Sentencing in Germany – Explaining Long Term Stability in the Structure of Criminal Sanctions and Sentencing

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Summary

The paper deals with description and explanation of stability in German sentencing practices and sentencing outputs. Remarkable stability in the structure of criminal sanctions is on display in Germany since the end of the 1960s when a major law amendment gave priority to (day) fines and restricted significantly the use of (short) prison sentences. 4 out of 5 criminal sanctions imposed are day fines. Although, the statutory framework of sentencing is limited in Germany and does not provide much guidance, sentencing doctrine developed by the German Supreme Court and emphasizing personal guilt results in the bulk of criminal sentences falling in the lower third of the range of sentences carried by criminal offence statutes. While ups and downs in rates of imprisonment can be observed over the last 40 years, it is quite clear that significant restraints are at work. These restraints prevent the use of long prison sentences as a response to assumed dangerousness and as a message to the public. The two track system of criminal sanctions adds to stability in sentencing with responding to dangerousness through measures of rehabilitation and security strictly bound by the principle of proportionality and to relieve sentencing from the pursuit of security.

Introduction: A Short Outline of Sentencing and Criminal Sanctions in Germany

Germany was on trial before the European Court of Human Rights over the last two years on several occasions, facing allegations of violations of Art. 5 ECHR due to the introduction of a retroactive security measure allowing indeterminate preventive detention for (in particular sexual) offenders assessed to be dangerous. In the hearings an interesting argument was presented by the German Federal Ministry of Justice to the Court. The lawyers argued that this type of security measure (preventive detention for dangerous (habitual) offenders) was contributing to the relatively low imprisonment rate observed for Germany. Along this line of reasoning Hassemer has argued that the advances in sentencing doctrine and sentencing theory as well as corresponding standards

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of reasoning, transparency and accountability imposed on trial courts by appellate courts have resulted in concentrating political pursuit of security and pressure to align criminal law to a comprehensive architecture of security on the second track of criminal sanctions and preventive detention ³.

In fact, prisoner rates have been on the decline in Germany for at least a decade, and in some German states this decline is so marked that prison capacity had to be reduced significantly ⁴.

The argument brought forward in favor of preventive detention is based on a logic of guilt dependent criminal punishment, restricting not only imposition of a criminal sentence but also its extent in terms of length of a prison sentence. A system of sentencing strictly guided and limited by individual guilt – according to this logic - prevents inflation of prison sentences as a consequence of sidelining incapacitation and the pursuit of security in decision-making on criminal punishment in the criminal courts. With a separate track of measures of rehabilitation and security the system provides for a narrow (safety) valve which very selectively responds to political and public pressure for security and deterrence.

Germany has adopted a two track system of criminal sanctions; criminal law allows besides criminal punishment which requires a finding of guilt and a determination of the for so-called measures of rehabilitation and protection of public security ⁵. These measures do not depend on personal responsibility, they are not considered to carry blame. But, they are the consequence of a finding of dangerousness and the degree of dangerousness (based on assessments of risks by forensic psychologists or psychiatrists) and the need for treatment or preventive detention. This two track approach is based on the conviction that proportional punishment limited by the principle of personal guilt may not be sufficient to respond effectively (in terms of public protection) to habitual offenders or offenders suffering from mental diseases or addicted to alcohol or drugs likely to re-commit very serious crimes. German criminal law (as well as other continental European countries, for example Austria and Switzerland) therefore provides a line of criminal sanctions which pursues prevention of serious recidivism alone. Measures of treatment and security address three groups of criminal offenders deemed to be particularly at risk of serious recidivism: the mentally ill, the addicted and the habitual offender. These groups figured prominently in 19th century conceptions of crime and punishment. Preventive detention may be imposed besides a prison sentence of 2 years or more if – besides formal conditions of prior convictions - the status of a habitual felon and dangerousness are established. A series of criminal law amendments starting 1998

and driven by political concerns about dangerous sexual offenders widened the legal scope of the preventive sentence significantly, making it in its indeterminate form applicable retroactively and providing for the possibility of its imposition after a prison sentence had been served. Retroactive application and post enforced sentence imposition ultimately brought Germany before the European Court of Human Rights (after the Federal Constitutional Court had turned down challenges by detainees on the ground that the prohibition of retroactivity would apply to criminal punishment only) 6.

The system of sentencing and criminal sanctions implemented in Germany includes substantive and procedural elements 7.

The substantive elements are found in the criminal penalties provided in the criminal code as well as their minimum and maximum ranges, criminal offence statutes carrying each a minimum and maximum penalty, statutory prescriptions as regards the choice between different criminal sanctions such as day fines and prison sentences. The basic rule on sentencing mentions personal guilt as the decisive factor in determining the sentence but concedes that the impact of the sentence on the offender should be taken into account (§46 I). Moreover, a not exhaustive list of offence and offender related elements is part of this rule which must be considered when it comes to determining the sentence (§46 II). Beyond that, the sentencing rule says only that characteristics which establish a criminal offence may not be used to justify a particular sentence (§46 III). The victim and victim-offender reconciliation of course have found explicit consideration (§46a) with allowing for mitigation in case of seriously attempted or completely achieved reconciliation. Recently, a crown witness provision was introduced which allows also for a sentencing discount, too (§46b). Particular rules then address sentencing of multiple offences (§§52 – 55); they demand for a cumulative sentence (separate sentences may not be imposed) and result in mandatory sentencing discounts. In case of statutorily defined mitigating circumstances (most important: diminished responsibility, participation in the form of aiding and abetting, attempt), minimum penalties are lowered significantly (§49). A general statutory minimum for recidivists was abolished in 1986 8.

The procedural elements affecting sentencing refer to simplified criminal proceedings which – if implemented - restrict sharply the range of penalties available, and to the recently introduced formal rules on sentence bargaining; further procedural elements concern the duty to give detailed reasons in writing (§267 III Criminal Procedural Code) and the rules which allow for a review of sentencing decisions of the trial court by the High Court or Supreme Court. The duty to give detailed reasons in writing is suspended if prosecutor and defence waive the right to appeal resulting in the verdict becoming immediately final.

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The German system of criminal sanction is simple and provides for two penal sanctions only, day fines and imprisonment. Day fines come with a minimum of 5 day fines and a maximum of 360 day fines; prison sentences in general may range from 1 month up to 15 years. Life imprisonment is almost exclusively restricted to murder. Prison sentences of up to 2 years may be suspended and conditions (fine, compensation, community service etc.) may be attached. The choice between a day fine and a short prison sentence (below 6 months) is strictly regulated (since a major law reform in 1969) with giving priority to day fines over prison sentences below 6 months and imposing a duty to explicitly explain in writing why the priority rule should not apply. Most criminal offence statutes do not prescribe a minimum sentence, but define the maximum penalty only. For offences considered the most serious minimum penalties are statutorily defined, the most common minimum penalty is 1 year imprisonment. However, for selected serious crimes (in particular aggravated robbery, rape, drug trafficking, homicide) the minimum is raised to 2, 3, 5 years, in exceptional cases to 10 years). But, increased minimums from 1 year imprisonment and up come with regularly with a provision which reopens the minimum and provides for a lesser minimum in case of crimes of less seriousness (minder schwere Fälle). In almost all of these cases reduced minimums result in the possibility to suspend a prison sentence. A full criminal trial then can be circumvented with resorting to simplified procedures. A so called penal order does not require a trial at the consequence of restricting the sentence imposed in the penal order to a day fine or a suspended sentence of imprisonment of a maximum of 1 year.

Summarizing some of the characteristics of the German system of sentencing and sanctions which follow simply from substantive and procedural rules and which are of relevance for the analysis of stability, we find

(a) No effective statutory minimums

(b) Strict obligations to justify sentencing in detail and in writing

(c) Incentives to resort to lower penalty ranges with providing for
   (aa) Simplified proceedings
   (bb) Reduced obligations to give reasons for sentencing

(d) Strict limitation of prison sentences to a 15 years maximum

(e) Multiple offence sentencing statutes preventing separately enforceable sentences

(f) A two track system of criminal sanctions which separates preventive and repressive functions

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Crime, Sentencing and Stability: Comparative Perspectives

Over the last two decades prisoner rates have increased significantly in many European countries and in particular in North-America. When looking at comparative prisoner rates then Germany in 2010/2011 is located in the bottom half of European countries. When looking at the course imprisonment rates take in various countries, Germany turns out to be different from a group of countries which exhibit during the last two decades extreme movements in this respect. The Netherlands, Spain, France and in particular England/Wales experienced a long term increase in imprisonment rates from the 1980s/1990s on. This resulted for example in a quadrupling of the prison population in The Netherlands and unprecedented prisoner rates in England/Wales and Spain. While the Dutch prisons over the last 6 years have been emptied rapidly which then resulted in the closing of prisons, other countries exhibit further growth (in particular France after Sarkozy had put an end to the regular implementation of amnesties).

Graph 1: Prisoner Rates in Europe and in the USA 2010/2011 (most recent figures)

Source: www.prisonstudies.org/info/worldbrief/?search=Europe&x=Europe

Michael Tonry has raised the question why - despite facing the same crime problems and displaying the same punitive discourses in the political arena – German penal policies were not harsher and imprisonment rates higher. From the course of German rates of

imprisonment, on display in graph 2, it seems clear that the crime rate is not strongly correlated with prisoner rates. Crime evidently does not explain punishment, at least not to a substantial extent. In the 1960s and 1970s imprisonment rates declined while crime rates increased significantly. From the mid 1970s until the beginning of the 1980s a small window opens demonstrating a parallel increase of crime rates and prisoner rates. In the 1980s until the beginning of the 1990s imprisonment rates declined again while crime rates continued to climb. From the mid 1990s until today the imprisonment rate follows the crime rate in a remarkably stable and consistent way.

In contrast, England/Wales and the USA, Spain and recently France display a reverse pattern. Rates of imprisonment move up despite a long term trend of declining crime rates (for the US and England Wales accounted for both in police statistics and crime surveys). Stable rates of imprisonment are observed in most Scandinavian countries, with the exception of Finland where rates of imprisonment declined significantly during the 1990s.

Graph 2: Rates of Imprisonment and Crime in Germany 1961 - 2010


The course of imprisonment rates in Germany follows sometimes the course of crime rates but responds consistently also to criminal law reforms which restrict imprisonment or offer alternatives to imprisonment. The drop in the number of prisoners in the second half of the 1960s is caused by the introduction of a rule giving priority to day fines and requesting detailed reasoning in case of resorting to short term prison sentences. The drop occurring in the 1980s reflects the impact of a criminal law amendment lowering the legal requirements placed on the decision to suspend a prison sentence.
International comparative research on criminal sanctions and sentencing is still in its infancy. Research so far has dealt with various approaches to explain increases (to a lesser extent decreases) in prison populations. Increases in prisoner rates are commonly linked to a growth in the demand for punishment. Public opinion has been seen to be crucial in understanding the increase in prison populations in some countries. However, it is evident that the course of imprisonment and the trends in the size of prison populations do not follow a common set of variables or conditions. Developments in prison populations are diverse and reflect – as Tonry/Farrington recently have pointed out for the outcomes of criminal sanctions and sentencing in the Western world – idiosyncrasies which necessitate careful analysis of individual national systems of criminal justice.

Political will as to what place prison sentences should play in a system of criminal sanctions and how prison sentences should be enforced certainly have a central place in explanations. A major impact on the size of prison populations can be expected from deliberate political decisions to cut down the use of imprisonment. Examples can be drawn from decisions made by Austrian and German parliaments to reduce the use of short term prison sentences (up to six months) in the 1960s. Finland opted also for a major change in the use of prison sentences when making a decision to adjust to practices implemented in other Scandinavian countries. Both examples, the German/Austrian as well as the Finnish, demonstrate also what is needed to initiate political discourses and ultimately political changes which reduce the prison population effectively: a justificatory system or a narrative which is politically acceptable, which endorses decarceration policies or alternatives to imprisonment and is embraced by the legal professions to whom implementation of crime policies is entrusted. In Germany/Austria the narrative drawn from the program of Franz v. Liszt (imprisonment without long term rehabilitative efforts makes offenders worse) was very successful when implementing in the 1960s a criminal policy which gave priority to fines and cut back drastically short prison sentences. In Finland it was evidently the wish to fall in line with the rest of the Scandinavian countries which resulted in adopting a decarceration policy which decreased the prison population significantly.

However, it is not clear how such narratives are put to work effectively, in particular how they achieve to be inserted into the collective conscience and value system of the

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judiciary and other legal professions and why under certain conditions they seem to be successful and under other conditions they are not.

The Finnish case shows that discourses on the role of prison sentences and the size of the prison population may be also initiated by placing national prison figures and sentencing practices into a comparative perspective. In the 1990s in Australia the question was raised why New South Wales would experience a much higher prisoner rate than the demographically similar state of Victoria. Research came up with a mix of grounds. In New South Wales more imprisonment for fine default, longer prison sentences, and in particular a higher rate of custodial sentences can be observed, while Victoria disposes of an additional alternative, periodic detention. Such comparisons seem to become effective within clusters of countries (or political entities) which are due to various reasons close to each other. However, comparisons may also result in discourses headed towards sentence enhancements and increasing the size of the prison population. The Chairman of a Northern Irish political party in 2005 and at the occasion of the publication of English prison figures expressed surprise when noticing that Northern Ireland had prison population figures half of those documented for England/Wales. Referring to pressing issues of violence and security it was then stated that the public would not understand that Northern Ireland resorts that rarely to imprisonment.

The questions to be answered now concern first, how can stability in sentencing (outcomes) be demonstrated beyond the rather crude measures of imprisonment rates, and second, what explains stability in basic patterns of sentencing, if stability can be observed.

Measures of Stability in Sentencing

Stability of sentencing can be observed when looking at the course of the structure of criminal sanctions. Germany displays in this respect a remarkably stable pattern. Between 1970 and 2010 the structure of criminal penalties evidently did not change at all. In 1970 and after a political decision to give priority to fines, fines accounted for more than 80% of criminal penalties, the same proportion which can be found 2010. In between, minor fluctuations reflect “white noise” only.

When considering developments in the second track (measures of rehabilitation and security), we find a long term decline in the number of offenders sentenced besides imprisonment to incapacitating (preventive) detention. This trend was reversed in the mid 1990s, when dangerous sexual offender legislation widened the applicability of

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preventive detention in a spiral of law amendments 19. This development was stopped by a series of decisions of the European Court of Human Rights (mentioned in the introduction) and ultimately by a landmark decision of the Federal Constitutional Court 20 declaring all second track provisions related to preventive detention to be unconstitutional and fixing a time limit of 2013 for the Federal Parliament to enact legislation in line with the Basic Law (Grundgesetz, German Constitution). However, the absolute number of offenders sentenced to preventive detention and confined after having served a prison sentence was always relatively small, amounting for example in the year 2010 to 101 cases (and preventive detainees to less than 1% at the prison population at large). The impact of such small numbers certainly does not affect the structure (and stability) significantly; it rather characterizes a penal system which exposes a few to extreme (indeterminate and possibly lifelong) measures of security in exchange for routine sentence application in the first track of criminal sanctions. As has been mentioned in the introductory remarks, Hassemer has interpreted the role of the second track as relieving the system of criminal penalties and sentencing from pressure to consider dangerousness and security when imposing criminal punishment. A system of punishment determined and restricted by personal guilt will be in all societies - focused on risk and the management of risk - confronted with an enormous pressure to accept risk and the prevention of risk as a salient goal 21. With a two track system risk management is channeled to measures of security which follow a different logic of implementation.

Another way of making stability in sentencing and sentencing outcomes visible concerns patterns in the length of imprisonment imposed and their course. Four cases will be presented: Burglary, aggravated robbery, rape and murder/homicide. These offences were chosen because they represent varying degrees of policy choices as regards resorting to prison sentences due to different minimum sentences prescribed by the offence statutes (burglary 3 months, rape 2 years (until the end of the 1990s, then as a result of expanding the offence statute and including marital rape cases and sexual assault in general, the minimums were differentiated into 1, 2, 3 and 5 years categories; aggravated robbery 5 years (until the end of the 1990s, then the minimum was split up into 3 years and 5 years attached to different sets of aggravating circumstances), murder life, homicide 5 years). For rape, aggravated robbery and homicide the minimum is statutorily downgraded for less serious offences (rape 6 months respectively 1 year, aggravated robbery 1 year, homicide 1 year). A definition of less serious offences is not provided by the law but left to the assessment of criminal courts.

Sentencing of burglary cases results - in the 35 years period covered in graph 3 - in a stable pattern of prison sentences (and day fines). There is evidence that a law amendment mentioned earlier which lifted particular restrictions placed on suspending prison sentences between 1 and 2 years had a significant impact with increasing the rate of suspended prison sentences in burglary cases immediately from some 40% to

20 Federal Constitutional Court, 2 BvR 2365/09, decision as of 4. 5. 2011.
approximately 60%. However, after the significant increase, the rate of suspended prison sentences tends to become stable again at a level of some 60%. Moreover, the rate of day fines imposed for burglary offences (a day fine may replace a prison sentence between 3 and 6 months) between 1976 and 2010 does likewise not reveal particular trends. The rate does not move away significantly from an average of some 25% during the period under observation. Most important though is the observation that long prison sentences (over 2 years) despite a maximum prison sentence of 10 years provided in the offence statute remain consistently and over a period of 35 years well under a share of 10% of all sentences imposed for burglary. While burglary and burglars still in the 1960s were convenient candidates of the second track and preventive detention due to the large share of recidivists and in particular recidivist passing easily the formal thresholds of preventive detention (prior convictions and prior prison experience), property offenders moved out of preventive detention since the 1960s, initiated by court practice in the 1970s and 1980s and then acknowledged in recent law amendments which restricted imposition of preventive detention essentially to violent crime.

Graph 3: Prison sentence length and rates of suspended prison sentences for burglary 1976 – 2010 (%)

Aggravated robbery provides for a minimum prison sentence of 5 years (since the end of the 1990s for minimums of 3 and 5 years) and the statutory maximum of the prison

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sentence (15 years). However, the offence statute reduces the minimum penalty to 1 year if a case of minor seriousness is established.

Graph 4 shows that over a 34 years period consistently approximately 70 – 75% of sentences fall below the statutory minimum of 5 years (revised in 1998). In the upper half of the regular sentencing range (10 to 15 years) a stable trend prevails. Imprisonment of more than 5 years holds its share on a constant level between 1976 and 2010. Changes are evidently confined to the area below the regular minimum penalty and to an exchange of penalties above 5 years in favor of prison sentences of between 3 to 5 years. A change, indicating a move towards imprisonment of between 1 and 2 years is paralleled by an increase in suspended prison sentences. In robbery cases the use of preventive detention remains stable; preventive detention is added to approximately 0,5% of aggravated robbery sentences.

Graph 4: Prison sentence length and rates of suspended prison sentences for aggravated robbery 1976 – 2010 (%)


The times series accounting for sentences for rape offences offer an opportunity not only to look at stability but also at possible effects of a major revision of the rape statute in 1998. This law amendment - which went into force in 1998 - followed public outrage about sexual murder of children by sexual offenders released on forensic assessments of
low risk of re-offending\textsuperscript{23}. As has been indicated earlier, the minimum penalties were differentiated and raised according to various aggravating circumstances. Moreover, restrictions of the security measure of preventive detention have been eased. The amendment went beyond the provision of enhancement of punishment and easing preventive detention. The amendment responded also to other policy issues with including marital rape as well as same gender rape.

When looking at sentencing patterns unfolding between 1995 and 2010 in rape cases, two trends can be observed. There is an increase in prison sentences of 1 to 2 years and a parallel increase in the rate of suspended prison sentences. The increase in the 1 – 2 years category of course affects (slightly) other categories of prison sentences.

Graph 5  Prison sentence length and rates of suspended prison sentences for rape 1995 – 2010 (%)

From police statistics it is known that during the last 20 years and evidently influenced by the law reform of 1998, patterns of victim-offender-relationship in rape cases known to the police changed. While the number of stranger to stranger rapes reported to police declined, the number of rapes in close partnerships increased. From that it may tentatively be concluded that the changes in the 1 – 2 years category and the increase in suspended sentences reflect a change in the structure of rape cases brought to criminal courts. It may be assumed that marital rape cases attract more prison sentences out of the

1 – 2 years category which in turn will have also a higher probability to be suspended (an assumption which is plausible on the basis of what is known about the effect of the victim-offender relationship on sentencing). Trends in other sentence categories display stability. A look at the imposition of preventive detention during this period reveals a slight increase in absolute numbers (before 1998 preventive detention is imposed on average in 11 cases per year, in the period after 1998 some 21 cases are counted per year).

Criminal courts thus have responded to the law amendment of 1998 as Hassemer (2006) would have suggested. Criminal punishment after the reform was imposed in the same way and with the same results as was done before. The safety valve of preventive detention on the second track was opened slightly to trap a few more sex offenders, the punishment track remained stable and with that imposition of prison sentences on the basis of personal responsibility and guilt.

Stability in sentencing is also visible in murder and homicide cases. Murder as defined in §211 Criminal Code carries mandatory life imprisonment. However, decisions of the Federal Constitutional Court and the Supreme Court - despite the explicit wording of the law - have opened the murder statute for prison sentences below life (basically with the argument that a mandatory criminal penalty does not comply with the need for individualization and the consideration of personal guilt).

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In fact, murder convictions during the last 50 years never generated a corresponding number of life prison sentences. Courts obviously have found ways to circumvent the mandatory penalty long before the Federal Constitutional Court held that life imprisonment must not always be the result of a murder conviction due to the need of adjusting criminal punishment to individual guilt. From the time series of conviction and sentencing data as well as data on offenders serving life sentences, it may be concluded that despite long term flat lines in murder convictions and life sentences, the number of prisoners serving life sentences has doubled between the early 1980s and 2010. The only explanation here may be found in life prisoners serving longer terms and post sentencing decisions which delay release from life imprisonment.

A last approach to sentencing stability concerns a look at the reversed J-curve distribution of sentencing outcomes. The reversed J-curve distribution comes in two forms and evidently can be traced back to the beginning of the 20th century. For the first decades of the 20th century Franz Exner pointed out that criminal sentences were not normally distributed over the penalty range prescribed in a criminal offence statute but – in those cases for which data back then were accessible – come in the form of a reversed J

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distribution, placing the bulk of penalties close to the minimum prescribed by a criminal offence statute 28.

Graph 7: Sentencing Fraud: Distribution of Criminal Sentences 2010


Sentencing of fraud cases results in an extreme and reversed J-distribution. The fraud offence statute carries a penalty range of a minimum of a day fine and a maximum of 10 years imprisonment. Data on display in graph 7 show that sentences above 2 years are extremely rare and that the bulk of sentences is concentrated on penalties below 6 months and there on day fines. Virtually all criminal offences with a maximum of 5 years (or lower) and no minimum attached display this distribution.

Another type of reversed J-distribution becomes apparent in cases with an elevated minimum penalty. Here, it is evidently a move below the minimum which parcels out those cases where courts find the minimum not adequate and resort to the reduced minimum (and maximum) made available through provisions making exemptions for cases of less seriousness.

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Graph 8: Distribution of Criminal Sentences for Drug Trafficking (significant amounts of drugs)


§29a I, No. 2 Narcotics Law provides for a minimum of 1 year imprisonment and a maximum of the general maximum (15 years) for drug trafficking (including production, trafficking, possession of significant amounts of controlled drugs). In cases of minor seriousness the minimum is reduced to 3 months. The distribution of sentences approaches a normal distribution (when considering day fines as the legal minimum. However, the left side of the distribution exhibits exemptions from the regular range of penalties which starts at the 1 – 2 years category. From this point on, the reversed J-curve takes effect demonstrating the concentration of sentences at the bottom of the penalty range.

Summarizing sentencing patterns for Germany it can be concluded that criminal punishment demonstrates significant stability over several decades. The structure of criminal sanctions and measures of sentence length exhibit also immediate responsiveness towards criminal law amendments which at the end of the 1960s establish priority over fines and in the 1980s expand suspension of prison sentences. Responsiveness to law reform addressing the choice between fines and prison sentences and suspended prison sentences and immediate imprisonment may be explained by a reversed J distribution of criminal sentences which places the bulk of criminal sentences in penalty ranges which are open for these choices. The provision of less serious offence statutes allowing deviation from elevated minimum penalties open a road back to the choice between day fines and prison sentences or suspended and immediate imprisonment. The question of stability of sentencing therefore moves away from sentence length towards the choice between intermediate (or community) penalties and
imprisonment. The second track of sanctions, a major issue of law reforms aiming at protection of the public in the 1990s and in the new millennium, does not affect structure and stability of criminal punishment but serves evidently as a safety valve which exposes few offenders (and negligible seen from structure and structural impact) assessed to be dangerous in rather complex and complicated proceedings to indeterminate confinement.

What accounts for Stability in Sentencing?

Explanations of the course of criminal sentencing on the basis of comparative approaches have been sought over the last decade in the political and social framework within which sentencing is implemented and in the constitutional arrangements which define the relationship between the judiciary, the public and the political system. Explanations have been sought then in differences in welfare orientation. In fact, retention of welfare policies seems to be correlated with vertical trust and through trust with less punitive attitudes of the public and ultimately also with less use of imprisonment (and stable patterns of imprisonment) 29. However, France, Greece, Belgium or Spain have also political agendas embracing the welfare state but display different patterns in the development of criminal penalties.

Then, the extent of insulation of the judiciary from the political system has been tabled as an explanatory factor. Insulation of the judiciary and protection against political pressures to implement punitive policies may make transformation of punitive tendencies into sentencing practice more difficult and sustain stability. In particular when considering that certain arrangements might be even designed to “reflect public emotion” in sentencing 30, this assumption certainly has considerable credit when comparing the United States with continental European countries. But, differences in such arrangements do not explain why judicial systems which are comparably insulated and designed to separate judicial and political arenas display completely different patterns of sentencing (and responses to punitive discourses and policies). Germany seems to be different also in another aspect of the political (and legislative) input into the system of sentencing. In Germany there was (in the last five decades) never a serious political attempt at raising minimum sentences without offering at the same time an escape ramp in the form of a “minor seriousness” category which then reopened the way back to lesser penalty ranges 31.


Insulation (and stability) might also be achieved through a professionalized body of judges and a consolidated and imagined (but convincing) explanation of sentencing which gets entrenched in the legal profession, in particular in the judiciary.

In fact, sentencing theory as developed by the judiciary and its essential elements confirmed in legal doctrine provided for an effective path to restricting sentencing discretion and creating commitment to sentencing standards among the judiciary. The judiciary has generated mechanisms which stabilize sentencing outcomes through a strong attachment to traditional and established sentencing tariffs. Sentencing research has confirmed that professional socialization of judges (and public prosecutors) includes learning patterns which feed almost exclusively on (1) sentencing information passed through informal channels (but within the judiciary), (2) documents containing information on past sentences (prior records accessible for prosecutors and judges before the sentencing decision) and (3) trial arrangements which provide for sentencing proposals of the public prosecutor and defence council before the judicial decision is made.

In addition, an effective system of self control within the judiciary has been developed which narrows down opportunities and incentives to deviate from established sentencing patterns.

This system is simple but comes with an elaborate sentencing doctrine and complex reasoning which is based on rather restricted statutory guidance (available in §46 German Criminal Code placing emphasis on personal guilt as the decisive basis for sentencing and criminal punishment and criminal sentences to be always commensurate with personal guilt) 33. However, elaborate normative reasoning and corresponding sentencing doctrine or theory do neither explain mechanisms of guidance of sentencing (or sentencing practices) can they account nor stability in sentencing. They just reflect the difference between presenting (or reasoning about) a sentencing decision and the way a sentencing decision is made.

Criminal law and doctrine do not provide for guidance and structure beyond the statement that personal guilt. Individual guilt has two functions. It determines the imputation of criminal responsibility (rationale of punishment) and the sentencing decision and the size of the penalty (limitation/restriction of punishment). The judiciary has developed a model of joining (combining) various functions of criminal punishment. (1) The limitation function of guilt does not allow deviating from criminal punishment commensurate to guilt 34. (2) Deterrence and rehabilitative purposes may only be considered within a range of sentences which is commensurate to individual guilt. The sentencing theory of „Margins“ (Spielraumtheorie) as adopted by the German supreme court and widely supported by penal scholars assumes that a single sentence (length) exists which corresponds exactly to individual guilt as expressed in the criminal offence.

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34 BGHSt (Supreme Court Decisions in Penal Cases) Vol, 34, pp. 345
However, it is also assumed that it is not possible to determine this sentence exactly because of general limitations in decision-making under conditions of uncertainty and in general limited possibilities of access to the truth. The discourse on this issue is neither theoretically interesting nor of any value for sentencing practice. The theory of margins says simply that a sentence corresponding to personal guilt may be chosen from a (narrow) range of sentences determined within the range of penalties carried by the offence statute. Minimum and maximum sentences of this narrow range must still be justified by guilt. Of course, such an assertion is tautologic. If it is not possible to quantify the sentence which would be exactly corresponding to personal guilt, why should it then be possible to quantify the lower and upper borders of a sentence still commensurate with guilt? Within this assumed range of guilt commensurate sentences, however, preventive functions of the penalty may be considered. Sentences falling within the range are considered to be legally acceptable penalties. The consequence of the theory of margins is the opening of a normative discourse on which arguments may influence the limits of a guilt commensurate criminal penalty. German doctrine and judicial decisions in fact over the last 40 years have generated an impressive amount of literature and judicial decisions as regards what factors may be used as aggravating or mitigating circumstances in sentencing decisions. Normative discourses on sentencing center around the question of the relationship between personal guilt and positive general prevention, questions of proportionate sentencing and the range of admissible aggravating and mitigating circumstances or the weight to be attached to certain circumstances and how such weight might be expressed.

These discourses fail however, to make a distinction between the presentation of a sentencing decision and the making of a criminal sentence. Presentation and making, however, have to be distinguished, in particular in legal systems where the criminal court is obliged to give detailed reasons in writing.

What is evidently most important concerns the placement of a criminal offence on the scale of penalties which are applicable. The range of penalties carried by an offence statute represents a scale which reflects seriousness of offences. Of much more relevance than the arguments about which sentencing goals should be pursued and which factors may affect the size of punishment concerns the question of how sentences shall be distributed along the range of penalties in principle available as sentencing options. The German Supreme Court has developed the concept of the normal or typical case (Regelfall). A „normal case“ shall represent the typical perpetration of a criminal offence. With this approach a comparative and empirical view is adopted (what is typical and which elements should be considered when establishing whether an offence falls into the category of a normal or typical criminal offence). The typical offence – and this is the decisive point - is placed within the lower third of the penalty range carried by the respective offence statute. The Supreme Court assumes (and certainly is correct when considering mainstream assumptions on the seriousness of crimes) that the typical criminal offence displays a low degree of seriousness. In fact, distribution of losses in case of theft, burglary, fraud or robbery, seriousness of injuries in case of violent offences as well as other indicators of crime seriousness display a concentration in the less serious

35 BGHSt 27, pp. 2.
space. The comparative and empirical access to placing criminal offences within the sentencing range is in principle not compatible with the normative access to discussing guilt and personal responsibility and vice versa. While the latter approach – be it based on individualized assessments or proportionate thinking– is not capable to identify a place in the range of sentences (and it is symptomatic for normative discourses not to refer concrete cases or sentencing decisions), the comparative but also empirical approach is not capable to account for the myriads of arguments coming with individualized sentencing and possible expressions of personal guilt. This conflict cannot be resolved.

However, the German normative framework of sentencing provides for an opportunity to satisfy the obvious need to discuss all factors relevant for individualized sentencing and to achieve a decision which is carried primarily by those factors which establish the “normal case” (or establish deviations from it). Sentencing research dealing with the question whether a criminal sentence can be predicted by the arguments used in writing (and justifying the sentencing decision) has revealed that a part of the grounds introduced in the sentencing decision in fact predict the sentence as do the same factors which have been established before the sentencing decision was made. However, most of the reasoning in sentencing decisions was linked to arguments which did not correlate with the sentencing outcomes 36. From that, it seems clear that – at least as systems are concerned which require detailed reasoning in writing on sentencing decisions – such written accounts of sentencing display a response to normative demands for complex decisions which in making a decision cannot be met but in presenting a decision can perfectly be complied with.

This system of generating at the same time complex legal reasoning and straightforward practical results (in terms of placing cases regularly at the bottom of sentencing ranges) is backed up by a appellate or review system which during the last decades has sentencing increasingly treated as a decision based on the application of law (and not on discretion). Thus the German Supreme court could identify several areas along the decision making process where mistakes in law may occur when deciding on the criminal sentence. First, inconsistency (contradictions) in reasoning has to be mentioned which moved into the status of a legal mistake and which is directly related to the demand of complexity in reasoning about a criminal sentence. Flawed assessment of sentencing facts (mitigating or aggravating) then has received attention by the Supreme Court as well as, third, deviation from the „usual“ (tariff) in sentencing. The latter argument is close to the concept of an error of law which is based on the finding that a sentence imposed by a trial court is “completely unjustifiable”. Then, the extent of reasons given in writing for a criminal sentence must match the seriousness of the sentence. It follows from this that the closer the sentence is to the maximum penalty allowed the more detailed the reasons given in writing must be. Appellate court (or Supreme Court) decisions over the last decades have widened review of sentencing decisions on legal grounds significantly. While sentencing once was considered to be fully at the discretion of the trial judge, today, a sentencing decision is considered to be in essential parts application of criminal law.

The German system of sentencing therefore is designed not to respond to external influences but to increase incentives to stay in line with past sentencing decisions and patterns resulting from that and to drastically reduce opportunities to deviate from established sentencing patterns.

**Conclusion**

The German system of sentencing is based on a deeply entrenched mechanism of learning and transmitting established sentencing patterns. This mechanism performs the same functions as do sentencing guidelines or sentencing councils, but is more effective in sustaining stable and predictable sentencing patterns through

- Self control and commitment generated within the judiciary itself

- A comparative and empirical approach to assessing cases which separates making a sentencing decision from reasoning about a sentencing decision.

Both levels are important, though; the comparative and empirical approach serves to allow for learning, professional socialization and the formation of collective knowledge about where to place “normal cases”, the level of normative reasoning and development of legal doctrine on sentencing serves to satisfy the demand for individualized sentencing and – due to elaborated statutory duties to justify sentencing in writing - as a permanently available reservoir of mistakes in law which allow for interventions by appellate courts.

The normative framework supports this system of self control also with providing a second track of measures of security which facilitates commitments to guilt and relieves the first track of pressures to consider risk and security that would not be compatible with learning routines, values and sentencing discourses developed and transmitted in the judicial system.