PROTECTING THE RIGHT TO SECRECY OF CORRESPONDENCE: CONSTITUTIONAL MYTHS AND REALITY IN MODERN GREECE

DIMITRIOS GIANNOULOPOULOS*

The broadcast of unlawfully intercepted communications in investigative journalism TV programmes has become trivial in recent years in Greece. However, the use of recordings obtained through improper telephone interceptions and surveillance constitutes a criminal offence. It is punished under provisions of the Penal Code and other statutory legislation that reflect the constitutional right to secrecy of correspondence. Interference with this right is possible, but only if it is judicially authorised interference within the limits set by the Constitution and statutory law. Law 2225/ 1994 specifies these constitutional limits and goes as far as to forbid the use of any legally intercepted material for any other reasons than those for which the interceptions were authorised. More important, unlawfully intercepted communications cannot be used as evidence in a criminal court, especially after article 19 para. 3 of the Constitution instituted an automatic exclusionary rule for violations of privacy. Thus, one can identify in Greece a complete framework of innovative privacy and 'right to correspondence' protections, of constitutional and criminal law nature. Independent administrative authorities play an important role in the protection of privacy as well. Therefore, the continuing arbitrary broadcast on TV of intercepted communications is a demonstration of significant inconsistency between human rights rhetoric and practice. It reveals generalised public indifference towards blatant privacy violations and highlights the responsibility of the Prosecution Authority in regard to the enforcement of constitutional rights.

---

* I am indebted to my colleagues Professor Peter Jeffey, Dr Emmanuel Voyiakis and Dr Alexandra Xanthaki for reading an early draft and providing many important suggestions. Unless otherwise stated, all translations are my own.

In the light of the Hellenic culture of constant all-embracing antithesis, it is not with great surprise that one identifies the existence in Greece of inconsistency between principle and practice in regard to constitutional rights. Yet, the degree of apathy, currently demonstrated by the public and criminal justice officials towards the serious degradation of the right to secrecy of correspondence is shocking. To be more specific, it is the standardisation of unlawful telephone interceptions and surveillance by private parties and the unquestioned use of their fruits outside the courtroom, contrary to explicit constitutional safeguards, that this article will focus on. The explosion in the use of unlawfully obtained audio and video tapes in TV programmes, paradoxically following the constitutional amendments of 2001 that aimed to reinforce privacy protections, has actually been the great irony that inspired this paper.

1. Privacy undermined

The use of unlawfully intercepted material in TV programmes has not been met with anger or surprise by the public. In fact, quite the contrary happened. There is the risk of a generalisation here, but Greeks give the impression they are totally accustomed to the existence of investigative journalism TV programmes, where unlawfully obtained audiotapes are regularly broadcast[1]. Yet, television is not

[1] These programmes are broadcast by private/ commercial TV stations and can be seen across the country. They are often produced by independent studios, even though broadcasting TV stations retain a certain control over their content and have the right to terminate them if necessary. Such programmes have often enjoyed great commercial success. Most recently, they have achieved high ratings as a result of their uncovering the existence of corruption within Justice and the Orthodox Church. I will cite some examples giving the name of the programme and the rating in certain dates during the period of continuous revelations: "The Jungle": 23/1/05 – 6.4% of the total of people watching at that time; 27/1 – 8.2%; 3/2/05 – 8.7%; 10/2 – 7.7%; 24/2 – 7.1%. "Yellow Press": 30/1/05 – 8.4%; 5/2 – 9.6%; 13/2 – 7.5%; 20/2 – 6.6%; 6/3 – 5.8%; 20/3 – 5.6% (source: AGB Hellas: http://www.agb.gr/en/about/default.htm). In these dates, the above mentioned programmes were in the top-ten of the rating list. It should be also noted the above percentages were particularly high, given that the programmes usually topping the list achieve ratings of around 10%. The main feature of investigative journalism TV programmes is the broadcast of surreptitiously obtained audiotapes and videotapes, which prove the commission of criminal offences by certain persons (most often, sexual offences and offences related to public service, like 'bribery' and 'abuse of

where it all started to go wrong for the right to privacy in Greece, as a general trend of unlawful interceptions seems to have preceded the commercialisation of television and the rise of investigative journalism.

This trend was first identified in the field of criminal justice, where unlawfully obtained audiotapes were basically used for judicial evidential purposes, both civil and criminal (Psarouda-Benaki, 1965: 397). Mrs Anna Psarouda-Benaki, the current President of the Hellenic Parliament, wrote in 1965:

> *Surveillance of private conversations is so extensive that it puts a lot of strain on the citizen, so that the fact that there is a constant suspicion that a citizen's speech is under surveillance and that it is being recorded amounts to a limitation of liberty (Psarouda-Benaki, 1965: 397).*

Since the era when Psarouda-Benaki made these remarks, the legality of the judicial use of evidence obtained in violation of the right to privacy has been hotly debated in courts, with the Hellenic Supreme Court, otherwise known as *Arios Pagos*, abandoning its original exclusionist position[2] and accepting the use of such evidence until nearly the beginning of 90s[3]. Naturally, the phenomenon of

---

process'). Persons heard or seen in the tapes are most often clearly identified. Most shocking, a discussion follows the reproduction of the tape, where various personalities from across the professional spectrum (lawyers, academics, politicians, and journalists amongst other) undertake an impassionate effort to pinpoint those guilty of a criminal offence before they can take the 'investigation' further, to other 'guilty' persons and other shocking affairs. All in all, these programmes are rightly described as 'televised trials'.

[2] It is as soon as in 1871 that *Arios Pagos* (Decision 89/ 1871) has found a personal letter could not be used as evidence in court, since its *use* would be a breach of the *inviolable* constitutional right to secrecy of correspondence. See Diovouniotis, G. (1901), *Hellenic Codes, Constitutions*, Athens, pp. 165-166 cited by Tasopoulos, G. (1993), "Issues of Protection of Secrecy and Freedom of the Press according to Article 370D of the Penal Code", *Iperaspisi*, Vol. of 1993, p. 1449, at pp. 1451-1452. In later cases, the Court based its decisions to exclude unlawfully obtained letters on the fact that they had been *obtained* in violation of the aforementioned constitutional right. See Kaminis, G. (1998), *Illegally Obtained Evidence and Constitutional Guarantees of Human Rights (The Exclusion of Evidence in Criminal and Civil Proceedings)*, Athens – Komotini: A. N. Sakkoulas, pp. 24-26.

[3] See, for example, decision 717/ 1984, where *Arios Pagos* held that the interception of a private conversation by one of the parties taking part in that conversation was not a criminal offence and therefore the audiotape thus obtained could be used in court. AP 717/ 1984, *Poinika Chronika*, Vol. 34, p. 1031.

telephone interceptions and surveillance grew bigger with time and it even led to a turbulent political period at the late 80s and early 90s, as an express result of telephone interceptions whose victims were Members of Parliament and political parties[4]. At this time, which coincides with the inception of private television stations[5], one can find the traces of what constitutes today privacy's nadir. This was a time when

> *'politicians, businessmen, [newspapers'] editors and judges were listening to their private conversations on the radio' (Tsakirakis, S., 1993: 1007).*

This was a time when one could say

> *'a peculiar right [had] been de facto instituted in Greece; the right to intercept telephone conversations' (Tsakirakis, S., 1993: 995).*

This was also a process that helped the political parties realise there was a need for radical change. Thus, change was ultimately attempted by Parliament, whose efforts to deal with the problem have led to the introduction of specific legislation throughout the 90s[6], culminating in innovations brought with the constitutional revision of 2001 and other statutory acts that followed[7]. Unfortunately, legislative change has not led to any immediate cultural change. At the very time that the Constitution's devotion to the protection of privacy was being reaffirmed through the constitutional revision (constitutional amendments), a new round of privacy violations started. In particular, at the beginning of 2002, as a result of journalistic investigations regarding alleged corruption

---

[4] In that regard, see Paulopoulos who refers to the bugging of the offices of the Communist Party and the ensuing institution of a parliamentary committee to investigate the matter. Paulopoulos, P. (1987), "Technological Advancement and Constitutional Rights – The Modern Adventures of the Secrecy of Correspondence", *Nomiko Bima*, Vol. 35, pp. 1511-1520, at p. 1516 ss. See, also, Spirakos, D. (1993), "The Secrecy of Correspondence. Basic Principles and Choices for Coping with it Legally and Politically", *To Sintagma*, Vol. 3, p. 526.

[5] The first private commercial television stations have begun broadcasting in 1989.

[6] See Law 1941/ 1991, Law 2172/ 1993, Law 2225/ 1994, Law 2408/ 1996, Law 2472/ 1997.

[7] See Law 3090/2002 and Law 3115/ 2003.

in the football championship, dozens of unlawfully obtained audiotapes containing private conversations were being occasionally broadcast on national TV. Nevertheless, nothing happened, no action was taken to prevent the continuation of this state of affairs, at least no action which could have had a real effect, as is proved by the fact that in the eve of 2005 the same phenomenon was repeated.

This time, it was a grave institutional crisis that attracted the interest of the privacy-devouring media, as dramatic revelations of generalised corruption within the judiciary and the Orthodox Church came to the surface[8]. The crisis was initiated with the airing, during investigative journalism TV programmes[9], of intercepted communications that brought to light a pattern of bribery and unlawful interference with justice, linking members of the Church with judges and public prosecutors. 'Moral corruption' of clerics was another aspect of revelations made through broadcasts of sexual encounters of homosexual nature. I will give the example of a case that was examined by two independent administrative authorities. It concerned the broadcast of an extended private conversation between a bishop and a young man that contained full details about the sexual preferences of these two persons and analytical accounts of their sexual encounters[10]. In general, such was the scale of disrespect towards the right to privacy that new sets of unlawfully obtained recordings were being played every week in the TV programmes mentioned above, and sometimes this would also happen

---

[8] See, amongst other, the following Greek newspaper articles: Alexiou, S., *Barristers and doctors in the judicial clan: Surprises expected in regard to those who will be prosecuted*, Ta Nea, Feb. 7, 2005 ; Alexiou, S., *30 judges to be examined by Arios Pagos*, Feb. 8, 2005; Antoniadou, M., *An avalanche hitting the Church*, To Bima, Feb. 5, 2005, A3; Boukalas, P., *Letters to judges*, Kathimerini, Feb. 8, 2005; Dede, M., Interview with the ex Minister of Justice, Prof. Stathopoulos, *The separation of Church and State could start immediately*, Eleutherotipia, Feb. 13, 2005; Diakogiannis G., *Anna Psarouda-Benaki : No covering for corruption*, Ta Nea, Feb 7, 2005; Fotopoulou, B., *Persons above suspicion coming to light*, Eleutherotipia, Feb. 14, 2005; Kalliri, F., *Corruption in Justice was a well known secret*, Kathimerini, Feb. 20, 2005, p. 8; Konstantoudaki, E., *Substance and decisions in the home of Themis*, Apogeumatini tis Kiriakis, Feb. 6, 2005, Koumantos, G., *A crisis of foundations*, Kathimerini, Feb. 20, 2005, p. 23;

[9] About the nature of such programmes see fn. 2 *supra*.

[10] See *infra* under section 8: 'The independent administrative authorities, competent and alert'.

on a daily basis. Likewise, endless were the repeated broadcasts of such recordings.

How such recordings were obtained remains a mystery, but to establish who *obtained* them and for what reason is not necessary, since the mere *use* of unlawfully intercepted communications constitutes a criminal offence. It is, rather, questions regarding the implementation of the relevant criminal provisions this paper will be posing. It is also procedural and constitutional sanctions imposing the judicial exclusion of evidence obtained in violation of the right to privacy it will be looking at, trying to explain their significance for the use of such evidence outside the courtroom. Finally, this paper will describe the general constitutional background in which these media violations occur and discuss the role of the competent independent administrative authorities.

Generally speaking, pinpointing the antinomy between an extremely protective framework regarding the right to privacy and the parallel phenomenon of absolute disrespect towards the latter will be the primary objective of this paper. I will now start by referring to those constitutional mandates vis-à-vis privacy and correspondence that seem to have gone adrift.

2. The right to privacy, a fundamental constitutional right

Greece has a Bill of Rights, which is part of the Constitution, and, as it will be demonstrated, privacy *lato sensu* occupies a very central place within it. In particular, Part B of the Hellenic Constitution[11] contains various provisions safeguarding specific expressions of privacy. Article 9 guarantees the sanctity of 'every person's home' and also states that 'the private and family life of the individual is inviolable[12]'. It then goes on to impose the conduct of police searches in the presence of members of the judiciary. Article 9A, which has been introduced with the constitutional amendments of 2001, is significantly innovative in sanctioning a right to be protected against the collection, treatment and use of personal data

---

[11] Articles 4-25 of the Hellenic Constitution on "Individual and Social Rights".

[12] Translation by G. Tragakis, H. Caratzas, H. Zombola (1998), *English-Greek, Greek English Dictionary of Law Terms & the Constitution of Greece*, Athens: Nomiki Bibliothiki.

(Mitrou, 2001: 83). Furthermore, despite the existence of a general right to the protection of private and family life, correspondence is explicitly protected by article 19 para. 1, which states that

> *'the secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable*[13]'.

In providing explicit protection for specific expressions of privacy, the Constitution constructs, in fact, a private sphere. This sphere encloses the private and family life of the individual, her immediate space as well as her correspondence and communication with other individuals (Dagtoglou, 1991: 319). This is why one could refer to privacy *lato sensu*, a holistic notion that can be broken into the elements of informational privacy, territorial privacy as well as privacy of communications[14]. The Constitution entertains such a large concept of privacy to ensure the individual will be sufficiently protected against all potential interference with any aspect of privacy. Thus, it could be argued that the Constitution echoes today what Sbolos and Blaxos have been writing in 1955, namely that the right to privacy is

> *'probably the most sacred and most necessary [constitutional right] for the very dignity of humans'* (Sbolos and Blaxos, 1955: 311).

As a specific expression of the right to privacy, the right to secrecy of correspondence is equally central to the Hellenic constitutional system of individual liberties, as can be eloquently demonstrated if one adopts the historic or comparative method. Commencing with the former, it is quite characteristic that with the exception of the revolutionary Constitutions[15] and the first post-revolutionary

---

[13] *Ibid.*

[14] For these distinctions of privacy, see Banisar, D. – Davies, S., (1999), "Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments", *The John Marshall Journal of Computer Information Law*, Vol. 18, p. 6.

[15] The Constitution of Epidauros (1822), the Constitution of Astros (1823) and the Constitution of Troizina (1827) were the first Constitutions to be voted during the war of Independence against the Ottomans and, therefore, are all known as revolutionary.

Constitution of 1832, the right to secrecy of correspondence has always been constitutionally sanctioned in modern Greece. It was first limited to the secrecy of letters[16], but in response to technological advancement it was progressively broadened to include telegraphs and telephone communication[17], before it evolved towards its current form, which allows it to accommodate any possible means of correspondence and communication[18].

To turn now to the latter method, one could compare Greece, where the right to correspondence has enjoyed a constitutional status since mid 19th century, to other developed judicial systems, especially those boasting a great constitutional culture, where such a right has only recently been incorporated. One could take the example of United Kingdom law, which 'traditionally [...] recognised no general right to respect for privacy' (Fenwick, 2002: 533), let alone a specific right to secrecy of correspondence, and where only after the incorporation of the ECHR, under the Human Rights Act 1998, can British citizens claim a right to privacy on the basis of article 8 of the ECHR (Feldman, 2002: 546). On the other coast of the Atlantic, the US Supreme Court has been very reluctant to acknowledge, up until 1967, that

> *'wiretapping and electronic eavesdropping are subject to the limitations of the Fourth Amendment'* (La Fave, Israel and King, 2000: 259, 261)[19].

In France, the Constitution does not contain a specific provision on the right to secrecy of correspondence and the right to privacy has been recognised as a constitutional right with a decision of the

---

[16] Constitutions of 1844, 1864, 1911 and 1925.

[17] Constitution of 1927.

[18] For analytic reviews of the historic development of the right to secrecy of correspondence in Greece see Kaminis, G. (1995), "Secrecy of Telephone Communication: Constitutional Protection and its Application from the Criminal Legislator and the Courts", *Nomiko Bima*, Vol. 43, 505-507; Paulopoulos, P., *op. cit.*, pp. 1511-1513; Tsiris, P. (2002), *The Constitutional Protection of the Right of Correspondence*, Athens – Komotini, A. N. Sakkoulas, pp. 61-70.

[19] In *Olmstead v. United* States, 277 U.S. 438 (1928), a case that is best known for its dissenting opinions, the Supreme Court, with a 5-4 majority, had refused to take that step. It eventually did so first in *Silverman v. United States*, 365 U.S. 747 (1952) and, more determinatively, in *Katz v. United States*, 389 U.S. 347 (1967).

Conseil Constitutionnel only in 1977[20]. The case of France seems to be the exception though, since the Constitutions in nearly all the country-members of the Council of Europe endorse the right to secrecy of correspondence (Tsiris, 2002: 47-49). The comparative law argument that one can make is that Greece is currently, at the very least, in that league of countries that demonstrate the highest possible legal respect towards the right to secrecy of correspondence, in the form of an explicit constitutional right. In fact, it can be argued that the Hellenic Constitution has been more proactive and particularly progressive in regard to the right to secrecy of correspondence in times that other traditionally liberal jurisdictions had failed to take any relevant action.

To sum it up, the mere fact that the Constitution provides specific protection for the various expressions of privacy as well as the brief comparative and historic analysis regarding secrecy of correspondence undertaken above demonstrate that privacy and correspondence have always been at the very heart of the Hellenic Constitution. This is as true today as it has always been. The constitutional revision of 2001, which has given constitutional status to the 'Authority for the Protection of Secrecy of Correspondence'[21] and sanctioned a constitutional exclusionary rule for violations of privacy[22], is sufficiently indicative of that. If that is the case, one has great difficulty understanding how practice totally incompatible with the right to privacy and correspondence goes unchecked.

3. State telephone interceptions: listening to the Constitution and balancing competing interests

At this point, it is very important to mention that not all interference with private communications is incompatible with the right to secrecy of correspondence. As discussed, article 19 para. 1

---

[20] Decision of January 12, 1977. See Favoreu, L., "Le Conseil constitutionnel et la protection de la liberté individuelle et de la vie privée. À propos de la décision du 12 janvier 1977 relative à la fouille des véhicules", Études offertes à Pierre Kayser, t. 1, pp. 411-425, cited by Kayser, P. (1995), *La protection de la vie privée par le droit – Protection du secret de la vie privée*, 3e éd., Aix-en-Provence : Economica, Presses Universitaires d'Aix-Marseille, p. 124.

[21] New Article 19 para. 2 of the Constitution.

[22] New Article 19 para. 3 of the Constitution.

states the right to correspondence is 'absolutely inviolable'. Yet, the same article states that

> *'the guarantees under which the judicial authority shall not be bound by the secrecy [of correspondence], for reason of national security or for the purpose of investigating especially serious crimes, shall be specified by law*[23]'.

The Constitution acknowledges there will be circumstances where the constitutional block that protects privacy will have to be bypassed. It could be assumed that in benefiting from these exceptional circumstances police do not have to resort to unlawful interceptions and surveillance.

Such exceptions to the right to correspondence were first sanctioned by the Constitutions of the military junta era, those voted in 1968 and 1973. Naturally, their preservation in the Constitution of 1975, the first Constitution following that era, has been the object of academic criticism[24]. Nonetheless, the introduction in 1994 of specific legislation, in the light of article 19 of the Constitution, in order to regulate the conduct of telephone interceptions by the police, has subdued such criticism. Law 2225/ 1994 exceptionally permits for such interceptions and distinguishes between interceptions for reasons of national security and interceptions for the investigation of crime. While the former present some constitutionality problems – especially since there is no specification of the persons against which they can be ordered and no obligation that the prosecutor who orders such interceptions gives specific reasons for so doing (Tsiris, 2002: 119) – the latter not only satisfy the requirements of legality, proportionality, accessibility and foreseeability under the ECHR[25], but also conform, more or less, to what seems, in

---

[23] Translation by G. Tragakis et al., *op. cit.*

[24] Professors Dagtoglou and Manesis worried there was a great risk of abusing this provision. See Dagtoglou, P. (1991), *Constitutional Law – Individual Rights*, Tome A, Athens – Komotini: A.N. Sakkoulas, p. 354; Manesis, A. (1978), *Constitutional Rights – Individual Liberties*, 4thed., Salonica: Sakkoulas, pp. 240-241. Paulopoulos considered that the retention of this provision in the Constitution of 1975 indicated a retreat from traditional principles. Paulopoulos, P. (1987), *op. cit.*, p. 1513.

[25] In regard to these requirements see, amongst other, *Kopp v. Switzerland* (1999) 27 EHRR 91, *Valenzuela v. Spain* (1999) 28 EHRR 483, *Kruslin v. France* (1990) 12 EHRR 528.

comparative perspective, to be the standard model of telephone interceptions worldwide[26].

Quite interestingly for the purposes of this article, law 2225/ 1994 strictly forbids the use of any intercepted material for any other reasons than those for which the latter had been ordered. More specifically, such material cannot be used in any other criminal, civil, administrative or disciplinary process, but only in relation to the criminal process in the field of which the interceptions have occurred.

To conclude this part, it could be argued that, post 1975, the wording of article 19 of the Constitution is misleading. The right to secrecy of correspondence is not *absolutely* inviolable. The Constitution recognises the importance of leaving some space for the authorisation of telephone interceptions in the sake of national security and the combat of serious crime. Nevertheless, this conscious encroachment of the right's absolute nature has been in harmony with the findings of the European Court of Human Rights[27] and represents the culmination of tensions between antagonistic principles ever existing in the criminal justice system[28]. It is also the result of a conscious constitutional decision and, thus, possesses the legitimacy required. In other words, the possibility that state agents conduct telephone interceptions, with prior authorisation by judicial officers and under strict conditions provided by specific, accessible to all, legislation, has been an explicit constitutional choice. On the contrary, the conduct of telephone interceptions by private parties and the airing of their fruits by investigative journalists in

---

[26] Giannoulopoulos, D. – Parizot, R. (2003), "Les interceptions et les surveillances" *in Les transformations de l'administration de la preuve pénale: perspectives comparées: Allemagne, Belgique, Canada, Espagne, États-Unis, France, Italie, Portugal, Royaume-Uni* / Study realised by ARPE, Association de recherches pénales européennes; and the UMR de droit comparé, Université Paris 1, Panthéon Sorbonne, CNRS; scientific direction, Prof. Geneviève Giudicelli-Delage, Report on file with author, Forthcoming publication.

[27] See *Klass v. Federal republic of Germany* (1978) 2 E.H.R.R. 214, where the ECtHR found that secret surveillance of correspondence is necessary in democratic societies, even if that happens only in exceptional situations.

[28] Ashworth, for example, described such tensions in the 2002 Hamlyn Lectures by referring to 'conflicting goals' and 'conflicting pressures'. Ashworth, A. (2002), *Human Rights, Serious Crime and Criminal Procedure*, London : Sweet & Maxwell, pp. 38-44.

TV programmes are totally incompatible with the aforementioned choice.

4. Criminal liability for unlawful interceptions and surveillance

The impropriety of telephone interceptions by private parties is inherent in the fundamental protections of privacy and correspondence contained in the Constitution and is equally adduced by the fact that the latter specifically provides, in limited circumstances, for *state interference only* with the right to secrecy of correspondence. This is emphatically reaffirmed in the provisions of the Penal Code, which reflect the constitutional principle of secrecy of correspondence and, thus, punish the conduct of unauthorised telephone interceptions and surveillance as well as the use of their products.

In particular, article 370A para. 1 of the Penal Code punishes the bugging of a telephone connection and the use of the material intercepted by the perpetrator, the latter being equally considered an aggravating factor leading to a harsher sentence. Likewise, article 370A para. 2 punishes the interception and recording of conversations or other acts not conducted in public. It also prohibits the recording of a conversation by a person participating in that conversation, when the recording occurs without the persons being recorded consenting. The use of the recordings by the perpetrator is again an aggravating factor. Most importantly, article 370A para. 3 punishes the use of information or the use of audiotapes or videotapes that have been obtained in one of the ways enumerated in paragraphs 1 and 2. The minimum sentence for all the acts punished under article 370A is one-year imprisonment[29], while the maximum is five years imprisonment.

While the above provisions are quite straightforward, article 370A para. 4, which instituted a specific criminal defence to the offence punished under article 370A para. 3[30], has caused some serious controversy. Article 370A para. 4 states that

---

[29] The provision of a minimum sentence was introduced with article 6 para. 8 of Law 3090/ 2002.

[30] This defence was introduced by Law 2172/ 1993.

> *'the act of paragraph 3 is not wrong, if the use has taken place before a judicial or other investigative authority for the protection of a justified interest, that could not be protected otherwise*[31]*'.*

The controversy was mainly about what exactly constituted a justified interest[32], but the meaning of a judicial or other investigative authority was absolutely clear. In that regard, Professor Manoledakis observes that the defence does not apply when the recording was used 'on TV or before third parties that do not constitute a judicial or a public authority' (Manoledakis, 2002: 277). Equally, when an audio or video recording is played on TV, the requirement of para. 4, namely that the justified interest cannot be protected otherwise, is not respected. In such cases, there is always the choice of delivering the tape to the responsible investigative or prosecuting authority and since such a choice is not made, the defence should fail (Charalabakis, 2002: 1070).

Therefore, *every time that a TV station broadcasts an audio or video recording that has been obtained in violation of articles 370A para. 1 and 2 of the Penal Code, the offence of article 370A para. 3 is committed. The defence of para. 4 does not apply*, since the use of such tapes on TV does not fall within the scope of the latter.

Other provisions of the Penal Code specifically provide for the criminal liability of persons employed in the communications domain for violations of correspondence[33]. The violation of secrecy of letters is equally a criminal act[34]. On top of the offences under the Penal Code, Law 3115/ 2003 has introduced the offence of violating *in any way* the secrecy of correspondence, which is punished with a minimum of one-year imprisonment and a fine of between 15.000 to 60.000 euros, and which could lead to article 7 ECHR objections in the future, because of its imprecise scope. Be that as it may, the broadness of the *actus reus* of this offence permits it to accommodate

---

[31] According to the wording of article 370 para. 4, as modified by article 6 para. 8 of Law 3090/ 2002.

[32] Before the change of wording brought by Law 3090/ 2002, the act of article 370A para. 3 was not wrong if there was a *justified* and *substantial public* interest.

[33] Violations by employees of the Mail Service (article 248) and the Telephone Service (articles 249 and 250).

[34] Article 370 of the Penal Code.

any conduct potentially not covered by the provisions of the Penal Code and reflects 'the objective of [even] more efficient protection of secrecy of correspondence' (Nouskalis, 2003: 249).

To summarise, the Constitution allows for state interference with the right to correspondence *only* under exceptional circumstances and both the Penal Code and other specific criminal legislation punish those persons who are responsible for any interference outside that context. However, the constitutional protection of correspondence goes even further, since any intercepted material, which has been obtained in violation of the right to privacy *lato sensu*, cannot be used in court either.

5. Privacy and the exclusion of unlawfully obtained evidence

The exclusion of unlawfully obtained evidence could allow one to view the use of unlawfully intercepted material on TV from yet another perspective. A brief historic review of the development of the exclusionary rule in Greece, with the focus on the modern evolution of the rule in the field of the right to privacy, would be helpful.

Under the strong influence of German law, balancing theories had prevailed within Hellenic criminal procedure doctrine since the 70s. However, in the early 90s, the Hellenic Parliament has moved the law towards automatic exclusion; the courts were quick to follow on the same axis. Thus, article 31 of Law 1941/ 1991 introduced a specific automatic exclusionary rule. According to the latter, any evidence obtained in violation of article 370D of the Penal Code, which prohibited unauthorised telephone interceptions of private communications and surveillance, was automatically excluded, without the judge having any discretionary power to decide that such evidence should be admitted. With this 'absolute' and 'panegyric' exclusionary rule, Parliament's intention was 'mainly to deter state authorities and private parties from resorting to the obtaining of [such] evidence' (Dalakouras, 1992: 27). The abolition of this provision only in 1993 and, in fact, the simultaneous introduction of the specific defence mentioned above, both decided under Law 2172/ 1993[35], was definitely an important drawback in this process towards automatic exclusionary

[35] For an analysis of this legislation, see Manoledakis, I. (1994), "The New Law 2172/ 1993", *Iperaspisi*, Vol. of 1994, pp. 475-484.

rules. Nevertheless, it was not late before Parliament took another very decisive step in that direction, since, in 1996, a general, absolute and automatic exclusionary rule for improperly obtained evidence was instituted with article 177 para. 2 of the Code of Penal Procedure. The inception of article 177 para. 2, which states that

> *'any evidence obtained by the commission of a criminal offence ... will not be considered ... '*, was of *'catalytic importance'* (Giannoulopoulos, 2001: 625),

as it was

> *'the first time that the Hellenic legislature ventured into a general statutory regulation of the issue of evidential restrictions [for improperly obtained evidence], abandoning the fragmentary approaches with reference to specific means of evidence'* (Tzannetis, 1998: 105)[36].

Indeed, article 177 para. 2 is not specific to unlawful interceptions and surveillance, like the rule under article 370D above, and applies to any stage of the criminal process, which means that, besides the determination of legal guilt, it also concerns the pre-trial determination of potential restrictions upon the defendant – like, for example, remand in custody after refusal of bail – as well as the sentencing stage. This, alone, is sufficiently indicative of the broad protective role that article 177 para. 2 is able to fulfil, but there is also a substantial exception to the rule, which prevents the latter from applying when the offence with which the defendant is charged is one that is punished with life[37].

An automatic rule that imposes the exclusion of any evidence obtained by the commission of a criminal offence is very innovative as an evidential sanction. It would be considered extreme by jurisdictions that have settled for far more conservative sanctions, but the Hellenic Parliament has followed yet more original and

---

[36] For an analysis of article 177 para. 2 see Dimitratos, N. (2001), "The Evolution of the Institution of Evidential Prohibitions in the Hellenic Penal Procedural Law – Simultaneously, a Comparative Review of the Correspondent American and German law", *Poinika Chronika*, Vol. 51, pp. 5-13; Tzannetis, A. (1998), "The Unlawful Obtaining of Evidence (Interpretative Approach of article 177 para. 2 of the Code of Penal Procedure)", *Poinika Chronika*, Vol. 48, pp. 105-109.

[37] See article 177 para. 2 Code of Penal Procedure *in fine*.

extreme paths in search of an absolute evidential guarantee of the defendant's rights. In fact,

> *'the ever growing sensitivity of the legislature towards the use of [unlawfully obtained] evidence ... reached its peak with the new article 19 [para. 3] of the Constitution' (Androulakis, 2003: 11). Article 19 para. 3,*

which is in my opinion a very considerable legacy of the constitutional revision of 2001, institutes an automatic and *'absolute constitutional exclusionary rule'* (Venizelos, 2002: 147) for evidence obtained in violation of articles 9, 9A and 19 of the Constitution. This means that if evidence is now obtained in violation of the sanctity of a person's home or the right to private and family life or the right to protection of personal data or the right to secrecy of correspondence, it will be excluded, independently of whether a criminal offence has been also committed and independently of whether the offence with which the defendant is charged is punishable with life. The mere affirmation of one of the above constitutional violations automatically leads to exclusion.

Given the constitutional nature of the newly introduced rule – which simply means it rules supreme and overcomes any opposite statutory provision – it is safe to say that Greece has definitively turned its back to utilitarian arguments in favour of the *unquestioned* use in court of some allegedly very reliable means of evidence, such as telephone intercepts, intercepts obtained after the bugging of premises, real evidence discovered during an unlawful investigative search, or information obtained after the unlawful access to databases containing personal data. In the definitive constitutional balance, the protection of the right to privacy has thus weighed more than an ultimate fight against crime, conceptually built on an 'ends justify the means' basis.

A comparative review can elucidate how groundbreaking the rule of article 19 para. 3 is, since few are the countries where a similarly absolute constitutional exclusionary rule can be identified. Portugal is the exception, where there is such an explicit constitutional provision[38].

---

[38] See Iliopoulou-Stragga, J. (2002), "The Use of Unlawfully Obtained Evidence to Prove the Defendant's Innocence after the Revision (2001) of the Constitution", *Poinikos Logos*, Vol. 6, pp. 2113-2114.

In the United States, the exclusionary rule may not be explicit in the Bill of Rights, but, as the Supreme Court held, it is inherent in some of its fundamental provisions[39]. The U.S. exclusionary rule is an automatic constitutional rule, but, due to its considerable judicial minimisation during the Burger and Rehnquist eras, it is now very distant from what used to be the *Weeks-Mapp* and the *Miranda* exclusionary rules and, therefore, is far from being absolute. In South Africa and Canada there is equally a constitutional exclusionary rule, but evidence obtained in violation of constitutional provisions in these two countries can be excluded only after an appreciation of the potential effect of its admission. In South Africa, evidence unconstitutionally obtained is excluded if its admission would render the trial unfair or otherwise be detrimental to the administration of justice[40]. In Canada, evidence is excluded if its admission would bring the administration of justice into disrepute[41]. So, these rules are discretionary in nature and can *theoretically* be considered much less protective of constitutional rights than automatic rules are[42]. New Zealand law used to have a *prima facie* rule of exclusion, 'whereby evidence obtained through a breach of the Bill of Rights would (generally) be excluded' (Mahoney, 2003: 607), but the Court of Appeal has recently substituted a balancing discretionary model for the *prima facie* rule[43]. Finally, there are other countries where the exclusionary rule is only sanctioned by a statutory Code, but where the commission of constitutional violations is of central importance to the admissibility of the evidence in question. In Spain, for example, the Code of Penal Procedure forbids the use of evidence obtained in violation of constitutional rights and liberties (Bück, 2000: 296).

---

[39] See *Weeks v. United States* 232 U.S. 383 (1914), *Mapp v. Ohio* 367 U.S. 643 (1961), *Miranda v. Arizona*, 384 US 436 (1966), *Dickerson v. United States*, 530 US 428 (2000).

[40] Article 35 para. 5 of the Constitution of South-Africa. See Schwikkard, P.J. – Van der Merwe, S.E. (2002), *Principles of Evidence*, 2nd ed., Chapter 12.

[41] Article 24 para. 2 Canadian Charter of Rights and Freedoms. See, also, *R. v Collins*, [1987] 1 SCR 265.

[42] Yet, whether discretionary exclusionary rules are less protective of individual rights *in reality*, compared to automatic ones, can be verified only through an extensive review of the relevant case law, as well as an examination of other institutional factors, which might be rendering, directly or indirectly, a framework of evidential restrictions more or less protective.

[43] *R. v Shaheed* [2002] 2 NZLR 377 (CA).

In the light of this review, one could suggest that Greece substantially innovates in that it now has an *explicit constitutional* exclusionary rule, which is *absolute* and *automatic*, and which is also *specific to violations of privacy*. Greece also innovates in that it has adopted such a rule despite there already existed another far-reaching exclusionary rule of absolute and automatic nature; the rule under article 177 para. 2 of the Code of Penal Procedure. In other words, *such is the importance Parliament attaches to the inviolability of the private sphere that it has adopted, in the most emphatic way of a constitutional revision, a radical solution with nearly no correspondent in comparative law.*

6. The paradox of the use of unlawfully obtained recordings in TV programmes

It follows from all the above that there exists in Greece a uniquely complete set of protections – of constitutional, criminal and procedural nature – which allows for the effective prosecution and punishment of those who violate the secrecy of correspondence. It equally makes in theory the use of improperly obtained evidence impossible, especially when the evidence in question has been obtained in violation of a right falling within the private sphere.

Moreover, conscious of its delicate mission as the highest guarantor of constitutional mandates in the country, *Arios Pagos* echoes the parliamentary emanated message of right to privacy constitutional supremacy over criminal justice efficiency reasoning. In its most characteristic decision to date, it held, in a plenary assembly, that audiotapes obtained without the consent of a person that is a party to a conversation is *'evidence constitutionally forbidden'* and decided such evidence could not be used in a civil process either. It then went on to state that *'the generalisation of the use of audio recorders'* to intercept private conversations would be a *'limitation of the liberty of communication'*, since, if that became true, *'everyone would live with the depressing feeling that any spontaneous or, even, excessive thought, expressed during a private conversation, could be later used, under different circumstances, against him ...'*[44].

[44] AP 1/ 2001, *Elliniki Dikaiosini*, Vol. 42, 375.

Taking a holistic approach and seeing the *reality* of an undermined privacy through the prism of a legal system where privacy, in general, and secrecy of correspondence, in particular, are *theoretically* untouchable – being locked, *de lege lata*, in an inviolable constitutional safe, that can be unlocked only when the Constitution itself so imposes – one could say the continuation of television broadcasting of unlawfully obtained audio and video recordings is nothing else but legal insanity and a veritable paradox. Social acceptance or state inactivity towards a phenomenon, which completely depilates the persons who are the victims of its practices from any expectation of privacy they might have, is an uncivil affront to common sense. It is also utterly hypocritical for the State to boast adherence to great constitutional principle and civil liberties innovation – ironically, innovation even in the global scene – when it is the State itself that is ultimately responsible for the intermittent invalidation of principle and the shocking denial of civil liberties. Naturally, such tremendous inconsistency wounds the integrity of the criminal justice system and is susceptible of, eventually, lowering the level of the legal civilisation of a country.

7. Who is to blame?

In light of the above, the fact that privacy undermining television programmes have, without doubt, become part of the cultural curriculum is revealing of those responsible for this state of affairs. As described, state inactivity towards the continuation of this phenomenon is an affront to common sense, but the question is which is the state institution that should have prevented it in the first place. Parliament, in any case, is definitely not to blame, since it has done – it was clearly demonstrated above – much more than could have been reasonably expected in order to safeguard the right to privacy and correspondence. It has covered the issue from all imaginable angles, using constitutional means – sanctioning privacy *lato sensu* and introducing a constitutional exclusionary rule for privacy violations – and common legislation means, particularly criminalizing telephone interceptions and surveillance as well as instituting procedural sanctions prohibiting the use of unlawfully intercepted material in court. Liability does not appear to lie with the courts either, since the latter have immediately conformed to the express legislative wishes; the emphatic statements of *Arios*

Pagos regarding the potentially catastrophic effect of generalised surveillance of private communications is sufficient evidence of the above.

Thus, if legislation exists and if the courts are willing to apply it, responsibility for the continuation of the punishable conduct in question lies with those who do not bring the offenders to court. When I say this, I think of the general deterrence function of criminal law. I believe that *'so long as its provisions'* – in this case, article 370A of the Penal Code and other relevant provisions in the Code and other statutes –

> *'are enforced with some regularity, [criminal law] constitutes a standing disincentive to crime'* (Ashworth, 2003: 16);

in this case, a disincentive to the use of unlawfully intercepted private communications. Therefore, common sense dictates it is primarily the Prosecution Authority that fails its mission. For the sake of clarity, I have to explain here that the Prosecution Authority alone has nearly exclusive responsibility for prosecuting crime in Greece. With a few exceptions only, it can do so without prior denunciation by an aggrieved or, even, a third party. In particular, the offences under article 370A of the Penal Code can be prosecuted without any such prior action. More importantly, prosecution, in general, is not a *possibility* for the Prosecution Authority, but an *obligation* it cannot bypass. The principle of legality imposes that the Prosecutor with jurisdiction in the case exercises the public action[45] immediately after being informed of the commission of a criminal offence[46]. There is no discretion to decide whether the public action should be exercised or not. Moreover, the Police are obliged

---

[45] After the introduction of Law 3160/ 2003, the Prosecutor is now only obliged to order a preliminary investigation for serious offences. Whether he exercises the public action or not is upon his discretion to decide after the culmination of the preliminary investigation. This is a significant exception to the principle of legality.

[46] Unless the denunciation or information is apparently unreasonable or false or if it cannot be judicially examined. Article 43 para. 1 Code of Penal Procedure. For an analytic account of the legality and opportunity principles in prosecution see Stamatis, K. (1984), *The Preliminary Investigation in the Criminal Process and the Principles of Legality and Opportunity*, Poinika (series), No 18, Athens – Komotini: A.N. Sakkoulas.

to inform the Prosecutor without delay of any offences within his jurisdiction that can be automatically prosecuted[47]. More exceptionally, they are also faced with the obligation to take appropriate action, even without any Prosecution guidance, in order to secure the arrest of the perpetrators of a 'flagrant' offence, for as long as the offence remains flagrant[48].

Therefore, principally the Prosecution, but the Police as well, have no justification for failing to apply the relevant legislation. Quite simply, every time they do not intervene to stop the airing of unlawfully obtained audio or video recordings in TV programmes, they omit to fulfil a legal duty that is explicitly described by the Constitution, the Penal Code and the Code of Penal Procedure. Both the Prosecution and the Police have available all means necessary to act; they have a legal duty to act. Omitting to do so is illegitimate, unethical, unprofessional, completely arbitrary and a demonstration of absolute indifference as to the protection of constitutional rights.

8. The independent administrative authorities, competent and alert

The unacceptable nature of this state of affairs is further highlighted by the particularly active role of two independent administrative authorities in this field; the National Council for Radio and Television (NCRTV) and the Authority for the Protection of Personal Data (APPD). The former is responsible for controlling radio and television[49], while the latter's main mission is the protection against the collection and treatment of personal data[50]. Both authorities have jurisdiction in the case of audio and video reproduction on TV of intercepted private conversations. Such

---

[47] Article 37 Code of Penal Procedure.

[48] Article 243 para. 2 Code of Penal Procedure.

[49] See article 15 para. 2 of the Constitution and article 4 of Law 2863/ 2000. For general information about the authority see http://www.esr.gr/.

[50] See article 19 para. 2 of the Constitution and article 15 of Law 2472/ 1997 for the "Protection of the Person Against the Treatment of Personal Data". For an analysis of the Authority's role see also Igglezakis, I. (2004), *Sensitive Personal Data*, Athens-Salonica: Sakkoulas Editions, p. 81 ss and Mitrou, L. (1999), *The Independent Authority for the Protection of Personal Data*, Athens-Komotini: A.N. Sakkoulas.

reproduction constitutes a treatment of personal data[51], and the APPD can interfere if the treatment is in violation of the relevant personal data legislation[52]. Likewise, the NCRTV can scrutinise any television programme when it suspects a violation of privacy. The NCRTV can impose administrative sanctions, while the APPD can impose sanctions of both criminal and administrative nature.

In stark contrast with the prosecuting authorities and the police, the administrative authorities mentioned above were quick to put investigative journalism programmes under scrutiny. In a seminal decision in 2000[53], the APPD held that the reproduction on TV of unlawfully obtained video recordings, concerning the private life of a Greek pop-singer, was an unlawful treatment of his personal data. The video recordings contained images of sexual encounters between the singer and a minor. The Authority conducted a balancing exercise between the right to private life and the right to inform the public. In spite of the gravity of the criminal offence that was being revealed through the recordings, the Authority decided, on proportionality grounds, that the broadcast of such recordings could not be justified on the basis of informing the public opinion. It held, in particular, that public opinion could not go as far as legitimating access to personal data the broadcast of which humiliates the person and is a violation of human dignity. Therefore, the Authority ordered the termination of the broadcast and the destruction of the personal data in question, and it also imposed a fine of approximately one hundred thousand euros upon the journalist and the responsible[54] TV station.

Likewise, the NCRTV dealt with the use of unlawfully obtained recordings on TV. In two recent decisions[55], it held that recordings obtained surreptitiously could not be reproduced on TV, even though the recordings were not obtained in violation of the right to privacy and independently of the fact that such recordings could be used in

---

[51] See Decision 26.1.2000 of the Authority for the Protection of Personal Data.

[52] Law 2472/ 1997.

[53] Decision 26.1.2000.

[54] For detailed analysis of the decision see Antthimou, K. (2000), "Protection of Personal Data and Mass Media: Reflections on the decision 26.1.2000 of the Authority for the Protection of Personal Data", *KritE*, pp. 271-318 and Gkana, M. – Kateri, S. (2000), "Comment", *Efarmoges Dimosiou Dikaiou*, pp. 140-156.

[55] Decision 403/21.12.2004 and Decision 32/8.2.2005. Source : http://www.esr.gr/

a criminal process. It observed that human dignity had to be protected against the irreparable damage that a television broadcast was susceptible of producing.

In regard to the corruption cases that have been the latest subject of investigative journalism TV programmes in Greece, as explained in the beginning of this article, the NCRTV's response was equally clear. In the particular case coming before the NCRTV, two TV programmes had broadcast the representation of the oral communication, of an explicit sexual nature, between a bishop and a young man. The NCRTV found that was a blatant interference with the right to private life and added it was irrelevant that the aggrieved person was a public figure. Consequently, it imposed fines of 250000 euros and 150000 euros respectively upon the two TV stations that were responsible for the above broadcast.

Surprisingly, when the APPD examined the same case[56], it reached the opposite conclusion. It held that the broadcast was not unlawful, since a bishop is a public figure and the public is entitled to information about actions reflecting the bishop's character and morals, if this information proves that the bishop engages in conduct incompatible with the conduct dictated by religious rules. Moreover, the APPD applied the same reasoning to the broadcast of a conversation between a judge and another person, which proved that the judge was receiving bribes[57]. Obviously, this reasoning does not sit comfortably with the reasoning behind the important 2000 decision on the same subject. While the latter put the protection of privacy first, the former suggests that those persons who hold 'public office' are not entitled to even a minimum protection of their private sphere; a sphere enclosing their sexual relationships and private conversations. This cannot be right. The distinction between public and private figures is irrelevant when the audio or video recording in question has been obtained via the commission of a criminal offence. As Professor Karakostas observes,

> *'investigative journalism, and in fact any kind of journalism, finds its limit in the provisions of the Penal Code'* (Karakostas, 2005: 25).

---

[56] Decision 25/2005, *Dikaio Meson Enimerosis kai Epikoinonias*, Vol. 2, 2005, 290, with comments by E. Mixailidou.

[57] These two cases were examined by the APPD in the same decision, Decision 25/2005, *ibid.*

The law is therefore the final frontier. Certainly, the public has a more justified expectation to know about the actions of public figures related to 'public office' (*fitness for office* cases), more so than to know of actions of other citizens[58]. This expectation, though, does not go as far as to allow journalists to employ unlawful means.

Having said that, I need to emphasise the special importance of the decisions of the above mentioned independent authorities. Regardless of the content of this latest interpretation adopted by the APPD, these authorities can be admired for their passionate engagement with difficult questions raised by the need to protect privacy within a rapidly growing technological society. There is no logical explanation as to why the Prosecution Authority has not been equally vigilant. The continuation of unlawful broadcasts despite the repeated administrative sanctions imposed by independent authorities stresses the need for the immediate intervention of the responsible criminal justice authorities, especially since the latter have leeway to adopt more radical, and therefore theoretically more efficient, measures.

9. Epilogue

If both the unlawfulness of the journalists' actions and the unreasonableness of the Prosecution Authority's and the Police's persistent omissions are so straightforward, and if these defects are further highlighted by the active role that independent administrative authorities have successfully claimed in recent times, there is concrete evidence then of a worrying disorientation of two institutions fundamental to any democratic regime.

First of all, those investigative journalists, who have become famous for revealing institutional corruption through the broadcast of unlawfully obtained recordings, have acted as a *de facto* instituted prosecution authority. They believe, or simply allege, they have come to the rescue of public interest, which, under specific circumstances, can weigh more heavily than the right to privacy in the constitutional balance. They argue their actions are legitimate on the basis of the constitutional *'freedom of the press'*[59]. However, according to article

---

[58] See decisions of *Arios Pagos* 1317/ 2001 and 874/ 2004.

[59] Article 14 para. 1 and 2 of the Constitution.

14 of the Constitution 'every person may express and propagate his thoughts orally, in writing and through the press *in compliance with the laws of the State*[60]'. In other words, the Constitution explicitly states there is no right to divulge information *in violation of state legislation*. There can be no balancing when the information in question has been obtained in violation of such legislation – i.e. provisions of the Penal Code – since 'the freedom of the press does not contain the freedom of revealing legally protected secrets through the press' (Dagtoglou, 1991: 509). In such cases, there is simply *no* right to inform the public that could be balanced with the protection of the right to privacy[61]. Clearly, then, the broadcast of unlawfully obtained audiotapes in TV exceeds by far the boundaries of the freedom of the press. It is also an abuse of a very considerable power – the power to inform the public – with extremely serious side effects.

The realities of 'financial gain' dominated commercial television may explain such disorientation of the journalists who make use of unlawfully obtained intercepts, but how can one explain a parallel disorientation of the institutions charged with the protection of the fundamental law of the country? There is obviously a link between the two, which owes its existence to the incomparable power to influence the public the mass media possess in modern societies. The Prosecution Authority is intimidated by such power, especially in an era when corruption within the Hellenic Justice itself is at the focal point. This is an assumption, but an assumption supported by hard evidence. In that respect, it suffices to refer to an interview given by the President of the Association of Greek Prosecutors, who is also a Prosecutor at the Court of Appeal:

> *There are [...] legal and moral limits to the means that journalistic investigation can make use of [...] On the other hand, there is the argument for the revelation of serious crimes that – without the use of such means – would stay in the dark [...] Therefore, there is an immediate*

---

[60] Translation by G. Tragakis et al., *op. cit.* Emphasis added.

[61] In that regard, see Fenwick, H. (2002), *Civil Liberties and Human Rights*, 3rd ed., London – Sydney: Cavendish Publishing, p. 626, who may be speaking of a balancing exercise, but seems to allude that factors like the use of intrusive means to obtain the information or a very intimate setting where the obtaining occurs, would turn the balance in favour of the protection of privacy.

> *need that the balancing point is strictly determined, so that prosecuting authorities clearly know what the domain they can function within is; so that they can intervene without hesitation and without risking of being accused of abolishing journalistic research and, in particular, of obstructing the revelation of crimes. Be that as it may, the unsupervised intrusion of audiovisual means in the private life of the individual leads directly to a 'Big Brother' society and to the abolition of any human liberty*[62].

The above quote highlights the effect on the prosecution that the mass media allegedly has. One does not need to try hard to smell the 'fear' of the prosecuting authorities in prosecuting such cases. With all the respect, one has to oppose such reasoning and condemn such fears. To begin with, the balancing point has already been determined by the Constitution, it has been specified in statutory legislation that reflects the constitutional mandates and is identical to that balancing point illuminated by the ECHR. Prosecuting authorities must have no doubts then about what their functions are. Likewise, there should be no reason to worry that serious crime would stay in the dark, but for the use of unlawful journalistic means; if journalists knew they could never use any unlawfully intercepted material on TV, they would eventually recur to informing the prosecuting authorities of any tips regarding serious crime they might have. Serious crime would come to light if the prosecuting authorities, rather than journalists and private detectives, undertook surveillance and interceptions; the law explicitly provides for such possibilities. To conclude, the prosecuting authorities should intervene without hesitation, if they act within the law. Whether they risk being accused of obstructing the press is totally irrelevant; the independent prosecutor should always be bound by law and not by public opinion anyway (Karras, 1993: 244).

Yet, it seems that public opinion is ultimately the root of the institutional crisis and the right to privacy decadence identified throughout this article. The Hellenic public is indifferent, to say the least, towards serious degradation of privacy rights and, in fact,

---

[62] Bagias, S., Newspaper Interview, *Control, even stricter*, Kathimerini, Feb. 13, 2005.

addicted to the public spectacle that is made of it. The mass media simply dance in the rhythm of consumer satisfaction. The prosecuting authorities are too worried they might be seen as spoiling it all and, thus, remain reluctant to take appropriate action, even though the existing administrative measures seem, from a prevention perspective, to be inadequate.

All in all, *the surrender of privacy protections to this culture of disrespect tends to turn fundamental constitutional principles into constitutional myths*. Privacy protections may be efficient against state interference within the criminal process, but they completely evaporate outside that context, and all that in spite of the all-important consecration – with the constitutional revision of 2001 – of the effect of constitutional rights against private parties, rather than against the State only[63].

However, the Constitution is under serious threat of becoming a dead letter if the citizens are not willing to continuously activate its sacred mandates. It can be effective only when it reflects a culture of substantive respect towards the values theoretically cherished by Society. In fact, having complete faith in a document, even a constitutional one, can be very deceiving. That document simply describes an ideal; if citizens no longer share the ideal, the document becomes obsolete. The serious degradation of privacy in television programmes in Greece persuasively illustrates this point.

The right to privacy has been described as 'the most comprehensive of rights and the right most valued by civilized men[64]', and as a 'supremely important human good' (Whitman, 2004: 1153). It is arguably the right most valued by the Hellenic Constitution, but whether civilized Greeks consider it a supremely important human good still needs to be demonstrated, and there is a long way to go towards that direction.

BIBLIOGRAPHY†

Androulakis, N. (2003), Foreword *in* Tz. Iliopoulou-Stragga, *Use of Unlawfully Obtained Evidence – The Evidential Prohibition of Article 19 para. 3 of the Revised Constitution*, Athens – Komotini: A.N. Sakkoulas. *

---

[63] Article 25 para. 1 of the Constitution.

[64] *Olmstead v United States*, 277 U.S. 438, 478 (1928).

† Publications followed by an * are in Greek. Translations of their publication details are my own.

Antthimou, K. (2000), "Protection of Personal Data and Mass Media: Reflections on the decision 26.1.2000 of the Authority for the Protection of Personal Data", *KritE*, pp. 271-318. *

Ashworth, A. (2003), *Principles of Criminal Law*, 4th ed., Oxford – New York: OUP.

–, (2002), *Human Rights, Serious Crime and Criminal Procedure*, London: Sweet & Maxwell.

Banisar, D. – Davies, S., (1999), "Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments", *The John Marshall Journal of Computer Information Law*, Vol. 18, pp. 3-111.

Bück, V. (2000), *L'influence des Cours constitutionnelles sur la politique pénale. Étude comparée France/ Espagne*, PhD thesis, University of Panthéon-Sorbonne (Paris I), under the supervision of Prof. M. Delmas-Marty.

Charalabakis, A. (2002), "The Punishable Nature of Interceptions and the Procedural Use of their Product", *Nomiko Bima*, Vol. 50, pp. 1061-1072. *

Dagtoglou, P. (1991), *Constitutional Law – Individual Rights*, Tome A, Athens – Komotini: A.N. Sakkoulas. *

Dalakouras, T. (1992), "The Exclusionary Rule for Improper Audio and Video Recordings Under Article 370D para. 2 of the Penal Code (article 31 of Law 1941/ 1991)", *Iperaspisi*, Vol. of 1992, pp. 25-44. *

Dimitratos, N. (2001), "The Evolution of the Institution of Evidential Prohibitions in the Hellenic Penal Procedural Law – Simultaneously, a Comparative Review of the Correspondent American and German law", *Poinika Chronika*, Vol. 51, pp. 5-13. *

Diovouniotis, G. (1901), *Hellenic Codes: Constitutions*, Athens. *

Favoreu, L., "Le Conseil constitutionnel et la protection de la liberté individuelle et de la vie privée. À propos de la décision du 12 janvier 1977 relative à la fouille des véhicules" *in Études offertes à Pierre Kayser*, tome 1, pp. 411-425.

Feldman, D. (2002), *Civil Liberties and Human Rights in England and Wales*, 2nd ed., Oxford – New York: Oxford University Press.

Fenwick, H. (2002), *Civil Liberties and Human Rights*, 3rd ed., London – Sydney: Cavendish Publishing.

Giannoulopoulos, D. – Parizot, R. (2003), "Les interceptions et les surveillances" *in Les transformations de l'administration de la preuve pénale: perspectives comparées: Allemagne, Belgique, Canada, Espagne, États-Unis, France, Italie, Portugal, Royaume-Uni* / Study realised by ARPE, Association de recherches pénales européennes; and the UMR de droit comparé, Université Paris 1, Panthéon Sorbonne, CNRS; scientific direction, Prof. Geneviève Giudicelli-Delage, Report on file with author, Forthcoming publication.

–, (2001), "The case of *R. v Khan* and the discretion to exclude evidence in English law", *Poiniki Dikaiosini*, Vol. 4, pp. 614-628. *

Gkana, M. – Kateri, S. (2000), "Comment", *Efarmoges Dimosiou Dikaiou*, pp. 140-156. *

Igglezakis, I. (2004), *Sensitive Personal Data*, Athens-Salonica: Sakkoulas Editions.*

Iliopoulou-Stragga, J. (2002), "The Use of Unlawfully Obtained Evidence to Prove the Defendant's Innocence after the Revision (2001) of the Constitution", *Poinikos Logos*, Vol. 6, 2175-2120. *

Kaminis, G. (1998), *Illegally Obtained Evidence and Constitutional Guarantees of Human Rights (The Exclusion of Evidence in Criminal and Civil Proceedings)*, Athens – Komotini: A. N. Sakkoulas. *

–, (1995), "Secrecy of Telephone Communication: Constitutional Protection and its Application from the Criminal Legislator and the Courts", *Nomiko Bima*, Vol. 43, 505-522. *

Karakostas, I. (2005), "Terms and Conditions for the publications of personal data concerning a person of actuality", *DiMEE*, Vol. 1, pp. 24-33. *

Karras, A. (1993), *Penal Procedural Law*, Athens-Komotini: A.N. Sakkoulas. *

Kayser, P. (1995), *La protection de la vie privée par le droit – Protection du secret de la vie privée*, 3e éd., Aix-en-Provence : Economica, Presses Universitaires d'Aix-Marseille.

La Fave, W. – Israel, J. – King, N. (2000), *Criminal Procedure*, Handbook Series, 3rd ed., St. Paul, Minn.: West Group.

Mahoney, R. (2003), "Abolition of New Zealand's *Prima Facie* Exclusionary Rule", *Crim.L.R.*, pp. 607-617.

Manesis, A. (1978), *Constitutional Rights – Individual Liberties*, 4thed., Salonica: Sakkoulas. *

Manoledakis, I. (2002), "The Defence in Regard to the Violation of the Secrecy of Telephone Calls and Private Conversation", *Poiniki Dikaiosini*, Vol. 5, pp. 277-278. *

–, (1994), "The new Law 2172/ 1993", *Iperaspisi*, Vol. of 1994, 475-484. *

Mitrou, L. (2001), "Protection of Personal Data: a New Right?" *in* Tsatsos, D. – Venizelos, E. – Kontiadis, X., *The New Constitution*, Works of a conference on the revised Constitution, Centre for European Constitutional Law – Foundation of Themistoklis and Dimitrios Tsatsos, Athens – Komotini: A.N. Sakkoulas, pp. 83-103.*

–, (1999), *The Independent Authority for the Protection of Personal Data*, Athens-Komotini: A.N. Sakkoulas. *

Mixailidou, E. (2005), Comments on the decision of the APPD 25/2005, *DiMEE*, Vol. 2, 2005, pp. 295-298. *

Nouskalis, G. (2003), "Law 3115/ 2003 Regarding the Authority for the Protection of Secrecy of Correspondence: Some Remarks and some Speculations", *Poiniki Dikaiosini*, Vol. 6, pp. 248-249. *

Paulopoulos, P. (1987), "Techonological Advancement and Constitutional Rights – The Modern Adventures of the Secrecy of Correspondence", *Nomiko Bima*, Vol. 35, 1511-1520. *

Psarouda-Benaki, A. (1965), "The Tape Recorder in the Criminal Trial and the Need to Protect Oral Speech", *Poinika Chronika*, vol. 15, pp. 397-403. *

Sbolos, A. – Blaxos, G. (1955), *The Constitution of Greece*, Tome B, Athens. *

Schwikkard, P.J. – Van der Merwe, S.E. (2002), *Principles of evidence*, 2nd ed.

Spirakos, D. (1993), "The Secrecy of Correspondence. Basic Principles and Choices for Coping with it Legally and Politically", *To Sintagma*, Vol. 3, pp. 521-536. *

Stamatis, K. (1984), *The Preliminary Investigation in the Criminal Process and the Principles of Legality and Opportunity*, Poinika (series), No 18, Athens – Komotini: A.N. Sakkoulas. *

Tasopoulos, G. (1993), "Issues of Protection of Secrecy and Freedom of the Press According to Article 370D of the Penal Code", *Iperaspisi*, Vol. of 1993, pp. 1449-1465. *

Tragakis, G., Caratzas, H., Zombola, H. (1998), *English-Greek, Greek English Dictionary of Law Terms & the Constitution of Greece*, Athens: Nomiki Bibliothiki. *

Tsakirakis, S. (1993), "Secrecy of Correspondence: Absolutely Inviolable or a Wish of the Legal Order", *Nomiko Bima*, Vol. 41, 995-1008. *

Tsiris, P. (2002), *The Constitutional Protection of the Right of Correspondence*, Athens – Komotini, A. N. Sakkoulas. *

Tzannetis, A. (1998), "The Unlawful Obtaining of Evidence (Interpretative Approach of Article 177 para. 2 of the Code of Penal Procedure)", *Poinika Chronika*, Vol. 48, pp. 105-109. *

Venizelos, E. (2002), *'The Constitutional Acquired' – The Constitutional Phenomenon in the 21st century and the Contribution of the Revision of 2001*, Athens – Komotini: A.N. Sakkoulas. *

Whitman, J. (2004), "The Two Western Cultures of Privacy: Dignity Versus Liberty", *Yale Law Journal*, Vol. 113, pp. 1151-1221.