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The Reason of State, Surveillance & Radical Democracy

Draft GUARDINT Discussion Paper¹
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GUARDINT is a research project focused on the democratic oversight of intelligence agencies, and in particular of their surveillance activities. At the heart of our work is a tension between democratic values and related practices of publicity, transparency, and the rationalities of the reason of state and attached practices, like secrecy.

The goal of this discussion paper is to bring to light this tension and propose political theories on which to ground our joint work and our conceptualization of oversight and democracy. Ultimately, such theories should inform our work in this project, from the normative assumptions that we develop to the methods that we will mobilize to explore our research topics.

The Reason of State and its Technologies (Foucault–Deleuze)

The premise of the GUARDINT project is that under the veil of secrecy, within the “deep state”, powerful security assemblages use surveillance technologies to acquire knowledge on strategic adversaries and the population at large. In turn, this knowledge forms the basis of security practices which vary in their logic – preemptive, repressive, manipulative, etc. – but which creates strong information asymmetries. In turn, such asymmetry can be used to protect the political order, or change it in a way that aligns with the interests of people in these agencies and their allies in connected fields. By its very existence, a surveillance apparatus undermines democratic processes the the autonomy of subjects, for instance preempting their ability to voice their conception of the common good through the exercise of freedom of expression. As the European court of Human rights recognized in its landmark ruling *Klass and Others v. Germany* in 1971:

(...) in the mere existence of the legislation itself there is involved, for all those to whom the legislation could be applied, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an “interference by a public authority” with the exercise of the applicants’ right to respect for private and family life and for correspondence.³

Against the claim of those in government that intelligence and large-scale surveillance are necessary to protect democracy and the rule of law from their “enemies”, critical political theory teaches us that such power-knowledge, at its core, antithetical to democratic values.

³§41. See <http://hudoc.echr.coe.int/eng?i=001-57510>

These practices of surveillance doubly embedded in the “reason of state”, an “*art of governing*” theorized by 16th century authors like Botero or Bodin. Indeed, if “the art of governing people is rational on the condition that it observes the nature of what is governed” (Foucault, 1988, p. 149), then it follows that intelligence through surveillance (to “observe the nature of what is governed is a necessary precondition of practicing this art in a rational way. But surveillance is not just a precondition for practicing the art of governing. It is also one of the key techniques in exerting this art.

If, as Foucault puts it, one of the key ruptures enacted by the emergence of the reason of the state is not to, like in Machiavelli, to “reinforce the power of the prince” but instead “to reinforce the state itself”, then state surveillance is one of the power techniques that puts the reason of state and the “rational” conduct of the conduct of others into practice. The reason of state is thus a form of rationality where:

From the state’s point of view, the individual exists insofar as what he does is able to introduce even a minimal change in the strength of the state, either in a positive or in a negative direction. It is only insofar as an individual is able to introduce this change that the state has to do with him (Foucault, 1988, p. 152).

Seen in that utilitarian light, the reason of state establishes a form of political regime whose goals are alien to those of democracy, where the later is defined as a political regime aiming to maximize individual and collective autonomy (see below).

In his study of power, Foucault also identified several *economies of power* in which techniques of power are inscribed and which all live up to this days:

- a **feudal** economy of power, based on the sovereignty over a territory and rule over subjects located within it. Its modes of constraint are based on ostentatious violence when the norms are violated (Foucault summed up rationale the feudal economy of power with the sentence: “let live and make die”).
- a **disciplinary** economy of power (from the 19th century on), where power *dispositifs* are made more productive and inconspicuous, aiming to discipline subjects and promote economic production through form of training and testing aiming for the maximum regularity in behavior, and applied in the context of closed environment (the jail, the school, the factory, the military barracks) (“make live and let die”). Here, surveillance is embedded in disciplinary *dispositif* following the diagram of the panopticon, and serves to reinforce the rule and enact corrective measures and sanctions if needs be.

- a **securitarian** economy of power (first envisaged by physiocrats in the 18th century but whose advent comes from the 1970's on), where social control is more integrated, claimed by the very subjects it seeks to dominate. To the contrary of disciplinary logic, the space of power is not a closed but open, and the subjects of power are not so much the population located in circumscribed environment, but the flows (of people, goods, money, data, etc.) that matter for state power and which need to be governed. In the same way, a securitarian *dispositif* does not assume that a desired norm can be imposed over well-trained subjects obeying the rule. Rather, it aims to manage flows based on their “natural qualities”, the “statistical average” which should be measured in real-time and, when needs be, marginally modified through tinkering so as to reach to the objective at hand. According to Foucault, securitarian *dispositifs* are “at once an analysis of what happens and a program for what should happen” (e.g. let in/out a given item in a flow – “*laisser faire, passer et aller*”) (Foucault, 2007).

One could say that in the age of Big Data, managing flows in real-time becomes not only technically feasible, but also doable at scale. Computing technologies offer the means to practice *at scale* a form of governmentality that was already in formation in the early forms of modern state power; they make it possible for securitarian *dispositifs* to match almost exactly the tactical principle that they are meant to enact.

After Foucault's death in 1984, it is Gilles Deleuze who offered the most concise description of the securitarian societies of our time, which he termed “societies of control”. And interestingly, he made that connection between “control societies” and computers:

Types of machines are easily matched with each type of society –not that machines are determining, but because they express those social forms capable of generating them and using them. The old societies of sovereignty made use of simple machines –levers, pulleys, clocks; but the recent disciplinary societies equipped themselves with machines involving energy, with the passive danger of entropy and the active danger of sabotage; the societies of control operate with machines of a third type, computers, whose passive danger is jamming and whose active one is piracy or the introduction of viruses (...).

The conception of a control mechanism, giving the position of any element within an open environment at any given instant (whether animal in a reserve or human in a corporation, as with an electronic collar), is not necessarily one of science fiction. Felix Guattari has imagined a city where one

would be able to leave one's apartment, one's street, one's neighborhood, thanks to one's (dividual) electronic card that raises a given barrier; but the card could just as easily be rejected on a given day or between certain hours; what counts is not the barrier but the computer that tracks each person's position--licit or illicit--and effects a universal modulation " (Deleuze, 1990).

Of course, the analysis of these critical authors seems rather pessimistic. But as Deleuze wrote, "there is no need to ask which is the toughest regime, for it's within each of them that liberating and enslaving forces confront one another (...). There is no need to fear or hope, but only to look for new weapons". What sort of tools or weapons can we use to counter the reason of state and infuse democracy, and forms of oversight could give the normative horizon of democracy some actual teeth? Here, two important French theorists teach important lessons: Claude Lefort and Cornelius Castoriadis, two thinkers who spent most of their intellectual lives together opposing totalitarianism (at a time when most people on the Left remained blind to the reality of the Soviet regime).

Human Rights, Democratic Contention and the (Possible) Loss of Democratic Culture (Lefort)

Claude Lefort's writings (1981) point in particular to the symbolic and normative role of human rights in the democratization of modern states; occupying the "empty place" of power left vacant by the King's death (which cut the connection of political power with its transcendent, religious justification). In 1981, in *The Democratic Invention*, Claude Lefort rightly observed that a polity abiding by the rule of law is necessarily exposed to the "indeterminate nature of human rights" and confronted "with rights which are yet to be incorporated", as new citizen groups use existing formulations of rights (e.g. those of the French 1789 Declaration of the Rights of Man and of the Citizen) to advance new claims:

[The democratic state] is subject to a forms of contention whose goal is not just the tacit preservation of tacitly established pact, but which takes shape in places that power cannot entirely control (...). From the moment rights are posited as the ultimate reference, established law is fated to being questioned. It is increasingly at issue as collective wills or, if you prefer, social agents bringing new claims mobilize a force in opposition to that which tends to contain the effects of recognized rights. Where the law is being questioned, society, that is the established order, is under question (Lefort, 1986).

Insofar as the movements advocating against the state interpretation of human rights frame their actions as legitimized by human rights and the willingness to preserve and extend the collective political rights enshrined in constitutions and their bills of rights, they engage in this exact same process, which Lefort called an “opposition of right” (*opposition de droit*). A process, he said, is the essence of a democratic regime, and through which citizens aim to (re)define the substance of their rights.

In a way, opponents of large-scale, suspicionless surveillance, be they whistleblowers, lawyers or activists, also wage an “opposition of right”, invoking the social contract and making right claims “to persuade others (and themselves) about how they should be treated and about what they should be granted” (Minow, 1987). That being said, their use of rights is defensive, trying to alleviate the hypertrophy in surveillance power afforded by new technologies and associated regulatory framework, rather than expanding rights.

In essence, this entrenched defensive posture might be one of many signs of a historic crisis of liberal-democratic regimes – one where democracy is on the defensive. A former judge turned lawyer turned civil rights advocate, François Sureau, recently released an eloquent essay entitled *Sans la Liberté* (“Without Freedom”). Born in 1957, Sureau explains that at the time, despite important rights violations (in the this late-period of the old colonial rule). individuals and institutions alike were marked by a spirit of liberty, of autonomy. Not by personal convictions of the political and administrative elites, but because the aspiration to democracy and liberty was a *zeitgeist* (an “*esprit du temps*”), one that has largely disappeared in contemporary institutions and, increasingly, in the aspirations of citizens. Sureau says it has been lost because of a loss of confidence in free citizens and their ability to govern themselves, as well as a growing appetite for large bureaucracies, a “strong state”.

For all its literary value, Sureau may sound like a new iteration of a standard liberal-conservative argumentation. In part, it certainly is. But I think it also full of sensible intuitions about the illiberal drift, and that this idea of a growing decline of democratic culture in Western European elites (and beyond) could be around working hypothesis for GUARDINT, which a socio-historical approach might be able to assert, which important lessons for what exactly can count as a meaningful “democratic oversight” framework in such a historical context (I think that comparing surveillance debates in the 1970s and those of today would verify the hypothesis, as would national and transnational sociogenesis of oversight).

Representative Regimes as Non-Democratic (Castoriadis)

Castoriadis's work on democracy insists not so much on the contentious nature of democratic politics, but on its goals:

(...) the objective of [democratic] politics is not happiness but freedom. Effective freedom (I am not discussing here "philosophical" freedom) is what I call autonomy. The autonomy of the collectivity, which can be achieved only through explicit self-institution and self-governance, is inconceivable without the effective autonomy of the individuals who make it up (Castoriadis, 1997).

For Castoriadis, "deciding on who decides" (elected representatives) is not the same thing as deciding. Hence, for him true democracy is direct democracy.

After all, what we call today representative democracy were conceived as a way to establish an aristocratic regime based on merits, talents, and fitness to govern (Manin shows how the word democracy was almost never used by 18th century philosophers, or when it was, it was associated to the democratic *polis* of Ancient Greece or the "Republican Renaissance" of Florence and hence direct democracy – a model that they explicitly rejected for the sake of "efficiency"). Whereas now representative institutions and the democratic project seem indistinguishable, our institutions were designed as elitist and free from campaign promises (no imperative mandate) (Manin, 1997).

Policing techniques developed in the feudal era under the veil of the reason of state of course survived the shift to liberalism (enshrined through the growing recognition of civil and political rights) and to representative institutions. In France, whereas article 2 of the 1789 Declaration of rights referred to the concept of "security" (*sûreté*) as the guarantee of individuals against the arbitrariness of institutions, the 1791 Constitution adjoined it to the State. The concept of "State security" (*sûreté de l'État*) was taken up in the Constitutions of 1795 and 1799, and remains a pillar of public law to this day (often through new denomination: "national security", "fundamental interests of the nation", etc). These notions are a source of indeterminacy, marking the renewal of the main principles of reason of state in liberal law, and the legal backdrop for practices deeply embedded in the administrative order and the professional habitus inherited from monarchic bureaucracies. In the middle of the 19th century, Alexis de Tocqueville would highlight this strong continuity between feudal and liberal regimes:

The reason is that, since 1789, the administrative system has always remained untouched in the midst of political convulsions. The person of the sovereign or the form of the central power has been altered, but the daily transaction of business has neither been disturbed nor interrupted (...). For if each revolution struck off the head of the government, it left its body untouched and alive, so that the same functionaries continued to perform their functions, in the same spirit, and according to the same routine, under every different political system. They administered justice or managed public affairs in the name of the king, then in that of the republic, lastly in that of the emperor (Tocqueville, 2011, p. 177).

What Tocqueville is pointing at is the primary role of large bureaucratic structures and their importance in the new form of legal-rational domination, one which is always exposed to the risk of turning into an “iron cage” as Max Weber famously wrote. Bureaucracies fast developed in the 19th century as the right organizational scheme to manage “mass societies” and increasingly large markets, and for that they appropriated information processing tools which soon led to the advent of computers (Beniger, 1986).

In Lefort and Castoriadis’s writings, the critique of bureaucracy is also a central issue, and in Castoriadis’ work it is intimately tied to the critique of science. In a text called “A Dead End” (*Une voie sans issue*) (1990), Castoriadis notes that the modern era was characterized by two connected but antithetical “imaginary social meanings”: autonomy and the quest for freedom on the one hand, and the search for “rational mastery” on the other (closely link to the reason of state):

Rational mastery means that it should be perfectly “objectifiable”, which has quickly meant: algorithmizable, an impersonal mastery (...). Quite symptomatic in this respect is the current trend towards “automation of decisions”, already under way in a large number of secondary cases, but which is beginning to take on a different pace with “expert systems.”

The growing recourse to Big Data and techniques of Artificial Intelligence in the field of surveillance, and the role of human-machine assemblages in “creating” suspicion through “weak signals” is certainly an example of this trend. But these new “expert systems” accelerate a broader trend towards the automation of bureaucracies, in a context of techno-solutionism and austerity act as two justifications for this ever-greater autonomy of machines in classifying and taking decisions – in governing populations and flows.

Procedural Democracy as a Fix?

This process was already perceived by the activist and intellectual critiques of computing in the 1960s and 1970s. To some extent, data protection frameworks and transparency laws were adopted to alleviate the fears and opposition to the use of computers by the state. That meant creating new rules, and new bureaucracies tasked with implementing them.

This process of procedural “patches” in some ways summarises the way we are used to addressing the insurmountable tensions that are at the core of our political regimes: to solve the antinomy between democracy and the state, the liberal-representative regime that elected representative and law-making assemblies act as delegates of the people, and that the democratic essence of our regime is enabled through the two pillars of the rule of law: the protection of rights (substantive guarantees) and the separation of power and the hierarchy of norms (formal/procedural guarantees). From it, follows a very detailed legal order constraining state action, the work of its agents, but also new bureaucracies to apply this legal framework and oversee the functioning of other bureaucracies.

This is typically what happened in the 1970s with the creation of “independent” public agencies and data protection authorities (already an attempt to de-judicialize the protection of fundamental rights). But this procedural fix on the potential threats raised by the reason of state, its associated practices and technologies is also seen in the ethical committees that have been developing across academic institutions. The point is that, in the face of surveillance technologies and their use by private actors and the state, we are often presented with the debate of adopting regulatory framework – procedural fixes – to enable innovation while pretending to contain its negative effects. But to what extent is it effective?

In his writings on power, Foucault once asked: “How can the growth of capabilities” – and he explicitly mentioned “techniques of communication – “be disconnected from the intensification of power relations?” (Foucault, 1984, p. 48). It is indeed a key strategic question raised by critical theorists. My take is that recent history shows that neither technology itself nor law nor ethics can actually be truly effective instruments in achieving such decoupling. At best, these procedural approaches can slow down dominant trajectories, but usually cannot stop them. After all, as Castoriadis made clear, democracy is not only about procedures, it is also about substantive values (those promoting individual and collective autonomy)⁴. How can

⁴Foucault made a similar point: “I am not saying that power, by nature, is evil; I am saying that power, with its mechanisms, is infinite (which does not mean that it is omnipotent, quite the contrary). The rules that exist to limit it can never be stringent enough; the universal principles for dispossessing it of all the occasions it seizes are never

procedures – including those involving human rights judges– be useful if we lose sight of the values they are supposed to serve? Connecting back to the hypothesis of a loss of democratic culture, Castoriadis also observed that, in our time:

(...) while the rage of 'power' (*puissance*) increased along with a growing fetishism of 'rational mastery', the other great imaginary meanings created by Greco-Western history – that of autonomy, especially political – lapsed”.

Still, many proponents of orthodox visions of “representation as democratic” often believe that negative aspects of technology can be “mastered” through “democratically-deliberated rules” adopted by Parliaments. It is as if there was no other ways possible technological path: if one believes that technology is “endogenously embedded in the theory of evolution”, it will likely follow that dominant technological trajectories appear as a given, a “*fait accompli*”. And once they exist, when companies are ready to market these products, it of course seems totally “reasonable” for them to use them to facilitate, streamline, scale up the work of intelligence and law enforcement agencies, in the name of efficiency, expediency, and cost minimization.

It is often only when these technologies are market-ready that any form of public debate is allowed to take place (this is typically the case today with facial recognition), but one that will only relate to what procedural constraints should be created to alleviate threats on rights and freedoms, to ensure that these technologies are used in an ethical way. That’s where “technical democracy” stops, and it is often reaped with deceptive tactics (pseudo-consultations, ineffective ethics committees, etc.). But never are we asked whether such technologies should exist at all, nor whether it was a good idea for this or that bureaucracy to decide that tens of millions of euros worth of taxpayers money should be spent on research in order to develop them. Who decided that we should have technologies like facial recognition? Such questions only raise an issue if we embrace a normative stance rooted in a more radical understanding of democracy.

Outputs of science and innovation policies are bound to profoundly affect our societies. And if the structural lack of “democratic oversight” in such settings is usually not seen as a problem, it is because Western culture has fetishized sciences to the point of eluding its fundamental political questions. Apparently also inspired by the writings of Jacques Ellul, Castoriadis wrote:

[For] this techno-knowledge to be sociologically possible; for this endeavour –with its generally immense costs which are not

sufficiently rigorous. Against power one must always set inviolable laws and unrestricted rights” (Foucault, 2001)

rationally justifiable (which does not mean that they are positively unjustified) – to be funded; for it to attract gifted young people, accumulating both authority and prestige; and for the risks of all kinds that it engenders to remain socially repressed, it is necessary to present to the public a certain image of modern science which is the one precisely that the public, under the influence of the imaginary meaning of the unlimited expansion of “rational” mastery, waits and asks. This image is that of a triumphal march, one from which all theoretical uncertainties inherent to science as well as the substantive questions relating to its object and its relation to society must at all costs be evacuated (...). Thus, of all human activities, science would be the only one to simply solve questions without raising any – the only one exempt from interrogation as well as from responsibility. A divine innocence, a wonderful extraterritoriality.

Another interesting aspect is why and how scientists become directly or indirectly complicit in the advent of a dangerous technoscience: their connection to the fields of power:

As long as they participate in decision-making processes, [scientists] can only influence them by joining one of the clans or gaining the trust of one of the politico-bureaucratic cliques who are fighting over power and using scientific and technical issues as emblems and flags or, much more frequently, require “experts” to scientifically dress up options already taken and motivated by other factors (...). Let us add to what has been said above about their motives that getting funding for one’s own projects, in competition with those of others, is not just about personal career and prestige; for each his idea is his child, “objectivity” here is subjectively almost impossible (...). There is neither technocracy nor scientocracy. Far from forming a new dominant group, scientists and technicians serve existing devices of power (at least they are part of it) and these devices exploit, certainly, and oppress almost everyone, but do not really manage (*dirigent*) anything.

Public policies focused on research, innovation, and technology appear as an often neglected site of state surveillance. And I believe that a large part of the “democratic oversight failures” happen in the making of technology and science as a whole, and that our project should also address this issue.

References

- Castoriadis, C. (1997). Democracy as Procedure and Democracy as Regime. *Constellations*, 4(1), 1–18. <https://doi.org/10.1111/1467-8675.00032>
- Castoriadis, C. (1922-1997). (1990). Voie sans issue ? In *Le Monde morcelé* (Vol. 3). Seuil.
- Deleuze, G. (1990). Post-scriptum sur les sociétés de contrôle. *L'Autre Journal*, 1.
- Foucault, M. (2007). *Security, Territory, Population: Lectures at the Collège de France (1977-1978)* (A. I. Davidson, Ed.; G. Burchell, Trans.; 2009 edition). Palgrave Macmillan.
- Foucault, Michel. (1984). What is Enlightenment? In P. Rabinow (Ed.), *The Foucault Reader*. Patheon Books.
- Foucault, Michel. (2001). Useless to Revolt? In J. D. Faubion (Ed.), & R. Hurley (Trans.), *Power: The Essential Works of Foucault, 1954-1984* (1 edition, Vol. 3, pp. 449–453). The New Press.
- Foucault, Michel, Martin, L. H., Gutman, H., & Hutton, P. H. (Eds.). (1988). The Political Technology of Individuals. In *Technologies of the Self: A Seminar with Michel Foucault* (pp. 145–162). University of Massachusetts Press.
- Lefort, C. (1986). Politics and Human Rights. In J. B. Thompson (Ed.), *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (UK ed. edition, pp. 239–272). The M.I.T. Press.
- Manin, B. (1997). *The Principles of Representative Government*. Cambridge University Press.
- Minow, M. (1987). Interpreting Rights: An Essay for Robert Cover. *The Yale Law Review*, 96(8), 1860–1915.
- Tocqueville, A. (2011). *The Ancien Régime and the French Revolution*. Cambridge University Press.