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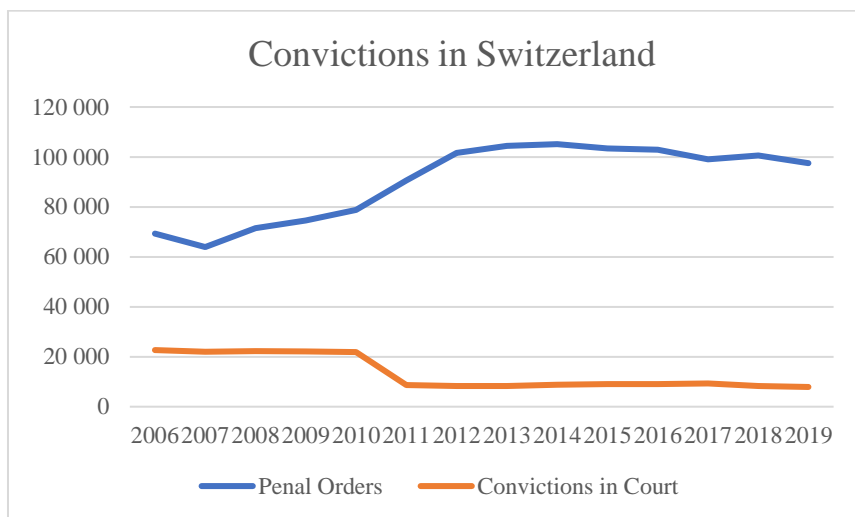
Penal Orders and Abbreviated Proceedings

Introduction

Criminal proceedings are a mechanism to formally pacify a society shaken by a crime. 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 sentencing felonies and misdemeanours in ‘special’ proceedings (penal order and abbreviated proceedings) in well over 90 % of all cases. Less than 10 % of all convictions are handed down in ‘ordinary’ court proceedings.²

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² The statistical data on penal order proceedings in this chapter are derived from the research project “Facts and Figures on Penalty Order Proceedings” by André Kuhn and Marc Thommen. The project was funded by the Swiss National Science Foundation. Approximately 5000 randomly selected penal order files on felonies and misdemeanours (2014-2016) were analysed in four different cantons (Bern, Neuchâtel, St. Gallen and Zurich).



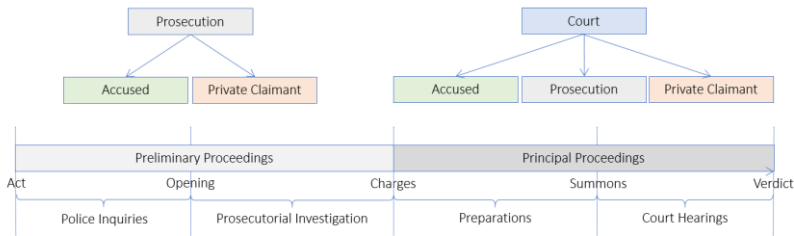
Markwalder [2021]; data: Federal Office of Statistics

With this, the legislator expresses two things. Firstly, it clarifies that whenever possible, perpetrators should be *convicted*. Alternative forms of conflict settlement, such as diversion (§§ 198ff Criminal Procedure Code of 1975/Austria) or non-prosecution agreements (§ 153a Criminal Procedure Code 1987/Germany), do not exist in Switzerland. Secondly, the high proportion of penal orders and abbreviated proceedings reveals that the legislator gives greater weight to *efficiency* in criminal proceedings than to the rule of law. In the following sections, penal orders (I.) and abbreviated proceedings (II.) will be discussed, before turning to the need for reform in modern criminal proceedings (III.).

I. Penal Orders

Swiss criminal proceedings are divided into two stages, the preliminary and the principal proceedings. The preliminary proceedings are led by the prosecution. At the end of the preliminary proceedings, the → prosecutor can discontinue and close the case, issue a penal order, or bring charges. After the → indictment is filed, the court is in charge of the principal proceedings. In the principal proceedings, the prosecution is merely a party.

Swiss Criminal Proceedings



Thommen [2021]

The prosecutor shall issue a penal order if the accused has admitted the facts of the case or if the facts have been sufficiently clarified in another way and the sentence to be imposed does not exceed six months' imprisonment (Article 352 I Swiss Code of Criminal Procedure/CCP³). As the investigation by the police and prosecution is generally less thorough for penal orders, they are also referred to as summary penal orders or summary punishment orders.

The penal order is immediately issued in writing (Article 353 III CCP). The accused may lodge a written objection against the penal order with the prosecutor within 10 days. Only about 12 % of accused exercise this right. They do not have to give reasons for their objection. Without a valid objection, the penal order becomes a final judgment (Article 354 CCP). In practice – adding the withdrawn objections – this is the case for 92 % of penal orders.

If an objection is raised, the prosecutor takes the further evidence required to assess the objection (Article 355 I CCP). Taking 'further evidence' is a statutory euphemism for a first examination hearing. In practice, most defendants raising an objection are hereafter interrogated for the first time by the prosecutor.

The prosecution then has four options: 1. It can uphold the penal order and transfer the file to the court. In this case, the penal order constitutes the indictment. 2. It may discontinue the proceedings. 3. It can issue a new penal order with a different type of sanction, a higher or lower sentence or a conviction for a

³ Swiss Code of Criminal Procedure of 5 October 2007, SR 312.0; for an English version of the Swiss Code of Criminal Procedure (<https://perma.cc/BT3L-BW2W>).

different offence (e.g. → aggression, Article 126 Swiss Criminal Code/SCC⁴, instead of insult, Article 177 SCC), which can then be objected to again. 4. It may bring charges at the court of first instance. If the prosecution wishes to request a sentence of more than six months, it *must* file an indictment with the court. The penal order proceedings do not take place in public (Article 69 III d CCP). However, final penal orders must be made available for public inspection (Swiss Federal Supreme Court Decision/DFC 124 IV 234).

Penal orders are very popular. Criminal justice authorities appreciate their efficiency; defendants appreciate their discretion. However, penal orders are also criticised regarding the maximum sentences that can be imposed (1.), the right to be heard (2.), the separation of powers (3.), prosecutorial discretion (4.), defence rights (5.), translation (6.), notification (7.), and service (8.).

1. Maximum Sentences

The introduction of penal orders about 100 years ago was possible because the legislator at that time guaranteed that custodial sentences would never be imposed in penal orders (Sträuli [1920] 241, 243 ff.). Today, prison sentences of up to six months can be handed down in penal orders. Contrary to the recommendation of the Council of Europe (No. R. (87) 18) to limit penal orders to pecuniary sanctions, about three quarters of all custodial sentences in Switzerland are imposed in penal orders.

It is also noteworthy that penal orders are limited only regarding the maximum sentences, and not the offences to be judged. All felonies, misdemeanours and contraventions can be dealt with in penal orders. This even applies to homicides, as long as the sentence does not exceed six months.

Whether the current maximum sentences in penal order proceedings are in line with the European Convention on Human Rights (ECHR) is unclear. The penal order cases dealt with in Strasbourg so far (e.g. *Hennings v Germany* [1992], *Maass v Germany* [2005])) concerned fines or monetary penalties. Article 6 (1) ECHR guarantees ‘*the right to a fair and public hearing [...] by an independent and impartial tribunal established by law*’. The decisive factor for the ECtHR is whether the accused has the possibility to appeal to an independent court. The failure to object to a penal order is deemed to be a waiver of judicial review. The guarantee must be waived voluntarily and without coercion. Such a waiver is not prohibited by Article 6 (1) ECHR.

⁴ Swiss Criminal Code of 21 December 1997, SR 311.0; for an English version of the Swiss Criminal Code see [www.admin.ch \(https://perma.cc/V8MH-MMRB\)](https://perma.cc/V8MH-MMRB).

However, it remains unclear whether Article 6 (1) ECHR also permits the waiver of a court in more serious cases with up to six months of imprisonment. The ECtHR requires a judicial review in plea-bargaining proceedings, but does not specify whether it must be automatic or (as in penal order proceedings) only upon request (cf. *Natsvlishvili and Togonidze v Georgia* [2014] para 90ff). In the cited case, domestic law provided for a mandatory judicial review.

If prison sentences are imposed Article 5 (1) a ECHR suggests that the judicial review must be automatic. According to this provision, deprivation of liberty is only lawful after conviction by a competent court: '*Detention might violate Article 5 [...] although the person concerned might have agreed to it*' (*De Wilde, Ooms and Versyp v Belgium* [1971] para 65). Here, a waiver is not possible (Summers [2021]).

Waiving judicial review is not only a matter of the individual freedom of the accused. It is also a question of public accountability of the justice system and positive general prevention. Above a certain sentence, the interests of the public and the victims in a public trial outweigh the interest of the accused in a discreet and speedy settlement of the case (Hutzler [2010] 158; Thommen [2013] 59).

2. Right to be Heard

The parties have the right to be heard (Article 29 II Federal Constitution). The core of this right is that the accused must be fully informed of the underlying facts and given the opportunity to comment on the allegations (Article 6 (1) ECHR; *Murtazaliyeva v Russia* [2018] para 91). Case law (DFC 127 I 6) derives this right from the fundamental right to human dignity (Article 7 Federal Constitution). It is intended to ensure that the accused is not treated as a mere object of criminal proceedings by being subjected to a decision without a prior *hearing*. The right to be heard also requires that *reasons* be given for decisions (DFC 136 I 229).

On the *hearing*: According to the will of the legislator, penal orders can be issued without the prosecutor ever having heard the accused. A provision in the draft bill, guaranteeing the accused a hearing in the case of an imminent prison sentence, was later removed (Article 356 draft of CCP; BBl [2006] 1499). Today, the prosecutor must hear the accused only after she has objected to the penal order (Article 355 I CCP). In practice, 25 % of penal orders are issued without any interrogation. In 67 %, only police interrogations take place. Only in 8 % of cases, the prosecutor hears the accused before issuing a penal order.

How is the prosecution supposed to adjust the penal order to the culpability and the (financial) circumstances of an accused if it does not hear her? The widespread practice of penal orders without prior hearings is said to be justified by the fact that the accused can object to the order and thus force to be heard. However, this presupposes that the accused knows about this possibility. But even if she is aware, it is wrong to force the accused to raise an objection to be heard. First, an objection entails costs and the risk of being punished more severely (Thommen and Diethelm [2015] 151 ff.; Thommen and Eschle [2020] 8 ff.). Second, a hearing should be granted unconditionally and irrespective of an objection (Thommen [2010]).

On the *reasons* for the decision: By law, reasons for penal orders *must* only be given in rare cases (e.g. in case of a prison sentence). Of course, reasons *may* be given in every case. Nevertheless, this regulation bears the risk of a systematic violation of the requirement to give reasons. Practice shows that this fear is well-founded: 70 % of penal orders are issued without giving any reasons. In 36 % of the cases, even the mandatory statement of reasons is missing. Both the statutory regulation on unreasoned penal orders and its practical implementation are therefore unconstitutional and contrary to the European Convention on Human Rights.

The right to be heard must be granted *ex officio* and not merely upon request. As it hands down the judgement, the prosecution is responsible for hearing the accused, not the police. In any case, the accused must be heard in person and reasons must be given for the decision.

3. Separation of Powers

The prosecutor issues the penal order (Article 352 I CCP). If no objection is raised within ten days, the penal order becomes a legally binding judgment (Article 354 III CCP). The penal order proceedings are justified by the fact that every accused person can raise an objection and thus obtain a court hearing (cf. Donatsch [1994]; Daphinoff [2012] 551 ff.).

First, this is *de iure* incorrect. Whether the case is brought before a court is not merely in the hands of the accused. After the objection, the penal order goes back to the prosecutor. She does not have to refer the case to court but can issue a new penal order. Second, *de facto* the power of judgement lies with the prosecution. Only 12 % of penal orders for felonies and misdemeanours are contested. For contraventions, the rate is as low as 2 % (Hansjakob [2014] 162). Furthermore, around a third of all objections are withdrawn.

The separation of powers in criminal proceedings is thus abolished. Investigative and judicial functions are no longer separated. The prosecutor, influ-

enced by his investigative hypothesis, issues the verdict. This violates the principle that *'a judge ought never ... prosecute'* (Coleridge). A sober look at the reality of proceedings (not only in Switzerland) shows, however, that the *'no judgment without a charge'* principle only applies on paper (cf. Article 9 CCP). Out-of-court settlements of criminal proceedings are ubiquitous.

As stated above, penal order proceedings are contrary to the European Convention on Human Rights, at least as far as they concern custodial sentences. According to Article 5(1) a ECHR, deprivation of liberty is only permissible after conviction by a competent court (*De Wilde Ooms and Versyp v Belgium* [1971] para 65; Summers [2021]). The separation of powers must be respected here.

4. Prosecutorial Discretion

Prior to the enactment of the Swiss Code of Criminal Procedure, penal orders were directly brought before the court if an accused raised an objection (*devolutive system*). Today, if the → accused raises an objection, the case is not automatically transferred to the court. Rather, it goes back to the prosecutor so that she can hear the accused in person (mostly: for the first time). In this *reconsiderative system*, the prosecutor can then decide whether to transfer the case to the court, issue a new penal order, or discontinue the proceedings (Article 355 CCP).

The reconsiderative system was created to avoid that accused persons, who had never been interrogated by the prosecution, would be heard for the first time in court. Thus, the legislator has 'improved' a bad system (no hearing by the prosecutor before issuing the penal order, I.2.) by an even worse one (no direct access to the court (→ Courts and Tribunals)).

Indirectly, this has given the prosecutor a more powerful position than he already had. He can cut off the accused's way to court by repeatedly issuing new penal orders. The possibility of discontinuing proceedings after an objection has been raised is even more problematic: The prosecutor can issue a penal order although he has doubts about the guilt of the accused and use it as a 'trial balloon'. If the accused does nothing within ten days, his conviction is final.

Only 12 % of the penal orders are appealed. A third of these objections are withdrawn, not infrequently after the prosecutor's office has advised the (undefended) accused to give up the opposition, pointing to the costs and procedural risks. In the remaining cases, the file returns to the prosecutor. The prosecutor can then discontinue the proceedings without fear of being reprimanded by the court for having issued a penal order on a mere suspicion of guilt (Thommen [2013] 125 ff., 185, 297).

In 10 % of cases, proceedings are discontinued after an objection; in 23 % a new penal order is issued. Such circumstances could indicate that prosecutors issue penal orders even when in doubt (*in dubio contra reo*). During the research project, a practice of issuing penal orders that are based neither on clear evidence nor confessions by the accused was observed, further supporting the theory of ‘trial balloons’.

In summary, the very low prevalence of objections in conjunction with the fact that files always return to the prosecution create fatal structural incentives to exercise prosecutorial discretion to the detriment of the accused.

5. Defence Counsel

In Swiss criminal proceedings, the accused *may* obtain a defence counsel at any time (defence counsel of one’s own choosing; so-called *requested* defence counsel), even at the first police interrogation (Article 158 I c CCP). If the accused cannot afford legal assistance, he or she may request a *legal aid* defence counsel (Article 29 III Federal Constitution). This request is granted if the case presents legal or factual difficulties and a sentence of more than four months is to be expected (Article 132 CCP). According to Article 130 CCP, a defence lawyer (requested or legal aid) *must* participate in the proceedings for example if the accused has been in detention on remand for more than ten days or faces a custodial sentence of more than one year.

In penal order proceedings, only 7 % of the accused are defended. 6 % are defended by a requested defence counsel, 1 % have a legal aid defence counsel. Domestic defendants are defended more frequently than foreign defendants.⁵

At first glance, the findings on the ‘frequency’ of defence counsels do not seem concerning. More than 10 days of detention on remand are imposed in only 1 % of penal order proceedings; in only 8 %, the sentences exceed four months. However, a closer look raises considerable doubts:

First, many defendants either do not understand German, French or Italian or suffer from illiteracy disorders. They do not understand the content of penal orders, nor do they know how to defend themselves (Riklin [2007] 775 ff.). Also, only few defendants are aware of the secondary consequences of penal orders (e.g. revocation of driver’s licence, deportation, damages). Even if the prosecution fulfilled its duty to provide comprehensive and comprehensible information about the penal order procedure and its consequences, the accused would still be dependent on a defence lawyer to effectively exercise her rights.

⁵ Swiss defendants are defended in 9.2 % of cases, while foreign defendants are only defended in 7.1 % of cases, $p < .05$.

Second, objections against penal orders are rare (12 %). In proceedings with defence counsels involved, the objection rate is significantly higher than in those without. Defence lawyers recognise the necessity of objections more easily, but also raise objections as a precautionary measure to get access to the file and be able to assess the case.

Third, equality of arms is threatened. In court, around 85 % of the accused are defended (Summers et al [2016] 141). Even if the prosecutor is checked by an independent court, it is (rightly) considered necessary that the accused be provided with a defence lawyer in the main hearing. All the more, the accused should be defended in proceedings in which he or she faces the prosecutor alone.

6. Translation

According to very conservative estimates, every year 7000 penal orders with convictions for felonies and misdemeanours are not translated in Switzerland (Thommen et al [2020] 455). If contraventions are also considered, this figure is likely to amount to several tens of thousands of penal orders per year. The Federal Supreme Court (DFC 145 IV 197) takes the view that the defendants are usually already aware of what they are accused of, as they have been interrogated by the police or prosecution. Moreover, the Federal Supreme Court is of the opinion that the accused must take care of the translation of the penal orders themselves.

According to Article 6 (3) ECHR, every accused person has the right to be informed ‘*in a language which he understands*’ of the charges against him (b) and ‘*to be assisted free of charge by an interpreter*’ (e). These two guarantees are not only applicable before a court, but also in preliminary proceedings, and shall ensure an effective defence. There is no right to translation of all documents, but the most important procedural acts are to be translated (*Kamasinski v Austria* [1989] para 74; Article 68 II CCP).

The penal order is a proposal that becomes a final verdict after ten days if it is not objected to. In case of an objection, it constitutes the → indictment. It is therefore *the* most important procedural act and must be translated. The assumption that the accused persons are already aware of the charges from the preliminary proceedings is frequently incorrect. Often, interrogations do not take place at all. Even if they do take place, the accused not only have a right to know what they are accused of, but also what has become of these accusations. Specifically, whether they were convicted or acquitted. Obtaining this knowledge is not the task of the accused or their defence.

As shown above, in many penal order proceedings there is no defence counsel. In cases in which a lawyer is involved, the translation of the penal order

is often *de facto* left to him. However, having the defence counsel translate the penal order undermines the right to *free* translation. Information about the conviction is a duty of the criminal justice authorities. There is no way around translating penal orders orally or in writing to all defendants (Thommen et al [2020]).

7. Notification

When an accused is charged and sentenced in an ordinary trial, the verdict is pronounced and explained orally to her and the public (Article 6 (1) ECHR; Article 84 I CCP). This ensures that the accused is informed whether she has been convicted or acquitted and what the consequences are (→ fine, → imprisonment, → costs, etc.).

For penal order proceedings, Article 353 III CCP stipulates that the penal order must immediately be issued in writing to the accused person. In practice, only a very small number of penal orders are explained to the accused in person by the prosecutor (2 % of the cases). In most cases, penal orders are sent to the accused by post (77 %). There are at least three reasons why addressees might not understand what has been decided. First, penal orders are only issued in one of the three official languages (German, French, Italian). A written translation is rarely provided (I. 6.). Second, penal orders are written in very technical legal terms that are difficult to understand, even for persons proficient in German, French or Italian (cf. Riklin [2007] 776). Third, reasons are only very rarely given for penal orders (I. 2.).

Therefore, even defendants who speak one of the official languages often do not understand *what* offence they have been found guilty of, *why* they have been convicted, *what* sanctions have been imposed, and *how* they can challenge the verdict. Defendants who do not understand the penal order cannot waive judicial review in accordance with Article 6 ECHR (*Hermi v Italy* [2006] para 74).

8. Service

Defendants who receive the penal order by post at least know about their conviction, even though they may not understand it. Some defendants do not even know of the verdict (→ Judgement and Verdict). The Swiss Code of Criminal Procedure allows penal orders to become final without being served. In practice, there are three types of ‘fictitious service’: First, penal orders are deemed to have been served if they are not handed over to the defendant herself, but merely to a person in her household (Article 85 III CCP). Second, a penal order is deemed to have been served if personal service was unsuccessful and the order is then not collected from the post office within seven days (Article 85 IV a CCP;

6 % of all penal orders). Third, if the residence or whereabouts of the accused cannot be ascertained, decisions may be served by publication in the Official Gazette. The penal order is a decision that is deemed to have been served even without such publication (Article 88 CCP, cf. Agostino-Passerini and Ruckstuhl [2021] 297 ff.; 1 % of all cases).

If a penal order is served fictitiously, it is not certain that the person concerned is aware of his conviction. Nevertheless, the sentence becomes legally binding ten days after this ‘service’. It is obvious that these ‘*secret convictions*’ (Mattmann et al [2021]) violate the European Convention on Human Rights. According to Article 6 ECHR, only those who know that they are about to be convicted can validly waive their right to a judicial review. The right to be informed of charges is also violated (Article 6 [3] a ECHR). Therefore, penal orders cannot be served fictitiously. Whenever possible, they should be handed and explained to the accused in person.

II. Abbreviated Proceedings

The second ‘special’ proceedings provided for in the Code of Criminal Procedure are the abbreviated proceedings. They are much rarer than penal orders, but are gaining in importance compared to ‘ordinary’ court proceedings. On average, every fifth indictment today is filed in abbreviated proceedings (Giger [2021] 309 ff.).

The accused can apply to the prosecutor for abbreviated proceedings at any time during the preliminary proceedings. It is required that he confesses (→ Confession) to the charges and accepts, at least in principle, the civil claims (Article 358 I CCP). If the prosecutor does not wish to request more than five years of → imprisonment (Article 358 II CCP), she may decide to conduct abbreviated proceedings (Article 359 I CCP). Based on the demands of the private claimant (Article 359 II CCP), the prosecutor prepares a proposal for the indictment (Article 360 I CCP), which she submits to the parties for approval (Article 360 II/III CCP). If the parties agree, the prosecutor transfers the indictment to the court (Article 360 IV CCP).

The court conducts a (summary) main hearing. However, there are no evidentiary proceedings (Article 361 IV CCP). According to Article 362 CCP, the court only examines whether the abbreviated proceedings were conducted in accordance with the law (I) and then decides whether it wishes to turn the charges into a verdict (II) or have ordinary proceedings conducted (III). The legal remedies against a judgment in abbreviated proceedings are severely limited (V).

Therefore, the accused must have a defence counsel in abbreviated proceedings (Article 130 e CCP).

Structurally, abbreviated proceedings are penal order proceedings with three essential extensions: First, prison sentences of up to five years are possible; second, the sentence must be formally passed by a court; and third, plea agreements (→ Pleas Bargaining and Guilty Pleas) are deemed to be possible in abbreviated proceedings. Materially, however, the prosecutor is the determining authority here as well, because she negotiates the plea bargain and drafts the proposed verdict.

With the abbreviated proceedings, the legislator wanted to introduce plea bargains into the Swiss criminal justice system. These new proceedings were highly controversial from the outset. As early as 1992, the later Federal Supreme Court Justice NIKLAUS OBERHOLZER complained: '*Plea Bargains contradict almost all principles of criminal procedure.*' As true as this statement is, it shows the shortcomings of the debate on abbreviated proceedings: there is an insufficient distinction between the plea bargains and the ensuing abbreviation of the proceedings. *Bargains* are highly problematic regarding the determination of the truth and the principle of legality. The *abbreviation* is problematic for the very same reasons that have already been put forward against penal order proceedings. The main one is that the discretionary power of judgement is in fact vested in the prosecutor's office.

III. Need for Reform

In the model criminal trial, which the → European Convention on Human Rights is based upon, convictions are handed down after a public hearing at court. This hearing is structured according to an 'accusatorial trinity' (Summers [2007] 24). The prosecutor on one side and the accused and his defence counsel on the other side face each other before the court. With equal arms, they fight for justice and truth under the eyes of the court.

As shown above, convictions by courts make up only a low single-digit percentage of all convictions. Therefore, it is misleading to refer to trials as 'ordinary' proceedings and to penal orders and abbreviated proceedings as 'special' proceedings. Rather: '*The trial has become an accident in the smooth administration of criminal justice*' (Weigend [2006] 207).

The penal order proceedings have been criticised as a return to the '*Grand Inquisitor*' (Schubarth [2007]). It is true that today's procedural reality bears traits of the inquisition, in that the investigating person *de facto* passes the ver-

dict. *De iure*, the difference is that – at least theoretically – the accused can always appeal to an independent court. Nevertheless, as shown, these summary proceedings violate the European Convention on Human Rights in various respects.

It is therefore time to fundamentally reflect on the criminal proceedings and their guiding principles. First, the image of the criminal trial should be turned upside down. Today, the ordinary proceedings are not the court trial, but the summary proceedings led by the prosecution. Second, this means a fundamental change: The traditional court procedure is designed to establish '*justice through truth*': The facts that support the conviction are to be obtained from the '*epitome of the trial*' (§ 261 Criminal Procedure Code 1987/Germany). Summary proceedings are sometimes referred to as 'Kangaroo Courts'. They allow for a justice that leaps from facts to conclusions (Potter [2005] 118 f.). It is not the determination of the truth, but the consent of the accused that carries the conviction. With her consent, the accused takes responsibility for the accusations. Third, such a post-modern criminal process would therefore have to be based on '*justice through responsibility*' (Thommen [2013] 307).

The price for this – *de facto* already accomplished – turnaround is extremely high: A criminal procedure that is no longer based on proof of guilt, but rather on an acceptance of guilt, cannot be reconciled with the principle of legality (Article 7 ECHR) and the need for attribution of liability (Summers [2021]). Consequently, both penal order and abbreviated proceedings would have to be abolished. This claim is as legally sound as it is politically futile. Legislators have become accustomed to the '*McDonaldization of Criminal Justice*' (Bohm [2006]). The least legislators would have to do in a post-modern criminal process is to establish procedural principles that enable the accused to make her decision in an informed and responsible manner and on an equal footing with the prosecution. For summary proceedings to be fair, conditions for autonomous participation must be created. Therefore, there is no way around hearing the accused in every case, informing her about the charges and her rights, and providing her with a defence counsel.

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