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Collateral consequences of conviction – a hidden punishment?

Uboczne konsekwencje skazania – ukryta kara?

Abstract: Traditionally, the focus of research lies on the process of sentencing and on criminal sanctions. However, these criminal sanctions are often accompanied with supplementary ramifications. These diverse ramifications are legal and social, intentional and unintentional, immediate and distant and temporary and lifelong. Especially in the United States, they are known among other terms as "collateral consequences" of a criminal conviction or criminal punishment. These collateral consequences may have serious negative effects for the convict. For example, a fine for tax evasion in the context of a trade can be followed by a trade ban. As trade bans are administrative acts, the criminal court does not usually take the impending trade ban into account in its sentencing decision. However, the trade ban might strike the convicted person much harder due to the loss of their livelihood. Collateral consequences concern a wide area of application extending beyond the well-known criminal sanctions. In doing so, they do not depend on a specific legal system and its dogmatic assumptions. In this article, the definition and nature of collateral consequences are introduced first. Afterwards, the focus turns to the wide spectrum of collateral consequences. Then, the criminal provisions and penal purposes of collateral consequences come to the fore with an emphasis on Germany. Even before a conviction, media coverage can lead to prejudgment: an example from Germany illustrates these negative side effects of criminal investigations, i.e. of potential convictions in future. Finally, it is important to raise awareness of the collateral consequences of a conviction and to establish (legal) mechanisms to regularly take them into account.

Keywords: ancillary ramifications, collateral consequences, hidden punishment, media coverage, penal purposes, sentencing

Abstrakt: Tradycyjnie badania koncentrują się na procesie wymiaru kary oraz na sankcjach karnych. Sankcjom tym często towarzyszą jednak dodatkowe następstwa. Mają one zróżnicowany charakter:

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mogą być prawne i społeczne, zamierzone i niezamierzone, bezpośrednie i odroczone w czasie, tymczasowe lub długotrwałe. Szczególnie w Stanach Zjednoczonych określa się je – między innymi – mianem ubocznych konsekwencji (*collateral consequences*) skazania lub ukarania. Uboczne konsekwencje mogą mieć dla osoby skazanej poważne negatywne następstwa. Przykładowo do grzywny za przestępstwo skarbowe popełnione w związku z prowadzeniem działalności gospodarczej może następnie być dodany zakaz prowadzenia tejże działalności. Ponieważ zakaz taki ma charakter administracyjny, sąd karny zazwyczaj nie uwzględnia go przy wymiarze kary. Tymczasem to właśnie zakaz prowadzenia działalności gospodarczej – ze względu na utratę źródła utrzymania – może okazać się dla skazanego dotkliwszy niż sama kara zasadnicza. Zakres ubocznych konsekwencji wykracza daleko poza klasyczne sankcje karne i obejmuje szerokie spektrum sytuacji. Nie są one przy tym zależne od konkretnego systemu prawnego ani jego dogmatycznych założeń. W niniejszym artykule w pierwszej kolejności przedstawiono definicję oraz charakter ubocznych konsekwencji skazania. Następnie omówiono ich szerokie spektrum. W dalszej części analizie poddano karnoprawny charakter i cele penalne tych konsekwencji, ze szczególnym uwzględnieniem prawa niemieckiego. Jeszcze przed wydaniem wyroku negatywne skutki może wywoływać samo zainteresowanie mediów – przykład z Niemiec ilustruje uboczne konsekwencje postępowań karnych, a więc potencjalnych przyszłych skazań. Na koniec podkreślono potrzebę zwiększenia świadomości istnienia ubocznych konsekwencji skazania oraz stworzenia (prawnych) mechanizmów umożliwiających ich systematyczne uwzględnianie.

Słowa kluczowe: dodatkowe następstwa, uboczne konsekwencje, ukryta kara, relacje medialne, cele kary, wymiar kary

Introduction

For a long time, sentencing and punishment have been subjected to scholarly debate. The controversy starts with the theoretical foundation and extends to the criteria and effects of sentencing. Although sentencing principles and judicial discretion differ across national jurisdictions (Haverkamp, Kaspar 2023), there exists a similar corpus of typical aggravating (e.g. reoffending) and mitigating circumstances (e.g. confession).

Despite these known criteria of sentencing, further considerations may come into play. German law provides an example: "The effects which the penalty can be expected to have on the offender's future life in the society are to be taken into account" (Sec. 46 para. 1 sent. 2 German Criminal Code; translation by Bohlander, Reusch 2021). The wording is vague and points inter alia to the dissocialising impact of punishment. These consequences may add to a punishing effect if they impose an additional burden on the convicted person. Another German provision regulates removing the right to hold public office or to vote and be elected when the accused person is sentenced to at least one years' imprisonment for a serious crime (Sec. 45 German Criminal Code). Apart from such statutory or legal "side effects" of a criminal conviction that are regulated in the German Criminal Code itself, there are many possible legal consequences of a conviction outside the realm of criminal law, such as extraditing foreign offenders to their home countries or

banning, say, doctors or lawyers from working in their profession. One can also include the mere factual negative consequences of a conviction (and the following punishment), e.g. social isolation and stigmatisation or difficulties in finding a home or a job due to a criminal record.

Until recently, these so-called "collateral consequences" of criminal conviction have been neglected in the European scholarly debate (Corda 2023; Corda, Rovira, Henley 2023; Fitrakis 2018). Their distinctive feature is their rather hidden or invisible nature, as they stem from different sources with different degrees of formalisation: they might serve as an add-on to punishment within the criminal proceedings, be separate from them as an administrative or civil restriction or even represent mere informal factual consequences. The term "collateral consequences" was coined in the United States. There, the federal and state systems list around 45,000 collateral consequences in a database called the National Inventory of Collateral Consequences of Conviction (American Bar Association n.d.; National Inventory of Collateral Consequences of Conviction n.d.). Since they are well established there, a considerable body of research has developed (Hoskins 2019). According to Brian Murray, "collateral consequences […] are the harshest sanctions because they limit opportunity, they can be timeless, and inhibit full reentry" (Murray 2020: 1032). Both the huge amount and the detrimental effects are beyond compare in Europe, where collateral consequences are "more narrowly targeted, less comprehensive, usually imposed directly and publicly, not retroactive, and time-limited" (Demleitner 2018: 512). Nevertheless, these consequences are widespread in Europe and heterogenous in their impact, nature, scope and dimension (Rovira, Henley 2023: 528–532). They are legal and social, intentional and unintentional, immediate and distant and temporary and lifelong.

In our paper, we introduce a definition of collateral consequences within the criminal system. The broad spectrum of these consequences is then addressed, including the question of how they affect third parties such as family members or employees. Then, our focus turns to the question of whether collateral consequences should become relevant to sentencing decisions. Finally, we discuss a concrete example of negative media coverage. In our conclusion we stress the need to raise awareness of the existence of collateral consequences and to establish mechanisms to promote their relevance within the sentencing process.

1. Definition of collateral consequences of conviction

The term "collateral consequences" of criminal conviction seems to be most frequently used in academia and practice. However, other labels are preferred to highlight their nature, such as "invisible" (Mauer, Chesney-Lind 2002; Kilchling 2025: 435) and "hidden" (Kaiser 2016: 123; de la Cuesta 2021: 1095) punishment or sup-

plementary ramification, "disordered" (Corda, Lageson 2020: 245) punishment, "additional sanctions" (Corda, Kaspar 2022: 420) or "quasi-criminal" (Haverkamp 2026) consequences. The civil character is emphasised by the expressions "civil penalties" (LaFollette 2005: 241) or "civil disqualifications" (von Hirsch, Wasik 1997: 599), while the quasi-administrative character is highlighted by the term "regulatory measures" (Murray 2020: 1050). This last term falls short because – unlike in the United States (Uggen, Stewart 2015: 1874) – collateral consequences are situated both outside criminal law and within it, as is the case in Germany.

According to Alexander Corda and Johannes Kaspar, the collateral consequences of conviction are "(a) formally non-punitive 'side effects' of being found criminally liable imposed, either *de jure* or *de facto*, automatically or discretionarily, by state as well as non-state actors; and (b) those ancillary, formally punitive ramifications of conviction that, while internal to the criminal law, are not usually included in the common understanding of criminal punishment in scholarly work and policy debates, and, at least in part, share the same stated preventive rationale and purpose of most formally non-punitive collateral consequences" (Corda, Kaspar 2022: 393–394).

This definition is a good start, but there are some points to be discussed further. Firstly, as mentioned above, collateral consequences may also have an impact on third parties, especially if one takes into account not only the formal conviction and its consequences, but also the punishment that follows a conviction. Therefore, one could clarify the definition above by stating that some of these side effects might also unintentionally affect third parties such as family members or employees (Haverkamp 2026).

Another question is whether sanctions such as "measures of rehabilitation and incapacitation" (*Maßregeln der Besserung und Sicherung*) in the German twin-track system of criminal sanctions are embraced by this definition (Corda, Kaspar 2022: 408). Unlike a fine or imprisonment, which are understood as criminal punishments, these measures share a non-punitive character. Their common objective is to prevent recidivism based on the supposed dangerousness of the offender. On the one hand, one could argue that in many cases they accompany criminal punishment and that they should be taken into account to avoid a disproportionate cumulative "sanction package" – which is one of the reasons why the debate on "collateral consequences" is an important one (Corda, Kaspar 2022: 409). On the other hand, it is of course doubtful whether these statutory legal consequences that are imposed by a criminal court as a different and independent type of criminal sanction can really be called "ancillary." Some scholars argue that a line could be drawn between custodial measures (which are even more independent from the imposition of criminal punishment) and non-custodial measures, such as the supervision of conduct, a driving ban or disqualification from practising a profession (Haverkamp 2024).

We ask further whether the debate should be extended to consequences that are not necessarily linked with a formal criminal conviction, but may stem from merely being a suspect in a criminal investigation; one could speak of collateral

consequences of a potential conviction in these cases. Since the purpose of this paper is to explore the meaning of collateral consequences with regard to sentencing, it is reasonable to include these pre-conviction consequences, as they might also become relevant to the sentencing decision. One obvious example is stigmatising media coverage of criminal investigations and proceedings. Below, we discuss a recent German example.

Lastly, as collateral consequences are spread throughout different areas of law, they blur the legal distinctions between them (Meijer, Annison, O'Loughlin 2019: 1). One example is deportation following a prison sentence of at least six months (section 54 German Residence Act), which is the most serious collateral consequence for foreigners without established residence status and demonstrates the merging of migration and crime (so-called crimmigration) (Stumpf 2006: 367; Corda, Rovira, Henley 2023: 534). The dynamism of crimmigration is expressed in the increasing intertwining and interchangeability of migration and crime control (Walburg 2016: 380; Werkmeister 2018: 187–189). Crimmigration serves as an example of growing possibilities for merging criminal and administrative law in different areas.

It has to be noted that at least some collateral consequences of administrative law (e.g. disciplinary proceedings under civil-service law) are indeed considered in sentencing by criminal courts. In contrast, those of civil law remain more hidden. Therefore, the criminal court may be unaware of the civil-law ramifications for the accused; consequently, critics fear that the acknowledged safeguards of criminal law may sometimes be circumvented regarding civil collateral consequences (Meijer, Annison, O'Loughlin 2019: 1). Such overlaps can be found in the areas of application that are discussed as examples in the following section.

2. Areas of application and affectedness of third parties

The broad definition of collateral consequences of actual or potential conviction used in this paper already reveals the wide spectrum of their application. It ranges from education and science, employment and business activities, through family and domestic rights, free movement, residence, immigration and related areas, to permits and ownership, political and civic participation, property and social and public welfare (Kilchling 2021: 1075–1078).

Convictions – and the subsequent prison sentences in particular – entail adverse effects for employment and business activities, which typically are affected the most by collateral consequences. A known criminal record is a strong barrier for getting employed (Hoskins 2019: 11–13). In Europe, various options are available to obtain a person's criminal records, "ranging from court records, databases and government criminal history repositories to multiple online platforms operating

for commercial and non-commercial purposes" (Corda, Lageson 2020: 246). The general public or selected segments have no or limited access to criminal records because the data is sensitive and protected. Nevertheless, the digital age opens up backdoors to private companies that undermine data protection, as happened in Sweden, where databases on judgments are easily accessible. One private company took advantage of this situation and created a legally compliant, fee-based database for background checks (Corda, Lageson 2020: 245–266). Due to the Swedish principle of openness, complaints have so far been in vain (Österdahl 2016: 31–33). Besides, the business of a trader might be forbidden as an administrative consequence of a conviction connected with trading. In Germany, the owner of a bratwurst stall accepted a penalty order for tax irregularities (Kilchling 2021: 1078). After the penalty order took legal effect, the trader's licence was revoked with immediate effect. Not only did the trader lose his licence, but his employees also lost their jobs. Thus, in addition to the convict himself, the employees were affected as third parties by the administrative act following the conviction.

When it comes to education and science, exclusionary clauses are applied to restrict access to examinations, academic titles, scholarships and research funding from public funds. At the EU level, exclusionary clauses are safeguards for its financial interests and are therefore common in framework programmes and topical funding lines. According to Article 13 para. 1 of EU Regulation 390/2014, "the financial interests of the Union are protected by the application of preventive measures against fraud, corruption and any other illegal activities, by effective checks and, if irregularities are detected, by the recovery of the amounts unduly paid and, where appropriate, by effective, proportionate and dissuasive administrative and financial penalties." The indeterminate term "any other illegal activities" entails checking research funding and is heavily criticised as "a blank cheque to invent further exclusions" (Kilchling 2021: 1079). The "Declaration on honour on exclusion criteria and selection criteria" precludes funding of research in case of bankruptcy or a criminal conviction relating to fraud, corruption, money laundering or human trafficking, for example (European External Action Service 2022).

An important target group is serious sex offenders, especially those who sexually abused a minor (Corda, Rovira, Henley 2023: 534–537). If they are released, they are usually exposed to various restrictions of movement and residence. Child sex offenders are banned from kindergartens, parks, playgrounds and schools. To monitor these bans, they are mostly subjected to electronic monitoring that might last their lifetime. Despite the commonalities between EU Member States, one observes remarkable differences in national jurisdictions. In Germany, electronic monitoring is in principle intended for serious violent or sex offenders who are at risk of reoffending and have served full imprisonment of at least three years or completed a measure of prevention and security (section 68b para. 1 sent. 1 no. 12, sent. 3 German Criminal Code).

Furthermore, prisoners are often confronted with the removal of their political rights, which has an exclusionary effect as they receive the stigmatising signal of

being "second-class citizens" (Ripollés 2016: 240). In 2005, the European Court of Human Rights declared that the blanket ban on voting by all prisoners in the United Kingdom violates their right to free elections (Art. 3 Protocol No. 1 to the European Convention on Human Rights) (ECtHR 2005). Despite the binding character of the verdict, the UK delayed its enforcement until 2018, when the Council of Europe approved the UK's proposals and dismissed the case (Johnston 2023: 4). The Court of Justice of the European Union (CJEU 2015) acknowledged the voting ban for French prisoners. However, this ruling does not contradict the verdict by the European Court of Human Rights. In contrast to the former UK voting ban for all prisoners, the French law restricts the voting ban to inmates sentenced to at least five years' imprisonment (Caird 2016). In Germany, a voting ban of between two and five years is established by law (section 45 para. 5 German Criminal Code), such as the possible voting ban for persons sentenced to imprisonment for at least six months for a crime against the state (section 92a German Criminal Code).

Another severe restraint is the deportation of legal foreign residents who are convicted of a crime. The deportation may happen before a sentence, during its enforcement or after its completion. In 1998, the German case against "Mehmet" (a pseudonym) even attracted international recognition (Bös 2010: 1–2). When the Turkish boy turned 14 years old, he was deported without his parents to Turkey. Even before he had reached the age of criminal responsibility, he was known to the police as a so-called "chronic offender." At the age of 14 he robbed a victim and caused injuries that had to be treated in hospital. For this crime he was sentenced to unconditional juvenile imprisonment, which he never served because the Munich municipality denied the prosecutor's request to prolong his residence permit. A long legal dispute followed Mehmet's deportation to Turkey. When the German Federal Administrative Court declared the deportation unlawful, Mehmet came back to Germany – after spending four years in Turkey. The case law of the European Court of Human Rights considers the deportation of a child without their parents to be a violation of the right to respect for private and family life in Article 8 of the European Convention of Human Rights (ECtHR 2006; Collinson 2020). Third-party involvement is obvious in this case, as the parents' human rights were affected by the deportation of their child (Corda, Rovira, Henley 2023: 535).

Another crucial ramification is the loss of social and public welfare, which threatens basic human needs and life itself. In particular, ex-prisoners without residency are dependent on public housing. Even during preliminary proceedings, a suspect's residency can be at risk in case of relapse combined with a threat to the neighbourhood. In Germany, repeated drug dealing may be cause for terminating tenancy without notice, even if the tenant – who is not the suspect – claims not to have known about it (Frankfurter Neue Presse 2019). The local and regional courts have accepted several summary dismissals by the municipal housing company due to drug dealing (Frankfurter Neue Presse 2019). One case turned out to be particularly unfortunate, as a family of six, including a girl who was severely disabled, were affected because one son was suspected of dealing drugs

(Teutsch 2019). This family moved to a flat in another part of the city, while the suspected son was banned from the house (Teutsch 2019).

Two more examples distinctly show third-party involvement. To date, research on collateral consequences has not addressed third parties who are associated in different ways with the convicted person. However, these third parties are also affected by collateral consequences, even though they are not connected to the crime, but only to the convicted person. They are unable to avoid these collateral consequences that were not directed at them. Therefore, the following differentiation makes sense: direct consequences are aimed exclusively at the offender, whereas indirect consequences might also affect innocent third parties. As the examples illustrate, these indirect consequences not only include family members, but also other third parties such as employees. The pivotal question that arises from this is whether all the aforementioned consequences, including those that affect third parties, are (or at the very least should be) relevant to the sentencing decision.

3. Relevance to sentencing

When discussing the relevance of the collateral consequences of conviction to sentencing, we focus on the German legal situation as an example and show that this relevance can be substantiated not only by certain provisions of German criminal law, but also by penal theories that are independent of national law.

As mentioned above, an important regulation in this regard is section 46 para. 1 sent. 2 of the German Criminal Code (Corda, Kaspar 2022: 428–429). It complements section 46 para. 1 sent. 1 of the German Criminal Code, where the "blameworthiness" or "guilt" (*Schuld*) of the criminal act serves as the "basis" for the sentencing decision, which is obviously a retributive element of German sentencing law. However, section 46 para. 1 sent. 2 of the German Criminal Code states that the "effects which the penalty can be expected to have on the offender's future life in the society" are also to be considered within the sentencing decision, thereby directly influencing the punishment that is imposed. With this provision, the legislature obviously does not refer to retribution, but to the purpose of individual or (as it is called in the German discussion) "special" prevention (*Spezialprävention*), which aims to avoid future crime by the sanctioned person. The wording can be read in two ways, containing quite different views of punishment: either as a means of positively influencing the offender's behaviour or as a burden that comes with special difficulties for the offender's future life and that should therefore be restricted. The latter view of punishment, especially in the form of imprisonment, is not only supported by criminological theories and empirical research but has also been acknowledged by the German

legislature: state prison law (e.g. section 5 para. 2 Bavarian Prison Law) demands that any "harmful consequences" of imprisonment should be met with suitable countermeasures. The possibility to consider a specific and individual impact of collateral consequences on the offender is also stressed by section 46 para. 2 of the German Criminal Code, with its catalogue of potential sentencing factors, where inter alia "personal circumstances" are mentioned.

Another important normative foundation for the relevance of collateral consequences regarding sentencing is dispensing with penalty pursuant to section 60 of the German Criminal Code (Corda, Kaspar 2022: 428–429), which reads as follows: "The court dispenses with imposing a penalty if the consequences of the offence suffered by the offender are so serious that the imposition of penalties would clearly be inappropriate. This does not apply if the offender has incurred a penalty of imprisonment for a term of more than one year for the offence."

This provision is meant for exceptional cases of a *poena naturalis*, like the case of a mother killing her own child in a negligent car accident (Albrecht 2023: margin number 4). A punishment imposed by the state would not seem to be an act of justice serving any meaningful purpose, but instead a cruel and merciless burden (BGH 1977). We can draw important conclusions from this provision: First of all, the provision clearly shows that mere factual circumstances which are not imposed by the state on a legal basis, but by nature or fate itself, can be a reason not only to mitigate punishment, but even to completely desist from punishing at all. In other words, these factual (in our example, dramatic) consequences can actually serve as a functional equivalent to regular punishment, even though their nature is obviously non-punitive. Secondly, we can conclude that even less dramatic negative consequences that do not meet the quite high requirements of section 60 of the German Criminal Code should be relevant to sentencing in the sense of a mitigating factor. It would not be convincing to assume that there is a "tipping point" where all of a sudden dramatic collateral consequences become a reason to completely abstain from punishment, despite being completely irrelevant before this point is reached. The assumption of such a "double relevance" for different aspects of the sentencing phase also appears in the example of victim–offender mediation and compensation. Under certain circumstances, section 46a of the German Criminal Code allows the court to completely refrain from imposing a penalty after restorative efforts by the offenders. Apart from that, if the prerequisites of section 46a of the German Criminal Code are not fulfilled, the court at least has to take these efforts into account within its general sentencing decision (see section 46 para. 2, sent. 2 German Criminal Code).

The relevance of collateral consequences to sentencing decisions is not only supported by these legal provisions, but also by penal theory (which is the basis for sentencing). If one focusses on retribution for a start, punishment appears as an evil that is supposed to make the offender suffer – they get what they deserve, their "just deserts" (von Hirsch 2007: 413). If part of the suffering comes from

elsewhere, one could argue that the need for suffering by punishment itself is diminished. From a puristic point of view one could of course insist that retribution of guilt (*Schuldausgleich*) could only be reached exclusively by criminal punishment alone, but not by other, non-punitive legal measures, let alone by mere factual consequences. We can see this thinking (and its problems) within the German twin-track system: even though preventive detention for fully responsible offenders that are considered dangerous (*Sicherungsverwahrung*) resembles regular imprisonment in many ways, it is seen as a non-punitive, merely preventive criminal sanction that does not add to the retributive function of punishment. Therefore, it just comes "on top" of the prison sentence and is not supposed to mitigate it. However, the view of such a "functional exclusivity" of punishment is doubtful. Firstly, the constitutional principle of proportionality demands that when the state interferes with liberty rights, it always has to look for the mildest possible measure that is "equally apt" to fulfil the purpose in question. If one declares retribution to be a purpose that can only be reached through criminal punishment, this important constitutional instrument for limiting the exercise of state power is undermined in the field of criminal law. Furthermore, we must keep in mind that "retribution of guilt" is a highly normative purpose that cannot be tested empirically, but strongly depends on legal assumptions, including constitutional law, statutory law and, last but not least, decisions by criminal courts. Therefore, the legislature is free to decide that the purpose of retribution can be achieved (fully or partially) by non-punitive measures or consequences. Thus, they can be a legitimate reason for mitigating or even abstaining from punishment, as is explicitly evident from section 60 of the German Criminal Code, referenced above.

Even once this standpoint is accepted, a plethora of points remain contentious. In this paper, these points can only be referenced but not discussed in depth. This prompts the following questions: What is the scope and the limit for such a reduction of punishment? Should every burdensome side effect of punishment somehow be considered, or just extraordinary ones? What about the "expressive function" of the sentencing decision that is stressed by some scholars, if the final punishment seems very low compared to the crime in question? Would it suffice that one could explain to the public (including the victim) that part of the "censure" by criminal punishment was not necessary because of certain other burdensome circumstances?

From the perspective of preventive purposes, collateral consequences are relevant in different ways. Some of them, such as a ban from working in a certain profession, have an immediate preventive effect in the sense of incapacitation. Apart from that, as they are burdens themselves, they might all function as means of individual and general deterrence. They contribute to the notion that crime does not pay but has burdensome consequences that make offending less attractive. This again helps to restore trust in the legal order and legal peace (which is the purpose of "positive general prevention" in the German discussion), even

through a mitigated punishment. And if we assume that by such mitigation, the potential stigmatising or dissocialising effects of punishment can be attenuated or even avoided, this contributes to the special preventive effect of rehabilitation and reintegration into society.

The crux of the issue is the absence of explicit regulations concerning the circumstances in which and to what extent collateral consequences should be taken into account during the sentencing process. But that is a general problem within sentencing in Germany, at least, where judges have a huge margin of discretion within the broad legal framework that the legislature has provided them with. It would nonetheless be an important step forward to raise the court's general awareness concerning the problem of collateral consequences, even though it is hard to come up with a precise general regulation of their relevance within sentencing. Such an awareness would help to avoid the "danger of a potentially disproportionate cumulative effect" (Corda, Kaspar 2022: 409) of a punishment and other legal and factual consequences. To promote the relevance of collateral consequences, the legislature could introduce the "consequences of the offence suffered by the offender," which appear as the key element in section 60 of the German Criminal Code, into the catalogue of general sentencing factors in section 46 para. 2 of the German Criminal Code. Whether and how these consequences would actually influence sentencing decisions would still remain an open question (as it is *lege lata*), since courts would still enjoy a broad margin of discretion within sentencing. Existing case law by the Federal Court of Justice (*Bundesgerichtshof* or BGH) shows that the relevance of collateral consequences is decided upon in a rather selective and inconsistent manner. General negative side effects are usually not discussed within the sentencing decision; non-punitive sanctions or measures are not part of the consideration of negative and positive sentencing factors.

An exception is made especially for formal legal work-related consequences such as the (upcoming) loss of the ability to work in certain professions (e.g. as a doctor, lawyer or public servant) or the loss of a public servant's pension. Here, a paradox exists that is challenging to avoid: German public service law regulates the loss of one's position as public servant, including pensions, if the court imposes a prison sentence of at least one year. Some courts try to avoid this consequence by handing down (if possible) sentences under one year's imprisonment; thus, in the end, the potential collateral consequence that has been taken into account as a mitigating factor does not materialise at all. The question of timing is a general problem in this regard: for the criminal court it will not be certain at the time of the verdict if particular consequences of a conviction will actually occur or not. In the event of an administrative sanction – such as the withdrawal of a business licence (section 35 para. 1 Trade Regulation Code) – being issued subsequent to a conviction, the revocation will not be certain in many cases, especially if the respective regulations leave some margin of discretion for the relevant administrative bodies. It is understandable that criminal courts tend to consider only collateral consequences that are certain or at least likely to

occur (Lubin 2020: 178; BGH 2022). At least in the case of a withdrawn business license, the problem is attenuated by a specific regulation in section 35 para. 3 of the Trade Regulation Code, according to which the administrative authority is bound by some of the criminal court's findings, as there can be no deviation from the judgment to the detriment of the convicted person concerning the following circumstances: the assessed facts of the case, the assessed question of the guilt and the assessment of the question of relapse. In other words, whether the convicted person will commit significant unlawful offences within their trade which would disqualify them from practising their profession (section 70 German Criminal Code) and whether it is appropriate to prohibit the trade to avert these dangers is for the Criminal Court to decide. This regulation connects criminal and administrative law consequences; it makes it possible for the criminal court to, for example, impose a criminal sanction but to exclude further administrative measures by finding no relevant danger of future offences. The criminal court in the above-mentioned Bratwurst case did not do so, perhaps because it was not aware of the administrative-law implications of its verdict. We will come back to the problem of judicial awareness in the concluding section of our paper.

4. Negative effects of media coverage – A case study from Germany

An illustrative recent example of collateral pre-conviction consequences is the case of Joachim Wolberg, the former mayor of Regensburg, a historic Bavarian city with a population of 150,000. Wolberg was (inter alia) accused of having accepted payments by the owner of a local construction company that were seen as bribes. Wolberg spent several months in pre-trial detention and lost his job and his reputation. He and his family were verbally attacked and there was widespread (negative) media coverage of the case. In the end, not only Wolberg, but also his wife and children suffered from psychological problems.

In its verdict of 4 July 2019, the District Court of Regensburg found that the defendant had indeed committed the crime of accepting benefits (section 331 German Criminal Code). Nonetheless, the court did not impose any punishment (section 60 German Criminal Code) (LG Regensburg 2019). The court highlighted the various serious impacts of criminal investigations on the personal life of the offender and his family, especially with regard to the stigmatising media coverage (that included false reports of a huge amount of cash that was allegedly found in the defendant's house, for example). The court stated that the frequency and intensity of media coverage in this case was unprecedented compared to other previous cases. The Federal Court of Justice, however, overruled the verdict (BGH 2021). The Court stressed that section 60 of the German Criminal Code is only applicable in exceptional cases when it is absolutely clear that criminal

punishment would not serve any meaningful purpose. In the Wolberg case, the Court found no such exceptional circumstances. According to the Court, negative media coverage (as a typical side effect of criminal allegations) as well as regular work-related consequences for public servants should be considered usual consequences of pre-conviction that do not call for mitigation of punishment. The Court stated that prominent persons holding a public office such as Mayor Wolberg had to assume that the public and the media would be particularly interested if they committed offences in the course of their profession (BGH 2008). The reasoning of the verdict shows that the Federal Court of Justice not only tries to restrict the application of section 60 of the German Criminal Code, but also the general relevance of "usual" collateral consequences as mitigating factors. It referred to other verdicts where relevance was denied, e.g. with regard to large financial claims by third parties following the offence (as the offender could have foreseen such a typical consequence) (BGH 2005) or extensive media coverage as a general sentencing factor independent of section 60 of the German Criminal Code (BGH 1999; BGH 2008; Knauer 2009: 541; Groß, Kulhanek 2023: Section 60 margin number 11; Maier 2023: Section 46 margin number 68). The verdict implies that the High Court is rather sceptical about mitigating punishment with regard to collateral consequences and tries to limit the scope of such mitigation to atypical, extraordinarily burdensome and unforeseeable consequences for the offender. The scope of this mitigation remains unclear, however. Where is the cut-off for an "atypical" consequence? And does it really exclude any mitigation if the offender could have foreseen (even very drastic) consequences such as the complete destruction of their professional and private life?

Conclusion

In this paper we argue that collateral consequences of conviction are an important, yet still neglected aspect of criminal sanctioning. A common and broad definition encompasses, on the one hand, formally non-punitive consequences for convicted persons, which are imposed de jure or de facto, automatically or discretionarily, by state or non-state actors and, on the other hand, ancillary, formally punitive consequences belonging to criminal law; both ramifications share, at least in part, the same stated preventive rationale and purpose. We expand this definition in two respects: firstly, collateral consequences also include the accused person before their conviction and, secondly, they have direct and indirect effects; the direct effects relate exclusively to the accused or convicted person, whereas indirect ones might also affect third parties such as close family members or employees.

The judiciary is only partially aware of the variety of these ancillary ramifications, which usually concern those expressly regulated in the German Criminal Code and those for certain professional groups in other legal contexts (e.g. public

servants). However, other administrative-law and (even more so) civil-law consequences are frequently overlooked or forgotten. One striking example in our paper refers to the prohibition of a trade after a conviction that can be prevented by the criminal court: its judgment has a certain legally binding effect, but only if the criminal court expressly assesses no risk of committing further offences, also in view of a trade prohibition (section 35 para. 3 Trade Regulation Code). Therefore, it is crucial that criminal courts as well as public prosecutors know about the multitude of negative side effects for the offender, their family and other parties involved. Only then are they able to take these effects into account within their sentencing (or non-prosecution) decision. Arguments in favour of this relevance can be found in penal theory as well as in German criminal and constitutional law.

It is reasonable that criminal courts will not always have a complete overview of all non-punitive legal or factual consequences that a conviction will have for the offender's future life or for third parties. Therefore, the introduction of a database that lists and systematises these consequences – as in the USA (NICCC 2025) – seems to be a good idea for other countries, including Germany. The new possibilities of AI-driven tools could improve efficiency by making it possible for the courts to enter some concrete facts about the case and receive a full picture of the vast range of potential collateral consequences within seconds. Due to the lack of specific and detailed regulations and the wide margin of discretion, there will still be huge differences concerning the question of whether and how collateral consequences actually do influence sentencing and non-punishment decisions. These shortcomings are not restricted to the topic of collateral consequences but rather represent a general problem of sentencing. And apart from the area of sentencing, a general awareness of destructive collateral consequences seems to be necessary, as in some cases the harm caused by these effects may greatly exceed the severity of punishment. This consciousness could promote the famous and wise (yet often neglected) principle of *ultima ratio*, i.e. the idea of using criminal law and punishment only as the last resort if other means do not suffice.

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