



**» CRIMINAL PENALTIES SELDOM  
COME ALONE «**

**INTRODUCTION INTO A EUROPEAN STUDY  
ON RESTRICTIONS AND DISENFRANCHISEMENT  
OF CIVIL AND POLITICAL RIGHTS AFTER  
CONVICTION**

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# OVERVIEW

- Introduction
- Areas of restriction
- For example: selected occupational restrictions
- Legal analysis
- Prevalence and impact
- Discussion

# INTRODUCTION



- Medieval concepts of penal intervention: Honour-related and degrading punishments, disenfranchisement of civil and political rights, partial or total exclusion from (civil) society
    - the criminal as "outlaw"/"outcast"
  - Modern concept: constitutionalization of penal intervention (human rights), rehabilitation, re-integration into civil society
    - in Germany: re-socialization as immediate constitutional principle, BVerfG
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- Direct consequences of penal conviction:
  - Sentence
  - Registration
- Indirect/collateral consequences:
  - Additional legal interventions (judicial, administrative and civil restrictions in various areas of civil life)
  - Stigmatization (→ labeling approach), discrimination, exclusion (→ *Miracle Village*, Florida)
  - "*Invisible punishments*" (Fitrakis et al. 2018), "*hidden punishments*" (de la Cuesta 2018 & 2021)

# AREAS OF RESTRICTION



- **Political rights**

- Right to vote
- Right to be elected
- Civic positions, e.g., lay judge/jury member, etc.

- **Employment**

- Public positions (public offices)
- Public service (civil servants)
- Regulated professions: limited access and approbation, disciplinary regimes (independent of, and supplementary to public prosecution)
- Private sector (labor/employment law)
- Educational professions
- Voluntary activities, leisure sector
- Honorary positions
- Ranks, honorary titles

- **Commercial activities**

- Registered or licensed businesses
- Companies, stock companies (company/stock market laws, compliance rules, codes of conduct, etc.)
- Blacklisting (procurement rules, corruption registers, etc.)

# AREAS OF RESTRICTION



- **Education, science and academic sector**
  - Exams
  - Academic titles
  - Student loans and grants
  - Research grants
  - Access to education for prisoners
- **Permits and ownerships**
  - Driver's license, taxi/public transport license, flight license, boating license, boatmaster's patent, etc.
  - Gun ownership
  - Hunting license
  - Animal permit
  - Etc.
- **Free movement and residence**
  - Exclusion zones
  - Control of residence
  - Communication restraint
  - Prohibition to visit specific locations

# AREAS OF RESTRICTION



- **Property**
  - Seizure/confiscation of legal property (objects or assets)
  - Dissolution/forced closure of enterprise
  - Prohibition to possess certain (legal) objects (e.g., car)
- **Immigration and related areas**
  - Visa and admission to enter a country
  - Immigration
  - Asylum
  - Expulsion
  - Detention and deportation
  - Residency and naturalization
  - Alimentation and medical care for asylum seekers
- **Private and family life**
  - Parental rights
  - Conjugal/marital rights
  - Custody rights
  - Adoption
  - Inheritance/succession

# AREAS OF RESTRICTION



- **Social and public welfare**
  - Pension
  - Public housing
  - Victim compensation

# FOR EXAMPLE: SELECTED OCCUPATIONAL RESTRICTIONS (GER)



## 1. Penal: occupational ban, removal from/prohibition to hold a public position

## 2. Non-penal:

- **Civil service**

- Active and retired civil servants
- Additional independent disciplinary measures: warning, downgrading, reduction of remuneration or pension, removal (incl. loss of pension and loss of the privileged medical care)
- Removal mandatory in case of a prison sentence of 1 year or more
- Lifelong re-entry ban (neither as a civil servant nor as a civil employee)

- **Regulated professions**

- Lawyers, notaries, auditors/accountants, tax consultants, medical doctors, dentists, veterinaries, apothecaries, architects, construction engineers, etc.
- Conditions and consequences similar as above

- **Private employment**

- Work-related crimes ("undue conduct") and private crimes ("personality-related") can justify dismissal
- Prosecution not required:
  - e.g., "*Emmely*" case



# FOR EXAMPLE: SELECTED OCCUPATIONAL RESTRICTIONS (GER)



- **Commercial activities (incl. self-employment)**
  - Many activities require a state license or business permit
    - e.g., restaurants, bars, cafés, food stands, kiosks, beauty/hairdressing salons, retail/wholesale stores, betting shops, video/gambling halls, agencies (real estate, insurance, travel, advertising, etc.), dry cleaning, facility cleaning, transportation (taxi, bus, haulage), chimney sweepers, travelling salesmen, etc.
  - In case of lack of "reliability" the business license/permission can be revoked or application for such license/permission be denied
  - Crime commission regularly implies such lack of reliability
  - Extra registration in the public business register
  - Traditional legal concept of personal reliability (19<sup>th</sup> century), adopted also in new pieces of legislation
    - e.g., Commerce and Business Regulation Act (1883), Restaurant Act (1930), Chimney Sweeps Handicraft Act (2008)
  - **For example:** Consequences of a traffic crime committed by a self-employed taxi/bus driver
    1. Statutory penalty (penal)
    2. Withdrawal of the driver's license (penal-preventive)
    3. Withdrawal of the license to drive passengers (administrative)
    4. Revocation of the business permit (administrative)



- **Preconditions**
  - Commission of a crime/specific type of crime (sometimes with a minimum penalty incurred), or a criminal record
- **Purpose**
  - Protection of integrity of the State (elections, public service, etc.), integrity of the economy and business life
  - Personal (un-) worthiness
  - Personal (un-) reliability
  - Prevention
- **Procedures**
  - Penal vs. administrative imposition
  - Automatic legal consequence vs. case-by-case decision
  - Post-trial – pre-trial – no trial (non-prosecution, judicial dismissal/discontinuation)
  - Sentence-based – registration-based – suspicion-based
    - *often no final penal judgement required*
  - Abstract legal terms (open for interpretation, esp. moral and character-related)
  - Accessory vs. discretionary decision
  - Full vs. limited administrative discretion
    - *no negative deviation from judicially determined facts*
    - *acquittal or dismissal of penal proceedings not always binding*



- **Legal character**

- Penal: supplementary penalty, additional order (probation, parole, intensive supervision), preventive measure (*Maßregel*), sometimes hybrid instruments
- Non-penal: collateral consequence, disciplinary measure, administrative act, private legal act, legal consequence sui generis

- **Scope**

- Temporary vs. unlimited in time
- Additional non-penal consequences sometimes anticipated and considered in sentencing, sometimes not
- Different standards of proportionality; proportionality check sometimes explicitly precluded



- **E.g., restrictions of voting rights (2018)**
  - Judicial bans of active voting right (penal): 1
  - Judicial bans of passive voting right (penal): 1
  - Automatic loss of passive voting right/public office (penal, on persons found guilty of a felony): ca. 18,500 p.a. = ca. 92,500 in total (fix 5 years term)
  - *Until 2019: automatic preclusion from active voting (on inmates held in psychiatric custody because of lack of criminal responsibility): ca. 6,500 (non-penal, Federal Elections Code, nullified as unconstitutional, BVerfG 2019)*
- **E.g., occupation/business-related restrictions (2018)**
  - Judicial occupational bans (penal): 83
  - Administrative business restrictions (non-penal): 144.377 persons registered with unreliability notice (total no.), 4,612 new revocations and 246 denials
- **Potential general impact**
  - Ca. 6.2 – 6.5 million individuals registered with active criminal records (national)
  - Additional records in other EU member states: number unknown
  - Further aspect: potential impact on third parties



- **Particular impact of occupational restrictions**
  - BVerfG: constitutional right to rehabilitation
  - Counterproductive practices: Social re-integration and occupational re-integration are important variables for a successful rehabilitation
- **Rudiments of past concepts of status-related punishment partly survived; actually they re-gained significance and returned in administrative disguise**
- **Post-modern trends in (criminal) policy:**
  - Parallel growth of preventism and punitivism
  - Expansion of registration regimes (quantitative, qualitative)
  - 'Enemy law' (*Feindstrafrecht*)
- **Complex mix of additional (collateral) sanctions and restrictions, lack of coherent concepts**
- **Can exceed the primary penalties' consequences significantly, potential long-term impact**
- **Private sanction regimes as challenge for the state monopoly of prosecution and punishment?**
- **Offenders, ex-offenders, ex-prisoners de facto second class citizens (Meijer et al. 2019)**



**THANK YOU FOR YOUR ATTENTION**

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