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## PENAL ORDERS AND THE ROLE OF PROSECUTORS IN SWITZERLAND

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**Abstract:** Minor infractions represent the majority of criminal cases. Simplified or summary procedures have addressed their increasing number in order to unburden the courts. Because of reduced requirements for the case to be adjudicated, this procedural economy comes usually to the cost of the defendant. Penal orders represent the most successful form of fast track procedure in which the public prosecutor plays a predominant role. After a police report and sometimes a short investigation, penal orders are issued and notified to the defendant. If they are not objected, their judgment equals the decision of a court. In other words, penal orders rely on the tacit agreement of the defendant. This contribution presents the risks of penal orders to produce wrongful convictions and proposes a set of recommendations that could improve the current situation. A combination of legal sources and empirical studies shed light on the delicate balance between the efficiency of justice and the defendant's rights.

**Keywords:** simplified procedure, penal order, prosecution, court hearing, wrongful conviction.

### 1. Introduction

Since more than fifty years, courts saw an increasing overload of criminal cases. At the same time, human resources did not increase in a proportional way. As a result, files continued to pile up and created a backlog of criminal cases (Israel, 1996). In order to deal with the high number of infractions observed in every European country, simplified and negotiated procedures have emerged (Gautron & Retière, 2014). In March 2020, the pandemic declared worldwide contributed to even more cases waiting for adjudication: courts were closed on short notice, trials were delayed and rarely replaced by online hearings. In England and Wales, for example, ten additional years could be necessary to return to pre-pandemic delays

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(Bowcott, 2020). In this context, summary procedures are seen more than ever as an effective way to unburden courts by means of procedural economy.

Criminal cases carrying minor penalties represent the majority of a prosecutor's and of a court's workload. These cases are typically simpler and tend to be closed with minimal effort. In Germany, 85 percent of crimes committed in a year qualify as low-level. In Switzerland, more than 90 percent of criminal cases follow a summary procedure. When addressing cases that do not attract attention or media coverage, Mosteller (2010, p. 409) rightly states "our largest problem lies in cases that lack publicity, where high stakes errors remain unnoticed and undetectable". Despite their simplicity, the adjudication of minor crimes could be at risk of leading to wrongful convictions due to simplified procedures. This contribution investigates penal orders in Switzerland, a fast track procedure for infractions punished with a fine or a prison term of a maximum of six months. More specifically, we shed light on the delicate balance between the procedural economy and the rights of the defendant.

## 2. The origins of penal orders in modern criminal law

After the defeat of Napoleon, the Congress of Vienna reshaped in 1815 the borders of European territories and divided Poland among Prussia, Russia and Austria. The Russian authorities abolished gradually Polish social and patriotic organizations as well as opposition groups. Soon a large number of people joined clandestine groups to organize and regain their freedom. When a revolution started in Paris and in Belgium, Russia intended to suppress it with the help of the Polish army. A group of cadets starting the uprising, joined shortly after by armed civilians supported by the local administrative council (Linch, 2009; see Hordynski, 2018). Prussia declared itself neutral but in reality wished to avoid the turmoil in their Polish territories. The Prussian police decided to take a hard line on insurgents but at the same time was not able to deal effectively with the amount of minor criminal cases. A new mandate procedure called Mandatsverfahren was created ad hoc in 1830 and allowed a fast track conviction with no trial or prior investigation. Fifteen years later it was codified in the Prussian procedural law. The first similar procedure in Switzerland emerged in 1849 under the term Unterziehungsverfahren, which was reserved for contraventions (Thommen, 2013, p. 46). Mandates were used by police courts throughout Prussia and allowed the police to react quickly to infractions (Vivell, 2006, p. 26). Initially, it was reserved for cases in which the punishment excluded prison sentences, but was quickly extended to more serious crimes bearing up to six weeks of imprisonment. If the offender opposed the sentence, the judge could not change it; only the prosecutor was able to do so. However, if the offender opposed the original sentence, the prosecutor would typically threaten with a harsher punishment. The Swiss canton of Aargau was the

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first to introduce in 1868 penal orders delivered by judges (Thommen, 2013, p. 25). In 1877, the Prussian procedure became part of the Code of Criminal Procedure of the newly formed German Empire and was renamed Strafbefehlsverfahren or penal order procedure. At that time, penal orders were mostly based on a police report involving an arrest in "flagrant" where was guilt was beyond doubt.

During World War I, the police procedure was transformed into a written criminal procedure that could be used as an alternative to an ordinary trial at the discretion of the public prosecutor. Before long, penal orders were used in one-third of criminal cases. Their objective was to efficiently deliver justice in simple cases with minor punishment and therefore to reduce the time required to close a case. After the war ended, criminality rose due to social unrest, large-scale unemployment, and the Depression. Courts were overwhelmed by new cases, which led to the first increase of the maximum term of imprisonment for crimes prosecuted by penal orders: from six weeks to three months (Vivell., p. 37). By 1936, the sentence had risen to a maximum of six months and penal orders were used in slightly over two-thirds of criminal cases. At the end of World War II, the maximum imprisonment term varied greatly across the occupation zones: three months in the American and French zones and six months in the British and Russian zones. Once the laws of criminal procedure were unified in West Germany, the maximum imprisonment term was three months, while East Germany applied up to six months of custodial sentences.

In January 1975, an amendment to the Code of Criminal Procedure secured a fundamental safeguard for defendants: prison terms were excluded from the arsenal of sanctions under penal orders. A judge who neither saw nor heard the defendant, and who examined exclusively written documents about a case, could sentence only to fines or other non-custodial sentences. Unfortunately, this changed in March 1993 when suspended prison sentences of up to one year were introduced in the Code of Criminal Procedure for such procedures (Riess, 2009). In 1987, the Council of Europe encouraged its member states to simplify their criminal justice system by following a set of principles: discretionary prosecution, application of summary procedures, out-of-court settlements, and simplified procedures to minor and mass offenses, simplification of ordinary judicial procedures. In the recommendations, penal orders were presented as "simplified procedures in cases which are minor due to the circumstances of the case" (Council of Europe, 1987). In the last thirty years, the number of penal orders has risen and will certainly continue to do so, not only in Germany but throughout Europe and beyond, in countries like Italy, France, Croatia, Finland, the Netherlands, Scotland, Norway, and Switzerland (Melunovic Marini, 2018). Greece is the latest country to have introduced in July 2019 penal orders on the German model of Strafbefehle

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(Alvanou, 2019). In the following section, we will focus on penal orders and their limitations in Switzerland, a country that introduced a century ago this form of summary procedure.

### 3. Penal orders in the Swiss Criminal Procedure Code

A brief history of the code of procedure shows the role of penal orders in the Swiss administration of justice. Since the first confederation of three cantons in 1291, Switzerland became a federal state comprised of twenty-six cantons united under the Helvetic Confederation. Until 2011 each canton had its own code of criminal procedure standing next to a federal code of criminal procedure for federal crimes. In accordance with the Federal Constitution (FC), the organization, the procedure and the operations of the courts remained under a cantonal duty (art. 64 al. 3 FC). While we will refrain from presenting the procedure for minor offenses in each canton, the proceedings in the canton of Berne sheds light on summary written procedures: the courts could sentence an accused to a fine with a written procedure called Strafmandatsverfahren. This procedure applied to cases punishable with a fine or if the judge considered a fine as an appropriate alternative to imprisonment. Quite clearly, the application of a summary procedure involved judicial authorities and excluded prison sentences. An objection could be filed orally if the penal mandate was handed over to the defendant or in writing within five days after receiving the order. In the absence of an objection, the order was to be executed like a judgment. If an objection took place, the court had to initiate proceedings (Pfander, 1944, p. 23). In Zurich, penal orders were introduced as early as 1919. They were issued by the district prosecutor or Bezirksanwalt with an important limitation and promise for the future: penal orders should not apply to offenses punishable with imprisonment. In 1919, the maximum fine was 50 Swiss Francs (CHF) and a fine was the only type of penalty to be imposed by penal order. In 1935, the maximum fine doubled and a prison term up to 14 days was introduced for the first time. In 1953, the maximum amount of a fine doubled once again but the prison term remained unchanged. In 1974, the fine rose up to 5'000 CHF and the imprisonment could last one month. In parallel to the increase of the prison term, a directive sent in 1992 to prosecutors allowed them to issue penal orders without hearing the defendant, a milestone in criminal proceedings. In 1995, the prison term increased again, up to three months, and in 2006 it doubled to six months. Meanwhile, the amount of a fine was unaltered. In 2007, a case of homicide through negligence was decided through penal order, for which the defendant received a suspended monetary penalty of 38'250 CHF and a 5'000 CHF fine. The peak was reached in the canton of Geneva in 2010 when prosecutors could impose a fine up to 10'000 CHF and a prison term up to 12 months by penal orders. In 2011, the maximum amount for a fine was unified and set at 10'000 CHF

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while the maximum imprisonment was limited to six months (Riklin, 2007). As seen earlier, the limits of these sanctions are generous enough to allow the adjudication of homicides through penal order (Schubarth, 2007, p. 529).

Since 2011, the new Criminal Procedure Code (CrimPC) replaces the procedural code of each canton. Niklaus Schmid (2009) worked extensively on a draft of the unified code and published a useful commentary with Daniel Jositsch. Switzerland, having four official languages, the law is available in French, German, Italian, and Romansh. By translating penal order into decreto d'accusa in Italian – meaning ruling of accusation – the law provides a clear term for the judgment. 95 percent of criminal offenses and 85 percent of felonies and misdemeanors are tried with a penal order instead of a trial in a court (Thommen, 2019). Trials with a public hearing allowing a contradictory procedure in front of a judge became an exception (Wenger, 2020). Indeed, penal orders can be seen as a written procedure skipping a contradictory debate. If we take into account the absence of investigation in favor of the defendant, the risk of erroneous decisions and wrongful convictions becomes apparent (Enescu, 2019). Moreover, the consequences of a penal order can be devastating for accused individuals. For example, a criminal record can hinder renting an apartment, the possibility to practice certain professions, or the opening of a bank account (ibid., 2019). The procedure for penal orders is regulated by five articles – article 352 to 356 CrimPC – a limited number compared to their extensive effects on the administration of justice. The following paragraphs present the different steps involved in Swiss penal orders.

If the responsibility of the accused has been satisfactorily established or if the accused has accepted his responsibility by confessing to the offense, the prosecutor issues a penal order. A police report is sufficient to issue a penal order if the responsibility of the defendant is clear. The appropriate sanction can be a fine, a financial penalty of no more than 180 daily penalty units, or a custodial sentence of no more than six months. The amount of one daily penalty unit can vary from 30 CHF to 3'000 CHF per unit according to the income of the accused (art. 34 Criminal Code (CC)). Different types of sentences can be combined but their total is limited to 180 units corresponding to six months. The overall unit limit is very often used by prosecutors in their sentencing exercise, as has been observed on a sample of penal orders in the canton of St Gallen (Thommen & Studer, 2020). A fine can always be combined with any other type of sentence and does not count in the calculation of 180 units (art. 352 CrimPC). Every sentence can be associated with measures described under article 66 and 67e-73 CC: good behavior bond [1], prohibition from carrying on an activity, disqualification from driving for a period from one month to five years, publication of the judgment [2], forfeiture of dangerous objects or assets, equivalent claim [3]. Finally, the prosecution can order

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a period of probation and can impose assistance or conduct orders (art. 44 al. 2 CC).

In a preliminary version, article 356 ordered a hearing of the defendant if the penal order sentenced him to imprisonment or community work. Unfortunately, this element was not kept and in the present code, the public prosecutor is not obliged to hear the defendant before issuing a penal order. He can decide to base his decision on the police report, which already takes place in the Swiss cantons (Gless, 2010, p. 18; Gilliéron, 2013, p. 1162). If the prosecutor needs to gather additional information on the circumstances of the offense, he can request a hearing of the defendant. According to Nora Markwalder, the hearing offers an opportunity for defendants to present their own arguments and deliver useful information about their person (Wenger, 2020). If the defendant does not answer the request of the prosecutor, a penal order can still be issued. In Germany, prosecutors receive an average of 120 new cases per month and the time spent on a case will depend on its complexity. In her interviews with prosecutors, Boyne (2010, p. 45) sheds light on their divergence from objective fact-finders: « We don't make so many investigations on our own. Most investigations are conducted by the police. In our department, you see, you have a lot of files, as you see. If you have only a few files, maybe you can make some investigations on your own. I always do these things only in very special cases [...] But in normal cases – I don't. It's too much work. ». In other words, prosecutors cannot afford to seeking the truth and spending time on minor cases (Boyne, 2018, pp. 236–237).

After receiving a letter of penal order, a written objection must be filed within ten days by the accused, without a statement of grounds, a shorter period than 14 days in Germany. The French procedure provides the longest objection period, 30 days for contraventions, and 45 days for misdemeanors. If he fails to object, the penal order is accepted by tacit agreement and the prosecutor's accusation becomes a final judgment (art. 354 al. 3 CrimPC). The objection must be signed and not been sent by fax in order to be valid; prosecutors must give a short time to correct formal requirements. The letter of objection can be posted on the tenth day at a Swiss or Liechtenstein post but not at any other foreign post office. In the latter case, the letter has to be posted earlier to arrive on the tenth day at the Swiss address for objection given in the penal order. An objection has to be interpreted generously: for example, if a person asks for a duty counsel, it means that the penal order has been objected even if this is not clearly formulated. If the intentions of the person whose objects are not clear, the prosecutor contacts him or her for clarification.

Once the penal order has been objected, the prosecutor gathers additional evidence to assess the objection. He can instruct the police to carry out additional inquiries and he orders an examination hearing of the defendant. If a hearing already took place during the police investigation, a second hearing is not mandatory. A

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defendant cannot be represented by another person at the hearing and if he does not come without reason, his objection is considered to have been withdrawn. If the order of examination hearing is sent abroad, the prosecutor cannot withdraw the objection if the defendant does not come to the hearing. If the hearing of the defendant is necessary to establish the facts, the prosecutor requests judicial assistance to interrogate the defendant. If the facts are clear enough, the prosecutor must request a stand by of the penal order. After additional evidence is gathered, the prosecutor decides if he wishes to uphold the penal order or if he prefers one of three other possibilities: abandon the proceedings, issue a new penal order, or bring charges at the court of the first instance (art. 355 CPP). The prosecutor can choose a more serious sentence since he is neither bound by his first sentence nor by a ban on reformatio in pejus. This element might deter defendants who hear about it in the hearing with the prosecutor to keep their objection (Enescu, 2019). The prosecutor does not review the case and cancels a penal order if it concerns facts that were already tried beforehand by a court or by another authority in a different area. Although it is obvious that the principle ne bis in idem should apply to penal orders, it can be found in a large number of wrongful convictions (Dunkel, 2018). The empirical study of penal orders in the canton of St Gallen shows that 37 percent of the penal orders have been dismissed, 24 percent have been modified, 15 percent have been confirmed, 15 percent of the objections led to the proceedings being abandoned, and 5 percent have been sent to a court of first instance (Thommen, 2019b). These results emphasize the role of prosecutors in handling minor crimes and issuing penal orders: even if an objection has been filed, a case lands very rarely on the desk of a judge for a complete procedure with trial hearing. In order to help defendants understand the meaning of a penal order and allow them to object if they deem it necessary, Fabio Burgener, a young lawyer in Geneva, developed in 2017 a free online resource presenting clearly the most important elements of the procedure [4]. For example, it explains that the prosecution is not obliged to investigate fully the case before issuing a penal order. Some facts, especially the ones in favor of the defendant, might not be known and therefore not be taken into consideration for a conviction by penal order. This assumption is supported by results from a study of wrongful convictions in Hamburg between 2003 and 2015. The main causes of erroneous decisions were a lack of investigation about the mental health of the defendant, a prior conviction for the same crime, and an incomplete taking of evidence in favor of the defendant (Dunkel, 2018). If the defendant notices that the facts are not correct and decides to object, an objection can be generated online after entering the data sent in the penal order. Further questions are addressed on the website: the differences between a judgment, a decision and a penal order, the time limit to object to a penal order,

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addressee of the objection, consequences of non-attendance at the hearing with the prosecution, withdrawal of an objection, consequences of an objection once it has been sent. Although very useful, the initiative of Burgener gathers contradictory reactions depending on the position occupied by the protagonists of the procedure: defense lawyers encourage the consultation of the online resource, underlining that the notification of a penal order bears no difference with a payment reminder, which of course leads to many erroneous judgments. The spokesperson of the Public Prosecution Service in the canton of Geneva states that every person receiving a penal order can find all relevant information regarding the objection to be filed with a simple letter (Lafargue, 2017). Unfortunately, this statement does not take into account the fact that many individuals cannot decode the formal legal language in which the penal order is written (Gilliéron, 2013, p. 1162), or that some might not have a good command of one of the four official languages. This is especially true in Switzerland where an individual from a German-speaking canton can receive a penal order from an Italian or French-speaking canton, or vice versa (Schubarth, 2007, p. 532).

An ongoing study by Thommen (2019a) at the University of Zurich investigates penal orders for misdemeanors and crimes (contraventions are excluded) registered in the National Statistics Office between 2014 and 2016. Their number has increased from 93'928 penal orders in 2014 to 105'266 in 2015 and 105'730 in 2016. An in-depth analysis will be performed on a selection of penal orders in four cantons: 40'461 in Berne, 17'924 in St Gallen, 10'457 in Neuchatel, and 37'687 in Zurich. Preliminary results from 7'000 cases show that a monetary penalty is imposed in 89 percent of the cases, a fine in 74 percent, and imprisonment in 8 percent of penal orders. The prison term lasts mostly 30, 60, or 90 days. The objection rate is 6 percent in Zurich, 12 percent in Berne, 10 percent in St Gallen, and 14 percent in Neuchatel. Only 7 percent of the defendants sought counsel in St Gallen, other cantons remain to be analyzed. These low percentages do not mean that defendants accept their conviction. Apart from the reasons mentioned above, even innocent individuals might refrain from objecting due to the consequences of a public trial. For example, a teacher, wrongfully accused of watching illegal pornographic content, did not object out of fear of devastating publicity and damages to his professional and social life (Wenger, 2020). The procedure is nevertheless not completely secret: interested people can still request to inspect the issued penal order (art. 69 al. 2 CrimPC). The consequences of an objection show that in the canton of St Gallen, the majority of the objections, 37 percent, end up in a simple withdrawal of the penal order. The four listed outcomes in art. 355 al. 3 are found in the following proportions: the prosecutor issues a new penal order in 24 percent of the objections, he upholds the penal order in 15 percent of the cases, abandons the proceedings in 15 percent, and only in 5 percent of the objections



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does the prosecutor send the case to court for a trial under a contradictory procedure (Thommen, 2019a.).

#### 4. Discussion

More than 90 percent of criminal cases are tried by penal order in Switzerland (Gless, 2010, p. 21); in the canton of Fribourg, it goes up to 95 percent and in the canton of Basel-Stadt, to 98 percent (Riklin, 2006, p. 115). While penal orders have certainly reduced the overload of courts wherever they have been implemented, they bring a long list of collateral damages: the defendant's right to be heard has been suppressed, the right to counsel is reserved to the least minor cases, the separation of powers between prosecutors and judges is no more, the right to translation is not guaranteed and the material truth has been sacrificed to the efficiency of the criminal justice system. When the independence of the decision-maker, the judge, from the investigative authorities, the prosecution, and the police, is suppressed, there is a higher risk of erroneous judgments. Studies have extensively shown how police officers and prosecutors are biased against the suspect. There is no need to call on fraudulent activities, although they do take place, but simply on cognitive biases such as tunnel vision or confirmation bias (see for example Jonas et al., 2001; Findley & Scott, 2006; Wallace, 2015; Liden, 2018).

Convicting an individual without a hearing by the prosecutor avoids repetitions of an interrogation carried out by the police, but at the same, the accused loses his right to be heard by the one who will judge him. For example, among the penal orders issued in St Gallen between 2014 and 2016, the police interrogated the suspect in 92 percent of the cases, the prosecutor only in 11 percent of the cases. At the earliest stage, a simplified procedure was restricted to minor or petty offenses (Pfenninger, 1919) and could not have been applied to cases punished by imprisonment. Obviously, this restriction did not hold long before being extended to less minor crimes. Nowadays, out of 2'090 custodial sentences, 76 percent stem out of penal orders and only 24 percent follow a trial (Thommen, 2019a). Prosecutors counter-argue that the accused can easily object to the judgment by penal order. He certainly can, if he understands the procedure, but the right to be heard should be granted by the state. Schubarth (2007, p. 531) emphasizes that penal orders are based on the assumption that defendants have the capacity to handle their case, which is often not true. The right to a hearing shows the transition from the defendant being an object of inquisition to him being a participant in his own procedure (Vest, 2002). It is also a sign of minimum respect granted to offenders and constitutes a precept of human dignity (Thommen, 2010, p. 393). Hence the hearing should not constitute a right that the accused can

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exercise if he understands correctly the penal order and the procedure to follow, but a right written in the procedure.

In Switzerland, objecting to a penal order does not lead automatically to a court adjudicating the case. On the contrary, it goes back to the prosecutor who seeks additional evidence. The prosecutor then decides if he upholds the penal order, abandons the proceedings, issues a new penal order that could punish the defendant to a more serious sentence, or sends an indictment to the first instance court. If the hearing of a defendant would be obligatory, potential mistakes could be detected on time. In the context of a partial revision of the Criminal Procedure Code, the Swiss Federal Council wishes to amend the law on this point. If accepted, the public prosecutor would have the obligation to hear a defendant if the sanction includes a prison term. Baschi Dürr, director of the Department of justice and security in the canton of Basel-Stadt and vice-president of the Conference of cantonal directors of justice and security departments, states that this proposal goes too far. He finds the current procedure without hearing « not unfair » given the fact that defendants can object. He is afraid that the costs of such hearings will be too high and wishes to find a compromise between « the perfection of a rule of law and a cost-effective pragmatism » (Wenger, 2020).

In a study of wrongful convictions in Switzerland, out of 236 revisions between 1995 and 2004, 159 concerned penal orders. In 136 cases, new evidence in favor of the defendant could be presented, out of which 54 cases showed an erroneous identification of the defendant. For example, the vehicle registration plate was misread and the wrong driver was notified a penal order, or a person presented the identity card of another individual who then was wrongfully convicted. These results show that the police report and the investigation by the prosecutor have lacked due diligence. The revisions led in 21 cases to a reduced sentence, to a harsher sentence only once, and to an acquittal in a vast majority of 109 cases (Gilliéron, 2013, p. 160-161). In Germany, a recent study dealing with wrongful convictions shows a similar tendency (Dunkel, 2018). Between 2003 and 2015 in Hamburg, the majority of wrongful convictions – 27 out of 48 – involved penal orders. The causes of wrongful convictions were classified into three categories: in 12 cases a mental disorder, which should have been grounds for an insanity defense and a not guilty verdict, was not recognized in the previous judgments; 8 erroneous convictions were caused by faulty or missing material evidence; in 2 cases the defendant had already been convicted for the same charge and should not have been tried again (*ne bis in idem*). These categories reveal as in Switzerland that the police and prosecutors sometimes neglect crucial exculpatory evidence during the investigation. Even if the procedure of penal orders does not oblige the police to investigate extensively the personal circumstances of the suspect, his mental state should be part of the investigation. A project by Adja Lea Niang and Prof. Momsen

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at the Free University in Berlin investigates precisely the role of the German penal order procedure on wrongful convictions. With the help of empirical data (questionnaires of judges and defense lawyers, interviews of prosecutors), results will shed light on specific points of law and practice that can provoke erroneous decisions. In the near future, we hope to add data from the procedure in France. For the moment, available findings from both countries, Germany and Switzerland, suggest that the absence of separation of powers between the executive and the judiciary leads to a well-known result: fast-track procedures might be at a higher risk of producing wrongful convictions. Schubarth, a Swiss federal judge, calls the phenomenon of prosecutors – the ones who inquire – passing judgment the “return of inquisition” (2007, p. 528).

## 5. Conclusions

In Switzerland, the public prosecutor occupies a very strong and favorable position in which he can issue penal orders as trial balloons to test if the defendant rejects or accepts the prosecutorial judgment. If he objects, prosecutors still have the possibility to issue a new penal order after gathering additional evidence, like for example hearing the accused. He is not obliged to send the case to court and can float another trial balloon by issuing a new penal order, possibly with a harsher sentence that could deter from objecting a second time. Only if the prosecutor decides that the case should go to court, he forwards his indictment to a judge. The risk with this practice lies in the fact that it institutes prosecutors sending penal orders even if they are not convinced of the defendant’s guilt. This practice has been already recognized and discussed in Germany as a confirmation of probable cause or more bluntly as a punishment based on suspicion called Verdachtsstrafe (see Thaman, 2007, p. 18 & 2012, p. 171). Preliminary proceedings and investigations do not constitute a solid ground to discover the material truth in a criminal case. They are merely the beginning from which the case can be tried in a court allowing a contradictory debate. Although penal orders reduce the burden of courts, they are not conceived in a way that guarantees the correctness of the judgment. The core of an investigative phase consists of an inquisitorial procedure that is meant to bring charges against a defendant. It is not meant to establish the truth on which a judgment should be based (Schünemann, 2004, p. 83). In other words, preliminary proceedings aim at gathering sufficient evidence to bring charges against a defendant, which would be weighted by a court. The fact that penal orders, in the absence of a successful objection by the defendant, do not offer this counterweight leads to an inquisitorial procedure being transformed into a judgment (Schubarth, 2007, p. 537).

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As we discussed in the previous section, a defendant might end up with a harsher sentence if he objects to the penal order and his case is taken to trial. This phenomenon is called the trial penalty (Alschuler, 2016) and highlights the innocence dilemma. To test the trial penalty hypothesis, Thommen (2019a) looked at fifty criminal cases with imprisonment ordered by penal order in St Gallen, all brought to court after a successful objection. Results show that the imprisonment was confirmed in twenty-three cases, among which two defendants received 60 days less, two had 40 days less, seventeen saw no change in the length of imprisonment, and one received 40 days more. In sixteen cases, a monetary penalty was ordered, but five defendants had their monetary penalty suspended, two were given community work and five were acquitted. The difference in the length of imprisonment ranges from 40 to 180 days less after a trial, only one case ordered 40 days more than by penal order. On average, defendants receive 75 days less, which amounts to 63 percent of their sentences. Although the sample is rather small, the results are significant and show a significant trial discount. A question thus arises: should prosecutors be allowed to impose imprisonment? The European Court of Human Rights has no landmark case addressing prison terms in penal orders. This question could be investigated in Germany with penal orders imposing a suspended prison term, or in general the results of objections.

Another result that deserves consideration is the fact that in Switzerland, half of the penal orders are issued against foreign citizens, while they represent one-quarter of the population. Instead of asking if they are more criminal than Swiss citizens, Thommen (2019b) is addressing a more relevant question: has Switzerland a problem with racial profiling? The German Institute for Human Rights wrote in a recent statement that the practice of the police should be investigated at a regional and federal level (Deutsches Institut für Menschenrechte, 2020; see Cremer, 2019). Further research will hopefully address this question in order to shed light on the practice of penal orders.

As was confirmed once again by public prosecution services and Dürr, the efficiency of the penal order procedure plays an essential role for judicial authorities (Gless, 2010, p. 22). The sociologist Mirjam Stoll (2018) shows how the handling of criminality follows neo-liberal principles. Judicial authorities transfer responsibility to defendants, who then have to decide if they wish to file an objection to the prosecutor's penal order (Bernauer, 2018, p. 8). This transfer corresponds to an increased allocation of responsibility on defendants in lieu of the state holding responsibility for the criminal procedure. This approach leads to inequalities due to the fact that people who received less education, understand less well the legal language of the penal order, or have less financial means, won't be able to object to the prosecutor's decision, even if it is erroneous, while advantaged individuals will be able to do so and even hire a defense lawyer to assist them in

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their proceedings. The line separating efficiency and injustice is indeed thin (Gless, 2010) if prosecutors can cause wrongful convictions for disadvantaged defendants in order to unburden courts. A solution could be to transform penal orders in an explicitly consensual procedure requiring defendants to send their agreement with the penal order as well as to extend the period for an objection with statement of grounds to twenty or thirty days (Bernauer, 2018, p. 9).

The need for sanction is very pronounced in Switzerland and elsewhere, with the rise of security measures and the transition from a constitutional to a security state (Brunhöber, 2018) and any change of criminal policy requires extensive social and political debates. One very promising solution would be to reduce the growing number of minor criminal cases and the pending cases in courts not by increasing the efficiency of justice systems with simplified procedures, but by decriminalizing the pettiest infractions and by abandoning proceedings for bagatelle cases. The measure was proposed in 1987 by the Ministers of Justice of European state members in the document recommending the development of penal orders to simplify criminal justice systems, under Decriminalization of and summary procedures for offenses which are inherently minor (Council of Europe, 1987, p. 3): "Legal systems which make a distinction between administrative offenses and criminal offenses should take steps to decriminalize offenses, particularly mass offenses in the field of road traffic, tax and customs law, under the condition that they are inherently minor.". After decades of developing widely penal orders, it is time to go back to the recommendation and move towards the decriminalization of the most minor infractions.

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## Notes

[1] If a person is at risk of committing an infraction, the court can obtain a promise from the accused that he will not commit the offense and require him to deposit security funds. If he



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refuses to make the promise or fails to deposit the money, the court can impose a period of detention for security reasons. The period of detention for security reasons may not exceed two months. If he commits the felony or the misdemeanor within two years of depositing the security, it is forfeited to the state. If no offense is committed, the security is returned.

[2] The publication of a criminal judgment can be required in the public interest, or the interests of the person harmed. The publication is done at the expense of the accused.

[3] If the assets subject to forfeiture are no longer available, the state can make a claim for compensation for a sum of equivalent value.

[4] Information page on penal orders in Switzerland, only available in French: [www.ordonnance-penale.ch](http://www.ordonnance-penale.ch), visited last time on September 25, 2020.