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# Chapter 1: Testing the Continental Restraint Hypothesis in France and Germany

Kirstin Drenkhahn, Fabien Jobard, Johanna Nickels, Tobias Singelstein

## Abstract:

This chapter situates our project on Penal Cultures on the Continent within the international debate, explains key concepts for our research and gives an outline of the book. For many of the classical texts with a focus on the U.S./UK perspective, there has been a debate in Continental European countries about whether these narratives also hold true for one's own country. In some texts, the U.S. have been contrasted with Continental European countries directly or categories of countries have been developed according to political regime indicators such as the model of the welfare state or of democracy in which the U.S. usually sticks out. France and Germany are sometimes placed in the same, sometimes in different categories. In a more recent strand of European research, the concept of penal moderation has been developed, which we are going to explore further in this book. As the following chapters will show, the situation in France and Germany follows this path of penal moderation, although this does not mean that punitive attitudes and desires are completely suppressed.

## **Punitiveness as the Standard Lens of Punishment and Society Research**

“Punitiveness” – this term has dominated international research on punishment and society for the last three decades. Accepted by many and discussed by even more, the concept of a "punitive turn" that has taken hold of Western democracies is omnipresent in the literature. In this context, most observers refer inter alia to an expansion of the realm of criminalized behaviour, new legal provisions on harsher penalties, an increasing acceptance of high prison population rates and a decline of rehabilitative ideals. Many authors situate these observations in a context of a growing desire to punish in the general public as well as heightened electoral competition.

However, most of these observations have been voiced for the USA and the UK. Already anticipated in the 1980s (Garland and Young 1983), these trends have been masterfully synthesised by David Garland for the USA and UK national cultures and the “penal state” as well as by Jonathan Simon who observed an increasing use of the crime topos in various fields of US society, especially in the political field. For Garland, a “culture of control (...) has

increasingly taken hold in public discourse about social and criminal issues” (Garland 2001, 185), a culture that is both marked by heightened attention to crime and criminality in public life and by strong punitive views on crime policies. For Simon, echoing a fundamental societal transformation, “the American elite are ‘governing through crime’”, since “crime has become a significant strategic issue across all kinds of institutional settings (...), people deploy the category of crime to legitimate interventions that have other motivations (...), technologies, discourses, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions, where they can easily gravitate into new opportunities for governance” (Simon 2007, 4 f.).

Marked by positioning effects in the transnational field of idea production (Bourdieu and Wacquant 1991), international criminology, essentially an Anglophone endeavour with a strong research focus on Western anglophone countries, has adopted the punitive turn as a standard diagnosis for the evolution of Western societies (Body-Gendrot et al. 2014, 1; s. also Nelken 2009, 294). Regarding the (epistemological) relevance of the notion of the punitive turn beyond the USA and the UK, two positions have emerged in the international literature.

One of them, rather a minority in the international academic field, but very popular in the critical social circles of the countries concerned (we will come back to this perception gap), consisted in making the punitive turn not only the standard for research, the reference point, but moreover the political horizon of all Western countries. In this vein, Loïc Wacquant soon considered Great Britain as “the acclimation chamber of neoliberal penalty with a view toward its dissemination on the continent” (Wacquant 2008, 11) and America as the “living laboratory of the neoliberal future”, bringing “carceral aberration in France” (Wacquant 2009, xi, 270). But warnings against U. S. ethnocentrism were soon to be heard, provoking a second perspective to emerge. David Downes asked already at the beginning of the 2000s: “A great deal rides on whether or not, and the extent to which, the USA is an exceptionalist outlier in

the penal sphere or both a prefiguration and a driver of things to come” (Downes 2001, 63). Speaking to the European Society of Criminology in 2007, John Muncie said: “There is something of an unfortunate tendency for many Anglophone academics and policy makers to assume that general trends in the USA are not only crossing all American states, but are also capable of being transferred internationally. They are not.” (Muncie 2008, 118). David Nelken also emphasized the need for comparative criminology, since it “has the potential to make criminologists become more reflexive, for example learning to avoid the common error of treating the modern Anglo-American type of ‘pragmatic instrumental’ approach to law as if it were universal” (Nelken 2012, 139; s. also Pakes 2015, 4).

And indeed, an opposite position rejecting the idea of the diffusions of trends in the U. S. and the UK to other Western democracies has surfaced in international research. This second position has seen particularly the UK and the USA as exceptions and Continental Europe as a space of “resistance” to punitiveness (Snacken 2010; s. also Jobard 2017). Yet, it is noteworthy that even in this perspective, U. S. and UK punitiveness tend to remain the standard lens, through which Continental Europe acquires the status of an area of penal restraint. Hence, the picture of penal restraint only becomes visible in relation to a punitiveness standard shaped by the development in the U.S. and the UK.

It is exactly this body of international literature, the literature on the diffusion of U. S. and UK punitiveness to other Western democracies as well as the literature which distances Continental Europe from these trends that sparked our idea of a closer look on two Western Continental European countries: France and Germany. As will be shown, literature focusing on one or the other country either traces elements of U.S.-like punitiveness in each society or classifies them as archetypical strongholds of penal moderation. This book sets out to zoom in on three spheres of society, the general public, politics and the media, to empirically and systematically explore

the social production and meanings of punishment in both countries as well as the notions of punitiveness and penal restraint.

Being sparked and referring to the standard narrative of punitiveness or a punitive turn in Western democracies, this book thus contributes to the debate by nuancing and above all contextualising diagnoses for France and Germany. However, this book also aims to move beyond other accounts on punitiveness in one important way. As the focus is on France and Germany and each country's specific configurations of the social production of punishment, punitiveness and penal moderation are primarily understood and analysed in the context of these two countries. Only to a lesser degree are the findings linked back to research accounts of the USA and the UK. This book therefore undertakes a two-fold endeavour: providing innovative empirical analyses of both countries as well as a more epistemological challenge to the standard lens of punitiveness.

As a point of departure and to situate this book in the existing literature, international accounts on driving factors for punitiveness are briefly revisited that have been identified for the U. S. and the UK or by comparative macro-level studies. This is contrasted with earlier diagnoses specifically expressed for France and Germany. In this context, puzzling contradictions between the national and international literature become apparent. The second part of this chapter introduces the interdisciplinary research project that forms the foundation for this book.

### **Continental Western Europe: a Subcontinent of Penal Restraint**

As has been pointed out, Europe is – in contrast to the USA and the UK – seen as the continent of penal moderation by most comparative criminologists and there is even the question if this moderation could define a specific “European criminology” (Body-Gendrot et al. 2014) or “European penology” (Daems et al. 2013). However, even at a first glance, this does not appear to be totally obvious because, as the promoters of this European criminology of penal restraint

state themselves, one of the characteristics of continental countries is that “there has been an upward trend in incarceration rates since the 1990s, and for many Western European countries since the 1960s” (Body-Gendrot et al. 2014, 9). European penal restraint is therefore a relative notion both in space and in time. In space, established in relation to the USA and the UK. In time, or diachronically, established in relation to the abruptness of the changes in Anglo-American countries.

With these first hints at the need for a more complex understanding of penal restraint in mind, it is important to briefly consider the elements on which the hypothesis of moderation is based. We will revisit the three most pertinent arguments, which shape today’s comparative research on punishment and society and serve as important points of departure for this book. Moreover, we will also introduce a fourth comparative argument, which has usually been neglected in international punishment and society research.

### ***The Political Cultures Explanation***

The cultural or historical dimension of European restraint has been eloquently traced by James Q. Whitman. According to him, the reason why “American punitiveness is comparatively harsh, comparatively degrading, comparatively slow to show mercy” (Whitman 2003, 19), is mainly because the political culture of the U. S. was not built on opposition to a former regime of iniquitous, degrading and inhumane treatment. By contrast, the Enlightenment in Europe was primarily a rupture with previous regimes and thus tamed state coercion with the devices of *Rechtsstaat* and due process, tending towards the measure and proportionality of sentences and respect for the human dignity of arrested or convicted persons. This line of interpretation of European restraint draws on an intellectual tradition already at work in Alexis de Tocqueville’s questioning of the historical foundations of U. S. institutions, especially prisons

(de Tocqueville 1840), but also on a Weberian tradition of reflecting on the role of culture in shaping societies (Melossi 2001; 2008, 88 ff.).

### ***The Autonomy Explanation***

The second explanation focuses on the sharp contrast between U. S. political decision-making and European policy paths, a contrast that can be summarised by the notion of “autonomy” (Garland 2013, 495 ff.; Snacken 2015, 404 ff.). It draws most often on the pioneering work of David Downes (1988) on the difference between high prison population rates in England and Wales and low detention rates in the Netherlands in the 1970s and 1980s. According to his analysis, the Dutch criminal justice system was then characterized by academic expertise, bureaucratized forms of decision-making and hence rather sealed off from external influences. By contrast, in England and Wales judges were granted more freedom in the sense of being more independent from occupational guidelines and doctrinal limitations. Autonomy and bureaucracy are hence thought of as key analytical concepts. This is supported by Whitman who also points out that “bureaucracies are relatively immune to the vagaries of public opinion” (Whitman 2003, 13 f.).

Three main aspects characterise this notion of autonomy of state punishment. The first points to rather centralized and bureaucratized political institutions, which, in contrast to the USA, insulates political and judicial decision-makers from the interests and emotions of local electorates. Following the example of the so-called Utrecht school in the Netherlands, the second one describes a rather sealed-off circulation of penal ideas between policymakers and academics. As Joachim Savelsberg pointed out, it is this specific institutionalised form of knowledge production on punishment that is crucial and separates Germany from the U. S. The third aspect refers to the European integration of courts and judicial systems creating with e.g., the European Court of Human Rights (ECtHR) of the Council of Europe a transnational judicial

umbrella that is detached from national politics and backs a progressive alignment of jurisprudence and judicial practices in Europe (Snacken 2010; Cliquennois 2021).

### ***The Political Economy Explanation***

The third argument put forward by comparative criminology has been subject to numerous developments in recent years and is commonly referred to as “political economy and punishment” (Cavadino and Dignan 2006, 14). Even if this tradition stems from Rusche and Kirchheimer's (1939) analysis of the economic foundations of punitive institutions, it has been strongly renewed. Especially Michael Cavadino and James Dignan's (2009) recourse to Gøsta Esping-Andersen's (1990) typology of welfare states has been highly influential. In a study of eleven countries, Cavadino and Dignan observe that more punitive criminal policies go hand in hand with “liberal” welfare regimes that characterize the USA and the UK. “Conservative-corporatist welfare states” such as France and Germany are characteristic of Western Continental Europe and have more moderated approaches to criminal policies (Cavadino and Dignan 2009, 17). These findings are supported by David Greenberg (1999), Katherine Becket and Bruce Western (2001) or David Downes and Kirstine Hansen (2005) who all established that one of the best-known correlations with indicators of punitiveness of Western penal systems, e.g., prison population rates, is welfare spending. Corporatist and social-democrat countries are considered to be comparatively lenient in their penalty, but relatively generous and supportive in other aspects of their social policies and display a “high degree of empathic ideology and concern for the well-being of others” (Greenberg 1999, 297).

In the same vein of neo-institutionalism, Nicola Lacey uses Peter Hall and David Soskice' varieties of capitalism (2001) to oppose “co-ordinated market economies” and “liberal market economies”. This differentiation is coupled with different markers of democratic systems. Drawing on Arend Lijphart's typology of democracies (1984 and 1999/2012), special attention



is given to different voting systems. According to Lacey, countries with co-ordinated market economies and a proportional voting system like Germany tend to have a more consensual political culture that is shaped by long-term coalition governments and more stable and lenient approaches to criminal policies. Liberal market economies with majority electoral systems like the UK or the USA, by contrast, show a more competitive political culture that incentivizes political actors to politicize criminal justice topics and to promote harsh criminal policies. Here again, Germany is held up as a textbook example of a consensualist political system, as opposed to the U. S. and the UK (s. for an example Lacey 2008, 62 ff.). Taking France into consideration shakes up this clear-cut typology: Despite strong welfare elements, France is neither a coordinated nor a liberal market economy and relies on a two-stage majoritarian voting system, but also shows aspects of a more consensualist democracy.

### ***Types of media systems***

These hypotheses and explanations on the causes of punitiveness or penal moderation are often bolstered up by a “media-driven hypothesis” (Cavadino and Dignan 2009; s. also Beckett and Sasson 2004, 73 ff.). This hypothesis generally focuses on the relationship between patterns in crime news and in crime statistics or the lack thereof, and the strong affinity between media coverage of crime and policies of law and order (Reiner 2012). However, comparative research has not yet developed the same degree of sophistication in distinguishing observable patterns as in the cultural, political, or economic fields that were just mentioned. Most often, the influence of quality press and popular press are considered, or the mere presence of the tabloid press is identified as a driving factor for punitiveness (e.g., Lappi-Seppälä 2013). The Anglo-American countries with the Rupert Murdoch consortium as a paradigmatic case, offer a clear example of tabloid-driven media on law-and-order issues. Germany by contrast, disturbs these approaches with its very powerful tabloid press and the influential Bild Zeitung in particular.

Current media studies use a more nuanced approach and distinguish between three media systems sorting France and Germany in two different boxes: a polarized pluralist model in the case of France and a democratic corporatist model in the case of Germany. These are both opposed to the liberal model e.g., in the USA and the UK (Hallin and Mancini 2004; Benson 2013). The liberal model is characterized by a "neutralized" journalism, which favours a strong separation of facts and comments in media coverage. Conversely, the polarized pluralist model displays a stronger preference for "committed journalism": articles do not always separate facts and comments and put a greater emphasis on the debate of ideas. In this model, media groups are often linked to and subsidized by public stakeholders. This helps to maintain a larger diversity of news outlets with varying orientations than in the liberal model. Intersecting these two models, the democratic corporatist system is defined by the significant weight of public media in the audio-visual sector, but also by large private press groups (Springer, Bertelsmann, Burda, DuMont, etc.). The journalistic tone adheres to the liberal model's neutralized style with a strict separation of facts and commentary and journalistic writing is rather consensual. Private groups, however, often politicize their publications with controversial comments, as in the polarized-pluralistic model. This specific complexity of media systems is generally overlooked in punishment and society literature but offers great potential for a more subtle comparative understanding of the role of the media.

### **Western Continental Europe in Punishment and Society Research**

The combination of these factors produces the seemingly general consensus around a typology of Western states, which classifies Western Continental European states as "conservative corporatist democracies" (Cavadino and Dignan 2006, 15) and places them in the area of penal moderation. This typology has been nuanced and complemented by more recent contributions. Particularly relevant for Western European countries is the recent work of Georg Wenzelburger

(2020), who analysed the partisan politics of law-and-order legislation in 20 Western countries. Zooming in on four European countries with in-depth case studies on law-and-order policies between the 1990s and 2014, Wenzelburger points out important differences between France and Germany. While he observes a rather substantial shift towards more repression in France, Germany's law-and-order policies seem to remain more tempered. Despite these new developments in the international literature, it still holds true that the strong focus on the U. S. and the UK left many countries including Continental European countries under-researched. This is even more striking, as research produced within these allegedly moderate countries is often at odds with this very hypothesis. We need to address these contradictions between international research and domestic French and German research in order to bring it closer to our project.

### ***International Perspectives on Continental Europe: an Obscure Continent***

The case seems clear: Europe is a continent of restraint. Surprisingly though, a closer look at the international literature reveals little empirical work to support this assessment. In fact, the comparative literature is overwhelmingly devoted to describing the punitive turn or the tradition of harshness in the U. S., and to describing the policy path followed in England and Wales and then in Scotland. Meanwhile, little is said about the countries of Continental Europe. Two noteworthy exceptions to this are David Nelken's work on juvenile justice in Italy (2006; 2012), extended today by Zelia Gallo (2015; 2019) on the Italian penal system, and John Pratt's work on what he called (and what has since prevailed) "the Nordic exceptionalism", testifying to particularly low prison population rates in Scandinavian countries and, in particular, to the dynamics of reducing the prison population in Finland (see also Lappi-Seppälä 2007).

Apart from the focus on specific geographical areas, comparative research has been mainly concerned with classifying countries into categories derived from the neo-institutionalist work

already mentioned and later on with identifying various country-specific characteristics within the different groups of each typology. These efforts, however, do not allow us to understand the patterns of the presumed penal moderation and their endurance or endangerment in the face of various economic, social and political upheavals and crises. The Dutch example which in Downes' work, provided a model for comparative analysis between a moderate system (the Netherlands) and an excessive system (England) was overturned a few years after its publication, though, by the transformation of Dutch society in the face of drug-related problems: the Netherlands became in a few years a model country of the punitive turn, “on the road to dystopia” (Downes and van Swaaningen 2007).

Comparative research seems to have little concern for empirically testing and exploring the patterns of penal moderation. Germany, France, the Netherlands, or Italy seem to be firmly and soundly classified as moderate democracies, but not 'exceptional', offering the reassuring face of a kind of stable restraint. Yet, an increasing number of contributions acknowledge that things are probably not that simple. Many authors also voice their dissatisfaction with the heuristic scope of the very macro-sociological scales of analysis and call for the testing of the soundness of classification conventions and for exploring the mechanisms by which restraint (or harshness) is perpetuated or, on the contrary, retreats or collapses. In his presidential address to the American Society of Criminology, David Garland (2013, 489) alleged that “most of (the) questions can only be answered by means of careful, qualitative and quantitative comparisons, most likely using in-depth analyses of a few comparable jurisdictions or perhaps of the same jurisdiction at different points in time”. A decade earlier, Michael Tonry (2001, 531) called for “more, fuller and nuanced policy histories for individual countries and their subjurisdictions”. This need to change scales and methods is, in our view, all the more urgent since, by a strange reversal effect, the specialised literature in the Continental European countries is far from agreeing on the supposed moderation in criminal policies.

### *Views from France and Germany: an Archipelago of Excess*

A surprising fact in research on Western European countries is that international production seems to be the opposite of national production. Yves Cartuyvels and Philippe Mary denounced the “political drift” of criminal and security policies in Europe in the late 1990s (Cartuyvels and Mary 1999). Daniela Klimke, Fritz Sack and Christina Schlepper (2011) argue that the “culture of control” identified by David Garland in Anglo-American countries is also prevalent in Germany, the putative paragon of European temperance, in a context of steadily rising prison population rates from the early 1990s until the early 2000s (Mauer 2001; Suhling 2003). In their view, the punitive wave did not miraculously stop at Germany's borders: “In the Anglo-Saxon world, or better yet, anywhere but in the German-speaking parts of the world, the empirical evidence of a punitive turn in criminal justice is almost uncontested” (Klimke, Sack and Schlepper 2011, 289, s. also Schlepper 2014, 7). This view was shared at the time by the former vice-president of the Federal Constitutional Court Winfried Hassemer who thought that the continuous growth of criminal legislation “expands the prohibited domains, increases sentences, facilitates the burden of proof, minimizes chances of defense, and complicates the control of legislation” (Hassemer 2002, 11; s. also Dollinger and Kretschmann 2013; Wenzelburger and Staff 2016; Kury and Schüßler 2019). In her doctoral thesis on the evolutions of the German Criminal Code from 1976 to 2005, Christina Schlepper (2014) strengthened the hypothesis of a growth and extension of the repressive arsenal in Germany, and more broadly the hypothesis of a punitive turn.

Overall, however, the question of punitiveness “gave rise to considerable controversy among German criminologists” (Kury and Shea 2011, 16). For many scholars, there is undoubtedly a growing harshness – only its scope and magnitude are questioned. In this regard, Bernd Dollinger’s appreciation rather reflects the prevailing view among scholars: due to a framing

alignment on crime of the Social Democrat Party (SPD) led by Gerhard Schröder (Chancellor from 1998 to 2005) with the Christian-Conservatives (CDU), Germany also witnessed something like a punitive turn from the 1990s onward. This was specifically observed for youth violence and the crime-immigration nexus. This turn has been described as a “restricted punitive turn” (Dollinger 2020) due to the strong positions of the Federal Constitutional Court (s. also Wenzelburger 2020) and parties like the Liberals (FDP) and the Greens, who play a moderating role in the governing coalitions they are part of. The assessment expressed one decade earlier by three other German scholars on variations in public opinion, criminal legislation, and sentencing since the 1970s clearly stated that “from the beginning of the mid-90s a slight rise in punitiveness can be assumed, but definitely not a considerable one” (Kury, Brandenstein and Obergfell-Fuchs 2009, 78). Using a time-series analysis of opinion polls on three items in the International Crime Victim Survey on support for the death penalty, consent to certain deviant behaviours and sentences chosen by the citizens against certain offenses, Karl-Heinz Reuband stated that the empirical basis for a punitive turn in Germany is rather “shaky” (Reuband 2011, 132) and that German public opinion overall endorsed a rather restrained view on crime and punishment, even though some signs of punitiveness can be seen concerning very specific issues like robbery, tax evasion, and above all domestic violence.

On the French side, debates were by far not as divisive and clear manifestations of punitiveness have been identified. Prison population rates there have never stopped rising since the 1970s, except for a brief reversal in the second half of the 1990s. In France, despite being classified as a corporatist democracy, researchers have been unanimous in diagnosing a punitive turn. The book edited by Laurent Mucchielli in 2008 and translated into English 2009, “The Security Mania”, bears witness to this. In one chapter, Bernard Harcourt presents France as one example among others of an ongoing global process: “The turn of the twenty-first century witnessed significant shifts in punishment and penalty, not only in the United States, but also abroad, in

France, Great Britain, Italy, Canada, and across the globe” (Harcourt 2009, i). With his numerous books, Laurent Mucchielli has reached a large public audience. But his analyses converged with those of the majority of academics and experts who pointed to legislative inflation (Danet 2006), increasing prison population rates (Bérard and Chantraine 2013), the managerialization of justice (Gautron 2016), the increased powers of police and prosecution (Aubusson de Cavarlay 2006), the acceleration of justice and the severity of speedy judgements (Bastard et al. 2016), or more broadly “penal populism” (Salas 2005), the “law-and-order ideology” (Mucchielli 2011), and the “punitive moment” of French society that is slowly blurring the distinction between legal punishment and unlawful state violence (Fassin 2018). There is thus a striking contrast between what Anglo-American macro-sociological comparative research says about Western Continental European countries and what domestic research in these same countries, especially in the case of France, says. The aim of this book is therefore to zoom in on the two largest countries of Western Continental Europe to describe the processes around punishment, following an approach that we will now outline.

### **A Journey Into the Continent: French and German Penal Moderation put to the Test**

Our aim for this book is to open the “black box when it comes to demonstrating how penal law and policies are shaped” (Garland 2013, 492) and to address the need for in-depth qualitative and finely grained quantitative studies of the penal field based on contrasting two societies on the European continent. Based in political science, sociology, media studies and law, this book addresses the social production of punishment in France and Germany from multiple angles for an encompassing picture.

### ***France and Germany as two Important Societies of Continental Europe***

France and Germany are “the two dominant legal cultures of the European continent” according to James Q. Whitman (2003, 5). Our ambition is to use these two societies to understand the patterns of perpetuation, or decline, of restraint in the region of “resistance to punitiveness” (Snacken 2010) that is Continental Europe and thus to test the consistency of this hypothesis and explore the specific patterns of the social production of punishment. While Germany is celebrated as the paragon of penal restraint, neighbouring France resembles the ideal to a lesser degree. It is precisely this somewhat murky similarity between the two countries that first led us to bring them together. So, if moderation lasts, if it resists or, on the contrary, if it gives way to other trends and patterns, is explored from a comparative perspective. This helps to identify relevant mechanisms and dynamics beyond simple national or even “parochial” (Tonry 2001) aspects that would too easily lead to conclusions, as Cavadino and Dignan point out in a thought that surprisingly contrasts with their classificatory approach: “It is not going too far to say that we have found all of the countries in this study to be exceptional in at least some respect” (Cavadino and Dignan 2009, 36).

In an approach close to the cross-history promoted by Bénédicte Zimmermann and Michael Werner (2006), we therefore consider France and Germany as two places where penal restraint manifests itself to possibly differing degrees and in possibly differing ways and try to understand the dynamics that promote or prevent it. We are not primarily interested in measuring the relative degrees of moderation or punitiveness in the two countries, nor in explaining the causes of penal moderation there, but in documenting the place and meaning of crime and punishment in these two societies, i.e. how penalty, understood as a representation, a discourse and a policy, shows in these two societies.

### ***Three Spheres of Penalty: Public Opinion, Politics, and Journalists***



To explicitly address research gaps in comparative criminology and in punishment and society research in particular, this book's field of research primarily focuses on three spheres of penalty: the public opinion, politics, and journalism.

While key aspects of criminal justice systems illuminate how state punishment actually spells out, research on e.g., comparative criminal law, sentencing practices, or penitentiary institutions has widely been conducted and produced many important insights. As Sonja Snacken, Kristel Beyens and Hilde Tubex already showed in 1995, the characteristics of the criminal justice system are embedded and interlinked with a country-specific configuration of public opinion, politics, and the media. However, in comparative French and German research, it is exactly these spheres that have been less researched. Thus, their analysis promises to address many of the described voids in international punishment and society research.

We therefore change the analytical perspective and explicitly zoom in on the social production of punishment outside of the criminal justice system. In addressing international research beyond macro-sociological approaches, we explore how notions of harshness or penal restraint are lived out and realised in the three spheres of public opinion, politics, and the media. Moreover, the configuration between these three domains appears to us to be poorly documented and poorly problematised, too. It is therefore one of our main research interests.

Each country's criminal justice system is still considered as an important point of departure and as the backdrop against which public debates on punishment can be contrasted. Thus, we are also interested in criminal law provisions and criminal justice practices as structuring forces. We also take the idea for granted that the embedding of the criminal justice system in a transnational European whole favours due process, respect for the proportionality of sentences and parsimony as well as for human dignity (Snacken 2010).

### ***Penal Restraint: a Configurational Approach***

The first objective is to research social spheres that have received little international attention so far. If these two countries form an area of penal restraint, how do citizens, journalists and politicians contribute to it? Or if their beliefs run counter to the principles of parsimony and proportionality that are thought to make up penal restraint, how is it that penal restraint persists and even resists? Then, what is the relationship between these three spheres? What is the nature of exchanges between them? How do public opinion, media and politics contribute to, or jeopardize, penal moderation in France and Germany?

To answer these questions, we draw on Norbert Elias and propose a “configurational” analysis of punishment. In criminology, Elias is best known for his reflections on how crime and punishment have followed a path of pacification and “civilisation” over the centuries (Elias 1978; Spierenburg 2013; for a comparison of the U. S. to France and Germany Whitman 2000). The notion of “configuration” is, however, taken from Elias’ sociology of football (Elias and Dunning 1966) as well as from his sociology of courtly relations (Elias 2006). The challenge is to understand how each of our social sphere is shaped by its relations with and representations of other social spheres. How do journalists foresee the effects of their productions on public opinion or on politicians? How do politicians govern themselves with regard to what they imagine to be the effects of their speeches and actions on their constituencies? How does public opinion imagine the way in which politicians transform their demands and the consequences of their possible collective mobilisations on legislation, of which the population will ultimately also be the target? This is a “configurational approach” (...) “in which attention is focused not on the dynamics of one side or the other, but of both together as a single configuration in tension” (Elias and Dunning 1966, 391). Based on an in-depth study of the social spheres in which penalty might find its expressions and manifestations, such a configurational study of the tensions, conflicts and modes of regulation that exist between these spheres offers important insights on how penal moderation is produced or jeopardized.

### *Our Fields of Investigation*

The work carried out in the framework of our book therefore focuses on the dynamics of production, maintenance, challenge and possible destruction of penal moderation, from the spheres of public opinion, the media and politics in France and Germany. It is captured in the research scheme for our joint project (Fig. 1.1).

<Insert Fig. 1.1 here>

Following the configurational approach, the focus is on investigating the contextual dimensions of “punishment” in both France and Germany. As Francis Pakes (2015, 3) puts it, “criminal justice arrangements need to be contextualized so that we can understand how they work in relation to each other and how the nuts and bolts of arrangements fit together”. But this “context” is one of the blackest of boxes of today’s comparative research and is too often taken for granted: public opinion as much as media coverage are too often reduced to a clear-cut, drastic and radical position without systematic data collection and analysis.

This book therefore asks what is actually going on when people think about deviance or criminal justice and punishment, when journalists hear about a crime and how they see their role in this process or when politicians elaborate on new legal provisions. It also traces to which degree the answers to these questions are also mirrored in trends in criminal policies and media coverage and may be linked back to e.g., specifics of the political field or media landscapes.

To address these questions, the following chapters draw on a research project that consisted of several packages and was rooted in multiple disciplines ranging from political science, sociology, media studies to comparative law. It is not only this multi- and at times

interdisciplinary approach that allowed us to adequately set the focus on the different spheres, but also a mixed-methods design with innovative methodological approaches.

Package A provides an important basis for the following chapters. In giving a comparative overview of the relevant normative basics of each criminal justice system, namely key aspects of the criminal sanctions and procedure law, Ch. 2 fleshes out what is legally enshrined as adequate forms of punishment and of the way(s) the law prescribes to get to the moment of punishment. This is complemented by a brief analysis of statistics on crime and law enforcement activity (Ch. 3). Taken together, these chapters thus reflect the approach described above: criminal law provisions and the criminal justice system are thought of as an essential point of reference for researching the three public spheres where penal cultures are shaped. Ch. 4 gives an overview of the methods that we applied for the data collection in the following packages.

Package B zooms in on the general public through two lenses. First, the results of a quantitative survey of 3,000 persons in each country are contrasted with survey of 1,500 prosecutors and judges in both countries. So, here we look at restraint not as an absolute concept (restraint v. harshness), but as a relative one as we compare the results of a survey on penal attitudes and specific sentencing options (Ch. 5.1). To add a qualitative perspective to these findings, we examined the reasoning and even the “penal rationality” (Laumond 2020; Pires 1998) at work when people think about punishment and crime (Ch. 5.2). This is done with the help of a card game that encourages the participants to voice their rationalities for choosing specific criminal sentences for fictitious crime cases.

Then, package C explores the sphere of politics in three complementary ways. In Ch. 6.1, we take a prosopographical approach to find out whether “crime pays”, as Katherine Beckett (1999) put it. Here, the question is whether politicians who have worked on and invested time in these issues during the course of their career, profit in terms of better career opportunities

towards the top of the political establishment in Germany and France. Ch. 6.2 takes politicians at their word. Members of the two national parliaments are interviewed to understand the place and meaning of crime issues in their everyday practices and how this is connected to the two other spheres. Then, Ch. 6.3 takes an in-depth look at all modifications of the German and French penal codes adopted between 1995 and 2020 to put the notion of moderation to the test in both national legislations. The systematic longitudinal approach reveals and compares legislative trends and patterns in both countries.

Package D delves into the world of news media in both countries. Ch. 7.1 introduces the sociology of the media field with international classifications of media systems that resonate strongly with the comparative neo-institutionalist literature on crime and punishment. Mirroring the longitudinal approach of Ch. 6.3, Ch. 7.2 analyses trends in the front-page headlines of a sample of print media in both countries and concludes that there is a gradual, but ambiguous, tabloidization of this press on both sides of the Rhine. As with the parliamentarians, in Ch. 7.3 we ask print and broadcast journalists about their representations of crime and punishment, and the place that these issues take in newsrooms and in their career opportunities. Package E consists of Ch. 8, in which we return to the notion of European penal restraint in the light of our project. In this chapter, the findings of the previous chapters are synthesized to examine the content and robustness of penal restraint. Lastly, possible (future) endangerments for the notion of penal moderation are discussed.

### **Penal Restraint or Moderation: an Open Concept**

We have used the words moderation and restraint interchangeably in this chapter – but what do they mean for us in this project? Similarly, as in the case of the widely used notion of punitiveness, substantive and encompassing definitions are almost impossible to find. And, we

argue, they do not necessarily prove to be fruitful. Thus, we understand penal moderation as multi-dimensional and inherently ambivalent and strive to explore at least two dimensions.

The first dimension addresses the question of what the yardstick is for the classification of penal moderation or restraint. This may either be done in a substantive way or in a relational way. Among the few who dared a substantial definition of moderation, Ian Loader (2010) defined it according to three cumulative modalities: "restraint, parsimony and dignity". While we certainly agree that these are crucial aspects of penal moderation, this project is more focused on identifying patterns and exploring narratives that go beyond these three notions.

Most often penal moderation is described in relation to other notions. For e.g., David Hayes, moderation is characterised by a double distance, a distance from minimalism and a distance from excess: "Moderation involves steering a course between extremes: not too much, but also not too little. Minimalism represents an absolute account of action, in other words, whereas moderation is relative to the extreme being avoided. Moderation is somewhere 'in the middle' between too little (a deficiency) and too much (an excess), relative to the possible actions that may be taken. Minimalism, by contrast, is relative to the principles that guide how we should act, *ab initio*" (Hayes 2019, 14). While this definition is fitting in the sense that moderation may very well be defined by what it is not, namely the extremes, as a relational concept it raises the question of points of reference. Excess may be seen as punitiveness in this context. But a conception that is solely based on punitiveness would come with two important risks. On the one hand, as the notion of punitiveness is so often shaped by the U. S. and UK context, the U. S. and UK yardstick and standard lens of punitiveness may be replicated once again and limit options for a more sensitive and open approach to French and German specifics. On the other hand, conceptualizing penal moderation as a section or maybe even point on a one-dimensional continuum may not fully capture the many dimensions that come with the social production of punitiveness. Regarding this concern, Roger Matthews' (2005, 181) appreciation of

“toleration”, which we will take as a synonym for “moderation”, incorporates a more open, not predetermined approach: “Toleration is a more dynamic, relational and less rigid term than punitiveness and carries within it an element of tension and ambiguity, while suggesting a sense of limit rather than outright condemnation of certain actions”. Hence, Matthews’ conceptual approach fittingly opens up the definition of penal moderation and focuses on navigating between two rather vaguely defined or even varying boundaries. Interestingly, these tensions also mirrored by Ian Loader’s more substantial approach, which places moderation in the very close neighbourhood of “ambivalence”, when he suggests that penal restraint “connects with and builds upon the moral ambivalence that many citizens feel towards punishing – an ambivalence that rarely registers in current political debates” (Loader 2010, 353).

The second dimension of punitiveness is the dimension of time. As Hayes’ focus on navigating suggests, penal moderation may be seen as something situational. This may concern specific decisions or voiced attitudes of interviewed actors, e.g., politicians, journalists or members of the general public in this context. It is hence the specific situation in a specific context that allows for the manifestation of penal moderation and may be symptomatic for societal configurations. But penal moderation is also something that may be looked at over time. In this longitudinal perspective, moderation can also be defined as stability over time and therefore as rather incremental changes than abrupt and stark societal transformations. In this sense, moderation would be the antonym of the “punitive turn”, which is characterized by its magnitude but also by its suddenness: among others, David Garland considers that the punitive turn is “something akin to a stockmarket crash” (Garland 2001, 69; s. also Zedner 2002, 345). This book builds on all of these considerations in using a multi-faceted understanding of penal moderation that acknowledges its inherent indeterminacy and ambivalences. Resonating with the ideas of navigating between extremes and of intrinsic tension, penal moderation is not seen or defined in a de-contextualized or static way. While we also agree with a reading of penal

moderation on a more abstract level, a too restrictive definition would have decidedly limited our empirical approach. Instead, different dimensions and manifestations or the lack thereof are empirically explored for the specific context in each chapter. We will see that the ambivalence is evident in all three spheres of public opinion, political representatives and journalists in France and Germany and manifests differently according to the specific context. What can already be said is that both countries did not experience a punitive turn in the sense of a significant rupture. However, aspects of punitiveness are present in both countries. This is especially true for criminal legislation, which is characterized by many modifications that make the substantive criminal law more punitive. If contrasted with the prison population rates, it becomes apparent that the data on criminal legislation is more representative of legislative decisions than of an actual harshening of the criminal justice system. This is especially true in the case of Germany and to a lesser degree in France, too.

All spheres under study show different context-specific expressions of penal moderation, which mostly showed in powerful counter-positions to potential excesses. The following chapters show a strong adherence to values such as “restraint, parsimony and dignity”. Yet, many conflicting aspects such as e.g., perceptions of limited policy options and fears of potential public outcries in the case of politicians, ideas on the logics of the media market for journalists or an intolerance for recidivism among laypersons can be observed.

Thus, we observed firm manifestations of penal restraint in contrast to many assumptions of the domestic literature, even though this is visible especially in relation to the situation in the U. S. and the UK. However, and this is in striking contrast to many assumptions of the international literature, penal moderation is not a static state characterized by consensus, parsimony, and calm. Penal restraint is dynamic, the result of continuous conflict and negotiation.



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