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

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Duncker & Humblot • Berlin

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.ddb.de> abrufbar.

DOI https://doi.org/10.30709/978-3-86113-834-1

Redaktion: Petra Lehser

c/o Max-Planck-Institut für ausländisches und internationales Strafrecht
Günterstalstraße 73, 79100 Freiburg i.Br.
http://www.mpicc.de
Vertrieb in Gemeinschaft mit Duncker & Humblot GmbH, Berlin
http://www.duncker-humblot.de

Umschlagbild: © Martin Langhorst, Köln
Druck: Stückle Druck und Verlag, Stückle-Straße 1, 77955 Ettenheim
Printed in Germany

ISSN 1860-0093
ISBN 978-3-86113-834-1 (Max-Planck-Institut)
ISBN 978-3-428-13830-2 (Duncker & Humblot)
Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706

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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

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[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 Legalitätsprinizip; 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

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[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]

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[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.

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[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

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[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

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[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]

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[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]

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[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

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[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]

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[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; intérpretation 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]

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[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]

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[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]

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[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

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[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]

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[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]

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[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

Nullum crimen, nulla poena sine lege certa: BGE 119 IV 242

Formal law required for sanctions restricting the personal liberty: BGE 112 Ia 107

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)

PublG	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 (Federal Law of 18 June 2004 on the Compilations of Federal Legislation and the Federal Gazette [Publications Law])
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)
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])