

# **Annex D.10**

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# 7

## *Culpability*

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### SECTION 7.01 GENERAL CONCEPT<sup>1</sup>

Although crime is influenced by both sociological and biological factors combined in one way or another, it does not follow necessarily that crime is a product of those factors alone. To be sure, the will as such is to a large extent subject to one's surroundings and personality, but it often directs and dominates the latter. The personality, subsequent to any congenital predisposition, is developed by the accumulation of experiences obtained in contact with the outer world during the course of one's own life. Experiences usually occur in accordance with the inclinations present in one's personality, which is already formed, but there are experiences which come about through the exercise of the will despite such inclinations or sometimes even with the intention to change such inclinations. Thus, personality is formed to a certain extent spontaneously with one's own initiative, even though this naturally will be confined within certain limits by environment and predisposition. The same may be said as to the criminal act as well. In short, a crime is largely determined by the environment and personality of the actor, but at the same time there is undeniably room for free will to play a part.

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1. Adapted from Dando, *Basic Problems in Criminal Theory and Japanese Criminal Law*, 35 IND. L.J. 423 (1960).

## SECTION 7.05

### AWARENESS AND ACKNOWLEDGMENT OF MATERIAL FACTS

#### (1) Introduction

Intent is a clear manifestation of a personal attitude on the part of an actor to contravene a penal norm. Negligence, a concept discussed below,<sup>52</sup> involves a lack of awareness on an actor's part of the material facts, which rules out a personal attitude to act directly contrary to an essential norm; it does not extend beyond a personal state of mind indirectly to violate a norm by intentionally contravening a duty of care. In contrast, intent means that an actor knows the material facts of a crime, so that the issue presented under a given norm<sup>53</sup> can be resolved on a concrete basis. Accordingly, the actor's personal attitude bore directly on the norm in question. Both intent and negligence are alike in that they evince a personal attitude that contravenes a norm, but differ in terms of a direct purpose to violate an underlying penal norm.<sup>54</sup> Consequently, the prerequisite for intent is, first, that there be proof of awareness<sup>55</sup> or acknowledgment of that material fact. However, it is

52. See § 7.08 *infra*.

53. For example, "did the accused kill a person?"

54. For example, in the crime of death through negligence [Penal Code art. 210], an accused does not know that someone will be killed, and so does not manifest a personal attitude directly to violate a basic norm that "thou shalt not kill a person." There is only a violation of a duty to take care that actions do not result in the death of another; when that duty of care is breached, there is only an indirect contravention of the "thou shalt not kill" standard.

55. Awareness [*Vorstellung*] need not be accompanied by a tension of consciousness with reference to the activity itself. A lower court precedent that should be considered on point is 3 Kōsaikeijisaiban tokuhō no. 20, p. 984 (Takamatsu High Ct., Oct. 16, 1956). According to the judgment:

Intent for the crime of homicide, *i.e.*, an intent to kill, need not be manifested clearly at the surface level of the actor's consciousness. There are instances in which the intent to kill for purposes of the crime of homicide must be recognized even though no apparent intent to kill could be perceived at that level of the actor's consciousness, when an actor has inflicted a grave wound on a vital part of the victim's body while in a state of unconsciousness, with the intent to kill buried within the depth of consciousness. In instances of unawareness brought on by excessive rage, when an accused takes up a Japanese sword and slashes at the head of another person, or takes a sharp chef's knife and thrusts it into the breast of another, resulting in an extremely serious injury to the part of the body in question that precipitates death, even if the accused immediately thereafter calms down, and as a result sincerely reconsiders the matter in a way indicating no reason and no volition to kill, the matter involves nothing more than a problem of a manifestation of consciousness (if the accused suffered from no mental defect); the latent state of



necessary to distinguish between two categories of material facts. The first is material facts in the narrow sense, *i.e.*, those corresponding to the constituent elements of a crime. The second comprehends other facts bearing on the substance of illegality. If there is neither awareness nor an acknowledgment of both these categories of fact, an actor cannot be found culpable on the basis of intent.

## (2) Awareness and Acknowledgment of Facts Corresponding to Constituent Elements

Before intent can come into being, first, an actor must be aware of objective facts<sup>56</sup> corresponding to the constituent elements of the crime, and must acknowledge their existence. If this requirement is not met, then from the outset the constituent elements have not been satisfied either. For example, if there is no intent to kill at the time of an act producing death, then from the outset there is no fact corresponding to a constituent element of the crime of homicide, and the intent to kill is of itself a prerequisite for attributing blameworthiness to the actor. Thus, the problem of intent may be said to be covered concurrently by the doctrines of constituent elements and of culpability.

Objective facts corresponding to the constituent elements of a crime comprehend acts (including the subject of those acts, their object and the circumstances in which they take place), consequences, and the cause-and-effect relationship between the two.<sup>57</sup> If an actor was not aware of all of them—in detail, a knowledge of present facts and foresight as to future facts—then there cannot be said to have been intent. In contrast, it is not necessary that there have been an awareness of the actor's own criminal capacity or of

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consciousness is taken to be the intent to kill and there is no objection to a finding that the crime of homicide has been established.

In the context of continuing crimes, the awareness need not continue throughout the entire period. *See* 3 Keishû 796 (S. Ct. G.B., May 18, 1949); 4 Keishû 2194 (S. Ct. First P.B., Oct. 26, 1950) (both relating to unlawful possession). *Compare* ALI MODEL PENAL CODE § 2.01(4) (1985) ("possession is an act . . . if the possessor . . . was aware of his control for a sufficient period to have been able to terminate his possession").

56. If the subject matter of the awareness is facts not amounting to a crime, no crime in fact arises even if an actor erroneously believes there is a crime. This is called a putative crime [*Wahnverbrechen, Putativdelikt, reato putativo, reato immaginario*]. Italy Penal Code article 49(1), (4) provides for protective measures to be taken in such cases, but the propriety of such legislation is questionable. The 1949 Italian draft (art. 19) would have abrogated the provision.

57. It is not required, however, that there have been knowledge of all the details of the causal relationship. 4 Keishû 470 (Gr. Ct. Cass., July 3, 1925). Precedents on mistake as to causation are discussed *infra* note 7.

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