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

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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/10.30709/978-3-86113-833-4

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 978-3-86113-833-4 (Max-Planck-Institut)
ISBN 978-3-428-13829-6 (Duncker & Humblot)
Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706

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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

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[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*

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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 main-

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[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.

tained *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]

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-

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[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]

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[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]

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[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 Ordi-

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[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.

nance 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]

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[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

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[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.

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]

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

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[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]

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[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]

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[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

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[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]

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[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]

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[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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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)