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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

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[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-

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[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 aris-

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[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.

ing 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]

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]

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[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;

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[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.

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

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[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.

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[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-

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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

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[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]

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[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

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[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)*.

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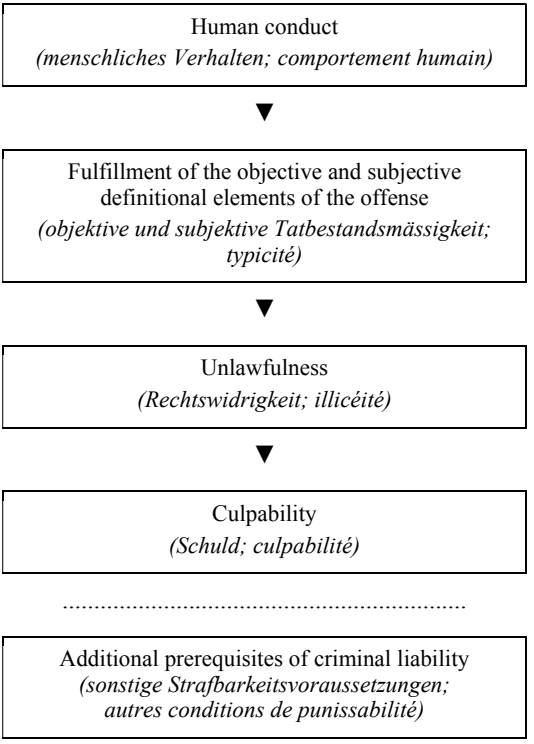
[57] Niggli/Wiprächtiger-*Bommer*, Vor Art. 19 StGB, pp. 351–352, §§ 3–5; *Riklin*, Verbrechenslehre, pp. 202-203, §§ 1–9; *Seelmann*, Strafrecht AT, p. 75.

[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)

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[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