

## §1 What is Criminal Law?

### I. Criminal law in the legal system

**The German criminal law distinguishes between three areas:**

- Bürgerliches Recht (Civil Law)
- Öffentliches Recht (Public Law)
- Strafrecht (Criminal Law)

Formally the criminal law is a part of the public law. The public law (Öffentliches Recht) is characterized by the following principle of Über-/Unterordnungsverhältnisses (superordinate and subordinate relationships): The police tells the citizen about the prohibition of consuming alcohol. Here is an authority by law taken to oblige a citizen to commit an act/omission. In civil law, the principle of Gleichordnung (equal status) prevails: after paying the purchase price, the customer requires the baker to give the goods. Here the baker is right to hand over the goods because he has completed a (free will) purchase agreement with the customer. First, traditional reasons, and secondly, the aspect of the high importance of criminal conviction – the most serious engagement of the state on civil liberties – criminal law is understood to be an independent area of the legal system.

**Case:** *A knowingly offers rotten meat in her restaurant. Guest B suffers a severe gastrointestinal infection and may not work for a week.*

**Task of Civil Law:** A legal framework for social relationships between citizens /compensation of conflicts of interest: *B can assert the loss suffered, any medical treatment costs, and the loss of earnings in civil law against A.*

**Task of public law:** Public law establishes statutory requirements, which mainly regulate the relationship between people and the state as well as the social relations of the people. Thus, e.g. the Law on the Establishment of a Restaurant (Gaststättengesetz) regulates the person with permission (a license), which can be granted or withdrawn, to operate a restaurant. In the present case, the competent authority will examine whether A's permission to operate a restaurant is withdrawn, § 15 GaststättenG i.V.m. § 1 LGastG-BW, because A may not possess the reliability required for the commercial establishment, § 4 I Nr. 1 GaststättenG i.V.m. § 1 LGastG-BW.

**Task of criminal law:** Criminal law ensures legal peace by safeguarding and enforcing legal order, which is itself the basis of an orderly human existence (BVerfGE 123, 267, 408). This protection is ensured by the fact that the legal system forbids certain types of socially harmful behavior and thereby a social ethical value is expressed against the perpetrator („sozialethisches Unwerturteil gegenüber dem Täter zum Ausdruck gebracht wird“) (Wessels/Beulke/Satzger AT Rn. 4). The violation of „causing bodily harm“ is found, under penalty, in §§ 223, 229 StGB.

## **II. Criminal Law in the system of criminal sciences**

Criminal law is divided into core and secondary criminal law. The core criminal law covers all the norms which can be found in the criminal code, thus regulating the core material of criminal law. The secondary criminal law refers to the penal norms, which are not in the Criminal Code, but in other laws. As is clear from §§ 29 ff. Narcotics Act (Betäubungsmittelgesetz), the division into core and secondary criminal law does not imply the importance of the criminal norm for society.

Besides, there are further sanctioning norms that do not belong to criminal law. For socially and ethically abusive behavior, which does not reach the level of a criminal offense, the legislature has enacted administrative offenses, which are sanctioned by the administration. Therefore, the Act on Regulatory Offences (Ordnungswidrigkeitenrecht) is regarded as the right to penalize the "small coin" of the social activities (BVerfGE 22, 78); cf. § 111 OWiG (Stating False Names).

### **The German criminal law needs to be delimited to**

#### **- criminal procedure law (Strafverfahrensrecht)**

Regulations governing the detection of criminal offenses and the enforcement of state punishment.

- **punishment law (Strafzumessungsrecht)**

Rules governing the nature and amount of the penalty to be imposed.

- **prison law (Strafvollzugsrecht)**

Rules on the execution of imprisonment and of custodial measures.

- **to Juvenile Justice (Jugendstrafrecht)**

For juvenile offenders (14 - under 18), the idea of education is at the forefront.

- **Criminology (Kriminology)**

“[C]riminology is an empirical science which looks at the contexts of both peno-legal judgements of occurrences as well as those occurrences judged by penal law.”

Full quote: „Nach dem Konzept dieses Buches ist Kriminologie eine empirische Wissenschaft von den Zusammenhängen sowohl strafrechtlicher Beurteilung von Geschehensabläufen als auch strafrechtlich beurteilter Geschehensabläufe. Zugleich wird davon ausgegangen, dass die Zusammenhänge einschlägiger Erfassung (als abstrakte wie konkrete Norm- und Wertsetzung) wesentlich von gesellschaftlicher bzw. sozialer Macht abhängig sind.“ (*Eisenberg* Kriminologie [6. Aufl. 2005] § 1 Rn. 4)

- **Forensics (Kriminalistik)**

Forensics refers to the doctrine of combating criminal offenses. Here the criminalist uses specific tactics and techniques.

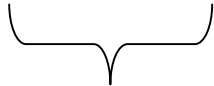
- **Criminal Policy (Kriminalpolitik)**

Criminal policy describes the political efforts (right up to the laws) of criminal law.

### III. General Part and Special Part

## Allgemeiner Teil

General Part



§§ 1 – 79b StGB

Legal norms which apply to all situations of the Special Part (BT):

- General requirements of culpability.
- General statements on the legal consequences of culpable behavior.

## (Besonderer Teil)

Special Part



§§ 80 – 358 StGB

List of individual offenses, including the respective criminal sanctions.

- Within the Special Part (BT) ordered by legal interests.

→ Culpability

## Introductory case

**Facts** (according to BGH NJW 2013, 2133): *S is a candidate of the NPD for the election of the parliament in Baden-Wuerttemberg and member of "Kameradschaft Süd Sturm Baden". In the past, he had been convicted of Incitement to hatred (Volksverhetzung) and the showing of anti-constitutional Nazi symbols. On August 4, 2011, he was "protested" by people from the left as a radical right-wing and then insulted on relevant Internet blogs. A few weeks later, S wrote to a political fellow in an internet chat: "I'm just waiting on that one attack. Then I can let 'him eat the sword.' The nice thing is that it would be self-defense! Picture it! A tick attacks and you pull a knife. The idiot folds together and no longer moves. This must be like the feeling before you ejaculate! "*

*On October 1, 2011, S is waiting for some friends in a Mitsubishi Colt on a commuter parking area near the A5 by Riegel, where he would like to visit a party of the radical right-wing scene. This was known by some leftist activists, sitting together in a five-seater in a neighboring parking place. At around 7:15, they marched with helmets, equipped with pepper spray and quartz-sand gloves, on the road leading to the commuter parking area in order to attack S. It cannot be excluded that S panicked, when he noticed the quick steps towards him, and decided to flee. He started the car and drove with full throttle over the first exit into the group of people. He was aware that he put the five people into considerable danger of being hit by the vehicle and being seriously injured. This he willingly accepted.*

*Four of the left-wing activists were able to save themselves by jumping to the side. K, however, was hit by the car, bounced against the windshield, crashed the back of his head on the pavement, and remained seriously injured. He suffered a life threatening cerebral hemorrhage and various bruises and abrasions. Due to the cerebral hemorrhage he further suffered a motor aphasia. He had to be treated on the intensive care unit and went to a rehab in order to relearn his linguistic ability.*

Note: This case raises problems at different levels and is therefore complex. Without absolute knowledge of the requirements of Self-Defense according to § 32 StGB, the case cannot be resolved. Therefore, at this point, no comprehensive criminal assessment is required by you. On the contrary, you should be rather motivated here to, intuitively and with the aid of your natural sense of law, filter the relevant information and criminal “crucial points” from the described sequence of events and at least assign them to the corresponding dogmatic categories of the General Part. The following summary of the legal assessment of the case serves for completeness, but also falls short. As far as structured and substantiated presentation is concerned, as in a criminal law examination or homework, you will be able to acquire the necessary knowledge and skills during this course and the accompanying events.

S received the charges of attempted murder, (§§ 212, 22, 23 para. 1 StGB), causing bodily harm (§§ 223 para. 1, 224 para. 1 no. 2, 5 StGB) and dangerous disruption of road traffic (§ 315b Abs. 1 Nr. 3 StGB). With regard to attempted murder, it was questionable whether S, in the moment in which he directed the car to the group, had the intention to kill, i.e. acted with the recognition and acceptance of the left-



wing activists' possible death. The courts dealing with this case rejected this. In the investigation of culpability for the charge of causing bodily harm, the question arose to whether S was acting in self-defense, as the group threatened a massive attack on his physical integrity. If the requirements of self-defense were met his action wouldn't be illegal and therefore he wouldn't be culpable. However, the existence of the requirements for self-defense can be doubted for two reasons: on the one hand, S could have escaped the attack without having to collide with the left-wing activist if he had taken a previous exit. On the other hand, in light of the comments made by S in the previous Internet chat, it is questionable whether he really wanted to defend his own legal interests (*Rechtsgüter*) in the moment of the action or if he wanted to use the opportunity, which was apparently promised, to harm the left-wing activists "under the guise of self-defense" (*unter dem Deckmantel der Notwehr*). The focus of the case is on these legal questions. As a result of the appeals brought by the prosecutors and co-plaintiff against the first acquittal of S by the LG in Freiburg, the BGH met the decision, considering the defenses of S, and referred the matter back to the LG Freiburg for a more thorough examination and a new decision. However, another chamber came to the conclusion that S was acting in self-defense and released him again.

### **Literature reference:**

If you want a first impression on the structure and legal argumentation of a criminal case, see the decision of the BGH to read it in the NJW 2013, 2133 ff. (German) as well as online at: <https://openjur.de/u/633156.html> (link last accessed on December 5, 2016).

### **Review questions**

- I. Why does criminal law enjoy a special role within public law?
- II. In which section of the criminal law are questions concerning the specific accommodation, psychological assessment and regular monitoring of a prisoner awaiting trial?
- III. A corpse is found at the Dreisam. Who's coming to the scene? Criminalist or criminologist?
- IV. What is the relationship between the General and the Special Part of the Criminal Code?