Universität St.Gallen

The impact of hearings on prosecutorial decision-making

Prof. Dr. Nora Markwalder
Prof. Dr. Martin Killias

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Background I

- Increasing use of penal orders in Switzerland under the 2011 Code of Criminal Procedure
- Penal orders are convictions issued by prosecutors or legal clerks, not by a judge
- Penal orders are an option only for minor cases:
  - Fines
  - Day-fine penalty (max. 180 days)
  - Custodial sentence (max. 180 days)
  - Sanction can be conditional or unconditional
- Often based on police report only
- No legal requirement to hear defendants or victims in person (only if deemed necessary by prosecutor)
- Defendant can, within 10 days, ask for judicial review; otherwise penal order becomes a final conviction.

Background II

- Advantages:
  - Quick procedure and fast verdict
  - Cheap (short procedure)
- Criticism:
  - Frequently no hearing of defendant or victim by prosecutor
  - No further evidence collected, often based only on police report
  - Lack of fundamental procedural rights (right to be heard etc.)
  - Prosecutor issues verdict → lack of judicial control
  - Defendant might not understand the penal order
  - Penal orders with higher risk of wrongful convictions
- More than 90% of criminal proceedings in Switzerland end up with a penal order

Research Aims I

- What effects do personal hearings have during the procedure?
- Positive effect of hearings on the defendant?
  - Procedural fairness (having a voice) effects, legitimacy of verdict and acceptance of punishment
  - Punishment perceived more intensively
    - Recognition that one has done something bad / ritual of punishment
    - Specific deterrence: less recidivism?
  - Better understanding of the procedure
- Negative effect of hearings on the defendant?
  - Time consuming for the defendant
  - Procedure resp. prosecutor could be perceived as unfair
  - Criminal identity (labelling) could be strengthened

Research Aims II

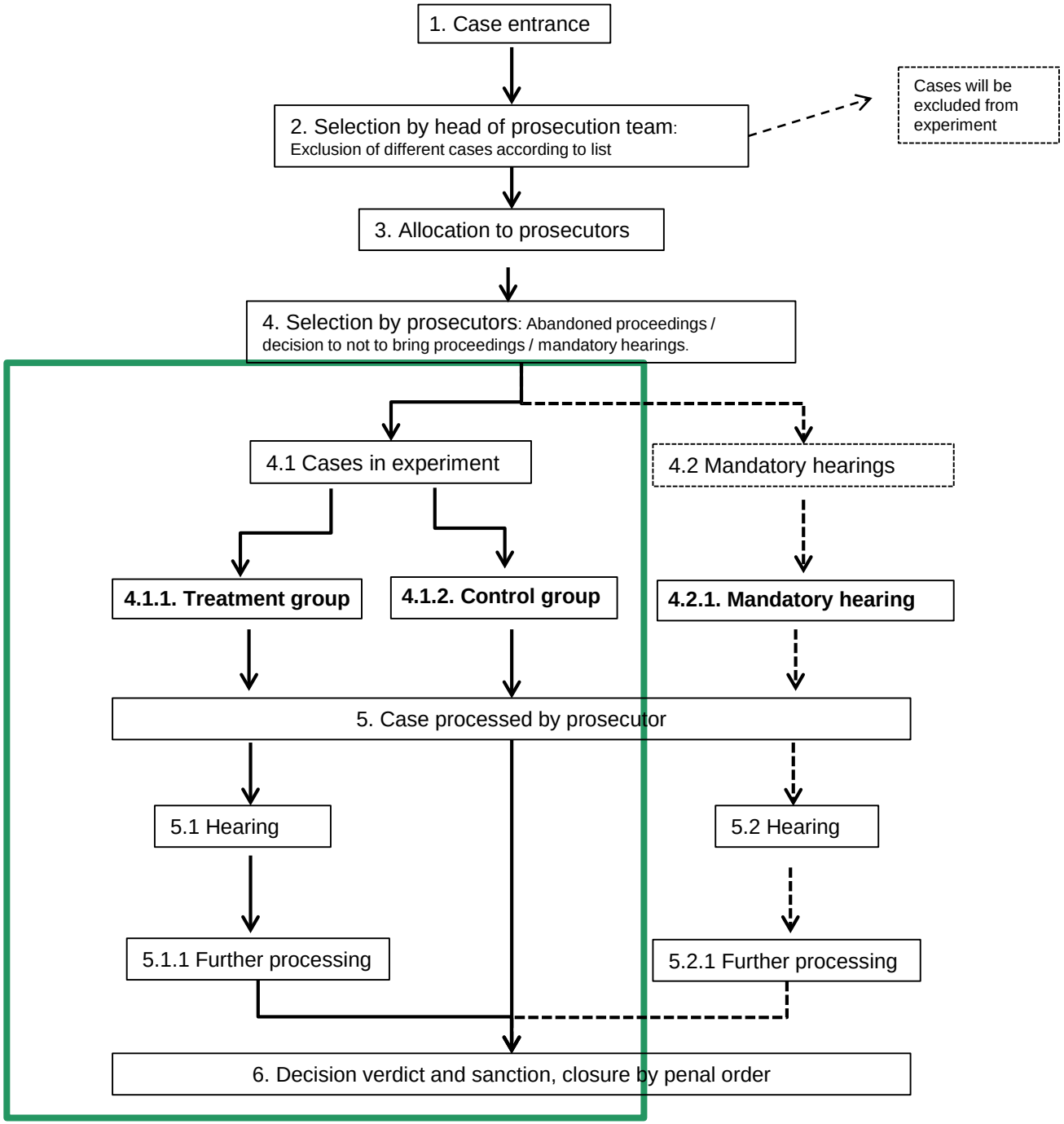
- Effect of hearings on verdicts?
  - Empathy of prosecutors might mitigate sentences
  - Defendants might bring up mitigating circumstances

➢ Effects of penal orders and hearings are simply not known yet

Research Method I

- Randomised controlled trial (RCT)
  1. Cases enter judicial system
  2. Unsuitable cases are excluded
  3. Cases are distributed to prosecutors & clerks (exclusion of cases with mandatory hearings)
  4. Software allocates cases to treatment or control group
     - Treatment group: Defendant with personal hearing
     - Control group: No personal hearing
  5. Cases are handled, verdict is passed
  6. Prosecutors and clerks record case information
  7. Once case is settled, questionnaire is sent to offenders

➢ RCT allows for control of multiple factors


1. Case entrance
2. Selection by head of prosecution team:
Exclusion of different cases according to list
Cases will be excluded from experiment
3. Allocation to prosecutors
4. Selection by prosecutors: Abandoned proceedings / decision to not to bring proceedings / mandatory hearings.
4.1 Cases in experiment
4.2 Mandatory hearings
4.1.1. Treatment group
4.1.2. Control group
4.2.1. Mandatory hearing
5. Case processed by prosecutor
5.1 Hearing
5.2 Hearing
5.1.1 Further processing
5.2.1 Further processing
6. Decision verdict and sanction, closure by penal order

Research Method II

- Surveys among defendants (after trial): Independant variables will be
  - Defendant's knowledge about the procedure
  - Defendants' perceived procedural fairness
  - Criminal identity / techniques of neutralization
  - Perceived fairness of punishment
- Survey among prosecutors/clerks (after trial)
  - Information about the procedure
  - Measure of emotions / empathy towards defendant

- After 24 months: Assessment of reoffending

Preliminary Findings I

- Pilot data collection to evaluate cases
- Data of all penal orders collected from one month (September 2016) in the Prosecutor's Office of St. Gallen

➢ Gives a first impression of types of cases included in the RCT

Preliminary Findings II

Concerned laws	N	%
Traffic law	149	44.0
«Other» convictions (e.g. criminal code)	107	31.6
Narcotics law	75	22.1
Traffic law & narcotics law	6	1.8
Rest & narcotics	2	0.6
Total	339	100.0

- Over 40% of the cases involve traffic offences
- Over 20% of the cases involve drug offences

➢ Basically a lot of minor offenses?

Preliminary Findings III

- **2.4%** (8 of 339) cases with **appeal**
  - 7 of 8 with subsequent reduction of sentence (1 pending)
- **5.9%** (20 of 339) with personal **hearing**
  - ➢ Even less than presumed!

Reasons given by prosecutors for personal hearings	N
Defendant on probation for an earlier conviction	5
Interview was seen as necessary to complete investigation	5
Hooliganism	3
Defendant had appealed against penal order	3
Preexisting admonition	1
Reason unclear, possibly the severity of the offence	3
Total	20

- ➢ Only 3 out of 8 appeals lead to a personal hearing!

Preliminary Findings IV

Sentences	N	%
Fine	222	65.5
Day-fine penalty in combination with a fine	83	24.5
Day-fine penalty	16	4.7
Custodial sanction	8	2.4
Custodial sanction in combination with a fine	6	1.8
Admonition	2	0.6
Community service	1	0.3
Case still pending	1	0.3
Total	339	100.0

Preliminary Findings V

- Total 14 prison sentences, 8 “pure”, 6 combined with fines

Length of prison sentence (in days)	N
20	1
30	3
40	2
70	1
90	2
150	2
180 (max. for penal order)	3
Total	14

➢ Wide range in length of prison sentences

Conclusion

- In Switzerland, 90% to 95% of convicted defendants receive a penal order.
- Penal orders mainly concern traffic and drug offences, criminal code offences are less often handled this way
- The penal order procedure is cheap and fast, but lacks personal contact (only 5.9%) and judicial control
- Very few appeals (2.4%): Not clear if this is due to the undisputed factual base of most convictions, or to the defendant's inability to use his procedural rights?
- Assessing the impact of personal hearings through an RCT is the only way to answer these questions

Thank you for your attention!

For comments and questions feel free to contact us:

nora.markwalder@unisg.ch
martin.killias@unisg.ch

Nora Markwalder
University of St. Gallen (HSG)
Law School
Bodanstrasse 4
9000 St. Gallen
Switzerland

Universität St.Gallen