

BVERFG, 2835/17, 19 MAY 2020 (ON FEDERAL INTELLIGENCE SERVICE – FOREIGN SURVEILLANCE)

- **BVerfG, 2835/17, 19 May 2020**
- **Legalities involved:** international human rights law, European human rights law, German constitutional law
- **Tools to deal with inter-legality:** Article 53 of the ECHR, Article 12 of the Universal Declaration of Human Rights, Article 17(1) of the ICCPR, Article 1 of the German Constitution
- **Reasons for Inter-Legality:** Internationalized political actions and new technological developments

On the 19th of May, the German Constitutional Court ruled that telecommunication surveillance of non-German individuals outside German territory violates the German Basic Law (BVerfG [2020] 2835/17). In the judgment, the Court conducted a constitutional review on certain provisions of the German Act on Federal Intelligence Service, allowing German authorities to collect and process communication data between non-German nationals outside German borders. The complainants, a group of journalists and NGOs, claimed that the provisions of the Act (BND-Gesetz) violate their right to privacy and the freedom of press. The Government objected that it is not bound by the German Basic Law when conducting surveillance activities on foreign individuals on foreign soils. However, the Court found violations of Articles 5 and 10 of the German Basic Law, and stated that the Legislature would have to revise the existing provisions in accordance with the German Basic Law until the 31st of December 2021.

The reasoning of the Court entails a number of crucial questions both from the international and European human rights law perspective. The most important one being whether the German Federal Government is bound by the provisions of the German Constitution when it interferes with the rights of non-German individuals in a non-German territory. Relying on international human rights law, the Court answered affirmatively, raising three main arguments in favour of the accountability of the German Federal Government on foreign soils, mainly interpreting paragraphs 2 and 3 of Article 1 of the Basic Law. Indeed, **pursuant to Article 1(3)**

of the Basic Law, the Court stated that German authorities are comprehensively bound by the fundamental rights of the Basic Law without restrictions on the German territory (Staatsgebiet) or the German people (Staatsvolk) (i). In this context, by making references to the history of the Basic Law and applying to the teleological interpretation, the Court clearly emphasized that the Basic Law aims a comprehensive reading of the fundamental rights rooted in human dignity (par. 94).

Secondly, in the light of the second paragraph of Article 1 and the Preamble, the Court found that the Basic Law recognizes inviolable and inalienable human rights as the basis of every community, of peace and justice in the world. Thus, the fundamental rights of the Basic Law are placed in the context of international human rights guarantees. **This requires that fundamental rights of the Basic Law must be interpreted in the light of Germany's international-law obligations (ii)** (par. 94).

Such a reading inevitably leads the BVerfG to focus on the relevant case-law of the European Court of Human Rights. It clearly cited the leading decisions as regards the territorial scope of the European Convention of Human Rights. In the light of these cases, the BVerfG induced that the case-law of the ECtHR is largely based on the doctrine of “effective control over territory”, and it is still not clear on the protection against surveillance measures taken abroad by the Convention States

- “The European Court of Human Rights is mainly guided by the criterion of whether a state exercises effective control over an area outside its own territory; on this basis, it has in many cases affirmed the applicability of Convention rights abroad (cf. in summary ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, Judgment of 7 July 2011, no. 55721/07, §§ 132 *et seq.* with further references; cf. also Aust, *Archiv des Völkerrechts* 52 <2014>, p. 375 <394 *et seq.*> with further references). However, there has been no final determination as to whether protection is afforded against surveillance measures carried out by Contracting Parties in other states. In a decision that has not become final yet, the First Section of the European Court of Human Rights measured the implementation of surveillance measures targeting persons abroad against the standards of the Convention without any restrictions and found such measures to be in violation of the Convention. The complainants in this case

included foreign nationals who were not present or resident in the state against which the applications were directed (cf. ECtHR, *Big Brother Watch and Others v. the United Kingdom*, Judgment of 13 September 2018, no. 58170/13 and others, § 271). Similarly, a Swedish foundation challenged strategic foreign surveillance powers under Swedish law that exclude domestic communications. The European Court of Human Rights reviewed these powers without calling into question the Convention's applicability abroad (cf. ECtHR, *Centrum för Rättvisa v. Sweden*, Judgment of 19 June 2018, no. 35252/08). Both proceedings are now pending before the Grand Chamber." (paras. 97-98).

Following this reasoning, the Court highlighted that Article 53 of the European Convention on Human Rights allows it to provide further protection for fundamental rights by stating that "the Convention does not rule out further-reaching fundamental rights protection by the Contracting Parties." (par. 99)

Therefore, the Court implicitly applied to the doctrine of "effective control over rights". Different from the effective control over territory and over persons doctrines of the ECtHR, "effective control over rights" is based on whether states have the effective control over the enjoyment of the rights. Such a reading stemmed from the reconnaissance of the link between human rights and fundamental rights. The Court found that the German state is accountable both on the ground of Basic Law and on the international conventions particularly citing the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights:

- "This link between fundamental rights and human rights guarantees is incompatible with the notion that the applicability of the fundamental rights of the Basic Law ends at the national border, which would exempt German public bodies from having to adhere to fundamental rights and human rights when they act abroad vis-à-vis foreigners. Such a notion would run counter to the Basic Law's aim of ensuring that every person is afforded inalienable rights on the basis of international conventions and beyond national borders – including protection from surveillance (cf. Art. 12 of the Universal Declaration of Human Rights, Art. 17(1) of the International Covenant on Civil and Political Rights). Given the realities of internationalised political action and the ever increasing involvement of states beyond their own borders, this would

result in a situation where the fundamental rights protection of the Basic Law could not keep up with the expanding scope of action of German state authority and where it might – on the contrary – even be undermined through the interaction of different states. Yet the fact that the state as the politically legitimated and accountable actor is bound by fundamental rights ensures that fundamental rights protection keeps up with an international extension of state activities.” (par. 96).

Finally, according to the Court, new technological developments and their usages require a comprehensive reading of paragraph 3 of Article 1 to take into account the threats to fundamental rights and the resulting shifts in the powers. **This leads to the fact that German authorities are subject to international human rights obligations regardless of the territory in the context of new technologies which offer cross-border services (iii).** In other words, such a comprehensive reading of the German Constitution is particularly highlighted for new technological developments allowing states powers to reach out into third countries.