IT and the tension between personal freedom and security: the case of surveillance of the public sphere

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The development of IT has not only brought up new challenges for human rights but also the re-emergence of old dilemmas, such as the tension between individual freedom and security. For instance, just a month ago, in April 2011, the new Indian lnformation Technology (Electronic Service Delivery) Rules have revised the Information Technology Act of 2000 in a sense of reinforcing restrictive regulation in the name of security. According to the new regulations Internet sites and service providers are obliged to remove objectionable content that includes anything that "threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states or public order."[1]

A. Is there a constitutional, subjective right to security from risks?

The dilemma security vs freedom is a pertinent one[2], but it has re-emerged as one of the basic stakes of modern societies after the 11th of September. Terrorism, and more generally the new forms in which risks emerge in post-modern societies, "risk

[1] It is true that the law removed liability from Internet intermediaries as long as they are not active participants in creating the offensive content. For the big internet companies the liability waiver has been considered a big improvement over the previous law. In 2004, for instance, the police arrested eBay's top India executive because a user of the company's Indian auction site had offered to sell a video clip of a teenage couple having sex.

[2] See, for instance, S. Roche, Insecurité et libertés, Seuil, Paris, 1994 ;O. de Schutter, La vie privée entre droit de personnalité et liberté, RTDH, 1999.860.

societies" according to an important current of social sciences[3], significantly alter the terms of the debate: nowadays, the central question is the individual's protection against perils of non state origin, and mainly, after the 11th of September -the real starting point of the 21st century- the protection against terrorism and criminality in general[4].

In the continental public law, security is a goal of public interest, an objective element of public order (that includes, for the classical French legal doctrine, la sécurité physique des personnes et des biens, la sureté d' Etat et la sécurité nationale[5]). However, does exist a constitutional, subjective *right to security from risks*?

A significant part of Greek theory rejects the existence of such right, in order to avoid the formation of a panoptical Leviathan, which, under the pretext of the entrenchment of security and the clampdown on terrorism, would drastically constrain freedom. The main argument of this doctrinal trend is that such a right to security could be easily transformed into a "hyper-right", which, balanced against other forms of freedom, would tend to override them[6]. In the same wavelength, it is feared that its acknowledgement would constitute an additional, new, specific limitation of all rights, beyond and on top of the general limitation for non-infringement of the rights of others (article 5 par. 1 of the Greek Constitution).

I believe that this point of view, despite of its intentions for freedom, does not reflect the constitutional law's evolution and the rights' transformation within the contemporary social state. For this reason, it eventually fails to achieve its goal,

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[3] For the «risk society", as a novum of post-modernity, see U. Beck, Die Erfindung des politischen, Suhrkamp Verlag, Frankfurt am Main 1996, particularly p. 76 ff., E. Denninger, Der Prävention-Staat, Kritische Justiz, 1998; from the Greek theory see Ξ. Κοντιάδη, Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001, A. Sakkoulas, Athens, 2002, particularly p. 91 ff.

[4] Cf. Ch. Walters – S. Voneky –V. Roben – F. Schorkopf, (Eds), Terrorism as a challenge for national and international law: security versus liberty?, Berlin – Heidelberg, New York, 2004, W. F. Schutz, Tainted Legacy: 9/11 and the Ruin of Human Rights, Nation Books, New York, 2003, R. C. Leone, The War on our Freedoms: Civil Liberties in an Age of Terrorism, A Century Foundation Book, New York, 2003

[5]. Αυτή είναι η «στενή» έννοια της δημόσιας τάξης, όπως την ερμηνεύει η νομολογία του Conseil Constitutionnel. Αντίθετα, το Conseil d'Etat, αντιλαμβάνεται την έννοια ευρύτερα, ως τρίπτυχο των sureté, salubrité, tranquillité publique. Για τις διακρίσεις των εννοιών βλ. Ch. Vimbert, Ordre public et Conseil Constitutionnel, RDP 1994.693, ιδίως σ. 704-707, A. Moulin, L' ordre public dans la jurisprudence du Conseil Constitutionnel, Memoire DEA, Paris-I, 1987-1988, σ. 43-44.

[6] Thus I. Καμτσίδου, Το θεμελιώδες δικαίωμα στην ασφάλεια: έννοια περιττή ή επικίνδυνη; paper in Conference of the Manesis Association, 2005, see also Χ. Ανθόπουλου, Κράτος πρόληψης και δικαίωμα στην ασφάλεια, in Χ. Ανθόπουλος - Ξ. Κοντιάδης - Θ. Παπαθεοδώρου (eds.), Ασφάλεια και Δικαιώματα στην κοινωνία της διακινδύνευσης A. Sakkoulas, Athens, 2005, p. 108 ff.

namely, Leviathan's control. On the contrary, the acknowledgement of the existence of such a right, due to the fact that it will delimit the perimeter of its implementation, and the relevant claims, might prove more expedient for defending freedom.

The institutionalization of the principle of the social state did not merely entail the institutionalization of social rights, but also brought about a radically new reading and interpretation of the traditional forms of freedom. For anything that is of interest within the framework of the issue examined herein, the most significant transformation lies within the fact that the personal rights' functions is no longer limited to their *status negativus*; that is, repulsing the state's interference in the sphere of freedom that they entrench[7].

It is their positive function that attains great significance, by forcing the state to take certain measures in order to ensure the material preconditions for their implementation, as well as for their actual materialization. Within the framework of this "protection responsibility" state, the social rights, apart from "ex subject", also function as an "objective law commitment", which oblige the public authority to take certain measures for their guaranteed protection.

The term "duty of protection" (*Schutzpflicht)* constitutes a product of German theory. It defines the State's responsibility to take measures against eventual violation of fundamental rights by third parties, i.e. private persons or other States. According to the BVerfG, "the State must establish rules in order to limit the danger of violation of civil rights. Whether and to which extend such an obligation exists, depends on the kind and the size of the possible danger, the kind of the protected interests and the existence of previous rules". The bulk of this jurisprudence is related to the right to life (art. 2 §2 GG) in cases as different the use of atomic energy for peaceful purposes[8], the protection of health[9] and of the environment[10], the protection from

[7] See, among others, Δ. Τσάτσο, Συνταγματικό Δίκαιο Γ, Athens-Komotini, 1987, p. 219 ff., Αρ. Μάνεση, Συνταγματικά Δικαιώματα, Thessalonica, 1982, p. 47, Α. Μανιτάκη, Το υποκείμενο των συνταγματικών δικαιωμάτων κατά το άρθρο 25 §1 του Συντάγματος, Sakkoulas, Athens, 1981, p. 264 ff., Α. Ράικο, Συνταγματικό Δίκαιο, τ. Β, τεύχος Α, Athens-Komotini, 1984 p. 144 ff. See also Ν. Ν. Σαρίπολο, Ελληνικόν Συνταγματικόν Δίκαιον, Athens, 1915, τ. Γ΄, p. 38 ff.

[8] BVerfGE 49, 89 1 ff; BverfGE 53, 30 ff; 77, 381 ff.

[9] BVerfGE NJW 1987, p. 2287 ff. BverfG, EuGRZ 1995, p. 255 ff.; BverfGE, EuGRZ 1998, p. 172 ff; BayVfGH, NJW 1987, p 2921 ff.

[10] BVerfGE 56, 43 ff; BverfGE 72, 66 ff., BverfGE 79, 174 ff.; BVerfGE 56, 54, NJW 1975.573.

foreign states' hostile actions in foreign territory[11], the protection of privacy from mass media[12] and, naturally, the issue of our times, the confronting of terrorism[13].

The theoretical basis of "duty of protection" is usually attempted to be substantiated on the state's obligation to establish a status of social peace: only as long as the state guarantees the protection of the rights from third party offences will self-redress be avoided, given that solely the state is entitled to exercise legitimate violence[14]. Thus, the individual's *status socialis* was reformed and the "state's de-liberalization" completed[15].

However, under no circumstances do the aforementioned apply solely to the German legal order. Strasburg's case law has already rendered the positive obligations for the rights' effectuation and protection a part of the European common law. Consequently, through the osmotic procedures that connect nowadays all Supreme or Constitutional European courts much of it is now part of the common European legal culture.

These new functions of the rights are explicitly entrenched in the Greek Constitution of 1975: initially in article 2 par. 1 (obligation not only to respect, but also to *protect* the value of the human being), and in article 25 par. 1, where the fundamental rights are placed under the guaranteeing protection of the state, which has a duty to ensure their protection and unimpeded exercise[16]. In particular, the constitutional legislator's explicit intention for the state to undertake positive obligations for the rights' protection is also resulting by the debates during the Fifth

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[11] BVerfGE 55, 349, NJW 1981.499, also see M. Klein, Diplomatischer Schutz und grund-rechtliche Schuztpflicht, DöV, 1977.704.

[12] BVerfGE 73, 118 ff.; BverfGE 97, 128 ff.

[13] BVerfGE 46, 1 ff.; BverfGE 46, 160 ff.; BVerfGE 49, 24 ff.

[14] See J. Isensee, Das Grundrecht auf Sicherheit, Zu den Schutzpflichten des freiheitlichen Verfassungsstaates, Berlin, 1983, p. 21, the same, Das staatliche Gewaltmonopol als Grundlage und Grenze der Grundrechte, Honorary volume Horst Sendler, 1991, p. 39 ff., the same, Das Grundrecht auf Sicherheit, in: Handbuch des Staatsrechts des Bundesrepublik Deutschland, volume V, 2000, p. 143 ff., M. Klein, Grundrechtliche Schutzpflicht des Staates, NJW 27, 1989.1633, pp. 1635-1636. This "pragmatic" basis meets the American philosophy of law, as well as the practical discourse of many active politicians. R. Dworkin writes relatively (Life's Dominion, Knopf, N. York, 1993, p. 14) that the government's principle duty is to protect the interests of all community members, and mainly of those who cannot defend them by themselves".

[15] Cf Γ. Κασιμάτης, Αρχή επικουρικότητος, Αθήνα, 1974 op. cit., p. 140 and p. 158, with reference to G. Leibholz, Das Wesen der Representation und der Gestaltwandel der Demokratie im 20. Jahrhundert, 3 Auf, Berlin, 1966.

[16] See relatively Hellenic Court of Cassation (Plenary Session) 40/1988, The Greek Constitution 1999, 103, see also instead of others, Κ. Χρυσόγονου, Ατομικά και Κοινωνικά Δικαιώματα, A. Sakkoulas, Athens, 2002, p. 38 ff.

Revisory Parliament, where, despite of the suggestions for the deletion of the word "protection" from article 2, the word remained[17].

The acknowledgement of new aspects and functions to social rights does not automatically provide an answer to the question whether there also exists a subjective right to security, cognate to the relevant objective state protection responsibility. In German theory as well, other authors reply affirmatively[18], setting out as their main argument that the right to free development of the personality is thus enhanced, whereas other authors remain more reluctant, considering the perils concerning freedom[19].

The citizens' security against non-state offences constitutes a good protected by the joint regulatory purview of numerous fundamental rights. All relevant demands may, for reasons of simplicity, be considered as being concentrated in an justiciable, actionable "right to security", differentiated by both the traditional right to personal security and public security as an objective principle of public order. However, in reality, it does not concern an autonomous right, since it does not protect a self-existent legal good, but merely summarizes the protection demands that derive form other rights.

Under this sense, the "right to security", does not have a distinct, self-existent *sedes materiae* in the Greek Constitution, but constitutes the resultant of the positive demands that derive form the right to life (article 5 par. 2 of the Greek Constitution), ownership (article 17 par. 1 of the Greek Constitution), family life (article 19 of the Greek Constitution), health (article 21 par. 3 of the Greek Constitution), as well as the protection of human life (article 2 par. 1 of the Greek Constitution)[20] and the general right to free development of personality (article 5 par. 1 of the Greek Constitution)[21].

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[17] Minutes of the House of Representatives' Plenary Session upon the Greek Constitution, 1975, National Printing House, Athens, 1975, pp. 365-366.

[18] Klein, op. cit., pp. 1636-1637, Isensee, op. cit., p. 33 ff. From the French doctrine, see indicatively S. Roche, Insecurité et libertés, Seuil, Paris, 1994.

[19] See for example, E. Badura, Staatsrecht, 1986, p. 79.

[20] On the principle of respect and protection of human dignity (article 2 par. 1 of the Greek Constitution) see P. Pararas, Greek Constitution and ECHR, A. Sakkoulas, Athens 2001, p. 16. Pararas, who probably was the first to introduce the relevant debate in Greek theory traces the *sedes materiae* of the right to effective provision of police services..

[21] See for example the similar but not tantamount analysis of Χ. Ανθόπουλος, Κράτος πρόληψης και δικαίωμα στην ασφάλεια, op. cit., p. 116, Κ. Χρυσόγονος, Ατομικά και κοινωνικά δικαιώματα, op. cit., Athens-Komotini, 2002, p. 37 ff., the same, Το θεμελιώδες δικαίωμα στην ασφάλεια, in Χ. Ανθόπουλος/Ξ. Ι. Κοντιάδης/Θ. Παπαθεοδώρου Ασφάλεια και Δικαιώματα στην κοινωνία της διακινδύνευσης, op. cit., p. 144.

Namely, in contrast with the typical, liberal rule of law where security, as a personal right, could only be perceived as a defensive right towards the state, in the welfare state it also exerts a function of protection from perils of non-state origin, entailing claims pursuable in courts. This dimension is not differentiated from the traditional one only due to its positive function, but also because it presupposes the taking of preventive measures, against probable risks[22], aiming either for their avoidance, or for the elimination of their consequences[23].

In case this state obligation is not fulfilled, there arises a demand for compensation for any damage they suffered due to this infringement. The aforementioned do not signify that there exists a hyper-right to security, against which all the other rights should be balanced. However, the specific scope of the state obligation depends on the kind and the size of the probable perils[24]. On the basis of the principle of proportionality the judge may examine whether the legislator or the administration fulfilled their obligation[25].

It is often argued that the choice between the two goods, freedom on one hand and security on the other, is clearly a matter of political choice, if not only of simple personal preference. However, this constitutes a simplified and misleading image of reality.

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[22] The German doctrine has proceeded into a differentiation of the risks in three discernible gradual categories: "Gefahr", "Risiko", "Restrisiko". J. Isensee, Das Grundrecht auf Sicherheit, Das Grundrecht auf Sicherheit, Zu den Schutzpflichten des freiheitlichen Verfassungsstaates, Berlin, 1983, pp. 43-44, see also Κ. Χρυσόγονου, Το θεμελιώδες δικαίωμα στην ασφάλεια, σε Χ. Ανθόπουλου/Ξ. Ι. Κοντιάδη/Θ. Παπαθεοδώρου, Ασφάλεια και Δικαιώματα στην κοινωνία της διακινδύνευσης, op. cit., p. 151. Direct risk (Gefahr), which always implies the State's obligation for protection, exists when according to the objective course of things and with the exception of an unexpected eventuality, a direct causation of damage to a specific legal good is imminent. The intermediary category, the mere threat of risk (Risiko) defines jeopardy, which cannot be precluded, however the probability for causation of direct damage is limited. Finally, mere possibility for a peril's threat (Restrisiko) exists when the threat's probability is particularly small. See also Γ. Κατρούγκαλου, Ελευθερία και ασφάλεια στην «κοινωνία της διακινδύνευσης», Το παράδειγμα των παρακολουθήσεων, Νομικό Βήμα 6/2006.360.

[23] See A. Hesse, Der Schutzstaat, Baden-Baden 1994, p. 18 ff., P. Szczekalla, Die so genannten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht, Recht, Inhalt und Reichweite einer gemeineuropäischen Grundrechtsfunktion, 2002, D. Grimm, Verfassungsrechtliche Anmerkungen zum Thema Prävention, Vierteljahresschrift 1986, p. 171, see also Π. Μαντζούφας, Ασφάλεια και πρόληψη στην εποχή της διακινδύνευσης: εισαγωγικά ερωτήματα και προβληματισμοί για το συνταγματικό κράτος, σε Τιμητικό Τόμο Συμβουλίου της Επικρατείας – 75 χρόνια, Sakkoulas, Athens-Thessalonica, 2005, p. 59 ff., 71.

[24] See BVerfGE 49, 89 (142).

[25] See also E. Grabitz, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgericht, AöR 98, 1973.568. V. Tzemos, Das Untermassverbot, 2004, p. 13 ff.

Obviously, this is a deeply political issue. However, there are some constitutional minima beyond the political cleavage: In a modern state based on the rule of law, the protection of privacy and of personal freedom defines the constitutionally dictated rule, whereas their limitations, for security reasons or for any other reason of public interest, merely constitute only exceptions that are not allowed to affect the core of these two rights. Consequently, public security does not have the nature of a general, overriding rule that trumps freedom every time. It merely constitutes a public good, and more specifically, one of the elements of public order which, as already mentioned, according to the French theory of public law, comprises as much the security of individuals and of goods as well as the security of the State (*sécurité physique des personnes et des biens, sureté d'Etat, -sécurité nationale-*).

There is a need for protection of personal autonomy even when we are moving within the public sphere. More specifically, there exists a need to protect private life also in the public space because, even when we are getting around in places where we are by definition visible to others, we do not wish for our words or actions to be perceived by others without our will. Moreover, evidently, some of our public actions constitute protected manifestations of other constitutional rights (participation in a demonstration, visiting offices of a trade union or a political party, attendance of the litany of the Epitaph, etc). The sense alone that citizens undergo a condition of electronic surveillance may affect them regarding the exercise of their rights[26], by fear of possible repercussions. That's why A. de Lajartre speaks of the "Caméra epouvantail"[27].

Furthermore, having in mind the contemporary means for the process of personal data, electronic information recorded by public surveillance systems may become "multiply useful", as it may be dissociated and detached from the original purpose for which it has been collected. Hence, even different information originally appearing as "harmless", and irrelevant to sensitive personal data may offend the

[26] See Ch. Slobogin, "Public Privacy: camera Surveillance of Public Places and the right to anonymity," 72 Miss. lJ 2002.213, p. 233, see R. Wasserstrom, "Privacy: Some arguments and assumptions," in Philosophical dimensions of Privacy, 325-26 in F. D. Schoeman, ed., Cambridge Univ. Press, 1984.

[27] A. de Lajartre, Fonctions et fictions des miradors électroniques publics. La videosurveillance dans la loi du 21 janvier 1995, La Sémaine Juridique, 1996, I, 3955, 317, cited by A. Νικολοπούλου, Βιντεοεπιτήρηση και θεμελιώδη δικαιώματα, ΤοΣ 3, 2008, 579, 607. This concept has been accepted by the pioneer decision for security measures 2765/2005 of the Court of First Instance of Patras, according to which "the cameras' operation illegally infringes the citizens' right to personality (…), because it puts them under control and unjustifiably limits their freedom".

individual's private life, when associated with each other, so as to form a total electronic depiction of the person's preferences[28].

Despite of the constitutional priority of freedom and privacy before other rights, the legal systems internationally have not developed until this very day effective institutional mechanisms and equitable guarantees which efficaciously limit the increased attempts to monitor and control public space coming from either state authority or private authorities as well.

Indeed, the anti-terror hysteria that was fostered as a real or ostensible answer to terrorism, led most countries of the world to a significant abatement of freedom and privacy. Therefore, the main aim of this article is to bring out the relevant equitable gap. For this purpose, certain comparative facts regarding the constitutional and case law protection of the involved rights in the United States of America as well as in Europe will be presented concisely, so as to proceed to a specific analysis of the Greek case.

B. Comparative outline of the protection of privacy in Europe and the United States of America

In the USA, privacy and freedom are protected mainly by the Fourth Amendment of the Constitution. In Europe, through the provisions of article 8 of the European Convention on Human Rights for the protection of private life, as well as the national constitutional provisions of privacy, the protection of personal data and the general right to personal freedom.

B-The legal solutions in the two sides of the Atlantic

B-1. USA

According to the US Supreme Court's milestone decision *Katz*[29] in 1967, which has overruled the prior case law[30], the Fourth Amendment ensures that even in public space exists a privacy sphere in which the Government cannot invade without a "reasonable cause". This sphere covers not only each individual's private space, but

[28] See I. Ιγγλεζάκη, Ευαίσθητα Προσωπικά Δεδομένα, Sakkoulas, Salonica, 2003, p. 181, Απ. Γέροντα, Το δικαίωμα της αυτοδιάθεσης των πληροφοριών, ΔιΔικ 1990. 32, see also BVerfGE 65, 1 (45).

[29] Katz v. United States, 389 US, 347, 351 (1967).

[30] Olmstead v. United States, 277 US 438 (1928).

also any ground where the person considers enjoying a certain form of privacy, even when that ground is accessible to the public. According to the decision's felicitous wording, *"the Fourth Amendment protects people, not places"*. Based on this case law, the wire tapping by the police of a public telephone, for the use of which there existed a "reasonable expectation of privacy[31]" was contrary to the fourth amendment.

However, the criterion of "reasonable expectation" is particularly subjective, as proved by the shrinkage of protection provided by the Katz case law in the following decades. Thus, in 1976, it was judged that the Government does not infringe the Fourth Amendment when it investigates banking files without a warrant, since the depositor, according to the Court, could not expect that the information included therein would remain confidential, since he had taken the risk, in revealing his affairs to another (i.e. the Bank), that the information will be conveyed by that person to the Government[32]. Three years later, the Supreme Court judged that, for the same reason, state access in telephone call archives kept by telephone companies was lawful, on the grounds that everyone knows that these companies hold such information[33]!

In the same line, on 1983, it was judged that the surveillance of a car entrapped with an electronic beeper is not unconstitutional, since a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements[34]. This shrinkage of the protected public space by case law resulted in 2001 to the limitation of the protection even in the archetypal private space of domicile, when the Court considered that the surveillance of the residence's internal space with binoculars or other instruments that "are accessible to the wider public" was constitutional, as long as the police officers carry the surveillance from a "legitimate point"[35].

Within this framework, one can easily understand that the installation of a closed-circuit surveillance system that monitors public space by the state authorities is not, according to this case law, unconstitutional. The situation noticeably got worse after the 11th of September, when the President has authorized the National Security Agency ("NSA") to electronically keep track of suspects for terrorist action, without a

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[31] Katz, op. cit., 351.
[32] US v. Miller, U.S. 435, 442 (1976).
[33] Smith v. Maryland US 735, 742 (1979).
[34] US v. Knotts, 460 US. 276, 281 (1983).
[35] 532 U.S. 67 (2001).

warrant or the guarantees of the existing legislation of the Foreign Intelligence Surveillance Act ("FISA").

Finally, we must emphasize on the fact that there exists a basic difference between the American and the European legal systems: in the American legal system, the fundamental constitutional rights do not act "horizontally" towards third parties. The Fourth Amendment (as well as all constitutional rights according to the American Constitution) provides protection only against the state authority and not against similar invasions in the sphere of private freedom by individuals. It is obvious that in a world where the majority of threats against privacy come from the private sector, this is a major inadequacy.

B-2. Europe

Almost all European constitutions entrench the right to private life, whereas the most modern among them also enshrine a right to "informational indeterminism", that is to say the protection towards the involuntary monitoring and recording of personal information through electronic means[36]. In general, the Constitutional Courts consider the public space's surveillance as a limitation of the aforementioned rights, tolerable however, in case a significant purpose of public interest exists, always seen under the context of the principle of proportionality[37].

Correspondingly, the standing case law of the European Court of Human Rights considers that the systematic monitoring and recording through closed-circuit television constitutes a limitation of the right to personal life, as this is protected by article 8 par. 1 of the European Convention on Human Rights. According to the

[36] More specifically, it is entrenched in the Constitutions of Austria (art. 10), Belgium (art. 22), Bosnia & Herzegovina (art. 3), Bulgaria (art. 32), Croatia (art. 35), Cyprus (art. 15), Finland (art. 10), Iceland (art. 71), Ireland (art. 40-42-44-45), Latvia (art. 96), Lithuania (art. 22), Malta (art. 32), Moldova (art. 28), Holland (art. 10), Poland (art. 30-31), Portugal (art. 26), Romania (art. 26), Russian Republic (art. 23), Slovakia (art. 19-21), Slovenia (art. 35), Spain (art. 18), Sweden (Ch. 1 art. 2), Switzerland (art. 13), FYROM (art. 25), Turkey (art. 20) and Ukraine (art. 32). See Venice Commission, Opinion on Video Surveillance in public places, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

[37] See indicatively Decision 225/2002 of the Constitutional Court of Portugal.

Court, this occurs because even within the framework of public place, there exists among people a zone of interaction, which falls within the scope of "private life"[38].

For this reason, according to the Court, any recording/storage "of systematic or permanent nature" of the surveillance data of public life activities constitutes a interference to the right of private life, as it is protected by the article 8 par. 1 of the European Convention on Human Rights[39]. The Court considers that this is the only interpretation in accordance with the regulations of the Convention of the Council of Europe on 28 January 1981, for the protection of individuals with regard to automatic processing of personal data, which entered into force on the 1st of October 1985 and whose scope is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms and in particular his right to privacy, with regard to automatic processing of personal data relating to him (article 1). Similar data requiring protection is "any information relating to an identified or identifiable individual" (article 2)[40].

Assuredly, this interference does not constitute, without fail, a violation of the European Convention on Human Rights. According to paragraph 2 of article 8 in principle, there shall be no interference by a public authority with the exercise of this right, unless such an interference a) is in accordance with the law, b) is necessary "in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

According to the Court, the provision "in accordance with the law" requires, on one hand, that the impugned measure should have some basis in domestic law and on the other, that it refers to the quality of the law in question, requiring that it should be accessible to the person concerned (known), who must moreover be able to foresee its consequences for him ("rule of foreseeability")[41]. Additionally, these restrictions

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[38] Judgment of 28.1.2003, Peck v. United Kingdom, Collection 2003-I, p. 129 paras. 57, also see P.G. and J.H. v. United Kingdom, no. 44787/98, para. 56, 2001-IX, with further references.

[39] Judgment of 16.2.2000, Amann v. Switzerland, Collection 2000-II, p. 251 para. 65-67, Rotaru v. Romania, no. 28341/95, paras. 43-44, 200-V. However, the Commission had considered that the surveillance of an individual's activities in public space with the use of photographic equipment that does not record ("save") the visual recording does not constitute, by itself, intervention in personal life. See mainly, Herbecq and the association "Ligue des droits de l'homme", v. Belgium, appeals no. 32200/96 and 32201/96, Commission's Decision on 14th January 1998, DR 92-B, p. 92.

[40] See the First Additional Protocol of 2001 in Contract 108, as well as Decision 95/46/EC.

[41] Case P.G. and J.H. v. United Kingdom, Collection 2001-IX, p. 203, paras. 56-57.

must not be arbitrary, so as not to be opposed to the Rule of Law[42] and must also be "necessary in a democratic society"[43]. Consequently, in order to be compatible with the European Convention on Human Rights, they must fulfill the criteria of necessity, suitability, as well as proportionality *stricto sensu*[44], in relation with the purpose of public interest they serve[45].

Summarizing, according to the ECHR, the installation and operation of a closed-circuit television is tolerable only when the following preconditions concur cumulatively:

- Its installation is foreseen by a specific law
- The privacy's limitations deriving from the system assessed herein are not arbitrary and fulfill the criterion of foreseeability, are compatible with the principle of law order and necessary in a "democratic society"
- There exists a possibility for judicial protection against probable infringements that offend the right's core.

In view of the aforementioned, it is obvious that the terms for the operation of the public space's surveillance systems in Europe are regulated more exhaustively than in the United States. By all means, this fact did not prevent the United Kingdom from being nowadays the most monitored society in the world. For that matter, it is the legal guarantees that are determined by the dominant political choices and not vice versa. This is also clear in the case of Germany, one of the emblematic countries of the European legal culture, where a recent (2008) amendment gave the Federal Criminal Police Office [BKA] special powers for preventing threats arising from international terrorism. In addition to a general clause and the standard police powers this includes in particular provisions on visual and acoustic surveillance of private

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[42] Kopp v. Switzerland, Decision 25.3.1998, Collection 1998-II, p. 540, para. 55, Amann v. Switzerland, op. cit (ref. 37), para. 46.

[43] Amann v. Switzerland, op. cit (note 37), para. 71, see Γ. Πινακίδη, Η ρήτρα της «δημοκρατικής κοινωνίας» στην ευρωπαϊκή σύμβαση των δικαιωμάτων του ανθρώπου, A. Sakkoulas, Athens, 2007.

[44] The principle of proportionality within the scope of electronic data protection is also specified and co-supplemented with the so-called "principle of thrift" (Datensparsamkeit Prinzip), according to which the extended use of means that are not absolutely necessary for the achievement of the intended goal is prohibited.

[45] It should be noted that the European Court of Justice (ECJ) also referred to this case law, in its judgment Österreichischer Rundfunk with an explicit reference to article 8 of the ECHR, in concordance with the Directive 95/46/EC. See joined cases Rechnungshof v. Osterreichischer Rundfunk etc. and Christa Neukomm Joseph Lauermann v. Osterreichischer Rundfunk C-465/00, C-138/01 and C-139/01, paras. 76-79.

homes and telecommunications at the source as well as remote searches of computer hard drives[46].

C. - The Greek case

The protection of personal freedom and privacy within the Greek Constitution is one of the most complete in Europe. The provision of article 9 of the Greek Constitution that entrenches the "inviolability" of the individual's personal and family life and the asylum of domicile, permanent in all Greek Constitutions, was supplemented after the revision of 2001 with the new provisions of Article 9A. These provisions establish the personal right to protection against the collection, processing and use, mainly by electronic means, of the individual's personal data.

Apart from particularizing the protection against the novel challenges of the new technologies, article 9A introduces two new elements regarding competence and procedure: The first element is the explicit providence in the article's first verse that the collection, processing and use of the individual's personal data must be taking place in accordance to a special law executive of the Greek Constitution. The second element is that it assigns the safeguard of the personal data's protection to a special independent administrative authority, which has absolute jurisdiction over ad hoc decisions of administrative nature, concerning the right's ensuring[47]. This Independent Administrative Authority for the Protection of Personal Data had been founded before the Constitutional Revision, by the Law 2472/97, but it has acquired by the latter constitutional status.

The hardest challenge for the Authority –and the Greek legal system, in general- has been raised by the installation of an integrated surveillance system of

[46] J.E.Ross, The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany. American Journal of Comparative Law, Vol. 55, 2007, p. 493-579

[47] Assuredly, this does not signify that the authority's exclusive administrative purview excludes the exercise of judicial control over its relevant decisions. The Courts' competence in regard with any issue that concerns the implementation of fundamental rights may not be excluded, as it constitutes a dictate of article 20 par. 1 of the Greek Constitution and the Rule of Law principle. Nevertheless, this concern the *ex post* control of the exercise of the administrative purview. However, the administrative purview by itself cannot be attributed to any other body, because of the constitutionally defined exclusive competence of the Authority. See Ν. Αλιβιζάτου, Η αθέατη πλευρά της τροπολογίας για τις κάμερες, «Τα Νέα», 15.12.2007.

public space, the "C4I"[48], which was supposed to shield the Olympic Games of 2004 against the imminence of terrorism[49]. As already discussed, the installation and implementation of any extensive system that monitors public space preventively, permanently and systematically is not possible without the existence of a special law which will regulate in detail the guarantees, terms and limitations of the relevant right. This special executive law must be different from the one regulating the issues regarding the competence of the Data Protection Authority (L. 2472/97), for which there exists a separate reference in the second verse of the constitutional provision overviewed here.

Such a law does not exist in the Greek legal system yet. The aforesaid law 2472/1997 cannot be considered as such, for an additional reason: it is by nature a law of general aim, and does not respond to the criterion of speciality that is required by the Greek Constitution as well as by the aforementioned case law of the European Court of Human Rights for the installation of a public closed-circuit surveillance system. Neither is it possible to substitute a statute, having in mind that the nature of the issue demands political balancing of the conflicting values, by some regulative act of the Data Protection Authority.

Therefore, the "C4I" system was installed without the concurrence of at least one basic precondition, required by the Greek Constitution as well as by the case law of the European Court of Human Rights: the existence of a special law. This blank was attempted to be filled in two ways: On one hand with the issue of an *ad hoc* dictum of the Public Prosecutor of the Hellenic Supreme Court of Civil and Penal Law, and on the other, with the precipitated (in view of the hearing before the Council of the State for the annulment petitions regarding the system's legitimacy) special amendment of the art. Eigth of L. 3625/07.

According to the dictum 14/2007 of the Public Prosecutor of the Court of Cassation, there exists no requirement for a special law or for a decision by the Data Protection Authority for the operation of a public space surveillance system, since the recording by the police authorities of any illegal activity in public space is possible at all times, for the following reasons: a) Because it *"concerns the recording of actions*

[48] The term "C4I" summarizes the words Command, Control, Computing and Communications & Integration. This complete system embodies thirty different communication and data processing sub-systems, which process sound, image and data.

[49] The contribution of C4I in the security of Olympic Games' was null, since it was made possible to set it in an official readiness status several years after 2004.

that take place in public space", b) "the protection of private and personal life is conceivable only while it is manifested through a legal activity, and not when it is manifested trough illegal behavior and criminal acts", c) "the provision of article 9A of the Greek Constitution and even more so the provisions of L. 2472/1997 do not extend to the field of penal procedure, (because) *"neither the principle for the protection of personal data, nor any other principle could possibly exercise control over judicial authority and the manner it operates",* (since) *"the revelation of the essential truth in the penal trial as well as the exposure and punishment of the crimes constitute a value of constitutional stature, since they lead to the prevalence of the principle of Law Order".*

This argument is not in the least convincing. In principle, for the reasons set forth, the constitutional rights overviewed here cover not only actions that take place privately, but also actions taking place in public space. Secondly, the preventive operation of public surveillance systems, by being precautionary, concerns by definition everyone, both those who exercise the right to assemble "illegally" and those "abiding by law". However, the main error of the dictum, from a constitutional point of view, lies in the following: it is true that the discovery of the truth constitutes a value of constitutional stature, however, its pursuit does not take place at all cost if it is in conflict with explicit constitutional provisions. As, for instance, its pursuit is not allowed to take place with torture by police, thus it is not constitutionally acceptable to take place with illegal probative facts, as those collected by violation of article 9A of the Greek Constitution[50].

Moreover, the administrative purview for judging whether there exists or not a violation of article 9A of the Greek Constitution belongs exclusively to the Data Protection Authority, without exceptions; this, not because the Authority *"exercises control over the judicial authority and the manner it operates"*, as the dictum advocates. On the contrary, it is controlled by it. Nevertheless, exactly because it concerns the exercise of administrative purview, the judge who will examine the legitimacy and constitutionality of the Authority's decisions is not the penal judge, but, in virtue of articles 94 par. 1 and 95 par. 1 of the Greek Constitution, the Council of the State.

[50] It is characteristic that the ECHR case P.G. and J.H. v. the United Kingdom (above, note 39) concerned incriminating discourse of accused parties that had been intercepted while they were held into custody in the police station.

The aforementioned conclusions are valid even after the regulation of the eighth article of L. 3625/07, which attempted to shield the aforementioned acknowledgements of the Public Prosecutor, which would be of no luck before the Judge of the Council of the State, with the prestige of law. The new law's ineffectiveness derives not only from the fact that its regulations are of questionable constitutionality, but also, mainly, from the fact that it fails to fill the existing legislative blank, that is to say the determination of the specific terms and preconditions under which the installation of a closed-circuit surveillance system is allowed. In other words, by taking for granted the existence of the system C4I, the law does not explicitly foresee the potential to install and operate a public space surveillance system, and consequently, does not comprise the special typical law required by both the explicit case law of the European Court of Human Rights and the proper interpretation of article 9A of the Greek Constitution.

The only thing accomplished by the provision overviewed herein, is to -unconstitutionally- exclude from the scope of L. 2472/97 the data collection "from the judicial-prosecuting authorities as well as the services operating under their direct supervision within the framework of the award of justice or for the satisfaction of the needs for their operation, with the purpose of assessing crimes". However, even if the new regulations were not unconstitutional, this would not suffice to save the existing closed circuit surveillance system: from the mere exception from the scope of L. 2472/97, obviously no regulation that foresees the installation of a panoptical public space surveillance system, as the system C4I, is concluded.

And this, because the prohibition of the operation of a similar system does not accrue from L. 2472/97, but from the combined provisions of articles 9, 9A of the Greek Constitution, and 8 par. 1 of the European Convention on Human Rights[51]. Consequently, in order to bend this prohibition, it is not sufficient to merely introduce an exception from the scope of L. 2472/97. A *special positive legislative provision* is required, that corresponds to the degree of speciality and perspicuity that is required by both articles 9A of the Greek Constitution and 8 of the European Convention on

[51] Besides, L. 2472/1997 provides in article 1 par. a that personal data should be collected for a "definite, specific and legitimate" purpose, that is to say a purpose determined by another law, given that L. 2472/1997 does not define the purpose which justifies the collection and process of personal data.

Human Rights, a condition that is still missing in the Greek legal system even after the new regulation[52].

The amendment's preamble attempts to obfuscate this fact, with the argument that the Directive 95/46/EC of the European Parliament and of the Council on 24 October 1995, "on the protection of individuals with regard to the processing of personal data and on the free movement of such data" excludes from its scope the processing of sound and image data, as well as video surveillance, "provided that they take place for the purposes of public security, defense, national security or in the course of State activities relating to the area of criminal law or of other activities *which do not come within the scope of Community law*"[53].

However, the aforementioned concern exclusively the Directive's scope, which could not be broader, given that the relevant purviews of the European Union of the so-called "third pillar" are limited[54]. In other words, these issues merely "do not come within the scope of Community law" and could not therefore be regulated by the Directive. Besides, for that reason, the European Court of Justice, in its aforementioned decision for the Austrian Broadcasting Company (Ősterreichischer Rundfunk[55]) explicitly refers to article 8 of the European Convention on Human Rights as an essential supplement to the community Directive.

The existing closed-circuit surveillance system cannot survive even on the basis of the second part of the provision, which aims to regulate the surveillance of

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[52] See the proposal submitted by Councellor E. Sharp in a relevant trial before the Council of the State, for an annulment request against the installation of the G4I system: "The systematic and continuous recording and storage of personal data, all the more so by a public authority, even without the use of secret surveillance systems, constitutes an interference in private life that falls within the scope of the aforementioned article 8 of the European Convention on Human Rights (…). Consequently, the constitutional legitimacy of any state or public interference to personal data presupposes that it is founded on law, under the sense exposed herein, that it to say a law that must specifically determine at the very least the scope of the state or public activity, within the framework of which the data collection, process and use takes place, as well as the type of the data, the state or other bodies competent for the exercise of the relevant activity, the extent of such activity, as well as the guarantees provided to subjects of the personal data and their relevant specific rights, so as to safeguard the core of their right to personal data protection from a constitutionally illegal infringement.

[53] Preamble no 16, the emphasis is mine. See also the provision of article 3 par. 2 first verse of the Directive, as well as the citations of the preamble with numbers (34) and (43).

[54] See relatively P. J. Kuijper, "The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects", 41 CMLRev. 2004, p. 609; S. Peers, EU Justice and Home Affairs Law London, Longman 2000 N. Walker (ed.), Europe's Area of Freedom, Security and Justice Oxford, Oxford University Press 2004, H. Haenel, Justice, Police force and Safety in the European Union; Notes of the Foundation R. Shuman, 13, 2003.

[55] Cf. above, note 43.

gatherings and merely allows the "simple operation of sound or image recording devices or other specific technical means" with the purpose of the assessment of crimes, following "an order of a representative of the Prosecuting authority and provided that grave risk for public order and safety is imminent". This provision is specific by nature, and may not be used as a legalization basis for a permanent surveillance system.

Moreover, verse (b) of the regulation which dispossesses from the Data Protection Authority its constitutional competence concerning the collection, processing and use of personal data in regard with issues relating with the major part of the Penal Code, including the particularly dangerous and vague purport of the "designs made against public order"[56], is directly contrary to the second verse of article 9A of the Greek Constitution. However, even if that did not exist, the limitations foreseen concerning the right to personal life would be contrary to article 8 of the European Convention on Human Rights, as excessive and unnecessary in a democratic society on one hand, and as arbitrary and opposed to law order, since the relevant decision of the competent prosecuting officer for collecting personal data practically is not subject to legal redress.

For the same reason, this verse is unconstitutional and directly opposite to articles 94 and 95 par. 1 of the Greek Constitution, since it dispossesses this specific issue, clearly one of administrative nature, from the jurisdiction of the Council of the State, its normal judge.

D. - Conclusion

On the basis of the aforementioned criteria, an ubiquitous, panoptical closed-circuit surveillance system that keeps an eye over an entire city, as it already exists in London and other cities and is beginning to take place in Athens, does not constitute a mere limitation, but encroaches the core of the aforementioned rights itself: the continuous and systematic monitoring of everyday life entails a violation of the right to private life, since surveillance no longer constitutes an exception to the rule of

[56] According to article 183 of the Greek Penal Code "He, who by any means incites others to disobey the law or commit a crime, should be punished with imprisonment of no more than three years". This provision, of questionable constitutionality, hardly compatible with the freedom of expression (article 14 of the Greek Constitution), may easily constitute the basis for the surveillance of any public protest demonstration.

freedom, but becomes general and uncontrolled[57], whereas the risk that must be confronted is at the very least uncertain.

For this reason, the surveillance systems that are installed in Greece lack the basic precondition for their legitimacy, i.e. the existence of an explicit legislative provision for their installation. This does not mean that in case this blank is filled in the future it will necessarily signify the constitutionality of their operation. Assuredly, it is true that freedom and protection of personal life are not entrenched unconditionally and that they are susceptible to limitations, in order to serve a purpose of public interest, and mainly public order and safety.

However, the point beyond which the generalization of surveillance, in combination with the recording of data, ceases to constitute a mere limitation and is converted into an unconstitutional violation can be objectively defined[58] with the aid of the principle of proportionality, mainly taking into consideration the probability for a risk against public order to occur, the extent of the offence that is imminent and the effectiveness of the measure for its prevention[59].

[57] For this reason, the Data Protection Authority, in article 1 of Directive 1122/2000 had judged that recording and processing of personal data with the use of a closed circuit television that operates permanently, continuously or at fixed intervals is not allowed in principle, as it offends the individual's personality and private life.

[58] Ι. Μανωλεδάκης (Κοινωνία της διακινδύνευσης: Μεταξύ ασφάλειας και ελευθερίας σε Χ. Ανθόπουλο , Ξ. Ι. Κοντιάδη/Θ. Παπαθεοδώρου, Ασφάλεια και Δικαιώματα στην κοινωνία της διακινδύνευσης, A. Sakkoulas, Athens, 2005, p. 183) writes relatively: "Risk is the objectively ascertainable presence of an imminent harm that threatens the existence of a legal good. It constitutes an objective situation to the extent that this presence must be objectively ascertained on the basis of specific elements". See also the same, «Ασφάλεια κράτους ή ελευθερία», σε: Τιμητικός Τόμος για Ι. Μανωλεδάκη, Athens-Thessalonica, 2005, p. 24.

[59] See Opinion 4/2004 of the Independent Authorities for the Protection of Personal Data of the European Community, according to which "The over-proliferation of image acquisition systems in public and private areas should not result in placing unjustified restrictions on citizens' rights and fundamental freedoms; otherwise, citizens might be actually compelled to undergo disproportionate data collection procedures which would make them massively identifiable in a number of public and private places" (Article 29 Working Party, Consultory Response 4/2004).