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3 The code of silence

Transnational autonomy and oversight of signals intelligence¹

Ronja Kniep

Introduction

Rarely have German intelligence agencies addressed the public as offensively as they did at the beginning of 2020. The Constitutional Court was hearing a case on the legality of surveillance conducted by the Bundesnachrichtendienst (BND), Germany's foreign intelligence agency. In the media, intelligence officers discredited the claimants – a group of NGOs and journalists – as “litigation fools”² (“Prozesshansel”; my translation) and feared the trial had become a “mockery of fellow agents”³ in other countries. They framed the lawsuit as absurd, a security risk, and a possible threat to the lives of soldiers.⁴ The public warning of a former head of intelligence to the Constitutional Court was also novel.⁵ From the perspective of intelligence officers, their ability to work was at stake if, in accordance with the complaint, the communication of foreigners abroad was also to be protected by the German constitution.

These harsh words should be read as an attempt to defend the transnational autonomy of digital surveillance by intelligence agencies. The lawsuit challenged an established principle of division and domination of the field, which is based on the distinction between domestic and foreign communications and is constitutive of established forms of mass data collection and sharing by intelligence agencies. Eventually, the ruling of the court tackled another rule of the transnational intelligence game: the *Third Party Rule*, according to which data can be shared with a third party only under the caveat of the originator. This article outlines how the practices of the *Third Party Rule* and the *domestic–foreign–distinction* work through and produce different forms of silence that were partly and temporarily broken by the negotiations: silence created by *doxic*, unquestioned forms of symbolic power, and silence as a social code among the players of a field that internally binds its members and secures their power from external interference. Thus, in addition to secrecy – what should not be spoken about – the notion of silence draws attention to the spaces of power that are based on habitualised practices that need not or cannot be spoken about.

The negotiations of the rules of digital surveillance in Berlin and Karlsruhe cannot be understood as a purely national reform process. It was intertwined

with the transnational forms of symbolic power in the field of signals intelligence (SIGINT) and its oversight. The advantages of a Bourdieusian approach to studying phenomena that transcend the nation state have been described in detail and applied to research by several scholars in sociology, IR, and beyond.⁶ For a better understanding of intelligence and its oversight, field analysis provides a useful tool for avoiding the naturalistic and functionalist view of intelligence and the state that has been particularly dominant in intelligence studies.⁷ Similarly, the field approach allows for an analysis of intelligence oversight that focuses on the struggles and practices involved, breaking with the prominent yet incomplete understanding of oversight as a venue for compromise and balance.⁸

Along three elements of field analysis – genesis, autonomy, and heteronomy – this article examines the extent to which the structural conditions, practices, and power relations of SIGINT have destabilised or circumvented democratic oversight and democratic self-determination, using the cooperation of the German BND with the US National Security Agency (NSA) and its oversight as an example. What we can observe in this concrete cooperation and the corresponding oversight practices is partly an effect of the genesis of a transnational SIGINT field. Examining the power dynamics of this field and its interplay with established oversight structures, including the production of orthodoxy by courts, explains why digital surveillance of transnationally operating intelligence agencies continues to work so well despite (and partly due) to its contestation post-Snowden. The aforementioned negotiations in Germany and the subsequent legal and oversight reforms represent not only a challenge to the symbolic power of intelligence, but also a new form of its legalisation, normalisation, and legitimisation.

Genesis: The transnational field of Signals Intelligence

Fields – such as academia, journalism, or art – are distinct social spaces of society that are characterised by four main features: asymmetric power relations structured by unequally distributed capital, common objects of struggle, largely internalised rules, and relative autonomy from other fields.⁹ These social spaces or “social games”¹⁰ can be more or less confined to national borders, or distinctly extend transnationally. However, one of the most important features of field analysis is that it breaks with such repeatedly replicated divisions as *state* vs. *international* or *individual* vs. *society* and provides analytical access to the interstices that *transnationally* or *transversally* emerge between and across them.¹¹ Additionally, in order to avoid thinking “the state with a state thought”,¹² it is necessary to disengage from the fiction of the state as an acting agent or central power entity. In fact, it is composed of a multiplicity of actors of different fields and sub-fields that confront each other in complex, hierarchical relations in a web of interdependence of the powerful.¹³

Following this perspective, instead of conceiving intelligence agencies as neutral collectors of information working as the “right hand of the state”,

intelligence can be considered a subfield of the bureaucratic field in which actors compete for interpretive and informational sovereignty over security threats. SIGINT, in turn, is a distinct cosmos within the intelligence world that has emerged in distinction to the military and other disciplines such as human intelligence (HUMINT). The shifting and shared images of the enemy among the agencies have contributed to the collective *illusio* – “the idea that the game is worth the candle, that it is worth playing”.¹⁴ This *illusio* has been reinforced by the cooperative adoption of surveillance practices in view of new communication technologies, ranging from the surveillance of wireless telegraphy in World War I and World War II, to satellite surveillance during the Cold War and Internet surveillance in the context of terrorist threats.

Capital and symbolic power

As a practice, SIGINT can be described as the secretive production of “exclusive information” through the mathematical and technical analysis of any traces (“data”) left by human actors or machines in the electromagnetic spectrum or digital networks. As the practice of SIGINT became increasingly systematic during World War II, another type of producing “informational capital”¹⁵ was introduced into intelligence which re-shaped existing power relations. At least by the 1950s and 1960s, SIGINT had come to be regarded as a separate entity in the military field and an elite in intelligence, a phenomenon that has been described as “SIGINT snobbery” or “alienation” from the military on the ground.¹⁶ While reports from HUMINT or other sources were often labelled as “unconfirmed information”,¹⁷ SIGINT seemed to promise its customers the technical, quasi-magical extraction of truth from seemingly “raw data”¹⁸ at a distance. SIGINT gained symbolic power – “a power of constituting the given (...) that can be exercised only if it is *recognized*, that is, mis-recognized as arbitrary”¹⁹ – vis-à-vis other forms and actors of intelligence.

Power relations arise within the SIGINT field from technical and legal competencies for data access and analysis. These are also mediated by economic and social capital – budget and access to transnational SIGINT networks – which constitute the informational capital that can be effective as symbolic power inside and outside the field. There are two features of the symbolic power of SIGINT. First, the interpretations and meanings co-produced and enforced in the field, such as enemy images or the classification of risk and non-risk, are commonly difficult to contest due to their secret and technically complex conditions of production; these may increase their symbolic power. Second, in addition to the exercise of “symbolic violence”²⁰ via these interpretations, informational power can certainly be linked to the exercise of physical violence. The infamous quote of former NSA chief Michael Hayden – “We kill people based on meta-data”²¹ – does not point to a new type of practice but describes the contemporary form of the “marriage between SIGINT information and operational procedures to effect a kill”²² that had already emerged in World War II.

Centralisation of power through transnational dynamics

The emergence of SIGINT was accompanied by a process of autonomisation and centralisation of informational and symbolic power. The centralised SIGINT agencies or departments found in many countries today are the product of struggles involving both agencies on a national level (such as the army, navy, and domestic and foreign intelligence agencies) and intelligence practitioners of other countries. For instance, the latter promoted certain persons or agencies who were regarded as more akin to their own interests,²³ and eventually, centralisation itself was advocated by foreign partner agencies. Foreign agencies preferred to have “single points of contact”, which made secret interaction easier. In the 1950s, GCHQ still found parts of US American SIGINT “to be frustratingly decentralised”.²⁴

In many cases, transnational dynamics did not follow the formation of national SIGINT entities, but preceded or even helped to bring them about – this is sometimes ignored in functionalist narratives of how intelligence “globalised” as a natural response to global threats. In some countries, transnational exchange of military and intelligence personnel drove the institutionalisation of SIGINT more than deliberate decisions of elected governments, which were informed and convinced after surveillance practices had already been established. This was the case in the founding of the Australian²⁵ and German²⁶ SIGINT organisations, decisively driven by the exchange with US-American and (in the case of Australia) British intelligence professionals. In turn, the creation of the NSA itself was influenced by American Siginters’ contacts with the British GCHQ, which was a model for the centralisation of SIGINT in the US.²⁷ Before the NSA was founded in 1957 as the first centralised SIGINT organisation in the US, the UKUSA alliance formed in the 1940s,²⁸ from which the Five Eyes eventually emerged. Transnational agreements preceded centralisation in the US, as an NSA historian describes:

Even in such a sensitive area as foreign relationships, each COMINT service demonstrated a predisposition to act completely independently. For example, the Army and Navy persisted in establishing their own technical agreements with their British counterparts, but without coordination or dialogue with the other U.S. service. These agreements frequently conflicted, usually with respect to the amount and kinds of intelligence information to be exchanged. Because of these diverse agreements, a potential for serious damage to American intelligence interests always existed.²⁹

SIGINT was thus never confined to the national bureaucratic field, constituting itself as a transnational field as early as the first half of the 20th century. SIGINT provides an example of how entangled national and transnational fields are despite their relative autonomy, and how they

encompass forms of state and non-state power that may counteract, stabilise, or exponentiate each other.

Actors and modes of cooperation

While having always been “transnational”, the development of the SIGINT field since the end of World War II confirms the observation of an increase and deepening of transnational order formation in the security field.³⁰ This is evidenced by the growth in importance of multilateral modes of cooperation through the expansion of existing networks, the formation of new multilateral SIGINT networks, and the deepening of common practices within these networks. The UKUSA agreement, formalised in 1946, became the Five Eyes (1948). The SIGINT Seniors Europe (SSEUR, 1982) were formalised during the Cold War and the European Maximator network (1976) was formed in parallel, and later the SIGINT Seniors Pacific (SSPAC, 2005) came into being, structurally mimicking the SSEUR for the Asian pacific region (Table 3.1). The expansion of such formalised, multilateral forms of cooperation is noteworthy because informal bilateralism is often considered the preferred mode of cooperation in the field.

The Five Eyes form the NSA’s closest circle as so-called Second Party Partners, which include the SIGINT organisations of the United Kingdom (Government Communications Headquarters, GCHQ), Canada (CSE, The Communications Security Establishment), Australia (Defence Signals Directorate, DSD) and New Zealand (The Government Communications Security Bureau, GCSB). Over the years, other domestic and HUMINT-focused agencies have also gathered under the Five Eyes and cooperation has also encompassed covert actions and assassinations.³¹ However, even within the larger Five Eyes network, the SIGINT group remains a distinct entity with a particularly tightly knit mode of cooperation. This consists of jointly operated interception stations, a division of labour with regard to the surveillance of different geographic regions of the world, and a largely automated data exchange. In an internal document, the NSA notes that in some cases it is impossible “to tell where one partner’s work ends, and another’s begins”.³²

Nevertheless, even among the Five Eyes, there is no absolute no-spy agreement³⁴ and there is always information that is not shared, or not automatically shared. The NSA labels such exclusive material as “NOFORN” (no foreign nationals).³⁵ Acting together in a field does not mean unanimity. The simultaneity of cooperation and competition – which in the case of intelligence includes mutual spying and deception – is part of the *modus operandi* of the field. The new awareness of how closely intelligence agencies work together since the Snowden revelations, especially in the case of the Five Eyes, has sometimes led to an overemphasis on unity and alliance – even an alliance constituted by liberal, democratic, or Western values. However, Bourdieu reminds us that players of a field are particularly “united by the struggles that divide them, and even the alliances that may unite them always have something

Table 3.1 NSA's formal SIGINT Relationships (Bilateral and Multilateral)³³

<i>Five Eyes (1946)</i>	<i>SSEUR (1982)</i>	<i>SSPAC (2005)</i>	<i>NATO</i>	<i>Bilateral Third Parties</i>	<i>Maximator (1976)</i>
USA (1946)	USA	USA	USA	Algeria	Denmark (1976)
Australia (1956)	Australia	Australia		Austria	France (1985)
Canada (1948)	Canada	Canada	Canada	Belgium	Germany (1976)
NZ (1956)	NZ	NZ		Croatia	Netherlands (1978)
UK (1946)	UK	UK	UK	Czech Rp. (2005)	Sweden (1976)
	Belgium	France	Albania	Denmark	
	Denmark	India (2008)	Belgium	Ethiopia	
	France	Korea (2005)	Bulgaria	Finland	
	Germany	Singapore (2005)	Croatia	France	
	Italy	Thailand (2005)	Czech Republic	Germany (1962)	
	Netherlands		Denmark	Greece	
	Norway		Estonia	Hungary	
	Spain		France	India	
	Sweden		Germany	Israel	
			Greece	Italy	
			Hungary	Japan	
			Iceland	Jordan	
			Italy	Korea	
			Latvia	Macedonia	
			Lithuania	Netherlands	
			Luxembourg	Norway (1954)	
			Montenegro	Pakistan	
			Netherlands	Poland	
			North Macedonia	Romania	
			Norway	Saudi Arabia	
			Poland	Singapore	
			Portugal	Spain	
			Romania	Sweden (1954)	
			Slovakia	Taiwan	
			Slovenia	Thailand	
			Spain	Tunisia	
			Turkey	Turkey	
			ETI	UAE	

to do with the positions they occupy within these struggles”.³⁶ Therefore, to speak of a *field* is to break with the idea of an intelligence *community*.³⁷

In addition to “Second Party Partners”, the NSA has bi- and multilateral relationships with “Third Party Partners” (Table 3.1). These relationships are also relatively stable but vary in how close collaborations are structured. The closeness of the relationships is not only determined by historical and geopolitical factors, but also by infrastructural, geographic constellations and available information capital; SIGINT-specific circumstances. The NSA itself describes Third Parties as providers of “unique accesses, regional analytical expertise” and “foreign language capabilities”.³⁸ For Third Parties, on the other hand, the NSA often provides technologies and is in demand due to its “global reach”.³⁹ Providing surveillance technologies goes hand in hand with developing shared expertise and knowledge transfer, such as in joint training. Relationships with recognised third parties are usually formalised in Memorandum of Agreements (MOAs), in which agencies agree not to spy on each other. The validity of this agreement may be selective, such as for specific joint programmes. But as the NSA writes in an internal presentation, “[we] can, and often do, target the signals of most 3rd party foreign partners”.⁴⁰

SIGINT cooperation between the BND and the NSA was formalised in 1962,⁴¹ after the Central Intelligence Agency (CIA) had played a major role in the formation of the German agency.⁴² More precisely, the SIGINT relationship was established between the NSA and the SIGINT department BND-TA, which stands for *Technische Aufklärung* (TA). Thus, in Germany, the autonomisation of SIGINT took place within its foreign intelligence agency, the BND. The fact that the SIGINT department has been referred to by BND personnel as having developed a life of its own, as a “a department *sui generis*”⁴³ that differs from the rest of the agency due to its military and technical mindset, can be regarded as a field effect.

Presumably, there are a number of other SIGINT agreements around the world which add to a transnational space of partly overlapping SIGINT networks. In addition, there are certainly multiple collaborations of SIGINT agencies with domestic and HUMINT agencies and private companies. However, cooperation among SIGINT agencies has a distinguishable quality which becomes visible through exclusive multilateral SIGINT networks or the high level of institutionalisation. The transnational orientation of different intelligence agencies varies⁴⁴ and is particularly strong in SIGINT. This is precisely the effect, the force of a field: the attraction of a particular, shared game.

Autonomy: The foreign neverland and the code of silence

The degree of autonomy of a field – the degree to which a field follows its own rules, logics, and practices at the expense of external domination – is a central feature of a field that distinguishes one field from another, varies from field to field, and historically fluctuates. While Vauchez⁴⁵ describes

transnational fields as weakly autonomous constellations, the analysis of relative autonomy remains an empirical exercise and is central to understanding the power relations of actors inside and outside of a field. Eventually, the emergence of a relative autonomy is one of the conditions for existence of fields in the first place.

There are a number of concrete criteria for assessing the degree of autonomy of a field.⁴⁶ These include the entry conditions and the sanctioning of rule breaking. Generally, intelligence has a relatively high degree of autonomy. Security checks set high barriers to entry to the field, classification schemes prevent exchange with outsiders, and breaking internal secrecy rules is relentlessly sanctioned with exclusion, not only from agencies themselves but also in some cases from taking part in society. This is demonstrated by the way whistle-blowers are treated, even in democracies. Traditionally, particularly high levels of secrecy have been applied in SIGINT. Historians found that the reluctance of SIGINT agencies to share information with national authorities has cost numerous lives.⁴⁷ This secrecy is exacerbated when it comes to collaborations with transnational peers that are negotiated and implemented – at least in detail – not between governments but between organisations and individual departments. Joint operations usually take place as carefully shielded *compartmented operations*, as the field language puts it. Beyond these particularly high levels of secrecy, there are two rules in SIGINT that enable and promote the transnational autonomy and ultimately secure the power of actors in the field: the *domestic–foreign distinction* applied to data and the *Third Party Rule*.

The domestic–foreign distinction as a doxa of mass surveillance

The exercise of symbolic power and domination does not begin with immediately tangible infringements on individual freedom of choice (as action theory and liberal ideas of freedom suggest) but with the construction of legitimate perceived classifications. In the intelligence field, these include the production of distinctions between security and insecurity, risk and non-risk, or suspicious and unsuspicious behaviour. While these classifications in SIGINT are traditionally produced based on data and algorithmically mediated, they are reconfigured by using new technologies such as machine learning.⁴⁸ This is also true for the distinction between domestic and foreign communication.

The domestic–foreign distinction describes the common practice in the SIGINT field that foreign communication, *nota bene*, has no protection or a significantly lower level of protection from surveillance than communication involving national citizens or persons on national territory. (Para)doxically, this is not a distinction that separates the SIGINT agencies of different countries from each other, but a field-relevant division principle that connects the agencies. Large scale and largely uncontrolled foreign data collection is a central currency of the field's transnational surveillance economy. Many of

the closer collaborations are based on the ability to arbitrarily collect and automatically forward foreign data. One of these collaborations was the BND-NSA Operation codenamed *Eikonal*.⁴⁹ By the end of the 1990s, the agencies had begun to discuss the new challenge of intercepting Internet cables. In *Eikonal*, ultimately operational from 2004 until 2008, the BND learned from the NSA how to “early on master and surveil mass data from the internet [my translation]”⁵⁰ while the BND let the NSA participate in the results. The German agency autonomously and automatically shared intercepted (with few exceptions) foreign data with the NSA based on millions of search terms, i.e. technical identifiers such as emails or IP addresses, called selectors. Even the BND did not have complete knowledge to whom or what the NSA’s selectors referred to. It mattered, however, that the selectors do not aim at domestic communication.

It is not a coincidence that it is mostly the foreign rather than the domestic intelligence agencies which have exclusive competencies for mass surveillance. This provides SIGINT agencies with a special position in the national security field. The claim that “we are not monitoring our own citizens” has also served as an argument to establish and legitimise mass surveillance as a practice in democracies. Thus, the domestic–foreign distinction was part of the *doxa* of the field on the basis of which the rationalities and transnational economy of mass surveillance emerged. The *doxa* refers to the unquestioned common sense of a given field; a point of view that, through its naturalisation and silent acceptance, is also an effect of symbolic power and domination.⁵¹

In practice, the *doxic* foreign–domestic distinction does not mean that SIGINT agencies never put their own citizens under surveillance. In contrast to the surveillance of foreigners, however, these practices are either defined as transgressions that are sanctioned when they become public, or they are subject to stricter authorisation and oversight rules and are internally defined as comparatively unusual business. The BND, for instance, declares the collection of foreign communication as “Routineverkehr” (“routine traffic”), in contrast to “G10 collection” which targets domestic communication protected by the basic law (Article 10) and requires ex-ante authorisation. The foreign domain, however, is an intelligence neverland, as for a long time, neither legal rules nor democratic oversight set limits on surveillance practices.⁵² It is convenient, therefore, for intelligence agencies to conduct or even outsource joint operations abroad. Despite its self-declared “homefield advantage as the primary hub for worldwide telecommunications”,⁵³ it became attractive for the NSA to set up cable tapping operations with their third party partners in Europe. Not only could these accesses fill small gaps in its global reach, but there were also no restrictions imposed by law or oversight. The ability of SIGINT agencies to jointly operate in the unregulated foreign domain might also have contributed to the extraordinary close ties in SIGINT.

The high degree of internalisation of a *doxa* and its integration into the practice of the field is also visible in the defensive reactions of the intelligence

agencies cited in the introduction. They experience the claim to extend basic rights protection to foreigners abroad as something that completely escapes the *common sense* of their world and embarrasses them in front of their colleagues abroad. These are precisely the characteristics of a *doxa*: forms of rule and domination are based on it, but it does not come in a diabolical guise or as a coercive measure. “The dominant are generally silent”.⁵⁴ Their philosophy becomes visible as such only “when they are rankled, when people say to them: ‘Why are you like you’ are?”.⁵⁵ Only in retrospect do *doxic* realities become identifiable – sometimes even to rulers themselves. Former NSA director Michael Hayden states:

we [the NSA] have historically been Manichean about the rest of the world. Are you, or are you not protected by the Fourth Amendment to the US Constitution? Are you? Oh my God, we can’t touch you. Are you not? Game on!⁵⁶

In similarly sloppy terms, a BND Siginter said that “as long as no basic rights holder is affected, they [data] are cleared for firing [my translation]”.⁵⁷

The *doxa* – as part of the *practical sense* of the field – was based on the distinction between domestic and foreign, which was challenged but not abolished by the *object sense*,⁵⁸ the transnationality of the Internet. The Internet’s methods for transmitting data in packages, in which an e-mail, for example, is fragmented as it is sent and routed over unpredictable geographic routes, make it difficult to distinguish between domestic and foreign communications. In the case of telephone surveillance, area codes made it clear where the communicating party was located. The architecture of the Internet undermines a clean separation of domestic and foreign. However, it is insufficient to simply state that infrastructural conditions have dissolved the distinction. We must also look at the technological practices that have been developed to maintain the distinction. While the BND initially combined algorithmic filters with manual review, the agencies increasingly rely on more automated techniques, including machine learning. Here, communicative relationships determine whether surveillance subjects receive fundamental rights protection or are “fair game”. Traditional state rationalities of *jus loci* (territoriality) or *jus sanguinis* (ancestry) as legitimate constitutional principles of citizenship are being replaced in the intelligence field by *jus algorithmi* (communicative behaviour).⁵⁹ This shows how state power is simultaneously reproduced and transformed in the transnational SIGINT field.

Contrary to the common narrative of the extraterritoriality of the Internet, the shift of communications from satellites to Internet cables was also accompanied by a re-territorialisation of surveillance. To capture certain foreign communications, agencies required access to cables within their countries, over which communications were routed in ways that made the separation of domestic from foreign communications nearly impossible. The transnationality of the Internet irritated the *doxic* distinctions of domestic and foreign, which

agencies sought to restore with new techniques and new interpretations of law; at least to those outside the field, the arbitrariness of these interpretations was obvious. The BND defined communications routed over German cables as a “virtual foreign country”⁶⁰ and the British GCHQ monitored Facebook messages per se as “external” because it was a virtual platform.⁶¹

Third Party Rule – The code of silence

Another significant and autonomy-enhancing rule in the transnational intelligence game is the *Third Party Rule*. The *Third Party Rule* is not a legal norm,⁶² but rather a flexibly interpreted practice by intelligence agencies in which information is shared with third parties only with the consent of the transmitting agency. A flexible interpretation means “that the originator of the information controls to whom it is released”,⁶³ but also that agencies can inquire and negotiate among themselves whether and which parts of information may be passed on and to whom. Both the type of information and the power relations in the field are likely to play a role in these negotiations. Silence, here, is not absolute but works on a continuum. Little is known about the exact procedures in multilateral collaborations within which data from multiple agencies can be aggregated into information. However, it may be even easier to refuse to release information to third parties if all the participants in the network have to agree to disclosure, in accordance with a consensus principle.⁶⁴ Despite the flexibility and differences in who is defined as a third party, the rule amounts to a structural exclusion of outsiders from the exchange of information.

In the language of German authorities, the *Third Party Rule* has been described as an “Informationbeherrschungsrecht”⁶⁵ – which literally translates as an “information mastery right” – of the sharing agency. In the wording of the Federal Ministry of the Interior, “the issuing state or states remain ‘masters of information’ and retain the power of disposal over the information they release [own translation]”.⁶⁶ The masters of information, however, are not primarily sovereign states but the agencies themselves: the globally connected “SIGINT Seniors” whose sharing options are co-determined by their positions in the transnational field, such as the social capital (networks) and symbolic capital (recognition) available to them.

The exclusion of actors external to the field creates an unequal but “shared secrecy”⁶⁷ among agencies, which does not precisely display national sovereignty but, on the contrary, can lead to tensions between transnational solidarities and the interests of other national security agencies. In Germany, this was illustrated by discussions surrounding the video footage of the attacker Anis Amri, which the BND received from a foreign intelligence agency after Amri’s attack in Berlin in 2016 but did not initially forward to German investigative authorities.⁶⁸ Such public cases are both occasions for problematising and legitimising the field practices. The agencies can claim: Without the *Third Party Rule*, we will no longer obtain such information. In practice, however, the rule

is about much more than the “decisive tip” in case of imminent danger, i.e. selective information exchange for terrorist threat prevention. It is the joint practices of the agencies as a whole, which regularly escape external interference and control by referring to a partner’s need for secrecy.

The *Third Party Rule* has functional similarities with the unwritten law of the *omertà*, the Mafia’s code of silence.⁶⁹ Both codes of silence, the *Third Party Rule* and the *omertà* promote internal solidarity and external shielding of their respective fields, becoming a “structural component of the sphere of power [my translation]”.⁷⁰ As Georg Simmel has noted about secret societies, there is a “protective character” of these societies as an external quality, while their inner quality consists of “a specific type of confidence between the members” built on the mutually expected “ability to preserve silence”.⁷¹ The *Third Party Rule* codifies the transnational secrecy of SIGINT beyond state secrecy, being framed as a professional codex in the name of cooperation and the loyal promise to keep the secrets of others. Non-compliance with the *Third Party Rule* in the SIGINT field, while not sanctioned by physical death like the *omertà*, is punishable in case of doubt by discrediting and isolation in the exchange of information – quasi-professional death. The threat of being cut off from transnational exchange of information can be used or misused by intelligence professionals, at times in public, to hold back information or fend off control. Addressing the parliamentary inquiry into the BND’s involvement in Five Eyes cooperation, the former head of the BND, Gerhard Schindler, warned about the consequences of “too much oversight”:

This international cooperation is in danger of lasting damage ... the first partner agencies worldwide, not only in Europe, are reviewing their cooperation with the BND, and the signals we are hearing are anything but positive. I am very concerned about this development because ultimately the future of the service is at stake [own translation].⁷²

The argument of the agencies is then: if you control us too much, you put your own security at risk.⁷³ As a consequence, oversight bodies, especially parliamentary bodies, are more or less explicitly defined as third parties in many countries.⁷⁴ The *Third Party Rule* institutionalises existing control gaps that arise from the weak regulation of intelligence cooperation and the monitoring of foreigners abroad. If an active inquiry is made, a reference to the *Third Party Rule* often follows. As a legal scholar has noted, considering “the high degree of international networking of intelligence, the *Third Party Rule* leads to a considerable immunisation of the security agencies against domestic investigations [own translation]”.⁷⁵

Heteronomy: Oversight and the production of orthodoxy

All fields and the positions within the field are embedded in various relations to other fields. These relations constitute the point of entry for external

(heteronomous) influence on the players and their practices. On the one hand, structural influence is exerted on SIGINT by those fields occupied by its “customers” from the political and bureaucratic field, the military, and the larger intelligence field in which SIGINT agencies work as central distributors of informational capital. As such, SIGINT agencies have to respond to different customer demands and their field logics. This includes quickly delivering “actionable information”⁷⁶ for covert action and (para)military operations. SIGINT then becomes intertwined with the life-or-death logic of war, becoming both a potential resource for protecting the lives of soldiers, as often publicly emphasised by intelligence officers, or for the killing of declared enemies. When innocents are targeted as a result of incomplete, inaccurate, or inaccurately interpreted data, the *illusio* of data magic becomes fatal.⁷⁷ Another newly pronounced heteronomous force in the past two decades has been the influence of commercial markets for digital data and private intelligence products and personnel on SIGINT.⁷⁸ The relationships between SIGINT and commercial (or other) fields require analysis in their own right. However, it is important to note that heteronomy is not a one-way street in these relationships. SIGINT has successfully exported its logics to the private tech world as well.⁷⁹

Despite heteronomous dynamics in both directions, the SIGINT field generally has a high degree of transnational autonomy that consolidates its symbolic power. However, this degree has changed. SIGINT had a very high degree of autonomy in the period from the mid-1960s until the end of the 1980s. The establishment of centralised and often remotely located SIGINT organisations and high budgets in the Cold War context contributed to this autonomy, as did the infrastructures of global, already automated and wireless surveillance of satellite communication – a surveillance practice referred to as using a “vacuum cleaner in the ether”⁸⁰ or surveillance of the “open sky”⁸¹ which required neither authorisation nor structural cooperation with hosts of communication carriers. The emergence of the Internet and the dominance of new private actors whose rationalities differed from the traditional telecommunication world, alongside the end of the Cold War, made the field more prone to heteronomous influence.

Intelligence oversight – a heteronomous force?

In intelligence studies, it is often claimed that during the same period – the late 1960s and especially the 1970s – intelligence was put under the rule of law and democratic oversight, which would amount to a loss of autonomy. This narrative is particularly strong in the context of the *Church Committee* in the US⁸² and the *Hope Commission* in Australia⁸³ which, following scandals exposed by whistle-blowers and journalists, led to semi-public investigations into intelligence in these countries for the first time. However, as Félix Tréguer has shown,⁸⁴ the institutionalisation of oversight structures in the reforms following the *Church Committee* and the habitus of oversight

professionals actually went along with them being included in the realm of secrecy and following field logics, rather than them acting as a heteronomous force. The “overseers” of intelligence are simultaneously recipients of silence (e.g. when defined as “third parties”) and producers of silence, though to a differing degree depending on how close oversight institutions are to the intelligence field and the executive. Generally, the closer an oversight institution and its actors are positioned to the intelligence field, the more information is shared with them, and the more susceptible these actors become to the logics of the field they are supposed to oversee.

Using the information from the Snowden revelations and subsequent inquiries, (again) a wider set of actors (who have been and continue to be formally excluded from intelligence oversight) have started to hold intelligence agencies to account more systematically from the outside, for instance through litigation or campaigning.⁸⁵ The following examples show the interplay between external claims challenging the autonomy of SIGINT and its defence, and how courts particularly act as intermediaries in their capacity of normalisation, legitimation, and production of orthodoxy.

Breaking the silence of the doxa

The *doxic* symmetry of cognitive and objective structures – the basis for how the foreign–domestic distinction formerly worked in the field – was broken not only by the *object sense* of the Internet, but also equally by diplomatic and legal discourses that developed on a transnational scale in the wake of the Snowden revelations. In 2013 and 2014, all eyes initially turned to the NSA and its Five Eyes partners. Here, the mass surveillance of foreign communications did not yet appear as what it was, namely, the *doxa* of a transnational field, but as American imperialism. Prompted by a German-Brazilian initiative involving a number of other governments and civil society organisations, a first official heterodox discourse formed that turned the *doxa* into an *orthodoxy*: a UN resolution on the “Right of Privacy in the Digital Age” was launched that challenged the domestic–foreign distinction through the language of human rights and universality.⁸⁶ In doing so, data subjects formerly cleared for unregulated surveillance were reconfigured as data citizens, enshrined in international law.⁸⁷ This language of human or universal rights was taken up by the Obama Administration in the Presidential Policy Directive 28; on this basis, SIGINT rules were formulated to be valid regardless of nationality.⁸⁸

A decisive moment in the German debate on the *domestic–foreign distinction* was the confrontation of two field discourses in the first public hearing of the Bundestag Inquiry into BND and NSA in May 2014. The interpretations shared by the BND and the German government were challenged by the interpretation of the German basic law of highly respected legal experts, including a former constitutional judge. The basic law’s privacy rights, they claimed, are neither tied to citizenship nor territory: “Article 10 [privacy of correspondence] protects as a human right”.⁸⁹ Despite being

publicly contested by high-profile representatives of the juridical field, the 2016 BND reform upheld the domestic–foreign distinction, though it was further differentiated. European communications were to receive more protection than before, which seemed to be a political move following the revelations of the BND’s surveillance of European country representations and EU institutions.

The persisting inconsistency between the intelligence and juridical views and the discursive space it opened became the basis of a constitutional complaint in Germany. The litigation was launched by two civil society organisations which joined forces with international journalists to establish “legal standing”; to make sure that there were claimants who were affected by extraterritorial surveillance⁹⁰. The Federal Constitutional Court’s subsequent ruling on BND’s SIGINT practices established for the first time with legal force that the surveillance of foreigners abroad also constitutes an encroachment on fundamental rights. The fundamental right to privacy, it declared, has a binding effect on German authorities which is not restricted to German territory.⁹¹ This decision made explicit what a ruling by the constitutional court from 1999 had left open.⁹² From a purely juridical point of view, the judges found nothing surprising about the argument of the extraterritorial binding effect of the basic law.^{93, 94} Instead, they saw the opposing view held by the BND and the government as a curiosity.⁹⁵ The punch of the ruling resulted from the clash of the extraterritoriality argument with the BND’s foreign surveillance practices – which seemed to have been almost immune for a long time – and from the fact that the judges made such detailed specifications on the rules of SIGINT and its oversight. However, three examples show how the domestic–foreign distinction was nevertheless not abolished with the ruling and the subsequent BND reform, but became a newly legalised and legitimised orthodoxy.

First, the court ruling does not only declare a different level of protection at home and abroad to be permissible, but also justifies it in terms of legal theory so that, in the end, the logic of the law fits the practical logic of the field. For example, a duty to notify about surveillance, which is provided for German citizens and ultimately enables the claiming of rights, would not be necessary abroad as this would not enable democratic discourse in the same way as the notification requirement does for national citizens.⁹⁶ Above all, however, a notification seemed impracticable, even unthinkable for intelligence professionals who used to polemically argue for the territorial logic of privacy protections: “Shall we, then, inform the Chinese or Afghans about our surveillance”? This easy-to-follow argument not only ignores the very broad exceptions for notifications in practice, but also ignores the fact that notifications are not the only mechanism of redress that could be established for non-nationals (for instance, there are institutional channels for complaints). The importance of individual remedies has recently been stressed by international case law on surveillance by intelligence agencies and its oversight. This may enact more far-reaching and more heteronomous demands than national courts.⁹⁷

Second, the maintenance of the distinction is supported by the fact that a special body, the Independent Control Council, was created for the oversight of extraterritorial surveillance instead of either integrating this task into existing oversight structures or bundling it into a new structure.⁹⁸ As a result, there is a dual oversight structure that mimics the *foreign-domestic distinction*. Third, the principle of an automated exchange of foreign data is legally legitimised, provided that there is a certain degree of control of the mass of exchanged data.⁹⁹

The juridical field has a special role to play in transforming *doxa* (“what is done”) into *orthodoxy* (“what must be done”).¹⁰⁰ Equipped with appropriate material and symbolic resources, legal work performatively co-produces the *right view* and can simultaneously reject the definitions of other social worlds as *wrong*. With litigation collectives,¹⁰¹ new modes of intelligence oversight have emerged that can mobilise the symbolic power of law for contestation, co-producing new *orthodoxies* as a result. However, the expectation that judges could be the “last institutional resort against large-scale surveillance”¹⁰² did not seem to materialise, as the ruling enshrines the legitimacy of mass surveillance as a principle of orthodoxy. The domestic-foreign distinction is not rejected by the court ruling or the reform but is modified in such a way that mass collection and exchange continue to work well.

Contesting and normalising the code of silence

In a quite straightforward way, the 2020 ruling also takes up the obstacles to oversight from the *Third Party Rule*.¹⁰³ Citing three different organs of the Council of Europe – the Venice Commission, the Parliamentary Assembly and the Commissioner for Human Rights – it states: “for conducting effective oversight ... it must also be ensured that oversight is not obstructed by the third party rule” and “that the bodies conducting legal oversight are no longer considered ‘third parties’”.¹⁰⁴ By taking a position on the definition of who cannot count as a third party, the ruling clearly intervenes further in the field practices than in its previous ruling dealing with the *Third Party Rule*. In its 2016 decision on the *NSA selectors* (further discussed below), the judges refrained from determining whether or not the rule applies to oversight bodies because “it is upon this agency [sharing intelligence] to determine who it considers to be a ‘third party’”.¹⁰⁵

In the subsequent reform, the government designed organisational oversight structures that protect the functioning of the *Third Party Rule* and only slightly displaced its boundaries. Existing oversight bodies, such as the Federal Commissioner for Data Protection and Freedom of Information (BfDI) and the Parliamentary Control Committee (PKGr), remain third parties while the newly created Independent Control Council, formally bound to the executive sphere, is set up as a “control body acting independently of the Third Party Rule”.¹⁰⁶ The Control Council is formally inaugurated into the code of silence and must keep this silence when reporting to parliamentary oversight.¹⁰⁷ The

alternative of entrusting already competent data protection authorities with control was rejected; “This, they argued, would be detrimental to international intelligence sharing because of significant reservations and concerns voiced by Germany’s main intelligence partners”.¹⁰⁸

Despite having unique competencies for ex-post and ex-ante oversight, it remains questionable to what extent the Independent Control Council will act as an independent and heteronomous player. First, it lacks a form of adversarial council, as required by the ECtHR as a safeguard “against arbitrariness”.¹⁰⁹ Second, if the Council finds irregularities and wants to file a complaint, this has to be discussed with the BND first. Third, it is formally integrated into the executive branch, removing intelligence oversight further away from the parliamentary sphere and away from more independent data protection institutions.

Furthermore, while the court found that a narrow definition of the *Third Party Rule* that only includes the agencies and the government and excludes legal oversight would be unlawful, in principle the rule was further legitimised and normalised. Drawing on the 2016 *NSA selectors*’ case law, the judges made clear that not only the agencies but also governments may refuse to hand over information to oversight bodies or committees.¹¹⁰ In the case it referred to, the court legitimised the refusal of the BND and the German government to allow oversight bodies¹¹¹ to inspect the search terms shared by the NSA with the BND – the “selectors list”.¹¹² Among these selectors, such as telephone numbers, IP addresses, and e-mail addresses, were technical identifiers of several institutions of the EU and EU countries, including the French ministry for foreign affairs, Le Palais de L’Élysée and the EU-Commission.¹¹³ Additionally, there were identifiers belonging to Germans or individuals within German territory, which had been shared by the NSA with the BND, in violation of the Basic Law and the MOA formalized by the two agencies.¹¹⁴ Some of the latter were at least temporarily part of the BND’s data collection.¹¹⁵ Instead of the parliamentary committee, a so-called “expert in a position of trust” (sachverständige Vertrauensperson) was appointed to inspect and report¹¹⁶ on the selectors. While the court acknowledged that this inspection did not satisfy the parliamentary committee’s right to collect evidence, it ultimately acted as a protector of the code of silence, undermining independent inquiries into basic rights violations. In deciding that “secrecy interest outweighs the parliamentary interest in information”,¹¹⁷ the court followed the Government’s argument that a disclosure of the selectors to the parliamentary committee would be a violation of the mutually promised confidentiality under the *Third Party Rule*, harming the ability of the German intelligence agencies to cooperate.¹¹⁸

A legal scholar commenting on the *NSA selectors* ruling noted that, surprisingly, there has never been any documentation of the US-American side’s wish to keep the selectors secret, which according to him makes the whole legal decision questionable: “it is not sufficient to use a non-legal norm such as the Third-Party Rule to give constitutional standing to the silence of a foreign

power [my translation]”.¹¹⁹ The code of silence works through silence; when it works perfectly, it completely escapes the public eye and academic research. The case of the *NSA selectors*, in principle cemented by the 2020 ruling, however, provides one example of how the *Third Party Rule* can destabilise democratic oversight of the transnationally constituted field of intelligence.

Conclusion

This paper approaches intelligence and its oversight through the characterisation of the social space of SIGINT, which can be described as a transnational field in Bourdieu’s sense. This field perspective allows us to observe dynamics that can be connected to current debates on transnational power and domination and their contestation in digital societies, as well as to understand the dynamics of transnationally connected intelligence agencies and their oversight.

The SIGINT field is an example of transnational domination that is not particularly precarious or weakly autonomous, but relatively stable. This stability, however, does not point to democratic legitimacy. The rule-making and autonomy of the transnational field are accompanied by deficits in parliamentary control that resemble the problem of an inter-ministerial “executive multilateralism”.¹²⁰ Unlike executive multilateralism, however, the transnational multilateralism of intelligence agencies does not involve democratically elected representatives. The field perspective also draws attention to the fact that the multilateralism of SIGINT is not to be equated with a cooperative and procedural control mechanism, but rather with the emergence of a field with a specialised rationality. However, what is negotiated in the context of field rationalities does not remain in the field. As IR scholar Itamar Mann points out, the rules of global mass surveillance created by SIGINT agencies resemble the “dark side”¹²¹ of Anne-Marie Slaughter’s notion of disaggregated sovereignty – not only because the rules defy democratic self-determination, but because they influence how governments interpret their laws and constitutions.¹²² There is a problem of democracy in the field of intelligence not because of anomie¹²³ (i.e. weak or absent orders), but because of autonomy (i.e. self-legislated orders that have an impact on democratic institutions). Fields are not closed spaces, they are intertwined.

The field approach allows for the analysis of the rule-making power of intelligence agencies which are relatively independent of governments – and their potentially anti-democratic tendencies – without having to resort to the idea of a ‘deep state’. Considering that the concept of a deep state has been successfully hijacked by conspiracy theorists and right-wing populists, it seems more useful to use the autonomy of fields and the symbolic power attached to them as analytical categories to analyse the (transnational) power of intelligence. The conception of fields in which there are struggles and resistance – “and thus historicity!”¹²⁴ – as opposed to apparatuses (as Althusser proposes¹²⁵) or systems (like those of Luhmann¹²⁶), is quite explicitly directed

against the “fantasy of the conspiracy, the idea that an evil will is responsible for everything that happens in the social world”.¹²⁷ Moving away from a functionalist view of surveillance and intelligence has consequences for thinking about domination. Not only being ruled, but also the exercise of rule involves internal struggles and resistance and is underpinned by unintended and sometimes pre-reflexive dynamics. Transnationally connected intelligence agencies are neither an Orwellian instance of power nor a heroic alliance in defence of our security – neither *deus* nor *diabolus* in machina.¹²⁸

Contemporary forms of digital surveillance do not emerge solely from the logic of digital communication or from the nature of a particular threat.¹²⁹ Digital surveillance is rather the product of disputes, struggles, and processes of differentiation of social fields in which sociotechnical interpretations are negotiated, declared as legitimate, and thus become effective as symbolic power. Symbolic domination can be read in terms of its temporality and historicity, which can take *doxic* (uncontested) and *orthodox* (contested) forms. *Doxic* rule describes symbolic relations in which politicisation is initially impossible. Dynamics of politicisation and de-politicisation only set in when the silence of pre-reflexive *doxa* is broken. However, precisely these pre-political states are relevant to domination. They are the product of a misrecognised power that acts gently, though not as the result of a “soft power”¹³⁰ that persuades through appeal and attraction, but through the exercise of symbolic violence that categorises and excludes. The exercise of symbolic domination also operates through unquestioned principles of division and habitualised practice and must be included in an analysis of the phenomena of transnational domination.

In the context of other debates on the power of data and surveillance in digital societies, in which much thought is given to the power of social networks, disinformation, and the manipulability of opinions, this reference to the silence of domination is initially irritating. The fact that domination functions not only through discourse, but also through the absence of discourse, does not only apply to intelligence. The surveillance capitalism of Google and Facebook was also able to emerge primarily on the basis of long-term silent acceptance and habitualised forms of data production. In particular, algorithmic order formation¹³¹ and communication infrastructures as a whole¹³² are also accompanied by misrecognition effects linked to symbolic power. We can learn from Bourdieu: the misrecognition, and often, the silence of domination and its contingency are the very best conditions for it to work.

This raises the question of how and under what circumstances silent, internalised forms of domination can be broken. These are primarily crises, but also the confrontation of the discourses of different fields, which particularly unmask the field-specific forms of *doxa*. Lastly, a reflexive break with the *doxa* is demanding, but possible. For Bourdieu, however, the break with the *doxa* is primarily performed by sociologists who break with the common sense of their objects of study and thus “destroy a *doxa*”.¹³³ On this point, this chapter resolutely opposes Bourdieu’s “underestimation of actors and ...

overestimation of critical social science [own translation]”.¹³⁴ Next to social sciences and crises, practices oriented towards heteronomous confrontation and irritation can counter *doxic* forms of domination. Breaking the silence of *doxa* is thus not to be understood as a purely intellectual or accidental act, but also as a political act of contestation, and a potentially emancipatory practice. The extent to which oversight can act as a heteronomous force – be it through civic practices, courts, or specific bodies – becomes crucial.

Notes

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