

The Individuals Fragmented Political Autonomy: Surveillance of Public Spaces, Anonymity and the Myth of ‘Public Security’

by **Christina M. Akrivopoulou**¹

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- 1. A global and greek overview of the ‘Public Camera Surveillance’ phenomenon**

The famous Orwell’s phrase could adequately describe the state of affairs as far as the expansion of public surveillance in all over the world is concerned: ‘Big Brother is watching you’². For many this phrase provides the comfort of public safety in an unsafe, especially after the September 11th, era. Yet, for others it marks the transition to a society that threatens fundamental rights and freedoms. The reality is the following. As international statistics inform us, in the **USA** since 2003 the CCTV systems (Closed Circuit Television) have expanded from 2.000.000 to 30.000.000. It is reported that nowadays 2.000.000-3.000.000 CCTV systems are introduced each year in order to serve commercial, government or research purposes.³ After the September 11th in the area of Manhattan more than 10.000 functioning CCTV systems are functioning, especially in the famous ‘Ring of Steel’, an area that encircles Wall Street and the World Trade Center. The most sophisticated system of ‘Public Camera Surveillance’⁴ can be found in Washington D.C. where the CCTV technology based on ‘satellite optics’ provides with the most accurate system of surveillance globally. As far as pedestrians, workers and everyday shoppers are concerned the use of such systems approximately catches them at 200-300 instances of their everyday life.⁵ In the **UK** only there are 800 programs of public surveillance in action and

¹ PhD Constitutional Law, Special Scientist of DUTH, Post Doctoral Researcher of the Greek Scholarships’ Foundation.

² See G. Orwell, *1984*, Penguin, New York 1948.

³ See M. McCahill/ C. Norris, «On the threshold to Urban Panopticon: Analyzing the employment of CCTV in european cities and assessing its social and political impacts», *Working Paper No 6*, Centre for Criminology and Criminal Justice, University of Hull, UK 2002.

⁴ Abbreviation used instead of the term CCTV.

⁵ See D. Aaronovitch, «The strange case of the Surveillance Cameras», *The Sunday Times*, March 3, 2009.

approximately 2.000.000-3.000.000 CCTV systems functioning (fortunately only 200.000-400.000 of them in public areas). The **Princedom of Monaco** is a 100% surveilled area, whereas **Australia** is using extensively the CCTV systems with 40.000 functioning in Melburn. **Japan** and **China** also use CCTV systems extensively. Since the Olympic Games 260.000 CCTV systems are functioning in Pei Jin only.

In **France** approximately 340.000 CCTV systems are in use, a number augmented after the terrorist attacks in Spain and the UK. In **Sweden** the application of hidden CCTV systems is banned. The use of 'Public Camera Surveillance' is issued only for research or public interest purposes and only when the public is adequately informed of its presence according to the 'Public Camera Surveillance Act [56]' of 1998.⁶ In **Italy** the national Data Protection Authority requires a specific survey on the necessity of 'Public Camera Surveillance' in order to authorize its use. In the **Netherlands**, 'Public Camera Surveillance' is permitted only if the public is priory informed about the presence of CCTV systems in function. In **Switzerland** the CCTV systems employed bear the capacity to automatically encrypt the information which the competent authorities can decode, only in cases that criminal actions have taken place. **Greece** provides with a much lower statistics (a little more than 1000 CCTV systems in function, mainly used in monitoring traffic circulation) as most of the EU countries due to the reluctance and limitations that the national Data Protection Authorities poses.

In Greece, the public and theoretical dialogue concerning public surveillance was initiated by the Parliamentary legislation (Act 3625/2007) which acknowledged the legitimate use of cameras during public demonstrations and manifestations in Greece. The scope of the legislative intervention was to protect public safety, public security and private property against acts of violence that were occurring during such public demonstrations. The legislative intervention followed an 'institutional' conflict between the Attorney of the Court of Cassation and the Council of the Data Protection Authority, which ended in a political crisis and the consequent, resign of all members of the Independent Authority.⁷ Subsequently the relevant legislation is still existing but not enacted. More recently in the summer of 2009 an amendment of the 'basic' data protection legislation (Law 2472/1997, Art. 8) has enabled the use of over a 1000

⁶ Nevertheless Sweden has introduced a legislative package (known as Fra-lagen) that authorizes the warrantless surveillance of all means of communications (telephone, internet etc). Since now it has faced a strong criticism and may soon be tried in front of the ECtHR as far as the violation of human rights (privacy, dignity, personality and freedom of communication) is concerned. See M. Klamberg, «Fra and the ECHR- A Paradigm Shift in Swedish Electronic Surveillance Law», in *Nordic Yearbook of Law and Information Technology*, Fagforlaget, Bergen 2010, pp. 96-134.

⁷ See H. Anthopoulos, «The electronic surveillance of Public Assemblies: Political Privacy & Public Anonymity in Greece», in *Personal Data Privacy and Protection in a Surveillance Era*, (edit. Ch. Akrivopoulou/ Ath. Psygkas) Information Science Reference, Hersey-New York, 2011, pp. 59-68.

CCTV cameras in public spaces and the relevant retention of data for the short period of a week, despite the strong objections of the Greek DPA as far as the protection of privacy and dignity is concerned.⁸

2. The lost private/public sphere boundary and the consequences for the political participation

The division between the public and private sphere is introduced in theory in the work of Hannah Arendt.⁹ Arendt is presenting in her work the private/public demarcation initially as an absolute one that has gradually blurred due to the parallel construction of a third, intermediate sphere, the social. In this line, the private sphere represents a space connected to the family life and intimacy of the individual, where he/she can develop freely his/her sexuality, his/her ethical views and values. At the same time the public sphere represents the common place which everyone can share and where everyone can meet, communicate and exchange politically, or held accountable in the political deliberation. The third sphere, the social is the sphere of the economy, of property and professional life, where the subject is acting as an individual and not as a citizen.

This division, extremely useful in theory and jurisprudence in order to define the normative consequences of civil, political and social rights, is actually defied in practice. Therefore, many theorists justly doubt its absolute character, noting that many human practices in the course of history have reshaped from private to public (eg. the naked body which constituted a symbol of strength and was publicly demonstrated in ancient Greece, while today is protected as the core of human intimacy).¹⁰ Nevertheless, nowadays one could claim that public and private can be represented more as *spatium mixtus* and less as a clear dichotomy. The main reason for such a paradigm shift is the privatization of the public sphere due to the connection of the public space with the notion of property and the transfer of private and intimate life to the public sphere. To this direction, ‘Public Camera Surveillance’ serves as the rhetoric or the symbol of this transfiguration.

Terrorist attacks taking place in all over the world, with their epicenter the September 11th, as well as the augmentation of crime has given rise to the notion of public safety and the protection of community in most of the modern representative democracies. Those arguments are based in the communitarian perspective that community values, such as public safety should be prioritized to the protection of

⁸ See A. Tsiftoglou, «Surveillance in Public Spaces as a Means of Protecting Security: Questions of Legitimacy and Policy», in *Personal Data Privacy and Protection in a Surveillance Era*, op. cit. pp. 93-103.

⁹ See H. Arendt, *The Human Condition (Vita Activa)*, The University of Chicago Press, Chicago 1958.

¹⁰ See D. Solove, «Conceptualizing Privacy», *California Law Journal*, 2002, pp. 1087-1156.

civil liberties and political rights. Such argumentation can be additionally reinforced in countries such as Greece where political participation in some occasions has led to violence.¹¹ Nevertheless, this approach apart from its generalizing rhetoric (in most cases it restricts the freedom of the majority based on the actions of a small minority) it is based in the connection of public safety and public space with the notion of *private property*. Thus, the notion of public safety it proposes is less a public, common, community value and more the sum of private, individual interests. That is why it is often combined with arguments concerning the need for protecting private property against violent or criminal acts. Along this line, surveillance seems a justified solution, since it is the best provision of protecting private property. In today's society one does not have to build a 'fence' or guard his/her acquisitions if he/she can electronically protect them. Yet it should be noted that the public sphere is a place not *owned* but *shared* by all. According to this argument, 'Public Camera Surveillance' is actually functioning as a metaphoric bridge that transfers the private to the public sphere.

The second reason for the privatization of the public sphere lays in the modern culture of our public communication and social exchange which becomes more and more privatized. It is a phenomenon that Richard Sennet has vigorously described as the 'tyranny of intimacy'¹². Thus, even the public space, public figures and public actions are evaluated in terms of privacy e.g. in many cases the politicians are evaluated not according to their public work but with criteria such as their family relations, sexual choices etc. Though, we must concur that the individual is not entering the public sphere naked or neutral of any personal characteristics, even beliefs, which in many occasions become of stake in the public deliberation (e.g. gender or homosexuality), we should nevertheless underline the following. In the traditional private/public division the public sphere is not nowadays the space of the monumental and great political acts since it has transfigured to a sphere of quotidian life, where even the political discourse becomes an everyday routine. Measuring the political according to what we deem as private enables more and more the introduction of the 'Public Camera Surveillance' systems in the epicenters of the modern democracies political spheres. The indiscriminate surveillance of common, anonymous everyday people transfers the culture of intimacy into the public sphere. Anyone can be seen and revealed in the same manner that our most intimates do.

¹¹ We are specifically referring to the Greek December of 2008, when public demonstrations have led to an unseen for Greece violence in the streets of Athens, Thessaloniki and other Greek cities. It was these events that triggered the adoption of legislative measures of the 'Public Camera Surveillance' of public demonstrations in Greece. See A. Kalyvas, «An anomaly? Some reflections on the Greek December of 2008», *Constellations*, 2010, pp. 315-365.

¹² See R. Sennet, *The Fall of Public Man*, Alfred A. Knopf, New York, 1976.

3. Debating public surveillance: arguments *pro* and *against* the use of CCTV technology in public spaces

In theory there are arguments in favor and against 'Public Camera Surveillance'. The arguments supporting its use underline its importance for public safety, private property and mainly for confronting terrorism and deterring crime. Those supporting the use of 'Public Camera Surveillance' also emphasize that in the near future when the CCTV's will not be operated humanly but with the use of motion detection systems, their use will become the most valuable remedy against criminal activity and terror. The main legitimizing line of thought is based on the distinction between the lawful and unlawful citizen according to which the first do not face any threats or risks by the use of their data, since they are not in any way implicated with criminal activities.¹³ In this perspective the protection of community as a whole is hierarchized as more important than the protection of the basic individual rights and freedoms that the 'Public Camera Surveillance' is jeopardizing, namely privacy and dignity.¹⁴ Seen critically the main threat posed by this point of view is its attachment to the use of the symbolic power that any argument based on a community's common values bears, a symbolic power that in some cases can be proved to be misleading.¹⁵

The arguments against bring forward the not so low cost of the use of the CCTV systems in comparison with other alternative measures, such as specialized police forces, patrols etc. and mainly their low deterring effects. In Australia the statistics show that one arrest every 160 days is occurring due to 'Public Camera Surveillance'. In Italy a 28% increase of bank robberies has followed the expansion in the use of CCTV systems.¹⁶ Many theorists observe that cameras are not effective deterrents since in most of the cases their presence is not stated to the possible offenders and thus their use for preventing crime is minimized. In several cases the taped material is destroyed before it could be used in order to resolve a crime and in others the possibility of identifying a criminal is jeopardized by the poor quality of the recording, or needs more specific analyses and interpretation.¹⁷ In those cases where there are objective statistics on their use against crime shows that any notable reduction of crime connects with specific kind of criminal activities, namely robberies

¹³ See K. Günther, «World Citizens between Freedom and Security», *Constellations*, 2005, 379-391.

¹⁴ See M. Foucault, *Society Must be Defended. Lectures at the Collège de France, 1975-1976*. (trans. D. Macey), Picador, New York, 2003.

¹⁵ See M. Neves, «The symbolic force of human rights», *Philosophy & Social Criticism*, 2007, σελ. 411-444.

¹⁶ See an analogous argument in the ECtHR case, *K. H. & Marper versus UK*, 4th December of 2008. The ECtHR in this famous case has underlined that there are no reliable statistic or survey that can prove beyond doubt a connection between harvesting and processing personal, genetic or other personal data and crime prevention or detention.

¹⁷ See Ch. Slobogin, «Surveillance and the Constitution», *Wayne Law Review*, 2009, pp. 1105-1130.

and thefts (e.g. the example of Newcastle, where a 21% drop in thefts was noticed, one of the highest percentages globally by the use of ‘Public Camera Surveillance’).

As far as theory and jurisprudence is concerned it must be noted that a strong criticism is deriving from the fact that in many cases ‘Public Camera Surveillance’ tends to generalize for the vast majority acts that concern a much smaller minority. The ‘chilling effect’ of such kind of surveillance also presents a counter argument. Thus in the famous case *Peck versus UK*,¹⁸ the ECtHR strongly underlined the effects of such a surveillance for the autonomy and freedom of the individual as well as the possible risks that could derive even by innocent activities of the individual by the future use of recorded material. Especially in the case of the surveillance of public, political activities such as demonstrations and political manifestations, those risks are significantly augmented, since they could deter the freedom of expressing political ideas and thus they could deter public, political participation.¹⁹

In such cases one could pose the following objection: when someone is moving in the public sphere where everything and everyone is transparent and observable by the others, how he/she can expect the constitutional protection of privacy, a notion combined with secrecy, confidentiality and freedom in the private sphere? This is the very opinion of the U.S. Supreme Court which in the case of *U.S. versus Knotts*²⁰ when it stated that the monitoring of cars with an electronic beeper does not violate the individuals reasonable expectation of privacy.²¹ What is here supported is that privacy is not limited by space, public or private and that is as closely connected with our sentiments and thoughts as with our words and our public communication, contact and actions. Such a broad conception of privacy can safeguard the freedom and autonomy of the individual especially in those legal orders where there is not sufficient legislation to regulate the violations of fundamental rights occurring by the use of ‘Public Camera Surveillance’ (the case in the other side of the Atlantic where such government policies are only restricted by soft law, ‘Guides of Conduct’ etc.).

4. The scope of protecting *public* privacy and the right to anonymity

The central argument of this paper is that a right to public privacy, a right to public anonymity must be deducted from the traditional notion of privacy in order to

¹⁸ See the ECtHR case *Peck versus UK*, 1st November 2001.

¹⁹ See Ch. Slobogin, *Privacy at Risk: The new government surveillance and the Fourth Amendment*, The University of Chicago Press, Chicago, 2007.

²⁰ 460 US 276 (1983).

²¹ For the notion of ‘reasonable expectation of privacy’ in the international jurisprudence see the case of the US Supreme Court, *Katz versus US*, 389 US 347 and the analogous ECtHR case *Von Hannover versus Germany*, 24th June 2004. Also see, C. Boa, «Privacy outside the Castle: Surveillance Technologies and Reasonable Expectations of Privacy in Canadian Judicial Reasoning», *Surveillance & Society*, 2007, pp. 329-345.

protect the individual in the public sphere. This right can be used as a guide map for the judiciary in the judicial review of legislation that restricts public autonomy by the use of CCTV systems and in order to weight the proportionality of administrative measures enforcing such legislations. The association between privacy and anonymity is not new. In the American bibliography it has been supported by Allan Westin and Christofer Slobogin. According to Westin anonymity is a 'state of privacy' that 'occurs when the individual is in public places or performing public acts but still seeks and finds, freedom from identification and surveillance'²². According to Slobogin in this state an individual is able 'to merge into the situational-landscape'²³. The value of protecting the right to anonymity is that thus the individual can enjoy his/her autonomy in the public sphere without restraining or abstain from actions that can cause him/her any political or social discrimination, stigmatization, social humiliation or seclusion.

Those actions deserving such a protection by nature do not merit the government's attention and vary from a usual visit to a local bar or pub to an innocent a lawful participation in a public gathering, demonstration or participation. The right to anonymity permits to the individual to dissolve with the crowd and though observed to remain anonymous in his/her actions unless of course he/she is a celebrity. It is especially valuable as far as the political participation of the individual is concerned because not only it protects him/her in deliberating in the political sphere but it also enables him/her to form the decision, the choice for such a participation which is otherwise jeopardized. Thus, this right is a precondition to the political autonomy of the individual securing and guaranteeing that he/she can express his/her public beliefs, not alone but with others, collectively, without the threat of being manipulated in his/her political choices or that those will be used against him/her, in order to cause any discriminations. In this frame, the right to anonymity or to public privacy goes beyond the right to privacy of the individual and is tightly bonded with his/her freedom to enjoy political autonomy, without pressures or interventions by the government authorities.

The theoretical justification of such right is twofold. First it is based in an approach of the right to privacy that understands it both as a *negative* and as a *positive* freedom.²⁴ As a negative right, privacy relates to the autonomy of the individual thus fostering for the individual the claim for absence of any interference in his/her life choices, decision-making or deliberation. From this point, privacy could be

²² See A. Westin, *Privacy and Freedom*, Athenaeum, New York, 1967, p. 31.

²³ See Ch. Slobogin, «Public privacy: Camera Surveillance of public places and the right to anonymity», *Mississippi Law Journal*, 2002, pp. 231-315 (239).

²⁴ See I. Berlin, «Two concepts of Liberty [1958]» in *I. Berlin, Four Essays on Liberty*, Oxford University Press, Oxford, 1969.

represented as the *metaphorical space* that provides the individual with the necessary freedom and autonomy in order to shape his/her views and values without interventions or pressures. Shielded in this metaphorical space the individual can form his/her decisions regarding not only the private but also the public sphere, and thus make the decision to participate or act in public. As a positive right, privacy relates to the aims, the goals that the individual sets for and tries to achieve under the protective veil of privacy. These goals vary from the protection of intimacy and sexuality of the individual to his/her communication with the others, the protection of his/her diversity or the expression of his/her thoughts, feelings, views or values, thus including also political deliberation.

The second part of the theoretical justification of a right to ‘public privacy’, a right to anonymity, is that otherwise a division between the private and public self of the individual is introduced. Such a division seems not only impossible to be supported in theory but also in practice since it implies that the individual could be divided in two: a public self acting in the open and a private self acting in the intimacy of the private sphere. In theory has justly been supported by Jean Cohen that privacy shields us both in the public, social and private space.²⁵ A quite similar thesis has been also maintained by the ECtHR in its recent jurisprudence.²⁶ The main argument defending the idea of a unified subject both in public and private is that otherwise the door opens for an inauthentic public life, where the political participation from a civil right and constitutional duty will be transformed to a public *role* of unexpressed intentions and motivations. A right to ‘public privacy’ should guarantee that no one should be obliged to reveal his/her private thoughts or views in public but if decides to do so that he/she will remain anonymous and thus protected by any discrimination or pressure or social conformity.

5. The epimyth of public safety

Should the right to anonymity be considered as a significant component of privacy and thus enjoy its constitutional acknowledgement? For this line of argumentation this choice is central in order to effectively protect the individual against the risks posed to his/her freedom by the ‘Public Camera Surveillance’. The protection of such a right can serve as a guide map for the judiciary in order to perform the principle of proportionality as well as judicial review in the case it clashes

²⁵ See J. Cohen, *Regulating Intimacy: A new legal paradigm*, Princeton University Press, Princeton and Oxford, 2004, p. 62.

²⁶ See the ECtHR case of *Kurić and Others versus Slovenia*, 13th July 2010, where the ECtHR has supported the idea of ‘social privacy’ underlining that the immigrants relate socially with the community in which they reside, a bond that falls into the scope of autonomy and the right to privacy as it is protected by the Art. 8 of the ECHR.

with the value of public safety.²⁷ The augmenting need of protecting public safety in the post-modern, globalized, threatened by terrorism and violence societies is after all the main reason for the expansion of surveillance, for the creation of a ‘panoptic’ society in the Foucault’s terms.²⁸ During this transition the boundaries between public and private have shifted in modern societies. A retreat of the public space and a privatization of the public sphere are noted both in Europe and the States mainly due to the use of modern surveillance technology and the Media impact in public life. This change has given rise to arguments that are aiming more and more in understanding the public space less as a sphere for everyone to gather and coexist and more than a place *owned* by all, as a *property*. This notion gives priority to arguments of securing this space in ways that private ownership implies, arguments that mainly are based on communitarian rather than libertarian perspectives. This is the main reason why such policies hierarchize the need for public safety as prior to the enjoyment of the private and public autonomy of the individual.

In concluding, someone could wonder. Isn’t the need for protecting public safety in today’s postmodern, ‘risk societies’ a solid justification for limiting the freedom and political autonomy of the individual. We must remark that public safety and freedom, private and public autonomy are equally important values and as such should not be hierarchized in their protection. Moreover, the greatest risk posed in the case of justifying the ‘Public Camera Surveillance’ lays in the creation of a misleading division between the ‘good’ and the ‘bad’ citizen. This division preserves the modern ‘myth’ of public safety and emphasizes that if one is a totally legitimate citizen, acting in a lawful way, no kind of surveillance can harm him/her. This myth is not only misleading, since even innocent activities can implicate future risks and discriminations for the individual, fragmenting his/her autonomy but it is also harmful for a society’s common solidarity and *ethos*. It can produce a culture of surveillance between the citizen’s themselves capable of providing the preconditions for the creation of a totalitarian global society.²⁹

Abstract:

²⁷ See Ch. Slobogin, «Proportionality, privacy and public opinion: A reply to Kerr and Swire», *Minnesota Law Review*, 2010, pp. 1588-1619.

²⁸ See M. Foucault, *The Foucault Reader*. (edit. P. Rabinow), Penguin Books, London, 1991.

²⁹ See M. Foucault, *Security, Territory, Population. Lectures at the Collège de France, 1977-78*, (trans. G. Burchell), Palgrave Macmillan, Hampshire 2007.

This paper is critically commenting on the augmenting policy of public surveillance through the ‘Public Camera Surveillance’ system (CCTV technology) in Greece and in other countries such as the UK, USA, Canada and Australia. It presents the arguments in favor and against such policies and the main threats that such policy-making poses for the freedom of the individual as represented in the relevant jurisprudence of the ECtHR. The main argument of the presentation underlines the need for the interpretive deduction of a **right to anonymity** or otherwise of a **right to public privacy** from the traditional notion of privacy. This right enables the individual to enjoy his/her privacy in public, thus allowing him/her to circulate in public assured that its presence will remain anonymous and permitting him/her to merge with the rest of the crowd. Such a right is specifically valuable in order to protect the political autonomy of the individual as a participant of demonstrations and public movements or manifestations under the precondition that his/her deeds do not merit the state’s intervention. The presentation closes with some remarks on the changing social and political *ethos* that brings forward the demand of public surveillance as a need for public safety.

Ch. M. Akrivopoulou