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## Humanism, Punishment and Surveillance. Criticism of M. Foucault's "Surveiller et punir"

**Review.** This article is devoted to philosophical research on the origins of modern state surveillance, punishment and, more generally, the evolution of modern criminal law. It is presented as a discussion between the author of this article and Michel Foucault. It develops the idea that humanism has played an important role in the softening of state-sanctioned punishment and in the development of state surveillance over the last 300 years. The article deals with the historical origins of the modern state and the evolution of its relations with the individual; the evolution of government functions; the evolution of criminal law; and human rights and freedoms. It contains a critique of Foucault's analysis of the evolution of the modern system of criminal law and of his concept of surveillance.

**Keywords:** punishment, state (government) functions, criminal law, modern law, Michel Foucault, Social philosophy, surveillance, humanism, human rights, freedoms.

Punishment and surveillance, as basic aspects of criminal law, have undergone significant changes since the verge of the modern era. On one hand, criminal law punishment was softened; rendered more humane. On the other hand, surveillance was increased and developed to the point that it is no longer limited only to the scope of criminal law.

Such evolution dates back to the renaissance and saw a substantial development during — what we used to call — the absolutist era. Indeed, many authors correctly pointed out that during the late *Ancien régime* (absolutist era) there was a signifi-

cant increase in the monarchical powers<sup>1</sup>: centralization of the power, enlargement and enhancement of the efficiency of bureaucracies, instauration of monopoly on the use of force ... dates back to the XVI–XVII century and is often explained by different socioeconomic factors. As a consequence, state's surveillance over individuals was developed during this period predominantly due to the monarch's initiative. Some authors also advanced that the humanization (or softening) of punishment also took place thanks to the monarch's initiative, which is

<sup>1</sup> A. de Toqueville, *L'ancien régime et la révolution*, Gallimard, 1967.

nothing more than the concessions made by monarch to the subjects (citizens) in an effort to calm the public opinion and prevent the revolutions<sup>1</sup>.

Nonetheless, humanism (in a broad sense) has a part to play in this development. In other words, human rights and civil liberties movements have strongly contributed to the softening of the punishment and the increase in surveillance of individuals.

There are many explanations to such evolution. First of all, criminal law grew: the number of incriminating acts grew in order to protect what was later considered one of the most important objects of human rights protection — private property. The same is true for the development of surveillance: private property owners have strongly contributed to the development of surveillance systems designed to protect their property. Finally, the fact that in democracies the citizens could participate in the legislative process through their representatives in elaboration of the law (citizen's right to vote), the political domination over them was legitimized; whence the existence of the standing armies and their use as well as the law-enforcement agencies creation were no longer the arbitrary decision of the monarch, but an expression of one of the human rights (right to vote) destined to protect other human rights (security, life and livelihood of the citizens).

As we can see, if such evolutionary process of the modern criminal law, as described in Michel Foucault's major study, were indeed initiated under the monarchical absolute rule, this evolution is inextricably tied to the humanization as we know it today.

### **1. Humanism, the softening of punishment and surveillance**

In his major book *Surveiller et punir* Foucault develops the idea that the evolution

of punishment — from torture and cruel forms of execution that have disappeared in modern developed states, and which were replaced by softer forms of punishment and control — is due to the development of more effective forms of control and manipulation methods directed to correct, control and subdue the individual. Foucault emphasizes the fact that those with the power to punish intended to create new techniques of domination. This was done not because of concerns for the human condition; they were forced to reduce public displays of punishment in order to reduce the population's challenges to their power. Nevertheless, as the fundamental human rights acts of the 17<sup>th</sup> and 18<sup>th</sup> centuries attest, this phenomenon of political fear (*peur politique*) of the sovereign was concomitant with the emergence of the concept of state-individual relations and, therefore, it was not a mere concealment of the power to punish, but something more than that. In other words, the modern state's new methods of control and surveillance were not to be considered as a simple consequence of the necessity to conceal the power to punish in order to reduce the pressure coming from a populace that was attacking the power to punish. It was due to what was really being challenged by the population — namely inequality, absolutism and despotism of the power and not the power itself. It is symbolic in that regard that the most significant event of the French revolution was not the execution of Louis XVI or the Republic proclamation, but the demolition of a prison (*la Bastille*).

The evolution of the criminal justice system of the modern state was accomplished in the name of the humanization of state-individual relations and embodied in "natural, unalienable and sacred rights of man". Indeed, the Declaration of the Rights of Man and of the Citizen of 26 August 1789 patently tied this evolution of criminal justice with the humanization of state-

<sup>1</sup> M. Foucault, *Surveiller et punir*, Gallimard, 1975

individual relations. An example of this is the principle which states that punishment has to have “strictly and evidently necessary character” (*peines strictement et évidemment nécessaires*). This assumes that special investigative actions have to be carried out in order to evaluate the personal situation of the criminal, and that such evaluations have to be considered in the process of selecting an appropriate punishment. In other words, the development of modern state surveillance and investigation techniques such as psychiatric analyses of individuals was a direct consequence of the humanization of the criminal law.

Nonetheless, Foucault distorts the essence of this evolution by stipulating that “the softening of punishment is a consequence of the new tactic of power” (*principe de l’adoucissement punitif des processus d’individualisation ... sont plutôt un des effets des nouvelles tactiques de pouvoir... la douceur pénale comme technique de pouvoir*) (p. 28). Such a statement wholly contradicts the legacy of the French Revolution, embodied in the French Declaration. Moreover, it perverts the common analysis of the evolution of state-individual relations over the last 200–300 years: that it has been characterized by *limitations* on the actions of the state for the sake of the rights of the individual.

It is because of this evolution that it was necessary to develop this massive apparatus of government institutions, structures, and procedures; state surveillance and control over individuals were developed as a consequence of the humanization of state-individual relations, and not solely due to the monarch’s desire to consolidate power. Using the above example, it is clear that the development of psychiatric institutions and mental health control procedures in criminal justice can be explained as a consequence of the humanization of the criminal justice system, one manifestation of which is the absence of liability or the revocation

of punishment in cases where the accused has mental health problems.

The reason why power was no longer exercised as a property but rather as a strategy (“*le pouvoir qui s’y exerce ne soit pas conçu comme une propriété, mais comme une stratégie*” (p. 36)) — with the aid of different maneuvers, tactics and techniques — lies in the fact that state power was restricted by the growing importance of human rights. The role and functions of the state could no longer be arbitrarily exercised in any form desired by the sovereign; therefore, more subtle and humane techniques of wielding power were required.

Such changes arose due to the new notions of state-individual relations. Indeed, the individual was no longer considered as the property of the monarch (his subject), nor could the monarch execute his power discretionally — as the right of an owner over his property is often defined. Therefore, state power was no longer directed against the body (*corps*) of the subdued (executions, torture, corporal punishment), as Foucault correctly put it, but directed against the soul (*l’âme*) of the individual, his rights (*droits*), and his private property. In other words, the real reason for this change was that the sovereign was stripped of his absolute power (possession) over the subdued and was therefore forced to find other, more humane methods of control. Moreover, with the advent of a democratized criminal law (see here under § 2), citizens naturally rejected the use of inhumane forms of punishment; they voted for more humane criminal laws.

As a consequence, Foucault’s conclusions on the renouncement of cruel punishment are only partly correct. It is true that cruel punishments were abandoned (or at least limited in their publicity) due to public unrest that often accompanied public executions and which challenged the monarch’s power; concomitant regal

fear of a coup forced the monarch to make some concessions, especially in the field of criminal law. At the very least, the public forced him to conceal the brutality of his penal system. We agree with such determinism, but, at the same time, there is no place to reject the role of the humanism of those events, as Foucault does (*"Dans l'abandon de la liturgie des supplices, quel rôle eurent les sentiments d'humanité pour les condamnés? Il y eut en tout cas du côté du pouvoir une peur politique devant l'effet de ces rituels ambigus"* (p. 68)). Indeed, if humanism had no role to play in the process of limiting the sovereign's rights at the dawn of the modern era, then why were his rights limited via fundamental human rights acts and not via constitutions, abdication acts, or other forms of power-sharing in the first place?

The witnessing of cruel public punishments, public tortures and executions caused spectators to rail against the unlimited power of the sovereign<sup>1</sup>. Absolute power, as expressed through torture and public executions, was a clear indication that the relations between the monarch and his subjects were conceived in the form of property rights: the sovereign owned his subjects<sup>2</sup>. The extreme cruelty of the punishment was aimed mainly to intimidate the subjects of the sovereign in order to make his power more effective: since the

sovereign's property rights over his subjects were unlimited and could take any form, they would take ever more extreme forms in order to enhance his efficiency. In other words, since the status of the subdued allowed the sovereign to apply to them any possible measure, the sovereign naturally chose extreme measures in order to make his power more effective. This situation changed with the advent of the first modern revolutions.

And so the dawn of the modern era brought with it the emergence of several changes in sovereign-individual relations that, as Foucault remarks, caused a major change in the sovereign's methods of exercising power. They contributed to the development of different techniques of research, investigation and control of individuals and even stimulated the development of bureaucracy. Yet again, this evolution was due to the humanization of sovereign-individual relations.

Another relevant example of this idea can be seen in such human rights as the right to due process, which was imposed on the state's justice system as a reaction against arbitrarily applied legal regulations and abuses by the officials during the *Ancien régime*<sup>3</sup>. The Due Process Clause acts as a safeguard from arbitrary denial of life, liberty, or property by the government outside the sanction of the law. More specifically, as the Fifth Amendment of the US Constitution

<sup>1</sup> Chugaev, V. V. Юридическое оформление результатов Славной революции 1688–1689 гг. (Legal arrangement of the results of the Glorious Revolution of 1688–1689), *Pravo i politika* 10 (2014): 104–107; DOI: 10.7256/1811–9018.2014.10.13132

<sup>2</sup> There is no better testimony to the fact that the monarch's right over his subjects was tantamount to a property right than the Magna Carta: "No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right". Indeed, words such as "destroyed" applying to individuals is a clear example that human beings at that time were no different from an object (article) whose existence in society was governed by the monarch's property rights.

<sup>3</sup> The idea that criminal law reforms were created, and some of the human rights in the sphere of justice were established as a reaction to the sovereign's abuses power is clearly expressed in the Habeas Corpus Act: "great delays have been used by sheriffs, gaolers and other officers, to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation..."

states, this right imposes on state power several formalities which have to be applied in criminal cases (e.g. indictment by a grand jury; the prohibition against compelling the accused to give evidence against themselves). Similar provisions can be found in other major human rights acts, such as Art. 7 of the French Declaration: “No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law”. As can be seen in all these fundamental clauses, human rights in the sphere of justice imposed, at the very least, some forms or formalities for a trial prescribed by law<sup>1</sup>. More specifically, these formalities deal with the gathering of evidence and led to the development of some forensic investigation and recording techniques, as well as the development of criminal police services and an increase in their functions and powers in respect of the scope of surveillance. State surveillance and control appear yet again to have been a direct consequence of a suspect’s augmented human rights. In other words, human rights proclamations (especially of rights relating to criminal justice) are concomitant with the imposition on a state’s services of an obligation to respect some forms “imposed by law” in matters when the state is likely to inflict punishment. Thus, human rights can be “blamed” for the rise of legal formalism and bureaucracy, a proliferation of judicial procedures, and the codification of the rights of the criminally accused.

Even without thorough research into the criminal laws adopted by the legislatures and monarchs of some western nations in the 17<sup>th</sup> and 18<sup>th</sup> centuries, this rise in formalism can be demonstrated via the example of the provisions of the English *Habeas*

*Corpus Act* 1679, which came about due to the push for an increase in human rights and the protection of liberties. Indeed, this act contains provisions that establish the necessity of the written form of certain acts; it institutes formalities (e.g. the necessity of a signature); procedural terms (e.g. ten days); and sanctions (“forfeit to the prisoner or party grieved the sum of five hundred pounds”), etc. An emerging trend — the rise of formalism — is clearly identifiable in this act. Moreover, as the first provision of this act affirms, this formalism appears because of the necessity to protect the individual against the abuses of state power holders and not to simply enhance the effectiveness of the power.

The presumption of innocence also spurred the development of investigative techniques and contributed to the development of policing and investigative services. Indeed, since the accused was now to be considered not guilty at the outset, there was a need to prove the opposite (his guilt). Presumably, there was a realization for the need for deliberate activities to collect incriminating evidence. As a consequence, the sovereign was forced to create various techniques and methods (formalities) for the collection and evaluation of evidence and to stimulate the crime information, investigation, and record-keeping functions of the police services. Specifically, human rights were again the basis for what Foucault deprecatingly calls “techniques of individual domination or taming”.

The sovereign’s preoccupation with the efficient functioning of the state was not founded on some abstract sovereign desire to control every minute aspect of an individual’s life. On the contrary, it was based on the necessity to enhance techniques of modern state power functioning which, because of the need to conform to the new humanistic values, became less effective. In other words, the state had to develop those

<sup>1</sup> Kostenko, N. I. Концепция становления международного уголовно-исполнительного (пенитенциарного) права (The concept of formation of the international criminal penal (penitentiary) law), *Pravo i Politika* 4 (2014): 452–464; DOI: 10.7256/1811-9018.2014.4.11614

techniques, methods and institutions in order to enhance its powers, now limited by human rights.

It is worth observing that such principles of modern criminal law as the right to the assistance of counsel for one's own defense or to have compulsory process for obtaining witnesses (Sixth Amendment to the US Constitution), or the right against self-incrimination and the right to not be tried for the same offence twice (Fifth Amendment to the US Constitution) are not considered by Foucault. This is understandable because — from his point of view — it is hard to see in those human rights and principles of modern criminal law anything other than a clear intention to protect individuals against the abuses of state power, not merely a desire to subdue them.

One contemporary example of the softening of punishment due to the pressures of human rights and freedoms combined with the concomitant emergence of surveillance and control techniques is the practice of electronic tagging of criminals<sup>1</sup>. Indeed, ankle tagging and electronic bracelets are a perfect example of the humanization of criminal law and of the humanization of the criminal's condition, as well as being an example of the replacement of punishment by surveillance. Electronic bracelets allow for electronic monitoring of the individual, and are therefore a measure of the replacement of imprisonment by surveillance. These devices clearly demonstrate the replacement of more liberty-restricting punishment (imprisonment) by less liberty-restricting means (surveillance). Nonetheless, it can be argued that electronic surveillance is not necessarily derived from a humanist per-

spective, i.e. an attempt to replace imprisonment with something which restricts the individual's liberty to a lesser degree. Instead, its introduction has been brought on by the necessity for a state to try to unload its overloaded prisons and, therefore, reduce the cost of fulfilling some of its functions. In short, there is a place for the argument that such changes are not founded in humanistic reasons, but are implemented because of the need for cost reductions, i.e. economic reasons. Although this Foucaultian explanation cannot be rejected, it constitutes only part of the explanation since, as has already been demonstrated, the development of modern punishment and surveillance took the path of humanization. Moreover, if such changes could be even partly explained by economic reasons, they still conflict with another major Foucaultian position: all modern state history is dominated by the development of techniques for the domination, discipline, and control of the individual because it is difficult to accept that the state would intentionally abandon the most effective measure of domination over the individual (imprisonment) in favor of a less effective one (electronic tagging).

Finally, if we consider the punishment as a broader concept which postulates that a punishment can be administered upon an individual not only by the state, but also by another individual (for example by a parent to a child) than the idea of the punishment humanization would appear more clearly. Indeed, the ban on the physical child punishment that exists today in almost all developed countries could hardly be explained by any argument other than the humanistic one. It would be absurd to consider it from Foucault's position, because then we would have to explain the prohibition of child punishment as a parent's (or state's) strategy to prevent a possible child's revolt against them (the power to administer punishment) and not as a manifestation of humanism. In

<sup>1</sup> Shubina E. V. Административно-предупредительные меры в системе административно-правового принуждения (Administrative Preventive Measures in the Systems of Administrative Preventive Coercion), *Administrativnoe i municipalnoe pravo* 11 (2014): 1160–1164; DOI: 10.7256/1999–2807.2014.11.13277

other words, if the adoption of laws prohibiting child's physical punishment to be explained from Foucault's point of view, then we would have to admit that such prohibition is only a consequence of the parents' lobbying, which is due to their fear that the parental power would be overthrown by the child's revolt if the punishment were not softened.

## 2. Property as a human right, punishment and surveillance

The essence of both human rights and the functions of the modern state is impeccably expressed by Art. 2 of the French Declaration: "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression". Clearly, this act considers property as a human right, a humanistic value, or a natural sacred right. Consequently, it gives it the same value or importance as freedom, equality, or the right to express oneself freely. While the value of property as a human right can be debated vis-a-vis liberty, freedom or equality, it is nonetheless considered to be such by human rights acts as well as by scholars<sup>1</sup>.

This sanctification of property arose because of major socioeconomic changes that occurred at the dawn of the modern era. The accumulation of wealth, prompted by the development of commerce and industrialization as well as the breakdown of efforts to prohibit interests, required property to be protected. Moreover, some academics<sup>2</sup> argue that property was considered to be *the* main human right, given that the French Revolution, the values of which were embodied in

the French Declaration, is considered to be a bourgeois or capitalist revolution.

It is not the case that the main idea underpinning human rights (in the 17<sup>th</sup> and 18<sup>th</sup> centuries) was merely the protection against abuses by state officials, expressed as a negative or "abstention principle", i.e. the state simply abstaining from harmful action in its relations with individuals<sup>3</sup>. There is a hint of a positive obligation on the state to take measures in order to protect the citizen's human rights against harmful actions of other individuals. In other terms, if it is true that the main preoccupation of the modern state, in regard to property rights, was the protection from abuses and violations of state officials<sup>4</sup>, it is also true that the state was also burdened with an obligation to protect an individual's human rights (and, as a consequence, their property) against the actions of other individuals.

It is difficult to unearth this preoccupation with the protection of individuals against other individuals' harmful actions as it was concealed embryonically in the human rights values revealed at the dawn of the modern era. Nonetheless, it does present itself in the fundamental human rights documents of this era. For example, Art. 4 of the French Declaration states: "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights". This provision, clarified by Art. 2 of the same Declaration, indicates that it is the obligation of a state to protect individuals against the harmful actions of

<sup>1</sup> Art. 17 of the French Declaration confirms this statement: "Property being an inviolable and sacred right..."

<sup>2</sup> Babin, B. V. Proprietary right of the peoples in the modern international law, *Mezhdunarodnoe pravo i mezhdunarodnye organizacii / International Law and International Organizations* 3 (2013): 300–308; DOI: 10.7256/2226–6305.2013.3.9479

<sup>3</sup> Лараева V. V. Приватизация социалистической собственности как конституционно-правовая проблема (Privatization of socialist property as a constitutional and legal issue), *Pravo i Politika*, 2 (2014): 140–152; DOI: 10.7256/1811–9018.2014.2.10901

<sup>4</sup> The Fifth Amendment to the US Constitution express this idea aptly: "...nor shall private property be taken for public use, without just compensation".

other individuals — actions which cross the boundary imposed by the rights of other members of society. Indeed, without clarifying from whom they have to be protected, Art. 2 affirms that “the aim of any political association” (i.e. it is an obligation of the state) is the preservation of the natural and imprescriptible rights of man”. In other words, there is an assumption that this obligation of the state is not limited only to the state’s own actions, but that it concerns the actions of other individuals also.

The leading voices of the Enlightenment did little to promote these functions of the modern state because the revolutions at that time were clearly directed against the sovereign (monarch), the church (clergy), and nobility — not against other (private) individuals. Moreover, abuses concerning liberty, freedom, and equality are less likely to be carried out by private persons (other individuals), because such abuses usually take place when someone exercises the functions of power (e.g. a judge). In some cases, it is even inconceivable that some human rights and freedoms — such as the freedom of petition, equal burden of taxes, and proportionality of fines and punishments as found in the French Declaration and in the Bill of Rights — could have been violated by private individuals.

Individual-individual relations, as evidenced by the general concept of civil (non-criminal) law — are concerned mostly with property rights and not offenses against liberty, freedom or equality. As a consequence, the natural, human and sacred property rights (as the French Declaration puts it), and the concomitant obligation of the state to protect them, appear to be — even at the dawn of the modern era — not only as values that have to be protected against the actions of the state, but also against the actions of other individuals (to a large extent). Other fundamental human rights at the dawn of

the modern era were considered to be less prone to such protection as, at the time, they were considered to be less likely to be violated by private individuals.

The Industrial Revolution, accumulation of capital, demographic changes, urbanization and other factors of the modern era, changed the paradigm of criminality. There was an increase in property crimes and a growing preoccupation of the population with protection of their property (especially of the bourgeoisie). This evolution is described perfectly by Foucault in his book. As he points out (p. 87), small crimes (*illegalismes*) became less tolerable for the bourgeoisie especially when they concerned property. Using statistical data of the era, Foucault correctly demonstrates and describes how property became an absolute right of the bourgeois owner and how crimes concerning property (*illegalisme des biens*) became more important for society than crimes concerning rights (*illegalisme des droits*). Property and the rights of its owners became so important that they were integrated into the newly determined set of human rights. These changes explain the growth in the number of property offenses, an attendant increase in relevant criminal laws, as well as the rise of cruel punishments for such crimes<sup>1</sup>.

In conclusion, as Foucault put it, given that small crimes were now vigorously prosecuted and atrocious ones less so, and given that there was no strict proportionality between the atrocity of the crime and the severity of the punishment, there was a new economy of power. Nonetheless, to say that the state was preoccupied only with efficiency and not with humanistic values is a direct denial of the natural human right status of the right to property. In other words,

<sup>1</sup> For example, a French decree of 18 March 1793 sanctioned any attempt to adopt a law that intended to strip landowners of their property. Such an act was punishable by death.



we should not be shocked — as Foucault is (p. 95) — by the fact that the severity of punishment was “presumably” not based solely on the atrocity of the crime, since property had gained significance in the eyes of the public. Any offenses against something so important came to be considered more and more atrocious.

First and foremost, property protection measures were undertaken by property owners themselves in the form of private surveillance and not by the state. As a consequence, the responsibility for the increase in some measures and techniques of control and surveillance over individuals cannot be imputed to the state. Foucault seems to confirm this idea himself when he cites examples of *private* surveillance: “the necessity for constant surveillance because of a rise in property crimes became real” (*s'affirme la nécessité d'un quadrillage constant qui porte essentiellement sur cet illégalisme des biens*). By pointing out (p. 139) the importance of discipline (Part III), Foucault admits that disciplinary procedures that allowed the state to subordinate the bodies (of the people) existed for quite a long time and were used by state or quasi-state organizations (e.g. armies, convents) as well as by private bodies (workshops).

Moreover, some of Foucault's thoughts confirm our idea that these techniques for the control and submission of “bodies” and “souls” had their origins in the humanization process: “different from slavery because they exclude the appropriation of the body (...); different from domesticity, which is constant, global, massive, non-analytic and unlimited domination (...); different from vassalage, which is a highly coded submission”; “the elegance of the discipline is itself exempt from this highly expensive and violent relation while attaining at least the same effectiveness (*l'élégance même de la discipline de se dispenser de ce rapport de*

*domination coûteux et violent en obtenant des effets d'utilité au moins aussi grands* (p. 139)).

Foucault provides a perfect example of a private surveillance and control system in capitalist employer–employee relations by describing a system of employee surveillance created by early plant owners. Moreover, he compares the employee housing system, installed by plant owners within the plant enclosure, with the military barracks system and control over soldiers (p. 144). The other examples which Foucault provides similarly justify our point of view that there was no malicious intent on the part of the state; on the contrary, there was a simple expression of property rights, the source of which was rapidly growing capital.

Foucault features various rules and principles of control and discipline in his book, such as enclosure (*clôture* (p. 143)), functional emplacements (*emplacements fonctionnels* p. 145), and determination of time (*l'emploi du temps* (p. 151)). These were nothing more than the consequences of the rationalization of the production process in a capitalist world, where competition and the pursuit of large profits forced plant owners to extract the maximum possible profitability from their labor. In other words, such rules and methods of control were nothing more than the expression of property rights, which were almost without limits at that time.

Today's cubicle system of office organization and surveillance of employees by business owners via Facebook (e.g. managers using social networks to verify an employee's claims for sick leave) are also means of protecting the owner's human rights (private property). However, their theoretical foundation is significantly different because the property rights of owners today are limited more than before by the need to respect their employees'

human rights (e.g. the privacy rights of the employee).

### 3. Democracy as a humanistic value, punishment and surveillance

Foucault correctly identifies changes in the concept of crime itself (p. 92), since the law (criminal law included) was no longer the product of the monarch's will but that of society's. Indeed, crimes were no longer offences against the monarch but against society as a whole. This major change was embodied in Art. 5 of the French Declaration: "Law can only prohibit such actions as are *hurtful to society*". Moreover, this principle read together with the principle of equality (equal application of the law to any member of society) created more effective state's domination, since it subordinates all strata of the population. This understanding of crime, taken together with the principle of the universal (equal) application of punishment, explains the growth and the intensity of the state's domination and surveillance over individuals.

The advent of private police is a fitting example of the idea that it was no longer the monarch (or the government) who would decide on the nature of crime and the need for surveillance, it would be the society itself. Before the adoption of the *Metropolitan Police Act* of 1828 and the creation of the Metropolitan police forces as a public service, life in new urbanized areas was characterized by lawlessness and severe crime waves. As one scholar puts it, "As economic opportunities increased, householders found it unprofitable to assume their turns at keeping the peace. They hired others to do it for them; their choice was decided by the price. (...) Boroughs, parishes, and private bodies established their own police or night watch, and each operated only within its own boundaries (...) metropolitan property owners combine into societies for protection against burglars. Each society would

collect an annual subscription fee of two guineas per member."<sup>1</sup>

In other words, in the face of the state's incapacity to provide the necessary municipal services, the inhabitants of the most criminalized areas created their own police services. The initiative behind the creation of private surveillance and watch patrols came from the property owners and from society's demand for security, not from the state or the municipality. It was later on that such functions were transferred from private structures to government ones<sup>2</sup>. Once again, this is an example of the public service system evolving to more intensive control and surveillance over individuals, changes which were initiated not by the government, but by members of society itself.

Foucault provides another example of the modern development of surveillance and control due to the pressure of public opinion. Indeed, when he describes the barrack system of the modern army he describes this system as a system of controlling soldiers, designed to "settle the army — this vagabond mass, to prevent looting, to appease the peasantry which hardly supported the troops, and to prevent conflicts with civil authorities" (...*apaiser les habitants qui supportent mal les troupes de passage; éviter les conflits avec les autorités civiles ...* (p. 143). Yet again the initiative of surveillance and control was imposed upon the state authorities by the society; it was not an initiative of the government itself.

<sup>1</sup> Lyman J.L. The Metropolitan Police Act of 1829, *J. Crim. L. Criminology & Police Sci.*, 55 (1964): 141

<sup>2</sup> Today, there are examples of this in reverse: surveillance functions are transmitted back to the private sector. For example, modern fiscal evasion and fiscal fraud surveillance functions are partly exercised by the banking sector and by private financial institutions, and not exclusively by government agencies. The same is true for Internet-related service and product companies as well, which are often accused of collaborating with state security services and, especially, of transmitting personal data to those bodies.

There is no better example of the organization of the maintenance of order and population protection by society itself than the Second Amendment to the US Constitution. It is indeed clear that the word “militia”, as well as the “right of the people to keep and bear Arms” supposes that the maintenance of order was largely conceived (at least at the origins of the creation of the United States) as a matter of private persons and communities and not as a state/municipal function. The Second Amendment is proof that it was not a state initiative — designed to subdue citizens, as Foucault seems to think — but a product of society, nothing more than a right to security or self-defense for each of its members.

If modern security services were to become public instead of civil society structures, with control and surveillance becoming a function of the state and not a function of civil society structures or each of its members taken separately, such a change could be considered only as a delegation of these functions from the bottom up to the state agencies and officials. Therefore, we cannot accept Foucault’s vision of a “villain” state trying to install a system of ubiquitous and total control and surveillance over the citizens, since the public police services are nothing more than a professionalization of the militia’s functions, or a delegation of society’s functions or personal rights (security) via the legislative (democratic) process.

Another example of Foucault’s critique of modern state surveillance and control is based on the disproportionality between the punishment and the offense committed. It is true that at the dawn of the modern era, severe crime and waves of lawlessness (especially in new urban areas) caused a reversal of the humanization phenomenon: increased penalties even for the smallest crimes were imposed in derogation from the humanist principle of proportionality be-

tween the punishment and the offense committed. Foucault perceives this phenomenon but interprets it incorrectly. Indeed, at first glance this disproportion between crime and punishment was contrary to one of the very modern criminal law principles set out in the French Declaration (Art. 8: “The law shall provide for such punishments only as are strictly and obviously necessary”). But in this case, the disproportion between the punishment and the offense committed was simply due to the necessity to keep this principle in line with other humanistic principles (such as Art. 5: “The law can prohibit only such actions as are hurtful to society” and Art. 6: “The law is the expression of the general will.”).

This means that while the seriousness of the crime should be taken into consideration at the time the legislature or the judiciary are deciding on the most suitable punishment, the democratic principle should be also taken into consideration. There is therefore another humanistic principle — which is embodied in the very notion of democracy — according to which the society has to decide what acts should be considered as offenses because they are harmful to society, and what punishments should be applied in such cases. Consequently, it is not true that “the punishment is calculated not in consideration of the crime, but of the frequency of its repetition ... To try not to punish the offense made in the past, but prevent future disorder ... The act of punishment became an art of the effects.” (*“calculer une peine en fonction non du crime, mais de sa répétition possible. Ne pas viser l’offense passée mais le désordre future ... Punir sera donc un art des effets”*) (p. 95)).

Firstly, disproportionality may be applied in some cases for political reasons. It may be necessary to derogate from the principle of proportionality by increasing the severity of punishments for certain types of crimes, or for crimes committed

in certain areas, in order to reduce some types of crimes or to reduce the number of crimes in those areas. However, such examples of disproportionality are only exceptions. Secondly, it is not correct because such derogations are direct expressions of another humanistic principle of the French Declaration<sup>1</sup>: the democratic organization of state power, wherein the society via the law — the expression of the general will — can forbid acts harmful to society. It is indeed possible for society's own protection to adopt by legislative means such derogations while respecting other humanistic principles (e.g. due process and a ban on cruel punishments). The same thinking can be applied to recidivism, which — as Foucault puts it — became important in the modern world because society's demand for an overall decrease in criminality imposed more insistently on the state the preventive function in criminal law<sup>2</sup>.

Such reasoning is perfectly understandable in modern states where the legitimacy of power use was transmitted from the monarch to the society. Indeed, the emergence of modern democratically-governed countries is characterized by the creation of a new political entity — the society, which is represented by values such as the general good, public interest, general welfare and other common values, entrenched in basic humanist acts created at the dawn of the modern era. These values have the same humanistic status as other human rights entrenched in those acts. And though these values are more often expressed as part and parcel of the concept of democracy, it is possible to categorize them as human rights. To wit, the

right to vote, or, as French Declaration puts it, the right for an individual to participate personally or through his representatives, is the expression of the general will (Art. 6), and is considered to be a human right (or at least the right of the citizen). Moreover, the general will is clearly at the forefront of the framework of the criminal law principles of the French Declaration: “The law can only prohibit such actions as are hurtful to *society*” (Art. 5). This can only signify that the legislative power, being representative of the general will, can nominate any act as a crime — if such act is harmful to society — while respecting other humanistic values.

At the same time, we have to remember that the main purpose of these texts is the protection of the individual's freedoms; as a consequence, the general will and democratic values have to be read in conjunction with the individual's natural rights. In other words, while some derogations from certain human rights are possible in accordance with the very notion of democracy, the general will is still limited by an individual's natural rights. This situation presents nothing more than competing principles<sup>3</sup>. In other words, we are in a situation where one humanistic value (the proportionate character of the punishment to the offense committed) is pitted against another (the general will).

Such thinking leads us to conclude that submission techniques of individuals (control, discipline, surveillances, exercises) and relevant institutions (prison, army, hospitals, schools), of Foucault writes, were created in the name of the public interest or the society itself. Foucault correctly points out that the creation of these techniques and institutions was prompted by a range of conjunctive events: industrial innovations, epidemics, crime waves, etc. (p. 140). Such

<sup>1</sup> Parkhomenko, R. N. Государство и право в работах Б. Чичерина (State and law in the works of B. Chicherin), *Pravo i Politika* 3 (2013): 436–444; DOI: 10.7256/1811–9018.2013.03.18

<sup>2</sup> Parkhomenko, R. N. Формирование демократических учений в Англии и Франции (XVII–XVIII вв.) (Creation of Democratic Teachings in England and France (XVII — XVIII Centuries)), *Politika i Obshestvo*, 10 (2014): 104–107, DOI: 10.7256/1812–8696.2014.10.12023

<sup>3</sup> Alexy R. *A Theory of Constitutional Rights* (Oxford Press, 2010), 44.

determinism is true. These events were taken into account by the legislative power only in response to the preoccupations of the population: the general will imposed such techniques and institutions only because society needed them.

Aside from democratic values, there is another factor<sup>1</sup> that contributed to the creation of such techniques and institutions: the humanization of punishment forced the state to adapt existent ones and to create new techniques of submission, since the most effective (inhuman, atrocious) punishments were banned. In other words, in the first place, “the calculated economy of the punishment power” (*économie calculée du pouvoir de punir* (p. 103)) was nothing more than a response of the state to the demands of the population for a decrease in criminality. In the second place, if this power became calculated and worked on the subjugation of the perpetrator’s mind instead of his body directly (*la soumission des corps par le contrôle des idées* (p. 105)) it was because the state was no longer allowed to act directly and more effectively on the body of the perpetrator. As a consequence, the creation of new offences and new punishment measures in the modern state came about as a result of the pressure from two humanistic values: the right of citizens to vote and the impossibility of combatting crime with less effective yet more humane methods. This explains why society impacting on the perpetrator’s mind became the preferred method of the modern democratic legislator.

This is indeed the dilemma of the modern liberal: how to make the criminal law effective in light of the essential need to respect humanistic values (the rights of the accused, for example) by proscribing atrocious punishments or inhumane methods of investigation and judicial procedures. These values turned the whole organization of the

system of criminal justice and punishments on its head: since the state power could no longer apply cruel punishments and had to apply *less effective but humane* punishments, it put in place a completely different system of punishment and, to some extent, replaced punishment with surveillance techniques.

The modern punishment system — as Foucault points out — is based on a mechanism that acts on the mind of the individual in order to reduce his will to commit crime, thus making the crime less attractive. It is a system that does not terrorize the individual because of the atrocity of the punishment, but creates in his mind an impression of the inevitability of a less cruel or humane punishment. Another way to impact on the mind of the individual is to present the punishment as humiliating or very lengthy (Foucault uses the example of the death penalty being replaced by forced labor or exile) and consequently, make the crime less attractive. A system in which the punishment is constantly visible to other members of society (e.g. public labor, such as road construction<sup>2</sup> and is not only temporarily observed by them (e.g. public executions) also creates in their minds a constant presence of punishment and lessens their will to commit offenses (pp. 108–112).

It is another question whether legislation ever actually reflects the general will or that of political parties and whether bureaucratic state structures substitute the general will with their own. Indeed, a contention that it was solely the state which created criminal law, punishments and surveillance, and changed the paradigm of punishment (subduing the individual by its constant surveillance thereby taming him) is a rejection of the democratic foundations

<sup>1</sup> As mentioned above. See paragraph 1.

<sup>2</sup> Idrisov, I. T. Наказания, связанные с трудовым воздействием, в Англии и Франции (Punishments regarding correctional labor in England and in France). *Pravo i Politika* 10 (2014): 104–107; DOI: 10.7256/1811–9018.2014.10.12952

of the modern state. The democratic foundations of the modern state mean that it is not the state or government officials that decide what the law is, but society (or at least the majority of it). Even if there was only an imperfect correlation between the law and the majority's will (the right to vote extended only to a small section of the population) at the dawn of the modern era, the intervening changes in developed democracies over the last 200–300 years have brought us to a point in power-society relations at which there is now correlation between the ideas of citizenship and democracy. It is therefore natural to impute such functions not to the state itself (as Foucault seems to), but to society's will.

If the functions that society imposed on the state via the law increased because of the development of humanism (i.e. the need to protect the rights of the accused, the property rights of the owner, or society's interests), then one of the underlying reasons for this increase was the growth in the autonomy of the individual and the correlative necessity of the state to play a social cohesive role<sup>1</sup>. If, before the advent of the modern state, individual relations were dominated by highly dense, "face-to-face", interpersonal *community* relations (based mostly on kinship), those ties were ostensibly undermined with the emergence of industrialization and, as a consequence, of urbanization. Furthermore, the advent of modern society is characterized by the reduction of the influence of the common will on the individual's condition (i.e. the moral and religious domination of the community and of the church); personal autonomy is concomitant with urbanization, which is characterized by impersonal, often anonymous relations. As a conse-

quence of this process, which can be characterized as the liberation of the individual from the moral and religious domination of the community, the only logical and acceptable solution was to transfer some of these functions to the (modern) state powers — first to the monarch, and then to the society (as represented by elected representatives), which exercises legal domination over individuals via the law. There are many examples of the transfer of such functions from the community and the church to society: community customs and canon laws were replaced by legislated family laws, inheritance laws, etc. The advent of the modern state led to a major change of power: authority was transferred from the community and the church to the society (or its representatives). As a consequence, the functions that belonged to the community were transferred into the hands of society or to state officials and agencies which represented the will of the society in democratic countries.

At the same time, this domination — contrary to Foucault — became less intense since in the modern world the individual's liberty is the overarching principle. This is not the opinion of Foucault. He thinks that surveillance became omnipresent or generalized with the advent of what he calls a *Panopticon* system (pp. 206 et seq.). Indeed, what Foucault considers as the most efficient way of achieving the total submission of the individual (the *Panopticon*) is a system in which the individual is dominated not because of the probability of punishment or the fact that there exists an *external* surveillance system, but due to the fact that the individual thinks that he is constantly surveilled (*internal* surveillance) (p. 208). Nonetheless, Foucault simply confuses this with the functions that the state had to assume by replacing the community's moral control — which waned due to the diminishing role of the community in the

<sup>1</sup> Alyoshina, M. V. Cohesion of the Society as a New Trend of Social Policy: Sociological Analysis, *Politika i Obshchestvo*, 5 (2014): 513–523; DOI: 10.7256/1812–8696.2014.5.9512

life of the individual<sup>1</sup> — as well as replacing the religious domination on the life of the individual. As a consequence, the state was charged with carrying out functions that were initially exercised by community and religion, but it did not do so to the same degree. In other words, authority over individuals became not more intense — as Foucault thinks — but less intense. This was due to socioeconomic factors (urbanization, industrialization, social mobility, demographic changes) which produced a negative, disintegrating influence on the community, and made the individual more independent from the “group”. Thus, even though the state tried to replace intense forms of controlling the individual that had been used earlier by the community, the state was simply incapable of doing so due to the aforementioned factors.

It has already been satisfactorily demonstrated that what was accomplished under the influence of these factors was a “diminishing role of the collective conscience”<sup>2</sup>, when “surveillance became less effective, because there were more people to surveil”<sup>3</sup>, and “public opinion exercised less and less influence on each of us”<sup>4</sup>. In other words, Foucault seems unwilling to accept what was perfectly clear to Durkheim — a “liberation of the individual from the collective yoke”<sup>5</sup> (*joug collectif*).

The functions of the state increased, as did its control over the individual, because there was a need to replace a deficient societal mechanism of dominance over the indi-

vidual, given that there was no other actor to exercise these functions (because the community’s control was no longer adequate over vast populations as found in contemporary societies and because control by the church was undermined by the state itself). Foucault’s *Panopticon* is nothing more than a description of the state’s attempt to replace the community and the church; this much he seems to admit himself (*l’étatisation des mécanismes de discipline* (p. 214 ssq.)). Indeed, every distinctive trait of these phenomena indicates that they are nothing more than the replacement for societal mechanisms of submission: the extension of control and surveillance over the whole society (*corps social*); the extension of such techniques to cover all of an individual’s activities, even if lawful (*toute fonction*); the extension of control through non-state institutions (*foyers de contrôle disséminé dans la société*) (pp. 209–214)<sup>6</sup>. The notable change with the *Panopticon* (or a ubiquitous surveillance system) is the appearance of a new agent of surveillance — the state — which accompanied a concomitant decline in the controlling role of the community and the church.

It is worth noticing also that the appearance of new mechanisms to control individuals (accurate records of insignificant facts, events and data; extension of control to all social institutions; the permanent character of surveillance) was nothing more than a tentative step to create something resembling the previously tight control by the community. Nonetheless, contrary to Foucault, state control and surveillance of individuals have not become more extreme with the advent of the modern state (at least when compared to control by the community). State control and surveillance could not become as intense and invasive as the community’s dominance

<sup>1</sup> Samarskaya, E. A. Раймон Арон. “Идеально-типический” метод рассмотрения индустриальных обществ (Raymond Aron. “Ideal Typical” Approach to Studying Industrial Societies), *Filosofiya i kultura* 10 (2014): 1441–1449; DOI: 10.7256/1999-2793.2014.10.12883

<sup>2</sup> Durkheim E. *De la division du travail social* (PUF, 2013), 276.

<sup>3</sup> *Ibid.* 284

<sup>4</sup> *Ibid.* 287

<sup>5</sup> *Ibid.* 284

<sup>6</sup> It is significant that in this chapter (“Le panoptisme”) — unlike other parts of his book — Foucault uses such words as “social” or “moral” a great deal.

was over individuals, which in any primitive society seems to have been totalitarian: “religion takes over everything (...) it rules even the smallest details of the private life.”<sup>1</sup> As we have mentioned, control and surveillance of individuals in modern mass societies are more complicated to execute because the classic mechanisms of tradition, religion, and direct interpersonal relations are undermined.

Despite the necessity to replace failing collective control with state control, the replacement process was not carried out altogether successfully. Indeed, the individual’s actions are now less dominated by any exterior will: we are not told what to wear, what and when to eat, nor are we preoccupied by what a neighbor would think about our actions. In other words, the era of *totalitarian* social control of the individual<sup>2</sup> — which was associated with community and religious control — ceased irreversibly with the appearance of modern society, in which the individuality or personality of each member of society is so developed that any form of exterior control would be rather inefficient. As a consequence, the state control and surveillance measures developed in the 17<sup>th</sup> and 18<sup>th</sup> centuries could not entirely replace the intense social, moral and religious domination of the individual, which was inherent to the classic sedentary (agricultural) community’s social organization. From a practical point of view, such totalitarian control of the individual’s mind is hardly conceivable in mass societies where individual autonomy and anonymity hampers the exercise of any form of exterior pressure on him.

This argumentation allows us to assert that Foucault’s impression of the growth in state control and surveillance measures is

exaggerated or at least highly pessimistic. Foucault’s ideas about state control and surveillance are true only if they focus on a *totalitarian* state, whose dominance over the individual could (with a few reservations) be compared to the dominance of the original sedentary communities. This explains why it is easier for Foucault to use, as examples, the surveillance and control systems of absolutist states of the 17<sup>th</sup> and 18<sup>th</sup> centuries (p. 216), systems which developed in an era before the advent of the liberal values that began an irreversible trend of limiting the state’s intervention at a personal level. Foucault does not use contemporary criminal law examples of from the second half of the 20<sup>th</sup> century. Moreover, it must be pointed out that this line of argument, presented in the second half of the 20<sup>th</sup> century, is insupportable, given that the development of modern state-individual relations during last 300 years has been characterized by ever-increasing limits on state control and surveillance in the name of human rights.

Foucault’s insightful thoughts reflect perfectly those changes in state-individual relations: the emergence and development of new institutions for the submission of the individual (army, hospitals, schools) and new methods of dominating the individual (discipline, surveillance, control methods). But Foucault’s negative approach is wrong: domination over individuals did not become more intense. On the contrary, while growing in absolute number, these measures became less intense and less invasive than previous forms of social control and domination. External domination of all forms concerned the individual’s actions less than before. Moreover, it became legitimized, since the new agent of domination (society, acting via the law) was created on the basis of humanistic, democratic values.

#### 4. New humanistic values (welfare state) and surveillance

Initially, modern humanist values were centered on the ideas of liberty and the equality

<sup>1</sup> Durkheim E. De la division du travail social (PUF, 2013), 105.

<sup>2</sup> Konstantinov, M. S. Время добродетели: моральные концепты коммунитаризма (The Burden of Virtue: Moral Concepts of Communitarianism), *Politika i Obshchestvo* 12 (2013): 1416–1422. DOI: 10.7256/1812–8696.2013.12.10375



of rights. They were responsible for limiting the unlimited power of the monarch as well as putting an end to aristocratic privileges. They were also centered on the protection of property and democratic rights (e.g. the right to participate in state affairs or the right to vote).

More recently, humanism has been augmented by other values. These are called social rights, and they are often associated with the emergence of the welfare state.

A major shift in humanistic values that was perceivable in the late 19<sup>th</sup> century is embodied in the Universal Declaration of Human Rights. Indeed, after the reaffirmation of the humanistic values of the early modern era (“reaffirmed their faith in fundamental human rights”) it develops *inter alia* that it is important “to promote social progress and better standards of life”. In other words, according to the Declaration, the state is not only restricted in its actions by human rights, as are imposed by the classic concept of humanism; the state now has to act positively in order to protect individuals. The contemporary concept of humanism recognizes that the individual not only has the rights that the state has to protect *negatively*, by abstaining from wrongdoing, but also a legal capacity (or a positive status) to use state power and institutions for the individual’s own purposes; that is, to exercise individual positive claim rights against the state<sup>1</sup>. The idea of the new, contemporary concept of humanism is clearly expressed in the International Covenant on Economic, Social and Cultural Rights<sup>2</sup>. This UN document states: “the ideal of free human beings

enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights”.

It should be noted that these new rights contradict the “old” human rights<sup>3</sup>. Whereas humanistic values at the dawn of the modern era were largely perceived as individualistic rights, the values of modern humanism are sensibly more *egalitarian*, allowing limits on some individual rights for the purpose of promoting the general welfare of a democratic society. The International Covenant on Economic, Social and Cultural Rights clearly affirms this new concept of humanism, in which the individual’s human rights appear to be less absolute because of the necessity of “promoting the general welfare” (Art. 4)<sup>4</sup>. This idea is also clearly expressed by the preamble of this treaty: “the individual, *having duties to other individuals and to the community to which he belongs*”. These lines clearly express the idea behind the new direction of humanistic values, which presume that the claim rights that burden the government embody the concept of wealth redistribution or an obligation to protect the less advantaged against the more prosperous<sup>5</sup>.

It can be argued that this idea was implicitly included in the original humanistic values and human rights as set out in the French Declaration: “Liberty consists in the

<sup>1</sup> Jellinek G. System der subjectiven öffentlichen Rechte (Hrsg. u. eingel. v. Jens Kersten, 1905).

<sup>2</sup> Попова, С.М., Яник, А. А. Проблемы глобального старения населения: анализ документов и стратегии ООН (Problems of global ageing of the population: analysis of documents and strategy of the UN), *Mezhdunarodnoe pravo i mezhdunarodnye organizacii / International Law and International Organizations* 3 (2014): 429–443; DOI: 10.7256/2226–6305.2014.3.12857

<sup>3</sup> Pavroz, A. V. Государство всеобщего благосостояния: сущность политики и фундаментальные противоречия (The Welfare State: the Nature of Politics and Fundamental Contradictions), *Politika i Obshestvo*. 11 (2011): 21–30.

<sup>4</sup> Nikolaev, V. V. Право на образование и международные стандарты организации объединенных наций (Right to education and international standards of the United Nations Organization). *Mezhdunarodnoe pravo i mezhdunarodnye organizacii / International Law and International Organization* 2 (2014): 215–222; DOI: 10.7256/2226–6305.2014.2.11895

<sup>5</sup> Ismailov, N. O. Справедливое общество как проект будущего в философии А. М. Ковалёва (Fair Society as the Project of Future in Alexander Kovalev’s Philosophy), *Politika i Obshestvo*, 3 (2014): 277–286; DOI: 10.7256/1812–8696.2014.3.11439

freedom to do everything which injures *no one else*" (Art. 4). Nonetheless, there was a significant upgrading of those humanistic values subsequently. Capital, the new source of power which arose at the dawn of the modern era, and the almost unlimited character of a property owner's human rights (property rights) created a situation in which abuses of workers' human rights were likely to be committed not only by the state, but by other individuals (employers) also. In turn, industrialization and the concomitant urbanization created the conditions for labor to organize themselves. This helped them to fight the abuses of manufacturer-owners and to improve their working conditions through an affirmation of labor rights. Humanist values were renewed through socialist revolutions and labor uprisings of the modern era or through prudent, pre-emptive concessions made by the holders of power (state and capital) to avoid such situations.

It should be noted that the new functions of the state (to protect individuals against the actions of other individuals as well as to create conditions for social justice by redistributing wealth) were not initially perceived as humanistic values or human rights<sup>1</sup>. Some scholars point out that the growth of the welfare state was due to a range of factors: industrialization, free trade, capitalism, modernization, corporatism<sup>2</sup>, and therefore welfare state values did not emerge merely to protect human rights. Moreover, in some countries, welfare measures were undertaken to consolidate the nation (nation-state building), to integrate the poor politically, and even to prevent

revolutions<sup>3</sup>. Foucault even argues that the development of such a welfare state measure as universal education system was a technique to produce socially useful individuals ("*techniques fabriquant des individus utiles*" (p. 212)). In other words, it is true that the welfare state drew its first breath not as a humanistic phenomenon, but as a set of measures pursuing different — and, often, not even interconnected — goals.

Nonetheless, in the mid-20<sup>th</sup> century, welfare state values reached the status of human (social) rights<sup>4</sup>. Indeed, the welfare state and social policy are perceived today as "key elements of universal human rights"<sup>5</sup>. Proof of this promotion of welfare state values to human rights status can be found in several international as well as national legislative instruments, including very important documents such as the Universal Declaration of Human Rights, which clearly includes social rights in its catalogue of universal human rights.

In other words, it seems that social measures — those concerning rest and leisure, sick leave, unemployment insurance, old-age pensions, family benefits, and education — that were originally created for different sociological, economical and political reasons, became manifestations of humanistic values or human rights, benefits that individuals could now demand from the state. To put it

<sup>3</sup> Pierson Ch., Leimgruber M. Intellectual roots, in *The Oxford Handbook of the Welfare State* (Oxford University Press 2012), 32ssq

<sup>4</sup> The welfare state's values are also considered by some authors as social rights of citizenship (e.g. T.H. Marshall (1964) *Citizenship and Social Class*, q.v.). Nonetheless, a conception of social rights based on citizenship, concomitant with such phenomena as the emergence of social democracy which was achieved by extending political rights (especially the right to vote) to the majority of the population, is outdated. Indeed, today many welfare rights are claimable not only by citizens, but — with conditions — by every person (even foreigners). As a consequence, social rights today are more than mere rights of citizenship; they have become universal human rights.

<sup>5</sup> Nullmeier F., Kaufmann F. — X. Post-War Welfare Development, in *The Oxford Handbook of the Welfare State*, (Oxford University Press 2012), 84

<sup>1</sup> Vaimatov, P.N. Конституционное право на социальное обеспечение: место и роль в системе основных прав и свобод человека и гражданина (The constitutional right to social services: its place and role in the framework of basic rights and liberties of the man and the citizen), *Pravo i Politika* 11 (2013): 1527–1535. DOI: 10.7256/1811–9018.2013.11.10037

<sup>2</sup> Castles F.G., Introduction in *The Oxford Handbook of the Welfare State* (Oxford University Press 2012), 5

simply, welfare measures initially provided by the state power independently (or due to political pressure) became human rights that individuals could claim and which the state was obliged to provide.

Welfare measures undoubtedly increased the range of state functions and activities. The state now became responsible for more than merely abstaining from actions that could harm individuals and performing basic functions so as to maintain order and protect the citizens. Indeed, the growth in government functions was clearly a necessary consequence of welfare measures. The state was now meant to act positively in order to protect the individual's human rights against other individuals' actions as well as to redistribute wealth between the members of society.

In other words, what became the new generation of human rights, in the course of time, spurred the growth and the proliferation of state functions and activities. It is an almost unchallenged fact that the welfare state is responsible for the "growth in the size of the state, in terms of both spending and the numbers of peoples it employs, together with its more interventionist role"<sup>1</sup>. This phenomenon — the growth in public services, which partly replaced some tasks originally executed by non-state actors (municipalities, church, charity organizations, family networks) — was due not only to the proliferation of state functions, but also due to the fact that those functions were designed for the masses. Indeed, this growth was due to the fact that social human rights were now meant to profit *every* citizen. Whereas the functions of social justice used to be executed by different structures and benefited only some segments of the population, the modern concept of social human rights has resulted in the number of beneficiaries of those measures growing

permanently (and continuing to grow even today). In other words, the growth of state functions was due not only to the simple fact that such functions were transferred to the state from other actors (e.g. the church and other non-governmental institutions). It was, above all, due to the fact that the state was now burdened with the obligation of procuring social benefits for every member of society. Whereas only a limited number of citizens had access to health, cultural or educational services at the dawn of modern society, today the state is tasked with providing such benefits to everyone in its jurisdiction. Health services were originally created for general interest reasons — to combat epidemics. Today, they have grown into a huge apparatus by the sheer pressure of a society exercising its right to obtain government-provided medical services. Education facilities and cultural activities used to be accessible by a select few. Today, the demand for compulsory elementary education and cultural services for all has caused an explosion in public service institutions (schools, hospitals, universities), institutions which have become complex organizations with highly structured administration and bureaucratized operational procedures.

It is instructive that in his discussion of hierarchical surveillance, administrative punishments (*sanctions*) and the test system (*examen*), Foucault focuses on health and education public services (pp. 172–196). He claims that the purpose of such mechanisms is to subdue (*dresser*) the individual, apparently to make them more useful to the state (p. 172). Despite this critique, it seems that the surveillance and examination systems as well as administrative sanctions — which are nothing more than distinctive traits of any contemporary bureaucracy — are the logical methods of the functioning of huge public services administrations. Foucault seems to admit this much when discussing school examination results and data

<sup>1</sup> Castles, op. cit. 6

collection about the individuals by public service institutions (hospitals and schools): “any data concerning the individual echoes in overall evaluations” (*chaque donné de l'examen individuel puisse se repercuter dans les calculs d'ensemble*) (p. 192). Surely it is a given that the very functioning of such enormous public services as hospitals or schools supposes at the very least the existence of personal data collection. Efficient and effective functioning of the public service requires a minimum level of information on how many institutions (hospitals, schools) have to be built, their optimal location, and the exact services they have to provide. Moreover, the emergence of the field of statistics — techniques of data collection and analysis — is concomitant with the expansion of government functions (public services). The same is true for sciences such as demography.

Hierarchical surveillance, administrative sanctions, and the test system, as examined by Foucault, are nothing more than the bureaucratized functioning mode that is inherent in large, cumbersome modern state institutions. In other words, Foucault's techniques of “subduing” the individual are merely the logical outcome of the functioning of huge institutions of the modern state, institutions which grew disproportionally into colossuses, specifically because of the need to provide public services to every member of society.

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It is widely accepted that the promotion of the protection of human rights in the modern world is due in large part to mavericks such as Foucault, who promoted the values of freedom, justice and equality by criticizing human rights abuses committed by governments. However, today it is difficult to accept the inconsistencies of his ideas. Foucault's thoughts on punishment

and surveillance are, at the very least, surprising.

Even three centuries ago — as liberal philosophers began to assert the need for a change in state-individual relations and the revolutionary embedding of those humanistic values in real life — the trends that were set in motion originated in a manner quite different to Foucault's theories. Contrary to Foucault's views in *Surveiller et punir*, the protection of human rights since that time has not stopped its progress; as a consequence, the capacity of the state to interfere with an individual's rights has actually reduced<sup>1</sup>. Moreover, new technologies (communication, transport, digital) have actually contributed to personal autonomy and independence from state dominance. They have reduced the number of hierarchical bonds by creating more opportunities for the construction of interpersonal horizontal relations<sup>2</sup>.

It is often argued that state surveillance of individuals is due to the development of new technologies<sup>3</sup>. This could not be further from the truth. If state surveillance activities are indeed executed with the help of new communication devices and technologies (satellites, phone tapping, e-mail interception) these are merely instruments of state surveillance and control of individuals, and they are not the primary causes of the existence of government surveillance and control. The

<sup>1</sup> Gorokhova, D. I. Конвенция Совета Европы о защите физических лиц при автоматизированной обработке персональных данных (The Council of Europe Convention in the sphere of protection of individuals in the sphere of automatic processing of the personal data), *Nazionalnaya Bezopasnost* 1 (2014): 165–170; DOI: 10.7256/2073–8560.2013.01.17

<sup>2</sup> Vladimirova, T. V. Информационная безопасность: социальные практики и структуры (Information security: social practices and structures), *Nazionalnaya Bezopasnost* 3 (2014): 390–397; DOI: 10.7256/2073–8560.2014.3.11511

<sup>3</sup> Ursul A. D., Ursul T. A. The Future of Humanity: Death or Immortality? *Sociodinamika* 3 (2013): 138–199; DOI: 10.7256/2306–0158.2013.3.478. URL: [http://e-notabene.ru/pr/article\\_478.html](http://e-notabene.ru/pr/article_478.html)

real causes of state surveillance can be found in the socioeconomic changes and the evolution of the role of government, which in the modern world was ultimately accomplished in the name of humanistic values. Firstly, the humanization of punishment and of the criminal law system — which were undertaken due to social pressure and resulted in the first wave of modern revolutions — created a need to find new, more effective mechanisms. Punishments which were more respectful of the individual's dignity were less atrocious and less visible, and therefore they became less intimidating and less effective. Secondly, these new mechanisms of control and surveillance should not be considered as more invasive to an individual's privacy, but as less invasive than those that they replaced (social/community moral and religious control). Thirdly, if it is true that, over the last 200 to 300 years, general state surveillance and control has grown substantially by replacing the control of the preceding era, it did not become more intrusive with regards

to individual freedoms. This process has simply been concomitant with the growing number of state functions and activities, which emerged because of the development of factors such as the growing need to protect private property, to respond to new social preoccupations and problems, and to implement welfare state values. The individual has become more and more autonomous despite the growth of state surveillance and control necessary to implement humanistic values. Individual autonomy has become so immense that state control and surveillance measures are now even inadequate to fulfill their basic functions (tax evasion and terrorism financing have created a strong need for cooperation between governments and private institutions).

A paradox of the human rights and civil freedoms consist in the fact that, on the one hand, they limit the possibilities of any exterior subject to intervene with them and, on the other hand, they ask for some restrictions on them necessary to implement the same humanistic values.

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3. There is no better testimony to the fact that the monarch's right over his subjects was tantamount to a property right that he or she exercised over them than the Magna Carta: "No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right". Indeed, words such as "destroyed" applying to individuals is a clear example that human beings at that time were no different from an object (article) whose existence in society was governed by the monarch's property rights.
4. The idea that criminal law reforms were created, and some of the human rights in the sphere of justice were established as a reaction to the sovereign's abuses power is clearly expressed in the Habeas Corpus Act: "great delays have been used by sheriffs, gaolers

and other officers, to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation..."

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11. The Fifth Amendment to the US Constitution express this idea aptly: "...nor shall private property be taken for public use, without just compensation".
12. When considering this natural law, Locke used only the examples of the individual-individual property relations and not state-individual property relations
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15. Even today, there are examples of this in reverse: surveillance functions are transmitted back to the private sector. For example, modern fiscal evasion and fiscal fraud surveillance functions are partly exercised by the banking sector and by private financial institutions, and not exclusively by government agencies. The same is true for Internet-related service and product companies as well, which are often accused of collaborating with state security services and, especially, of transmitting personal data to those bodies.
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