

Rule of Law and Police in Germany

**Dr. Clemens Arzt
Professor of Public Law
Berlin School of Economics and Law**

**www.hwr-berlin.de/prof/clemens-arzt
Clemens.arzt@hwr-berlin.de**

Lectures at SLS 2014

Major Duties of German Police (I)

Police Law / Public Safety Laws:

- Maintenance of **public safety**
- Maintenance of **public order**
(*Today a very limited approach. E.g. begging, drinking in the public, or loitering do not interfere with public order in general but are constitutionally protected*)
- Protection of **private rights** against intrusions by private persons, only in case a judge cannot come to a timely decision and delay may endanger said private right
- (Compulsory) **Enforcement** of other agencies' orders
- Few other miscellaneous duties as provided for by the law

Major Duties of German Police (II)

Prevention of crime:

By definition no danger to public safety nor suspicion of criminal act exists

Criminal Procedure Law:

- ***Making provisions for the detection of crime***
- ***Detection of crime / Investigating crime***
- ***Apprehension of criminals***

[Not covered in this lecture !!!]

Article 20(3) German Constitution (so called Basic Law - Grundgesetz)

Basic Principles of State

*The Legislation is subject to the constitutional order;
the executive and the judiciary are **bound by law** and justice.*

The Executive is Bound by Law and Justice: Art. 20(3) Const.

- The police too have to adhere to the law – PERIOD !
- “Law” only refers to **statutory law** (not rule or regulations of police)
- A **duty** of police doesn’t provide for any **powers**
- No “action” without **explicit statutory provision !!!**
(Very restricted use of so called blanket clause in police law)
- **Law** might be different from **Justice** (e.g. Nazi laws)
- The police cannot refer to Justice if they think the Law is “wrong”

Police Officers Are Bound by the Law

- Is the problem before hand within the **competence/ responsibility** of the police?
- If police action results in an **intrusion** upon fundamental right:
 - Is there any **statutory law** that gives the police the right/power act ?
 - Is **judicial control** required before taking action ?
- Are the means police uses in accordance with the constitutional principle of **appropriateness-of-means** (proportionality) ?

The Appropriateness-of-Means-Standard

In police law (as well as in criminal procedure law) any means has to be in accordance with each of the three following constitutional principles, following from the **rule of law**

- **Suitable** Can a given purpose be achieved by this specific means ?
- **Necessary** Is there any less intrusive means ?
- **Adequate** Is a suitable and necessary means also adequate in a given case ?

Thus, rule of law is **substantial**, not only formal or procedural standard

Typical Powers under Police Law (I)

In case of danger for public safety, e.g.:

- Interrogation/Questioning
- Investigation/Inquiry
- Ascertaining of personal data (identification)
- Collection, and use of personal data including rules on data protection
- Subpoena
- Sending a person off a certain place, or his or her home
- Search (persons/houses/personal goods)
- Seizure/confiscation (personal goods/property)
- Arrest

- **Blanket Clause** (*Applicable only when no specific power is provided for in the other rules, but not, if legislature fails to provide for such means.*)

Typical Powers under Police Law (II)

Prevention of crime, e.g.:

- **Video-surveillance** of public places
- **Video-surveillance** of any police-citizen interaction
- **ID-Checks and ID-Checkpoints** without danger or suspicion
- **Search** of person and luggage at such checkpoints
- **Automatic Number Plate Recognition** in certain areas (in some States only under very strict limitations)

Each of these means may legally be used **against everybody** even though this person does not cause any danger, and no suspicion that she/he may have committed a crime !

To keep in balance with **appropriateness-of-means** as a constitutional principle, however, some of these means require **prior approval** by a high ranking police officer or court!

Typical Powers under Police Law (III)

Summary:

- German Police Law is governed by high constitutional standards and limited powers of the police when it comes to **dangers to public safety**
- So-called “**Prevention of Crime**” in the last 10 – 15 years resulted in a continued downhill trend against protection of fundamental rights.
- Despite of high constitutional standards German police law provides for all necessary means to constitute a “**police state**” without “formal” change being necessary.

This is especially true when it comes to the powers under Prevention-of-Crime-Standards.

- In recent years often the courts “reconstructed” protection of **fundamental rights** when it comes to (new) police law under the prevention-of-crime “flagship”.

Decision-Making-Process under Police Law

1. Is the problem before hand within **competence/responsibility** of police ?
(This is only the case, if no other agency in charge of public safety, is able to take timely action; standard varies according to law of the *Laender*.)
2. Is action is an **intrusion** upon fundamental right
(*which almost always is the case in a police-citizen-interaction*):
3. Is there any **statutory law** that gives me the **right/power** to undertake planned action?
4. What exactly are the **legal requirement/standards**?
5. Discretionary power:
Is there any **legal obligation** for the police to act under police law ?
6. Is action in the given case in accordance with the principles of **appropriateness of means** ?
7. Is **judicial control** required before taking action ?

Use of Force

- In general, **non-compliance with a police order** this neither is a crime, nor a (minor) offence.

Different only for active physical resistance, and refusal of (legitimate) identification procedures.

- If a person does not comply with such order, the police might carry out this order by **use of force**
- Appropriateness-of-means-standard apply
- **Means of coercion** are:
 - **Substitutional Act** by the Police
(The police is carrying out the demanded action, e.g. moving a car out of a parking ban, while the responsible person is being charged for.)
 - **Physical Force**
 - **Coercive Fine**
(This is not a sanction/penalty but only intended to bring disobedience of the responsible person to an end !)

Slides and Link

<http://www.hwr-berlin.de/prof/clemens-arzt/lehre/>

**Go towards end of page: „Lectures at Symbiosis Law School“
See also slides on „Basic Principles of Police Law“**

German Constitution in English:

www.gesetze-im-internet.de/englisch_gg/index.html