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Aspiring to Modernization. Trends of state surveillance in Portugal

Helena Machado e Catarina Frois

Introduction

In various countries throughout the world, the bureaucratic development of the modern states has been accompanied by the creation of identification systems whose purpose is to collect, store and manage personal and biometric data about its citizens. In this chapter we analyse the establishment of a national DNA database for criminal and civil forensic identification and the intention of implementing CCTV (closed-circuit television) in open areas on a national scale.

The comprehensive analysis of these processes in the Portuguese context is especially relevant due mainly to the fact that, on the one hand, we are considering a country with a long history of a political dictatorship in the twentieth century (1928- 1974) characterized by political and police repression and censorship and, on the other hand, a newly democratic state divided between the quest for modernization and uniformity by following the paths of surveillance implemented in other European countries (considered to be more advanced) while at the same time struggling with its own cultural and social specificities marked by scarce economic resources and low criminality rates.

From our point of view, it is intriguing that Portugal has a long and social history of citizens' apparently passive compliance with the state's requirements of collecting diverse sorts of personal identification data and, at the same time, both national and international studies suggest that public confidence in the state, the police and the justice system is weak in European terms (Cabral *et al.* 2003). In fact, this is one of the countries in which the majority of respondents consider that the institutions that are most affected by corruption in the country are politics, business, the police and the judiciary (Transparency International 2020).

We explore possible explanations for this phenomenon of a combination of low confidence in the state and in the criminal justice system with the absence of a public outcry over the state's mechanism of surveillance of its citizens. To do so, we develop a comprehensive approach to the phenomenon of public distrust of the state in the context of surveillance for civil and criminal purposes based on different methodologies in multi-sited research, namely the evolution of legal regulation pertaining to identification systems for civil and criminal investigation - databases containing fingerprints, criminal records and, since 2008, DNA profiles, accompanied by the use, since 2007, of CCTV in open areas.

Fully understanding the process of developing state surveillance mechanisms in Portugal - from video surveillance, to the mandatory request that all citizens carry an identification card and provide their fingerprints for civil purposes, to plans to develop a forensic genetic database with profiles of the entire population - requires paying close attention to this country's recent history, particularly the period extending from the mid-1970s up until the present. Besides allowing one to confirm the recurrence of the modernization discourse, this helps to highlight yet another significant aspect that is directly linked to the legacy of nearly four decades of political dictatorship. More than searching for a thematic correspondence between the past and the present, our approach is focused on revealing the existence of a whole underlying mindset. In other words, we are not necessarily concerned with establishing a direct analogy between a political and ideological regime that relied strongly on surveillance practices and the apparent direction taken by recent political measures, with the result that this would probably limit our inquiry to determining the extent to which the latter constitutes a continuation or a break with the former, leading ultimately to overly rigid categorizations. Instead, this perspective will rely on the premise of a more flexible relationship of action and reaction, in

which the past is continually called to bear on present events but nevertheless remains a strictly residual presence in contemporary democratic practice (Freire 2009). In the following sections we discuss the current development of state surveillance practices in Portugal, especially since 2005 when the state actively sought to rely on technological devices such as video surveillance and DNA technology to fight crime and to assure public safety and well-being.

Video surveillance

In Portugal, video surveillance in public spaces was initially conceived as an extraordinary measure, since its use - with regard to the invasion of privacy and its impact on the rights and freedoms that generally characterize modern democratic societies - could be justifiable only under exceptional circumstances. Whereas video surveillance had previously been restricted to confined spaces (e.g. commercial areas, gas stations and banks) and was managed by private security companies, in January 2005 Law No. 1/2005 authorized for the first time in the country the implementation of this technology in public spaces. It also gave the Public Security Police and the National Republican Guard the authority to monitor and register the images collected in these areas. Video surveillance is interpreted, within the spirit of Law No. 1/2005, as an auxiliary mechanism intended to help fight crime and improve police efficiency and performance. The promotion of this measure rests on the premise that the use of this device will have a significant impact by deterring and preventing criminality, and also that it will be an extremely reliable instrument for the identification of criminals in post-crime investigations.

Which guidelines should authorizations to use video surveillance cameras comply with in this particular context; that is, in public space? Again, according to the legislation, the guidelines must follow a principle of proportionality, defined by the following conditions: (1) such use is permissible "whenever this type of equipment proves the best suited to ensure security and public order and to prevent crimes, and always taking into account specific features of the prospective area under surveillance"; (2) "the probability and extent of interference with personal rights" must always be taken into account; (3) the use of concealed cameras is prohibited, and the installation of "video surveillance cameras must always imply the existence of a real threat to security and public order".

Ten requests for video surveillance in public areas were submitted between 2005 and 2010, out of which five were granted. By the end of 2010, only three were fully operational - in Oporto's and Coimbra's historic districts, as well as in Fatima's Sanctuary - while at Lisbon's Bairro Alto district, installation was underway but never saw the light of day. In fact, by the end of 2012, only two of these remain in operation, considering on the one hand that there are no funds to continue investing in this device at Oporto (where it was the Commercial Association and not the police or the City Council which underwrote the costs of the cameras), and, on the other hand, the external financial assistance programme that since 2011 has put an end to all future investments. As this data clearly indicates, even though the promulgation of the law that allowed installation of surveillance cameras in public areas dates back to the beginning of 2005, the first time such a system was effectively authorized to operate was in 2007. If we were to make an analysis based merely on the quantitative data, this trend could easily find a probable cause, especially if we followed the obvious rationale of the end served by video surveillance, its relation to crime rates and feelings of insecurity among the population. We would have to conclude that the decrease in these indicators had logically led to a diminished interest by the authorities in using surveillance cameras throughout Portuguese cities.

There was in fact a growing disinterest in these projects of video surveillance, but the reason is not so much bound up with fighting criminality - which is indeed low - or the necessity of this system, but instead with the obstacles met by these requests in their final stages, namely going through the Data Protection Authority's final seal of approval. The implementation of video surveillance in public areas from 2007 to 2012 was in fact a troubled process, as much in terms of its aspirations as of the roles played by the different entities responsible for conducting and executing it. Measures deemed imperative by the Ministry of Internal Affairs were sometimes trivialized by police forces, apparently

unwilling to admit that video surveillance was actually useful, or in any case reluctant to follow advice from external organisms on the proper performance of their own assignments. In addition, albeit the almost unconditional support of the Ministry's representatives - who incessantly encouraged projects and approved them - the fact remained that these did not always conform to the law, insofar as they did not meet some of its requirements regarding legitimately established goals and purposes.

The progress and outcome of consecutive requests revealed yet another obvious fact: the position of the Portuguese Data Protection Authority, whose power of decision was legally binding and final, emerged as being on principle against the use of such devices, especially in open areas. As the process developed, each of these actors' positions *vis-a-vis* the use of public video surveillance (even if not always assumed as such officially) gradually became more evident. An analysis of the details for this period concerning video surveillance proposals and its implementation in Portugal also revealed the diversity of proponents and specific objectives: some originated in professional associations interested in protecting their businesses or areas of business; others were initiated by Councils which advanced spontaneously with proposals of their own, later seeking the cooperation of local police forces on whose official reports the proposals' designs were ultimately based (Frois 2011, 2013, 2014).

There was, however, a fundamental change in this draft law: the binding decision power of the National Commission for Data Protection was removed, and from now on only the Minister of Internal Administration would have the power to apply the law wherever, whenever and for whatever reasons he or she deemed convenient. Since it was said that the National Commission for Data Protection acted as a "blocking force" in relation to proposals for the installation of video surveillance, with this change in the law it would only have a supervisory role in relation to technical requirements. The law was changed and, therefore, given *carte blanche* for the installation of video surveillance on public roads. However, let's remember that the slogans "modernization," "development," "progress," which marked the socialist legislatures of the previous decade, were replaced by others far less appealing. In the new economic and financial situation, the watchwords have become "cuts", "austerity", "sacrifices" in the face of bankruptcy. And the crisis also reached security policies: the reduction of funds allocated to public institutions, as well as the termination of projects that were underway, blocked new initiatives and promoted the reduction of spending. In this context, video surveillance on public roads, now free of institutional constraints, is no longer an "urgent" issue. The "fear and insecurity of the populations" were no longer governmental flags (Frois 2015).

Considering some discrepancies about the motives, main goals and even official positions regarding the use of CCTV in public areas in Portugal, and keeping in mind that the main argument for the use of this device is to act directly to relieve feelings of insecurity - by itself an ambiguous notion - we may ask ourselves: are we facing a case of pure political dispute between parties, government and institutions, using the *leitmotiv* of security as a pretext to maintain and somehow affirm their own power, in a struggle that is all but successful in terms of its initial and allegedly primary goal? This interrogation may be applied to other devices of the Portuguese state's surveillance apparatus (e.g. the establishment of a national DNA database for criminal and civil identification purposes), as we discuss in the next section.

The national forensic DNA database

On 2005, in the same year that Portuguese law allowed the use of video surveillance in public spaces, the newly elected socialist government announced the intention to create a genetic database of the entire population for civil identification purposes, which could also be used in criminal investigation work. The plan to create a universal genetic database announced by the government was presented as an important (scientific) tool that would improve "the fight against crime and criminal justice more efficiently"¹. The announcement stated that the establishment of an "integrated criminal information

¹ Programa do XVII Governo Constitucional. Presidencia do Conselho de Ministros (Programme of the XVII Constitutional Government. Presidency of the Council of Ministries). Available at <http://www.portugal.gov>

system" was needed that would allow for links to be made between the various existing public databases containing information about citizens.

The political announcement of the plans to establish a universal forensic DNA database in Portugal also stated that the criminal police would not be the custodians of the genetic database. On various occasions during the two years that followed, representatives from the Ministry of Justice emphasized the idea that the police would not have direct access to genetic information for the purposes of criminal investigation, to ensure adequate protection for citizens with regard to possible abuses of the DNA database. This political concern seems to reflect the weight of the fear of returning to the past authoritarian regime based on police power and actions of surveillance. If this plan had been implemented, Portugal would have been the first country in the world to have a centralized DNA database of its entire population for civil and criminal identification purposes.

The government's intention to create a universal DNA database seems to have aroused little interest among the public, and the same could be applied to the implementation of CCTV in public areas described above. In addition, media coverage of the subject was mainly neutral and descriptive in tone, and limited to presenting regular updates on the draft bill, the parliamentary debate and the setting up of the database (Aguas *et al.* 2009; Boavida 2005). Although this plan never passed into law, its political intent resonates with the long social history of the state collecting personal identification data in Portugal.

The idea of creating a universal database was transformed into one of the most restrictive laws in Europe in terms of the criteria for DNA profile inclusion and removal for criminal investigation purposes (Machado and Prainsack 2012; Machado and Silva 2010). Law 5/2008, which approved the creation of a DNA profile database, stipulated that the body responsible for its operations was the National Institute of Forensic Medicine (*Instituto Nacional de Medicina Legal*), which processes the DNA samples (Article 16 of Law 5/2008). The Institute is accountable to the Ministry of Justice (the custodian of the DNA database) and is responsible for forwarding results to the competent judicial authorities (Article 19 of Law 5/2008). The DNA profiles are inserted into the DNA database in case of convicted offenders receiving a sentence of three years or more, and if insertion is ordered by a judge and the profiles are deleted with the expungement of the criminal record (maximum ten years after serving a prison sentence). All the activities developed by the NILM are formally supervised and controlled by an independent Supervisory Body (*Conselho de Fiscalização*) with powers of authority, nominated by the Portuguese Parliament.

In May 2012, the press announced that fewer than 600 profiles were included in the DNA database. Although in recent years the Portuguese DNA database has expanded the number of profiles, it is still one of the European countries with the smallest DNA databases. According to the European Network of Forensic Science Institutes (ENFSI), at June 2016, the database had 5,339 profiles from individuals, which represents just 0,05 per cent of the resident population in Portugal. More recent data shows that, at 31 December 2018, the database contained 9,128 profiles from individuals convicted of a crime, which represents 0.09 per cent of the population (of 10,263,220²) (Conselho de Fiscalização Base de Dados de Perfis de ADN, 2019). Apparent causes for this modest growth are associated with the restrictive nature of the legislation and financial costs of constructing the DNA database. The development of the DNA database has to be embedded in a particular project of nationhood that is linked to the aspiration to modernize through technology. This project is, nevertheless, challenged by cultural ambiguities: on one side, the judiciary powers want to 'modernize' the criminal justice system by resorting to forensic DNA technologies; on the other, judges and public prosecutors are orientated to implementing a highly protective regime that aims to safeguard the rights of citizens from potential abuses by the police forces (Amelung and Machado, 2020; Amelung, Granja and Machado, 2020; Machado and Silva, 2010).

[.pt/pt/o-governo/arquivo-historico/governos-constitucionais/cg17/programa-do-governo/programa-do-xviii-governo-constitucional.aspx](https://www.governo.pt/o-governo/arquivo-historico/governos-constitucionais/cg17/programa-do-governo/programa-do-xviii-governo-constitucional.aspx).

² Data available here: <https://www.pordata.pt/Portugal> (last visited 22 March 2021).

More successful than the attempt to expand video surveillance throughout the country and to develop the DNA database for crime-fighting purposes was the fact that in 2008, the so-called citizen's card replaced the traditional identity cards. Carrying a citizen's card, which was now available in smart card format, remained compulsory. In addition to replacing the previous identity card, it also took on the functions of the previous taxpayer card, social security card, electoral registration card and National Health Service card. The citizen's card also bears a photograph, fingerprints taken from the left and right index finger, address, and a digital signature. Portuguese law allows fingerprints to be taken from all Portuguese citizens for the purpose of issuing a citizen's card or passport, and for it to be cross-referenced with fingerprints found at crime scenes. Equally, criminal police investigating bodies can take fingerprints, photographs or other items of a "similar nature" for use in identifying a suspect. However, the law does not specify what is meant by evidence of a "similar nature", and it is therefore not clear whether the collection of samples for DNA profiling can be included in this category (Moniz 2009: 3).

Another important identification technique for criminal investigation is the databases for criminal identification held by the General Board of Administration of Justice (*Direcção-Geral da Administração da Justiça*) which contain criminal registers (*Registo Criminal*), with information on all criminal convictions of Portuguese citizens, and fingerprints of convicted individuals. These databases are governed by Law 57/98 of 18 August 1998, which defines the general principles regarding the organization and functioning of criminal identification.

The discourse that bridges intentions and actions becomes all the more effective as it is repeated in the public arena, a connection that in this case is established between politicians and the population through the media, additionally becoming more entrenched in its convictions as it is met with opposition. One would therefore be wrong to restrict the idea of developing surveillance apparatus (for instance, installing video surveillance in major urban areas or collecting genetic information from citizens) to a matter of crime-fighting policies, ignoring the fact that we are dealing with policy making in the broader sense, and that we have the problem of its meta-discourse. Roughly speaking, this is how it operates: a given initiative is conceived with a particular purpose, and as soon as it is announced begins to produce effects, even when it is not carried through. This does not amount to deception or dissimulation, but is simply a case of meta-discourse, of pronouncing intentions and goals that do not always have to be realized.

Notwithstanding the diversity of motivations driving the different entities involved in the Portuguese case, it is crucial not to lose sight of the legal framework that enabled it - first and foremost the general law which regulates public video surveillance and the DNA database - and the governmental plans responsible for conferring to it a national scope. It has already been stated that the appearance of video surveillance in public spaces in Portugal, as well the plans to establish a universal DNA database for criminal and civil identification, emerged within the context of a political design bent on introducing advanced technology in all areas of state activity. It must therefore be understood as an instrument of modernization (one among many) intended to raise this country to levels of development that seek to emulate the models of more advanced European countries.

This aspect of permanent comparison and imitation, mainly through the belief that technology will automatically improve efficiency in public security and in crime fighting, follows the kind of simple reasoning that may be summed up as follows. If countries such as France, the United Kingdom, Italy or the Netherlands use these monitoring devices to aid crime fighting, why shouldn't the same technologies be used in Portugal? This task of emptying phenomena of their context carries with it other consequences, and the greater the number of actors involved, the greater the chance there is of misunderstanding and miscommunication throughout the process. The result is that as each institution follows its own political, cultural and economic agendas, the diagnosis - originally intended to make

sense of previously scattered data - becomes itself incoherent and unbalanced.

Besides the political enthusiasm regarding the potential benefits to increase the public safety and success in crime fighting and prevention that conflates with a quest for modernization, our data also indicate that surveillance identification systems have been implemented in Portugal without a public debate that actually involves the common citizen. The debate around the implementation or expansion of the surveillance mechanism has been done in a closed circuit, involving mostly experts in the areas of law, bioethics, politics and crime investigation (Machado and Silva 2010, 2019). In addition, national and international polls indicate that Portuguese citizens see state institutions and the justice system as being vulnerable to pressure from powerful people and exposed to corruption, and thus holding little guarantee of confidentiality and security of information found by the criminal investigation agencies.

Moreover, there is the coexistence of official identification systems with more informal databases held by the police. This scenario suggests that the uses of surveillance mechanism are never neutral, and are deeply conditioned by cultural and historical contexts of the management of information. As we can learn from reading the works of Susana Durão (2010) on the history and evolution of the Public Security Police in Portugal, in the years between the end of the 1980s and the second half of the 1990s, there was a major effort by the state to change the previous perception that related police forces with excessive use of violence, and generally viewed its agents as unprofessional and undertrained. Throughout this decade there was a huge investment in providing Portuguese police forces with better training, namely members of the Public Security Police and the National Republican Guard. Due to their greater contact with the general population, these forces were also more strongly represented in the popular imagination with the authoritarianism of the previous regime, and thus a symbol of everything the democratic revolution had fought against.

In addition, there is the question of the proportionality between the possible benefits of using technological devices for crime fighting and the prevention of criminality and its economic costs in a country facing serious economic problems and with a relatively low level of serious crime rates. Nevertheless, the conservative ideologies claiming more public security may well increase in breadth and scope over the next few years. The ideology of neutrality and truth of science and technology may be used to garner the confidence of citizens (Jasanoff 2004). In these current turbulent and ambiguous times, we need to give voice to civic accountability that fosters participatory democracy to best address these complexities.

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