When trust no longer plays a role

On the future of freedom in smart orders

By Klaus Günther

What significance does individual freedom still have in times of digitally generated predictions? Is it still important for us at all? Risks are supposedly minimized with the help of artificial intelligence. But at what price?

In the 1990s, there were several films which, as science fiction, anticipated what today at least partially already is or could become reality. In »The Truman Show«, the protagonist has led a seemingly normal and unremarkable life since childhood in the world of a gigantic television studio. The fact that his everyday life takes place as a live show on TV is kept secret from him, albeit unsuccessfully at the end. The film »The Matrix« works explicitly with a simulated world created by means of artificial intelligence, whose inhabitants no longer know the real world at all and to escape from which is a dangerous and almost futile endeavour.

We too are moving around more and more frequently in artificially created worlds, whose construction is steered by algorithms that only a small number of people understand and which can only be controlled by the fewest. As self-learning machines, these algorithms collect and process the data they harvest from users' behavioural statements and generate a profile from them which makes it possible to predict future behaviour and out of which, in turn, the world is assembled in which users move.

Predictive data as the capital of the 21st century

What many people evidently fail to see entirely is the fact that the predictive data they generate are used to influence and channel their behaviour and this namely in the interest of corporate entities and governments. Predictive data are, as Shoshana Zuboff vividly described in her book »The Age of Surveillance Capitalism«, the capital of the 21st century. They can be sold or used to produce even more precise behaviour patterns in order to create an even better, customizable product. Viewed from this perspective, the actual value of smartphones or devices such as »Alexa« lies neither in their practical value nor in their exchange value, but instead in their


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»Knowledge is power«: Francis Bacon, pictured here in an oil painting by Frans Pourbus (1617), could not foresee to what extent his famous sentence would one day prove true.

added value in terms of the predictive data they produce.

Alongside private companies, however, political stakeholders, governments and above all authoritarian regimes are very interested in using predictive data generated algorithmically to gain or stabilize political control as well as for effectively combating dissent, protest or opposition. As the attempt by »Cambridge Analytica« to influence voters' behaviour in the last presidential elections in the USA showed, democracies are not immune to such temptations either. In some regions of China (e.g. in Rongcheng), experiments are being conducted with techniques such as digital face and voice recognition in order to establish a system that combines surveillance, control and the social classification of citizens (social credits) with incentives and sanctions, the purpose being to optimize their day-to-day »civil« behaviour (and political good conduct) in line with prescribed »core socialist values«.

A new form of power

Both kinds of use of predictive data lead to the strengthening of a type of power that so far has led a rather shadowy existence. A person capable of predicting the future as reliably as possible, who has at least an information headstart with regard to future developments, has always had an advantage. That such knowledge creates power became clear at the latest when we became able to master nature more effectively than in the past through our understanding of the laws of nature. This awareness prompted Francis Bacon to coin his famous sentence at the beginning of the 17th century: »Knowledge is power«. This applies to a still greater degree for fervently desired, social predictive knowledge, that is, when it is a matter of the future intentions, decisions, courses of action, the future behaviour of others and thus of controlling them. Whoever has such knowledge at their disposal possesses predictive power in the truest sense of the word.

However, other than is the case with predictions based on the laws of nature, social predictive knowledge was for a long time much more uncertain. Indeed, there were already the first successful attempts back in Bacon's day to measure probabilities mathematically and thus also to calculate people's future behaviour, for example, by compiling social statistics and drawing conclusions from them about behaviour patterns (Hacking, The Emergence of Probability, 2. A., Cambridge 2006). As Michel Foucault has shown, the developing European state of the modern age used this new type of knowledge for a biopolitical economy of power directed at the productivity and security of the population. It replaced the previous panoptic power of internal and external surveillance directed at the disciplining of the body and the soul (Michel Foucault, Geschichte der Gouvernementalität I, Frankfurt am Main 2004). However, this new predictive knowledge relates above all to regularly recurring phenomena in the population (e.g. annual suicide rate, birth and death rates) and less to future individual behaviour. As modern society becomes a risk society due to its dependence on complex technologies and the state becomes an anticipatory prevention state, the need for reliable predictions increases considerably. With big data and AI, social predictive knowledge seems now, however, to be becoming much more robust and can be individualized more precisely. Probability could finally transmute into certainty. In this way, predictive power has the best chances of becoming the biopower of the 21st century.

Freedom and trust in normative orders

If we go along with Foucault's analyses, modern biopolitics operated above all in its liberal manifestations with the freedom of the individual to shape his or her own life in a process of exchange with other free persons. From this external perspective, it was above all a matter of weaving the individual person into a tight net of norms and normalizations through many different and lengthy processes of subjectification in order thus to spawn attitudes and practices which empowered that person to make use of freedom both autonomously as well as to general advan-

tage (Foucault, page 78). This freedom necessitates above all working continuously on oneself so that each person contributes to the security of the population through his or her own individual anticipatory behaviour.

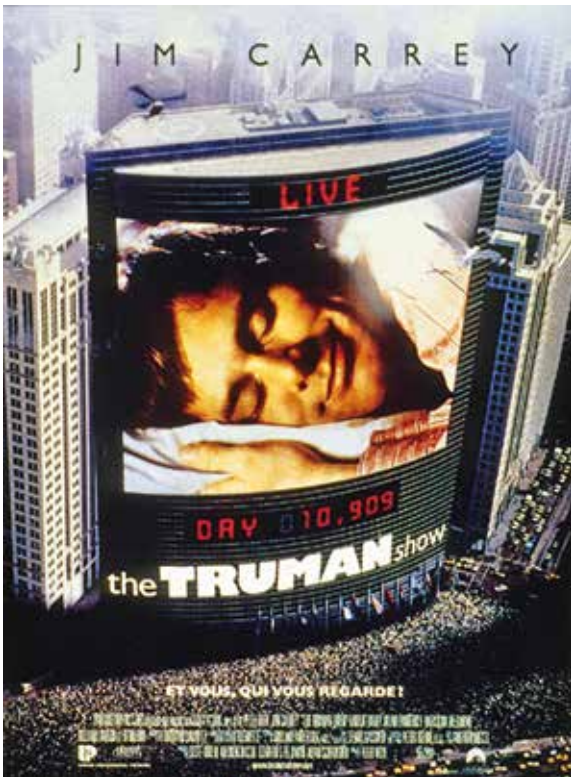
However, freedom is not only the product of the economy of power described by Foucault but rather at the same time the reason for existence for individual and political autonomy and thus of the possibility of release from heteronomy and domination. It presupposes that people develop a reflected relationship to themselves through their experiences with others as well as with outer and inner nature in view of a slightly uncertain future. Only in this way can the self also recognize and criticize the social norms that guarantee its status as a free and equal person, and at the same time that of all others, as well as be held responsible for violating them. By reviewing and correcting our own intentions, wishes and convictions in the light of – often opposing and highly conflicting – experiences with others, with ourselves and with outer nature, that is, through learning processes, the self gains and is given its freedom.

It already becomes clear from this brief outline that such a freedom is – from a social perspective – at the same time full of preconditions and risky. In addition, an indelible remainder of spontaneity is inherent in this freedom, often only awakened by surprising experiences. With this moment of chance, it evades all predictions and calculations again and again. Admittedly, this insight is by no means new, but so far society has confronted this risk with the fragile and not easily producible good known as trust. It seems, however, to be becoming increasingly risky in a globally collaborative, technologically innovative, highly individualized and diverse society to rely on this fragile resource. Freedom itself becomes a risk, relying on the autonomous actions of others could lead to disadvantages for ourselves. The loss of trust is now, however, being accelerated by the fact that with the predictive power perfected through AI and digitalization there seems to be an alternative with which trust can be transposed into certainty about the future actions of others. But then freedom too threatens to disappear – not through oppression or manipulation, but simply because it no longer matters.

Freedom and security in smart orders

Anyone who orders something online or is underway in social networks can observe – on a small scale in their own actions – how freedom in the sense of autonomous decision-making is becoming increasingly superfluous. On our next visit, we receive offers based on conclusions drawn about our past purchasing decisions or on messages we have posted. The offer varies, namely in such a way that it still fits into the range of interests constructed on the basis of our personality profile, but at the same time it also has the appeal of the new. Similar can be said of social networks: Our own activities bring us together with other users who perhaps do not share identical, but indeed similar needs, experiences or emotions, which are recognizable not least from the number of likes and followers. Anybody moving around in such digital echo chambers finds themself in a kind of smart world of affirmation, in which the self remains as it is within a certain range of variation. We are spared conflicts with others or can stave them off. We are relieved of the job of making decisions and forming opinions with all its learning processes, which is an indication, according to Gaspard Koenig, of the end of the individual (Koenig, page 135). For the architects of this world of affirmation, for corporate entities as well as for political stakeholders, this minimizes the risk that consumers or voters will suddenly decide differently.

However, this also applies for the normative orders in which we are continuously underway with our words and actions. Although the participants do not always behave everywhere according to their rules, some of which are also institutionalized in the form of legal systems, again and again they do so in such a way that they decide freely and independently to comply with a rule. This is expressed not only through their criticism of rules, e.g. with reference to



Virtual reality in the cinema of the 1990s: Jim Carrey in the role of Truman Burbank, who – without knowing it – is the protagonist in a TV series. Since his birth, the viewers have followed how his life progresses.

Brave new world? Already today, authoritarian regimes use voice and face recognition to establish a system that allows the monitoring, control and social classification of the entire population.

other rules, but also by the fact that they have the factual freedom to deviate from the rule in their behaviour – also while accepting negative consequences (Haffke, page 967). No normative order, no legal system is so perfect that it could exclude this factual freedom. This risk too could only be offset by a general, but always fragile trust in the other and, in the case of a violation of the law, in the readiness and ability of the constitutional state to impose sanctions.

Here too arises then the alternative, one which guarantees more security, of simply bypassing the freedom to comply with norms on our own responsibility by making orders smart. Smart orders are characterized by their use of technologies designed to avoid errors. A model for this is the smart city, in which as many complex routines as possible involving the people and things there are coordinated by algorithmically steered processes in such a way that very few malfunctions and errors occur (e.g. in road traffic via externally activatable control modules in self-driving electric vehicles). Regulating these confluent processes is a smart order that directly determines individual behaviour and, so to speak, takes effect via each individual.

The power of conviction of smart orders

If this model is transferred to society as a whole, it becomes clear that the prevention state can

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- »Knowledge is power«. At the latest since Francis Bacon we know that an information headstart with regard to future developments plays into the hands of those in power.
- The complexity of our modern society increases the need for predictive knowledge. Big data and AI facilitate predictions on a scale never before known.
- The individual freedom establishing itself in a diversified learning process since the Enlightenment accepts risks which are countered with trust.
- In times of AI, this trust threatens to become obsolete: Smart orders are replacing liberal norm-setting processes and leave the individual hardly any choice regarding his or her behaviour.
- The readiness to forego individual freedoms in the interest of more security and prosperity is surprisingly great.

Literature

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use smart orders to optimize itself to a considerable degree and without being reliant on coercion and direct control. First proposals in this respect have already been put forward under the title of »anticipatory government« (https://www2.deloitte.com/us/en/insights/industry/public-sector/government-trends/2020/predictive-analytics-in-government.html). The objective is to identify social problems much sooner than in the past and to predict their danger potential in order then to be able to intervene in good time and successfully before they turn into crises.

The new technical possibilities give the leading principle of any prevention state, »prevention rather than cure«, an almost invincible power of persuasion. It does not take much imagination to envisage how these possibilities will meet with great approval above all in the prevention of dangers to the internal and external security of the population.

It is not by chance that proposals regarding anticipatory government are predominantly put forward by private enterprises, such as international consultants Deloitte. Not only because they hope to acquire a new business model from the conversion of a normative order into a smart one but also because the distinction between sovereign action by the state and the shaping of order by the private sector will mostly become obsolete in favour of the latter: Technical prevention through smart orders demands technical expertise as well as efficient management but not lengthy political processes in the shaping of legislative opinions and policies.

This raises the question of the democratic legitimation of anticipatory government with smart orders. Here too, it seems that processes for shaping public opinion and policies, within which free citizens adopt a critical stance and resolve conflicts according to rules, no longer matter. What is the point of continuing with the political theatre of representation and public debate if AI and big data make it possible to poll individual preferences in a permanent referendum of tracking, e.g. via mobile phone usage and social networks? Would an order that could immediately transform such data into personalized technical prevention measures not be far more democratic? At the end of the day, the question is only how such an order would differ from that of Truman's or The Matrix, with the exception that we would become indifferent to freedom with our eyes wide open. ●

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Klaus Günther, 63, has been professor for legal theory and criminal law and procedure at the Faculty of Law since 1998 and dean since 2019. In 2016 he also became a member of the Institute of Philosophy at the Faculty of Philosophy and History. Günther studied philosophy and law at Goethe University and completed his doctoral degree (Dr. jur.) as a member of a Leibniz Prize research group under the supervision of Jürgen Habermas. His post-doctoral degree (Habilitation) followed in 1997 at the Faculty of Law of Goethe University. In 2001 he became a member of the research college at the Institute for Social Research. Günther was co-spokesperson of the cluster of excellence »The Formation of Normative Orders« from 2007 to 2019. In 2019 he became Principal Investigator at the Research Centre Normative Orders currently being established. His main research interests are philosophy of law (including discourse theory of law) as well as the principles of national and international criminal law. This article is based on current research work on the transformation of normative orders into smart orders.

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