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Surveillance and Security - A Dodgy Relationship

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Surveillance and Security - A Dodgy Relationship

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Abstract

Modern societies are vulnerable. We have known this long before the attacks of September 11, but they made it clear to everyone. The second lesson learned was that it is impossible to foresee such events. Although these attacks to the real world were “low-tech”, now there are attempts around the globe to control especially the electronic or virtual world. However, does more surveillance really lead to more security? If so, what will be the price we have to pay?

This paper gives an overview over what happened on a governmental level after September 11 in the EU, in some EU-member states and in the USA. Apart from political actions, we already face even direct socio-economic implications as some anonymizer services were shut down. They empowered Internet users to protect their right of privacy, and they were the first targets of investigation and suspicion. Shutting down these services reduces the potential room of users to protect their privacy by using privacy enhancing technologies (PETs). This is an indicator for a serious societal problem: democracy already has changed.

In a second part this paper analyses the relationship between surveillance and security. It is argued that, the international over-reactions will not lead to the intended effects. Rather, they will have long-term implications for the respective societies.

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Paper for the international Rathenau Institute conference “Debating Privacy and ICT – before and after September 11.

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I Introduction

Modern societies are vulnerable. We have known this long before the attacks of September 11, but they made it clear to everyone. The second lesson learned was that it is impossible to foresee such events. Although these attacks to the real world were “low-tech”, now there are attempts around the globe to control especially the electronic or virtual world. However, does more surveillance really lead to more security? If so, what will be the price we have to pay?

National states try to provide to their citizens a high level of security. But the effort for better security gets often mixed up with the claim for more surveillance. This is one reason why, over the past few weeks, governmental activities seemed to jeopardise the internationally acknowledged fundamental right of privacy. Societal security versus personal freedom is an old and well-known area of conflict. In the light of the incidents of September 11 some old ideas for surveillance and for measures restricting privacy got on the agenda again – and new ones keep emerging.

This paper will give an overview over what happened on a governmental level after September 11 in the EU, in some EU-member states and in the USA. Apart from political actions, we already face even direct socio-economic implications as some anonymizer services were shut down. They empowered Internet users to protect their right of privacy, and they were the first targets of investigation and suspicion. Shutting down these services reduces the potential room of users to protect their privacy by using privacy enhancing technologies (PETs). This is an indicator for a serious societal problem: democracy already has changed.

In a second part I will analyse the relationship between surveillance and security and I will argue that, and give reasons why, these international over-reactions will not lead to the intended effects, rather, they will have long-term implications for the respective societies. So in the end this has to be acknowledged in a necessary appreciation of values.

2 Overview on International Reactions¹

The following overview does not claim to fully describe what happened after September 11. Moreover, it is not possible to give a comprehensive assessment of the impacts of different governmental activities. This short overview only aims to give a picture of the hectic activities and to indicate the direction in which politics are heading. Some of the measures mentioned are already being enforced while others are in the phase of implementation, so they may still be watered down when passing the legislative bodies.

I will first have a brief look at those nations that were mainly affected restricting myself to a short summary of the main legal actions. Presentations in this conference from speakers from the US, the UK and Canada will give us a more profound analysis of the ongoing developments.

¹ More information on recent activities may be found at <http://www.statewatch.org/observatory2.htm> and within the privacy-linklist of the Institute of Technology Assessment of the Austrian Academy of Sciences (<http://www.oeaw.ac.at/ita/privacylinks.htm>).

USA

One of the main activities was to enact the Patriot Act: “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” (US Congress 2001). This law substantially lowers the standard of juridical control of law enforcement activities and gives a broad range of new possibilities to law enforcement agencies.²

UK

The UK enacted a handful of anti-terrorism laws under which certain suspects can be indefinitely detained without trial. In order to pass the legislation, the government derogated from – i. e., opted out of – article 5 (1) of the European convention on human rights, which guarantees the right to liberty (Dyer, 2001).

Furthermore, the freedom of information act that was resolved in the year 2000 will be suspended until 2005 (Medosch 2001). Telecommunications service providers are forced to retain communications data for 12 months under a “voluntary code”. In demanding such a practice the government, at a stroke, dumps the EU Directive on data protection and privacy (1997). The Directive permits data to be retained for the purpose of billing only (i. e.: for the benefit of the customer). Like with the derogation from the ECHR in the case of the indefinite detention of terrorist “suspects” possible under the new law the UK government violates one of the fundamental rights of privacy established by the EU (Statewatch 2001b).³

Germany

In Germany the Minister for the Interior, Otto Schily, put up two legislative proposals (Sicherheitspaket I and Sicherheitspaket II).⁴ Cornerstones of these proposals are enlarged competencies of various law enforcement and military agencies as well as considerable infringements of several existing laws. All this severely threatens basic human rights (including the secrecy of letters).

France

France also has its Anti-Terror-Package with new rights for the police and for judicial authorities. In the future it will be easier for them to acquire warrants for searching in private houses and cars. Service providers will have to store transmission data for up to 12 months, and providers of security services may be forced to reveal secret keys to de-encrypt data etc (Roller 2001).⁵

² For further information see the paper of Barry Steinhardt.

³ An analysis of recent developments is given in the paper of Charles Raab. Some more information is also available at <http://wood.ccta.gov.uk/homeoffice/hopress.nsf/50e2456405b67f7d802566b3006819dc/2a5fc6811dec4c7180256ae6004fa4d3?OpenDocument>; <http://politics.guardian.co.uk/attacks/> and <http://www.statewatch.org/news/2001/nov/17ukdata.htm>.

⁴ For the respective pressrelease see http://www.eng.bmi.bund.de/services/externalViews/ExternalViews.jsp?template=singleFrameset&category=presse&ixepf=7294_presse&behoerde=&schwerp=&Thema=&language=en&verknuepfung=&hits=5&phits=64084%2c64089%2c59920%2c61325%2c59989&id=64084&page=0.

⁵ Parliamentarian report <http://www.senat.fr/rap/101-007/101-0071.pdf>;
Changes to laws <http://www.senat.fr/pl/5-0102.pdf>
and <http://www.statewatch.org/news/2001/oct/10france.htm>.

Austria

The Austrian government did not indulge into extraordinary activities. However, in the light of the attacks of September 11 it was easier for government to change from temporary to permanent the status of a new law on electronic eavesdropping and „Rasterfahndung“. Additionally, like in some other European countries, there was a discussion on taking fingerprints of all inhabitants.

EU

On the European level, an Extraordinary European Council held on September 21 approved a plan of action. It implies to enhance cooperation between national police and judicial forces by the introduction of a European arrest warrant and the adoption of a common definition of terrorism, as well as a better exchange of information between all intelligence services of the Union. Furthermore, Member State authorities will share with Europol, systematically and without delay, all useful data regarding terrorism. A specialist anti-terrorist team will be set up within Europol as soon as possible, who will co-operate closely with their US counterparts. Additionally, the Council stated the necessity to develop international legal instruments in order to put an end to the funding of terrorism, to strengthen air security and to coordinate the European Union's global actions (EC 2001).⁶

Canada

The new anti-terror-law intends to “criminalize terrorist financing, establish a procedure to freeze, seize, and forfeit proceeds for and proceeds of terrorist activities/terrorist groups, enhance our ability to protect sensitive information, create new investigative tools and allow for preventative arrest when needed to address the serious threat posed by terrorist groups and those who would carry out terrorist activity, establish a means to identify and list terrorist groups” (Zaccardelli 2001) and (RCMP 2001).⁷

Australia

In Australia, federal elections have delayed specific legislative changes from being implemented. However, the Federal Cabinet has announced some extraordinary measures, and over the coming months the proposed legislation will be made public. There are extremely concerning announcements, like the Attorney General stating that arrested people could face up to five years in jail for refusing to answer questions, which abolishes the right to refuse to make a statement. People could be held incommunicado with no right to see a lawyer. Such powers would not be restricted to those suspected of terrorism, but could be applied against anyone who might have information regarding politically motivated violence. The Attorney General has stated that this could include lawyers and journalists (Statewatch 2001a).

⁶ Updated information will be provided at: <http://europa.eu.int/news/110901/index.htm>.

⁷ For a substantial analysis of the situation in Canada see the paper of Collin J. Bennett.

Other socio-economic impacts

Apart from the above governmental activities there are already socio-economic impacts on the everyday lives of the most different people. The erroneous arrest of Pierre Boulez, the famous conductor, provides an impressive example of, on the one hand, the hectic policy activities during the first weeks following the attacks and, on the other, for the very long memory of computer systems and data-bases. Some time during the sixties, the now 75 years old musician had said that all opera houses should be blown up. This metaphorical sentence brought him into trouble some 30 years later (Coomarasamy 2001).

Thousands of km away, in Somalia, the whole Internet traffic was shut down. "Somalia's only internet company and a key telecoms business have been forced to close because the United States suspects them of terrorist links. The two firms, Somalia Internet Company and al-Barakaat, both appear on a US list of organisations accused of funnelling money to the al-Qaeda network. Hassan Barise in Mogadishu told the BBC's Network Africa programme more than 80 % of Somalis depended on money they receive from relatives outside the country. He said all Internet cafes had now shut down and international phone lines run by two other companies were failing to cope with the extra pressure of calls" (BBC 2001).

In the US, an anonymizer service was shut down. "ZeroKnowledge, providers of Freedom.net and Freedom privacy software, have abruptly decided to stop providing anonymous web browsing and private, encrypted, untraceable e-mail for its customers. They give users 7 days before the system is shut down and all untraceable e-mail addresses are disabled. They also say that your "secret" identity may not remain a secret for long" (Wouters 2001). Anonymizer services like other PETs (Privacy Enhancing Technologies) empower Internet users to protect their right of privacy. They were one of the first targets of investigation and suspicion. Shutting down these services reduces the potential scope of possible action for users to protect their privacy by using PETs. This is another indicator for a serious societal problem: it demonstrates that the quality of democracy already has profoundly changed to the worse.

The list of examples is of course incomplete. There are lots of other developments all around the world. This short overview just flagged up some important ones that are directly connected to the privacy issue. Additionally in many countries, measures are undertaken that restrict other basic human rights and undermine minimum standards of judicial control.

3 Relationship of Surveillance and Security

All the measures mentioned above could easily be enacted because the citizens have been presented with the simple equation: more surveillance means more security. Under the shock of the attacks of September 11 many people were willing to waive a little of their personal freedom if they were gaining more security in exchange. In order to be able to appraise profoundly the different measures, on the one hand, and the basic human rights, on the other, it is necessary to look into the matter in more depth. The question is: does more surveillance really lead to more security, and if so, what is the price for it?

Before answering this question, we need to define the relationship of two key terms that are often used synonymously, namely surveillance and control. *Control* is about the comparison of a target value and the actual value; control may trigger a correcting action if necessary. Hence control is necessarily based on a normative idea and the will to realise this order. By contrast, *surveillance* may be seen as a sequence of actions of control. Furthermore surveillance implies an asymmetric hierarchical relationship between those who observe and those who are observed. Thus surveillance is to a great extent conservative and oriented towards retaining the status quo (Nogala 2000, 141).

Coming back to our core question whether more surveillance will bring about a higher degree of security, it seems useful to distinguish further between an ex-ante and an ex-post perspective. If new surveillance technologies could contribute to identify potential terrorists before they can perform their criminal activities, this would increase security. But as said above, surveillance is a sequence of acts of control. Control is about comparing an actual behaviour with a – how ever defined – standardised behaviour. From the attacks of September 11, we had to learn that the involved persons lived “normal” lives for years. Hence they could not be detected. This is true for telecommunications wiretapping and eavesdropping as well as for video-surveillance of public places and for the biometric methods that are in discussion all over the world. Electronic fingerprints or iris-scans can only tell you something about the authenticity of a person. However, if the person did not attract attention yet, she will never be in a database and therefore cannot be detected as “suspicious”. Even if all citizens are in a database, authentication will not give you any information with a surplus value. Thus we can conclude from an ex-ante perspective that, in general, surveillance does not raise security.

From an ex-post perspective, data sets gained from huge databases and widespread surveillance may certainly facilitate the prosecution of criminals. Hence its contribution towards a higher level of security is of an indirect order only. Deterrence, i. e. the positive impact of high rates of reconnaissance and high penalties, may be enhanced. However, deterrence does not seem to be a successful instrument to keep people from performing terrorist attacks. Especially when they are willing to risk their lives anyway.

Another problem is whether widespread surveillance is possible at all. There are at least two boundaries: technical and social. Any comprehensive surveillance of telecommunication networks depends on technical measures. Systems have to be programmed to react to specific “catchwords” or other parameters, i. e. to a behaviour that is deviating from a pre-defined “norm behaviour”. As the attacks of September 11 showed, the terrorists had led fully adapted “mainstream lives” for a considerable time and they escaped from being observed. The second problem occurs as soon as surveillance is no longer just a theoretical term that will be restricted for “more security”. As soon as technical means like video systems in public places or wire-tapping of telecommunications systems will be perceived by ordinary people in their everyday lives, they will try to circumvent those surveillance systems. Two different ways of doing so are conceivable: (i) strategies of avoidance and (ii) use of preventive technologies. Strategies of avoidance may be the use of personal communication and meetings rather than digital communication and virtual meetings like phone calls, e-mail

or chat-rooms. Preventive technologies or so called privacy enhancing technologies (PETs) are using cryptographic tools, steganography or other newly developed systems like onion routing etc. It is difficult to apply but who ever has the resources, the education and the determination to do so, will be able to remain incognito. Most probably, criminals will do so and it will rather be the “ordinary citizens” who will be traced and restricted in their basic human right of privacy.

This was to point out that more surveillance does not necessarily lead to a higher level of societal security. Hence it is highly questionable whether massive constraints in human rights are justified.

4 Impacts of Widespread Surveillance

Why are basic rights like privacy, freedom of speech and freedom of assembly etc. that important? What are possible impacts of constraints? There are short- and long-term effects.

In a short-term perspective, we can see that surveillance leads to adapted behaviour of human beings. We will see not their “real”, “own” behaviour, but rather the behaviour the individuals think they are supposed to show. This leads to a loss of autonomy. This development is critical from a democratic point of view, because liberal democratic societies are built on the idea of self-conscious and autonomous citizens. The more surveillance (governmental and private) we tolerate, the more we are heading towards a so-called “panoptic-society”. The panoptic-society traces back to the well-known Panopticon of Jeremy Bentham who modelled a prison in which the prisoners could be observed from a central point, but where they could not see the observers themselves. Foucault (1994, 258 f) pointed out that the specific meaning of this model lies in the creation of a permanent awareness of being observed that ensures power to take effect automatically. In other words the effects of surveillance are permanent even if actual surveillance is not performed. In this respect, power is automated and de-individualised. Foucault transferred the mechanisms of the Panopticon to describe modern societies. Today, it is used to describe the new kind of transparency in the so-called information society (Rössler 2001, 219).

In the long run, a much greater problem is arising: The short-term “mainstreaming” of citizens' behaviour, i. e. restricting variation and avoiding what would be deemed deviation, may turn out to prevent any “driving momentum” in societal, cultural and economic terms. Dissenting or variant behaviour is considered to be one of the most important driving forces of economic and societal development. When losing this force, Western democratic societies may soon get into trouble.

In the social sciences, it is beyond any dispute that non-conformist behaviour is a necessary driving force for societal development. One of the most prominent examples is the concept of “charismatic leadership” by Max Weber. Charismatic leadership is based on “non-ordinary” claims of an individual or a group. These claims suffice themselves and do not need tradition or law. Charismatic leadership is revolutionary by definition, it is destructing and by purpose different to existing rules and tradition (Berger et al. 1976, 227). Charismatic leadership may be transformed into a traditional or rational kind of governance; but as soon as these actions are becoming an everyday habit, this directly leads to a decline. For the second generation all the famous actions of the charismatic revolution are perceived as an “old hat” – what was non-ordinary in the beginning becomes part of everyday life (Berger et al. 1976, 229). Even Talcott Parsons who denied the possibility to establish a general theory of social change may be cited as a witness for the above stated thesis. He defined social change as a product of the system's endeavours to react upon external interferences. One important reason for social change is a failure in the socialisation of individuals or groups. The latter did not learn to adapt to the societal needs and therefore generate disturbances of the so-

cietal equilibrium (Berger et al. 1976, 234). But the structural-functional theory did not deal consequently enough with social change and, hence, cannot deal adequately with conflict. However, conflict is the great and creative power that promotes social change (Dahrendorf 1965, 109 in Endruweit 1989, 803).

Mainstreaming is not a danger for societies in abstract models of social change only. We can see the same kind of problem in the economic world, too. The best example is the notion of “entrepreneur” in Schumpeter’s writing. Schumpeter’s entrepreneur is not placed within a static theory of equilibrium or disequilibrium. According to Schumpeter, entrepreneurs are economic agents whose functions are “the carrying out of new combinations, the creative destruction of equilibria, thereby preparing the ground for a superior state of equilibrium” (Swoboda 1984, 17). This is not the place to go into the details of Schumpeter’s theory but a telling quote stays for this part of his theory: “While an economic subject swims with the stream in the well known cycle, it swims against the stream if it wants to change its way” (Schumpeter 1952, 118/transl. by the author).

If our societies stop to develop⁸ – even in a very long term – they will perish. This would mean the terrorists have got what they aimed at.

5 Conclusions

In this paper, I gave an overview on legal actions as well as socio-economic impacts of the attacks of September 11. Furthermore, I argued that more surveillance does not necessarily lead to more security. Rather, this equation seems to be a brilliant marketing trick of the law enforcement authorities around the world to get things going they had on their agenda for many years already. Finally, I tried to sketch a picture of possible short- and long-term impacts of widespread surveillance for democratic societies.

If one agrees that the discussed possible impacts of widespread surveillance are undesirable and if one recognises that the discussed restrictions of basic human rights (producing these unwanted side-effects) may even be the wrong drug for the necessary therapy, I come to the conclusion that one should better discontinue the drug.

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⁸ This does not mean that the author is blind for possible negative impacts of change. This is just said to highlight the possible long-term negative impacts of stagnation.

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