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 fiori*: 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 assemble 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
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 parlamentary 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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