

§ 8 Basics of German criminal law

I. Historical development and structure

- the Middle Ages: a long-lasting inglorious tradition of feuding, inhuman and degrading punishments, torture, capital punishment, witch burnings and even execution of animals
- 1532: Constitutio Criminalis Carolina of Emperor Charles V
 - first Criminal Code applicable to all Germany
 - emphasis on criminal court procedure
 - already with some modern elements of criminal law (principle of guilt, grounds of justification, attempt, definition of various offences etc.)
- in the 19th century Criminal Codes in many German states
- 1871: Criminal Code of the German Empire [Reichsstrafgesetzbuch]
 - now titled "Criminal Code" [Strafgesetzbuch (= StGB)]
 - often amended, fundamental modernisation in the 1970s, last comprehensive reform 1998
- 1933 - 1945: totalitarian misuse of criminal law under the rule of National Socialism
- 1949: abolition of capital punishment in West Germany by art. 102 of the Basic Law of the Federal Republic of Germany
- distinction between the *general part of criminal law* (general rules about crime and punishment: act & omission, perpetration & participation, intent & negligence, attempt & completion, system of sanctions, fixing of penalties) and the *special part* (the specific criminal offences; some regulated in special laws)
- distinction between adult criminal law and *juvenile criminal law* (on criminal liability & sanctioning of offenders under the age of 21 at the time of the offence)
- distinction between criminal offences and *regulatory offences* (minor offences under administrative law, sanctioned by the administrative authorities with a *regulatory fine* [Bußgeld] under the Act on Regulatory Offences [Ordnungswidrigkeitengesetz])

II. Introduction to the German Criminal Code [Strafgesetzbuch (= StGB)]

- *nulla poena sine lege* (sect. 1 StGB, in line with art. 103(2) Basic Law)
 - excludes analogies in criminal law against the offender
 - also excludes increasing punishment after offence was committed (sect. 2 StGB)
- criminal liability only of natural persons, not of organizations or companies
- offender's *guilt (culpability)* is the basis for the punishment (cf. sect. 46(1) StGB)
- punishment serves both purposes, *specific and general prevention* (deterrent effect on the particular offender and general deterrence)
- many basic concepts of criminal law are assumed or mentioned but not defined or not defined precisely in the Code, leaving plenty of room for jurisprudence and scholarly doctrine

III. General part of German criminal law

1) The basic structure of criminal offences

- a *tripartite examination of criminal liability*:
 - a) **Fulfillment of the elements of the crime** [Tatbestandsverwirklichung]
 - aa) Fulfillment of the objective elements of the crime [objektiver Tatbestand]
 - commission of an act corresponding to the objective elements of the crime
 - includes *causality* of the act for the result
 - not defined in the Code; courts apply *equivalence theory*: every *conditio sine qua non*

- bb) Fulfillment of the subjective elements of the crime [subjektiver Tatbestand]
 - intention [Vorsatz] or, in some cases, negligence [Fahrlässigkeit]
 - fulfillment of possible other subjective requirements
 - e.g. lust to kill, greed or base motives for murder (sect. 211 StGB)
 - e.g. intention of obtaining an unlawful pecuniary benefit for fraud (sect. 263 StGB)
- b) **Unlawfulness** [Rechtswidrigkeit]
 - no grounds of justification
- c) **Guilt (culpability)** [Schuld]
 - personal reproachability of the unlawful act
 - not of children under 14 years of age (sect. 19 StGB)
 - not in case of mental disorder, profound disturbance of consciousness (→ alcohol, drugs) or intellectual disability (sect. 20 StGB)
 - not in case of grounds of exclusion of guilt
- d) Addendum: Additional conditions for punishment:
 - aa) No special grounds for exclusion of punishment [Strafausschließungsgründe]
 - e.g. withdrawal from an attempt (sect. 24 StGB)
 - cc) Objective conditions for criminal liability [objektive Strafbarkeitsbedingungen]
 - conditions set for some criminal offences that are not considered objective elements of the crime and thus do not need to be included in the intent of the offender
 - e.g. death of a person as consequence of a brawl (sect. 231 StGB)

2) Intention and negligence

- in principle, criminal liability only for intentional contact, but for some offences also for negligence (cf. sect. 15 StGB)
- intention is the will to fulfill the elements of the crime (voluntary element) being aware of all circumstances of the crime (cognitive element)
- three degrees of intention
 - *dolus directus in first degree* [Absicht]: offender aims to bring about the result
 - *dolus directus in second degree* [direkter Vorsatz]: offender is sure that his action will bring about the result
 - *dolus eventualis* [bedingter Vorsatz]: offender considers it possible that his action will bring about the result and deliberately accepts it
 - if not provided otherwise in the law, any degree of intention is sufficient
 - *not a form of intention: conscious negligence* [bewusste Fahrlässigkeit]: offender foresees the possible result of his action but does not want it and believes that it will not occur

3) Unlawfulness, grounds of justification and guilt (culpability) [Schuld]

- fulfillment of the elements of the crime indicates unlawfulness of the act: it is unlawful, unless there is a ground of justification
- grounds of justification:
 - self-defence (sect. 32 StGB)
 - must be required and necessary to avert a present unlawful attack
 - defence of a third person (sect. 32 StGB)
 - necessity as justification (sect. 34 StGB)
 - act is committed to avert a present danger to a legal interest that cannot be averted otherwise
 - upon balancing, protected interest substantially outweighs the one interfered with
 - act is proportionate to avert the danger
- in case of exclusion of guilt (culpability), the offender is not criminally liable but the act remains unlawful and the victim may defend himself in self-defence

- grounds of exclusion of guilt:
 - necessity as excuse (necessity as defence) (sect. 35 StGB)
 - act is committed to avert a present danger to life, limb or liberty from the offender, a relative or close person
 - offender could not be expected, under the circumstances, to accept the danger
 - extra-statutory necessity (strictly exceptional; not regulated in the Code)
 - sacrificing the life of some victims to save the life of many others
 - example: shooting down the passenger airplane kidnapped by terrorists for a terrorist attack
 - confusion, fear or fright causing excession of self-defence (sect. 33 StGB)
 - unavoidable lack of awareness of acting unlawful (sect. 17 StGB)

4) Mistakes [Irrtümer]

- a complex and in many details still HIGHLY CONTROVERSIAL doctrine how to deal with the numerous different constellations where the acting of the offender relies on an *error*
- in some constellations, the offender did not want to do anything bad but actually did
 - the hunter accidentally shoots the colleague in the bush because he mistakes him for a boar (*mistake of fact* [Tatbestandsirrtum]; see sect. 16 StGB)
 - the student smokes a joint in the public after he has read that the parliament passed a law to legalise it, but ignores that the law has not yet entered into force (*mistake of law* [Verbotsirrtum]; see sect. 17 StGB)
 - the father beats his noty son, mistakenly assuming that serious misconduct of a child entitles the parents to do so (*mistake of justifying grounds* [Erlaubnisirrtum]; see also sect. 17 StGB)
- in other constellations, the offender wanted to but actually did not do something bad
 - he mistakenly thinks that he has already killed the victim (only → attempt)
 - the girl uses pepper spray against a policeman who sexually harasses her and mistakenly assumes that there is no self-defence against the police (*reverse error on justifying grounds* [umgekehrter Erlaubnisirrtum] - no offence)
- controversial problem: erroneous assumption of facts constituting a ground of justification ([Erlaubnistatbestandsirrtum]; not regulated in the Code)
 - the sexy woman uses pepper spray against a dubious-looking man approaching her in the park because she thinks he wants to rape her, but he only wants to ask for the way out of the park
 - VARIOUS THEORIES IN SCHOLARLY DOCTRINE, referring in different ways to sect. 17 or sect. 16 StGB
 - FEDERAL COURT applies sect. 16 StGB analogously: no criminal liability for intention but possibly for negligence

5) Perpetration and participation [Täterschaft & Teilnahme] (sect. 25 et seq. StGB)

- a categorical but sometimes difficult and controversial distinction
- *perpetrators* [Täter] commit the offence themselves and are fully liable, either alone as sole perpetrators [Alleintäter] or jointly (on the basis of a joint decision to act) as *co-perpetrators* [Mittäter] (cf. sect. 25 StGB)
- *participants* do not commit the offence themselves but contribute to someone else's offence as
 - *instigators (abettors)* who intentionally induce the perpetrator to commit his unlawful act; they incur the same penalty as a perpetrator (sect. 26 StGB)
 - *aiders (accessories)* who intentionally assist the perpetrator in his unlawful act; their penalty will be mitigated (sect. 27, 49(1) StGB)
- someone who abuses another as a tool to commit an offence, e.g. through coercion, duress or deception, causing the result indirectly by the abused person's acting, is criminal liable as *indirect perpetrator*, while the abused generally goes unpunished
 - classical example: while hunting together, one of the hunter points out to an alleged "boar" and causes a colleague with not so good eyesight to shoot and kill a rival in the bush
 - exceptionally, the person behind may be liable as "perpetrator behind the perpetrator" alongside the person in front
- the delimitation is still CONTROVERSIAL
 - the SUBJECTIVE THEORY in jurisprudence focuses on the will of the acting persons: animus auctoris or animus socii?
 - the prevailing DOCTRINE OF CONTROL OVER THE ACT [TÄTHERSCHAFTSLEHRE] focuses on the deliberately exercised actual control over the act

6) Crimes of omission [Unterlassungsdelikte]

a) Genuine crimes of omission

- specific provisions stipulating the failure to fulfil certain duties as a criminal offence
- e.g. failure to render assistance in case of an accident, common danger or emergency (sect. 323c(1) StGB)
- e.g. failure to report planned offences (sect. 138 StGB)

b) Non-genuine crimes of omission (cf. sect. 13 StGB)

- offender fulfills the elements of the offence by failing to prevent the defined result although he is legally responsible to prevent it
- in principle possible with any offence and by any kind of non-acting
 - ***you can commit a murder by sleeping!***
- but only if offender is in a special *guarantor position* with regard to the victim's safety, which can result from
 - the law (→ parents, spouses etc.)
 - contractual obligation (→ doctors, midwives, nannies, teachers, mountain guides etc.)
 - actually taking over care (→ within the family, among friends, neighbours etc.)
 - ingerence (causing a hazardous situation, e.g. a car accident)
- committed by *non-performance of an action that is actually possible and required by the guarantor status* of the offender

IV. Special part of German criminal law (the specific offences)

- note that the design of the specific criminal offences varies greatly from country to country!
- 30 divisions of the German Criminal Code on the specific offences, complemented by more specific offences under special legislation
- the types of homicide in German criminal law:
 - simple homicide: *manslaughter* ([Totschlag]; sect. 212 StGB)
 - note that the simple intentional killing of a human being is not called "murder"!
 - homicide under aggravating conditions: *murder* ([Mord]; sect. 211 StGB)
 - the aggravating objective or subjective conditions differ from those in other countries
 - less serious homicide: killing upon request ([Tötung auf Verlangen]; sect. 216 StGB)
 - involuntary homicide: negligent killing ([fahrlässige Tötung], sect. 222 StGB)
 - complementation by various offences concerning abortion (sect. 218 et seq. StGB)
- *fraud* (sect. 263 StGB) is defined as
 - damaging the assets of another
 - by causing/maintaining an error under false pretences or distorting/suppressing true facts
 - with the intention of obtaining an unlawful pecuniary benefit

V. Criminal procedural law

- regulated in the Code of Criminal Procedure [Strafprozessordnung]