

E-BOOKS CEAD Francisco Suárez

THE CRIMINAL OFFENSE
– A TRIANGULAR DEBATE



INÊS FERNANDES GODINHO

Coordenadora

2026

FICHA TÉCNICA

O presente e-book compila um conjunto de intervenções proferidas no Seminário Internacional – A Vida do Crime, realizado no dia 30 de junho de 2025 na Universidade Lusófona – Centro Universitário de Lisboa, inserindo-se no Projeto A Vida do Crime – Projeto de Direito Comparado Portugal/Alemanha/Brasil (CEAD/1/2025), uma parceria que envolve o CEAD Francisco Suárez, a Universidade de Mannheim, a Universidade de Düsseldorf e a Universidade de Hamburg. As presentes atividades desenvolveram-se no projeto do CEAD Francisco Suárez – (UID/06331/2025 <https://doi.org/10.54499/UID/06331/2025>).

This e-book includes a collection of presentations delivered at the International Seminar – The Life of Crime, held on June 30, 2025, at Lusófona University – Lisbon University Center, as part of The Life of Crime Project – Comparative Law Project Portugal/Germany/Brazil (CEAD/1/2025), a partnership involving CEAD Francisco Suárez, the University of Mannheim, the University of Düsseldorf, and the University of Hamburg. These activities were carried out as part of the CEAD Francisco Suárez project – (UID/06331/2025 <https://doi.org/10.54499/UID/06331/2025>).

EDIÇÃO

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Capa e paginação: Luís Henriques

DOI: 10.60543/7db7dc2a-9d9c-43fc-8b50-720a558d56f8

e-ISBN: 978-989-757-360-6

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SEMINAR

THE LIFE OF THE CRIMINAL OFFENCE

SESSION 1 (GENESIS)

11:15 Opening

José de Faria Costa | Dean of the Law Faculty and President of CEAD Francisco Suárez

11:30 Principles & Legality

Inês Fernandes Godinho | Universidade Lusófona

Commentary

Milan Kuhli | Universität Hamburg

Discussion panel

13:00 Lunch break

14:30 System

Antônio Martins | UFRJ

Commentary

Anne Schneider | Universität Düsseldorf

Discussion panel

16:00 Coffee-break

16:15 Structure

Laura Neumann | Universität Mannheim

Commentary

Bruno de Oliveira Moura | Universidade Lusófona

Discussion panel

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FOREWORD

INÊS FERNANDES GODINHO
Universidade Lusófona/CEAD Francisco Suárez

This Ebook is part of the project *The Life of the Criminal Offence – Comparative Law Project*, started in January 2025 and funded by CEAD Francisco Suárez/Lusófona University.

This project aims to establish a trilateral dialogue between Portugal, Germany and Brazil on the General Part of the Penal Codes. As these countries share a common conceptual and dogmatic language, the aim is to carry out a comparative law analysis of the main dogmatic concepts of the general offence theory, in order to provide a narrative that explores not only the similarities, but also the differences, thus contributing to the development of the criminal law dogmatics of the three countries and to a better application of criminal law.

This Ebook entails the comparison carried out in a Seminar held at Lusófona University on June, 30th, 2025, to which other colleagues were invited in order to enable a full trilateral comparison. We thank them all for their participation and for making this ebook possible.

Comparative Law analysis allows the participating researchers to share a common language and with that language enable common ground in legal research. This project aims at contributing to this language and the goal is, through the development of this project, to further widen its results and making them available to all.

Lisbon, July 6th, 2026

I. LEGALITY

THE LIFE OF THE CRIMINAL OFFENSE – LEGALITY

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INÊS FERNANDES GODINHO

Universidade Lusófona/CEAD Francisco Suárez

1. GENERAL ISSUES

The principle of legality is a fundamental principle of the legal system. In its broad sense, as the submission of the state to (democratic) law, the principle is anchored in art. 3 (2) of the Portuguese Constitution (*Constituição da República Portuguesa*, CRP).

This constitutional provision encompasses both the regulation of the state by the democratic rule of law as well as the submission of all authorities to the law (principle of legality in the broad sense). The Constitution also contains rule-of-law principles that specifically regulate the application of criminal law (art. 29 CRP).

The rule-of-law principle also has a specific meaning in the context of criminal law, namely, that the fundamental rights and freedoms of the citizens are protected, on the one hand, by criminal law and that these rights and freedoms are protected from criminal law, on the other, thus fully respecting the *nullum crimen, nulla poena sine lege* principle. As such, the principle of legality is a cornerstone of the criminal system: it is explicitly stated both in the Constitution (art. 29 CRP) and in the Criminal Code (art. 1 *Código Penal*, CP) and is undisputed in the scholarly literature.¹

The criminal law principle of legality is also an expression of the principle of democracy, since according to the principle, criminal law can only be considered legitimate if it is based on a formal law (i.e., a law enacted by the organ of the state that represents the people). The principle of legality is also

¹ This chapter was based in our "Principle of legality". In *National Criminal Law in a Comparative Legal Context*, eds. Ulrich Sieber; Konstanze Jarvers; Emily Silverman, 53–67. Berlin: Duncker & Humblot, 2017.

an expression of the principle of culpability: a person cannot be punished for his or her actions if those actions were not defined as a crime before their commission. Furthermore, strict liability is not recognised in Portuguese criminal law, since Portugal adheres to the principle of *nulla poena sine culpa*² as laid down in the Constitution (art. 1 CRP) and the Criminal Code (art. 40 (2) CP).

2. TREATMENT AND SCOPE OF PRINCIPLE OF LEGALITY

a) Location

The principle of legality regarding criminal law is stated in the Constitution, where all the main elements of the principle are considered.

The Constitution also provides for jurisdiction of the Portuguese courts over certain crimes against international law (*criminal iuris gentium*) even if said acts are not punishable under domestic law (art. 29 (2) CRP). However, they must be crimes of “commonly recognized international law.” As such, they are applicable in Portugal under art. 8 (1) CRP, according to which “[t]he rules and principles of general or common international law shall form an integral part of Portuguese law.” The punishment must be within the limits of domestic criminal law.³

Portugal has ratified a number of international treaties, such as the European Convention on Human Rights (ECHR)⁴, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), that contain important provisions regarding the principle of legality and that are applicable in domestic law (art. 7 ECHR, art. 11 (2) UDHR, art. 15 (1) ICCPR). As a member state of the European

2 Godinho, Inês Fernandes, “Culpa e direito penal: reflexões a propósito das neurociências”, in: *Dasein um Gerechtigkeit/Ser-ai e Justiça. Liber Amicorum. Festage für José de Faria Costa zum 70. Geburtstag*, Baden-Baden: Nomos, 2020, 225–241.

3 Caeiro, Pedro, *Fundamento, Conteúdo e Limites da Jurisdição Penal*, Coimbra: Coimbra Editora/Wolters Kluwer, 2010.

4 Moura, Bruno de Oliveira, “O princípio da legalidade penal na jurisprudência do Tribunal Europeu dos Direitos Humanos”. In *Instituto de Direito Penal Económico e Europeu 25 anos depois*, Coimbra: Faculdade de Direito da Universidade de Coimbra, 2022, 75–93.

Union, Portugal is also bound by the Charter of Fundamental Rights of the European Union.⁵

In domestic substantive criminal law, the principle of legality is foreseen in art. 1 CP. This article encompasses both the *nullum crime sine lege* and the *nullum poena sine lege* maxims.

Art. 1 CP (Principle of legality)

1. An act can only be punished as a crime if it was described and declared punishable by law prior to the moment it was committed.

2. A security measure can only be imposed in a situation involving dangerousness where the prerequisites of dangerousness were established by law prior to their fulfilment.

3. Recourse to analogy is not permitted to qualify an act as crime, to define a situation involving dangerousness, or to determine a corresponding penalty or security measure.

This broad provision addresses several aspects of the legality principle. First, there is no criminal offence without a law. Second, there can be no penalty without a law. In short, these two aspects reflect *Feuerbach's* Latin maxim *nullum crimen, nulla poena sine lege*. It should be noted that security measures are also subject to the principle of legality (art. 1 (2) CP) in accordance with the Constitution (art. 29 (2) CRP). Third, this principle has a specific rule regarding interpretation.

The formal element of the principle of legality requiring criminal provisions to be based on a law is stated in art. 1 (1) CP, together with the previously mentioned art. 29 (1) CRP. As for the requirement of reasonable clarity, this requirement is not explicitly foreseen in either the Criminal Code or in the Constitution; rather, it is inferred from the general principle of legality. In regard to the limits on interpretation (specifically the prohibition of analogy), this aspect of the principle of legality is expressly regulated in art. 1 (3) CP.⁶ Finally, the *nullum crimen sine lege praevia* element is defined, together with the *lex mitior* principle, both in the Constitution (art. 29 (4)) and in the Criminal Code (art. 2 (1, 2 and 4)).

5 Antunes, Maria João, “Proteção multinível do princípio da legalidade criminal”, in: Costa *et al.*, *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*, Coimbra: BFD, 2017, 117–128.

6 Costa, José de Faria; Sousa, Susana Aires de, “A interpretação do tipo legal de crime à luz do princípio da legalidade: reflexão a propósito dos bens alimentares perigosos para a saúde e vida humanas”, *Revista de Legislação e Jurisprudência*, Ano 144 3990 (2015), 198–215.

b) Scope

The principle of legality in substantive criminal law (art. 1 CP) is applicable to all criminal law norms. This includes the norms located outside the Criminal Code (so-called secondary criminal law). In the framework of substantive criminal law, both the norms of the Criminal Code and the criminal norms outside the code must obey this principle. Considering the teleology of the principle, it is important to emphasise that it applies to all situations involving the punishment of the offender, including the requirements (objective and subjective) of criminal liability, such as the definitional elements of a particular crime and its penalties. In this sense, the principle does not apply to situations relating to the liberty or freedom of the offender, such as justification or excuse defences. This has consequences for all elements of the principle of legality. The principle is also applicable to security measures (art. 1 (2) CP),⁷ although these measures are not considered penalties.

Here it is important to note that administrative offences (*Ordnungswidrigkeiten*) are also subject to a principle of legality with the same content as the one in art. 1 CP.⁸ In fact, under art. 1 of Decree-Law no. 433/82 of 27 Oct. 1982 (General Regime for Regulatory Law, *Regime Geral das Contra-Ordenações*, RGCO), an act may only be punished as an administrative offense if it was made punishable as such by law prior to the commission of the act.

The principle of legality also plays a role in criminal procedure. It is codified in art. 2 of the Portuguese Criminal Procedure Code (*Código de Processo Penal*, CPP).⁹

In this context, the principle, which addresses the structure, development, acts, and content of the procedure, brings together substantive and procedural principles of criminal procedure. It relies on the maxim *nulla poena sine processu*, meaning that a criminal sanction can only be imposed following a procedure previously defined by law. Article 2 CPP requires all

⁷ Carvalho, Américo Taipa de, *Sucessão de Leis Penais*, Coimbra: Coimbra Editora, 3. Ed., 2008, p. 269 f.

⁸ Vilela, Alexandra, *O Direito de Mera Ordenação Social*, Coimbra: Coimbra Editora, 2013.

⁹ Marques, Pedro Garcia/Albuquerque, Paulo Pinto de, “Artigo 2º”, in: Paulo Pinto de Albuquerque (Org.), *Comentário do Código de Processo Penal*, Vol. I, 5. Ed., Lisboa: UCE, 2023, 52–53.

procedural acts and coercive measures to be undertaken within the limits set by law and prohibits the undertaking of any procedural acts that are not regulated in the law.¹⁰ According to the prevailing view in the scholarly literature, the principle of legality is a cornerstone of the coherence between substantive and procedural principles in the context of criminal procedure, namely, the requirement of the statutory definition of the rights and duties of procedural subjects (arts. 8–84 CPP) and the requirement of the law of evidence (art. 125 CPP).

The principle of mandatory – as opposed to discretionary – prosecution is codified in arts. 49, 262, and 283 CPP. However, this principle is not absolute; under circumstances defined by law, the principle of moderate discretionary prosecution may apply.

3. ELEMENTS OF THE PRINCIPLE OF LEGALITY

a) *Formal requirements – nullum crimen sine lege scripta*

The principle of legality requires the existence of a formal law as a basis for both criminal offences and their penalties as well as for security measures; thus, customary law alone will not suffice as a basis. The formal law requirement means that only laws passed by the Assembly of the Republic (*Assembleia da República*) – the parliament – or a government law authorized by the Assembly can define crimes, penalties, security measures, and their prerequisites. This exclusive responsibility of the Assembly of the Republic to legislate (*reserva de lei*) refers to the formal enactment procedure and is provided for expressly in the Constitution (art. 165 (1)(c) CRP).

Moreover, in general, under the Constitution all restrictions on fundamental rights are subject to strict requirements, including formal ones.

Thus considered, the principle of legality embodied in the constitutional rule stated in art. 165 (1)(c) CRP has three main strands: the exclusive responsibility of the Assembly to legislate; the prohibition on the normative inter-

¹⁰ Belez, Teresa Pizarro/Pinto, Frederico Lacerda da Costa, “Tipicidade e matéria da proibição num Direito Penal do facto”, in: José de Faria Costa. Estudos por Ocasão dos Seus 75 Anos, Vol 1, Lisboa: EUL, 2025, 697–724, p.711–712.

vention of regulations in criminal matters; and the exclusion of customary law as a source for the definition of crimes and penalties.¹¹

At this point, it is also important to consider problems associated with so-called blank-form criminal norms (*normas penais em branco*).¹² Blank-form criminal laws are formal laws that define a certain conduct as criminal but refer for a more specific definition of the prohibited conduct to regulations located in non-formal laws, such as administrative regulations. Two problems arise in this context: first, the criminal principle of legality does not apply to non-formal laws, and second, the use of the blank-form technique can imply the breach of the principle's formal law requirement. However, according to the scholarly literature, the formal law requirement is satisfied, even by a blank-form criminal law, as long as the actual definition of (the elements) of the crime is made in the formal law itself (and not in the non-formal law referred to).

Regarding the exclusion of customary law as a source for the definition of crimes or penalties, the following can be said: although exclusion is a direct consequence of the *nullum crimen sine lege scripta* maxim (the formal law requirement of the principle of legality), it is also a consequence of the requirement of reasonable clarity.

Since it works in favour of liberty and not against it, decriminalisation does not fall within the scope of the principle of legality. Nevertheless, the Constitutional Court (*Tribunal Constitucional*, TC) has ruled that the definition of crimes, penalties, and security measures includes both the positive as well as the negative aspects of the principle of legality.¹³

b) Requirement of reasonable clarity – nullum crimen sine lege certa

The requirement of reasonable clarity is not expressly foreseen in either the Constitution or the Criminal Code. However, since the principle of legality is a constitutional principle (art. 29 (1) CRP), it can be inferred that this requirement is addressed directly to the legislature in the sense that criminal

¹¹ Canotilho, J.J. Gomes/Moreira, Vital, *CRP Anotada*, vol. I. Coimbra 2007.

¹² Beleza, Teresa Pizarro/Pinto, Frederico Lacerda da Costa, *O regime legal do erro e as normas penais em branco (Ubi lex distinguit...)*. Coimbra: Almedina, 1999.

¹³ Ac.TC 173/85, of 9 Oct. 1985.

laws have to be understandable for everyone. Everyone has to know which acts are irrelevant to criminal law or, in other words, what is allowed and what is forbidden so that he or she can adjust his or her behaviour accordingly. Therefore, the scope of the requirement of reasonable clarity encompasses the requirements of criminal responsibility (liability and penalties).

As far as the clarity of criminal laws is concerned, the criminal offence definition (criminal provision) means the set of criminal offence elements that have to be defined in order for the principle of legality to be satisfied. In fact, when enacting criminal law, the legislature has to describe the forbidden act and other preconditions as completely and as objectively as possible. Thus, the criminal provision has to be objectively determinable.

Consequently, the legislature should avoid vague and ambiguous terms even though the use of normative terms is inevitable. In order to overcome this lawmaking difficulty and to assure compliance with the *nullum crimen sine lege certa* maxim, the legislature frequently provides legal definitions of terms used in the Criminal Code. In the context of property crimes (art. 202 CP), for example, these include terms concerning monetary value (such as “high” or “considerably high” value), breaking-in (*arrombamento*), and fake keys (*chaves falsas*); in the context of forgery crimes (art. 255 CP), they include the terms document (*documento*) and currency (*moeda*); and in the context of crimes committed in the exercise of public office (art. 386 CP), they include the term public official (*funcionário*).

However, this lawmaking technique is not always sufficient. In fact, there are provisions, especially in criminal law outside the Criminal Code, that contain ambiguous terms. This is also true of the Criminal Code itself, notwithstanding the definition of a number of relevant terms. In fact, some criminal offence definitions contain terms that may not be sufficiently clear. These terms include, for example, “vile or futile reason” as a motive for aggravated homicide (art. 132 (2) (e) CP) and “relevant sexual act” as an element of sexual abuse of a person incapable of resisting (art. 165 (1) CP). These criminal provisions provide for a certain level of clarity but have, however, vague terms. In instances such as these, it is possible to determine the content of the terms by referring to customary interpretation of their meaning. Customary interpretation in this sense does not refer to customary law or even to a legal

category but to the meaning that certain terms have in the society at a certain (historical) moment.¹⁴

The principle of legality, namely, the *nullum crimen sine lege certa* maxim, is considered to be satisfied if, in spite of the inevitable imprecision of certain terms that appear in the legal provision, the criminal provision itself has a clearly defined scope.¹⁵

Another problem associated with the requirement of reasonable clarity involves commission by omission. In the Criminal Code, a result offence can be committed both by action and by omission, thanks to the so-called equivalency clause of art. 10 CP: in the case of omission, the general rule is that the offender is punishable if he or she is legally responsible for preventing a particular result from occurring and he or she should have acted. However, the equivalency of action and omission may be denied if denial is consistent with the intent of the offence definition at issue. As the situations in which this equivalency of action and omission is denied are not expressly stated, they are therefore subject to interpretation.

In this context, it cannot always be clear when, on the one hand, equivalency is not possible and when, on the other hand, there is a legal duty. As such, a situation of “diminished definition” of the elements of the provision is said to exist. This situation of diminished definition (*tipicidade diminuída*) expresses the idea that, in the case of commission by omission, some of the elements of the offence are not explicitly defined in the criminal provision, and it is necessary to interpret the criminal provision at issue together with the equivalency clause of art. 10 CP and with the existence of a legal duty to act. In this context, a situation of diminished definition refers to punishment for an offence of omission, since not all definitional elements of the offence are expressly stated in the provision.

c) *Limits on interpretation – nullum crimen sine lege stricta*

The principle of legality includes the *nullum crimen sine lege stricta* maxim. According to this maxim, criminal liability cannot be a result of analo-

¹⁴ Costa, José de Faria, *Direito Penal*, Lisboa: INCM, 2017.

¹⁵ Monte, Mário Ferreira, “O princípio da legalidade criminal: uma revisitação à luz de concretas exigências de justiça material”, *Revista da Faculdade de Direito da Universidade Lusófona do Porto*, 2015, 148-161, <https://doi.org/10.60543/ul-plr-rdul-p.v7i7.5543>.

gy (in the sense of lawmaking, the so-called *analogia legis*). This conclusion derives already from the constitutional text (art. 29 (1) CRP). However, the limits on interpretation deriving from the principle of legality, in particular the prohibition of analogy, are expressly stated in substantive criminal law (art. 1 (3) CP).

Since the legislature has to express itself through words and words are, by nature, polysemic, every legal text is subject to interpretation. In other areas of the law, such as civil law, the use of analogy is broadly accepted. As mentioned above, this is not the case in criminal law. Thus, it is imperative to set the boundary between permitted interpretation and prohibited analogy.

Interpretation in criminal law is methodologically anchored in a teleological principle. In fact, the function of criminal law, which is expressly stated in art. 40 no. 1 CP, is to protect legal interests (*bens jurídicos*). As a result, all criminal law interpretation has to have as its purpose the defence of the specific legal interest that the criminal provision is designed to protect.¹⁶

In this context, it is also important to consider the systematic method of interpretation as well as the historical method. However, these come together as auxiliary methods to the teleological principle in attaining the true sense of the criminal norm within the framework of the principle of legality.

When enacting criminal provisions, the legislature selects the acts to be prohibited. This selection reflects the fragmentary nature of criminal law: the interpreter of the law cannot fill the spaces left blank (i.e., the criminally non-punishable acts) by the legislature. Lawmaking by analogy is strictly forbidden, since it works *in malam partem*, that is, it creates a criminal offence – based on similarity – to the detriment of the offender. This is expressly stated in the Criminal Code (art. 1 (3)).

Considering the polysemy of words, the legal practitioner can interpret with regard to the common and literal sense of the words. Beyond this, it should be deemed prohibited analogy. This criterion is then the limit of permitted interpretation.¹⁷

16 Costa, José de Faria, “Construção e interpretação do tipo legal de crime à luz do princípio da legalidade: duas questões ou um só problema?”, *Revista de Legislação e Jurisprudência* Ano 134, 3933 (2002): 354.

17 Neves, António Castanheira, “O princípio da legalidade criminal”, in: *Digesta*, Vol. I, Coimbra: Coimbra Editora, 1995, 349–473.

But the same rule does not apply if the analogy works to the benefit of the offender (*in bonam partem*). Most important in this context are defences (justifications and excuses) to criminal liability. In the context of defences, the prohibition of analogy is valid when it leads to the reduction of their scope. On the contrary, analogy is allowed if it leads to the expansion of their scope. With regard to punishment by omission, analogy should be allowed if it leads to the denial of the existence of a legal duty that personally obligates the offender.

d) Prohibition of retroactivity – nullum crimen sine lege praevia

The retroactive application of criminal law is prohibited in art. 2 CP. This article addresses all matters relating to the temporal application of criminal law.

Accordingly, the temporal applicability of criminal law has to respect the prohibition of retroactive application (art. 2 (1) CP). However, this prohibition is not absolute. In fact, the normative translation of the maxim *nullum crimen sine lege praevia* aims at the protection of every person. This means that a person commits a crime only if the conduct in issue was previously defined by law as a crime and the law had already entered into force at the time of commission. However, if the retroactive application of the provision would benefit the offender, so that the prohibition on retroactivity would be detrimental to the person, the prohibition does not apply. Here, the *lex mitior* principle has priority over the prohibition of retroactive application of criminal law. Thus, the prohibition of the retroactive application of a criminal provision stands in situations in which the provision has a *malam partem* (detrimental) effect or works *contra reum* (against the offender); where the provision benefits the offender, it may be applied retroactively.

To better understand the full extent of each principle within the framework of the temporal application of criminal law, it is essential to consider the time-of-commission rule, on the one hand, and the *lex mitior* principle, on the other.

According to the time-of-commission rule (art. 3 CP), an offence is considered committed at the time the offender acted or, in case of omission, at the time the offender should have acted. The point in time at which the result of an offence occurs is irrelevant to the definition of the time of commission.

The *lex mitior* principle is expressly foreseen in the Criminal Code (art. 2 (4)). Accordingly, if the law in force at the time of the act is different from that foreseen in subsequent laws, the law more favourable to the offender is always applicable. In practice, this principle does not mean that new laws always have precedence over old ones; rather, it implies that the law favourable to the offender always has to be ascertained if new laws have been passed. As a result, if the new law is more favourable to the offender than the old law, the new law will be applied retroactively.

In fact, art. 2 CP foresees two different phenomena, namely, decriminalization, which occurs when an act ceases to be punished under criminal law (art. 2 (2) CP), and reduction in punishment (art. 2 (4) CP).¹⁸

Prior to 2007, this principle was not absolute. Under the old version of art. 2 (4) CP, the *lex mitior* rule applied only until a definitive sentence had been pronounced. Following the pronouncement of such a sentence, the *lex mitior* rule was no longer applicable. Although this limitation on the application of *lex mitior* was questioned, the Constitutional Court upheld its constitutionality in 1998. However, with the 2007 revision of the Criminal Code, the limit was removed, thus making the principle absolute. Today, it is possible for the more favourable new law to be applied retroactively even if a definitive sentence has already been imposed. In this situation, the procedure regarding the determination of the penalty is reopened so that the penalty can be determined according to the law most favourable to the offender. This procedure is regulated in the Criminal Procedure Code (art. 371-A).

This rule, together with the *lex mitior* principle, is also applicable to so-called intermediate laws, namely, those laws that enter into force after commission of the act but that are no longer in force at the time of the trial (art. 2 (4) 1st part CP and art. 29 (4) 2d part CRP). In fact, considering the text of these two legal provisions, no limitation is made regarding the time of validity of the law subsequent to that in force at the time of the commission of the punishable act. Thus, if an intermediate law is more favourable to the offender, then the *lex mitior* principle is fully applicable.

Temporary (criminal) laws, namely, laws that derive from a specific situation and that are enacted for a limited period of time, represent the only exception

18 Costa, José de Faria, *Direito Penal*, Lisboa: INCM, 2017.

to the *lex mitior* principle. If it is clear from the onset that a law is to be in force for a limited period of time only, acts committed in violation of this law while it is in force will continue to be punished after it has expired (art. 2 (3) CP).

The *lex mitior* principle is not directly applicable to case law. There is, however, a situation in which this principle should be considered, namely, when the case at issue is a so-called standardisation decision of the Supreme Court. A standardisation decision is a decision of the collective of judges (*Acórdão de Fixação de Jurisprudência*) of one of the sections of the Supreme Court: in the case of criminal law, the collective of judges of the Criminal Section. This decision is made upon appeal. Such an appeal is possible when, if the legal norms in force are the same, there are two conflicting decisions of the Supreme Court on the same legal issue (art. 437 CPP). This type of decision is published in the Official Bulletin of the State (*Diário da República*) in accordance with art. 444 (1) CPP.¹⁹

19 Dias, Jorge de Figueiredo, *Direito Penal. Parte Geral*, Coimbra: Gestlegal, 2019.

THE PRINCIPLE OF LEGALITY IN GERMAN CRIMINAL LAW: LEGAL FRAMEWORK, HISTORICAL ROOTS AND CONTEMPORARY CHALLENGES

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MILAN KUHLI / JULIUS BAYÓN

Universität Hamburg

This short article serves as a comment to Inês Godinho's paper.¹ It addresses the German legal perspective and focusses specifically on four aspects. Firstly, we provide a brief overview on the legal framework of the core criminal law principle of legality in Germany, paying special attention to significant aspects of its historical development (I). We then outline the main elements that define the principle, followed by an overview of its scope of application (II). Particular attention will be given to the practical and interpretative challenges that arise in its implementation (III). Finally, we briefly consider related legal instruments beyond classical criminal law, such as regulatory offences and security measures (IV).

I. LEGAL FRAMEWORK AND HISTORICAL BACKGROUND

The principle of legality is deeply rooted in the ideas of the Enlightenment, that called for the necessity of legal certainty and predictability of punishment in a state under the rule of law.² Its Latin expression “*nulla poena sine lege*” was formulated by the German scholar Paul Johann Anselm von Feuerbach, who emphasized the significance of the principle rather for its general preventive purpose, aiming to deter potential offenders through clear and predictable legal rules.³

1 Godinho, *Legality*, p. 11.

2 Kuhli, *Geschichte des Strafrechts. Von der Frühen Neuzeit bis zur Gegenwart*, 2025, marginal no. 252 et seqq.; Roxin/Greco, *Strafrecht Allgemeiner Teil I: Grundlagen. Der Aufbau der Verbrechenslehre*, 5th ed., 2020, § 5, marginal no. 19 et seqq.

3 Kuhli, *Geschichte des Strafrechts*, 2025, marginal no. 258; Roxin/Greco, *Strafrecht Allgemeiner Teil I*, 5th ed., 2020, § 5, marginal no. 22 et seq.

An equally crucial point for the understanding of the principle of legality in Germany is the history of Nazi Germany. So, in the years between 1933 and 1945, the National Socialist regime had fundamentally undermined and distorted the principle of legality. The Nazi legislator and judiciary frequently applied criminal law by analogy, allowing punishment for conduct that was not explicitly defined as an offence.⁴ Furthermore, vague legal provisions granted the courts and the executive broad discretionary power.⁵ As a result, this legal uncertainty opened the door to arbitrariness and political manipulation of the justice system.

Against the historical background sketched above, the constitution (Grundgesetz or GG, Basic Law) of the Federal Republic of Germany which was founded in 1949⁶ was conceived as a deliberate counter-concept⁷ to the injustices of the Nazi legal order. The legislator sought to restore the rule of law and to ensure – inter alia – that no one could be punished without a clear, pre-existing legal basis by implementing a strict principle of legality in criminal law. The principle is thus enshrined in Art. 103 para. 2 GG, which states:

“An act may be punished only if it was defined by a law as a criminal offence before the act was committed.”⁸

Since 1953,⁹ the same principle has also been incorporated into Sec. 1 of the German Penal Code (Strafgesetzbuch or StGB). Through this dual anchoring – both constitutional and statutory – the principle of legality remains one of the strongest safeguards of the rule of law in Germany in the field of criminal law.

4 Kuhli, *Geschichte des Strafrechts*, 2025, marginal no. 267 et seq.

5 Kuhli, *Geschichte des Strafrechts*, 2025, marginal no. 266. An example is the “Gesetz gegen heimtückische Angriffe auf Staat und Partei und zum Schutz der Parteiuniformen” from 1934, RGBl. I, S.1269, that criminalized in Sec. 2 para. 1 “publicly malicious, inflammatory, or low-minded statements about leading figures of the state or of the NSDAP that were capable of undermining the people’s trust in the political leadership”, author’s translation.

6 After the defeat of Nazi Germany in the Second World War, two German states were established in 1949: the Federal Republic of Germany (“Bundesrepublik Deutschland”, West Germany) and the German Democratic Republic (“Deutsche Demokratische Republik”, East Germany). The reunification of those two states took place in 1990: in this year the territory of East Germany became part of the Federal Republic of Germany.

7 See e.g. German Federal Constitutional Court, Decision, 4 November 2009 – 1 BvR 2150/08, marginal no. 64.

8 Official Translation of the Federal Office of Justice, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0576, accessed on 14 October 2025.

9 Drittes Strafrechtsänderungsgesetz vom 4. August 1953, BGBl. I 1953, p. 735.

II. ELEMENTS

Regarding the elements of the principle of legality, Art. 103 para. 2 GG and Sec. 1 StGB guarantee all four classical components.¹⁰ First, they prohibit the use of analogy in criminal law. Second, they exclude customary law as a source for defining crimes and penalties. Third, they establish the principle of reasonable clarity, which – unlike in Portuguese law¹¹ – can be explicitly derived from the wording of Art. 103 para. 2 GG and Sec. 1 StGB, particularly from the term “defined”. Finally, they prohibit retroactive punishment: an offence may only be punished if criminal liability was established by law prior to the commission of the act.

With respect to retroactive punishment, Sec. 2 StGB regulates the temporal application of criminal law, and in our view, it bears significant similarity to the Portuguese provisions.¹² It provides:

“(1) The penalty and any incidental legal consequences are determined by the law which is in force at the time of the act.

(2) If the threatened penalty is amended during the commission of the act, the law which is in force at the time the act is completed is to be applied.

(3) If the law in force at the time of the completion of the act is amended before judgment, the most lenient law is to be applied.

(4) A law which was intended to be in force only for a determinate time is, as a rule, still to be applied to acts committed while it was in force even after it ceases to be in force. This does not apply to the extent that a law provides otherwise.”¹³

Thus, at least in theory, the principle of legality has applied strictly in Germany since 1949. However, it would be misleading to present an entirely affirmative picture, as there remain practical and interpretative challenges in the application of the principle today. This leads to the next chapter.

¹⁰ Cf. e.g. Schmitz in Erb/Schäfer (eds), *Münchener Kommentar zum Strafgesetzbuch*, 5th ed 2024, § 1 marginal no. 32.

¹¹ Godinho, *Legality*, p. 16.

¹² Godinho, *Legality*, p. 20 et seqq.

¹³ Official Translation of the Federal Office of Justice, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0017, accessed on 14 October 2025.

III. CHALLENGES

1. STATE CRIMES AND PROHIBITION OF RETROACTIVITY

Following the collapse of an unjust regime, a state may prosecute agents of the state who acted lawfully under that regime's rules, *inter alia* by limiting the prohibition against retroactive criminal punishment. In German history, this issue arose both in relation to Nazi injustices and, after reunification,¹⁴ in the so-called “Mauerschützen cases” concerning the conviction of border guards of the German Democratic Republic who shot citizens attempting to illegally cross the border. In some cases, jurisprudence found no violation of the prohibition of retroactive punishment.¹⁵ The reasoning was largely shaped by the idea of the Radbruch formula.¹⁶ However, concerning the “Mauerschützen cases” this jurisprudence was heavily criticized, and some argued instead for a modification of Art. 103 para. 2 GG.¹⁷

¹⁴ See note 6.

¹⁵ Cf. to judgments for crimes in Nazi-Germany: Laage, *Gesetzliches Unrecht: Die Bedeutung des Begriffs für die Aufarbeitung von NS-Verbrechen. Die Rezeption der Radbruchschen Formel in Rechtsprechung und Rechtslehre nach 1945*, 2014, 409, 426 et seq.; Cf. to the Mauerschützen cases, German Federal Court of Justice, Judgment, 3 November 1992 – 5 StR 370/92; German Federal Constitutional Court, Decision, 24. October 1996 – 2 BvR 1851/94 et al.; ECHR, Judgment of 22.03.2001, *Case of Streletz et al. vs. Germany*, Applications nos. 34044/96 et al.

¹⁶ Which, in a simplified form postulates that legal provisions which legalize extremely unjust conduct cannot claim legal validity even at the time of their enactment, cf. Radbruch, 1 SJZ 1946, 105, 107. Thus, in the Mauerschützen cases, the defenses that legalized the shootings (§ 27 GrenzG) were held to be inapplicable, German Federal Constitutional Court, Decision, 24 October 1996 – 2 BvR 1851/94 et al., marginal no. 136 et seq.

¹⁷ E.g. Dreier, 52 JZ 1997, p. 421; an overview about the problems the literature raised with respect to the judgement of the German Federal Constitutional Court can be found in Kuhl, *Das Völkerstrafgesetzbuch und das Verbot der Strafbegründung durch Gewohnheitsrecht*, 2010, p. 213. Insofar it is also worth mentioning that Germany, which originally agreed to Art. 7 para. 2 ECHR only under the reservation that its application must be in conformity with Art. 103 para. 2 GG, has withdrawn that reservation on 1 October 2001, cf. Human rights information bulletin, No. 54, p.1. Art. 7 para. 2 ECHR allows “the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.

2. PROBLEMATIC CRIMINAL LAW PROVISIONS

Another challenge arises with criminal law provisions that appear problematic in light of the strict principle of legality. One example is the criminal offence of stalking. Sec. 238 StGB enumerates several types of conducts which constitute stalking, if the further requirements of para. 1 are met. According to No. 8, it is also sufficient if the perpetrator commits “an act comparable to those listed in nos. 1 to 7”.¹⁸ This is justified by arguing that the acts in nos. 1 to 7 merely specify, but do not establish, the offence.¹⁹ However, such a construction – even if not considered as analogy – appears questionable missing reasonable clarity.²⁰

Also worth mentioning are certain provisions of the German Code of Crimes Against International Law (Völkerstrafgesetzbuch or VStGB). A number of offences contained therein refer to rules of customary international law.²¹ However, insofar as customary law merely operates as a dynamic reference within the statutory definition of the offence, such provisions do not constitute a violation of the principle of legality provided that they are formulated with sufficient precision and clarity.²²

Finally, also highly vague criminal offences like the one of “insult” according to Sec. 185 StGB may bear concerns in light of the principle of legal certainty.²³ Nonetheless, the extensive and well-established judicial interpretation of such provisions is often deemed sufficient to satisfy the requirements of legal certainty.²⁴

18 Official Translation of the Federal Office of Justice, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2263, accessed 15 October 2025.

19 See e.g. Roxin, GA 2020, p. 460, 466; the legislator calls that a “innertatbestandliche Analogie”, see BT-Drs. 16/3641, p. 14.

20 See e.g. Eidam in Matt/Renzikoswki (eds), Kommentar zum Strafgesetzbuch, 2nd ed 2020, § 238 marginal no. 21; Eisele in Eisele (ed), Tübinger Kommentar zum Strafgesetzbuch, 31th ed 2025, § 238, marginal no. 30.

21 Sec. 8 para. 1 No. 6 VStGB may serve as a representative example: “Whoever, in connection with an international or non-international armed conflict, departs or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law from an area in which they are lawfully present to another State or another area in contravention of a general rule of international law incurs a penalty (...).”

22 Regarding details, see Kuhli, Das Völkerstrafgesetzbuch und das Verbot der Strafbegründung durch Gewohnheitsrecht, 2010, p. 246 et seqq.

23 See e.g. Gaede in Matt/Renzikoswki (eds), Kommentar zum Strafgesetzbuch, 2nd ed. 2020, § 185 marginal no. 1.

24 With respect to Sec. 185 see e.g. German Federal Constitutional Court, Decision, 10 October

3. EXCEPTIONS TO THE PRINCIPLE?

Of particular note is the issue of whether exceptions to the principle of legality in criminal law can be justified.

a. General Part

In contrast to the special part²⁵ (*Besonderer Teil*) of the StGB, the general part²⁶ (*Allgemeiner Teil*) does not contain any rules of conduct.²⁷ Instead, it is characterized by highly abstract provisions that establish a framework determining the concrete applicability of the offences included in the special part.²⁸ As a result, the provisions of the general part are conceptually less determinate.²⁹ Examples include the notion and scope of intent (Sec. 15 and 16 StGB) or, as Godinho also has shown with regard to Portugal,³⁰ the question of omission (Sec. 13 StGB). However, given the central importance of these provisions for the existence of criminal liability,³¹ it would be problematic, to completely deny the applicability of the principle of legality with regard to the general part.

b. Blank-Form

Another issue concerns the so-called “blank-form” criminal law provisions. These provisions do not, by themselves, fully define the constituent elements of an offense but instead refer to another legal norm. A reference to another formal law may still satisfy the requirement of legal certainty when the relevant provisions are interpreted as a whole.³² However, the situation becomes

1995, 1 BvR 1476/91 et al., marginal no. 116.

25 Sec. 80 – 358 StGB.

26 Sec. 1 – 79 lit. b StGB.

27 Dannecker/Schuh in Cirener/Radtke et al (eds), Leipziger Kommentar zum Strafgesetzbuch, 13th ed. 2020, § 1 marginal no. 82.

28 Dannecker/Schuh in Cirener/Radtke et al (eds), Leipziger Kommentar zum Strafgesetzbuch, 13th ed. 2020, § 1 marginal no. 82.

29 Wessels/Beulke/Satzger, Strafrecht Allgemeiner Teil, 54th ed 2024, § 2 marginal no. 82.

30 Godinho, Legality, p. 18.

31 Cf. Jescheck/Weigend, Lehrbuch des Strafrechts. Allgemeiner Teil, 5th ed., 1996, p. 19.

32 Schmitz in Erb/Schäfer (eds), Münchener Kommentar zum Strafgesetzbuch, 5th ed 2024, § 1 marginal no. 70.

considerably more problematic when the referenced norm is not a formal law but rather a subordinate administrative regulation. In such cases, in line with Godinho's contribution,³³ also the prevailing view in German literature maintains that the criminal provision enacted by the legislature itself must contain a sufficiently precise definition of the offense.³⁴ However, determining when this requirement is met remains a particularly complex and difficult matter of legal assessment.³⁵

c. Criminal Procedural Law

The final challenge to be mentioned here concerns criminal procedural law. In contrast to Portuguese law,³⁶ German law does not contain an explicit provision codifying the principle of legality in criminal procedure. According to the prevailing interpretation, Art. 103 para. 2 GG does not apply directly in this context.³⁷ This, however, does not imply that the principle of legality and particularly the prohibition of retroactivity is irrelevant in criminal procedure. In any case, it follows – albeit in a less stringent form – from the general rule-of-law principle enshrined in Art. 20 para. 2 and 3 GG.³⁸

A number of constellations can be envisaged in which subsequent procedural amendments may have effects comparable to those of substantive criminal law changes. Examples include the admissibility of evidence, particularly in cases of subsequent expansion of investigative powers³⁹ or

³³ Godinho, *Legality*, p. 16.

³⁴ Schmitz in Erb/Schäfer (eds), *Münchener Kommentar zum Strafgesetzbuch*, 5th ed 2024, § 1 marginal no. 71; Dannecker/Schuhr in Cirener/Radtke et al (eds), *Leipziger Kommentar zum Strafgesetzbuch*, 13th ed. 2020, § 1 marginal no. 153.

³⁵ Moreover, further unresolved legal issues remain in this context, such as the distinction from normative elements of the offense, which are likely to entail different legal consequences, cf. Dannecker/Schuhr in Cirener/Radtke et al (eds), *Leipziger Kommentar zum Strafgesetzbuch*, 13th ed. 2020, § 1 marginal no. 149.

³⁶ Godinho, *Legality*, p. 36.

³⁷ Cf. e.g. Kudlich in Heintschel-Heinegg/Kudlich (eds), *Beck'scher Online Kommentar zum Strafgesetzbuch*, 66th ed., last updated 1.8.2025, § 1 marginal no. 9; Kudlich in Kudlich/Montiel/Schuhr, *Gesetzlichkeit und Strafrecht*, 2012, p. 233, 244; Jäger, GA 2006, p. 615, 626.

³⁸ German Federal Court of Justice, Judgment, 15 March 2001 – 5 StR 454/00, p. 27 et seq.; Kuhli/May, GA 2022, p. 37, 39 with add. evidence.

³⁹ Kuhli/May, GA 2022, p. 37, 47 et seq.

the conversion of offences requiring a complaint into offences prosecuted *ex officio*.⁴⁰ While not procedural in the strict sense, modifications to the statutes of limitation⁴¹ or shifts in settled jurisprudence⁴² present similarly sensitive concerns.

In such cases, an analogous application of Art. 103 para. 2 GG is partly advocated.⁴³ Alternatively, one could consider applying the general prohibition of retroactivity with a stricter standard of review.⁴⁴ This assessment, however, must be made on a case-by-case basis.⁴⁵

IV. OTHER LEGAL INSTRUMENTS

The principle of legality is also relevant beyond the conventional scope of criminal law. In this context, two areas gain particular attention.

1. REGULATORY OFFENCES

As Sec. 1 StGB does not apply in this regard, Sec. 3 of the Regulatory Offences Act (*Gesetz über Ordnungswidrigkeiten* or OWiG) provides that “an act may only be sanctioned as a regulatory offence if the statutory possibility of imposing a sanction existed prior to its commission”.⁴⁶

40 Kuhli/May, GA 2022, p. 37, 45; Schmitz in Erb/Schäfer (eds), *Münchener Kommentar zum Strafgesetzbuch*, 5th ed 2024, § 1 marginal no. 23.

41 German Federal Constitutional Court, Decision, 18 September 1952 – 1 BvR 612/52, marginal no. 32; German Federal Constitutional Court, Decision, 26 February 1969 – 2 BvL 15, 23/68 marginal no. 80; cf. Schmitz in Erb/Schäfer (eds), *Münchener Kommentar zum Strafgesetzbuch*, 5th ed 2024, § 1 marginal no. 23.

42 Cf. Kudlich in Heintschel-Heinegg/Kudlich (eds), *Beck’scher Online Kommentar zum Strafgesetzbuch*, 66th ed., last updated 1.8.2025, § 1 marginal no. 10.

43 Dannecker/Schuhr in Cirener/Radtke et al (eds), *Leipziger Kommentar zum Strafgesetzbuch*, 13th ed 2020, § 1 marginal no. 415 et seqq.

44 Kuhli/May, GA 2022, p. 37, 38 with add. evidence.

45 An analysis for multiple scenarios is provided by Kuhli/May, GA 2022, p. 37.

46 Official Translation of the Federal Office of Justice, https://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html#p0019, accessed 16 October 2025.

2. MEASURES OF CORRECTION AND SECURITY

Our final example concerns measures of correction and security, such as placement in preventive detention. Unlike Portuguese law,⁴⁷ German law contains no general provision which governs explicitly the application of the principle of legality on these measures.⁴⁸ The reason for that is seen in the different purpose: Measures of Correction and Security are not to assign guilt and impose punishment, but rather to prevent future harm.⁴⁹ This reasoning likewise supports the constitutionality of Sec. 2 para. 6 StGB,⁵⁰ which provides for a specific form of retroactive application. It reads:

“Unless otherwise provided by law, decisions regarding measures of correction and security shall be taken according to the law in force at the time of the decision.”⁵¹

However, by contrast, the European Court of Human Rights has held that the retroactive application of laws to measures of correction and security does constitute a violation of Art. 7 para. 1 ECHR.⁵² Against this background, and given the factually quasi-punitive effect of measures of correction and security on the individual,⁵³ each such measure should be critically evaluated at least in light of the general rule-of-law principle enshrined in Art. 20 para. 2 and 3 GG.⁵⁴

47 See Art. 29 CRP, cf. Godinho, *Legality*, p. 14.

48 German Federal Constitutional Court, Judgment, 5 February 2004 – 2 BvR 2029/01, marginal no. 129; confirmed by German Federal Constitutional Court, Judgment, 4 May 2011 – 2 BvR 2365/09 et al, marginal no. 142.

49 German Federal Constitutional Court, Judgment, 5 February 2004 – 2 BvR 2029/01, marginal no. 129.

50 Hecker in Eisele (ed), *Tübinger Kommentar zum Strafgesetzbuch*, 31th ed 2025, § 2 marginal no. 40.

51 Official Translation of the Federal Office of Justice, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0017, accessed 16 October 2025.

52 Unlike in the German doctrine, the ECHR considers measures of Correction and Security to be a penalty in the sense of Art. 7 ECHR, see ECHR, Judgment of 17 December 2009, Case of M vs. Germany, App. No. 19359/04, marginal no. 117 et seqq.

53 Schmitz in Erb/Schäfer (eds), *Münchener Kommentar zum Strafgesetzbuch*, 5th ed 2024, § 1 marginal no. 79.

54 This is also the approach taken by the Constitutional Court, cf. German Federal Constitutional Court, Judgment, 4 May 2011 – 2 BvR 2365/09 et al, marginal no. 141.

PRINCIPLE OF LEGALITY IN BRAZILIAN CRIMINAL LAW

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I. LEGAL FRAMEWORK AND HISTORICAL BACKGROUND

The principle of legality has a long-standing tradition in Brazilian criminal law. Since the country's earliest statutes, dating back to the Imperial period in the 19th century, the principle of legality has been expressly enshrined both in constitutional texts and in the successive criminal codes enacted over time.¹

The Constitution of the Empire of Brazil (1824) already established in its Article 179 that “*no citizen may be compelled to do or refrain from doing anything except by virtue of the law*” (item I), adding that “*no one may be arrested without a formal charge, except in the cases declared by law*” (item II), and that “*no one shall be sentenced except by competent authority, by virtue of a prior law, and in the manner prescribed by it*” (item XI). Likewise, the first Brazilian Criminal Code, the Criminal Code of the Empire (1830), opened with the same requirement of legality: “Article 1 – There shall be no crime or offense (terms used synonymously in this Code) without a prior law that defines it.”

During the Republican period, the commitment to the primacy of legality remained constant, shaping the first article of the Criminal Code of the Republic in 1890 and, later, the Criminal Code of 1940 (revised in 1984), which remains in force to this day.²

The current Brazilian Criminal Code provides in its Article 1

1 Tavares, Juarez; Martins, Antonio. *Fundamentos de teoria do delito*. 5ª ed., São Paulo :Tirant lo Blanch, 2025, p. 92 s.

2 D'Avila, Fabio Roberto. Il codice penale del Brasile. Una presentazione. *Diritto penale XXI secolo*, (1) 2012, p. 41-59.

“There is no crime without a prior law that defines it.
There is no penalty without prior legal prescription”.

This principle is further reinforced and specified by subsequent provisions — for instance, those concerning the application of criminal law over time and the prohibition of strict liability.

For its part, the Federal Constitution of Brazil expressly provides in its Article 5 that:

XXXIX – there is no crime without a prior law that defines it, nor punishment without prior legal prescription;
XL – criminal law shall not be retroactive, except to benefit the defendant;
LIV – no one shall be deprived of liberty or property without due process of law;

It is, therefore, a legal tradition deeply rooted in the conviction that the principle of legality constitutes the cornerstone of criminal law. Even in the face of legislative movements that, after the First World War, began to question the prohibition of analogy at the international level—and that preceded the enactment of the Brazilian Criminal Code of 1940 (such as the Russian Penal Code of 1926, the Danish Penal Code of 1930, and the German Law of 1935, which amended Article 2 of the 1871 Penal Code)—the Brazilian Code remained faithful to the primacy of legality.

This context of uncertainty surrounding the prohibition of analogy is, in fact, explicitly mentioned in the Explanatory Statement of the Brazilian Criminal Code, in which the legislator once again reaffirms the supreme value of legality: “*Among us, the criminal legislator cannot even hesitate in upholding the nullum crimen, nulla poena sine lege.*” It is worth noting, finally, that the 1940 Criminal Code was enacted not during a democratic period of Brazilian history, as one might expect, but under the dictatorship of Getúlio Vargas, a period known as the Estado Novo (1937–1945).

There is, however, a stain in the history of Brazilian criminal legislation.³ It occurred toward the end of the Second World War, in response to an attack on a Brazilian merchant vessel that was sunk by the German Navy. Brazil, until then neutral, broke off diplomatic relations with the Axis powers and, before formally declaring war, enacted Decree-Law No. 4,166/1942, which applied to assets and funds belonging to nationals of Axis countries (Germany, Italy, and Japan) located in Brazil, with the aim of securing compensation for damages caused to the State and to Brazilian citizens during the Second World War. The Decree, which created the offense of concealing such property (Article 5),⁴ provided in § 3 that “for the characterization of the crime, the judge may resort to analogy”.

II. Elements

There is broad consensus in Brazilian criminal law that the Federal Constitution of Brazil, in Article 5, items XXXIX and XL, and the Brazilian Criminal Code, in Articles 1 and 2, establish the four fundamental elements of the principle of legality:

- *Lex praevia*:

(i) Only a formal law (*i.e.*, a law enacted by the Legislative Branch) may establish crimes and penalties. A “provisional measure” (*medida provisória*), a type of delegated legislative act provided for in Article 62 of the Federal Constitution,⁵ cannot perform this function.⁶ In this regard, Article 62, §1, of the Constitution provides that “the issuance of provisional measures is

3 Hungria, Nélson. *Comentários ao código penal*. vol. I, tomo I, 2. ed. Rio de Janeiro: Forense, 1953, p. 43.

4 Article 5. Any intentional or negligent act or omission resulting in the diminution of the property of a German, Japanese, or Italian national, or intended to defraud the purposes of this law, shall be punished by imprisonment from one to five years and a fine ranging from one to ten contos de réis, unless a more severe penalty applies.

5 Article 62. *In cases of relevance and urgency, the President of the Republic may adopt provisional measures with the force of law, which must be immediately submitted to the National Congress.*

6 Assis Toledo, Francisco de. *Princípios básicos de direito penal*. 5. ed. São Paulo: Saraiva, 2002, p. 24 (§ 17); Ilha da Silva, Ângelo Roberto. *Instituições de direito penal*. 6. ed. São Paulo: Tirant lo Blanch, 2025, p. 180 s.; Silva Franco, Alberto. Do Crime. In: Franco, Alberto Silva; Stoco, Rui. (orgs.) *Código penal e sua interpretação*. Doutrina e jurisprudência. 8. ed. São Paulo: Revista dos Tribunais, 2007, p. 53 s.

prohibited on matters related to: (I) (...) (b) criminal law, criminal procedure, and civil procedure.”

(ii) The law must precede the act. Retroactivity *in malam partem* is prohibited, being admitted only *in bonam partem*, that is, when favorable to the defendant.

(iii) The principle of legality also applies to “security measures” (*medida de segurança*), so that the enactment of a subsequent and more severe law in this field is likewise subject to the requirement of a formal law and to the prohibition of retroactive application *in malam partem*.⁷ Security measures, however, are not considered criminal penalties.

(iv) The principle also extends to Military Criminal Law, as expressly provided in Article 1 of the Brazilian Military Criminal Code.

- *Lex scripta*: prohibition of customary law as a source for defining crimes and penalties. No such prohibition, however, applies in the opposite direction. In certain circumstances, customary law may operate as a supralegal ground for excluding unlawfulness or for mitigating punishment. It may also serve as a source for clarifying the content of certain criminal provisions.⁸

- *Lex stricta*: prohibition of analogy as a basis for establishing the existence of a crime or aggravating its penalty (*analogia in malam partem*). It is, however, admissible for the benefit of the defendant (*analogia in bonam partem*), on grounds of equity.⁹

- *Lex certa*: prohibition of vague or uncertain criminal provisions and of indeterminate penalties. This prohibition is inherent to the principle of legality, whose disregard ultimately deprives it of all meaning and effect.¹⁰

7 Silva Franco, Alberto. Do Crime. In: Franco, Alberto Silva; Stoco, Rui. (orgs.) *Código penal e sua interpretação*. Doutrina e jurisprudência. 8. ed. São Paulo: Revista dos Tribunais, 2007, p. 54.

8 Assis Toledo, Francisco de. *Princípios básicos de direito penal*. 5. ed. São Paulo: Saraiva, 2002, p. 25 (§ 18); Ilha da Silva, Ângelo Roberto. *Instituições de direito penal*. 6. ed. São Paulo: Tirant lo Blanch, 2025, p.182; Tavares, Juarez, Martins, Antonio. *Fundamentos de teoria do delito*. 5ª ed., São Paulo :Tirant lo Blanch, 2025, p. 100.

9 Assis Toledo, Francisco de. *Princípios básicos de direito penal*. 5. ed. São Paulo: Saraiva, 2002, p. 27 (§ 22); Reale Junior, Miguel. *Fundamentos de direito penal*. 5. ed. Rio de Janeiro: Forense, 2020, p. 71 s. (online).

10 Silva Franco, Alberto. Do Crime. In: Franco, Alberto Silva; Stoco, Rui. (orgs.) *Código penal e sua interpretação*. Doutrina e jurisprudência. 8. ed. São Paulo: Revista dos Tribunais, 2007, p. 55 s.

TEMPORAL APPLICATION OF CRIMINAL LAW

The temporal application of criminal law is governed by Article 2 of the Brazilian Criminal Code, which prohibits retroactive application *in malam partem* — encompassing both *novatio legis incriminadora* and *novatio legis in pejus*. However, retroactivity *in bonam partem* is broadly accepted, even after the final judgment of a conviction, and may extend to administrative acts that complement blank criminal provisions.¹¹ A notable example is the Ministerial Regulation (Portaria) of the Ministry of Health, which complements the Brazilian Law on Drugs (Law No. 11,343/2006). In 2000, this regulation excluded “ethyl chloride” (commonly known in Brazil as *lança-perfume*) from the list of illicit narcotic substances. This amendment led the Supreme Federal Court (STF) to recognize an *abolitio criminis*, even though the regulation was later reissued to reinclude *lança-perfume* among the prohibited substances.¹²

Temporal Application of Criminal Law

Article 2 – No one may be punished for an act that a subsequent law no longer considers a crime; as a result, the execution and the criminal effects of the conviction shall cease.

Sole Paragraph – A subsequent law that in any way benefits the offender shall apply to acts committed prior to its entry into force, even if already adjudicated by a final and unappealable conviction.

Exceptional or Temporary Law

Article 3 – An exceptional or temporary law shall apply to acts committed during its validity, even after the period of its duration has expired or the circumstances that motivated it have ceased.

¹¹ Tavares, Juarez; Martins, Antonio. *Fundamentos de teoria do delito*. 5ª ed., São Paulo :Tirant lo Blanch, 2025, p. 97 s.

¹² Brazilian Supreme Federal Court (STF). *Habeas Corpus No. 94,397, Second Panel, reporting Justice Cezar Peluso, decided on March 9, 2010.*

III. CHALLENGES

1. EXCESSIVELY BROAD OR VAGUE CRIMINAL LAW PROVISIONS

The requirement of *lex certa* is sometimes undermined through excessively broad or vague criminal law provisions. Examples within the Brazilian Criminal Code include the crime of obscene act (Article 233: “*Performing an obscene act in a public place or in a place open or exposed to the public*”), as well as the expression “*other lewd acts*”, referring to acts other than sexual intercourse, in the crime of rape (Article 213).

However, this phenomenon occurs more frequently in special criminal law (*Nebenstrafrecht*), either in the form of overly indeterminate normative elements (for example, Article 86 of Law No. 9,605/1998, the Environmental Protection Law: “*Failing, by one who has a legal or contractual duty to do so, to fulfill an obligation of relevant environmental interest*”), or in the form of criminal law provisions encompassing an excessive multiplicity of behaviors, such as the drug trafficking offense, which includes 18 different actions in Article 33, *caput*,¹³ not counting those described in its paragraphs I to IV, of Law No. 11,343/2006.

2. BLANK CRIMINAL LAW PROVISIONS

In Brazil as well, the so-called “blank criminal law provisions”, in the proper sense, have proven to be problematic. Although the prohibition of retroactivity also extends to the complementary norms that give content to such criminal law provisions — as already noted in the context of drug trafficking — other issues remain unresolved.

First, delegating part of the incriminating content to non-formal laws (usually administrative regulations) does not meet the strict require-

¹³ Article 33, *caput*, of Law No. 11,343/2006 (the Brazilian Law on Drugs): *To import, export, send, prepare, produce, manufacture, acquire, sell, display for sale, offer, keep in storage, transport, carry, possess, prescribe, administer, deliver for consumption, or supply drugs, even free of charge, without authorization or in violation of legal or regulatory provisions.*

ment of legality in the formal sense. Second, the argument that compliance with the principle of legality is ensured merely because the essential elements of the offense are defined by a formal statute is not only debatable but also doubtful.¹⁴ There is no shortage of examples in Brazilian environmental criminal law where criminal law provisions are reduced to the mere violation of administrative rules.

3. ANALOGY DISGUISED AS INTERPRETATION

One of the main concerns regarding the principle of legality relates to the application of *analogia in malam partem* under the guise of mere statutory interpretation. The most representative case in recent Brazilian jurisprudence is the Direct Action of Unconstitutionality by Omission No. 26 (2019),¹⁵ in which the Supreme Federal Court (STF) recognized the National Congress's omission in criminalizing acts of homophobia and transphobia. At the same time, the Court decided that, until a specific law is enacted, such conduct should be punished as forms of racism, through the application of Law No. 7,716/1989 (the Anti-Racism Law). Despite the dissenting opinion of Justice Marco Aurélio Mello, who maintained that this represented an unacceptable violation of the principle of legality, the STF held, by majority, that the concept of "racism" encompasses homotransphobic practices, invoking for that purpose a constitutionally conforming interpretation. Justice Marco Aurélio's dissent emphasized that only the legislature has the authority to define crimes and penalties, and that judicial expansion of criminal provisions by analogy — even under constitutional grounds — undermines the separation of powers and the core of the legality principle.

14 Tavares, Juarez; Martins, Antonio. *Fundamentos de teoria do delito*. 5ª ed., São Paulo : Tirant lo Blanch, 2025, p. 94 s.

15 Brazilian Supreme Federal Court (STF). *Direct Action of Unconstitutionality by Omission No. 26, District Federal, rapporteur Justice Celso de Mello, decided on June 13, 2019.*

4. GENERAL CRITERIA FOR THE DELIMITATION OF CRIME: THE DUTY OF GUARANTEE

In Brazil, the duty of guarantee is established in Article 13, paragraph 2, of the Brazilian Criminal Code.

Relevance of Omission

§ 2. An omission is criminally relevant when the person who omits had both the duty and the ability to act in order to prevent the result. The duty to act applies to those who:

- a) have a legal duty of care, protection, or supervision;
- b) have, by their own act, assumed the responsibility to prevent the result;
- c) have created the risk of the occurrence of the result through their prior conduct.

Although Brazilian regulation may appear, *prima facie*, more detailed than that of other countries of similar legal tradition, the fact remains that the legal criteria still exhibit excessive openness, thereby challenging the principle of legality. This issue is particularly relevant given the growing interest in commission by omission offenses across various domains of criminal regulation, such as economic criminal law.

5. LACK OF CLEAR CRITERIA IN SENTENCING

With regard to the measurement of penalties, the requirement of legality must encompass not only the prior determination of the statutory sentencing framework, but also the establishment of clear criteria for its application.¹⁶ At this very point, Brazilian criminal practice has demon-

¹⁶ Silva Franco, Alberto. Do Crime. In: Franco, Alberto Silva; Stoco, Rui. (orgs.) *Código penal e sua interpretação*. Doutrina e jurisprudência. 8. ed. São Paulo: Revista dos Tribunais, 2007, p. 56.

strated the absolute insufficiency of the existing legal criteria, resulting in a context of excessive arbitrariness¹⁷.

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17 National Council Of Justice (CNJ). *Report of the Working Group on Sentencing Guidelines*. Brasília: CNJ, 2022.

II. SYSTEM

THE LIFE OF THE CRIMINAL OFFENSE — SYSTEM

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A. THE MEANING OF THE SYSTEM

1. It is a little-discussed – and hardly debatable – commonplace that the continental European and Latin American penal systems have similar characteristics and, to a large extent, mirror each other.¹ So the structure of these systems will unequivocally coincide in its fundamental aspects, and any differences will appear, if at all, in the details. The central question, therefore, should not be about the structural elements of agreement or disagreement between these systems, but about the more fundamental, underlying problem of the meaning of this common systematic structure and the plausibility of producing general, substantive solutions based on this structure.

B. NORMATIVE LEVELS

2. I will first give a description of the different levels at which penal systems are structured. I'll take the Brazilian system as a model, but I'll mention the German and Portuguese systems as examples. This system is structured as follows:

a) On a first level, the constitutional order establishes content limits related to general principiology, particularly with regard to legality, human dignity,

¹ For the development of the crime system, see Roxin/Greco, *Strafrecht Allgemeiner Teil I*, 5th ed., München, 2020, p. 291 et seq. For the development of crime theory in Brazil, see Zaffaroni/Batista/Alagia/Slokar, *Direito Penal Brasileiro II*, I, Rio de Janeiro, 2010, p. 39 et seq.

subjective responsibility (guilt), the rule of law, the possibilities of sanction, procedural standards and guarantees, as well as establishing the obligation to create rules of conduct related to certain crimes (such as racism, drug trafficking, etc.), but without determining the specific content of these rules;

b) on a second level, the Penal Code is the fundamental document where, at least in theory, the main rules of conduct and all the rules of imputation are listed:

c) on a third level, complementary legislation expands the state's punitive pretence in fields that exceed the systematic limits of the Penal Code.

3. As the first level (constitutional-penal system) is aimed at the axiology that will inspire the creation and interpretation of the content of the rules of conduct, as well as determining the rules of imputation,² it is first and foremost identified with the list of fundamental principles, which have already been analysed in other contributions. I will now move on to analyzing the second level of the system, outlined in the Penal Code, in its General and Special Parts.

C. GENERAL PART AND SPECIAL PART

Time and space

4. The General Part contains rules on the temporal and spatial scope of criminal law and the general rules of imputation and interpretation. The rules relating to time are concrete applications of the principle of legality.³ First and foremost, there is a prohibition on the retroactivity of criminal law, except to benefit the defendant. The Brazilian Code has exceptions to the rule that pro-

² See Lobo da Costa/Martins, Aspectos del Derecho y Proceso penales em la Constitución brasileña de 1988, in: Guzmán Dalbora (ed.), *El Derecho penal en la Constitución*, Santiago de Chile, 2021, p. 53 et seq.

³ See Kuhli/Bayon, The Principle of Legality in German Criminal Law. Legal framework, Historical Roots and Contemporary Challenges, in this issue.

hibits the retroactivity of criminal laws unfavourable to the defendant, in the form of temporary and exceptional laws (art. 3rd, Brazilian Penal Code). These exceptions are not provided for in the Federal Constitution, and as such, since they are an infra-constitutional limitation on a constitutional guarantee, they must be rejected.⁴

5. The time of the crime is determined by the moment of the conduct (art. 4th BPC), while the place of the crime follows the theory of ubiquity (place of the conduct, where the result occurred or should have occurred; art. 6th BPC). The rules relating to the area of application of Brazilian rules and jurisdiction are guided first and foremost by the concept of territory, which includes airspace and territorial sea, expanded according to the flag of public and private vessels and aircraft. Taking into account the principles of universal justice, active and passive personality, public interests and sovereignty, the field of application is extended to include cases of extraterritoriality. These rules must form part of the limits of the criminal offence itself.⁵

Imputation Rules

6. The General Part also contains rules relating to imputation. The first of the rules (art. 13, BPC) deals with the causal relationship and links the offence to the concept of result:⁶ which from the outset calls into question the possibility of merely normative results, without empirical support. The Brazilian Penal Code follows the condition theory. Article 13 also contains the only real rule of objective imputation, which excludes imputation in the event of supervening causes.⁷

4 See, as here, Zaffaroni/Batista/Alagia/Slokar, *Direito Penal Brasileiro I*, Rio de Janeiro, 2011, p. 216 et seq.; Luisi, *Os princípios constitucionais penais*, Porto Alegre, 1991, p. 23.

5 See Assis Toledo, *Princípios básicos de direito penal*, 5th ed., São Paulo, 1994, p. 45 et seq.; Fragoso, *Lições de direito penal*. Parte Geral, 9th ed., Rio de Janeiro, 1985, p. 112 et seq.

6 For details see Joffily, *O resultado como fundamento do injusto penal*, Florianópolis, 2016, p. 197 et seq.; Tavares, *Teoria do injusto penal*, 3rd ed., Belo Horizonte, 2003, p. 254 et seq.

7 See Cirino dos Santos, *Direito penal. Parte Geral*, 9th ed., São Paulo, 2020, p. 144 et seq.

7. The same article provides for the possibility of imputation by omission, strictly establishing its basis in the position of guarantor: (i) by legal determination, (ii) by the agent's own assumption of responsibility for preventing the result and (iii) by the deliberate creation of the risk of the result occurring by the agent's previous behaviour.⁸

8. The concepts of consummation and attempt are also delimited in the General Part (art. 14): in a consummated crime, all the elements of its legal definition are met, while in an attempt the crime, once it has begun, is not consummated due to circumstances beyond the agent's control. Every crime whose legal definition accepts, by its normative logic, the attempted construction is punishable as an attempt, which will always be subject to a penalty reduction of one to two thirds.⁹ The hypotheses of voluntary desistance and effective repentance are provided for (art. 15).

9. Definitely different from German criminal law, and just as in the Portuguese Penal Code, an improper attempt (known as an impossible crime) is not punishable in the cases defined by law as absolute ineffectiveness of the means or absolute impropriety of the object, to be defined *ex post*. This gives a clear objective slant to Brazilian criminal law, whose punishability of a conduct will never be justified exclusively by the devaluation of the action, but must demonstrate some feasibility of the concrete occurrence of the result.¹⁰ A parallel can be drawn, from this point on, with the option of not requiring a subjective element of justification to exclude the unlawfulness of the conduct by a relevant part of the doctrine.¹¹

10. The concept of intent is also defined in the General Part (art. 18), including will as an element of this concept and expressly adopting the theory

8 For a general theory of omission in Brazilian criminal law see Tavares, *Teoria dos crimes omissivos*, São Paulo, 2011, esp. p. 312 et seq.

9 See Biitencourt, *Tratado de direito penal*, vol. 1, 24th ed., São Paulo, 2018, p. 540 et seq.

10 See Zafaroni/Batista/Alagia/Slokar, *Direito penal brasileiro* II,II, Rio de Janeiro, 2017, p. 540 et seq.

11 See Tavares/Martins, *Fundamentos de teoria do delito*, 5th ed., São Paulo, 2025, p. 416 et seq.; Zaffaroni/Batista/Alagia/Slokar, *Direito penal brasileiro* II,II, Rio de Janeiro, 2017, p. 43 et seq.

of consent to define eventual intent (as in Portuguese law).¹² The punishment of a negligent offence (defined in an inconclusive way using the categories of negligence, recklessness and malpractice) requires express provision in the Penal Code.

11. The Penal Code differentiates between mistake of fact and mistake of law (*Tatbestandsirrtum* and *Verbotsirrtum*) and adopts the limited theory of culpability: errors about factual elements of causes of justification exclude intent, but can be punished as recklessness.¹³

12. Irresistible coercion and hierarchical obedience (art. 22) are foreseen, in an unsystematic way, as causes of exclusion of culpability, and as causes of exclusion of unlawfulness, the state of necessity, legitimate defence, strict compliance with legal duty and the regular exercise of rights. There is no express rule about the victim's consent in Brazilian criminal law (unlike Portuguese and German law).¹⁴

13. The legislator does not expressly differentiate between justifying and exculpating states of necessity. As a result, part of the doctrine adopts the unitary theory of the state of necessity,¹⁵ and another part adopts differentiating theories, sometimes requiring that the sacrificed interest be of lesser value than the one saved for the justifying state of necessity,¹⁶ sometimes requiring that the sacrificed and the saved interest being of equal value, leaving for the exculpating state of necessity only the hypothesis of scaring an interest of greater value than the interest saved.¹⁷ The hierarchy of interests (goods) is outlined according to the order of values defined in the

12 For details, see Tavares/Martins, *Fundamentos de teoria do delito*, 5th ed., São Paulo, 2025, p. 328 et seq. For another view, defending a purely cognitive concept of intent see Viana, *Dolo como compromisso cognitivo*, São Paulo, 2017.

13 See Busato, *Direito penal. Parte Geral*, 2nd ed., São Paulo, 2015, p. 619 et seq.; Bittencourt, *Tratado de direito penal*, vol. 1, 24th ed., São Paulo, 2018, p. 513 et seq.

14 For the recognition of lack of consent as a supra-legal justification in Brazilian criminal law, see Tavares/Martins, *Fundamentos de teoria do delito*, 5th ed., São Paulo, p. 322 et seq., 460 et seq.

15 Cirino dos Santos, *Direito penal. Parte Geral*, 9th ed., São Paulo, 2020, p. 254.

16 Fragoso, *Lições de direito penal. Parte Geral*, 5th ed., 1985, p. 195 et seq.

17 Assis Toledo, *Princípios básicos de direito penal*, 5th ed., São Paulo, 1994, p. 183.

Federal Constitution.¹⁸ The norm speaks only of reasonableness in assessing the sacrifice of a right.

14. Self-defence, in the face of unjust or imminent aggression against one's own rights or the rights of others, contains a clause of moderation in the use of appropriate means, which makes a supra-legal construction on an ethical basis unnecessary, even though such a construction could help give concrete form to the aforementioned clause.¹⁹ Excess in self-defence is punishable.

15. Mental incapacity (art. 26) arises from medical-psychological reasons when the agent, at the time of the action or omission, was entirely incapable of understanding the unlawful character of the fact or of determining himself in accordance with that understanding. The law also provides for reduced sentences when this capacity is diminished.²⁰

16. Individuals under the age of 18 are criminal unaccountable and are dealt with by specific legislation (the 1990 Statute of the Child and Adolescent, which provides for socio-educational measures for juvenile offenders).²¹

17. Emotion and passion, like drunkenness,²² do not exclude imputability (art. 28). Doctrine deals with the hypotheses of drunkenness based on the theory of *actio libera in causa*.²³

18. Problems related to the plurality of agents are treated ambiguously. The Penal Code seems to enshrine the unitary concept of perpetrator, defining

18 See Tavares/Martins, *Fundamentos de teoria do delito*, 5th ed., São Paulo, 2025, p. 427; Lobo da Costa/Martins, Lobo da Costa/Martins, *Aspectos del Derecho y Proceso penales em la Constitución brasileña de 1988*, in: Guzmán Dalbora (ed.), *El Derecho penal en la Constitución*, Santiago de Chile, 2021, p. 57.

19 See Tavares/Martins, *Fundamentos de teoria do delito*, 5th ed., São Paulo, 2025, p. 439 et seq.; Karam/Martins/Zilio, "Lei Anticrime" (Lei 13.964/2019): impactos penais, *Revista Brasileira de Ciências Criminais*, vol. 181, vol. 21, p. 41 et seq.

20 For a comprehensive and historical analysis of the topic, see Gonçalves Ferraz, *Inimputáveis*, Belo Horizonte: D'Plácido, 2021, p. 53 et seq.

21 Ibid., p. 224 et seq.

22 Ibid., p. 399 et seq.; see also Zaffaroni/Batista/Alagia/Slokar, *Direito penal brasileiro* II,II, Rio de Janeiro, 2017, p. 292 et seq.

23 For a critical approach see Martins, *Reestruturação da culpabilidade*, São Paulo, 2024, p. 123 et seq.; Zaffaroni/Batista/Alagia/Slokar, *Direito penal brasileiro* II,II, Rio de Janeiro, 2017, p.310 et seq.

him as ‘anyone who contributes to the crime’, to be punished depending on his culpability. However, it makes a distinction between participation of lesser importance, which receives a lower penalty, and expressly adopts the theory of limited accessoriness, making it dependent on the offence being at least attempted to punish adjustment, determination or instigation and complicity. This enshrines the conceptual differentiation between authorship and participation, even though the Code does not assign them the necessary criminal consequences based on the different contents of the offence.²⁴ A rule that is also the subject of doctrinal dissent is that expressed in article 30, according to which the subjective circumstances are not transferred to the other participants in the crime, except when they are ‘elementary to the crime’. The only plausible interpretation of this expression is its identification with the legal definition (Tatbestand).²⁵

19. There is no provision for punishing legal persons in the Penal Code, but there is in complementary legislation, notably the Environmental Crimes Law.²⁶

Sanctions

20. The General Part also defines the penalties for offences (prison, rights’ restrictions, and fines), as well as a three-stage sentencing model.²⁷ The death penalty and life imprisonment are excluded by constitutional determination, as are cruel or degrading punishments (art. 5th, XLVII, Federal Constitution). The rules on the application of penalties and the circumstances that mitigate or aggravate them are laid down in great detail.

²⁴ See Batista, *Concurso de agentes*, 4th ed., Rio de Janeiro, 2008; Corrêa Camargo, *A teoria do concurso de pessoas*, São Paulo, 2018, p. 66 et seq.

²⁵ Another opinion is that of Bittencourt, *Tratado de direito penal*, vol. 1, 24th ed., São Paulo, 2018, p. 824. for whom “elementary to the crime” concerns exclusively basic crimes, but not qualified ones.

²⁶ For a critical analysis, see Cirino dos Santos, *Direito penal. Parte Geral*, 9th ed., São Paulo, 2020, p. 683 et seq.

²⁷ For details, see Roig, *Aplicação da pena*, 2nd ed., São Paulo, 2015, p. 28 et seq.; de Carvalho, *Penas e medidas de segurança no direito penal brasileiro*, 3th ed., São Paulo, 2020, p. 352 et seq.

21. The General Part also deals with the hypotheses of material and formal concurrence and continued offences. In the case of *aberratio ictus*, the Code adopts the theory – a minority in Germany – that the offence is punished as if the person against whom the action was directed had been hit.

22. The General Part of the Penal Code also provides for suspended sentences and conditional release during execution. It also regulates security measures (for offenders who cannot be held accountable for their acts) in an anachronistic way, providing for internment as the normal case. The so-called Anti-Compulsory-Internment Law (Law 10.216/2001) provided for a series of restrictions on the possibility of internment in asylums and thus modifies the principle orientation and rules of the Penal Code with regard to security measures. With enormous delay, these changes have been guiding decisions by the National Council of Justice regarding the application of security measures and determining the non-institutional treatment for offenders with mental illnesses (Resolução n. 487/2023, CNJ).

Norms of conduct and norms of sanction

23. Criminal behaviour is individually defined in the Special Part. Unlike previous Penal Codes, there is a clear individualistic approach. Crimes against the person (life, physical integrity and health, honour and freedom) are provided for first, followed by crimes against property, the organisation of work, intellectual property, the religious sentiment and respect for the dead, sexual dignity, the family, public safety (with emphasis on crimes of common danger and against public health), public peace, public faith, public administration and democratic institutions.

24. The Special Part also contains rules of interpretation – e.g. the concept of public officer in art. 328 – and rules on the application of the penalty, as well as specific causes of justification, such as the exclusion of the illegality of abortion carried out to save the life of the pregnant woman or

if the pregnancy is the result of rape, provided it is carried out by a doctor (art. 128).²⁸

25. Of all the sections, sexual offences are the ones that have undergone the most changes, as a result of recent one-off reforms and a systematic reform in 2009, which reoriented the concept of crimes against sexual morality (indicating a collectivist approach) towards the concept of crimes against sexual dignity (with an individual focus, disconnected from the idea of a public sexual morality, even though there are remnants in the legislation).²⁹ Among crimes against life, it is worth highlighting the inclusion of the crime of femicide, with the highest penalties in the Brazilian legal system (20 to 40 years in prison). The old national security legislation, of a complementary nature, was replaced in 2021, in the last section of the Penal Code, by the introduction of offences against democratic institutions.³⁰

D. COMPLEMENTARY LEGISLATION

26. On the third normative level, rules of conduct and penalties are also provided for in complementary legislation. This is another normative level, not because they are in specific laws, but because the rules for imputation and determining the penalty must also guide the application of these laws, unless they provide their own rules. This is the case, for example, with the aforementioned possibility of holding legal persons liable, provided for in environmental legislation (Law 9.605/1998).

27. In terms of practical importance, the most relevant special criminal law is the Law Against Drugs Possession and Traffic (Law 11.343/2006), which

28 For general aspects of the Special Part, see Fragoso, *Lições de direito penal. Parte Especial*, 8th ed., Rio de Janeiro, 1986, p. 14 et seq.

29 See Jorio, *Crimes sexuais*, Salvador, 2018, p. 25 et seq.

30 For a comprehensive analysis, see Batista/Borges, *Crimes contra o estado democrático de direito*, Rio de Janeiro, 2023.

differentiates between drug possession and drug trafficking, with the provision of various behaviours, ranging from transport to the free offers of narcotics.³¹ The Federal Supreme Court recently (2024) ruled on the non-criminal nature of the punishment for possession of cannabis, in a modest sign in the direction of decriminalising possession for personal use (RE 635.659/SP). Drug legislation is undoubtedly the legislation that most clearly contributes to penal selectivity in Brazil.

28. Also noteworthy is the Criminal Organisation Law (Law 12.850/2013), which punishes participation in a complex criminal enterprise, regardless of the actual commission of crimes. A criminal organisation is defined as an association of four or more people to commit crimes with a maximum penalty of more than four years or that are transnational in nature. The law provides for a series of specific conducts, such as financing and integrating the organisation, as well as relevant procedural rules, among which is the figure of plea bargaining, which previously did not exist in Brazilian criminal procedure.

29. An example of legislation that breaks with the normative structure of Brazilian criminal law is the Anti-Terrorism Law (Law 13.260) of 2016, which already provides for the punishment of preparatory acts in particular, but also includes the odd generic clause of any preparatory acts in Article 5, openly violating the principle of legality, but also the principles of imputation defined in the Penal Code relating to attempt and initiation of execution.

30. Money laundering is also the subject of a specific law (Law 9.613/1998) and in its current version (since 2012) does not contain an exhaustive list of prior offenses.³²

31 For a critical analysis, see de Carvalho, *A política criminal de drogas no Brasil*, 8th ed., São Paulo, p. 261 et seq.

32 For the many problematic issues regarding this topic in Brazilian criminal law, see Tavares/Martins, *Lavagem de capitais*, São Paulo, 2020.

E. CONCLUSIONS

31. The criminal law systems analysed have a similar structure, divided into three levels, demarcated by the prevalence of specific rules at each of these levels. The Brazilian criminal law system was taken as an example, pointing at times to similarities and differences with the Portuguese and German systems.

32. At the first level, within the constitutional order, general principles with a strong value charge prevail, defining the general orientation of the system.

33. At the second level, the Penal Code presents rules for the concretisation of principles (especially legality and culpability), jurisdictional competence, imputation and interpretative rules, the definition of penalties and a sentencing model, the substitution of prison by penal alternatives and rules of conduct and sanction.

34. On a third level, complementary to the Penal Code, there are rules linked to specific themes, whose compatibility with the general rules of imputation is constantly being tested.

35. This brief presentation was intended to demonstrate that there are reasons for understanding criminal law as a system of rules, even if they do not derive from a necessary logic of the norms, but rather from the organisation of the argumentative structure through which responsibility is attributed for the commission of crimes in a given temporal, spatial and social context.

36. The different systems compared show more coincidences than differences. In any case, the differences appear in the content of some rules, which can nevertheless be defined in the same conceptual context. In other words: the general and common structure is compatible with particular and differentiated content solutions.

THE LIFE OF CRIME – SYSTEM. COMMENTARY FROM THE GERMAN PERSPECTIVE

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I. INTRODUCTION

The system of Criminal Law is a topic that is dear to a German scholar's heart because German legal doctrine in general values an ordered structure, and German Criminal Law in particular is well known for its highly systematic approach. In his article on the Brazilian Criminal Law system, *Antonio Martins* has given an excellent overview on the system of Brazilian Criminal Law in general and the Brazilian Penal Code in particular. Instead of providing a comprehensive overview of the German Criminal Law system, this commentary wants to highlight three aspects of the presentation that are particularly interesting when comparing them with German law. The first concerns the levels of legislation that have been identified, the second is about the general part of the Criminal Code and the third concerns the Special Part of the Criminal Code.

II. THE LEVELS OF LEGISLATION

In Brazilian Law, there seem to be three levels of legislation that are relevant for Criminal Law purposes: Constitutional Law, the Penal Code and complementary penal legislation.² *Martins* has described the latter as „exceeding the

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² *Martins*, *The Life of Crime – System*, mn. 2 (in this issue).

systematic limits of the Penal Code³. Examples for complementary penal legislation are Drug Law and the Law of Criminal Organisations. In Brazil, it is justified to classify complementary penal legislation as being on a different normative level than the Penal Code because these laws depend on the imputation rules contained in the Penal Code.⁴ This distinguishes a Code from complementary legislation: the code contains both complete imputation rules and a list of criminal offences because its purpose is to cover a subject matter comprehensively, whereas complementary legislation can refer to a specific point only.

Complementary penal legislation is also common in Germany, but a German scholar would not consider it to be on a different “level” from the German Penal Code because both types of legislation are of equal normative value, and because there is already a lower level of regulation for minor offences and misdemeanours (*Ordnungswidrigkeiten*).⁵ And yet, complementary penal legislation in Germany is different from the German Penal Code. This is not only because it usually lacks rules on general concepts such as intent, but also because complementary penal legislation often follows a different normative system. Mostly, these rules have not been established for the purpose of criminal sanctioning, and, accordingly, the criminal sanction norm takes a backseat. Often, the laws follow a binormative structure in, first, prescribing which conduct is allowed and forbidden, and adding a sanction norm for violations of the conduct norm at the end.⁶ This difference has, indeed, led to an argument among norm theorists about the nature of conduct norms. While some scholars consider conduct norms that are referred to in criminal law sanction norms to be part of criminal law, others find them to be part of public law or private law.⁷

Accordingly, it could be useful to have a closer look at complementary penal legislation and treat it not as an annex to criminal law, but as a distinct system of penal norms. A not-exhaustive list of questions that could be explored further with regard to complementary penal law is:

- a) whether some of it can be regarded as a code and why/why not

3 Martins, *The Life of Crime – System*, mn. 2 (in this issue).

4 Martins, *The Life of Crime – System*, mn. 26 (in this issue).

5 Those are regulated in a separate code, the *Ordnungswidrigkeitengesetz* (Act on Regulatory Offences), and are considered to be punitive administrative law.

6 E.g. §§ 22, 23, 33 I KUG

7 See *Erb*, in *MitKo StGB*, 5th ed. 2024, Vol. 1, StGB Einleitung mn. 9.

- b) which concepts of the general part differ more often in complementary penal legislation and which do not and
- c) what structural differences mean for the application of the law, in particular of the general part of criminal law.

III. The General Part

The second point concerns the General Part of the Penal Code: The Brazilian and German Penal Code both start with a General Part which is followed by a Special Part. The structure of the General Parts is similar: They begin with the scope of criminal law and go on to the elements of crime in the order in which they are applied in a case-study. However, the order slightly differs: The Brazilian Penal Code integrates the attempt right after the provisions on the criminal conduct (so on act and omission), see Art. 14 Brazilian Criminal Code. This seems to be a more logical choice than the solution used in the German Penal Code, in which attempt is explained after the elements of crime and excuses based on mental health issues (§§ 22, 23 StGB).

Both Penal Codes choose to deal with participation after all the elements of crime have been defined,⁸ but, again, this order seems more fitting from the Brazilian point of view. If the Brazilian Penal Code favors a unitarian participation model, then the manner of participation is primarily relevant for the sanction, and it should be expected that these rules are regulated close to the rules on sanctions. If, however, the Penal Code favors a model of restrictive perpetration, like the German Penal Code in § 25 StGB, then it might be more convincing to place these rules in the *actus reus*. Another position in the Penal Code could have influenced the discussion about how to distinguish between different participation models:⁹ an inclusion after § 13 or 14 StGB would have shown a preference for an objective test, while a position after §§ 15, 16 StGB would have shown a preference for a subjective test. The current position gives nothing away, but stresses that the single perpetrator who con-

⁸ Art. 29 ff. Brazilian Criminal Code, §§ 25 ff. German Criminal Code.

⁹ For an overview of the discussion, see Scheinfeld, in *MüKo StGB*, 5th ed. 2024, Vol. 1, § 25 mn. 4 ff.

summates a crime is the norm.

Both Codes begin with the scope of the application of criminal law in a similar manner by explaining when and where the criminal law applies. This gives the impression that this is the only scope worth talking about. But this approach is wrong from a theoretical point of view: Each law has a personal scope (to whom does it apply?), a material scope (what does it prohibit/allow?), a spatial scope (where does it apply?) and a temporal scope (when does it apply?).¹⁰ These limits are, as was rightly pointed out by *Antonio Martins*,¹¹ part of the law. People can err about any of the limits of these scopes, but the common doctrine on mistake of facts and law generally focusses on the material and personal scope only.¹²

For the purpose of this project, it could be beneficial to take a broader perspective and start the discussion on the hypothesis that all scope limits are equal from a normative point of view. This enables

IV. The Special Part

A third comment on *Antonio Martins*' writing concerns the special part. We have heard that the Brazilian Penal Code is following an individualistic approach, putting crimes against persons first, followed by other crimes against individual interests. This particular order has been implemented first by the Brazilian Criminal Code of 1940.¹³

The German Criminal Code has an almost completely opposite structure: It begins with offences against the state like high treason and endangering democratic state under rule of law (treason, offences against constitutional organs, §§ 80–121 ff. StGB), then goes on to include offences against public order (terrorism, public unrest, hate speech crimes, counterfeiting of money, §§ 123–152c StGB) and crimes against prosecution and judicial institutions

¹⁰ Ermacora, ZÖR 1953, 101 (106 ff.); Gutzwiller FS Lampert, 1925, p. 162 (163). See Schneider *Die Verhaltensnorm im Internationalen Strafrecht*, 2011, pp. 68 ff. with further references.

¹¹ Martins, *The Life of Crime – System*, mn. 5 (in this issue).

¹² Schneider *Die Verhaltensnorm im Internationalen Strafrecht*, 2011, p. 82. For including spatial scope see Böse, FS Maiwald, 2010, S. 72; Neumann, FS Müller-Dietz, 2001, S. 604 f.

¹³ Decreto-Lei n° 2848. See also Mayrink da Costa *Revista da EMERJ*, 2001, v.4, n.16, p. 196.

such as false testimony and against religion (§§ 153–168 ff. StGB). It only then starts with crimes against persons (civil status, marriage and family, sexual self-determination, insult, violation of privacy of personal and private sphere, life, physical integrity, personal liberty, §§ 169–241a ff. StGB) and the large area of property crime in the broader sense, including theft, robbery, extortion, fraud and embezzlement (§§ 242–266b StGB), but also forgery of documents, offences in the state of insolvency, criminal self-interest and criminal damage (§§ 269–305a StGB). It then goes on to include crimes against the society in a more general sense, focusing on offences against competition in the economic area, offences constituting public danger like arson and dangerous driving, offences against environment and offences committed in public office (§§ 306–358 StGB).

This order that goes back to the initial version of the Code from 1871 is difficult to understand, even for German lawyers.¹⁴ If one assumes that the first offences named are those considered most important, it becomes clear that the German legal order is concerned with protecting the state and its institutions, even though murder is the most severe crime in German law, see § 212 f. StGB, as it is in Portuguese and Brazilian law, see Art. 131 f. Portuguese Criminal Code and Art. 121 f. Brazilian Criminal Code.¹⁵ The stability of the state takes precedence over the violation of individual interests. There is a certain logic to this order because individual guarantees would be pointless in a failed state. Moreover, Germany has suffered a lot of unrest in the 20th Century and might rate state stability higher than other countries. This reasoning might also explain why offences against the public peace are ranked second. Interestingly, this is one of the areas of Criminal law that is most often changed. Particularly § 130 StGB that prohibits certain types of hate speech against part of the population and denying the holocaust and other international crimes has been changed a lot in the past couple of years.¹⁶

If you look at the crimes against individual persons individually, the struc-

¹⁴ Weigend, *Einführung*, S. XXI, Beck-Texte StGB, 63th ed. 2024.

¹⁵ All three Codes have a provision for “voluntary homicide” first and second a qualified provision on homicide for more severe cases, see § 211 StGB, Art. 132 Portuguese Criminal Code, Art. 121 § 2 and 121A Brazilian Criminal Code.

¹⁶ For an overview, see, e.g., Stein/Schneider, in: *SK-StGB*, 10th ed. 2025, Vol. 3, § 130 mn. 1 ff.

ture does not follow the severity of the offence. Family-related offences such as not paying child support or the infamous incest offence¹⁷ are first, followed by sexual offences, protection of honor and privacy. The protection of life and physical integrity is set in the middle, then comes freedom and property. If one considers the most important rights to be protected first, the German legal order seems to value family, sexual integrity, honor and privacy more than life. This is baffling from a modern point of view, but there is actually some evidence that shows that these aspects play a prominent role in the German legal order:

Family is strongly protected in criminal procedure law, to the detriment of criminal prosecution, by a very extensive right of family members to refuse to testify (§ 52 StPO) and additional rules.¹⁸ There are also tax reductions for nuclear families and other benefits.¹⁹

Privacy is a constitutional right and also very strongly protected in German law. There is a core area of the private conduct of life that cannot be investigated.²⁰

Sexual integrity and honor are the odd elements out. However, it should be noted that sexual offences – an area of law which has seen many recent changes – were formerly linked to “honor” in that certain minor sexual offences could be prosecuted as insult (§ 185 StGB).²¹ This balance has shifted by putting more emphasis on sexual autonomy and less on the insulting aspect of such behavior. Moreover, sexual marital abuse was initially not criminally liable²², meaning that sexual offences were usually committed by a family outsider, thus attacking not only the individual, but also the family. Sexual abuse of a child is in any case a danger to family stability, even in

17 In 2008, the German Constitutional Court decided in a controversial decision that § 173(1) sent. 2 StGB, criminalizing sexual intercourse among natural siblings, was conform with Constitutional Law, BVerfG, decision of 26.02.2008 – 2 BvR 392/07, BVerfGE 120, 224.

18 E.g. § 61 StPO, § 97 I n. 1 StPO. See, in more detail, *Schneider*, *Strafprozessuale Ermittlungsmaßnahmen und Zeugnisverweigerungsrechte*, 2020, passim.

19 E.g. §§ 62 ff. EstG.

20 See § 100d StPO and its constitutional origin in Art. 2 I in conjunction with Art. 1 I GG, Di Fabio, in *Dürig/Herzog/Scholz GG Kommentar*, 108th ed. 2025, Vol. 1, GG Art. 2 I, mn. 151 ff., 157 ff.

21 Pörner, *NSrZ* 2021, p. 336, 338 f.

22 It is criminally liable since 1997, see Renzikowski, in *MüKo StGB*, 5th ed. 2025, Vol. 3, § 177 mn. 9.

caring and loving families. Therefore, one could argue that sexual offences and offences against honor were linked to family life and thus considered to be particularly important initially.

Although there might be some reasons for the structure of the Special Part of the German Criminal Code, it is open to discussion whether these reasons are still compelling in the 21st Century and if these reasons are good enough to explain the structure of the German Penal Code. If both Portugal and Brazil have chosen to begin the special part of their criminal codes with offences against life, one must question why Germany has not.

IV. CONCLUSION

Looking at the structure of a penal law system is helpful when one wants to discern the values of the respective legal order. However, a restructuring of legal codes rarely occurs. This is probably because lawyers who have grown up in a certain legal system tend to accept the system as normal and not see faults within it. A comparative approach helps in questioning the familiar legal order and allows to discuss criminal law from a structural point of view.

COMMENTARY
“THE LIFE OF CRIME – SYSTEM”

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I.- The current Portuguese Penal Code (PC) was enacted a few years after the restoration of democracy in Portugal, more precisely in 1982, by means of Decree-Law (DL) No. 400/82 of 23 September. Since its adoption, it has undergone numerous amendments, among which one of the most significant was the 1995 reform, introduced by DL No. 48/95 of 15 March.

II.- In the context of this study, it is important to emphasise that the new PC departed from the previous systematisation of criminal law, a break that becomes particularly evident when one compares the Special Part (SP), set out in Book Two, concerning specific offences, in both PCs.

III.- Indeed, the General Part (GP) preserved the fundamental principles, the defining provisions concerning criminally relevant acts, and the legal consequences of crime. It also maintained the framework for the choice and determination of penalties, the conditions governing the imposition of security measures,¹ and the provisions on offences subject to complaint, on private prosecutions, that is, prosecutions initiated by the victim, and on the extinction of criminal liability, though naturally with significant and, in some instances, substantial modifications.

IV.- The PC is a modern enactment that essentially follows the line of the preliminary drafts authored by Eduardo Correia. It exhibits consistency

¹ In Portuguese criminal law, “security measures,” understood as preventive measures or orders (e.g., hospital orders, treatment orders, etc.) imposed on offenders considered dangerous, irrespective of culpability, serve both to protect society from future offences and to address the offender’s condition.

between the principles of the rule of law and criminal law, and alignment between the legal rights it protects and the axiological values enshrined in the Constitution of the Portuguese Republic (CPR), with culpability serving as both the foundation and the maximum limit of punishment. In addition, the Code reflects a humanistic approach and demonstrates a tendency towards monism in criminal responses.²

V.- Thus, as noted above, the current PC has brought about a genuine revolution in the systematic classification of crimes. In particular, it opens the catalogue of offences with crimes against persons, which, in the view of the “father” of the PC, Eduardo Correia, places “man and his fundamental rights at the starting point of all law.”³

VI.- It is important to note, however, that over time the PC has been revised regarding to penalties for two main reasons. First, to provide for the liability of legal persons, who, as will be discussed below, have been subject to criminal responsibility for certain offences since 2007.⁴ Second, in relation to short-term imprisonment, a system of alternative penalties has been adopted, as evidenced, for example, by Articles 43 and 46, which respectively regulate the regimes of house arrest and the prohibition from exercising a profession, function, or activity.⁵

VII.- With regard to the PC, Title I encompasses crimes against persons. Articles 131 to 139 establish the various forms of criminal homicide, including simple,⁶ aggravated (with the aggravation technique

2 Costa, José de Faria, *Direito Penal*, Lisboa, Imprensa Nacional Casa da Moeda, 2018, p. 177.

3 Correia, Eduardo, “As Grandes Linhas da Reforma Penal” in *Jornadas de Direito Criminal—O Novo Código Penal Português e Legislação Complementar*, I, Lisbon, CEJ, 1983, p. 32.

4 Albuquerque, Paulo Pinto de, *Comentário do Código Penal à luz da Constituição da República Portuguesa e da Convenção Europeia dos Direitos do Homem*, 4th revised edition, Lisbon, Universidade Católica Editora, 2021, pp. 132 ff.

5 Albuquerque, Paulo Pinto de, *Comentário do Código Penal*, pp. 132 ff.

6 In the absence of aggravating or mitigating circumstances, the offence corresponds to “simple homicide.”

considered unprecedented among legal systems closest to the Portuguese one),⁷ privileged,⁸ and negligent, among others. This is followed by offences against intrauterine life, now regulated by Articles 140 and 141. Article 142 provides for non-punishable termination of pregnancy. The Code then addresses the protection of physical integrity, in its dual dimension of offences against the body and against health. The safeguarding of personal legal rights continues with the protection of freedom in its different forms, culminating in the protection of honour, privacy and other personal rights, this catalogue concluding with Article 201.

VIII.— Title II, concerning crimes against property, opens with a provision that defines certain expressions used in the subsequent articles as constitutive elements of specific offences, such as “minor value,” “breaking and entering,” and “forged keys,” among others. The PC then enumerates the offences of larceny, grand larceny, breach of trust,⁹ robbery, damage to property, and fraud, which may, depending on the circumstances expressly set out in the relevant provisions, be classified as semi-public offences¹⁰ (for example, where value is at stake, pursuant to Article 203), public offences¹¹ (where high value is involved, under Article 204(1) and (2)(a)), or private offences¹² (Article 207). Article 206(1) further provides for the extinction of proceedings in respect of certain public offences through restitution or reparation, thereby avoiding the prosecution of criminal cases which, according to some authors, are no longer justified from the standpoint of the need for punishment.¹³ In summary, this

7 Dias, Jorge de Figueiredo, “Art. 132.” in Dias, Jorge de Figueiredo (dir.), *Comentário Conimbricense ao Código Penal*, I, Coimbra, Coimbra Editora, 2012, pp. 49 ff.

8 The offence becomes “privileged homicide” where extenuating circumstances are present.

9 That is, “misappropriation” or “embezzlement” committed by individuals acting in a private capacity.

10 A category of offence that requires a victim’s complaint or report in order for the authorities to initiate criminal proceedings.

11 A category of offence whose proceedings can be initiated by the authorities without the involvement of a victim.

12 A category of offence in which criminal proceedings can only be initiated by the victim, who must be represented by a lawyer, because it’s a private prosecution.

13 Albuquerque, Paulo Pinto, *Código Penal português*, pp. 882 ff. Against this regime, see Vilela, Alexandra, «Revisitando o n.º 1 do artigo 206.º do Código Penal», in *Revista Julgar online*, September 2025, available at <https://julgar.pt/revisitando-o-n-o-1-do-artigo-206-o-do-codigo-penal/>.

Title encompasses not only crimes against property, but also crimes against assets in general, crimes against property rights, and, finally, crimes against the public sector or cooperatives aggravated by the status of the perpetrator. These are followed, in separate titles, by crimes against cultural identity and social integrity, crimes against life in society, and crimes against public order and tranquillity. Until 2014, the PC concluded with a title devoted to crimes against the State, including offences against State security, resistance, disobedience and false statements to public authorities, embezzlement, usurpation of functions, among many others. It is noteworthy that, in the previous PC, the Title on crimes against State security was the second of the SP, immediately after crimes against religion and offences committed through abuse of religious functions, a title which has since disappeared. This disappearance is explained by the fact that, since the entry into force of the CPR, Portugal has been a secular State and a guarantor of religious freedom, in accordance with Article 41 of the CPR.¹⁴

IX.- As noted above, prior to 2014, the PC concluded with the offences described in the previous point. However, as in other legal systems, the criminalisation of the mistreatment of companion animals became a subject of discussion in Portugal as well. Consequently, Law No. 69/2014 of 29 August introduced the offences of mistreatment and abandonment of companion animals into the PC, both of which have subsequently undergone amendments.

X.- The constitutionality of these offences is not undisputed, as it has been argued that they protect legal rights lacking explicit constitutional backing. For this reason, it cannot be said that these offences are fully established within the framework of the PC.¹⁵

14 On the subject of religious freedom, see Canotilho, J.J. Gomes e Moreira, Vital, *CRP – Constituição da República Portuguesa anotada*, 4th revised ed., Coimbra, Coimbra Editora, 2007, pp. 610 ff.

15 Regarding the discussion in the Constitutional Court on the issues addressed in the text, see, among others, rulings n.ºs 843/2022, of 20 September, 478/2024 of 20 June, and 148/2024 of 27 February, all available on the Court's website (<https://www.tribunalconstitucional.pt/tc/acordaos/20240148.html>). On this subject, see Valdágua, Maria da Conceição, «O crime de maus tratos a animais de companhia», in *RJLB*, Year 7, 2021, n.º 2, pp. 1139 ff.

XI.- From the perspective of *Nebenstrafrecht*, the Portuguese legislator has frequently regulated certain offences through extraordinary legislation, although some of these crimes are included in the PC. Examples include crimes against nature (Article 278) and violations of urban planning regulations (Article 278-A), among others.

XII.- It should be emphasised, however, that offences under *Nebenstrafrecht* are established in specific legislation and constitute exceptional cases. For example, economic offences are regulated by their own statute, namely DL No. 28/84 of 20 January. In addition to economic offences, this law also covers offences against public health.

XIII.- It should be noted that, in a similar manner to the previous example, tax offences are regulated under the General Framework for Tax Offences, approved by Law No. 15/2001 of 5 June. Both this law and the legislation on economic offences provide not only for criminal offences but also for *Ordnungswidrigkeit* and include specific provisions in both substantive criminal law and criminal procedure. Other statutes, such as the Securities Code, the General Regime for Credit Institutions and Financial Companies, and the Cybercrime Law, among many others, follow the same approach.

XIV.- Still with regard to the Portuguese criminal justice system, it is worth noting that the 1982 Penal Code did not initially provide for voluntary termination of pregnancy, a situation that changed a few years later with the enactment of Law No. 6/84 of 11 May.

XV.- It should also be noted that the offences of homicide at the victim's request¹⁶ (Article 134), incitement to suicide, and assisted suicide have been amended in order to comply with Law No. 22/2023 of 25 May, which establishes the legal framework for medically assisted death. These amendments, however, have not yet entered into force, as their application remains contingent upon the adoption of specific implementing regulations, pursuant to Article 34 of that law.

¹⁶ A form of homicide analogous to mercy killings.

XVI.- It is also worth noting that, in its original version, the 1982 PC did not provide for the criminal liability of legal persons, despite this having become a general principle in secondary criminal law. However, Law No. 59/2007 of 4 September now establishes that legal persons may be held liable for the offences provided for in Article 11(2), as amended. This provision also sets out the criteria for attributing criminal liability to legal persons, a framework that has not been without criticism within Portuguese legal scholarship.¹⁷

XVII.- It should also be noted that, following the approval of the National Anti-Corruption Strategy 2020–2024 by the Portuguese Government, the PC introduced the possibility of mitigating or granting exemptions from penalties for certain offences, including money laundering (Article 368-A), specific corruption offences (Article 374-B), and embezzlement (Article 377-A), among others, provided that the defendant cooperates with the investigation. This measure was likewise extended to *Ordnungswidrigkeit* and, in my view, remains a matter of debate.¹⁸ Previously, exemption from punishment could be granted only in cases of minor offences, characterised by reduced wrongfulness and culpability, provided that the harm has been remedied and requirements of prevention have not been compromised, in accordance with Article 74.

XVIII.- In conclusion, the PC has undergone numerous amendments, some of which appear of doubtful necessity.¹⁹ Nevertheless, it remains a PC that can be characterised as modern.

17 For a study on the attribution of criminal liability to legal persons, see Silva, Germano Marques da, *Responsabilidade penal das sociedades e dos seus administradores e representantes*, Lisbon, Verbo, 2009. See also, for an analysis of the current regime, Paulo Pinto de Albuquerque's commentary on Article 11 PC, at Albuquerque, Paulo Pinto, *Código Penal português*, cited above.

18 In this regard, see Vilela, Alexandra, in “A Directiva (UE) 2019/1937 do Parlamento Europeu e do Conselho, de 23 de Outubro de 2019, relativa à proteção das pessoas que denunciam violações do direito da união e a estratégia nacional de combate à corrupção. Inquietações a propósito do designado ‘direito premial’ no âmbito do direito penal”, in *ULP Law Review*, vol. 14, n.º 1, 2020, p. 189 ff., available at <https://revistas.ulusofona.pt/index.php/rfdulp/issue/view/769>.

19 In the text, reference is made, for example, to the successive, unnecessary, and at times erratic amendments to Articles 132 and 152, concerning aggravated homicide and domestic violence, respectively.

III. STRUCTURE

THE LIFE OF THE CRIMINAL OFFENCE — STRUCTURE

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This article aims to examine the structure of the criminal offence. However, speaking in such general terms, this proves to be a task that cannot be accomplished on some pages. The reason is that “the criminal offence” as such does not actually exist. Rather, there are many different types of criminal offences each of which is characterised by its own distinct structure. Just for example, the types of the offence differ in terms of whether they require success or merely an action, whether the protected legal interest must be violated or only endangered and what degree of danger must be reached, whether they are realised through action or omission, require intent or negligence, are completed or only attempted, can be accomplished by anyone or only by specific perpetrators¹. For the purpose of understanding the basic structure of criminal offences, it makes however sense to start from the intentional and completed result-oriented offence – the so-called “Erfolgssdelikt” – which can be regarded a kind of basic form of the offence.² Therefore, my following remarks apply in principle to the structure of this intentional, completed result-oriented offence in the German criminal law system.

As it is customary for the structure of offences in the continental European legal area, also the offence in the German criminal law system comprises, according to the prevailing opinion, three levels of requirements for criminal liability, namely the level of the elements of the offence, the level of unlawfulness or illegality and finally the level of guilt.³

1 For a classification of offences by type, see e.g. *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 10.

2 Cf. *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 12 para. 1.

3 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 12 paras. 1–6; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 133 et seqq.; *Heger*, in: *Lackner/Kühl/Heger* (eds.), *StGB*, 31st ed. 2025, preliminary remarks regarding § 13 para. 6; *Paeffgen/Zabel*, in: *Kindhäuser/Neumann/Paeffgen/Saliger* (eds.), *StGB*, 6th ed. 2023, preliminary remarks regarding § 32 para. 6.

I. THE ELEMENTS OF THE OFFENCE

The elements of the offence that constitute the first and basic level of requirements for criminal liability can be subdivided into objective elements on the one hand which make up the so called “actus reus” and subjective elements on the other hand which constitute the so called “mens rea”.⁴ The function of both is to describe conduct that is typically unlawful and is typically deemed to be a punishable wrong.⁵

1. OBJECTIVE ELEMENTS OF THE OFFENCE (ACTUS REUS)

The objective elements describe the external circumstances that are constitutive for the offence.⁶ Accordingly, a strictly necessary objective element of the offence is its subject, i.e. the perpetrator. In the standard case of so-called “everyman offences” or “Jedermannsdelikte” the perpetrator can be anyone⁷. Only in the case of so-called “special offences” or “Sonderdelikte” does the quality of the perpetrator require special characteristics such as, for example, the status of a public official.⁸ In addition to the subject of the offence, also the criminal act performed by this subject constitutes a necessary element of any offence and in the case of result-oriented offences, the result or outcome of this criminal act, consisting of an adverse change to the legal interest protected,⁹ must of course as well be specified.

4 See *Freund/Rostalski*, in: *Münchener Kommentar zum StGB*, Vol. 1, 5th ed. 2024, preliminary remarks regarding § 13 para. 121.

5 *Rönnau*, JuS 2021, 499, 500; cf. *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 8 para. 1, § 9 para. 1.

6 *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 199; *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 9 para. 2; for an overview of the necessary or typical objective elements of offences referred to in the following see *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 9 para. 3.

7 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 10 para. 24; *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 8 para. 16.

8 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 10 para. 25; *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 8 para. 16; *Schittenhelm*, in: *Tübinger Kommentar StGB*, 31st ed. 2025, preliminary remarks regarding § 324 para. 31.

9 *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 10 para. 3.

In addition to these typically written necessary objective prerequisites, any result-oriented offence also requires, as an unwritten element, a link between the perpetrator's conduct and the result of this conduct. This link between action and result is not limited to a causal link in the sense of a naturalistic causal connection, but is supplemented by the requirement of the objective imputability or objective attribution of the offence's result to the perpetrator's conduct.¹⁰ This objective attribution or imputability is only given if two conditions are fulfilled. First, the offender must cause a legally disapproved danger for the legal interest or legal good protected by the offence in question. Second, precisely this danger created by the perpetrator must materialise in the result of the offence, and not any other danger or merely the general risk of life.¹¹

The necessary objective elements of the result-oriented offence – its subject, the subject's conduct, the result of this conduct, the causal link between the conduct and the result and the objective imputability of the latter – can be supplemented by further objective elements of the offence. Such additional elements are linked in particular to special ways of committing the offence or they specifically describe the means or the object thereof.¹² For example, treacherous murder pursuant to Section 211 para. 2 group 2 variant 1 of the German Criminal Code requires not only the killing of a person, but the killing of a person in a perfidious manner, dangerous bodily harm pursuant to Section 224 para. 1 No. 2 variant 2 of the German Criminal Code requires the causation of bodily harm not in any way, but specifically by using a weapon or a dangerous tool, and the offence of theft pursuant to Section 242 of the German Criminal Code requires not only the breaking of another person's custody of any object, but specifically of another person's movable property.

Finally, the necessary written and unwritten as well as the complementary written objective elements of the offence can be further supplemented by unwritten objective elements that are not expressly mentioned in the

10 Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 222 et seqq.; Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 13 para. 2; Kühl, *Strafrecht Allgemeiner Teil*, 8th ed. 2017, § 4 para. 4; see *Hardtung*, in: *Münchener Kommentar zum StGB*, Vol. 4, 5th ed. 2025, § 223 para. 46.

11 Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 259; Kühl, *Strafrecht Allgemeiner Teil*, 8th ed. 2017, § 4 para. 43; Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 13 para. 46.

12 See Kindhäuser/Zimmermann, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, para. 3.

respective statutory offence itself but are generally recognised, such as, for example, the disposition of assets in the case of fraud under Section 263 of the German Criminal Code.¹³

All of these objective elements of the offence can in principle be descriptive or normative.¹⁴ They are considered descriptive if they refer to natural characteristics that can be determined through sensory perception without requiring any further legal or social evaluation.¹⁵ The meaning of normative elements of the offence, on the other hand, cannot be grasped by sensory perception only without a supplementary legal or social assessment.¹⁶ For example, the term “takes” derived from the verb “to take” in the offence of theft under Section 242 para. 1 of the German Criminal Code is generally deemed to designate a descriptive element,¹⁷ whereas the expression “belonging to another” in the same offence is deemed to constitute a normative element.¹⁸ However, this distinction should be treated with caution, because ultimately every element of an offence also requires a legal assessment. An excellent example of this is the term “person” which is used in Section 212 of the German Criminal Code in the sense of “human being”. Generally, it is considered to designate a descriptive element of the offence of murder.¹⁹ However, when humanity begins and when it ends is actually not a question purely of fact, but a question linked to complex medical and biological, but also social, ethical and legal assessments which are not at all made uniformly.²⁰

13 BGH, judgment of 11.03.1960, 4 StR 588/59 with further references; *Kindhäuser/Hoven*, in: *Kindhäuser/Neumann/Paeffgen/Saliger* (eds.), StGB, 6th ed. 2023, § 263 para. 195; *Hefendehl*, in: *Münchener Kommentar zum StGB*, Vol. 5, 5th ed. 2025, § 263 para. 439 with further references.

14 See *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 196 et seqq.; *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 9 paras. 9 et seqq.; *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 paras. 10 et seqq.

15 *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 9 para. 10.

16 cf. *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 9 para. 11; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 197.

17 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 para. 11.

18 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 para. 12; *Wittig*, in: *BeckOK-StGB*, 66th ed., stand: 01.08.2025, § 242 para. 6.

19 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 para. 11.

20 See *Sternberg-Lieben/Steinberg*, in: *Tübinger Kommentar StGB*, 31st ed. 2025, § 212 paras. 7 et seqq.; *Neumann*, in: *Kindhäuser/Neumann/Paeffgen/Saliger* (eds.), StGB, 6th ed. 2023, preliminary remarks regarding §§ 211–217 paras. 6 et seqq.

2. SUBJECTIVE ELEMENTS OF THE OFFENCE (*MENS REA*)

The certainly difficult question of whether the objective elements of the offence are descriptive or normative is not of a purely academic nature. Rather, this classification has a concrete effect on the requirements for the respective subjective elements of the offence.

In general, these subjective elements refer to the inner attitude, mindset and thoughts of the perpetrator, i.e. they describe his or her ideas, intentions and motives.²¹ Put concretely, the “prototype” intentional, completed result-oriented offence, which we want to focus on here, requires as a basic and necessary subjective element intent with regard to all objective elements of the offence.²² In addition, there may be special subjective elements which, like intent, shape the unlawful character of the offender’s conduct, but, unlike intent, have no objective reference point. They rather go beyond the objective elements of the offence, which is why we also refer to them as excessive internal tendencies.²³ These include, for example, the intention of obtaining an unlawful pecuniary benefit for oneself or a third party in the case of fraud pursuant to Section 263 of the German Criminal Code or the intention of unlawfully appropriating movable property belonging to another in the case of theft pursuant to Section 242 of the German Criminal Code.

In contrast to these special subjective elements, which all have individual and specific prerequisites, the meaning of the general intent requirement can be defined uniformly at the outset. Briefly and roughly, intent can be described as knowledge and intention or will regarding the factual circumstances relevant to the objective elements of the offence.²⁴ In the case of intent with regard to normative elements of the offence,

21 Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 para. 16.

22 Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 14 para. 2; see Section 15 German Criminal Code.

23 Kindhäuser/Zimmermann, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 13 para. 14; Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 16 para. 2; see Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 204.

24 See e.g. BGHSt 19, 295, 298; BGHSt 36, 1, 9 et seq.; on the dispute concerning the necessity of the element of will required at least by the German Federal Court of Justice and a significant part of the literature in addition to the element of knowledge, see Sternberg-Lieben/Sternberg-Lieben, JuS 2012, 976, 976; Kindhäuser/Zimmermann, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 13 para. 6.

the knowledge element also requires, in addition to the knowledge of the factual circumstances, that the offender correctly grasps the legal-social meaning of the respective normative element in the manner of a layman. This requirement is referred to as parallel assessment in the layman's sphere.²⁵

Finally, a strict distinction must be made between the criminal intent described so far which forms the mens rea of the offence or its subjective elements, on the one hand, and intent as a form of guilt, on the other hand, that only becomes relevant at the level of guilt.²⁶ Intent as mens rea reflects the legal and social meaning of the perpetrator's act, describing his or her psychological relationship to the external circumstances relevant to the offence. It thus answers the question of whether the intention of the perpetrator was directed towards realising the objective elements of the offence and whether he or she knew that his or her conduct would have this said effect.²⁷ In contrast, intent as a form of culpability or guilt concerns the question of why the perpetrator has acted contrary to the requirements of the law and whether his or her decision to act was based on a legally reprehensible attitude that contradicts the values of the legal order.²⁸ Intentional guilt, which is relevant to the intentional completed result-oriented offence we focus on here, is assumed if the perpetrator has shown a hostile or indifferent attitude towards the behavioural requirements of the law. Accordingly, in contrast to criminal intent as mens rea, intent as a form of guilt is not an element of wrongdoing, but rather the bearer of a wrongful attitude.²⁹

25 Kindhäuser/Zimmermann, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 27 paras. 28 et seqq.; more in detail see Schulz, in: *Festschrift für Günter Bemmman zum 70. Geburtstag*, 246 et seqq.

26 Cf. in this regard Puppe, in: Kindhäuser/Neumann/Paeffgen/Saliger (eds.), *StGB*, 6th ed. 2023, § 15 paras. 1 et seqq.; Heger, in: Lackner/Kühl/Heger (eds.), *StGB*, 31st ed. 2025, § 15 paras. 31 et seqq.; Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 207 et seqq.

27 Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 209 et seq.

28 Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 210.

29 Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 209.

II. OBJECTIVE CONDITIONS FOR CRIMINAL LIABILITY

In addition to the objective and subjective elements of the offence, some offences include so-called objective conditions for criminal liability.³⁰ An example is Section 231 German Criminal Code which requires the purely objective causation of death or serious bodily injury within the meaning of Section 226 German Criminal Code in order to establish criminal liability for participation in a brawl.³¹ With regard to such purely objective conditions for criminal liability, neither intent nor negligence is required.³² As this leads to tensions with the principle of culpability,³³ the constitutionality of objective conditions for criminal liability is sometimes called into question.³⁴

III. UNLAWFULNESS

1. GENERAL MEANING AND PRINCIPLES

If a conduct fulfils the objective and subjective elements of an offence, this conduct is deemed to be typically unlawful because it interferes with a legal interest or – in terms of normative theory – because it violates a behavioural norm, i.e. a non-criminal law which commands or prohibits a conduct.³⁵ However, this does not yet answer the question of whether such conduct

30 Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 para. 15; Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 213 et seqq.

31 BGH, judgment of 24.08.1993, 1 StR 380/93; Hohmann, in: *Münchener Kommentar zum StGB*, Vol. 4, 5th ed. 2025, § 231 para. 23 with further references.

32 Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 para. 15; cf. Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 213.

33 Rengier, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 8 para. 15.

34 On the respective discussion see Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 215; Eisele, in: *Tübinger Kommentar StGB*, 31st ed. 2025, preliminary remarks regarding § 13 para. 125.

35 Renzikowski, in: Matt/Renzikowski (eds.), *StGB*, 2nd ed. 2020, preliminary remarks regarding § 13, para. 39.

is actually and finally to be considered unlawful in the concrete case and against the background of the overall legal order or whether it is rather even approved by law due to the special circumstances of the individual case. This question is only answered at the level of unlawfulness.³⁶

According to the prevailing dogmatic understanding, only if not only the elements of the offence are given, but also the unlawfulness of the perpetrator's conduct is affirmed, it is definite that this conduct contradicts the legal order as a whole³⁷ and is therefore actually and finally to be considered unlawful.³⁸ By contrast, if only the elements of the offence are given, but the unlawfulness of the perpetrator's conduct cannot be affirmed, this conduct is definitely and finally considered to be in line with the overall legal order.³⁹

In finally deciding on the question of lawfulness or unlawfulness, the relevant standard is whether special permissive norms, so-called grounds for justification, exceptionally apply in the concrete case.⁴⁰ Based on the principle of the unity of the legal system, these grounds for justification can be derived from any area of law.⁴¹ Thus, according to the prevailing understanding, the fulfilment of the elements of the offence only leads to an assessment of the conduct in question as typically unlawful, but the fulfilment of the elements of the grounds for justification can still lead to a revision of this preliminary assessment because only at this stage the concrete individual conduct is evaluated against the background of the legal system

36 See *Kindhäuser/Zimmermann*, Strafrecht Allgemeiner Teil, 11th ed. 2024, § 15 para. 1; *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 17 para. 1; *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, paras. 395, 397; *Duttge*, in: Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag, 2006, pp. 179, 186.

37 *Heger*, in: Lackner/Kühl/Heger (eds.), StGB, 31st ed. 2025, preliminary remarks regarding § 13 para. 16.

38 *Duttge*, in: Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag, 2006, pp. 179, 186; *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 395; *Kühl*, Strafrecht Allgemeiner Teil, 8th ed. 2017, § 6 paras. 3, 6.

39 *Duttge*, in: Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag, 2006, pp. 179, 186; *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 17 para. 1.

40 *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 397; *Kindhäuser/Zimmermann*, Strafrecht Allgemeiner Teil, 11th ed. 2024, § 15 para. 1; *Sternberg-Lieben*, in: Tübinger Kommentar StGB, 31st ed. 2025, preliminary remarks regarding §§ 32 et seqq. para. 4.

41 *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 17 para. 3; *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 400.

as a whole.⁴² In short, a conduct that constitutes an offence in the sense of fulfilling the elements of the offence is typically unlawful unless it can be subsumed under the requirements of a ground for justification. In this sense, it is also said that the fulfilment of the elements of the offence generally indicates unlawfulness.⁴³

2. EXCEPTION: OFFENCES WITHOUT PRELIMINARY ASSESSMENT OF UNLAWFULNESS BY THE ELEMENTS OF THE OFFENCE (“OFFENE TATBESTÄNDE”)

The situation is however different with so-called “open offences” or “offene Tatbestände”, such as, for example, the offence of coercion under Section 240 German Criminal Code.⁴⁴ These “open offences” are so broadly defined that they are often also fulfilled by behaviour which is completely socially acceptable.⁴⁵ Accordingly, a conduct that fulfils the elements of an “open offence” is not typically unlawful against the background of the legal order as a whole. Whether it is unlawful in this comprehensive sense must rather be examined and determined separately for each individual case without the fulfilment of the constituent elements of the offence having any indicative value in this regard.⁴⁶ For this reason, “open offences” contain so-called “reprehensibility clauses” or “Verwerflichkeitsklauseln”.⁴⁷ According to these, a conduct that fulfils the elements of the offence is only to be deemed unlawful if it is reprehensible. The legally reprehensible aspect can however not

42 Kühl, *Strafrecht Allgemeiner Teil*, 8th ed. 2017, § 6 paras. 6 et seq.; Paeffgen/Zabel, in: Kindhäuser/Neumann/Paeffgen/Saliger (eds.), *StGB*, 6th ed. 2023, preliminary remarks regarding §§ 32 et seqq. para. 15.

43 Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 395; Kühl, *Strafrecht Allgemeiner Teil*, 8th ed. 2017, § 6 para. 2; critically e.g. Kindhäuser/Zimmermann, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 8 para. 5.

44 See Valerius, in: BeckOK-StGB, 66th ed., stand: 01.08.2025, § 240 paras. 45, 49; Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 396.

45 Cf. Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 396; Eidam, in: Matt/Renzikowski (eds.), *StGB*, 2nd ed. 2020, § 240 para. 57; Valerius, in: BeckOK-StGB, 66th ed., stand: 01.08.2025, § 240 para. 44.

46 Wessels/Beulke/Satzger, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 396.

47 See Toepel, in: Kindhäuser/Neumann/Paeffgen/Saliger (eds.), *StGB*, 6th ed. 2023, § 240 para. 137; Rengier, *Strafrecht Besonderer Teil II*, 26th ed. 2025, § 23 para. 57.

be found unilaterally in the means employed or in the intended purpose, but rather only in the relationship between the means and the purpose.⁴⁸ This relationship between means and purpose must be assessed on the basis of a comprehensive evaluation, taking into account all the circumstances of the individual case.⁴⁹ Of particular importance in this regard is, *inter alia*, whether the means and the purpose pursued are contextually and intrinsically linked.⁵⁰ However, also “open offences” require first that the conduct in question is not covered by a ground for justification. If this is the case, it is clear from the outset that the conduct is in line with the legal system as a whole in the specific individual case and, therefore, cannot be reprehensible.⁵¹ Consequently, the grounds for justification are relevant for the assessment of the unlawfulness of a conduct with regard to all offences without exception. It is therefore worth making a few further fundamental comments on them and in particular on their basic structure.

3. GROUNDS FOR JUSTIFICATION

As norms in favour of the perpetrator, the grounds for justification can be written or unwritten.⁵² In view of the legal system’s unity, they can, as said, in principle originate from any area of law, including civil law or public law, because a conduct that is approved by the legal system cannot be punishable.⁵³

The legitimising basis of the grounds for justification are various elementary principles, such as, for example, the principle of protection of the legal

48 BGH, decision of 18.03.1952, GSSt 2/51 = BGHSt 2, 194, 196; *Eidam*, in: Matt/Renzikowski (eds.), StGB, 2nd ed. 2020, § 240 para. 61; *Valerius*, in: BeckOK-StGB, 66th ed., stand: 01.08.2025, § 240 para. 47.

49 *Sinn*, in: Münchener Kommentar zum StGB, Vol. 4, 5th ed. 2025, § 240 para. 124 with further references.

50 Cf. *Rengier*, Strafrecht Besonderer Teil II, 26th ed. 2025, § 23 para. 62; *Sinn*, in: Münchener Kommentar zum StGB, Vol. 4, 5th ed. 2025, § 240 para. 124.

51 *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 396.

52 *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 17 para. 3; *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, paras. 401 et seq.

53 *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 17 para. 3; *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 400.

interests or goods of the perpetrator himself or herself or of other individuals as well as the principle of defending or upholding the legal order as such in the case of self-defense according to Section 32 German Criminal Code⁵⁴ or the principle of balancing interests in the case of necessity according to Section 34 German Criminal Code,⁵⁵ Consent of the bearer of the legal interest, which constitutes an unwritten ground for justification, is even founded on a constitutional basis, namely on the right to self-determination pursuant to Article 2 of the German Constitution.⁵⁶

If, in accordance with these principles, a conduct is not to be considered as a wrong despite fulfilling the elements of an offence and is therefore approved of by the legal system in the concrete case, the perpetrator is exceptionally authorised to impair the legal interest protected by the offence. His or her conduct is thus justified in the individual case at hand. This authority of the offender to impair the protected legal interest corresponds to the victim's obligation to tolerate the respective impairment.⁵⁷ The victim must endure the encroachment on his or her legally protected interests by the offender precisely because the offender's conduct is in line with the legal system as a whole due to elementary evaluations and principles of law and despite the fact that it fulfils the elements of an offence.

In parallel to the elements of the offence, the elements of the grounds for justification are also divided into objective and subjective ones.⁵⁸ The fulfilment of the objective elements of a ground for justification compensates for the *actus reus* and thus cancels out the objective wrong which is reflected in the offence's result. The subjective element of a ground for justification, on the other hand, compensates for the *mens rea* and thus eliminates the subjective wrong which is realised by the offender's conduct.⁵⁹

54 *Perron/Eisele*, in: *Tübinger Kommentar StGB*, 31st ed. 2025, § 32 paras. 1 et seq. with further references.

55 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 19 para. 1.

56 *Kühl*, *Strafrecht Allgemeiner Teil*, 8th ed. 2017, § 9 para. 20 with further references.

57 *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 15 para. 2; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 398.

58 *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 410; *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 17 para. 9.

59 See *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 17 para. 9 with further references.

Which specific requirements the subjective element of a ground for justification poses is however controversial.⁶⁰ In any case, the offender must have knowledge of the circumstances that constitute the objective elements of the ground for justification in question.⁶¹ However, it is not uniformly assessed whether, in parallel to the element of will which supplements the element of knowledge of the mens rea requirement, justification also requires that the offender must specifically be motivated by the will to fulfil the objective elements of a ground for justification, for example by a will in the sense of a specific intention to defend oneself in the case of self-defence under Section 32 German Criminal Code. While part of the literature negates the necessity of such an element of will as part of the subjective element of a ground for justification due to the otherwise given proximity to the so-called “Gesinnungsstrafrecht” which imposes a penalty not according to the principle of culpability, but only on grounds of the offender’s reprehensible attitude,⁶² the German Federal Court of Justice and a considerable part of the literature require that the justifying circumstances must not only be known to the perpetrator, but must also be reflected in his or her motive for action.⁶³ This view is supported not only by the wording of the written grounds for justification, but also by the argument that without an element of intent at the level of justification the intent element of the subjective elements of the offence would not be compensated.⁶⁴

Likewise disputed as the necessity of an element of will as part of the subjective element of a ground for justification are the consequences of the absence of the subjective element of a ground for justification as such. Courts and part of the literature want to punish the offender who only fulfils the objective, but not the subjective elements of a ground for justification for a completed offence. They argue that in such cases the offender has not fulfilled

60 On this, see *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 18 paras. 103 et seqq.; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 411 et seqq.

61 *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 15 para. 9.

62 E.g. *Erb*, in: *Münchener Kommentar zum StGB*, Vol. 1, 5th ed. 2024, § 32 para. 251 with further references.

63 E.g. BGH, judgment of 25.10.2010, 1 StR 57/10; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 413; *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 18 para. 108 with further references.

64 *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 18 para. 108.

all the requirements for justification and that therefore the realisation of the elements of the offence cannot be regarded as compensated.⁶⁵ This is opposed by another considerable part of the literature according to which the fulfilment of the objective elements of a ground for justification compensates for the actus reus, but in the absence of the subjective element of the respective ground for justification, the mens rea remains. This corresponds to the constellation of an attempt, the unlawfulness of which is essentially constituted by the mens rea.⁶⁶

IV. INTERIM CONCLUSION: FINAL JUDGEMENT OF UNLAWFULNESS BASED ON THE ELEMENTS OF THE OFFENCE (LEVEL 1) AND THE GENERAL ASSESSMENT OF UNLAWFULNESS AGAINST THE BACKGROUND OF THE LEGAL ORDER AS A WHOLE IN THE CONCRETE CASE (LEVEL 2)

In summary, we can conclude that, according to the prevailing view, the elements of the offence describe a typically unlawful conduct that is however nonetheless approved of by the legal system as a whole in exceptional cases in which the requirements of a ground for justification are given. If, on the other hand, a conduct fulfils the elements of the offence, but does not fulfil the elements of a ground for justification, it is definitively and finally established that this conduct is unlawful and is disapproved of by the legal system.⁶⁷

V. GUILT

It remains the level of guilt. At this level, it is no longer in question whether the offender's conduct was unlawful. Rather, the level of guilt concerns the

⁶⁵ E.g. BGHSt 2, 111, 114; *Paeffgen/Zabel*, in: Kindhäuser/Neumann/Paeffgen/Saliger (eds.), StGB, 6th ed. 2023, preliminary remarks regarding §§ 32 et seqq. para. 128 with further references.

⁶⁶ E.g. *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 417; *Kühl*, Strafrecht Allgemeiner Teil, 8th ed. 2017, § 6 paras. 14 et seqq.; *Sternberg-Lieben*, in: Tübinger Kommentar StGB, 31st ed. 2025, preliminary remarks regarding §§ 32 et seqq. para. 22 – all with further references.

⁶⁷ See again e.g. *Kühl*, Strafrecht Allgemeiner Teil, 8th ed. 2017, § 6 paras. 1 et seqq.; *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, paras. 395, 397; *Duttge*, in: Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag, 2006, pp. 179, 186.

different question of whether the offender can be individually blamed for his or her unlawful conduct.⁶⁸ Accordingly, guilt is understood as blameworthiness. With the negative judgement of guilt, the perpetrator is accused of not having behaved lawfully, of having chosen wrongdoing even though he could have behaved lawfully and chosen rightdoing.⁶⁹ Only in this case, punishment can be justified on the basis of the principle of culpability⁷⁰ as it is not only enshrined in Section 46 and Section 29 of the German Criminal Code,⁷¹ but also in the constitutional guarantee of human dignity, making part, therewith, of the unalterable constitutional identity.⁷² Therefore, if the offender, for specific reasons, could not possibly have acted in accordance with the law, can therefore not be blamed for his or her unlawful conduct and thus not be accused of having acted culpably, the law disapproves of his or her conduct as socially harmful and unlawful, but does not impose a penalty. Accordingly, under Sections 26 and 27 of the German Criminal Code, it is possible to participate in an unlawful offence that has not been committed culpably because such an offence regards a conduct which is objectively disapproved of by the law. On the other hand, however, participation in an offence that is covered by a ground for justification and is, therefore, not unlawful, is not possible.⁷³

As a rule, the law assumes that the offender acts fully culpably, unless exceptions that exclude or mitigate his or her culpability apply in the concrete case.⁷⁴ To name it, according to the German Criminal Code, the offender is not culpable if he or she is under 14 years of age at the time of the commission of the offence (Section 19), is incapable of appreciating the unlawfulness of his or her actions or of acting in accordance with any such appreciation

68 *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 621; *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 24 para. 1.

69 BGH, decision of 18.03.1952, GSSt 2/51 = BGHSt 2, 194, 200.

70 See BGH, decision of 18.03.1952, GSSt 2/51 = BGHSt 2, 194, 200; cf. *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 24 paras. 1 et seqq.

71 *Kinzig*, in: *Tübinger Kommentar StGB*, 31st ed. 2025, preliminary remarks regarding §§ 38 et seqq. para. 19.

72 BVerfGE 123, 267, 413; BVerfGE 128, 326, 376.

73 On this and the underlying principle of limited accessory, see *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 45. paras. 13 et seqq.; cf. *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 622.

74 *Rengier*, Strafrecht Allgemeiner Teil, 17th ed. 2025, § 24 para. 1.

due to a mental disorder (Section 20), if he or she lacks the awareness of acting unlawfully and could not avoid this mistake (Section 17 sentence 1), or if written (Sections 33, 35) or unwritten excuses⁷⁵ apply or so-called special guilt features or “spezielle Schuldmerkmale” are missing that particularly characterise the offender’s reprehensible attitude.⁷⁶ Furthermore, according to the probably prevailing opinion,⁷⁷ intentional guilt is not given if the perpetrator erroneously assumes factual circumstances that would have justified him or her if they had existed. In this situation, which is referred to as “Erlaubnistatbestandsirrtum”, the perpetrator has not shown any hostile attitude towards the behavioural requirements of the law and, therefore, has not realised intentional guilt.⁷⁸

VI. SUMMARY AND CONCLUDING REMARKS

In summary, the following tripartite basic structure emerges from the above for the offence in the German criminal law system: It is divided into the level of the elements of the offence, the level of unlawfulness and the level of guilt. Both, the level of the elements of the offence and the level of unlawfulness, concern the question of whether the perpetrator’s conduct constitutes a wrongdoing in the sense of being unlawful. A conduct that fulfils the elements of an offence is typically and regularly unlawful. It is only exceptionally approved by the legal system if a permissive norm intervenes in the form of a

75 On these see *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 711 et seqq.; *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 24 paras. 40 et seqq., § 28 paras. 1 et seq.

76 E.g. – according to a however disputed opinion – “carelessly” in Section 315c para. 1 No. 2 German Criminal Code, *Kudlich*, in: *BeckOK-StGB*, 66th ed., stand: 01.08.2025, § 315c para. 41.3; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, para. 675; different view e.g. *Hecker*, in: *Tübinger Kommentar StGB*, 31st ed. 2025, § 315c para. 28; on special guilt features in general see *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 675 et seqq.

77 E.g. BGH, judgment of 02.11.2011, 2 StR 375/11; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 756 et seqq.; *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 30 paras. 21 et seq.

78 On the “Erlaubnistatbestandsirrtum” in general and the different views on its legal consequences, see *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 740 et seqq.; *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 30 paras. 1 et seqq.; *Kulhanek*, in: *Münchener Kommentar zum StGB*, Vol. 1, 5th ed. 2024, § 16 paras. 139 et seqq.

ground for justification. In this case, the conduct is exceptionally in line with the overall legal system despite fulfilling the elements of the offence. It is thus not unlawful in the concrete case.

Both, the elements of the offence and the grounds for justification, are subdivided into objective and subjective elements. The objective elements of the offence constitute the so-called *actus reus* which can be compensated for by the fulfilment of the objective elements of a ground for justification. The subjective elements of the offence, on the other hand, constitute the *mens rea* which can be compensated for by the fulfilment of the subjective elements of a ground for justification. If the realisation of the *actus reus* and the *mens rea* is not compensated for by any ground for justification, the conduct is objectively and subjectively unlawful. In this case, at the level of guilt, the question must be answered whether the offender can also be personally blamed for his or her unlawful conduct. Only in this case, a penalty can be justified in a criminal law of guilt.

This is the basic structure of the offence in the German criminal law system according to the prevailing opinion.⁷⁹ However, numerous deviating constructions are also advocated which assume a two-stage offence structure.⁸⁰ Their proponents regard the elements of the offence and the unlawfulness, which constitutes the second level of requirements for criminal liability in the tripartite offence structure, as only one single offence level whose elements are all constitutive for the unlawfulness of the conduct in question.⁸¹ Conse-

79 See again e.g. *Rengier*, *Strafrecht Allgemeiner Teil*, 17th ed. 2025, § 12 paras. 1 et seqq.; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 54th ed. 2024, paras. 133 et seqq.; *Heger*, in: *Lackner/Kühl/Heger* (eds.), *StGB*, 31st ed. 2025, preliminary remarks regarding § 13 paras. 6, 17; see also *Renzikowski*, in: *Matt/Renzikowski* (eds.), *StGB*, 2nd ed. 2020, preliminary remarks regarding § 13 para. 1.

80 E.g. *Schlehofer*, in: *Münchener Kommentar zum StGB*, Vol. 1, 5th ed. 2024, preliminary remarks regarding § 32 paras. 36 et seqq.; *Hoffmann-Holland*, in: *Münchener Kommentar zum StGB*, Vol. 1, 5th ed. 2024, § 22 para. 156; *Freund/Rostalski*, *Strafrecht Allgemeiner Teil*, 3rd ed. 2019, § 3 paras. 25 et seqq.; cf. *Puppe/Grosse-Wilde*, in: *Kindhäuser/Neumann/Paeffgen/Saliger* (eds.), *StGB*, 6th ed. 2023, preliminary remarks regarding §§ 13 et seqq. paras. 12 et seqq.; comparing the theories of the three- and the two-level offence structure and pointing at the little practical relevance of the dispute: *Kindhäuser/Zimmermann*, *Strafrecht Allgemeiner Teil*, 11th ed. 2024, § 6 paras. 8 et seqq., 14; *Eisele*, in: *Tübinger Kommentar StGB*, 31st ed. 2025, preliminary remarks regarding §§ 13 et seqq. paras. 15 et seqq., 19; *Paeffgen/Zabel*, in: *Kindhäuser/Neumann/Paeffgen/Saliger* (eds.), *StGB*, 6th ed. 2023, preliminary remarks regarding §§ 32 et seqq. para. 6.

81 *Puppe/Grosse-Wilde*, in: *Kindhäuser/Neumann/Paeffgen/Saliger* (eds.), *StGB*, 6th ed. 2023, preliminary remarks regarding §§ 13 et seqq. para. 12; *Hoffmann-Holland*, in: *Münchener Kommentar zum*

quently, according to this conception, the lack of the elements of a ground for justification is constitutive for the conduct's unlawfulness in the same manner as it is the existence of the objective and subjective elements of the offence.⁸² Such a conception is theoretically feasible. However, it neglects the different functions and evaluations inherent in the elements of the offence, on the one hand, and the level of unlawfulness, on the other hand.⁸³ Furthermore, it is not in line with the wording of the German Criminal Code, which recognises unlawfulness as an independent category alongside the elements of the offence in several norms.⁸⁴

Therefore, on the basis of the German Criminal Code, the basic structure of the offence is the one described in the foregoing. It is tripartite, consisting of the three levels of the elements of the offence, unlawfulness and guilt which all express different assessments of the perpetrator's conduct and, therefore, all have an independent function and meaning.

StGB, Vol. 1, 5th ed. 2024, § 22 para. 156.

82 *Schlehofer*, in: Münchener Kommentar zum StGB, Vol. 1, 5th ed. 2024, preliminary remarks regarding § 32 paras. 36 et seq.; *Hoffmann-Holland*, in: Münchener Kommentar zum StGB, Vol. 1, 5th ed. 2024, § 22 para. 156 referring to *Schlehofer*.

83 *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 191; *Heger*, in: Lackner/Kühl/Heger (eds.), StGB, 31st ed. 2025, preliminary remarks regarding § 13 para. 17.

84 *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 54th ed. 2024, para. 192.

COMMENTS ON THE STRUCTURE

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1. PREMISE AND FRAMEWORK

It is my privilege and pleasure to offer some comments on the presentation delivered by Prof. Laura Neumann. I will do so by bringing into the discussion certain aspects of comparison with Portuguese law,¹ taking into account our Penal Code (PPC) and proceeding from two very clear assumptions established by my German colleague:

(i) “structure” refers here to the conventional synthesis of the components that constitute the formal definiens of crime, assuming — as a minimal shared framework reflecting the technical meaning of legal terms customarily used in the continental legal tradition — the mainstream perspective, that is, the widely accepted *three-element model* of the concept of criminal offense,² divided into: the offense itself (the fulfilment of its statutory definition), unlawfulness (or wrongfulness), and culpability (or guilt or blameworthiness);³

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1 Translating into English the specialized vocabulary or jargon of continental criminal law dogmatics is not always straightforward. Accordingly, I will adopt the relevant technical terms used by Markus D. DUBBER / Tatjana HÖRNLE, *Criminal Law. A Comparative Approach*, Oxford: Oxford University Press, 2016.

2 In this (classificatory or organizational) sense, “structure” does not have a meaning very different from “system” of the theory of crime, as a conceptual framework. See, among others: Gustav RADBRUCH, “Zur Systematik der Verbrechenslehre”, in AA.VV., *Festgabe für Reinhard von Frank*, Band I, Tübingen: Mohr, 1930, pp. 161 ff., rejecting both the autonomy of the concept of action as the basis or higher component of the definiens of crime and the theory of negative elements of the offense. Similarly, emphasizing the concept of fulfillment (realization) of the statutory offense definition as the starting point: Eberhard SCHMIDHÄUSER, “Zur Systematik der Verbrechenslehre”, in AA.VV., *Gedächtnisschrift für Gustav Radbruch*, Göttingen: Vandenhoeck & Ruprecht, 1968, pp. 268 ff.

3 Johannes KEILER / David ROED (eds.), *Comparative Concepts of Criminal Law*, 3rd ed., Cambridge: Intersentia, 2019, pp. 64 ff. It is also possible (and even advisable) to consider the structure in an alternative,

(ii) the analysis deals only with the structure of *intentional and completed result-oriented offense*,⁴ taken as the basic image or prototype of criminal behavior; it therefore does not address the so-called⁵ “special forms of manifestation of crime”.⁶

2. THE ELEMENTS OF THE DEFINIENS OF CRIME

2.1. Within this framework, I will try to underline a few points that are most relevant to the Portuguese legal system. Thus, regarding the number of constituent elements of the definiens of crime: in Portugal — as in many other countries influenced by the German legal tradition — the three-element model (or “tripartite system”) described by Prof. Laura Neumann is widely accepted, both in criminal law scholarship and by the courts.

In fact, over the past few decades, academic focus has declined on the search for an ontological concept of action, one that precedes any legal evaluation and could serve as a foundational reference — a common ground or inte-

deeper (normological) way, closer to what Beatriz Corrêa CAMARGO proposes in this volume, emphasizing other analytical categories, such as the distinction between “object” and “grounds” of liability, “ought” and “can”, “norm” and “ascription”, “rules of behavior” and “rules of attribution”, “ordinary imputation” and “extraordinary imputation”, as well as the relationship between these concepts and the ordering of the corresponding assessments, e.g., the sequence “imputatio facti” → “applicatio legis ad factum” → “imputatio iuris”. With references: Bruno de OLIVEIRA MOURA, “The «Depth Grammar» of Criminal Law: The Case Rule and the Distinction Between Norm and Ascription”, in AA.VV., *Jurist’s Law and European Identity Dogmatic-Institutional, Methodological and Legal-Philosophical Problems*, Coimbra: Instituto Jurídico, 2019, pp. 131 ff. In this sense, we could speak, for example, of “relata” or “relational” structures: Jan C. JOERDEN, *Strukturen des strafrechtlichen Verantwortlichkeitsbegriffs. Relationen und ihre Verkettungen*, Berlin: Duncker & Humblot, 1988, pp. 13 ff. But this implies adopting another, more profound grammar, which, however, could operate as a starting point for a comparative approach based on norms theory in the next stages of our joint project. In any case, it is undeniable that the recognition of those deeper “operational” structures can help improve the more superficial “formal” structures (such as the pairs offense/defense and actus reus/mens rea), showing its inconsistencies and ambiguities, and thereby favoring “functional” structures — e.g., the distinction between (ex ante) “rules of behavior” and (ex post) “principles of adjudication” — that better serve the purposes of criminal law. For these nuances: Paul H. ROBINSON, *Structure and Function in Criminal Law*, Oxford: Clarendon Press, 1997, pp. 4–8.

4 = “vorsätzlichen vollendeten Begehungserfolgsdelikt”.

5 In Portuguese literature, instead of many: Maria Paula RIBEIRO DE FARIA, *Formas especiais do crime*, Porto: Universidade Católica Editora, 2017, pp. 11 ff., 29 ff., 45 ff.

6 = “besondere Erscheinungsformen der Straftat”.

grative basis — for those three components. The most basic element is the performance of conduct that satisfies the offense definition as provided in the criminal statute, which operates as both the logical and axiological starting point for organizing the concept of crime. The statutory definition of the offense thus marks the threshold of legal relevance — serving as a warning or alert function — with respect to behavior that causes or threatens harm to a legally protected interest.

However, in Portugal there is a relatively recent and intense debate over whether “punishability”⁷ — including, as its categorical specification, the so-called “objective conditions of punishability”⁸ — should constitute a new, fourth, and autonomous element of the crime. In this respect, the criminal law doctrine is somewhat divided.⁹ The prevailing view seems to be returning¹⁰ to a *four-element model*,¹¹ in which punishability now emerges — through a rule-and-exception reasoning similar to that existing between the offense definition and unlawfulness — following a positive conclusion in the assessment of culpability. In general, a wrongful and blameworthy offense is also punishable, unless the “overall picture of the case”, viewed holistically in light of the circumstances, allows for a concrete reassessment showing, ultimately, that the act committed does not deserve punishment in that particular instance.¹²

By contrast, in national courts the prevailing view remains that “the [objective] conditions of punishability are elements situated outside the definition of the crime, whose presence constitutes a requirement for the unlawful act

7 = “Strafbarkeit”.

8 = “objektive Bedingungen der Strafbarkeit”.

9 For the equivalent discussion in German literature, but also with explicit reference to Portuguese scholarship on the existence of a new, fourth element of the crime: Claus ROXIN / Luís GRECO, *Strafrecht. Allgemeiner Teil*, Band I, 5. Aufl., München: Beck, 2020, p. 1171 (§ 23, mn. 34), footnote 51.

10 Of course, even this enumeration is relative and depends on the perspective adopted. After all, the approach that considers the action as an autonomous substrate supporting the other constituent elements of the crime was already a four-element model. Cf. Tereza PIZARRO BELEZA, *Direito Penal*, Vol. II, Lisboa: AAFDL, 2000, pp. 15 ff., 53 ff.

11 Exhaustively, and promoting an important space for considerations of the current theory of norms: Frederico de Lacerda da COSTA PINTO, *A categoria da punibilidade na teoria do crime*, Coimbra: Almedina, 2013, Vol. I, pp. 48 ff., 384 ff., and Vol. II, pp. 506 ff., 863 ff., 1018 ff.

12 Jorge de FIGUEIREDO DIAS, *Direito Penal. Parte Geral*, 3.^a ed., Coimbra: Gestlegal, 2019, pp. 325 ff., 782 ff.

to have criminal consequences, that is, to be effectively punishable”.¹³ Still on this point, Prof. Laura Neumann notes, under the German law, the potential tension between the objective conditions of punishability¹⁴ and the principle of culpability (*nullum crimen, nulla poena sine culpa*), which could call into question their normative conformity with the constitutional framework.

Nevertheless, in Portuguese criminal law scholarship, this tension has been resolved through the interpretation that such additional requirements for punishment — and this argument can be generalized to the supposedly new (autonomous) category of “punishability” as a whole — do not establish criminal liability, but rather merely limit it, since their occurrence lies beyond the agent’s capacity for avoidance or control. These conditions, therefore, work in favor of the defendant and are not subject to the principle of culpability, as reflected in the traditional understanding that the intent (*dolus*) does not refer to their factual occurrence.¹⁵

2.2. Now, with respect of the objective elements of the offense (*actus reus*): the structure presented by Prof. Laura Neumann is essentially followed in Portugal as well. Particular mention should be made of the components of causality and objective imputation.¹⁶ Since the Portuguese Penal Code — following the approach proposed by Prof. Eduardo Correia¹⁷ — has accepted the theory of adequate causation (Art. 10 (1)), the debate on objective imputation is generally confined to the criteria concerning the connection (or realization) of the (prohibited) risk.¹⁸

Furthermore, the so-called “implicit elements of the offense” are also recognized in Portugal. Consider, for example,¹⁹ crimes against property: while

13 See the judgment of the Lisbon Court of Appeal, October 9, 2024 (Case No. 4555/20.5T9LSB.L1-3), available at <https://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/d3c38c0ac-0f4ee6180258bb7004eea85?OpenDocument> (accessed on November 3, 2025).

14 For example, with respect to the Portuguese legal system, in the offenses of engaging in a fight (PPC Art. 151(1)) and fraudulent insolvency (Art. 227 (1)).

15 Frederico de Lacerda da COSTA PINTO, *A categoria da punibilidade na teoria do crime* (cit.), Vol. II, pp. 1052 ff., 156 ff.

16 = “objektive Zurechnung”.

17 Who is the father of the Portuguese Penal Code in force since 1982. On the theory of adequate causation, see Eduardo CORREIA, *Direito Criminal*, Vol. I, Coimbra: Almedina, 1963, pp. 257 ff.

18 Pars pro toto: Jorge de FIGUEIREDO DIAS, *Direito Penal. Parte Geral* ³ (cit.), pp. 387 ff.

19 Although the issue is quite current in other cases, such as the crime of sexual harassment in the

the patrimonial value of the stolen object constitutes an implicit element of the offense of theft (PPC Art. 203 (1)), the intention not to return it is an implicit element of the offense of unauthorized use of a vehicle (Art. 208 (1)).²⁰ Moreover, in some cases, the legislator itself describes the factual elements of the offense by referring to a special subjective element²¹, as the intention to obtain an unlawful gain for oneself or for a third party, e.g., in the crime of extortion (Art. 223 (1)).

2.3. Probably the greatest structural controversy arises in the field of the general subjective elements of the offense (*mens rea*),²² also established as an imputation requirement in our normative system (PPC Art. 13). In fact, the mainstream view, inspired by a well-known strand of German legal dogmatics,²³ adheres to the so-called “dual position (or function) of *dolus*”. Put briefly: intention operates both as an element of the offense and as an element of culpability.²⁴

Or, in a close variant, *dolus* comprises certain components — cognitive and volitional — that are addressed at the level of wrongdoing, while others — the emotional side, mainly the hostile or indifferent attitude toward the law — are evaluated at the level of blameworthiness.²⁵ However, this dualistic

form of a sexually suggestive proposition (PPC Art. 170, 2nd hypothesis), where it is possible to discuss a teleological reduction of the norm, by requiring repetition — at least two proposals — as an implicit element of the offense.

20 José de FARIA COSTA, *Direito Penal Especial. Contributo a uma sistematização dos problemas “especiais” da Parte Especial*, Coimbra: Coimbra Editora, 2004, pp. 70 ff.

21 With a general theory of these components: António Manuel de ALMEIDA COSTA, *Elementos subjectivos especiais do ilícito-típico*, Coimbra: Almedina, 2023, pp. 160 ff.

22 For case law on the subjective dimension of the crime (intent as part of the offense vs. intent related to culpability), see the judgment of the Évora Court of Appeal, February 20, 2024 (Case No. 119/20.1PBELVE1), available at <https://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f-080b/88c18ce96611b4cc80258ad3003b201c?OpenDocument> (accessed on November 3, 2025).

23 Namely by Wilhelm GALLAS, “Zum gegenwärtigen Stand der Lehre von Verbrechen”, *ZStW* 67 (1955), pp. 5 ff., 31–40 and 44 ff. (with particular reference to p. 46, footnote 89). See also his developments in IDEM, “Zur Struktur des strafrechtlichen Unrechtsbegriffs”, in AA.VV., *Festschrift für Paul Bockelmann*, München: Beck, 1979, pp. 169 ff.

24 On the same path: Hans-Heinrich JESCHECK, “Neue deutsche Verbrechenstheorie und ihre praktische Bedeutung”, in AA.VV., *Boletim da Faculdade de Direito - Número Especial - Estudos em Homenagem ao Prof. Doutor Eduardo Correia*, Coimbra: FDUC, 1984, pp. 265–266 and 276–278.

25 Something similar happens with negligence, contrasting an “external” duty of care with an “internal” one. On all this: Jorge de FIGUEIREDO DIAS, *Direito Penal. Parte Geral* ³ (cit.), pp. 290, 314–318, 406–409, 622–623 and 1043–1049.

assessment model — which appears to correspond to the distinction drawn by Prof. Laura Neumann between “Vorsatz als Unrechtsform”²⁶ and “Vorsatz als Schuldform”²⁷ — is not universally accepted among us, as some legal scholars continue to prefer a system of criminal offense centered on a strictly objective concept of unlawfulness.²⁸

Under Portuguese law, the dual function of intent is reflected in the distinct treatment of two types of mistakes. On the one hand, a mistake pertaining to the objective elements of the act excludes the intent aspect of the offense and may allow punishment based on negligence instead (PPC, Art. 16 (1) and (3)). In contrast, a mistake with regard the unlawfulness of the act excludes the intent aspect of culpability, but only if the mistake is not blameworthy. If it is blameworthy, *dolus* as part of culpability remains intact, and the act is punishable within the penalty range for the intentional offense, although the sentence may be specially mitigated (Art. 17 (1) and (2)).

Nonetheless, the Portuguese legislator acknowledges, to some extent, that the distinction between *dolus* as part of the offense and *dolus* as part of culpability is not always rigid or clear-cut, and that, in certain cases, a grey area exists, with a fluid zone where the differentiation becomes blurred. In these intermediate situations — typically associated with the “*mala prohibita*”,²⁹ very common in the “secondary criminal law” (e.g., in tax, financial or economic offenses),³⁰ characterized by prohibitions whose knowledge is reason-

26 “Intent as mens rea establishes the intentional wrong” = “Der tatbestandliche Vorsatz begründet das Vorsatzunrecht”.

27 “ (...) intent as a form of guilt is not an element of wrongdoing, but rather the bearer of a wrongful attitude” = “(...) ist der Vorsatz als Schuldform somit kein Unrechtselement, sondern Träger des Gesinnungsunwerts”.

28 Already under the 1982 PPC: Manuel CAVALEIRO DE FERREIRA, *Lições de Direito Penal. Parte Geral*, Vol. I, 4.^a ed., Lisboa: Editorial Verbo, 1992, pp. 86 ff., 105 ff., 133 ff., 282 ff. Currently: José de FARIA COSTA, *Direito Penal*, Lisboa: Imprensa Nacional, 2017, pp. 235 ff., 385 ff.

29 Augusto SILVA DIAS, «*Delicta in Se*» e «*Delicta Mere Prohibita*». *Uma análise das descontinuidades do ilícito penal moderno à luz da reconstrução de uma distinção clássica*, Coimbra: Coimbra Editora, 2008, pp. 187 ff., 209 ff. In Anglo-American scholarship: George P. FLETCHER, *Basic Concepts of Criminal Law*, Oxford: Oxford University Press, 1998, pp. 177 ff.

30 Consider, for example, offenses of corruption in the private sector (Law No. 20/2008, of 21 April). Although this may also occur, albeit exceptionally, within the scope of “primary (core) criminal law”, when the legally protected interest has not yet been clearly recognized as such in the legal consciousness of the population, e.g., in the aforementioned case of sexual proposal (supra, footnote 19) or in the influence peddling (Art. 335).

ably indispensable for the agent to become aware of the unlawfulness of the act, since the tenuous or nonexistent axiological relevance of the prohibited matter is insufficient to guide their ethical conscience on the wrongdoing — our Penal Code opts to treat a mistake related to wrongfulness as equivalent to a mistake of fact, thereby applying the same legal solution and excluding intent as part of the offense (Art. 16 (1) *in fine*).³¹

Still in connection with the general subjective elements of the offense, and again unlike German law,³² the Portuguese Penal Code (Art. 14) has chosen to establish legal definitions of intention (or, more precisely, its different forms).³³ Of particular note is the legal criterion adopted to distinguish between *dolus eventualis* (Art. 14 (3)) and conscious negligence (Art. 15(a)): the agent's acceptance (acquiescence) of the possible occurrence of the offense. As one might expect, this legislative effort falls far short of resolving all issues: *omnis definitio in jure periculosa est*.³⁴ This becomes evident, for instance, in the interpretation of the acceptance standard, which oscillates between a more psychological perspective and normative approaches.³⁵

2.4. Regarding unlawfulness: in Portugal as well, both in theory and in practice, the prevailing view has been that the fulfillment of the components of the statutory definition of an offensive act plays only an indicative role with respect to its wrongfulness, thus rejecting the “theory of negative elements of the offense”. Our legal system also recognizes “open

31 Jorge de FIGUEIREDO DIAS, *Direito Penal. Parte Geral* ³ (cit.), pp. 423 ff. This legal solution is not unknown to German doctrine, and is even praised, for example, by Klaus TIEDEMANN, “Zum Verhältnis von Allgemeinem und Besonderem Teil des Strafrechts”, in AA.VV., *Festschrift für Jürgen Baumann*, Bielefeld: Giesecking, 1992, pp. 14–15. In fact, the same solution had already been proposed by this same author for the field of secondary criminal law: IDEM, *Tatbestandsfunktionen im Nebenstrafrecht. Untersuchungen zu einem rechtsstaatlichen Tatbestandsbegriff, entwickelt am Problem des Wirtschaftsstrafrechts*, Tübingen: Mohr, 1969, pp. 282 ff., 335 ff.

32 StGB § 14, which define intent by exclusion.

33 A similar approach can be observed in the legal definition of negligence (PPC Art. 15), when compared with German law (StGB § 15).

34 José de FARIA COSTA, «As definições legais de dolo e de negligência enquanto problema de aplicação e de interpretação das normas definitorias em Direito Penal», *Boletim da Faculdade de Direito*, 69 (1995), pp. 361 ff.

35 Also in light of Portuguese law: Wagner MARTELETO FILHO, *Dolo e risco no Direito Penal. Fundamentos e limites para a normativização*, Madri / São Paulo: Marcial Pons, 2020, pp. 28 ff., 288 ff., 420 ff., 460 ff. And comparable challenges arise to negligence as well, in view of the clause “failing to act with the care which, under the circumstances, one is both obliged and capable” of exercising.

offenses”,³⁶ in which the prohibition matter is merely suggested by the legislator. That is: offenses lacking a complete (even if provisional) assessment of unlawfulness at their legal definition, marked by “reprehensibility clauses” that allow the judicial exclusion of socially acceptable behaviors. The example is the same as that pointed out by Prof. Laura Neumann: coercion (PPC Art. 154 (3) (a)).³⁷

With respect to the general³⁸ grounds for justification, the Portuguese Penal Code — which, unlike German law, has never developed a strong tradition of unwritten defenses excluding wrongfulness — contains an explicit mention to the principle of the normative unity of the legal system (Art. 31 (1)), accompanied by a broad, though not exhaustive, list of codified circumstances that remove the (*prima facie*) unlawfulness of the act. These include, for example, not only self-defense (Art. 32) and necessity (Art. 34), but also conflict of duties (Art. 36), consent (Art. 38), and presumed consent (Art. 39).³⁹

In relation to the subjective elements of the grounds for justification, in Portugal as well, for these defenses to fully produce their legal effects, it is required — always according to the prevailing opinion — that the agent, at the time of the act, possess at least knowledge of the justifying circumstances, if not also the corresponding intent, for example, the intention to defend or to protect oneself or a third party, under the provisions on self-defense and necessity.

On this matter, Prof. Laura Neumann has drawn attention to the controversy surrounding the consequences of the lack (non-occurrence) of the subjective elements of justification, particularly the debate between

36 = “offene Tatbestände”.

37 Other examples in PPC include Articles 306 (“abusively”), 307 (1) (“illegitimately”), and 348 (“legitimate”). To these, we can add certain special manifestations of criminal offenses, such as improper omissions (Art. 10) and negligent offenses themselves. Cf. Jorge de FIGUEIREDO DIAS, *Direito Penal. Parte Geral* ³ (cit.), pp. 336 ff.

38 Leaving aside, therefore, the special grounds for justification, which are provided only for certain offenses, such as abortion for therapeutic, fetopathic, criminal, or social indications (PPC Art. 142 (1)). See Paulo Pinto de ALBUQUERQUE, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos Humanos*, 5.^a ed., Lisboa: Universidade Católica Editora, 2022, pp. 613 (mn. 2) and 616 (mn. 22).

39 With an overview, from the standpoint of norms theory: Bruno de OLIVEIRA MOURA, *Illicitude penal e justificação*, Coimbra: Coimbra Editora, 2015, pp. 122 ff., 151 ff., 192 ff., 206 ff.

the “completion solution” (Vollendungslösung) and the “attempt solution” (Versuchslösung). In Portuguese legal system, however, the answer to this question may be somewhat simpler, since the legislator itself clearly provides a clue by regulating justifying consent, expressly stipulating that “if the consent is not known to the agent, they shall be punishable with the penalty applicable to attempt” (PPC Art. 38 (4)).

It is true that this solution does not explicitly reappear in the specific legal precepts of other grounds for justification. Nevertheless, it is widely accepted, in criminal law scholarship, that the aforementioned statutory provision permits the inference of a general principle — reflecting the substantive structure of the wrongdoing — applicable to all defenses excluding unlawfulness, or, at the very least, that the same rule may be applied by analogy.⁴⁰ Under this interpretation, we are presented with a compelling test case for the admissibility of *in bonam partem* analogy in light of the principle of legality in criminal law (*nullum crimen, nulla poena sine lege*).

Further on the subjective aspect of justification, it is worth emphasizing that the PPC — once again, unlike the StGB — expressly provides for the case of an error concerning the occurrence of justifying circumstances,⁴¹ i.e., the false belief about the presence of the objective elements of a permissive ground (for instance, in putative self-defense). This situation is legally treated as equivalent to a mistake of fact (Art. 16(2)) and therefore excludes *dolus*, a result that comes close to (or even coincides with)⁴² the “restricted theory of culpability”.⁴³

2.5. Finally, with reference to culpability and grounds for excuse: in Portugal as well, the assessment of guilt pertains to whether the offender can be individually blamed, that is, if he bears personal responsibility for the unlawful conduct, taking into account his capacity to have acted otherwise at the critical moment for avoiding the offense. However, three key differences arise with respect to the incapacity to bear criminal liability under Portuguese law.

40 José de FARIA COSTA, *Direito Penal* (cit.), pp. 304–306.

41 = “Erlaubnistatbestandsirrtum”.

42 It remains unclear whether the exclusion affects intent as part of culpability or, rather, as part of the offense.

43 = “eingeschränkte Schuldtheorie”.

First, from an age-based perspective, minors under sixteen years old are deemed not criminally responsible (Art. 19).⁴⁴ Second, with regard to insanity and intentionally self-inflicted mental disorders, our Penal Code expressly regulates the *actio libera in causa* scenario (Art. 20 (4)), thereby avoiding the issues debated in German law in relation to the guarantees provided by the principle of legality.⁴⁵ Third, since 2007 the PPC provides a general framework for corporate criminal liability in certain (enumerated) offenses (Art. 11).⁴⁶

With respect to the grounds for excuse,⁴⁷ our legal system — rejecting the proposal to establish a general clause of unreasonableness in requiring one to act in accordance with the norm⁴⁸ — provides for specific exceptions that exclude the agent's culpability.⁴⁹ Thus, similarly to StGB (§ 35), the PPC (Art. 35 (1)) embraces the dual theory of necessity, providing — in addition to justifying necessity (as a subjective right) — an excusing necessity (*duress*). Likewise, and again in line with StGB (§ 33), another ground for excuse recognized in PPC is the asthenic excess of self-defense, provided that it is not blameworthy (Art. 33 (2)).⁵⁰

44 In the German legal system, criminal liability begins at the age of fourteen (StGB § 19).

45 For instance, René ZENKER, *Actio libera in causa. Ein Paradoxon als öffentlicher Strafanspruch in einem vom Schuldprinzip geprägten Rechtsstaat*, Münster: LIT, 2003, pp. 22 ff., 83 ff., 103 ff., 107 ff., 120 ff., 134 ff., 173 ff., with conclusions on pp. 198 ff., while also rejecting the a.l.i.c. concept in light of the principle of culpability.

46 Although the criminal liability of collective persons had previously been introduced in special frameworks under standalone legislation within the field of secondary criminal law, notably in the areas of economic and public health offenses. Regarding the initial steps in this matter: Jorge dos REIS BRAVO, *Direito Penal dos Entes Coletivos*, Coimbra: Coimbra Editora, 2008, pp. 121 ff., 185 ff., 250 ff. More recently, on the criteria for imputing criminal liability to corporations and other organizations: Teresa QUINTELA DE BRITO, *Playdoyer por uma autêntica responsabilidade penal de entes coletivos*, Lisboa: AAFDL, 2023, pp. 319 ff., 589 ff.

47 On this subject, a comparison between Portuguese and German law has already been made by Manuel CORTES ROSA, “Die Funktion der Abgrenzung von Unrecht und Schuld im Strafrechtssystem”, in AA.VV., *Bausteine des europäischen Strafrechts. Coimbra-Symposium für Claus Roxin*, Köln: Heymanns, 1995, pp. 188 ff.

48 = “Unzumutbarkeit normgemäßen Verhaltens”.

49 With a comprehensive theory of excuse: Fernanda PALMA, *O princípio da desculpa em Direito Penal*, Coimbra: Almedina, 2005, pp. 117 ff., 141 ff.

50 By contrast, where the asthenic excess is blameworthy, or in case of sthenic excess, the penalty may be especially mitigated (PPC Art. 33 (1)). On the scope of these provisions: Bruno de OLIVEIRA MOURA, *A não-punibilidade do excesso na legítima defesa*, Coimbra: Coimbra Editora, 2013, pp. 221 ff.

Moreover, the Portuguese legislator goes further by regulating, *expressis verbis*, a third ground for the exclusion of blameworthiness: exculpatory undue obedience (Art. 37), which is sometimes interpreted as a specific instance of a mistake concerning the occurrence of justifying circumstances.⁵¹ Lastly, in any case of a mistake concerning the occurrence of exculpatory circumstances (and therefore not only in the putative duress), the PPC (Art. 16(2)) literally provides for the exclusion of *dolus*,⁵² once again going beyond the StGB (§ 35 (2)).

3. CLOSING REMARKS

Prof. Laura Neumann concludes by noting the existence of minority divergent opinions that operate with a two-element model of the *definiens* of crime, based on an integrative understanding in which the absence of grounds for justification constitutes an essential component of the offense definition itself (the aforementioned theory of negative elements of the offense). To this, I would add certain theoretical efforts — also present in Germany — aimed at dissolving the distinction between wrongdoing (unlawfulness) and culpability (blameworthiness), which likewise appear as a minority dissenting view in Portugal.⁵³

Before concluding, I would like to recall some historical figures in German criminal law scholarship, such as Prof. Hans-Heinrich Jescheck,⁵⁴ and others who maintained a strong connection with Portugal, especially Prof. Peter

51 NUNO BRANDÃO, *Justificação e Desculpa por obediência em Direito Penal*, Coimbra: Coimbra Editora, 2006, pp. 284 ff.

52 The comment noted above in footnote 42 applies here as well.

53 Notably in the thought of Paulo de SOUSA MENDES, *O torto intrinsecamente culposos como condição necessária da imputação da pena*, Coimbra: Coimbra Editora, 2007, pp. 219 ff., 300 ff. Reference may also be made to another of his studies: IDEM, “Über die philosophischen Wurzeln der Trennung zwischen Unrecht und Schuld”, in AA.VV., *Festschrift für Jürgen Wolter*, Duncker & Humblot, Berlin, 2013, pp. 271 ff.

54 With an influential essay in German on the topic discussed here, published in the book honoring Eduardo Correia, already mentioned (*supra*, footnote 24). Furthermore, there is a Brazilian Portuguese translation of his well-known study on comparative criminal law [*Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (1955)]: HANS-HEINRICH JESCHECK, *Desenvolvimento, tarefas e métodos do Direito Penal Comparado*, translated by Pablo Alfén da Silva, Porto Alegre: Fabris Editor, 2006.

Hünerfeld,⁵⁵ who advanced comparative criminal law efforts from a European perspective and fostered close ties with Portuguese legal dogmatics. It is truly encouraging that we now have the opportunity to keep this tradition alive. And perhaps the “new” structures this time should be different, likely normo-logical ones. Some of these were already highlighted by the commentary of Prof. Beatriz Corrêa Camargo in this volume.⁵⁶

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55 As a scholar associated with the Max Planck Institute for Foreign and International Criminal Law, he helped strengthen academic relations between Germany and Portugal in the field of comparative criminal law doctrine. In this context, special mention should be given to the Peter HÜNERFELD, *Strafrechtsdogmatik in Deutschland und Portugal. Ein rechtsvergleichender Beitrag zur Verbrechenslehre und ihrer Entwicklung in einem europäischen Zusammenhang*, Baden-Baden: Nomos, 1982. Moreover, this author was honored with a commemorative book published in Portugal: Manuel COSTA ANDRADE, et al. (Orgs.), *Direito Penal. Fundamentos Dogmáticos e Político-Criminais. Homenagem ao Prof. Peter Hünerfeld*, Coimbra: Coimbra Editora, 2013.

56 See again above, footnote 4.

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REMARKS ON THE “STRUCTURE” OF CRIME FROM THE PERSPECTIVE OF BRAZILIAN CRIMINAL LAW

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I. THE STRUCTURES OF CRIMINAL LIABILITY

Like German and Portuguese criminal law, Brazilian criminal law is based on the tripartite concept of crime. Under this framework, criminal conduct is divided into three analytical categories: the elements of the offense, unlawfulness, and culpability. Within each of these categories, the law recognizes grounds for excluding liability of the defendant, even when the prohibited outcome (*actus reus*) has occurred. The instances where personal liability is excluded generally involve:

- a) incapacities to act (*vis absoluta*, states of unconsciousness),
- b) incapacities for self-control and judgment (mental disorders, criminal minority, intoxication),
- c) lack of knowledge of the law or of legally relevant facts (mistake of fact and mistake of law), as well as situations of
- d) moral necessity (*vis compulsiva*, exculpatory necessity, supralegislative grounds for exclusion of culpability).

I believe we can best understand the concept of crime through the lens of what Joachim Hruschka has described as the structures of ordinary and extraordinary imputation.

Ordinary imputation occurs in standard cases of criminal conduct—that is, in cases where the actor was fully capable of preventing the occurrence of the event forbidden by the law at the time it took place and yet consciously decided not to do so.

Extraordinary imputation, by contrast, arises when the person could not prevent the prohibited outcome at the moment it occurred, but is nonetheless held imputable for the very condition of impossibility or incapacity in which

they found themselves. These are, therefore, situations that would *prima facie* excuse the agent—whether because, at the time of action, they lacked the capacity for action, judgment, or self-control, or because they were ignorant of the criminal law or relevant facts, or because they faced a situation of moral necessity. Nevertheless, despite such incapacities, ignorance, or necessities, imputation of liability remains justified when the actor was responsible for the incapacity, ignorance, or necessity at the time the event occurred.

The framework of ordinary and extraordinary imputation merits particular emphasis, as similar conceptual structures manifest themselves across diverse legal systems—the discussions of Laura Neumann and Bruno Moura within this book give us some examples. Such convergence is not merely the product of shared moral assumptions among contemporary societies. Rather, the notions of ordinary and extraordinary imputation can be traced to the earliest foundations of our legal traditions—deeply influenced by Roman law, which recognized the maxim *impossibilium nulla obligatio est* (“no one is bound to do the impossible”)—and by the works of Aristotle, St. Thomas Aquinas, and Samuel von Pufendorf, who first articulated the view that a person may be held responsible for an event even if unable to act otherwise at the moment of its occurrence, provided that he was the cause of his own incapacity.¹

II. ELEMENTS OF THE OFFENSE (*TATBESTANDSMÄSSIGKEIT*)

Since the 1980s, Brazilian legal scholarship has drawn a distinction between the objective elements of the offense—those relating to the external description of the actor’s conduct—and the subjective elements of the offense, which concern the actor’s physical and cognitive capacity to avoid the event prohibited by law.

1 On the evolution of these principles of liability over time and in various sources of literature, see Joachim Hruschka, *Strukturen der Zurechnung*, Berlin: W de G, 1976, p. 43, 46; Joachim Hruschka, *Ordentliche und außerordentliche Zurechnung bei Pufendorf*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 96, 1984, p. 661 et seq.; Joachim Hruschka, *Imputation*, *Brigham Young University Law Review*, 1986, p. 686–689. See also Edward van Alphen, Kelsen and Hruschka: concepts of imputation, *International Journal for the Semiotics of Law*, v. 6, 1993, p. 163.

According to Article 13 of the Brazilian Penal Code², “the result upon which the existence of the crime depends is imputable only to the person who caused it.” This provision embraces the *conditio-sine-qua-non* theory, defining as a cause any “action or omission without which the result would not have occurred.” Notably, the statute itself conditions the actor’s criminal liability on the existence of an act, whether in the form of action or in the form of omission.

As to causation, however, Article 13(1) provides an exception to the *conditio-sine-qua-non* theory by stating that “the supervening of a relatively independent cause excludes imputation when, by itself, it produced the result.” Neither Brazilian legal scholarship nor case law offers a clear understanding of what it means to say that a condition “by itself” produced the result. The classic example often cited is that of an ambulance transporting the victim of an attempted homicide to the hospital and becoming involved in a fatal accident. In such a case, the shooter is deemed liable only for attempted homicide, even though, without the gunshot wounds, the victim would not have been in the ambulance when the fatal accident occurred.

Despite the ostensibly evaluative dimension of Article 13(1) it remains the case that—aside from a few isolated judicial decisions—Brazilian criminal law has not embraced the theory of objective imputation as part of the offense’s objective elements.

Under Article 18 of the Brazilian Penal Code, unless the law expressly provides for a negligent form of the offense, “no one may be punished for an act defined as a crime except when committed intentionally.” The statute further specifies that an agent acts with intent when he “desires the result or takes the risk of producing it”. From this definition, most legal scholars infer that the Penal Code adopted a volitional theory of intent (*dolus*), with the acceptance-of-risk theory widely acknowledged and applied in both doctrine and practice.

At the same time, intent is excluded by a mistake of fact when the mistake concerns circumstances relevant under the prohibitive norm, as set forth in Article 20, *caput*. The 1984 reform of Brazilian Penal Code incorporated German finalist doctrines in its treatment of mistakes—a point I will return

2 All legal provisions mentioned hereafter refer to the Brazilian Penal Code.

to below. With respect to mistakes of fact, the statute eliminates intent but maintains the possibility of punishment for negligent offenses, provided that the offense is punishable in its negligent form.

A negligent offense, in turn, is defined as a case in which “the agent causes the result through recklessness, carelessness, or lack of skill” (Article 18, II). It is noteworthy that, under this definition, a causal nexus must exist between the breach of the duty of care and the harmful result in cases of negligence. Although contemporary doctrine explains this issue through the theory of objective imputation, it was already recognized by the Brazilian legislature as early as 1940.

Furthermore, the requirement of a nexus between negligence and the resulting harm highlights the extraordinary nature of imputation in these cases: the absence of intent—whether due to mistake or lack of voluntary action—is not sufficient to establish a negligent offense. It is also necessary that the absence of intent derive specifically from recklessness, carelessness, or lack of skill.

Still regarding the subjective elements of the offense, Brazilian law is distinctive in setting forth explicit provisions for situations that, in other jurisdictions, remain largely matters of scholarly debate. These include mistake induced by a third party (Article 20, 2), error in persona (Article 20, 3), *aberratio ictus* (Article 73), *aberratio criminis* (Article 74), and obedience to an order that is not manifestly unlawful (Article 22).

III. UNLAWFULNESS (RECHTSWIDRIGKEIT)

Article 23 enumerates four grounds for the exclusion of unlawfulness: (i) necessity, (ii) selfdefense, (iii) strict compliance with legal duty, and (iv) the lawful exercise of a right.

Unlawfulness comprises both an objective aspect—referring to the absence of the objective elements required for a justification—and a subjective aspect, which concerns the actor’s physical and cognitive capacity to satisfy the conditions of the permissive norm.

In this respect, the 1984 law reform adopted the limited theory of culpability regarding the error about justifying circumstances—that is, a mis-

take concerning facts relevant to a justification. In such cases, Article 20 (1) provides that "A person who, due to a mistake reasonably justified by the circumstances, believes in a factual situation that, if it actually existed, would justify the act, is exempt from punishment."³ As with the elements of the offense, the statute further specifies that "there is no exemption from punishment when the mistake results from negligence and the act is punishable as a negligent offense."

The limits of justification in cases involving the actor's own responsibility for the situation are also elucidated with respect to necessity. Under Article 24, this justification is excluded for an actor who intentionally created the dangerous situation or could otherwise have avoided it. Provoked self-defense, by contrast, is not expressly regulated by statute, and its recognition remains controversial in legal scholarship.

Furthermore, Brazilian legal scholars advance a distinctive interpretation of the necessity justification. They maintain that justificatory necessity extends to injuries inflicted upon legal interests of equal value to those sacrificed.⁴ According to this prevailing view, the classic case of a shipwreck survivor who kills another to secure a place in a lifeboat would constitute a ground for the exclusion of unlawfulness—rather than a ground for the exclusion of culpability, as is generally understood in Germany and Portugal.⁵

IV. CULPABILITY (SCHULD)

In Brazilian criminal law, only individuals over eighteen years of age are criminally liable. Individuals below this age who come into conflict with criminal law receive attention under specific legislation for the protection of children and adolescents. In these cases, adolescents may be subject to con-

3 Although the statute employs only the phrase "is exempt from punishment," it is generally understood that a factual mistake concerning a justification renders the conduct itself justified, thereby excluding its unlawful character.

4 On the origins of the discussion, Francisco de Assis Toledo, *Princípios de Direito Penal*. São Paulo: Saraiva, 2014, p. 176–181.

5 In this regard, see Beatriz Corrêa Camargo, Artigo 28. In: Luciano Anderson (ed.), *Código Penal Comentado*. São Paulo: Revista dos Tribunais, 2022, p. 97–101.

finement in facilities appropriate for their age but cannot be detained for more than three years.⁶

Unlike German and Portuguese law, Brazilian law does not recognize the exclusion of culpability in cases involving a momentary impairment of the senses resulting from a passionate outburst. Under Article 26, “A person is exempt from punishment if, due to mental illness or incomplete or delayed mental development, they were, at the time of the act or omission, entirely incapable of understanding the wrongful nature of their conduct or of acting in accordance with such understanding.”

As established by Article 28 (I) “emotion or passion” does not exclude criminal liability. Although this provision clearly affirms the irrelevance of emotional states such as fear, fright, or anger in determining culpability, several scholars argue that culpability should be excluded in cases of asthenic excesses in justifications.⁷ Article 23, however, establishes that any excess in the exercise of a justification is punishable when committed intentionally or negligently.

Brazilian law also addresses cases involving intoxication. Under Article 28 (II) culpability is excluded for a person who, “at the time of the act or omission, was entirely incapable of understanding the unlawful nature of the act or of acting in accordance with such understanding.” If, however, this incapacity results from voluntary or negligent intoxication, the individual remains fully liable for the commission of the offense.

In response to this provision, a segment of Brazilian legal scholarship advances the same criticisms articulated in German doctrine against the theory of *actio libera in causa*, particularly arguing that it violates the principle of legality.⁸ In my view, however, this critique is misguided. Unlike German law, Brazilian law expressly provides for this extraordinary form of criminal imputation. Moreover, as demonstrated throughout this analysis, the Brazilian criminal law system is grounded in the notion that an individual may still be

6 Article 121(3) of Law No. 8,069/1990.

7 See, among others, Bruno de Oliveira Moura, *A não-punibilidade do excesso na legítima defesa*. Coimbra: Coimbra Editora, 2013, p. 149 et seq.; Juarez Cirino dos Santos, *Direito Penal – Parte Geral*. Curitiba: ICPC, 2014, p. 328 et seq.; Juarez Tavares, *Fundamentos de teoria do delito*. Florianópolis: Tirant lo Blanch, 2020, p. 546.

8 Paulo César Busato, *Direito penal – Parte Geral*, São Paulo: Atlas, 2018, p. 544 et seq.

held responsible even if, at the time of the prohibited conduct, they were unable to prevent its occurrence—provided that they themselves were the cause of that incapacity.⁹

The same reasoning applies to mistakes concerning the existence or scope of a criminal norm that prohibits or justifies the conduct. Under Article 21, a mistake regarding the unlawfulness of the act exempts the agent from punishment if it was unavoidable. If, however, the mistake could have been avoided, the actor remains criminally liable.

While Brazilian law expressly provides for the exclusion of culpability in cases of duress (Article 22), it contains no statutory rule regarding exculpatory necessity. Exculpatory necessity is recognized by legal scholarship as a supra-legislative ground for the exclusion of culpability. As noted, most Brazilian scholars regard the sacrifice of another's life to preserve one's own as a justification excluding unlawfulness. Consequently, Brazilian doctrine understands exculpatory necessity quite differently from the approach taken in Germany or Portugal, as it encompasses only extreme situations—such as the hypothetical case of an archaeologist who allows another person to die in a disaster in order to preserve the results of his research.¹⁰

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⁹ For the discussion under Brazilian law, see Camargo, cited in note 5, p. 117–121.

¹⁰ Guilherme de Souza Nucci, *Código penal comentado*. 22nd ed. Rio de Janeiro: Forense, 2022, p. 234.

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