

Exclusion of Illegally Obtained Evidence in Greek Penal and Civil Proceedings - An Outline

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The legal rules, restraining persons from obtaining evidence in breach of fundamental rights, such as physical and moral integrity, privacy etc. in Greece are derived from the **Constitutional provisions** (under 1.1), from **International Conventions** (under 1.2) and from **other statutory provisions** (under 1.3).

1.1 Constitutional provisions:

The Constitution is the cornerstone of the Greek legal system¹. The present Constitution of Greece entered into force in 1975, immediately after the fall of the military junta². The experience of the dictatorship made easier the implementation of some modern provisions of protective fundamental rights and privacy. The Constitution contains a detailed catalogue of Human Rights. Among them, emphasis must be given to the provisions of Article 2, Par. 1³, Art. 5, Par. 1⁴, Art. 6, Par. 1⁵, Art. 7, Par.2⁶, Art. 9, Par. 1⁷ and Art.19⁸.

The Constitution of 1975 was first amended in 1986, then again very extensively⁹ in 2001 and recently – to a smaller extent – in 2008. The second Amendment “... *has probably been the worst amendment in Greece’s constitutional history*”¹⁰. It is, nevertheless, of great importance for our issue. In 2001, the rights of

¹ So Yessiou – Faltsi, Civil Procedure in Hellas, (1995), p. 12.

² Dagtoglou, Constitutional and Administrative Law, in: Kerameus/ Kozyris, Introduction to Greek Law (2008), pp. 23-24.

³ “Respect for and protection of human dignity constitute the primary obligation of the State”.

⁴ “Each person is entitled to develop his personality freely and participate in the social, economic, and political life of the country, provided that he does not encroach upon the rights of others, the Constitution, or bona mores”.

⁵ “No person shall be arrested or imprisoned without a reasoned judicial warrant which must be served at the moment of arrest or detention pending trial, except when caught in the act of committing a crime”.

⁶ “Torture and any kind of bodily ill-treatment, injury to health, or the use of psychological pressure or any other offence against human dignity are prohibited and shall be punished according to the law.”

⁷ “No house searches shall be made except when and as the law directs, and always in the presence of representatives of the judicial authorities” See also Art 253 of the Greek Code of Criminal Procedure.

⁸ “The privacy of correspondence and any other form of communication is absolutely inviolable. The law shall determine the guarantees under which the judicial authority is released from the obligation to observe the abovementioned right, for reasons of national security or for the investigation of particularly serious crimes.” See also Law 2225/1994 ,2713/99, 2225/94, Art. 200A, PPC and 253A, PPC (Organized criminality).

⁹ A total of seventy-nine articles of the Constitution were amended.

¹⁰ Dagtoglou in: Kerameus/Kozyris, Introduction to Greek Law (2008), p. 24.

access to information (art. 5A)¹¹ and the right to the protection of personal data (art 9A)¹² were added to the Constitution.

1.2 International Conventions

International human rights instruments are implemented in the Greek civil- and criminal procedure systems. Art. 28 of the Constitution, establishes that “*The generally recognised rules of international law, as well as international conventions as of the time they are sanctioned by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.*” Thus, the generally accepted rules of international law and the international treaties ratified by Greece have power above the national law.¹³ The international statutes, after their ratification in Greece, prevail over conflicting provisions of Greek law.

The European Convention for the Protection of Human Rights and Fundamental Freedoms of November the 4th, 1950 (ECHR) and its Protocols¹⁴ 1¹⁵, 2¹⁶, 3¹⁷, 5¹⁸, 6¹⁹, 7²⁰, 8²¹, 11²², 13²³ and 14²⁴ have been signed and ratified.²⁵ The right to liberty (Art. 5 ECHR), the right to a fair trial (Art.6 ECHR) and the right to privacy (Art. 8 ECHR) exert a profound influence on both criminal and civil proceedings. The jurisdiction of the European Court of Human Rights and the right of individuals to petition to the Court are also recognised. Greek Courts occasionally refer to the ECHR²⁶ and to the jurisprudence of the Court on the right of fair trial²⁷.

11 Article 5A 1. All persons are entitled to information, as specified by law. Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties.

2. All persons are entitled to participate in the Information Society. Facilitation of access to electronically handled information, as well as of the production, exchange and diffusion thereof constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19.

12 Article 9A: All persons have the right to be protected from the collection, processing and use, especially by electronic means, of their personal data, as specified by law. The protection of personal data is ensured by an independent authority, which is established and operates as specified by law.

13 Dagtoglou, (fn.2), p. 25 “[they]...rank between the Constitution and acts of Parliament”.

14 See Texts comments and case law in: Naskou-Peraki, International Mechanisms Protecting Human Rights (2010).

15 Law 2329/1953 and Legislative Decree 53/1974).

16 Legislative Decree 215/1974.

17 Signature 30/11/1965 Ratification 8/1/1974.

18 Signature 28/11/1974 Ratification 8/1/1975.

19 Signature 2/5/1983 Ratification 8/9/1998.

20 Signature 22/11/1984 Ratification 29/10/1984.

21 Signature 19/3/1985 Ratification 6/9/1989.

22 Signature 11/5/1994 Ratification 9/1/1997.

23 Signature 3/5/2002 Ratification 1/12/2005.

24 Signature 13/5/2004 Ratification 5/8/2005.

25 Protocols 9, 10 and 12 are signed (6/9/1990, 29/4/1992, 4/11/2000 respectively) but not ratified.

26 See Areopag 981/2009 (NOMOS), Areopag 560/2010 (NOMOS), reference to Art. 8 ECHR. (Areopag is the supreme Greek court for Civil and Penal cases).

27 In the case of Khan vs. the United Kingdom (2001) 31 E.H.R.R. 1016, ECHR, the Court decided that per se the admission of illegally- through violation of ECHR rights- obtained evidence does not infringe the right to a fair trial. For a Greek view of the problem see: Kaiafa-Gbandi: Modella epitirisis sto kratos asphalias kai poiniki diki (2010), 59 fn.176.

Greece has also signed and ratified the European Social Charter, which was adopted in 1961 and revised in 1996²⁸.

The International Covenant on Civil and Political Rights²⁹, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁰, the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment of 26/11/1987³¹ and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg 1981)³² are also ratified.

Greece is full member³³ of the European Communities since 1981. The Treaty of Lisbon amended the Treaty on European Union and the Treaty establishing the European Community³⁴. According to Art. 6.1: *“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”*

1.3 Other statutory provisions

1.3.1. EU-Directive 95/46/EU is implemented in Greece by Law 2472/1997 on the Protection of Individuals with regard to the Processing of Personal Data, which has already been modified by the Laws 2663/1998, 2703/1999, 2721/1999, 2819/ 2000 and 2915/2001. The Law 2472/1997 provides, in the articles 21-23, administrative and penal sanctions, as well as the civil liability of the persons who unlawfully “process” personal data. As mentioned above, not only is the right of privacy constitutionally protected but the right to the protection of personal data has also been guaranteed by the Constitution (Art. 9A) in Greece since 2001.

28 Signature 18/10/1961 Ratification 06/06/1984 - of the 1961 Charter - by Law 1426/1984. Only Signature of the Revised European Social Charter on 3/5/1996.

29 Law 2462/1997.

30 Law 1782/1988.

31 Law 1949/1991, Article 1: There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Committee"). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. Article 2. Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority. Article 3. In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co-operate with each other.

32 Law 2068/1992.

³³ Christianos, Application of Community Law in Greece in: Kerameus/Kozyris, Introduction to Greek Law (2008), p. 65.

³⁴ (2007/C 306/01), Law 3671/2008.

1.3.2. The Greek Penal Code (PC) includes provisions which criminalize³⁵:

1.3.3. The breach of post secrecy (Art. 370 PC).

1.3.4. The trapping and taping of telephone calls (Art. 370A, Par. 1 PC). This is an important provision which has been incorporated to the Penal Code in order to more efficiently protect the human rights³⁶.

1.3.5. The eavesdropping on and recording of private conversations (Art. 370A, Par. 2 PC)³⁷.

1.3.6. The use of the information of the tape recording or of the video recording which are obtained through violation of Par. 1 and 2 of Art. 370A (Par. 3). According to Par. 4 of Art. 370A, which is now derogated³⁸, the crime of Par. 3 was not punishable, if the evidence was brought before the Court in order to protect legitimate interests which could not be protected by other means³⁹.

1.3.7. The unlawful copying, use or disclosure to third persons of computer data or software constituting state scientific, professional or trade secrets of the private or public sector (Art. 370B PC)⁴⁰.

1.3.8. The unauthorized copying and use of computer software (Art. 370C PC).

1.3.9. The breach of professional secrecy (Art.371 PC).

1.3.10. Unlawful opening of sealed letter by employees of state post offices (Art.248 PC).

1.3.11. The Penal Code penalizes in Art. 187 and 188 the organized crime⁴¹. Act subject to penalty is the accord between two or more persons to commit serious offences, contained in Art.187, as a group. According to Art. 253A⁴² of the Code of Criminal Procedure, given specific legal requirements (253A par. 2), several means of investigation (e.g. undercover agents) are provided (Art. 253A, par.1) in order to combat the criminal acts of the organisation. The results of those investigations and the knowledge gained through these investigations can be used only for the reasons determined by the Judicial Council. Exceptionally, the evidence or the obtained knowledge, can be used, as long as the Judicial Council decides specifically about that

³⁵ Anagnostopoulos/Magliveras, Criminal Law in Greece (2000) ,193.

³⁶ See Areopag 928/2010(NOMOS) and the Legal Opinion of the Public Prosecutor By Areopag, No. 4/2008.

³⁷ Modified by art 33 par 7 of Law 2172/1993 and by art 8 par.6 of Law 3090/2002.

³⁸ Art. 10 par. 1 Law3674/2008. See Symeonidou/Kastanidou, I tropopoiissi tou arthrou 370A me to nomo 3674/2008. In: Paraviassi tis idiotikotitas. Oi kameres. (2009), 9-36. Kalfelis, Paraviassi tis idiotikotitas kai kameres, In: Paraviassi tis idiotikotitas. Oi kameres. (2009), 37-48.

³⁹ See Areopag 53/2010(NOMOS).

⁴⁰ Art. 370B and 370C are introduced in Penal Code by Art. 3 and Art. 4 of Law 1805/1988.

⁴¹ See Symeonidou/Kastanidou, Organomeno englima kai tromokratia, 2nd. Ed. (2007). Dalacouras OI idikes anakritikes praxeis tou arthrou 6 tou nomou 2928/2001 Poinika Chonika 2001,1022. Livos Organomeno englima kai idikes anakritikes praxeis (2007) Tzannetis I ennoia tis englimatikis organossis kata to neo arthro 187 Poi. Kod.,Poinika Chronika 2001, 1016.

⁴² Androulakis, Themeliodeis ennoies tis poinikis dikis 3rd. ed. (2007), p. 309.

(art. 253 par 4. Gr. PPC), in order to furnish proof of a crime, to arrest perpetrators, **and to dismantle another criminal organisation.**

1.3.12. The Greek Code of Civil Procedure (CCP) also erects barriers in certain exceptional situations to the search of truth, giving priority to other legal interests⁴³, e.g. Art. 393, 394, 399, 400, 401, 402, 450 par. 2⁴⁴.

2. Admissibility

Does the fact that the evidence was obtained unlawfully makes the evidence generally inadmissible in criminal or civil proceedings or does this fact remain without any consequences for the use of evidence obtained in an unlawful way? This question has not been answered in a uniform manner in the Greek legal system⁴⁵. Initially the position of the Greek jurisprudence was that courts had not the power to exclude evidence merely because it was obtained by illegal means⁴⁶. The Greek legal theory formerly also took the same position. In the last thirty years the risks for the right to privacy caused by the modern technology however made the revaluation of these old positions necessary. In penal proceedings the two main concurrent interests regarding the admissibility of illegally obtained evidence are, on the one hand, the necessity to discover, ex officio, the **objective truth**⁴⁷ - a duty which for judges and prosecutors is principally derived from the rule of law (Art. 23, Par. 1⁴⁸, Art. 25, Art. 96, Par. 1⁴⁹, Art. 87, Par. 1⁵⁰ of the Greek Constitution) and from some legal

⁴³ See Kerameus, Judicial Organization and Civil Procedure, in: Kerameus/Kozyris, Introduction to Greek Law (2008), p.359: “ (...) there are no exclusionary rules of evidence in the American sense (...)”.

⁴⁴ See primarily Pelayia Yessiou – Faltsi, Civil Procedure in Hellas, (1995), pp. 332-336. Maniotis/Tsantinis, Civil Justice in Greece (2010), pp. 49-50; Kaissis, Die Verwertbarkeit materiell rechtswidrig erlangter Beweismittel im Zivilprozess (1978).

⁴⁵ Literature: Spynellis, Beweisverbote im griechischen Strafprozessrecht ZfRV 1989, p. 39; Kaissis, Die Verwertbarkeit materiell rechtswidrig erlangter Beweismittel im Zivilprozess (1978); Dalakouras, Beweisverbote bezüglich der Achtung der Intimsphäre (1998); Triantafyllou, Truth or Due Process: Exclusionary Rules in Greek Criminal Procedure Law in RHD 63, 476-509; Kaissis, Paranoma apodiktika mesa (1986); Iliopoulos-Strangas, The use of illegally obtained evidence and the right to defence- The evidentiary prohibition of article 19 paragraph 3 of the revised Greek Constitution (2003) (in Greek). Kaiafa-Gbandi, Modella Epitirisis sto kratos asfalias kai poiniki diki (2010); Kaminis, Illegally Obtained Evidence and Constitutional Guarantees of Human Rights (The Exclusion of Evidence in Criminal and Civil Proceedings), (1998) (in Greek). Kaminis, To problima ton paranomon apodiktikon meson stin poiniki diadikasia meta tin anatheorisi tou arthrou 19 tou syntagmatos; Timitikos tomos gia ton Gianni Manoledaki, Dimokratia Elefteria Asfalia, I, (2005), pp. 337-363; Androulakis, Themeliodeis ennoies tis poinikis dikis 3rd. Ed. (2007), pp. 199-220, 467-475.; Kalfelis, MME kai krisi thesmon in Poiniki Dikaosyni 2005, p. 878; Kalfelis, Paravasi idiotikotitas kai kameris in Poinika Chronika 2008, p. 865; Triantafyllou, Apodiktikes apagoreyseis kai archi tis analogikotitas in Poinika Chronika 2007, (295-310); Giannopoulos, Kapoies skepseis schetika me to fainomeno tis chrisis paranomos apoktithissou magnitotenion se tileoptikes ekspompe, Poiniki Dikaosyni 2005, p. 220; Dalakouras, Poiniki Dikonomia, B, 120, 128; Dalakouras, Apagorevmena apodiktika mesa in Poinika Chronika 1996, p. 321; Dimitratou, Peri ton apodiktikon apagorevseon stin poiniki diki (1992); Dimitratou, I ekseliki tou thesmou ton apodiktikon apagorevseon in Poinika Chronika 2001, p. 5; Karras, Poiniko Dikonomiko Dikaio, 3rd. Ed. 2006, p. 742. Margaritis, Poiniki diadikasia kai apodeiktika mesa athemitos ktithenda in: Meletes gia emvanthyssi stin piniki dikonomia (1990), p.130; Margaritis, I dikonomikou periechomenou diataxeis tou nomou 2408/1996 in: Yperaspissi 1997 p. 517 Tsiris, The constitutional protection of the right of correspondence privacy (in Greek) (2002). Papadamakis, Poiniki Dikonomia (2004).

⁴⁶ See the old decision of the Areopag 761/1973 in Poinika Chronika 1973, p. 806 (admissibility of a statement of the defendant obtained by violence against him). This is a ruling made before the adoption of the present Greek Constitution. See also Areopag 1150/1989, 783/2001, 71/2007, 316/2007.

⁴⁷ See Spynellis, Beweisverbote im griechischen Strafprozessrecht in ZfRV 1989, p. 39. In Greek *Civil Procedure Law* the terms used are “presumed” or “formal” truth. See Kaissis, Die Verwertbarkeit materiell rechtswidrig erlangter Beweismittel im Zivilprozess (1978) pp. 15-23.

⁴⁸ Art. 23, Par. 1 “The State shall adopt due measures safeguarding the freedom to unionise and the unhindered exercise of related rights against any infringement thereon within the limits of the law”.

⁴⁹ Art. 96, Par. 1 “The punishment of crimes and all of the measures provided by criminal laws, belong to the jurisdiction of regular criminal courts”.

provisions of the Greek Code of Criminal Procedure (Art.177 , Art.178, Art. 179, Art. 239, Par.2, Art. 327, Art.351, Par. 2, Art. 352, Art. 353) - and on the other hand, the rights of a man as an individual and as a member of the society which are, according to Art. 25, Par. 1 of the Greek Constitution, guaranteed by the State⁵¹.

2.1. The Greek criminal justice system is basically investigatory with strong adversarial elements⁵². Under the statutory regulations, the Code of Criminal Procedure (CCP) has a significant role. It stipulates a series of procedural provisions, which erect barriers to the search of truth giving priority to other legal interests as for example to professional secrecy. Such provisions are for instance Articles 192⁵³, 218, Par. 1⁵⁴, 212⁵⁵, 364, 365⁵⁶ and 358 CCP. Their violation empowers the court to exclude the evidence through the legal instrument of absolute or relative nullities of the proceedings. They are regulated in Art. 171 and 170 of the Code of Criminal Procedure respectively. Nullities occur only in cases explicitly provided by the law (Art.170, Par. 1). An absolute nullity and a relative nullity in the trial stage which is not remedied lead to the nullity of the whole proceeding or of the concrete procedural act and to the reversal of the judgement (Art. 510, Par. 1A and 1B CCP). Through the instrument of the nullities the Greek Code of Criminal Procedure enables the exclusion of evidence obtained by specific procedural irregularities concerning procedural rights or formalities with regard to the production of evidence.⁵⁷

2.2. There is also an explicit legal basis for the exclusion of evidence⁵⁸:

2.2.1. Regarding criminal proceedings, Art. 177 CCP is of special significance. Art. 177, Par. 2 of the Code of Criminal Procedure, as amended by Art. 2, Par. 7 of the Law 2408/96⁵⁹ and by Art. 10, Par. 2 of the Law 3674/2008, introduces the exclusion of evidence which has been obtained **by or through criminal acts to criminal proceedings**. This is an effective exclusionary rule. Until the year 2008, the wording of Art. 177, Par. 2 was broader: Such evidence could be admitted in exceptional cases if the criminal offence in question was punishable by a life sentence and if special reasons justified its admissibility. The illegally obtained evidence was admissible also in order to prove the defendants' innocence⁶⁰. Although the version in force (of Art.

⁵⁰ Art. 87, Par. 1 "Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence."

⁵¹ Art. 25, Par. 1. "All agents of the state are obliged to ensure the unhindered and effective exercise thereof."

⁵² Spinellis, Criminal Law and Procedure ,in: Kerameus/Kozyris, Introduction to Greek Law (2008), 475.

⁵³ Absence of Notification regarding the appointment of a forensic expert. For the absolute nullity see Areios Pagos, Poinika Chronika. 2004, p. 223.

⁵⁴ Testimony under oath.

⁵⁵ Professional secret of the witness. See Kaiafa-Gbandi, Montella epitirisis sto kratos asfalias kai poiniki diki (2010), pp. 88-91.

⁵⁶ Pursuant to Artt. 364 and 365 CCP all documents must be read out aloud. The prosecutor and the parties may comment on the evidence after it has been taken (Art. 358). See Spinellis, Criminal Law and Procedure, in: Kerameus/Kozyris, Introduction to Greek Law (2008), p. 481; Triantafyllou, RHDl 63 (2010), p. 482.

⁵⁷ See in detail Triantafyllou, RHDl:63, 481-483.

⁵⁸ In 1991 an exclusionary rule for illegally obtained tape recordings and video recordings was statutorily introduced for both penal and civil proceedings (Art. 31, Par. 2 and 3 of the Law 1941/1991). This rule was abolished some time later by Art. 370A PC.

⁵⁹ See Margaritis, Oi dikonomikou dikaiou diataxeis tou nomou 2408/96 in Yperaspissis 1997,517.

⁶⁰ Mikto Orkoto Efeteio Athinon 213/2003 (NOMOS).

177, Par. 2) is now more rigid, providing no exceptions to the exclusionary rule, the Greek jurisprudence does not hesitate to admit in certain cases, evidence obtained by or through criminal acts. This is, for instance, the case when the unlawfully obtained tape recording leads to the proof of the innocence of the defendant⁶¹. Use of evidence obtained in violation of Art. 177, Par. 2 leads to nullity.⁶²

2.3. Until the year 2001 the **Constitution** did not contain rules providing for the exclusion of illegally obtained evidence. The 2001 Amendment introduced a new paragraph to Art. 19 which establishes that “*Use of evidence acquired in violation of the present article and of articles 9 and 9A is prohibited.*” The significance of Art 19, Par. 3 is evident: the Greek Constitution⁶³ establishes a *prima facie* absolute exclusionary rule of superior rank, according to which evidence obtained in violation of the abovementioned selective and specifically elected constitutional rights, is inadmissible in **criminal and civil** proceedings. The exclusionary rule concerns mainly evidence obtained by unlawful use of modern electronic devices. With reference to Art. 25, Par. 1, pursuant to which the rights of a man as an individual and as a member of the society are guaranteed by the State and apply also to the relations between private parties (and not only against the State), the violation of the constitutionally protected rights of Art. 9, 9A and 19 of the Greek Constitution has a consequence the inadmissibility of the evidence before **criminal civil and all other Greek Courts** not only in the cases in which the evidence was obtained by the State, but **also when the evidence was obtained by a private party.**⁶⁴

2.3.1. This exclusionary rule attracted criticism from the Greek legal doctrine. While a part of the constitutional doctrine, especially in the period immediately after the amendment, based on the precise wording of the Constitution, strongly voted for the **absolute character** of the exclusionary rule and accepted no exceptions⁶⁵, recent interpretations of Art 19, Par. 3, depart from this understanding and advocates the exceptional admissibility of evidence **which proves the innocence or improves the position of the accused**⁶⁶, especially in cases of particularly serious offences.⁶⁷

2.3.2. These concerns about the **absolute character** of the exclusionary rule are shared also by the practice of the courts which exceptionally admits illegally obtained evidence in order to protect constitutionally superior goods, as is the human life.⁶⁸

⁶¹ Compare, Areopag, 53/2010 (NOMOS).

⁶² See Margaritis, Kodikas Poinikis Dikonomias, Tomos Protos (2010), Art.177, p.686; Kaiafa-Gbandi, Montella epitirisis sto kratoss asfalias kai poiniki diki (2010), pp. 25, 90; Areopag 1568/2004 (NOMOS); Areopag 1713/2006(NOMOS).

⁶³ This is -especially in Europe- unusual but not unique. See analogous regulations in the Constitutions of Portugal, Turkey, and of the Federative Republic of Brazil (Title II, Capital I, Art. 5, LVI : “Illegally obtained evidence is inadmissible”).

⁶⁴ See Kaminis, To problima ton paranomon apodiktikon meson stin poiniki diadikasias meta tin anatheorisi tou arthrou 19 tou syntagmatos.Timitikos tomos gia ton Gianni Manoledaki, Dimokratia Elefteria Asfalia, I, (2005), 337(340); Kaiafa-Gbandi, Montella epitirisis sto kratoss asfalias kai poiniki diki (2010), pp. 24, 28, 31, 33-34 (for evidence obtained by unlawful surveillance).

⁶⁵ See Venizelos, To anatheoritiko kektimeno, (2002), p. 148; Cryssogonos, Mia bebaiotiki anatheorisi (2000) and Cryssogonos, Atomika kai koinonika dikaionomata (2002), p.245. In favour of the absolute character of Art. 19, Par. 3 with no exceptions in civil proceedings Nikas, Politiki Dikonomia II (2005), 416.

⁶⁶ Kaiafa-Gbandi, Montella epitirisis sto kratoss asfalias kai poiniki diki (2010), pp. 14-15, 17-18, 24. Areopag 12/2004 (NOMOS).

⁶⁷ See Iliopoulos-Strangas, pp.101- 107. Areopag 1537/2007 (NOMOS).

⁶⁸ See Areopag 996/2010, 981/2009, Plenum of the Areopag 1/2001. All civil cases regarding illegal tape recording.

2.3.3. Arguments like the principle of proportionality⁶⁹, the principle of the practical concordance as a method of interpretation⁷⁰ of Art 20, Par. 1⁷¹ and Art. 19, Par. 3, **the priority of human dignity⁷² and especially the character of Art. 2, Par. 1 of the Constitution which cannot be amended⁷³**, dominate the scientific discourse about this controversial question. From the exceptional character of the admissibility is derived, that the evidence must be the sole⁷⁴, necessary and adequate means to prove the innocence or generally to assist in the defence of the accused.⁷⁵

2.3.4. According to a well-established opinion in the constitutional doctrine, the exclusionary rule of Art 19, Par. 3 encompasses not only the constitutional rights which are mentioned in its wording, but also evidence obtained by violation of other constitutional rights not included in Art. 19, Par.3.⁷⁶

2.4. Evidence obtained in violation of the terms of the Law 2472/1974 on the Protection of Individuals with regard to the Processing of Personal Data, is inadmissible according to Art. 19, Par. 3 of the Constitution and Art. 177, Par. 2 of the Code of Criminal Procedure.⁷⁷

2.5. The provision of Art. 14 par 2 of the **Covenant on Civil and Political Rights** stipulates that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law, and its Article 14, Par. 3G provides that in determination of any criminal charge against a person he is entitled not to be compelled to testify against himself or to confess guilt. Under the Greek Code of Criminal Procedure the accused has the right to deny to answer, i.e. to remain silent with respect to the charges (Art. 104, 273, Par. 2 and 363, Par. 3). Violation of this right by undercover agents leads to inadmissibility of the evidence

69 Orfanoudakis, I archi tis analogikotitas stin elliniki ennomi taxi (2003), 158; Triantafyllou, Apodiktikes apagorevseis kai archi tis analogikotitas, Poinika Chronika 2007,297. See also Iliopoulos-Strangas, pp. 93 and 107 and Kaiafa-Gbandi, Montella epitirisis sto kratas asfalias kai poiniki diki (2010),p.17, Areopag 611/2006 (NOMOS).

70 See Iliopoulos-Strangas, The use of illegally obtained evidence and the right to defense- The evidentiary prohibition of Article 19, Paragraph 3 of the revised Greek Constitution (in Greek) (2003), pp. 95-96.

71 Article 20.1: Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law. 20.2: The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests.

72 Kassimatis, Nomiko Vima 47 (1999) , pp. 705-727 (711); Kassimatis /Mavrias, Ermineia tou Syntagmatos, Tomos B, (1999), Art 20,No. 35.

73 Iliopoulos-Strangas, 100/101, 107.

74 Areopag 42/2004 (NOMOS).

75 Iliopoulos-Strangas, 102, 104.

76 Iliopoulos-Strangas, 107 with reference to the exclusion of evidence obtained by torture. For exclusion -after balancing of concurring interests- see: Dalacouras, Poinika Chronika,1966, 337; Kaissis, Prosopika dedomena kai apodeiktikes apagorevseis in: Aferoma stin kathigitria P. Gessiou Faltzi (2006), 75-99. Within the framework of the "theory of the balancing of interests" a dominant position is taken by the principle of proportionality, which is established in the Greek Constitution (Art. 25, Par 1.) See in detail Triantafyllou, Apodiktikes apagorevseis kai archi tis analogikotitas, Poinika Chronika 2007, pp. 295-310, (297-299).

77 For the problem in penal proceedings see extensively Kaiafa-Gbandi, Montella epitirisis sto kratas asfalias kai poiniki diki (2010); Kokkinakis, Prostasia dedomenon prosopikou charaktira kai dikonomikes apagorevseis stin poiniki diki, PoinikaChronika 2000, 765; Nouskalis, Piniki prostasia prosopikon dedomenon (2005). For the problem in civil proceedings see Kaissis, Prosopika dedomena kai apodeiktikes apagorevseis in: Aferoma stin kathigitria P. Yessiou Faltsi (2006), 75-99; Nikas, Politiki Dikonomia II (2005),417. See also Legal Opinion of the Public Prosecutor By Areopag Legal Opinion No. 9/2009 and Mantzoufas Prostassia prossopikon dedomenon kai dimossia asphalia. Oi stathmisseis tis Archis Prostassias Dedomenon Prossopikou stis apophaseis gia tin chrissi kameron klistou kiklomatos se ipethrious chorus, in: Kampsidou i ilektrniki parakolouthissi se ipethrious chorus(2008), 39-40.

(Art. 172, Par. 2 CCP). The admissibility of this evidence causes an absolute nullity (Art. 171, Par. 1d)⁷⁸.

2.6. Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment imposes the obligation on the State Parties to ensure that “any statement which is to have been made as a result of torture” is inadmissible in any proceedings. Although the abovementioned⁷⁹ Art. 7, Par. 2 of the Constitution, which prohibits torture and Art. 137A and 137B of the Greek Penal Code, do not provide an expressis verbis inadmissibility of the thus obtained evidence, it is clear that evidence obtained as a result of torture cannot be admitted either in penal nor in civil proceedings⁸⁰.

2.7. In Civil Procedure Law, photographs, films, tape recordings and all kinds of mechanical reproductions are to be considered as private documents (Art.443, CCP)⁸¹. In most reported cases civil courts had to decide about illegally obtained tape recordings.⁸² “Illegally obtained” means: tape recordings produced without the consent of one of the interlocutors⁸³, irrelevant to the place where the discussion took place⁸⁴ and irrelevant to the person secretly recording⁸⁵. It is now consistent practice of the courts that illegally obtained tape recordings are inadmissible in civil proceedings against the person whose right of communication was violated⁸⁶ or against a third person⁸⁷. Tape recordings are exceptionally admissible in order to protect constitutionally superior goods like e.g. the human life⁸⁸. Evidence obtained illegally by violation of a rule which has not a constitutional character remains admissible⁸⁹ after balancing of the conflicting interests. In this act of balancing the constitutionally protected right to proof⁹⁰ is given particular weight.

78 Kaiafa-Gbandi, *Verschiedene Systeme des Einsatzes „Verdeckter Ermittler“ am Beispiel des griechischen und deutschen Rechts. Gemeinsame Probleme für den Rechtsstaat*, FS Berman, 1997, p. 560; Kaiafa-Gbandi, *Modella epitirisis sto kratos asfalias kai poiniki diki* (2010), p. 88.

⁷⁹ See above fn 6.

⁸⁰ Areopag 611/2006 (NOMOS); Margaritis, *Kodikas Poinikis Dikononias*, (2010) Art. 177, p. 687.

⁸¹ Yessiou – Faltsi, *Civil Procedure in Hellas*, (1995), p. 350. Nikolopoulos, *To dikaio tis apodixeos*, (2005), 251.

⁸² Plenum Areopag 1/2001 (NOMOS), Kalavros *I magnitotenia stin politiki diki* 2nd ed. (1991).

⁸³ Plenum Areopag 1/2001 (NOMOS), Areopag 1092/2009 (NOMOS), 981/2009 (NOMOS), 996/2010 (NOMOS).

⁸⁴ Plenum Areopag 1/2001 (NOMOS), Areopag 1092/2009 (NOMOS), 981/2009 (NOMOS), 996/2010 (NOMOS).

⁸⁵ Areopag 996/2010 (NOMOS).

⁸⁶ Plenum Areopag 1/2001 (NOMOS), Areopag 1092/2009 (NOMOS), 981/2009 (NOMOS), 996/2010 (NOMOS), all referring to Art.2 par. 1, 9 par.1, 19 gr Constitution and Art 8 ECHR.

⁸⁷ Areopag 1092/2009 (NOMOS).

⁸⁸ Plenum Areopag 1/2001 (NOMOS), Areopag 1092/2009 (NOMOS), 981/2009 (NOMOS), 996/2010 (NOMOS).

⁸⁹ Kaissis, *Paranoma apodiktika messa*. 23. Nikas, *Politiki Dikonomia*, II, 2005, 418.

⁹⁰ See Yessiou – Faltsi *To dikaio tis apodixeos sto neo dikaio tis apodixeos tou kodika politikis dikonomias*, in: *i dikonomiki ennomi taxi III*, (2009), 391-414.