

## Dimensions of Punitiveness in Germany

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**Abstract** Over the last few years, international criminology has increasingly focussed parts of its research on whether there has been a rise in punitiveness in certain nations, and, if so, to what extent it is linked to social developments. In particular, the spread of globalisation corresponding fears and worries have been introduced into the discussion as possible influencing factors. Analyses often refer to the situation of the USA or Great Britain. The situation in continental Europe, however, is obviously a different one. In this contribution especially the situation in Germany will be described. The differentiated levels of punitiveness include attitudes in the population, legislation, sentencing, and enforcement of sentences. As concerns the attitudes within the population the results are partially contradictory, which particularly is due to the blurry concept and the different operationalisations of punitiveness. Overall the results of surveys show a tendency of slightly rising harshness for the population's attitudes. On the level of legislation the criminal laws have in parts become harsher over the last decades. More statutory definitions of offences have been established, while comparable measures of decriminalisation have fallen away. Here a more distinct development towards punitiveness becomes evident. Case law, especially in the field of sentencing, also tends to become tighter. Eventually, for certain groups of criminals like sex and violent offenders a tendency towards a declination of early releases can be found. Today, these offender groups have to serve a larger proportion of their sentence than they had to in the 1970s. Overall these results in Germany indicate a slight rise of punitiveness that is most distinctly seen in the area of legislation. As to the attitudes to punishment within the population the data hardly suffice to claim a rise in punitiveness.

**Keywords** Attitudes to punishment · Enforcement of sentences · Measuring problems · Punitiveness · Sentencing

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## Introduction

During the last few years, German as well as international criminology came up with the question, whether and to what extent the population's attitudes to punishment and those of the official controlling and sanctioning forces have become harsher. In many cases the findings reflected a rise in the population's demand for tougher punishment, at least towards certain offender groups like sex or (juvenile) violent offenders. The courts in particular are believed to impose harsher punishments, e.g. more and longer prison sentences, following on from corresponding developments in criminal law. A growing reluctance to grant privileges to prisoners or early releases was also reported.

A development towards tougher criminal laws in the last few years was described by experts in most of the Western industrial countries, also for Japan (cf. Kury 2008; Krajewski 2006; Kossowska et al. 2008; Yoshida 2008; Serrano-Maillo 2006). As to the population's attitudes to punishment it has been pointed out that within the last few decades there has obviously occurred a sensitisation towards the topic of crime. Crime and inner security are extensively reported and discussed in the media, albeit in a one-sided way.

On many occasions politicians refer to the results of public-opinion polls which are supposed to show that the population expects harsher action against criminals. Within the last few years the validity of these polls on attitudes to punishment as well as on fear of crime has increasingly been questioned. In particular, the question was raised as to what we actually measure with our standardised instruments, e.g. whether they really survey fear of crime, or merely general feelings of insecurity and anxieties (Boers 1997; see the contributions in Kury 2008, esp. Gray et al. 2008; Sessar 2008; Kury and Obergfell-Fuchs 2008a). By using methodically undifferentiated instruments victim surveys often contribute to strengthen traditional ideologies about what crime is, who the victims are, and how offenders should be dealt with.

Criminologists rightly point out that there is certainly no agreement about how punitiveness should be defined and operationalised. This makes it considerably difficult to interpret the partially contradictory findings. For instance, there is still no consensus about whether punitiveness refers to attitudes of singular persons that, e.g. correlate with other personality traits, or whether it measures the courts' practice of sanctioning, the development of legislation and crime policy, or of "behaviors and outlooks of states and countries" generally (Brown 2006, S. 309; cf. also Kury et al. 2004). Mathews (2005, S. 178) rightly concludes: "Although the term 'punitiveness' is widely used in the literature, there is little attempt to define or deconstruct it. The consequence is that punitiveness remains a 'thin' and undertheorised concept. Its largely undifferentiated nature and the general vagueness surrounding it, however, has not been an impediment to its adoption."

In Germany Hassemer (2000), vice president of the German Federal Constitutional Court, senses a growing penal mentality, even a desire to punish, but above all refers to legislation and sentencing. "Since I am able to observe my punishing environment with wakeful eyes, I have never perceived as much self-evident readiness to punish, or even delight in punishing as I do today" (translation by authors). Apart from extending penal prohibitions he determines intensifying controls and decreasing protection of data privacy.

Other authors, too, have spotted a rise of harshness in German criminal law during the last decades that have contributed to a "renaissance of repressive criminal law" (Sack, p. 39, translation by authors), well before the attacks on the World Trade Center. Sack (2004) ends his analyses and investigations with the conclusion that all in all punitiveness has risen in Germany. Above all, Sack criticises the lack of reception of Garland's findings and analyses

(Garland 2001) in Germany. However, Sack's evidence for a rise in punitiveness amongst the population is only partially convincing.

Within the discussion about punitiveness its several dimensions are rarely differentiated. The heterogeneously used methods add to the resulting blurring and inconsistencies.

Among others, the following dimensions of punitiveness can be differentiated (cf. Kury et al. 2004):

- Punitiveness can be seen as a penal mentality or need for punishment, respectively, of singular persons. On this individual level, especially personal assumptions, attitudes, values, concepts and emotions, about which persons report, e.g. in surveys, are of interest (micro perspective of punitiveness).
- It can also be regarded as a supra-individual value that is related to the whole population. It appears in the social discourse, and can be followed especially in the media (macro perspective of punitiveness).
- Another dimension of punitiveness concerns the penal legislation as the outcome of political discourse (political punitiveness). The legislation again concerns several areas, such as establishing new statutory definitions of criminal acts; extending the ranges of punishment; extending the applicability of measures of correction and prevention, esp. in regard to preventive custodies; shift of priorities within the Prison Administrative Codes from a rehabilitative to a repressive approach, etc.
- Punitiveness can also be found on a judicial level (judicial punitiveness). Concrete decisions concern sentences as well as early releases of prisons.

Of course, these dimensions of punitiveness cannot be regarded as separate from each other. They rather share numerous connections and interactive relations with each other. Principally, it is not possible to draw conclusions from attributes on one level to those of another. Thus, a growing punitiveness, e.g. on the level of legislation, doesn't necessarily mean that the population has become more punitive – or vice versa.

In the following we will first discuss particular dimensions of punitiveness and its development in Germany. We will focus on the population's attitudes to punishment, as they are commonly used as evidence for a new punitiveness. Subsequently we will sum up our analyses in the context of the present discussion about punitiveness in Germany.

## **Punitiveness as Need for Punishment in Society**

### Methodical Problems with Measuring the Population's Attitudes towards Punishment

A large area of national and international research on punitiveness is represented by surveys on the penal mentality within the population. Since the beginning of victim surveys in the USA in the 1960s the respondents were not only asked about victimisations they suffered themselves, but were also questioned about other aspects like attitudes to punishment, habit of making a report, or fear of crime. Earlier, punitiveness was merely registered by the attitude towards capital punishment, although the methodologist Thurstone in 1932 had already pointed out the lack of validity with this kind of operationalisation. He therefore proposed a "Death Penalty Attitude Scale" consisting of 24 items to register different aspects of the construct "punitiveness". This has never become accepted though. Until today surveys regularly are carried out with a simplified operationalisation of the complex construct, occasionally even by using only one single item (cf. e.g. International Crime and Victimization Survey; Van Dijk et al. 1990, 2007; Kury and Ferdinand 1999).

The Sentencing Advisory Council of Australia in Melbourne (cf. Gelb 2006) has collected and evaluated the results of international investigations concerning attitudes towards punishment in a comprehensive project. Though the methodological approaches differ from country to country, Gelb (2006, p. VI) concludes that there are in fact internationally consistent findings:

- people consider the pronounced punishments to be too lenient,
- when asked about their attitudes to sentencing, the respondents bear in mind one-sidedly violent criminals and recidivists,
- they know very little about crime and the criminal justice system,
- the main sources of information about crime and sanctioning are the mass media that regularly report in a biased way,
- when receiving more information about the circumstances of a case, their punitiveness drops significantly,
- respondents with own experiences of victimisation are not more punitive than non-victimised respondents,
- respondents with high values in fear of crime are more punitive,
- although there seems to be a regularly measurable rise of punitiveness, the population considers imprisonment not to be as effective in reducing crime as alternatives and training programs; the people also favour supporting families in need as a preventive measure,
- the sentences supported by the population do not differ significantly from those actually pronounced by courts,
- especially for young and first offenders as well as for property offences the public prefers rehabilitation programmes over sanctions without reintegration measures,
- the support for incarceration declines considerably when offenders are willing to make amends; the scarce research on this topic that does exist in Germany confirms these findings.

However, even more differentiated research is needed to obtain a valid overview about the population's attitudes towards punishment. "Coming to public judgment is hard, time-consuming work—people cannot achieve informed public judgement unassisted. It requires partnerships between experts and the public that provide for dialogue and debate about current knowledge in the field and about the likely consequences of potential reform" (Gelb 2006, S. VI).

During the last few years intensified methodological studies proved that standardised surveys are often devaluated by one-sided data entry.

For instance, Roberts and colleagues showed that penal attitudes in the public depend largely on both the level of information about the offender and the conception of the survey instrument. The more information was given about the offender, the milder the supported sanction became (cf. Doob and Roberts 1983; Roberts 1992). The results obtained may vary considerably depending on how the questions on punitiveness are formulated and in which context they are put (see Kury 1995; Kury and Obergfell-Fuchs 2008b). In a study by Sessar (1992) which became quite prominent in Germany, attitudes towards sanctioning were examined. Kury (1995) investigated with an experimental design that the results of Sessar's examination changed considerably depending on how the items of the survey instrument were arranged. Changing, e.g., solely the order of the given sanctioning alternatives for a criminal offence within the instrument or varying the number of possible answers leads to totally different results for many items.

In a recent study of 2005/2006 a random sample of 336 inhabitants of Freiburg/Germany were asked about their penal attitudes through the use of a standardised questionnaire. Those who turned out to have exceptionally punitive attitudes were subsequently interviewed orally in addition (see Kury and Obergfell-Fuchs 2008b). The most dramatic effect on the results of the survey was produced by the choice of the method of collecting the data. As expected, the values of punitiveness were considerably higher when measured through standard written polls than through oral interviews; they were actually twice as high (cf. for comparable problems concerning fear of crime Farrall et al. 1997; Kury and Obergfell-Fuchs 2008a).

Overall, the data confirm that, on an attitudinal level, punitiveness is a very complex concept and that there are no unitary factors that influence this trait. The perception of incivilities for instance is an explanatory factor for a punitive attitude to drug related offences, but with regard to serious, much publicised violent crimes it is rather a moderating factor, and in other constellations it has no significant impact at all. In a similar form, this also holds true for other factors.

The results clearly show, in confirmation with earlier studies, that punitiveness is not a consistent construct, that there is no punitiveness as such, but only varying aspects thereof that may take on a different significance in different areas of crime. Attitudes to punishment depend not only on the survey method used, but also on demographic factors, character traits, personal attitudes, and on the knowledge and the degree of information of the respondents about the type of offences concerned. This explains why the media transmission of attitudes to punishment may not have the same effect on all recipients. For some, the demand for tough measures will fall on fertile ground, others will pay slight attention to such headlines, and in yet another group it may even lead to a reduction in punitiveness.

### Findings on Attitudes to Punishment Amongst the German Population

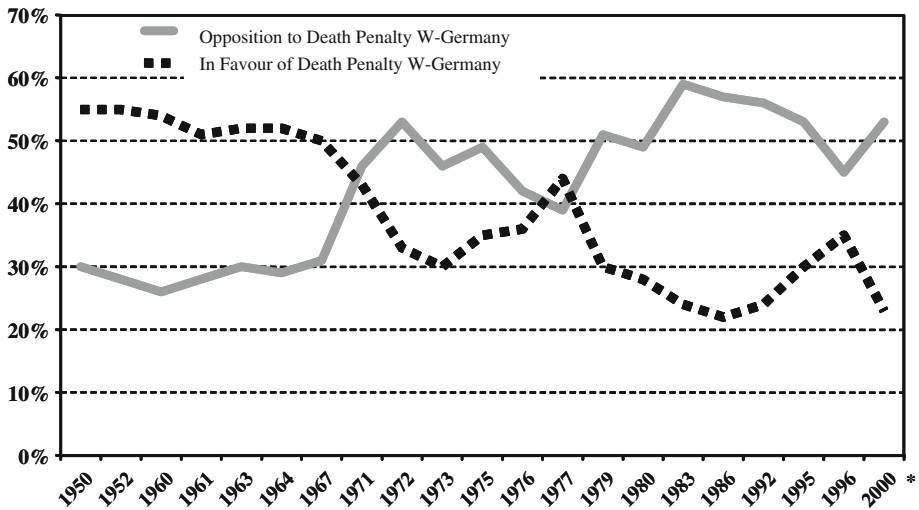
The significance of survey results, normally gathered via standardised measuring instruments, must be interpreted carefully; in this respect only limited conclusions may be drawn. In West Germany (the Federal Republic of Germany) the death penalty was abolished in 1949 after World War II; in East Germany, the former German Democratic Republic, its abolishment was announced in July 1987 by the privy council of the GDR and a law was passed in December of the same year by the People's Chamber (Volkskammer). The last death sentence was carried out in 1981. In West Germany the abolishment of the death penalty was introduced against the will of the majority of the population. In 1949, only weeks before the decision of the Parliamentary Council (Parlamentarischer Rat) in Bonn, the Institut fuer Demoskopie – Gesellschaft zum Studium der Oeffentlichen Meinung m.b.H. (1949) had run a survey in West Germany (the three-section-zone) with 1000 representatives of selected citizens regarding this topic: "In case a new German penal code came into force, would you vote for the keeping or abolishment of the death penalty?" At the same time the British parliament had suspended the practice of the death penalty for 5 years, shortly after a similar survey was carried out in Great Britain. Thus it was possible to contrast the German results with those of Great Britain.

Shortly before the abolishment of the death penalty, votes in West Germany showed a 74% (Great Britain: 77%) approval rate for keeping it, 21% (14%) voted against it, 5% (9%) were undecided. There was a clear approval for the death penalty throughout the different social classes. A special report was set up to establish the kind of offences that should be punished by death sentence according to its participants. The results were the

following: murder 73%, violation and moral crimes 42%, crime against humanity 33%, high treason 30%, war crimes 23%, sabotage 19% and political assassinations 16%. Obviously the death penalty was especially demanded for murder.

Endorsement of the death penalty declined only slightly at the beginning of the 1960s in the Federal Republic of Germany, but fell off clearly in the second half of the 1960s until 1973 (cf. Fig. 1). In 1967 the Institut fuer Demoskopie Allensbach (1967) carried out a representative survey among the population, including a question about the abolition of the death penalty with the result: "The Germans support with almost undiminished force the death penalty" (1967, p. 1). The institute observed that a strong majority of the respondents were in favour of imposing capital punishment on serious criminals. It should be noted that at this time the researchers of the Allensbach Institute pointed out that the Americans would "have a totally different view of the situation." In America the Gallup-Institute had observed continuous declining support for the death penalty since 1953. In comparison, 68% would have voted for the death penalty in the case of murder (25% against it) in 1953; in 1966 it was down to 42% supporting the death penalty (47% against it). At this point nobody could have forecast that such a low rate would never be reached again. Already one year later, in June 1967, 54%, i.e. more than half of the respondents, supported the death penalty (38% voted against it). In the following years, especially 1972 onwards, the supporting rates of death penalty in the USA were again clearly rising (in November 1972: 57%). Today (October 2008) the death penalty counts a 64% rate of support in the USA (Gallup Poll, <http://www.gallup.com/poll/111931/Americans-Hold-Firm-Support-Death-Penalty.aspx>; Dec. 9, 2008).

Since the death penalty was abolished in West Germany in 1949, surveys show a declining trend for its approval, especially at times of a social-liberal zeitgeist in the late '60s and early '70s. This trend shortly rose in the mid-'70s in connection with the left-wing



Source: Allensbacher Jahrbuch der Demoskopie, 2002, p. 676

\* not all years registered

**Fig. 1** Death penalty – support and opposition in West Germany (Question: "Are you principally in favor of or against the death penalty?")

terrorism of the Red Army Fraction (RAF), just to decline again rapidly for a second time until shortly after the beginning of the 1990s. In connection with social and political uncertainties, arising from the reunification of Germany and the border-openings to former Eastern Bloc states, the proportion of death penalty supporters rose until the mid 1990s, declining again afterwards (cf. Fig. 1).

In connection with the opened borders to the former states of the East Bloc (Ostblock) and the reunification of both German states, surveys showed a rising fear of criminal offences. That said, measuring problems must always be taken into account – there is a danger that the actual fear of crime, as measured by standardised surveys, is often overestimated, similar to newer research findings regarding punitiveness (cf. Farrall et al. 1997; Kury and Obergfell-Fuchs 2008a). During the first half of the 1990s general fear amongst Germans and fear towards criminal offences rose more or less clearly, according to recent analyses. By the mid-1990s this rise was not as steep anymore and eventually the fear of crime declined. The correlations found between fear of crime and punitiveness are not consistent, some studies see connections, others do not (cf. e.g. Boers and Sessar 1991).

Punitiveness among the population depends very much on the perceived sanctioning practice of a nation. In this regard the sentencing ‘tradition’ of a country sets the standards for the public when it has to decide whether a sentence is appropriate, i.e. whether a punishment is fair, too lenient or too harsh. History shows that in countries where the death penalty has been practiced since time immemorial, usually a larger proportion support the death penalty than in those countries where it was abolished a long time ago. Therefore, the attitude to punishment is influenced by reactions that are continuously practiced and experienced, or, more precisely, by the media describing the states reactions and their attitude towards criminal behaviour and their reasoning. To a certain degree the public ‘learns’ how to react ‘appropriately’ towards criminal offences, and what kind of sanctions are necessary to guarantee a country’s security. This correlation between penal attitudes and the sanctioning practice has also been shown in the context of a comparison between East and West Germany on the basis of data from Freiburg (West) and Jena (East) (cf. Obergfell-Fuchs and Kury 2004). Findings show that the public of the former GDR, having grown up in a different system of law and sanctions, showed a higher level of punitiveness, even though not for crimes in general, but only in regard to certain offences. Those surveyed in Jena showed significantly higher values of punitiveness for 17 of 21 crimes examined in the study (exceptions: ‘squatting’, ‘rape in marriage’ and ‘abortion’). This indicates, at least for the past, a higher level of punitiveness in East Germany, although it has to be taken into account that the samples were not representative entirely for both East Germany and West Germany, respectively.

Ludwig and Kraeupl (2005, p. 56ff.) compared the results of the 1991/92 study carried out in Jena with two follow-up studies (1995/96 and 2001/02) that took place in the same towns using the same methods. Thus it is possible to draw conclusions about developments of penal attitudes over the 10 years following German reunification. Findings indicate that in Jena a “special emphasis on intensive sanctions (especially incarceration with or without parole) greatly declined from 1991/92 until 1995/96, only to rise again towards 2001/02, although in most cases not to the standard of 1991/92.”

The acceptance of alternatives towards traditional sanctions in reunified Germany, such as reconciliation of perpetrator and victim, rose in the three measuring dates from 32.2% over 32.9% to 38.4%. The support for the accusation and conviction of the offender rose significantly from 83.6% to 87.2% in the time between 1991/92 and 1995/96, and then remained at this level. The importance of help for the offender was supported much less

over time (2001/02: 63.9%). A decline of claims for punishment that was noticed in 15 of 20 similar crimes between 1991/92 and 1995/96 can especially be attributed to

- a rise of support for decriminalisation measures as regards less grave offences such as fare dodging, hashish consumption, or shoplifting,
- a rise of emphasis on balancing reactions (reconciliation of perpetrator and victim), and
- a decline in claims for incarcerations in favour of probations and fines (cf. Kraeupl and Ludwig 2000, p. 182)

“The rise of punitiveness between the last two measurements does not really surprise. The process of liberalisation of penal attitudes that took place until the mid 90s has been influenced especially after the 1995/96 survey, as an intensive discussion about the threat of crime rates in the general public broke out (especially via the media and politics)” (Ludwig and Kraeupl 2005, p. 64). Note that this conclusion has been drawn on a basis that does not even include the attacks of September 11, 2001.

In his nationwide study in 2003, Reuband (2006) also identified amongst 2507 orally questioned candidates different needs for punishment in East compared to West Germany, corresponding to the type of crime. He collected information about the assessed level of severity of different crimes, about the supported punishment for each crime and the purpose of punishment. Results show that East Germans assess tax evasion (East 57%, West 41%) and hashish consumption (East 37%, West 23%) as distinctly more severe than West Germans. In contrast, theft of property from a workplace (East 36%, West 75%) is assessed as far less grave, while violence against one’s wife (East 71%, West 75%) and homosexuality both show only slight differences. Reuband (2008, p. 152f) concludes that East Germans support harsher penalties and laws than people from West Germany. “However, if the topic comes to a precise appraisal of crimes, they are not necessarily more punitive than people from the West” (translation by authors). He further explains the rising punitiveness in East in contrast to West Germany with both the specific socialisation of the former GDR population and the rising dissatisfaction in the time following the reunification of Germany.

In a 2002 to 2006 survey by a research group from Bielefeld, people from East Germany supported the statement that “crimes should be punished much harder.” According to its authors this stands for a distinct ‘Law and Order’ thinking (Gostomski et al. 2007).

### **Punitiveness in Penal Legislation**

Another field wherein the punitiveness of a society can be measured is penal legislation. Over the past few years, the tightening of criminal laws has been reported by several countries (Kury and Obergfell-Fuchs 2008b, S. 277).

The same can be said for Germany. Rengier (2002), for example, demonstrated that 20 to 30 years ago there existed a definite movement to decriminalise some sexual offences but that today this trend has been reversed and that over the last few years sentences have become increasingly more severe. He concludes that there is little doubt about the way criminal policy has been evolving over the last few years, given the priority granted to security considerations and the trend to more severe sanctions. According to Rengier (2002, p. 25) the actual harder line corresponds with international tendencies that have originated primarily in the United States.



Haffke (2000) also points out a tightening of laws in German criminal law dealing with sexual offences since the mid-1990s, beginning with the creation of a law to fight sexual offences from 1997 and leading to federal laws and *Laender* laws concerning preventive detention. Schroeder (2006, p. 230 f.) emphasises that German criminal law was nearly “perfect” and could hardly become any harsher. “Criminal Code of Sexual Offenses was chosen as a starting point for tightening criminal law, because crimes offending sexual self-determination tend to produce popular outrage.” Sometimes, the changes in criminal law dealt with “rather odd phenomena.” All in all, Schroeder (2006, p. 231) and Rengier (2002, cf. above) both conclude that “for quite a while, changes in German criminal law have only taken place in rather peripheral areas. Furthermore it is notable that the tendency towards decriminalization in German penal law, which prevailed in the 1970s, has given way to a contrary tendency.”

As Sack has noted, the tightening of criminal law is executed by augmenting the range of punishment, expanding the elements of an offence, abolishing or diminishing the possibility to release a sex offender on probation, lowering the barrier for preventive detention and raising the barrier for ending preventive detention. While there were 31 new cases of preventive detention in 1990, there were 83 in 2007. In the same time, the number of those in preventive detention increased from 182 to 415. While a clearly visible decline could be perceived from the 1960s to the 1990s, (number of new cases 1960: 210, sum of those preventively detained: 182) and preventive detention was increasingly considered to be some sort of *ultima ratio*, the past twenty years have reversed that trend for the sake of more severe measures. Yet it must be acknowledged that the use of subsequent preventive detention, i.e. preventive detention decreed during regular imprisonment, has not commonly been used even though it is legally allowed. The number of those in preventive detention is very small when considered against the total number of prisoners.

The possibility to decree subsequent preventive detention for juvenile delinquents has only recently been created but it is the sixth expansion of this legal institution within ten years (Woessner et al. 2009). It has to be emphasised that until 2003, (subsequent) preventive detention could not even be decreed when an adolescent offender was concerned (Woessner et al. 2009), so, only a few years ago, (subsequent) preventive detention for juvenile delinquents would have been hardly thinkable. Although the “law introducing subsequent preventive detention for those sentenced after the criminal law relating to youth offenders” (08.07.2008) was vehemently criticised by some practitioners and scholars, it was passed without further ado.

Preventive detention ties in with an offender’s future dangerousness and not only with the past criminal wrong the offender has committed. Thus the preconditions of preventive detention can only be speculated. The barrier to decree preventive detention is lowered because the preconditions are rather low. And even the want for security itself, the main reason for preventive detention, is rather questionable because “the want for security tends to result in excess” (Hassmer 2006). Already imprisonment itself is a rather problematic device when considered from a constitutional point of view. As imprisonment deeply affects a person’s private sphere, it is on the very verge of what is justifiable in a State of Law. But tolerated solutions soon become accepted solutions all too easily. The introduction of (subsequent) preventive detention for juvenile delinquents without much discussion highlights ongoing desensitization in this legislative area. This legislative development can be taken as proof of the ongoing augmentation of punitivity in Germany even when it is taken into consideration that preventive detention is not actually a penal sanction in the strict sense.

The tightening of juvenile criminal law only affects a very small group of criminal offenders. As the analysis of data from the Federal Central Criminal Register shows, only 74 people were sentenced to the maximum penalty of ten years within a ten year observation period (from 1987 to 1996) covering all Germany. According to Woessner et al. (2009), the trend in juvenile criminal law and Criminal Code of Sexual Offenses indicates a general tendency towards the tightening of criminal law. According to Sack (2004, p. 39), the “Renaissance of repressive criminal law” is not only to be observed in foreign countries, the Federal Republic of Germany is “in cadence with other Western countries.”

According to Rueckert (2006), since 1992 to 2006, 42 paragraphs of the criminal code have been modified in Germany to allow for tougher sanctions. The recent drafts for new legislative arrangements to deal with juvenile offenders also put the main emphasis on “security”. Whereas the German prison law for adult offenders (Strafvollzugsgesetz, StVollzG), adopted in 1977 in more liberal times, names the primary aim of imprisonment as being to help inmates “lead a socially responsible life in the future without further conflict with the law” and lists the protection of society from further offences only in second place (§ 2 StVollzG), it seems that the actual laws of the particular *Bundesländer* have taken a step towards a higher emphasis on security, because some of them changed the reintegration aims from their prominent place in the beginning to a less conspicuous one in later paragraphs.

The discussion about the rank and the positioning of the two principal aims of sentencing is often coloured by ideological viewpoints. The question is not whether to rehabilitate or to protect society. The Federal Constitutional Court (Bundesverfassungsgericht - BVerfG), in its decision of 31 May 2006, concerning the need for a specific law for juvenile offenders, has made it clear that “between the aim of rehabilitating young offenders and the wish to protect the public from further offences... there exists no basic contradiction” (BVerfG, 2 Bv that R 1673/04). Several authors have nevertheless reached the conclusion that, on an international level, recent legislative trends point towards increased punitiveness (see Brandenstein 2006; Sack 2006; Beckett and Sasson 2004; Garland 1990, 2001).

## **Punitiveness in Sentences and Their Enforcement**

Considering the fact that legislative decisions are quite often on a more symbolic level, it is interesting to see whether stricter laws have any actual effect on sentences and their enforcement.

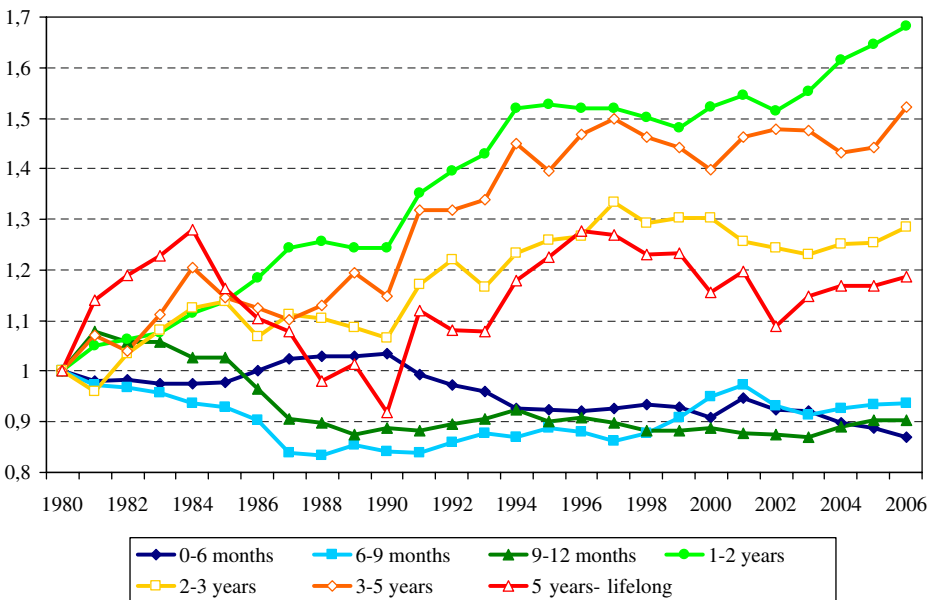
The development of penal practice can be traced on several levels (above), yet not all of them can be taken into consideration in this thesis. First, consideration must be given to how the inflicted punishment of stationery measures develops with regard to its severity and quantum (1). Then, the development on the level of law enforcement must be looked at (2).

In terms of punitiveness, once a person is considered culpable and formally sanctioned by a court, the severity of his punishment arouses interest. In earlier analyses (see Kury and Obergfell-Fuchs 2006; Obergfell-Fuchs 2006) we have shown that for some kinds of offences, sentencing in Germany became harsher over the last 25 years, especially the sentencing of sex offenders. The data from these studies showed that the number of sentences inflicting terms of imprisonment of 5 years or more has roughly tripled between 1980 and 2004 for rape and sexual assault. When it comes to sexual abuse of children, the portion of this harshest sanctioning category has even sextupled. Otherwise, one has to keep

in mind that such long sentences for sex offenders are rather an exception than the rule, in 2004 only about 7% of all sentences for rape and sexual assault belonged to this category. Thus, only a rather small number of offenders are affected by harsher sanctions.

In order to analyze the general development of sentencing, prison sentences for all crimes were summed up. Seven sentencing categories were built, starting with rather mild sentences from 0 to 6 months, 6 to 9 months, 9 to 12 months, and 1 to 2 years. All these sentences have in common that they can be suspended for probation. This decision is to be taken by the judge, mandatory probation sentences do not exist in Germany. The upper end is represented by sentences which cannot be suspended for probation, starting with the category 2 to 3 years, followed by 3 to 5 years and 5 years up to lifelong imprisonment; the latter is the most severe sentence in Germany. For each year, all of these seven sentencing categories add up to 100%. Figure 2 shows this general overview of all sentences (cf. Statistisches Bundesamt 1981–2006). To make the development more visible, each portion has a reference value of 1 in 1980. The following years until 2006 show the relative decrease or increase of the portion of each category referring to the given starting point in 1980. Values above the virtual reference line 1 mark a relative increase in this category, values below 1 a decrease.

The Figure clearly depicts that the rate of all three short sentence categories has decreased between 1980 and 2006, while the relative portion of all longer sentences has increased. This is not only the case for sentences which cannot be suspended for probation, it also – and especially – applies to the category 1 to 2 years. It seems that the courts have executed a shift upwards in the direction of harsher sentences. In comparison to the sanctioning of sex crimes (cf. Obergfell-Fuchs 2006), this shift is rather moderate, the steepest increase can be observed in the category 1 to 2 years with the factor 1.7, in the most harsh category 5 years to lifelong imprisonment, the factor is even much more



Source: Statistisches Bundesamt (1981 – 2008). Rechtspflege. Strafverfolgung

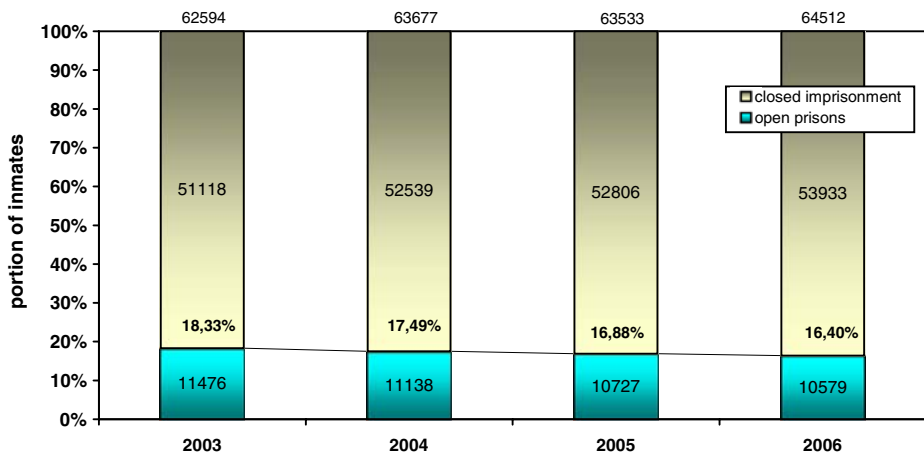
Fig. 2 Relative development of sentence lengths – Germany 1980–2006

moderate with about 1.2. But equivalent to sexual offences, longer sentences are quite rare, in 2006 only about 1.6% of all prison sentences were longer than 5 years, while 44% were less than 6 months.

While the depicted increase of harsher sanctions seems to reflect a rising judicial punitiveness, there is also a development in the opposite direction. In 1980, 65.7% of all prison sentences were suspended for probation, until 2006 this portion has increased up to 68.8%. These data suggest a tendency among the German criminal justice courts to avoid imprisonment, especially short-term imprisonment of less than 2 years. This tendency can also be observed for crimes that are intensely discussed in public, e.g. rape and sexual abuse of children. But one has to keep in mind that such mild sentences of up to 2 years are only imposed on less severe offences.

When it comes to law enforcement, especially when imprisonment as the strongest form of punishment in Germany is concerned, over the last years a tendency can be seen towards increased punitiveness, at least for offenders having committed violent or sex crimes. According to § 10 Abs. 1 StVollzG, a prisoner should be “with his consent obtained, taken to an institution or division allowing open imprisonment (i.e. incarceration in a minimum security prison) when he meets its requirements, especially when it is not to be feared that he might try to abscond from imprisonment or abuse the liberties of open imprisonment by committing another crime.” According to most of the comments on this law, the offender shall be housed in an institution or division allowing open imprisonment. To place the offender into open prisons should be the usual way of executing the sentence of imprisonment, not to place the offender into open prisons should be the exception. This directive is based upon the idea expressed in “the goal of imprisonment in § 2 (“During imprisonment, the prisoner should be enabled to lead in future a life without crime and in accordance with his social responsibility”) which means to restrict liberty as much as necessary but to allow the prisoner as much normal life and contact with the rest of society as possible” Calliess and Mueller-Dietz 2000, S. 135).

In spite of these clear regulations, the closed imprisonment (i.e. imprisonment that prioritises security over rehabilitation) tends to be much more the rule than the exception in Germany. As can be seen in Fig. 3, less than a fifth of all prisoners have been placed into



Source: Statistisches Bundesamt (2008). Rechtspflege. Strafvollzug

**Fig. 3** Portion of inmates in closed imprisonment and in open prisons 2003–2006

open prisons. In this context, it is revealing that the share of those in open prisons has even declined over the past few years. While 18.8% of prisoners were assigned to open prisons in 2003, their number declined continuously to 16.4% in 2006. The decreasing chances for inmates to enter a minimum security prison might reflect an increasing security mentality of the correctional system and therefore an increase in punitivity, but it is also owed to the fact that the (assumed) public's sense of justice asks for a harsher prison regime, here, minimum security prison/open prisons are often regarded as "hotel incarceration". The planning of a new prison building in the Federal Land of Baden-Wuerttemberg made such difficulties evident: here, the construction of a unit for day release prisoners was scuttled due to the resistance of a citizen's group.

### The Suspension Practice of Prison Sentences

The general increase in harsher sanctions could be due to a rising number of severe crimes, and indeed, as police crime statistics show, the numbers of robberies (1980: 39 offences per 100,000 inhabitants; 2006: 65 offences/100,000) or severe physical attacks (1980: 106.4 offences/100,000; 2006: 183 offences/100,000) have heavily increased over this period of time (cf. Bundeskriminalamt 1981–2005). However, in the same time other severe crimes such as rape and sexual assault have shown no significant alterations (1980: 11.2 offences/100,000; 2006: 9.8 offences/100,000), but, as mentioned above, particularly here the harshness of punishment has increased, and there is no plausible evidence that, for example, cases of rape and sexual assault itself have become more severe.

Another indicator of an increased judicial punitiveness could be the number of inmates in preventive detention, i.e. a detainment for security reasons after the completion of the prison term, in Germany so-called "Sicherungsverwahrung". This measure is used for offenders who have been convicted for at least one pertinent or dangerous offence before and who are supposed to be dangerous. Therefore, preventive detention is not a penalty; it is a measure to protect the public from a potentially dangerous and relapsing offender.

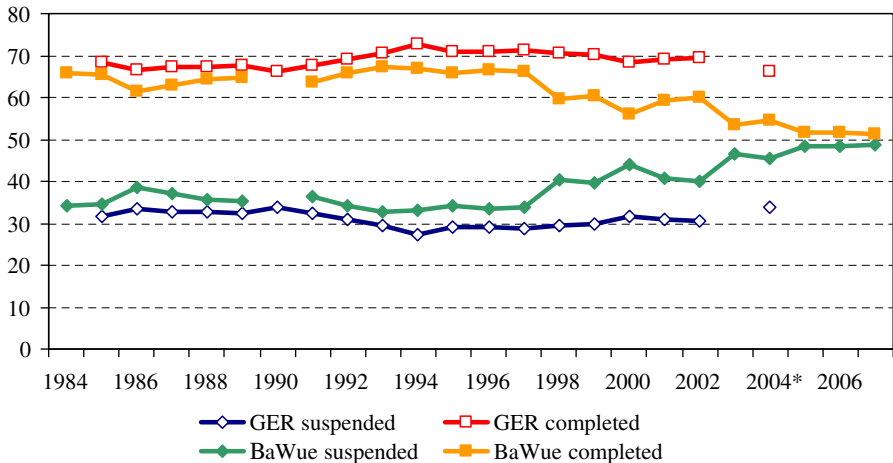
Until the end of the 1990s, preventive detention was supposed to be a phased-out model (cf. Kaiser 1997, p. 446; Kinzig 1996) and it was thought about abolishing this often controversial discussed measure. The measure was used in a declining fashion from the mid-1970s until 1984, followed by a short revitalization at the end of the 1980s and a new decline until 1999 (cf. Statistisches Bundesamt 1976–2006; see Obergfell-Fuchs 2008, p. 308). At the end of the 1990s the situation clearly changed. Initialised by some severe sex offences (sexual murders) against children, a huge media campaign started and an enormous public discussion on how to deal with sex offenders arose. Only a short time later the German parliament passed a new law including legislation concerning the less restrictive use of the preventive detention. Since then, a steady increase in the use of the measure can be observed (see Obergfell-Fuchs 2008, p. 308). Kinzig (2008) thoroughly analyzes the reasons for this rapid increase in the use of preventive detention. Above all, the protection of the general public and the protection of potential victims are the most frequently stated reasons, but often the argumentation is not based on a general development of crimes, but on some few – severe – singular cases, especially sex offenses. Meanwhile most inmates in preventive detention are sex offenders, not at least as a result of the new legislations (cf. Kinzig 1996; Obergfell-Fuchs 2006, p. 607f).

Some further aspects of a possible change in judicial punitiveness should be discussed. According to German law (Par. 57, 1 German Criminal Code, "Strafgesetzbuch - StGB"), prison terms can be suspended for parole after two-thirds of serving the sentence – after at

least two months of serving a sentence – when the public needs for security are not impaired, and when the prisoner agrees. Another piece of legislation allows the release of a prisoner even after the halftime of the sentence (Par. 57, 2 German Criminal Code, “Strafgesetzbuch - StGB”). This is possible after serving at least six months of the prison term, when the offender is incarcerated for the first time and the prison sentence is not longer than two years, or when the offender’s personality, his development in prison and the situation of the committed offense legitimate special mitigating circumstances. According to German law there are some more possibilities for suspending a prison sentence, these will be explained later.

Figure 4 gives an overview of the general early release practice in Germany (light labeled curves). The lines do not depict overly large changes during the last 20 years. About 70 percent of all prison sentences have to be completed, while another 30 percent were suspended for parole. One has to keep in mind that these Figures do not include probation practices; here the numbers are much higher, as explained above. Unfortunately, due to changes in registration, national overall statistics are only available until 2002. Only estimates, for example by the “Zweiter Periodischer Sicherheitsbericht” [Second Periodical Security Report] (Bundesministerium des Innern, Bundesministerium der Justiz 2006, s. 630), are available.

However, comparable statistics still exist for the different German states, e.g. the state of Baden-Wuerttemberg. The two curves (solid labels) depicted in Fig. 4 show an increase in suspended prison terms since the late 1990s. In 1984 the quota of prison sentences suspended for parole was about 34.1 percent, until 1997 it has not really changed (33.8%). Since then, the quota of suspended sentences heavily increased, it was about 48.8% in 2007. This means, the rate for suspended and completed prison sentences has almost equaled. A similar tendency, although limited by the estimation mentioned above, can be



Sources: Statistisches Bundesamt (1985 – 2003). Rechtspflege. Strafvollzug – Anstalten, Bestand und Bewegung der Gefangenen; Justizministerium Baden-Wuerttemberg, Jahresabschluss Vollzug 2003 – 2007

\* The percentages for Germany for 2004 are estimates by the Zweiter Periodischer Sicherheitsbericht (Bundesministerium des Inneren and Bundesministerium der Justiz 2006, p. 630).

**Fig. 4** Percentage of suspended and completed prison terms in Germany (GER) and in the federal state of Baden-Wuerttemberg (BaWue)

seen for Germany in total. These data seem to reflect a decrease in punitiveness – at least in the state of Baden-Wuerttemberg – in contrast to the above described results.

While the portion of completed prison terms dropped, the portion of parolees increased. But a closer look at this trend showed that it was not for the numbers of suspended prison sentences at half or two thirds of serving the term, neither for adults nor for juveniles. Such a development would have been a “real” indicator of more lenient practice within the correctional system, but on the contrary, this practice of early release has decreased. The rise in early releases has been more or less due to two other developments: on the one hand, the postponed executions of prison sentences for therapy of drug addicts has heavily increased, a fact which can be attributed to the perception that such inmates are more often ill than evil, on the other hand, there has been a steep increase in releases as an act of mercy, mostly in combination with the execution of substitute penalties. The latter can be regarded as a measure of reducing overcrowding in prison and can be seen in connection with a general tendency to avoid short term imprisonment.

Generally speaking, a rise in leniency among the penal system is widely restricted to the remittal of a more or less short part of the penalty or to the avoiding of short term imprisonments. In contrast, the remittal of longer parts of a prison term, for example one third or even half, has been more and more reduced within the last 20 years. Sometimes, there are some variations between Germany in total and Baden-Wuerttemberg as a single federal state, but the general trends are widely comparable.

The data show a steep increase in the use of acts of mercy, especially in the state of Baden-Wuerttemberg since the late 1990s. In Germany as a whole, this increase occurred somewhat later and is hardly interpretable because of the estimated Figure for 2004. Here, until 2002, there were no big changes in the percentages (1985: 2.4%; 2002: 2.9%), at best, there was a slight increase. But in 2004 the estimated portion reached 9.0%, it has, in fact, tripled. One has to keep in mind that all German data refer to practices in the particular federal states and it might be evident, that some of the states followed the example of Baden-Wuerttemberg. The first increase in this south-western state was between 1997 and 1999. In 1997, the portion of released inmates for reasons of mercy was about 4.9%, two years later, in 1999, it has become 10.3%. Most often such a release is due to a halftime suspension of a substitute penalty – for those not willing or not able to pay day fines – in order to avoid prison overcrowding. Meanwhile (2007) about 20.7% of all released inmates in Baden-Wuerttemberg left prison because of reasons of mercy. Therefore, releases as an act of mercy has become a powerful tool in regulating prison occupancy.

## Discussion

The aim of the paper was to discuss the question whether there has been an increase in punitiveness in Germany in different parts of the concept, especially as far as it concerns the penal attitudes within the public, the legislation and sentencing, and eventually the criminal justice system during the last decades.

Answering questions regarding a rising punitiveness remains difficult due to the lack of clarity about the construct of punitiveness and thus its insufficient operationalisation. This applies particularly to the registration of the population’s penal attitudes. In the long term, when regarding the development during the last 60 years, one can say that the penal attitudes in West Germany have become milder. While after World War II almost three quarters of the West German population voted for keeping the death penalty, today it is only about one third.

The flourishing social and economic development in the 1950s to 1980s contributed to a more liberal attitude towards criminals, a result of this being the passage of the Prison Administrative Code (“Strafvollzugsgesetz”) in 1977. As recently as 2008 the first State Laws for Juvenile Prisons came into force. They stress security aspects even more than the general (adult) Prison Code does, being contradictory with the Juvenile Court Act, which explicitly prioritises rehabilitation over repression (due to the “immature” character of juvenile offences).

The question of whether the population has become more punitive over the last 20 years cannot be answered without ambiguity, for the research findings are partially contradictory. During the first years after reunification all in all the former GDR-residents showed harsher penal attitudes than the residents in Western Germany (FRG), which certainly has to do with the differences in the social conditions between both states as is reflected, in the different cultures of sanctioning. From our viewpoint all one can say is that from the beginning of the mid-90s a slight rise in punitiveness can be assumed, but definitely not a considerable one. This applies to the whole of Germany.

Furthermore the claims for help and rehabilitation for criminals still play a major role among the supported forms of reaction within the population.

The punitive attitudes can easily be influenced by giving the respondents more information about the crime in question or by adding response possibilities, respectively. Apart from grave crimes the respondents are not primarily interested in repressive actions against the offender, but rather in having the conflict between him and the victim effectively solved, e.g. by reconciliation of perpetrator and victim (cf. Hoyle and Young 2002). The public approves less repressive and more rational responses to crime, when they are informed.

On the level of legislation a rise in punitiveness can definitely be observed. During the last decades a considerable amount of criminal laws on several fields have been tightened. More statutory definitions of offences have been established, while comparable measures of decriminalisation have fallen away. Although initially of merely symbolic meaning in terms of crime policy, the expansion of ranges of punishment for certain offences could in the long term affect sentencing. Law students of today will later apply these new laws, even though they are very deficiently introduced to the subtleties of sentencing during their studies (cf. Streng 2006).

When only looking at the overall sentence lengths in Germany, the punitiveness hypothesis seems to be confirmed. For many years now, particularly since the early 1990s – and therefore it is not an effect of the rising discussion on sex offenders – the portion of longer sentences has clearly increased. But otherwise the portion of suspended sentences for probation has increased too, which casts doubt on the punitiveness hypothesis. It seems that today’s offenders have a higher chance of receiving a longer prison sentence than 20 years before, but their probability of being incarcerated has decreased.

However, there are some other developments stressing the necessity of a differentiated look at this phenomenon. One of these developments is the change in preventive detention (“Sicherungsverwahrung”, cf. above). At first, the portion of such detainees for security reasons seems to have decreased within the last 30 years, but since some years, a renaissance of this measure can be observed. In fact, it is a consequence of the enhanced public as well as judicial attention on sex offenders. But taking into account that the number of such offenses has remained quite stable since many years now, the augmentation of preventive detention can be seen as an increase in punitiveness.

Unlike the development of sanctioning and the practice of preventive detention, punitiveness seems to have decreased within the correctional system.



Although some developments go in contradictory directions, a general trend towards an increased punitiveness in the German penal system is observable. In this respect, Germany seems to have taken a similar direction alongside other Western European countries, e.g. The Netherlands (cf. Althoff and Engelkamp 2006; Van Swaaningen 2005) or Great Britain (cf. Garland 2001; Horsfield 2006; summing up Sack 2006), although it is still far away from the British or even American situation. The latter is true for the general development of punitiveness in Germany. Thus, Oberwittler and Hoefler (2005, p. 465) conclude: "...on the whole, however, neither penal practice nor popular attitudes as measured by periodic surveys support the notion of a 'punitive turn' in Germany". All in all, the majority of indicators and research findings suggest a more or less slight, but not significant rise in punitiveness on several dimensions. But the population as well as the justice system are very open-minded towards rehabilitative approaches and alternatives to punishment.

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