Should cities be smart?

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Abstract: The why and whether of smart cities

- Why would citizens want smart cities?

- Smartness for whom?

- Cities can and should be smart?

➔ rephrase my initial questions to a more generic question: should governments be smart (or smarter than citizen)

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Smartness is a dangerous catchword

- S.M.A.R.T stands for: *sufficiently specific, measurable, achievable, realistic and time-bound.*

- Use of information and communication technologies (ICT), Internet of Things (IoT), big data and open data. Sold by private companies to governments so they think they can be smart.

- *Smart governance:* A state seeking the solution of problems through the collection, analysis and production of information. (Jack Balkin, 2008)

- Legacy of New Public Management (NPM), that defends quality and efficient public services through the achievement of means (Christopher Hood, 1995)

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Four very distinct drivers of the Smart State, out of many others

DRIVER 1: From State intervention to smart nation-building: The development of States demanded the further development of bureaucratic infrastructures, which demand more bureaucracy. Snowball effect. (Richard Devetak, 2010)

- The bureaucracy is the natural extension of the executive power, but is also is a policy-maker in its own right (Huber and Shipan, 2002; Potter, 2019; Rudalevige, 2021).

- Many studies have demonstrated the roles of groups of top civil servants as 'programmatic elites' with clear views of the policy reforms that they believe must be carried out (Hassenteufel and Genieys, 2021) or of individual bureaucrats as policy 'brokers' who mediate between opposing coalitions and are active in the pursuit of compromise (Ingold and Varone, 2012) ((Papadopoulos, 2023, 23-25).

- Vanessa MacDonnell, The civil servant's role in the implementation of constitutional rights, *International Journal of Constitutional Law*, Volume 13, Issue 2, April 2015, Pages 383–406,

- Many constitutions have duties and protective measures for civil servants

DRIVER 2: Bureaucratic foundations of human rights: The evolution of human rights from a non-interference posture to positive action demands more bureaucratic apparatus. Human Rights became the new "lingua franca" in a world where God is dead. (McEvoy, 2017)

Four very distinct drivers of the Smart State, out of many others

DRIVER 3: The entrepreneurial state: This movement calls for further intervention of the State in the economy. Mazzucato's "entrepreneurial state" highlights the role of the state in developing new markets. (Mazzucato, 2016)

DRIVER 4: Technology and the micromanaging state: Through the sharing and interoperability of data, States develop ubiquitous micromanaging, through the use of a myriad of technologies e.g., Digital IDs, Automatic Number-Plate Recognition.

- Impact on position of the executive

- Driven by private actor promises

- Driven by the agency of technology (van Maanen, 2023; Ellul)

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The Construction of the Smart Bureaucratic State

- In the Enlightenment period, the traditional belief that humans are inherently relational beings was challenged. Society moved from absolutism to liberalism, prioritizing principles like equality, legalism, and scientific objectivity. (MacIntyre, 2013)

- This paradigm shift left a vacuum. Gone is a telos that orients society. Western world became a platform with three actors 1) the individual 2) the market, and 3) bureaucracy (MacIntyre, 2013)

- The reliance of Western continental democracies on bureaucracy has developed an individual total reliance on bureaucratic systems to solve their problems and fears. Whenever there is a problem for the individual (with others or with the market), there comes a claim for more government. (MacIntyre, 2013). Data protection law is a typical outcome in this regard (Kighlinger, 2006)

- This paradigm is essential to comprehend Western legal and administrative arrangements and the progressive legitimisation of State intervention in politics, economy, human rights, and technology regulation, discussed in the previous slides.

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Marcel Gauchet and the liberal illusion (1980 & 2009)

- Gauchet shows that there is a liberal illusion among liberals (but less so among constant) and the right of the moderns not to be involved in the political but to be allowed ot be only active in society.

- The illusion is that society and government share power and that powers are going to shift from government to society, but this has not produced itself on the European continent; the state has made itself indispensable and through soft steering rather than subjugation the state has grown larger and so has its effective control.

- GAUCHET hen describes how the state will develop apart from society : With the advent of the modern democratic state, however, the terms of the political equation are inverted: explicit subordination and subjugation disappear, but effective control is enhanced to a fantastic degree. Society is left helpless before a power that claims to emanate from it, for it is tacitly understood that it must constitute itself without the help of the authority to which power is delegated. In reality, however, this apparent (and effective) autonomization of society allows the state to set itself up outside society, to break the organic bonds that had linked it to the human community, and to devote all its energy not merely to *maintaining* society but to *developing* it from a position of radical exteriority. [. . .]

Jean-Marie Guéhenno on the future of the state (1999, Ch3)

- todays states are bigger than ever and not only the estatist left but also the right seems to be fine with it

- Even liberals became 'etatistisch'

- States used to be the expression of sovereignty , the horizon of the life of the citizen and the national sovereignty was seen as the basis of the legal order

- Now this is not true anymore: the state became 'modest' a service provider next to other players that provide services and has to adapt itself constantly

- ==> this is canalization of the role of the state: a state is no longer judges for its capacity to represent its citizens and to give them identity but for the quality of her services

- state officials are loosing their status , no longer respected specialist serving the general interest. These 'high priest of rationality and knowledge' now are no longer the 'clerus' of the modern democracy

- state officials can almost no longer be put apart from people working in the private sector ==>their legitimacy is now technical no longer political and there is no problem with putting out vacancies for state jobs in the private market

- Belief in rationality is still there but less in the rationality monopoly of the state

Proposals for taming the Smart State: caveat

- **PROPOSAL 1: The development of a new vocabulary**

- **PROPOSAL 2: New proposed digital rights**

- **PROPOSAL 3: Epistemic constitutionalism**

Caveat : What can a scientistsay about what *political actors* should do? "For that reason some political realists are reluctant to give much 'guidance' and are skeptical about the roles theorists and theories (should) have in that respect. Raymond Geuss, for instance, explicitly rejects the idea that critique should be accompanied by some 'positive' alternative; his precisely for the reason that such an implicit duty to combine criticism with alternatives could be used by those in power to "(...) dictate the terms on which it can be criticized (...)." (Geuss, 2008; van Maanen, 2023, 47)

Proposals for taming the Smart State

Idea : Updating Constants impact on our constitution's and the moderate government

- Most respected constitutionalist in 1820s and major influence on Belgian constitution

- Less known: Constant was a non-constitutional constitutionalist and also advocated different solutions than contemporary constitutionalists to restrain the exercise of sovereignty.

- He put his hope not so much in a written constitution, as in the pressure of a well-informed public opinion and in the political process itself, where the existence of multiple counteracting channels of power should prevent potentially dangerous concentrations of power.

- While he does believe that the constitutional order needs to be protected against the unrestrained expression of sovereign will, his trust in public opinion and in the political process – rather than in the constitution itself – to do so, certainly puts him apart from most other constitutionalists (Raf Geenens & Stefan Sottiaux, 2015)

- Constant defends the *moderate state* which is *limited* but *effective*. Against the *motto* more data the better. Non-interoperable government. Civil society should be thriving. (De Hert, 2015 & Gauchet, 2009)

- Gauchet shows that Constant was dissatisfied with constitutions of his time: our constitutionalism failed since we used solutions of the past.

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Proposals for taming the Smart State

PROPOSAL 1: Constant and the moderate government: Constant defends the *moderate state* which is *limited* but *effective*. Against the *motto* more data the better. Non-interoperable government. Civil society should be thriving. (De Hert, 2015 & Gauchet, 2009)

Proposals for taming the Smart State

PROPOSAL 1: The development of a new vocabulary and communication strategy with a new positioning of the civiel servant and the expert and the technocratic society:

A strategy for states and civil servants

- Dropping the word *smart* - a legacy of Claude-Henri de Saint-Simon's technocracy - for the adoption of a *sufficient, moderated efficient state.* (Kryger, 1979)

- **Do not focus only on the possibility of doing more due to digitalization, but also look at what others in society can do and envisage other ways of reaching. your goal by collaborating and safeguarding public values** (Stol, 2021)

- Understanding the limits of current accountability mechanisms on civil servants (Papadopoulos, 2023)

- Gilley, B. Technocracy and democracy as spheres of justice in public policy. *Policy Sci* 2017, vol **50**, 9−22

- clarifying the communication strategy of the government. do not use the strategy of the past: not telling the citizens the truth not to alarm them, but take them seriously and tell the truth from the moment you have it. (R. De Langhe, 2020)

- Adapting structures: complicated (foreseeable tasks: organising train networks) v. complex tasks (non-foreseeable with small problems having large impacts) (R. De Langhe, 2020)

A strategy for experts

- European Commission, Directorate-General for Research and Innovation, Taking European knowledge society seriously, Publications Office, 2007,

- Networks of experts that organize themselves spontaneously, horizontal rather than vertical networks (R. De Langhe, 2020)

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Proposals for taming the Smart State

PROPOSAL 2: New proposed digital rights:

- The combination of already existent rights with new ones adapted to the digital environment in which we live. e.g. *the right to know*, the right to anonymity, the right to remain offline, and to dissent. (van der Sloot & van Schendel, 2021 & Koops & Lips, 2007):

- un-human (like German right to integrity of systems) , more structure oriented rights in the internet constitution to make (Fischer-Lescano, 2016)

- The Coming Good Society: Why New Realities Demand New Rights (William F. Schulz and Sushma Raman, 2020)

- Rochel21 Digital Integrity as a Human Right (Rochel 2021)

- Procedural and political rights

Caveat: should be a list of fundamental rights and unhuman rights and addressing not only humans but also citizens (Declaration des droits de l'homme et du Citoyen 1789) So a return to the original Enlightenment idea giving rights and protecting against abuses or power moves by political power (Sicurella, 2018)

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PROPOSAL 3: Epistemic constitutionalism: The right to know and entitlement to learn. Propose that Constitutions should build new epistemic guidance to address what type of state we want. (Zuboff, 2020 & Gauchet, 2009)

- Balkin 2008 democratic information state v authoritarian information state. The former is information gourmet (only collect with justifiable reasons) and information philantrophist (forgiving)
- Citizen scrutiny over governments. Constitutionalise data minimisation, data retention, and transparency.
- Jeremy Millard's evolution of governmental ideal types, a technology fueled evolutionary process From e-government, or new public management government to transformational government (t-government) transforming government in fundamental ways to put the citizen at the centre, to Leaner of Platform Government (l-government) to open-government (o-government)(Millard 2016, van Maanen, 2023, 17)
- Harari's 3 basic rules protecting us from digital dictatorship (Harari, 2021)

  1. -data should be used to help these people rather than to manipulate, control or harm them (rule on trust)

  2. -surveillance must always go both ways (rule on data dictatorship).

  3. -never allow too much data to be concentrated in any one place. Not during the epidemic, and not when it is over (rule on data monopoly)

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Sketching Constantian constitutionalism

- *The manifestation and transformative capacities of power are topics of major concern, warranting careful analysis. This question of power should be asked continuously, but especially at moments when power relationships are changing, or on the verge of getting changed. And although it is always hard to pin down where you are yourself in the development towards another brink — it is far easier to find that our 'afterwards'— I believe there is more than sufficient reason to ask how open government, governance, and power interact in the Netherlands* (van Maanen, 2023,4)

- The new constantian constitutionalism there can be an update in terms of rights, combined with other methods in the constitution (to frame a government that wants to be too smart)

- The outcome should be respectfull of the idea behind 'checks and balances' and respectfull of modern digital times

Now let us come back to this slide: The why and whether of smart cities

- Why would citizens want smart cities?

- Smartness for whom?

- Cities can and should be smart?

➔I made a detour to these questions and asked a more generic question: should governments be smart (or smarter than citizen)

After the foregoing the foll. should be clear

1/ there is nothing against cities being smart, in the sense of citizens being smart

2/ governments should not be smarter than civil society, but should be moderate in their curiosity, should be open both in terms of mind and citizen control

3/ governments that want to be the smartest have to render account in terms of bigger constitutinal schemes (see also ECtHR, Marper case)

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Further recommendations

- Paul De Hert's lecture *Should governments be smart* on Youtube

- P. De Hert, A., Kinneging & M. Colette (eds.), *Benjamin Constant. Ontdekker van de moderne vrijheid*, Antwerp: Pelckmans, 2015, 240p

- Rogier De Langhe, 'De overheid wilde duidelijk niet dat mensen panikeerden, maar het probleem was net de ontkenning' , *De Morgen,* 23/4/ 2020

- European Commission, Directorate-General for Research and Innovation, *Taking European knowledge society seriously*, Publications Office, 2007,

- Andreas Fischer-Lescano (2016). Struggles for a global Internet constitution: protecting global communication structures against surveillance measures. Global Constitutionalism, 5, pp 145-17

- Marcel Gauchet 'Benjamin Constant: L'Illusion lucide du libéralisme," in De la liberté chez les Modernes. Ecrits politiques, ed. Marcel Gauchet (Paris: Livres de Poche, 1980

- Raf Geenens & Stefan Sottiaux, 'Sovereignty and Direct Democracy: Lessons from Constant and the Belgian Constitution', European Constitutional Law Review, 2015, vol. 11(2), (293-320),

- Jean-Marie Guéhenno,   L'avenir de la liberté - La démocratie dans la mondialisation, Paris, Flammarion, 1999, 222 p.

- Raymond Geuss, *Philosophy and Real Politics* (Princeton and Oxford: Princeton University Press, 2008), 95–96.

- B. Gilley, 'Technocracy and democracy as spheres of justice in public policy'. *Policy Sci* 2017, vol **50**, 9–22

- Yuval Noah Harari, 'Lessons from a year of Covid', *Financial Times,* 26 February 2021

- Jeremy Millard, "European Strategies for E-Governance to 2020 and Beyond," in *Government 3.0 - Next Generation Government Technology Infrastructure and Services: Roadmaps, Enabling Technologies & Challenges*, ed. Jeremy Millard and Adegboyega Ojo (Springer, 2017), 1–26.

- Jeremy Millard, "Open Governance Systems: Doing More with More," *Government Information Quarterly*, 2015, https://doi.org/10.1016/j.giq.2015.08.003.

- Yannis Papadopoulos, *Understanding Accountability In Democratic Governance,* CUP, 2023, 85p

- W. Stol, 'Digitalisering en de rol van de politie. Naar een 'autoriteit fatsoenlijke rechtshandhaving', *Panopticon*, 2021, vol. 42/2, 161-167

- G. van Maanen (2023). From communicating to distributing: Studying open government and open data in the Netherlands. [Doctoral Thesis, Tilburg University].

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