

Swiss Summary Penalty Order

Workshop HU - Faculty of Law – Discussion paper

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The way in which crimes and offenders are treated reveals much about the self-perception of a state and its relationship to its citizens. Criminal justice systems are increasingly confronted with the question of how to deal with mass delinquency. The Swiss legislator has opted for adjudicating well over 90% of all crimes in penal orders. Less than 10% of all convictions are handed down by courts.

Criminal justice authorities appreciate the efficiency of penal orders; defendants appreciate their discretion. However, penal orders are also criticised regarding the right to be heard, defence rights, translation, the maximum sentences that can be imposed, and service.

The goal of our National Science Foundation project was to collect as much empirical data as possible on the practice of penal order proceedings in Switzerland. Now we¹ are faced with the normative evaluation of the findings collected. I am still troubled by the question of whether a fair short trial is conceivable?² The question of whether criminal proceedings are fair can be broken down to a simple equation:

Fairness x Truth = Justice

The reasoning behind this is that if either of these two factors is zero, there is no justice. If a criminal trial produces a 100% "true" result, i.e. the real perpetrator is convicted, but this is only possible because the accused was threatened with torture beforehand,³ his conviction cannot be considered as just because of the lack of a fair trial. Conversely, a trial in which all rules of evidence and procedural principles are observed, i.e. which is fair, but which ends in a non-guilty person being convicted, is not just either.

¹ In his dissertation, *David Eschle* looks at the opposition procedure and its consequences. Is there such a thing as a trial penalty in Switzerland? Do the prosecutors use penal order proceedings to get rapid convictions if no objection is raised? *Franziska Rader* looks at defence counsel in penal order proceedings. What influence does it have on the charges/objection/sentence/proceedings duration etc. if there is a defence lawyer in the proceedings? Given the complexity of the proceedings and the subsequent questions (deportation, withdrawal of driving licence, compensation consequences, etc.), is it always necessary to have legal counsel? *Caroline Ruggli* takes a closer look at the sanctions in penal orders and the reasons given for them. *Sherilyn Kirchhofer* examines the translation of penalty orders in her doctoral thesis. Are the charges and sanctions translated to the defendants? If so, by whom and for which offences? *Livia Widmer* focuses on penalty orders with unconditional custodial sentences and asks whether they are compatible with the right to adjudication by a court in Art. 5 ECHR (right to liberty).

² See already: [Marc Thommen, kurzer Prozess – fairer Prozess? Bern 2013](#)

³ Vgl. etwa ECHR, Grand Chamber, *Gäfgen v. Germany*, Application no. 22978/05, 3 June 2010.

Both factors of the equation present us with great challenges. In the case of **truth**, it is already highly controversial epistemologically whether it can be found at all. Because all perception is subjective, an objective truth independent of such perception cannot be found. Even those who do not want to accept these limits to cognition will have to acknowledge that a procedure in which defendants are allowed to remain silent and even to lie and in which evidence can be excluded is ill-suited at generating truth. This problem becomes even more acute when truth is no longer seriously sought. Plea bargaining procedures, abbreviated proceedings or penal orders all aim to shorten the process of fact-finding and to focus on confessions/guilty pleas (sometimes even a *nolo contendere*-pleas suffices)⁴. The problem of finding the truth in criminal trials is unsolved, maybe even unsolvable.

In my research, I concentrate mainly on the **fairness** aspect. Fairness in criminal proceedings can be defined as compliance with procedural rules. In penal order proceedings and other "summary convictions" the following problem arises. The procedural rules today's codes were created with an ideal type of criminal procedure in mind: A trial in court characterised by an "accusatorial trinity"⁵, i.e. a setting in which the prosecution and the accused face each other with equal arm in a public trial where they argue about justice and truth under the vigilant eyes of the court. Our procedural principles were created based on this ideal trial: the principles of publicity, accusation (separation of investigation and adjudication), equality of arms or the prohibition of hearsay evidence. However, these so-called ordinary proceedings have long since become extraordinarily rare.

These "short trials" are the new ordinary trials.⁶ The aim of my research is therefore to develop "*principles of modern criminal procedure*". Here I am only at the beginning. My thesis is that such principles must be oriented towards the three "C":

- **Caution** (information/cautions about charges and rights)
- **Counsel** (assistance through counsel and interpreter)
- **Contact** (listening and calling to account in person)

At the workshop I would like to discuss the concept and the theses with the participants and hopefully take home new ideas.

⁴ In the U.S., even so-called Alford Pleas ("I didn't do it, but I plead guilty anyway") are admitted. In North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, 56 O.O.2d 85, Alford pleaded guilty to avoid an imminent death sentence and was sentenced to 30 years imprisonment.

⁵ Julius Vargha, Die Verteidigung in Strafsachen – historisch und dogmatisch dargestellt, Wien 1879, 288; Sarah Jane Summers, Fair trials: the European criminal procedural tradition and the European Court of Human Rights, Zürich 2006, 24 ff.

⁶ As indicated above in Switzerland over 90% of all convictions for felonies and misdemeanors are rendered in penal order proceedings. No courts are involved. If contraventions are taken into account too this ratio rises to over 98%.