ABSTRACT: The paper will analyse the problem of surveillance and deterritorialised global flows of data in the context of the Nation-state. To do so, it will explain the need for a theory of surveillance. Such a theory should initially explain how the surveillance (post-modern) couldn’t be compared to the simple cloak and dagger surveillance (in traditional sense, associated with modern structures). Then, it will deconstruct mistakes widely associated to the panopticon (Foucault), because prison walls were dissolved and Nation-states ceased to be the central element of surveillance. Private companies are major developers of surveillance techniques in order to control and incentive consumption. Paradoxically, the major consequence of this shift is the most ignored: surveillance, besides violations of privacy, creates inequalities. Therefore it is necessary to raise questions about limits and possibilities of exercising democratic control of surveillance. To deal with these problems, it will be proposed the idea of a network State (Manuel Castells and Saskia Sassen), because it explains how global data flows affect sovereignty, territory, space and time. In this sense, this model shows that transformations of the Nation-state are inevitable in the contemporary world. It will be concluded that if legal theory wants to understand surveillance and protect human rights, legal scholars must be open to new influences and ready to abandon theoretical frameworks derived from the Modern Era that are taken for granted because they are incapable to solve problems associated with post-modern surveillance.

INTRODUCTION

Recently, the NSA analyst Edward Snowden brought to the media information about the existence of a plethora of data surveillance systems, including PRISM and Upstream.
short, these systems show the astonishing capacity of intelligence agencies from USA and other countries to intercept, store and index almost data transmitted through the internet, transforming raw data into searchable databases. In addition, these agencies seem to be able to access data stored in private IT companies’ servers, like Google, Microsoft and Apple.

A little after PRISM/Upstream-related news, the media disclosed new information about the XKeyscore system. By using this powerful tool, NSA employees are able, without judicial authorization, to access and analyse all Internet use of a specific target. With the XKeyscore, NSA can (and do) monitor e-mails, watch personal chats, and websites visited, view queries to search engines and analyse VoIP calls from any person around the world. All these tools have in common the fact that they dissolve territorial and legal boundaries by ignoring the limits between public and private, national and international. Due to its liquid and uncontrollable nature, the global data flow can be controlled by anyone with sufficiently advanced technical tools.

Nevertheless, none of these media coverage is a real surprise for those studying constant violations of human rights by surveillance mechanisms associated with information technology. Before the whole Snowden coverage – and even before the “war on terror” motto used by the US government to justify surveillance – the ECHELON system was well known. Despite the denial of its existence by the countries involved (USA, UK, Canada, New Zealand and Australia), the EU Parliament considered ECHELON’s existence very real. The main goal of ECHELON was to intercept worldwide data and voice communications, including satellite and microwave transmissions. For those concerned with human rights violations, Snowden-related news seems very familiar to ECHELON.

The common use of the word “surveillance”, especially its translation in Portuguese, usually leads to misunderstandings regarding the subject. Nowadays, surveillance isn’t only specifically directed to selected individuals, but it’s far broader than that. In addition to the surveillance made by the State, private companies are very interested in collecting, processing and using personal data from people worldwide.

Highlights about surveillance are usually associated with the violation of privacy, especially after Snowden’s whistleblowing. However, surveillance is one of the main

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3 For further details, see the report on the existence of a global system for intercepting private and commercial communications (ECHELON interception system), PE 305.391 EU Parliament (July, 11, 2001)
processes of modern societies, and, as such, there’s much more than someone’s privacy at 
stake. Debates about privacy only scratch the surface of surveillance-related problems and it’s 
incredibly naïve to think that ordinary citizens are immune to it because they have “nothing to 
hide”. It’s important to understand that equity is even more violated by the systematic 
collection and analyse of data flows, as they allow a non-democratic classification of people 
into different groups. This becomes even clearer if we remember that surveillance is often 
associated with “the war on terror”, because IT is used to distinguish between groups of 
“friends” and “foes”. Therefore, it is clear that indiscriminate accumulation of information 
allows the creation of arbitrary social categories, showing how surveillance is not only a 
privacy problem, but also a tool that amplifies discrimination and social inequalities. Since 
the categorization of humans aims their inclusion or exclusion, virtual surveillance creates 
doors or obstacles to ensure or prevent access to essential elements for the human life.

In regard of the increasingly violations of human rights by surveillance, one needs to 
ask what is the role of the Nation-state in the protection of these rights? Are there any hopes 
to protect human rights with modern instruments (legislation), which are inherently linked to 
the idea of a territory? How could legislation of one Nation-state (designed to solve problems 
of the 15th century) be able to protect global data flows (a 21st century problem)? What was 
the EU response to ECHENLON or the Brazilian response to the recently discovery that NSA 
deployed surveillance against President Dilma Roussef or Petrobras, the biggest oil company 
in Brazil?

Obviously, these questions are merely rhetorical. Nowadays, people’s chances to be 
included or excluded are determined by computer systems with arbitrary rules. This makes 
clear that we need new ways to protect human rights and democracy against the new 
surveillance. The legal system of a Nation-State (or, for the same reason, a group of them), 
are incapable to deal with new problems associated with the liquid modernity since they are 
deeply dependent on the idea of a territory and a centralised power.

The previous statement should not be understood as a proposition to the end the idea 
of Nation-state, but as recognition that the new surveillance is a relevant phenomenon that the 
State cannot control. So, instead of the classic question “quis custodiet ipsos custodes?” we 
need to ask what is the legitimacy of software-based categories that sorts individuals 
everyday. Only by expanding democracy and transparency to these computer systems it will 
be possible to protect human rights and make those invisible relations a little more visible.
Therefore, it’s needed a new approach to understand globalization and the fate of the Nation-state. We’ll not propose its end, but show that the idea of a network State, as put by Manuel Castells, is one adequate theoretical framework to think legal protection of human rights in this liquid modernity. It will be shown the necessity to abandon the common and naïve dichotomy of the global against the national. This is an opportunity to discuss what transformations of the Nation-state are needed to make it more capable to deal with 21st century problems, especially those derived from surveillance. Since new global players limit Nation-state political power in a variable geometry of sovereignty, the role of the Nation-state as a power structure needs to be reassessed.

2 WHY DO WE NEED A POST-PANOPTIC SURVEILLANCE THEORY?

Although surveillance itself is as old as the Western civilization, it acquired greater power in the Modern Era because of the needs from the bureaucratic organization of the modern State. However, an exponential increase in surveillance related studies only started after the 1980s. This happened as consequence of the development of new technologies, mainly of new data storage and process techniques.

It is common, especially for people outside surveillance studies, to think that the panopticon is a brilliant idea, because, besides being an example of how “practical” surveillance works, is an archetype of modern societies’ power structure. However, it’s seems to be a common opinion amongst surveillance scholars that, “[...] mere mention of the panopticon elicits exasperated groans. For them, too much has been expected by too many of the panopticon with the result that the diagram is wheeled out at every conceivable opportunity to, well, explain surveillance”.

It is necessary, however, to ask what are the limits of the foucauldian model to handle the walls’ dissolution in the contemporary world. It is indispensable to overcome the panoptic model to understand, beyond cloak and dagger surveillance, the new mass surveillance, which is heavily dependent on information technologies. For this reason, David Lyon discuss a central problem that is capable to show why the panoptic model isn’t

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compatible with the liquid modernity: the more rigorous and visible the control – as in the panopticon –, the more resistance it creates on individuals subject to its gaze. Conversely, the more subtle and imperceptible, or liquid, the more it creates compliance of individuals.

The oppressive character of the panopticon continues far beyond the prisons in the field of surveillance studies, not due to the reasons envisioned by Jeremy Bentham, but because this model have become a metaphor to analyse how power and surveillance manifest in a world that main characteristics could not be predicted by Bentham and were neglected by Foucault.

Due to its historical importance and – although restricted – applicability, surveillance studies cannot ignore the panopticon, but certainly should go beyond it. A little more radical is Kevin Haggerty’s opinion. For him, the panopticon paradigm and its claim to totality must be abandoned. According to Haggerty, the excessive use of this model can result in an undesired theoretical restriction, since it pre-determines which aspects shall be prioritized and neglected. This is because it is common to see the extrapolation of the panoptic model to explain phenomena that cannot be explained by the foucauldian framework.

As consequence of popularity of the Foucauldian panopticon, there are a vast number of references in the literature to various “-optic” on s. Each one represents an expansion / adaptation of Foucault’s panopticon with distinctions draw to compensate the limits of the original theory. Besides the obvious popularity of Foucault’s idea, this situation shows the inability of the panopticon to deal with key aspects of surveillance today. Therefore, against the permanence of the metaphor of the panopticon, Kevin Haggerty is pretty radical. In his opinion,

... changes in surveillance processes and practices are progressively undermining the relevance of the panoptic model for understanding contemporary surveillance. Foucault continues to reign supreme in surveillance studies and it is perhaps time to cut off the head of the king. The panoptic model masks as much as it reveals, foregrounding processes which are of decreasing relevance, while ignoring or slighting dynamics that fall outside of its framework.

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The main objective of Foucault’s panoptic model is to induce the inmate into a state of conscious and permanent visibility that assures the automatic functioning of power. This state of self-observance in the observer-observed relationship does not occur in most situations where contemporary surveillance happens. In fact, the true is quite the opposite since there are many reasons – usually commercial or political – to hide as much detail as possible about what kind of information is collected and how this data is processed. As argued before, this is one of the main features that allow the emergence of new relations of invisibility: the lack of transparency about how surveillance works is one of the most important features in post-panoptic societies.

Implementations of the Bentham’s theory certainly exceeded the goals for which it was originally thought, but a common trait among all derived models is the focus on rationalization as a tool to save resources and increase the efficiency of power. However, in the contemporary world applications of surveillance go beyond this common trait of the panoptic model. Much more than with prisons, today’s surveillance is involved with a plethora of projects ranging from the alleged “war on terror” – which feeds, among other projects, the aforementioned PRISM and Upstream – to encourage consumption – for example, through compilation of databases with customers’ purchases preferences and history. In this sense, it’s possible to say that

[...] surveillance comes out of specific enclosures to permeate all of life. Surveillance is universal in the sense that no one is immune from the gaze. Surveillance is also universal in the sense that wherever new systems are adopted they tend to have a similar technological character.

Moreover, the increasing ability to store huge amounts of raw data to analyse them later in infinite ways – a phenomenon commonly known as dataveillance – makes clear that there is no predetermined purpose for surveillance. On the contrary: as a technology-driven phenomenon, new surveillance cannot be reduced to a series of static concepts and currently only find two limits, namely the technical capacity of tools and the creativity of individuals to design new systems of data analysis and sort. Thus, it’s increasingly difficult to associate surveillance to simple social control and privacy violation or as having limited number of purposes, as occurs with models derived from panopticon.

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8 Michel Foucault, *Vigiar e punir: história da violência nas prisões* (Petrópolis: Vozes, 1999), 166.

Another final distinction is that the types of visibility related to the panoptic model involve the monitoring of people who are somehow considered socially inferior or dependent. Thus, “[...] it is reminiscent of the functioning of a microscope, where specific marginalized or dangerous groups are situated under the unidirectional gaze of the powerful who can watch while remaining unseen by their charges”\(^{10}\). While it’s true that many institutions use surveillance to monitor groups considered inferior, the exclusive use of the panoptic model ignores the important fact that traditional hierarchies of visibility are being completely reconfigured, since surveillance is pervasive in various spheres of contemporary societies and isn’t directed exclusively against disadvantaged groups.

As with such complex phenomenon, the various ways that surveillance appears in the real world have characteristics from both, panoptic (modern) and post-panoptic (post-modern). Nevertheless, if we recognise that the panoptic model is incapable to explain the whole phenomenon of surveillance today, it will be possible to improve our understanding of these complex post-panoptic traits that floods our everyday lives and threatens human rights.

3 The network State

According to Edgar Morin\(^{11}\) the barbarism isn’t only one of the sides of the civilizing process, but an integral part of it. It’s possible to expand this line of thought to the Nation-state born in the Modern Era. In fact, in addition to having helped the development of human rights, the Nation-state served as a catalyst for the largest massacres seen by mankind. Thus, it’s possible to agree with Manuel Castells when he claims he has “[...] no particular sympathy for modern nation-states that have eagerly mobilized their people for reciprocal mass slaughter in the bloodiest century of human history – the twentieth century”\(^{12}\). Therefore, it’s necessary to point out, first, that the Nation-state, as an artificial creation, is subject to historical influxes and there is no reason to be extremely attached to it.

Debates about the crisis of the Nation-state are not exactly new. Perhaps by it very nature as a human construction, the crisis of the State is part of its foundation. However, more

\(^{10}\) Haggerty, *Tear down the walls*, 29.


recent analyses seem to have the globalization as a common thread in discussions about the fate of the Nation-state, especially when we take into account the fact that the today’s world is characterized by a global expansion of technology, information and wealth, which leads to the disintegration of space and time boundaries.

Some authors point to the disintegration of the Nation-state. Others, more optimistic, believe that the global expansion and large-scale application of state model would be the most appropriate and feasible way to protect human rights. Another group of scholars, such as Manuel Castells, realise that the world is under a process of multiple transformations – economic, political, technological, institutional and cultural – and believe that we are witnessing the emergence of a global multifaceted order, which have as main characteristic a network organisation for cooperation between states and non-national institutions.

They understand that “in order to survive in the new context of global governance, the nation-states morphed into a different form. Not a global government, as some have prophesied, but a network of national and international political actors jointly exercising global governance”. Therefore, this isn’t about professing the end of the Nation-state or believing in the possibility of implementation on a global scale. We suggest that a new order of multilateral and shared governance is needed to overcome the notion of modern Nation-state that is deeply dependent on ideas such indivisibility of sovereignty and space-time limitations.

3.1 Changes to Sovereignty due to Global Data Flows

Territory is a central element in traditional State theories or, more precisely, is considered the spatial limitation of State’s power legitimacy, in the sense that legal rules emanating from a sovereign power are valid only within certain boundaries. However, the

15 Jose Luis Bolzan de Morais and Lenio Luiz Streck, *Ciência política e teoria do estado* (Porto Alegre: Livraria do Advogado, 2010), 164.
importance of territory is ignored by global data flows that are intrinsic to post-modern societies, which leads to a reduction in the ability Nation-states to control these flows.

According to Castells, Nation-state’s sovereignty is getting weaker due to the inability to “[...] navigate the uncharted, stormy waters between the power of global networks and the challenge of singular identities”\(^\text{17}\). This doesn’t mean, however, the complete breakdown of the State as a model of organisation, since its political core will often resist to power losses. Nowadays, this situation is evident, since, in addition to the crisis of the State, there is a simultaneous reorganisation of institutions as a way to make their existence possible in the 21st century.

A major problem faced by the Nation-state is the inability to control data and communication flows. This alone is a characteristic powerful enough to establish a new era of extraterritoriality. The data flow is the message itself – to paraphrase Marshall McLuhan’s “the media is the message” – as it weakens State’s power. Although there are several attempts made by legal theory to control data flows, the theoretical framework of legal theorists is inescapably linked to the idea of territoriality and, for this reason, classical attempts to control data flows have little or no significance at all. In this sense, Castells believes that

\[\text{[...] for the years to come, nation-states will be struggling to control information circulating in globally interconnected telecommunication networks. I bet it is a lost battle. And with this eventual defeat will come the loss of a cornerstone of state power. Altogether, the globalization/localization of media and electronic communication is tantamount to the de-nationalization and de-statization of information, the two trends being inseparable for the time being}\(^\text{18}\).

The denationalization and privatization of information shows how troublesome is the idea of indivisible sovereignty. However, this doesn’t mean that certain states are unable to access the global data flow and use it for their own agenda, as became clear in view of recent news about the NSA analyst Edward Snowden. In the particular case of the USA, it’s a late return to the Nation-state motivated by the fear created by the “war on terror” and that can only be sponsored by the “last of the sovereign states”, whose dominance over information technology ensures a temporary resistance against the decentralizing tendency of global data flows. This return to the monopoly of Nation-state’s violence is against the current trend of creation of a global network. Thus, “[...] instead of a network state learning to enact global governance, we

\(^{17}\) Manuel Castells, *The power of identity*, 304.
are witnessing the unfolding contradiction between the last imperial hurrah and the first truly interdependent world. Nevertheless, this contradiction doesn’t seem to be sustainable in the long term, as explained by Castells.

Despite this contradiction of the USA surveillance power over global data flows, the dissolution of sovereignty is a consequence of the emergence of new non-state structures of authority and power. The Nation-state is now inevitably vulnerable to “attacks” from unspecific new global players. In this sense, the State needs to reformulate its functions, to start acting not as the centre anymore, but as a node within a decentralized network of power. In this sense, Saskia Sassen believes that sovereignty and territory remain the key features of the international system. Notwithstanding, they were partially diverted toward other institutional arenas outside the State, the territory and nationalized models. Since sovereignty and territory are classically considered indivisible and essential to the Nation-state, global data flows associated with surveillance – from governments and private companies – represent a turning point of the very idea of Nation-state.

The Nation-state, with sovereignty and authority, is antagonized by influxes of various powers, which are also network nodes. This becomes clear when, without the possibility of control by the nation-state, data doubles of individuals move freely between companies that monetize data (and metadata) of individuals and how they conduct their daily activities. This deconstructs the sovereignty, at least in the traditional sense, since it’s classically seem as indivisible. In this new role, while maintaining certain decision-making powers in certain matters, the Nation-state is also influenced by decisions of an endless number of other powerful interferences that are part of the decentralized network of global players.

Therefore, we still need a theory to understand the State since power relations, though not exclusively confined at the State level, are still part of the whole state activity. However, it becomes increasingly important to relate State and society in a structure of variable geometry of power. In the concept of the network state, the power are part of the relations between different network nodes and since each node is different, their ability to

influence other nodes depends on a number of factors that are extremely dynamic. Manuel Castells explains that not all the nodes of the network are equal, and their interests diverge, coalesce, or conflict, depending on issues and contexts. Moreover, under some circumstances, one of the components of the network (e.g., the American state in the early twenty-first century) may decide to impose its interests on the whole network, using its superior organizational capacity. While it is unlikely that it can prevail systematically (if it does the network would be replaced by a global chain of command), its unilateral logic destabilizes the delicate balance of cooperation and competition on which the network state is based. Ultimately, unilateralism breaks the network state into different networks and introduces a confrontational logic between these networks.

On the opposite side, Georg Sørensen believes that the core of sovereignty remains intact. In his opinion, there are three aspects that must be examined: the legal core of sovereignty, which he understands to be the constitutional independence, the rules governing this sovereignty, i.e., reciprocity and non-intervention, and, thirdly, the material reality of states, i.e., their real capacity to act and to control economy and political institutions.

To sustain his point of view, Sørensen argues that the history of the State is often misinterpreted, since external interference always existed and it was never able to completely regulate flows on its borders. Furthermore, the strength of the Nation-state would be clear due the multiplication of the number of sovereign states after 1945, without other players capable to endanger supremacy. Thus, although the “modern game” and the “new game” are different games, Sørensen believes that constitutional independence of the state remains intact.

This position, however, proves to be problematic if considered in light of surveillance theory. Thus, things are not as simple as Sørensen wants and States are not as free as he thinks. For instance, recent events involving vulnerabilities of worldwide communications, especially NSA surveillance deployed against Brazilian president communications and against the most important Brazilian company (Petrobras) have shown that there is nothing Brazilian federal government can do in the political arena to protect itself.

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21 Manuel Castells, *The power of identity*, 365
22 Georg Sørensen, *La transformación del Estado*: más allá del mito del repliegue (València: Tirant lo Blanch, 2010), 127.
against USA surveillance. Part of Sørensen’s misunderstanding is possibly related to the fact that his theoretical framework are from the 60s and 80s and, obviously, are unable to capture changes caused by IT-driven surveillance, which, as seen before, only started to grow after 1980. Although he may fail to analyse the importance played by global data flows and the impact over the constitutional independence of the state, it’s possible to agree with him when he states that sovereignty will change.

However, many global processes are still highly dependent on the Nation-state to become functional. It is a complex phenomenon that resists simple explanations and requires that we understand “[...] deep structural shifts underlying surface continuities and, alternatively, deep structural discontinuities underlying surface discontinuities.” In few words: the Nation-state is too small to deal with global problems related to surveillance, but it’s too large to solve problems of individuals. Despite the contradiction represented by the USA military power, the increasingly liquidity of data flows characterises a process of systematic reduction of sovereignty and power of the Nation-state in order to maintain longevity.

3.2 STATE TRANSFORMATIONS IN THE CONTEMPORARY WORLD

In his book on liquid modernity, Zygmunt Bauman justifies the metaphor of fluidity as the most appropriate for today’s world and explains that liquids don’t easily maintain their shapes and are constantly ready to change their shape in order to adapt to whatever recipient they are.

This ability to suppress rigidity and ignore time and space easily is a fundamental characteristic of what, without going into further debate on the precision of the expression, is called postmodernity. Information technology, far beyond a simple instrument of this liquidity is one of its keystones. With this idea in mind, Saskia Sassen analyses what she calls “assemblages” in the global digital era and asks what are the consequences of information technology to the Nation-state. While recognizing the paradigm shift that involve a new

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23 There is plenty of news about a new e-mail system for Brazilians that are supposed to be protected against NSA surveillance. Since this system contradicts the very idea of the Internet – a global decentralised network –, it seems to be more a public relations stunt than a serious countermeasure.


institutional dynamics of globalization, Sassen doesn’t agree with the common vision of the State as a victim of globalization, because it remains a privileged place for legal production. As argued before, this doesn’t mean the end of the State but underlines the important overlap between a plurality of denationalized global institutions and the State itself. Saskia Sassen argues that

[...] major transitions ushering novel arrangements [...] might depend on multiple capabilities of the older order. This “dependence” is not necessarily easy to recognize, as the new organizing logic can and will tend to alter the valence of a given capability” [...] some of the old capabilities are critical in the constituting of the new order, but that does not mean that their valence is the same; the relational systems or organizing logics within which they then come to function may be radically different. The critical issue is the intermediation that capabilities produce between the old and the new orders: as they jump tracks they are in part constitutive and at the same time can veil the switch by wearing some of the same old clothes26.

The key point in the discussion about the impact of information technologies on State structures is the limit of democracy and State law-making capacity over these technologies. In general, they destabilize formal hierarchical structures and replace them by new structures that, although not yet formalized, are often appropriated by private powers that are immune to democratic influences. From the point of view of surveillance theory, this means that although these practices often escape from democratic regulation – especially when they involve private companies or State secrets – they are not immune to control, but, on the contrary, are under the regulation of those who control technology. This is a big problem, since it removes the need for accountability of surveillance mechanisms, even when States uses them, as we’ve seen in recent events involving Edward Snowden.

To analyse transformations of the State in the contemporary world, we cannot use categories that were developed inside other paradigms or contexts. This reinforces the urge to understand how new information technologies can liquefy what wasn’t commonly liquid, assigning hypermobility to what was previously physical. These changes in solid structures like the State and its formal authority doesn’t mean the disappearance of old power structures, but a rearrangement. In this sense, Saskia Sassen argues that ‘existing theory is not enough to map today’s multiplication of nonstate actors and forms of cross-border cooperation and conflict, such as global business networks, NGOs, diasporas, global cities, transboundary

26 Saskia Sassen, Territory, authority, rights, 8.
public spheres, and the new cosmopolitanisms. For this reason, international law, despite being commonly associated as a possible solution to problems created by new information technologies, is insufficient. That’s because their categories were created to deal with inter-states relations (whose subjects are exclusively Nation-states) and ignores the fact that, nowadays, important global decisions are taken not only by Nation-states and, therefore, don’t follow their logic. As Saskia Sassen shows, State sovereignty – understood as the capacity, within a given territory, to centralise all power, legitimacy and law – becomes unstable, since the manifestations of power in the territories are no longer mutually exclusive.

Although the Nation-state remains important, other powerful players, not linked to a territory, are gaining more importance over decision-making processes. Rather than an instrument, information technologies restructure visibility, territoriality and temporality. This is why the new surveillance requires new models of control in order to guarantee the protection of human rights.

4 CONCLUSION

It would be impossible to solve such a complex problem in one short essay. The main goal of this text was to show how surveillance studies are ignored by legal theory, especially in the Brazilian context. We’ve raised some questions about possibilities of legal control – if there is any – over information technology surveillance in order to protect human rights against violations. Even if legal theory doesn’t have, currently, instruments to deal with surveillance, we must keep looking to create new ways to protect what makes us humans. In a liquid world, legal scholars cannot continue to think solid.

REFERENCES


27 Saskia Sassen, Territory, authority, rights, 346.


