 17 and 20 Parliament Act, *Parlamentsgesetz*, ParlG[44]).[45] Immunity rules for members of the Federal Council are identical to those enjoyed by members of parliament; they, too, may be spared from prosecutions (Art. 14 Government Liability Act, *Verantwortlichkeitsgesetz*,[46] Art. 61a Government and Administration Organisation Act, *Regierungs- und Verwaltungsorganisationsgesetz*[47]).[48] Cantons can also establish immunity for members of their governments and for legislative and judicial authorities (Art. 7 para. 1 StPO).

[36] The translation of the provision of the Swiss Criminal Code is taken from the unofficial translation provided by the Swiss Confederation, available at http://www.admin.ch/ch/e/rs/c311_0.html [last visited July 2013].

[37] *Kiener/Kälin*, Grundrechte, pp. 119–120.

[38] *Vo v. France*, 8 July 2004, § 90; *Schwarzenegger* et al., Strafrecht II, pp. 19–20.

[39] ECtHR, *MC v. Bulagria*, 4 Dec. 2003, §§ 148 ff.; *Schwarzenegger* et al., Strafrecht II, p. 20.

[40] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, p. 168, Rn. 524.

[41] *Pieth*, Strafprozessrecht, p. 31.

[42] See I.G.

[43] See II.A.

[44] Bundesgesetz vom 13. Dezember 2002 über die Bundesversammlung/Loi du 13 décembre 2002 sur l'Assemblée fédérale, SR/RS 171.10.

[45] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, pp. 519–521, Rn. 1612–1615a.

[46] Bundesgesetz vom 14. März 1958 über die Verantwortlichkeit des Bundes sowie seiner Behördemitglieder und Beamten/Loi fédérale du 14 mars 1958 sur la responsabilité de la Confédération, des membres de ses autorités et de ses fonctionnaires, SR/RS 170.32.

[47] Regierungs- und Verwaltungsorganisationsgesetz vom 21. März 1997/Loi du 21 mars 1997 sur l'organisation du gouvernement et de l'administration, SR/RS 172.010.

[48] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, pp. 531–532, Rn. 1648–1650.

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To avoid conflicts between national and international law, national law has to be interpreted in accordance with international law: BGE 117 Ib 367.

Restrictions of the right to primary school education (Art. 19 BV) are possible, if in accordance with Art. 36 BV: BGE 129 I 35.

Art. 2 ECHR requires an effective judicial system including criminal provisions, which have a deterrent effect: *Vo v. France*, 8 July 2004, § 9.

D. Fundamentals of criminal law

1. Functions of criminal law

The legal system supports the wider social system by promoting and enforcing certain kinds of conduct by means of various instruments.[1] In contrast to civil law, criminal justice does not primarily serve the enforcement of individual interests but rather tries to prevent violent private conflict resolution and to replace individual emotionality with institutionalized distance.[2] The main goal of criminal law is to reinforce legal conduct by punishing the violation of criminal statutes. Criminal law, thus, is an important means of social control and regulation.[3] The unsolved question is: what types of conduct should be enforced by means of criminal statutes?

A liberal and enlightened perception of criminal law – such as that adopted in Switzerland – precludes enforcement of morality by means of criminal statutes. Therefore, Swiss criminal law protects only certain recognized legal interests[4] *(Rechtsgüter/biens juridiques protégés)*.[5] The function of criminal law is not to protect all legal interests but rather only those whose violation is detrimental to the victim, to society as a whole, or to social peace.[6] These legal interests mirror society's values, which, in turn, do not remain constant, but evolve over time. They are particularly difficult to identify with certainty in a pluralistic society.[7]

Given the extensive interference it represents to the freedom and property of the individual, criminal law is regarded as a measure of last resort *(ultima ratio)*.[8] It can be argued, however, that Swiss criminal provisions are not always measures of last resort. In some cases, they seem instead to be fast, convenient solutions to complex problems legislated in times of general uncertainty;[9] in other cases, their enactment seems to be the result of the Europeanization and the internationalization

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[1] *Riklin*, Verbrechenslehre, p. 57, Rn. 2. For discussion of the substantive concept of the criminal offense, see II.C.1.

[2] *Jenny*, BJM 1985, 8.

[3] *Ibid.*; *Stratenwerth*, Die Straftat, § 2, pp. 31–63, Rn. 1–51.

[4] On the difficult definition of legal interests, see II.C.1. On the heterogeneous notion of the legal interest, see *Fiolka*, Rechtsgut, pp. 51–54; *Trechsel/Noll*, Strafrecht AT, p. 26.

[5] *Seelmann*, Strafrecht AT, pp. 4–5. In the following, original Swiss legal expressions are included in German and French in parentheses. Italian terms are omitted in the interest of simplicity. Translations and explanations of Swiss legal expressions can be found in the termdat database of the Federal Chancellery at http://www.termdat.ch [last visited July 2013].

[6] *Riklin*, Verbrechenslehre, p. 58, Rn. 4; *Seelmann*, Strafrecht AT, pp. 6–7.

[7] *Seelmann*, Strafrecht AT, p. 7.

[8] See 2. below.

[9] *Oberholzer*, recht 6/2002, 223–225; *Seelmann*, Strafrecht AT, p. 7.

of criminal law.[10] This is especially true of criminal provisions whose goal is to prevent the endangerment of a legal interest (as opposed to the more common goal of preventing the actual violation of the legal interest). Examples can be found in the Criminal Code (*Strafgesetzbuch*, StGB[11]) as well as in the secondary criminal law *(Nebenstrafrecht/droit pénal accessoire)*.[12] Examples from the Code include financing of terrorism and participating in or supporting a criminal organization (Art. 260^{quinquies} and Art. 260ter StGB). Examples from the secondary criminal law include drug offenses (Arts. 19–28a Narcotics Act, *Betäubungsmittelgesetz*[13]). This politicization of criminal law may lead to a decrease in the persuasive power of criminal law theory, as it is more difficult to reach legal certainty and to clarify unresolved questions with scientific arguments resulting in a prevailing view when the legislature criminalizes conduct simply because it happens to be high on the political agenda.[14]

2. Limits on criminal law imposed by the rule of law

The rule of law is expressly stated in Art. 5 of the Federal Constitution of the Swiss Confederation (*Bundesverfassung*, BV, hereinafter Constitution):[15]

Art. 5 BV [Rule of law]

[1] All activities of the state shall be based on and limited by law.

[2] State activities must be conducted in the public interest and be proportionate to the ends sought.

[3] State institutions and private persons shall act in good faith.

[4] The Confederation and the Cantons shall respect international law.[16]

The rule of law as stated in Art. 5 para. 1 BV is given concrete form by the criminal law principle of legality.[17] The substantive criminal law principle of legality

[10] See I.B.2.b.

[11] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0.

[12] See I.E.1.

[13] Bundesgesetz vom 3. Oktober 1951 über die Betäubungsmittel und die psychotropen Stoffe/Loi fédérale du 3 octobre 1951 sur les stupéfiants et les substances psychotropes, SR/RS 812.121.

[14] *Arzt*, ZStrR 4/2006, 351–356. On the developments in substantive criminal law, see I.G.2.

[15] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101.

[16] All translations of provisions of the Constitution in this chapter are taken from the unofficial translation provided by the Swiss Confederation, available at www.admin.ch/ch/e/rs/c101.html [last visited July 2013].

[17] For a detailed discussion of the principle of legality, see II.A.

(strafrechtliches Legalitätsprinzip/principe de la légalité en matière pénale), also called the principle of *nulla poena sine lege*, is stated in Art. 1 StGB. The elements of criminal conduct as well as its consequences in the form of punishments and measures must be established by law. Furthermore, there can be no offense without law, nor can unlawful sanctions be imposed on an individual.[18] It should be noted that the principle of legality has a different meaning in the context of criminal procedure.[19]

The principle of proportionality as stated in Art. 5 para. 2 BV[20] (and concretized in Art. 36 BV) manifests itself in criminal law in the principle of last resort, also called the principle of *ultima ratio*.[21] According to the principle of proportionality, a particular act can only be subject to punishment under the criminal law if less invasive means, such as administrative or civil measures, cannot prevent it.[22] It can be argued, however, that the legislature does not always abide by the principle when creating criminal provisions.[23]

Further limits on the criminal law imposed by the rule of law result from the principle of culpability as stated in Art. 47 StGB, according to which a punishment can only be imposed if the offender committed a criminal offense and if culpability can be established.[24]

3. Purposes of punishment

The purpose of punishment in Switzerland cannot be conclusively determined. There are various theories.[25] Purposes of punishment are – as in other countries – divided into absolute and relative ones. The Criminal Code does not follow one purpose exclusively but rather recognizes several, without mentioning them expressly. The absolute purpose, whose goal is to eliminate the injustice created by the offense, focuses on the past and seeks a just punishment.[26] According to Art. 47 StGB, a punishment can only be imposed if the offender committed a crim-

[18] *Riklin*, Verbrechenslehre, p. 22, Rn. 2–3.

[19] See discussion at 4. below.

[20] See I.C.3.

[21] *Hurtado Pozo*, Droit pénal, p. 15, Rn. 38; *Riklin*, Verbrechenslehre, pp. 58–59, Rn. 6–7; *Seelmann*, Strafrecht AT, p. 7; *Stratenwerth*, Die Straftat, § 3, pp. 73–74, Rn. 14.

[22] II.C.1; *Riklin*, Verbrechenslehre, pp. 58–59, Rn. 6; *Stratenwerth*, § 3, Die Straftat, pp. 73–74, Rn. 14.

[23] See I.D.1.

[24] Niggli/Wiprächtiger-*Bommer*, pre-Art. 19 StGB, p. 362, Rn. 45; *Stratenwerth*, Die Straftat, § 2, pp. 33–34, Rn. 3. See I.D.3.

[25] *Baechtold*, Strafvollzug, p. 3, Rn. 3.

[26] *Schwarzenegger* et al., Strafrecht II, pp. 6–10.

inal offense and if culpability can be established. The connection between the punishment and the culpability is a basic principle of the StGB.[27] Thus, punishment seems to expiate the committed offense.[28]

The relative purpose of punishment, in contrast, is to prevent further crime. It therefore focuses on the future and aims to influence the future behavior of an offender or of the community.[29] The relative purpose of punishment encompasses special and general prevention. Goals of special prevention include deterring the concrete offender from committing further crimes, reintegrating the offender into society, and protecting society from the offender.[30] Preventing recidivism is one of the main aspects of special prevention. Therefore, less severe sanctions with the aim of rehabilitation are imposed if certain conditions are met.[31] Art. 42 para. 1 StGB, for instance, calls for suspending the execution of certain sentences "if an unsuspended sentence does not appear to be necessary in order to deter the offender from committing further felonies or misdemeanors."[32] Also, the execution of custodial punishments aims to reintegrate the offender into society and to prevent recidivism by encouraging improvement in the offender's social behavior and in his or her ability to live without reoffending (Art. 75 para. 1 StGB).[33] General prevention is divided into negative and positive general prevention. Negative general prevention means the deterrence of all members of society from committing crime. Positive general prevention means strengthening the sense of right and wrong and the conception of fairness in the population.[34] These various theories may merge seamlessly and therefore are combined in unifying theories. In Swiss criminal law scholarship, the preventive unifying theory, which focuses on the general and special prevention of crime, is predominant.[35]

The Federal Supreme Court has endorsed all of the purposes of punishment mentioned here. Recently, however, special prevention appears to be the favored pur-

[27] Niggli/Wiprächtiger-*Bommer*, pre-Art. 19 StGB, p. 362, Rn. 45; *Stratenwerth*, Die Straftat, § 2, pp. 33–34, Rn. 3.

[28] Niggli/Wiprächtiger-*Bommer*, pre-Art. 19 StGB, pp. 362–363, Rn. 46–50; *Schwarzenegger* et al., Strafrecht II, pp. 18–19; *Stratenwerth*, Die Straftat, § 2, pp. 33–41, Rn. 3–14.

[29] *Schwarzenegger* et al., Strafrecht II, pp. 6–10.

[30] *Ibid.*, pp. 6 and 12–14; *Stratenwerth*, Die Straftat, § 2, pp. 41–44, Rn. 16–19.

[31] *Stratenwerth*, Die Straftat, § 2, p. 50, Rn. 30. See I.E.3.

[32] All translations of provisions of the Swiss Criminal Code in this chapter are taken from the unofficial translation provided by the Swiss Confederation, available at http://www.admin.ch/ch/e/rs/c311_0.html [last visited July 2013].

[33] *Schwarzenegger* et al., Strafrecht II, p. 19.

[34] *Ibid.*, pp. 11–15; *Seelmann*, Strafrecht AT, pp.24–27; *Stratenwerth*, Die Straftat, § 2, pp. 44–47, Rn. 20–24.

[35] *Schwarzenegger* et al., Strafrecht II, pp. 15–16; *Stratenwerth*, Die Straftat, § 2, pp. 49–51, Rn. 27–32.

pose – as long as it is within the constraints of general prevention.[36] According to the Federal Supreme Court, the goal of criminal punishment is first and foremost to prevent crime; punishment is not a retaliatory measure. Furthermore, the court has pointed out that the priority of general prevention over special prevention could thwart the latter whereas a priority of special prevention might weaken but would not thwart general prevention.[37]

A more recently developed theory of punishment focuses on reparation of harm. Under this theory, offenders should be afforded the opportunity to take on their obligations and be held accountable:[38] "This accountability means understanding and acknowledging the harm and taking steps to make things right."[39] Apart from reparation to victims, reparation of harm also addresses offenders' needs and has a therapeutic and reintegrative effect.[40] The integration of the victim into the theories of punishment has been criticized by some legal scholars in Switzerland, as the starting point of traditional theories of punishment is a norm violation and not a violation of a person (not all crimes have a clearly definable victim).[41] Furthermore, this approach is said to be incompatible with the preventive unifying theory: positive general prevention requires, for example, public disapproval.[42] As the victim has an interest in the investigation of injustice, the victim's role is seen in the criminal procedure.[43] The Code of Criminal Procedure (*Strafprozessordnung*, StPO[44]) contains several provisions that take the particular nature of the victim's role into account. A non-exhaustive list of victim's rights is found in Art. 117 StPO.

In any event, the Criminal Code attaches importance to reparation. Under the Code, punishment may be reduced (within the sentencing range applicable to the offense committed, Art. 47 StGB) or mitigated (below the sentencing range applicable to the offense committed, Art. 48 lit. d StGB) and, in certain cases (Art. 53 StGB), the prosecution and the courts must refrain from pursuing prosecution if reparation has been made (Art. 8 para. 1 StPO).

[36] BGE 120 IV 1, 3–5 E. 2; BGE 124 IV 246, 247–249 E. 2; BGE 129 IV 161, 163–164 E. 4.2; BGE 134 IV 1, 9–15 E. 5; Niggli/Wiprächtiger-*Bommer*, pre-Art. 19 StGB, pp. 367–369, Rn. 65–72; *Stratenwerth*, Die Straftat, § 2, p. 51, Rn. 32.

[37] BGE 129 IV 161, 164 E. 4.2 with further references.

[38] *Zehr*, Changing lenses, pp. 196–200.

[39] *Ibid.*, pp. 200–201.

[40] *Schwarzenegger* et al., Strafrecht II, pp. 14–15; *Stratenwerth*, Die Straftat, § 2, pp. 47–48, Rn. 25–26; *Zehr*, Changing lenses, p. 200.

[41] Niggli/Wiprächtiger-*Bommer*, pre-Art. 19 StGB, p. 369, Rn. 73.

[42] *Brunner/Heimgartner*, ZSR 5/2011, 621.

[43] Niggli/Wiprächtiger-*Bommer*, pre-Art. 19 StGB, p. 369, Rn. 74.

[44] Schweizerische Strafprozessordnung vom 5. Oktober 2007/Code de procédure pénale suisse du 5 octobre 2007, SR/RS 312.0.

4. Fundamental principles of criminal procedure

Some fundamental principles of criminal procedure flow directly from the Constitution (e.g., Arts. 29–32[45]) or from legal bases that take precedence over national legislation, such as the European Convention on Human Rights (ECHR)[46] (Art. 5 para. 4 BV).[47] Most of the fundamental principles of criminal procedure are addressed in a single chapter of the Code of Criminal Procedure titled "Principles of Criminal Procedure Law." Other fundamental principles appear elsewhere in the Code.[48] General procedural regulations are covered by Arts. 66–103 StPO.[49]

– *Respect for human dignity and requirement of fairness*

Human dignity as stated in Art. 7 BV and Art. 3 StPO is the most fundamental principle of criminal procedure. Among others, the principle of good faith (*Grundsatz von Treu und Glauben/principe de la bonne foi*, Art. 9 BV, Art. 3 para. 2 lit. a StPO) and the prohibition of abuse of rights (*Verbot des Rechtsmissbrauchs/l'interdiction de l'abus de droit*, Art. 9 BV, Art. 3 para. 2 lit. b StPO) derive from this fundamental principle; both must be respected by all parties to the criminal procedure.[50] The accused, for example, cannot lose his or her rights if criminal justice authorities give wrong instructions regarding legal remedies.[51] The accused, in turn, may not renounce a right and later claim that this right was breached *(venire contra factum proprium)*.[52] Furthermore all those involved in the proceedings must be treated equally and fairly (Art. 29 para. 1 BV, Art. 3 para. 2 lit. c StPO), and the obtainment of evidence through recourse to methods which violate human dignity is prohibited (Art. 3 para. 2 lit. d, Arts. 140 and 141 StPO).

– *Principles of criminal justice administration*

The principle of official investigation, according to which the investigation of criminal matters is a function of the state, is found in Art. 2 para. 1 StPO. Consequently, the administration of criminal justice may only be carried out by the criminal justice authorities designated by statute.[53] Furthermore, criminal proceedings

[45] See I.C.2.

[46] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1951. Implemented in Switzerland SR/RS 0.101.

[47] See I.B.2.b. for the effects of international treaties and conventions.

[48] *Schmid*, Handbuch, p. 27, Rn. 81–82.

[49] *Riedo* et al., Strafprozessrecht, pp. 17–18, Rn. 99.

[50] *Schmid*, Handbuch, p. 32, Rn. 91.

[51] *Riedo* et al., Strafprozessrecht, p. 23, Rn. 143 and pp. 118–119, Rn. 744–746.

[52] *Schmid*, Handbuch, pp. 33–34, Rn. 93–94 (with examples from the case law).

[53] All translations of provisions of the Swiss Code of Criminal Procedure in this chapter are taken from the unofficial English translations provided by the Swiss Confederation, available at http://www.admin.ch/ch/e/rs/c312_0.html [last visited July 2013] or from Donatsch et al.-*Summers*.

can only be initiated, carried out, and completed in the forms provided for by law (Art. 2 para. 2 StPO).[54] The criminal justice authorities are independent in applying the law and are bound solely by the law *(Prinzip der Unabhängigkeit/principe d'indépendance*, Art. 4 StPO). In order to ensure an independent judiciary, the separation of powers *(Gewaltenteilung/séparation des pouvoirs)* has to be ensured.[55]

If criminal justice authorities are aware of or have sufficient grounds for suspecting that a criminal offense has been committed, they are obliged to institute and carry out criminal proceedings (Art. 7 para. 1 StPO). This principle of legality in criminal procedure *(strafprozessuales Legalitätsprinzip/principe de la légalité en procédure pénale)*[56] flows from the requirement of equality before the law as stated in Arts. 8 and 29 para. 1 BV *(Gleichheitsgebot/principe de l'égalité devant la loi)* and is stated in Art. 7 StPO. However, exceptions to the principle of legality are possible in accordance with Art. 8 StPO, which establishes the moderate principle of discretionary prosecution *(gemässigtes Opportunitätsprinzip/principe de l'opportunité modérée)*.[57] If, according to this principle, the federal law so provides, namely, in accordance with the conditions set out in Art. 52 StGB (culpability and consequences of offense negligible), Art. 53 StGB (offender has made reparation), and Art. 54 StGB (offender seriously affected by act), the public prosecution and the courts must refrain from pursuing prosecution. Further reasons for waiver of prosecution are set out in Art. 8 paras. 2 and 3 StPO.

– *Principles relating to the accused and other parties involved*

The right to be heard *(Anspruch auf rechtliches Gehör/droit d'être entendu)* is stated in Art. 3 para. 2 lit. c StPO and is of great practical importance for the entire criminal process. It serves as a starting point for the rights of the parties.[58] The right to be heard is an adversarial element of the criminal procedure.[59] According to Art. 107 para. 1 StPO, it encompasses the right to inspect case documents, to par-

[54] For an enumeration of these forms, see *Piquerez*, Procédure pénale suisse, p. 141, Rn. 415.

[55] *Schmid*, Handbuch, p. 52, Rn. 134.

[56] For more details on the principle of legality in criminal procedure, see Botschaft StPO, p. 1130/Message StPO, p. 1106; Niggli/Wiprächtiger-*Riedo/Fiolka*, Art. 7 StPO, pp. 92–93, Rn. 1–36; *Schmid*, Handbuch, pp. 68–69, Rn. 178–182. For the substantive criminal law principle of legality, see I.D.1. and II.A.

[57] For more details on the moderate principle of discretion, see Botschaft StPO, pp. 1131–1132/Message StPO, pp. 1106–1107; Niggli/Wiprächtiger-*Fiolka/Riedo*, Art. 8 StPO, pp. 115–116, Rn. 1–5; *Pieth*, Strafprozessrecht, pp. 39–40; *Schmid*, Handbuch, pp. 70–77, Rn. 189–202.

[58] *Bommer*, recht 6/2010, 198. For more details on the components of the right to be heard, see *Riedo* et al., Strafprozessrecht, p. 24, Rn. 144–146 with further annotations.

[59] *Zimmerlin*, Verzicht auf Verfahrensrechte, p. 25, Rn. 69 with further references.

ticipate in procedural acts, to appoint a legal adviser *(Rechtsbeistand/conseil juridique)* (e.g., a defense lawyer), to comment on the case and on the proceedings, and to request that further evidence be taken. Art. 107 para. 2 StPO obliges the criminal justice authorities to notify parties who are unaware of their rights. The right to be heard is further concretized in diverse provisions of the Criminal Procedure Code.[60] Art. 158 StPO, for example, states the notifications that have to be given to the accused by the police or public prosecution at the beginning of an examination hearing: The accused must be notified in a language that he or she understands that preliminary proceedings have been commenced against him or her and must be informed of the offenses that are the subject of the proceedings. The accused must also be informed of the following: of the right to appoint a defense lawyer or, if appropriate, to request the assistance of a duty defense lawyer (*amtliche Verteidigung/défense d'office*, appointed by the director of proceedings); of the right to request the assistance of an interpreter; and of the right to remain silent and to refuse to cooperate in the proceedings. The principle of *nemo tenetur se ipsum accusare* is further provided for in Arts. 113 and 169 para. 1 StPO. Statements made at an examination hearing conducted without this foregoing notification are inadmissible as evidence (Art. 158 para. 2 StPO). The right to be heard may be restricted under the conditions set out in Art. 108 StPO.

The right to be heard and the principle of fair trial may be considered related.[61] Fair trial, however, is a principle that primarily addresses the prosecution authorities.[62] It encompasses, among other things, the right to a speedy trial *(Beschleunigungsgebot/célérité)* as regulated in Art. 5 para. 1 StPO (and again for the main hearing in Art. 340 para. 1 StPO). Accordingly, the criminal justice authorities must commence criminal proceedings immediately and conclude them without unjustified delay.[63] Proceedings must be conducted as a matter of urgency if an accused is in detention (Art. 5 para. 2 StPO).

The principle of equality of arms *(Grundsatz der Waffengleichheit/égalité des armes)*, which derives from the principle of fair trial, is not as practicable in criminal procedure as it is in civil procedure, as criminal justice authorities have coercive measures at their disposal.[64] Equality between the accused and the criminal justice authorities is not foreseen, particularly in the preliminary proceedings.[65]

[60] *Bommer*, recht 6/2010, 198.

[61] *Ibid.*; *Hauser* et al., Strafprozessrecht, p. 263, Rn. 4a; *Piquerez*, procédure pénale suisse, p. 156, Rn. 460. The notion of fair trial coincides with the notion of the right to be heard according to *Zimmerlin*, Verzicht auf Verfahrensrechte, p. 25, Rn. 67 with further references.

[62] *Schmid*, Handbuch, p. 36, Rn. 98.

[63] *Hauser* et al., Strafprozessrecht, p. 263, Rn. 8.

[64] *Ibid.*, p. 265, Rn. 17–18.

[65] *Donatsch* et al., Strafprozessrecht, pp. 31–32; *Schmid*, Handbuch, pp. 35–36, Rn. 97.

Nevertheless, criminal justice authorities must examine *ex officio* all circumstances relevant to the assessment of the criminal act and the accused (Art. 6 para. 1 StPO). In accordance with the principles governing the investigation *(Untersuchungsgrundsatz/maxime de l'instruction)*, they must investigate inculpatory and exculpatory circumstances with equal care (Art. 6 para. 2 StPO) in order to find the substantive truth.[66]

Every person is presumed to be innocent until he or she has been convicted in a judgment that is final and legally binding (Art. 10 para. 1 StPO). The presumption of innocence *(Unschuldsvermutung/présomption d'innocence)* and the personal privacy of the persons concerned must be respected, especially when information is provided to the public (Art. 74 para. 3 StPO). The court is free to interpret the evidence in accordance with the views that it forms over the entire proceedings (free evaluation of evidence/*freie Beweiswürdigung/libre appréciation des preuves*) (Art. 10 para. 2 StPO). If there is insurmountable doubt as to whether the factual requirements of the alleged offense have been fulfilled, the court must proceed according to the principle of *in dubio pro reo* (Art. 10 para. 3 StPO).

According to the principles of *ne bis in idem* and *res iudicata*, a person may not be prosecuted again for the same offense, once this person has been convicted or acquitted in Switzerland by a final, legally-binding judgment (Arts. 11 and 300 para. 2 StPO). The principle of *ne bis in idem* does not, however, apply to proceedings that have been dropped or discontinued nor does it apply to the review of a case[67] (Art. 11 para. 2 StPO).

– *Principles relating to classification of procedure*

Even though accusatorial, adversarial, and inquisitorial influences in Swiss criminal procedure are blurred,[68] some accusatorial and adversarial elements are crucial. The principle of orality is one example.[69] Proceedings before criminal justice authorities are conducted orally unless the StPO provides for written proceedings (Art. 66). Hearings therefore play a pivotal role in the preliminary proceedings as well as in the proceedings of first and second instance. Orality is even foreseen for appeal procedures in order to safeguard the adversarial nature of the criminal process.[70] In accordance with Art. 145 StPO, however, criminal justice authorities may

[66] *Aemisegger*, AJP 1/2008, 21; Botschaft StPO, p. 1130/Message StPO, p. 1106; Donatsch et al.-*Wohlers*, Art. 6 StPO, p. 47, Rn. 1–3; *Hauser* et al., Strafprozessrecht, pp. 241–242, Rn. 1–3; Niggli/Wiprächtiger-*Riedo/Fiolka*, Art. 6 StPO, pp. 76–77, Rn. 1–3; *Pieth*, Strafprozessrecht, p. 40; *Piquerez*, Procédure pénale suisse, pp. 173–174, Rn. 505–512; *Schmid*, Handbuch, pp. 59–61, Rn. 153–157.

[67] On reviews, see I.A.5.c.

[68] See I.B.1.

[69] *Schmid*, Handbuch, p. 116, Rn. 309.

[70] Botschaft StPO, p. 1316/Message StPO, p. 1300.

also invite a person wanted for questioning to provide a written report instead of or in addition to holding an examination hearing. In proceedings of the first and the second instance, the principle of orality finds expression in the fact that the parties must make submissions presenting and justifying their applications at the conclusion of the evidence-taking procedure and in the fact that the court must give oral notice of the judgment – if the proceedings are public.[71]

The principle of public proceedings *(Prinzip der Öffentlichkeit/principe de la publicité,* Art. 69–72 StPO) applies exclusively to the main proceedings; it does not apply to preliminary proceedings or to the summary penalty order procedure. The same may be said for the principle of no judgment without a charge *(Anklagegrundsatz/maxime d'accusation),* which is a typical accusatorial element that strictly separates the function of the prosecution from that of the courts.[72] According to Art. 9 para. 1 StPO, an offense may only be judicially assessed if the prosecution has brought a related charge against a specific person in the competent court based on precisely described circumstances. Once the facts of the case are set out in the charging document, the charges may not be changed *(Immutabilitätsgrundsatz/principe d'immutabilité)* except in the cases foreseen in Art. 333 StPO.[73] The court is not bound, however, by the prosecution's legal assessment of the case (Art. 350 para. 1 StPO). Pursuant to the principle of immediacy *(Unmittelbarkeitsprinzip/principe de l'immédiateté),* the court takes new evidence, adds to evidence already taken that is not complete (Art. 343 para. 1 StPO), takes evidence that was not taken in the proper manner in the preliminary proceedings (Art. 343 para. 2 StPO), and decides whether evidence that was taken in the proper manner in the preliminary proceedings should be taken again (Art. 343 para. 3 StPO).

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[71] *Schmid*, Handbuch, p. 116, Rn. 309.

[72] Donatsch et al.-*Wohlers*, Art. 9 StPO, p. 69, Rn. 3.

[73] Botschaft StPO, p. 1132/Message StPO, pp. 1107–1108; Niggli/Wiprächtiger-*Niggli/Heimgartner*, Art. 9 StPO, p. 146, Rn. 40–41; *Pieth*, Strafprozessrecht, p. 42; *Riedo* et al., Strafprozessrecht, p. 35, Rn. 222–223; *Schmid*, Handbuch, pp. 80–81, Rn. 210–211.

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E. Nature, form, and boundaries of criminal law

1. Nature and form of criminal law

– *Definition of criminal law*

There is no definition of criminal law in the Swiss Criminal Code or in any other legislation. Criminal law from a subjective point of view describes the right of the state to punish an offender. The offender has the legal obligation to accept the punishment and its execution. Criminal law from an objective point of view is the embodiment of all legal norms that specify the conditions under which the state may exercise its right to punish. "Criminal law" also refers to the study of the conditions under which punishment may be imposed as well as the nature and content of criminal law (criminal law science).[1]

– *Classification of criminal law*

Law is traditionally divided into private law and public law.[2] However, the distinction is not always easy to make as there are various criteria to consider. According to the Federal Supreme Court *(Bundesgericht/Tribunal fédéral)*,[3] public law involves public authorities such as the state, a canton, or a municipality and governs legal relationships between these public authorities and (subordinate) individuals. In contrast, private law governs legal relationships between (equal) individuals.[4] Criminal law is classified as being part of public law in a broad sense; its function is the administration of the state's penal power.[5] In medieval times, criminal law was, however, a private matter. Offenses prosecuted on complaint *(Antragsdelikte/infractions poursuivie sur plainte)*[6] may be considered a relic of that era.[7]

– *Interrelation between criminal law and other legal disciplines*

Criminal law and other legal disciplines are interrelated. This can be illustrated by the following examples: Constitutional provisions may limit the penal power of

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[1] *Schwander*, Strafgesetzbuch, p. 12, Rn. 14.1–3.

[2] *Forstmoser/Vogt*, Einführung, p. 117, Rn 61.

[3] BGE 132 V 303, 307 E. 4.4.2 with further references.

[4] For a more detailed discussion of distinction criteria, see *Forstmoser/Vogt*, Einführung, pp. 117–123, Rn 61–94.

[5] *Riklin*, Verbrechenslehre, p. 13, Rn. 36; *Schwander*, Strafgesetzbuch, pp. 16–17, Rn. 27.2.

[6] In the following, original Swiss legal expressions in German and French are included in parentheses. Italian terms are omitted in the interest of simplicity. Translations and explanations of Swiss legal expressions can be found in the termdat database of the Federal Chancellery at http://www.termdat.ch [last visited July 2013].

[7] *Riklin*, Verbrechenslehre, p. 13, Rn. 35.

the state.[8] Violations of civil law may lead to consequences under criminal law (e.g., protection of privacy, Arts. 173–179[novies] Criminal Code, *Strafgesetzbuch*, StGB[9]).[10] Civil claims may be filed within the framework of the criminal procedure (Art. 119 para. 2 lit. b Code of Criminal Procedure, *Strafprozessordnung*, StPO[11]). Substantive criminal law provisions may be linked to civil law provisions. For instance, the notion of "moveable property belonging to another person"[12] used in Art. 139 StGB (theft) is defined in the civil law.[13] Criminal conduct often gives rise to administrative as well as criminal procedures. This is especially true in the case of road traffic offenses.[14] Furthermore, administrative decisions may become the subject of criminal proceedings (e.g., if an actor fails to comply with an official administrative order, Art. 292 StGB).[15]

– *Components of criminal law*

Criminal law in the broad sense encompasses substantive criminal law, law of criminal procedure, and law of execution of sentences.[16] While these three areas differ in their functions, they are closely connected.[17] It is not always easy to distinguish between substantive and procedural criminal law, in particular, as some of the provisions of the Criminal Code – for example, filing and withdrawing complaints (Arts. 30–33 StGB) – may be considered procedural.[18]

Criminal law in the narrow sense refers to the substantive criminal law and encompasses all provisions linking a certain human behavior to a criminal sanction.[19] It answers the question of whether criminal conduct has been committed and – if yes – determines the appropriate sanction to impose.[20]

[8] See I.C.; *Schwander*, Strafgesetzbuch, p. 17, Rn. 27.3.

[9] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0.

[10] *Schwander*, Strafgesetzbuch, p. 17, Rn. 27.3.

[11] Schweizerische Strafprozessordnung vom 5. Oktober 2007/Code de procédure pénale suisse du 5 octobre 2007, SR/RS 312.0.

[12] All translations of provisions of the Swiss Criminal Code in this chapter are taken from the unofficial translation provided by the Swiss Confederation, available at http://www.admin.ch/ch/e/rs/c311_0.html [last visited July 2013].

[13] *Schwander*, Strafgesetzbuch, p. 17, Rn. 27.3.

[14] *Riedo* et al., Strafprozessrecht, pp. 5–6, Rn. 15–20. See I.E.2.

[15] *Riedo* et al., Strafprozessrecht, pp. 5–6, Rn. 15–20.

[16] *Flachsmann* et al., Tafeln AT, p. 3, chart 1.

[17] *Killias* et al., Grundriss, p. 3, Rn. 106; *Riklin*, Verbrechenslehre, p. 6, Rn. 16; *Seelmann*, Strafrecht AT, p. 20.

[18] *Riedo* et al., Strafprozessrecht, p. 5, Rn. 13; *Schmid*, Handbuch, pp. 2–3, Rn. 5.

[19] *Flachsmann* et al., Tafeln AT, p. 3, chart 1; *Riklin*, Verbrechenslehre, p. 1, Rn 1.

[20] *Kunz*, Strafrecht AT, slide 5; *Riklin*, Verbrechenslehre, p. 1, Rn. 1.

Criminal procedure law in the narrow sense encompasses all provisions regulating the procedure to be followed to enforce the state's right to inflict punishment.[21] Its function is to enforce the substantive criminal law.[22] It answers the question of how to carry out investigations to determine whether a certain act was punishable.[23] In the broad sense, the law of criminal procedure also includes the provisions that regulate the organization of criminal justice authorities.[24]

The law of the execution of sentences refers to all provisions regulating the execution of criminal sanctions.[25] A distinction between application *(Strafvollstreckung/application des sanctions pénales)* and execution of sentences *(Strafvollzug/exécution des sanctions pénales)* was unknown in Switzerland until recently. The latter regulates the implementation of imprisonment. Application of sentences is defined as imposing a sentence, monitoring its implementation, and termination of the sentence.[26]

– *Location of criminal law*

In Switzerland, a distinction may be made between the core or primary area of criminal law *(Kernstrafrecht/droit pénal commun)* and secondary criminal law *(Nebenstrafrecht/droit pénal accessoire)*. The core area is composed of substantive criminal law provisions located in the Criminal Code that regulate criminal conduct that violates central ethical values.[27] In this sense, the core area of criminal law protects legal interests such as life, health, freedom, honor, and property.[28] However, these legal interests may also be protected by the secondary criminal law.

Secondary criminal law comprises substantive criminal law provisions that are located outside the Criminal Code and the Military Criminal Code (*Militärstrafgesetz*, MStG[29]).[30] In other words, secondary criminal law refers to supplementary criminal provisions in legislative acts that are not of exclusively criminal character.[31] Examples are criminal provisions in the Road Traffic Act, the Foreign Na-

[21] *Riedo* et al., Strafprozessrecht, p. 4, Rn. 4 with further references; *Flachsmann* et al., Tafeln AT, p. 3, chart 1; *Schmid*, Handbuch, pp. 1–2, Rn. 2.

[22] *Riedo* et al., Strafprozessrecht, p. 5, Rn. 14; *Schmid*, Handbuch, p. 3, Rn. 6.

[23] *Kunz*, Strafrecht AT, slide 5.

[24] *Riedo* et al., Strafprozessrecht, p. 4, Rn. 5 with further references; *Schmid*, Handbuch, pp. 1–2, Rn. 2.

[25] *Flachsmann* et al., Tafeln AT, p. 3, chart 1.

[26] *Baechtold*, Strafvollzug, p. 47, Rn. 2; *id.*, Exécution, p. 52, Rn. 2.

[27] *Popp*, Rechtshilfe, p. 140, Rn. 208; *Heine* et al., ZStrR 129 (2011), 118.

[28] *Riklin*, Verbrechenslehre, p. 38, Rn. 32.

[29] Militärstrafgesetz vom 13. Juni 1927/Code pénal militaire du 13 juin 1927, SR/RS 321.0.

[30] *Niggli*, Strafrecht, pp. 7 and 10.

[31] *Riklin*, Verbrechenslehre, p. 38, Rn. 33.

tionals Act, the Narcotics Act, and many more.[32] Federal secondary criminal law was partially harmonized in 1975 by the Federal Act on Administrative Criminal Law (*Bundesgesetz über das Verwaltungsstrafrecht*, VStrR[33]).[34] This Act contains procedural provisions in addition to substantive provisions.[35] Cantonal acts may also contain provisions of secondary criminal law.[36] In practice, the secondary criminal law and especially the Road Traffic Act usurp the leading role. In 2011, for example, only 32.8 % of all criminal judgments were based on the Criminal Code; 54.5 % were based on the Road Traffic Act.[37]

The relationship between the Criminal Code and secondary criminal law is governed by Art. 333 StGB. According to this article, the general provisions of the Criminal Code apply to offenses provided for in other federal acts unless these federal acts themselves include detailed provisions on such offenses. Nevertheless, there are some important differences: Negligence in the commission of felonies, misdemeanors, and contraventions, for example, is not punishable in core criminal law unless the law expressly provides otherwise (Arts. 12 para. 1 and 104 StGB).[38] In contrast, in other federal legislation, negligence in the commission of contraventions is generally punishable (unless the provision concerned only criminalizes intentional acts) (Art. 333 para. 7 StGB).[39] Another difference between the core area of criminal law and the secondary criminal law are the consequences of mistakes: Whereas mistakes of fact and mistakes of law[40] have different consequences in the context of the core area of criminal law (mistakes of fact may result in a finding of negligence, Art. 13 StGB; mistakes of law may have an impact on culpability, Art. 21 StGB), arguably both kinds of mistakes have the same consequence (a finding of negligence) in the context of secondary criminal law.[41] Complicity and corporate liability are also treated differently in the core area of criminal law than they are in secondary criminal law.[42]

[32] See I.F.2.

[33] Bundesgesetz vom 22. März 1974 über das Verwaltungsstrafrecht/Loi fédérale du 22 mars 1974 sur le droit pénal administratif, SR/RS 313.0.

[34] *Riklin*, Verbrechenslehre, p. 38, Rn. 35.

[35] *Killias* et al., Grundriss, p. 18, Rn. 126.

[36] See I.F.2.

[37] Bundesamt für Statistik, Verurteilungen nach den wichtigsten Gesetzen.

[38] See II.E.1.

[39] *Riklin*, Verbrechenslehre, p. 38, Rn. 34.

[40] On mistakes, see II.E.5.

[41] *Heine* et al., ZStrR 129 (2011), 118; *Jenny*, ZStrR 108 (1990), 241–258.

[42] *Eicker* et al., Verwaltungsstrafrecht, p. 18. See II.G. and H.

2. Boundaries between criminal law and other areas of law with a criminal or quasi-criminal function

– *Administrative criminal law*

In Switzerland, secondary criminal law is to a large extent administrative criminal law.[43] Administrative criminal law helps the state in the performance of its administrative functions.[44] The distinction between criminal law and administrative criminal law is merely a formal one, as the latter does not provide for administrative sanctions but rather for criminal sanctions imposed by administrative authorities[45] – as opposed to the judiciary – by means of so-called summary penalty orders (*Strafverfügung/prononcé pénal*).[46] A person affected by a summary penalty order may demand judicial review (Art. 21 para. 2 VStrR).[47] Only the judiciary may impose custodial punishments and measures (Art. 21 para. 1 VStrR). A law of administrative offenses *(Ordnungswidrigkeiten)* as in Germany or Austria does not exist.[48] Instead, special regulations for extremely minor contraventions are provided for within the framework of criminal law. An example is the Fixed Penalties Ordinance of 4 March 1996 *(Ordnungsbussenverordnung/Ordonnance sur les amendes d'ordre)*, which contains a list of fines for road traffic offenses.

Forfeiture of the driving license as a sanction for violations of the Road Traffic Act is not a criminal sanction; it is an administrative sanction imposed by administrative authorities. In view of its similarity to criminal sanctions, however, the Federal Supreme Court affirmed the applicability of Art. 6 ECHR[49] (fair trial) in cases of forfeiture of the driving license.[50] Persons ordered to forfeit their driving license are also subject to criminal sanctions.

– *Military criminal law*

Military personnel and some civilians are subject to the Military Criminal Code (Art. 3–8 MStG). The Code is autonomous and has its own self-contained general part. Therefore, it does not qualify as secondary criminal law.[51] The general parts

[43] *Stratenwerth*, Die Straftat, § 2, p. 57, Rn. 40.

[44] *Hurtado Pozo*, Droit pénal, p. 17, Rn. 41.

[45] *Maeder/Niggli*, AJP 4/2011, 452; *Riklin*, Verbrechenslehre, p. 10, Rn. 26.

[46] *Riklin*, Verbrechenslehre, p. 10, Rn. 26.

[47] *Ibid.*

[48] *Ibid.*, pp. 8–9, Rn. 23–24.

[49] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1951, SR/RS 0.101.

[50] BGE 121 II 22, 25–27 E. 3.; *Riklin*, Verbrechenslehre, p. 10, Rn. 27.

[51] BGE 98 Ib 400, 403 E. 3; *Riklin*, Verbrechenslehre, p. 37, Rn. 28; *Schwander*, Strafgesetzbuch, p. 11, Rn. 11.

of the Criminal Code and the Military Criminal Code are to a large extent the same, and there are also parallels between the special parts of the two codes.[52]

– *Disciplinary law*

Disciplinary sanctions are sanctions of the administrative law that are applicable to individuals having a special status relationship with the state, such as people performing military service, officials, pupils, prisoners, parties to a procedure, or members of a profession under state supervision (e.g., doctors, lawyers entitled to practice).[53] The goal of disciplinary sanctions is to safeguard certain public interests.[54] This goal is also seen in the maintenance of order within the collective concerned and the reputation of the professions under state supervision.[55] The elements of violations of disciplinary law are usually stated in general provisions and are not subject to the principle *nullum crimen sine lege*.[56] A disciplinary sanction does not preclude a criminal sanction for the same set of facts and vice versa, as the principle of *ne bis in idem* is not applicable.[57] However, the non-applicability of *ne bis in idem* is debatable if a disciplinary sanction is criminal in nature as, for example, in the case of fines.[58] According to *Stratenwerth*, disciplinary sanctions that are criminal in nature should only be possible if there is no criminal prosecution. This would, for example, be the case if the disciplinary violation does not fulfill the elements of a crime (e.g., Art. 180 MStG).[59] Finally, disciplinary sanctions are imposed by special administrative bodies.[60] The procedure is simplified – compared to criminal law procedure – and usually not public.[61]

– *Private law*

Punishments imposed by individuals are possible in private law. A controversial example is the parental right of corporal punishment,[62] which was abolished but not

[52] *Trechsel/Noll*, Strafrecht AT, p. 40.

[53] *Hurtado Pozo*, Droit pénal, p. 18, Rn. 46; *Riklin*, Verbrechenslehre, p. 10, Rn. 28; *Stratenwerth*, Die Straftat, § 2, p. 60, Rn. 45; *Trechsel/Noll*, Strafrecht AT, p. 36.

[54] *Stratenwerth*, Die Straftat, § 2, p. 60, Rn. 46.

[55] *Riklin*, Verbrechenslehre, p. 10, Rn. 28.

[56] *Hurtado Pozo*, Droit pénal, p. 18, Rn. 47; *Trechsel/Noll*, Strafrecht AT, p. 36. For the principle *nullum crimen sine lege*, see II.A.

[57] *Hurtado Pozo*, Droit pénal, pp. 18–19, Rn. 47; *Riklin*, Verbrechenslehre, p. 11, Rn. 28.

[58] *Hurtado Pozo*, Droit pénal, p. 19 Rn. 48; *Riklin*, Verbrechenslehre, p. 11, Rn. 28; *Stratenwerth*, Die Straftat, § 2, pp. 60–61, Rn. 47–48 with further references.

[59] *Stratenwerth*, Die Straftat, § 2, p. 61, Rn. 48.

[60] *Trechsel/Noll*, Strafrecht AT, p. 36.

[61] *Ibid.*

[62] See, e.g., *Ryser*, in: Mühlemann/Mannhart (eds.), Freiheit ohne Grenzen, pp. 1–20.

forbidden by the Civil Code *(Zivilgesetzbuch*[63]*)* and is seen as customary law.[64] It is restricted by Art. 126 para. 2 lit. a StGB, according to which a person is "prosecuted ex officio if he commits acts of aggression repeatedly on a person under his protection or in his care, and in particular on a child."[65]

A further example of a private punishment is the contractual penalty *(Konventionalstrafe/clause pénale)*, Arts. 160–163 Code of Obligations *(Obligationenrecht*, OR[66]) "for non-performance or defective performance of a contract" (Art. 160 para. 1).[67] The goal of a contractual penalty is to enforce civil law obligations; it is not a sanction under criminal law.[68]

Company penalties are imposed by companies on employees for misconduct within the company.[69] Some cases involving conduct that both infringes internal regulations and is punishable under criminal law may be dealt with informally, with companies imposing company penalties. One result of this approach is that social control is exercised by a private entity rather than by the state.[70]

The legitimacy of lump sum reimbursement for expenses due to shoplifting, which may be as much as CHF 150 and actually is a private punishment, is disputed.[71]

3. Special regimes connected to the status of the offender

– *Introduction to measures in the system of sanctions*

The dual-track system, consisting of punishments *(Strafen/peines)* and measures *(Massnahmen/mesures)*, was introduced by *Carl Stooss* into the Criminal Code and entered into force in 1942.[72] Punishment is the restriction of the rights to freedom of offenders who have fulfilled the elements of a crime unlawfully and culpably.

[63] Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907/Code civil suisse du 10 décembre 1907, SR/RS 210.

[64] *Trechsel/Noll*, Strafrecht AT, p. 35; *Riklin*, Verbrechenslehre, p. 12, Rn. 31.

[65] *Trechsel/Noll*, Strafrecht AT, p. 35.

[66] Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht)/Loi fédérale du 30 mars 1911 complétant le Code civil suisse (Livre cinquième: Droit des obligations), SR/RS 220.

[67] *Stratenwerth*, Die Straftat, § 2, p. 62, Rn. 49; *Trechsel/Noll*, Strafrecht AT, p. 35.

[68] *Riklin*, Verbrechenslehre, p. 11, Rn. 30.

[69] *Stratenwerth*, Die Straftat, § 2, p. 62, Rn. 50.

[70] *Riklin*, Verbrechenslehre, p. 13, Rn. 34; *Stratenwerth*, Die Straftat, § 2, p. 62, Rn. 50; *Trechsel/Noll*, Strafrecht AT, p. 35.

[71] *Stratenwerth*, Die Straftat, § 2, p. 63, Rn. 51.

[72] *Schwarzenegger* et al., Strafrecht II, p. 23. For developments in punishments, see I.G.4.; for more details on penal sanctions, see I.A.5.d.

One of the goals of punishment is atoning for guilt *(Schuldausgleich/équité)*.[73] Punishments are determined in terms of duration (community service or imprisonment with exception of lifelong imprisonment) and quantity (money).[74] Measures (Arts. 56–73 StGB) complement punishment in the protection of legal interests. They do not have the goal of atoning for guilt; instead, they are imposed if dangerousness is found, particularly if the dangerousness originates from the offender. Their goal is to prevent or at least reduce the risk posed by the danger,[75] and they usually last until the goal is reached or until it is clear that the goal cannot be reached.[76] The order in which measures and punishments are executed is regulated in the Criminal Code (e.g., Art. 57 para. 2).

According to Art. 56 StGB, measures (which must be proportionate) are only imposed if "a penalty alone is not sufficient to counter the risk of further offending by the offender" (danger of recidivism) and if the offender is in need of treatment or treatment is necessary in the interest of public safety. There are various types of measures, including therapeutic measures and the measure of indefinite incarceration (Arts. 56–65 StGB) as well as other forms known as "personal" (e.g., Arts. 66–68 StGB, forfeiture of driving license)[77] and "factual" (e.g., Arts. 69–73 StGB, confiscation of dangerous objects).[78] Therapeutic measures and the measure of indefinite incarceration may only be imposed on the following special categories of offenders. Juvenile offenders have their own system of punishments and measures.

– *Dangerous offenders*

An offender who has committed a serious offense that carries a maximum sentence of five or more years is considered a dangerous offender. In such cases, if it is likely that the offender will commit further offenses of the same type and no other measure promises any success (Arts. 64–65 StGB), the court may order indefinite or lifelong incarceration to prevent further crimes.

– *Offenders with mental disorders*

According to Art. 59 StGB, a measure for treatment in an appropriate psychiatric or therapeutic institution may be ordered by the court if the offender suffers from a serious mental disorder and if two conditions are satisfied: first, the offender's mental disorder was a factor in the committed offense; and second, it is expected

[73] *Schwarzenegger* et al., Strafrecht II, p. 21. On the purposes of punishment, see I.D.3.

[74] *Killias* et al., Grundriss, pp. 205–206, Rn. 1304.

[75] *Schwarzenegger* et al., Strafrecht II, pp. 4 and 21–22.

[76] *Killias* et al., Grundriss, pp. 205–206, Rn. 1304; *Schwarzenegger* et al., Strafrecht II, p. 4.

[77] *Schwarzenegger* et al., Strafrecht II, p. 193.

[78] *Ibid.*, p. 201. See I.A.5.d.

that the measure will reduce the risk of further offenses in which the mental disorder of the offender is a factor. As long as there is a risk of the offender fleeing or committing further offenses, he or she is treated in a secure institution or in a penal institution in accordance with Art. 76 para. 2 StGB (if the required therapeutic treatment can be provided by specialist staff). If there is no such risk, the offender may be ordered to receive out-patient treatment (Art. 63 StGB).

– *Offenders with addictions*

According to Art. 60 StGB, the court may order a measure for treatment in a specialized institution or in a psychiatric hospital if the offender suffers from an addiction if two conditions are satisfied: first, the offender's addiction was a factor in the committed offense; and second, the treatment is expected to reduce the risk of further offenses, in which dependence is a factor. The court must take account of the offender's request for treatment and the offender's willingness to be treated. According to Art. 63 StGB, out-patient treatment may be ordered by the court as well.

– *Young adults*

The Criminal Code foresees special therapeutic measures for young adults. Three reasons justify these special measures: young (male) adults between the ages of 18 and 25 show a high crime rate; the personality of persons in this age group is still developing; and the crimes committed by young adults are often related in some way to the maturation process.[79] Special educational measures seem to be more conducive to reducing the risk of recidivism than custodial sentences.[80] Such measures may only be applied, however, if the young adult is suffering from a serious developmental disorder that was a factor in the felony or misdemeanor committed (Art. 61 para. 1 lit. a StGB). Furthermore, the measure must be designed to reduce the risk of further offenses being committed in which the developmental disorder is a factor (Art. 61 para. 1 lit. b StGB). If these requirements are not met, a sanction applicable to persons ages 25 and above will be imposed on the young adult. The goal of measures applicable to young adults is to treat and educate them.

– *Juveniles*

The Juvenile Criminal Law Act (*Jugendstrafgesetz*, JStG[81]) is applicable to offenders who commit a criminal offense before they reach the age of 18 (Art. 1

[79] *Baechtold*, Strafvollzug, p. 274, Rn. 26.

[80] *Schwarzenegger* et al., Strafrecht II, p. 173.

[81] Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs, SR/RS 311.1.

para. 1 lit. a JStG) but after they reach the age of 10 (Art. 3 JStG). The Juvenile Criminal Law Act operates as *lex specialis* relative to the Criminal Code.[82] The criminal procedure rules are provided for in the Juvenile Criminal Procedure Code (*Jugendstrafprozessordnung*, JStPO[83]), which operates as *lex specialis* relative to the Code of Criminal Procedure. This code only contains rules that deviate from those of the Code of Criminal Procedure.[84] It provides, for example, for mediation. If the mediation is successful, the case may be dropped (Art. 17 para. 2 JStPO). If mediation is not an option and the juvenile is convicted, the juvenile faces a dual-track system of sanctions: A measure of protection *(Schutzmassnahme/mesure de protection)* is ordered if educative care or therapy is required (Art. 10 JStG). If the juvenile acted culpably, a punishment will be imposed, either in addition to the measure or, if a protection measure is not required, alone (Art. 11 JStG). In practice, punishments are more relevant, as in most cases a protection measure is not required. If a measure is required, it is ordered along with a punishment. If custodial sanctions are imposed, only the custodial punishment or the measure is enforced. As a rule, the measure is served first. If the measure is not effective, however, it will be revoked and the juvenile will have to serve the imposed punishment. The time that was already served under the measure is subtracted from the punishment term (Art. 32 JStG, so-called optional dualistic execution, *dualistisch vikariierender Vollzug/exécution dualiste facultatif*).[85]

The focus in juvenile criminal law lies on preventing the juvenile offender from reoffending *(Spezialprävention/prévention particulière)*.[86] Juvenile criminal law has a questionable offender-based character:[87] The shape of the sanction depends on the personality, status of personal development, the sensitivity to the sanction, and the lifestyle of the juvenile offender rather than on the offense committed.[88] However, the type of offense committed does play an important role in determining the sanction.[89]

[82] *Kunz*, Strafrecht AT, slide 4.

[83] Schweizerische Jugendstrafprozessordnung vom 20. März 2009/Loi fédérale du 20 mars 2009 sur la procédure pénale applicable aux mineurs, SR/RS 312.1.

[84] Niggli et al.-*Hug/Schläfli*, Pre Art. 1 JStPO, p. 2930, Rn. 5.

[85] *Aebersold*, Jugendstrafrecht, pp. 93–95.

[86] *Ibid.*, p. 85; Niggli/Wiprächtiger-*Gürber/Hug/Schläfli*, Pre Art. 1 JStG, p. 5, Rn. 9. On the purposes of punishment, see I.D.3.

[87] *Kunz*, Strafrecht AT, slide 4; Niggli et al.-*Hug/Schläfli*, Pre Art. 1 JStPO, p. 2930, Rn. 5; Niggli/Wiprächtiger-*Gürber/Hug/Schläfli*, Pre Art. 1 JStG, p. 5, Rn. 9.

[88] *Aebersold*, Jugendstrafrecht, pp. 85–86.

[89] *Ibid.*, p. 86.

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F. Sources of criminal law and interpretation aids

1. Overview

The primary source of criminal law in Switzerland is legislation,[1] a term that, in this context, encompasses formal as well as substantive federal and cantonal laws.

The Federal Constitution of the Swiss Confederation (*Bundesverfassung*, BV, hereinafter Constitution)[2] is the supreme legislative act of the Confederation; it forms the legal foundation for all other legislation.[3] In the hierarchy of federal legislation, formal federal laws *(formelles Gesetz/loi formelle*[4]*)* are inferior to the Constitution but take priority over federal ordinances *(Verordnung/ordonnance)*, also called substantive federal laws *(materielles Gesetz/loi matérielle)*. Formal federal laws are enacted through the normal procedure by the Federal Assembly (the Swiss parliament, *Bundesversammlung/Assemblée fédérale)*, possibly with the involvement of the people via referendum.[5] Ordinances are legislative acts that are enacted by means of a simplified procedure and not necessarily by the Federal Assembly (they may, e.g., be enacted by the Federal Council/*Bundesrat/Conseil fédéral*, which is the supreme governing and executive authority of Switzerland).[6]

Federal enactments other than formal federal laws and ordinances are promulgated in the form of federal decrees (Art. 163 para. 2 BV). Federal decrees are not legislative in character. Consequently, they cannot be a source of criminal law. Decisions on the validity of popular initiatives and approval of international treaties, for example, are expressed in federal decrees.[7]

This order of priority – constitution, formal laws, and ordinances (sometimes other terms are used) – also applies on the level of cantons and municipalities. All forms of federal law take precedence over any conflicting provision of cantonal law (Art. 49 para. 1 BV), even over provisions in cantonal constitutions.[8]

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[1] *Riklin*, Verbrechenslehre, p. 22, Rn. 1. See 2. below.

[2] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101.

[3] Parlamentswörterbuch, http://www.parlament.ch/d/wissen/parlamentswoerterbuch/seiten/bundesverfassung.aspx [last visited July 2013].

[4] In the following, original Swiss legal expressions in German and French are included in parentheses. Italian terms are omitted in the interest of simplicity. Translations and explanations of Swiss legal expressions can be found in the termdat database of the Federal Chancellery at http://www.termdat.ch [last visited July 2013].

[5] See I.A.4.

[6] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, p. 600, Rn. 1851–1852. See I.A.4.

[7] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, p. 594, Rn. 1836 and p. 595, Rn. 1838.

[8] *Voyame*, Introduction, p. 5. On the system of government and the law-making procedure, see I.A.4.

Courts interpret legislation by applying the four standard methods of interpretation.[9] It should be noted that when interpreting a provision based on its wording (so-called grammatical interpretation) from, for example, the German version of the Criminal Code, courts can turn for impetus to the French and Italian versions of the legislation, which are equivalent and equally binding (Art. 14 para. 1 Publications Act, *Publikationsgesetz*[10]). Drafting materials such as the minutes of parliamentary debates, draft provisions, and reports of the Federal Council on the respective draft provisions serve as valuable interpretation aids.

Under certain circumstances, customary law may be a source of criminal law.[11] Judicial decisions may also be seen as source of criminal law.[12] Legal doctrine, that is, scholarly writings, influences law-making, the application of law, and case law.[13]

2. Legislation and other written laws

Some fundamental rules with respect to criminal law and criminal procedure are provided for by the Constitution.[14] The principle of legality, which is substantiated in Art. 1 Criminal Code (*Strafgesetzbuch*, StGB),[15] is essential.[16]

In accordance with the principle of legality, sanctions for criminal acts (i.e., punishments and measures[17]) must be provided for by law. In this context, the notion of law encompasses both formal laws as well as ordinances. According to the case law of the Federal Supreme Court *(Bundesgericht/Tribunal fédéral)*,[18] which was adopted explicitly in Art. 31 para. 1 BV, formal laws are generally required for punishments and measures implying a deprivation of liberty. Monetary penalties

[9] For a discussion of the four recognized methods of interpretation, see II.A.3.c.

[10] Bundesgesetz über die Sammlungen des Bundesrechts und das Bundesblatt (Publikationsgesetz) vom 18. Juni 2004/Loi fédérale sur les recueils du droit fédéral et la Feuille fédérale, SR/RS 170.512.

[11] See 3. below.

[12] *Riklin*, Verbrechenslehre, p. 42, Rn. 47. See 4. below.

[13] See 5. below.

[14] On the constitutional parameters of criminal law, see I.C.

[15] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0.

[16] *Trechsel/Noll*, Strafrecht AT, p. 38.

[17] See I.E.3.

[18] BGE 99 Ia 262, 269 E. 5; BGE 112 Ia 107, 112 E. 3b.

(Geldstrafe/peine pécuniaire) and fines *(Busse/amende)*, however, may be imposed on the basis of an ordinance.[19]

– *Federal criminal law*

The core of substantive criminal law is codified in the Criminal Code.[20] In the past, the criminal law applicable to juveniles was part of this code; in the early years of this century, however, it was transferred to a new law, the Juvenile Criminal Law Act *(Jugendstrafgesetz*[21]*)*. This law entered into force on 1 January 2007.[22] The Military Criminal Code *(Militärstrafgesetz*[23]*)*, which entered into force on 1 January 1928, is also exclusively criminal in character.

Criminal procedure is codified in the Swiss Code of Criminal Procedure (*Strafprozessordnung*, StPO[24]), which entered into force on 1 January 2011. The Federal Council and the cantons, insofar as they are responsible, issue the provisions necessary to implement this code (Art. 445 StPO).

Federal secondary criminal law *(Nebenstrafrecht/droit pénal accessoire)*[25] comprises criminal provisions in more than 200 legal acts and ordinances.[26] It was partially harmonized by the Federal Act on Administrative Criminal Law *(Bundesgesetz über das Verwaltungsstrafrecht*[27]*)*, which entered into force on 1 January 1975.[28] Examples of federal secondary criminal law are found in the following acts:

- Federal Act of 16 December 2005 on Foreign Nationals (*Ausländergesetz*, SR 142.20);
- Asylum Act of 26 June 1998 (*Asylgesetz*, SR 142.31);
- Federal Act of 9 October 1992 on Copyright and Neighbouring Rights (*Urheberrechtsgesetz*, SR 231.1);

[19] On federal law-making procedure, see I.A.4.; on the formal requirements of criminal legislation, see II.A.3.a.

[20] For a discussion of codification as such, see I.B.1. and *Killias* et al., Grundriss, pp. 14–17, Rn. 121–125.

[21] Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs, SR/RS 311.1.

[22] For a discussion of juvenile criminal law, see I.E.3.

[23] Militärstrafgesetz vom 13. Juni 1927/Code pénal militaire du 13 juin 1927, SR/RS 321.0.

[24] Schweizerische Strafprozessordnung vom 5. Oktober 2007/Code de procédure pénale suisse du 5 octobre 2007, SR/RS 312.0.

[25] On secondary criminal law, see I.E.1.; *Riklin*, Verbrechenslehre, p. 22, Rn. 1.

[26] *Niggli*, Strafrecht, p. 6.

[27] Bundesgesetz vom 22. März 1974 über das Verwaltungsstrafrecht/Loi fédérale du 22 mars 1974 sur le droit pénal administratif, SR/RS 313.0.

[28] *Riklin*, Verbrechenslehre, p. 38, Rn. 35.

- Federal Act of 19 December 1986 on Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb*, SR 241);
- Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (*Kartellgesetz*, SR 251);
- Federal Act of 16 December 2005 on the Protection of Animals (*Tierschutzgesetz*, SR 455);
- Road Traffic Act of 19 December 1958 (*Strassenverkehrsgesetz*, SR 741.01) and diverse related ordinances and acts;
- Federal Act of 3 October 1951 on Narcotics and Psychotropic Substances (*Betäubungsmittelgesetz*, SR 812.121);
- Federal Act of 7 October 1983 on the Protection of the Environment (*Umweltschutzgesetz*, SR 814.01);
- Federal Act of 9 October 1992 on Foodstuffs and Utility Articles (*Lebensmittelgesetz*, SR 817.0);
- Federal Act of 10 October 1997 on Combating Money Laundering and the Financing of Terrorism in the Financial Sector (*Geldwäschereigesetz*, SR 955).

– *Cantonal criminal law*

The Constitution establishes the Confederation's legislative power in the field of criminal law and the law of criminal procedure (Art. 123 para. 1 BV). However, cantonal legislation is overridden only if and to the extent that the Confederation makes use of this power. The Criminal Code expressly states that the cantons retain the power to legislate on contraventions that are not the subject of federal legislation (Art. 335 para. 1 StGB). Consequently, cantonal legislation also includes secondary criminal law. Examples of cantonal criminal legislation include tax violations, hunting offenses, and fire protection offenses.[29] Furthermore, the cantons have the authority to provide for sanctions (i.e., punishments and measures) for offenses against cantonal administrative and procedural law (Art. 335 para. 2 StGB).[30]

Even though the rules of procedure and the organization of criminal justice authorities are interlinked (due, e.g., to the uniform prosecution model and the uniform description of the criminal court's substantive jurisdiction in the Code of Criminal Procedure),[31] each canton retains the authority to regulate the composition, organization, powers, and supervision of its criminal justice authorities

[29] For more examples, see *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, pp. 249–250.

[30] Ehrenzeller et al.-*Vest*, Art. 123 BV, p. 1905, Rn. 2.

[31] *Ibid.*, pp. 1909–1910, Rn. 13. On investigating, prosecuting, and criminal courts, see I.A.5.a.–c. On developments in criminal procedure, see I.G.3.

(Art. 123 para. 2 BV and Art. 14 StPO). Accordingly, most cantons have their own acts on court organization and on the implementation of the Code of Criminal Procedure.[32]

Furthermore, the cantons are responsible for the execution of penalties and measures (Art. 123 para. 2 BV), unless the law provides otherwise. On the federal level, punishments and measures that are applied to minors are regulated in the Juvenile Criminal Law Act.[33] The general rules applicable to adults are found in the general part of the Criminal Code.[34] The cantons have their own acts and ordinances with concretizing provisions.[35] Furthermore, there are intercantonal agreements on the execution of penalties and measures.[36] The Confederation may issue (further) regulations on the execution of penalties and measures (Art. 123 para. 3 BV).

– *Publication of legislation and travaux préparatoires*

Legislation that has entered into force, such as international treaties and conventions, the Constitution, formal federal laws, and substantive federal laws, are published in the Official Compilation of Federal Legislation *(amtliche Sammlung/recueil officiel)*. The Official Compilation is published weekly in German, French, and Italian and is accessible online.[37] In the Classified Compilation of the Federal Legislation *(systematische Sammlung/recueil systématique du droit fédéral)*,[38] the law in force published in the Official Compilation is continuously updated online (and every few months on paper) and classified by subject.[39] It should be noted that no one who is bound by a legal rule in force may rely on an omitted text or on a text accidently incorporated into the Classified Compilation (negative legal force, *negative Rechtskraft, force obligatoire négative*).[40]

[32] See, e.g., the act of Basel-Stadt on court organization (Gesetz betreffend Wahl und Organisation der Gerichte sowie der Arbeitsverhältnisse des Gerichtspersonals und der Staatsanwaltschaft, SG 154.100); and the act of Basel-Stadt implementing the StPO (Gesetz über die Einführung der Schweizerischen Strafprozessordnung, SG 257.100).

[33] See I.E.3.

[34] See I.A.5.e. *Baechtold*, Strafvollzug, p. 55, Rn. 2.

[35] See, e.g., the act and the ordinance of Basel-Stadt on the execution of penalties and measures (Gesetz über den Vollzug der Strafurteile, SG 258.200; Verordnung über den Vollzug von Strafen und Massnahmen, SG 258.210). On the execution of custodial penalties, see also I.A.5.e.

[36] See I.A.5.e.

[37] See http://www.admin.ch/ch/d/as/index.html [last visited July 2013].

[38] See http://www.admin.ch/ch/d/sr/sr.html [last visited July 2013].

[39] Systematische Sammlung online; *Forstmoser* et al., Juristisches Arbeiten, pp. 139–140 and p. 142.

[40] Systematische Sammlung online; *Forstmoser* et al., Juristisches Arbeiten, p. 141.

Some legislation is provided for in English for informational purposes.[41] The English versions of federal legislation do not, however, have legal force. Cantonal constitutions[42] are also included in the classified compilation of federal legislation. Official and classified cantonal compilations comprise the respective cantonal constitution, acts, and ordinances.[43] The Institute of Federalism – a nationally and internationally recognized center of interdisciplinary academic expertise in the fields of federalism, state organization, democracy, and human rights – also provides federal and cantonal legislation online.[44]

Drafting materials – such as the reports of the Federal Council to the Federal Assembly on draft provisions – are not considered sources of criminal law but are valuable interpretation aids. They are published in the Official Federal Gazette *(Bundesblatt/Feuille fédérale*[45]*)* in German, French, and Italian. Minutes of parliamentary debates and additional materials (such as comprehensive files about important issues discussed in parliament and most of the issues that are put to the popular vote, various reports, and consultations) are included in the official bulletin *(amtliches Bulletin/bulletin officiel)*, which is also accessible on the parliament's website.[46] Information on cooperation between Switzerland and the EU is available online as well.[47]

– *International criminal law*

International treaties and conventions (e.g., ECHR[48]) set additional guidelines and limits on the making and application of criminal law.[49]

Switzerland follows the monistic principle; thus, international treaties enjoy the force of federal law as soon as they are ratified.[50] Criminal law-related provisions provided for in international treaties and conventions stand at least on the same hierarchical level as formal federal laws.[51] Conflicts between international law and Swiss law are avoided via the principle of interpreting national law in accordance with international law *(Grundsatz der völkerrechtskonformen Auslegung/principe de l'interprétation conforme)*.[52]

[41] See http://www.admin.ch/ch/e/rs/rs.html [last visited July 2013].

[42] SR 131.211–131.235.

[43] See, e.g., Basel-Stadt: http://www.gesetzessammlung.bs.ch/ [last visited July 2013].

[44] See http://www.lexfind.ch/?cid=10 [last visited July 2013].

[45] Accessible online http://www.admin.ch/ch/d/ff/index.html [last visited July 2013].

[46] See http://www.parlament.ch/ [last visited July 2013].

[47] See http://www.europa.admin.ch/index.html?lang=en [last visited July 2013].

[48] Implemented in Switzerland SR/RS 0.101.

[49] See I.D.2. for the rule of law and I.B. for international ties.

[50] *Voyame*, Introduction, p. 5. See I.B.2.b.

[51] *Häfelin* et al., Schweizerisches Bundesstaatsrecht, p. 626, Rn. 1917. See I.C.1.

[52] Botschaft Bundesverfassung, p. 135/Message constitution, p. 137; BGE 117 Ib 367, 373 E 2e, 2f; *Tschannen*, Staatsrecht § 9, pp. 168–169, Rn. 36–39.

3. Customary law

Prior to the invasion by the French and the subsequent establishment of the Helvetic Republic in 1798, customary law was recognized as a source of criminal law, as there was no codified criminal law whatsoever in most of the cantons at that time. The Helvetic Republic promulgated the country's first unified criminal law, the Helvetic Penal Code *(Helvetisches Peinliches Gesetzbuch)*, in 1799. Following the failure of the Republic in 1803, legislative power in the field of criminal law reverted to the cantons. Some cantons retained the Helvetic Penal Code; some introduced other criminal laws. Two of the cantons that abandoned the Code did not have a criminal code until the Swiss Criminal Code of 1937 entered into force in 1942.[53]

Today, legislation is the primary source of Swiss criminal law. A non-written rule may become customary law if it is recognized by case law due to the general belief that the rule complies with the law and is legally binding.[54]

Customary criminal law is limited, however, by the principle of legality.[55] Interpretations that would make the criminal law stricter or construct new criminal law provisions are not allowed.[56] Customary law may complement the written criminal law via interpretation. This is particularly true of the general part, where customary law may clarify imprecise notions such as offender or aider and abettor, distinguish between different kinds of errors, or answer the question of when an attempt becomes punishable.[57] Furthermore, customary law may exclude or mitigate punishment.[58]

Art. 7 para. 2 ECHR as well as Art. 15 para. 2 International Covenant on Civil and Political Rights recognize customary international law as a source of criminal law. As a result, the principle of *nullum crimen nulla poena sine lege scripta* under Swiss law is not applicable to core international crimes, that is, to crimes against humanity, war crimes, and genocide.[59]

[53] *Killias* et al., Grundriss AT, p. 10, Rn. 117; *Stratenwerth*, Die Straftat, § 4, pp. 94–95, Rn. 23 with further reference. On the developments of criminal law throughout history, see I.G.

[54] *Stratenwerth*, Die Straftat, § 4, p. 95, Rn. 23.

[55] *Kunz*, Strafrecht AT, slide 39; *Riklin*, Verbrechenslehre, p. 42, Rn. 47; *Stratenwerth*, Die Straftat, § 4, p. 95, Rn. 23. On the principle of legality, see II.A.

[56] *Kunz*, Strafrecht AT, slide 39; *Stratenwerth*, Die Straftat, § 4, p. 95, Rn. 24.

[57] *Stratenwerth*, Die Straftat, § 4, p. 96, Rn. 25., p. 97, Rn. 27.

[58] *Kunz*, Strafrecht AT, slide 39; *Riklin*, Verbrechenslehre, p. 42, Rn. 47; *Stratenwerth*, Die Straftat, § 4, pp. 96–97, Rn. 27.

[59] *Gless*, ZStrR 1/2007, 36.

4. Case law and judicial opinion

The primary task of the courts is to judge individual cases; however, a judgment may be relevant to future, similar cases.[60] Case law is generally recognized as an autonomous source of law.[61] As it is impossible for a piece of legislation to regulate explicitly every conceivable case, the courts must answer via interpretation the questions left open by the legislature.[62]

Courts interpret criminal law provisions just like any other legal provision.[63] Due to the principle of legality,[64] however, only offenses expressly provided for by criminal law are punishable.[65] Case law may clarify but never modify legislation.[66]

Customary law is dependent on case law: without judicial recognition, it cannot exist. In contrast, case law shapes the applicable law but need not be customary law.[67] Published judgments may become important for other cases and are consulted together with the legislation.[68] Even though case law is not as binding as legislation and is open to critical analysis, a court will only defy judgments of the Swiss Federal Supreme Court if there are important reasons for doing so.[69]

The Federal Supreme Court publishes its leading cases in the Official Compilation of Decisions of the Swiss Federal Supreme Court *(Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts*, BGE/*Recueil officiel des arrêts du Tribunal fédéral Suisse*, ATF*)*. The leading cases as well as the other judgments of the Federal Supreme Court are also accessible online.[70] The guiding principles *(Regesten/regestes)* of the leading cases (but not the entire judgment) are published in German, French, and Italian. Occasionally, translations or summaries and reviews of decisions are published in journals (e.g., Die Praxis; forumpoenale; Aktuelle juristische Praxis [AJP]; Schweizerische Juristenzeitung [SJZ]; plädoyer).[71] The judgments of the Federal Criminal Court *(Bundesstrafgericht/Tribunal pénal fédéral*[72]*)* and those of the Federal Administrative Court *(Bundesverwaltungsgericht/Tribunal administratif fédéral*[73]*)* are available online. On occasion, judgments of cantonal courts are published and reviewed in legal journals (e.g., JurActuel; for Basel: Basler Juristische Mitteilungen [BJM]; Bern: Zeitschrift des Bernischen Juristenvereins [ZBJV]; Lausanne: Journal des Tribunaux [JdT]; Geneva: La Semaine Judicaire).[74]

[60] *Forstmoser* et al., Juristisches Arbeiten, p. 158.

[61] *Schultz*, AT Strafrecht, p. 51 and pp. 57–58; *Stratenwerth*, Die Straftat, § 4, pp. 97–98, Rn. 28; *Trechsel/Noll*, Strafrecht AT, pp. 43–44. For a more cautious approach, see *Riklin*, Verbrechenslehre, p. 42, Rn. 48.

[62] *Trechsel/Noll*, Strafrecht AT, p. 43; *Stratenwerth*, Die Straftat, § 4, p. 97, Rn. 28.

[63] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 248; II.A.3.c.

[64] See II.A.3.c.

[65] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 248. *Trechsel/Noll*, Strafrecht AT, p. 45.

[66] *Trechsel/Noll*, Strafrecht AT, p. 44.

[67] *Stratenwerth*, Die Straftat, § 4, p. 98, Rn. 28.

[68] *Riklin*, Verbrechenslehre, p. 42, Rn. 48; *Trechsel/Noll*, Strafrecht AT, p. 43.

[69] *Riklin*, Verbrechenslehre, p. 42, Rn. 48.

[70] See http://www.bger.ch/de/index.htm [last visited July 2013].

[71] For more examples, see *Forstmoser* et al., Juristisches Arbeiten, pp. 170–175.

5. Legal literature and academic opinion

Academic analysis of criminal law in the legal literature (such as textbooks, commentaries, dissertations, journal articles) and in academic opinion is seen as a source of criminal law by some scholars.[75] However, the majority of textbooks do not list it as such. Nevertheless, its influence on law-making, application of law, and case law is beyond dispute.

One goal of the academic analysis of criminal law is to evaluate the law systematically and to contribute to legal certainty.[76] At the same time, academic analysis contributes to the development of criminal law.[77] For instance, academic analysis plays an important role as far as the drafting of important new laws is concerned. Consequently, legal scholars are entrusted with the drafting of important codifications, such as the Criminal Code and the Code of Criminal Procedure.[78]

Judgments often refer to academic publications. At times, courts may even take the legal literature and case law of neighboring countries into account.[79] In a case involving the scope of fraud as defined in the Swiss Criminal Code (Art. 146 StGB), for example, the Federal Supreme Court mentioned the approach taken to the issue at hand in German and French case law and scholarly literature before turning to an analysis of the approach taken in Switzerland.[80]

[72] See http://www.bstger.ch/ [last visited July 2013].

[73] See http://www.bvger.ch/ [last visited July 2013].

[74] For more examples, see *Forstmoser* et al., Juristisches Arbeiten, pp. 170–175.

[75] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 250; *Schultz*, AT Strafrecht, p. 58.

[76] *Arzt*, ZStrR 4/2006, 351; *Hurtado Pozo*, Droit pénal, p. 26, Rn. 68; *Riklin*, Verbrechenslehre, p. 14, Rn. 39–40; *Schultz*, AT Strafrecht, p. 38; *Trechsel/Noll*, Strafrecht AT, p. 44.

[77] *Hurtado Pozo*, Droit pénal, p. 26, Rn. 68; *Riklin*, Verbrechenslehre, p. 14, Rn. 39–40; *Schultz*, AT Strafrecht, p. 38; *Trechsel/Noll*, Strafrecht AT, p. 44.

[78] See I.G.2. and 3.

[79] *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 250.

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Fraud in obtaining a judgment is fraud in the sense of Art.146 StGB: BGE 122 IV 197

G. Developments in criminal law, criminal procedure, and the execution of punishment

1. Overview

The history of Swiss criminal law remains largely unexplored. It can be assumed that Germanic criminal law prevailed in the territory of what is now Switzerland after it was invaded by three Germanic peoples (Burgundians, Alemanni, and Lombards) in the 5th century. Only the Rhaetians, a non-Germanic tribe, were able to hold on to their ground (today Graubünden) a little longer. In the course of the 6th century, however, the Franks (another Germanic tribe) conquered the aforementioned four tribes but allowed them to keep their respective criminal laws.[1] During the reign of Charlemagne (also known as Charles the Great), who became the sole ruler of the Franks in 771,[2] the existing rights and customs of Rhaetia continued to be protected. These included two sources of criminal law, the so-called *Lex Romana Curiensis* and the *Capitula episcopi Remedii*. The written record of the former dates back to the first half of the 8th century;[3] the latter – probably the first criminal code on Swiss territory – was created by *Remedius*, the bishop of Chur, some decades later.[4]

The death of Charlemagne in 814 and the subsequent end of the Carolingian Empire led to a legal fragmentation into country, town, and village laws.[5] The criminal law of this era was characterized by tribal laws and dominated by feuds avertable by monetary compensation (referred to as *Composition*).[6] However, public prosecution was not excluded for major crimes such as murder, if, for instance, there was no clan to seek vengeance.[7] To avoid feuds, God peace and public peace *(Landfrieden)* were installed. The Federal Charters *(Bundesbrief/pacte fédéral)*[8] of 1291 and 1315 can be seen as public peace pacts.[9] These pacts abandoned feuds and vengeance and provided for the death penalty for murder and for banishment and confiscation for other offenses. However, these Federal Charters only applied to the members of the confederated alliance: Uri, Schwyz, and Nidwalden. The

[1] *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, pp. 162–163.

[2] *Kaiser*, Karl der Grosse, pp. 100–101.

[3] *Arquint*, Lex Romana Curiensis, p. 818.

[4] *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, p. 162.

[5] *Ibid.*, p. 164.

[6] *Pieth*, Strafprozessrecht, p. 20.

[7] *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, pp. 164–165.

[8] In the following, original Swiss legal expressions in German and French are included in parentheses. Italian terms are omitted to simplify matters. Translations and explanations of Swiss legal expressions can be found in the termdat database of the Federal Chancellery at http://www.termdat.ch [last visited July 2013].

[9] *Pieth*, Strafprozessrecht, p. 20 with further reference.

Confederation started and continued to grow soon after the Federal Charter of 1315.[10]

Criminal law at the beginning of the modern era consisted mainly of the reception of Roman law by the well-known *Constitutio Criminalis Bambergensis* of 1507. It served as a model for the *Constitutio Criminalis Carolina* (1532), which became applicable in the territory of the German Reich. The Swabian War of 1499, it should be noted, had led to the *de facto* separation of the Swiss Confederation from the German Reich. As a result, the Constitutio Criminalis Carolina, which sought to link punishment to the culpability of the offender as opposed to the result of the crime, influenced only some but not all the Swiss cantons; however, it served as the law of war for Swiss mercenary soldiers until the 19th century.[11]

Despite the legal fragmentation, several criminal law phenomena could be observed throughout Switzerland in the beginning of the modern era. An example is the persecution of "harmful people," such as vagabonds and habitual criminals, who were killed. In the course of time "harmful people" were sent to sea or foreign military service instead of being killed. Both of these alternatives were imposed without the benefit of prior trial before a court. These types of undertakings, the so-called Landjegi, were not seen as a punishment for crime but rather as self-defense of the state communities. A religion-based example is the persecution of Jews, who were banished from the cities. Finally, a Swiss peculiarity was the criminal law against animals. In one instance, a rooster was burned alive because it laid an egg; in another, beetles, worms, and grubs were expelled from the country because they damaged herbs and grain.[12]

Beginning in the 18th century, Swiss criminal law was influenced by continental common law, that is, a conglomerate of non-codified acts of all levels and customary law, which includes transregional principles. Continental common law is in many ways comparable to the common law in England. The law of the Holy Roman Empire of the German Nation and, after the revolution in 1789, French law were particularly influential.[13] However, criminal law still varied from canton to canton. The unified, codified criminal law, which was in force during the Helvetic Republic (1798–1803), did not last long.[14] Legislative power in the field of criminal law reverted to the cantons following the downfall of the Republic in 1803, and the Confederation did not regain this power over substantive criminal law until 1898. The law of criminal procedure remained within the legislative power of the

[10] *Voyame*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, pp. 1–2.

[11] *Gschwend*, Carolina, pp. 212–213; *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, pp. 170–171; *Stratenwerth*, Die Straftat, § 1, p. 17, Rn. 1–2.

[12] *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, pp. 169–171.

[13] *Killias* et al., Grundriss AT, p. 8, Rn. 114–115; *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 246.

[14] See below 2.

cantons until the early 21st century. For both substantive as well as procedural criminal law, it took years and long parliamentary debates before federal laws entered into force. Military criminal law was the first branch of criminal law that was unified for the whole country in the modern era.[15] The Military Criminal Code (*Militärstrafgesetz*, MStG[16]) entered into force on 1 January 1928.[17]

Developments in criminal law in the second half of the 20th and in the beginning of the 21st centuries have been influenced by such factors as international ties,[18] today's global risk society,[19] and the idea of criminal law as a simple solution to complex problems.[20] Particularly the latter has led to the introduction of symbolic provisions such as the provision prohibiting female genital mutilation (Art. 124 Swiss Criminal Code, *Strafgesetzbuch*, StGB[21]), which entered into force on 1 July 2012. Female genital mutilation was of course always punishable to the same extent under Art. 122 (serious assault) and Art. 123 (common assault) StGB. The introduction of the new provision was based on the argument that it was politically appropriate and would showcase society's disapproval of this practice.[22]

2. Developments in substantive criminal law

– *Towards a codified Swiss criminal code*

Prior to the invasion by the French and the establishment of the Helvetic Republic in 1798, the cantons were only loosely connected. Criminal law was within the legislative power of the cantons, and in most of them it was not codified.[23] The Helvetic Republic codified the criminal law as well as the civil/private law in order to boost national consciousness and patriotism.[24] The first unified codified Swiss criminal code, the Helvetisches Peinliches Gesetzbuch (1799) (Helvetic Penal Code), was inspired by the French criminal code of 1791.[25] After the Helvetic Republic failed in 1803, the cantons regained legislative power for criminal law.[26] In some cantons, the Helvetic Penal Code was regarded as being too soft.[27] Nevertheless, in the cantons Basel-Stadt, Vaud, Solothurn, Luzern, Thurgau, and Bern, the Code remained in force; however, in some of them, it was considered subsidiary to cantonal law.[28] Additionally, special laws were created, and not all cantons retained the Helvetic Penal Code. As a result, more than 40 cantonal criminal laws – patterned on various models – were produced.[29] Fribourg, for example, reintroduced the *Constitutio Criminalis Carolina*.[30] Aargau was influenced by Austrian criminal law and the scholar *Paul Johann Anselm von Feuerbach* (who was in turn influenced by *Immanuel Kant*).[31] St. Gallen was influenced by Austrian criminal law and the Helvetic Penal Code but still had a self-contained criminal law.[32] Ticino was influenced by the Helvetic Penal Code as well as by Austrian and Bavarian criminal law.[33] Appenzell Innerrhoden, Nidwalden, and Uri did without criminal legislation of their own.[34] Instead, they relied upon common law and, in the course of time, the criminal legislation of neighboring cantons.[35] Thus, the cantonal solutions reflected influences of various scholars of the time, such as *Paul Johann Anselm von Feuerbach*, *Franz Anton Felix von Zeiller*, *Charles-Louis de Secondat, Baron de La Brède et de Montesquieu*, and *Cesare Beccaria*.[36]

In the 19th century, various cantons and associations called for a unified criminal law.[37] Consequently, the Federal Council *(Bundesrat/Conseil fédéral)* entrusted *Carl Stooss* with a comparative study on criminal law in the cantons and with the drafting of a unified criminal code in 1889.[38] The Confederation gained legislative power for substantive criminal law in 1898,[39] but the unified code was not adopted until 1937, after it had been edited by two expert commissions and debated at

[15] *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, p. 171.

[16] Militärstrafgesetz vom 13. Juni 1927/Code pénal militaire du 13 juin 1927, SR/RS 321.0.

[17] For a discussion of other codes, see 2. and 3.

[18] See I.B.2.

[19] For a definition of world risk society, see *Beck*, Weltrisikogesellschaft.

[20] *Oberholzer*, recht 6/2002, 223.

[21] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0.

[22] Stellungnahme Verstümmelung, 5678–5679/Avis réprimer les mutilations, 5152–5153.

[23] *Killias* et al., Grundriss AT, p. 10, Rn. 117.

[24] *Fankhauser*, Helvetische Republik, pp. 258–267.

[25] *Gschwend*, Strafrecht 19. und 20. Jahrhundert; *Hurtado Pozo*, Droit pénal, p. 28, Rn. 74; *Killias* et al., Grundriss AT, p. 10, Rn. 117.

[26] *Gschwend*, Strafrecht 19. und 20. Jahrhundert; *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 246.

[27] *Alkalay*, Strafrecht, pp. 184–187.

[28] *Bühler*, Rechtsquellen, p. 258; *Killias* et al., Grundriss AT, p. 10, Rn. 117.

[29] *Stratenwerth*, Die Straftat, § 1, pp. 19–20, Rn. 5.

[30] *Bühler*, Rechtsquellen, p. 258.

[31] *Ibid.*, p. 259; *Gschwend*, Strafrecht 19. und 20. Jahrhundert.

[32] *Bühler*, Rechtsquellen, pp. 260–261.

[33] *Ibid.*, p. 262.

[34] *Gschwend*, Strafrecht 19. und 20. Jahrhundert; *Killias* et al., Grundriss AT, pp. 10–13, Rn. 117–118.

[35] *Killias* et al., Grundriss AT, pp. 10–11, Rn. 117.

[36] *Bühler*, Rechtsquellen, pp. 258–263; *Gschwend*, Strafrecht 19. und 20. Jahrhundert; *Killias* et al., Grundriss AT, p. 13, Rn. 119.

[37] Botschaft Rechtseinheit, pp. 737–743/Message l'unification du droit, pp. 578–583.

[38] Botschaft Rechtseinheit, p. 743/Message l'unification du droit, p. 583; *Killias* et al., Grundriss AT, p. 11, Rn. 118.

[39] *Killias* et al., Grundriss AT, p. 11, Rn. 118.

length in parliament. However, the federalists of Western Switzerland and conservative Catholic circles forced a federal referendum.[40] They were mainly opposed to the abolition of the death penalty and the decriminalization of abortion for medical reasons. Only a narrow majority of the population (53 %) voted in favor of the Criminal Code, which finally entered into force in 1942.[41] The ideas of *Carl Stooss* have been conserved until today in the Criminal Code, which is characterized by its eclecticism:[42] it integrated French, German, Austrian, and Italian approaches and opted for intermediate solutions.[43] Today, the cantons have reduced legislative power in the area of criminal law.[44] The Criminal Code expressly states that the cantons retain the power to legislate (only) on contraventions that are not the subject of federal legislation (Art. 335 para. 1 StGB).[45]

– *Amendments to the Criminal Code*

In the first 40 years after its entry into force, amendments to the Criminal Code were rare. However, the number of amendments (including amendments of criminal law provisions located outside the Criminal Code[46]) increased tremendously in the last decade of the 20th century. As a result, it is difficult to identify a clear direction. For instance, a revision of the recent amendment of the sanctioning system is already planned.[47] Some scholars therefore attest a lack of quality in the legislation of recent years.[48]

At first, it was mainly provisions of the special part of the Criminal Code that were amended, added, or repealed.[49] Some amendments were the result of technical developments. These include Arts. 179$^{bis-novies}$ StGB (in force since 1 May 1969), which deal with offenses involving the breach of privacy and secrecy such as illegal recording (audio and video), illegal taking of pictures, marketing and promotion of devices for the unlawful listening or the unlawful making of sound or image recording, and misuse of a telecommunications installation. Furthermore, the goal of excising morality crimes from the Criminal Code led to amendments such as the revision of the sex offense catalog (Arts. 187–200 StGB), which entered into force

[40] For more on the federal referendum, see I.A.4.

[41] *Killias* et al., Grundriss AT, p. 11, Rn. 118.

[42] *Hurtado Pozo*, Droit pénal, p. 28, Rn. 77.

[43] *Ibid.*; *Trechsel/Killias*, in: Dessemontet/Ansay (eds.), Introduction to Swiss Law, p. 247.

[44] See I.F.2.

[45] On the division of crimes into categories, see II.C.1.b.

[46] On the location of criminal law provisions in Switzerland, see I.E.1.

[47] See below 2. and 4.

[48] *Oberholzer*, forumpoenale 2008, 47.

[49] On the chronology of amended, added, and repealed provisions, see http://www.admin.ch/ch/d/sr/3/a311_0.html [last visited July 2013].

on 1 October 1992. The goal – which was not fully reached – was to abolish double moral standards and punish only conduct that causes harm or danger to human beings and cannot be tackled by other legal means.[50] International pressure, international treaties and conventions,[51] as well as the wish to protect the Swiss financial center also play an important role in the amendment of criminal law. Amendments designed to fight organized crime[52] – such as money laundering (Art. 305bis StGB),[53] insufficient diligence in financial transactions and right to report (Art. 305ter StGB, which grew out of a private law agreement among Swiss banks),[54] and participation in and support of criminal organizations (Art. 260ter StGB)[55] – are examples thereof as is the provision on terrorism financing (Art. 260^{quinquies} StGB).

Amendments of the Criminal Code may also result from popular initiatives. Examples are the introduction of life-long incarceration for untreatable high-risk sex and violent offenders (Art. 64 para. 1bis lit. c StGB and Art. 64c StGB)[56] and the removal of time limits on the right to prosecute sex or pornography offenses involving children below the age of 12 (Art. 101 para. 1 lit e and para. 3 sen. 3 StGB).

Preliminary work on a thorough revision of the general part of the Criminal Code and on a separate Juvenile Criminal Law Act (*Jugendstrafgesetz*, JStG[57]) began in the early 1980s.[58] *Hans Schultz* was entrusted with drafting the general part of the Criminal Code, *Martin Stettler* with the law applicable to juveniles.[59] Based on the examination of these drafts by a commission of experts and considering the comments submitted during the consultation procedure, the Federal Council presented a report and a draft.[60] The Federal Council draft, in turn, was modified by parliament. Criticism by representatives of criminal prosecution and enforcement authorities

[50] Niggli/Wiprächtiger-*Maier*, pre-Art. 187, p. 1091, Rn. 3 with further references.

[51] On effects of international ties, see I.B.2.

[52] On the history of organized crime legislation, see *Kunz/Hofstetter*, in: Fijnaut/Paoli (eds.), Organised crime, pp. 933–940.

[53] On the history of origins of Art. 305bis StGB, see Niggli/Wiprächtiger-*Pieth*, pre-Art. 305bis StGB, pp. 2193–2196, Rn. 9–17; Trechsel/Pieth-*Trechsel/Affolter-Eijsten*, Art. 305bis StGB, pp. 1379–1380, Rn. 5–5a with further references.

[54] On the history of the origins of Art. 305ter StGB, see Niggli/Wiprächtiger-*Pieth*, Art. 305ter StGB, pp. 2221–2222, Rn. 1–3.

[55] On the history of origins of Art. 260ter StGB, see Niggli/Wiprächtiger-*Baumgartner*, Art. 260ter StGB, pp. 1723–1724, Rn. 2–4; Trechsel/Pieth-*Trechsel/Vest*, Art. 260ter StGB, pp. 1185–1186, Rn. 1.

[56] See 4. below.

[57] Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs, SR/RS 311.1.

[58] *Schwarzenegger* et al., ZSR 128 (2009), 77.

[59] *Hurtado Pozo*, Droit pénal, p. 29, Rn. 80; *Schwarzenegger* et al., ZSR 128 (2009), 77.

[60] Botschaft StGB Allgemeine Bestimmungen/Message CP dispositions générales; *Hurtado Pozo*, Droit pénal, p. 29, Rn. 81; *Schwarzenegger* et al., ZSR 128 (2009), 77.

led to further modifications. The revision of the general part and the criminal law applicable to juveniles entered into force on 1 January 2007.[61] The revisions mainly involved sentencing issues.[62] As criticism has continued, a revision of the revision is planned.[63]

3. Developments in criminal procedure

The history of criminal procedure before and after the alliance of the three cantons Uri, Schwyz, and Unterwalden (which led to the emergence of the Swiss Confederation in August 1291[64]) is, to a large extent, unexplored. It can be said, however, that it mirrored developments in continental European law.[65]

Even though there was no Swiss codification of criminal procedure, it can be assumed that the German *Constitutio Criminalis Carolina* (1532), the Austrian *Constitutio Criminalis Theresiana* (1768), and the French *Ordonnance criminelle* (1670), which were inquisitorial in character, had an impact on the criminal procedure law in the cantons.[66] The *Constitutio Criminalis Carolina* served, for example, as the law of war of Swiss mercenary soldiers.[67]

After the Helvetic Republic was established as a unitary state, a codification of criminal procedure law was discussed, but these efforts came to naught due to the rebellion of the federalists, who fought for a decentralized state.[68] This rebellion *(Stecklikrieg)* led to the failure of the Helvetic Republic and ushered in the era of mediation (1803–1814). In the Act of Mediation, issued in 1803, Napoleon recognized the federal structure of Switzerland. Thus, the cantons remained responsible for criminal procedure law. However, the *French Code d'instruction criminelle* (1808), which created the modern criminal procedure combining the principles of inquisition and accusation, influenced the criminal procedure of some cantons as of 1830.[69]

[61] *Schwarzenegger* et al., ZSR 128 (2009), 77–78.

[62] On developments in punishment, see I.G.4. For an overview of the revision of the general part, see *Heine*, recht 6/2008, 250–260; *Heer-Hensler* (ed.), Revision; *Tag/Grubmiller*, Synoptische Darstellung.

[63] See press release of the Federal Department of Justice and Police http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2012/2012-04-04.html [last visited July 2013]

[64] *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, p. 157.

[65] *Hauser* et al., Strafprozessrecht, p. 11 Rn. 1; *Pieth*, Strafprozessrecht, p. 20.

[66] *Hauser* et al., Strafprozessrecht, p. 12, Rn. 5–7.

[67] *Ibid.*, p. 12, Rn. 7; *Pfenninger*, in: Mezger et al. (eds.), Strafrecht, pp. 170–171; *Stratenwerth*, Die Straftat, § 1, p. 17, Rn. 1–2.

[68] Niggli et al.-*Wicki*, Einleitung, p. 4, Rn. 5.

[69] *Hauser* et al., Strafprozessrecht, p. 13, Rn. 12.

After the Second World War, ideals of the "social state" were implemented in criminal procedure as, for example, impoverished persons were provided access to defense lawyers.[70] In more recent times, the ECHR,[71] which was ratified and entered into force on 28 November 1974, led to an expansion of the rights of suspects in the cantonal criminal procedure laws. Furthermore, the police became more important, thanks to the evolution of science and technology,[72] the creation of endangerment offenses,[73] and efforts to render criminal procedure more efficient. Efforts at efficiency also increased the importance of preliminary proceedings.[74]

Various factors, including common standards set by the ECHR, the demand for efficiency, and the demand for legal equality,[75] paved the way for a unified Swiss Code of Criminal Procedure (which was demanded already in the 19th century).[76] In May 1994, an expert commission was entrusted with analyzing the need for a unified Swiss Code of Criminal Procedure.[77] *Niklaus Schmid* was asked to draft a unified code of criminal procedure in 1999 – more than 100 years after *Carl Stooss* started drafting a unified code of substantive criminal law.[78] Even though the Confederation gained legislative power for substantive criminal law in 1898, it did not gain comparable power for criminal procedure until after the people and the cantons consented in 2000 (Art. 123 para. 1 Federal Constitution of the Swiss Confederation (*Bundesverfassung*, BV[79]) entered into force in 2003.[80] The unified Code of Criminal Procedure (*Strafprozessordnung*, StPO[81]) was adopted in 2007 after long parliamentary debates and several amendments to the draft and entered into force on 1 January 2011. It replaced the 26 cantonal criminal procedure laws and the Federal Act of 15 June 1934 on the Administration of Federal Criminal Justice (for crimes under federal jurisdiction).

Prior to adoption of the unified Code of Criminal Procedure, the cantons had different models of prosecution. To make the criminal procedure efficient, the new

[70] *Pieth*, Strafprozessrecht, p. 28.

[71] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1951. Implemented in Switzerland SR/RS 0.101.

[72] *Hauser* et al., Strafprozessrecht, p. 14, Rn. 15.

[73] *Arzt*, ZStrR 4/2006, 371. On endangerment offenses, see II.D.2.

[74] *Pieth*, Strafprozessrecht, p. 31; *Zimmerlin*, Verzicht auf Verfahrensrechte, p. 10, Rn. 24; *Hauser* et al., Strafprozessrecht, p. 14, Rn. 15.

[75] *Pieth*, Strafprozessrecht, p. 30.

[76] Botschaft Rechtseinheit, pp. 737/Message l'unification du droit, pp. 578.

[77] Botschaft StPO, p. 1098/Message CPP, p. 1072.

[78] *Ibid.*, p. 1099/Message CPP, p. 1073.

[79] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101.

[80] Botschaft StPO, p. 1095/Message CPP, p. 1068.

[81] Schweizerische Strafprozessordnung vom 5. Oktober 2007/Code de procédure pénale suisse du 5 octobre 2007, SR/RS 312.0.

law opted for a public prosecution model. The examining magistrate was abolished. As a countermove to the power of the public prosecution, a court responsible for overseeing coercive measures *(Zwangsmassnahmengericht/tribunal des mesures de contrainte)* was established, and the rights of the accused were enhanced.[82] Further characteristics of the newly unified Code of Criminal Procedure are the moderate principle of discretionary prosecution,[83] the possibility of accelerated proceedings *(abgekürztes Verfahren/procédure simplifiée)*, and enhanced rights of victims.[84] Additional legislation expanded witness protection *(Zeugenschutz/protection des témoins)*: the new Federal Act on Extra-Procedural Witness Protection *(Zeugenschutzgesetz*[85]*)* and the new Ordinance on Extra-Procedural Witness Protection *(Zeugenschutzverordnung*[86]*)* entered into force on 1 January 2013. They protect the victim outside of the actual proceedings and after the proceedings. Another important innovation of the Code of Criminal Procedure is the surveillance of banking transactions *(Überwachung von Bankbeziehungen/surveillance des relations bancaires)* as a new coercive measure.[87] The accelerated proceedings were inspired by plea bargaining as it is conducted in the United States; however, Swiss proceedings differ significantly from proceedings in the United States.[88]

4. Developments in the execution of punishment

– *Competence for establishing and executing punishments and measures*

Issues concerning types, determination, and suspension of measures and penalties used to be regarded as questions of substantive criminal law and therefore were covered by the Criminal Code.[89] In contrast, the execution of punishments and

[82] Niggli et al.-*Wicki*, Einleitung, pp. 8–9, Rn. 33.

[83] See I.D.4.

[84] See I.D.4.

[85] Bundesgesetz vom 23. Dezember 2011 über den ausserprozessualen Zeugenschutz/Loi fédérale du 23 décembre 2011 sur la protection extraprocédurale des témoins, SR/RS 312.2.

[86] Verordnung vom 7. November 2012 über den ausserprozessualen Zeugenschutz/Ordonnance du 7 novembre 2012 sur la protection extraprocédurale des témoins, SR/RS 312.21.

[87] Niggli et al.-*Wicki*, Einleitung, p. 9, Rn. 34; Botschaft StPO, p. 1087/Message CPP, p. 1059.

[88] Donatsch et al.-*Schwarzenegger*, Art. 358, pp. 1756–1757, Rn. 2 with further references. On the differences between accelerated proceedings in Switzerland and plea bargaining in the United States, see *Bommer*, ZSR 128 (2009) II, 5–124. A table with the main differences between summary penalty order procedures and accelerated proceedings in Switzerland and plea bargaining in the United States can be found in *Gilleron*, Strafbefehlsverfahren, pp. 98–99.

[89] *Rehberg*, Strafrecht II, pp. 22–23.

measures used to be regarded as a procedural matter and therefore was within the legislative power of the cantons. However, the amendment of Art. 123 BV, which entered into force in 2003, authorized the Confederation to override cantonal legislative power in this area. Cantonal legislation was overridden, to some extent, by the revised general part of the Criminal Code that entered into force on 1 January 2007. The current Criminal Code contains several general provisions concerning the execution of punishments and measures (e.g., Arts. 74–92 StGB). Details regarding execution, however, are still regulated by the cantons.

Penal institutions are managed by cooperation between cantons with penal system agreements.[90] The Confederation may grant subsidies to the cantons for the construction of penal institutions, for improvements in the execution of penalties and measures, and for institutions that conduct educative measures for the benefit of children, adolescents, and young adults (Art. 123 para. 3 BV).

– *Death penalty and corporal punishment*

Although culpability was a prerequisite of punishment in the *Constitutio Criminalis Carolina* (which influenced criminal law in some cantons), that code recognized cruel methods of implementing the death penalty – such as death by fire, being broken on the wheel, and live burial – as well as other cruel punishments – such as the cutting off of fingers or entire hands and the gouging out of eyes. Despite its acceptance of brutality, the *Constitutio Criminalis Carolina* introduced the permanent deprivation of liberty as an alternative to the death penalty; however, this sanction was not often imposed.[91]

The *Constitutio Criminalis Carolina* did not influence the law of all cantons. Indeed, some cantons even had a kind of lynch law in the 15th and the following centuries. Ideas from the Age of Enlightenment did not have an immediate impact on punishment. In the 18th century, it was still possible to accuse a woman of being a witch and sentence her to death. The last woman sentenced to death under these circumstances was *Anna Göldi* – in 1782. Effects of the Enlightenment were not felt until the introduction of the so-called Helvetisches Peinliches Gesetzbuch (1799).[92] Although the death penalty was retained in this Code, it could only be carried out by means of decapitation. Also, other cruel punishments were abolished and replaced by imprisonment.[93]

[90] See I.A.5.e.

[91] *Baechtold*, Strafvollzug, p. 13, Rn. 11.

[92] On the Helvetic Republic and the Helvetisches Peinliches Gesetzbuch, see I.G.2.

[93] *Stratenwerth*, Die Straftat, § 1, pp. 17–19, Rn. 2–4. For the history of the deprivation of liberty, see below. See also *Baechtold*, Strafvollzug, pp. 8–25, Rn. 1–25.

The punishments foreseen in the Helvetisches Peinliches Gesetzbuch were regarded as being too soft.[94] Consequently, the cantons intensified punishments after they regained legislative power following the failure of the Helvetic Republic in 1803. The death penalty for political offenses was prohibited by the first Swiss Constitution of 1848.[95] Since the cantons had legislative powers, the death penalty for other offenses was, however, still common. Legislative powers were tossed back and forth in the following decades: In 1874, the Constitution abolished corporal punishment and the death penalty for all crimes. However, the Constitution was amended shortly afterwards and legislative power on the death penalty was returned to the cantons in 1879.[96] Subsequently, some of the cantons, including Appenzell Innerrhoden, Obwalden, Uri, Schwyz, Zug, St. Gallen, Luzern, Wallis, Schaffhausen, and Freiburg, reintroduced the death penalty for murder and a number of other serious offenses.[97] The last execution took place in 1940 in Obwalden.[98] The death penalty was finally abolished in the Criminal Code drafted by *Carl Stooss*, which entered into force on 1 January 1942.[99] However, the Military Criminal Code retained the death penalty until 1992.[100]

– *Deprivation of liberty*

Deprivation of liberty took various forms at various stages in history.[101] In the 17th century, persons subject to deprivation of liberty were held in workhouses *(Schallenwerk/sonnettes ou travaux forcés)*, which were initially created for beggars and vagabonds.[102] The inmates – who were forced to wear bells – worked outside as garbage removers and street cleaners.[103] Prison reforms in the 18th and 19th centuries in Europe and Switzerland led to the introduction of cells in prisons (e.g., Geneva and Lausanne in 1825 and 1826 respectively), panoptical prisons, and the execution of prison sentences in progressive stages (St. Gallen and Aargau in 1839 and 1857 respectively).[104] Conditional release was added to the progressive system

[94] *Alkalay*, Strafrecht, pp. 184–187.

[95] *Stratenwerth*, Die Straftat, § 1, pp. 19–20, Rn. 5–6.

[96] *Gauch*, Strafen – 19. und 20. Jahrhundert. *Stratenwerth*, Die Straftat, § 1, pp. 19–20, Rn. 5–6.

[97] *Schwander*, Strafgesetzbuch, p. 166, Rn. 342.2.

[98] *Gschwend*, Todesstrafe.

[99] *Schwarzenegger* et al., Strafrecht II, p. 23. On the history of the death penalty in Switzerland, see also *Luginbühl*, in: Ackermann (ed.), Strafrecht als Herausforderung, pp. 39–44.

[100] *Gschwend*, Todesstrafe.

[101] *Baechtold*, Strafvollzug, p. 12, Rn. 7–9.

[102] *Ibid.*, p. 13, Rn. 12.

[103] *Baechtold*, Strafvollzug, p. 15, Rn. 12; *Killias* et al., Grundriss AT, pp. 219–220, Rn. 1335.

[104] On the execution of custodial penalties, see I.A.5.e.

in Aargau in 1868. Other cantons followed this model.[105] Bern opened an institution that employed the majority of inmates outside of the institution – on farms, for instance – in 1895. This model was known as the open regime *(offener Strafvollzug/exécution de peine en milieu ouvert)* and still exists today.[106] The execution of a sentence in an open regime was adopted and expanded in other cantons.[107] During the 20th century, the goals of punishment began to shift from repression to prevention. The purpose of custody was no longer simply to punish but rather to prepare offenders for a crime-free life after their release into the community.[108] The unified Criminal Code introduced the suspended sentence *(bedingter Strafvollzug/sursis à l'exécution d'une peine)* and parole *(bedingte Entlassung/libération conditionnelle)*. Later on, the Criminal Code was amended, and various forms of execution of deprivation of liberty, such as semi-detention or community service, were introduced.[109]

One of the main aims of the amended general part of the Criminal Code, which entered into force on 1 January 2007, was to reduce the number of short-term deprivations of liberty imposed and replace them with monetary penalties *(Geldstrafe/peine pécuniaire)* and community service *(gemeinnützige Arbeit/travail d'intérêt général)*.[110] Nevertheless – due to criticism by politicians and enforcement authorities – a revision of the amended general part that would reintroduce short-term deprivations of liberty and abolish suspended monetary penalties *(bedingte Geldstrafe/peine pécuniaire avec sursis)* is anticipated.

– *Electronic monitoring*

Electronic monitoring as a form of execution of a custodial punishment[111] was introduced in the cantons Bern, Solothurn, Basel-Stadt, Basel-Landschaft, Ticino, Vaud, and Geneva by permission of the Federal Council in accordance with Art. 387 para. 4 lit. a StGB.[112] This Article allows the Federal Council to permit the cantons to introduce new penalties and measures as well as new forms of execution. It also permits the modification of the scope of application of existing sanc-

[105] *Baechtold*, Strafvollzug, p. 19, Rn. 20.

[106] *Ibid.*, p. 21, Rn. 21.

[107] *Ibid.*, p. 21, Rn. 23.

[108] *Ibid.*, pp. 24–25, Rn. 25.

[109] *Ibid.*; *Schwarzenegger* et al., Strafrecht II, p. 54.

[110] *Schwarzenegger* et al., Strafrecht II, p. 46. On the revision of sanctions, see also *Hurtado Pozo*, Droit pénal, pp. 29–31, Rn. 79–87; *Riklin*, Verbrechenslehre, pp. 103–112, Rn. 30–58. On the punishments foreseen in the Criminal Code, see I.A.5.d.

[111] *Baechtold*, Strafvollzug, p. 134, Rn. 66; *Schwarzenegger* et al., Strafrecht II, p. 287.

[112] Bundesamt für Justiz, Electronic monitoring, available at http://www.ejpd.admin.ch/ejpd/de/home/themen/sicherheit/ref_straf-_und_massnahmevollzug/ref_monitoring.html [last visited July 2013].

tions and forms of execution (provided the Federal Council gives permission). The permission given to the above-mentioned cantons to execute custodial punishment via electronic monitoring will expire as soon as federal legislation providing for electronic monitoring enters into force. If no such provision enters into force, permission will expire in December 2015.[113] It is anticipated that electronic monitoring will be introduced for the first time in the Criminal Code in the course of the revision of the amended general part. According to Art. 79b para. 1 lit. a of the draft amendment to the Criminal Code,[114] electronic monitoring will be introduced as a form of execution for prison sentences from 20 days to 12 months. The draft also introduces electronic monitoring as an alternative to the so-called external accommodation and employment *(Wohn- und Arbeitsexternat/travail et logement externes)*, one of the later stages in the execution of custodial sentences,[115] if the external accommodation and employment does not last less than 3 or more than 12 months (Art. 79b para. 1 lit. b of the draft amendment to the StGB).

– *Introduction of measures by Carl Stooss*

Carl Stooss recognized the limits of the functionality of the requirement of personal guilt of the offender to impose criminal liability. Therefore, he introduced securing measures *(sichernde Massnahmen/mesures de sûreté)* into the system of sanctions.[116] In so doing, he established a dual-track system of sanctions (which inspired other countries) and a bridge between the classical and the sociological theories of punishment.[117]

Indefinite incarceration *(Verwahrung/internement)*, which is the most rigorous measure, was amended by the popular initiative on life-long incarceration for untreatable high-risk sex and violent offenders. The initiative led to the new Art. 123a BV and was implemented in Art. 64 para. 1[bis] StGB and Art. 64c StGB. If certain requirements are met, the court must order life-long incarceration.[118] However, the scope of application remains narrow.[119] Life-long incarceration has been criticized by experts as its imposition depends on such vague notions as "permanently untreatable."[120] In addition, the text of the initiative was in breach of Art. 5 para. 4 ECHR. Therefore, the requirements for consideration of release from indefinite incarceration and parole were implemented in Art. 64c StGB. However, compatibility of life-long incarceration with the ECHR remains debatable.[121]

[113] Para. 4 Bundesratsbeschluss über die Verlängerung der Bewilligungen für die Kantone Bern, Solothurn, Basel-Stadt, Basel-Landschaft, Tessin, Waadt und Genf, Freiheitsstrafen in Form des elektronisch überwachten Vollzuges ausserhalb der Vollzugseinrichtung zu vollziehen (accessible online: http://www.ejpd.admin.ch/content/dam/data/sicherheit/straf_und_massnahmen/monitoring/bbl-verl-em-d.pdf [last visited July 2013].

[114] BBl 2012 4757.

[115] See I.A.5.d.

[116] For an overview of measures provided for in the Swiss Criminal Code, see I.A.5.d.

[117] *Hurtado Pozo*, Droit pénal, pp. 28–29, Rn. 77–78; *Schwarzenegger* et al., Strafrecht II, p. 23.

[118] Trechsel/Pieth-*Trechsel*, Art. 64 StGB, p. 402, Rn. 13 with further references.

[119] Trechsel/Pieth-*Trechsel/Pauen Borer*, Art. 64 StGB, p. 404, Rn. 20 with further references.

[120] *Ibid.*, p. 404, Rn. 19 with further references.

[121] Trechsel/Pieth-*Trechsel*, Art. 64c StGB, pp. 411–412, Rn. 1 with further references.

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List of abbreviations in country report Switzerland

AJP/PJA	Aktuelle Juristische Praxis/Pratique juridique actuelle (law journal)
AT	Allgemeiner Teil des Strafrechts (general part of the criminal law)
AuG	Ausländergesetz (Federal Act on Foreign Nationals)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Official Federal Gazette)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official case reporter of the Swiss Federal Supreme Court; cases are cited by volume, chamber, starting page, page and paragraph)
BGG	Bundesgerichtsgesetz (Federal Supreme Court Act)
BJM	Basler juristische Mitteilungen (law journal)
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft (Federal Constitution of the Swiss Confederation)
CCC	Constitutio Criminalis Carolina
CHF	Swiss Franc
E.	Erwägung (paragraph in cases of the Swiss Federal Supreme Court)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police office
FF	Feuille fédérale (Official Federal Gazette)
GOG BS	Gerichtsorganisationsgesetz Basel-Stadt (Act on the organization of the court of Basel-Stadt)

ICC	International Criminal Court
Interpol	International Criminal Police Organization
IRSG	Rechtshilfegesetz (Mutual Assistance Act)
IRSV	Rechtshilfeverordnung (Mutual Assistance Ordinance)
JdT	Journal des Tribunaux (law journal)
JStG	Jugendstrafgesetz (Juvenile Criminal Law Act)
JStPO	Jugendstrafprozessordnung
KV BS	Kantonsverfassung Basel-Stadt (Constitution of the canton of Basel-Stadt)
MStG	Militärstrafgesetz (Military Criminal Code)
MStP	Militärstrafprozess (Military Criminal Procedure Code)
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NZZ	Neue Zürcher Zeitung
OECD	Organization for Economic Cooperation and Development
OLAF	Office Européen de Lutte Anti-Fraude (European Anti-Fraud Office)
OR	Obligationenrecht (Swiss Code of Obligations)
OSCE	Organization for Security and Cooperation in Europe
ParlG	Parlamentsgesetz (Parliament Act)
PKS/SPC	Polizeiliche Kriminalstatistik/Statistique policière de la criminalité (police crime statistics)
SAA	Schengen-Assoziierungsabkommen (Schengen Association Agreement)
SG	Systematische Gesetzessammlung des Kantons Basel-Stadt (Classified Compilation of the cantonal legislation of Basel-Stadt)
SJZ	Schweizerische Juristen-Zeitung (law journal)
SR/RS	Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral (Classified Compilation of Swiss Federal Legislation)
StBOG	Strafbehördenorganisationsgesetz (Criminal Justice Authorities Act)
StGB	Strafgesetzbuch (Criminal Code)
StPO	Strafprozessordnung (Code of Criminal Procedure)
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht (law journal)
UN(O)	United Nations (Organisation)

VStrR	Bundesgesetz über das Verwaltungsstrafrecht (Federal Act on Administrative Criminal Law)
ZBJV	Zeitschrift des Bernischen Juristenvereins (law journal)
ZSR	Zeitschrift für schweizerisches Recht (law journal)
ZStrR	Schweizerische Zeitschrift für Strafrecht (law journal)
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft (law journal)

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National Criminal Law in a Comparative Legal Context

Volume 2.1

General limitations on the application of criminal law

- Principle of legality
- Extraterritorial jurisdiction

Australia, Bosnia and Herzegovina, Hungary, India, Iran,
Japan, Romania, Russia, Switzerland, Uruguay, USA

edited by

Ulrich Sieber • Susanne Forster • Konstanze Jarvers

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Principle of legality (nullum crimen sine lege) in Switzerland

1. General issues

– *The principle of legality in constitutional law*

The principle of legality in constitutional law (also called principle of legality *lato sensu*) can be summarized as follows: The State is subject to the law. The principle of legality *lato sensu* appears in art. 5 para. 1 of the Swiss Constitution *(Bundesverfassung der Schweizerischen Eidgenossenschaft/BV; Constitution fédérale de la Confédération Suisse)*, which lists the different rule of law principles *(Grundsätze rechtsstaatlichen Handelns; principes de l'activité de l'Etat régi par le droit)*. These principles aim at protecting the individual from unlimited, unpredictable and uncontrollable power.[1]

Art. 5 BV [Rule of law][2]

1 All activities of the state shall be based on and limited by law.

The principle of legality *lato sensu* features three different aspects, the first of which is the hierarchy of norms *(Normenhierarchie; hiérarchie de normes)*. The entirety of norms is hierarchically structured and the lower ranked norms must respect the higher ranked norms. This guarantees coherence and avoids contradictions within the legal order. Furthermore, higher ranked norms are issued in a more complex procedure enhancing their legitimacy and stability.[3] The second aspect of the principle of legality *lato sensu* is the supremacy of the law *(Vorrang des Gesetzes; suprématie de la loi)*, which requires that all state authorities must respect the whole legal order when carrying out their activities.[4] The third aspect is the proviso of legality *(Vorbehalt des Gesetzes; réserve de la loi)* according to which every

[1] *Häfelin/Haller/Keller*, Schweizerisches Bundesstaatsrecht, p. 51, §§ 170–171; Thürer/Aubert/Müller-*Moor*, Schweizerisches Verfassungsrecht, pp. 265–266, § 1.

[2] All translations of provisions of the Swiss Constitution (BV) in this chapter are taken from the unofficial translation provided by the Swiss Confederation, available at www.admin.ch/ch/e/rs/c101.html [last visited: 15 October 2010].

[3] Thürer/Aubert/Müller-*Moor*, Schweizerisches Verfassungsrecht, pp. 265–266, § 1 and p. 266, § 4.

[4] *Ibid.*, pp. 265–266, § 1 and p. 267, § 6.

state activity and the modalities of how it is carried out must be foreseen in the law. This makes state activity not only predictable and confines state power, but is also conducive to equal and non-arbitrary treatment of the individual.[5]

Neither the Swiss Constitution of 1848 nor 1874 explicitly mentioned rule of law principles. However, doctrine and case law recognized those principles as being part of unwritten constitutional law. It was only with the entry into force of the Swiss Constitution of 1999 that the principles found express mention in art. 5 BV.[6]

From the principle of legality *lato sensu* stated in art. 5 para. 1 BV, which governs all kinds of state activity, flows the more specific criminal law principle of legality. Thereby, the principle of legality has a different meaning in substantive and procedural criminal law.

– *The substantive criminal law principle of legality*

The content of the substantive criminal law principle of legality *(strafrechtliches Legalitätsprinzip; principe de la légalité en matière pénale)* is expressed by the Latin maxim *nullum crimen, nulla poena sine lege*, which means "no offense and no sanction without a law."[7] The principle, which is stated in art. 1 of the Swiss Criminal Code *(Schweizerisches Strafgesetzbuch/StGB; Code pénal suisse)*, is thus composed of two aspects.

Firstly, it prescribes that there can be no offense without a law. No one can be held criminally liable for conduct, which is not threatened with punishment by a law. It is neither possible to prosecute or convict someone based on a criminal law, which is not, or is no longer, valid. The principle is further violated if the judge applies a criminal norm to conduct, which is not covered by that criminal provision if interpreted *lege artis*.[8] Secondly, the substantive criminal law principle of legality also protects the individual from unlawful sanctions, that is, penalties *(Strafen; peines)* and measures *(Massnahmen; mesures)*, given that the judge can only impose the sanction(s) foreseen in the respective criminal provision.[9]

The substantive criminal law principle of legality was first introduced in Swiss criminal law in the era of the Helvetic Republic of 1799 when the former federation was replaced by a republic and criminal law was no longer a competence of the

[5] *Häfelin/Haller/Keller*, Schweizerisches Bundesstaatsrecht, p. 51, §§ 170–171; Thürer/Aubert/Müller-*Moor*, Schweizerisches Verfassungsrecht, pp. 265–266, § 1 and p. 269, §§ 18–19.

[6] Ehrenzeller/Mastronardi/Schweizer/Vallender-*Vest*, Art. 5 BV, p. 50, § 1; *Fleiner/Misic/Töpperwien*, Swiss Constitutional Law, p. 29, § 39.

[7] Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 2, § 3.

[8] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 157, § 13; Trechsel-*Trechsel/Jean-Richard*, Art. 1 StGB, p. 2, § 1.

[9] Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 4, § 14.

Cantons. The so-called *Peinliches Gesetzbuch* of 4 May 1799, which was basically a translation of the French Penal Code of 1791, contained the substantive criminal law principle of legality. With the Constitution of 1803, Switzerland became again a federation and the Cantons regained their competence with regard to criminal law. The substantive criminal law principle of legality was retained in the law of various Cantons. In 1898, by way of a constitutional amendment, competence in the field of substantive criminal law reverted to the federal legislature. Thereafter, the Swiss Criminal Code was adopted on 21 December 1937, which contained in art. 1, the substantive criminal law principle of legality. The new General Part of the Swiss Criminal Code, which entered into force on 1 January 2007, likewise states the substantive criminal law principle of legality in its first article.[10]

– *The principle of legality in criminal procedure*

The principle of legality in criminal procedure *(strafprozessuales Legalitätsprinzip; principe de la légalité en procédure pénale)* obliges the prosecution authorities to initiate and conduct criminal proceedings within the limits of their competence if they possess information about an offense or sufficient cause for suspicion (art. 7 StPO). The principle of legality in criminal procedure, also known as principle of mandatory prosecution, thus embodies the opposite of the principle of discretion in prosecution *(Opportunitätsprinzip; principe de l'opportunité)*, which allows dispensation with criminal prosecution at the authorities' discretion.[11]

Under Swiss criminal law, the principle of legality in criminal procedure does not have absolute validity. Rather, in some legally defined cases, the authorities can decide not to initiate criminal proceedings. This so-called moderate principle of discretion in prosecution *(gemässigtes Opportunitätsprinizip; principe de l'opportunité modérée)* is stated in art. 8 StPO.[12]

The principle of legality in criminal procedure has to be distinguished from the principle of legality *lato sensu*, which governs all state activity. Thus, the criminal prosecution authorities also have to respect the hierarchy of norms, the supremacy of the law and the proviso of legality. With regard to criminal procedural law this idea is embodied in the maxim *nullum judicium sine lege*.[13]

[10] *Killias* et al., Droit pénal général, pp. 10–13, §§ 117–118; Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 152, § 1; *Riklin*, Verbrechenslehre, pp. 98–101, §§ 10–23; on the historical development of criminal law in Switzerland, see I.G.2.

[11] Botschaft StPO-CH, pp. 1130–1132/Message StPO-CH, pp. 1106–1107; *Hurtado Pozo*, Droit pénal, p. 52, § 146.

[12] Botschaft StPO-CH, pp. 1130–1132/Message StPO-CH, pp. 1106–1107; *Hurtado Pozo*, Droit pénal, p. 52, § 146.

[13] *Hurtado Pozo*, Droit pénal, p. 52, § 146; *Piquerez*, Procédure pénale suisse, pp. 46–47, § 19.

2. Treatment and scope of principle of legality in the law

a) Location and text of treatment

– *Criminal law*

The substantive criminal law principle of legality, that is, the prescription *nullum crimen, nulla poena sine lege*, is stated in art. 1 StGB. The title of the provision "no sanction without a law" only reflects one aspect of this maxim. However, the norm encompasses both – the idea that only conduct threatened with punishment by a law can constitute an offense and that only sanctions foreseen by law may be imposed:[14]

Art. 1 StGB [No sanction without law][15]
A penalty or measure may only be imposed for an act, which is explicitly threatened with punishment by a law.

Art. 1 StGB is interpreted as encompassing four aspects: Firstly, the *nullum crimen sine lege scripta* principle, which excludes customary law as a basis for criminal conviction and sanctions;[16] secondly, the *nullum crimen sine lege certa* principle requiring that criminal laws are clearly and precisely formulated;[17] thirdly, the *nullum crimen sine lege stricta* principle prohibiting the creation of criminal offenses by analogy;[18] and fourthly the *nullum crimen sine lege praevia* principle, which forbids retroactive application of criminal laws unless it is in favor of the accused.[19]

The principles of *nullum crimen sine lege praevia* and *lex mitior*[20] are statutorily defined in art. 2 StGB:

Art. 2 StGB [Temporal scope of application]
1 Whoever commits a felony or misdemeanor after the entry into force of this law is subject to it.
2 If the offender committed a felony or misdemeanor before the entry into force of this law, but the judgment takes place only after this date, the present law is applicable if it is more lenient towards him.

[14] Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 4, § 14.

[15] All translations of provisions of the Swiss Criminal Code (StGB) are the author's own.

[16] See below 3.a.

[17] See below 3.b.

[18] See below 3.c.

[19] See below 3.d.

[20] See below 3.d.

– *International law*

The substantive criminal law principle of legality is also reflected in provisions of international treaties ratified by Switzerland, namely the ECHR and ICCPR:

Art. 7 ECHR [No punishment without law]

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Art. 15 ICCPR [No punishment without law]

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2 Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Arts. 1 and 2 StGB only govern federal criminal law. Thus, with regard to cantonal criminal law,[21] the substantive criminal law principle of legality must either be based on the Federal or Cantonal Constitution or on international norms, such as art. 7 ECHR or art. 15 ICCPR.

b) Scope of principle

The substantive criminal law principle of legality as stated in art. 1 StGB applies to all norms of federal criminal law, including the so-called secondary criminal law[22] *(Nebenstrafrecht; droit pénal accessoire)*. It relates to all requirements of criminal liability: the objective and subjective definitional elements of the offense, unlawfulness, culpability, and additional prerequisites of criminal liability.[23] In addition, it also covers the sanctions, that is, penalties and measures. Hence, not only the norms defining specific offenses (e.g., those of the Special Part of the Criminal Code) but also the general rules dealing with the requirements of criminal liability

[21] I.F.4.

[22] II.C.2.a. and I.F.2.

[23] II.C.2.c.

(e.g., those of the General Part of the Criminal Code)[24] are subject to the principle of legality.[25]

Art. 1 StGB is neither applicable to disciplinary law *(Disziplinarrecht; droit disciplinaire)*[26] nor to procedural criminal law *(Verfahrensrecht; droit de procédure)*, including the rules on the determination of the forum *(Gerichtsstandsregeln; règles de for)*. Furthermore, the law of enforcement *(Vollstreckungsrecht; droit de l'exécution de peines)* is not governed by the substantive criminal law principle of legality.[27]

3. Elements of the principle of legality

a) Formal requirements – nullum crimen sine lege scripta

– *Exclusion of customary law as a legal basis for offenses and sanctions*

The substantive criminal law principle of legality as embodied in art. 1 StGB requires a "law" as a basis for criminal offenses and sanctions. Thus, criminal law cannot be based on customary law *(Gewohnheitsrecht; droit coutumier)*. The notion of customary law stands for unwritten norms having legal character because they correspond to a practice exercised over a certain time and because they are perceived as being a part of the legal order *(opinio iuris)*.[28]

Art. 1 StGB only prohibits the application of customary law which is to the disfavor of the offender, for example, by holding someone criminally liable for an offense only existing under customary but not under written law. However, it is generally admitted that customary law can be applied in order to restrict criminal liability. The most prominent example is extra-legal justifications[29] *(übergesetzliche Rechtfertigungsgründe; faits justificatifs non prévus par la loi)*.[30]

In juxtaposition to customary law where a rule is created through the existence of a practice and an *opinio iuris*, disuse *(desuetudo)* is defined as the abrogation of a norm due to its non-application over a long period of time. With regard to the

[24] II.C.2.a.

[25] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 157, § 14; Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 4, § 14; *Trechsel/Noll*, Strafrecht AT, pp. 53–54.

[26] I.E.2.

[27] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 154, § 10 and p. 157, § 14; Trechsel-*Trechsel/Jean-Richard*, Art. 1 StGB, p. 5, § 11.

[28] I.F.3.; Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 158, § 15; Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 9, § 34.

[29] II.J.1.b.

[30] *Riklin*, Verbrechenslehre, p. 26, § 11 and p. 193, § 54; Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 10, § 39; Trechsel-*Trechsel/Jean-Richard*, Art. 1 StGB, pp. 3–4, § 4.

Criminal Code, *desuetudo* is rarely admitted given its relatively recent adoption and its constant partial revision.[31] The same holds true for other newer criminal laws and provisions as well as for norms defining serious offenses. However, the abrogation of a criminal norm due to its non-application is considered as possible with regard to criminal norms of the secondary criminal law, which have not been applied over a long period of time.[32]

– *The notion of "law" as used in art. 1 StGB*

Art. 1 StGB requires a "law" as a legal basis for criminal conviction and punishment. The notion of law has two meanings in the Swiss legal order. Firstly, the notion of law refers to a law in the formal sense *(formelles Gesetz; loi formelle)*, which is an act hierarchically below the Constitution, and which is enacted by the Parliament with the participation of the people by way of the optional referendum (art. 141 BV) in the regular legislative procedure.[33] On the federal level, this would be any federal law *(Bundesgesetz, loi fédérale)* as foreseen in art. 163 para. 1 BV.[34] Secondly, the term "law" as used in art. 1 StGB could also refer to a law in the material sense *(materielles Gesetz; loi matérielle)*, that is, any general and abstract norm notwithstanding by which procedure, by whom (for so long as the respective organ is competent), and on which level of the hierarchy of norms it was enacted.[35]

Initially, the Swiss Federal Supreme Court considered that a law in the material sense would satisfy the substantive criminal law principle of legality. Thus, it was possible to define criminal offenses and their sanctions in ordinances *(Verordnung; ordonnance)*, as long as they were in conformity with higher ranked federal law.[36] In a decision of 1986,[37] which was later confirmed, the Swiss Federal Supreme Court required a formal law if the sanction restricts personal liberty (while other sanctions can be foreseen in a material law). The revised Federal Constitution of 1999 mentions this requirement explicitly in art. 31 para. 1 BV and implicitly in the second sentence of art. 36 para. 1 BV:[38]

[31] I.F.2. and I.G.2.

[32] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 158, § 15; Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, pp. 9–10, § 38.

[33] I.A.4.

[34] *Tschannen/Zimmerli/Müller*, Allgemeines Verwaltungsrecht, p. 92, §§ 1–3.

[35] *Ibid.*, p. 93, §§ 6–9.

[36] On the sources of criminal law in Switzerland, see I.F.

[37] BGE 112 Ia 107.

[38] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 160, § 18; Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 6, § 20; *Trechsel/Noll*, Strafrecht AT, p. 54; Trechsel-*Trechsel/Jean-Richard*, Art. 1 StGB, p. 5, § 13.

Art. 31 BV [Deprivation of liberty]

1 No one may be deprived of their liberty other than in the circumstances and in the manner provided for by the law.

Art. 36 BV [Restrictions on fundamental rights]

1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal law. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

The Swiss Federal Supreme Court allows a restrictive exception to the general rule according to which a sanction restricting the personal liberty cannot be based on a material law. This is the case of so-called independent ordinances *(selbstständige Verordnungen; ordonnances indépendentes)* of the Federal Council, which are directly based on the Constitution. They can be enacted in the case of a state of emergency *(Polizeinotstand; état de nécessité de police)* as described in the last sentence of art. 36 para. 1 BV and based on the following constitutional norms:

Art. 184 BV [Foreign relations]

3 Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.

Art. 185 BV [External and internal security]

3 It may in direct application of this Article issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.

In sum, it can be said that, with the exception of independent ordinances of the Federal Council, sanctions implying a deprivation of liberty can only be provided for by a formal law. Monetary penalties *(Geldstrafe; peine pécuniaire)* and fines *(Busse; amende)* on the other hand, can be based on a material law. This position of the law is criticized since monetary penalties and fines can also constitute a significant restriction of fundamental rights, for example, of the right of property (art. 26 BV), which requires a formal law according to art. 36 para. 1 BV. Furthermore, a monetary penalty or fine can be converted into a so-called alternative custodial sentence *(Ersatzfreiheitsstrafe; peine privative de liberté de substitution)* in the case of non-payment (arts. 36 and 106 StGB).[39]

[39] *Hurtado Pozo*, Droit pénal, p. 49, § 134; Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 6, § 22.

b) Requirement of reasonable clarity – nullum crimen sine lege certa

– *The clarity requirement and its rationale*

One aspect of the substantive criminal law principle of legality is the requirement that the criminal provision must be precise and clear *(Bestimmtheitsgebot; exigence de précision et de clarté de la loi)*. This imperative is expressed by the Latin maxim *nullum crimen, nulla poena sine lege certa*. Criminal norms have to be formulated in such a precise manner that the addressee is able to adapt his conduct accordingly and that he can foresee the consequences of his conduct with some degree of certainty.[40] Furthermore, the more precise the wording of a criminal provision is, the smaller the danger of arbitrary criminal judgments will be, and likewise that a case-by-case approach is pursued to the detriment of a constant jurisprudence. Given the content of the *nullum crimen, nulla poena sine lege certa* prescription, its primary addressee is the legislature.[41]

– *Scope of the clarity requirement*

As stated above, the substantive criminal law principle of legality relates to all requirements of criminal liability as well as to the sanction.[42] This holds also true for the clarity requirement given that it is simply a specification of the general principle.

– *Difficulties pertaining to the clarity requirement*

The legislative technique used in Switzerland in the field of criminal law is characterized by the fact that it defines the prohibited conduct in a general and schematic way. Thus, for example, some criminal provisions do not describe the prohibited conduct in detail or do not define it at all (e.g., art. 133 StGB threatens with punishment "[w]hoever participates in an affray" without defining the latter term). Moreover, the legislature often uses notions not having a plain meaning but requiring an interpretation based on legal, moral or social considerations (e.g., art. 112 StGB threatens with punishment, whoever kills a person in an "unscrupulous" way).[43]

Absolutely precise criminal norms are not only impossible due to the legislative technique used in Swiss criminal law and the imperfect nature of every language, but would – especially in the field of sanctions – not be desirable. Thus, the system

[40] BGE 119 IV 242, 244 E. 1c.

[41] *Hurtado Pozo*, Droit pénal, p. 50, § 138; Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 166, § 31; Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 7, § 27.

[42] See above 2.b.

[43] Roth/Moreillon-*Hurtado Pozo*, Art. 1 StGB, p. 8, §§ 30–31.

of fixed sanctions known in the 19th century was abandoned in favor of a system allowing for an individualization of the sanction.[44]

Therefore, the Swiss Federal Supreme Court considers the *nullum crimen, nulla poena certa* principle to be satisfied if the criminal norm features a "sufficient", "appropriate" or "optimal degree" of certainty.[45] Thus, the clarity requirement seems only to exclude extremely imprecise wordings. Nevertheless, it is an important guiding principle for the legislature, which is the primary addressee of the requirement that criminal provisions have to be as precise and clear as possible.[46]

c) Limits on interpretation – nullum crimen sine lege stricta

As a general rule it can be said that criminal norms are to be applied and interpreted just like any other Swiss legal provision. However, the principle of legality, and more precisely the aspect *nullum crimen sine lege stricta*, sets some clear limits on the application and interpretation of criminal provisions. With regard to the application of criminal law, interpretation has to be distinguished from law-making by way of analogy.[47]

– *Interpretation of criminal norms*

The interpretation of criminal provisions is not only allowed in the light of art. 1 StGB but, most of the time, is also necessary given that their meaning is rarely clear. When interpreting criminal norms, the judge tries to establish their true sense *(ratio legis)*.[48] In Switzerland four methods of interpretation are recognized, among which no hierarchy or order of priority exists.[49]

The first method is the so-called grammatical interpretation *(grammatikalische Auslegung; interprétation grammaticale)* where the norm is interpreted based on its wording. Thereby, the German, French, and Italian wording of the respective provision[50] is equally authoritative and, thus, no language is given priority.[51] If they contradict each other, it must be decided which version best reflects the true sense of the norm.[52]

[44] *Ibid.*, Art. 1 StGB, p. 8, § 32.

[45] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 166, § 32 citing the respective case law of the Swiss Federal Supreme Court.

[46] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, pp. 167–168, § 36.

[47] *Trechsel/Noll*, Strafrecht AT, p. 45.

[48] *Riklin*, Verbrechenslehre, p. 47, § 7.

[49] *Donatsch/Tag*, Strafrecht I, p. 34.

[50] I.A.2.b.

[51] Art. 14 para. 1 PublG.

[52] *Riklin*, Verbrechenslehre, p. 47, §§ 3–4.

The historical interpretation *(historische Auslegung; interprétation historique)* constitutes the second method. Thereby, the judge tries to grasp the idea the legislature wanted to lay down in the respective provision when drafting it. The will of the legislature is mainly inferred from the drafting materials (such as the minutes of the expert commissions, draft provisions and their explanatory comments or the minutes of the parliamentary debate). However, one of the tasks of the courts is to adapt legal provisions to prevailing circumstances. Therefore, the Swiss Federal Supreme Court considers that the conception of the legislature is instructive but not binding for the interpreting judge, especially with regard to old criminal norms.[53]

The third method is the so-called systematic interpretation *(systematische Auslegung; interprétation systématique)*. The judge looks at the norm to be interpreted not in an isolated way but tries to understand it as a piece of a larger system, which can be the respective title of the Criminal Code or even the whole criminal law or legal order. Thus, for example, the systematic order of a norm within the Criminal Code can provide indications on the legally protected interest. Further, it is assumed that the criminal law or even the whole Swiss legal order forms a coherent system of norms with common underlying values. Thus, for example, a criminal norm has to be interpreted in conformity with the Federal Constitution.[54]

Finally, the teleological method *(teleologische Auslegung; interpretation téléologique)* asks what the spirit and purpose of a legal provision is. Thus, the underlying values of a criminal norm provide some guidance on how to apply it and the sense that should be accorded to it.[55]

An important question is whether it is admissible to attach a meaning to a criminal provision based on its historical, systematic and teleological interpretation, which is not covered by its wording. Some authors argue that an interpretation cannot go beyond the wording, that is, the literal sense of a criminal provision, without constituting a prohibited analogy. This would namely follow from art. 1 StGB requiring that the conduct in question is "explicitly" *(ausdrücklich/expressément)* threatened with punishment by a law.[56] However, the Swiss Federal Supreme Court has ruled that the judge is not bound by the wording where the *ratio legis* necessarily commands a different reading of the norm.[57]

[53] *Donatsch/Tag*, Strafrecht I, p. 50; *Riklin*, Verbrechenslehre, p. 47, § 8.

[54] *Donatsch/Tag*, Strafrecht I, p. 50; *Riklin*, Verbrechenslehre, pp. 49–50, § 9.

[55] *Riklin*, Verbrechenslehre, p. 49, § 10.

[56] *Seelmann*, Strafrecht AT, pp. 28–29; Trechsel-*Trechsel/Jean-Richard*, Art. 1 StGB, p. 8, § 22.

[57] *Trechsel/Noll*, Strafrecht I, p. 49.

– *Law-making by way of analogy*

The maxim *nullum crimen sine lege stricta* stands for the prohibition against a judge of creating penal offenses by way of analogy. Thus, if specific conduct does not fall under a penal norm interpreted *lege artis* by the judge, he cannot apply this norm by way of analogy, that is, based on the similarity of the conduct in question with the conduct threatened with punishment by the criminal provision.[58]

Analogies are only prohibited to the detriment of the accused. Thus, for example, it is prohibited to create new offenses or to expand existing offenses by way of analogy. In juxtaposition, analogies in favor of the accused are allowed. Thus, a real gap *(echte Lücke; pure lacune)* in the law, meaning one which was not intended by the legislature, can be filled in favor of the accused. An example thereof is the creation by case law of extra-legal justifications rendering conduct, which fulfills an offense description, lawful.[59] However, even if in favor of the accused, a gap cannot be filled in the case of so-called qualified silence *(qualifiziertes Schweigen; silence qualifié)*, where the legislature consciously and willingly left a gap in the law. It is prohibited for the judge to fill such a gap regardless of whether it is in favor or in disfavor of the accused.[60]

In juxtaposition to law-making by way of analogy, which is prohibited in criminal law if it goes to the detriment of the accused, a norm can be interpreted in favor as well as in disfavor of the alleged offender. The *nullum crimen sine lege stricta* principle only prohibits convicting for conduct, which is not covered by a correctly interpreted criminal provision.[61]

d) Retroactive application of criminal provisions/judgments – nullum crimen sine lege praevia

– *Prohibition of retroactive application of criminal law and lex mitior exception*

The prohibition on applying criminal provisions retroactively is a specification of the substantive criminal law principle of legality and is expressed by the maxim *nullum crimen sine lege praevia*. Under Swiss criminal law, the prohibition is based on art. 2 para. 1 StGB which states that the Criminal Code applies to every person who commits a felony or misdemeanor *after* its entry into force. The prohibition is also stated in art. 7 para. 1 ECHR and art. 15 para. 1 ICCPR.[62]

[58] Niggli/Wiprächtiger-*Popp/Levante*, Art. 1, p. 161, § 21.

[59] II.J.1.b.

[60] *Riklin*, Verbrechenslehre, p. 26, § 12 and pp. 50–51, §§ 16–19.

[61] *Donatsch/Tag*, Strafrecht I, p. 34.

[62] For the wording of the cited provisions, see above 2.a.; *Donatsch/Tag*, Strafrecht I, p. 41.

An exception exists, however, to the rule that criminal laws cannot be applied retroactively. According to the principle of *lex mitior* a new law can be applied retroactively if it is more favorable to the offender than the law, which was in force at the time of the commission of the offense. This exception is stated in art. 2 para. 2 StGB.[63]

– *Time of commission of the offense*

Pursuant to art. 2 para. 1 StGB, the Criminal Code is only applicable to offenses committed after its entry into force. However, the Criminal Code does not define at what moment the offense is deemed to be committed. The prevailing doctrine considers the time when the offender acts, that is, when the conduct fulfilling the definitional elements of the offense is carried out, as determinative. Thereby, the threshold of an attempt must be attained.[64] The moment when the result of an offense is obtained, is not taken into account in order to determine when an offense is committed.[65] Omissions are deemed to be committed for so long as the duty to act persists.[66]

Continuing offenses *(Dauerdelikt; délit continu)* are characterized by the fact that the violation of the legally protected interest is maintained over a certain period of time (e.g., unlawful deprivation of liberty; art. 183 StGB). If the new law enters into force during this period of time, the whole offense is considered to be committed under the new law.[67]

With regard to participation,[68] it should be noted that the acts of the instigator or the aider and abettor (and not those of the principal) are relevant to determine the time of the commission of the offense.[69]

If the offender fulfilled various offense descriptions or committed the same offence several times due to the plurality of acts, every act is adjudicated according to the law which was in force at the time of commission. However, with regard to the sentence, the offenses are treated as a package and a so-called global sentence *(Gesamtstrafe; peine d'ensemble)* according to art. 49 StGB is imposed.[70]

[63] For the wording of the cited provision, see above 2.a.; *Riklin*, Verbrechenslehre, p. 114, § 7.

[64] II.F.2.

[65] II.D.6.; Niggli/Wiprächtiger-*Popp/Levante*, Art. 2, p. 171, § 5; Trechsel-*Trechsel/Vest*, Art. 2 StGB, p. 12, § 4.

[66] II.D.4.; Niggli/Wiprächtiger-*Popp/Levante*, Art. 2, p. 171, § 5; Roth/Moreillon-*Gauthier*, Art. 2 StGB, pp. 19–20, § 14.

[67] Roth/Moreillon-*Gauthier*, Art. 2 StGB, p. 20, § 17; Trechsel-*Trechsel/Vest*, Art. 2 StGB, p. 12, § 4.

[68] II.G.3.b.

[69] Niggli/Wiprächtiger-*Popp/Levante*, Art. 2, p. 171, § 5; Roth/Moreillon-*Gauthier*, Art. 2 StGB, p. 20, § 15.

[70] Roth/Moreillon-*Gauthier*, Art. 2 StGB, p. 21, § 19.

– *The lex mitior exception*

The rule that criminal laws cannot be applied retroactively has no absolute validity. Rather, according to the *lex mitior* principle a new law can be applied retroactively if it is more favorable to the offender than the law, which was in force at the time of the commission of the offense. This exception is stated in art. 2 para. 2 StGB.[71]

This implies that someone, whose conduct constituted an offense under the old law but not under the new law, is not prosecuted at all. If the conduct is still punishable under the new law but the offense description or the sanction has changed, a decision has to be made as to whether the new law is more favorable to the offender. If it is, the new law is applied retroactively. The comparison is made *in concreto*; hence, rather than comparing the abstract norms, the judge determines the concrete liability of the offender under the new and the old law and compares the outcomes.[72]

The *lex mitior* principle does not apply to temporary laws *(Zeitgesetze; lois temporaires)*, that is, to criminal provisions whose validity is limited in time from the outset. Thus, acts committed during the period of time when the law was valid are adjudicated based on this law, even if it is no longer in force at the time of judgment and the specific conduct is no longer punishable. However, the *lex mitior* principle applies, if the time limited law was not abrogated without replacement, but has been substituted by a more lenient law.[73]

In the field of sanctions, it should be noted that art. 2 StGB which states the prohibition of retroactivity and the *lex mitior* principle, applies to penalties. For measures, however, specific transitional provisions were enacted with the entry into force of the new General Part of the Criminal Code.[74] According to these transitional provisions, the securing measures *(sichernde Massnahmen; mesures de sûreté)* defined in arts. 56–65 StGB and encompassing therapeutic measures and indefinite internment apply retroactively (with some specificities applying to indefinite detention and the placement of young adult offenders in vocational training institutions). The transitional provisions do not contain specific rules for so-called other measures *(andere Massnahmen; autres mesures)* as defined in arts. 66–73 StGB. From the drafting materials and the case law of the Swiss Federal Supreme Court, it follows that the rules on confiscation do not apply retroactively and that

[71] For the wording of the cited provision, see above 2.a.; *Riklin*, Verbrechenslehre, p. 114, § 7.

[72] *Donatsch/Tag*, Strafrecht I, pp. 42–43; Roth/Moreillon-*Gauthier*, Art. 2 StGB, p. 25, § 33.

[73] Trechsel-*Trechsel/Vest*, Art. 2 StGB, p. 13, § 9; Roth/Moreillon-*Gauthier*, Art. 2 StGB, p. 26, § 36.

[74] Schlussbestimmungen der Änderung vom 13. Dezember 2002, Ziffer 2/dispositions finales de la modification du 13 décembre 2002, chiffre 2 (Annex to the Criminal Code).

the *lex mitior* principle applies. Some authors argue that this should also hold true for the remaining "other measures".[75]

– *Scope of the principle*

The prohibition of retroactive application of criminal law and the *lex mitior* principle are valid for the whole criminal law, that is, the General Part (including the rules on the territorial scope of application of the criminal law; arts. 3–8 StGB)[76] and to offense descriptions contained in the Special Part.[77] Hence, art. 2 StGB governs all general requirements[78] and consequences of criminal liability.[79]

Art. 2 StGB does not apply to criminal procedural law, including the rules on the determination of the forum (arts. 336 f. StGB). Thus, a procedural provision can also be applied in a proceeding where an offense committed before the entry into force of that provision is adjudicated. The retroactive application of procedural criminal law provisions is explained, first and foremost, by procedural economy arguments.[80]

The Criminal Code contains some specific intertemporal rules for offenses prosecuted on complaint (art. 390 StGB), statute of limitations rules (art. 389 StGB), and the enforcement of sentences passed under old criminal law (art. 388 StGB). They complement or specify art. 2 StGB.[81]

Art. 390 StGB contains specific intertemporal law rules for offences that are only prosecuted at the request of the victim of the offense, so-called offenses prosecuted on complaint *(Antragsdelikte; infractions punies sur plainte)*. If an offense prosecuted *ex officio (Offizialdelikt; infraction poursuivie d'office)* under the old law became an offense prosecuted on complaint under the new law, a request is necessary to initiate or continue prosecution (art. 390 para. 2 StGB). If an offense prosecuted at request was converted into an offense prosecuted *ex officio*, the request requirement persists for offenses committed before the new law entered into force (art. 390 para. 3 StGB).[82]

[75] Niggli/Wiprächtiger-*Popp/Levante*, Art. 2, p. 176, § 12a; *Schwarzenegger/Hug/Jositsch*, Strafen und Massnahmen, p. 149.

[76] II.B.

[77] II.C.2.a.

[78] II.C.2.c

[79] Trechsel-*Trechsel/Vest*, Art. 2 StGB, p. 11, §§ 1 and 3.

[80] *Riklin*, Verbrechenslehre, p. 115, § 11; Roth/Moreillon-*Gauthier*, Art. 2 StGB, p. 26, § 37; *Trechsel/Noll*, Strafrecht AT, p. 55.

[81] Trechsel-*Trechsel/Vest*, Art. 2 StGB, p. 11, § 3.

[82] Trechsel-*Trechsel/Lieber*, Art. 390 StGB, p. 1512, §§ 2–3.

With regard to statute of limitations rules, art. 2 StGB is specified and complemented by art. 389 StGB.[83] Unless otherwise stipulated in the new law, the new rules on the period of limitation on prosecution *(Verfolgungsverjährung; prescription de l'action pénale)* are applicable to offenses committed before their entry into force if they are more favorable to the offender. New rules on the period of limitation on enforcement *(Vollstreckungsverjährung; prescription des peines)* are applicable to convictions based on the old law if they constitute *lex mitior* compared to the old norms.[84] However, with regard to particularly serious offenses, such as genocide or war crimes, the *lex specialis* of art. 101 StGB, stating the non-applicability of the statute of limitations, prevails; according to art. 101 para. 3 StGB, the provision is even applicable retroactively, on the condition that the offenses were not already time-barred at the time of the entry into force of art. 101 StGB, on 1 January 1983.[85]

With regard to the enforcement of a sentence passed under old criminal law and whose penalty or measure is not, or is not fully, enforced at the time when the new law enters into force, art. 388 StGB is pertinent. Generally, the enforcement is governed by the old law (art. 388 para. 1 StGB); the judgment issued under the old law does not become void due to a new law, which is more favorable to the convicted person. However, there are two exceptions to this general rule. Firstly, the enforcement of a penalty or measure is stopped (or alternatively, never started) if the conduct for which the person was convicted is no longer punishable under the new law (art. 388 para. 2 StGB). Secondly, new rules pertaining to the enforcement regime that regulate the manner in which the sentence is enforced or the different phases of execution (e.g., parole) also apply to persons convicted under the old law (art. 388 para. 3 StGB).[86]

Finally, the prohibition of retroactive application only relates to criminal provisions, not to judicial decisions. If case law has developed to the disfavor of the offender between the commission of the crime and the criminal judgment (e.g., an element of the offense description is interpreted differently), the offender cannot invoke the prohibition of retroactive application of criminal law.[87]

[83] On statutes of limitations, see II.K.

[84] Trechsel-*Trechsel/Lieber*, Art. 389 StGB, p. 1512, § 1.

[85] Niggli/Wiprächtiger-*Müller*, Art. 101, p. 1687, § 9; Trechsel-*Trechsel/Lieber*, Art. 389 StGB, p. 1512, § 2.

[86] Trechsel-*Trechsel/Lieber*, Art. 388 StGB, p. 1511, §§ 1–3.

[87] *Donatsch/Tag*, Strafrecht I, p. 43; *Hurtado Pozo*, Droit pénal, pp. 104–105, §§ 304–305.

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Table of cases

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List of abbreviations

AT	Allgemeiner Teil des Strafrechts (General Part of the criminal law)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Official Federal Gazette)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official case reporter of the Swiss Federal Supreme Court; cases are cited by volume, chamber, starting page, page, paragraph)
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101 (Federal Constitution of the Swiss Confederation of 18 April 1999)
E.	Erwägung (paragraph in cases of the Swiss Federal Supreme Court)
ECHR	Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten/Convention du 4 novembre 1950 de sauvegarde des droits de l'homme et des libertés fondamentales, SR/RS 0.101 (Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1951)
FF	Feuille fédérale (Official Federal Gazette)
ICCPR	Internationaler Pakt vom 16. Dezember 1966 über bürgerliche und politische Rechte/Pacte international du 16 décembre 1966 relatif aux droits civils et politiques, SR/RS 0.103.2 (International Covenant on Civil and Political Rights of 16 December 1966)

Anna Petrig

Extraterritorial jurisdiction – the applicability of domestic criminal law to activities committed abroad in

Switzerland

1. General issues

The rules on the geographical scope of application *(räumlicher Geltungsbereich; conditions de lieu)* define the conditions under which Swiss criminal law is applicable to specific conduct taking place within Swiss territory or abroad, that is, how far Switzerland's penal power *(Strafrechtshoheit; pouvoir répressif)* reaches. The entirety of rules defining the geographical scope of application of Swiss criminal law is referred to as international criminal law *(internationales Strafrecht; droit pénal international)*.[1]

Whether Switzerland is competent to adjudicate upon a case, that is, when it has criminal jurisdiction *(Gerichtsbarkeit; pouvoir juridictionnel)* is a different question to the geographical scope of application of Swiss criminal law and is of a procedural nature. However, if Switzerland possesses penal power, it generally also has criminal jurisdiction. Yet a separate issue is the determination of the competent court within Switzerland according to the rules laid down in arts. 340 ff. StGB. Having a forum *(Gerichtsstand; for)* in Switzerland requires that it has penal power and criminal jurisdiction.[2]

a) Scope of protection provided by domestic criminal offenses

What legally protected interests *(Rechtsgüter; biens juridiques protégés)* Swiss criminal norms seek to protect is a separate question to the potential applicability of domestic criminal norms to extraterritorial conduct.[3]

[1] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3 StGB, p. 179, § 1; Roth/Moreillon-*Harari/Liniger Gros*, Intro aux art. 3 à 8 StGB, p. 28, § 5; *Trechsel/Noll*, Strafrecht AT, p. 57.

[2] *Hurtado Pozo*, Droit pénal, pp. 63–64, §§ 176–177; *Trechsel/Noll*, Strafrecht AT, p. 57 citing BGE 108 IV 145, 146 E.2; Roth/Moreillon-*Harari/Liniger Gros*, Intro aux art. 3 à 8 StGB, pp. 28–29, §§ 5–10.

[3] *Ambos*, Internationales Strafrecht, pp. 13–14, §§ 31–33; *Schultz*, AT Strafrecht, p. 104.

Most Swiss criminal provisions do not differ whether the holder of a legally protected interest is a national or a foreigner. Thus, for example, life and limb, property, reputation and privacy, freedom and sexual integrity of foreigners and Swiss nationals are equally covered by the provisions of Title 1–5 StGB.

Some offenses, however, only aim at protecting national legally protected interests. Thus, the so-called "felonies and misdemeanors against the State and national defense" (Title 13 StGB) exclusively protect Swiss interests. However, since these offenses are often committed from abroad, the rules on the geographical scope of application foresee that such conduct is subject to Swiss criminal law (art. 4 StGB).[4]

On the other hand, a set of provisions explicitly safeguards foreign interests, such as art. 250 StGB protecting foreign money and stamps from counterfeiting and art. 255 StGB prohibiting forgery of foreign documents. Furthermore, the Swiss Criminal Code contains a Title on "disturbance of foreign relations" (Title 16 StGB), threatening with punishment behavior such as insulting a foreign state (art. 296 StGB) or violating foreign territorial sovereignty (art. 299 StGB). However, these provisions primarily aim at prohibiting conduct detrimental to Switzerland's relations with foreign states and are thus the expression of a national interest; foreign interests are only secured collaterally.[5]

b) Location within legal system where applicability of domestic criminal law abroad is treated

The set of rules defining the geographical scope of application of Swiss criminal law is referred to as international criminal law. This notion is misleading in that these norms do not constitute international but rather domestic law. They define autonomously, albeit within the limits of international public law, the scope of domestic penal power, namely whether Swiss criminal law is applicable to facts featuring an extraterritorial moment.[6]

Rules defining the geographical scope of application of Swiss criminal law can not only be found in the General Part of the Swiss Criminal Code (arts. 3–8 StGB) but also in specific offense descriptions contained in the Special Part of the Swiss Criminal Code[7] and in the secondary criminal law[8] *(Nebenstrafrecht; droit pénal accessoire)*.[9]

[4] See below 3.b.

[5] Niggli/Wiprächtiger-*Omlin*, vor Art. 296, p. 2123, § 2.

[6] *Hurtado Pozo*, Droit pénal, p. 61, §§ 171–172; Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3 StGB, p. 179, § 1; BGE 119 IV 113, 116 E. 1c.

[7] E.g., art. 240 para. 3 StGB or art. 245 no. 1 para. 3 StGB.

[8] E.g., art. 19 no. 4 BetmG.

[9] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 179, § 2 and Art. 7 StGB, p. 219, § 13.

The provisions defining the geographical scope of application of Swiss penal law are substantive criminal norms and not of a procedural nature.[10]

c) Overview of the major principles governing the exercise of jurisdiction

– *Jurisdictional principles*

First and foremost, Swiss criminal law is applicable to offenses committed in Switzerland (principle of territoriality).[11] However, the legislature extended the application of Swiss criminal law to certain extraterritorial conduct if specific connecting factors *(Anknüpfungspunkte; points de rattachement)* exist, which legitimize the extension of Swiss penal power to offenses committed abroad.

One such connecting factor justifying the application of Swiss law to an offense is the Swiss nationality of the offender (active personality principle)[12] or the victim (passive personality principle).[13] In addition, Swiss criminal law is applicable to ships and aircraft flying the Swiss flag (flag principle).[14] Furthermore, the fact that a specific offense violates the interests of the Swiss State may trigger the application of Swiss criminal law (protective principle).[15]

Some offenses are considered to be of such a grave nature that every state is equally competent to apply its law even absent any link, that is, legitimizing connecting factor, to the offense in question (universality principle).[16] A specific link to the offense is also not required in the case where Switzerland exercises its penal power by representation for another state (representation principle).[17]

– *Order of rank*

The principle of territoriality (art. 3 StGB), which follows from the state's sovereignty over its territory *(Gebietshoheit; souveraineté territoriale)*, is the primary basis for applying domestic criminal law. It is given priority over other principles providing a basis for the exercise of criminal jurisdiction (arts. 4–7 StGB).[18]

[10] *Hurtado Pozo*, Droit pénal, p. 63, § 178; Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 181, § 8.

[11] See below 2.

[12] See below 4.

[13] See below 3.c.

[14] See below 2.d.

[15] See below 3.b. *Hurtado Pozo*, Droit pénal, p. 63, § 179; Trechsel-*Trechsel/Vest*, Vor Art. 3 StGB, p. 15, § 5.

[16] See below 5.

[17] See below 6. *Hurtado Pozo*, Droit pénal, pp. 63–64, §§ 179–180.

[18] *Donatsch/Tag*, Strafrecht I, p. 61; *Hurtado Pozo*, Droit pénal, p. 67, § 192; Trechsel-*Trechsel/Vest*, Art. 3 StGB, p. 19, § 1.

If, in a specific case, the exercise of extraterritorial jurisdiction can be based on multiple jurisdictional principles, then the principle that is given priority is that which imposes the least conditions for the application of Swiss criminal law. Despite this, the subsidiarity rule of art. 7 para. 1 StGB has to be observed, according to which the active and passive personality principle only apply if the conditions of art. 4 (protective principle), art. 5 (universal jurisdiction over specific offenses committed against minors) or art. 6 StGB (representation principle based on international agreements) are not met.[19]

d) Taking foreign legal norms into account

– *Application of Swiss criminal law as a fundamental principle*

The Swiss judge does not apply foreign criminal norms as such, even if conduct carried out abroad is under consideration. Rather, Swiss criminal law is applied, whether the offense is committed within Switzerland (art. 3 StGB) or abroad (arts. 4–7 StGB).

From an interstate perspective, the application of Swiss law to conduct taking place abroad may lack legitimacy. From an offender's perspective, the application of a law, which potentially differs from the law of the place of commission, may raise concerns with regard to the principle of legality *(Legalitätsprinzip; principe de la légalité)*.[20] In order to accommodate these concerns, foreign criminal law is taken into account to some extent. On the one hand, some jurisdictional principles make the application of Swiss criminal law contingent upon double criminality, that is, that the conduct is also punishable at the *locus delicti commissi*.[21] On the other hand, in some instances the milder sanction of the foreign law is considered when fixing the sentence according to Swiss law.[22]

– *Principle of double criminality*

Some jurisdictional principles make the application of Swiss criminal law to an offense committed abroad contingent upon the requirement that the conduct in question is also liable to punishment at the place where it was committed, that is, they require double criminality *(beidseitige Strafbarkeit; double incrimination)*.[23]

[19] *Eicker*, Swiss International Criminal Law, p. 308 and p. 315; Roth/Moreillon-*Henzelin*, Art. 7 StGB, p. 79, § 3.

[20] II.A.3.

[21] See below 1.d.

[22] See below 1.d.; Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 190, § 26; *Riklin*, Verbrechenslehre, p. 121, § 35.

[23] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 190, § 26. Whether double criminality is required with regard to each of the principles establishing extraterritorial jurisdiction is addressed in relation to each principle individually: see below 3.–6.

When deciding whether the double criminality requirement is fulfilled, the Swiss judge takes foreign law into account *ex officio*; the alleged offender does not bear any burden of proof.[24]

According to the Swiss Federal Supreme Court *(Schweizerisches Bundesgericht; Tribunal fédéral suisse)*, the principle of double criminality does not require complete identity between the foreign and domestic criminal norm *(Normidentität; identité complète des normes pénales)*. Rather, it is sufficient that the conduct in question matches the objective and subjective definitional elements of an offense under both laws. Elements pertaining to unlawfulness, culpability or additional prerequisites of criminal liability are not to be taken into account.[25] The consequences of the criminal offense do not have to be the same, that is, the type of sanction can differ; however, the addressee of the sanction has to be identical. Procedural norms are not relevant in the context of double criminality. The conduct under consideration has to be punishable under both laws at the time of commission of the offense and not the time of the judgment.[26]

– *Lex mitior*

Some jurisdictional principles foresee the so-called *lex mitior* principle according to which an offender, who is subject to Swiss law, cannot be punished more severely for an offense committed abroad than he would be under the law of the locus of commission.[27] The principle is statutorily defined as follows:

Art. 6 para. 2 StGB and Art. 7 para. 3 StGB[28]
The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.

The Swiss judge does not apply foreign criminal norms as such. Rather, when fixing the sanction according to Swiss law, he has to exercise his discretion by observing a possibly milder punishment under foreign law. Hence, the penalty that would be imposed under foreign law constitutes the maximum sentence that he can pronounce.[29]

[24] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 190, § 29.

[25] II.C.2.c.

[26] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, pp. 190–191, §§ 27–28; *Popp*, Internationale Rechtshilfe, pp. 142–143, §§ 211–212 and pp. 148–153, §§ 220–228; Roth/Moreillon-*Henzelin*, Art. 6 StGB, p. 71, § 21.

[27] The bases of jurisdiction to which the *lex mitior* principle applies is addressed in relation to each jurisdictional principle individually: see below 3.–6.

[28] The wording of the French and Italian versions of art. 6 para. 2 StGB and art. 7 para. 3 StGB is identical; the German wording of the two provisions varies slightly. All translations of legal provisions are the author's own, unless otherwise provided.

[29] Botschaft StGB, p. 1997/Message StGB, p. 1803; *Hurtado Pozo*, Droit pénal, p. 66, § 191; Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, pp. 192–193, §§ 30–31.

When determining the sanction under foreign law, the judge does not have to consider the abstract penalty as foreseen in the foreign criminal provision, but rather has to determine the concrete liability of the offender in the case in issue. By comparing the sanction under foreign and Swiss law, the overall effect of the sanction *(Gesamtwirkung der Strafe; conséquences globales des sanctions)* has to be considered, that is, including the modalities of the sanction (e.g., suspended versus unsuspended sentence) and the enforcement (e.g., house arrest versus confinement in a penitentiary). Since the punishment under foreign law constitutes the maximum penalty that the Swiss judge can impose, the *lex mitior* principle prevents the offender from being treated differently to someone undergoing trial for the same offense at the locus of commission.[30]

e) Taking foreign criminal judgments into account

Since every state can define its penal power autonomously within the limits of international public law, several states may subject the same offense to their domestic criminal law and jurisdiction. Hence, it is possible that according to the Swiss rules on the geographical scope of application, Swiss criminal law is applicable to an offense which could be or has already been judged in a foreign criminal procedure.

The principle of *ne bis in idem*,[31] which prohibits a person from being tried or punished again for an offense for which he or she has already been finally acquitted or convicted in accordance with the law and penal procedure of each country, does not bar prosecution for the same facts in two different states.[32] In addition, no clear international rules on how to solve positive conflicts of competence among states exist. Thus, an offender could potentially be tried and punished by several states for the same offense. Therefore, Swiss international criminal law foresees some principles, which govern the situation where a foreign criminal judgment has already been issued.[33]

[30] Botschaft StGB, p. 1997/Message StGB, p. 1803; Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, pp. 192–193, §§ 30–31.

[31] Art. 14 para. 7 ICCPR and Art. 4 protocol no. 7 ECHR

[32] *Frowein/Peukert*, EMRK-Kommentar, art. 4 protocol no. 7 ECHR, p. 712, § 2; *Nowak*, ICCPR Commentary, art. 14 ICCPR, p. 356, § 99.

[33] *Donatsch/Tag*, Strafrecht I, p. 47; *Hurtado Pozo*, Droit pénal, p. 74, §§ 213–214; Roth/Moreillon-*Harari/Liniger Gros*, Art. 3 StGB, p. 35, § 16; *Trechsel/Noll*, Strafrecht AT, p. 57. The bases of jurisdiction to which the principle of imputation, extinction or enforcement applies is addressed in relation to each basis of jurisdiction individually: see below 3.–6.

– *Principle of imputation*

In order to temper the consequences of double jeopardy, that is, that the offender can be tried again for the same facts in another state, the so-called principle of imputation *(Anrechnungsprinzip; principe de l'imputation)* obliges the Swiss judge to take into account a sentence served abroad. In concrete terms, this requires that he has to subtract a fully or partially enforced foreign sanction from the sentence he pronounces for the same offense. The principle thus reflects the idea of *ne bis poena in idem*, that is, that an offender shall not be punished twice for the same facts, and therefore prevents "an unfair accumulation of sentences."[34] The principle is statutorily defined as follows:

Art. 3 para. 2 StGB / art. 4 para. 2 StGB[35]

2 If the offender has been convicted abroad for the offense and if the sentence has been fully or partially enforced abroad, the judge must count the enforced sentence toward the sentence to be pronounced.

With regard to measures *(Massnahmen; mesures)*, the Criminal Code states the following rule:

Art. 5 para. 3 StGB / art. 6 para. 4 StGB / art. 7 para. 5 StGB[36]

If the offender has been convicted abroad for the offense and if the sentence has only been partially enforced abroad, the judge must count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

The principle only applies to enforced sentences. Thus, neither an acquittal nor a suspended *(bedingte Strafe; peine avec sursis)* or prescribed sentence *(verjährte Strafe; peine prescrite)* pronounced in a foreign proceeding has to be taken into account by the Swiss judge. The same holds true if the sanction was waived, for example, due to an amnesty *(Amnestie; amnistie)* or pardon *(Begnadigung; grâce)*. Also the remainder of a sentence in case of parole *(bedingte Entlassung; libération conditionnelle)* is not considered. Finally, a monetary penalty *(Geldstrafe, peine pécuniaire)* can only be counted towards the Swiss sentence if it has been paid.[37]

A direct crediting can take place if the foreign and domestic judgments foresee the same type of sanction; however, if the modalities of enforcement are fundamentally different, a direct crediting may not be adequate. If the type of sanction varies between the foreign and domestic judgments (e.g., monetary penalty and imprisonment) a conversion has to take place; thereby the judge can exercise some discretion.[38]

[34] Trechsel-*Trechsel/Vest*, Art. 3 StGB, p. 19, § 6 citing BGE 105 IV 225, 227 E. 3; *Hurtado Pozo*, Droit pénal, pp. 74–75, § 214.

[35] All translations of the Swiss Criminal Code (StGB) are the author's own.

[36] The wording of the French versions of art. 5 para. 3, art. 6 para. 4 and art. 7 para. 5 StGB is identical; the German wording varies slightly among the provisions.

[37] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, pp. 200–201, §§ 46–47; Roth/Moreillon-*Harari/Liniger Gros*, Art. 3 StGB, p. 35, § 17 and p. 36, §§ 19–23.

– *Principle of extinction*

According to the principle of extinction *(Erledigungsprinzip; principe de l'extinction)*, Switzerland does not prosecute an offender for a specific offense if he has been acquitted by final judgment abroad or if the sentence has been enforced, waived or is barred by a statute of limitations with regard to that offense. Thus, the principle of extinction, which not only bars double punishment but also double prosecution, is an application of the *ne bis in idem* principle.[39]

However, a prosecution in Switzerland remains possible despite a foreign acquittal or an enforced, waived or prescribed sentence, if the foreign proceeding contradicted the Swiss *ordre public*, that is, if it violated fundamental principles of the Federal Constitution or the ECHR. It is quite unclear what this criteria, which was only introduced during the parliamentary debate and thus in the very final phase of the legislative process, encompasses.[40] The principle of extinction is statutorily defined as follows:

Art. 5 para. 2 StGB / art. 6 para. 3 StGB / art. 7 para. 4 StGB

Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not to be prosecuted for the same offense in Switzerland, if:

a. he has been acquitted abroad by final judgment;

b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

With regard to the territoriality principle,[41] that is, offenses committed in Switzerland, the principle of extinction additionally requires that the foreign proceedings took place at the request of Swiss authorities. It is defined as following in the Swiss Criminal Code:

Art. 3 para. 3 StGB

3 Subject to a serious violation of the fundamental principles of the Federal Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR), an offender who has been prosecuted abroad

[38] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 201, § 47.

[39] Donatsch-*Donatsch*, Art. 3 StGB, pp. 33–34, § 13; *Hurtado Pozo*, Droit pénal, pp. 75–76, §§ 215–218.

[40] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, pp. 197–198, § 41; Roth/Moreillon-*Harari/Liniger Gros*, Art. 3 StGB, pp. 43–46, §§ 62–77.

[41] See below 2.a.

at the request of the Swiss authorities will not be prosecuted in Switzerland for that offense, if:

a. he has been acquitted abroad by final judgment;

b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

– *Principle of enforcement*

According to the principle of enforcement *(Vollzugsprinzip; principe de l'exécution)* a foreign sanction, which has not or has only partially been enforced abroad, is enforced in Switzerland. With regard to measures, the Swiss judge has to decide whether it is appropriate to execute a measure of foreign law in Switzerland. Thus, in juxtaposition to sentences, which are automatically enforced in Switzerland, a new proceeding is required.[42]

The principle of enforcement is only foreseen with regard to the territoriality principle and is defined as follows:

Art. 3 para. 4 StGB

If the offender who has been prosecuted abroad at the request of the Swiss authorities did not serve the sentence abroad, it is enforced in Switzerland; if he served it only partially, the remainder of the sentence is served in Switzerland. The judge decides whether a measure, which has not or has only partially been enforced abroad, is executed or continued in Switzerland.

2. Principle of territoriality

a) General issues

– *The principle of territoriality and its statutory definition*

According to the principle of territoriality *(Territorialitätsprinzip; principe de la territorialité)*, Swiss criminal law is applicable to every person (regardless of his or her nationality), who commits an offense in Switzerland.[43] The principle is thus intrinsically linked with the notion of territory[44] and the concept of locus of commission.[45] For felonies and misdemeanors, the principle of territoriality is stated in art. 3 StGB:

Art. 3 StGB [Felonies or misdemeanors committed in Switzerland]

1 Whoever commits a felony or misdemeanor in Switzerland is subject to this law.

[2–4] [...].[46]

[42] Roth/Moreillon-*Harari/Liniger Gros*, Art. 3 StGB, p. 47, §§ 78–81.

[43] *Hurtado Pozo*, Droit pénal, p. 67, § 193.

[44] See below 2.c.

[45] See below 2.b.

[46] For art. 3 paras. 2, 3 and 4 StGB see above 1.e.

This provision is also applicable to contraventions (art. 104 StGB). Art. 3 StGB applies in addition to offenses defined in federal laws other than the Criminal Code, unless they contain deviating rules on the geographical scope of application of Swiss criminal law (art. 333 para. 1 StGB).[47]

– *Foreign criminal law and foreign criminal judgments*

With regard to the principle of territoriality, foreign criminal law is not taken into account, either by requiring double criminality or via the *lex mitior* principle.[48] This holds true even if the criminal conduct was carried out abroad and the principle of territoriality only applies because the result was obtained in Switzerland.[49] However, foreign judgments are taken into account: art. 3 StGB not only foresees the principle of imputation (art. 3 para. 2 StGB) but also the principles of extinction (art. 3 para. 3 StGB) and enforcement (art. 3 para. 4 StGB).[50]

b) Concept of locus of commission / *locus delicti commissi*

– *Statutory definition*

According to art. 3 para. 1 StGB, Swiss criminal law applies to any person who commits an offense in Switzerland. When the locus of commission is deemed to be in Switzerland is defined in art. 8 StGB:

Art. 8 para. 1 StGB [Locus of commission]

1 A felony or misdemeanor is deemed to have been committed where the offender acted or where he failed to comply with a duty to act and where the result occurred.

2 An attempt is deemed to have been committed where the offender accomplished it and where the result should have occurred according to his conception.

Accordingly, for an offense to fall within the geographical scope of application of Swiss criminal law it thus suffices that either the place where the criminal conduct was carried out (act or omission) *or* the place where the criminal result occurred is located in Switzerland. Art. 8 StGB thus follows the so-called ubiquity theory *(Ubiquitätstheorie; théorie de l'ubiquité)*, and not the theory of acting, by which only the place of conduct is deemed to be a *locus delicti commissi*, or the theory of result which considers only the place where the criminal result occurs as constituting the locus of commission.[51]

[47] II.C.2.a.

[48] See above 1.d.

[49] See below 2.b.

[50] See above 1.e.

[51] *Hurtado Pozo*, Droit pénal, p. 60, § 199 and p. 70, § 201.

– *Place where the offender carried out the criminal conduct*

If the place where the offender acted (crime of commission) or where he failed to act contrary to duty (crime of omission) is located in Switzerland,[52] the offense is considered to be committed in Switzerland, that is, the specific conduct falls within the geographical scope of application of Swiss criminal law. Thereby, it suffices that only one of the objective definitional elements of the offense was (partially) fulfilled in Switzerland. However, mere preparatory acts carried out in Switzerland are generally not enough to give rise to a locus of commission; rather, an attempt is necessary. Also conduct taking place after the criminal offense has ended *(Beendigung; épuisement)*[53] is irrelevant for determining the locus of commission.[54]

– *Place where the criminal result occurs*

According to the ubiquity theory entrenched in art. 8 StGB, a crime is also deemed to have been committed where its result *(Erfolg; résultat)* occurs. Keeping in line with the newer case law of the Swiss Federal Supreme Court,[55] the notion of result should be understood as synonymous with its definition in the context of result offenses *(Erfolgsdelikte; délits matériels)*. Thus, only those changes in the outside world are considered to be a result in the sense of art. 8 StGB, which correspond to an objective definitional element of the offense.[56]

If from the offender's perspective the result occurs at a random place, this place should not qualify as a locus of commission. Rather, only those places where the result should have occurred according to the offender's conception should be considered as *locus delicti commissi*. This limitation is deduced from art. 8 para. 2 StGB pertaining to attempted crimes, which should *a fortiori* apply to completed offenses.[57]

– *Attempt*

An attempt[58] gives rise to a *locus delicti commissi*, if it was committed in Switzerland or if the result should have occurred in Switzerland according to the offender's conception. Thus, art. 8 para. 2 StGB also follows the ubiquity theory. However, given the nature of an attempt, the place where the criminal result occurs

[52] II.D.4.a.

[53] For the issue of the end of a crime see II.F.2.b.

[54] *Hurtado Pozo*, Droit pénal, p. 70, §§ 202–204; Trechsel-*Trechsel/Vest*, Art. 3 StGB, p. 19, §§ 2–3.

[55] Niggli/Wiprächtiger-*Popp/Levante*, Art. 8, p. 231, § 7; BGE 105 IV 326, 330 E. 3.g.

[56] II.D.6.

[57] Niggli/Wiprächtiger-*Popp/Levante*, Art. 8, p. 232, § 8.

[58] II.F.2.

is substituted by the place where the result should have occurred according to the author's perception.[59]

While mere preparatory acts generally do not give raise to a *locus delicti commissi* in Switzerland, the so-called punishable preparatory acts *(strafbare Vorbereitungshandlungen; actes préparatoires délictueux)* pertaining to specific crimes exhaustively listed in art. 260bis para. 1 StGB do so:

> **Art. 260bis para. 3 StGB [Punishable preparatory acts]**
> 3 Also punishable is whoever commits a preparatory act abroad, if the intended offenses will be committed in Switzerland. Article 3 paragraph 2 is applicable.

– *Participation*

In the case of co-perpetration *(Mittäterschaft; coauteur)*,[60] the criminal conduct of one co-perpetrator in Switzerland establishes a locus of commission in Switzerland for all co-perpetrators. Likewise, the criminal result obtained on Swiss territory by one co-perpetrator gives rise to a *locus delicti commissi* in Switzerland for every co-perpetrator.[61]

In the case of perpetration by means *(mittelbare Täterschaft; participation en qualité d'auteur médiat)*,[62] the place where the indirect perpetrator *(mittelbarer Täter; auteur médiat)* influenced the innocent agent *(Tatmittler; instrument humain)* as well as the place where the latter acted, or omitted to act, or where the result of the offense occurred, are deemed to be a locus of commission.[63]

An instigator *(Anstifter; instigateur)* is deemed having committed a crime in Switzerland even if he acted abroad if the result of the instigation occurred in Switzerland or, in the case of an attempt, the result should have occurred in Switzerland. The same holds true for an aider and abettor *(Gehilfe; complice)* contributing to the offense from abroad, if the result of the crime is obtained in Switzerland.[64]

However, according to the Swiss Federal Supreme Court, persons instigating or aiding and abetting in Switzerland an offense committed abroad, are not subject to Swiss criminal law based on the territoriality principle (other principles establish-

[59] Roth/Moreillon-*Harari/Liniger Gros*, Art. 8 StGB, p. 99, §§ 55–58; Trechsel-*Trechsel/Vest*, Art. 8 StGB, p. 32, § 5.

[60] II.G.3.a.

[61] Niggli/Wiprächtiger-*Popp/Levante*, Art. 8, p. 234, § 13; Roth/Moreillon-*Harari/Liniger Gros*, Art. 8 StGB, p. 98, §§ 48–49.

[62] II.G.3.a.

[63] *Donatsch/Tag*, Strafrecht I, p. 51; Roth/Moreillon-*Harari/Liniger Gros*, Art. 8 StGB, p. 98, § 51.

[64] *Donatsch/Tag*, Strafrecht I, p. 51; Roth/Moreillon-*Harari/Liniger Gros*, Art. 8 StGB, p. 98, § 54.

ing criminal jurisdiction may, however, subject the person to Swiss law).[65] Doctrine criticizes this view and argues that Swiss criminal law should be applicable under the condition that the principal offense is punishable in the state where it is committed.[66]

c) Territory of states (definition)

The notion of "Switzerland" as used in art. 3 para. 1 StGB refers to the territory of the Swiss State as defined by domestic and international public law.[67] It encompasses not only the land surface within the state borders but also the airspace above it and the subsoil (e.g., tunnels and mines) beneath it.[68]

Diplomatic missions are no longer considered to be parcels of land of the state they are representing. Rather, the penal power of Switzerland extends to these portions of territory, that is, Swiss criminal law applies *ratione loci*. However, its application might be inhibited because of diplomatic immunities and thus due to *ratione personae* considerations.[69]

d) Extension by flag principle *"territoire flottant"*

– *Flag principle as an independent basis of jurisdiction*

In the past, ships and aircraft flying the flag of Switzerland were assimilated to Swiss territory. Thus, Switzerland claimed territorial jurisdiction over its vessels based on the fiction that they are floating parts of its territory. However, to keep in line with international public law, under which the *territoires flottants* doctrine was abandoned, the application of Swiss criminal law to its vessels is today based on the so-called flag principle *(Flaggenprinzip; principe du pavillon)*. Under Swiss law, the flag principle is independent from the territoriality principle and constitutes a jurisdictional basis of its own.[70]

According to the flag principle, the state whose flag a ship or aircraft is flying has jurisdiction *(Hoheitsgewalt; juridiction)* over the vessel; one aspect of jurisdiction is the exercise of penal power. Switzerland has thus penal power over criminal conduct taking place on board ships and aircraft registered in Switzerland, regardless of the place where the offense is committed or the nationality of either the offender or the victim. Through the application of the flag principle potential jurisdictional loopholes resulting from the fact that Swiss vessels are navigating beyond Swiss borders can be closed.[71]

[65] *Donatsch/Tag*, Strafrecht I, p. 51; Roth/Moreillon-*Harari/Liniger Gros*, Art. 8 StGB, pp. 98–99, § 54; both citing BGE 104 IV 77, 86–87 E. 7b.

[66] Roth/Moreillon-*Harari/Liniger Gros*, Art. 8 StGB, pp. 98–99, § 54.

[67] For the geography of Switzerland, see in general I.A.1.

[68] *Hurtado Pozo*, Droit pénal, pp. 67–68, § 194; Trechsel-*Trechsel/Vest*, Art. 3 StGB, p. 19, § 3.

[69] *Hurtado Pozo*, Droit pénal, p. 68, § 195 and pp. 126–128, §§ 376–381.

[70] *Colombini*, Droit étranger, p. 39; *Hurtado Pozo*, Droit pénal, p. 68, § 196.

– *Flag principle with regard to ships*

With regard to ships, the flag principle is laid down in the Federal Law of 23 September 1953 on Navigation under the Swiss Flag (Navigation Law):[72]

> **Art. 4 Navigation Law [Scope of application of Swiss law]**[73]
>
> 1 On the high seas Swiss federal law is exclusively applicable on board Swiss ships. In territorial waters Swiss federal law is applicable insofar as the coastal State does not declare its law mandatorily applicable. […]
>
> 2 Offenses in the sense of the Criminal Code and of other federal criminal provisions, which are committed on board a Swiss ship, are however subject to Swiss law regardless of the place where the ship was located at the time of the commission of the offense.
>
> 3 The criminal provisions of this law apply regardless whether the offense was committed abroad or in Switzerland.
>
> 4 The offender is not punished in Switzerland, if:
>
> – he has been acquitted abroad by final judgment for the felony or misdemeanor;
>
> – if the sanction, which was imposed abroad for the same offense, has been enforced, waived or is barred by the statute of limitations.
>
> If the sanction has only partially been enforced abroad, it is given credit for the enforced part.

On the high seas, Swiss federal law exclusively applies to Swiss vessels (first sentence of art. 4 para. 1 Navigation Law). In the territorial waters of third states, Swiss law only applies if the coastal state's law is not mandatorily applicable (second sentence of art. 4 para. 1 Navigation Law). However, this distinction between the high seas and other geographical areas is not upheld with regard to penal law: Swiss criminal law is always exclusively applicable regardless of where the ship flying the Swiss flag was navigating when the offense was committed on board (art. 4 paras. 2 and 3 Navigation Law). Thus, according to the flag principle, Switzerland claims the exclusive application of Swiss criminal law over conduct taking place on board ships flying the Swiss flag.[74]

[71] *Riklin*, Verbrechenslehre, p. 119, § 28.

[72] Bundesgesetz über die Seeschifffahrt unter der Schweizer Flagge vom 23. September 1953 (Seeschifffahrtsgesetz/Loi fédérale sur la navigation maritime sous pavillon suisse du 23 septembre 1953), SR/RS 747.30.

[73] All translations of the Navigation Law are the author's own.

[74] *Colombini*, Droit étranger, p. 41.

The effect of a foreign judgment in Switzerland is laid down in art. 4 para. 4 Navigation Law which states the principle of extinction (first sentence) as well as the principle of imputation (second sentence).[75]

– *Flag principle with regard to aircraft*

With regard to aircraft, the flag principle is stated in the Federal Law of 21 December 1948 on Air Navigation (Air Navigation Law):[76]

Art. 11 para. 3 Air Navigation Law [Geographical scope of application of the law][77]

3 Swiss law applies on board Swiss aircraft abroad, insofar as the law of the State, in or over which the aircraft is located, does not mandatorily apply.

Art. 97 Air Navigation Law [Offenses on board Swiss aircraft]

1 Swiss criminal law is also applicable to offenses, which are committed on board Swiss aircraft outside Switzerland.

2 Crew members of a Swiss aircraft are subject to Swiss criminal law even if the offense was committed outside the aircraft but within the scope of their duties.

3 Criminal prosecution is only admissible if the offender is in Switzerland and is not extradited to a third State or if he is extradited to Switzerland for the offense in question.

4 Article 6 no. 2 of the Criminal Code [today Article. 6 para. 3 of the Criminal Code] applies regardless of the nationality of the offender.

Similar to ships, Swiss criminal law is applicable to offenses committed on board aircraft flying the Swiss flag regardless of where the aircraft is located, that is, whether it is on or over Swiss or foreign territory or in the airspace above areas under no jurisdiction (art. 97 para. 1 Air Navigation Law). In addition, crew members of Swiss aircraft are subject to Swiss criminal law even if they commit an offense abroad and outside the aircraft, as long as the crime was committed in connection with their duties. According to art. 97 para. 4 Air Navigation Law, the principle of extinction as defined in art. 6 para. 3 StGB applies.[78]

3. Protective principle

a) General issues

The protective principle and the passive personality principle share a common rationale. They both allow the application of Swiss criminal law to offenses which

[75] See above I.e.

[76] Bundesgesetz über die Luftfahrt vom 21. Dezember 1948 (Luftfahrtgesetz/Loi fédérale sur l'aviation du 21 décembre 1948), SR/RS 748.0.

[77] All translations of the Air Navigation Law are the author's own.

[78] See above I.e.

violate interests, the safeguarding of which Switzerland, potentially, attaches higher importance than does any third state, and which may not be sufficiently protected by foreign criminal law. However, apart from this common rationale, the two principles are governed by separate rules and apply under different conditions.

b) Protection of the state

– *The protective principle and its statutory definition*

The protective principle *(Realprinzip/Staatsschutzprinzip; principe de la compétence réelle/principe de protection étatique)* is laid down in art. 4 StGB:

Art. 4 StGB [Felonies and misdemeanors committed abroad against the State]

1 Whoever commits a felony or misdemeanor against the State or national defense (arts. 265–278), is also subject to this law.

2 If the offender has been convicted abroad for that offense and if the sentence has been fully or partially enforced abroad, the judge counts the enforced sentence toward the sentence to be pronounced.

Art. 4 para. 1 provides that persons committing an offense listed in Title 13 StGB (arts. 265–278 StGB), which is entitled "felonies and misdemeanors against the State and national defense," are subject to the Swiss Criminal Code. Hence, Swiss law applies to a limited number of extraterritorially committed offenses, which potentially endanger the state's existence, national security or other vital state interests.[79] Among these offenses are high treason (art. 265 StGB), attacks on the independence of the Confederation (art. 266 StGB), moving of national boundary marks (art. 268 StGB), industrial espionage (art. 273 StGB), attacks on the constitutional order (art. 275 StGB) or unlawful association (art. 275ter StGB).

Art. 4 para. 1 StGB cannot be applied to any other offense of the Criminal Code since the catalogue of offenses mentioned in the provision is exhaustive. However, various provisions of the secondary criminal law also foresee the protective principle (e.g., art. 33 para. 4 Federal Law on War Material[80] or art. 89 para. 4 Air Navigation Law).[81]

– *Rationale behind the principle of protection of the state*

The exercise of the protective principle is generally justified by every state's right to self-defense.[82] Given that offenses violating fundamental state interests are

[79] *Hurtado Pozo*, Droit pénal, p. 76, § 219 and p. 77, § 221.

[80] Bundesgesetz über das Kriegsmaterial vom 13. Dezember 1996 (Kriegsmaterialgesetz/Loi fédérale sur le matériel de guerre du 13 décembre 1996), SR/RS 514.51.

[81] Niggli/Wiprächtiger-*Popp/Levante*, Art. 4, p. 207, § 1.

[82] *Hurtado Pozo*, Droit pénal, pp. 76–77, § 220.

likely to emanate from abroad, taken in conjunction with the presumption that third states may not have (sufficiently severe) laws in place to prosecute such offenses or that they would lack an interest to prosecute alleged offenders, the victim state should have the right to subject offenders to their own criminal law.[83]

– *Foreign criminal law and foreign criminal judgments*

Since foreign law would most probably either not or not sufficiently protect fundamental interests of the Swiss State, the protective principle does not take into account foreign criminal law.[84] The application of the principle (to an increasing number of offenses) could thus be problematic in the light of the principle of legality.[85] With regard to foreign criminal judgments, the principle of imputation applies (art. 4 para. 2 StGB).[86]

c) Passive personality principle

– *Statutory definition*

The principles of active[87] and passive personality are both statutorily defined in art. 7 para. 1 StGB and are subject to the same requirements:

Art. 7 StGB [Other offenses committed abroad]

1 Whoever commits a felony or misdemeanor abroad, without the requirements of articles 4, 5, and 6 having been met, is subject to this law, if:

a. the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power;

b. the offender is in Switzerland or is extradited to Switzerland because of that offense; and

c. according to Swiss law extradition is permissible for that offense, but the offender is not extradited.

2 If the offender is not a Swiss national or if the felony or misdemeanor was not committed against a Swiss national, paragraph 1 is only applicable if: [...]

3 The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.

4 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:

a. he has been acquitted abroad by final judgment;

b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

[83] Roth/Moreillon-*Harari/Liniger Gros*, Art. 4 StGB, p. 49, § 8.

[84] See above 1.d.

[85] II.A.3.; *Hurtado Pozo*, Droit pénal, p. 78, § 222.

[86] See above 1.e.

[87] See below 4.

5 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge counts the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

Art. 7 para. 1 StGB also applies to felonies and misdemeanors defined in the secondary criminal law (art. 333 para. 1 StGB).[88] However, the provision does not apply to contraventions since they do not qualify as extraditable offenses as required by art. 7 para. 1 lit. c StGB.[89]

– *Requirements for the passive personality principle to apply*

For the passive personality principle to apply, the requirements listed in art. 7 para. 1 StGB have to be fulfilled cumulatively. In addition, the victim has to be a Swiss national; this follows *e contrario* from art. 7 para. 2 StGB.[90]

• Double criminality or place under no penal power

According to art. 7 para. 1 lit. a StGB, the passive personality principle only applies if, inter alia, the offense is also punishable at the locus of commission. Hence, it requires double criminality *(doppelte Strafbarkeit; double incrimination)*.[91] Alternatively, the principle also applies if the crime was committed in a place, which is not subject to any penal power (art. 7 para. 1 lit. a StGB), such as the high seas.[92]

• Offender's presence in Switzerland

Art. 7 para. 1 lit. b StGB requires that the offender, who committed an offense abroad, is voluntarily (or even involuntarily)[93] present in Switzerland. Alternatively, presence of the offender can also be obtained through extradition, which must be based on a lawful procedure. Presence achieved by way of abduction, deception or circumvention of extradition proceedings does not fulfill the presence requirement of art. 7 para. 1 lit. b StGB.[94]

• Extraditable offense and non-extradition of the offender

Art. 7 para. 1 lit. c StGB further stipulates that the crime under consideration has to be an extraditable offense *(Auslieferungsdelikt; infraction donnant lieu à extra-*

[88] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 222, § 1.

[89] See below 3.c.

[90] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 223, § 2.

[91] See above 1.d.

[92] Art. 98 UNCLOS.

[93] Roth/Moreillon-*Henzelin*, Art. 6 StGB, p. 72, § 24.

[94] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 223, § 6; Trechsel-*Trechsel/Vest*, Art. 7 StGB, p. 28, § 7.

dition) under Swiss law. Art. 35 IRSG defines the notion of extraditable offense as follows:

Art. 35 para. 1 IRSG [Extraditable offences][95]

1 Extradition shall be permitted if, according to the documents supporting the request, the offense

a. is punishable not only under the law of Switzerland but also under the law of the requesting State by a sanction with deprivation of liberty for a maximum period of at least one year or with a more severe sanction and

b. is not subject to Swiss jurisdiction.

Thus, offenders who have committed minor offenses *(Bagatelldelikte; cas de peu d'importance)* against Swiss nationals abroad are not subject to Swiss criminal law and to Swiss criminal jurisdiction based on the passive personality principle.[96]

In addition, art. 7 para. 1 lit. c. StGB requires that the offender not be extradited from Switzerland. The reason why the offender is not extradited is irrelevant; it could, for example, be because no third state requested the offender's extradition or because an extradition request was rejected.[97]

- Swiss nationality of the victim

While the provision on the passive personality principle of the old Criminal Code (art. 5 aStGB)[98] explicitly required that the victim has to be a Swiss national, this is no longer the case under art. 7 para. 1 StGB. However, from the introductory sentence of art. 7 para. 2 StGB it follows that for the passive personality principle to apply, the victim has to be a Swiss national.[99] Whether the victim possesses further nationalities in addition to the Swiss nationality is irrelevant.[100]

[95] All translations of provisions of the Federal Act on International Mutual Assistance in Criminal Matters (IRSG) in this chapter are taken from the unofficial translation of the IRSG provided by the Swiss Confederation, available at www.rhf.admin.ch/rhf/de/home/straf/recht/national/sr351-1.html [last visited: 13 July 2010].

[96] Botschaft StGB, p. 1998/Message StGB, p. 1804.

[97] Botschaft StGB, p. 1998/Message StGB, pp. 1804, 1805; Roth/Moreillon-*Henzelin*, Art. 7 StGB, p. 81, § 11.

[98] I.G.2.

[99] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 222, § 2.

[100] Trechsel-*Trechsel/Vest*, Art. 7 StGB, p. 27, § 3.

4. Active personality (nationality) principle

a) General issues

– *The active personality principle and its statutory definition*

According to the active personality principle *(aktives Personalitätsprinzip; principe de personnalité active)*, offenders having Swiss nationality are subject to Swiss criminal law for specific offenses committed abroad if certain requirements are fulfilled.[101]

While under the old Criminal Code[102] the active and passive personality principles[103] were regulated in two separate norms (arts. 5 and 6 aStGB), they are now both statutorily defined by the same provision (art. 7 para. 1 StGB).[104]

– *Requirements for the active personality principle to apply*

The active and passive personality principles are not only governed by the same provision (art. 7 para. 1 StGB), but their application is also subject to the same cumulative requirements. According to art. 7 para. 1 StGB, a Swiss offender having committed a felony or misdemeanor abroad is subject to Swiss criminal law if the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power (lit. a), the offender is in Switzerland or is extradited to Switzerland for that specific offense (lit. b), and according to Swiss law extradition is permissible for the offense in question but the offender is not extradited (lit. c).[105]

The only difference between the application of the principles is that for the passive personality principle to apply, the victim has to be a Swiss national, while with regard to the active personality principle the offender has to possess Swiss nationality. While the provision on the active personality principle of the old Criminal Code (art. 6 aStGB)[106] explicitly mentioned this nationality requirement, this is no longer the case under art. 7 para. 1 StGB. However, the criterion can be inferred from the introductory sentence of art. 7 para. 2 StGB.[107] Whether the perpetrator possesses further nationalities in addition to the Swiss nationality is irrelevant; it also suffices that he became a Swiss national after the commission of the offense as long as he is Swiss at the time of the judgment.[108]

[101] See below 4.a.

[102] I.G.2.

[103] See above 3.c.

[104] See above 3.c.

[105] See above 3.c.

[106] I.G.2.

[107] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 222, § 2; see above 3.c.

[108] Trechsel-*Trechsel/Vest*, Art. 7 StGB, p. 29, § 9 citing BGE 117 IV 369, 372, E. 3-7.

b) Legitimacy

The *ratio legis* behind enacting a rule that allows the application of Swiss criminal law to a Swiss national, who has committed an offense abroad has first and foremost to be seen in the prohibition upon the extradition of nationals. According to art. 25 para. 1 BV and art. 7 IRSG, no Swiss national may, without his written consent, be extradited or surrendered to a foreign state for prosecution. Without foreseeing the active personality principle, a Swiss national could rejoin Switzerland after having committed an offense abroad and could neither be extradited nor prosecuted (unless any other jurisdictional principle would apply). Thus, the active personality principle helps to avoid the impunity of Swiss nationals who have committed an offense abroad.[109]

c) Extension by principle of domicile

According to the principle of domicile *(Domizilprinzip; principe de domicile)*, an offender is subject to the law and jurisdiction of a specific state for offenses committed abroad, if he has his domicile in that state. Rather than the nationality of the offender, it is his domicile, that is, his principal place of residence, which forms the legitimizing connecting factor for subjecting a person to a specific state law and jurisdiction.[110]

The principle of domicile as an independent jurisdictional principle is unknown to Swiss criminal law. However, some norms of the secondary criminal law take into account the domicile rather than the nationality of the offender in circumstances where Switzerland is exercising jurisdiction in a representative capacity (representation principle).[111] An example of this is provided in art. 38 para. 4 JStG and art. 101 para. 1 SVG:[112]

Art. 38 para. 4 JStG[113]

4 The competent Swiss authority can assume criminal prosecution at the request of the foreign authority if:

a. the juvenile has his domicile in Switzerland or is Swiss national;

b. the juvenile committed an offense abroad, which is also punishable under Swiss law; and

c. the requirements for criminal prosecution according to art. 4–7 StGB are not fulfilled.

[109] Botschaft StGB, p. 1998/Message StGB, pp. 1804/1805; Trechsel-*Trechsel/Vest*, Art. 7 StGB, p. 29, § 9 and p. 30, § 12.

[110] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 190, § 24.

[111] See below 6.

[112] Niggli/Wiprächtiger-*Popp/Levante*, Vor Art. 3, p. 190, § 24.

[113] All translations of provisions of the Federal Law on the Criminal Law Applicable to Minors (JStG) are the author's own.

Art. 101 para. 1 SVG

1 Whoever commits a violation of traffic rules abroad [...] and is liable to punishment at the locus of commission, is prosecuted in Switzerland at the request of a competent foreign authority if he lives in Switzerland and is permanently settled here and does not subject himself to the foreign penal power.

5. Universality principle

– *Universality principle and its rationale*

According to the universality principle, a person can be subjected to Swiss criminal law and jurisdiction, even if the crime was not committed in Switzerland (principle of territoriality), if neither the offender nor the victim are Swiss nationals (active and passive personality principle, and if the offense does not violate fundamental state interests (protective principle). It is generally admitted that universal jurisdiction is provided solely based on the nature of the offense and only over the most serious crimes of concern to the international community as a whole. However, which offenses should concretely enter the category of crimes covered by universal jurisdiction is quite controversially discussed in doctrine and politics.[114]

In the Swiss Criminal Code the principle of universality is embodied in two different provisions for two distinct types of offenses: art. 5 StGB provides universal jurisdiction over a defined set of offenses against minors committed abroad while art. 7 StGB foresees the exercise of universal jurisdiction over particularly serious crimes, which are outlawed by the international community as a whole.

– *Universality principle for particularly grave offenses*

Art. 7 para. 2 lit. b StGB allows for the application of Swiss law to an offender who committed a particularly grave offense abroad, which is outlawed by the international community as a whole, even absent any link to Switzerland, such as the place of commission or the nationality of the offender or victim.[115] This provision was only introduced during the parliamentary debates and thus in the final stages of the legislative process.[116]

Art. 7 StGB [Other offenses committed abroad]

1 Whoever commits a felony or misdemeanor abroad, without the requirements of articles 4, 5, and 6 having been met, is subject to this law, if:

a. the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power;

[114] Roth/Moreillon-*Henzelin*, Art. 7 StGB, pp. 82–83, § 20.

[115] See below 6.

[116] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, pp. 226–227, § 16.

b. the offender is in Switzerland or is extradited to Switzerland because of that offense; and

c. according to Swiss law extradition is permissible for that offense, but the offender is not extradited.

2 If the offender is not a Swiss national or if the felony or misdemeanor was not committed against a Swiss national, paragraph 1 is only applicable if:

a. [...]

b. the offender committed a particularly grave offense, which is outlawed by the international community.

3 The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.

4 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:

a. he has been acquitted abroad by final judgment;

b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

5 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge is to count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

The introductory sentence of art. 7 para. 2 StGB requires that the offender does not possess Swiss nationality at the moment of the judgment (the nationality at the time of commission of the crime is not considered).[117] For the universality principle to apply the victim must be a non-Swiss national either at the time of the commission of the offense or the moment when the criminal result occurred.[118]

Besides these negative requirements, a "particularly grave offense, which is outlawed by the international community" must have been committed (art. 7 para. 2 lit. b StGB). This criterion is criticized for being quite vague.[119] Authors following a normative approach maintain that the provision applies to crimes recognized under international customary law, respectively *ius cogens*, such as genocide, crimes against humanity or the crime of aggression. Others follow a functional approach according to which a "particularly grave offense, which is outlawed by the international community" can only be one defined by an international instrument, such as a statute of an international tribunal.[120]

[117] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 225, § 12; BGE 117 IV 369, 372, E. 3-7.

[118] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 225, § 13.

[119] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, pp. 226–227, §§ 16–17; Roth/Moreillon-*Henzelin*, Art. 7 StGB, p. 83, §§ 22–23.

[120] Roth/Moreillon-*Henzelin*, Art. 7 StGB, pp. 83–84, §§ 24–29.

From the introductory sentence of art. 7 para. 2 StGB it follows that the requirements of para. 1 (double criminality, the offender's presence in Switzerland, non-extradition of the offender)[121] apply in addition to those set out in para. 2.

Foreign law is taken into account in that the double criminality requirement also applies to offenses prosecuted under the universality principle (art. 7 para. 2 referring to the application of art. 7 para. 1 StGB). However, some authors argue that the double criminality requirement would be inappropriate in the context of universal jurisdiction and most probably would not have been intended by the legislature.[122] Also the *lex mitior* principle applies (art. 7 para. 3 StGB).[123] With regard to the effects of foreign judgments, art. 7 para. 4 StGB states the principle of extinction and art. 7 para. 5 StGB foresees the principle of imputation.[124]

– *Offenses against minors (art. 5 StGB)*

Art. 5 StGB provides universal jurisdiction over a set of offenses against minors committed abroad. The provision aims at better protecting children from sexual and commercial exploitation.

Art. 5 StGB [Offences against minors committed abroad]

1 Subject to this law is whoever is in Switzerland, is not extradited and who committed one of the following offenses abroad:

a. trafficking in human beings (art. 182), sexual duress (art. 189), rape (art. 190), sexual acts with a person incapable of proper judgment or resistance (art. 191) or furtherance of prostitution (art. 195), if the victim is less than 18 years old;

b. sexual acts with children (art. 187), if the victim was less than 14 years old;

c. aggravated pornography (art. 197 no. 3), if the objects or performances have sexual acts with children as a content.

2 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:

a. he has been acquitted abroad by final judgment;

b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

3 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge is to count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

Art. 5 para. 1 StGB lists four requirements: First of all, the locus of commission has to be outside Switzerland. This is only the case if the conduct was carried out

[121] See above 3.c.

[122] Trechsel-*Trechsel/Vest*, Art. 7 StGB, pp. 30–31, § 14.

[123] See above 1.d.

[124] See above 1.e.

abroad and the result occurred abroad (*e contrario* from art. 8 para. 1 StGB).[125] Secondly, the offender has to be voluntarily present in Switzerland. Thereby, it is sufficient that the offender is present in Switzerland for a short period of time, for example, as a tourist or even only on transit. Thirdly, it is required that the offender not be extradited. Finally, universal jurisdiction is only provided over the offenses exhaustively listed in art. 5 para. 1 lit. a–c.[126]

Art. 5 StGB neither requires that the offense be also punishable at the locus of commission (double criminality) nor does it state the *lex mitior* principle.[127] According to the drafting materials, this should help in avoiding impunity due to a lack of legislation in the state where the offense was committed.[128] With regard to the effect of foreign judgments, art. 5 StGB stipulates the principles of extinction (para. 2) and imputation (para. 3).[129]

6. Representation principle

– *In general*

The representation principle *(stellvertretende Strafrechtspflege; compétence par représentation)* enables Switzerland to exercise its criminal jurisdiction over an offense committed abroad instead or on behalf of a third state having a closer link to the offense. The representation principle is provided for in art. 6 StGB (regarding extraterritorial offenses for whose prosecution Switzerland is obliged by international agreement) and art. 7 para. 2 lit. a StGB (regarding offenses where an extradition request was rejected).

– *Representation principle as defined in art. 6 StGB*

Art. 6 StGB [Offenses committed abroad prosecuted pursuant to an obligation resulting from an international agreement]

1 Whoever commits a felony or misdemeanor abroad, which Switzerland is obliged to prosecute pursuant to an international agreement, is subject to this law, if:

a. the offense is also punishable at the place of commission or if the place of commission is not subject to any penal power; and

b. the offender is in Switzerland and is not extradited to a third State.

2 The judge must determine the sanctions in such a way that the offender is overall not treated more severely than under the law of the locus of commission.

[125] See above 2.b.

[126] Niggli/Wiprächtiger-*Popp/Levante*, Art. 5, p. 210, § 2 and p. 212, §§ 5–8.

[127] See above 1.d.

[128] Niggli/Wiprächtiger-*Popp/Levante*, Art. 5, p. 212, § 3.

[129] See above 1.e.

3 Subject to a serious violation of the fundamental principles of the Federal Constitution or the ECHR, the offender is not prosecuted for the same offense in Switzerland, if:

a. he has been acquitted abroad by final judgment;

b. the sanction pronounced abroad has been enforced, waived or is barred by the statute of limitations.

4 If the offender has been convicted abroad for that offense and if the sentence has only been partially enforced abroad, the judge is to count the enforced part toward the sentence to be pronounced. The judge is to decide whether a measure ordered but only partially executed abroad should be continued or be counted toward the sentence to be pronounced in Switzerland.

The application of Swiss law based on the representation principle is conditioned upon the following cumulative criteria: firstly, the offense must have been committed abroad.[130] Secondly, Switzerland must explicitly be obliged to prosecute this type of offense by virtue of an international agreement. Various international treaties contain such a duty to prosecute, namely in the field of human rights,[131] health,[132] transportation[133] or terrorism.[134] Thirdly, since Switzerland is acting on behalf of a third state having a closer link to the offense, it is required that the offense also be punishable at the place of commission (double criminality)[135] or alternatively, that the *locus delicti commissi* is not subject to any penal power (e.g., the high seas).[136] Finally, the offender has to be (voluntarily)[137] present in Switzerland and has not been extradited. Whether extradition has priority over prosecution and *vice versa*, or whether Switzerland can only prosecute after an extradition request from the competent third state was filed and rejected, can only be answered with regard to a specific international agreement.[138]

[130] See above 2.b. and c.

[131] E.g., Convention against Torture of 10 December 1984 (Übereinkommen vom 10. Dezember 1984 gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe/Convention du 10 décembre 1984 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, SR 0.105).

[132] E.g., Convention on Psychotropic Substances of 21 February 1971 (Übereinkommen vom 21. Februar 1971 über psychotrope Stoffe/Convention du 21 février 1971 sur les substances psychotropes, SR 0.812.121.02).

[133] E.g., Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (Übereinkommen vom 23. September 1971 zur Bekämpfung widerrechtlicher Handlungen gegen die Sicherheit der Zivilluftfahrt/Convention du 23 septembre 1971 pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, SR 0.748.710.3).

[134] E.g., International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (Internationales Übereinkommen vom 9. Dezember 1999 zur Bekämpfung der Finanzierung des Terrorismus/Convention internationale du 9 décembre 1999 pour la répression du financement du terrorisme, SR 0.353.22).

[135] See above 1.d.

[136] Niggli/Wiprächtiger-*Popp/Levante*, Art. 6, pp. 216–218, §§ 2–7.

[137] Not requiring voluntariness: Roth/Moreillon-*Henzelin*, Art. 6 StGB, p. 72, § 24.

[138] Niggli/Wiprächtiger-*Popp/Levante*, Art. 6, p. 218, § 8; Roth/Moreillon-*Henzelin*, Art. 6 StGB, p. 74, §§ 31–32.

If Swiss law is applied based on the representation principle as foreseen in art. 6 StGB, the principles of double criminality (para. 1 lit. a) and *lex mitior* (para. 2) apply.[139] With regard to the effect of foreign judgments, art. 6 StGB stipulates the principles of extinction (para. 3) and imputation (para. 4).[140]

– *Representation principle as defined in art. 7 para. 2 lit. a StGB*

Art. 7 para. 2 lit. a StGB is based on the representation principle. The Swiss Criminal Code is only applicable subsidiarily, that is, when Switzerland refuses to extradite the offender. This seems justified given that neither the victim nor the perpetrator has a link with Switzerland. Swiss law is, however, not applicable if the extradition request was refused by reason of the nature of the offense, for example, if the offense is of a political, military or fiscal nature.[141]

Art. 7 para. 2 StGB [Other offenses committed abroad]

2 If the offender is not a Swiss national or if the felony or misdemeanor was not committed against a Swiss national, paragraph 1 is only applicable if:

a. the extradition request was rejected for a reason other than the nature of the offense; or

b. [...]

The introductory sentence of art. 7 para. 2 StGB requires that the offender not possess Swiss nationality at the time of the judgment (the nationality at the time of commission of the crime does not enter into consideration).[142] For the representation principle to apply the victim must be a non-Swiss national either at the time of the commission of the offense or the moment when the criminal result occurred.[143]

Swiss law is only applicable, if a third state submitted an extradition request to Switzerland, which was refused for a reason other than the nature of the offense (art. 7 para. lit. a StGB). According to Art. 3 IRSG,[144] the political, military or fiscal nature of the offense could constitute a ground for rejecting an extradition request, which in turn would bar the application of Swiss law based on the representation principle.[145]

[139] See above 1.d.

[140] See above 1.e.

[141] Botschaft StGB, pp. 1998–1999/Message StGB, p. 1805.

[142] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 225, § 12; BGE 117 IV 369, 372, E. 3-7.

[143] Niggli/Wiprächtiger-*Popp/Levante*, Art. 7, p. 225, § 13.

[144] The English translation of the IRSG provided by the Swiss Federal Administration is available at www.rhf.admin.ch/rhf/de/home/straf/recht/national/sr351-1.html [last visited: 24 May 2011].

[145] Roth/Moreillon-*Henzelin*, Art. 6 StGB, p. 82, §§ 16–17.

However, if the extradition request is denied for any other reason than the nature of the offense, for example, because the foreign proceeding would not meet the requirements of the ECHR or ICCPR (art. 2 lit. a IRSG), the representation principle of art. 7 para. 2 lit. a StGB would be applicable (if the other criteria are also met).[146]

Foreign law is taken into account in that the double criminality requirement also applies to offenses prosecuted under the representation principle (art. 7 para. 2 referring to the application of art. 7 para. 1 StGB). The *lex mitior* principle also applies (art. 7 para. 3 StGB).[147] With regard to the effects of foreign judgments, art. 7 para. 4 StGB states the principle of extinction and art. 7 para. 5 StGB foresees the principle of imputation.[148]

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[147] See above 1.d.

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Table of cases

List of abbreviations

AT	Allgemeiner Teil des Strafrechts (General Part of the criminal law)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Official Federal Gazette)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official case reporter of the Swiss Federal Supreme Court; cases are cited by volume, chamber, starting page, page, and paragraph)
BetmG	Bundesgesetz vom 3. Oktober 1951 über die Betäubungsmittel und die psychotropen Stoffe (Betäubungsmittelgesetz)/Loi fédérale du 3 octobre 1951 sur les stupéfiants et les substances psychotropes (Loi sur les stupéfiants), SR/RS 812.121 (Narcotics Act)
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101 (Federal Constitution of the Swiss Confederation of 18 April 1999)
E.	Erwägung (paragraph in cases of the Swiss Federal Supreme Court)
ECHR	Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten/Convention du 4 novembre 1950 de sauvegarde des droits de l'homme et des libertés fondamentales, SR/RS 0.101 (Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1951)
FF	Feuille fédérale (Official Federal Gazette)
JStG	Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht (Jugendstrafgesetz, JStG)/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs (Droit pénal des mineurs, DPMin), SR/RS 311.1 (Federal Law on the Criminal Law Applicable to Minors of 20 June 2008)

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und internationales Strafrecht

National Criminal Law in a Comparative Legal Context

Volume 3.1

Defining criminal conduct

- Concept and systematization of the criminal offense
- Objective aspects of the offense
- Subjective aspects of the offense

Australia, Bosnia and Herzegovina, Hungary, India, Iran,
Japan, Romania, Russia, Switzerland, Uruguay, USA

edited by

Ulrich Sieber • Susanne Forster • Konstanze Jarvers

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C. Concept and systematization of the criminal offense

Anna Petrig

Concept and systematization of the criminal offense in Switzerland

1. Concept of the criminal offense

a) Definitions, formal and substantive concepts of the criminal offense

– *Definition*

Under Swiss criminal law, no statutory definition of the criminal offense exists. Legal doctrine defines the notion of criminal offense as "human conduct *(menschliche Handlung; comportement humain)*, which fulfills the definitional elements of the offense *(tatbestandsmässig; typique)*, is unlawful *(rechtswidrig; illicite)*, and culpable *(schuldhaft; coupable)*".[1] Some scholars add a further element to this definition, specifying that the human conduct has to be threatened with punishment *(mit Strafe bedroht; passible d'une peine)*.[2]

– *Formal concept of the criminal offense*

The above definition reflects a formal understanding of the criminal offense, that is, it does not provide an answer *why* specific conduct deserves and requires punishment but rather provides a scheme to analyze *whether* a certain act is punishable according to the law. Hence, it embodies the formal concept of the criminal offense *(formeller Verbrechensbegriff; infraction au sens formel)* that has to be distinguished from the substantive concept of the criminal offense *(materieller Verbrechensbegriff; infraction pénale au sens matériel)*.[3]

– *Substantive concept of the criminal offense*

The substantive concept of the criminal offense describes the material criteria by which the legislature was or should be guided when criminalizing conduct by

[1] *Donatsch/Tag*, Strafrecht I, p. 78; *Hurtado Pozo*, Droit pénal, p. 6, § 13; *Trechsel/Noll*, Strafrecht AT, p. 69.

[2] *Hafter*, Schweizerisches Strafrecht, p. 69; *Riklin*, Verbrechenslehre, p. 139, § 3.

[3] *Hurtado Pozo*, Droit pénal, p. 6, §§ 13–16; *Trechsel/Noll*, Strafrecht AT, pp. 25 and 69–70.

enacting penal provisions, that is, it inquires into the *ratio legis*. So far the doctrinal debate has not yielded an unambiguous and tangible description of the reasons why conduct should or should not be threatened with punishment.[4]

Today, the opinion prevails that criminal law should not be used to uphold a certain morality, but to preserve conditions of fundamental interest to individuals and/or to society. Hence, according to this liberal tradition, only violations of legally protected interests *(Rechtsgüter; biens juridiques protégés)* should be threatened with punishment.[5] If the legislature aims at criminalizing particular conduct, it has to designate a victim within the legal order and specify what injury it suffers from the act in question.[6]

The concrete content of the notion of legally protected interests is contingent on the religious, political, or ideological convictions prevailing in a certain society and its protection needs. These are evolving, for example, with regard to technical or economic developments. But even an attempt to define the notion with regard to a specific place and time might fail due to a lack of uniform values in a pluralistic society. Given the fluid nature of the concept, rather than understanding it as providing material criteria, it could be perceived in a formal way: It could mean that those aiming at criminalizing specific acts bear the burden of proof that, according to the current understanding, the conduct in question violates clearly defined rights and interests.[7]

The doctrine mentions two factors limiting the rather broad concept of legally protected interest. First, not any violation of a legally protected interest should be penalized, but merely conduct which is detrimental to society *(sozialschädlich; nuisant à la communauté)*, that is, which inflicts harm not only on the victim as such but also on the society as a whole and puts social peace and order at risk.[8] Secondly, socially harmful conduct should only be subjected to criminal punishment if less invasive instruments belonging to other branches of law (e.g., administrative or civil law) cannot prevent it or provide a remedy. Hence, the proportionality principle dictates that criminal law should be used in a subsidiary way and as an *ultima ratio* only.[9] However, looking at current legislative practice, a certain depar-

[4] *Hurtado Pozo*, Droit pénal, pp. 6–7, §§ 16–20; *Stratenwerth*, Die Straftat, p. 62; *Trechsel/Noll*, Strafrecht AT, pp. 25–26.

[5] For an overview on the development of the concept of legally protected interests, see *Fiolka*, Das Rechtsgut, pp. 5–54.

[6] *Hurtado Pozo*, Droit pénal, pp. 9–10, §§ 21–23; *Seelmann*, Strafrecht AT, pp. 1–3; *Trechsel/Noll*, Strafrecht AT, p. 26.

[7] *Seelmann*, Strafrecht AT, pp. 2–3.

[8] *Riklin*, Verbrechenslehre, p. 58, § 4; *Seelmann*, Strafrecht AT, pp. 3–4.

[9] On the tasks of criminal law, see I.D.1.; *Hurtado Pozo*, Droit pénal, p. 15, § 38; *Riklin*, Verbrechenslehre, pp. 58–59, §§ 6–7; *Seelmann*, Strafrecht AT, p. 4; *Stratenwerth*, Die Straftat, pp. 69–70, § 14; for a critical assessment of the *ultima ratio* argument, see *Niggli*, Ultima Ratio, pp. 236–263.

ture from this idea can be witnessed since criminal law approaches seem often to be given priority over other solutions to current socio-political problems and challenges.[10]

b) Division of crimes into categories

– *Distinction according to threatened penalty*

Under Swiss criminal law, crimes are divided into three categories, namely felonies *(Verbrechen; crimes)*, misdemeanors *(Vergehen; délits)*, and contraventions *(Übertretungen; contraventions)*. The criterion for this tripartite division is the gravity of the crime as expressed by the maximum threatened penalty (art. 10 para. 1 of the Swiss Criminal Code, *Schweizerisches Strafgesetzbuch/StGB; Code pénal suisse)*.[11] Felonies are offenses punishable by imprisonment *(Freiheitsstrafe; peine privative de liberté)* exceeding three years (art. 10 para. 2 StGB), while misdemeanors carry a sentence of imprisonment of up to three years or a monetary penalty *(Geldstrafe; peine pécuniaire)* (art. 10 para. 3 StGB). Contraventions are offenses punishable by fine *(Busse; amende)* only (art. 103 StGB).

Art. 10 StGB [felonies and misdemeanors; definitions][12]

1 This law distinguishes felonies from misdemeanors according to the gravity of the threatened penalty.

2 Felonies are acts punishable by imprisonment exceeding three years.

3 Misdemeanors are acts punishable by imprisonment up to three years or by monetary penalty.

Art. 103 StGB [contravention; definition]

Contraventions are acts punishable by fine.

It is important to note that the qualification of an offense as a felony, misdemeanor, or contravention is done according to the abstract method *(abstrakte Betrachtungsweise, méthode abstraite)*. This means that the gravity of the threatened penalty is decisive, that is, the abstract upper limit of the most serious form of penalty that a criminal provision provides for. Thereby, imprisonment is considered to be the most serious type of penalty, followed by monetary penalty, while fines are the most lenient punishment. Accordingly, the sentence imposed or likely to be imposed in a concrete case according to the rules on sentencing (e.g., art. 34 para. 2 and arts. 47 et seq. StGB) or the existence of aggravating or mitigating factors arising from the General Part of the StGB are irrelevant for the qualification.[13] The same holds true for the applicability of the statute containing specific rules on sanctions and procedure for juvenile offenders (Federal Law on the Criminal Law Applicable to Minors; *Jugendstrafgesetz/JStG; Droit pénal des mineurs*): crimes committed by minors are qualified based upon the threatened penalty set by the provisions applicable to adults.[14]

[10] *Riklin*, Verbrechenslehre, pp. 59–60, § 8.

[11] On penal sanctions, see I.A.5.d.

[12] All translations of provisions of the Swiss Criminal Code (StGB) are the author's own.

There is a doctrinal debate whether the distinction between felonies/misdemeanors on the one hand and contraventions on the other hand is of a qualitative nature, that is, whether felonies/misdemeanors are penalizing conduct which constitutes a moral wrong *(malum in se)*, while contraventions are reflecting acts that are morally indifferent *(mala quium prohibitum)*,[15] or of a purely quantitative nature. Today, the latter opinion prevails and the distinction between the three categories of crimes is characterized as a formal one.[16]

– *Consequences of the distinction*

The distinction between crimes serves as a criterion for differing rules on the level of substantive and procedural law and with regard to the power to legislate. Thereby, it is less the distinction between the three categories of crimes (felonies, misdemeanors, and contraventions) which is decisive, but rather the distinction between more serious crimes (felonies and misdemeanors) and less serious crimes (contraventions). This dichotomy is mirrored by the structure of the General Part of the StGB, containing a Part One entitled "felonies and misdemeanors" (arts. 1–102a StGB) and a Part Two labeled "contraventions" (arts. 103–108 StGB).[17] Hence, the distinction between felonies and misdemeanors is of very little practical importance given that they are, notwithstanding few exceptions (e.g., art. 24 para. 2 StGB on attempted instigation), governed by the same rules,[18] while a set of special rules apply to contraventions. This privileging regime, which takes into account the limited seriousness of contraventions, can be derived from arts. 103–109 StGB and *e contrario* from provisions only applicable to felonies and misdemeanors.[19]

[13] On sentencing, see II.D.4.d., II.F.4. and 5.b.

[14] Niggli/Wiprächtiger-*Niggli*, Art. 10 StGB, pp. 247–248, §§ 25–28; *Dupuis* et al., Art. 10 StGB, §§ 6–8.

[15] E.g., *Germann*, Das Verbrechen, pp. 96–118, § 11.

[16] *Hafter*, Schweizerisches Strafrecht, p. 98; Niggli/Wiprächtiger-*Heimgartner*, Vor Art. 103 StGB, p. 1790, §§ 9–10; *Killias* et al., Droit pénal général, pp. 31–32, §§ 211–213; Niggli/Wiprächtiger-*Niggli*, Art. 10 StGB, p. 244, §§ 9–11; *Trechsel/Noll*, Strafrecht AT, pp. 65–66.

[17] Niggli/Wiprächtiger-*Niggli*, Art. 10 StGB, pp. 243–244, § 8.

[18] Botschaft StGB, pp. 2000–2001/Message StGB, pp. 1806–1807.

[19] Niggli/Wiprächtiger-*Heimgartner*, Vor Art. 103 StGB, p. 1791, § 13.

• Consequences of the distinction with regard to the power to legislate

The first consequence of the distinction between felonies/misdemeanors and contraventions relates to the power to legislate.[20] Art. 123 para. 1 Swiss Constitution *(Bundesverfassung der Schweizerischen Eidgenossenschaft/BV; Constitution fédérale de la Confédération Suisse)* vests the competence to legislate in the field of substantive criminal law *(materielles Strafrecht; droit pénal matériel)* in the Confederation. However, the federal legislature did not fully exhaust its competence, but rather authorizes the Cantons through art. 335 para. 1 StGB to legislate in the field of contraventions, under the condition that the subject matter is not already covered by federal law.[21]

• Consequences of the distinction with regard to substantive criminal law

With regard to substantive criminal law, several privileges and modifications attach to contraventions. An important difference to felonies/misdemeanors lies in the fact that attempt and aiding and abetting are only punishable if the law expressly states so (art. 105 para. 2 StGB). A further privilege results from art. 105 para. 1 StGB, stating that the provisions on criminal liability of enterprises (arts. 102 and 102a StGB) are not applicable to contraventions. In the field of sanctions, the provisions on suspended and partially suspended sentences *(bedingte und teilbedingte Strafe; sursis et sursis partiel à l'exécution de la peine)* do not apply to contraventions (arts. 42 and 43 StGB in connection with art. 105 para. 1 StGB), while custodial measures (arts. 59–61 and 64 StGB) *(freiheitsentziehende Massnahmen; mesure entraînant une privation de liberté)*, the prohibition from practicing a profession (art. 67 StGB) *(Berufsverbot; interdiction d'exercer une profession)*, and the publication of the judgment (art. 68 StGB) *(Veröffentlichung des Urteils; publication du jugement)* can only be ordered if the law explicitly provides for it (art. 105 para. 3 StGB).

• Consequences of the distinction with regard to procedural criminal law

The categorization of crimes has also a bearing on criminal procedure. According to the procedural proportionality principle, expenditures relating to the prosecution and punishment of crimes should be proportionate to their gravity.[22] Hence, while felonies and misdemeanors have to be adjudicated by a court, contraventions can be tried by an administrative body *(Verwaltungsbehörde; autorité administrative)* (art. 345 no. 1 para. 1 aStGB). In these so-called contravention proceedings *(Übertretungsstrafverfahren; procédure pénale en matière de contraventions)* an administrative body enacts a penal order (e.g., *Strafverfügung*: § 340 StPO-ZH; *Strafbefehl; ordonnance pénale*: art. 357 StPO) stating, *inter alia*, the facts, the applicable provisions, and the fine.[23] These proceedings are in line with the judicial guarantees granted by the Swiss Constitution and the ECHR subject to the condition that the defendant can appeal to an independent and impartial tribunal, in the sense of art. 6 para. 1 ECHR, which has the power to review all questions of fact and law.[24] For a limited, legally defined set of contraventions, where the facts are easy to establish and are generally not disputed (e.g., in the field of road traffic) the fixed fine procedure *(Ordnungsbussenverfahren; procédure relative aux amendes d'ordre)* applies instead of the contravention proceeding (e.g., §§ 353–359 StPO-ZH). The fine is imposed and collected by the police in accordance with a list of fines *(Bussenkatalog; liste des amendes)* contained in a statute. The fined person can request, either explicitly or implicitly by not paying the fine, that his or her acts are determined in the contravention proceeding.[25]

As for the statutes of limitations of contraventions, art. 109 StGB foresees a period of limitation on prosecution *(Verfolgungsverjährung; prescription de l'action pénale)* and enforcement *(Vollstreckungsverjährung; prescription des peines)* of three years. For felonies and misdemeanors, arts. 97–99 StGB contain a differentiated prescription system taking as a distinguisher the nature and length of the threatened (limitation on prosecution) and imposed sentence (limitation on enforcement), rather than the abstract distinction between these two categories of crimes. However, the periods of limitation for these more serious crimes are longer than those for contraventions.

2. Systematization of the criminal offense

a) Introduction

Swiss criminal law distinguishes between a general and a special part. The general part contains those rules dealing with the requirements of criminal liability and the consequences of the criminal offense. These generally applicable rules are mainly laid down in Book One *(General Provisions)* and Book Three *(Implementation and Application of the Law)* of the Criminal Code. However, the general part

[20] On the power to legislate, see I.A.4.

[21] Ehrenzeller/Mastronardi/Schweizer/Vallender-*Vest*, Art. 123 BV, pp. 1270–1271, §§ 2–4.

[22] See I.D.4.

[23] *Hauser/Schweri/Hartmann*, Strafprozessrecht, pp. 433–434, §§ 5–6; Niggli/Wiprächtiger-*Heimgartner*, Vor Art. 103 StGB, p. 1795, §§ 24–26; *Schmid*, Zürcher Strafprozessrecht, pp. 352–356, §§ 924–934a; Botschaft StPO-CH, pp. 1292–1294/Message StPO-CH, pp. 1276–1278.

[24] *Hauser/Schweri/Hartmann*, Strafprozessrecht, pp. 433–434 § 5; *The Case of Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) at 28–32, §§ 61–73.

[25] *Hauser/Schweri/Hartmann*, Strafprozessrecht, p. 433, §§ 2–4; *Schmid*, Zürcher Strafprozessrecht, pp. 356–357, §§ 935–935a.

of Swiss criminal law also encompasses rules outside the Criminal Code, such as definitions and notions developed by case law.[26]

The entirety of provisions containing definitions of specific crimes is called the special part. A substantial share of the offenses are defined in Book Two *(Special Provisions)* of the Criminal Code. However, numerous other federal statutes include penal provisions, such as the Road Traffic Act, the Narcotics Act, or the Federal Law on Foreigners (replacing the Federal Act on the Residence and Permanent Settlement of Foreign Nationals on 1 January 2008). In terms of convictions, this so-called secondary criminal law *(Nebenstrafrecht; droit pénal accessoire)* transcends the practical importance of the Special Part of the Criminal Code.[27]

The General Part of the Criminal Code does not only apply to the offenses defined in the Special Part of the Criminal Code, but also to those laid down in other statutes. Art. 333 StGB sets out the relationship between the General Part of the StGB and the secondary criminal law. As a general rule, the former applies to the offenses defined in the secondary criminal law. However, if a statute belonging to the secondary criminal law contains deviating rules, they prevail as *leges speciales* over the rules stated in the Criminal Code (principle of subsidiarity).[28]

Art. 333 StGB [application of the General Part of the Criminal Code to other Federal Laws]

1 The general provisions of this law apply to offenses threatened with punishment by other Federal Laws, unless they contain their own general provisions.

The juvenile criminal law was outsourced from the Criminal Code in 2007 and is now laid down the Federal Law on Criminal Law Applicable to Minors *(Bundesgesetz über das Jugendstrafrecht; loi fédérale régissant la condition pénale des mineurs)*, which mainly contains rules on sanctions and procedure. According to art. 1 para. 2 JStG, a limited set of provisions of the General Part as well as the entire Special Part of the Criminal Code are applicable *per analogiam* to minors.[29]

The Military Criminal Code *(Militärstrafgesetz; code pénal militaire)* is *lex specialis* compared to the Criminal Code (art. 9 para. 1 StGB) and has its own General and Special Part.

[26] *Hurtado Pozo*, Droit pénal, pp. 5–6, §§ 11–12; *Seelmann*, Strafrecht AT, pp. 25–26.

[27] Swiss Federal Statistical Office, Conviction Statistics, state of the database: 30 June 2009.

[28] Donatsch-*Weder*, Art. 333 para. 1 StGB, pp. 386–387.

[29] *Dupuis* et al., Art. 1 JStG, §§ 1–37; *Hurtado Pozo*, Droit pénal, p. 35, § 91.

b) Development and current state of prevailing opinions on generally applicable requirements of criminal liability

The theories of acting *(Handlungslehren; théories de l'action)* deal with the generally applicable requirements of criminal liability *(allgemeine Strafbarkeitsvoraussetzungen; conditions de punissabilité)*, that is, they describe and systematize the conditions under which specific acts are considered criminal.[30] Hence, one of their main functions consists in providing a basis for distinguishing between criminal conduct and conduct which is irrelevant when observed through the lens of the criminal law. Further, they yield a mode of analysis of the various requirements of criminal liability, which allows for more rational, consistent, and comprehensible rulings.[31]

Even though the various theories of acting developed since the 19th century yielded different understandings of the internal structure of the criminal offense, they all have a common trait in that they separate wrongfulness *(Unrecht; illicéité pénale)* from culpability *(Schuld; culpabilité)*.[32] Given that there can never be culpability without wrongfulness, the examination whether a criminal offense was committed has to start with the requirements of criminal liability pertaining to the category of wrongfulness. However, the requirements belonging to the categories of wrongfulness and culpability respectively vary according to the different theories of acting and the internal structure of criminal offenses they are proposing.[33]

– *Causal theory of acting*

The causal theory of acting *(kausale Handlungslehre; théorie de l'action causale naturelle)*[34] is the fruit of a doctrinal debate starting in the second half of the 19th century, in which German scholars (e.g., *Binding*, *von Beling*, *von Liszt*) were leading actors. In Switzerland, authors such as *Hafter*[35] and *Schultz*[36] argued in favor of this concept, which was the prevailing theory of acting in Switzerland after the turn to the 20th century.[37]

According to the causal theory of acting, an act is defined as the causation of a change in the outside world through volitional human behavior. While the act trig-

[30] See II.D.3.

[31] *Riklin*, Verbrechenslehre, p. 139, § 2 and p. 146, §§ 23–26; *Trechsel/Noll*, Strafrecht AT, p. 83.

[32] *Riklin*, Verbrechenslehre, pp. 140–141, §§ 3–9.

[33] *Ibid.*, p. 140, §§ 5 and 8–9.

[34] See II.D.3.

[35] *Hafter*, Schweizerisches Strafrecht, pp. 69–130.

[36] *Schultz*, AT Strafrecht, pp. 114–120 and 137–257.

[37] *Riklin*, Verbrechenslehre, pp. 140–141, §§ 2–8.

gering a causal event has to be volitional (and not the product of a reflex), the actual properties of this will (such as intent or negligence) are irrelevant for the determination whether the conduct was wrongful. It is only at the level of culpability where the inquiry is concerned with whether the outward change came about through intentional or negligent conduct.[38] Hence, a main feature of the causal theory of acting is the distinction between wrongfulness and culpability along the lines of the outer and inner manifestation of the offense:

- Wrongfulness. The category of wrongfulness encompasses only those definitional elements of the offense which can be discerned from the outside, that is, the outward change and result caused by the person's act. Since wrongfulness only refers to the outer, that is, objective definitional elements of the offense, the term "objective theory of wrongfulness" *(objektive Unrechtslehre)* is used.[39]

- Culpability. All inner, that is, subjective elements of the offense, are only analyzed at the level of culpability. Hence, the person's attitude towards the result caused by his or her acts – intent or negligence – is perceived as constituting different forms of guilt.[40]

The Achilles' heel of the causal theory of acting lies in the fact that it does not yield satisfying results for crimes of omission given that they lack any factual causation.[41] The opponents of the causal theory of acting further argue that it does not – in a first step – inquire into a person's will, but merely takes into account the objective elements. This is regarded as being in stark contrast with the fact that human conduct is inherently goal-directed and purpose-driven and cannot be reduced to a mere causal event.[42]

– *Goal-directed theory of acting*

The goal-directed theory of acting *(finale Handlungslehre; théorie finaliste de l'action)*,[43] originally formulated by the German criminal lawyer *Welzel*, is built upon the presumption that human conduct is, as a general rule, goal-directed and purpose-driven. This means that a person has a specific goal in mind when acting and adjusts his or her conduct accordingly. Hence, a wrongful act always comprises

[38] *Hurtado Pozo*, Droit pénal, pp. 138-139, §§ 406–407; *Riklin*, Verbrechenslehre, p. 141, §§ 4–6, and 148, § 3; *Stratenwerth*, Die Straftat, p. 120, § 4.

[39] *Donatsch/Tag*, Strafrecht I, pp. 91-92; *Riklin*, Verbrechenslehre, p. 140, § 5.

[40] *Donatsch/Tag*, Strafrecht I, pp. 91–92; *Hafter*, Schweizerisches Strafrecht, pp. 114–121; *Riklin*, Verbrechenslehre, p. 140, § 5; *Schultz*, AT Strafrecht, pp. 187–188; *Stratenwerth*, Die Straftat, pp. 120–121, §§ 4–5.

[41] On crimes of omission, see II.D.4.

[42] *Hurtado Pozo*, Droit pénal, p. 139, § 408; *Riklin*, Verbrechenslehre, p. 144, § 18; *Stratenwerth*, Die Straftat, p. 120, § 5.

[43] See II.D.3.

an objective (outer) *and* a subjective (inner) component. As a consequence, the person's attitude towards his or her acts – intent and negligence – is elevated to the category of wrongfulness. The emphasis put on the person's attitude towards his or her acts by the goal-directed theory of acting, that is, the perception that an unlawful act is more than a mere causal event, is reflected by the term "subjective theory of wrongfulness" *(personale Unrechtslehre)*.[44]

The goal-directed theory of acting, which is the prevailing theory of acting under current Swiss criminal law, adopts the following distinction between wrongfulness and culpability:[45]

- Wrongfulness. Conduct is wrongful if it fulfills both, the objective and subjective definitional element of the offense and is unlawful, that is, if there is a breach of a proscriptive or prescriptive criminal provision in the absence of any justification *(Rechtfertigungsgrund; fait justificatif)*. Hence, intention and negligence are no longer perceived as forms of culpability, but form part of the offense description *(Tatbestand; énoncé de fait légal)*.[46]

- Culpability. While wrongfulness is assessed regardless of the person's capability to observe a specific norm, the focus of the inquiry into culpability lies on the acting person and his or her ability to act in accordance with the law in a particular situation. Hence, culpability stands for the conditions under which a person can be held personally responsible *(persönliche Vorwerfbarkeit; imputabilité)* for his or her wrongful acts, that is, for his or her decision to act against the law.[47]

One of the shortcomings of the goal-directed theory of acting consists in the fact that it is built on the presumption that acts are goal-directed and purpose-driven and is thus tailored to the structure of intentionally committed crimes. Therefore, negligent acts, especially unconscious negligence *(unbewusste Fahrlässigkeit; négligence inconsciente)*, can hardly be integrated into the system proposed by the goal-directed theory of acting.[48]

[44] *Donatsch/Tag*, Strafrecht I, pp. 90 and 93; *Hurtado Pozo*, Droit pénal, p. 140, §§ 410–413; *Riklin*, Verbrechenslehre, pp. 143–144, §§ 12–16 and 19; *Stratenwerth*, Die Straftat, p. 121, §§ 6–7. For a comprehensive overview on the significance of the *finale Handlungslehre* in the Swiss criminal law, see *Stratenwerth*, ZStR 81 (1965), 179–209.

[45] See below 2.c.

[46] *Donatsch/Tag*, Strafrecht I, p. 92; *Stratenwerth*, Die Straftat, p. 139 § 24.

[47] *Riklin*, Verbrechenslehre, p. 143, § 14; *Stratenwerth*, Die Straftat, p. 139, § 24.

[48] *Donatsch/Tag*, Strafrecht I, pp. 90–91; *Hurtado Pozo*, Droit pénal, p. 141, § 416; *Riklin*, Verbrechenslehre, pp. 145–146, § 19; *Stratenwerth*, Die Straftat, p. 122, § 8. See II.E.3.

c) Modes of analyzing the general requirements of criminal liability

– *Internal structure of criminal offenses*

Based on the goal-directed theory of acting, the following internal structure of criminal offenses and mode of analysis of the general requirements of criminal liability prevails under Swiss criminal law:

• Human conduct. The first element required is the existence of a volitional human conduct, which manifests itself.[49] Thereby, the term "conduct" encompasses acts and omissions, which are committed intentionally or negligently.[50] Until recently, the principle of *societas delinquere non potest* prevailed under Swiss criminal law, that is, moral persons could not be held criminally liable. This concept was abandoned with the entry into force of the corporate criminal law *(Unternehmensstrafrecht; droit pénal des entreprises)* in 2003.[51]

• Fulfillment of the definitional elements of the offense. It is further required that the human conduct in question fulfills the objective and subjective definitional elements of the offense, that is, there has to be convergence between the concrete acts and the abstract offense description. The objective definitional elements of the offense *(objektive Tatbestandselemente; éléments objectifs de l'énoncé de fait légal)*[52] encompass all those elements which can be observed from outside, that is, the description of the external appearance and/or effects of the conduct. Subjective definitional elements of the offense *(subjektive Tatbestandselemente; éléments subjectifs de l'énoncé de fait légal)*[53] are those describing the acting person's inner attitude (e.g., intent, negligence, view to gain).[54]

• Unlawfulness. The element of unlawfulness *(Rechtswidrigkeit; illicéité)*[55] is fulfilled if the conduct in question infringes a proscriptive or prescriptive criminal provision and no overriding norm exists, which allows for or prescribes such conduct. This means that conduct fulfilling the definitional elements of the offense is, as a general rule, unlawful, unless a justification eliminates it.[56]

• Culpability. Human conduct fulfilling the objective and subjective definitional elements of the offense and which is unlawful is only punishable if the person can be held personally liable, that is, if his or her culpability *(Schuld; culpabilité)* can

[49] See II.D.3.

[50] *Donatsch/Tag*, Strafrecht I, pp. 79–80; *Riklin*, Verbrechenslehre, p. 150, § 8.

[51] *Riklin*, Verbrechenslehre, pp. 151–157, §§ 14–28. See II.H.2.

[52] See II.D.

[53] See II.E.

[54] *Riklin*, Verbrechenslehre, p. 160, §§ 7–10; *Trechsel/Noll*, Strafrecht AT, p. 76.

[55] See II.J.

[56] *Riklin*, Verbrechenslehre, p. 182, §§ 1–5; *Stratenwerth*, Die Straftat, pp. 134–135; *Trechsel/Noll*, Strafrecht AT, pp. 114–115.

be established. Culpability requires that the person possesses criminal capacity *(Schuldfähigkeit; capacité de culpabilité)*, that is, the individual capability to discern the unlawfulness of his or her conduct and to act accordingly. Further, the person must have knowledge or the ability to know of the unlawfulness *(Unrechtsbewusstsein; conscience de l'illicéité)*. Finally, it must be reasonable to require of the person that he or she acts in conformity with the law *(Zumutbarkeit rechtmässigen Verhaltens; fait qu'un comportement conforme à la loi puisse être équitablement exigé de quelqu'un)*. If one of these three elements of culpability is not fulfilled, the person is not culpable and can therefore not be held criminally liable.[57]

• Additional prerequisites of criminal liability. As a general rule, criminal liability is triggered if the human conduct fulfills the definitional elements of the offense, is unlawful and culpable. Exceptionally, additional prerequisites of criminal liability beyond wrongfulness and culpability have to be satisfied in order to hold a person criminally liable, such as the so-called objective prerequisites of criminal liability[58] *(objektive Strafbarkeitsbedingungen; conditions objectives de punissabilité)*.[59] With regard to some elements, there is a controversy as to whether they have to be qualified as additional prerequisites of criminal liability or as procedural prerequisites *(Prozessvoraussetzungen; conditions à l'ouverture de l'action pénale)*. This holds true, for example, for the criminal complaint[60] *(Strafantrag; plainte pénale)* or the period of limitation on prosecution[61] *(Verfolgungsverjährung; prescription de l'action pénale)*.

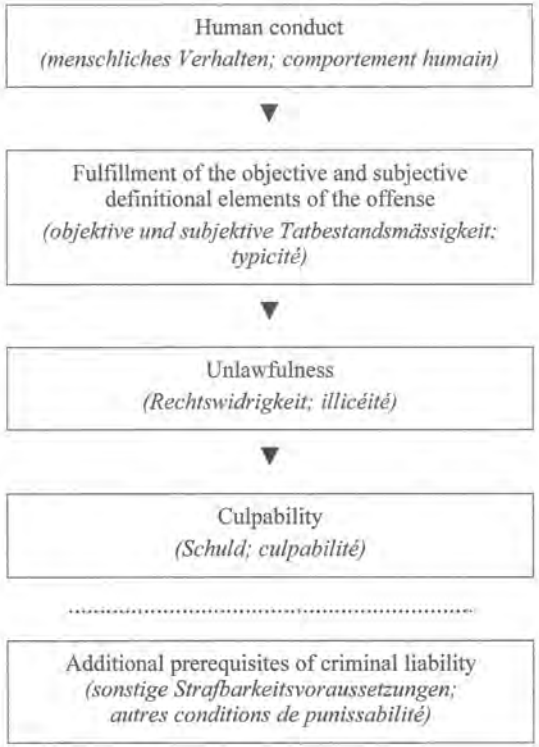
[57] Niggli/Wiprächtiger-*Bommer*, Vor Art. 19 StGB, pp. 351–352, §§ 3–5; *Riklin*, Verbrechenslehre, pp. 202-203, §§ 1–9; *Seelmann*, Strafrecht AT, p. 75.

[58] See II.E.4.

[59] *Riklin*, Verbrechenslehre, p. 301, §§ 1–4; *Stratenwerth*, Die Straftat, pp. 141–144, §§ 27–31.

[60] *Riklin*, Verbrechenslehre, p. 307, § 24; *Stratenwerth*, Die Straftat, p. 143, § 29; *Trechsel/Noll*, Strafrecht AT, pp. 295–296.

[61] *Riklin*, Verbrechenslehre, p. 302, § 6; *Trechsel/Noll*, Strafrecht AT, p. 307.



– *Consequences of the internal structure of criminal offenses*

One consequence of the internal structure of the criminal offense, which reflects the goal-directed theory of acting,[62] is the so-called limited accessoriness of participation *(limitierte Akzessorietät der Teilnahme; accessoriété limitée de la participation)*. This means that participants can only be held criminally liable if the principal's conduct fulfills the definitional elements of an offense and is unlawful. However, in order to keep in line with the principle of guilt *(Schuldprinzip; principe de culpabilité)* the participant's and principal's culpability are assessed separately (art. 27 StGB) and one can be held criminally liable even if the other is not culpable (e.g., due to incapacity of guilt or diminished capacity of guilt; art. 19 StGB).[63]

While a mistake of fact (art. 13 StGB) excludes intent and thus pertains to the subjective definitional elements of the offense,[64] a mistake of law (art. 21 StGB)

[62] See above 2.b.
[63] See II.G.3.b.
[64] See II.E.5.a.

requires that the offender does not possess any sense of unlawfulness; hence, it relates to culpability.[65] This means that whoever acts with knowledge and will but is mistaken about the unlawfulness of his conduct (mistake of law), nevertheless acts intentionally.[66] This is in line with the so-called theory of guilt where a person's knowledge or ability to know about the unlawfulness is an element of culpability and not of intent.[67]

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[65] See II.E.5.b. and II.J.8.
[66] See II.E.2.
[67] *Riklin*, Verbrechenslehre, p. 215, § 60 and p. 221, §§ 13–14.

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List of abbreviations

AT	Allgemeiner Teil des Strafrechts (General Part of the criminal law)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Official Federal Gazette)
BV	Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999/Constitution fédérale de la Confédération suisse du 18 avril 1999, SR/RS 101 (Federal Constitution of the Swiss Confederation of 18 April 1999)
ECHR	Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten/Convention du 4 novembre 1950 de sauvegarde des droits de l'homme et des libertés fondamentales, SR/RS 0.101 (Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1951)
Eur. Ct. H.R.	European Court of Human Rights
FF	Feuille fédérale (Official Federal Gazette)
JStG	Bundesgesetz über das Jugendstrafrecht vom 20. Juni 2003 (Jugendstrafgesetz, JStG)/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs (Droit pénal des mineurs, DPMin), SR/RS 311.1 (Federal Law on the Criminal Law Applicable to Minors of 20 June 2003)
ser.	series

SR/RS	Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral (Classified Compilation of Swiss Federal Legislation)
StGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/ Code pénal suisse du 21 décembre 1937, SR/RS 311.0 (Swiss Criminal Code of 21 December 1937)
aStGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937 in der Fassung vor Inkrafttreten der Revision des Allgemeinen Teils am 1. Januar 2007 (Swiss Criminal Code of 21 December 1937 in the version before the entry into force of the revision of the General Part on 1 January 2007)
StPO	Schweizerische Strafprozessordnung vom 5. Oktober 2007 [Referendumsvorlage]/Code de procédure pénale suisse du 5 octobre 2007 [Texte soumis au référendum facultatif] (Swiss Criminal Procedural Law of 5 October 2007 [draft as submitted to the optional referendum])
StPO-ZH	Strafprozessordnung des Kantons Zürich vom 4. Mai 1919 (Criminal Procedural Law of the Canton of Zurich of 4 May 1919)
ZStR	Schweizerische Zeitschrift für Strafrecht

Pablo Galain Palermo

Concept and systematization of the criminal offense in

Uruguay

1. Concept of the criminal offense

a) Definitions, formal and substantive concepts of the criminal offense

– *Definition*

In Uruguay the criminal offense is defined by statute. The definition is provided in Art. 1 of the Criminal Code (*Código Penal*, CP).

Art. 1 CP (Concept of the criminal offense) [1]
An offense is an action or omission expressly foreseen by the criminal law. To be considered an offense as such, it must contain a rule and a sanction.

– *Formal concept of the criminal offense*

Criminal offenses are those defined by the criminal law, which the legislature in a historical moment decided to penalize.[2] Academic discourse distinguishes between a formal and a substantive concept of criminal offense. This means that in the Uruguayan criminal system there is no consideration for the criminal offense *in se* and the definition of a criminal offense always depends on the assessment and the will of the legislature.

In the formal sense a criminal offense is a human conduct that is considered criminal because it is punishable and can be penalized according to the law. Art. 1 CP reflects this formal concept.

– *Substantive concept of the criminal offense*

The substantive concept of the criminal offense is anterior to the formal concept of criminal offense and establishes its limits. It determines why a specific conduct is criminal. The criminal offense must always be a human conduct which the legis-

[1] All translations of legal provisions in this chapter are the author's own.
[2] According to *Langón*, La Ley Penal, p. 36.

Spasovich, Vladimir, Учебник уголовного права (Textbook for the Criminal Law). Saint Petersburg 1863, p. 60.

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List of abbreviations

FZ	Federal´nij Zakon (Federal Statute)
pa.	part
RF	Rossijskaya Federaciya (Russian Federation)
UKR	Ugolovnij Kodeks Rossijskoj Federacii (Criminal Code of the Russian Federation)

Anna Petrig

Objective aspects of the offense in Switzerland

1. Definition and elements of the objective aspects of the offense

Under Swiss criminal law, every offense description *(Tatbestand; énoncé de fait légal)* is composed of objective and subjective definitional elements *(objektive und subjektive Tatbestandselemente; éléments objectifs et subjectifs de l'énoncé de fait légal)*, which are closely intertwined.[1] While subjective elements relate to the offender's inner world, the objective elements are those aspects of an offense that display or manifest themselves externally, that is, discernable conditions, factors and changes in the outside world.[2]

Among the objective definitional elements of the offense there is always a description of who can commit the offense, that is, the designation of an offender.[3] Depending on the specific offense, one or more of the following elements are additionally present: a description of the conduct threatened with punishment,[4] the object on which the criminal act is performed,[5] the result of the conduct,[6] and the causality[7] between conduct and result.[8]

2. Offender

– *Natural and legal persons*

Under Swiss criminal law, every natural person *(natürliche Person; personne physique)* can be an offender. However, only persons possessing criminal majority

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[1] II.C.2.c. and II.E.2.a.

[2] *Hurtado Pozo*, Droit pénal, pp. 155–156, §§ 455–456; *Riklin*, Verbrechenslehre, p. 160, § 7 and p. 161, § 13; *Trechsel/Noll*, Strafrecht AT, p. 76.

[3] See below 2.

[4] See below 3. and 4.a.

[5] See below 5.

[6] See below 6.

[7] See below 7.

[8] *Hurtado Pozo*, Droit pénal, p. 156, § 456; *Riklin*, Verbrechenslehre, p. 161, § 13; *Trechsel/Noll*, Strafrecht AT, p. 76.

(Strafmündigkeit; majorité pénale) can be subject to the criminal law and its sanctions. According to art. 3 para. 1 of the Federal Law on the Criminal Law Applicable to Minors *(Jugendstrafgesetz/JStG; Droit pénal des mineurs)*, children not having reached the age of ten do not possess criminal majority. Persons having committed an offense between the age of 10 and 18 are subject to the special sanctions foreseen in the JStG (art. 3 para. 1 JStG); after the age of 18, the Swiss Criminal Code *(Schweizerisches Strafgesetzbuch/StGB; Code pénal Suisse)* applies (art. 9 para. 2 StGB).[9]

Until recently, the principle of *societas delinquere non potest* prevailed under Swiss criminal law and hence legal persons could not be held criminally liable. However, a paradigm shift took place in 2003 when general provisions on corporate criminal liability *(strafrechtliche Verantwortlichkeit des Unternehmens, responsabilité pénale de l'entreprise)*[10] were introduced with arts. 102 and 102a StGB.[11]

– *Common and special offenses*

The vast majority of offenses can be committed by any natural person. Accordingly, most provisions defining specific crimes begin with the words "whoever [...]" followed by a description of the act threatened with punishment. Given that these crimes can be committed by any natural person, they are referred to as common offenses *(gemeine Delikte; infractions communes)*.[12]

While common offenses can be perpetrated by every natural person, so-called special offenses *(Sonderdelikte; délit propre)* can only be committed by a statutorily designated group of persons featuring specific characteristics, such as public officials, physicians, debtors, or witnesses. The doctrine distinguishes between genuine and non-genuine special offenses.[13]

Genuine special offenses *(echte Sonderdelikte; délit propre pur)* are crimes that can only be committed by persons on whom a special duty is incumbent. It is the very violation of this duty that establishes punishability. Thus, for instance, only members of an authority or public officials can commit crimes against public duties such as an abuse of authority (art. 312 StGB); or only a witness in a judicial proceeding, who is under a duty to tell the truth, can be held criminally liable for false testimony (art. 307 StGB).[14]

[9] *Dupuis* et al., Art. 3 JStG, §§ 1–11; *Hurtado Pozo*, Droit pénal, p. 157, § 460.

[10] II.H.2.

[11] *Killias* et al., Droit pénal général, pp. 89–93, §§ 609–612; Niggli/Wiprächtiger-*Niggli/Gfeller*, Art. 102 StGB, pp. 1696–1697, §§ 9–12; *Riklin*, Verbrechenslehre, pp. 151–157, §§ 14–28.

[12] *Donatsch/Tag*, Strafrecht I, p. 95; *Killias* et al., Droit pénal général, p. 37, § 224; *Riklin*, Verbrechenslehre, p. 132, § 19.

[13] *Donatsch/Tag*, Strafrecht I, p. 96; *Killias* et al., Droit pénal général, p. 37, § 224.

Non-genuine special offenses *(unechte Sonderdelikte; délit propre mixte)* are crimes that can be committed by a broader circle of persons than those on whom a specific duty is incumbent. However, if the offender is duty-bound, the threatened punishment is aggravated compared to the common crime penalizing the same act. Thus, if a debtor, who owes special duties towards his creditors, commits the crime of fraudulent bankruptcy and pledge fraud (art. 163 para. 1 StGB) the threatened punishment is imprisonment or monetary penalty, while third parties only risk a monetary penalty (art. 163 para. 2 StGB).[15]

With regard to genuine or non-genuine special offenses, specific rules on participation and sentencing apply.[16]

3. Act

– *Theories of acting and their concept of acting*

It is generally accepted that criminal liability can only be established for conduct, and not for mere thoughts, attitudes, or character traits without external manifestation. However, the doctrinal debate on what constitutes conduct in criminal law, that is, the criminal law concept of acting *(strafrechtlicher Handlungsbegriff; notion d'action)*, is long-standing and vivid. Each theory of acting *(Handlungslehre; théorie de l'action)* proposes its own concept of acting, which has essentially two functions: First, it yields a mode of analysis of the various requirements of criminal liability.[17] Second, it provides a basis for distinguishing between criminal conduct and conduct which is irrelevant for criminal law purposes.

Under the causal theory of acting *(kausale Handlungslehre; théorie de l'action causale naturelle)* the notion of act is defined as the causation of a change in the outside world through volitional human behavior.[18] This approach is criticized by proponents of the goal-directed theory of acting *(finale Handlungslehre; théorie finaliste de l'action)*, who argue that human conduct cannot be understood in a mechanical way as bodily movements triggered by human will. A person would rather pursue a specific goal when acting, that is, human conduct would be goal-directed

[14] *Donatsch/Tag*, Strafrecht I, p. 96; *Hurtado Pozo*, Droit pénal, p. 163, § 481; *Killias* et al., Droit pénal général, p. 37, § 225; *Riklin*, Verbrechenslehre, pp. 132–133, § 21.

[15] *Donatsch/Tag*, Strafrecht I, p. 96; *Killias* et al., Droit pénal général, p. 37, § 226; *Riklin*, Verbrechenslehre, p. 133, § 22.

[16] II.G.5.a.

[17] II.C.2.b. and c.

[18] *Hurtado Pozo*, Droit pénal, pp. 138–140, §§ 406–409; *Trechsel/Noll*, Strafrecht AT, p. 83; *Stratenwerth*, Die Straftat, pp. 120–121, §§ 4–5.

and purpose driven.[19] The social theory of acting *(soziale Handlungslehre; théorie de l'action sociale)*, which was developed as a response to the shortcomings of the causal and goal-directed theories of acting, defines conduct as socially relevant human action *(sozialerhebliches menschliches Verhalten; caractére socialement relevant du comportement humain)*. Given the vagueness and abstract nature of the concept of social relevance, the theory had virtually no practical implications for Swiss criminal law.[20]

The various concepts of acting discussed in criminal law theory over time are proof of the fact that they are the product of normative considerations rather than independent concepts providing generally valid criteria to determine what constitutes conduct. The assessment of what constitutes conduct can arguably only be made in a deductive manner and with regard to a specific legal order by looking at what the criminal law threatens with punishment, that is, what the legislature considers to be conduct.[21]

– *Definitional elements of conduct*

The first general requirement of criminal liability[22] is the existence of a volitional human conduct, which manifests itself externally. Thereby, the generic term conduct encompasses both, acts and omissions, either committed intentionally or negligently.[23] The conduct in question has to feature three characteristics:

First, only human conduct is relevant for criminal law purposes.[24] Thus, conduct of animals or natural phenomena do not qualify as conduct when seen through the lens of the criminal law. However, in situations where harm is caused by animals or through natural phenomena, prior human conduct could still constitute conduct in the sense of criminal law (e.g., damage is caused by an avalanche that only reached the village because the avalanche barrier was not correctly constructed).[25]

Second, conduct has to be volitional. Thus, bodily movements not being a product of the will, such as reflex movements or acts performed under hypnosis, while sleep-walking or under a seizure (e.g., a sudden attack of epilepsy) are not considered conduct. However, in these situations prior acts could constitute relevant conduct (e.g., a mother deeply sleeping is laying on her baby, who is thereby asphyxi-

[19] *Trechsel/Noll*, Strafrecht AT, p. 77; *Stratenwerth*, Die Straftat, pp. 121–122, §§ 6–7, II.C.2.b.

[20] *Riklin*, Verbrechenslehre, p. 149, § 5.

[21] *Hurtado Pozo*, Droit pénal, pp. 145–146, §§ 429–430; *Riklin*, Verbrechenslehre, p. 149, § 6.

[22] II.C.2.c.

[23] *Riklin*, Verbrechenslehre, p. 150, § 8.

[24] *Hurtado Pozo*, Droit pénal, p. 138, § 404.

[25] *Riklin*, Verbrechenslehre, p. 150, § 10.

ated; the mother's conduct is not volitional, however, she could potentially be liable for the previous acts of placing herself too close to the child). Further, acts or omissions, which are the product of irresistible force *(vis absoluta)* do not qualify as conduct (e.g., person A is thrown through a window; the demolition of the window pane by A is not volitional).[26]

Third, human conduct has to manifest itself in the outside world, that is, it must be discernable to third persons. Hence, criminal liability can never attach to mere ideas not quitting the realm of thoughts.[27]

4. Crimes of omission

a) Difference between acts and omission

– *Crimes of commission and crimes of omission*

The vast majority of offense descriptions prohibit specific active conduct or actions (e.g., inflicting bodily harm or taking away moveable property). They are called crimes of commission *(Begehungsdelikte; délits de comission)*. Exceptionally, it is not the active violation of a prohibition which is threatened with punishment, but the fact that someone remains passive, that is, fails to act despite a duty to act. These offenses are referred to as crimes of omission *(Unterlassungsdelikte; délits d'omission)*.[28]

– *Distinction between act and omission*

The qualification of specific conduct as act or omission can be difficult since it is not always obvious whether the offender acted in a prohibited way or whether he failed to act as prescribed. This difficulty is illustrated by the following case: A advised B, who was seriously ill, to undergo a "cosmic diet," that is, not to eat at all; the state of health of B deteriorated and she finally died. Was A acting in a prohibited way by suggesting the diet or did he fail to act in that he did not take rescuing measures?[29] The Swiss Federal Supreme Court *(Schweizerisches Bundesgericht; Tribunal fédéral suisse)* and the prevailing doctrine suggest that in case of doubt the distinction between act and omission has to be made according to the subsidiarity principle *(Subsidiaritätsprinzip; principe de subsidiarité)*: The first step is to

[26] *Hurtado Pozo*, Droit pénal, pp. 147–148, §§ 435–438; *Riklin*, Verbrechenslehre, p. 150, § 11.

[27] *Riklin*, Verbrechenslehre, p. 150, § 13.

[28] *Killias* et al., Droit pénal général, pp. 35–36, § 222; *Riklin*, Verbrechenslehre, p. 129, §§ 5–7.

[29] BGE 108 IV 3.

determine whether the conduct in question can be qualified as active conduct, that is, whether a crime of commission took place. This requires a determination as to whether the conduct fulfills the definitional elements of the offense, is unlawful and culpable. Only if this is negated, an inquiry into the requirements of crimes of omission should take place.[30]

– *Categories of crimes of omission*

Doctrine and case law distinguish between genuine and non-genuine crimes of omission. Genuine crimes of omission *(echte Unterlassungsdelikte; délits d'omission proprement dits)* are those offenses where the omission is explicitly mentioned in the offense description, such as, for instance, the provision on omission to render assistance (art. 128 StGB).

By contrast, non-genuine crimes of omission *(unechte Unterlassungsdelikte; délits d'omission improprement dits)* are characterized by the fact that the omission is not explicitly mentioned in the offense description. The term is used to refer to crimes, which are defined as active conduct in the respective legal provisions, but that can also be committed by omission. Thus, for instance, art. 111 StGB prohibiting the intentional killing of a human being is usually committed by active conduct (e.g., by shooting a person), but could also be fulfilled by omission (e.g., parents letting their child starve to death).[31] Given that commission by omission is not explicitly mentioned in the offense description, it was necessary to enact a general provision incriminating commission by omission:

Art. 11 StGB [commission by omission][32]

1 A felony or misdemeanor can also be committed through the failure to comply with a duty to act.

2 Failure to comply with a duty to act comprises whoever does not prevent the endangerment or harm of a legal interest protected by criminal law, even though the person is required to do so because of his legal status arising particularly from:

a. a law;

b. a contract;

c. a community of shared risks voluntarily entered into or;

d. the creating of a danger.

3 Whoever fails to comply with a duty to act is only punishable for the respective offense if, according to the circumstances of the criminal act, he would have been equally blameworthy for it if he had committed the offense through active conduct.

4 The court can mitigate the sentence.

[30] BGE 115 IV 199, 203-204, E. 2a; BGE 129 IV 119, 122, E. 2.2; *Hurtado Pozo*, Droit pénal, p. 412, § 1291; Niggli/Wiprächtiger-*Seelmann*, Art. 11 StGB, pp. 256–259, §§ 16–25; *Trechsel/Noll*, Strafrecht AT, p. 247.

[31] *Killias* et al., Droit pénal général, p. 36, § 223; *Riklin*, Verbrechenslehre, p. 247, § 4.

[32] All translations of provisions of the Swiss Criminal Code (StGB) are the author's own.

Art. 11 StGB only entered into force in 2007 with the revised General Part of the Swiss Criminal Code.[33] Until then, commission by omission was solely based on customary law and case law, which was problematic with regard to the principle of legality.[34]

The provision on commission by omission (art. 11 StGB) not only applies to felonies *(Verbrechen; crimes)* and misdemeanors *(Vergehen; délits)*, but *qua* art. 104 StGB also to contraventions *(Übertretungen; contraventions)*.

b) Specific duties to act, duties of care

While for genuine crimes of omission the offense description explicitly mentions the omitted act (e.g., the failure to render assistance, art. 128 StGB) and the addressee of the duty to act, this does not hold true for non-genuine crimes of omission. For the latter type of crimes what has to be analyzed is whether – in addition to the elements of the specific crime of the special part of criminal law – the following requirements of art. 11 StGB are fulfilled:

– *Position of guarantor*

The first requirement for establishing criminal liability for non-genuine crimes of omission is that the person failed to comply with a duty to act (art. 11 para. 1 StGB). However, not every person is under a duty to act in order to prevent the endangerment or violation of a third person's legally protected interests *(Rechtsgüter; biens juridiques protégés)*, but rather only so-called guarantors *(Garanten; garants)* (art. 11 para. 2 StGB). A person holds a position of guarantor *(Garantenstellung; position de garant)* if he has a legal (and not a mere moral) duty to take action in order to prevent an impairment of the third person's legally protected interests.[35]

Two types of guarantor are distinguished under Swiss criminal law: First, those having a duty to avert any kind of danger or harm for specific legally protected interests of a defined group of persons being under their custody (*Obhutsgarant* or *Schutzgarant; garant de protection d'autrui*); such as a physician towards his patient with regard to the legally protected interest of health and life. Second, those who have the responsibility to keep a specific source of danger under control in order to avoid the impairment of any possible legally protected interest of any possible person (*Sicherungarant* or *Überwachungsgarant; garant de surveillance*); such as the owner of a dangerous animal or the engineer carrying out a blasting.[36]

[33] I.F.2.a. and I.G.2.

[34] II.A.; Niggli/Wiprächtiger-*Seelmann*, Art. 11 StGB, p. 253, § 4.

[35] *Hurtado Pozo*, Droit pénal, p. 420, §§ 1317–1319.

[36] *Donatsch/Tag*, Strafrecht I, p. 300; *Hurtado Pozo*, Droit pénal, p. 421, § 1321.

Art. 11 para. 2 StGB provides a non-exhaustive list of grounds from which a duty to act can arise: First, a position of guarantor can follow from certain duties to act stated in the law (art. 11 para. 2 lit. a StGB); such as the obligation of parents to provide assistance to their children as foreseen in art. 272 Swiss Civil Code *(Schweizerisches Zivilgesetzbuch; Code civil suisse)*.[37] Second, contractual clauses by which persons are obliged to control or minimize risks, such as contracts entered into with mountain guides or physicians, can give rise to a position of guarantor (art. 11 para. 2 lit. b StGB).[38] Third, someone who voluntarily enters into a community of shared risks, such as a group of divers or mountaineers, can become a guarantor because, or insofar as, the community was constituted in order to better manage or minimize latent risks (art. 11 para. 2 lit. c StGB).[39] Fourth, a person who created or aggravated a danger for another's legally protected interests has to guarantee that it does not materialize (art. 11 para. 2 lit. d StGB). It is in contention whether only risks resulting from culpable conduct can establish a position of guarantor, or whether it may also include the taking of permissible risks.[40]

– *Equivalence of omission and active conduct*

Art. 11 para. 3 StGB limits punishability to cases in which the reproach made to the alleged offender for his omission is equal to the one that could be made to him for the commission of the same offense through active conduct. This equivalence requirement should serve as a corrective measure in cases of omission where attaching criminal liability could hardly be justified in the light of the principle of culpability *(Schuldgrundsatz; principe de culpabilité)* despite the general idea that both, commission by omission *and* active conduct, are punishable.[41]

c) Special issues with regard to criminal liability in the context of crimes of omission

– *Faculty, reasonableness, and necessity to act*

A guarantor can only be held liable if he had the faculty to act, that is, if he was in a position enabling and allowing him to act. Further, it must have been reasonable to require from the person that he acted according to the prescriptions of law. It is generally accepted that a guarantor cannot be held criminally liable if his action would have led to a concrete endangerment of his own life or even his death.[42] It is disputed among scholars whether the negation of the reasonableness to act implies that the offense description is not fulfilled, or is rather to be understood as legal justification *(Rechtfertigungsgrund; fait justificatif)* or excuse *(Entschuldigungsgrund; circonstance de non-culpabilité)*.[43]

[37] *Hurtado Pozo*, Droit pénal, pp. 422–423, §§ 1324–1327; Donatsch-*Donatsch*, Art. 11 para. 2 StGB, pp. 47–48.

[38] *Hurtado Pozo*, Droit pénal, pp. 423–424, §§ 1328–1329; Donatsch-*Donatsch*, Art. 11 para. 2 StGB, p. 48.

[39] *Hurtado Pozo*, Droit pénal, pp. 425–426, § 1332; Donatsch-*Donatsch*, Art. 11 para. 2 StGB, p. 48.

[40] Donatsch-*Donatsch*, Art. 11 para. 2 StGB, pp. 48–49; *Hurtado Pozo*, Droit pénal, pp. 424–425, §§ 1332–1333.

[41] Roth/Moreillon-*Cassani*, Art. 11 StGB, pp. 114–115, § 4; Niggli/Wiprächtiger-*Seelmann*, Art. 11 StGB, p. 274, §§ 82–83.

– *Intent and actor's misapprehensions, mistakes*

With regard to crimes of omission both, mistake of fact[44] (*Sachverhaltsirrtum; erreur sur les éléments constitutifs*; art. 13 StGB) and mistake on a legal command[45] (*Gebotsirrtum; erreur sur un commandement légal;* art. 21 StGB) are conceivable.

With regard to non-genuine crimes of omission, the intent of the offender has to relate to every objective definitional element of the offense, that is, the factual circumstances giving rise to the position of guarantor, the danger for the legally protected interest, the objective possibility to comply with the duty to act, and – with regard to result offenses – the result and hypothetical causality. If the offender is mistaken about one of these factual elements, the situation is one of mistake of fact. In contrast, if the offender knows about the factual circumstances giving rise to the position of guarantor, but believes that he is not obliged to act, he is mistaken about the unlawfulness of his omission; hence, the situation is one of mistake on a legal command.[46]

– *Justification*

The justifications *(Rechtfertigungsgründe; faits justificatifs)* for crimes of omission are identical to those for crimes of commission. However, from a practical point of view, the justifications of self-defense *(Notwehr; légitime défense)*, necessity *(Notstand; état de nécessité)*, and collision of duties *(Pflichtenkollision; collision des devoirs)*[47] are the most important justifications.

[42] *Riklin*, Verbrechenslehre, p. 280, §§ 23–26; Niggli/Wiprächtiger-*Seelmann*, Art. 11 StGB, p. 268, § 58.

[43] Niggli/Wiprächtiger-*Seelmann*, Art. 11 StGB, p. 268, § 57; *Stratenwerth*, Die Straftat, p. 434, § 32 and pp. 436–437, § 38. II.C.2.c. and II.J.

[44] II.E.5.a.

[45] II.E.5.b.

[46] Niggli/Wiprächtiger-*Seelmann*, Art. 11 StGB, p. 270, §§ 64–65.

[47] II.J.2.b.

– *Attempt*

An attempt[48] is only conceivable with regard to crimes of omission committed intentionally, but not negligently. However, drawing a line between preparatory acts *(Vorbereitungshandlung; acte préparatoire)* generally not giving rise to criminal liability, and attempted crimes, is especially challenging with regard to omissions. The prevailing doctrine holds that as long as the omission does not lead to a deterioration of the condition of the threatened legally protected interest, it cannot be qualified as an attempt. An attempt only begins at the moment where the delay of the rescuing intervention creates a danger for the legally protected interest (e.g., the parents do not send for the doctor even though the state of health of their child is getting worse). An attempt is completed if the person under a duty to act misses the last opportunity to intervene in a rescuing manner, but the result does not in fact eventuate (e.g., the father removes himself so far from his child playing close to a dangerous cliff, that he could no longer rescue the child; however a third person catches the child who is about to fall down the overhang).[49] Finally, impossible attempts[50] are also conceivable with regard to crimes of omission (e.g., a mother does not organize medical care for her seriously ill daughter although she considers, and is aware, that she could die as a result of the illness; however, after she passed away it transpires that a doctor could not have prevented the daughter's death).[51]

– *Forms of participation*

All forms of participation in a crime *(Teilnahme im weiten Sinne; participation au sense large)* are possible with regard to crimes of omission.[52] Thus, a crime of omission can be committed by co-perpetration *(Mittäterschaft; coauteur)* (e.g., parents deciding together not to organize medical care for their seriously ill child).[53] Further, while instigation *(Anstiftung; instigation)* to commit a crime of omission is possible (e.g., a sect leader convinces the parents of a seriously ill child not to send for a doctor), instigation by omission is not conceivable under Swiss criminal law. Aiding and abetting *(Gehilfenschaft; complicité)* a third person in his commission of a non-genuine crime of omission is conceivable (e.g., a sect leader backing up parents in their decision not to organize medical care for their child). Aiding and abetting by omission is only possible if the aider and abettor is a guarantor (e.g., a security guard, without having a view to gain, leaves the door open in order to facilitate a theft; given the lack of view to gain, he cannot be a co-perpetrator, but is potentially liable as aider and abettor).[54]

[48] On attempts, see II.F.2.

[49] On completed attempts, see II.F.2.b.

[50] On impossible attempts, see II.F.3.a.

[51] *Riklin*, Verbrechenslehre, p. 283, § 36 citing BGE 73 IV 164; see II.F.3.d.

[52] II.G.5.b.

[53] *Riklin*, Verbrechenslehre, pp. 283–284, § 37; *Stratenwerth*, Die Straftat, p. 445, §§ 9–11.

d) Special issues in the sentencing of crimes of omission

With regard to non-genuine crimes of omission, art. 11 para. 4 StGB states that the court can mitigate sentence, which is done according to the following provision:

> **Art. 48a StGB [mitigation of the penalty; effect]**
> 1 If the court mitigates the penalty, it is not bound by the statutory minimum penalty.
> 2 The court can also impose another type of penalty than the threatened one, but it is bound by the statutory maximum or minimum of the respective type of penalty.

Despite critiques during the consultation procedure,[55] art. 11 para. 4 StGB was introduced with the argument that the "criminal driving force" behind an omission could be lower compared to commission of crimes by active conduct. However, against the background that remaining passive can in some circumstances be at least as reprehensible as active conduct (e.g., parents letting their child starve to death), the mitigation of the penalty was left optional.[56] Some authors suggest that mitigation should be reserved to those cases where the observance of the duty to act would be at the limits of what can reasonably be required from someone.[57]

For genuine crimes of omission no specific sentencing rule exists and thus the general rules on sentencing (arts. 47–51 StGB) apply.

5. The concept of "object of the act"

Many, but not all offense descriptions designate an object of the act *(Tat-, Handlungs-, Angriffsobjekt; objet du délit)*, which is the person or the item on which the criminal act is performed; such as the "human being" for homicide (art. 111 StGB), the "moveable object belonging to another" for theft (art. 139 StGB) or the "document" with regard to forgery of documents (art. 251 StGB).[58]

[54] *Riklin*, Verbrechenslehre, pp. 283–284, § 37; *Stratenwerth*, Die Straftat, pp. 446–447, §§ 12–16.

[55] On the consultation procedure, see I.A.4.

[56] Botschaft StGB, p. 2002/Message StGB, p. 1808.

[57] *Donatsch/Tag*, Strafrecht I, p. 317.

[58] *Hurtado Pozo*, Droit pénal, pp. 157–158, § 462; *Stratenwerth*, Die Straftat, p. 150, § 12.

The object of the act has to be distinguished from the legally protected interest.[59] First, many legally protected interests are – compared with the object of the act – not physically tangible, such as "public health" protected by the prohibition of spreading human diseases (art. 213 StGB). Second, even though there are cases where the victim is both the object of the act as well as the holder of the legally protected interest (e.g., the object of the act of art. 111 StGB incriminating homicide is a "human being," who is at the same time the holder of the legally protected interest "life"), there are many offenses without such convergence. Thus, for instance, the object of the act of the offense of bribery of Swiss public officials (art. 322ter StGB) is the official; however, many more persons are holders of the legally protected interest, namely the "objectivity and impartiality in the performance of public duties."[60]

6. The concept of "consequences of the offense"

– *Conduct offenses and result offenses*

Conduct offenses *(Tätigkeitsdelikte; délits formels)* are characterized by the fact that specific conduct is threatened with punishment. The offense description is already fulfilled with the carrying out of the conduct threatened with punishment, no further or specific consequences resulting from the conduct in question are required. The offense of false testimony (art. 307 StGB), for instance, is already committed by giving false testimony; hence, it is not required that the false testimony yield any consequences, for example, that the court is actually induced into error.[61]

With regard to result offenses *(Erfolgsdelikte; délits matériels)*, the offense description not only threatens specific conduct with punishment, but requires in addition that the conduct in question yield a definite result. This result of the offense *(Taterfolg; résultat)* must be separable from the conduct of the offender, either in terms of time and location or at least notionally. Thus, for instance, with regard to the offense of extortion (art. 156 no. 1 StGB), the prohibited conduct – which consists in the offender's use of force against a person – does not yet fulfill the objective definitional elements of the offense; the conduct must, in addition, induce the victim to behave in such a way that he or another sustains financial loss, for example, by depositing a certain amount of money in a specific place. It is only with the producing of this result that the objective definitional elements of the offense are fulfilled and the offense is completed.[62]

[59] On legally protected interests, see II.C.1.a. and I.D.1.

[60] *Donatsch/Tag*, Strafrecht I, p. 102; *Hurtado Pozo*, Droit pénal, pp. 157–158, § 462; *Riklin*, Verbrechenslehre, p. 161, § 13; *Stratenwerth*, Die Straftat, p. 150, § 13.

[61] *Trechsel/Noll*, Strafrecht AT, p. 78.

[62] *Donatsch/Tag*, Strafrecht I, p. 98; *Hurtado Pozo*, Droit pénal, pp. 159–160, § 468.

The distinction between conduct and result offenses has the following implications: A completed attempt[63] is only possible for result offenses given that the very definition of a completed attempt is that the offender carried out the conduct threatened with punishment but the result did not eventuate.[64] Further, the question of attribution of a result to the offender's conduct only arises with regard to result offenses.[65] Finally, the distinction is relevant regarding the principle of territoriality defining the geographical scope of application of the StGB (art. 8 StGB)[66] as well as the determination of the competent court *ratione loci* (art. 340 StGB) within Switzerland.[67]

– *Harm offenses and endangerment offenses*

A further distinction is drawn between harm offenses *(Verletzungsdelikte; infraction de lésion)* and endangerment offenses *(Gefährdungsdelikte; infraction de mise en danger)*. The criterion to distinguish between these two categories is whether, through the commission of the crime, a legally protected interest was impaired or not.[68]

Harm offenses are characterized by the fact that the fulfillment of the objective definitional elements of the offense requires that a legally protected interest be impaired. This holds often true for result offenses; thus, in the case of homicide (art. 111 StGB), the legally protected interest "life" is harmed with the eventuating of the *result* of the offense, that is, the death of a human being. However, also conduct offenses can lead to an impairment of legally protected interests and can thus qualify as harm offenses. The offense of intercepting a private, non-public conversation (art. 179bis para. 1 StGB), for instance, threatens *conduct* that violates the legally protected interest of privacy, with punishment.[69]

While harm offenses require an impairment of a legally protected interest, it is sufficient for the completion *(Vollendung; consommation)*[70] of endangerment offenses that a legally protected interest is endangered. The doctrine distinguishes between concrete and abstract endangerment offenses.

With regard to concrete endangerment offenses *(konkrete Gefährdungsdelikte; infraction de mise en danger concrète)* the causing of a danger for the legally protected interest is a definitional element of the offense, that is, the offense is only

[63] On the difference between completed and incomplete attempts, see II.F.2.b.

[64] *Riklin*, Verbrechenslehre, pp. 237–238, §§ 10–11.

[65] *Riklin*, Verbrechenslehre, p. 161, § 14; see below 7.

[66] *Riklin*, Verbrechenslehre, p. 118, § 25; on the principle of territoriality, see II.B.2.

[67] *Riklin*, Verbrechenslehre, p. 130, § 12; *Trechsel/Noll*, Strafrecht AT, p. 78.

[68] *Trechsel/Noll*, Strafrecht AT, p. 79.

[69] *Donatsch/Tag*, Strafrecht I, pp. 101–102; *Trechsel/Noll*, Strafrecht AT, p. 79.

[70] II.F.2.b.

fulfilled if the danger materializes. All those offense descriptions explicitly mentioning a danger qualify as concrete endangerment offenses,[71] such as the following provision:

> **Art. 129 StGB [endangering life]**
> Whoever unscrupulously places another human being in immediate danger of life shall be punished with imprisonment up to five years or with a monetary penalty.

Hence, criminal liability attaches earlier, that is, not only when a legally protected interest is impaired, but already with exposing it to a concrete danger. The Swiss Federal Supreme Court defines the term of concrete danger as a situation in which, according to the ordinary course of things, the probability or near possibility of a violation of the legally protected interest existed.[72]

Abstract endangerment offenses *(abstrakte Gefährdungsdelikte; infraction de mise en danger abstraite)* are characterized by the fact that specific conduct is threatened with punishment, without requiring that the legally protected interest is actually impaired or even endangered by that conduct. The acts are threatened with punishment in that they usually increase the possibility of endangerment of a legally protected interest. Typically, abstract endangerment offenses are conduct crimes. Thus, for instance, a witness' false testimony (art. 307 StGB) comprises the risk that the legally protected interest of finding the truth in a court proceeding is endangered or impaired; however, even if the court's findings are not influenced by the false testimony, that is, the legally protected interest was not even endangered, the offense is fulfilled because false witness statements generally have the potential to imperil a court's finding of the truth.

7. Causation requirement and related rules governing attribution of criminal liability

Swiss criminal law doctrine distinguishes between causality and attribution. In a first step, it has to be determined whether the offender caused the result at hand, that is, whether causality *(Kausalität; causalité)* between conduct and result exists.[73] In Swiss criminal law doctrine, various theories of causation are discussed. Since the causality requirement relates to the objective definitional elements "conduct" and "result," it is considered to be an unwritten objective definitional element of result offenses.[74]

[71] *Donatsch/Tag*, Strafrecht I, p. 102.

[72] BGE 123 IV 128, 130, E. 2a.

[73] *Donatsch/Tag*, Strafrecht I, p. 99; *Hurtado Pozo*, Droit pénal, p. 166, § 491.

[74] *Riklin*, Verbrechenslehre, p. 163, § 22.

The term attribution *(Zurechnung; imputation)* stands for the requirements that have to be fulfilled in order to hold a person criminally liable for having caused a specific result. Hence, it addresses the question of liability after causation, as a first step, has been established. The various rules of attribution thus limit criminal liability based on specific normative considerations.[75]

– *Theories of causation*

To crimes committed intentionally, the Swiss Federal Supreme Court applies the so-called theory of conditions *(Bedingungstheorie; théorie de la causalité naturelle)*, which is also known as theory of the equivalence of conditions *(Äquivalenztheorie; théorie de l'équivalence des conditions)*.[76] With regard to crimes committed negligently, however, it applies the adequacy theory *(Adäquanztheorie; théorie de la causalité adéquate)*.[77] For crimes of omission, so-called hypothetical causality *(hypothetische Kausalität; causalité hyphothétique)* has to be established.

• *Theory of conditions or theory of the equivalence of conditions*

According to the theory of conditions, causality is established if the offender's conduct was causal in the natural scientific sense, that is, if natural causality *(natürliche Kausalität; rapport de causalité naturelle)* can be affirmed. Thus, the offender's conduct is a condition, that is, causal, if it cannot be excluded from the chain of events because without it the result would not have occurred. Hence, *but for* the offender's contribution the specific result came about – it was a *conditio sine qua non* for the result.[78] As the term "theory of the equivalence of conditions" indicates, various conditions contributing in various degrees to a specific result, are considered to be equivalent for establishing whether conduct was causal. Therefore, the offender's conduct is causal even if it did not contribute in an exclusive or major way to the result displayed; hence, it is, for instance, sufficient that the conduct favored, advanced or accelerated the eventuation of the result.[79]

• *Hypothetical causality*

Result offenses require that the conduct of the offender be causal for the result.[80] However, an omission can never cause a result *(ex nihil nihil fit)*. The result is thus rather caused through a causal chain of events that the alleged offender failed to

[75] *Donatsch/Tag*, Strafrecht I, p. 101.

[76] *Riklin*, Verbrechenslehre, p. 163, § 24.

[77] See below 8.; *Seelmann*, Strafrecht AT, p. 37 citing BGE 126 IV 13, 16-17, E. 7; BGE 127 IV 62, 64-65, E. 2d; BGE 130 IV 7, 10, E. 3.2.

[78] BGE 125 IV 195, 197, E.2b.

[79] *Donatsch/Tag*, Strafrecht I, pp. 99–100; *Hurtado Pozo*, Droit pénal, pp. 167–168, §§ 495–498; *Riklin*, Verbrechenslehre, p. 163, § 23; *Seelmann*, Strafrecht AT, pp. 34–35.

[80] See below 6.

interrupt. Given that the judgment on whether the offender's compliance with his duty to act would have interrupted the causal chain of events and would thus have averted the result, rests on a hypothetical basis, the term hypothetical causality *(hypothetische Kausalität; causalité hyphothétique)* is used.[81]

The Swiss Federal Supreme Court as well as the prevailing doctrine adhere to the so-called probability theory *(Wahrscheinlichkeitstheorie; théorie de la probabilité)*, according to which hypothetical causality is established if the offender's compliance with his duty to act would most probably have averted the result. A minority argues in favor of the so-called theory of increased risk *(Risikoerhöhungstheorie; théorie de l'augmentation du risque)*, according to which hypothetical causality is considered to be established if the offender's compliance with his duty to act would have decreased the risk of a violation of the legally protected interest, and thus the chance of averting the result.[82]

– *Rules of attribution limiting criminal liability*

Attaching criminal liability to every conduct which was in one way or the other naturally causal for the result would lead to virtually unlimited liability and would sometimes produce odd results, especially in cases where the offender's acts or omissions were of a negligible importance or took place very early in the chain of events. Therefore, various rules of attribution were developed under Swiss criminal law in order to limit the attribution of causal conduct to the offender:

• *Correction via intent requirement: subjective attribution*

The Swiss Federal Supreme Court as well as part of the doctrine suggest correcting unlimited criminal liability via the intent requirement. Based on this subjective attribution *(subjektive Zurechnung; attribution subjective)*, the offender can only be held criminally liable for foreseeable consequences, that is, if his intent not only relates to the conduct, but also covers result and causation. If the chain of events substantially deviates from what the offender thought it to be, criminal liability does not attach due to a lack of intent.[83]

Regarding intentional result offenses, the theory of conditions, in combination with the intent requirement as a limiting factor for criminal liability, leads to the following results in exceptional causality constellations:

A situation of cumulative causality *(kumulative Kausalität; causalité cumulative)* exists where several contributions cause a result but only through their concurrence

[81] *Donatsch/Tag*, Strafrecht I, p. 313; *Stratenwerth*, Die Straftat, p. 435, §§ 34–35.

[82] BGE 116 IV 306, 309-310, E. 2a; *Donatsch/Tag*, Strafrecht I, pp. 313–314; *Hurtado Pozo*, Droit pénal, pp. 418–419, §§ 1310–1316; *Riklin*, Verbrechenslehre, pp. 281–282, §§ 29-31; *Stratenwerth*, Die Straftat, pp. 435–436, §§ 36–37.

[83] *Riklin*, Verbrechenslehre, pp. 163–164, § 25; *Seelmann*, Strafrecht AT, p. 37; II.E.2.a

(e.g., A and B each mix a non-deadly dose of poison in a drink consumed by C without knowing of each other; the two doses together cause C's death). Everyone's contribution is naturally causal for the result (but for A's *and* B's contribution C died); however, an offender can only be held liable for the result, if the intent requirement is fulfilled, that is, if he knew about the other's contribution.[84]

The term alternative causality *(alternative Kausalität; causalité alternative)* stands for the case where several persons set a condition, each of which is sufficient to cause the result in question (e.g., A and B both mix poison in C's drink, and each dose is deadly). Each offender could argue that his contribution is not a *conditio sine qua non* for the result, given that it would also have eventuated without his contribution (B could argue that C would have died without his contribution solely due to A's dose). The doctrine nevertheless regards both contributions as causal. If both offenders acted with intent, they can both be held liable for the result.[85]

A so-called atypical chain of events *(atypischer Kausalverlauf; déroulement anormal des faits)* is given if completely unusual incidents produce a specific result (e.g., A beats B who breaks an arm and needs medical care in a hospital; the hospital burns down; B dies in the flames). The offender's contribution is causal for the result that eventuates; however, the intervening cause (the burning down of the hospital) was not foreseeable and the intent of the offender neither covers the result nor the causal chain leading thereto; hence, he cannot be held liable for the result.[86]

For the situation where the offender's contribution does not produce the intended result because another person's conduct provokes it, the term "overtaking causality" *(überholende Kausalität; causalité des faits passés)* is used. There are two separate causal chains, whereby only one leads to the intended result (e.g., A poisons B; before the poison displays its effects, B is shot dead by C). The offender causing the result is held liable for it, even though the same result would eventually have occurred due to the other person's conduct (B is held liable for killing C, even though C would have died shortly afterwards because of the poisoning). The offender not reaching his criminal goal is responsible for an attempt (A did not cause C's death, but is responsible for attempted killing).[87]

[84] *Hurtado Pozo*, Droit pénal, p. 169, § 502; *Riklin*, Verbrechenslehre, p. 162, § 16 and p. 164, § 28; *Seelmann*, Strafrecht AT, pp. 34–35.

[85] *Donatsch/Tag*, Strafrecht I, pp. 100–101; *Riklin*, Verbrechenslehre, p. 162, § 17 and p. 164, § 29; *Seelmann*, Strafrecht AT, pp. 34 and 36.

[86] *Riklin*, Verbrechenslehre, p. 162, § 18 and p. 164, § 29.

[87] *Hurtado Pozo*, Droit pénal, p. 168, § 499; *Riklin*, Verbrechenslehre, p. 162, § 19 and p. 164, § 31.

- *Applying the adequacy theory to intentionally committed result offenses*

Rather than relying on the theory of conditions with the intent requirement as a corrective, some scholars propose applying the adequacy theory[88] to intentionally committed crimes in order to limit criminal liability. However, the Swiss Federal Supreme Court applies this theory exclusively to negligently, and not to intentionally, committed result offenses.[89]

- *Theory of objective attribution*

The so-called theory of objective attribution *(objektive Zurechnung; imputation objective)* is yet an additional means of limiting criminal liability when the theory of conditions (despite the intent requirement), or the adequacy theory, does not yield justifiable results.[90] Objective attribution is thus an independent corrective for those cases where the inquiry into causality yields unsatisfactory or unjustifiable results. It allows a refraining from the imputation of a specific result despite the offender's causal contribution to it.[91]

One reason justifying the non-attribution of a specific result to the offender is the so-called missing risk *(fehlendes Risiko)*. It covers those situations where the offender's conduct – despite formally fulfilling the objective definitional elements of the offense – neither created nor enhanced, or even reduced the risk of a violation of a legally protected interest (e.g., A shoots at B; C manages to push B aside and the bullet hits B's arm instead of his heart; C's act is causal for B's arm injury; however, it would be unjustifiable to hold him criminally liable given that his conduct avoided B's lethal injury).[92]

Another reason not to impute a result to the offender is known by the term of social adequacy *(Sozialadäquanz; justification du point de vue social)*.[93] Given that offense descriptions can also be fulfilled by conduct that is socially accepted or tolerated, there is a need to exclude these acts or omissions from criminal liability (e.g., a passenger of a public bus requests the driver to stop at a place where there is no bus stop; the driver, who continues his journey and only stops at the official bus stop, will not be held liable for false imprisonment).

A similar reason for not attributing a specific result to the offender is provided by the doctrine of the admissible risk *(Lehre vom erlaubten Risiko; théorie du risque admissible)*.[94] The theory relates to those situations where the offender's conduct

[88] See below 8.
[89] *Seelmann*, Strafrecht AT, p. 37.
[90] *Riklin*, Verbrechenslehre, pp. 163–164, §§ 25–26.
[91] *Seelmann*, Strafrecht AT, p. 39.
[92] *Ibid.*, pp. 38–39.
[93] II.J.5.
[94] II.J.5.

created a risk, but one that is legally not relevant because it either constitutes a socially normal minimal risk or – if not a minimal – at least a generally accepted risk within a society. Danger or harm resulting from these risks is not imputable to the offender despite the existing causal link between his conduct and the result (e.g., a firefighter throws a child out of a burning building into a safety net; thereby, the child is injured; the risks resulting from such rescuing operations are generally accepted within society, and the firefighter will not be held liable for taking this permissible risk).[95]

There is further the situation, where the offender creates an impermissible risk, but where the harmful events are not the result of it, that is, there is no connection between the taking of an impermissible risk and the result that occurs *(Risikozusammenhang; rapport de connexité)*. This is especially relevant with regard to an atypical causal chain of events (e.g., A lightly injures B; while in the hospital for treatment, B gets infected with a lethal disease and dies; A cannot be held liable for B's death because a risk other than the one created by A led to the result).[96]

Further, according to the principle of personal responsibility *(Prinzip der Eigenverantwortlichkeit)*, the offender, whose conduct is causal for the result, is potentially not liable for it, if it is achieved as a consequence of the victim's behavior (e.g., the operator of a ski-lift cannot be held liable for negligently killing a skier, who died in an avalanche because he did not respect the signs on the slope indicating this danger).[97]

The basic idea behind these various grounds for non-attribution of a specific result is that the offender's conduct does not fall within the protective scope of the relevant criminal provision *(Schutzzweck der Norm; but de protection de la norme violée)*. If the offender violates a prohibition, he is only to be held liable for those results that were meant to be prevented by the specific norm (e.g., speed limits exist in order to prevent dangers for other road users; however, their purpose is not to prevent persons to arriving earlier at a specific place).[98]

[95] *Riklin*, Verbrechenslehre, p. 171, § 44 and p. 172, § 45; *Seelmann*, Strafrecht AT, pp. 39–40.
[96] *Riklin*, Verbrechenslehre, p. 170, § 43; Roth/Moreillon-*Corboz*, Art. 12 StGB, p. 160, § 163.
[97] *Riklin*, Verbrechenslehre, pp. 173–174, § 48.
[98] *Hurtado Pozo*, Droit pénal, pp. 182–183, § 545; *Riklin*, Verbrechenslehre, p. 170, § 43; *Seelmann*, Strafrecht AT, p. 40.

8. Objective aspects of offenses of negligence

– *Negligently committed result offenses*

• *Intertwinement of objective and subjective definitional elements*

In juxtaposition to intentional result offenses, the separation between objective and subjective definitional elements of the offense operates less strictly with regard to negligent result offenses. Rather, one global test is applied in order to determine whether an offender committed a negligent result offense. What is analyzed is whether the result occurred,[99] whether the offender naturally caused it,[100] and whether the offender did not act intentionally but through culpable carelessness, that is, whether according to the ordinary course of things he could have foreseen the result (adequate causality) and could have averted it according to his personal circumstances (negligence standard).[101]

A specific feature of negligently committed result offenses is thus that the objective element of adequate causality *(adäquate Kausalität; causalité adéquate)* and the subjective element of negligence as defined in art. 12 para. 3 StGB[102] are closely intertwined. Therefore, after having established adequate causality, that is, having approved the general suitability of the conduct to yield the result in question, an inquiry into the individual foreseeability has to be undertaken.

• *Adequacy theory*

The Swiss Federal Supreme Court applies the so-called adequacy theory *(Adäquanztheorie; théorie de la causalité adéquate)* to negligent result offenses.[103] According to the adequacy theory, specific conduct is considered causal for a result if it is, according to the ordinary course of things and the general experience of life, generally suitable to bring about the kind of result that occurred.[104] Hence, criminal liability shall only attach to foreseeable results; therefore, results at the end of an atypical causal chain of events which one does not reasonably have to take into account cannot be imputed to the offender (e.g., A negligently injures B, who needs medical treatment in a hospital; the hospital burns down and B dies in the flames).[105]

[99] See above 6.

[100] See above 7.

[101] *Riklin*, Verbrechenslehre, pp. 167–168, § 40 and pp. 232–233, §§ 58–63; II.E.3.a.

[102] II.E.3.a.

[103] *Riklin*, Verbrechenslehre, p. 166, § 37; *Seelmann*, Strafrecht AT, p. 37 citing BGE 126 IV 13, 17; BGE 127 IV 62, 65; BGE 130 IV 10.

[104] BGE 121 IV 10, 14-15, E. 3.

[105] *Riklin*, Verbrechenslehre, p. 165, § 34; *Seelmann*, Strafrecht AT, pp. 37–38.

However, it is sufficient that the offender's conduct only partially contributed to the result. Hence, in situations of contributory negligence of the victim or intervening acts by third persons, adequate causality is generally assumed. Only if these acts or events are of an utmost extraordinary nature, that is, where according to the ordinary course of things and the general experience of life the conduct of the offender is not suitable to produce the result that occurred, it cannot be imputed to the offender (e.g., A gives B a loaded gun in a shooting gallery in order to shoot against a target; thereupon, B unexpectedly directs the gun at himself and kills himself).[106]

The application of the adequacy theory limits criminal liability in certain cases – despite the fact that the offender's conduct is naturally causal for the result – based on normative (legal) criteria taken from the general experience of life. Thus, strictly speaking, the adequacy theory is not a theory of causation but rather a theory of attribution.[107]

• *Theory of objective attribution*

Where the two-step inquiry into adequacy and negligence does not yield a justifiable result, the theory of objective attribution might provide grounds for not imputing a specific result to the offender.[108]

– *Negligently committed conduct offenses*

Negligent conduct offenses are characterized by the fact that the offender is carrying out specific "basic conduct" with knowledge and will (e.g., driving a car towards a crossing). Thereby, he unintentionally fulfills a further definitional element of the offense through culpable carelessness, which renders his conduct unlawful (e.g., not brining the car to a halt at the stop signal of the crossing).[109]

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[106] *Riklin*, Verbrechenslehre, p. 166, § 39.

[107] *Ibid.*, pp. 166–167, §§ 35–36.

[108] See above 7.

[109] *Flachsmann/Eckert/Isenring*, Tafeln AT, p. 99, chart 62; II.E.3.a.

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Miscellaneous

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Concrete endangerment offenses: BGE 123 IV 128

Theory of condition, conditio sine qua non formulas: BGE 116 IV 306, BGE 125 IV 195

Adequacy theory: BGE 121 IV 10; BGE 126 IV 13; BGE 127 IV 62; BGE 130 IV 7

List of abbreviations

AT	Allgemeiner Teil des Strafrechts (General Part of the criminal law)
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Official Federal Gazette)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official case reporter of the Swiss Federal Supreme Court; cases are cited by volume, chamber, starting page, page, paragraph)
E.	Erwägung (paragraph in cases of the Swiss Federal Supreme Court)
FF	Feuille fédérale (Official Federal Gazette)
JStG	Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht (Jugendstrafgesetz, JStG)/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs (Droit pénal des mineurs, DPMin), SR/RS 311.1 (Federal Law on the Criminal Law Applicable to Minors of 20 June 2008)
SR/RS	Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral (Classified Compilation of Swiss Federal Legislation)
StGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0 (Swiss Criminal Code of 21 December 1937)

List of abbreviations

FZ	Federal´nij Zakon (Federal Statute)
pa.	part
RF	Rossijskaya Federaciya (Russian Federation)
UKR	Ugolovnij Kodeks Rossijskoj Federacii (Criminal Code of the Russian Federation)

Anna Petrig

Subjective aspects of the offense in Switzerland

1. Definition and elements of the subjective aspects of the offense

Under Swiss criminal law, every offense description *(Tatbestand; énoncé de fait légal)* is made up of objective and subjective definitional elements, which are closely intertwined.[1] While the objective definitional elements *(objektive Tatbestandselemente; éléments objectifs de l'énoncé de fait légal)* are those aspects of an offense that pertain to discernable conditions, factors and changes in the outside world,[2] subjective definitional elements *(subjektive Tatbestandselemente; éléments subjectifs de l'énoncé de fait légal)* describe the acting person's inner attitude towards his conduct and thus relate to the offender's inner world.[3]

With regard to the subjective offense description *(subjektiver Tatbestand; énoncé de fait légal subjectif)*, Swiss criminal law requires that the offender act either with intent *(Vorsatz; intention)* or negligence *(Fahrlässigkeit; négligence)*. While these two mental states are mutually exclusive, either of them always has to be fulfilled in order to hold a person criminally liable. In juxtaposition, other subjective elements are only required for specific offenses. They can be classified in three categories: specific intents *(Absichten; desseins)*, motives *(Beweggründe; mobiles)*, and attitudes *(Gesinnungsmerkmale; états d'esprit)*.[4]

Art. 12 of the Swiss Criminal Code *(Schweizerisches Strafgesetzbuch/StGB; Code pénal suisse)* defines the subjective definitional elements of intent[5] and negligence.[6] In addition, the provision contains the legal presumption that – unless the negligent commission is explicitly threatened with punishment – only intentionally committed felonies and misdemeanors are punishable:

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[1] See below 2.a.; *Hurtado Pozo*, Droit pénal, p. 155, § 455.

[2] II.D.

[3] *Hurtado Pozo*, Droit pénal, pp. 155–156, §§ 455–456 and p. 185, § 553; *Riklin*, Verbrechenslehre, p. 160, §§ 7–10; *Trechsel/Noll*, Strafrecht AT, p. 76.

[4] Roth/Moreillon-*Corboz*, Art. 12 StGB, pp. 134–135, §§ 9–15; *Riklin*, Verbrechenslehre, pp. 174–175, §§ 49–52; *Stratenwerth*, Die Straftat, pp. 197–203, §§ 115–129.

[5] See below 2.a.

[6] See below 3.a.

Art. 12 StGB [intent and negligence; definitions][7]

1 Unless explicitly stated otherwise in the law, a person can only be held criminally liable if he commits a felony or misdemeanor with intent.

Per art. 104 StGB, this legal presumption is also valid with regard to contraventions defined in the Special Part of the StGB. However, for contraventions contained in the so-called secondary criminal law,[8] the legal presumption of art. 12 StGB is reversed. It is assumed that negligent commission is also punishable unless the rationale of the respective criminal provision requires that only intentional commission be punishable:[9]

Art. 333 StGB [application of the General Part of the Criminal Code to other federal laws]

7 Contraventions threatened with punishment by other Federal Laws are punishable also if they are committed negligently, unless according to the rationale of the respective provision only the intentional commission is threatened with punishment.

Within the internal structure of criminal offenses, the subjective definitional elements of intent and negligence form part of the offense description *(Tatbestandsmässigkeit; typicité)*.[10] Thus, in keeping with the goal-directed theory of acting *(finale Handlungslehre; théorie finaliste de l'action)*, they pertain to wrongfulness *(Unrecht; illicéité pénale)* rather than to culpability *(Schuld; culpabilité)*.[11]

2. Intent

a) Concept and elements of offense to which intent requirement applies

– *Elements of intent: knowledge and volition*

From the first sentence of art. 12 para. 2 StGB it follows that an offender acts with intent if he commits an offense with knowledge *(Wissen; conscience)* and volition *(Willen; volonté)*. Thereby, the formation of a will presupposes knowledge. Thus, intent always features an intellectual as well as a volitional component.[12] The

[7] All translations of provisions of the Swiss Criminal Code (StGB) are the author's own.

[8] On the distinction between categories of crimes, see II.C.1.b., on secondary criminal law, see II.C.2.a.

[9] Roth/Moreillon-*Corboz*, Art. 12 StGB, p. 137, §§ 17–23; Trechsel-*Trechsel/Lieber*, Art. 333 StGB, p. 1387, § 15.

[10] II.C.2.c.

[11] II.C.2.b.; *Donatsch/Tag*, Strafrecht I, p. 92; *Hurtado Pozo*, Droit pénal, p. 185, § 554.

[12] *Trechsel/Noll*, Strafrecht AT, p. 96.

differentiation between the various types of intent[13] is based on the quality and intensity of each of these two components and how they are combined.[14]

Art. 12 StGB [intent and negligence; definitions]

2 Whoever commits a felony or misdemeanor knowingly and volitionally acts with intent. A person is presumed already to have intention if he considers the realization of the criminal offense as possible and accepts the offense if it should materialize.

– *Elements of the offense to which the intent requirement applies*

The offender's intent has to relate to all objective definitional elements of the offense. However, the intent requirement does not apply to the other general requirements of criminal liability,[15] that is, to the subjective definitional elements of the offense, the unlawfulness of the offender's conduct, the culpability, or the additional prerequisites of criminal liability.[16]

– *Intellectual component of intent (knowledge)*

It is required that the offender has knowledge about all objective definitional elements of an offense at the moment he engages in the criminal conduct. The objective side of the offense encompasses, in addition to the designation of the offender *(Täter; auteur)*,[17] one or more of the following elements: the conduct threatened with punishment *(Tathandlung; action)*,[18] the object on which the criminal act is performed *(Tatobjekt; object de l'infraction)*,[19] the result of the conduct *(Taterfolg; résultat)*,[20] and the causality *(Kausalität; causalité)*[21] between conduct and result.[22] Since the offender has to have knowledge with regard to all objective elements of the offense, he does not act with intent if he is mistaken about one or more of them.[23]

Most objective elements of an offense do not have a plain meaning but imply an interpretation or a value judgment. This holds especially true for the so-called normative elements of an offense *(normative Tatbestandselemente; éléments normatifs*

[13] See below 2.b.

[14] *Killias* et al., Grundriss AT, pp. 48–49, § 322, and table 1.

[15] II.C.2.c.

[16] Niggli/Wiprächtiger-*Jenny*, Art. 12 StGB, p. 284, § 18; *Riklin*, Verbrechenslehre, pp. 220–221, §§ 6–16.

[17] II.D.2.

[18] II.D.3. and 4.a.

[19] II.D.5.

[20] II.D.6.

[21] II.D.7.

[22] *Hurtado Pozo*, Droit pénal, p. 188, § 562; *Riklin*, Verbrechenslehre, p. 220, §§ 7–8.

[23] See below 5.

de l'énoncé de fait légal),[24] that is, notions whose meaning can only be assessed through an interpretation based on legal, moral, or social considerations (e.g., what killing a person in an "unscrupulous" way in the sense of art. 112 StGB means). However, also so-called descriptive elements of an offense *(deskriptive Tabestandselemente; éléments normatifs de l'énoncé de fait légal)*, that is, those describing things or events of the real world, are often equivocal (e.g., the term "human being" is not self-explanatory and it has to be determined when human life begins and ends in the realm of criminal law). Regarding objective elements of the offense that have to be interpreted, it is not necessary that the offender is aware of their technical-legal significance. Rather, it suffices that he attaches a general meaning to these elements, that is, that he undertakes a layman's evaluation of the element *(Parallelwertung in der Laiensphäre; appréciation des circonstances par un observateur neutre)*.[25]

Further, it is not required that the offender have precise and detailed knowledge about the objective elements of the offense. Rather, it suffices that he know about the essential facts that characterize the respective offense. Moreover, knowledge does not equal certainty about facts and it is enough if the offender consider the existence of specific objective elements as seriously probable. While the offender has to possess knowledge about the facts when acting, it is not necessary that he constantly bring them to his mind while engaging in the respective criminal conduct.[26]

– *Volitional component of intent (volition)*

In order to affirm intent, the offender not only has to have knowledge about all objective elements of an offense, but it is also necessary that he took the decision, that is, formed a will, to fulfill those elements through his conduct. Hence, the volitional component of intent stands for the offender's firm resolution to realize a criminal act.[27]

– *Timing of the mental element*

Intent must be present when the offense is committed, that is, when the offender is fulfilling the objective elements of the offense. This means that knowledge and volition already have to exist when the offender *begins* engaging in the conduct threatened with punishment. Further, both components of intent have to be maintained *during* the entire time of commission of the criminal act. Therefore, intent does not exist if the offender only acquires knowledge about the objective elements of the offense after having fulfilled them and approves this subsequently *(dolus subsequens)*. Further, if the offender's intent only occurs *while* he is engaging in conduct fulfilling the objective definitional elements of an offense *(dolus superveniens)*, the conduct carried out before the occurrence of knowledge and volition is not intentionally committed.[28]

[24] *Hurtado Pozo*, Droit pénal, pp. 156–157, § 458.

[25] *Hurtado Pozo*, Droit pénal, pp. 188–189, § 565; *Stratenwerth*, Die Straftat, pp. 174–176, §§ 66–71; see below 5.b.

[26] Roth/Moreillon-*Corboz*, Art. 12 StGB, p. 139, §§ 31–33; *Donatsch/Tag*, Strafrecht I, p. 111; *Hurtado Pozo*, Droit pénal, p. 189, §§ 566–567.

[27] *Riklin*, Verbrechenslehre, p. 221, § 12.

b) Types

Under Swiss criminal law three types of intent are distinguished. These are based on the quality and intensity of the intellectual and volitional component of intent as well as their combination: first degree *dolus directus*, second degree *dolus directus*, and *dolus eventualis*. The three forms of intent are treated equally under art. 12 StGB.[29]

– *First degree dolus directus*

The offender possesses first degree *dolus directus (dolus directus 1. Grades; dol direct de premier degré)* when he wants to engage in the very conduct threatened with punishment (volitional component), that is, when his ultimate objective is to attain the criminal result. Hence, he does not commit the offense in order to attain another goal; rather, the very commission of the offense is the driving force behind the offender's conduct. With regard to knowledge (intellectual component), it suffices that the offender deems the result to be likely.

An example where the offender acts with first degree *dolus directus* is the offense of rape (art. 190 para. 1 StGB), where committing the prohibited sexual act is the very goal pursued by the offender. Further, an offender throwing a stone against a window simply for the sake of destroying it commits the crime of damaging property (art. 144 StGB) with first degree *dolus directus* given that his ultimate objective is damaging property belonging to another.[30]

– *Second degree dolus directus*

The offender acts with second degree *dolus directus (dolus directus 2. Grades; dol direct de deuxième degré)* if he knows or foresees with certainty that his con-

[28] *Donatsch/Tag*, Strafrecht I, p. 110; *Hurtado Pozo*, Droit pénal, p. 198, §§ 593–595; *Trechsel/Noll*, Strafrecht AT, p. 103.

[29] *Dupuis* et al., Art. 12 StGB, § 10.

[30] Roth/Moreillon-*Corboz*, Art. 12 StGB, pp. 141–142, §§ 55–59; *Donatsch/Tag*, Strafrecht I, p. 114; *Flachsmann/Eckert/Isenring*, Tafeln AT, p. 25, chart 16; *Riklin*, Verbrechenslehre, pp. 221–222, § 18.

duct fulfills a specific offense description. However, in juxtaposition to first degree *dolus directus*, the commission of the offense, that is, realizing the criminal result prohibited by the penal norm, is not the offender's ultimate goal. Rather, he commits the criminal act in order to attain another objective. Hence, the commission of the offense is not a goal in and of itself, but a means to an end, which can be either lawful (e.g., an offense against personal honor is committed in an election campaign in order to collect more votes than another candidate, which is as such a lawful goal) or unlawful (e.g., killing a person in order to rob him). As long as the offender knows that his conduct fulfills the offense description, he acts with second degree *dolus directus*, even if it should be undesirable for him to commit the offense or if he is indifferent vis-à-vis his criminal conduct.

Thus, for example, an offender throwing a stone against a window in order to enter the house and steel jewelry commits the offense of damaging property with second degree *dolus directus*.[31]

– *Dolus eventualis*

Dolus eventualis (Eventualvorsatz; dol éventuel) is defined in the second sentence of art. 12 para. 2 StGB. According to this provision, a person is presumed already to have intention if he considers the realization of the criminal offense as possible and accepts the offense if it should materialize. Hence, the offender acts with *dolus eventualis* if he foresees the result's occurrence as possible and accepts it. In juxtaposition to second degree *dolus directus*, the criminal result is not a necessary, but simply a possible epiphenomenon, of the offender's conduct. This means that the commission of an offense is only an eventuality in the offender's mind, but whose realization he is ready to accept. If an offense description requires that the offender acts knowingly (*wissentlich; sciemment*; e.g., art. 221 para. 2 StGB), *dolus eventualis* is not sufficient to hold a person criminally liable and first or second degree *dolus directus* is required.

An example where the offender acts with *dolus eventualis* is provided by the situation where he engages in sexual conduct with a girl, even though he is uncertain whether she has already turned 16 and thus reached the age of consent. The offender foresees that his conduct potentially fulfills the offense of sexual acts with children (art. 187 StGB) and accepts it.[32]

[31] Roth/Moreillon-*Corboz*, Art. 12 StGB, pp. 141–142, §§ 60–61; *Donatsch/Tag*, Strafrecht I, p. 114; *Flachsmann/Eckert/Isenring*, Tafeln AT, p. 25, chart 16; *Riklin*, Verbrechenslehre, pp. 221–222, §§ 20–22.

[32] Roth/Moreillon-*Corboz*, Art. 12 StGB, pp. 142–144, §§ 62–75; *Flachsmann/Eckert/Isenring*, Tafeln AT, p. 25, chart 16; *Riklin*, Verbrechenslehre, pp. 222–223, §§ 23–28.

– *Distinction between dolus eventualis and conscious negligence*

The distinction between *dolus eventualis* and conscious negligence[33] is of considerable practical importance. On the one hand, most offenses are only punishable if they are committed intentionally. On the other hand, where the negligent commission of an offense is threatened with punishment, the sentencing ranges are lower compared with analogous offenses that are committed intentionally.

In Swiss criminal law doctrine, three theories on the distinction between *dolus eventualis* and conscious negligence can be found. Firstly, according to the theory on possibility *(Wahrscheinlichkeitstheorie; théorie de la probabilité)* it is decisive whether the offender considered the commission of the offense as probable. If the offender did not count on the occurrence of the criminal result, he acted with *conscious negligence*. This theory, which focuses on the intellectual component of intent, is criticized mainly on two grounds: On the one hand, it would be unrealistic to assume that criminals engage in probability calculations before committing a crime. On the other hand, even if the offender would perceive the eventuation of the criminal result as very probable, he could still (negligently) trust in its non-occurrence. Secondly, according to the theory on consent *(Einwilligungstheorie; théorie du consentement)* the offender is aware of the likelihood that the criminal result occurs and accepts it in case it should eventuate. This theory pertains to the volitional component of intent in that the offender consents to a result, which may or may not occur. How big the chances are that the result will materialize is irrelevant for assessing whether the offender acts with *dolus eventualis*. Thirdly, under the theory on approval *(Billigungstheorie; théorie de l'approbation)* it is determinative whether the offender approves the result. This theory is criticized on the ground that an offender often decides to engage in criminal conduct even though he dislikes or disapproves of the result but sees it as a necessary condition to attain another goal.[34] In its case law, the Swiss Federal Supreme Court applies and combines the three theories. However, in its recent jurisprudence a tendency towards applying the theory on consent can be observed.[35]

[33] See below 3.b.

[34] Niggli/Wiprächtiger-*Jenny*, Art. 12 StGB, pp. 292–294, §§ 47–51; *Riklin*, Verbrechenslehre, pp. 225–226, §§ 38–40.

[35] *Riklin*, Verbrechenslehre, p. 226, § 41 citing BGE 125 IV 242, 251–252, E. 3c.; BGE 130 IV 58, 61, E. 8.3.; BGE 133 IV 1, 3–4, E. 4.1.

3. Subjective side of negligence offenses

a) Concept and elements of offense to which negligence applies

– *Structure of negligence offenses*

In juxtaposition to intentionally committed crimes, the separation between objective and subjective definitional elements of the offense is less strict with regard to negligent offenses. Rather, one global test is applied in order to determine whether a person committed a negligent offense. This test is based on asking whether a specific result occurred, whether the offender naturally caused it (natural causality), and whether the offender did not act intentionally but through culpable carelessness, that is, whether according to the ordinary course of things he could have foreseen the result (adequate causality)[36] and could have averted it according to his personal circumstances (negligence standard).[37]

The following analysis focuses on the last element pertaining to the standard of negligence, namely that which describes the mental state of a negligent offender.

Art. 12 StGB [intent and negligence; definitions]

3 A felony or misdemeanor is committed negligently, if due to culpable carelessness, the offender does not realize or take into consideration the consequences of his conduct. Carelessness is culpable if the offender does not exercise the care required of him according to the circumstances and on account of his personal situation.

– *Standard of negligence*

The negligent commission of an offense is characterized by the fact that the offense description is not volitionally fulfilled (as this holds true for intent), but through culpable carelessness *(pflichtwidrige Unvorsichtigkeit; imprévoyance coupable)*. Culpable carelessness means that the offender's conduct violated a duty of care *(Sorgfaltspflicht; obligation de diligence)*, that is, that the person did not act with the necessary circumspection and diligence.[38]

– *Violation of a duty of care*

The duty of care is generally not described in the criminal norm as such, but arises from other sources. Duties of care can, for instance, be found in legal acts not (exclusively) pertaining to criminal law (e.g., the Road Traffic Act[39] or the Ordinance on the Prevention of Accidents and Occupational Diseases[40]) or are reflected in norms established by private organizations (e.g., construction norms established by the Swiss society of engineers and architects[41] or rules of conduct enacted by the International Ski Federation[42]). If with regard to a certain activity no specific rule reflecting the required duty of care exists, general rules apply. Thus, for instance, there is the general rule that one who is creating a danger has to undertake everything, which is reasonable, in order to avoid that the danger leads to a violation of third persons' legally protected interests[43] *(allgemeiner Gefahrensatz; devoir de prendre les mesures nécessaires à la protection des tiers lorsque l'on crée un état des choses dangereux)*.[44] It is debatable whether the rather blurry outline of duties of care, which are a central element of negligence offenses, complies with the legality principle as stated in art. 1 StGB.[45]

According to art. 12 para. 3 StGB, carelessness is culpable if the offender did not exercise the care required of him according to the circumstances and on account of his personal situation. Thus, the test to determine whether a violation of a duty of care constitutes culpable carelessness is not based on an objective and generalized, but on a subjective and concrete, standard of care. This means that the required care varies according to the specific situation and the abilities of the offender (e.g., a person possessing specific knowledge or skills may have to observe a higher standard of care while, e.g., physical handicaps or inexperience might lower the appropriate standard of care).

However, the very fact that an offender undertakes a task with which he cannot cope can constitute a violation of the duty of care. Hence, the reproach goes towards having carried out an activity or having assumed a responsibility even though it was foreseeable for the offender that he could not carry it out with the necessary standard of care *(Übernahmeverschulden; faute par acceptation ou par prise en charge)*.[46]

[36] II.D.8.

[37] *Riklin*, Verbrechenslehre, pp. 167–168, § 40 and pp. 232–233, §§ 58–63.

[38] Roth/Moreillon-*Corboz*, Art. 12 StGB, pp. 146–147, §§ 86–90; *Riklin*, Verbrechenslehre, p. 174, § 51; *Seelmann*, Strafrecht AT, p. 154.

[39] Strassenverkehrsgesetz vom 19. Dezember 1958/Loi fédérale du 19 décembre 1958 sur la circulation routière, SR/RS 741.01.

[40] Verordnung vom 19. Dezember 1983 über die Verhütung von Unfällen und Berufskrankheiten/Ordonnance du 19 décembre 1983 sur la prévention des accidents et des maladies professionnelles, SR/RS 832.30.

[41] For the so-called SIA norms see www.sia.ch/d/praxis/normen/index.cfm [last visited: 4 October 2010].

[42] For the so-called FIS rules of conduct see www.fis-ski.com/data/document/10-fis-rules-for-conduct.pdf [last visited: 4 October 2010].

[43] BGE 106 IV 80, E. 4a.

[44] *Seelmann*, Strafrecht AT, pp. 159–160; Trechsel-*Trechsel/Jean-Richard*, Art. 12 StGB, pp. 62–63, § 30.

[45] II.A.3.b.; *Seelmann*, Strafrecht AT, p. 155.

[46] *Riklin*, Verbrechenslehre, pp. 174–175, § 51; *Seelmann*, Strafrecht AT, pp. 158–159; Trechsel-*Trechsel/Jean-Richard*, Art. 12 StGB, p. 65, § 36.

b) Forms/degrees of negligence

– *Forms of negligence*

Under Swiss criminal law, a distinction is made between conscious and unconscious negligence.

Conscious negligence is circumscribed in the first sentence of art. 12 para. 3 StGB in the following words: "A felony or misdemeanor is committed negligently, if due to culpable carelessness, the offender does not (…) take into consideration the consequences of his conduct." The offender acts with conscious negligence/*luxuria (bewusste Fahrlässigkeit; négligence consciente)* if he considers the result's occurrence as possible, but carelessly trusts in its non-occurrence. Thus, he possesses knowledge about the possibility that the result could eventuate. However, out of a misconception, for which he can be blamed, the offender assumes that the result will not materialize.[47]

Unconscious negligence is described in art. 12 para. 3 StGB in the following terms: "A felony or misdemeanor is committed negligently, if due to culpable carelessness, the offender does not realize (…) the consequences of his conduct." If the offender is not aware that his conduct leads to a criminal result in a situation where he could possess this knowledge, he acts with unconscious negligence/*negligentia (unbewusste Fahrlässigkeit; négligence inconsciente)*. Hence, in juxtaposition to conscious negligence, where the offender acts based upon a misconception, an offender acting with unconscious negligence does not have a conception at all that he commits a crime, even though he could have this knowledge. Thus, he is carelessly inadvertent with regard to the possible consequences of his conduct.[48]

It follows from art. 12 StGB that both forms of negligence are treated equally in law. This seems coherent given that an offender's fault is not *per se* more or less important whether he does not realize that his conduct could cause a criminal result (unconscious negligence) or foresees it but trusts in its non-occurrence (conscious negligence). Rather, this assessment depends on the specific facts of the case.[49]

– *Degrees of negligence*

Under Swiss criminal law, a difference is drawn between minor negligence *(leichte Fahrlässigkeit; négligence légère)* and gross negligence *(grobe Fahrlässigkeit; négligence grave)*. This distinction is based upon the gravity or intensity of negligence and is thus a gradual one. If a criminal provision threatens the negligent commission of an offense with punishment, any degree of negligence suffices to hold a person criminally liable. Thus, with regard to the question whether an offense description was fulfilled, the distinction between minor and gross negligence is irrelevant. However, the degree of negligence is relevant regarding the determination of the appropriate sanction.[50]

[47] *Hurtado Pozo*, Droit pénal, p. 446, § 1392; *Riklin*, Verbrechenslehre, pp. 224–225, § 34; *Seelmann*, Strafrecht AT, p. 155.

[48] *Hurtado Pozo*, Droit pénal, pp. 445–446, § 1391; *Riklin*, Verbrechenslehre, pp. 224–225, §§ 35–36; *Seelmann*, Strafrecht AT, p. 155.

[49] *Seelmann*, Strafrecht AT, p. 155.

4. Reduced intent or negligence requirements

– *Strict liability*

Swiss criminal law abides to the principle *nulla poena sine culpa*, which is reflected in art. 47 StGB, and is thus based on fault *(Schuldstrafrecht; droit pénal basé sur la faute)*. Consequently, offenses committed without fault, that is, without intention or negligence, are nonexistent. Thus, in juxtaposition to Swiss tort law, strict liability, that is, responsibility without fault *(verschuldensunabhängige Haftung/Kausalhaftung; responsabilité objective)*, is unknown to Swiss criminal law.[51]

– *Objective prerequisites of criminal liability*

As a general rule, criminal liability is triggered if the human conduct fulfills the definitional elements of an offense *(tatbestandsmässig; typique)*, is unlawful *(rechtswidrig; illicite)*, and culpable *(schuldhaft; coupable)*. Exceptionally, some criminal norms contain so-called objective prerequisites of criminal liability *(objektive Strafbarkeitsbedingungen; conditions objectives de punissabilité)*, which have to be present in addition to establish criminal liability.[52]

Objective prerequisites of criminal liability are conditions or facts, which lie outside the objective offense description and to which, accordingly, intent or negligence does not relate. Hence, they do not belong to the description of the criminal conduct, but rather limit criminal liability in that they constitute an additional prerequisite next to the fulfillment of the offense description, unlawfulness, and culpability.[53]

Objective prerequisites of criminal liability can be found in most offenses relating to bankruptcy and debt collection (arts. 163–167 StGB). Thus, the offender, that is, the debtor, is only punishable for the conduct harmful to his creditors if he

[50] Roth/Moreillon-*Corboz*, Art. 12 StGB, p. 153, §§ 130–132; *Riklin*, Verbrechenslehre, p. 225, § 37.

[51] Roth/Moreillon-*Corboz*, Art. 12 StGB, p. 137, § 21; *Hurtado Pozo*, Droit pénal, pp. 269–270, §§ 817–821; *Trechsel/Killias*, Swiss Criminal Law, p. 256.

[52] II.C.2.c.; *Riklin*, Verbrechenslehre, p. 301, §§ 1–4; *Stratenwerth*, Die Straftat, pp. 141–144, §§ 27–31.

[53] *Donatsch/Tag*, Strafrecht I, p. 106.

has been declared bankrupt or if a loss certificate has been issued against him. Further, participation in acts of collective violence (arts. 133–134 StGB) is only punishable under the condition that a participant has been wounded or killed, regardless as to whether the offender contributed to that result.[54]

5. Mistakes and misapprehensions

a) Factual mistakes

– *Definition and consequences*

The term mistake of fact *(Sachverhaltsirrtum; erreur sur les faits)* as defined in art. 13 StGB stands for the erroneous belief held by a person with regard to any of the objective elements of the offense at the moment he is engaging in the criminal conduct. Given that the offender has a wrong, incomplete, or missing conception about one or more objective elements of the offense and that intent always has to relate to all of them, he did not act intentionally with regard to the offense that he objectively fulfilled.[55]

Art. 13 StGB [mistake of fact]

1 If the offender acts based on a misconception about the facts, he is judged according to his conception if this is favorable to him.

2 If the offender could have avoided the mistake by exercising the required care, he is criminally liable for negligence if the negligent commission of the offense is threatened with punishment.

The consequence of a mistake of fact is that the offender is judged according to his conception if it is favorable to him (art. 13 para. 1 StGB), that is, if the misconceived facts are either lawful or constitute a less severe offense than the objectively fulfilled one. Hence, art. 13 StGB only covers mistakes in favor of the offender. If the error arose due to a lack of care, the person acted negligently, which leads to punishability if the negligent commission of that offense is threatened with punishment (art. 13 para. 2 StGB). If the specific act is only punishable if intentionally committed, the person is acquitted.[56]

[54] *Ibid.*

[55] Roth/Moreillon-*Thalmann*, Art. 13 StGB, p. 165, § 4.

[56] *Flachsmann/Eckert/Isenring*, Tafeln AT, p. 27, chart 17; *Riklin*, Verbrechenslehre, p. 179, §§ 69–71; Trechsel-*Trechsel/Jean-Richard*, Art. 13 StGB, p. 78, §§ 1–2, p. 80, §§ 10–11; Roth/Moreillon-*Thalmann*, Art. 13 StGB, pp. 165–166, §§ 4–7.

– *To what the mistake relates*

The mistake can relate to any of the objective elements of an offense. Thus, the error might pertain to the object of the offense (e.g., a hunter fires at a person he took for an animal) or the means used (e.g., a person adds a substance to the drinking water whose adverse health effects he misconceives). It can also relate to normative objective elements of the offense[57] (e.g., a misconception as to whether an object constitutes property belonging to another)[58] or to the causal chain of events. A mistake about the causal chain of events *(Irrtum über den Kausalverlauf; erreur sur le rapport de causalité)* exists where the offender's conduct yields a result, which is not covered by his intent (e.g., person A hits B with an axe and erroneously believes B is dead; in order to dispose of the body, A cuts off B's head, which leads to his death). In this constellation, the intentionally committed act (hitting B) did not cause the result at hand, while the act yielding the result (cutting off B's head) was not intentionally committed. Whether the result (B's death) can be imputed to the offender depends on whether it was foreseeable or not; to evaluate this question the adequacy theory standard applicable to negligence offenses is borrowed.[59] If the result was foreseeable, he can be held liable for intentionally committing the respective offense (intentional killing in our case); if not, only liability for attempt or negligent commission would attach.[60]

Art. 13 StGB also applies if the offender erroneously believes that a fact exists, which would give rise to a justification *(Rechtfertigungsgrund; fait justificatif)*.[61] Thus, the actor may, for example, wrongly believe that a specific situation calls for self-defense *(Putativnotwehr; légitime défense putative)* or that a state of necessity *(Putativnotstand; état de nécessité putatif)* is at hand.[62]

The misapprehension of the acting person can also relate to circumstances having an influence on the severity of the sanction. The actor may, for example, erroneously believe that a mitigating factor *(strafmildernde Umstände; circonstances atténuantes)* exists.[63]

[57] See above 2.a.

[58] Trechsel-*Trechsel/Jean-Richard*, Art. 13 StGB, p. 79, §§ 3–5; Roth/Moreillon-*Thalmann*, Art. 13 StGB, pp. 165–167, §§ 4–10.

[59] II.E.8.

[60] *Müller*, Repetitorium, pp. 102–103; Niggli/Wiprächtiger-*Jenny*, Art. 12 StGB, pp. 286–288, §§ 26–32.

[61] II.J.1.

[62] Trechsel-*Trechsel/Jean-Richard*, Art. 13 StGB, pp. 79–80, § 6; Roth/Moreillon-*Thalmann*, Art. 13 StGB, pp. 167–168, § 15; II.J.a., b.

[63] Roth/Moreillon-*Thalmann*, Art. 13 StGB, pp. 168–169, §§ 19–21.

– *Irrelevant mistakes of fact*

Not all mistakes or misapprehensions qualify as mistake of fact in the sense of art. 13 StGB.

Firstly, a so-called error of object *(error in objecto)*, where the actor errs with regard to the object of the act, is irrelevant and the offender is judged according to the objectively fulfilled offense. Thus, for example, an offender stealing A's coat is criminally liable for theft even though he thought that the coat belonged to B.[64]

Further, a so-called error of person *(error in persona)*, where the offender is mistaken about the identity of the victim, is not covered by art. 13 StGB. Thus, for example, an offender killing person A because he takes him for B, is punishable for taking a person's life.[65]

It is necessary to distinguish the *error in persona* and *error in objecto* from the so-called *aberratio ictus*, which is not an error as such but stands for a result offense, which goes astray. It designates the situation where the effect of an offense is realized upon a person or object other than that against whom or which the conduct was directed. Thus, the person is not mistaken about existing facts but wrongly assesses the future causal chain of events (e.g., an offender shoots at person A with intent to kill but hits B who crosses the line of fire; while A remains uninjured, B dies). While the offender is liable for attempt of the intended, but not for the completed offense (here attempted killing of A), criminal liability for the negligently achieved result (here the negligent killing of B) depends on whether the actual causal chain of events substantially deviated from what the offender thought it to be.[66]

Finally, the situation where the offender erroneously believes that his conduct fulfills the definitional elements of an offense but which is in fact lawful, does not constitute a mistake of fact in the sense of art. 13 StGB. Rather, such conduct qualifies as an impossible attempt (art. 22 para. 2 StGB).[67]

b) Mistakes of law

– *Principle and categories*

Until the end of the 19th century, the principle *error iuris nocet* – ignorance of the law does not protect from punishment – prevailed under Swiss criminal law. However, with the expansion of the material scope of criminal law, namely with

[64] *Ibid.*, p. 169, § 22.

[65] *Ibid.*, p. 169, § 22, p. 170, § 25.

[66] II.D.8.; *Donatsch/Tag*, Strafrecht I, pp. 126–127; Roth/Moreillon-*Thalmann*, Art. 13 StGB, p. 170, § 25.

[67] II.F.3.a.; Trechsel-*Trechsel/Jean-Richard*, Art. 13 StGB, p. 80, § 12.

punishing conduct being morally indifferent, and the fact that due to increased mobility persons find themselves more frequently in foreign legal systems, it was deemed necessary to introduce the concept of mistake about unlawfulness.[68]

Art. 21 StGB [mistake about unlawfulness]
Whoever does not know and cannot know at the moment of acting that his conduct is unlawful, does not act culpably. If the mistake was avoidable, the judge mitigates the penalty.

Art. 21 StGB on mistake about unlawfulness *(Irrtum über die Rechtswidrigkeit; erreur sur l'illicéité)* covers different types of mistakes, which are treated equally in law.[69] Firstly, if the offender knowingly fulfills all objective definitional elements of the offense, but erroneously considers his conduct to be plainly lawful, the situation is one of mistake of law *(direkter Verbotsirrtum; erreur sur l'illicéité direct)*.[70]

Secondly, with regard to crimes of omission, art. 21 covers the so-called mistake of legal command *(Gebotsirrtum; erreur sur un commandement légal)*. It denotes the situation where the offender knows about all factual circumstances giving rise to a position of guarantor,[71] but erroneously believes that he is not under a legal duty to act.[72] Thirdly, art. 21 StGB also encompasses the so-called indirect mistake of law *(indirekter Verbotsirrtum; erreur sur l'illicéité indirecte)* where the offender knows that his conduct is fulfilling an offense description but erroneously assumes the existence of a justification rendering his conduct lawful.[73]

– *Requirements for application*

For art. 21 StGB to apply, it is necessary that the offender not possess any sense of unlawfulness *(Unrechtsbewusstsein; conscience de l'illicéité)*. A vague idea or slight awareness held by the offender that the conduct in question could go against what is deemed to be lawful excludes the admission of a mistake and its favorable consequences for the offender.[74]

[68] Niggli/Wiprächtiger-*Jenny*, Art. 11 StGB, pp. 432–433, § 5; Roth/Moreillon-*Thalmann*, Art. 21 StGB, pp. 218–219, §§ 3–4.

[69] Niggli/Wiprächtiger-*Jenny*, Art. 11 StGB, p. 434, § 8; Trechsel-*Trechsel/Jean-Richard*, Art. 21 StGB, p. 123, § 1; see also II.J.8.

[70] Niggli/Wiprächtiger-*Jenny*, Art. 11 StGB, pp. 435–436, §§ 11–14; Roth/Moreillon-*Thalmann*, Art. 21 StGB, pp. 220–221, § 13.

[71] II.D.4.b.

[72] Niggli/Wiprächtiger-*Seelmann*, Art. 11 StGB, p. 270, § 65.

[73] Niggli/Wiprächtiger-*Jenny*, Art. 11 StGB, p. 434, § 8; Roth/Moreillon-*Thalmann*, Art. 21 StGB, p. 221, § 14.

[74] Niggli/Wiprächtiger-*Jenny*, Art. 11 StGB, pp. 435–436, §§ 11–14.

If the offender was mistaken about the unlawfulness of his conduct and art. 21 StGB therefore applies as such, the question whether the mistake was avoidable or not has to be answered in a next step: If knowledge about the unlawfulness of the conduct could not have been acquired even when applying the necessary duty of care (art. 21 first sentence StGB: "[...] does not know and cannot know [...]"), the offender was not acting culpably and therefore cannot be punished. Thereby, the applicable duty of care standard is whether a diligent person would have been induced into error or whether the offender had sufficient reasons to discern the unlawfulness of his conduct or to learn about it. If, on the other hand, the mistake could have been avoided with the required care (art. 21 second sentence StGB: "If the mistake was avoidable [...]."), the person was acting culpably. The only consequence attaching to the mistake in this constellation is a mandatory mitigation of the penalty according to art. 48a StGB.[75]

– *Irrelevant mistakes about unlawfulness*

The term subsumption error *(Subsumptionsirrtum; erreur sur la qualification juridique de l'action)* stands for the situation where the offender, who committed a specific offense, attaches a wrong legal meaning or qualification to his conduct (e.g., an offender is embezzling an object but believes that he is committing theft). This is a so-called irrelevant error to which art. 21 StGB does not apply given that, in order to act with intent, it is sufficient that the offender undertake a layperson's valuation of the objective elements of the offense.[76]

The expression putative offense *(Putativdelikt; délit putatif)* denotes circumstances where the offender wrongly believes that his (in fact lawful) conduct is threatened with punishment. The offender is not punished since he does not fulfill any objective offense description and subjectively his intent relates to conduct which is lawful.[77]

[75] *Ibid.*, pp. 436–438, §§ 15–21 citing BGE 104 IV 217, 220–221, E.3.a. (standard of care with regard to mistake about unlawfulness); Roth/Moreillon-*Thalmann*, Art. 21 StGB, pp. 221–222, §§ 17–28.

[76] See above 2.a.; *Flachsmann/Eckert/Isenring*, Tafeln AT, p. 28, chart 17; Roth/Moreillon-*Thalmann*, Art. 21 StGB, p. 221, § 16.

[77] *Donatsch/Tag*, Strafrecht I, p. 145.

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Distinction between *dolus eventualis* and conscious negligence: BGE 125 IV 242, BGE 130 IV 58, BGE 133 IV 1

Duties arising with the creation of a danger: BGE 106 IV 80

Standard of care with regard to mistake about unlawfulness: BGE 104 IV 217

List of abbreviations

AT	Allgemeiner Teil des Strafrechts (General Part of the criminal law)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (official case reporter of the Swiss Federal Supreme Court; cases are cited by volume, chamber, starting page, page, paragraph)
E.	Erwägung (paragraph in cases of the Swiss Federal Supreme Court)
JStG	Bundesgesetz vom 20. Juni 2003 über das Jugendstrafrecht (Jugendstrafgesetz, JStG)/Loi fédérale du 20 juin 2003 régissant la condition pénale des mineurs (Droit pénal des mineurs, DPMin), SR/RS 311.1 (Federal Law on the Criminal Law Applicable to Minors of 20 June 2008)
StGB	Schweizerisches Strafgesetzbuch vom 21. Dezember 1937/Code pénal suisse du 21 décembre 1937, SR/RS 311.0 (Swiss Criminal Code of 21 December 1937)
SR/RS	Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral (Classified Compilation of Swiss Federal Legislation)

Pablo Galain Palermo

Subjective aspects of the offense in

Uruguay

1. Definition and elements of the subjective aspects of the offense

The concept of the criminal offense brings together objective and subjective definitional elements. In the Uruguayan criminal law, every legal description is based upon the combination of objective and subjective definitional elements. While the objective definitional elements represent the changes in the outside world as a consequence of the criminal act,[1] subjective definitional elements are related to the inner attitude of the acting person in relation to his/her act. The Uruguayan Criminal Code (*Código Penal*, CP) establishes a link between the inner attitudes of the author and culpability (Art. 18 CP). Culpability is considered the central element of the subjective aspects of the offense. Thus the perpetrator can be declared culpable when the criminal offense is fulfilled by an act committed with intent *(dolo)*, negligence *(culpa o imprudencia)*, or praeter-intention *(ultraintención)*.[2] Culpability is composed of intellectual and volitional components. Conscience or awareness *(consciencia)* and will *(voluntad)* cover not only intent but also all other manifestations of the subjective element (negligent criminal offenses and praeter-intentional criminal offenses). The conscience or awareness of the unlawfulness *(consciencia de la antijuricidad)* is important in order to confirm culpability; this means, the perpetrator's knowledge that he/she is violating a criminal norm should be proved, otherwise the conduct cannot be established as being culpable in a criminal sense.[3]

The Uruguayan criminal system relates the subjective aspects of the offense to the capacity to be culpable in Arts. 18 and 30 CP. For that reason culpability and the capacity to be culpable must be considered together. According to Art. 30 CP, the attribution of responsibility requires the capacity of culpability *(capacidad de culpabilidad o imputabilidad)*. Nevertheless, what capacity of culpability means is not defined in the Uruguayan Criminal Code, which only states the causes of its exclusion. The doctrine says that what is called conscience or awareness and will in

[1] See II.D.
[2] See II.C.
[3] See *Chaves Hontou*, Derecho Penal.