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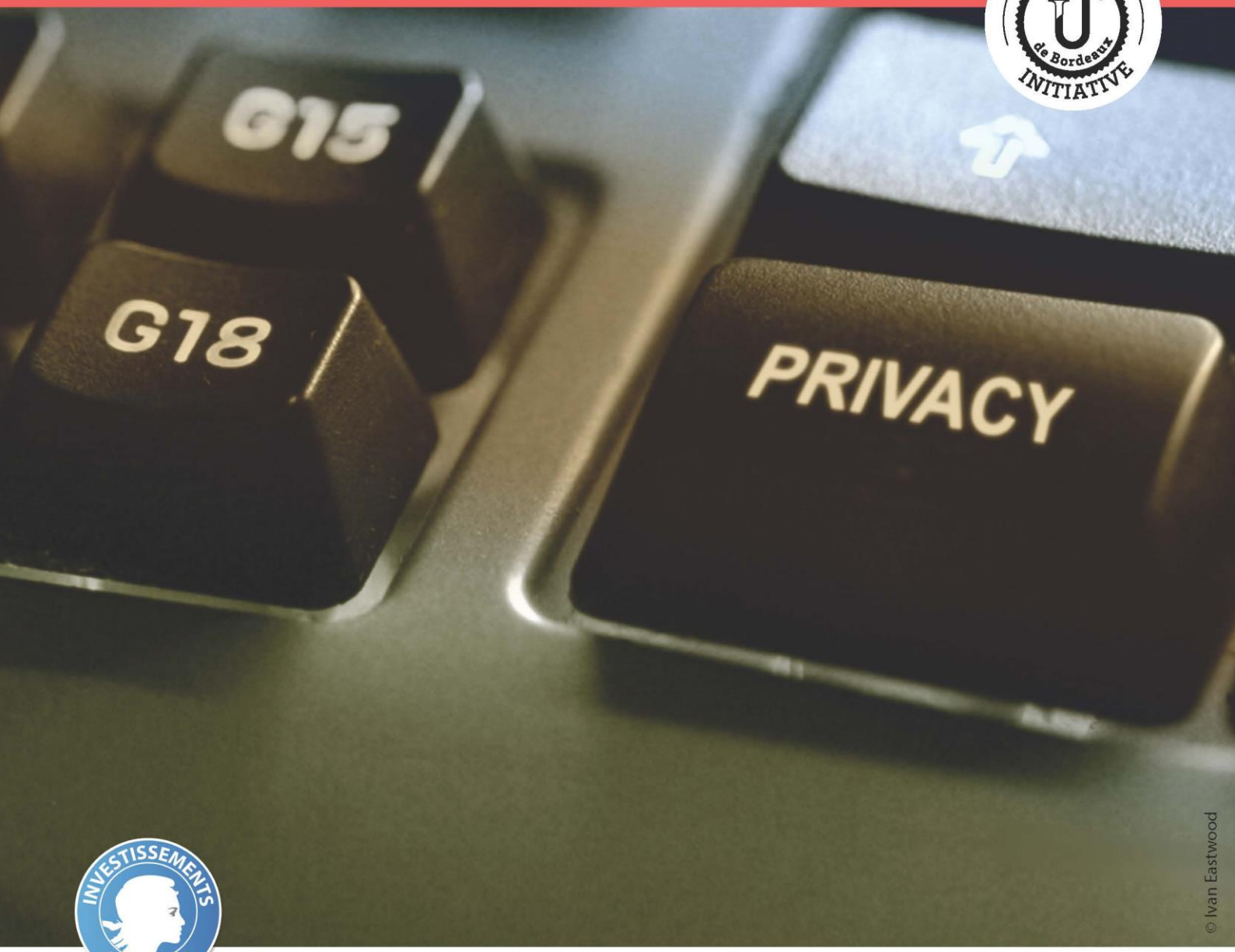

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"*Ignorance of the law on respect for private life can be of such a nature as to restrict individual freedom*" – thus ruled the Constitutional Council in its decision of 18 January 1995 (1). In this assertion, the Council recognised and explicitly linked privacy to the constitutional principle of individual freedom, thus hauling it up to the zenith of the pyramid of norms. This was an essential step as, up until then, France stood out by its conception of privacy, which was neither part of the Constitution (unlike Spain (2)) nor of the "*bloc de constitutionnalité*", the body of constitutional rules and principles (unlike Germany (3)).

The above statement leads us to infer that there then existed no real long tradition in French constitutional law (4) relating to the protection of privacy; on the contrary, it is a concept that has recently and gradually become a part of national law through international and European legislation on the one hand, and the development of information technology on the other.

However, and paradoxically, a quick glance at history confirms that the concept of privacy is one of the cornerstones of our society. Indeed, soon after the French Revolution, Benjamin Constant (5) suggested a distinction between *la liberté des Anciens*, exercised through active participation in collective power; and *la liberté des Modernes*, which consists in protecting individual rights and the private sphere against government interference. For Alexis de Tocqueville, privacy must be examined in light of the "growing equality of conditions" and the spread of democracy, which encourages the rise of individualism, that "*considered and peaceful sentiment that disposes each citizen to isolate himself from the mass of his fellows and to withdraw to the side with his family and his friends*" (6). It emerges, from such intellectual considerations, that the notion of privacy is intrinsically linked to the individual and the exercise of his freedoms, as society acknowledges his right to dispose of his own private sphere, independently of collective public life.

Previously, invasions of privacy were essentially government acts; nowadays, however, it would appear that private persons may also be perpetrators of such acts. The protection of privacy, initially a political issue, has over time become a financial concern. Technological progress has facilitated that transition by making database creation and data collection – the new challenges faced by said protection – accessible to businesses, sometimes even with the consent of the citizen-consumer. It would appear that privacy may no longer be separated from personal data.

So it is a concept marked by the intellectual and technological considerations of a given age. It fluctuates and changes, and this is why case law is called upon to play a central role, particularly in how best to reconcile that concept with other fundamental principles. The recent classification of private life as an area of constitutional concern thus leads us to question the content of said protection in light of the development of Constitutional Council case law. These considerations

invite us first to consider the recent emergence of constitutional protection under the twofold restriction of national and international pressures, before observing its current development in light of technological progress.

I – Recent constitutional protection

Article 9 of the Civil Code, created by the Law of 17 July 1970, formally enshrines the principle that "everyone has the right to respect for his private life". For a long time, it fell to the ordinary courts to take the necessary steps in order to bring an end to any invasion "of personal privacy" (*intimité de la vie privée*) (7). Thus, like "personal privacy" under Article 18 of the Spanish Constitution or the German constitutional courts' theory of the spheres (8), French law places the notion of *intimité* or personal privacy at the very heart of private life. On that basis, constitutional protection can be erected and, thereafter, strengthened and empowered.

A – A favourable context for the emergence of constitutional protection

This recognition was first of all the result of international law, which naturally influenced national law.

The favourable international context for the protection of privacy opened in 1948 with the adoption of the Universal Declaration of Human Rights (9). Shortly thereafter, the 1950 European Convention on Human Rights stated at Article 8 that "*[e]veryone has the right to respect for his private and family life, his home and his correspondence*". This fundamental piece of legislation, at the root of an abundance of case law, has contributed to the emergence of a number of new rights in French national law. Indeed, we cannot help but note that the Constitutional Council "*takes inspiration directly and in numerous cases in its case law*" (10) from the European Court of Human Rights in Strasbourg, the bedrock for the protection of rights and freedoms. However, the Council is under no obligation to align itself with ECHR case law even if, in order to maintain "*the unity of the French legal order and legal certainty*", it is implicitly subject to it. From this unofficial perspective, arises "a conversation without words" (11) and ultimately "*the Constitutional Council and the ECHR protect […] the same rights*" (12). Privacy gradually emerged as a constitutional concept. The international context that was favourable to recognition at the highest level accelerated the development of a similar process on a national level which, in 1977 (13), allowed the Constitutional Council to attach greater legal value to privacy by integrating it into the fundamental principles recognised by the laws of the French Republic (14).

Lastly, the constitutional enshrinement of the said protection was definitively established when, in 1993, the Vedel Report (15) suggested the addition to Article 66 of the Constitution of a paragraph stipulating that "*everyone has the right to respect for his private life and the dignity of his person*". The proposal was not acted upon; nevertheless, it opened the way for more protective Constitutional Council case law. The legal and legislative foundations had been laid to allow full and complete acceptance into the body of constitutional rules and principles.

B – The concept becomes independent and explicit

In Spain, the protection of privacy expressly included in Article 18 of the Constitution serves in establishing guaranteed legal stability as to its basis and content. In France, as in Germany, there are multiple legal bases which force the courts to make choices.

This in particular is the reason why "*the constitutional value of respect for private life was long cast into doubt*" (16). Indeed, it took the "video-surveillance" decision of 1995 for the Constitutional Council to refer expressly to privacy. In the absence of any constitutional provisions on that protection, the Council had to find the best legal response. This is why it based the protection on the foundation (17) of Article 66 of the Constitution, i.e. on a broad conception of individual freedom including security, freedom of movement, freedom to marry, and the right to respect for private life.

Nevertheless, difficulties arising from that approach have been brought to light. Indeed, the process bolstered the powers of the judicial courts, which dealt with cases of privacy almost exclusively to the detriment of the administrative courts. As part of a political strategy and in order to share jurisdiction more equitably, the Constitutional Council decided in 1999 (18) to amend the legal basis by expressly linking privacy to Article 2 of the Declaration of Human Rights (19), stating that "*the freedom proclaimed by this Article implies respect for private life*". It is therefore a new right nonetheless founded on an old provision dating back to 1789, the affirmation of which had been renewed a number of times by the case law of the ECHR in Strasbourg relying on the Convention. This new basis allowed the Council to "*freely manage its case law on the division of trial jurisdiction between the ordinary and administrative courts*" (20). Henceforth and quite apart from the protection of the home which rests on the foundation of Article 66C, the protection of privacy is based on the jurisdiction sometimes of the ordinary courts, sometimes of the administrative courts. The modulation that the Council allowed itself is echoed in German law, which considers that some rights enjoy specific protection (protection of the home or of correspondence), while others (such as personality rights) are subject to general subsidiary protection.

For the French as for the German courts, the objective is to avoid fencing off the content of that right and leave a margin of appreciation.

II - Constitutional protection tested by current demands

While private life was initially synonymous with the *sphere de l'intimité* or the "sphere of privacy", to use Jean Carbonnier's phrase, it would appear that with new technology, the emphasis is now on information. Indeed, the consistency between information and personal data would make substantial changes to the content of privacy. The latter could be defined as "a collection of personal, i.e. identifying information" (21). The right to respect for private life would become "a right of control over personal information" (22).

A - Strengthening the constitutional affirmation of respect for private life

In accordance with Article 34 of the French Constitution, it falls to the legislature to set the rules and restrictions concerning fundamental freedoms granted to citizens. However, the Constitutional Council then has the task of establishing a framework reconciling the safeguarding of public order and respect for private life, both principles having constitutional value.

In 1978, France was among the first few countries to pass data protection legislation in the form of the *Informatique et Libertés* Law (23). The *Loi* allowed the Constitutional Council to deliver the law on the protection of personal data as, under Article 4, it defined personal details as those that "*in whatever form, serve in the identification of the physical persons to whom they apply, be it*

directly or otherwise". On that basis, the Council regularly reminds the legislature that it must respect those "*provisions safeguarding individual freedom provided by legislation on information, databases and freedoms*" (24).

Next, in 1995, the European Union adopted a Data Protection Directive, transposed in France by the Law of 6 August 2004. This proposed a series of flexible principles intended to provide a sustainable framework for that protection: purpose; proportionality; data security; right of access and rectification; right to information; right to object; and the right to prior consent. It was ultimately on that basis that the decisions of the ECHR and the Constitutional Council would interact consistently.

Fairly typically; the right to respect for private life is defined as the "*right not to be disturbed by others either in one's own home (inviolability of the home) or one's own interests (inviolability of the private sphere)*" (25). Constitutional Council case law connects private life with classic concepts such as the inviolability of the home, the interception of correspondence and doctor-patient confidentiality, but also more modern concepts linked to video surveillance and data processing.

An examination of the various decisions shows that, for the ECHR as for the French court, the frontier between the lawfulness or otherwise of invasions of privacy depends on whether national law complies with procedural requirements and the various forms of protection provided against any potential infringement.

Thus in its decision of 2 March 2004 (26), the Council ruled that certain provisions that seemingly invaded privacy nevertheless complied with the Constitution, in light of "*public order requirements and the prosecution of the perpetrators of criminal offences*". This compliance was also based on the fact that the relevant judicial authority must give consent in order to approve such practices (searches, seizure of evidence outside the hours provided by the Criminal Procedure Code, etc.) which, in the eyes of the court, constitutes a sufficient constitutional guarantee.

This is why some writers stress the fact that that "*strengthening the constitutional affirmation of respect for private life did not bring with it a genuine reinforcement of its effectiveness or its protection*" (27).

B - The lack of genuine reinforcement for the protection of privacy

For a number of years, the growing demand with regard to increased security through powerful surveillance and monitoring systems has been expressed in a number of rulings against the right to private life. New technology is indeed viewed as the possibility of combatting insecurity and we can see fairly broad social acceptance of these, nevertheless intrusive, tools.

Consequently, requirements as to the respect of that right are increasingly flexible and, like France's European neighbours, "*the boundaries of private life are shrinking while the authorities' surveillance powers continue to expand*" (28). The European Commission has described this trend in terms of a "period of decline" as the majority of national legislation is passed in order to counter terrorist threats and serious crime.

France is no exception to this trend. Involved as she is in the international war on terror and in response to the *Charlie Hebdo* attacks of January 2015, she has sought to increase the powers of the intelligence services in the Bill (29), approved at first reading by the National Assembly on 5 May 2015 and which is currently the subject of a broad consensus in public opinion and amongst Members of Parliament; it would appear that it will be referred to the Constitutional Council, whose decision will be hotly anticipated, particularly with regard to private life, the respect of which, according to the Council, supposes both (30) public interest grounds and the proportional nature of the means implemented in order to achieve the established aim (31).

Equally, the use of geolocalisation is permitted within a very strict procedural framework. It is a judicial police procedure consisting in the surveillance of a given person using considerable technical means that allow the geographical location of a vehicle or telephone to be followed in real time. The invasion of privacy is characterised by this continuous, instant localisation. That is why, in its *Geolocalisation* decision of 25 March 2014 (32), the Council examined the compliance of this practice with the right to respect for private life and the inviolability of the home. While the technique is permitted by the legislature for serious offences, it is nevertheless placed under the guidance and control of the judicial police. These procedural and restrictive legislative measures are intended to guarantee that "*the restrictions imposed on constitutionally guaranteed rights are necessary for ascertaining the truth and are therefore not disproportionate to the seriousness and complexity of the offences committed*". It therefore concluded that the measures were constitutional.

Conclusion

The legal restrictions linked to the respect for private life are gradually being relaxed by successive Council decisions but also by the technological context. The emergence of "new digital memory devices" (33) or, more generally, the digitisation of society "*threatens our traditional conception of privacy*" (34). The recent but rapid development of the smart cities phenomenon in France, equipped with digital sensors which serve to locate any individual and monitor their consumption habits at any given moment, is a relevant example, the existence and evolution of which have evaded the Constitutional Council's scrutiny.

This raises the question of the future of the concept of privacy.

We could well imagine the emergence of a distinction between the scope of privacy – linked to the intimate sphere, according to the classic conception, which would enjoy greater protection – and that of the more technological personal life, which would be linked to digital personal data and on that basis subject to more relative protection.

Whether it be under the influence of political will, legal restrictions or even economic needs, it is clear that the current situation is destined to undergo significant change in the near future.

Notes:

(1) Constitutional Council, 18 January 1995, Decision n° 94-352 DC, Rec. p.170; F. Luchaire, "La vidéosurveillance et la fouille des voitures devant le Conseil constitutionnel", *RDpub.*, 1995, p.575

(2) Article 18 of the Spanish Constitution of 27 December 1978 speaks of the right to "honour, to

personal and family privacy". In the same vein, see F. J. Matia Portilla, “Espagne. Constitution et secret de la vie privée", *AIJC*, XVI-2000, pp.209-24

(3) In the same vein, see the study conducted by Laurence Burgogue-Larsen, "L’appréhension constitutionnelle de la vie privée en Europe. Analyse croisée des systèmes constitutionnels allemand, espagnol et français", in Frédéric Sudre, *Le droit au respect de la vie privée au sens de la CEDH*, Bruylant, coll. Droit et Justice, 2005, p 98 onwards, for whom, regarding Germany, "*the right to private life does not feature per se in the Basic of 23 May 1949 but is apprehended through other rights that are closely linked to it*".

(4) It is important to emphasise that only Constitutional Council decision will be examined here; the constitutional case law of the ordinary courts will not be taken into consideration.

(5) Benjamin Constant, *Discours prononcé à l'Athénée Royale de Paris*, 1819.

(6) Alexis de Tocqueville, *Democracy in America,* Volume 3, Part II, Chapter II

(7) Article 9 para.1, Civil Code.

(8) See Christoph Gusy, « La théorie des sphères », *AIJC*, 2002, pp. 467-484. The German courts make the distinction between the intimate, the private and the public spheres, and ultimately reconcile the intimate and private spheres.

(9) Article 12 UDHR "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation”.

(10) Olivier Dutheillet de Lamothe, « L'influence de la Cour Européenne des droits de l'Homme sur le Conseil constitutionnel », speech delivered on 13 February 2009, www.conseil-constitutionnel.fr

(11) *Idem.*

(12) François Luchaire, « Le Conseil constitutionnel et la CEDH » , *Gaz. Palais*, 10 June 2007, n° 161, p.11

(13) See Decision 76-75DC of 12 January 1977, known as the "fouille de véhicules” ("vehicle search") decision, on the law "permitting the search of vehicles for the purpose of investigating and preventing criminal offences".

(14) In the first recital, the Council states that "*individual freedom is one of the fundamental principles guaranteed by the laws of the Republic*".

(15) *Comité consultatif pour une révision de la Constitution* (Consultative Committee for a revision of the Constitution", chaired by Dean Jean Vedel, « Propositions pour une révision de la Constitution », 15 February 1993, p.23

(16) Marthe Fatin-Rougé Stefanini, "France. Constitution et secret de la vie privée", *AIJC,* 2000, p.279

(17) Decision 94-352 DC, 18 January 1995, recital 3, JO 21 January 1995, p.1154, Rec. p.170

(18) Decision CMU 99-416 DC of 23 July 1999, recital 45, JO 28 July 1999, p. 11250, Rec. p.100

(19) Article 2, Declaration of the Rights of Man and of the Citizen: "*The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression*".

(20) Dominique Rousseau, « Chronique de jurisprudence constitutionnelle », *RDpub*, 2001-1, p.76

(21) Laure Marino, « Les nouveaux territoires des droits de la personnalité », *Gaz.Palais*, 19 May 2007, n°139, p.22

(22) Daniel Gutmann, *Le sentiment d'identité*, n° 247, p.221, LGDJ, coll. Bib privée de droit privé, 2000, n°247

(23) Law 78-17 of 6 January 1978

(24) Constitutional Council, DC 13 August 1993, *Maîtrise de l'immigration,* Rec. p.224

(25) *Vocabulaire juridique*, Association Henri Capitant

(26) Constitutional Council, Decision 2004-492 DC, JO 10 March 2004, p. 4637, *Évolution de la criminalité*

(27) Bertrand Mathieu, Michel Verpeaux, *Contentieux constitutionnel des droits fondamentaux*, p.452

(28) Report on the situation of fundamental rights in the European Union and its Member States in 2001, vol.1, p.82

(29) The Bill adds an Article L. 811-1 to the Internal Security Code, which guarantees "*respect for private life, and particularly for its components which are the confidentiality of correspondence and the inviolability of the home, by provising that these may only be infringed in the event of overriding public interests provided by law, while complying with the proportionality principle*".

(30) Decision 2003- 467 DC 13 March 2003, on internal security

(31) Decision 2004-504 DC of 12 August 2004 on the law on sickness insurance

(32) Decision du 2014-693 DC 25 March 2014 on geolocalisation

(33) Information report by Yves Détraigne, Senator for La Marne, and Anne-Marie Escoffier, Senator for L'Aveyron, *La vie privée à l'heure des mémoires numériques* ("Privacy in the age of digital memory devices"), Commission des lois du Sénat, 27 May 2009

(34) Emmanuel Decaux, « La protection de la vie privée au regard des données informatiques », *Droits fondamentaux*, n°7, 2008-2009, p.9