

The Decision of the *Bundesverfassungsgericht* of April 12, 2005 – Concerning Police Use of Global Position Systems as a Surveillance Tool

By Nicole Jacoby*

A.

On April 12, 2005,¹ the *Bundesverfassungsgericht* (German Federal Constitutional Court) ruled that regulations in the *Strafprozessordnung* (StPO – Code of Criminal Procedure)² concerning police use of global positioning systems (GPS) did not violate the *Grundgesetz* (GG – German Constitution or Basic Law)³ so long as the investigators did not use the technology in conjunction with other surveillance methods that could lead to the construction of a personality profile of the suspect observed. The following comment examines the facts of the case and evaluates the Court's decision in detail.

B.

In 1992, out of growing concern for the difficulties in fighting organized crime, the German legislature passed a new law⁴ that broadened the types of investigative measures federal and state law enforcement officials could undertake. One provision of the new law,⁵ which was integrated into the Code of Criminal Procedure as § 100c StPO, permits the taking of photographs and visual recordings

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¹ BVerfG, 2 BvR 581/01 from April 12, 2005, available at http://www.bverfg.de/entscheidungen/rs20050412_2bvr058101.html.

² For an English version, see <http://www.iuscomp.org/gla/statutes/StPO.htm>.

³ For an English version, see http://www.bundestag.de/htdocs_e/info/gg.pdf.

⁴ *Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität*, of July 15, 1992 (BGBl. I S. 1302).

⁵ § 100c StPO.

without the knowledge of the person that is the subject of the surveillance.⁶ In addition, the provision permits, under certain conditions, the use of “other special technical measures” for the purposes of surveillance to establish the facts of a case or to determine the whereabouts of a perpetrator.⁷ Such measures are permissible where the investigation concerns a criminal offense of considerable importance, and where other means of establishing the facts or determining the perpetrator's whereabouts are considerably less promising or more difficult.⁸ Crimes of considerable importance include murder, aggravated robbery, extortion, gang theft, and money laundering.⁹

An amendment to the law that came into effect on November 1, 2000 further expanded the investigative powers of the police by allowing for long-term surveillance of suspects.¹⁰ Under § 163f StPO, in investigations concerning a criminal offense of considerable importance, the surveillance of suspects may take longer than 24 hours or may take place on more than two days so long as other means of establishing the facts or determining the perpetrator's whereabouts would be considerably less promising or would be more difficult.¹¹ A criminal prosecutor must approve this type of surveillance.¹² For surveillance periods of longer than one month, an order must be obtained from a judge.¹³

C.

In his *Verfassungsbeschwerde* (constitutional complaint) that led to the Court's decision, the claimant, Bernhard Falk, argued that the use of GPS by police investigators violated his rights under Articles 1(1) and 2(1) of the *Grundgesetz*.¹⁴

⁶ § 100c StPO (1)1a.

⁷ § 100c StPO (1)1b.

⁸ § 100c StPO (1)1b.

⁹ § 100c StPO (1)3.

¹⁰ See § 163f StPO.

¹¹ § 163f StPO (1)1-2.

¹² § 163f StPO (3).

¹³ § 163f StPO.(4).

¹⁴ BVerfG, 2 BvR 581/01 from April 12, 2005, para. 27-29, available at http://www.bverfg.de/entscheidungen/rs20050412_2bvr058101.html.

Falk, a member of the left extremist group *Antimperialistische Zelle* (Antimperialist Cell) who has since converted to Islam and now uses the surname Uzun, had been investigated for his use of explosives against German political parties in furtherance of his political cause as early as 1985. In 1999, he was convicted on four counts of attempted murder and was sentenced to thirteen years in prison.¹⁵ Criminal proceedings took place before the *Oberlandsgericht* (OLG – Highest Regional Criminal Court) in Düsseldorf, and the court depended heavily on surveillance evidence collected by police investigators in convicting Falk.¹⁶

In addition to traditional observation methods that included video, telephone and mail surveillance, police investigators secretly placed a GPS receiver on the claimant's car. Through a system of satellite signals and computers, GPS technology can determine the latitude and longitude of a receiver on Earth. Using this technology, police investigators were able to pinpoint the location of the claimant's vehicle within a 50-meter radius for a period of approximately 10 weeks.

The claimant alleged that the use of GPS surveillance violated his fundamental right to privacy and exceeded the legal boundaries set by § 100c StPO 1(1b). In addition, Falk claimed that the use of GPS, coupled with the other observation methods, cumulatively constituted an unconstitutional invasion of his privacy under Articles 1 and 2 of the *Grundgesetz*.

Article 1 of the *Grundgesetz* provides:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.¹⁷

Under Article 1, the state has an affirmative obligation to create the conditions that foster and uphold human dignity.¹⁸ Article 1 is closely linked to Article 2's personality clause.

Article 2 provides:

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.¹⁹

¹⁵ *Id.* at para. 14.

¹⁶ *Id.* at para. 15.

¹⁷ *Grundgesetz* [Constitution] art. 1, para. 1.

¹⁸ James J. Killean, *Der Große Lauschangriff: Germany Brings Home the War on Organized Crime*, 23 HASTINGS INT'L & COMP. L. REV. 173, 186 (2000).

¹⁹ *Grundgesetz* [Constitution] art. 2, para. 1.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.²⁰

Thus, the right to personality, unlike the human dignity clause, is not absolute, and it does not impose upon the state an affirmative obligation to create the conditions necessary for its realization.²¹ The *Bundesverfassungsgericht* has held that the personality clause should be invoked only when intrusive state action is at stake.²²

The *Bundesgerichtshof* (BGH - Federal Supreme Court) ruled against Falk's claim and held that the use of the GPS device fell within the legal boundaries of § 100c StPO 1(1b).²³ Moreover, the court found that the use of GPS, both individually and in conjunction with other surveillance techniques, by police investigators did not violate the constitutionally protected *Kernbereich* (core sphere of privacy) evoked in Articles 1 and 2 of the *Grundgesetz*.²⁴

D.

In its April 12, 2005 opinion, the *Bundesverfassungsgericht* agreed that the use of GPS technology in police investigations of crimes of considerable importance was not unconstitutional.²⁵ Although the Court noted that GPS surveillance did constitute an attack on the suspect's personality rights, the extent and intensity of the invasion was not at a level that violated human dignity or the untouchable core sphere of privacy.²⁶ The Court emphasized the usefulness of GPS technology was limited to revealing a person's location and the length of time spent in a given location, and that GPS did not function effectively in closed rooms or on streets in dense neighborhoods.²⁷

²⁰ *Grundgesetz* [Constitution] art. 2, para. 2.

²¹ See Killean, *supra* note 18, at 189.

²² See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 314 (2^d ed. 1997); Killean, *supra* note 18, at 189.

²³ BGH, *JURISTEN ZEITUNG* [JZ], 56 (2001), 1144.

²⁴ *Id.* See BVerfG, 2 BvR 581/01 from April 12, 2005, para. 23-26, available at http://www.bverfg.de/entscheidungen/rs20050412_2bvr058101.html.

²⁵ BVerfG, 2 BvR 581/01 from April 12, 2005, available at http://www.bverfg.de/entscheidungen/rs20050412_2bvr058101.html.

²⁶ *Id.* at para. 56.

²⁷ *Id.* at para. 53.

In rendering its decision, however, the Court asserted that the rapid development of information technologies demanded that legislators be alert to the creation of new investigative measures that could infringe upon the constitutional right to informational self-determination.²⁸ Accordingly, the Court required lawmakers to be prepared to step in with corrective legislation as necessary to limit the scope of § 100c StPO should the term “other special technical measures” evolve to include technologies that overreach constitutional privacy bounds.²⁹

Notably, the Court found that *Rundüberwachung*, or total surveillance (i.e. multiple simultaneous observations), leading to the construction of a personality profile of a suspect, would be constitutionally impermissible.³⁰ Nonetheless, the Court did not find that the comprehensive surveillance of Falk rose to the level of a *Rundüberwachung*, even though police periodically read the suspect’s mail, tapped the suspect’s phone lines, and observed his home via video.³¹ The Court noted that the additional surveillance measures, which were used primarily on the weekends, merely supplemented the GPS surveillance.³² Moreover, the Court noted that the use of what it considered to be particularly sensitive acoustic surveillance had been very limited.³³

As a preventative measure, the Court mandated that prosecutors be the primary decision makers regarding all investigative matters in a case and that prosecutors be informed of all investigative tools in use.³⁴ The Court noted that a full documentation of all completed or possible investigative measures must be recorded in the suspect’s file.³⁵ Moreover, in order to prevent parallel surveillance procedures of the same suspect, prosecutors from different *Länder* (federal states) should coordinate their investigative efforts through the *Verfahrenregister* (prosecutorial procedure register).³⁶ Similar coordination should occur between

²⁸ *Id.* at para. 51.

²⁹ *Id.* at para. 51.

³⁰ *Id.* at para. 60.

³¹ *Id.* at para. 16.

³² *Id.* at para. 67.

³³ *Id.* at para. 67.

³⁴ *Id.* at para. 62.

³⁵ *Id.* at para. 62.

³⁶ *Id.* at para. 62.

prosecutors and federal intelligence agencies.³⁷ The Court stated that legislators should be vigilant in regard to whether such coordination is taking place and, if not, create regulations that would prevent uncoordinated investigative measures.³⁸

E.

The Court's findings regarding police use of GPS technology are in line with previous decisions that held that surveillance measures that facilitate the construction of a complete personality profile and those that invade an individual's core sphere of privacy are unconstitutional.

In the groundbreaking *Census Act Case* (1983), the Court stated that under Articles 1 and 2 of the *Grundgesetz* an individual has "the authority to decide for himself, on the basis of the idea of self-determination, when and within what limits facts about his personal life shall be disclosed."³⁹ In that case, the Court struck down provisions of Germany's 1983 census law⁴⁰ that permitted information gathered by the federal government to be shared among local and regional authorities.⁴¹ In light of the development of new technologies, the Court noted that "the technical means of storing highly personalized information about particular persons today are practically unlimited."⁴² Of particular concern to the Court was the possibility that government officials could use automatic data processing to construct a "complete personality profile."⁴³ However, the Court stated that the right to informational self-determination was not unlimited and that certain restrictions on an individual's right to informational self-determination for reasons of compelling public interest would be acceptable.⁴⁴

In the more recent (and controversial) *Lauschangriff Case* (2004), the Court emphasized the interrelationship between human dignity, the right to personality, and the inviolability of the home in ruling that acoustic surveillance of the home by

³⁷ *Id.* at para. 63.

³⁸ *Id.* at para. 64.

³⁹ BVerfGE 65, 1 at para. 154 (translation from KOMMERS, *supra* note 22, at 324).

⁴⁰ Volkszählungsgesetz 1983 (VoZählG 1983) of March 25, 1982 (BGBl. I S. 369), § 9 Abs. 2-3.

⁴¹ BVerfGE 65, 1 at para. 210-212.

⁴² *Id.* at para. 102, 104 (translation from KOMMERS, *supra* note 22 at 324).

⁴³ *Id.* at para. 102 (translation from KOMMERS, *supra* note 22, at 324).

⁴⁴ *Id.* at para. 156-157 (translation from Kommers, *supra* note 22, at 324).

the state was constitutionally prohibited. There, the Court noted that all citizens were entitled to a sphere of intimacy in which to conduct private conversations without fear of government intrusion.⁴⁵ The Court described the home as “last refuge” for the development of one’s personality and preservation of one’s dignity – the place where one’s innermost perceptions, thoughts, and opinions emerge.⁴⁶ The Court noted that persons may be able to forego writing letters or making telephone calls to preserve their privacy, but asserted that the right to retreat into one’s home was absolute.⁴⁷ In its inquiry, the Court found that particularly intimate types of communications should be constitutionally safeguarded in all but exceptional cases. The Court created a protected category of communications that included conversations between close family members or other persons of trust, such as members of the clergy, physicians, and criminal defense attorneys.⁴⁸

The Court’s GPS decision, although consistent with previous rulings, has not expanded much on existing judicial guidelines regarding what types of technologies may be constitutionally acceptable in police investigations. The GPS ruling is consistent with the idea that the homes, as well as personal communication, receive greater constitutional protection than other personal activities, such as one’s whereabouts or movements, which at least in theory could be observed even without the assistance of locator-technology. Because GPS technology was ineffective indoors and even on densely populated streets, the Court found that its use in police investigations did not affront human dignity as it relates to the sanctity of the home.

The Court took steps to ensure the prevention of a *Rundüberwachung* that can lead to the construction of a complete personality profile by centralizing surveillance information in the state prosecutor’s office and requiring federal and state law enforcements to share surveillance information with one another. However, the characteristics of a *Rundüberwachung* remain loosely defined. The Court indicated that such an analysis is qualitative, rather than quantitative, by treating acoustic surveillance as a larger infringement into the privacy sphere than, for example, video observations. In fact, the limited use of acoustic surveillance in the GPS case supported the Court’s finding that no unconstitutional *Rundüberwachung* had taken place. The Court has also applied a principle of proportionality, weighing the

⁴⁵ BVerfG, 1 BvR 2378/98 from March 3, 2004, para. 119-120, available at http://www.bverfg.de/entscheidungen/rs20040303_1bvr237898.html

⁴⁶ *Id.* at para. 120.

⁴⁷ *Id.* at para. 54.

⁴⁸ *Id.* at para.148.

surveillance used against the crime under investigation. These are, however, the only guidelines to aid prosecutors in their determination of whether a cumulative use of surveillance methods has crossed constitutional bounds.

Given the rapid evolution of location- and other technologies in recent years, the Court's decision is unlikely to be far-reaching. In just the few years since Bernhard Falk filed his *Verfassungsbeschwerde*, the precision of location technology has increased immensely. At that time, a GPS receiver could fix a suspect's location within a 50-meter radius. Today, GPS can in some cases pinpoint locations to an accuracy of five meters.⁴⁹ Moreover, the use of GPS technology in police investigations already appears to be obsolete. The *Bundeskriminalamt* (BKA – Federal Bureau of Criminal Investigation) claims only to use GPS in six to ten investigations annually, and reports suggest that police have begun to favor the tracing of cell phones as a means to track the physical movements of criminal suspects.⁵⁰ By sending a silent text message to the suspect's phone, police easily can determine the location of the phone, and thereby the suspect, down to a city block.⁵¹ The fact that location technology in cell phones is capable of tracing movements regardless of whether the suspect is traveling by car, by train, or on foot very well could lead to the construction of a constitutionally prohibited personality profile. Although the Court determined that the use of GPS as a surveillance tool did not violate Articles 1 and 2 of the *Grundgesetz*, the Court also made plain that other emerging surveillance technologies could be constitutionally impermissible. In light of the rapid developments in surveillance technology, the Court is likely to confront more privacy complaints arising under StPO 100(c) in the not too distant future. The Court's request, however well intentioned, that legislators act preemptively to prevent police use of particularly invasive surveillance measures is unlikely to prompt action in a political climate that favors tough law enforcement measures against criminals and terrorists. Ultimately, it will be up to the courts to decide whether new and invasive surveillance measures pass constitutional muster.

⁴⁹ See Günther Hörbst, *Auch als Wanze -- wie GPS den Standort verrät*, HAMBURGER ABENDBLATT (April 12, 2005), available at <http://www.abendblatt.de/daten/2005/04/13/420970.html>; Christian Rath, *Polizei darf per Satellit schnüffeln*, DIE TAGESZEITUNG (April 13, 2005), available at <http://www.taz.de/pt/2005/04/13/a0104.nf/text.ges,1>.

⁵⁰ See Mattias Gebauer, *Das Arsenal der High-Tech Polizistin*, SPIEGEL ONLINE (April 12, 2005), at <http://www.spiegel.de/politik/deutschland/0,1518,350921,00.html>; Kay-Alexander Scholz, *Überwachung per Handy ist viel bequemer*, DEUTSCHE WELLE ONLINE (April 12, 2005), at <http://www.dw-world.de/dw/article/0,1564,1550210,00.html>. Cf. Jim McKay, *Nowhere to Hide*, GOVERNMENT TECHNOLOGY (June 2004) (discussing the development and use of location technology by law enforcement officials in the United States).

⁵¹ See *id.*