



THE LEGALISTIC APPROACH
IN
GERMAN LAW ENFORCEMENT
PART II
THE IMPACT ON TRAINING AND DAILY POLICE WORK

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1. INTRODUCTION

In my paper "The Legalistic Approach in German Law Enforcement - Part I" I introduced the legal aspects of German policing. The legalistic principle, which implies total enforcement of law violations (excluding misdemeanors), clearly defines the assignment as well as the limits of police officers.

On the first view it may seem this approach is clearer and easier to practice and monitor. Though the police in Germany can impress the public with professionalism and success-rates there are many disadvantages to describe. Part II of "The Legalistic Approach in German Law Enforcement" shall offer an insight in the daily police work and training in Germany.

2. THE PROCESS OF RECRUITMENT AND MOLDING

The nature of the legalistic principle demands a broad knowledge of its legal background and embodiment in the Code of Criminal Procedure and of the police law of the German states. The training in the police academies takes two and one half years and is dominated by introductions into the German legal system and legal aspects of policing. In college type lectures the cadets learn the federal and state laws and their application in daily police work. Of a total of 3919 hours of training in the academy, 803 hours are law classes and another 448 hours of training instruct in applied legal regulations. Although it may be hard for American researchers to believe, neither the imparting of discretionary thinking nor new ideas for an appropriate or effective way of policing are goals of teaching in the academy. Police cadets and new sworn officers often complain about the inflexibility and narrow-mindedness of the system. *"If you have an idea on how to improve policing and the image of the police or how to enhance the effectiveness I can guarantee you are going to run up against a wall. They want to keep it the way it is"* (a Bavarian police cadet in an interview with me in 1990). The college-type character, the length, and the military style of the training attract especially young high school graduates 16 to 18 years of age with the minor diploma (Germany has a divided high school system which provides four different diplomas) and a

blue collar background. This tendency has been strengthened by the practice of the police to prefer young graduates to applicants with higher education and life experience in their hiring process. The reason - although never admitted by police officials - may be they adapt faster to a military/boarding school type facilities and are easier to mold (Busch 1985, 155). Attractive for young males is that the police training is the only education which is accepted as a supplements to the time young men have to serve in the military (or in supplementary civil services) after high school. Due to my own observations I found at least 90 % of all applicants advancing in the hiring process are 20 years of age or younger. The extent of regulations and laws they have to study in the academy is enormous. An ex-prosecutor and assistant professor of law in Munich mentioned in class 1987: "*The amount of laws a German police officer has to memorize exceeds even the knowledge of a lawyer*". This way of teaching shows disadvantages in the later police routine: In interviews I conducted 1989 German citizens often complained they have to face "*law-robots*" who may be able to repeat every letter of the law but lack any understanding of the spirit of the law. The officer has become a bureaucratic institution of law enforcement.

3. THE DISADVANTAGES OF THE LEGALISTIC PRINCIPLE IN POLICING

This chapter deals with the negative "sides" of the legalistic principle in policing. As will be demonstrated the impact on law enforcement is both direct and indirect. In this chapter I will also show that the practicality of the legalistic approach is questionable. There are several contradictions in the system itself as well as problems in using the legalistic approach in daily police work.

3.1. Incomplete Definition

The Code of Criminal Procedure may provide exact information for execution and prosecution, the "when" and "whether" to intervene and to investigate a violation of the law but it lacks the information about the amount of effort and time to put in (the "how" to investigate in a certain situation). The nature of the bureaucratic approach to policing needs exact guidelines if it does not want to favor uncontrollable elements such as discretion and partiality (Doelling 1987, 284). At a police intern conference in Tutzing 1989 one of the police unions (the "Gewerkschaft der Polizei") complained about these "loopholes": The district attorney's offices prosecute only 50 % of all violations and dismiss the rest of the cases knowing that the police investigation often ended

after data processing and that many of those abandoned cases could have been solved.

The amount of investigation by law enforcement agencies, which is not regulated by the legalistic principle, does vary from case to case depending on the severity of the violation and the chance to solve it (limited resources often result in the storage of cases - Sommermann 1988, 4). Police authorities once copied this procedure from the U.S. system missing the fact that it does not harmonize with the legalistic principle. The police are assigned, according to paragraph 163 I StPO, to investigate every violation and prevent any collusion and are not authorized to consider arguments of practicality in their investigation (Doelling 1987, 266).

3.2. The Problem of Ineffectiveness

The legalistic principle further reflects the operation of a bureaucratic system for law enforcement. The police officer has to make sure to take "every single letter" of the law into account while serving the public. The citizen, on the other hand, is able to check every step made by the officer because the guidelines for every step in enforcing regulations are state law and as such easily available to the public. This may seem strange to American researchers, the German public

however is quite astute in interpreting the law and bringing law suits because of officers' violations of the law. The police are aware of these control mechanism - they are confronted with critical citizens and newsmedia on a daily basis. For example, the process of handcuffing is neither part of the departmental regulations nor left to the officer's discretionary power. The circumstances which lead to handcuffing are all named in the police task law (i.e. Bavarian Police Task Law: article 44). Police officers rather risk resistance or escape by the suspect than the investigation of an questionable handcuffing. At police departments files several months old dealing with complaints claimed by citizens are the norm rather than the exception. There is a tendency that minor parking violation tickets are argued by citizens. *"You have to note every single detail when writing a ticket - then perhaps some months later you will be confronted with a filed contradiction. Misdemeanors have also become a major paperwork mill to deal with. It's a shame"* (a police officer in the Munich area). The bureaucratic system shows its impact on the enforcement of traffic violations. To assure prosecution of speeding tickets and "red light violations" the police use cameras with high sensitive films to prove every detail of the violations (such as license plate, driver's identity, exact speed, date and day time). If one detail is missing or not exact *"the chances of fighting a ticket are almost 100 %"* (according to an attorney in Munich,

1989). The bureaucratic character of the German law enforcement system could not adapt to a practice like in California, where the enforcement of moving violations in traffic are mostly based only on the statement of one officer. The officer's statement alone is not enough, the above mentioned phototechnical evidence or witnesses are needed in court. On the other side, the citizen's position may be very weak when the officer's action harmonizes with the police task law. Also if non-enforcement might be the better approach in a certain case - the routine does not provide much flexibility (Sommermann 1988, 2).

3.3. The Problem of Total Enforcement

The legalistic principle empowers the idea of total enforcement of the law (excluding misdemeanors). This is practically impossible, even in a country with a much lower crime rate than the U.S. (Sommermann 1988, 2/Riess 1981, 3) There are at least two reasons for the problem: First, the German legislators did not have a police state in mind when enacting laws and second, the problem of limited resources in law enforcement. These factors force our legal systems to develop a strategy how to deal best with the crime problem. In their daily police routine officers often have to make compromises: To cope with the great amount of violations and

requests the police and district attorneys cannot always act in the "sense" of the legalistic approach. One of the admissions is "looking away" from minor violations.

3.4. Preferential Investigation and the Setting of Priorities

There is a quite big gap between the statistical registered crimes and the number of crimes that actually occur. The reasons for this gap are the variations of reporting behavior of the victims of a crime and the state policy in law enforcement. For example, a concentration of (selective) police patrol in a certain area with major prostitution activities and little patrol in residential areas will result in higher arrest rates for prostitutes than for residential burglaries.

An argument in this context is whether the police should investigate without a direct suspicion. Some lawyers base their argumentation on the civil right of equality and want to see the legalistic principle being used in investigation of different cases to prevent such collusion (i.e. Jeuttner 1976, 167 ff) while others argue against any expansion towards total investigation (i.e. Weigand 1978, 60).

The success of investigation and search is often based on a concentration of time and personal in a certain area (i.e. narcotics) or on another case it's failure due to selective enforcement. The idea behind this strategy is to fight new or increasing forms of crime by concentrating resources. Variations in the intensity of investigations might be problematic because the legalistic principle stands for equal enforcement and prosecution.

3.5. Collision with the Goals of the Legalistic Principle

3.5.1. The Impossibility of Enforcement

The legalistic principle forces law enforcement agencies and their sworn officers to act the same in all law violations. But, under certain conditions, enforcing the legalistic principles of law may be impossible. Such circumstances may be lack of physical strength (i.e. two officers are confronted with a big crowd out of control), lack of time (i.e. while responding to an important call the officers observe another violation) or too high risk (i.e. officers face life threatening risk when need for enforcing the law) (Kerl 1986, 314). The law responds to these problems unsatisfactorily: While the Code of Criminal Procedure does not deal with this

problem at all the Police Task Law only deals with time and offers use of a third persons for help (article 10 Bavarian Police Task Law). The interpretation of the circumstances leading to non-enforcement is often subjective while the obligation to enforcement is objective. Though the impossibility of an event may imply that there is no reasonable need for enforcement the law lacks clarity. Different views have caused internal conflicts for the police as well as between police and public.

3.5.2. Excessive Force

Under certain circumstances enforcing the law may result in excessive force. Examples: (a) A petty theft flees the scene when police are arriving. The theft could be stopped by shooting at him/her. (b) Police could apprehend a criminal who is hiding behind a big crowd of people only by a massive break through. The law prohibits excessive force and commits the police to the "principle of relativeness" (article 4 Bavarian Police Task Force Law / Kerl 1986, 314). These principles are: (a) The commitment to select the method with the lowest negative impact on the individual and the public; (b) The negative impact of the method may not be out of proportion to the desired success; (c) The method must end as soon as it has reached its goal or if it will not succeed. Therefore the

officers may have to abandon the legalistic principle if it's enforcement would be excessive.

The conflict between the legalistic principle of the Code of Criminal Procedure and the ban of excessive force by police law is described following example:

Police are facing a demonstration of several thousand people against nuclear power plants. There are about twenty people in this crowd wearing masks (which in the past was misdemeanor and today is a felony), the police officers obligated to arrest those twenty demonstrators must use force against the other demonstrators to reach the masked subjects. A tactic later interpreted by the public as police-provocation and excessive force. The supervisors at the scene justified their action by the legalistic principle knowing that non-enforcement due to excessive force would have been disapproved by the department of the interior (the highest police authority).

3.5.3. The Use of Deadly Force

The use of deadly force in the criminal justice system in Germany has been subject of many legal arguments and is still not nationally regulated. While some German States (i.e. Bavaria) provide an order for deadly force (the "Finaler

Rettungsschuss") to save innocent lives, other states (i.e. Northrhein-Westfalia) have refused to do so and have acted against the binding recommendation of the Federal Department of the Interior (the superior authority of all state police). The explanation given against the "calculated deadly shot" is the fact that the offender - after being killed - can no longer be prosecuted by court (Busch 1984, 310-317). Therefore, the critics argue that it is a constitutional question not only a human rights problem. The use of force as well as the use of deadly force are regulated by very strict and comprehensive guidelines in the "police laws" of the German States. Especially deadly force, may only be used in the ultimate case and may only be practiced if there is a "present, actual, and severe threat of life to the officer or a third person" and no other way to solve or to escape the situation (see Bavarian Police Task Law article 45-47).

3.5.4. The Problem of Undercover Investigation and Confidential Informants

Organized crime, drug-trafficking, and prostitution often happen in a closed environment and their processes are hardly visible to law enforcement and prosecutorial agencies. To gain access to these environments the police depend on undercover

agents and confidential informants (Schaefer 1986, 58-60). These are methods that have been successfully practiced in the U.S.A. for several decades but are problematic in Germany. While the "U.S. discretionary system" provides many possibilities for undercover police work this method is contrary to the legalistic criminal justice system in Germany: Neither may the police tolerate any criminal activities of informants nor any involvement of their own officers (Geisser 1985, 265-269). As soon as the police obtain knowledge about any deviancy on the part of the officer they must intervene. Since different forms of organized crime and drug-trafficking are advancing in Europe the German police have started to work with the help of undercover agents and confidential agents. They are moving on very thin "ice" because there is no legal protection for such action. Working undercover and/or with an informant needs the approval of the district attorney yet, there remains some vulnerability for the police. Also if the district attorney agrees with the procedure the undercover agent may not get involved in illegal actions. Either the agent has to leave his undercover position or he risks his own prosecution. The distribution of undercover work into legal approval and supervision by the district attorney on the one hand and the action and risk left with the undercover agent on the other hand is very problematic. Because of the lack of total insight in the case and experience in policing the district attorney may not be the most competent supervisor for

the agent (especially when supervising from behind the desk) and on the other side the agent - desperate to solve the case - is alone with the risk: Not only working undercover that causes a high danger the undercover agent also the risks being uncovered caused by the criminal justice system's strict rules. Working with confidential informants is also a problem. Informants who may have been involved in illegal actions - before, during or after working as an informant - they cannot count on the help of the police. The police are acting illegally themselves when working with an informant when they have knowledge of his criminal activities, past, or reputation (Geisser 1985, 247-269).

4. SUMMARY

By nature of the legalistic approach, the German police practice a re-active instead of pro-active policy. They have to respond to every violation (even to every suspicion of a violation) according to the letter of the law. Considering the police also have to investigate all those cases only based on a civilian's observation ("filed applications for enforcement and prosecution by citizens") there is little time left for the actual practice of preventive policing.

The inflexibility of the police for improvement of effectiveness or establishment of programs like community policing results out of the legalistic principle. Since 1975 when all local police departments became state police branches law enforcement became a centralized operation in Germany. The Federal Department of the Interior has adjusted the policies and police task laws of the German States. This development is only a logical result of the legalistic system which neither encourage nor tolerate individual forms of policing. Alternative methods regarding juvenile delinquency, drug enforcement, organized crime, and community policing are difficult if not impossible, to introduce to daily law enforcement: Police officers have become too familiar to the bureaucratic method of policing - asked whether they would like to have more discretionary authority they surprisingly

answer "no" though complaining about the narrow-mindedness of the legalistic system. I assume these officers fear the ultimate responsibility for their actions on the street based on their discretion to act. A development towards a more discretionary police system would require a new legitimacy of entire criminal justice system. I also believe neither the administration dominated by lawyers nor the German people would accept the idea of discretionary law enforcement. This approach would be too contrary to the German understanding of state authority and its value system, that is not based on freedom but on social achievements as well as on law and order of "Bismarck's Germany".

L I T E R A T U R E

- Busch, H./Funk, a./Kauss, U./Narr, W.-D./Werkentin, F.: Die Polizei in der Bundesrepublik, Frankfurt/New York 1985
- Doelling, D.: Polizeiliche Ermittlungstaetigkeit und Legalitaetsprinzip. Eine empirische und juristische Analyse des Ermittlungsverfahrens unter besonderer Beruecksichtigung der Aufklaerungs- und Verurteilungswahrscheinlichkeit. Erster Halbband. (BKA-Forschungsreihe, Sonderband). Wiesbaden, Germany 1987
- Doelling, D.: Determinanten und Strukturen polizeilicher Ermittlungstaetigkeit. In: Kaiser, G./Kury, H./Albrecht, H.-J.: Kriminologische Forschung in den 80er Jahren. Projektberichte aus der Bundesrepublik Deutschland, Freiburg, Germany 1988, pp. 95 following
- Geisser, H.: Die Yusage der vertraulichen Behandlung einer Mitteilung bei der Straftatenklaerung. In: Poetz, P.-G.: Goltammer's Archiv fuer Strafrecht (GA), 132. Jahrgang, 1985, pp. 247 following
- Harrach, E.-M. Graefin von: Grenzen und Moeglichkeiten der Professionalisierung von Polizeiarbeit. (Dissertation). Muenster 1983
- Jaeger, J.: Gewalt und Polizei. Beitraege zur gesellschaftswissenschaftlichen Forschung. Band 6. Pfaffenweiler, Germany 1988
- Jeuttner, F.: Sinn und Grenzen des Legalitaetsprinzips im Strafverfahren, Muenchen 1976
- Kerl, H.-J.: Das Opportunitaetsprinzip als Magd des Legalitaetsprinzips. In: Zeitschrift fuer Rechtspolitik (ZRP), Heft 12, 1986, pp. 312 following
- Krey, V.: Grundzuege des Strafverfahrensrecht (9.Teil). In: Brox, H./Friauf, K.H./Fromm, H. and others: Juristische Arbeitsblaetter. Ausbildung, Examen, Fortbildung, Germany, Februar 1985, pp. 61 and 119 following
- Marquardt, H.: Die Entwicklung des Legalitaetsprinzip. Ein historisch-empirischer Beitrag zur Gesetzgebung. Inaugural-Dissertation an der Universitaet Mannheim, Mannheim, Germany 1982
- Martin, H./Samper, R.: Polizeiaufgabengesetz: PAG. Gesetz ueber die Aufgaben und Befugnisse der Bayerischen Staatlichen Polizei (Boorberg Taschenkommentare), Stuttgart/Muenchen/Hannover, Germany 1979

Model, O./Creifelds, C.: Staatsbuerger-Taschenbuch. Alles Wissenswerte ueber Staat, Verwaltung, Recht und Wirtschaft mit zahlreichen Schaubildern, 21, Muenchen, Germany 1983

Reinke, H.: "Armed As If for a War": The State, the Military, and the Professionalisation of the Prussian Police in Imperial Germany. In: Emsley, C./Weinberger, B.: Policing Western Europe. Politics, Professionalism, and Public Order, 1850-1940. Westport, CT 1991

Riess, P.: Die Zukunft des Legalitaetsprinzips. In: Neue Zeitschrift fuer Strafrecht (NSTZ). Germany, Heft 1, 1981

Schaefer, H.: Die Praedominanz der Praevention. Ein Beitrag zu den Grundlagen der theoretischen Kriminalstrategie. In: Poetz, P.-G.: Goldammer's Archiv fuer Strafrecht (GA), 133. 1986, pp. 4 8 following

Schroeder, F.-C.: Der Begriff der Strafverfolgung. In: Poetz, P.G.: Goldammers Archiv fuer Strafrecht (GA), 132. Germany, Jahrgang, 1985, pp. 485 following

Sommermann, D.: Anrede zur Tagung der GdP ueber das Legalitaetsprinzip in Tutzing. Unpublished. 1988

Vahle, J./Buttgereit, S.: Eingriffsrechte der Polizei. Ratgeber fuer die polizeiliche Praxis, Karlsfeld bei Muenchen, Germany 1983

Wagner, H.: Zum Legalitaetsprinzip. Eine Studie, in Festschrift fuer den 45. DJT. Karlsruhe, Germany 1964

Weigend, T.: Anklagepflicht und Ermessen. Dissertation, Muenchen, Germany 1978

Wittkaempfer, G.W.: Rechtsstaat. In: Mickel, W.: Handlexikon zur Politikwissenschaft (Schriftenreihe der Bundeszentrale fuer politische Bildung - Band 237), Bonn, Germany 1986, pp. 431 following