Penal Orders, Prosecutorial Discretion, and Trial Penalty

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Introduction

• Paper
• Questions
• Introductiontoswisslaw.ch
Cattle case

Police investigation:
– First examination hearing
– Search of premises
– Seizure of gun

Cantonal Police of St. Gallen
Cattle case

Public Prosecutor, penal order:
– Threatening behaviour
– Violation of Weapons Act
– Monetary penalty (90 units at CHF 360.– = CHF 32,000.–)
– X. objected to penalty order
Cattle case

District Court, Toggenburg

Court of Appeals, Kantonsgericht St. Gallen

Federal Supreme Court, Bundesgericht Lausanne

European Court of Human Rights (ECHR)
Penal Order

1. Introduction
2. Penal Order
3. Prosecutorial Discretion
4. Criticism
5. National Science Foundation
6. Trial Penalty
Penal Order

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Swiss Criminal Proceedings

- Prosecution
  - Accused
  - Private Claimant

- Court
  - Accused
  - Prosecution
  - Private Claimant

- Preliminary Proceedings
  - Act
  - Opening
  - Police Inquiries

- Principal Proceedings
  - Charges
  - Summons
  - Preparations
  - Court Hearings
  - Verdict

- Act
  - Openning
  - Police Inquiries

- Charges
  - Summons
  - Preparations
  - Court Hearings
  - Verdict
Ratio Penal Orders/Trials

ALL OFFENSES
- 95% Penal Order
- 5% Court

FELONIES/ MISDEMEANORS
- 85% Penal Order
- 15% Court
Art. 352 CCP – Penal Order

If the accused person has ... confessed to the facts of the case or if the circumstances have been otherwise sufficiently resolved, then the prosecution shall issue a penal order if it considers... that one of the following sentences suffices:

a. a fine;
b. a financial penalty
c. ...
d. up to 6 months of imprisonment.
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Penal Order

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Course of Penal Order Proceedings

Prosecutor

Accused

First Instance Court
If an objection is filed, the public prosecutor shall gather the additional evidence.
Art. 355 CPP – Procedure after Objection

Prosecutor decides to

a. Uphold penal order
b. Abandon proceedings
c. Issue new penal order
d. Bring charges at court
Art. 355 CPP – Procedure after Objection

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Penal Orders – Criticism

1. Right to be heard
2. Right to counsel
3. Separation of powers
4. Right to translation
5. Material truth
6. «Test balloon» dilemma
Penal Orders – Criticism

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Swiss National Science Foundation (SNF)

- April 1, 2017: Swiss National Science Foundation awarded 0,4 Mio. CHF for empirical analysis of penal orders in Switzerland
SNF – Project

1. Analysis of all penal orders 2014–2016 (ca. 300’000) in Switzerland based on data of National Statistics Office.
Penal order convictions by age and sex

Dispersion of Age by Sex

Number of Penal Orders

Age of Defendant

Sex
- Male
- Female

Source: OFS
Density of PO-Convictions by age and sex

Dispersion of Age by Sex

Source: OFS
Penal Orders by Nationality of Defendants

Number of Penal Orders

- Swiss
- Foreigner
- Stateless
- Foreigner, origin unknown

Source: OFS
SNF – Project

2. In-depth analysis of penal orders 2014–2016 in selected cantons (Total: ca. 7000 cases)
### Beweislage

- **ja** nein Atemalkoholmessung
- **ja** nein DNA-Analyse
- **ja** nein Tests von (und auf) Drogen, Medikamente, Alkohol
- **ja** nein Fingerabdrücke
- **ja** nein Foto-/Video-/Audiobeweise (z.B. Radar)
- **ja** nein andere Gutachten (psychiatrische, physikalische etc.)
- **ja** nein eigene Wahrnehmung
- **ja** nein andere eindeutige Beweise (spezifizieren)

### Andere Beweise
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Trial Penalty

• A defendant ends up with a harsher sentence when he takes a case to trial.

Albert Alschuler
Trial Penalty

Problem: Innocence Dilemma

Prosecutor: 2 Years of Imprisonment → Defendant

Trial: 5 Years of Imprisonment
Trial Penalty in Switzerland

To test the trial penalty hypothesis, we looked at what happened to penal orders with prison sentences after they had been taken to court (n=50).
Why only 50 cases?

Penal orders: 157'916
Felonies/Misdemeanors: 29'485
Imprisonment: 1'954
Objections: 209
Trials: 1'03
Judgments: 50
Type of Sanction (n=50)

- Imprisonment: 23
- Monetary Penalty: 16
- Monetary Penalty, suspended: 5
- Community Service: 2
- Acquittal: 5

Penal Order

Trial
Difference in Length of Imprisonment (n=50)

Cases 1–50

Difference at Trial in days

Difference in Length of Imprisonment (n=50)
Difference in Length of Imprisonment (n=50)

Cases 1–50

Difference at Trial in days

Difference

Difference in Length of Imprisonment (n=50)
Difference in Length of Imprisonment (n=50)
Summary

- Ø sentence reduction over all 50 cases:
  - 75 days (± 10 days)
  - 63 percent (± 9 percent)
Methodological Remarks

• Selection bias: 90% of penal orders are accepted
• Problematic cases are more likely to be challenged
• N is small, but highly significant
• Sample only from one canton
Conclusions

• Trial Discount
• Should Prosecutors no longer be allowed to impose imprisonment in penal orders?
• ECHR: No landmark cases deal with imprisonment in penal orders
Penal Orders, Prosecutorial Discretion, and Trial Penalty

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Bargaining in Penal Orders?

**Imprisonment ≤ 360 days (n=2036)**

<table>
<thead>
<tr>
<th>Length of sentence in days</th>
<th>Number of convicions</th>
</tr>
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<tbody>
<tr>
<td>≤ 30</td>
<td>340</td>
</tr>
<tr>
<td>(30, 60]</td>
<td>389</td>
</tr>
<tr>
<td>(60, 90]</td>
<td>367</td>
</tr>
<tr>
<td>(90, 120]</td>
<td>178</td>
</tr>
<tr>
<td>(120, 150]</td>
<td>83</td>
</tr>
<tr>
<td>(150, 180]</td>
<td>505</td>
</tr>
<tr>
<td>(180, 210]</td>
<td>18</td>
</tr>
<tr>
<td>(210, 240]</td>
<td>32</td>
</tr>
<tr>
<td>(240, 270]</td>
<td>20</td>
</tr>
<tr>
<td>&gt; 270</td>
<td>104</td>
</tr>
</tbody>
</table>
Objections ↔ Sentence Length

Percentage of Objections

Length of imprisonment in days

≤ 30  |  (30,60]  |  (60,90]  |  (90,120]  |  (120,150]  |  (150,180]
---|---|---|---|---|---
4.52%  | 11.35%  | 8.81%  | 18.29%  | 17.63%  | 11.43%

R = 0.77

Overall $\bar{\phi}$ Objections = 10.70%
Imprisonment at Trial (n=22)

Number of Judgments

Difference in Length of Sentence compared to Penal Order

-60  |  -40  |  KEINE VERÄNDERUNG  |  40

2     |  2    |  17                 |  1
Percentage of Foreigners in Swiss Population
22.1%

Percentage of Foreigners in Swiss Prison Population
71.6%

http://www.immigration-massive.ch/
Crimes committed (10,000)
Crimes perceived: 10% (1000)
Crimes reported: 50% (500)
Crimes solved by police: 30% (150)
Crimes charged: 33% (50)
Convictions: 80% (40)
Prison: 66% (26)
Served: 23% (6)