

## Developments in Europe



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# The roads to abolition

# Enlightenment and the death penalty

- Beccaria (1738-1794): “Delle deliti e della pena” (1764)
- Critical assessment of the death penalty
- Punishment should pursue preventive goals only



- Three phases
- Enlightenment, French Revolution, Declaration of Human Rights
  - After the French revolution the death penalty was abolished during the 19th century in some European states
  - In some of these states the death penalty was reinstated, in others the death penalty remained abolished
- Post 2nd World War
  - Between 1949 and 1980 all Western European states abolished the death penalty
- 1989/1990 transition of Eastern Europe and immediate abolition of the death penalty in most Eastern European countries
  - Accession to the Council of Europe and the European Union

- Abolition after an extended moratorium
  - » United Kingdom, Belgium, Cyprus
- Abolition after change of governments
  - » France 1981, Socialist Party wins elections and replaces a conservative government
- Abolition after death penalty was declared unconstitutional by Constitutional Court
  - » Hungary 1990
- Parliaments decide on abolition/moratorium after a rapid political transition
  - Austria 1950, Germany 1949, Spain 1976, Eastern Europe after 1989/90
- Some countries introduced a constitutional prohibition to reinstate the death penalty (Germany, France, Ireland, Slovenia)

# The state of abolition in Europe

- Death penalty retaining countries
  - Bjelo Russia
- Death penalty retaining countries, but moratorium
  - Russia (last execution 1996)

# Main policy actors

- European Nation States
- Council of Europe
- European Union

# Europe, the death penalty and identity building

- The European position towards the death penalty is characterized by the goal of complete abolition of the death penalty and the establishment of legal standards that preclude reinstatement of the death penalty in Europe
  - 1. in the conviction that the death penalty is cruel, degrading and inhuman punishment which infringes upon basic human rights as expressed in the European Convention on Human Rights and in the Universal Declaration of Human Rights, in particular human dignity
  - 2. in the knowledge that there exist alternatives to the death penalty that are as efficient (and in some aspects even more efficient) as is the death penalty in deterring crime and incapacitating dangerous criminals from posing serious threats to society
- European Union Charter on Fundamental Rights proclaimed at the Nice Summit in December 2000 contains also a rule that prohibits the reinstatement of the death penalty

- The EU in 1998 decided to strengthen its international activities in opposition to the death penalty and to make such activities an integral part of its human rights policies [1]
- Guidelines to EU Policy Towards Third Countries on the Death Penalty
  - European Union position on the death penalty
  - as well as on the kind of policies that are to be implemented with respect to pursue the goal of abolition of the death penalty worldwide
- The European Union insists on full acceptance of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty
- The EU considers that abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights and has declared that its objectives with respect to the death penalty concern
  - Universal abolition of the death penalty
  - and, where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to certain minimum standards.
- [\[1\]](#) Council of the European Union, Brussels, June 3, 1998.

- The death penalty is obviously a strong symbol for a new Europe and a European identity
- Other offers of identity are merely available in Europe
  - Christianity historically was associated with conflicts and violence; the debate on whether to adopt christianity in the European Union Charter on Fundamental Rights has shown again how problematic a reference to Christianity is in Europe
  - Industrialization points to conflicts, competition and various problems (environment etc.)
  - The economic union is evidently not suited to serve as a symbol of identity
  - Other historical legacies (Greek and Roman cultures) stand for common as well as separating elements of European culture
  - The abolition policy represents shared experiences
    - Experiences of totalitarian regimes and abuse of power (in particular during the first half of the 20th century, but also in the authoritarian states of Central and Eastern Europe between the Second World War and 1990)
    - Secular understanding of the world
    - Mistrust towards a centralized and absolute state power which is symbolized in the death penalty as the death penalty expresses absolute power over humans
- The narrative of the abolition of the death penalty in Europe describes and explains the re-birth of Europe after the Second World War and is also part of a justificatory system which assumes a moral leadership when it comes to human rights and death penalty dialogues

# Legal developments

- **Article 2 – Right to life**
- 1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

- 6th Protocol to the European Convention on Human Rights 1982
  - complete abolition of the death penalty in peace time by all the member states of the European Convention on Human Rights
- 1994, the assembly of the Council of Europe recommended adoption of a protocol (No. 13) to the European Convention on Human Rights
  - complete abolition of the death penalty in military laws and during war time
- Protocol No. 13 entered into force on 1 July 2003 and marked the day when the death penalty was abolished in Europe in all circumstances
- No derogation or reservation to Protocol No. 13 to the European Convention on Human Rights is allowed

# The Soering Case 1989 <sup>1</sup>

- The European Court of Human Rights has dealt with the death penalty for the first time in the Soering case
  - Case involved an application by the USA to surrender the suspect in a murder case which could have resulted in a death penalty
  - The judgement did not comment on the compatibility of the death penalty itself with Art. 2 (right to life) and Art.3 (prohibition of cruel, degrading and inhumane punishment) of the European Convention on Human Rights
  - However, the judgement in the Soering case shows rather clearly that the death penalty is considered to be not compatible with Art.3
  - The European Court has stated in the Soering case that lengthy procedures and therefore long stays on death row (death row syndrome) result in the verdict of an infringement against Art. 3
  - Procedures in compliance with the rule of law, adequate provisions of appeal and adequate clemency rules will lead to considerable periods of time spent on the death row
- 1 European Court of Human Rights 7.7.1989, series A Vol. 161.

- In 2003, the European Court of Human Rights ruled in the case *Öcalan v. Turkey*
- It was argued that it could be possible that European practice has neutralized the clear wording of Art. 2 European Convention on Human Rights which restricts the right to life in case a death penalty imposed by a court of law is to be executed
- In the Court's view, it cannot be excluded, in the light of the developments that have taken place in this area (abolition of the death penalty in all member states (with the exception of Russia), ratification of protocol 6 to the European Convention on Human Rights by all member countries (with the exception of Russia, Turkey and Armenia) that the States have agreed through their practice to modify the second sentence in Article 2 § 1 in so far as it permits capital punishment in peacetime
- Against this background – the court held - it could also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3
- The court, however, said that it would not be necessary to reach a firm conclusion on these points as the unfairness of the trial which preceded the death penalty imposed on Öcalan would make implementation of the death penalty run counter the European Convention on Human Rights

# European policies and discourses

- There exist five discourses around the death penalty
  - *Human dignity and the death penalty*
  - *Sentencing, Discretion and Absolute Punishment*
  - *Wrongful judgements and the death penalty*
  - *Deterrence, prevention and the death penalty*
  - *Public Sentiments and the Public's desire for the death penalty*

- From the viewpoint of human dignity only such criminal penalties are acceptable which recognize criminal defendants as subjects
- With that, criminal penalties cannot be accepted which aim at the permanent exclusion of an offender from society
- Permanent exclusion through a violent death is breaking the basic rule which demands for recognition of each person as a subject and the right for not being treated as an object
- This position is backed up by the evidence that can be derived from comparative research on the deterrent properties of various criminal penalties
- There exist well-developed alternatives that provide adequate protection of the public and that convey deterrent messages as well and even better than does the death penalty
- With evidence available that deterrent benefits may not be drawn from executing offenders the right to life is infringed upon as executions are disproportional
- The procedure of putting a person to death is associated with additional and illegitimate suffering and terror (death row syndrome)

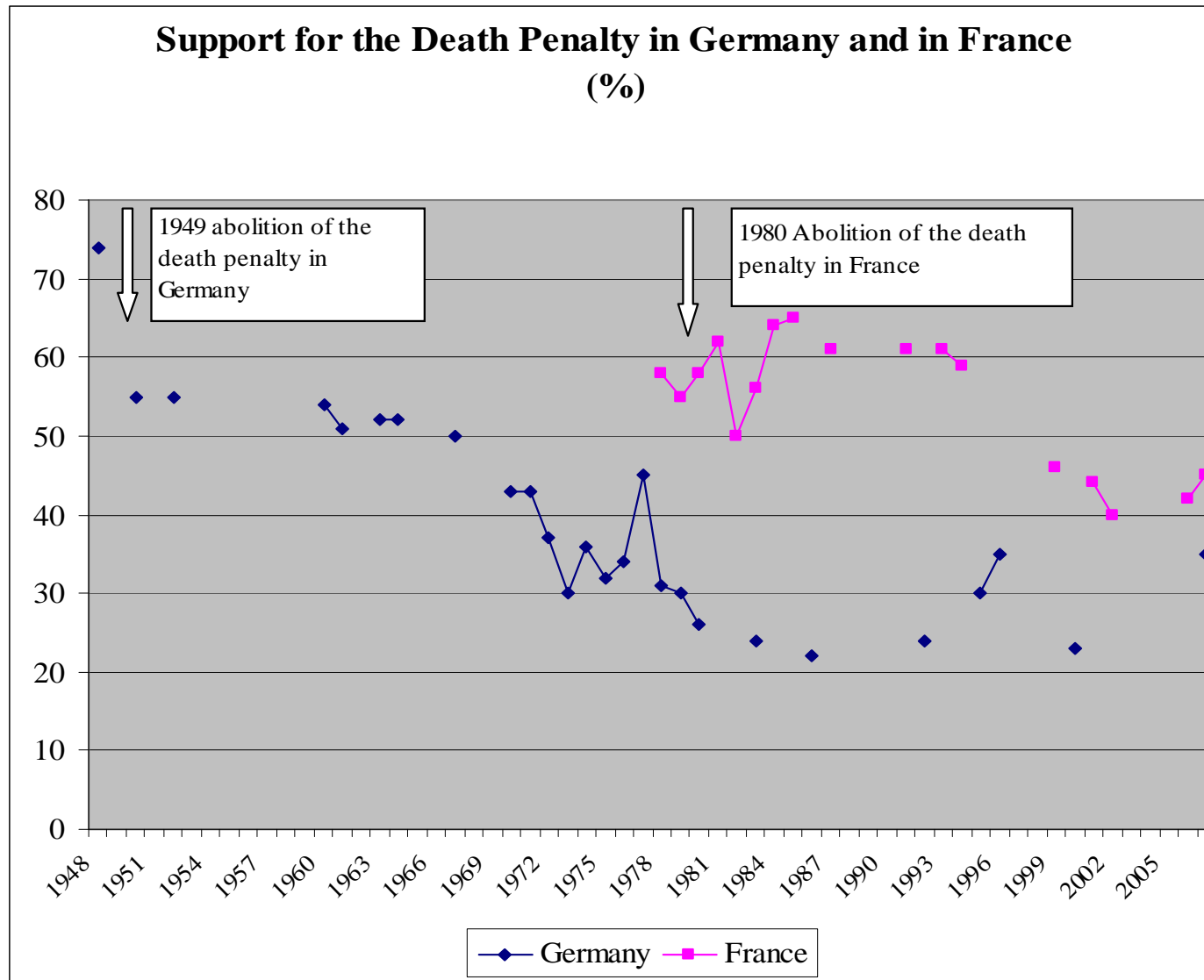
- Death amounts to absolute and irrevocable punishment
- Therefore, the death penalty is faced with the problem of selecting those criminal offences which should be eligible for such absolute punishment
- The problem is related to the requirement to restrict the death penalty to such criminal offences which exhibit the very same degree of seriousness and, moreover, exhibit a degree of seriousness that excludes any necessity to consider other personal or situational sentencing factors, be they of a mitigating or aggravating nature
- The absolute nature of the death penalty requires therefore on the side of criminal offending criminal offences that correspond in terms of seriousness to the absoluteness of death
- Furthermore, it must be guaranteed by way of procedural and substantive safeguards that no other factors than the criminal offence itself plays the decisive role in imposing and enforcing the death penalty
- These problems have led Europe already in the 19th century to restrict the death penalty essentially to first degree murder
- Reducing the discretionary power available for the criminal court in imposing the death penalty in order to reduce problems associated with discretionary justice
- Analyses of decision making as regards imposition and enforcement of the death penalty have shown - for jurisdictions where such research was possible - that it is possible to restrict death eligible offences statutorily and to issue strong sentencing guidelines in order to reduce unequal and arbitrary imposition of the death penalty
- However, such attempts until now do not exclude totally that the death penalty is imposed and enforced for a selection only of such offences and criminal offenders who in principle would have been eligible for imposition and enforcement of the death penalty
- Selection and choice made – this is shown very clearly in sentencing research – are essentially influenced through extralegal criteria. Sentencing research demonstrates eg. for the United States of America that just 6-15% of those who in principle could have been sentenced to death actually are sentenced to death. Similar data are available for Russia where in 1996 just about 3% of those sentenced for the crime of murder with aggravating circumstances and thus eligible for the death penalty actually have received a death sentence

- The history of all criminal justice systems demonstrates very clearly that there is always the possibility of wrongful judgement
- Errors and wrongful convictions cannot be avoided. That's why all criminal justice systems based on the rule of law have introduced legislation that provide for opportunities to correct faulty decisions after the judgement became final
- In some European criminal justice systems (in particular in the United Kingdom) the process of abolishing the death penalty was fuelled by debates on wrongful judgements that have led to the execution of innocent people
- Recent research in the US has confirmed the significance of the problem of executing the innocent. Between 1977 and 1996 5154 prisoners entered death row in the US death penalty states. Out of this group 358 have been executed However, between 1977 and 1997 75 individuals convicted and sentenced to death have been freed (after spending up to 10 years on death row) because ultimately evidence could be produced which proved their innocence. This amounts to approximately 1 innocent individual found among 50 persons sentenced to death
- Among the reasons of wrongfulness of death sentences we find wrong confessions (not necessarily obtained through deception or torture), evidence fabricated by police or prosecution (due also to the partially enormous pressure laid on police and prosecution by public or political concerns with certain crimes) as well as mere misinterpretation of evidence by trial courts

- Until today there is no convincing evidence that crime trends could be influenced through the threat, imposition or enforcement of the death penalty
- Numerous studies based on the comparison of countries and regions with and without the death penalty, analyses of time series interrupted through abolition or (re-)instatement of the death penalty as well as econometric analyses of time series (displaying death penalty eligible crimes and death sentences/executions) rather consistently underline that the death penalty does not have an impact on the general crime rate nor on specific types of crimes such as murder
- Although, methodological problems embedded in the type of research designs which up to now could be used in deterrence research pose considerable problems of interpretation of data that ultimately could be resolved only by way of implementing controlled experiments, the latter research strategy cannot be used in this type of studies
- However, it must be underlined that those legislative bodies which create death penalty laws and empower courts to mete out the death penalty have to bear the burden of proof as regards a deterrent effect of executions
- If a deterrent effect of the death penalty cannot be proven – and nothing speaks in favor of the assumption that such effects can ever be proven – then, the threat and imposition as well as enforcement of the death penalty have to be regarded to be disproportional and to infringe therefore unnecessarily upon human life
- The development of systems of penal sanctions should be headed towards the goal to minimize pain necessarily associated with punishment at a pace which reflects the developing scientific knowledge on effects of criminal penalties

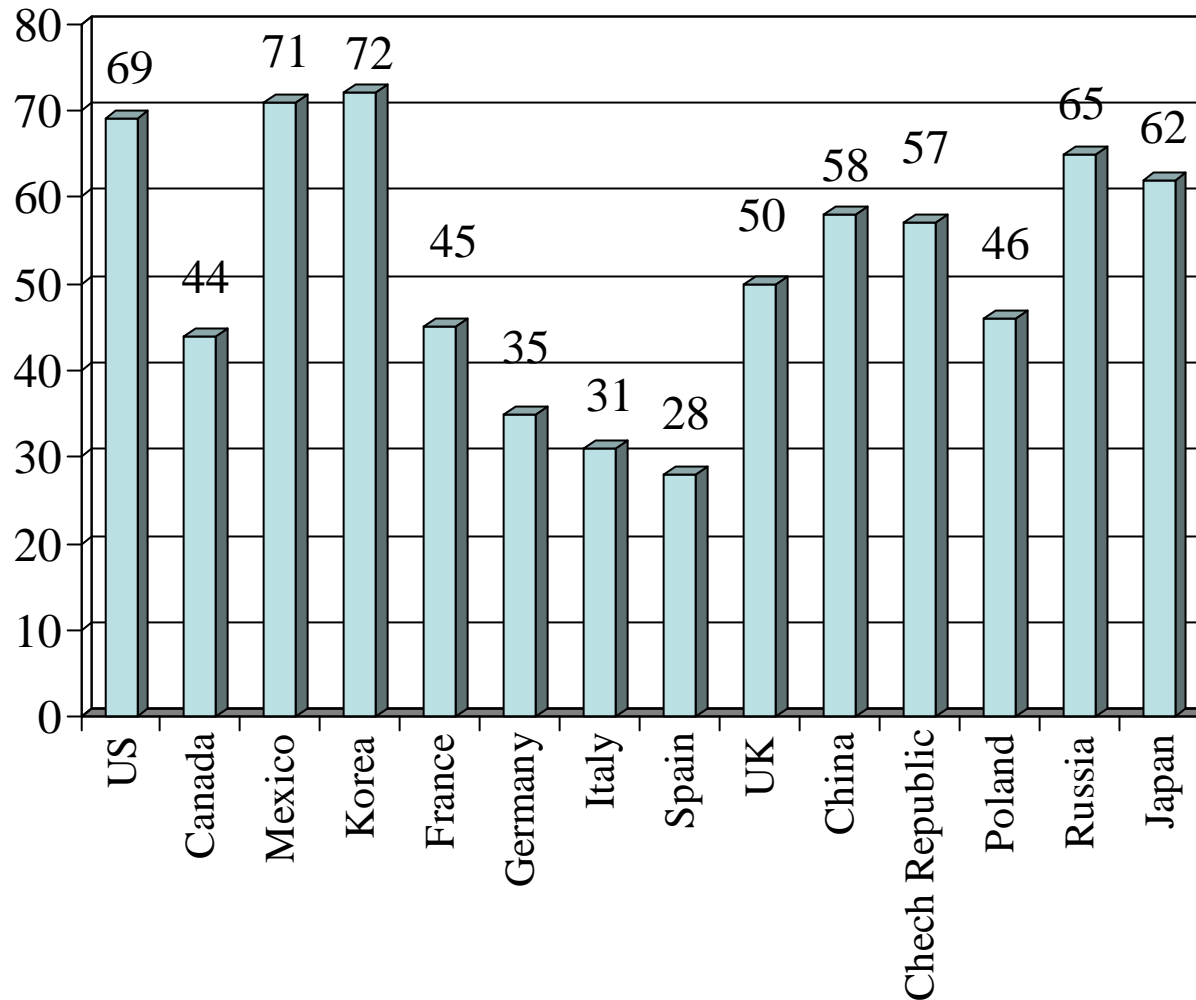
- How are public opinion, the media and policy making linked to each other
- In general it is assumed that policy makers are following the public's view on what should be done in crime policy and crime control
- Research demonstrates that it is the policy makers who set the agenda which in turn forms public opinion and triggers public sensitivity
- Research shows then that public opinion - serving often to justify retention of the death penalty - represents a rather unsecure and problematic basis
- The concept of „public opinion“ is vague and open and therefore accessible for differing interpretations
- From an European perspective it must be noted furthermore that a democratic society must not make basic criminal policy decisions dependent on public opinion
- The state is also obliged to exert influence on public opinion and the acceptance of systems of criminal penalties
- Ultimately, human rights cannot be subject to democratic decision-making but must be enforced independent on whether a majority within a society wants to do away with them in certain situations
- In Germany, the death penalty was abolished in 1949 when the German constitution went into force and outlawed the death penalty with simply prescribing in Article 102 “The death penalty is abolished”
- However, abolition fell into a period where public support for the death penalty was overwhelming

# Public Opinion and Decision Making



- In Europe so far only in Ireland the public had a (serious) say in a referendum that was held in 2001
- The referendum aimed at a vote on the question whether references to the death penalty in Irish law should be erased and whether an article should be adopted in the Irish constitution which prohibits explicitly the enactment of a law which reinstates the death penalty
  - (“The Oireachtas shall not enact any law providing for the imposition of the death penalty”)
- Two third of the voters opted for the constitutional prohibition of the death penalty

# % support the death penalty 2007/2008



- In Europe the death penalty has been abolished completely
- European states may become members of the Council of Europe and the European Union only if the death penalty remains abolished and the respective European protocols are ratified
- The death penalty amounts to cruel and inhuman punishment, the death penalty infringes on the right of life and the dignity of man
- Abolition of the death penalty has become an important symbol of European identity
- The Öcalan decision of the European Court of Human Rights has expressed the opinion that the European states practice with respect to the death penalty has led to a full and unrestricted right to life as expressed in Art. 2 of the European Convention on Human Rights
- In the face of the current social and economic state of development, the threat and enforcement of the death penalty is not necessary anymore; this is underlined by constitutional court jurisdiction as well as legislative moves towards abolition in various countries of transition in Central Europe
- There is no scientific evidence supporting the assumption of deterrent effects of the death penalty; long prison sentences or life term imprisonment will have at least the same degree of deterrent consequences as has the death penalty; therefore, enforcement of death penalties is disproportional and excessive punishment
- Public opinion is not a convincing ground to refrain from abolition