

PERMISSION TO KILL? THE DISREGARD OF THE LEGAL REGULATIONS ON THE USE OF FIREARMS BY THE (BERLIN) POLICE AND THE ILLEGAL POLICE SHOOTING TRAINING

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Abstract: Between 1990 and 2017, 276 persons died in Germany due to police shootings. In many cases, the victims were mentally ill; often they held a knife in their hands. Legitimation of shooting via police law has become exceptional; the cases are justified as self-defence. Police training focusses on fast reactions. The first explanation, why there is a certain accumulation of legally dubious police lethal- shooting in Berlin, could be the unprofessional handling of the police with people in mental crises or mentally ill humans. The second explanation raises the question of whether a carried knife, which is either used for self-harm or threat, can justify a police firearm use in general and especially a life-threatening or lethal use of firearms.

Disregard of the legal powers of intervention and the rash appeal to the law of self-defence is the third explanation for the often lethal firearms use of the police. The biggest problem arises when the factors described above are combined. In the police shooting training, a distinction is made between a so-called "UZwG shot" and a "self-defence shot", and first of all a knife attack is simulated as a scenario during the self-defence shot and, secondly, a point-shot is trained in this case, then a lethal shot is fired, which finds no basis in law. This shall apply even if a lethal use of firearms is considered admissible in exceptional cases in the police legislation. In addition, the idea underlying the police shooting training that in all self-defence situations automatically a point-shot and thus a highly likely lethal shot are appropriate contradicts the applicable law. The analysis of police firearms use and police shooting training shows a frightening picture. A careless treatment of mentally ill people, the automatic grip on firearms, when the police opposite has a knife in his hand and the broadest negation of the legal basis for the police firearms use too often lead to the police lethal shots. In addition, statistics show almost only self-defence shots. Police shooting training provides an automatic mechanism that leads to the fact that the legal limits to the firearms use and police killings aiming at the vital triangle are almost

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inevitable. Remedy can only bring a professional training, which gives a lot of space in all situations of application of the range of options and, above all, the legal limits.

Keywords: police shooting, shooting training, self-defence, disoriented people, disregard of legislation

1. BERLIN POLICE ACT UNPROFESSIONALLY TOWARDS MENTALLY ILL OR BEHAVIOURALLY ABERRANT PERSONS

The fatal shots fired on 28 June 2013 inside the Neptun Fountain in central Berlin caused numerous disputes. A young male, obviously mentally disoriented, was found naked and with a knife in his hand inside the fountain. A police officer climbed the fountain and shot him dead on the spot. This event was the first culmination of a series of two similarly tragic events from previous years. On 6 October 2012, another mentally disoriented male, aged fifty, armed with an axe and two knives, was running along a street in Berlin Wedding. Excessive police violence, including gunshots, a police dog and massive application of pepper spray caused heavy injuries, of which the person shortly after died.¹ On 24 August 2011, the police were called to a supported living home to provide law enforcement assistance in a case where a female resident of this home was, by court decision, to be taken to psychiatric hospital. As police officers forced entry into the apartment, they detected a knife in the hand of the woman. Shortly afterwards, additional operating forces arrived and shot the woman dead in her apartment.² On 24 April 2014, RBB broadcast its documentary "Tödliche Polizeikugeln [Deadly Police Bullets]", which was the first to thematise the fateful consequences of police ignorance in dealing with mentally ill persons; at the same time it became known, what new tactics police were using in their operational and shooting training.³ *Otto Diederichs'* statistics about fatal police shootings show a trend that in 2015 nine out of ten victims of fatal police shots were mentally ill or in a state of psychic crisis.⁴

A certain increase in the number of legally questionable fatal police shootings in Berlin may, according to the **first explanation**, be due to a frequent unprofessional police handling of individuals in psychic distress or mentally ill persons. This could be recognised and remedied, provided that, in domestic politics and within the police, there were any tendencies to halt this trend.

¹ Cf. *Berliner Zeitung* <<http://www.berliner-zeitung.de/berlin/wedding-von-der-polizei-angeschossener-mann-tot-5824870>>.

² Cf. *Morgenpost* <<http://www.morgenpost.de/berlin/article105081709/Polizist-erschiesst-psychisch-krank-Frau.html>>.

³ Cf. *Mats Kafke*, *Führt das Berliner Schießtraining zu einem rechtmäßigen Schusswaffengebrauch durch Polizeiangehörige?* [Does shooting training lead to legitimate use of firearms by the Berlin police?], Bachelor thesis at HWR Berlin, 2017.

⁴ *Bürgerrechte & Polizei/CILIP* 111, October 2016, at 85; cf. also *Asmus Finzen*, „Wer mit einem Messer Polizisten angreift, muss damit rechnen, erschossen zu werden.“ Schlechte Karten für psychisch Kranke [“Knife-wielding police attackers must expect to be shot dead.” Bad odds for the mentally ill] <http://apk-berlin.de/files/schusswaffengebrauch_gegen_psychisch_kranke_bei_polizei_final-1.pdf>.

2. DISREGARD OF LEGAL PROVISIONS AND RELEVANT COURT RULINGS

In almost all of the cited instances of mostly fatal use of firearms by police, the victim has employed a knife. The **second explanation** refers to this specific trend and poses the question, whether a knife used to endanger its carrier or to threaten another person would suffice to justify the police use of firearms in general or, in particular, a life-threatening or fatal use of firearms.

The specific provisions for the police intervention applicable to the Berlin police – as opposed to the relevant regulations in almost all other federal states, with the exception of Schleswig-Holstein, Mecklenburg-Vorpommern and Federal Law – initially do not provide rules for the lethal (final) rescue shot, as well as in e.g. Austria and in Switzerland.⁵ Pursuant to Section 11 of the Use of Immediate Coercion Act (UZwG),⁶ Berlin Police are authorised to shoot at persons in order to prevent them from committing a felony or a misdemeanour⁷ while carrying or using firearms or explosives. Attempted suicide with a knife is neither prosecutable nor forbidden and therefore does not justify the police use of coercion and, even less so, of firearms. Threatening another person with a knife is deemed a misdemeanour and therefore justifies the use of firearms only under the condition that such act be committed with the obvious intent to inflict serious bodily harm or to kill. Infliction of bodily harm (Section 223 Criminal Code) and of bodily harm by dangerous means (Section 224 Criminal Code), where an attacker uses, e.g. a knife, are not felonies – the term 'felony' applies only to the infliction of grievous bodily harm and of bodily harm causing death (Sections 226, 227 Criminal Code). Pursuant to the established

⁵ On problems of the final rescue shot in Germany cf. *Clemens Arzt*, Europäische Menschenrechtskonvention und polizeilicher Todesschuss – Zugleich eine Besprechung des Urteils des EGMR Makaratzis/Griechenland [European Convention on Human Rights and police fatal rescue shot - At the same time a discussion of the judgment of the ECtHR Makaratzis / Greece], *Die öffentliche Verwaltung* 2007, 230-237, *Heike Witzstrock*, Der polizeiliche Todesschuss [The police fatal rescue shot], Lang Frankfurt a.M. 2001; in Switzerland cf. *Gianni Giger*, Legitimation staatlicher Tötung durch den finalen Rettungsschuss – Rechtslage und Erkenntnisstand zum gezielten polizeilichen Todesschuss in der Schweiz unter Berücksichtigung rechtsvergleichender Aspekte und europäischer Standards [Legitimation of state killing by the final rescue shot - Legal situation and state of knowledge on the targeted fatal shooting in Switzerland, taking into account comparative law aspects and European standards], Zürich: Schulthess Verlag, 2013; comparing these countries cf. *Thomas von Berg*, Der Finale Rettungsschuss. Ein internationaler Vergleich der verfassungs- und polizeirechtlichen Problematik am Beispiel Deutschlands, Österreichs und der Schweiz [The final rescue shot. An international comparison of the constitutional and police-legal problems with the example of Germany, Austria and Switzerland], Bachelor thesis at HWR Berlin, 2016.

⁶ Gesetz über die Anwendung unmittelbaren Zwanges bei der Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Landes Berlin [Law on the use of immediate public coercion by enforcement officers of the State of Berlin (UZwG Berlin)], 22.06.1970, with subsequent amendments. Cf. to this law: *Baller/Eiffler/Tschisch*, ASOG Berlin. Zwangsanwendung nach Berliner Landesrecht – UzwG -, Boorberg, Stuttgart 2004

⁷ According to Section 12 German Criminal Code [Strafgesetzbuch (StGB)], in the version promulgated on 13 November 1998, with subsequent amendments:

(1) Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment, and

(2) Misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.

judicial practice of the Federal Court of Justice, a decisive criterion is the particular dangerousness of attack, such as may result from a life-threatening action of the attacker.⁸ Holding a knife and not dropping it when requested by the police, or moving towards the police with a knife in hand and not stopping upon the request does not comply with the requirements stated above, and yet the reason for why firearms were used was seen, as shown in the examples cited above, in such very circumstances.

Whilst Federal Law as well as the state laws of Baden-Württemberg, Hamburg and Saxony employ regulations similar to Berlin, most other states authorise the use of firearms also in situations where present danger to life or health must be averted.⁹ Such additional prerequisite does not apply, where a knife is used for inflicting self-harm, or is just being carried in hand. There is no unequivocal legal understanding of situations where individuals with knives move towards police officers. The law, here, is intrinsically contradictory insofar, as the same circumstances may look different, either in view of imminent danger to life or health, or of the basic offences described earlier. Whichever interpretation to choose, the use of firearms is restricted by law to the effect, that the purpose of any shot must be the inability to attack, i.e. the shot must aim at the target person's legs. An intended lethal shot would accordingly be illegitimate, since, pursuant to provision governing the 'final rescue shot', a lethal shot is permissible only in order to avert imminent danger to life or imminent danger of grievous bodily harm. This is roughly analogous to the delimitation between a felony and a misdemeanour within the statutory offence of causing bodily harm. Although the enlarged regulations in force in most of the federal States aim at self-defence situations, many of them provide, as an additional option, that lethal shooting is permitted also in cases of self-defence and duress.¹⁰ The law does not state unambiguously what kind of restrictions will apply to the self-defence shot.

Therefore it is not only the police, but, in many cases, also the prosecutors who regularly play the 'self-defence card', when they are to justify the police use of firearms, including the police fatal shooting. For 2012, statistics compiled by *Clemens Lorei* list 35 instances of the police use of firearms against persons, 34 of which were substantiated as self-defence or aversion of danger to health or life,¹¹ whereas in 2015 four shots at persons to prevent criminal offences and one shot to thwart escape appear little in comparison with the large number of self-defence shots, including shots to avert danger to health or life.¹² According to the official Firearms Statistics of the Deutsche Hochschule der Polizei [German Police University] in 2016, all cases of police firearm use were justified by self-defence.¹³

⁸ Cf. BGH NStZ 2014, 477, BGHSt 57, 183, and BGH NStZ 2012, 207.

⁹ Cf. § 67 Abs. 1 of the Police Law of Brandenburg [Gesetz über die Aufgaben, Befugnisse, Organisation und Zuständigkeit der Polizei im Land Brandenburg (Brandenburgisches Polizeigesetz - BbgPolG)], 19.03.1996, with subsequent amendments.

¹⁰ The Federal government, Baden-Wuerttemberg, Hamburg, the Saarland, Saxony and Saxony-Anhalt rightly renounce this rule.

¹¹ Cf. <http://www.schusswaffeneinsatz.de/Statistiken_files/Statistiken_1.pdf>

¹² Cf. <http://www.schusswaffeneinsatz.de/Statistiken_files/Statistiken.pdf>.

¹³ Cf. Welt <<https://www.welt.de/politik/deutschland/article166675828/Wie-oft-deutsche-Polizisten-wirklich-zur-Waffe-greifen.html>>.

All the options provided by the police powers of intervention, i.e. the use of firearms to prevent a criminal offence, to thwart escape, or to prevent freeing of prisoners clearly specify restrictions as to the 'whether' and 'how' in the use of firearms. The plea of self-defence, thus, is used quasi as a free ticket for the police use of firearms in general or of lethal shooting, in particular. There is a controversial debate about whether the police are at all entitled to plead their right to self-defence.¹⁴ But it is more than questionable whether the police adherence to the Law (Section 20 Para 3 of the German Basic Law) allows for such differentiation that would leave it up to the individual police officer to shoot or even to fire fatal shots. However that may be, disregard for the legal powers of intervention and the rash claim of the right to self-defence serves as the **third explanation** for the fatal use of firearms by police.

3. QUESTIONABLE METHODS IN POLICE SHOOTING TRAINING

Pursuant to the Section 20 Para 3 of the German Basic Law¹⁵, the executive power is bound to adhere to the Law. The sole purpose of the use of firearms by the police shall be, pursuant to the Section 9 Para 2 UZwG, to disable a person from attacking or fleeing. Both these requirements together constitute core milestones for the police shooting training. Firstly, such training must be precisely aligned with the legal framework and, secondly, the restriction to disabling attack and escape can be sustained only, provided that training is regular and is designed accordingly. In Berlin, the police shooting training is only partially in accordance with these two requirements, the same being true for other Federal States.

Police shooting training is based on the PDV 211¹⁶. With regard to the issue discussed here, it is important to consider that the trained shooting techniques distinguish between the so-called 'sighted shot (in German: Visierter Schuss)' and the so-called 'unsighted shot (in German: Deutschuss)'. In a sighted shot, the shooter takes aim, looking with one eye through the iron sight of his gun. This technique enables a shooting which is precise enough to comply with the legal requirements and restrictions, first of all the restriction to achieve disability to attack or to escape. Where, under pressure to act, the shooter takes aim less precisely, the result will be a 'roughly sighted shot (in German: Grob visierter Schuss)'. For an unsighted shot, which enables a fast response to an attack, the shooter

¹⁴ Cf. <<https://strafrecht-online.org/problemfelder/at/rw/notwehr/hoheitstraeger/>>; *Hillenkamp/Cornelius*, 32 Probleme aus dem Strafrecht. Allgemeiner Teil [32 Problems in Criminal Law. General Part], 15. Ed., Vahlen, Munich 2017, 43; dissenting *Andreas Hoyer*, in: *Deiters/Hoyer et al*, SK-StGB. Systematischer Kommentar zum Strafgesetzbuch [Systematic commentary on the Criminal Code], Vol. 1, 9. Ed., Carl Heymanns, Köln, 2017, § 32 para 15; affirming *Volker Erb*, *Münchener Kommentar zum Strafgesetzbuch* [Munich Commentary on the Criminal Code], Bd. 1, 3. Ed., C.H. Beck, München 2017, para 189 ff.

¹⁵ Grundgesetz für die Bundesrepublik Deutschland (GG) [Basic Law of the Federal Republic of Germany], 23.5.1949, with subsequent amendments.

¹⁶ Polizeidienstvorschrift (PDV) 211 „Schießtraining in der Aus- und Fortbildung“ [Internal Police Regulation „Shooting Training in Education and Further Training“] in its currently applicable 2005 edition (as per 08/2015).

holds the weapon in both hands, captures the target with both eyes open, points and shoots without sighting. This technique is applied with little or no regard for the described restrictions on the use of firearms.¹⁷

The details of the police shooting training are specified in various codes of practice, official instructions, edicts, manuals and directives, of which hardly any are publicly available. The sole exceptions are Hamburg and Hessen. Hamburg, which, besides Rhineland-Palatinate, is the only Federal State that has a modern transparency act, provides public access to the Instructions on the Hamburg police further shooting training.¹⁸ Both these instructions and the annual shooting programme contain no specific information on the shooting techniques trained. Here, training for shooting in self-defence situations is just a component of the training programme and, as such, provides an indirect reference to the training of unsighted shots. In Hessen, the Edict on operational training has been published by the Hessen police authority.¹⁹ This document explicitly mentions the training of 'unsighted shooting'. The descriptions of the modules for basic shooting training given in the manuals for the police bachelor study programme at the Hessische Hochschule für Polizei und Verwaltung draw a clear distinction between the defined shooting and the unsighted shooting.²⁰ This is not the case with the respective module description in use in Berlin.²¹ Both of these, however, specifically refer to a shooting avoidance training. In any case, the publicly available sources demonstrate that the cited shooting techniques are standard content of the police shooting training in Germany.

What are then, in terms of their effects, the main differences between the 'sighted shot' (defined shooting) and the 'unsighted shot'? When performed in strict compliance with the Immediate Coercion Act, sighted or defined shooting at persons generally aims at the target person's arms and, first of all, his legs. This is similarly stated in sub-paragraph 38 of the Manual for the Berlin enforcement officers dated 20 June 2016²², supplementing Section 9 of the Immediate Coercion Act. Under these conditions, survival is, at least,

¹⁷ Cf. *Mats Kafke* (note 3), at 8.

¹⁸ Dienstanweisung für die Schießfortbildung der Polizei Hamburg [Official instruction for further shooting training of the Hamburg Police], Az.: 11.88-12.

¹⁹ Erlass über das Einsatztraining bei der hessischen Polizei [Edict on operational training of the Hessen Police], 17.12.2013, Hessisches Ministerium des Innern und für Sport, Landespolizeipräsidium LPP 41 - PE - 7 t 10/8 e 12 05 – Gült.-Verz. 3100 –, StAnz. 4/2014 S. 76.

²⁰ Cf. the Manual for the uniformed police <https://www.hfpv.de/sites/default/files/public-type-files/04-Modulbuch_SchuPO_2016-09.pdf>.

²¹ Studienordnung des Bachelorstudiengangs Gehobener Polizeivollzugsdienst des Fachbereichs Polizei und Sicherheitsmanagement der Hochschule für Wirtschaft und Recht Berlin [Study Regulations of the Bachelor Degree Programme Advanced Police Service of the Department of Police and Security Management of HWR] (StudO/Pol B.A.) 12.04.2016, last updated 15.11.2016, <http://www.hwr-berlin.de/fileadmin/downloads_internet/Mitteilungsblaetter/2017/Mitteilungsblatt_06-2017_FB_5_Studienordnung_Polizeivollzugsdienst.pdf>.

²² Ausführungsvorschriften für Vollzugsdienstkräfte der Polizeibehörde zum UZwG Bln. (AV Pol UZwG Bln) [Executive regulations for the Berlin enforcement officers Immediate Coercion Act], 20 June 2016 <<https://www.berlin.de/sen/inneres/sicherheit/polizei/rechtsgrundlagen/> [Legal basis]>.

possible, provided that first medical aid is carried out timely. With unsighted shooting, the situation is completely different. Here, the weapon aims at the so-called 'vital triangle', which comprises the chest and its vital organs: the heart and the lungs. Hits in this area usually cause death, especially due to the impact of the deforming ammunition the Berlin police have been using for a long time.²³

4. FATAL CUMULATIVE EFFECTS

The biggest problem arises when the above described factors are brought together. Considering that at the core of the police shooting training lies a distinction between a so-called 'defined shot' (according to legislation) and a 'self-defence shot', and that, firstly, the scenario underlying the self-defence shot is a simulated knife attack, while, secondly, in that case, unsighted shooting is trained, then training *de facto* aims at lethal shooting that has no basis in law. This is true even where State police legislation deems lethal use of firearms to be permissible in exceptional situations. Contradictory to the governing law is also the underlying idea in police shooting training, according to which in any self-defence situation unsighted shooting – in other words: lethal shots – is appropriate.

Section 32 Para 2 of the Criminal Code defines self-defence as 'any defensive action that is necessary to avert an imminent attack on oneself or another'. Within the framework of self-defence, such defensive action is deemed to be necessary, as, on the one hand, gives reason to expect immediate abortion of attack and, on the other hand, is the most sparing, i.e. the least harmful means to avert attack.²⁴ Such ban on excessive defence springs from the principle of proportionality. The principle of proportionality is constitutive of the legal regulation of police use of firearms. Section 4 of the Immediate Coercion Act commits enforcement officers to always give priority to measures with the least adverse impact on target persons. In addition, the law forbids the use of coercive action, where inflicted damage is evidently disproportionate to the envisaged success. Section 9 sub-paragraphs 1-3 of the Immediate Coercion Act govern the use of firearms by orders and prohibitions, of which all express the principle of proportionality. All of these restrictive provisions seem to be negated by the cumulative effect of the factors described above.

Another aspect is that the plea of self-defence is often made in classical police officers operative situations. As a result, the legal commitment is in such cases often stronger than in exclusively private self-defence situations. In police legislation, the understanding prevails that justifications, such as self-defence, provide no rationale for the exercise of intervention powers²⁵. From this point of view, the commitments emanating from the exercise of legal powers interfere with the requirements for self-defence actions performed

²³ Cf. *Oesten Baller*, Neue Munition für die Polizei – Eine von Schein-Sachzwängen dominierte Diskussion [New ammunition for the police – a discussion dominated by bogus necessities] *Bürgerrechte & Polizei/CILIP* 65 (1/2000), 70.

²⁴ Cf. *Lackner/Kühl*, Strafgesetzbuch: StGB. Kommentar [Criminal Code. Commentary], 29. Ed., C.H. Beck, München 2018, § 32, paragraph. 9; *Andreas Hoyer* (note 14), § 32 paragraph 58 ff.

²⁵ Cf. for many others *Wolf-Rüdiger Schenke*, *Polizei- und Ordnungsrecht* [Police and regulatory law], 9. Ed., C.F. Müller Verlag, Heidelberg 2016, paragraph 40, at 562.

within the scope of sovereign duties.²⁶ When further following the understanding that a police officer in such a situation acts not as an official, but, instead, as a private person,²⁷ police shooting training appears to be even more questionable.

The first question is, whether it is legitimate to publicly fund training for private purposes. A positive answer can only come from a synoptic point of view. When 'private' self-defence directly relates to the performance of police duties, it should be permissible to train police officers also for those situations, where they are confronted with unexpectedly high personal risk. Another question, however, asks, whether the behavioural pattern 'self-defence situation - unsighted shot - vital triangle' should become a standard training component. The answer is clearly negative, since the absolute denial of legal commitment – no matter, whether it derives immediately from self-defence rights, or from the police's right of coercion – implies a kind of legal nihilism that is incompatible with the legal commitments stated in the Section 20 Para 3 of the German Basic Law.

5. CONCLUSION

The analysis of police use of firearms and police shooting training shows a terrifying scenario. Mentally ill persons are often treated carelessly, firearms are frequently used when police opponents hold knives in their hands, the legal prerequisites of police use of firearms are widely neglected – all of these lead more often than not to fatal police shootings. Moreover, statistics show almost exclusively self-defence shots. Operative police shooting training aims at developing automatic response mechanisms. Ever less regard is given to the legal restrictions to the use of firearms. Targeting the vital triangle makes fatal police shooting almost inevitable. The only remedy would be a professional training plan which would grant ample space for the whole range of activity options in any operative situation and, above all, for the consideration of legal restrictions. Such training must clearly demonstrate that resorting to firearms is allowed only in extremely exceptional situations, and that, in the face of mentally ill persons, this can be a solution in very rare cases only. First of all, however, it is necessary to perform operative and shooting trainings frequently and on a regular basis, and thus to reveal all the peculiarities of the different operative situations. Reducing training to the simple alternative between defined shot (according to legislation) and self-defence shot will bring no solution, but, on the contrary, will aggravate the problem and increase the risk of becoming a victim of fatal police shooting.

²⁶ Even if one acknowledges a criminal justification for the plea of self-defence made by police officers, it implies a violation in terms of public law and therefore remains illegal.

²⁷ Cf. *Dieter Kugelman*, *Polizei- und Ordnungsrecht* [Police and regulatory law], 2. Ed., Springer-Verlag GmbH, Heidelberg 2011, at 11 (30).

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