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Exploring the Tension Between the Obligation on the Police of Swiss to Prevent and Prosecute Crime

¹Andreas Donatsch
²Welte Eliane

¹ University of Zurich, Swiss
Rämistrasse 74/14, CH 8001 Zürich
Doctor of Legal Sciences, Professor
E-mail: andreas.donatsch@rwi.uzh.ch

² University of Zurich, Swiss
Rämistrasse 74/14, CH 8001 Zürich
Assistant
E-mail: welte.eliane@rwi.uzh.ch

Abstract

The following article examines the tension between the obligation on the police of Swiss to prevent crime and ensure public safety as regulated in police law on one hand and the prosecution of criminal offences in accordance with the Code of Criminal Procedure on the other. Police officers have two fundamentally different functions: They are authorized and indeed obliged to take action to prevent crime, in addition they are also expected to act in accordance with the Code of Criminal Procedure with a view to investigating crime and enabling the prosecution of offenders. It is not always easy, however, to draw a clear line between these two areas of responsibility as the police activity in a specific case can serve both preventive and repressive purposes. In the following article, a number of examples will be provided in order to highlight the different functions of the police in preventing and prosecuting crime.

Keywords: General police clause; hostage taking; investigating crime; police law; preliminary proceedings; preventing crime; principle of proportionality; prosecuting crime prosecution of criminal offences; protection against imminent danger; public events; public safety; risk of violence; ultima ratio.

Introduction

The tension between the obligation on the police of Switzerland to prevent crime and ensure public safety is not sufficiently uncovered in scientific literature. The object of the research is analysed from the positions of national and international law.

Sources and methods

The main sources for these article preparation were official documents of the Switzerland and its cantons, as well as articles from scientific magazines.

During the research were used such methods as: problematic-chronological, historical-situational, of system analyses and comparative. Authors reflection is based on the problematic-

chronological approach. The usage of historical-situational method allowed valuate approaches to the obligations of the police. Method of the comparative research was used to compare federal and cantonal legislation. The usage of the system analyses method is necessary to use knowledge of different legal disciplines (criminal law, criminal process, etc.).

Discuss

Both police law and the Code of Criminal Procedure of Suisse law serve to regulate the activities of the police. According to the Federal Constitution, the enactment of police law falls within the competence of the cantons whereas the Federal Government has competence in the context of the Code of Criminal Procedure [1, 2. S. 11, 3, 4. N 75, 5].

The preventive aspect of police activity is of great importance. This consists in ensuring public safety and public order and in taking the necessary measures in case of immediate danger or disturbance [2. S. 11]. According to paragraph 3 section 1 of the Police Act of the canton of Zurich (PolG ZH) [9]: «The police shall contribute to maintenance of public safety and order by providing information, advice, visible presence and other suitable measures». Section 2 of the same paragraph reads: «The police shall take measures, in particular, to prevent criminal activity» (lit. a) as well as «to protect people, animals, the environment and objects from imminent danger and to deal with any corresponding disturbances (lit. c)». In the context of danger, the police activity is targeted at future occurrences. Examples of police activity targeted at preventing criminal activity include traffic and identity controls, involvement at the scene following road accidents, the guarding of public buildings and patrolling residential districts. Furthermore the police are also involved in attending approved demonstrations and large sporting events in order to prevent disturbances and damage to property.

To the extent that police activity remains within the framework of the prevention of criminal offences, it is the Police Act and not the Code of Criminal Procedure which is applicable. In addition, the general police clause (Article 36 of the Federal Constitution), which authorizes the police to take the necessary measures to prevent serious, imminent danger or disturbances, also offers a legal basis for police activity, providing that no other legal norms are applicable [10, 11]. In the context of police law, particular difficulties arise in the context of meeting the requirement that legal rules be precisely defined. Especially in the context of preventing crime, it is impossible to exhaustively define, in advance, the limits of police activity [11, 12, 13]. On the contrary, police officers will often be required to take appropriate measures on the basis of the specific circumstances of the individual case, which will often be difficult if not impossible to predict in any detail in advance and frequently under significant time constraints [10, 11].

In such circumstances – in cases concerning unforeseeable dangerous situations which by their nature are not regulated in law – the general police clause takes the place of a substantive legal basis for interferences in fundamental rights [15]. In view of these far-reaching powers of intervention, the scope of application of the police general clause is strictly limited: It can be invoked in the event of genuine and unforeseeable emergencies, but it is not applicable in the context of typical and foreseeable dangerous situations, which despite the foreseeable nature of the situation had not otherwise been subject to legal regulation [10. N 213, 11. S. 160, 16, 17]. The indeterminate nature of the general police clause means that its scope of application must be interpreted restrictively. As is the case with any interference by the police in the constitutional rights of an individual, the principle of proportionality must be respected [4. N 79, 11. S. 162].

The police act in a different capacity when they take action within the framework of prosecution. Here they are responsible for detecting and investigating crime [9. § 4]. In this context, the police activity is not targeted at preventing crime and protecting against imminent danger but is rather focused on the investigation of criminal offences with a view to enabling the prosecution of offenders.

Within the framework of this aspect of police work, which is not targeted at preventing future harm, the provisions of the Code of Criminal Procedure are applicable [2. S. 11; 18. S. 273 ff.; 19. Art. 306 N 2; 5. Art. 15 N 2]. This applies to all police activity aimed at investigating crime and to all police officers who are involved in such activities [2. S. 11; 20. Art. 306 N 3; 21. S. 1085 ff., 1136]. The Code of Criminal Procedure is essentially repressive in nature and serves the enforcement of the state's monopoly on the punishment of its citizens for criminal acts [3]. According to Article 306, section 1 of the Code of criminal procedure (StPO) [22]: «On the basis of reports that a

criminal offence has been committed, the instructions of the prosecution or their own findings, the police shall establish in the course of their inquiries those facts relevant to the criminal offence». In particular they shall secure and evaluate traces and evidence, identify and question aggrieved parties and persons suspected of being involved in a criminal offence and conduct a search for and arrest suspected persons (Article 306, section 2). During these preliminary proceedings, the prosecution is authorized, from the very beginning, to give orders to the police and, if necessary, is entitled to assume principal responsibility for the case (Article 307 section 2). As soon as the activities of the police are no longer classed as preventive in nature, the prosecution is automatically entitled to issue instructions to the police [2, 21].

The distinction between preventing and prosecuting crime

It is important to note that the boundaries separating the activities of the police in preventing, and assisting in, the prosecution of crime fluctuate and it is not always easy to draw a clear line between these two areas of activity [4, 23. S. 48]. The difficulty in clearly differentiating between these two fields can be illustrated by way of example: If the police take action at an event at which there is potential for violence to erupt (such as a football match or a demonstration) with a view to preventing violence, their action is to be characterised as preventive and thus falling within the scope of police law. The police may be required to take concrete measures to protect legally protected assets or interests which are under threat. However, as soon as specific criminal offences (such as damage to property or assault) are committed during such an event, the police are obliged to take action to assist in investigating crime, which means that their activities involve the prosecution of crime and are thus governed from this moment on, at least in part, by Code of Criminal Procedure. Another example concerns police activity in the context of road traffic matters: If police officers carry out a traffic control or a traffic observation such activities constitute preventive measures, as the aim of such measures is to prevent the commission of criminal offences by identifying drivers unfit to drive or vehicles which are not safe to operate and withdrawing them from circulation. If, during such a traffic control or traffic observation, concrete violations of the Federal Law on Road Transport (SVG) [24] or of traffic regulations are observed, the police are required to initiate a criminal investigation. From this moment on, their activities are orientated towards the prosecution of crime [2, 25. S. 363].

The answer to the question whether police activity in the specific case falls within the scope of crime prevention or prosecution depends among other things on whether there can be said to be suspicion that a crime has been committed [20. Art. 306 N 8; 23. S. 48; 25. S. 363]. As soon as there is suspicion that a crime has been committed, the police activity is subject to the regulations set out in the Code of Criminal Procedure [4. N 82]. However the existence of suspicion cannot be the sole and decisive criterion determining this distinction. This can be illustrated with regard to the offence of hostage taking: Even though in such cases there is without doubt an initial and concrete suspicion that a crime has been committed, the police activity to protect the life of the hostages is primarily aimed at protecting against (imminent) danger and is therefore regulated by police law.

In the context of the activities within the framework of prosecution, Article 307, section 3 of the Code of Criminal Procedure obliges the police to record all of their observations as well as all measures taken in a written report for the attention of the prosecution. The point in time at which this duty of documentation arises is, however, not entirely clear. It will often be the case that while there is considerable circumstantial evidence, there cannot yet be said to be concrete suspicion [16]. As soon as concrete suspicion emerges that a crime has been committed, the police activity must be said to fall within the scope of preliminary proceedings and from this point on the Code of Criminal Procedure is applicable.

Defining the boundary between police law and criminal procedure law

It is often difficult in practice to draw a clear line between preventive activity and activity focused on prosecution not least because this distinction is subject to fluctuation [25. S. 363; 26. S. 245; 4. N 82]. Nevertheless the distinction is without doubt of considerable importance with regard to the determination of the relevant legal basis in the concrete case: In the case of preventive activity the police law is applicable, whereas at the stage of prosecution the Code of Criminal Procedure is applicable. There are situations in practice, however, in which there is a dual basis for

action, that is to say there is a basis both in police law and in the Code of Criminal Procedure [2. S. 42]. If police action serves preventive and repressive aims simultaneously, the measure is said to have a “double function” [27. S. 343 ff]. In such a situation, some overlap or even conflict between the interests in prosecuting and preventing crime can occur. This might happen, for example, if urgent rescue measures are undertaken which inevitably result in the destruction of evidence at the crime scene [25. S. 363; 20. Art. 306. N 7].

If only one of several tasks can be completed at a certain point in time, the police will be required to focus on the most important one which is likely in most cases to be the prevention of harm [28. § 5. N 13, 23. S. 48]. Especially in cases involving crimes against the person, it is likely that the prevention of harm will take priority. The police activity aimed at serving the purposes of prosecution, such as securing evidence, taking photographs of the crime scene and questioning witnesses will then be of secondary importance. As a rule, the police must first deal with any imminent danger and only after this has been dealt with, then turn their attentions to the matter of prosecution [28. § 5 N 10]. These difficulties will be illustrated in the following section with reference to two typical scenarios.

Hostage taking

A typical constellation for a conflict to arise between the prevention and prosecution of crime is the criminal act of hostage taking; in such situations it is not uncommon for multiple people to be in immediate danger. Of course, it is important in the interests of the prosecution of crime that evidence at the crime scene be secured and that the hostage-taker be arrested as soon as possible and called to account for his criminal act. But at the same time there is an immediate danger to important legal interests, notably the life and limb of the hostages and other persons, which requires to be protected at all costs [2. S. 42; 23. S. 48 f.]. In order to achieve a bloodless ending of the hostage taking, the police will often try to establish contact with the hostage taker and conduct negotiations with a view to saving the hostages and this will without doubt take priority over securing evidence and arresting the hostage taker. The police activity, as well as the activity of the chief negotiator, at this stage is therefore essentially preventive, with a view to protecting the interests of the hostages. In the case of a hostage taking, the police activity serves primarily protective interests as long as the hostage taker endangers any third parties. Even though in this constellation there is no doubt about the existence of a strong suspicion that a crime has been committed, the police activity in the first place constitutes crime prevention with a view to protecting against danger.

It is impossible to simultaneously meet the obligation to protect against danger and to promote the interests of the prosecution in such situations. As a result the weighing up of all of the interests at stake and the determination of how to proceed is essentially a tactical decision for the police. The decision-making competence in this regard lies with the person in charge of operation [19. Art. 306. N 3; 20. Art. 306. N 7].

In contrast there is no conflict if the hostage-taker entrenches himself in a building and there is no danger at all to third parties, because they were released or because they were able to escape. In this constellation, the police activity cannot be deemed to serve the preventive aim of protecting against harm but is targeted solely at arresting the hostage-taker and enabling his prosecution. For this reason, in such a constellation, only the regulations of the Code of Criminal Procedure are applicable. It is important to note that one of the fundamental principles of police action consists in the protection of the lives of those involved. For this reason, it is important too that the hostage-taker's life is also protected. Especially firearm action against the hostage-taker is only permitted as a last resort (*Ultima Ratio*) [29, 30, 23. S. 49, 31, 32].

In the specific case, the protection of the hostages' lives may mean that is necessary to allow the hostage-taker to escape with the hostages even if as a result the prosecution is delayed or even rendered impossible. In such a situation any attempt to catch the offender must be postponed, since when the protection of life and limb is at stake, protection against harm has clear priority over the prosecution of the offender [28. § 5. N 13 f.]. This also applies in relation to a shot to kill (final and fatal shot) which mortally injures the hostage-taker: if in this way a persistent threat to the hostages is eliminated and a possible escape combined with additional hostage taking is prevented the main focus of police action lies without doubt on protection against such danger

[33]. In this specific situation the secondary aim of the prosecution of the offender is no longer of any importance, as a criminal investigation cannot be initiated in respect of a deceased person.

Public events at which there is an enhanced risk of violence

A second area in which the aims of crime prevention and prosecution have the potential to collide concerns events at which there is an enhanced risk of violence. Demonstrations and large sporting events such as football games belong to this category of events. Within the framework of these events police activity can be divided into different stages which can be illustrated with regard to a football match: In the preparation phase the focus is on controlling the spectators arriving at the ground. The aim is to prevent people willing to resort to the use of violence from entering the stadium. In order to achieve this, the police undertake investigative activity and plan various measures in the run-up to the event despite the fact that at this stage there is no suspicion that a crime has been committed. During the football match, the police work closely with private security staff employed by the stadium operator and intervene if necessary [8. S. 60]. Up until this point in time, the aim is on the prevention of crime.

As soon as criminal offences are committed within the framework of such an event, however, the role of the police expands to include taking measures to further the interests of the prosecution of crime. As soon as the police establish that criminal offences have been committed, the police are under an obligation to identify the perpetrators and to ensure that they can be called to account, although this can prove difficult in practice. At football matches the period in time after the final whistle has been blown is deemed to present significant risk, because at this point in time there is considerable potential for aggression by the fans. It is not uncommon for considerable damage to property, assault and other criminal acts to be committed [8. S. 64 ff]. If such criminal offences are committed, the police are obliged to act within the scope of their function in relation to the prosecution of crime: The criminal acts are to be investigated and the offenders' identities determined. At this stage, the police activities are fully governed by the provisions of the Code of Criminal Procedure.

Conclusions

It is not always simple to draw a clear line in practice between the obligations on the police to prevent and prosecute crime. On the one hand police activity might fall under the regulation of both police law and the Code of Criminal Procedure. On the other hand conflicts might arise between the preventative and investigative functions of the police in the specific case at issue. In the latter case, the person in charge of operations is responsible for determining the priorities. As a general rule especially if the protection of the life and wellbeing of persons is at stake it will be necessary first to deal with the imminent danger and only then to turn to the issue of establishing the facts of the case and initiating the prosecution of offenders. In view of the different legal bases applicable in the concrete case, the distinction between preventive and repressive police activities is without doubt of the utmost importance.

References:

1. Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 // SR. 101.
2. Albertini, Gianfranco. Einführung // Polizeiliche Ermittlung, ein Handbuch der Vereinigung der Schweizerischen Kriminalpolizeichefs zum polizeilichen Ermittlungsverfahren gemäss der Schweizerischen Strafprozessordnung. Zürich, 2008.
3. Diego R. Gfeller/Adrian Bigler. Zwangsmassnahmen gemäss StPO versus polizeiliche Zwangsmassnahmen nach PolG/ZH, forumpoenale. 2014. N^o 2. S. 106.
4. Oberholzer N. Grundzüge des Strafprozessrechts. 3. Aufl. Bern, 2012.
5. Schmid N. Schweizerische Strafprozessordnung. Praxiskommentar. 2. Aufl. Zürich/St. Gallen, 2013. N 2. Art. 15.
6. Mohler Markus H.F. Grundzüge des Polizeirechts in der Schweiz. Basel, 2012. N 85.
8. Deusch F. Polizeiliche Gefahrenabwehr bei Sportgrossveranstaltungen, Darstellung anhand des Fussballsports. Berlin, 2005. S. 60.
9. Polizeigesetz (PolG) vom 23. April 2007 // LS. 550.1.
10. Baumann A. Aargauisches Polizeigesetz, Praxiskommentar. Zürich, 2006. N 212.

11. Reinhard H. Allgemeines Polizeirecht – Aufgaben, Grundsätze und Handlungen. Bern, 1993. S. 161.
12. BGE 128 I. S. 327 ff.
13. Ritter W. Schutz der Freiheitsrechte durch genügend bestimmte Normen, St. Gallen, 1994. S. 79.
15. BGE 128 I 340 f.
16. BGE 126 I 118.
17. BGE 121 I 28.
18. Donatsch A., Schwarzenegger C., Wohlers W. Strafprozessrecht. 2. Aufl. Zürich, 2014. S. 273.
19. Landshut N., Bosshard T. Zürcher Kommentar zur Schweizerischen Strafprozessordnung, 2. Aufl., Zürich/Basel/Genf 2014, hrsg. von A. Donatsch/Th. Hansjakob/V. Lieber. Art. 306 N 2.
20. Rhyner B. Basler Kommentar, Schweizerische Strafprozessordnung und Jugendstrafprozessordnung, Basel, 2011, hrsg. von M. A. Niggli/M. Heer/H. Wiprächtiger. Art. 306.
21. Botschaft zur Vereinheitlichung des Strafprozessrechts vom 21.12.2005 // BBl. 2006. S. 1085, 1136.
22. Schweizerische Strafprozessordnung vom 5. Oktober 2007 // SR 312.
23. Donatsch A / Käser B. Die strafrechtliche Verantwortlichkeit des Verhandlungsführers bei Geiselnahmen. Kriminalistik. 2010. N 64.
24. Strassenverkehrsgesetz vom 19. Dezember 1958 // SR 741.01.
25. Albertini G., Rügger P. zur Zusammenarbeit von Polizei und Staatsanwaltschaft, forumpenale. 2010. N 6. S. 363
26. Blättler S. Die Stellung der Polizei im neuen schweizerischen Strafverfahren // ZStrR. 2007. S. 245.
27. Nolte M. Doppelfunktionale Massnahmen in der polizeilichen Praxis // Kriminalistik. 2007. N 61. S. 343 ff.
28. Bodo Pieroth et al., Polizei- und Ordnungsrecht mit Versammlungsrecht. München, 2014.
29. See: SJZ 98/2002. S. 365.
30. Donatsch A. Die strafrechtliche Beurteilung von Rechtsgutsverletzungen bei der hoheitlichen Anwendung unmittelbaren Zwangs. Zürich, 1981. S. 186.
31. Hug T. Schusswaffengebrauch durch die Polizei. Zürich, 1980. S. 70, 273.
32. Rehberg J. Der Schusswaffengebrauch der Polizei in strafrechtlicher Sicht, Kriminalistik. 1977. № 1. S. 39.
33. Franz-Ludwig Knemeyer, Polizei- und Ordnungsrecht – Lehr- und Arbeitsbuch mit Anleitungen für die Klausur. 10. Aufl. München, 2004. N 124.

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Исследование взаимосвязи между обязанностями полиции Швейцарии по предотвращению и расследованию преступлений

¹ Андреас Донач

² Вельте Элайен

¹ Университет Цюриха, Швейцария
Rämistrasse 74/14, CH 8001 Zürich
Доктор юридических наук, профессор
E-mail: andreas.donatsch@rwi.uzh.ch

² Университет Цюриха, Швейцария
Rämistrasse 74/14, CH 8001 Zürich
Ассистент
E-mail: welte.eliane@rwi.uzh.ch

Аннотация. В статье рассматривается взаимосвязь между обязанностью полиции Швейцарии предотвращать преступления и поддерживать публичную безопасность, как это закреплено в законе о полиции, с одной стороны, и расследованием уголовных дел в соответствии с УПК, с другой. У офицеров полиции есть две принципиально разных функции: обязанность принять действия, направленные на предотвращение преступления; обязанность собирать доказательства по делу, для последующего поддержания государственного обвинения. В статье приведён ряд примеров, призванных показать различие между этими функциями полиции.

Ключевые слова: Общая оговорка о полиции; захват заложников; расследование преступлений; полицейское право; предварительное расследование; предотвращение преступлений; принцип пропорциональности; защита от неминуемой угрозы; публичные мероприятия; публичная безопасность; риск насилия; настороженность; последний довод.