

The Secret Activity of the State, from *Raison d'Etat* to the Rule of Law

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ABSTRACT

Since the question of the compatibility of the secret exercise of intelligence services with the rule of law cannot be resolved by recourse to public policies and legal frameworks alone, we need to ask ourselves how secrecy is defined in politics. A detour into the theories of the *raison d'État* allows us to measure what separates us from the baroque state, but also in what way the latter can instruct us on the meaning of secrecy. We can thus show that, in the liberal state, secrecy can be apprehended neither through the paradigm of visibility, nor only through that of temporality. Nothing, therefore, dispenses us from a common political reflection on the common interest in choosing the targets of the state's secret surveillance.

Keywords: rule of law, reason of state, intelligence, secrecy, security, surveillance

La actividad secreta del Estado, de la *raison d'état* al Estado de derecho

RESUMEN

Dado que la cuestión de la compatibilidad del ejercicio secreto de los servicios de inteligencia con el estado de derecho no puede resolverse recurriendo únicamente a políticas públicas y marcos legales, debemos preguntarnos cómo se define el secreto en política. Un rodeo por las teorías de la razón de Estado nos permite medir lo que nos separa del Estado barroco, pero también de qué manera éste puede instruirnos sobre el significado del secreto. Podemos así mostrar que, en el Estado liberal, el secreto no puede ser comprendido ni a través del paradigma de la visibilidad, ni sólo a través del de la temporalidad. Por lo tanto, nada nos dispensa de una reflexión política común sobre el interés común en elegir los objetivos de la vigilancia secreta del Estado.

Palabras clave: estado de derecho, razón de Estado, inteligencia, secreto, seguridad, vigilancia

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国家的秘密活动：从国家理由到法治

摘要

鉴于情报服务的秘密运作与法治的兼容性问题不能仅通过诉诸公共政策和法律框架来解决，我们需要探究一个问题，即政治是如何定义保密的。通过研究国家理由(*raison d'État*)理论，我们能衡量当前国家与过度官僚化的国家(*baroque state*)的区别，以及后者如何能教导我们保密的意义。因此，我们表明，在自由国家中，保密既不能通过可见性的范式来理解，也不能仅通过时间性的范式来理解。因此，没有什么可以免除我们对“选择国家秘密监视目标的共同利益”进行共同的政治思考。

关键词：法治，国家理由，情报，保密，安全，监视

That the rule of law does not exclude the use of intelligence activities as a matter of principle seems to be demonstrated by the state of war. As soon as a democracy or republican state is threatened, it finds itself, like any other state,² having to defend itself. As Clausewitz puts it, in a state of war, intelligence is not just an auxiliary technique, but a foundation: “the foundation on which our own ideas and actions are built.”³ It was not without reason that in 2013, following Edward Snowden’s revelations of secret U.S. surveillance programs targeting European politicians, there was outrage at inadmissible practices between allies, i.e., permissible between enemies.⁴

Yet we seem to be coming up against a possible internal contradiction in the rule of law. While the liberal state is, from the outset, a state defined by the limits of its action,⁵ in their mutual relations, states are like powers in relation to each other. The liberal state limits its power but must remain a power. The solution of

2 Here, I adopt the post-World War II understanding of the rule of law as a legal order dedicated to the protection of rights and freedoms. The notion is therefore not axiologically neutral, but on the contrary, in this sense, the rule of law is virtually synonymous with the liberal state. In the words of Jacques Chevallier: “L’État de droit n’est pas l’État de n’importe quel droit” (*L’État de droit*, 7^{ème} édition, LGDJ, 2023, p. 8).

3 Carl von Clausewitz, *On War* (1832–1834), 1^{ère} part, I, I, 6, trans. D. Naville, Minuit, 1955, p. 107.

4 Martin Untersinger and Damien Leloup, “Comment des dirigeants européens, dont Angela Merkel, ont été espionnés par la NSA depuis le Danemark,” *Le Monde*, May 30, 2021 https://www.lemonde.fr/pixels/article/2021/05/30/comment-des-dirigeants-europeens-ont-ete-espionnes-par-la-nsa-depuis-le-danemark_6082102_4408996.html.

5 Wilhelm von Humboldt, *Essay on the Limits of State Action* (1972), trans. H. Chrétien (1867), *Les belles lettres*, 2004, John Stuart Mill, *De la liberté*, (1859), trans. L. Lenglet, Gallimard, coll. “folio,” Michel Foucault, *Naissance de la biopolitique*, Cours au collège de France, 1978–1979, Gallimard-Seuil, 2004, lessons 1 and 2.

limiting the power of the state in internal affairs in order to develop it in external affairs is rendered futile by the existence of spies of opposing external powers living clandestinely in society. Intelligence services are needed to track the surveillance activities of external powers internally. But then, the form of government of a state (democracy, monarchy, or mixed regime) and the fact that it is governed by laws aimed at the general interest or by the particular interest of a man or a caste apparently makes no difference to intelligence activity. While not incompatible with the rule of law, intelligence activity does not appear to be bound to it by any link of essence. On the contrary, it is in some ways a “trans-constitutional” specificity. There would be no such thing as double agents and spies if, on either side of the rule of law, we were dealing with fundamentally different professions. If democracy requires that we sometimes take up arms for them, and that, in order to use them, we know more or less how to target them thanks to verified information, then, without waiting for a state of war, halfway between diplomacy and war, it seems in keeping with the rule of law that there should exist what is commonly called a “third way,” that of intelligence. In this way, liberal states monitor the populations of states that are neither entirely enemies—and sometimes even diplomatic friends—nor entirely friends, since they have potentially divergent interests. The concept of national security is the instrument used to legitimize intelligence within the rule of law.

This principle, formally defined by the concept of national security, does not, however, resolve the tension inherent in the rule of law when it takes this “third path.” It’s difficult to draw a line between the uncomplicated *raison d’État*, which doesn’t shy away from circular reasoning by assuring the world’s citizens that they are not being watched unless they pose a threat to national security (but you have to watch them to find out), and compliance with the rule of law, which is based on the liberal values formulated by Benjamin Constant, of an intolerance of the individual, independent in his or her private life, to state surveillance of his or her deeds.⁶ The secret dimension of intelligence is particularly problematic. Apart from any scandals or “dirty tricks,” the mere fact of carrying out surveillance, even as close as possible to open sources, is a matter of secrecy, since the interest in the object under surveillance is concealed. Putting intelligence activities into public policy, which is the solution adopted by public authorities in liberal democracies to reconcile the rule of law and intelligence, comes up against the problem of secrecy. We can integrate the so-called secret services into the ordinary workings of the State and consider their agents to be civil servants like any others, but we cannot overcome the fantastical dimension of espionage, as well as its reality. The term espionage may be rejected by intelligence specialists, but it has the advantage of designating secret surveillance and clandestine actions. Of course, to speak of intelligence and not espionage is not just a change of vocabulary but implies a

6 Benjamin Constant, “De la liberté des anciens comparée à celle des modernes” (1819), *Écrits*, Gallimard, “folio” series, pp. 594-595.

genuine transformation in the status and processing of information, while sobering up those who seek the thrill of transgression through covert action.⁷ Nevertheless, the trivialization of intelligence as an ordinary function of the State overlooks its specificity, which inevitably contains a degree of secrecy. In his doctoral thesis in political science, Benjamin Oudet showed that “intelligence remains a special object in terms of its aims and the—secret—instruments it uses.”⁸ The fact that the secret services are not secret, and that the recruitment and assessment of secret agents obey public and well-known procedures, does not mean that we can reduce the place of secrecy in the intelligence business, quite simply because it is constitutive of this work.

This being the case, respect for the rule of law is not self-evident. By definition, framing clandestine activities by law represents a challenge for the rule of law. The aim of this article is to go beyond the reasons often given for taking up this challenge. Indeed, if the problem is so robust, it is not only for ideological reasons (restraint on the part of certain political parties), or technical reasons (difficulties in implementing control of an opaque zone), but for philosophical reasons that have to do with the definition of secrecy. The aim is to show that a paradigm shift is needed to understand secrecy, by looking for paradoxical lessons to be learned from the thinkers of *raison d'État*. The transposition of Baroque thinking on secrecy to the French republican culture of the rule of law may give rise to a reflection not on the legitimacy of the secret aims of the state, but on the conformity or otherwise of the secret aims of the state to institutional legitimacy.

A Secret is Nothing Hidden, from the Paradigm of Visibility to that of Encryption

Looking for lessons on secrecy in the French absolutist tradition could lead us to believe that we are giving credence to the idea of a violent state fund. In the name of political realism, we would resign ourselves, more or less cynically, to these “great blows of authority” whose end Montesquieu had already foreseen.⁹ On the contrary, we must treat the baroque state as we would the repressed

7 For Olivier Chopin, “espionage and intelligence are not exactly synonymous.” While they designate a similar activity (the extraction of information), their historical depth is not the same. While espionage can be considered to have existed as soon as there was state power, as far back as antiquity in Egypt and China, intelligence dates back to the modern state, from the 17th century in Europe. In a way, it is “institutionalized, rationalized and bureaucratized espionage,” Olivier Chopin, entry “Renseignement,” in Benoît Durieux, Jeangène Vilmer, Frédéric Ramel, *Dictionnaire de la guerre et de la paix*, PUF, coll. “Quadrige,” 2017, p. 1175.

8 Benjamin Oudet, *D'une “stratégie” à une “politique publique” de renseignement, Changement et trajectoire de réformes en France. 1989–2020*, thesis for the doctorate in political science directed by Jean-Vincent Holeindre and Yves Surel, defended at the University of Poitiers, December 17, 2021, p. 503.

9 Montesquieu, *De l'esprit des lois* (1648), vol. II, XXI, 20, Flammarion, coll. “GF” p. 64.

in a psychoanalytic treatment, as knowledge whose meaning must be interpreted to become compatible with present reality.

From the absolute monarchy of Louis XIII to Joseph Fouché's Ministry of Police under the First Empire, State secrecy was conceived in reference to Machiavelli. To account for this, it seems necessary to return to the original meaning of *raison d'État*, which refers not to the art of governing the population, but to that of safeguarding the State. It develops from the 17th century onwards from the reading of Machiavelli and the interpretations of his texts—himself not using the term *raison d'État*—by Richelieu, Mazarin, or Louis XIV.¹⁰ In this tradition, Mazarin's librarian Gabriel Naudé, a good connoisseur of Machiavelli, particularly elaborated the notion of secrecy in *Considérations sur les coups d'état* in 1639. Although Louis XIV created the first police force in 1667 with absolutism in mind, secret surveillance was aimed more at what Machiavelli called the "Great Ones." According to Machiavelli, they alone had the power to hatch conspiracies: "It is of these that the prince must guard himself, and fear them as if they were declared enemies, for always, in adversity, they will contribute to his ruin."¹¹ For Louis XVI, the Fronde was indeed the greatest of evils.

For Naudé, the question of secrecy is linked to a theory of state action based on necessity,¹² a notion central to Machiavelli. For him, recourse to secrecy is not a transgression. Anything that contravenes common morality is considered transgressive. However, in accordance with Machiavellian teaching, "the justice, virtue and probity of the sovereign travels differently from that of private individuals; it has wider and freer paths."¹³ The freedom we're talking about here means acting without waiting for the verdict of the judicial institution, by striking the factious. Such a coup—a coup not *against* the state, but *of* the state—must remain secret. A *coup d'état* is the decision by which a prince decides a question. To prepare for it, it is necessary to spy and conceal, to "set up secret practices and intelligences."¹⁴ But to remain consistent with a theory of political action, we need to stop thinking of secrecy in the same way. Secret information is not a hidden object, locked away in a chest or fortress, as Gabriel Naudé puts it, referring to the two etymologies of *arcanum* ("arx" fortress, "arca" chest).¹⁵

To identify "*secretum*" and "*arcanum*" is to refer solely to the paradigm of visibility. What the Baroque state teaches us is that secrecy should not be un-

10 Étienne Thuau, *Raison d'État et pensée politique à l'époque de Richelieu*, Paris, Armand Colin, 1966, republished by Albin Michel, coll. "Bibliothèque de l'évolution de l'humanité," 2000; Michel Senellart, *Machiavellianism and the Reason of State*, Paris, PUF, coll. "Philosophies," 1989.

11 Nicolas Machiavelli, *The Prince*, (1513), Chapter 9, trans. T. Ménissier, Hatier, 1999, p. 47.

12 Marina Marietti, *Machiavelli, le penseur de la nécessité*, Payot, 2009.

13 Gabriel Naudé, *Considérations politiques sur les coups d'État* (1639), Éditions de Paris, 1988, p. 88.

14 Ibid, p. 89.

15 Ibid. p. 90.

derstood in the categories of visibility, since visibility authorizes shadow plays, illusions and false pretenses that unmask while masking, and mask while showing.¹⁶ Secrecy, then, does not refer to what is hidden from view, but to what is in front of our eyes without our being able to understand it. A theory of secrecy that would justify secrecy by attempting to formulate the rules for its proper political use would inevitably enter into contradiction with itself and would opacify the question of secrecy instead of making it clear. Secrecy cannot be brought to light because it is not a shadow.

If the paradigm of state secrecy cannot be that of visibility, it is because it concerns language itself. In his reading of Gabriel Naudé, Michel Senellart notes that the real hiding place of state action is in writing, and that it is sealed by code. He recalls the practice of the king's seal, which enabled the king to send secret letters¹⁷ as early as the end of the 13th century, as well as the rise of cryptography in the 17th century. In his view, cryptography is the paradigm for the concealment of court treatises by Baltasar Gracián or Cardinal de Mazarin. A secret is not revealed but deciphered. To lift the veil on a secret, like pulling an object from a chest, is to leave the enigma of its meaning unresolved. Politics is a symbolic universe. The prince needs secretaries who decipher and encrypt.

But if secrecy is nothing hidden, and if we have to move from the paradigm of visibility to the paradigm of language, then the secret of politics ultimately lies in the lability of human desires. For this reason, every state is precarious, and the source of its fragile stability lies in the state's secret moves. To explain this idea, which is in line with Machiavelli's philosophy, Naudé conjures up the image of a hidden spring, as the Nile was at the time: "[F]or just as the peoples neighboring its source drew a thousand conveniences from it without having any knowledge of its origin, so must the peoples admire the happy effects of these master strokes without knowing anything about their causes and various springs."¹⁸ If this is the case, secrecy must be understood within the framework of political action, namely temporality.

The Secret: Extra Time

The theory of *raison d'État*, a thought that has been suppressed in the politics of the rule of law—in France at least—contains useful lessons for understanding state secrecy, by pointing us in the direction of a solution other than transparency. In the rule of law, controlling the secret dimension of intelligence activity is often expressed in terms of the quest for transparency. But if we

16 Louis Marin, "Pour une théorie baroque de l'action politique," preface to *Considérations politiques sur les coups d'État*, by Gabriel Naudé, Éditions de Paris, 1988.

17 Michel Senellart, *Les arts de gouverner, Du regimen médiéval au concept de gouvernement*, Seuil, 1995, p. 255.

18 Gabriel Naudé, *Considérations politiques sur les coups d'état*, Op. cit. p. 90–91.

follow Naudé, the imperative of transparency condemns us to a *mise en abyme*, like the painted vaults of Baroque chapels that imitate celestial clarity to infinity. Transparency cloaks secrecy in a veil that becomes ever more opaque as the procedures for concealing it progress. How better to conceal the secret activity of the state than by making people believe that there's nothing to see? Transparency is the best cover for secrecy. The paradigm of visibility is particularly inoperative today, when more and more open information is available to those who plan clandestine action, and when secret state action is the subject of much debate. This paradox is underlined by Olivier Chopin and Benjamin Oudet, who show that it is even "one of the best-documented dimensions of the literature on intelligence."¹⁹ This doesn't mean that secrecy doesn't exist, but that we need to move beyond the problem of the visible and the invisible in order to grasp it.

If what remains encrypted in political action lies in the circumstances that frame it, and if the secrecy of the state is in fact no more than an attempt to establish a little stability in the general instability of human affairs, then it is within the framework of temporality that we must examine the compatibility of the secret dimension of politics with the rule of law. The power of secrecy lies in its relationship with time. According to the Latin etymology of "*secretus*," what is secret is what is set aside. Before being a ruse or a calculation, secrecy is embedded in a series of means and ends. Intelligence work resists transparency because all action is a process. The need for opacity is redoubled in the case of intelligence services by the fact that the process is strategic. This is the conclusion reached by Jean-Paul Brodeur in his analysis of the high police: "Insofar as human practice is ordered by ends, it is embodied in the form of a *strategy* for which opacity and ambiguity are a deliberately sought-after and maintained dimension."²⁰

In the case of intelligence, the strategy is to prevent acts intended to destroy the company or one of its parts. Since the early 2000s, the risks run by companies targeted by jihadist terrorism have highlighted this dimension of secrecy. Whether we're talking about the World Trade Center in New York in 2001 or the Bataclan in Paris in 2015, the question is always whether the attacks could have been known "before" the act was carried out. When the act is carried out, the temporal margin of secrecy is on the side of the attackers; when it is thwarted, the secret services gain the time they need to achieve the desired ends, by thwarting the planned attack, for the least controversial ends, or by resorting to targeted eliminations.²¹ Power relationships are always temporal. This is particularly true of covert state action. The clandestine activities of the secret services are designed to give state

19 Olivier Chopin and Benjamin Oudet, *Renseignement et sécurité*, Armand Colin, 2016, 2^{ème} ed. 2019, p. 137.

20 Jean-Paul Brodeur, *Les visages de la police*, Montreal, Presses de l'Université de Montréal, 2003, p. 33.

21 Jean-Baptiste Jeangène Vilmer, "Are targeted eliminations legal?" *Défense & Sécurité Internationale*, special issue no. 47, April-May 2016, pp. 60-62.

action extra time. The power of secrecy lies in the extra time it gives us to act without obstacle, by deception, and without having to use force.²² Secrecy protects this advance.

From this point of view, secrecy is merely a temporal technical clause required by the art of governing. To govern, therefore, we need to know, as knowledge is used to predict. If intelligence, particularly political intelligence, is used to govern, it seems to be in the name of the idea that to govern is, above all, to foresee. Intelligence is not simply information, but information that teaches someone something, without being reduced to mere teaching, since it is linked to action, subordinate to it, or involved in it, “targeted.” This is the challenge of analysis in the intelligence cycle.²³ Collecting information is not enough; analyzed information is useful for and through political action. If covert action is feared, it’s because the opposite is also true: anticipating and foreseeing is the same as governing. The point of placing recourse to secrecy within the framework of necessary foresight of the act of governing is certainly to rid political decision-making of the suspicion of *raison d’État*. By taking the logic of predictability to its logical conclusion, calculation gradually loses its sense of stratagem and takes on that of foresight. In this way, it could truly serve as an aid to political decision-making and earn its name as the “political science of state secrecy.”²⁴ But that’s without taking into account the fact that the demand for intelligence is never indeterminate. It always responds to a problem. Like any request, the demand for intelligence is apt to get carried away. A demand is never satisfied, but always wants more, and the demand for information is no exception to the rule.

The real advantage of thinking of secrecy as a temporal modality of state action is that it makes control easier. On the one hand, many state secrets dissipate of their own accord once the need for concealment has disappeared. The truth of a state secret is not known until much later, but it is known. Honoré de Balzac’s novel *Une ténébreuse affaire* (1841) closes with such a remark. The novelist doesn’t explain how the secret of the plot hatched by the deputies of Napoleon’s Minister of Police, Joseph Fouché, is dispelled, the important thing being to understand that Corentin and Peyrade are eventually unmasked ... by the passage of time. Time makes secrets, but it also undoes them. Yet you can’t always count on it. Some secrets last longer than necessary, even when they are not kept quiet, be-

22 Jean-Vincent Holeindre, *La ruse et la force, Une autre histoire de la stratégie*, Perrin, 2017.

23 Traditionally, there were three stages in the production of intelligence (gathering information, analyzing its veracity, and assessing its usefulness). Fouché already mentioned them in his letter to the prefects of March 31, 1815. Today, under the influence of American historian Sherman Kent, the idea has become more complex (Olivier Chopin and Benjamin Oudet, *Renseignement et sécurité*, op. cit. 49-53). We can see that the “cycle” begins with a demand from political decision-makers, and that this demand is constantly rekindled by the dissemination of intelligence gathered, then processed and analyzed—hence the cycle.

24 Alain Dewerpe, *Espion, Une anthropologie historique du secret d’État contemporain*, Gallimard, 1994, p. 223.

cause they conceal clandestine action on the bangs of legality, or because crimes have been covered up. Some secrets never dissipate. This is the case when those involved take the secret with them to their deaths. For example, the kidnapping of Moroccan left-wing leader Mehdi Ben Barka on French territory on October 29, 1965, probably with the complicity of a French secret service informer, and the manipulative use of two police officers from the Prefecture de Police, will most likely remain unresolved.²⁵

In matters of state that require the use of a temporal margin of secrecy, the solution adopted by the rule of law is to legislate on the duration of secrecy. When secrecy has become unnecessary, secret information can be declassified. In the case of human intelligence, classification periods take into account the need to protect sources. It must be possible to adjust the declassification period for secret information to the specific nature of clandestine action.²⁶ This solution is not without its drawbacks either, as declassification can occur at a time when the values that governed covert action are no longer recognized. John Le Carré's 2017 fiction, *The Legacy of Spies*, depicts the democratic reckoning of a loyal and competent British secret service agent who was responsible for clandestine agents in East Germany. Fifty years after the death of one of them, after the fall of the Berlin Wall and the end of the Cold War, the sacrifice of human lives in the fight against communist regimes seems incomprehensible.²⁷

The paradigm of temporality no more blunts the fascinating power of secrecy than that of visibility. The fantasy of espionage is not just the metaphor of the eye that sees the invisible, but of a truncated truth that presents itself as a narrative to be reconstituted in its temporal unfolding. This is how Foucault interprets Sophocles' *Œdipe-Roi*, the first known *thriller*, according to Régis Messac.²⁸ The fortune-teller Tiresias is one step ahead of Oedipus. He knows the secret and launches the investigation, revealing that he is the cause of Thebes' misfortune. Information is given in "halves," forcing us to retrace the course of the story, to seek out the agents of the secret action (notably the servant charged with abandoning Oedipus), witnesses (the shepherd who finds him and entrusts him to the king of Corinth). Foucault points out that the logic of the investigation corresponds to the workings of the Greek *sumbolon*, the tessera which is divided into two halves.²⁹ Crypto-history, or the reading of history in terms of plots and conspiracies, is based on the belief that we can find the other half of the truth by going from

25 Bernard Violet, *L'affaire Ben Barka*, Fayard, 1991, republished in the "Points" series.

26 Jean-Claude Cousseran and Philippe Hayez, *Nouvelles leçons sur le renseignement*, Odile Jacob, 2015, reprinted 2021, p. 385.

27 John Le Carré, *Legacy of Spies* (2017), trans. I. Perrin, Seuil, 2018.

28 Régis Messac, *Le Detectiv Novel et la naissance de la pensée scientifique*, Honoré Champion, 1929, p. 50.

29 Michel Foucault, "La vérité et les formes juridiques" (1974), *Dits et Écrits*, texte 139, Gallimard-Seuil, II, p. 560.

question to question. In the belief in conspiracies, any ignorance of the causes is blamed on a secret plot. After major attacks, conspiracy-mongering is always the order of the day. The secret services are the prime target of conspiracy beliefs, as if they contained the truth of politics, as if we could unify what always appears in incomplete and fragmented form. Our inability to symbolize power leads us to believe in an artificial factory of politics, rather than in the indeterminacy of action and the impossible mastery of politics.³⁰ Explanation through secrecy is driven by a desire to find meaning, in a totalizing, all-encompassing and closed way, whereas in the real world, we are dealing above all with the failure of meaning. Where there are real enigmas and hard-to-understand stories, the conspiracist asserts his ability to provide an explanation. Conspiracy thinking expresses a need to believe in a timeline, as if everything that happens were predictable. It's a kind of retrospective anticipation. It's astonishing to see the emptiness of secrecy, that missing part that's always cut in half, become a higher principle of explanation. This is not to say that there is no real conspiracy, or that we should denounce conspiracies without understanding their logic. As Michel Dobry has shown, we can disagree with "conspiratorial *representations* of social life," while taking their existence into account in order to explain them.³¹ There are two possible explanations. Firstly, when we can't symbolize, the imaginary takes over. The imaginary of power, in its belief in widespread conspiracies, rejects the emptiness inherent in politics. This is why it is part of the discourse of authoritarian political parties, which envy the power of secrecy insofar as it seems to them to be the prerogative of a strong state, the antithesis of the rule of law. Secondly, living in an emergency mode of temporality, which is currently the preferred mode,³² encourages the belief in the existence of conspiracies and undermines the rule of law. Secret action is special action, part of the most accidental course of events. In Baroque thought, *the coup d'état* was always justified by the urgency to act. Urgency always presents itself as a lack of time. Even in the rule of law, when there is urgency, secrecy is required, because it is the only corrective to the absence of time. Secrecy gives back time to those who have none.

Secrecy both protects us and threatens us. In temporal terms, secrecy is a condition of *kairos*, of the right moment to act. It protects us when we ourselves must remain secret. The secrecy of sources in journalism, the secrecy of investigations during legal proceedings, the protection of the identity of those who have given evidence in criminal or terrorist cases show us that secrecy is not reserved

30 Hélène L'Heuillet, "Le renseignement ou l'impossible maîtrise de la politique," *Les cahiers de la sécurité intérieure*, issue 30, fourth quarter 1997, pp. 103-118.

31 Michel Dobry, "Le renseignement dans les démocraties occidentales. Quelques pistes pour l'identification d'un objet flou," *Les Cahiers de la sécurité intérieure*, issue 30, fourth quarter 1997, p. 62.

32 Rosa, Hartmut. *Accélération, Une critique sociale du temps*, translated from the German by Didier Renault, Paris, La découverte, 2010; Christophe Bouton, *Le Temps de l'urgence*, Paris, Le Bord de l'eau, 2013.

for the monarchy, that it is not anti-democratic, but is a condition of both state and personal action. Yet we are also the secret hostages of those who keep secrets from us.

If the respective paradigms of visibility and temporality are equally incapable of fully resolving the question of the compatibility of secret action with the rule of law, all that remains is to attempt to define the place of secrecy in the politics of the liberal state. This means defining the limits of permissible secrecy and those of abuses of power that are intolerable under the rule of law. Insofar as the collection and analysis of information required for intelligence work is based on surveillance, the question becomes who can and must be monitored in the liberal state.

Limits to State Surveillance under the Rule of Law

The question of surveillance has taken on a new urgency today, thanks to the possibilities offered by digital technologies, as if the program prescribed by Louis XIV to the Dauphin had become a reality: “to have our eyes open to the whole world; to learn at all hours the news of all provinces and all nations, the secrets of all courts, the moods and weaknesses of all princes and all foreign ministers; to be informed of an infinite number of things of which we are thought to be ignorant; to penetrate among our subjects what we do not know. Of all courts, the moods and weaknesses of all princes and foreign ministers; to be informed of an infinite number of things that we are believed to be ignorant of; to penetrate among our subjects what they hide from us with the greatest care; to discover the most remote views of our own courtiers, their most obscure interests.”³³ Admittedly, the abundance of sources doesn't make it easy to process them, but the fact remains that the multiplicity of personal data voluntarily and inadvertently supplied by Internet users facilitates social control in a way that would probably have made the thinkers of *raison d'État* dream. What transforms open *data* into elements of covert surveillance lies in the political demand to target this or that section of the population.

Far from being justified by concern for the state alone - since the state is not supposed to be its own end in the liberal state - political surveillance is justified by security. What the thinker Robert Nozick calls the “ultra-minimal” state, the “night watchman state,” is the state “limited to the functions of protecting all its citizens against violence, theft and fraud, and the observance of contracts made.”³⁴ In this conception, the *sine qua non* of the liberal state implies a minimum of state organization and public protection. Security is a legitimate goal of the state in the liberal conception. The liberal state, insofar as it is minimal, does not dispense with surveillance. In fact, as a liberal, the state engages in political surveillance.

33 Louis XIV, *Mémoires pour l'instruction du dauphin*, (1661–1668), Paris, Imprimerie nationale, 1992, p. 52.

34 Robert Nozick, *Anarchie, État et utopie* (1974), trans. E. d'Auzac de Lamartine, revised by P-E Dauzat, PUF, 1988, p. 45.

In the rule of law, therefore, it is essential to reflect on dangerousness. There is no obvious dividing line between what constitutes a threat and what is harmless, as Hegel established.³⁵ Whether the definition of dangerousness stems from mores and habits, or from the initiative of power itself, not all members of society are equally watched or watched at the same time. Worse still, surveillance, insofar as it is secret in its exercise but not in its existence, has the power to intimidate. Knowing that you are being watched without knowing whether you really are “strikes the imagination rather than the senses,” as Jeremy Bentham put it.³⁶ In France, the question of the “S” file, listing people likely to represent a danger to state security, is for these reasons regularly the subject of public debate.

To make covert surveillance compatible with the rule of law, we need to know what a threat is, what is threatened, and who decides what is threatened. The rule of law does not exist once and for all. In democratic societies, it must be the subject of constant deliberation. If it is reduced to a standard label,³⁷ dangerousness must be assessed at the level of what defines the rule of law as republican, i.e., the pursuit of a common interest. Various pitfalls arise. They convince us that the definition of the secret targeting of the threat cannot be settled once and for all.

If parliamentary control takes up the question of defining dangerousness,³⁸ the lesson of the baroque state sheds light on the inescapably personal nature of all executive power, even under the rule of law. Now, the tension contained in the secret activity of the State stems from the fact that, while it depends on Parliament for its definition, dangerousness is subject to the appreciation of the executive power, which, even if it is not the supreme power as in monarchical absolutism, bears sole responsibility for acts of government. Even in a republic, the prince remains partly secret. Even when considered to be in the service of the state, the prince alone can authorize the launch of an attack. The order for information can also come from the executive. But how can the executive avoid confusing its own preservation with that of the state?

The distinction between the particular interest of the State and the common republican interest is not easy to establish. It is all the more difficult because, if there is one interest that seems indisputably common, it is public order. However,

35 There is “in itself no fixed limit between what is harmful and what is not,” Hegel, *Principes de la philosophie du droit* (1821), § 234, trans. from the German by R. Derathé, Paris, Vrin, 1982, pp. 246-247.

36 “Inspection: this is the sole principle, both for establishing order and for preserving it; but an inspection of a new kind, one which strikes the imagination rather than the senses, which puts hundreds of men in the dependence of a single one, by giving that single man a kind of universal presence within the precincts of his domain,” Jeremy Bentham, *The Panopticon* (1791), Belfond, 1977, pp. 6-7.

37 Jacques Chevallier, *L'État de droit*, Op.cit., p. 8.

38 Reference can be made, for example, to French Senate information report number 219 of December 19, 2018, presented by François Pillet, “Les fiches S en question: réponses aux idées reçues,” https://www.senat.fr/rap/r18-219/r18-219_mono.html#toc4.

when members of a society are monitored solely on the grounds of their ability to disrupt public order, abuses of power are to be feared. This is the case, for example, when terrorists whose explicit plan is to kill civilians are lumped together with climate activists who are fighting to preserve human life on earth without any intention of killing. The problem with the public order criterion for assessing threat is that it ignores the long term and cannot envisage that what appears today as a disturbance to the established order will perhaps define tomorrow's legitimacy. The criterion of order always leads us to feel more threatened by the dissident or the resistant, who proclaim their disagreement, than by the terrorist who escapes surveillance because he has learned how it works.³⁹ Order provides purely behavioral indicators, and never an idea of legitimacy. It is as "established" that the state seeks to preserve it, not as a real order corresponding to the common interest. By targeting dissidents, resistance fighters and terrorists in the same secret surveillance, the state itself can put itself at odds with the rule of law. To avoid this pitfall, Raymond Aron, drawing on the experience of resistance to the Nazi occupiers during the Second World War, suggested that the Clausewitzian distinction between tactics and strategy should be used to distinguish between terrorists and resistance fighters, and avoid threatening the latter with the former. The threat to the established order is only tactical for dissidents and resistance fighters. They do not want to destroy for the sake of destroying, but to establish a new legality in opposition to the usurpation of power, whereas terrorists are those for whom destruction is in itself a strategy.⁴⁰

Conclusion

We no longer live under the regime of the Reason of State. In the Baroque era, we were aware that the visible is folded, laminated, *trompe-l'œil*. Today, obligatory transparency buries secrecy in regions that are more difficult to access. If secrecy is empowering, it is insofar as it provides a precious temporal supplement for action. However, it cannot be entirely trivialized. In its function of anticipating acts of destruction, the secret dimension of state intelligence seems to be able to take science as its model. But insofar as it is concerned with urgency, it cannot escape the warlike paradigm. The result is a tension that may cast doubt on the compatibility of covert state activity with the rule of law. This compatibility does exist, however, on condition that we do not dispense with reflection on the targets of state surveillance.

39 Jean-Paul Brodeur, *Visages de la police*, Op. cit. p. 38.

40 Raymond Aron, *Penser la guerre, Clausewitz*, tome II, *L'âge planétaire*, Paris, Gallimard, 1976, chap. V, "la guerre est un caméléon," pp. 184-222.