

Report

Civil Liberties and Social Rights under Threat?

Friedrich Ebert Stiftung – Centre for European Constitutional Law

Online event 2/7/2020

The **Friedrich Ebert Stiftung (FES)** and the **Themistokles and Dimitris Tsatsos Foundation - Centre for European Constitutional Law** organised an online event on 2 July 2020 on the topic “Civil Liberties and Social Rights under Threat?”. The panel of speakers included **Xenofon Contiades**, Professor of Constitutional Law, President of the T & D Tsatsos Foundation, **Lilian Mitrou**, Professor of Personal Data Protection Law, **Elli Varchalama**, Legal Counsel of the General Confederation of Greek Workers, Vice-president of the Greek National Human Rights Institution, **Marinos Skandamis**, Dr Jur., Shadow Secretary for Citizen Protection for the ‘Movement for Change’ party (Kinima Allagis), former Secretary General at the Ministry of Justice, **Maria Gavouneli**, President of the Greek National Human Rights Institution, Professor at the University of Athens. **Fotini Kokkinaki**, Journalist, Director of Communications at Human Rights 360 moderated the panel.

Ulrich Storck, Director of the FES office in Athens opened the event. He welcomed the panel and the event attendees and introduced the main point of concern in relation to the topic at hand, i.e. to what degree are restrictions to civil liberties and social rights acceptable and necessary in order to deal with crises such as the current Covid-19 pandemic or the crisis which followed the September 11, 2001 attacks to the US. He noted that this is a particularly timely, international debate of crucial importance to progressives worldwide.

First to speak was **X. Contiades**, who gave a cross-cutting overview of the issues at hand, focussing on the risk of restrictions imposed in times of emergency becoming permanent. The main question facing us today, according to Prof. Contiades, is whether we will witness a reprise of previous periods of crisis, in particular 9/11/2001, which saw to the long-term consolidation of the prioritisation of security over civil liberties. Will this new 11th, the 11th of March 2020, the date the WHO declared Covid-19 a pandemic, become a milestone in a paradigm shift toward stifling surveillance of citizens’ personal beliefs and social behaviour?

This global crisis, the third we are being faced with within the first two decades of the 21st century after the global security crisis of 9/11 and the recent financial crisis, demonstrates that the introduction and degree of restrictions to civil liberties is, in great part, tied to the political, social, institutional, and, now, health-related context. Hence, a potential new wave of Covid-19 – whether global, regional or local – might see a return to the, strict to the point of prohibition, limitations to the exercise of rights such as the freedom of assembly, religious freedom and the freedom of movement. Nevertheless, these rights are gradually being restored and restrictions to their exercise are being lifted.

By contrast, rights such as the freedom to conduct business and to participate in a country’s financial life, and, of course, social rights, continue to be affected. Employment relations and social security are expected to face long-term consequences. At the same time, the measures

enacted to combat the spread of the pandemic raise serious concerns related to privacy and personal data protection. Indeed, the emergence in Europe of practices and trends hitherto seen only in authoritarian states, such as mass surveillance and manipulation of citizens through social media, the use of infrared cameras, the tracking of smartphones etc., is disconcerting. These phenomena lead to the conclusion that this pandemic will be a turning point in matters of privacy and mass surveillance of the population and will mark the transition from conventional electronic surveillance to biometric surveillance, which will be capable of revealing, in conjunction with other data, far more complex information about the persons being surveilled, making methods such as those employed by Cambridge Analytica seem almost unsophisticated.

It is important to note that the above issues did not appear out of thin air but found fertile ground in already existing conditions. We are in the midst of the 4th industrial revolution, the emergence of A.I., the digital transformation of the economy, teleworking, the internet and its distinct culture, flexible employment relations, monitoring and surveillance, biomedical experimentation, digital inequalities and the provisional suspension of liberties.

All of the above has already been the subject of debate. The pandemic, however, rendered visible the impact of the abovementioned changes in the field of human rights and opened the discussion on how to safeguard these rights from a potential perpetuation of this state of emergency and of the restrictions it brought. All things considered, the purported return to normalcy may not be as innocuous as we may have hoped.

L. Mitrou followed with a speech focussing on the novel data protection-related issues which manifested during the pandemic. First, Prof. Mitrou observed that the present health crisis presents many similarities to the 9/11 crisis in terms of the tendency to restrict liberties, but is also very different. Its main difference is that today we feel this balance between protecting lives, on the one hand side, and safeguarding personal data and other liberties, on the other, on a much more personal level than, say, the risk of a terrorist attack. This is due to the nature of the present threat, which we experience in our everyday lives, for instance when we have our temperature checked each morning upon entering our place of work.

In this context, the main issue in relation to personal data protection is the fact that surveillance is being used as a quid pro quo for more freedom of movement. In this regard, to quote the European Data Protection Supervisor, the pandemic constitutes a “game changer”. Thus, while measures such as the “tourists’ barcode” are being introduced, the question is how much surveillance is permitted and in exchange for what, given that surveillance itself constitutes a restriction to freedom of movement.

The framework on data protection does not, per se, preclude the restriction of privacy or freedom of movement to achieve a freer society or economy. Nevertheless, this framework is still in effect and these restrictions must be in accordance with the law. Administrations must, in particular, opt for the least intrusive solutions and select the tools which produce the least amount of information. Transparency must be prioritised, clear criteria for the collection and processing of information must be set, and appropriate checks and balances must be put in place. The data collected should be stored only for the time which is absolutely necessary to achieve the aim of their collection. All of the above safeguards are already prescribed by law and need only be adjusted to the current circumstances. It is also crucial that an impact

assessment is conducted so that citizens are clearly aware of what the stakes are for their liberties. At the decision-making level, there need to be certain limits to the power to impose restrictions to human rights.

It is important to keep in mind that the prospect of marginalisation may lead people to accept these restrictions out of fear. Nonetheless, if society builds a tolerance to them, there is a risk that people may accept measures which are very intrusive and unnecessary.

E. Varchalama spoke next on the impact of the pandemic to employment. Ms Varchalama drew attention to the fact that the current health crisis compounded the effects of the recent financial crisis to the legal and policy framework on employment and social security rights. The downgrading of collective bargaining and the consequent unilateral regulation of employment relations by the state, in addition to the recent draft law restricting freedom of assembly [*note: already voted into law at the time of writing*], have rendered any reaction to these measures an entirely controlled one. The establishment of minimum standards of protection, such as a lower wage for younger employees or a limited Social Security Number for refugees and asylum seekers, is particularly worrisome.

The Covid-19 pandemic created conditions fostering flexible forms of employment relations and patterns conducive to forced labour. Suspension of employment contracts proliferated and became the norm. Measures enacted to facilitate the return to normal promote part time employment through the “partnership” scheme, whilst new technologies which make remote working and teleworking possible also permit abuses of workers’ rights which are difficult to monitor.

There is a need to create a mechanism which will actually assess the impact of the measures enacted during this period so that the standard of living may be restored to pre-Covid-19 levels. Furthermore, discussions on the codification of employment law, which are currently on trend, must be held off, as codifying legislation at a time when employment rights are at such a low point would be catastrophic.

M. Skandamis focused on the need to rein in the digital technology giants ushering the implementation of surveillance measures by reinforcing EU competences to protect privacy.

According to Dr Skandamis, the pandemic consolidated, accelerated and manifested what was already there: mass monitoring of our private and social life. This monitoring may be deemed as justified due to the lack of credible alternatives to counter the spread of the pandemic. What is remarkable, however, is the readiness of the high-tech companies to produce and employ mass surveillance tools and mechanisms in such short notice.

This may be attributed to a number of pre-existing factors. First, 9/11 was the turning point which finally tipped the scale in favour of security versus liberty. Furthermore, the technologies which permitted this type of surveillance were already in existence: the tech giants collectively referred to as GAFAM (Google, Apple, Facebook, Amazon, Microsoft), already know more about citizens than their own country’s authorities. Thus, a system is already in place which impacts on our lives without us having any influence on it. Moreover, human behaviour itself appears to have been altered during the past few years. We are now more willing to share our data and do not hesitate to access data shared by others. This shift in our attitudes may lead some companies to claim some type of right to monitor us for our

own safety. Finally, the international climate is not as favourable to human rights protection as it used to be. The traditional east-west competition, which rendered the protection of civil liberties a favourable topic for the western bloc, has subsided and new authoritarianisms have emerged – Russia, Turkey, even the US under the Trump administration.

We may respond to these challenges by reframing the demand to safeguard the liberty of persons in social-democratic terms, as well as by boosting the role of the EU, which, as a regional Union, has proven that it can play a central role in protecting privacy, primarily by imposing controls on tech giants. For the latter to be effective, it is necessary that the EU invests in its own mechanisms and tools, such as an EU Google, Facebook, etc., making use of the European Future Fund. The negotiation of new international data protection treaties and the increased awareness and mobilisation of citizens constitute essential complements to the above responses.

The first round of presentations concluded with **M. Gavouneli**, who spoke on the role of civil society and National Human Rights Institutions (NHRIs).

Prof. Gavouneli considers it crucial to clarify that there is no before and after the pandemic: a paradigm shift has taken place, in the same way it did with 9/11. Our world has changed, and things will not turn back to the way they were. Thus, in order to safeguard civil liberties effectively, we need to create new mechanisms, adapted to the new conditions. Civil society can play a central role in this process.

NHRIs, a bridge between the State and civil society, exhibited remarkable reflexes as the pandemic erupted. They convened regularly and monitored the application of restrictive measures, intervening when necessary. Nevertheless, it is disappointing that no EU government had the instincts to consult with its NHRI prior to the introduction of these measures. Only a few governments did so after the fact and only for specific measures. This means that NHRIs must remain vigilant and invest in the rigorous observation and monitoring of everyday events.

The introduction of restrictions should follow the conditions laid down by law. Established decision-making and review processes must be observed, with due respect to the role of courts and international monitoring mechanisms. Restrictions must always be proportional and the need to preserve them must be subject to continuous assessment. This temporal parameter, which determines the overall duration of the restrictive measures, is of crucial importance. A measure that is proportional today may not be so in a week from now. This is the traditional way of dealing with limitations to civil liberties. However, it is important to keep in mind that we are no longer dealing with traditional restriction and suppression policies, but with new technologies which create additional challenges to NHRIs and Civil Society actors attempting to monitor them. Successful monitoring of these technologies requires first and foremost access to them. However, someone attempting to monitor them from the outside does not necessarily have the tools to understand what exactly they are supposed to be monitoring or if they should monitor it at all. These features create the need for a whole new institutional function.

NHRIs respond to these challenges by using the tools already available to them by law, accordingly adjusted. Civil Society, however, does not have the tools available to NHRIs, and is, thus, faced with greater difficulties when attempting to follow developments. Under these

circumstances, citizen specialists with knowledge of the new technologies may assume the role of the educator in addition to that of the activist.

After the first round of presentations, speakers responded to questions from the audience.

The first question concerned the risk of having the current state of emergency perpetuated and the consequent threat to our privacy and personal data. **X. Contiades** stressed the need to stay alert and vigilant even after the initial restrictions are lifted. **L. Mitrou** observed that in Greece we have not yet recorded any instances of broad surveillance, while the law sets strict conditions for the transmission and processing of data. The issue, therefore, is whether these conditions are being met and whether data are processed in a transparent manner. This, according to Prof. Mitrou should be the main focus in a democratic society: not prohibition of data collection but transparency with regards to who collects them and for what purpose. This is particularly important when it comes to scientific research for the novel coronavirus, which requires digital solidarity and data sharing among countries. **E. Varchalama** cautioned against the risk to abolish the protective character of employment law. **M. Skandamis** raised the issue of people growing accustomed to surveillance, which stems from the perpetuation of restrictive measures and the consequent dampening of our reflexes. **M. Gavouneli** attributed these worries to the fear of the unknown and underscored the need to familiarise and educate people on new technologies in order to limit marginalisation. She described the need to adjust to the new norm and construct a new notion of privacy as our No 1 challenge for the 21st century.

The second question was addressed to **X. Contiades** and concerned the consolidation of the state of emergency in the 21st century and the need to potentially redefine the concepts of “rule” and “exception” in order to render the difference between them clearer. Prof. Contiades focused on the nature of crises as accelerators of historical change. In this context, decisions are made instantly, do away with lengthy deliberation, and circumvent the peoples’ reactions. The risk for certain measures becoming permanent and for the experiment to become the new normal is real. Nevertheless, constitutional and international law delimit these tendencies. Courts are already issuing relevant decisions, while both citizens and the scientific community are on high alert to prevent this risk from becoming a reality.

The third question concerned our attitude toward measures enacted during emergencies, which are, however, irrelevant to the state of emergency itself. The recent reforms of the environmental law framework, which passed into law during the lockdown by a small number of parliamentarians, were cited as an example. **M. Skandamis** agreed that the pandemic should not be used as an opportunity to enact anti-popular policies. **M. Gavouneli** wondered whether it is preferable for democratic institutions to remain functional, even in a limited fashion, during emergencies or to have them suspended altogether, as was the case in Hungary, for example, where the parliament shut down during the lockdown. **E. Varchalama** stressed the need to consult with social partners and carry on the public debate, even in a state of emergency, in order to safeguard the legitimacy of any decisions made in time like this.

The fourth question was whether the electronic surveillance of citizens is really something new and if the differences observed after the pandemic are qualitative or quantitative. **X. Contiades** iterated that, aside from the obvious quantitative difference, right now we are

witnessing the transition from the conventional electronic surveillance to biometric surveillance. Furthermore, we are also in doubt on whether the current measures are indeed necessary. Therefore, the backdrop may have already been there, but the differences are massive, both quantity and quality-wise. **E. Varchalama** mentioned employers' abuses related to teleworking, such as the demand for full updates on their employees' activities – with audio and video footage – on a 24h basis, as well as the need to fill corresponding legislative and institutional gaps before a potential second wave of the pandemic. **M. Skandamis** focused once more on the risk of being desensitised to the restrictions of our liberties and to “internalise disciplination”, as well as on the role of the EU as a counterbalance to authoritarian surveillance trends. **M. Gavouneli** expressed the opinion that the difference is neither quantitative nor qualitative but, rather, temporal. The rate in which we are accepting the changes is shocking and everything else seems to fall back before the need to protect human lives, which is what is at stake at this moment. The fact that we do not get the luxury to sit back and reflect on the measures renders evident the need to promptly react to the new conditions and to prioritise transparency over privacy.

The fifth and final question concerned the right to access to justice and whether its exercise was facilitated during the lockdown, taking into account the limited to non-existent e-justice tools in Greece. Moreover, the speakers were given the option to give a final statement summarising their views on the topics at hand. **M. Gavouneli** responded to the question posed by the audience and mentioned the efforts of digitisation undertaken from the start of the pandemic. She did recognise, however, that a number of gaps and steps to be taken in this direction still remain. Specifically, she mentioned the virtual deliberations of Courts abroad, including of the International Court of Justice, and underscored the need for the Greek Judge to specialise in the use of similar tools. Moreover, she focused on the need to establish speedy procedures for the judicial review of state actions taken to execute the measures related to the pandemic, such as the SMS permits, in a manner which secures swift access to justice. **M. Skandamis** recognised the need to move forward with the digitalisation of justice but considers the need for quality justice to be more pressing and prioritises reforms which will ensure the functional independence of the judiciary. **E. Varchalama** mentioned the challenges to access to justice and monitoring mechanisms in the field of employment and iterated the need for an impact assessment. She also noted deficiencies to the regulatory framework in terms of access to social security coverage and corporate bylaws which do not regulate the obligation to assume costs related to Covid-19 protective measures, such as securing masks for employees. Overall, she stressed the need to reinforce the position of employees. **L. Mitrou** made two concluding observations: the first was that we cannot treat certain rights as “luxury rights”, applicable only in times of prosperity and not in hardship; the second observation was that to secure the citizens' cooperation and trigger personal responsibility, it is essential to cultivate trust to public institutions. Trust works both ways and presupposes following the rules in place as well as monitoring their correct implementation.

X. Contiades closed the event, on behalf the co-host Centre for European Constitutional Law, and delivered a statement on the need to tackle the inequalities highlighted during the pandemic, which brought forth, reproduced and exasperated pre-existing disparities. These include inequalities in relation to access to education through digital learning, which excluded students whose families did not have access to the digital tools necessary; inequalities within the family unit; gender inequalities; economic and social inequalities, especially in relation to

members of marginalised groups. The pandemic magnified these inequalities and greatly affected those experiencing lack of housing, precarious environments, lack of employment opportunities, undeclared work, challenges in their participation to collective decision-making processes, and a host of other types of social discrimination. The pandemic intensified these inequalities and should force us to rethink about these people and these groups and the ways in which we treat them.

The event initiated a debate on a number of important issues. The speakers raised some common points, such as the risk of perpetuating measures restricting fundamental liberties and social rights and of desensitising citizens to them, the need to respect the institutional and regulatory framework and to prioritise transparency, and, finally, the necessity to perform an impact assessment of the measures and to limit marginalisation and inequalities caused or highlighted by the pandemic. In sum, the common denominator seems to be the need to remain vigilant in order to adapt to the new conditions which appear to be here to stay.