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In February 2009 the House of Lords Constitutional Committee in the United Kingdom published the report *Surveillance: Citizens and the State*. Some have hailed this as a landmark document. The following is one of four commentaries that the editors of *Surveillance & Society* solicited in response to the report.

The February 2009 House of Lords report, *Surveillance: Citizens and the State* touches upon one of the central issues of democratic governance: how surveillance and data collection may alter “the nature of citizenship in the 21st century, especially in terms of citizens’ relationship with the state” (p. 6). This framing reiterates the centrality of surveillance practices for understanding the changing nature of citizenship in late-modern societies. It touches upon issues of how governments relate to and trust their subjects, and vice versa, where are the limits of state interference into the private sphere and what should be its guiding principles and justifications. These are, without doubt, vital questions for any polity and deserve the long overdue attention.

In its first recommendation the committee states:

We regard privacy and the application of executive and legislative restraint to the use of surveillance and data collection powers as necessary conditions for the exercise of individual freedom and liberty. Privacy and executive and legislative restraint should be taken into account at all times by the executive, government agencies, and public bodies. (House of Lords 2009: 103)

The statement reads almost as a declaration of faith in privacy, which has also guided much of the activism and academic work in critical surveillance discourse. The fact that it is adopted by a British parliamentary body is probably of greater political and cultural significance than what is at first apparent to a foreign observer. In addition to acknowledging the centrality of privacy for maintaining a free and democratic polity, the report makes a series of important practical recommendations which, if implemented, would go a long way towards improving the frail state of privacy in the UK.

Beyond these general observations, what more can be said about the report? In a way, the report’s title – Citizens and the State – says it all. What you see is what you get and this, I will argue, also indicates the report’s limitations. In what follows, I concentrate my discussion on the latter, not because the weaknesses outweigh the report’s strengths or diminish its commendable qualities. Rather, exploring the limits in what has been hailed as one of the best reports of its kind, can serve as a backdrop for discussing the boundaries

and silences in contemporary political debates about privacy, as well as suggesting potential ways to broaden its scope and focus.

Beyond the State

As indicated in the title, the state holds a central position in the report's conceptual structure and arguments. This is probably understandable since the House of Lords, and the committee itself, is a national political body concerned with matters of national democratic governance. Yet, in my view the lack of a perspective *beyond* the nation-state, i.e. beyond the UK, closes off some important lines of inquiry. As such the report can be read as an example of the methodological nationalist approach and its drawbacks. Truth be told, the text is replete with comparisons to other countries (US, Germany, Canada, etc) when it comes to particular issues or measures. The comparative approach could perhaps be used more systematically in order to uncover the degree to which the UK is an anomalous surveillance outlier as well as enable potential policy transfers and lessons from abroad.

Moreover, if frequency of use can be deployed as a crude indicator of a concept's importance, then we can observe that the word "global" hardly features in the document's 130 pages. More precisely, it is used only once in the text and once in a section title. This is surprising for several reasons. First of all because the topic of global surveillance and policing has been at the forefront of recent debates among academic observers and civil liberties activists, such as Statewatch. These are the issues where the House of Lords has come with valuable contributions in the past, particularly in its 2000 and 2007 reports on the Schengen Information System, which also received considerable praise and attention abroad. By contrast when the present report addresses the European situation it is almost exclusively in positive terms through reference to the European Convention on Human Rights, European Court of Human Rights or the European Data Protection Directive. Other less favourable aspects of the European situation are, with one small exception, left unmentioned. The silence is by no means justified by a lack of developments in the field of Justice and Home Affairs. In fact, some European surveillance measures were presented with considerable detail as evidence to the committee (see Volume II: Evidence), but were left unexamined in the report itself.

The omission from the report of the global and European dimensions of surveillance is all the more surprising since the topic raises important constitutional issues with respect to national parliamentary control of the expanding cross-border data exchange and thus highlights problems of transparency and accountability. According to Mathiesen (2006: 128), national media and parliaments – the traditional guarantors of accountability – no longer have the capacity, or the time to dig deeply into these issues, and therefore tend to uncritically accept the premises of the executive branch and police agencies. The expanding European surveillance systems are increasingly becoming "interlocked" and "de-coupled" from nation states and their political systems, thus gathering their own momentum (ibid.). If the House of Lords report is anything to go by, this continues to be the case.

Beyond Citizens

The second set of silences in the report which I would like to address is partly connected to the first. Namely, the report largely bypasses non-citizens, not only EU citizens, but more importantly, any kind of non-citizens. Again using crude numeric indicators, the term "foreign" is used only five times in the text, and not one of these instances directly refers to the privacy rights of foreign citizens, but rather to foreign jurisdictions, foreign visitors to the US, foreign companies, etc. This in itself is interesting since several of the surveillance measures discussed in the report have clear implications for foreign citizens living in the UK. Looking at the examples of biometric data collection and the national ID Card scheme, it is clear from the evidence given to the committee (Volume II) that their impact has been and will be first felt by foreign nationals. As the Government's own policy proclaims:

We will start with rolling out cards where there is maximum benefit in terms of protecting the public - hence starting with foreign nationals and then people employed in positions of trust. (Vol. II: 353)

The nexus between surveillance, public protection and foreign nationals could hardly be more explicit. The detrimental consequences of ID cards and other forms of securitization of identity for minority populations have been frequently debated in newer surveillance literatures (see inter alia, Lyon 2008, Bennett and Lyon 2008), yet these lines of enquiry are not pursued in *Surveillance: Citizens and the State*.

Foreigners, particularly those with irregular status such as illegal aliens, may be characterized as “default citizens.” By systematically omitting such foreign citizens from its analysis, the report builds on what might be termed a conception of citizenship with a capital C. Speaking from a position of Western liberalism, the report builds on a tacit assumption of universality of citizenship thus overlooking its subjective, differentiated and potentially exclusionary nature. The topic has for a long time been subject to lively debates within citizenship studies (Shafir 1998). Feminists in particular have critiqued a discourse that extolles the virtues of universal citizenship as expressing the universality of humanity while excluding some from participating in the public realm. The presupposition of homogeneity and universality of citizenship thus glosses over differences based on class, gender and ethnicity.

The issue exemplifies a more general tension within surveillance studies: the tension between the universalistic language of privacy, freedom and human rights and, on the other hand, the realities of unequal distribution of these goods. The social exclusionary effects of CCTV has been one of the main findings in the long line of studies on the subject (see also Vol II: Evidence). The surveillance gaze is not randomly directed at any citizen; it is not panoptic or all-seeing, but pre-selects its objects of control (Aas et al. 2008). Similarly, the report points out the remarkable over-representation of minority groups, particularly black youths, on the national DNA database. The discussion of whether, as a consequence, it would be desirable to establish a universal National DNA database is some of the most interesting reading in the report. Although not an initiative I would support in practice, the idea of a universal DNA database is at least a consistent defence of the concept of universal citizenship. The Government’s refusal of such an option makes its argument that “there is no guilty on the database” (Vol.II: 350) all the less believable. The DNA database is clearly meant to provide a list of chosen suspect populations.

My objective here is to indicate the importance of including various groups of “default citizens” into the liberal privacy discourse – groups which for various reasons have a reduced citizenship status or what might be termed a “damaged subjectivity.” For example, one publicly debated intervention by the Norwegian Data Inspectorate in 2008 was directed at the Norwegian prison system and uncovered systematic breaches of prisoners’ privacy rights, particularly through various ad hoc data registers (Datatilsynet 2008). A prisoners’ reduced status as a rights-bearing subject makes him or her an unlikely poster child for privacy advocacy, yet it is precisely the positions of social marginality where the challenges for privacy violations are the greatest. This applies not only to prisoners, ethnic minorities and foreign nationals but also to children. When it comes to the latter, the report comes with several interesting observations. It outlines a growing tendency towards monitoring and personal data collection in the name of helping children, better learning, prediction and efficiency. The problematic linkage of help and control has been a perennial concern in criminology and social work. One result described in the report is a classic example of function creep which, one would imagine and hope, would not be possible to implement for the adult Citizen (with a capital C) population:

[B]ecause the school census is now termly and they have gone from collecting very basic information about children to quite detailed information, including how a child gets to school in the mornings, recording behaviour and attendance data, whether they have special needs and whether they have free school meals. This is all going on to the National Pupil Database, which is, as far as we know at the moment, a permanent

database without the intention to delete the content of it. (Dowty in House of Lords 2009: 84)

Quo Vadis, surveillance studies?

What this and several other House of Lords reports are offering the British political system is an important dose of self-reflexivity; a critical look in the mirror and a warning that society may be going in the wrong direction. For this the report deserves a warm welcome. In conclusion, I would like to suggest that the report can function as a backdrop for self-reflection not only to the British public but to the growing field of surveillance studies as well. The report builds on the extensive expertise of many surveillance scholars. In fact, there are few areas where social science academics are able to have their voices heard with such clarity in a parliamentary report. As David Murakami Wood observed on his blog¹: “[I]t is a bit disconcerting to see myself, Surveillance Studies Network and other people and organizations with whom I work mentioned (approvingly) quite so much in such an important document.” Whether this apparent success should be seen as cause for celebration or disconcert may be debatable. In my view, however, it does merit a pause for reflection. What caused this political breakthrough and what are its consequences? What happens when a critical discourse enters into the realm of political legitimacy?

I was recently reminded of the dilemma following a similar debate in the field of human rights. Like surveillance studies, human rights scholarship offers a similar potential to defend liberty and human dignity, provide a voice of protest (against capitalism and authoritarian governments), and thus often combines liberatory potential and pessimistic doomsday prophecy. In her book *Who Believes in Human Rights?* (2006) anthropologist and human rights scholar Marie-Benedicte Dembour suggests that human rights scholarship can be divided into four schools of thought regarding their view of the role of human rights in society. The first, the natural school, is orthodox and based on the unconditional belief in the universality of human rights. For the second, the protest school, human rights are something that needs to be fought for and created through activism. For the third, the deliberative school, human rights belong to the political sphere and gain their existence and influence as principles for political and legal deliberation. Finally, the discourse school sees rights as a part of a political discourse and their uses and meanings as culturally determined. In short, rights can be either seen as given, fought for, agreed upon or talked about.

Most scholarship, of course, is hard to categorise and many positions can be attributed to several schools of thought. If we nevertheless apply this division to the field of privacy and surveillance studies, the first three positions are not hard to recognize. Privacy has been described as an essential condition of human dignity, as a mobiliser of social protest, and as a principle for guiding legal and political decision-making. Nevertheless, the last line of thought outlined by Dembour is more difficult to find. It may be that precisely at a time when surveillance scholarship is moving from a voice of resistance to a state of legitimacy that there is a need to examine its discursive functions and ask: What then is the role of surveillance and privacy discourse when providing political guidance? How are these positions deployed culturally and politically? If *Surveillance: Citizens and the State* can provide any indication, then a recipe might be: a large dose of the “surveillance-as-a-threat-to-freedom” orthodoxy, the standard liberal language of freedom and individual self-determination, and only a dash of the more radical edge of surveillance studies with its focus on social sorting, social exclusion and discrimination. It remains to be seen if this is the right recipe when judged by its ability to produce meaningful political change.

¹ Notes from the Ubiquitous Surveillance Society, <http://ubisurv.wordpress.com/2009/02/06/lords-report/>

References

- Aas, K. F., H. O. Gundhus, H. M. Lomell, eds. 2009. *Technologies of Insecurity: The Surveillance of Everyday Life*. Routledge: London & New York.
- Bennett, C. J. & D. Lyon, eds. 2008. *Playing the Identity Card: Surveillance, Security and Identification in Global Perspective*. Routledge: London & New York.
- Datatilsynet. 2008. *Endelig kontrollrapport*, saksnummer 07 / 01455, viewed at: <http://www.datatilsynet.no/upload/tilsynsrapporter/07-01455-9%2007-01455%20Kontrollrapport.pdf>
- Dembour, M. B. 2006. *Who Believes in Human Rights? Reflections on the European Convention*. Cambridge: Cambridge University Press.
- Lyon, D. 2009. 'Identification practices: state formation, crime control, colonialism and war' in Aas et al. eds., *Technologies of Insecurity: The Surveillance of Everyday Life*. Routledge: London & New York.
- Mathiesen, T. 2006. 'Lex Vigilatoria – Towards a Control System without a State?' in S. Armstrong and L. McAra (eds.) *Perspectives on Punishment*. Oxford: Oxford University Press.
- Shafir, G. ed. 1998. *The Citizenship Debates*. Minneapolis: The University of Minnesota Press.