

## Improvement of Civilian Oversight of Internal Security Sector Project

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## FINAL REPORT ON 'LEGAL FRAMEWORK OF VIDEO SURVEILLANCE IN GERMANY'

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Reference to the Description to the Action	
<b>Component</b>	A. Legislative Framework
<b>Activity</b>	A.7 Benchmarking and review of the video surveillance regulatory framework and mechanisms in selected EU countries and Turkey (Mobil Elektronik Sistem Entegrasyonu - MOBESE) with a view to enhanced civilian oversight
<b>Output</b>	A.7 Gap analysis of the video surveillance regulatory framework and mechanisms in selected EU countries and Turkey
<b>Description</b>	<ul style="list-style-type: none"><li>A Description of Legal Framework of Video Surveillance in Germany</li></ul>



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## **Mechanisms Used for Monitoring the Use of Video Surveillance at Local and National Level in Germany**

### **I. Factual basis and overview of the legal basis**

1. Distribution and deployment
2. Purpose of video surveillance
3. Types of use
4. Legal basis

### **II. Criticism from the point of view of legal policy**

### **III. Constitutional Framework**

1. The right to informational self-determination
  - a) Sphere of protection (Schutzbereich)
  - b) Constitutional requirements to justify an intervention
    - aa) Legal basis in statutory law (Vorbehalt des Gesetzes)
    - bb) Further requirements: Limitation-limits (Schranken-Schranken)
      - (1) Certain, clear and area specific regulations (normenklare und bereichsspezifische Regelungen)
      - (2) Organizational and procedural safeguards (Grundrechtsschutz durch Organisation und Verfahren)
      - (3) Principle of proportionality (Grundsatz der Verhältnismäßigkeit)
2. The Regensburg-Case
3. Urgent decision to the BayVersG

### **IV. Detailed analysis of three legal provisions**

1. Section 100h StPO (Federal Prosecution Act)
2. Art. 32 PAG (Bavarian Police Act)
3. New version of Art. 9 BayVersG

### **V. Requirements of the European Law**

1. Video surveillance as an invasion of Art. 8 ECHR
2. Legal requirements to justify the intervention

### **VI. Summary**

The aim of this paper is to provide an overview of the use and the legal framework concerning video surveillance by police forces in Germany. My article has six sections. First, I will give an overview about the factual and legal basis of CCTV by the German police.

The second part deals with the legal policy discussion. The debate in Germany is different from the debate held in other member states of the EU. This unique German way has an historical background, which still has a great impact on German constitutional law.

The third part will focus on the constitutional framework. This will be one of the main points of my lecture because German constitutional law has a much greater importance compared to other legal systems. A good example for this fact is video surveillance. Thus, the Federal Constitutional Court has confronted the legislature with detailed requirements how to design CCTV according to constitutional law, especially to the fundamental rights.

In the fourth part, I will present and discuss three different legal provisions that allow police forces the use of CCTV. The first provision is part of the Criminal Procedure Act, the second and the third are a part of the Bavaria Police Act.

The fifth part will bring in the perspective of the European law. I will show you how video surveillance is affected by the European Convention on Human Rights and the rulings of the European Court of Human rights.

In the sixth part I will finish with a short conclusion.

## **I. Factual basis and overview of the legal basis**

### **1. Distribution and deployment**

In Germany there does not exist any official inventory that lists the numbers of video surveillance systems currently in use. According to reliable estimates and assumptions, one can count around 400.000 video cameras, which are installed in public sphere. However, most of the video surveillance systems are rather operated from private owners than from government services.

It is notable that only 10.000 cameras belong to the public sector and the police authority. Most of the video surveillance cameras are installed in a fixed way to protect important public infrastructure facilities, for example at airports, train stations or metro stations. Besides, flexible systems are used to monitor especially events, assemblies and suspects.

### **2. Purpose of video surveillance**

Video surveillance by the police serves different purposes. Normally, one has to differentiate between three purposes.

a) The first purpose is deterrence. This is based on the expectation that CCTV can deter potential offenders from committing a crime. This effect of deterrence implies that the offenders are aware of the surveillance, which increases the risk to be detected and punished afterwards. Therefore, video surveillance functions as a mean of crime prevention.

b) Video surveillance systems can also be used to draw the attention of police officers to dangers of public security and public order and to guide the police deployment. In this regard video surveillance serves as replacement or as support for police patrols on the spot. CCTV

allows the police to assess the risk faster as well in a more precise way and to react adequately.

c) Finally, the video surveillance helps to preserve evidence. Once a criminal act is recorded, the footage can be used to identify the suspect and to prove his guilt in an following criminal proceeding.

### 3. Types of use

Besides the purpose of CCTV, one can also distinguish between different type of use.

a) The surveillance either happens covertly or open to the public. As I will show in the constitutional part of my lecture covert video surveillance is a seldom exception due to the stipulations of the Fundamental Rights.

b) Moreover one has to distinguish between a situation in which video surveillance is used in order to react to an exceptionally dangerous situation or a situation of suspicion.

Alternatively, CCTV can be used to permanently and fully monitor a particular area because dangers of public security and public order can generally be expected there by offenders committing crimes.

c) Furthermore, one can distinguish what is going to happen to the recordings. Either the images are just evaluated live by inspection staff or the collected information is kept in stock on data memory for a limited period of time.

### 4. Legal basis

The legal basis for CCTV can not be found in one single act, but are regulated in many different acts on the federal and the regional level. Examples are the federal and regional law concerning assemblies and processions (for example VersG und BayVersG), regional Police acts as well as the special Federal Security law and the Criminal Procedure Act.

The fragmentation of the legal basis is caused by the federal structure of the Federal Republic of Germany. According to this structure the legislative powers for the security law are divided between the federal and the regional level. The Federal level is responsible for the legislative power concerning criminal prosecution (Article 74 § 1 Nr. 1 GG). The area of averting dangers for the public safety falls under the competence of the regional level. The reason for this distribution was and still is the fear of a too strong central police state. To counteract the fear, the police power is not centrally located at the federal level, but at the regional level. Nevertheless, for single areas of public safety the federal level has a separate legislative power. To some part the acts are even carried out by the police forces of the federal government. This especially applies to protection from international terrorism but also to the area of constitutional- and state protection.

Looking at the legal basis of video surveillance of the police against this background, the following image occurs:

## II. Criticism from the point of view of legal policy

The recent terrorist attacks in Boston have shown that CCTV can make a significant contribution to the investigation of crimes and especially for the prevention of terrorist attacks. The German federal police (Bundespolizei) made a similar experience in 2006. Due to CCTV footage a terrorist group could be identified, who had attacked two regional trains of "Deutsche Bahn" with bombs that fortunately did not explode. Despite these successes, the

use of CCTV by the police is a very controversial. Four essential objections are raised against video surveillance:

1. It is criticised that CCTV does not help to combat of the real root causes of criminality. Video surveillance just combats the symptoms but not the causes of crime. Moreover, CCTV is very expensive. The financial means are bound by CCTV are no longer available for other, long term measure of crime prevention. As a result it cannot be afforded to integrate marginalized groups into society which are vulnerable to criminality, for example by improving their school education.

2. In addition the effect of deterrence is questioned. This applies especially to violent crimes that are usually committed in the heat of the moment. In case of acts of affect the offenders are not aware of the surveillance or would even if behave this way, if they would notice the recording.

3. In the areas in which video surveillance actually has a deterrent effect one refers to the displacement effect. From the moment the offenders adapt themselves to video surveillance crime is just shifted from surveyed zones to other areas. As result a shift takes place which does not lead on the whole to a decrease in crime.

4. The last and most important point of criticism in Germany are the losses on privacy. The fact that such reservations are made concerning the video surveillance by the police does not happen by accident but is closely linked to German history. After the National Socialists took over, in Germany a police state had been established.

The citizens of the German Democratic Republic also had to make a similar experience after the end of the National Socialist regime of terror and the separation of Germany. They had been oppressed and systematically spied on by the so called Staatssicherheit, a political police with the task to get information about opponents of the regime. These special historical experiences explain the broad mistrust German police officers are faced with when trying to obtain information. At the same time the Federal Constitutional Court shares these reservations concerning the police state as well. As I will explain in the following section, one can see that the main aim of the rulings of the Federal constitutional court is to protect the citizens' privacy against unlawful intrusion.

### **III. Constitutional Framework**

Constitutional requirements for the use of video surveillance for police purposes do not differ substantially from other measures of data collection. Therefore, I will first explain the Fundamental Right to informational self-determination. Afterwards I would like to specify its impact on video surveillance using the example of a landmark case decided by the Federal Constitutional Court in 2006.

#### **1. The right to informational self-determination**

The key to understanding German law are the Fundamental Rights. The basic law puts them at the beginning of its text. The fundamental rights guarantee freedom from the state and equality of the citizens. In contrast to the Weimar Constitution of 1919 the fundamentals rights do not only bind the executive and the judicial power but also the legislator. They grant individual rights to citizens which can be enforced by constitutional court actions.

##### **a) Sphere of protection (Schutzbereich)**

The basic law guarantees many different fundamental rights. These are for example the freedom of speech and the freedom of the press protected by Article 5, the freedom to assemble and the religious freedom protected by Article 8 and Article 4. Most important is the

protection of human dignity in Article 1 subsection 1 of The Basic Law. A fundamental right that guarantees the freedom from data collection by the state is not part of the catalogue of the fundamental rights promulgated by the Basic Law. This gap has been closed 1983 in a landmark decision of the Federal Constitutional Court<sup>1</sup>. Subject matter of this case was the population census in Germany in 1983 and its compatibility with the Basic Law.

The Federal Constitutional Court denied this. In its ruling the court created a new unwritten fundamental right, the so-called right to informational self-determination. This new fundamental right was derived from the right of general freedom of action and human dignity, protected by Article 2 subsection 1 in conjunction with Article 1 subsection 1 of the Basic law. To justify his ruling and the creation of the new fundamental right the court referred to the so-called chilling effect of the collection of data by the state and his authorities. Central quote of his decision is the following paragraph:

“Who is unsure, whether deviant behavior will be registered and this information will be permanently stored, used or shared with others will try to avoid to behave this way. Who takes in account, that he is registered, when he joins an assembly or a citizens’ initiative and this can have negative consequences for him, will abstain from using his fundamental rights, that guarantee the freedom of assembly and freedom of association. Such an abandonment of fundamental rights will not only harm the free development of the individual but also the common good. The common good is endangered because free development of the individual is essential for a free and democratic society, which is based on the initiative of its citizens.

The freedom to informational self-determination guarantees the right to decide on the exposure and the use of personal data. Protected is not only the collection of data. The sphere of protection also includes data retention, the use and the disclosure of personal data. Furthermore, the right to informational self-determination guarantees protection from using the data for a different purpose than the purpose of the initial data collection. Consequently, the change of the use of the collected data leads to a new intervention in the right to informational self-determination.

#### b) Constitutional requirements to justify an intervention

The invention of the new fundamental right to informational self-determination does not mean that police forces are not allowed to collect personal data under any circumstances. Besides the protection of human dignity fundamental rights do not grant absolute protection against interventions from the state and its administrative bodies. On the contrary, interferences with fundamental rights can be legitimate when the authorities who interfere in fundamental rights comply with certain requirements.

The Federal Constitutional Court has emphasized in the population census decision that this is especially true for the right to informational self-determination.

In principle, the requirements for interventions in the right to informational self-determination do not differ substantially from those that apply to other fundamental rights. Nevertheless, there are certain specifics that have to be considered.

#### aa) Legal basis in statutory law (Vorbehalt des Gesetzes)

Under German constitutional law, interventions in fundamental rights require a legal basis in statutory law. This requirement aims at different objectives. As far as interventions in a fundamental right require a legal authorization, it is ensured that the legislator, who is endowed with democratic legitimacy, approved of the measure. Therefore the first objective of this requirement is to ensure the democratic legitimation of an intrusion into fundamental rights. Besides the democratic function there also exists a constitutional aspect. The legal

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<sup>1</sup> BVerfGE 65, 1 ff. (<http://www.servat.unibe.ch/dfr/bv065001.html>)

basis in statutory law safeguards that the citizens are able to predict the intrusions they have to expect. Moreover, administrative powers are limited to interventions allowed by the legal basis. As a result the legal basis in statutory law also serves the legal clarity and the separation of powers. Finally, citizens have the possibility to estimate their chances when they seek for remedies against unlawful state action before the courts.

bb) Further requirements: Limitation-limits (Schranken-Schranken)

A statutory law that interferes with the right to informational self-determination has to meet several other requirements. In German constitutional scholarship these requirements are often called Limitation-limits. This expression explains their functions, because the Limitation-limits are aiming at a limitation of the legislator's power to interfere with fundamental rights.

(1) Certain, clear and area specific regulations (normenklare und bereichsspezifische Regelungen)

The most important aspect is that German constitutional law requires legal provisions to be certain, clear and specific. This presupposition is closely linked to the general doctrine of certainty which is based in the rule of law. In contrast to the general doctrine of certainty the requirements for an interference with the right to informational self-determination are even more stringent. The principle of a certain, clear and specific regulation forces the legislator to clarify the scope and scale of interventions to the right of self-determination entailed by the law in question. The yardstick are the citizens themselves. They have to be able to foresee which personal data is collected and what the purpose of the data collection is.

(2) Organizational and procedural safeguards (Grundrechtsschutz durch Organisation und Verfahren)

Fundamental rights are also critical for the arrangements of the administrative procedure. As the Federal Constitutional Court points out, procedural and organizational matters are of particular relevance to the fundamental right to informational self-determination. Therefore, it can be constitutionally warranted to make the erasure of data mandatory or to provide oversight by a data protection officer. Moreover, Article 19 subsection 4 GG that gives citizens a right to effective judicial protection is closely connected to the protection of fundamental rights through organization and procedure. Nevertheless, it is an independent fundamental right itself. Art. 19 subsection 4 GG guarantees an actually effective legal protection. To meet these demands it is not sufficient that an abstract possibility of legal protection only exists. Furthermore, legal protection rather has to be arranged in a way that the citizens are able to defend their rights effectively against unlawful interventions.

(2) Inviolability of the essence

Another requirement that is applicable for all interventions with fundamental right is the so-called principle of inviolability of the essence based in Article 19 § 2 of the Basis Law. It says: In no case may the essence of a basic right be affected. So far this principle has no practical relevance in the jurisdiction of the Federal Constitutional Court. Nevertheless an area-wide total surveillance would be unlawful.

(3) Principle of proportionality (Grundsatz der Verhältnismäßigkeit)

The limitation-limit of proportionality is of central importance. It can be seen as an unwritten constitutional principle that was established by the jurisdiction of the Federal Constitutional Court. It is structured in four steps. Firstly, the legislator has to pursue a legitimate aim. Secondly, the intervention has to be suitable to realize the aim. The third part of the

examination is the necessity of the intervention. In this part it is also checked if there is an at least equally effective but less intrusive mean to comply with the purposes of the intervention. At the fourth and last stage of the examination the principle of proportionality is examined in a narrower sense. As a standard of review, it requires state action not to feature an inappropriate relation between the expected advantages of the action compared to its downsides especially in terms of the gravity of the intrusion with fundamental rights. It must be noted that the legislator has a wide margin of appreciation at the second and fourth stage of the examination.

## 2. The Regensburg-Case

The practical relevance of the right to informational-self determination regarding video surveillance can be explained by the example of a case that was decided in 2006 by the Federal Constitutional Court<sup>2</sup>. Subject matter of this case has been the surveillance of a public square in the Bavarian city of Regensburg on the site of a former synagogue. The objective of the surveillance was to protect a memorial work of art against graffiti and vandalism, in particular by Neo-Nazis. To avoid this in the future the city of Regensburg installed a video surveillance system.

After all remedies against the installation were rejected by the courts, the plaintiff, a citizen of Regensburg, submitted a constitutional complaint to the Federal Constitutional Court. The Federal Constitutional Court granted the constitutional complaint.

In its reasoning, the Court explained why the video surveillance of a public square interferes with the right to fundamental self-determination. The court reiterated that the general right of personality guarantees the right to decide which personal data are shared with others. The fact that the video surveillance in question was restricted to monitoring personal behavior in a public sphere did not eliminate an interference. The sphere of protection of the right to informational self-determination is not limited to a inner sphere of privacy. To a greater degree the sphere of protection also includes the behavior in public. Furthermore, the intervention is not called into question by signs that the square was monitored by a video surveillance system. Indeed, bearers of a fundamental right can consent to an interference, and by their consent legalizing it. When it comes to video surveillance, the omission of protesting against monitoring does not mean you consent with the measure.

In its ruling, the Federal Constitutional Courts so recognized an interference with the right to informational self determination. Then, the Court reviewed whether the inference was justified. Under German constitutional law, a legal basis in *statutory* law is required to justify the interference. In the Regensburg case the only potential legal basis was Article 16 subsection 1 of the Bavarian data protection act. You can find the exact wording of this article in German and in an English translation on the handout. The exact word of Art. 16 is:

### **Data collection**

(1) Collecting personal data shall be lawful when the knowledge of such data is necessary for the controller to perform its tasks.

As mentioned above, it is not sufficient to justify an interference with the right to informational self determination simply with regard to any legal basis. Moreover, a basis in statutory law is required which has to be certain, clear and area specific. The precise

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<sup>2</sup> BVerfG, 1 BvR 2368/06 vom 23.2.2007  
([http://www.bundesverfassungsgericht.de/entscheidungen/rk20070223\\_1bvr236806.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20070223_1bvr236806.html))



requirements depend on the measure and the impacts on the bearer of the right. The more severe the intervention is, the stricter the requirements have to be.

In the Regensburg case the Federal Constitutional Courts regarded the interference as very severe. This assumption was based on two facts: a large number of citizens was affected by the monitoring, even though their behavior gave no reason to survey them. Moreover, the Federal Constitutional Court recalled the possibility to analyze the footage and to link the recording with other personal data.

Pursuant to the Federal Constitutional Court, that severe interference with the right to informational self-determination was not justified by a certain, clear and area specific legal basis in statutory law. Article 16 subsection Bavarian data protection act did not meet this requirement because it lacked provisions to limit the warrant to collect data. The only material safeguard in the article is the stipulation that requires the data collection to be necessary for the controller to collect the data to perform its tasks. However, section 16 par. 1 lacks a provision that specifies the concrete objectives of the data collection. Authorities and the public cannot anticipate under which circumstance the collection of data is appropriate for a certain aim. Neither can the citizens predict at which occasions they might be subjected to measures of video surveillance.

Therefore, Art. 16 data protection action did not meet the requirement of a certain, clear and area specific basis in statutory law. For that reason the Federal Constitutional Court granted the constitutional complaint.

The Regensburg Case shows how carefully the legislator should consider the constitutional requirements founded in the right to informational self-determination.

### 3. Urgent decision to the Bavarian Assembly Act (BayVersG )

It is confirmed by the decision of the Federal Constitutional Court referring to the Bavarian Law concerning assemblies given in 2009<sup>3</sup>. This decision was taken in the interlocutory injunction. Nevertheless the decision allows to draw further conclusions for constitutional requirements that the Federal Constitutional Court sets for the admissibility of video surveillance of the police. Subject of the procedure was the use of video technology to monitor demonstrations like it was provided in Art. 9 BayVersG.

The 1. Senate declared Art. 9 BayVersG to be inapplicable in substantial parts and alleged a large number of constitutional infringements.

The production of overview photographs (recordings) were marked by the Federal Constitutional Court to be an infringement of fundamental rights, because in general the individual could also be individualized in overview recordings. This constitutes a major disadvantage for the participant of the demonstration. From the consciousness, that the participation in the assembly is recorded, effects of intimidation could arise which affect at the basis of democratic debate in a retroactive way at the same time.

Therefore overview recording according to Art. 9 paragraph 2 sentence 1 BayVersG should only be admissible to control and guide the intervention of the police if it is necessary in the individual case because of the dimension or the confusion at the assembly. Recordings under Art. 9 paragraph 2 sentence 2 BayVersG have been provided with the reservation that the requirements of Art. 9 paragraph 1 sentence 1 BayVersG are fulfilled at the same time so that by the very nature of the matter a danger for public security is demanded.

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<sup>3</sup> BVerfGE 122, 342 (<http://www.servat.unibe.ch/dfr/bv122342.html>)

Moreover, the Federal Constitutional Court alleged the poor protection of fundamental rights by procedures. In this spirit, the evaluation of the overview recording shall only be admissible if it takes place immediately after the assembly. Insofar as data is not needed in relation to individual persons for prosecution of crime in connection with the recorded assembly or for the future defence of the assembly, the data has to be deleted within two months or has to be transformed in an anonymous and irreversible form.

With reference to the dogmatic of the constitution the decision is also interesting because the Federal Constitutional Court primarily makes recourse in its review standard to the freedom of assembly that are protected through Art. 8 GG. The question if the complainants could have also relied on the informational self-determination has been left open by the Federal Constitutional Court because of Art. 2 paragraph 1 GG there cannot arise further requirements than of Art. 8 paragraph 1 GG. In this sense the general conclusion can be drawn that rights to liberty also protect against the exercise of observation.

Such an observation needs to have a clear legal and area specific regulation and must be already restricted in the law by sufficient organizational and procedural safeguarding. As a result the particular legal barrier doctrine which the Federal Constitutional Court originally only created for the informational self-determination will be transferred on other freedoms. The paramount importance of the constitutional requirements will also be demonstrated in the next section, in which I will explain two provisions in detail that allow police forces the use of video surveillance.

#### **IV. Detailed analysis of three legal provisions**

Following, I will have a closer look on two provisions that allow police forces the use of CCTV. You can find the original law texts in German and an English translation on my handout.

##### **1. Section 100h StPO (Federal Prosecution Act)**

The aim of the measure is to obtain evidence for the criminal prosecution. The rule is completed by section 101 StPO.

a) Subsection 1 allows to take photographs (Bildaufzeichnungen), comprising both video and film recordings. Subsection 1 permits to take photographs without the knowledge of the persons concerned. This covert collection of the data regularly calls for a higher weight of the reasons that might justify the interference. Thus, subsection 1 contains limitations, based on the principle of proportionality: The measure is only admissible outside private premises to avoid an interference with the inviolability of the home protected by Article 13 of the Basic Law.

Furthermore, photographs may only be taken where other means of establishing the facts or determining an accused's whereabouts would offer less prospect of success or be more difficult.

b) Subsection 2 also explains itself in the light of the principle of proportionality. Subsection II generally allows to direct a measure only against an accused person. The intervention in one's fundamental rights is even more severe if a person is not accused. Therefore subsection 2 tightens the requirements for such an intervention. The measure is only admissible where other means of establishing the facts or determining an accused's whereabouts would offer much less prospect of success or be much more difficult.

c) Subsection 3 permits police forces to execute a measure even if third persons are unavoidably affected. This provision is also demanded by constitutional law. For third persons the video observation constitutes an interference with their fundamental rights. Therefore an explicit statutory legal basis is required.

d) Like I already mentioned section 100 h is completed by section 101. Section 101 leads back to the idea of fundamental rights protection through organization and procedure. At this point I do not need to give any more details. Section 101 requires to label personal data which was acquired by means of measure pursuant to section 100 h.

Subject matters of subsection 4, 5, 6 and 7 are the legal protection by the courts. The constitutional background of these provisions is the guarantee of access to justice protected by Article 19 subsection 4 of The Basic Law. This applies not only for open but also for secret measures. For these covert measures a subsequent remedy is constitutionally required. Therefore, the person targeted and other persons significantly affected thereby have to be notified when the surveillance is finished.

Subsection 8 imposes the obligation on the police to delete personal data acquired by means of the measure immediately, if they are no longer necessary for the purpose of criminal prosecution or possible court review of the measure.

## 2. Art. 32 PAG (Bavarian Police Act)

The regional police law also contains competences for video surveillance. Purpose of the police law is to avert dangers to public security, especially to commit crimes. Moreover the police is authorized to do preventive law enforcement as far as the federal legislator has not enacted statutory provisions in this area. Preventive law enforcement authorizes to compile data, which is needed in future criminal proceedings. Police laws differ from federal state to federal state but shares a common core of legal principles. Reason for these commonalities is a joint draft of the federal- and regional ministers of interior. Moreover, police law has been standardized by the judiciary of the Federal Constitutional Court.

Following I will take a closer look at the use of video surveillance to control hotspots of crime. These are areas where many crimes are committed. I have chosen the relevant provision of the Bavarian police act, which is provided in Art. 32 PAG. Similar provisions can also be found almost in all other regional police acts. You can find the text of the section on the handout.

Article 32 subsection 2 PAG authorizes the police to produce open visual and audio recordings. "Open" means that the surveillance shall not happen covertly. Thus, in accordance to subsection 2 sentence 2 one has to point to the recordings. In practice police forces put up signs with pictograms which are also understandable for people who are not able to read. The recording is limited spatially to the public locations named in Art. 13 II Nr.2 PAG. A location can only be surveyed if there are sufficient factual indications, that people arrange, prepare or commit an offense at this location (aa) or if people meet without the necessary residence permit (bb) or if there are criminals who are hiding (bb). Article 13 extends the measure to monitor location in which persons are involved in prostitution.

Furthermore, according to Art. 13 Abs. 2 Nr. 3 surveillance is admissible at public places at which people are involved in regulatory offences.

Article 32 subsection 3 also authorizes a covert surveillance. Spatially this competence is restricted to places or facilities named in Art. 13 subsection Nr. 3 PAG. These are for example transport- and supply facilities, public transport or other particularly endangered objects. According to subsection 3 video surveillance shall be permitted only if factual indications show that at or in these objects offences shall be committed and if these offences endanger the

persons which are in or at the objects or if they endanger the objects or the things that are contained therein.

The procedural safeguards differ from section 100 h. The only safeguard in Art. 32 subsection 4 PAG is the maximum amount of time for the retention of the recordings. The data normally have to be deleted at the latest after two month. This is in accordance with the principle of proportionality because a longer-lasting retention is not necessary, if the data is not required for the prosecution of mayor administrative or criminal offences.

In my opinion it is disputable whether Art. 32 subsection 3 is consistent with the fundamental right to informational self-determination. Compared to an open observation, a secret observation constitutes a much more intensive interference. With regard to the principle of proportionality this can only be lawful, if the purpose of the measure cannot be achieved through an open observation. However Art. 32 subsection 3 provides no such limitation. Therefore this provision violates the principle of proportionality and the requirement of a certain, clear and area specific legal basis in statutory law.

### 3. New version of Art. 9 BayVersG

The Bavarian Legislator responded to the urgent decision of the Federal Constitutional Court with a new version of the BayVersG. The exact wording of the new version can be found in the synopsis of the law.

In comparison to the initial version the encroachment elements were defined more restrictive. The police is according to Art. 9 paragraph 2 sentence 1 just allowed to openly produce overview recordings of assemblies in the open air in order to control and guide the intervention of the police and only if it is necessary in the individual case because of the dimension or complexity of the assembly. The recording of overview photographs is just admissible if actual facts justify the assumption that considerable risks for public safety and order arise from assemblies, parts thereof or their vicinity. The identification of a person depicted on an overview recording is just permitted by Art. 9 paragraph 2 sentence 3 BayVersG insofar as the requirements of paragraph 1 are fulfilled. Therefore actual facts are necessary that substantiate the assumption of a major risk for public safety and order. The protection of fundamental rights was considerably extended in Art. 9 paragraph 3 BayVersG through procedure. As a result the recordings have to be evaluated immediately and must be deleted within 2 months, insofar as they are not needed any more for the purposes named in Art. 9 paragraph 3 sentence 1 BayVersG.

The example of the BayVersG shows in which huge extent the Federal Constitutional Court influences the legislator in the area of security law. This creates an indisputable advantage to underwrite an effective protection of fundamental rights. On the other hand one should also recognize that the level of democratic legitimacy of laws, which transform almost word by word what is imposed by the Federal Constitutional Court, is at least reduced. This is the reason why an intensive debate takes place in Germany how to keep the balance between the protection of the fundamental rights through constitutional law and the democratic self-determination.

## V. Requirements of the European Law

Video surveillance by the police not only has a constitutional, but although a European aspect. Germany is like Turkey a member of the Council of Europe. Therefore, German police forces have to meet the standards of the European Convention on Human rights. For video

surveillance the most relevant provision is Art. 8 of the European Convention of Human Rights. This article guarantees the right to respect for private and family life. The wording of this article you will find on your handout.

Many rulings of the European Court of Human Rights in Strasburg deal with the protection of the right to respect for private life. Nevertheless, there are no clear precedents on video surveillance by the police. However, what Art. 8 means in this respect can be estimated on the base of other decisions. Subject matter of these cases have been covert monitoring of suspected persons<sup>4</sup>, video surveillance of employees at work<sup>5</sup> and the publishing of a CCTV footage by the press<sup>6</sup>. The comparison between these rulings and the rulings of the Federal Constitutional Court show some differences but although great similarities.

#### 1. Video surveillance as an invasion of Art. 8 ECHR

In contrast to the right to informational self-determination Art. 8 par. 1 does not guarantee an overall protection when the state and his authorities collect and process personal data.

Narrower Art. 8 is only applicable if the collection and processing of the data interferes with the private life of the citizens. As the European Court on Human Rights has stated several times the concept of private life extends to aspects relating to personal identity, such as a person's name or picture. Nevertheless there is no interference with private life, when a person is monitored in public without recording of the surveillance. On the other hand private life is affected when the surveillance is permanently recorded. Art. 8 is affected too by a covert monitoring of suspects. Under this circumstances even the interaction of a person with others, even in a public context, can fall within the scope of "private life".

As a consequence many measures of video surveillance by the police will interfere with the "private life" guaranteed by Art. 8. This is especially true for any measures of secret surveillance. The same is true for other open forms of surveillance if the data are not only transmitted to a control room but permanently recorded.

#### 2. Legal requirements to justify the intervention

Art. 8 subsection 2 stipulates that any interference in "private life" has to be in accordance with the law and has to pursue a legitimate aim.

Due to the common-law-tradition in accordance with the law has a different meaning than in German constitutional law. Law as laid down in Art. 8 is not restricted to statutes, but also includes common law. Nonetheless even common law affecting Art. 8 of the European Convention on Human rights has to satisfy strict standards. The European Court of Human Rights demands that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him. Moreover the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.

Therefore measures of secret surveillance require a minimum safeguard that should be set out in statute law in order to avoid abuses of power. The crucial questions are the following: What is the nature of offences which allow a secret surveillance. Who can be monitored secretly. What is the maximum duration of such a measure? What are the procedures for

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<sup>4</sup> ECHR No. 5029/71, 6.9.1978 - Klass/Germany (<http://hudoc.echr.coe.int/webservices/content/pdf/001-57510?TID=eeyebbc0yq>)

<sup>5</sup> ECHR No. 420/07, 5.10.2010 - Köpke/Germany (<http://hudoc.echr.coe.int/webservices/content/pdf/001-101536?TID=lgyeawmbzy>)

<sup>6</sup> ECHR No. 44647/98, 15.5.2001, Peck/GB (<http://hudoc.echr.coe.int/webservices/content/pdf/001-5860?TID=vnxtwgfxfwq>)

examining, using and storing the data to other parties. Under which circumstances the recordings have to be erased?

For example the European Court of Human rights has stated a violation of Art. 8 in the case that the domestic law lacks a provision how to deal with persons who are accidental dialogue partner of a person that is secretly monitored by the police.

In many cases the European Court on Human rights has noted the importance of guarantees of organization and procedure. The objective of this guarantees is to protect the citizens against arbitrary interception. The consequence is that the rulings of the European Court on Human Rights and the rulings of the Federal Constitutional Court share a common ground. For example regulations in accordance with the law require an independent control by the courts or other independent authorities.

The principle of proportionality is also acknowledged in the rulings of the European Court of European Rights. In the context of the protection of private life it is specified in Art. 8 subsection 2. According to this provision any inference with private life has to be necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

However, the concept of legal control of the balancing between the interests and the integrity of privacy is different from the approach of the Federal Constitutional Court. The European Courts of Human Rights accepts a broader margin of discretion of the legislator how to balance conflicting public and private interests. Therefore, as I have mentioned above, the main safeguards are procedural- and organizational provisions.

In summary, Art. 8 EMRK also imposes requirements for the collection and processing of personal data. However overall, they stay behind the stronger requirements, which the Federal Constitutional Court prescribes in its jurisdiction. This explains also why the jurisdiction of the European Court of Human Rights to Art. 8 EMRK does not have any real practical relevance in Germany in the area of collecting personal data by the police.

## **VI. Summary**

The question, if and within which limits police forces are allowed to use video surveillance as a mean of deterrence and for detection of crimes is not only a political decision in Germany. As I have shown in my presentation the legislator is limited by the Basic Law but also by the European Convention on Human Rights.

The stipulations, that these two different legal systems prescribe can not be brought to a simple formula. German constitutional law and the European Convention on Human Rights require organizational and procedural safeguards in order to reduce the intervention with privacy to a minimum. Furthermore, the German constitutional law limits the admissibility to collect and process personal data through the principle of proportionality.

I have reached the end of my presentation and will sum up my findings in four statements.

1. The Fundamental Rights and the European Convention on Human Rights force the police to justify the use of video surveillance.
2. Any interference with the right to informational self determination or with private life protected by Art. 8 of the European Convention on Human Rights require a legal basis. With regard to this stipulation the measures of surveillance become predictable for the citizens and are democratically legitimated by the parliament.
3. The admissibility of video surveillance is limited by organizational- and procedural safeguards as well as the principle of proportionality. Therefore a covert surveillance is only

lawfull when an open monitoring is less effective. Moreover, recordings that have been made must be deleted if they are not needed any more to protect public safety or to prosecute crimes. Furthermore, a maximum retention time limit has to be noted.

4. Whether these requirements are met is controlled by the jurisdiction.