On Data Retention, Post-Fordismand Privacy Movements in Germany

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The introduction of the data retention policy in the EU, resulting in digital doubles, has led to the emergence of grassroots protests centred on privacy and surveillance issues, especially in Germany. One of these, AK Vorrat, is a network platform that makes intensive use of the Internet and is rooted in the liberal democratic tradition. In the following text, media researcher Oliver Leistert places data retention in a post-Fordist framework and highlights some of the shortcomings of the protest movement.

The Directive

The 2006 / 24 / EC directive was published on 21 February 2006, officially as a means to harmonize the market of data retention. This prompted Ireland to make a court appeal against the directive, with the argument that it is aimed at crime prevention, not market harmonization. Ireland seems to have a point. The directive aims to retain the connection data of all electronic telecommunication within the European Union for six to 24 months.[1] The connection data to be retained is the information necessary to:

– trace and identify the source of a communication;
– identify the destination of a communication;
– identify the date, time and duration of a communication;
– identify the type of communication;
– identify users' communication equipment or what purports to be their equipment;
– and to identify the location of mobile communication equipment.

The responsibility of retaining this data is allocated to the telecommunication companies. Some of these companies in Germany have criticized the directive, pointing to data protection concerns, but also to the additional costs for them and their customers, arguing that data retention is a state interest and should be financed by the state.

Only data concerning the content of telecommunications is not allowed to be retained. But what is content and what is not? This is a pretty arbitrary distinction in modern communication technology. Calling the emergency number is not about ordering pizza. Email headers are an integral part of emails. SMS is an even denser stream of data. The distinction of what is content and what is not in telecommunications is a political project in itself. The idea of classification serves governing purposes. This aspect has been neglected in most considerations so far. Traditional surveillance by law enforcement agencies needs the permission of a judge, proof that the parties under surveillance are, for instance, criminal suspects, thus assuming that the content of their communications has something to do with their illegal activities. A discrimination between the content and metadata of this communication would not have made any sense. On a conceptual level, therefore, the data retention scheme is an innovation, as it is not after specific suspects.

The data retention directive introduces this discrimination of data as a standard for all

future telecommunications. Of course, this can be read as a balancing act between privacy and law enforcement interests. It is also a compromise to what is technically viable. Retaining all voice communication might not be viable yet, whereas retaining complete SMS communication is. In addition, the retained data is mostly data that is technically necessary for the communication services to function. This implies that most of this functional data is generated automatically at some point before, during or after the communication act in the technological infrastructure and only needs to be copied to be retained. Relying on the functional necessity of this automatically generated data, the directive is not based on principles but on technique, it is a *parasite* of technology. At the same time it introduces this distinction of data into the legal sphere, which has so far only played a role in billing and direct marketing, and even there with much less detailed data.

Making the doubling of information the institutional default plays into the hands of the industry of content production and that of copyright infringement prosecutors, who are lobbying intensively to get access to this data. Internet service providers and telecommunications companies also articulated an interest in this data (for marketing this is a goldmine). So, in a sense it's true, market harmonization does play a role here.

Mapping of Social Relations

What will be produced by this data retention scheme is a one-to-one mapping of all social relations passing through telecommunication technology. At least this is the wet dream of top-down bureaucrats. Starting from difficulties in standardization and technology hiccups, the problems the messy reality provides are numerous. And then, the means to circumvent data retention are at hand too, for those who care. Disregarding these difficulties, the idea of the data retention directive is to have access to the entire technologically mediated social fabric of the EU. The mapping of social networks via telecommunications is already a paradigm to make profit. Websites such as Facebook made this their business model, being fed with all this information by their content providers / users. In that sense, the EU and its stakeholders seem to only want their fair market share.

The powers of data retention are easy to sketch: a person receives a notice from the police about a person she communicated with half a year ago who now, according to them, is involved in crime. Most likely she will not remember the call or its contents. Maybe she cannot even remember this person. But it is all there on record and thus valid. Her virtual life strikes back, powerful and disintegrated from her physical existence. She has a *Doppelgänger* she can not control or get full knowledge about.

It echoes the physical presence of a person (well, at least that of her communication devices), since location data is also retained for all successful or non-successful acts of telecommunication. This adds a grid to the matrix of the doubled existence: the x and y axis. And z, the time-line, is also provided. GPS data, sent by default by more and more mobile phones to the nearest cell, narrows this down to a couple of metres.

Privacy

Google's CEO Eric Schmidt has openly stated that privacy has become impossible in all electronic communication and that the only way to regain privacy is to stay off the grid. This expression was critized as his personal, cynical view. But he has a point. The concept of privacy itself is changing with modern technology. Privacy is not all of a sudden under threat. It is a concept that is neither a-historical, nor universal. Rooted in Western liberalism, it never was global. It is a cornerstone of a specific ideology and therefore always in flux. It has an important function in the ideology of liberal democracy, occupying a similar space as the concept of free speech. It is an integral part of the idea of the liberal democratic state, a distinctive marker to differentiate it from totalitarianism. Privacy in its broadest sense is a state-sanctioned sphere where citizens can talk and perform while not being the object of state infringement. In this sphere a citizen is off duty. The police has to respect the privacy of the citizen's home. A raid can not be performed before 6 am. Therefore, it is not surprising to see protests and critique against the invasion of privacy by the state.

Citizen Rights and AK Vorrat

When 34,000 German citizens sued their government for the implementation of the European data retention scheme on the last day of the year 2007, this was regarded as a major hallmark of a new pro-privacy movement. The Arbeitskreis Vorratsdatenspeicherung (AK Vorrat) used the Internet as a major organizing tool from the beginning, making it easy to join in. This has been branded 'activism 2.0' with reference to Web 2.0. The AK Vorrat can be described as an alliance or network of individuals, NGOs rooted in humanism or liberalism and a decent amount of lawyers were eager from the start to prove that data retention does not comply with the constitution. Professionals in IT, mostly connected with the Chaos Computer Club, also played an important role, offering technological know-how to criticise, among other things, the possible 'abuse' of data.

This coalition has had a considerable impact on the discourse on data retention. Journalists, themselves not exempted from data retention (unlike priests), cooperated as well.

On 22 January 2007, AK Vorrat had already published an appeal to politicians to let go of the complete data retention idea. It was signed by 50 organizations, among them the German league for human rights, the international league for human rights and Reporters Without Borders.

Wolfgang Schäuble, the minister of the interior at the time, was not officially responsible for the law proposal, but was seen as one of the driving forces behind it. He and his first secretary August Hanning, former head of the BND (federal German secret service), resented the criticism and delegated the issue to the courts, which are to decide if the law passed by the legislative violates constitutional rights or not.

The Appeal to the Judiciary

The appeal to the judiciary by both politicians and protesters is of importance to understand the nature of this protest movement and the nature of contemporary politics. It has become a common procedure in Germany for new laws to be approved or rejected by the federal courts. The court as a touchstone and adviser on how to legislate indicates the erosion of the liberal state in itself. Whereas an excess of executive power has become a common phenomena in most liberal democratic countries, excess of the legislative power by instrumentalizing the judiciary points towards a non-institutional unification of all three powers.

So interestingly, both protesters and politicians seem to agree with each other in

addressing the judiciary, those who rule over what a law can be and what not. The politicians will learn what to change to make data retention compliant to the constitution. In their worst-case scenario, the court will reject the surveillance program *in toto*. But historically, the court has usually provided suggestions on how a law can be made compliant with the constitution or even on what part of the constitution needs to be changed to allow the law. In doing so, the judiciary promotes the blurring of powers.

The protest movement has aimed at going to court from the beginning, portraying the judiciary as an independent power. In some statements by some lawyers of AK Vorrat the idea of data retention is not rejected completely. It is argued it might help to prevent crime and terrorism. They therefore differentiate between good citizens, whose rights are under threat, and the bad outcasts, who do not seem to have the same rights. The Privacy 2.0 movements' cornerstone is its positive relation to the state. It is not an anarchist movement, neither does it show any leftist ambitions. It is not about solidarity with migrants or the working poor, it is not about neoliberal agendas or free trade of services. But the fight for the right to privacy cannot be a single-issue movement, as privacy and the loss of it have wide-ranging consequences.

Data Retention and Post-Fordist Labour

When Paolo Virno identified the post-Fordist labour condition by referring to Marx's notion of the General Intellect, as leading to the 'communism of capital', he referred to new qualities, such as communication and socialization skills, as necessities for the post-Fordist worker. In short, capital was able to integrate and valorise qualities that had emerged among the social movements of the 1970s and '80s in Italy. Post-Fordism, a counterrevolutionary strategy according to Virno, reduces more and more aspects of life to work. But Virno is clear in that capital is always at risk of not being fully able to integrate all aspects of the communication potentialities of the multitude [2] while at the same time capital needs to take full advantage of electronic communications as a means of generating surplus value. The data retention scheme is structured to satisfy both the need of control and that of communicative production. Protesting the advent of data retention is a fight for the commons of communications versus the attempts to enclose, commodify and restructure them under present historical circumstances, where the General Intellect is as important to capital as fixed capital was before.

The Good Citizen and the Bad Militant

With the arrest and detention of sociologist Andrej Holm as part of a § 129a investigation by the feds in Germany on 31 July 2007, an interesting observation could be made with regard to AK Vorrat.

In Germany, law enforcements' legal means for infiltrating, surveilling and detaining political opponents have been steadily extended and increasingly enforced since the 1970s. The most prominent case is § 129 of the criminal code, dealing with criminal organizations and its 'big brothers' § 129a (terrorists organizations) plus § 129b (foreign terrorist organizations). These laws are basically stripping suspects from every last bit of their rights and have been used mostly by law enforcement to update their knowledge on leftist activists. Hardly any of the numerous 129a investigations made it to court. More than 90 per cent were silently shut down when enough information was gathered. Interestingly, the number of cases targeting the extreme right is almost zero.

So, Andrej Holm was (and is!) subject to obsessive surveillance, including his partner and children, and his huge social network. He was arrested under the suspicion of membership of a phantom-like militant group, funnily enough going under the same name: 'militante gruppe'. But not only Andrej was arrested. Along with him three other suspects were locked behind bars and stayed there much longer than he did.

By blogging about her everyday life as a partner of a suspected terrorist, Anne Roth (Holm's partner) for the first time gave insights into what so far has been the exclusive knowledge or experience of the radical left: a life completely under surveillance, the experience of a temporal totalitarianism so to speak. By using the Internet to mobilize the netizens and bloggers, Anne Roth made the case valuable for the media sphere. Fittingly, public awareness about the case was produced with the exact communication means that are under threat by data retention: Internet communication. She reported the latest disclosed surveillance measure, started inquiries about her phone that functioned strangely, mobilized hackers for expertise, and reached a large audience, including journalists from newspapers, radio and television. This led to a huge public interest in the wellbeing of Andrej but not in the wellbeing of any other person prosecuted under 129, 129a or b.

Why not? Because Andrej proved to have enough qualities to be regarded as a citizen, whereas most of the other suspects lacked the appeal to be seen as such. AK Vorrat regarded Andrej as a case of a good citizen who was mistaken for a terrorist, AK Vorrat helped to separate the black from the white sheep, the good citizen from the outcasts, even prior to any court ruling against the accused. In neglecting the principle of Habeas Corpus, AK Vorrat showed a strange disregard towards the liberal principles it is fighting for. Being concerned with preserving the clean image of the good, innocent citizen who protests for his or her legitimate rights, it missed out on another important part of its role: to fight detention without verdict.

Post-Fordist Privacy

Privacy has become one of the central issues of the current organization of capital and labour, as it is a means (among other things) to nurture the chatter of the multitude to come. Privacy can not be stripped of its relevance to the political economy, as post-Fordist labour is centred on communication and information. Once the privacy movement relates their trajectories to the current labour situation, an important, so far missing element would be brought into the political reflections on the multitude.

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Footnotes

1. A deeper analysis is undertaken in: Oliver Leistert, 'Data Retention in the European Union: When a Call Returns', *International Journal of Communication* 2 (2008), 925–935.
2. The multitude is an abstract term, a similitude of the working class. Besides that, it contains far more potentiality than the latter, as it stems from forms of life and not from commodity production. See Paolo Virno, *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life* (New York: Semiotext(e), 2004).

Tags

Activism, Media Society, Privacy, Labour

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