

The Decision of the *Bundesverfassungsgericht* of March 3, 2004 Concerning Acoustic Surveillance of Housing Space

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A.

On March 3, 2004,¹ the *Bundesverfassungsgericht* (German Federal Constitutional Court) decided that the regulations in the *Strafprozessordnung* (StPO – Code of Criminal Procedure)² concerning acoustic surveillance of housing space (the so called “*Großer Lauschangriff*”) partly violate the *Grundgesetz* (GG – German Constitution or Basic Law).³ Article 13.3 of the Basic Law itself, which in 1998 integrated the right to acoustic surveillance of housing for reason of prosecution into the Basic Law, was nonetheless found to be constitutional.⁴ In the following comment, the legal status, the political background of the constitutional change in 1998 and the essential content of the Court’s decision shall be examined in detail.

B.

By constitutional change in 1998, Article 13 of the Basic Law, concerning the inviolability of housing space, was amended at subsections 3 through 6. Article 13.3 of the Basic Law now allows acoustic surveillance of housing space under the following circumstances:

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¹ BVerfG, BvR, 1 (2004), 2378 (2398), *available at*

http://www.bverfg.de/entscheidungen/rs20040303_1bvr237898.html, and NJW 2004, 999ff.

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 BVerfG, BvR, 1 (2004), 2378 (2398) *available at* http://www.bverfg.de/entscheidungen/rs20040303_1bvr237898.html, Abs.-Nr. 103 ff., and NJW 2004, 999 (1000 ff.).

- that clear facts give the reasons for the suspicion that someone has committed a severe crime defined individually by law,
- that the accused person probably will stay in the housing, and
- that the exploration of the facts by other means is out of proportion or offers no prospects of success.

Article 13.3 of the Basic Law was implemented by the statute concerning the improvement of the fight against organized crime.⁵ The central provision implemented by Article 2 of this statute was § 100(c)(1)(3) StPO. According to its terms, the words of a person under suspicion, which are not officially spoken in a home, are allowed to be intercepted and recorded with technical devices if certain facts arouse suspicion that the person has committed an offence specified in the provision (so called “*Katalogtaten*”).

The catalogue of offences especially contains offences that are typically associated with organized crime. Additionally some offences against national security are enumerated.⁶

Surveillance is allowed only if it is aimed at the discovery of the facts of the crime or at the investigation of the person’s dwelling, and only if any other measure of investigation would be out of proportion or would offer no prospects.

According to § 100(d)(2) StPO the surveillance must be ordered by the national security chamber of the *Landgericht* (regional court)⁷ and only upon the presiding judge’s finding of immediate danger.

⁵ *Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität*, 4 May 1998 (BGBl. I, p.845).

⁶ § 100 c subs. 1 No. 3 (d): criminal offenses against peace, of high treason, of endangering the democratic state based on the Rule of Law, or of treason and of endangering external security (sections 80 to 82, 85, 87, 88, 94 to 96, also in conjunction with section 97b, sections 97a, 98 to 100a, Penal Code);

§ 100 c subs. 1 No. 3 (e): a criminal offense pursuant to section 129 subsection (4) in conjunction with subsection (1), section 129a of the Penal Code (creation of a criminal organization in an especially severe case, support of a terrorist organization). For difficulties which arise from the specification of offences in the Code of Criminal Procedure, see Hans Kudlich & Florian Melloh, *Money Laundering and Surveillance of Telecommunication – The Recent Decision of the Bundesgerichtshof (BGH – Federal Court of Justice)*, 5 GERMAN LAW JOURNAL 123 (2004), at <http://www.germanlawjournal.com/article.php?id=381>.

⁷ The Chamber of national security is laid down in § 74a *Gerichtsverfassungsgesetz* (Organization of Courts Act) in the version of 9 May 1975 (BGBl. I, p. 1077), changed by law of 24 August 2004 (BGBl. I, p. 2198).

Further regulations concern injunctions against the admissibility of the evidence so gathered (§100(d)(3) StPO) and the duty to inform the person targeted (§101(1) and (4) StPO).

Section 100(f) StPO concerns the use of personal data, which was discovered pursuant to the above-described investigatory surveillance. Primarily, the information has to be used only for the purpose of criminal procedure, either the one in which the measure was applied or another procedure which concerns an offence enumerated in § 100 c (1) (3) StPO.

It is also allowed, however, to use the information for preventive activity of the police, although the following conditions must be met:

- The purpose of the police action must be the restriction of a danger in a single case concerning life, body or freedom of a person or significant material worth, and

- Any personal information gathered by a police action that corresponds to a measure regulated in §100(c)(1)(3) StPO can only be used for purposes of evidence if, during examination of the information gathered, facts emerge that are necessary for the investigation of the crimes enumerated in § 100(c)(1)(3) StPO.

C.

The claimants in the *Verfassungsbeschwerde*⁸ (constitutional complaint) procedure that led to the Court's decision argued that an act of acoustic surveillance conducted pursuant to the above-described law constituted a violation of their constitutional rights under the following provisions of the Basic Law: Article 1(1) and (3),⁹ Article 13(1)¹⁰ in connection with Article 19(2),¹¹ Article 79(3),¹² Article 19(4),¹³ and Article 103(1).¹⁴

⁸ Art. 93 subs. 1 Nr. 4 a GG.

⁹ Article 1 [Human dignity]

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

[...]

(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

¹⁰ Article 13 [Inviolability of the home]

(1) The home is inviolable.

¹¹ Article 19 [Restriction of basic rights]

(2) In no case may the essence of a basic right be affected.

The constitutional complaint had the following background:

The implementation of the acoustic surveillance of housing space for the purpose of prosecution (the 1998 constitutional amendment) was preceded by an intensive and controversial public discussion of the so-called "*Großer Lauschangriff*."

Concerned with the emergence of new forms of crime since the 1990s, especially organized crime, there have been increasing calls for the necessity of conducting surveillance of housing space for the purpose of discovering and investigating criminal offences. Early initiatives,¹⁵ however, were not successful.

By a law passed on July 15, 1992,¹⁶ which regulated measures to fight organized crime, the right to intercept conversations outside of closed rooms was integrated into the Code of Criminal Procedure. The authority to intercept words spoken inside a home were not regulated because of the constitutional doubts of the legality of such measures.¹⁷

Discussions after 1992 focussed on the concern that measures concerning the acoustic surveillance of the home could only be enacted following an amendment of the

¹² Article 79 [Amendment of the Basic Law]

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

¹³ Article 19 [Restriction of basic rights]

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

¹⁴ Article 103 [Hearing in accordance with law; ban on retroactive criminal laws and on multiple punishment]

(1) In the courts every person shall be entitled to a hearing in accordance with law.

¹⁵ See the discussion of criminal measures against organized crime in Eisenberg, *Straf(verfahrens-)rechtliche Maßnahmen gegenüber Organisiertem Verbrechen*, NJW 1033 (1993).

¹⁶ BGBl. I, p. 1302.

¹⁷ DEUTSCH, *DIE HEIMLICHE ERHEBUNG VON INFORMATIONEN UND DEREN AUFBEWAHRUNG DURCH DIE POLIZEI*, 264 (1991); See Eisenberg, *supra* note 15, at 1037; Leutheusser-Schnarrenberger, *Der "große Lauschangriff" – Sicherheit statt Freiheit*, ZRP 87, 88 (1998).

constitution. But the political need for and the legality of acoustic surveillance of the home remained controversial.

In October 1997 the CDU/CSU, SPD and FDP political parties collaborated in the introduction of the legislation, which finally led to the necessary constitutional amendment and to the implementation of the above-described new regulations of the Code of Criminal Procedure. The changes in Article 13 of the Basic Law were adopted by a two-thirds majority of the *Bundestag* (German Federal Parliament) and *Bundesrat* (Federal Council of the States) in a law of March 26, 1998.¹⁸

The amendment of the Basic Law is regulated by Article 79 of the Basic Law. According to Article 79(1), the Basic Law can only be amended by a law that expressly modifies or amends the wording of the text. Such a law is only valid if two-thirds of the members of the *Bundestag* and two-thirds of the votes of the *Bundesrat* agree.

The statute of May 4, 1998, concerning the improvement of the fight against organized crime,¹⁹ finally implemented Article 13(3) of the Basic Law.²⁰

The law has, however, been under severe criticism since it entered into force. Those who supported the main aim of the law, the effective fight against organized crime, had succeeded. Opposing politicians, who stressed the aim of legal standards and the respect for basic rights in the code of criminal procedure, continued to fight against the amendments implemented by the statute of 1998.²¹

The critics would not accept the arguments in favour of increasing the methods and means of investigation against organized crime. They argued that there does not exist a satisfying definition of the phenomenon of "organized crime."²² Further, they stated that organized crime concerns only 1% of all criminal cases. They rejected the suggestion of an especially high danger arising from organized crime, which, as they argued, was based on the lack of precise information and dependable facts.²³

¹⁸ BGBl. I, p. 610.

¹⁹ See Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität, *supra* note 5.

²⁰ Gusy, *Lauschangriff und Grundgesetz*, JuS 457 (2004) with further citations.

²¹ Leutheusser-Schnarrenberger, *Der "große Lauschangriff" – Sicherheit statt Freiheit*, ZRP 87 (1998).

²² Eisenberg, Ulrich, *Straf (verfahrens-) rechtliche Maßnahmen gegenüber "Organisiertem Verbrechen"*, NJW 1033, 1034 (1993).

²³ Eisenberg, *supra* note 23; Leutheusser-Schnarrenberger, *supra* note 22, at 88.

The criticism also focussed on the effectiveness of two statutes, which had been implemented earlier, in 1992²⁴ and 1994,²⁵ and which also were supposed to be measures to improve the fight against organized crime. There was no reason given by the *Bundesregierung* (Federal Government) supporting the need for such new regulations.²⁶

The most severe criticism, however, concerned the constitutional aspects of the 1998 law. The electronic surveillance of conversation taking place in the home was seen as a massive violation of the personal sphere of a citizen. It was asserted that there is no possibility to escape this surveillance and for this reason such surveillance differed distinctly from the permitted surveillance of telecommunication or postal communication. These forms of communication, it was argued, could be avoided by the adoption of other means of communication.

The *Bundesverfassungsgericht* has repeatedly decided that for every person there has to be a guaranteed private space in which he or she has the right to be left alone and in which the person is not subject to surveillance.²⁷ Under this aspect of constitutional protection, the question was asked, whether the acoustic surveillance of housing space undermines the substance of the constitutional protection of Article 13, which is further secured by Article 19(2) of the Basic Law.²⁸

Also the statute concerning the improvement of the fight against organized crime²⁹ itself was the subject of criticism. The constitutional doubts concerned

- the catalogue of offences in § 100(c)(1)(3) StPO,
- the (unlimited) possibility to extend the duration of supervision measures by court decision in § 100(d)(4) StPO,

²⁴ Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität, of 15 July 1992 (BGBl. 1992, p.1302).

²⁵ Verbrechensbekämpfungsgesetz, of 28 October 1994 (BGBl. I, p. 3186).

²⁶ See the *travaux préparatoire* for the statute of 1997, BT-Drs. 13/8651, 31.

²⁷ BVerfGE 101, 361 (383) (Caroline von Monaco).

²⁸ See for the theory of a relative substance of constitutional rights, BVerfGE 61, 82 (113); BVerfG, NJW 1996, 1201 (1202); Maunz, in: GRUNDGESETZ, KOMMENTAR, Art. 19(2), margin number 16 ; HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS, margin number 332 (20th ed. 1995); see also BVerwGE 84, 375 (380).

²⁹ See Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität, *supra* note 5

- the information of those who are affected by an acoustic surveillance in § 101(1) and (4) StPO, and

- especially injunctions on surveillance and on the use of evidence so gathered in § 100(d)(3) StPO.³⁰

According to Article 13(6) of the Basic Law the *Bundesregierung* has to prepare a detailed report every year where it details the cases in which acoustic surveillance measures were pursued.

The first report of the *Bundesregierung* from January 13, 2002, listed only 70 cases in the years 1998 to 2000; 272 persons were investigated, more than half of them were not accused of a crime. In 58% of the cases the acoustic surveillance had no influence on the result of investigations. The Government Report does not say how many persons really were the subjects of acoustic surveillance because not all of them were counted. Neither does the Government Report show how many private homes (excluding professional or hotel spaces) were subject to surveillance and it does not give evidence about the cases in which only private conversations were investigated.³¹

The official discussion concerning acoustic surveillance of housing space, therefore, continued. In 1999 seven persons filed constitutional complaints challenging this method of investigation under the authority of Article 93(1)(4)(a) of the Basic Law.

D.

The *Bundesverfassungsgericht* in its decision of March 3, 2004, partly rejected the constitutional complaints to the degree that they asserted that Article 13(3) through (6) of the Basic Law and the associated Criminal Procedure provisions, themselves, constituted a violation of the following provisions of the Basic Law: Article 1(1) and (3); Article 13(1); Article 19(2); Article 79(3); Article 19(4) and Article 103(1).

As appears from the judgement of the Court the following reasons were of decisive importance:

I. Article 13(3) GG Does Not Affect the Principles Guaranteed in Articles 1 and 20 GG

³⁰ Leutheusser-Schnarrenberger, *supra* note 22, at 91.

³¹ Leutheusser-Schnarrenberger, *Erfahrungsbericht der Bundesregierung kann Lauschangriff nicht rechtfertigen*, available at <http://www.leutheusser-schnarrenberger.de/>.

Those principles include the respect for and the protection of human dignity (Art. 1 subs. 1 GG). The Constitution only allows measures of supervision that do not violate the dignity of man. Art. 13 subs. 3 GG therefore has to be interpreted in a restrictive way regarding human dignity.³²

There exists a close connection between the inviolability of housing and the dignity of man, which establishes the state's duty to respect a purely personal sphere. Persons have to be sure that the confidentiality of communication is secure in their private rooms. In this substantially intimate sphere everyone is protected so that, without exception, acoustic surveillance of housing space is not allowed in this sphere. Even predominant public interests cannot justify an encroachment upon this sphere of privacy.³³

II. Nevertheless Not All Acoustic Supervision Violates Human Dignity

There are conversations, however, which do not fall within the substantially intimate sphere of persons, for example, those concerning committed criminal offences. Regulations of acoustic surveillance have to exclude any risk of violating human dignity. If surveillance unexpectedly leads to the discovery of absolutely protected personal information, the surveillance immediately has to be stopped and the recordings must be destroyed. Any use of such data is prohibited.³⁴

Typical risks occur in cases of conversations between close family members or other persons to which a confidential relation exists, e.g. religious advisers, physicians or trial lawyers. Here surveillance is allowed only if, at the time of the order permitting surveillance, concrete evidence exists that at least one of the persons talking privately was involved in a criminal offence.³⁵

The *Bundesverfassungsgericht* introduces a flexible method of drawing the line between constitutional and unconstitutional acoustic surveillance of conversations in private rooms. Human dignity is no longer afforded absolute protection.³⁶ The in-

³² 1 BvR 2378/98 of 3 March 2004, Absatz-Nr. 111, 132.

³³ Absatz-Nr. 122f., 134. See also Denninger, *Verfassungsrechtliche Grenzen des Lauschens*, ZRP 101 (2004); Gusy, *Lauschangriff und Grundgesetz*, JuS 457, 458 (2004); Aktuelles aus der Rechtsprechung, JZ 2004, at 2. See also, WEYAND, EINSCHRÄNKUNGEN BEIM "GROßEN LAUSCHANGRIFF" – KEINE KATASTROPHE FÜR DIE PRAXIS (Weyand states that these arguments of the Bundesverfassungsgericht are common sense).

³⁴ Absatz-Nr. 135, 152.

³⁵ Absatz-Nr. 138, 139.

³⁶ Gusy, *supra* note 34, at 459.

investigators are allowed to conduct surveillance of the content of a conversation as long as the information discovered does not touch upon the (still absolutely protected) purely personal sphere.³⁷

III. The Regulations in § 100(c)(1)(3), (c)(2) and (c)(3) StPO Violate Article 13(3) GG In Essential Parts

Injunctions on surveillance and on the use of evidence so gathered, provided by § 100(d)(3) StPO, which are necessary because of the substantial intimate sphere of a person, are not sufficiently appropriated in the sense commented above.³⁸

Article 13(3) of the Basic Law only allows acoustic surveillance in order to discover severe criminal offences defined individually by law. A special gravity can only be assumed if the law provides a penalty of at least five years in prison.

IV. The Inviolability of Housing Has to be Protected Also by Procedural Rules

Several offences listed in § 100(c)(1)(3) StPO do not fulfil this requirements. They are therefore unconstitutional.³⁹

Especially the necessity of a judicial order concerning surveillance of housing space (§ 100(2) and (4) StPO) plays a significant role as a control, in advance of the surveillance, administered by a neutral and independent body.⁴⁰

The *Bundesverfassungsgericht* specifies the requirements of content and grounds of an order permitting surveillance and states that the order has to include the type, duration and extent of supervision measures.⁴¹

In this context the court uses the so-called "*verfassungskonforme Auslegung*," which means an interpretation that respects the constitution. If a statute or other law ranking under the constitution can be interpreted in different ways, and if one of these interpretations would result in a violation of the constitutional provisions, whereas

³⁷ Denninger, *supra* note 34, at 102.

³⁸ Absatz-Nr. 168; See also Geis, *Angriff auf drei Ebenen: Verfassung, Strafprozessordnung und Überwachungspraxis, Die Entscheidung des BVerfG zum großen Lauschangriff und ihre Folgen für die Straferfolgungspraxis*, CR, 338, 341 (2004).

³⁹ Absatz-Nr. 225.

⁴⁰ Gusy, *supra* note 34, at 460.

⁴¹ Absatz-Nr. 269.

the other would not violate them, the second interpretation must be chosen. In this interpretation the regulation in § 100(2) and (4) StPO is constitutional.

V. The Duty to Notify the Supervised Persons According to § 101 StPO Partly Does Not Comply With Article 19(4) GG (guarantee of process of law) and Article 103(1) GG (due process of law)

Every tenant and all third persons affected have the right to be informed about acoustic surveillance of housing. Not all of the exceptions provided in § 101(1) StPO are in conformity with the Constitution. Danger for public safety or endangering the possible continued use of an undercover investigator are not adequate reasons that would legitimise the non-disclosure of the surveillance measures.⁴²

After the commencement of the trial the criminal court has the duty to inform the accused about any acoustic surveillance measures which had been implemented against him or her during the investigation. This duty arises from the right of every person under suspicion to be heard by a court.⁴³ Facts cannot be made known to the criminal court and at the same time be kept secret from the accused.⁴⁴ Therefore the regulation of § 101(1) (second half sentence) StPO is not in conformity with Article 103(1) of the Basic Law.

VI. Most of the Regulations Concerning the Use of Personal Data in Other Procedures (§ 100(d)(5), § 100(f)(1) StPO) Are Constitutional

Information, however, is only allowed to be used for the investigation of severe offences in the sense of § 100(c)(1)(3) StPO in the interpretation of the *Bundesverfassungsgericht* and in order to defend highly protected human rights.⁴⁵

VII. § 100(d)(4) and § 100(b)(6) StPO Contain an Unconstitutional Regulation Concerning Data Destruction

The interests in destroying data and the duty of effective protection by law in case of acoustic surveillance of housing have to be correlated in such a way that effective protection by law is not frustrated or at least made difficult because an investigation of the facts is no longer possible because the material of evidence was de-

⁴² Absatz-Nr. 300 .

⁴³ Absatz-Nr. 308 (316 f.).

⁴⁴ BVerfGE 57, 250 (288); E 101 106 (129).

⁴⁵ Absatz-Nr. 328.

stroyed. For the purpose of judicial control the data is not allowed to be destroyed, it may only be blocked. Data should only be used for the purposes of informing the supervised person and for judicial control.⁴⁶

E.

Two judges of the First Senate dissented, in part, from the decision of the *Bundesverfassungsgericht*.⁴⁷ They argued that Article 13(3) itself violates Article 79(3) of the Basic Law and is therefore invalid. The two judges found that Article 13(3) of the Basic Law does not guarantee the inviolability of the substantially intimate sphere. In their opinion, Article 13(3) of the Basic Law cannot be defined according to constitutional principles, because the use of human dignity as a tool of interpreting the constitution degrades this essential principle, which then can no longer function as a barrier against constitutional changes.⁴⁸

F.

The decision of March 3, 2004, follows the decisions of the *Bundesverfassungsgericht* concerning the gathering of information by the state.⁴⁹ The Judges of the Constitutional Court have limited the right to acoustic surveillance of housing space in favor of the dignity of man. The so called "*Großer Lauschangriff*," regulated in the German Code of Criminal Procedure since 1998, is only partly constitutional.

For the investigators, work might become more difficult. They must thoroughly inspect the legal situation before ordering acoustic supervision and they have to terminate the measure if an intimate conversation begins.

But was this not always the duty of investigators anyway? And was there an acoustic surveillance of housing in the past in order to get information about less than severe criminal offences? This does not seem to have occurred.⁵⁰ Also even members of a family can be exposed to surveillance if all of them were involved in a crime.

⁴⁶ Absatz-Nr. 348.

⁴⁷ This is Judge Jäger and Judge Hohmann-Dennhardt.

⁴⁸ Absatz-Nr. 355.

⁴⁹ BVerfGE 96, 27 (44); E 100, 313; E 103, 142.

⁵⁰ Weyand, *supra* note 33.

On the other hand, a police officer now has to monitor continuously the conversation in a housing space. If personal details are discussed, he or she has to stop the surveillance. This, at the first sight, seems to be only a technical problem.⁵¹

But it is not: In the future, investigators will often act at the limit between right and wrong,⁵² risking unlawful actions violating human dignity in the interpretation of the *Bundesverfassungsgericht* and producing evidence which cannot be used in court.

⁵¹ *Id.*

⁵² Geis, *supra* note 39, at 342.