



Deutsches Forschungsinstitut  
für öffentliche Verwaltung

# *Legal issues of digital assembly monitoring*

*Drones and other modern techniques*

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## Introduction

- » How can modern techniques of surveillance intervene in the fundamental rights of assembly participants?
- » Which aspects are important for the legislators and the police in terms of surveillance of assemblies?

## Constitutional preliminary questions

- » Which fundamental rights are concerned?
- » Art. 2 Abs. 1 GG, Art. 1 Abs. 1 GG; the right of a free decision about personal informations
- » Art. 8 Abs. 1 GG, the freedom of assembly; includes a higher level of protection, **but**: only for assemblies to form a **common opinion** (BVerfG).
- » **Argumentum a priori**: if a law allows the police to intervene in a political assembly, then it allows them even more to intervene in non-political assemblies (e.g. music festivals)

## Constitutional preliminary questions

- » Surveillance intervenes in the freedom to assembly **and** in the data protection law
- » assembly law= **German police law**; data protection = **law of the EU** (guideline 2016/680/EU)
- » For German law, the Grundgesetz is the constitutional reference; for European law, it's the European charter of fundamental rights
- » **P**: which fundamental-right-system is the reference?
- » → Art. 8 GG, but the charter has to be taken in consideration

## Art. 8 GG as reference

- » **Paragraph 1: All Germans\* have the right to assembly without registration or permission, peacefully and without weapons**
- » **Paragraph 2: For open-air assemblies, this right can be limited by or through the law**
  
- » \*Art. 18 TFEU forbids a discrimination of EU-Citizens, so „all Germans“ means „all European citizens“

## Art. 8 GG as reference

- » „The right of the citizen, to participate actively on the political process of forming a public opinion by using the right to assembly, is an indispensable element of the democratic community“ (BVerfGE 69, 315; „Brokdorf-Decision“, 1985)
- » Right to assembly = special form of the freedom of speech, which is „absolutely constituting“ for the liberal-democratic order in Germany (BVerfGE 20, 56 (97 f.)

## Interference and threat for the fundamental right to assembly

- » Observation does not intervene in assemblies physically, **but:**
- » Through observation, there can be a „feeling of uncontrollable surveillance“ (BVerfGE 125, 260 (332))
- » Participants do not use (special forms of) their freedom of assembly (so called. **chilling effect**)
- » chilling effect = interference in Art. 8 GG!

## **Interference and threat for the fundamental right to assembly: specific aspects of the intensity**

- » Noticeability of surveillance
- » Scope of action
- » Transmission of surveillance-data
- » Sensitive kind of data (political opinions, ethnicity...)
- » Techniques of surveillance, e.g. ...



## ...Drones (current research object)

- » Drones are used by the German police for different tasks (border protection, searching for missed persons, **Overview of assemblies**)
- » The records can be used to plan and coordinate police actions
- » Older court decisions: overview records can't be used to individualize persons → no interference in fundamental rights
- » Today: Because of the high resolution of modern cameras, people can be individualized even from distant overview pictures → there are no „innocent“ records anymore (BVerfGE 122, 342 (368))

## Aspects of Drones

- » Current law for video surveillance on assemblies: §§ 12a; 19 VersammlG (law of assemblies)
- » Does this law allow the use of drones?
- » § 12a is not limited on special techniques → not every technological progress needs an own law
- » **But:** are drones part of a new „dimension“ of surveillance?
- » Three-dimensional range of action → no obstacles can block a drone
- » Bird's-eye view → no possibility to take cover behind objects

## Aspects of Drones

- » Small and silent drones; high flying: lower visibility → secret use is not covered by §§ 12a; 19!
- » „Deficit of democratic legitimation“ (Prof. Gusy): no own law= no parliamentary and public discussion about new technologies
- » In the result: §§ 12a; 19 still covers the use of drones, **but** the police has to mind the special aspects of drones and their potential of intimidation. They are not a simple alternative to standard cameras.
- » Example for an own law for drones: Art. 47 PAG (Bavarian police law)

## Further questions for future research about assembly controlling and surveillance

- » Does the digital era need a new understanding of assemblies? E.G.: Turkish President Erdogan wants to speak via Skype on a political assembly in Germany (Cologne 2015). How can such actions be restricted by the public administration?
- » What is the function of European data protection law? Will the European Court get a new role as a fundamental right court for police actions?
- » The legal quality of DSS: how can suggestions of a DSS be used in a police decision, considering the principle of proportionality? (in cooperation with the sociology: the influence of the „machine bias“)



# Thank you for your attention!

*Any questions?*

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