

Penal Orders and the Risk of Wrongful Convictions

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1. Introduction

The number of activities designated as criminal has increased with modern law-making. In these overcriminalised times,¹ courts can no longer guarantee a complete trial for every criminal case. Simplified procedures have become an effective way to unburden courts by means of procedural economy. This article explores penal orders under German criminal law. A penal order is a form of simplified procedure for minor crimes punishable by fines or suspended prison terms of maximum one year.² More specifically, this article investigates the delicate balance between procedural economy and the risks of wrongful convictions when using penal orders. First, I present recent empirical data dealing with wrongful convictions in Hamburg, Germany. I introduce the legal concept of penal orders and its development and features, before discussing how penal orders challenge important procedural principles and threaten the rights of individuals subject to criminal charges. Finally, I present the

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¹ Between 1997 and 2003, 3000 new criminal offences have been introduced in the United Kingdom, see Criminal Liability in Regulatory Contexts, Consultation Paper 195, the Law Commission of England and Wales (2010), available at https://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf (last accessed 26 January 2020). See also Meese III, Too Many Laws Turn Innocents into Criminals, The Heritage Foundation (26 May 2010), available at <https://www.heritage.org/crime-and-justice/commentary/too-many-laws-turn-innocents-criminals> (last accessed 26 January 2020); and Head and Kibbe, Too Many Laws Means too Many Criminals, National Review (21 May 2015), available at <https://www.nationalreview.com/2015/05/too-many-laws-means-too-many-criminals> (last accessed 26 January 2020).

² Elements of penal orders in other countries are mentioned occasionally in order to provide a comparative perspective on simplified procedures.

difficulties related to the compensation of wrongfully convicted individuals in Germany. The article concludes with a set of recommendations to improve the practice of penal orders in Germany and hopefully assist in the preparation of new laws on simplified procedures, which would in turn prevent wrongful convictions.

2. In the shadow of post-conviction exonerations

The first exonerations obtained by post-conviction DNA testing took place in August 1989 in Chicago, USA, and in Europe almost fourteen years later, in July 2003 in London.³ To this day, 367 wrongful convictions have been overturned by DNA evidence in the United States, and many more judicial errors have been uncovered by different means, such as cell phone evidence and new testimonies supporting the innocence of the convicted person. By the end of the 1990s, some states had uncovered more wrongful convictions of death row prisoners than the number of people executed. Facing this shocking result, in 2003 the governor of Illinois cancelled all death sentences.⁴ Between 1989 and 2019, 2515 exonerations have been pronounced, and more than 22 thousand years of imprisonment have been wrongfully served.⁵ These numbers concern serious crimes such as homicides, sexual assaults, robberies or other violent felonies. The causes of wrongful convictions are well-known and find fertile ground beyond the United States: biased police investigation, prosecutorial misconduct, informant testimony, mistaken eyewitness identification, erroneous testimony, false confession, faulty forensic evidence, and inadequate legal counsel are among the most common.⁶ In these serious cases, if the suspect cannot afford the services of a defence lawyer, the court will appoint a public defender. Moreover, due to the high stakes of a potential conviction, they tend to be handled with particular care by criminal justice systems. On the other hand, criminal cases carrying minor penalties represent the majority of a prosecutor'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, although some of these would be classified as felonies in the United States.⁷ Despite—or precisely because of—their simplici-

³ Johnson and Robbin, Post-Conviction DNA Testing: the UK's First 'Exoneration' Case?, *Sci Justice* 44(2) (2004) pp. 77–82. There is no reliable source of information for the first DNA exonerations in continental Europe.

⁴ Stevenson, *Just Mercy: A Story of Justice and Redemption* (Scribe 2015) p. 249.

⁵ See <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last accessed 26 January 2020).

⁶ Brandon, Judging Innocence, *Columbia Law Rev* 100(2) (2007) pp. 101–190.

⁷ Low-level or minor crimes carry a minimum sentence of under one year of imprisonment; major crimes lead to minimum one year of imprisonment (German Criminal Code or *Strafgesetzbuch* (StGB) § 12). Only six percent of punishments exceed a prison term of one year, see Jehle, *Criminal Justice in Germany: Facts and Figures*, 5th ed. (Federal Ministry of Justice 2009) p. 9.

ty, minor crimes could be at higher risk of leading to wrongful convictions. When addressing cases that did not attract attention or media coverage, Mosteller rightly states that ‘our largest problem lies in cases that lack publicity, where high stakes errors remain unnoticed and undetectable’.⁸ This article focuses on a category of minor crimes whose underlying facts are considered simple and non-ambiguous. They can be adjudicated by penal orders and their punishment consists in a fine and/or a suspended prison term of maximum one year.

Far from being limited to adversarial systems, wrongful convictions also occur in continental Europe where most countries use inquisitorial systems. Examples include Germany, France, Italy, Spain, and the Netherlands, as well as the Nordic countries— which present elements of an adversarial process—such as Finland, Norway, and Sweden.⁹ The absence of national registries of wrongful convictions makes it difficult to provide figures, and the available estimates concern only serious crimes punished by years of imprisonment.¹⁰ In 2015, Ralf Eschelbach, judge at the Federal Court of Justice, the supreme court for criminal cases in Germany, estimated that every fourth conviction was erroneous. The commentary of Janisch on the lack of statistics applies not only to Germany, but throughout Europe:

*[Twenty-five percent of wrongful convictions] would be a horrendous finding, however there is no solid proof for this number. The absence of statistics in itself is already a small scandal. In 2013, 1,682 applications for retrial were filed. Their success rate would hint at the error rate of the original convictions—unfortunately there are no numbers’.*¹¹

Indeed, the courts and the Federal Statistical Office of Germany only register the fact that an application for retrial has been filed,¹² but neither the type of procedure which led to the conviction, nor the outcome of the application.¹³ Therefore, it is not possible to know if a retrial was granted and led to an exoneration, or if it confirmed the conviction. Schwenn suspects that the Federal Ministry of Justice wishes to avoid

⁸ Mosteller, Failures of the Prosecutor’s Duty to ‘Do Justice’ in Ordinary and Extraordinary Miscarriages of Justice in *The Prosecutor in Transnational Perspective*, eds. Luna and Wade (OUP 2010) pp. 408–423, at 409.

⁹ Brants, Wrongful Convictions and Inquisitorial Process: the Case of the Netherlands, *University of Cincinnati Law Rev.* 80(4) (2012) pp. 1069–1114; Roach, Wrongful Convictions: Adversarial and Inquisitorial Themes, *N. C. J of Int Law Commer Regul* 35(2) (2010) pp. 338–446, at 445.

¹⁰ Gross, Convicting the Innocent, *Annu Rev Law Soc Sci* 4 (2008) pp. 173–192, at 177f.

¹¹ Janisch, Fehlerurteile in der deutschen Justiz – Ohne jede Zweifel, *Süddeutsche Zeitung* (17 May 2015), available at <https://www.sueddeutsche.de/politik/fehlerurteile-ohne-jeden-zweifel-1.2479505> (last accessed 26 January 2020), translation by the author.

¹² See Federal Statistical Office of Germany (Statistisches Bundesamt) *Rechtspflege 2017, Strafgerichte* Fachserie 10 Reihe 2.3 (Wiesbaden 2018).

¹³ For simplified or abbreviated criminal procedures, see Thaman, A Typology of Consensual Criminal Procedures: an Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial in *World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial*, ed. Thaman (Carolina Academic Press 2010) pp. 380ff.

the legal changes that would necessarily have to follow if the true number of wrongful convictions should come to light.¹⁴

3. A recent attempt to estimate wrongful convictions in Germany

While the estimate of Eschelbach appears high, there is no reason to assume that the German criminal justice system causes more wrongful convictions than any other continental country. The most recent attempt by Dunkel¹⁵ to estimate wrongful convictions once again shed light on the difficulties of this task, and went one step further by focusing on penal orders.

Dunkel's project uses data on applications for retrial, which seek a new adjudication of a case and aim at vacating a judgment after all appeals have been unsuccessful.¹⁶ These applications are good indicators of potential wrongful convictions: they are filed only when a factual or legal error is assumed, or if there are serious doubts concerning the verdict. In 2015, 1150 applications for retrial in favour of the accused were sent to German courts.¹⁷ Dunkel sets herself the challenging task of investigating the applications for retrial received by the courts in Hamburg.¹⁸ Her initial request to the public prosecutor's office was denied for reasons of capacity. With the assistance of the Federal Commissioner for Data Protection and Freedom of Information, she drafted a data privacy concept for the analysis of the documents. She then partnered with two professors at the University of Hamburg and the Police Academy of Hamburg to send a duly justified request to the Senator of Justice. When it received a positive response, a third request was forwarded to the chief officer at the agency for prison services, who also offered his support. With the updated request, the public prosecutor's office granted permission to access the applications for retrial. Dunkel attempted to access applications for retrial in a second state, Schleswig-Holstein, but the Minister of Justice, Culture and European Affairs rejected the request on grounds that there were limited staff available to sort out the relevant documents.¹⁹

The difficulty of selecting retried cases underlined the fact that retrials did not have a specific sign that could distinguish them from any other type of judgment. This shortcoming had already been revealed in 1965 by scholars investigating

¹⁴ Schwenn, Merkmale eines Fehlurteils, *Forensische Psychiatrie, Psychologie, Kriminologie* 7(4) (2013) pp. 258–263, at 262.

¹⁵ Dunkel, *Fehlentscheidungen in der Justiz, Systematische Analyse von Wiederaufnahmeverfahren in Strafverfahren im Hinblick auf Häufigkeit und Risikofaktoren* (Baden-Baden 2018) pp. 169ff.

¹⁶ Marxen and Tiemann, *Die Wiederaufnahme in Strafsachen*, 3rd ed. (Heidelberg 2014) pp. 144ff.

¹⁷ See Federal Statistical Office of Germany, Rechtspflege 2015, *Strafgerichte* Fachserie 10 Reihe 2.3 (Wiesbaden 2016).

¹⁸ Dunkel (2018) pp. 169ff.

¹⁹ *Ibid.*, p. 170.

wrongful convictions in Germany, but has yet to be solved.²⁰ In Dunkel's investigation, judges and prosecutors in Hamburg were asked to remember any detail of a retrial that could help identify its reference number in the digital register of cases. Two court databases, MEGA and ForumStar,²¹ could be used in parallel to discover retrials.²² There was, however, a further difficulty in that it was unclear whether the databases were showing retrials or merely applications for retrial sent to the courts. Interviews with prosecutors in Hamburg clarified that the applications were registered, even if a retrial was later denied by the court.²³ After a lengthy procedure, the material of 115 applications for retrial could be accessed: 24 stemmed from the memory of judges and prosecutors, and 91 were registered in ForumStar. Due to limited staff at the prosecutor's office, the applications registered in MEGA could not be accessed.²⁴ For every application for retrial, the prosecutor in charge produced a letter of approval for the viewing of the documents; afterwards, the volumes containing the documents were sent from their storage location to the prosecutor's office. Lastly, the prosecutor viewed the material and delivered his final approval. The files could then be studied at the prosecutor's office in a room reserved for this task.²⁵

Out of 115 cases, 67 were mistakenly registered as retrials by the courts. The courts suggested that the clerks might have made mistakes while learning how to handle the new databases correctly.²⁶ After this drastic cut, the material shrunk to 48 requests for retrials between 2003 and 2015. According to the Federal Statistical Office, the overall number of applications for retrial in Hamburg amounts to 493 for these years, which means that the sample represents 10.3 percent of the applications.²⁷ Thirty-nine applications for retrial were sent to eight municipal courts, while the regional court re-

²⁰ See Kiwit, *Fehlurteile im Strafrecht – Entstehung, Gesetzmässigkeiten und Möglichkeiten zur Vermeidung untersucht an Wiederaufnahmeverfahren im Oberlandesgerichtsbezirk Hamm aus der Zeit von 1950 bis 1958* (Münster 1965); Peters, *Fehlerquellen im Strafprozess – Eine Untersuchung der Wiederaufnahmeverfahren in der Bundesrepublik Deutschland* (Karlsruhe 1970); Schöneborn, *Strafprozessuale Wiederaufnahmeproblematik – Eine funktionalistisch angelegte Aktenanalyse gescheiterter Wiederaufnahmeverfahren* (Tübingen 1980).

²¹ The database MEGA was introduced in 2004 and ForumStar in 2012 in the courts of Hamburg.

²² The court in Wandsbeck registered erroneously in MEGA 779 retrials between 2004 and 2012, while the usual number of retrials for this period lies under 100 for the largest court, see Dunkel (2018) p. 173.

²³ See Dunkel (2018) p. 173.

²⁴ From 991 applications for retrial in MEGA, if we subtract the erroneous data of one court (n=779), 212 applications remain available for study.

²⁵ Separate volumes dealing with juveniles, tax-related matters or DNA special cases cannot be accessed as a matter of principle, which represents a major impediment to the study of wrongful convictions, see Dunkel (2018) p. 175.

²⁶ See Dunkel (2018) p. 176.

²⁷ The department of justice in Hamburg transmits ca. 40 applications per year to the Federal Statistical Office. See Federal Statistical Office of Germany, *Rechtspflege 2015, Strafgerichte* Fachserie 10 Reihe 2.3 (Wiesbaden 2016).

ceived nine requests. The files showed that 44 applications for retrial were issued in favour of the defendant and four against the defendant.²⁸ Of the original decisions, two convictions were issued as court orders, 19 were obtained under an ordinary procedure with a public trial, and 27 were prosecuted through penal orders.²⁹ Thirty-two sentences imposed a fine, six resulted in suspended prison time, eight ordered an imprisonment term, and two defendants were initially acquitted. It is important to note here that the number of applications for retrial which come from penal order cases as opposed to ordinary cases is not proportional to the number of penal order convictions as opposed to ordinary convictions. In fact, despite penal orders making up the majority of criminal convictions, people convicted under penal orders apply for a retrial much less often than people tried under ordinary procedure.³⁰ Therefore, if a higher number of potential wrongful convictions—27 out of 48 applications for retrial—are obtained from penal orders, this is evidence that fast-track procedures at municipal courts might be at a higher risk of producing wrongful convictions.

Twenty-five out of forty-eight applications led to a retrial.³¹ Of these, retrial led to an acquittal in fifteen cases, a closing of the proceedings in four cases, a milder sentence in three cases, and a more serious sentence in three cases.³² The causes of wrongful convictions were classified into three categories: in twelve cases a mental disorder, which should have been grounds for an insanity defence and led to a ‘not guilty’ verdict,³³ was not recognised in the previous judgments. Eight erroneous convictions were caused by faulty or missing material evidence. In two cases the de-

²⁸ This article focuses on wrongful convictions and does not include these cases in the discussion. Three retrials against the defendant were prompted by a confession to the offence and one by an inaccurate statement of a witness or an expert.

²⁹ The charged offences were robbery; blackmail; fraud; dangerous disruption of rail, ship, air or road traffic; leaving the scene of an accident without cause; cultivating, producing or trading narcotic drugs; bodily harm; and possessing or transferring guns, see Dunkel (2018) pp. 180–181.

³⁰ The cost of a retrial procedure deters many defendants from seeking retrial for a penal order conviction, whose financial penalty—even if potentially erroneous—may be lower than the cost of an application for retrial, see Rennert, *Rechtsberatung in Strafbefehlsverfahren*, *Freispruch* 14 (2019) p. 39 for similar reasons why individuals do not oppose penal orders in the first place.

³¹ Several attempts to apply for retrial can be necessary in order to obtain a retrial and, ultimately, the cancellation of a previous judgment or sentence. Therefore applications that lead to retrial cannot constitute a reliable measure of wrongful convictions but simply show how many applications were accepted for retrial in the sample of cases under consideration. The number of applications for retrial offers a better approximation of potential wrongful convictions.

³² Twenty-three retrials took place at municipal courts and two at the regional court; the number of these which came from penal order cases is unfortunately not available, see Dunkel (2018) p. 188.

³³ See the exclusion of criminal liability in StGB § 20: ‘Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.’ All quotations drawn from the official English translation, available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (last accessed 28 January 2020).

defendant had already been convicted for the same charge and should not have been tried again (*non bis in idem*).³⁴ These categories reveal 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 condition of the suspect, his mental state should be part of the investigation.

4. The emergence of penal orders in modern criminal law

In 1830, the Prussian police could not deal effectively with the amount of minor criminal cases due to an uprising in the Polish territories. A new mandate procedure called *Mandatsverfahren* was created and codified fifteen years later in the Prussian procedural law. This procedure was used by police courts across the empire and allowed the police to react quickly to minor infractions.³⁵ It was initially 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. 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.³⁶ At that time, penal orders were mostly based on a police report involving an arrest *in flagrante*.

During World War I, the police procedure was transformed into a criminal procedure that could be used as an alternative to an ordinary trial; before long, it was used in one third of criminal cases. After the war ended, criminality rose due 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.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.³⁸

³⁴ See Dunkel (2018) pp. 190–191.

³⁵ Vivell, *Das Strafbefehlsverfahren nach Eröffnung des Hauptverfahrens (§ 408a StPO) – Eine kritische Untersuchung und Analyse* (Frankfurt a.M. 2006) p. 26.

³⁶ *Ibid.*, pp. 28–31.

³⁷ *Ibid.*, p. 33.

³⁸ *Ibid.*, p. 37.

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.³⁹ 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.⁴⁰ Unfortunately, this changed in March 1993 when suspended prison sentences of up to one year were introduced in the Code of Criminal Procedure. 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 offences, and simplification of ordinary judicial procedures. In these recommendations, penal orders were presented as ‘simplified procedures in cases which are minor due to the circumstances of the case’.⁴¹ In the last 30 years the number of penal orders has risen, not only in Germany,⁴² but throughout Europe and beyond, in countries like Italy, France, Croatia, Finland, the Netherlands, Scotland, Norway and Switzerland.⁴³ Greece is the latest country to have introduced penal orders on the model of *Strafbefehle*, in July 2019.⁴⁴

5. The predominance of prosecutors and of the police

The objective of simplified procedures is to efficiently deliver justice in simple cases with minor punishment. The time required to close a case is reduced, with the intention of reducing the burden on courts.⁴⁵ The meaning of ‘minor punishment’ has been subject to change since the first application of mandate orders in Prussia. At first, custodial sentences were excluded, but this changed steadily over time. Since 1993, the maximum sentence in Germany has been extended to one year of suspended prison term.⁴⁶ The issuance of a penal order takes place after the preliminary investigation is complete and the prosecutor has received a police report. For a penal order to be is-

³⁹ For a chronological overview of the amendments, see <https://lexetius.com/StPO/407,8> (last accessed 26 January 2020).

⁴⁰ Vivell (2006) pp. 42–43.

⁴¹ *Recommendation of the Committee of Ministers concerning the simplification of criminal justice* (Council of Europe), R(87) 18, Strasbourg, 18 September 1987.

⁴² See Federal Statistical Office of Germany, Rechtspflege 2017, *Strafgerichte* Fachserie 10 Reihe 2.3 (Wiesbaden 2018).

⁴³ Melunovic Marini, Strafbefehl erhalten, was tun?, *Neue Zürcher Zeitung* (19 November 2018).

⁴⁴ Alvanou, Penal Order in Greece: A New Era for the Rights of the Defendant? Professional Commentary, *JURIST Legal News and Research* (5 July 2019).

⁴⁵ Thaman, The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform? in *The Prosecutor in Transnational Perspective*, eds. Luna and Wade (OUP 2012) pp. 156–175, at 156.

⁴⁶ Switzerland introduced penal orders in 2011 and already allows custodial sanctions of up to six months of imprisonment (see Swiss Criminal Procedure Code § 352ff.).

sued, the prosecutor must have decided that there is sufficient cause to charge the defendant of a minor crime, and have determined that a trial would not help clarify the facts of the case.⁴⁷ By then, the defendant will have learnt that he is suspected of an offence, because he will have been contacted for an interrogation by the prosecutor or the police over the course of the investigation.⁴⁸ This gives the defendant time to hire a defence counsel, if he can afford one, who can negotiate the charge and the sanction with the prosecutor.⁴⁹ If no counsel is hired and the penalty involves a suspended prison time, the judge will have to appoint a lawyer after signing the penal order.

The rights of the defendant stipulate that he can access the investigative files, which would disclose the strength of the prosecutor's case and inform the defendant's decision to accept or oppose the penal order. Instead of granting access to the files, the prosecutor may propose to dismiss the proceedings⁵⁰ if a fine is paid (usually corresponding to one year's salary for the defendant).⁵¹ Without legal counsel, the defendant might feel under pressure to accept the offer of the prosecutor without knowing the facts of the case against him, otherwise he will be charged.⁵² While negotiations between prosecutor and defence counsel have been observed for misdemeanours tried under other types of procedure, they could also take place when the prosecutor considers a penal order.⁵³

The primacy of penal orders over an ordinary procedure has been promulgated by the German Code of Criminal Procedure of 1987: if the prosecutor deems an ordinary procedure to be unreasonably expensive and unnecessary after the preliminary investigation, a penal order and not an ordinary procedure has to be chosen.⁵⁴ The prosecutor sends the penal order to a judge, who decides whether to sign it after

⁴⁷ See Vivell (2006) p. 76.

⁴⁸ See German Code of Criminal Procedure, *Strafprozessordnung* (StPO) § 163a (1): 'The accused shall be examined prior to conclusion of the investigations, unless the proceedings result in termination.' All quotations drawn from the official English translation, available at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (last accessed 28 January 2020).

⁴⁹ See Thaman (2010) p. 164.

⁵⁰ A diversion offers a dismissal of the proceedings for misdemeanours where the question of guilt is borderline. If the defendant agrees to fulfil certain conditions—typically the payment of a fine—he is not charged of the crime (see Thaman (2010) pp. 333–334).

⁵¹ The offer of a year's salary fine for a diversion applies to misdemeanours in general. The defendant knows the proposed sentence when presented with the offer, and if he agrees, the case is not charged and therefore there is no record in the Central Criminal Register.

⁵² Dahs, *Absprachen im Strafprozess: Wirksamkeit eines Rechtsmittelverzichts*, 10 *Neue Zeitschrift für Strafrecht* (2005) pp. 580–582, at 581.

⁵³ See Thaman (2012) p. 168

⁵⁴ See StPO § 407: 'In proceedings before the criminal court judge and in proceedings within the jurisdiction of a court with lay judges, the legal consequences of the offence may, in the case of misdemeanours, be imposed, upon written application by the public prosecution office, in a written penal order without a main hearing. The public prosecution office shall file such an application if it does not consider a main hearing to be necessary given the outcome of the investigations.'

determining from the evidence in the prosecution file (police report, birth certificate, basic information about the defendant) if there are ‘sufficient grounds for suspecting the indicted accused.’⁵⁵ In practice, judges typically sign the penal order—rarely do they reject one and set the case for trial.⁵⁶ A letter informs the defendant of this decision, as well as the infraction, the time and place of commission, the sentence, the evidence, the legal consequences, and the information on the possibility to object within fourteen days⁵⁷ by replying to the court that issued the penal order (no reasons for objecting need to be given).⁵⁸ If the defendant opposes a penal order, a trial conducted by the judge who first approved the order is arranged at the municipal court under ordinary procedure, which involves a defence lawyer and a public court hearing. If there is no opposition, the penal order is binding without public trial and the sentence has to be executed. A conviction under penal order is equivalent to a judgment of guilt rendered by a court at the end of an ordinary trial.⁵⁹ Penal orders are therefore the shortest and fastest way for judges to impose a sentence.

The penalty is proposed by the prosecutor at the end of the preliminary investigation, even if in some instances the sanction and the content of the order are negotiated with the defence counsel before it is issued.⁶⁰ The investigative stage is predominantly handled by the police, who overshadow the role of the prosecutor with their with their manpower and skills.⁶¹ Indeed, the report sent to the prosecutor sometimes includes a recommendation for filing the charges.⁶² In 2013, 5231 prosecutors and approximately 250,000 police officers carried out almost six million

⁵⁵ See StPO § 408 (2): ‘If the judge does not consider that there are sufficient grounds for suspecting the indicted accused, he shall refuse to issue a penal order.’

⁵⁶ The rejection rate by judges of a prosecutor’s application for a penal order amounts to 1.6 percent, see Elsner and Peters, *The Prosecution Service Function within the German Criminal Justice System in Coping with Overloaded Criminal Justice Systems*, eds. Jehle and Wade (Springer 2006) pp. 207–236, at 219.

⁵⁷ Usually three to ten days in Norway, seven days in Lithuania, eight days in Croatia, ten days in Estonia and Switzerland, fourteen days in the Netherlands, fifteen days in Italy, thirty to forty-five days in France.

⁵⁸ Geis, *Überzeugung beim Strafbefehlserlass* (Frankfurt 2000) p. 27.

⁵⁹ See StPO § 410 (3): ‘Where objections to the penal order are not lodged in time the order shall be equivalent to a judgment that has entered into force.’

⁶⁰ Altenhain, *Absprachen in German Criminal Trials in World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial*, ed. Thaman (Carolina Academic Press 2010) p. 158.

⁶¹ In Norway, the separation between prosecution and police is reduced to a minimum in criminal investigations: the lowest prosecutor is part of the police and vice versa. Beside police officers, lawyers who are part of the police usually become prosecutors (see Strandbakken, *Victim-Offender Mediation, and Confession-Triggered Summary Procedures in Norway in World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial*, ed. Thaman (Carolina Academic Press 2010) p. 245f.).

⁶² Weigend, *A Judge by Another Name? Comparative Perspectives on the Role of the Public Prosecutor in The Prosecutor in Transnational Perspective*, eds. Luna and Wade (OUP 2012) pp. 377–391, at 380.

investigations. Each prosecutor has thirty police officers under his supervision, but in practice these officers have an independent role. This contributes to shifting the balance of authority in the investigation towards the police. Each month, a German prosecutor receives an average of 120 new cases and the time spent on a case will depend on its complexity.⁶³ In her interviews with prosecutors, Boyne sheds light on their divergence from objective fact-finders who investigate incriminating as well as exonerating elements in each case:⁶⁴

‘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.’⁶⁵

The workload of prosecutors effectively means that it is left up to the police to conduct investigations. Often this means that the level of evidence gathered pursuant to the prosecution of a case will be determined by the police, and cases might be insufficiently investigated in terms of exonerating evidence.⁶⁶ This puts the determination of whether the level of evidence passes the legal threshold for issuing a penal order in the hands of the police. The retrials in Hamburg and the observed causes of wrongful convictions show that this could well be the case. By effectively controlling the investigative process, the police might cause wrongful convictions due to their lack of supervision and a different culture of truth-finding than that expected of a prosecutor.⁶⁷ Another issue with the current system is the possibility that prosecutors might choose to issue a penal order because the guilt of the defendant would be difficult to prove in court under an ordinary procedure. Although the prosecutor would be acting illegally by offering a penal order under these circumstances, an innocent defendant might accept the penal order so as not to risk a harsher punishment in a public trial. Under the heavy time constraints discussed above, the temptation to prosecute at minimal cost is significant and could cause authorities to (illegally) issue penal orders without there being sufficient grounds to prosecute the defendant in an

⁶³ In Norway, due to resource constraints, the investigation of minor crimes depends on the availability of police officers who also have to solve serious crimes. The investigation of minor crimes can sometimes barely be conducted before the case is closed, see Strandbakken (2010) p. 251.

⁶⁴ See StPO § 160 (2): ‘The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken.’

⁶⁵ Boyne, Prosecution of Low-Level Criminality in Germany in *The Prosecutor in Transnational Perspective*, eds. Luna and Wade (OUP 2010) pp. 37–53, at 45.

⁶⁶ *Ibid.*, pp. 47–48. See also the Italian Code of Criminal Procedure stating that preliminary investigations collect only the evidence sufficient for probable cause to charge (Nicolucci, *Il Procedimento per Decreto Penale* (Milan 2008) pp. 27–29).

⁶⁷ Püschel, Fehlerquellen in der Sphäre von Staatsanwaltschaft und Polizei, *Straverteidiger Forum* 7 (2015) pp. 269–278, at 276.

ordinary trial. This has led some scholars to state that penal orders are not judgments of guilt, but merely a confirmation of probable cause.⁶⁸ In other words, because the required standard of proof for a penal order is sufficient suspicion that the accused person committed the crime, with a ‘probability of conviction’, penal orders in effect allow punishment on suspicion of guilt, rather than reserving criminal punishment for cases where guilt is proven beyond reasonable doubt.⁶⁹ If it is true that penal orders effectively lower the standard of proof required to convict, then the widespread use of penal orders increases the risk of convicting innocent individuals.⁷⁰

While the Federal Statistical Office of Germany registers the total number of convictions, they do not differentiate between convictions resulting from penal orders and convictions taking place after an ordinary trial.⁷¹ More generally, there is no way to distinguish between records of convictions under simplified or ordinary criminal procedures. It is nevertheless possible to access the number of penal orders issued by public prosecutors. The Konstanz Repository on Sanctioning is compiled by the University of Konstanz, and the last report presents data from 2015: prosecutors issued 542,643 penal orders, which represents more than half of the 997,375 decisions to prosecute a case.⁷² The minor cases ranged from road traffic offences, fraud and embezzlement, white-collar offences, theft and unlawful appropriation, to infractions punished by the Narcotics Law, intentional bodily harm, and offences against sexual self-determination. In 2001, Heinz found that two thirds of convictions in criminal cases resulted from penal orders,⁷³ a ratio confirmed by the Konstanz Repository: in Baden-Württemberg, penal orders led to 79 percent of all convictions, out of which 90 percent were fines, whereas in Nordrhein-Westfalen penal orders caused 64 percent of all convictions, among which 76 percent were fines.⁷⁴ The remaining 990 sanctions in Baden-Württemberg and 862 in Nordrhein-Westfalen were suspended imprisonment terms. In Norway, with a population less than one tenth that of Germany, the number of convicted individuals through penal orders exceeds yearly 300,000 since 2005 and reached 350,000 in 2006.⁷⁵ Far from constituting an exception, penal orders have become the norm for convicting alleged offenders in continental countries.

⁶⁸ Huber, *Criminal Procedure in Germany* in *Comparative Criminal Procedure*, eds. Hatchard, Huber and Vogler (London 1996) p. 158.

⁶⁹ Geis (2000) pp. 24–25.

⁷⁰ Zila, *Prosecutorial Powers and Policy Making in Sweden and the Other Nordic Countries* in *The Prosecutor in Transnational Perspective*, eds. Luna and Wade (Oxford 2010) pp. 235–249, at 249.

⁷¹ See Federal Statistical Office of Germany, *Rechtskräftig verurteilte Personen in Deutschland* (Wiesbaden 2017).

⁷² Heinz, *Kriminalität und Kriminalitätskontrolle in Deutschland – Überblick 2015*, Konstanzer Inventar Sanktionsforschung (Konstanz 2017).

⁷³ Heinz, *Der Strafbefehl in der Rechtswirklichkeit* in *Grundfragen staatlichen Strafens*, eds. Britz et al. (Munich 2001) pp. 272–313.

⁷⁴ In 2001 215,276 criminal cases were adjudicated by penal orders, see Strandbakken (2010) p. 253.

⁷⁵ See Zila (2010) p. 246.

The applications for retrial in Hamburg show a high rate of potential erroneous penal orders,⁷⁶ which suggests that penal orders should be placed under particular scrutiny. Until a wrongful decision is overturned, the conviction is recorded in the Central Criminal Register and might have serious consequences for the convicted person.⁷⁷ The Register has entries on 6.3 million individuals, which will be deleted ‘in the interest of resocialisation’⁷⁸ after the expiry of time limits as found in §34 and §46 of the Federal Central Criminal Register Act.⁷⁹ The convictions are removed from the Certificate of Good Conduct after a minimum of three years, and from the Register after a minimum of five years, depending on the type of sanction. Therefore, a wrongful conviction has long-lasting consequences, during which time so-called resocialisation—including job searching—will be made difficult. The police clearance certificate called the Certificate of Good Conduct is required for numerous jobs, and a conviction prohibits a person from work as, for example, a teacher, a parcel service driver or even a freelance cleaner.⁸⁰

6. Discussion

6.1 The rights of individuals facing criminal charges

The efficiency of the criminal justice system to deal with minor offences is based on bypassing the court. The costs incurred by the judiciary (for judges, audience rooms, and court clerks) are kept to a minimum at the expense of a fair trial, defined as ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ in the European Convention of Human Rights.⁸¹ Drafted in 1950 by the Council of Europe, the treaty contains eleven articles protecting fundamental human rights. Article 6, the right to a fair trial, applies to individuals charged with a criminal offence, and penal orders contain a criminal charge after a preliminary investigation. The lack of an imprisonment term is not crucial, since the severity of the pun-

⁷⁶ See Dunkel (2018) p. 179.

⁷⁷ Dahs, *Handbuch des Strafverteidigers* (Köln 2015) p. 614.

⁷⁸ See https://www.bundesjustizamt.de/EN/Topics/citizen_services/BZR/BZR_node.html, Federal Office of Justice, The Federal Central Criminal Register (last accessed 26 January 2020).

⁷⁹ See the Federal Central Criminal Register Act (21 September 1984, last amended on 18 July 2017) https://www.gesetze-im-internet.de/englisch_bzrg/englisch_bzrg.html (last accessed 26 January 2020).

⁸⁰ See the Certificate of Good Conduct required for freelance cleaners on *helping* in Germany, France, Italy, Ireland, the Netherlands, the UK, and Switzerland, <https://www.helping.de/infportal/certificate-good-conduct> (last accessed 26 January 2020).

⁸¹ Council of Europe, European Court of Human Rights, ECtHR. *European Convention on Human Rights*. Strasbourg: September 21, 1970. § 6 (1).

ishment has no connection with the criminal character of an offence.⁸² Because penal orders are an exclusively written procedure, penal orders lack the procedural safeguards granted when cases are tried under a normal trial procedure: public proceedings,⁸³ confrontation of witnesses against the defendant,⁸⁴ and reasoned judgment.⁸⁵ Finally, by imposing judgment without a trial, prosecutors blur the separation of powers between the judicial and the executive branches.⁸⁶ Even if judges have to review and accept a penal order before it is delivered to the defendant, in practice they rarely reject it. This is the reason why penal orders can be seen as prosecutorial sentencing.

When we consider trials in which procedural safeguards are stronger than under a simplified procedure, we observe that the risk of wrongful convictions increases greatly when the rights of the defendant are not respected. Wrongful convictions in criminal cases adjudicated in courts under an ordinary procedure often show that police forces or public prosecutors did not disclose exculpatory evidence, and that legal assistance was absent or inadequate.⁸⁷ It is true that penal orders have contributed significantly to unburdening courts of minor crimes, while at the same time allowing defendants to object against the prosecutor's offer and have their case tried fully in court.⁸⁸ However, the simplified procedure of penal orders lacks many safeguards protecting both the defendant and the reliability of the process, which opens the door even further to potential wrongful convictions than under ordinary procedures. Kühne goes further in writing that the current procedure of penal orders manifests an anti-constitutional procedure.⁸⁹ What makes the current system of penal orders even more problematic is that it is extremely difficult to correct a potential wrongful decision.⁹⁰ The resistance to correct wrongful convictions may reflect the protection of a final judicial decision, aiming at securing the stability of the law, but the result of this could be that a large number of innocent individuals do not have their judgment corrected or their conviction overturned.⁹¹

⁸² ECtHR, Guide on Article 6 of the European Convention on Human Rights, ECHR, *Right to a fair trial (criminal limb)*, updated 31 August 2019, pp. 9–10.

⁸³ See Lysaght, *Publicity of Court Proceedings*, 38 *Irish Jurist* (2003) pp. 34–57.

⁸⁴ See Maffei, *The Right to Confrontation in Europe*, 2nd ed. (Europa Law Publishing 2012) pp. 29–30.

⁸⁵ Pradel, *Procédure pénale*, 9th ed. (Cujas 1997) pp. 683–684.

⁸⁶ On the violation of due process rights and of the separation of powers, see Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, *Electronic Journal of Comparative Law* 11 (2007) p. 18.

⁸⁷ Ramsay and Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, *Crime and Delinquency* 53 (2017) pp. 436–470.

⁸⁸ See Taman (2010) p. 342.

⁸⁹ Kühne, *Strafprozessrecht – Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts* (Heidelberg 2015) p. 702.

⁹⁰ See Dunkel (2018) p. 52.

⁹¹ Greco, *Strafprozesstheorie und materielle Rechtskraft – Grundlagen und Dogmatik des Tatbegriffs, des Strafklageverbrauchs und der Wiederaufnahme im Strafverfahrensrecht* (Berlin 2018) p. 330.

6.2 Limited compensation after a wrongful conviction

After considering retrials of potential wrongful convictions, and especially the higher risk of penal orders, this section addresses the response of the state when a previous judgment has been corrected.⁹² Although penal orders apply to minor offences, their maximum sentence has become harsher over time: starting with fines only, sanctions nowadays include suspended prison sentences up to one year. This tendency may well continue, and in the future penal orders could apply to more serious crimes punishable by imprisonment. In Croatia, penal orders can already impose prison terms up to three months, and this is only half that of Swiss penal orders, which can impose prison terms up to six months.⁹³ In the near future, imprisonment will be very probably part of the sanctions in more countries using penal orders.⁹⁴ It is, therefore, crucial to improve compensation laws by offering faster resolution and higher rates of compensation, and by including non-custodial wrongful convictions as eligible for compensation. At the moment, compensation laws only take into account convictions in which a deprivation of liberty took place. Even in this case, the compensation granted to wrongfully convicted individuals suffers from severe limitations. When a wrongful conviction is overturned after a lengthy retrial, the difficulty of receiving compensation reflects a second resistance of the criminal justice system to deal with its own mistakes.

In Germany, the law for compensation in criminal matters grants compensation for both financial losses and days of imprisonment. It is granted if the person makes an official request to the public prosecutor who was responsible for the initial wrongful charge.⁹⁵ Financial losses are subject to taxation while compensation for imprisonment days is tax-free. As of 2019, the amount of compensation per day deprived of liberty is 25 Euros, until 2009 it was 11 Euros, a shameful amount. Wolfgang Neskovic, former judge at the Federal Court of Justice, calls the response of the state to victims of wrongful convictions a ‘sad and shameful chapter in justice policy’ and states that he does ‘not understand why legislators have so little empathy towards innocent convicted people.’⁹⁶ The president of the German Association of Judges, Jens Gnisa,

⁹² See Fon and Schäfer, State Liability for Wrongful Conviction – Incentive Effects on Crime Levels, *Journal of Institutional and Theoretical Economics* 163(2) (2007) pp. 269–284.

⁹³ See footnote 43.

⁹⁴ Krapac, Consensual Procedures and the Avoidance of the Full-Fledged Trial in the Republic of Croatia, in *World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial*, ed. Thaman (Carolina Academic Press 2010) p. 272.

⁹⁵ The code was promulgated in 1972 and is called *Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*.

⁹⁶ Banse, Lutz and Müller, Fehlurteil – Opfer sollen besser entschädigt werden, *Die Welt* (4 November 2017).

supports a modest increase of the rate per day.⁹⁷ At the conference for Justice Ministers in 2017, a statement requested the Federal Minister of Justice to draft a new law that would increase this amount, as agreed by Berlin, Hamburg and Thuringia.⁹⁸

In a study investigating 29 exonerations after which the individuals requested compensation, it took on average 15 months to deliver a decision, with a compensation time⁹⁹ ranging from one month to seven years and five months. The exonerated individuals expressed in interviews that state authorities often used tactics to artificially delay their decisions.¹⁰⁰ This devastating return of experience for those wrongly convicted who have to engage in a protracted struggle with authorities to claim compensation bears resemblance to victims of crime who suffered in their contacts with the police or with judicial authorities from a harsh treatment known as double victimisation.¹⁰¹

7. Conclusion

A penal order is a simplified criminal procedure without a full investigation and trial. The preliminary investigation is only sufficient to charge a person, not to prove his guilt. When the judge signs a penal order, the accusation becomes a judgment of guilt. If not opposed, a penal order, therefore, is equivalent to a guilty verdict, and represents a form of prosecutorial sentencing.¹⁰² If the alleged offender does object within two weeks, an additional problem arises: the trial judge will be the judge who approved the penal order and was initially convinced of a probability of conviction.¹⁰³

Violent crimes such as rape and homicide are punished by severe sanctions and draw a great deal of public attention. Widely publicised cases reveal widespread errors in the delivery of justice, but naturally we hear more often about wrongful convictions in serious crimes, whereas individuals wrongfully convicted of minor crimes rarely interest the media. Moreover, individuals wrongfully convicted of mis-

⁹⁷ Müller, Haftentschädigung: Was ein Tag in Freiheit wert ist, *Frankfurter Allgemeine Zeitung* (9 November 2017).

⁹⁸ See Conference of Justice Ministers (88. Konferenz der Justizministerinnen & Justizminister) Beschluss Top II.18 *Entschädigung für Strafverfolgungsmaßnahmen* (9 November 9 2017).

⁹⁹ Compensation time is the length of the false imprisonment for which an individual is compensated.

¹⁰⁰ Hoffmann and Leuschner, *Rehabilitation und Entschädigung nach Vollstreckung einer Freiheitsstrafe und erfolgreicher Wiederaufnahmeverfahren*, Elektronische Schrifreihe der Kriminologischen Zentralstelle e.V. (Wiesbaden 2017).

¹⁰¹ See for example Enescu, L'absence de dénonciation des agressions à caractère sexuel, *Bulletin de Criminologie* 25 (1999) pp. 41–54.

¹⁰² See Thaman (2012) pp. 169.

¹⁰³ See Geis (2000) pp. 48–49.

demeanours may be less likely to try to have their conviction quashed.¹⁰⁴ Nevertheless, wrongful fines can cause severe limitations in daily life. The Criminal Cases Review Commission in the United Kingdom looks into potential wrongful convictions without any criteria as to the seriousness of the case. Their page shows that serious crimes constitute the majority of cases, but the CCRC has also reviewed a great deal of less serious offences.¹⁰⁵ This confirms once again that minor crimes are also at risk of being mistakenly adjudicated and should be included in our efforts to prevent wrongful convictions.

Because penal orders are issued in two thirds of criminal cases and their risk of producing wrongful convictions is high, it is of paramount importance to advocate for better data delivery by the courts and the Federal Statistical Office. There is a necessity to distinguish convictions under penal orders from other types of convictions, and to record the applications for retrial, their outcome and exonerations by procedure, simplified or ordinary. Until progress takes place, penal orders and their risk of wrongful conviction should be further investigated with the aim of reducing the occurrence of wrongful convictions. To follow this line of investigation, our forthcoming project will investigate a corpus of penal orders and explore solutions to detect a higher risk of wrongful conviction, so that the decision can be opposed in time, before damaging consequences take place for the defendant.

Lastly, an interdisciplinary center dedicated to the examination of wrongful convictions is long overdue in Germany. This center should involve professionals from every field of work involved in the administration of criminal justice—defence lawyers, police, prosecutors, judges—in order to guarantee the relevance of the solutions it could propose.¹⁰⁶ Despite promising preliminary talks at the Humboldt University in Berlin, this project could unfortunately not be implemented at this time, but we remain optimistic that a new opportunity will soon arise. For optimal results, the work of such a center should be divided in three departments: the first would investigate wrongful convictions and maintain a database of successful retrials aiming at the creation of a national registry of exonerations. The second department would offer legal counseling in cases selected as potential wrongful convictions regardless of their penalty, with the help of students supervised by legal scholars.¹⁰⁷ The third department would transfer knowledge and offer training to professionals regarding

¹⁰⁴ See Rennert (2019) p. 39.

¹⁰⁵ See www.ccr.gov.uk (last accessed 26 January 2020).

¹⁰⁶ Fruitful contacts with teachers at the Police Academy of Brandenburg, forensic analysts, defence lawyers and criminologists were initiated during a guest professorship at the Humboldt University of Berlin. They also delivered inspiring lectures on their respective topics. For more information, see <https://www.interdisciplinary-laboratory.hu-berlin.de/de/content/vielfalt-der-wissensformen-wintersemester-201617/> (last accessed 26 January 2020).

¹⁰⁷ See the project of Prof. Momsen at the Free University Berlin, started in April 2019 and offering *pro bono* counselling in penal order proceedings, https://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/momsenc/Aktuelles_Ordner_Box/projektstart.html (last accessed 26 January 2020).

the causes of wrongful convictions in ordinary and simplified procedures, as well as recommend solutions to prevent wrongful convictions.

Apart from taking the necessary steps to shed light on the existing pitfalls of penal orders, a larger goal of this project would be to discuss further directions for a reform of the penal law. In order to improve the situation in which defendants cannot access the investigative files, preliminary investigations could be adversarial in their nature, a procedure coined ‘adversarial mini-trial’ by Thaman. The evidence would be disclosed to the defendant and the defence would have the opportunity to cross-examine witnesses and experts or ask for additional evidence to be taken. A preliminary investigation judge would hear the evidence and guarantee the rights of the defendant.¹⁰⁸ At the end of the investigation, prosecutors would propose their decision that could be accepted or rejected. The judge would then have enough material to deliver a reasoned judgment of guilt and a sanction. The punishment could not exceed the one offered by the prosecutor, thus avoiding that the defendant accepts the offer if he is innocent.¹⁰⁹ If only a fine is imposed for minor road traffic and tax offences, another recommendation aims at decriminalising these minor crimes. 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 the criminal justice system.¹¹⁰ Any development in this sensitive area should prioritise the implementation of safeguards to ensure that penal orders, or simplified criminal procedures, do not lead to wrongful convictions because of their inherent attributes.

¹⁰⁸ See Thaman (2012) pp. 174–175.

¹⁰⁹ Weigend, Die Reform des Strafverfahrens: Europäische und deutsche Tendenzen und Probleme, 104 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1992) pp. 536–511.

¹¹⁰ See Recommendation of the Committee of Ministers Ila *Decriminalisation of and summary procedures for offences which are inherently minor* (18 September 1987).