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(VENICE COMMISSION)

VIDEO SURVEILLANCE AND THE PROTECTION OF HUMAN RIGHTS

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Provisional observations on certain legal issues involved

1. Introduction

Video surveillance in public places is used as an instrument to prevent and prosecute disturbances of public order in general, and serious crimes in particular, and to promote, enhance and restore public security.

Even if only performed at public places, video surveillance amounts to an interference with private life in the sense of Article 8, paragraph 2, of the European Convention on Human Rights [hereafter: the Convention], since, within the limits inherent to the public character of the place concerned, one is also entitled to respect of one's privacy in public places. And, indeed, the European Court of Human Rights [hereafter: the ECtHR] has held that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life.[1]

The Court made the following observation: "There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities, which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technical means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain".[2]

In general, it is not the monitoring as such, but the recording of the data and their processing that may create the interference, especially if the data have been collected by covert surveillance methods.[3] In particular, publication of the data or general disclosure, for instance for broadcasting purposes, constitutes an interference, even if the behaviour to which public attention is drawn was performed in a public place.[4]

According to the second paragraph of Article 8 of the Convention, for an interference to be justified it has to be in accordance with the law and necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In addition, video surveillance in public places constitutes a restriction on liberty of movement in the sense of Article 2, paragraph 3, of Protocol no. IV. This freedom not only concerns the right to move freely, but also the right to move without constant being traced.[5] For such a restriction to be justified it has to be in accordance with law and necessary in a democratic society in the interest of national security or public safety, for the maintenance of *ordre public*, for the

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1 ECtHR 6 February 2001, P.G. and J.H. vs. United Kingdom, § 56.

2 Ibidem, § 57.

3 ECtHR 16 February 2000, Amann vs. Switzerland, §§ 65-66.

4 ECtHR 28 January 2003, Peck vs. United Kingdom, § 44 (attempted suicide).

5 Thus, that the measure requiring a person to wear an electronic belt as an alternative for detention is regarded to be a limitation of personal freedom.

prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

All of these requirements have to be discussed in the present study.

2. Prescribed by law

Different from what is required in certain national constitutions[6], and although the French, equally authentic, text of the second paragraph of Article 8 of the Convention and the third paragraph of Article 2 of Protocol No. IV speaks of *"prevue par la loi*", the ECtHR is of the opinion that Article 8 of the Convention does not require as a legal basis an act emanating from the legislator; governmental decrees and internal regulations may also constitute a sufficient basis[7], as well as unwritten law such as common law[8].

However, the ECtHR has developed rather high standards as to the quality of the legal basis concerned:

- First, the legal basis must be accessible to the public, which means that "the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case".[9] This amounts to the requirement that the legal basis may be assumed to be known to the citizen, if needed with some advice of a legal expert.

- Secondly, the law must be formulated in such a way as to enable the public to foresee with precision its scope and meaning so as to enable them to regulate their conduct. A citizen "must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[10]

- Thirdly, adequate safeguards against abuses must be proffered in a manner that sufficiently clearly demarcates the scope of the authorities' discretion and defines the circumstances in which it is to be exercised, "having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference".[11] This requirement links the legality principle with that of the rule of law, and is of special importance when the surveillance takes place at random.

The foregoing observations imply that the national authorities, including the national courts, when judging the compatibility of video surveillance with the Convention, have to pay special attention to the quality of its legal basis. In the Netherlands there is a special law on the issue: the Law on camera surveillance in public places.

3. Necessary in a democratic society

The ECtHR has consistently held that the adjective "necessary' is not synonymous with "indispensable", but neither has it the flexibility of such expressions as "admissible", "ordinary",

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6 See, e.g., Article 10 of the Dutch Constitution: "… except for limitations to be provided by or in virtue of the law …".

7 See, e.g., ECtHR 18 June 1971, De Wilde, Ooms and Versyp vs. Belgium, § 93.

8 See, e.g., ECtHR 26 April 1979, Sunday Times vs. United Kingdom, §§ 47 and 49.

9 ECtHR 26 April 1979, Sunday Times vs. United Kingdom (No. 1), §§ 47 and 49. Accessibility does not necessarily require codification.

10 ECtHR 4 June 2002, Landvreugd vs. the Netherlands, § 54.

11 ECtHR 24 March 1988, Olsson vs. Sweden (No. 1), § 61.

"useful", "reasonable" or "desirable". The interference must correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued".[12] This also implies the requirement that the reasons adduced by the authorities for justifying the interference must be both "relevant and sufficient".[13] Moreover, the kind of measures amounting to the interference must not be such that they have a deterrent effect on the exercise of human rights and other legitimate behaviour.[14]

Consequently, as is the case with international standards concerning personal data protection in general, the authority responsible for the interference in a person's private life must not only show that his power to do so has a sufficient and adequate legal basis, but that his making use of that power in the concrete circumstances meets the necessity test. In doing so, the national authorities are left with a margin of appreciation, but ultimately they are subject to the supervision of the ECtHR also in this respect.

4. Prevention of disorder or crime, and protection of national security

It is obvious that the national – and local - authorities are in a better position than the ECtHR to assess what measures are necessary to prevent disorder and restore order, to prevent and prosecute crimes, and to protect national security. Therefore, they are left with a broad margin of appreciation. In the *Leander* Case the ECtHR held as follows: "There can be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power, firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts of importance for national security. (…) Having regard to the wide margin of appreciation available to it, the respondent State was entitled to consider that in the present case the interest of national security prevailed over the individual interests of the applicant."[15]

What was said under 3 also applies here: it is primarily up to the national authorities to assess what is necessary to prevent disruptions of public order and crimes, and to protect national security, but, here as well, the ECtHR will perform the ultimate control.

5. Proportionality

The measure must serve a sufficiently serious aim to be justified.

Buttarelli gives as an evident example of a disproportionate measure video surveillance in public toilets to control and maintain a no-smoke policy. Equally, a system of video surveillance at the place of labour solely for the purpose of controlling the productivity and attention of the workers is disproportionate. If the surveillance system at the working place is necessary for safety reasons, the use of the collected data should be restricted to that aim.

The proportionality test has to include the issue of whether less far-going (less privacy-intrusive) measures are available and sufficiently effective to serve the purpose, e.g. police surveillance in loco. Thus, the aim to prevent the commission of crimes cannot, apart from exceptional situations of imminent threats to security or risks of serious crimes, justify an a-selective surveillance system that implies far-going limitations of privacy and movement for the public at

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12 ECtHR 4 June 2002, Landvreugd vs. the Netherlands, § 74.

13 ECtHR 24March 1988, Olsson vs Sweden (No. 1), § 68.

14 ECtHR 27 March 1996, Goodwin vs. United Kingdom, § 39.

15 ECtHR 26 March 1987, Leander vs. Sweden, § 67.

large, since it may be assumed that more selective systems of surveillance are available and sufficiently effective.

A surveillance measure is also unjustified if it is devised and/or used in a discriminatory way, for instance to register the criminal behaviour of exclusively the coloured part of the population. But if the surveillance aims at collecting information about the behaviour in public places of homosexuals, this may be not discriminatory if the public-order-problems involved are caused only by homosexuals.

Data concerning a person's race, sex etcetera may be collected only in so far as that is necessary for identification purposes.

6. Additional requirements

People have to be notified of their being surveyed at certain public places, or the surveillance has to be obvious. This is not only a requirement of privacy protection but also serves the aim of prevention. The most common device is notification by street sign. Even a detained person, who may expect a certain form of constant monitoring, is entitled to being notified if the data collected in the detention centre are used for a purpose that he or she could not have anticipated.[16]

People are entitled to access to the data collected of them, and to being informed about whether any data concerning them have been collected and processed, about whether these data have been transmitted to other persons or institutions, and about the use that will be made thereof. In principle the general rules concerning the public character of governmental information apply, unless there is special legislation. If and as long as access would endanger the prevention or prosecution of crimes or the protection of safety, access may be restricted. This implies a balancing of interests. Thus, a person who needs access in order to prepare his or her defence against prosecution, has a strong claim to protect his or her right to a fair trial with equality of arms. On access, see further the contribution by Buttarelli.

Data should not be conserved any longer, should not be processed any further, and should not be accessible to a larger group of people than the aim of prevention and prosecution of crimes, or the protection of safety requires. The person who is the object of data collection may request their rectification, supplementation, restriction of access or destruction.

The surveillance measures must be supervised by an independent authority. In the Netherlands this is the Commission for the Protection of Personal Data, established by law. Any collection and processing of personal data has to be notified to the Commission.

The person who is the object or assumed object of surveillance must have an effective remedy, and must be informed about that remedy and how to use it.[17]

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16 ECtHR 17 July 2003, Perry vs. United Kingdom, §§ 42-43.

17 Ibidem, §§ 47-49.