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## **MORALITY OF PENAL THEORIES IN THE XXI CENTURY**

The problem discussed in this paper is concerned with outlining the nature of contemporary forms and signs of the penal policy that undergo significant transformations in the postmodern era. These transformations traditionally and, in our opinion, reasonably are associated with the impact of globalization on culture and economy, which ultimately is reflected in the law. Contemporary European penal culture is deeply nihilistic. The Classical morality evaporated or almost evaporated, but it is this morality ensured its viability is quite bright for more than two centuries. Therefore, analyzing the transformation of European penalty, you can feel the tension that characterizes theories of punishment, which is increasingly moving away from rationality of penal and disciplinary practices.

This paper was prepared in the context of the author's research on transforming of penal policy under the influence of globalization. The article should be read alongside with other papers<sup>1</sup>.

First of all it is necessary to emphasize that this article is not devoted to the investigation of the essence of such a phenomenon as "pessimism", which was analyzed by many philosophers and sociologists. We believe that this definition found its more than adequate coverage by social science. For example, a deep analysis of sociological theories of postmodernism, where category of pessimism occupies a special place, was made by George Rittser.

We should also emphasize on the philosophical legacy of Friedrich Nietzsche due to the fundamental virtue of the latter (and especially for the purposes of this article). We are deeply convinced that the Nietzsche's works can serve as an valuable and important source of philosophical thought, which can be used for study of the postmodern penalty.

However, analysis of penalty in XXI century requires study of the phenomenon of pessimism in the context of punitive practices. We believe that the study of the nature and purposes of penal policy without this philosophical category in the current development of European penalty

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<sup>1</sup> Ягунов, Д.В. (2010). Глобалізація та «криза покарання» трансформація пріоритетів пенальної політики сучасних країн. *Актуальні проблеми держави і права*, 55, 550-554.; Ягунов, Д.В. (2010). Глобалізаційна обумовленість «кризи покарання»: аналіз сучасних пенальних практик на основі кримінологічних поглядів Мішеля Фуко. *Правова держава*, 12, 325-330.; Ягунов, Д.В. (2008). Глобалізація пробації або глобалізація соціального контролю? Перспективи розвитку концепції пробації у XXI ст. *Актуальні проблеми політики*, 34. Одеса: Юридична література, 115-121.

would be more than that incomplete. That underlines the relevance of this article.

Our previous articles, which were focused on the impact of globalization on punitive methods, were mainly concerned with periods of historical development and transformation features of the European penal concepts and appropriate punitive practices. However, this article is focused on the attempt to formulate some prognostic ideas that highlight the trend of development of these concepts and theories.

Here, first of all, we would like to express some fears, which are concerned with the following points.

We can guess that the academic process in contemporary national law schools and academic research institutions (if we are talking about the research on problem and justification of goals of punishment) are characterized by the fact that we can roughly define as penal over-optimism.

The problem is that students learn to perceive romantic penal hypotheses as axioms. Then the same is “consumed” by the science of criminal law and criminology, which shapes a largely formulaic and formalistic researches on relevant findings, which nobody actually dares to question the following statement: 1) the aims of punishment, which are declared in the criminal law, could be easily achieved; 2) the aims of the punishment not be identified from the outset incorrect or even false.

This penal over-optimism applies to any and all purposes of criminal punishment (punishment in itself, general prevention, special prevention). But most of all these researches and these romantic fantasies are “poured out” on the purpose of rehabilitation of criminals (regardless of how the goal defined in national criminal law).

Taking into account the aims of criminal punishment as a system, it can be said that traditional views on these and related symbols are characterized by stability and firmness. At least, the Ukrainian criminology and science of criminal law shape these mythological images.

Even if we talk about the “crisis of punishment”, mention of which can sometimes be found in the national criminological literature (though this crisis had been described in the European and American criminology more than forty years ago), anyway the problem seems to be no way, in fact, the problem for the Ukrainian science.

The introduction of new rehabilitation techniques (though their novelty is doubtful), adequate funding for national criminal justice systems, human rights protection, the UN and the CoE programs, a relatively innovative projects such as mediation or restorative justice, widespread introduction of highly bright brand of probation with the

corresponding maximum social advertising – all this and more provides the more or less stable development for the traditional objectives of criminal punishment (punishment in itself, general prevention, special prevention, rehabilitation), “fostered” within the borders of the Classical school of criminal law.

Both theoretical basis for criticism of Classical traditional goals of criminal punishment (eg, lack of clear criteria for measuring the achievement of these goals) and practical reasons (eg, unexplained classical interpretation of the growing number of prisoners in the world both in absolute and in relative terms despite the announcement of wider use of alternative penalties and probation and official recognition of the failure of imprisonment as a tool for achieving the stated objectives of punishment) still can not penetrate the solid armor of the penal conservatism, which is quite optimistic continue to be supported by the science of criminal law and criminology (especially of the Soviet model).

However, this stability does not take into account that pessimism influenced knowledge about punishment as a broad philosophical category of European and American criminology.

Pessimism of the scientific knowledge on theories and methods of punishment is a very serious challenge for the contemporary criminology. He accompanied with many bright, but at the same time sad examples that are more or less connected with the collapse (not even decline) rehabilitation paradigm.

As a result of this collapse, we can point out at the vacuum of philosophical and legal justification penal policies that could meet existing today punitive practices. In addition, this pessimism influences the aim of general prevention with its rational choice between profitable and unprofitable.

The general prevention has always had a weakness that one person was used for bullying others. As Nietzsche said, when people are used in a such manner, the guilt is not punishable. The guilt is on mentors, on the environment, on us, rather than on criminals. That is why, perhaps, the postmodern penological discourse got an opportunity to “strip” of largely artificial or at least controversial provisions, fairness and the right to existence of which has always been in doubt – “humanization”, “rationalism of offender”, “correction”, “rehabilitation”, “reduce of crime through punishment”, “crime prevention”, “reeducation through criminal law” and so on.

This is equally true for such a goal of punishment as a punishment in itself. As Nietzsche said, “the moral anger is the most insidious form of revenge”. To have a dream of punishment and implement it means to feel

strong attack of fever, which, however, passes quickly. The punishment in itself in the Classical interpretation does not even notice that it looks a lot worse in his own way, rather than the Lex Talionis principle.

All goals of criminal punishment in the light of the Classical explanation are examples of virtue. That's how they are presented within the Classical criminal attitudes. However, it is a virtue, as Nietzsche rightly put it, has the privilege to throw the first bundles of firewood to the fire that is burning under the feet of the convicted person.

Considering the above, we can say that the moral vacuum of justification of using the criminal repression under conditions of de facto formed postmodern penalty was filled with pragmatism and rationalism. The latter are concerned with certain practical steps that are not supported with philosophical and legal grounds but perhaps these grounds are even not required.

Under the dominance of the philosophical and legal vacuum in the application of punitive practices it is very interesting to observe how the Classic criminal law with excitement is looking forward to the arrival of a new Messiah in the person of a particular philosopher and criminologist, who later would be called "outstanding", which should bring to the Classical criminal legal stagnation some fresh ideas on the example of certain new revolutionary work or study, which, in turn, would take the Classic school of moral desolation and frustration caused by the rapid recovery of positivist ideas and implementation on the basis of their respective penal practices (mostly of panoptic and disciplinary orientation).

On our opinion, the reasons of this penal pessimism are more or less clear. At least we can adopt the Marxist ideas elaborated George Rusche and Otto Kirchheimer and subsequently originally presented by Michel Foucault in his modulation concept. However, it seems the main issue that arises in the context of the issue of this article is the question of pessimism and concentration limits of its influence on modern penal theory (if at all it is possible to use the word "concentration" and "limits" to the category of pessimism).

In addition, the question arises how this general pessimism and its concentration is "healthy" for modern European penalty.

This leads to another question, the answer to which requires the use of comparative analysis, the focus of which will be on scholastic and ephemeral rehabilitation paradigm, filled and continues to be filled the criminal law in the interpretation of the classical school, and, on the other hand, on radical and even aggressive postmodern positivism of panoptic and disciplinary sample.

On the one hand, we can ask whether the collapse of the rehabilitation paradigm is a tragedy or comedy. This question, I think, is important in view of how long European penalty had been artificially filled with “humanization”, an idea which had acted as “engine” of the transformation of modulations criminal penalties. “Humanization” as a guide to penal progress. Any other conceptual idea is sedition. Nothing but progress.

On the other hand, the “infusion” of concentrated panoptic practices which are deeply immersed in social relations – is it critically dangerous to the health of the society? Should we fight it? If should, how?

We are confident we will find the exact answer to this question in this article. However, at least we will try to put the issue up for discussion, using the same categories pessimism and nihilism.

Friedrich Nietzsche wrote that “nihilism is thought to the end logic of our great values and ideals, because we must first go through nihilism to make sure that was actually worth of these values. We need ever to find new values”. This statement most accurately reflects the perspective of this article, which deals with moral bankruptcy of the punitive practices through long enough lack of philosophical and legal justification and moral justification, instead of which these practices are filled with outdated, often dead absolutes that in turn, immediately rejected because of its artificiality.

That is, in our opinion, most accurately reflects the decline of the Classical criminal law values. Mentioned above rationalism and pragmatism that filled penal postmodern landscape and displaced the traditional Classical semi-religious cult deliberately left the field blank, providing time and opportunities to create new philosophical justification for penal theories of Postmodern.

In the meantime, we have a large concentration of penal pessimism associated with the decline of morality, which once was the basis of the Classical school of criminal law and that there is little work.

This concentration is bordering with nihilism. The border is arbitrary. So important is the question of Nietzsche “What is nihilism?” And his answer to this question – “what is the highest value lose value. No goal. No answer to the question “why?”. We believe that this quotation can serve with a great success a reflection of the crisis of philosophical and legal justification of penal theories that were inherited from the previous era.

The Classical school of punishment were based on the continuous exchange of moral categories that were evaluated by the category of the mind, and, according to Nietzsche, the belief in the categories of the mind is the cause of nihilism: “We measured the value of the world

categories relating devised world ... Ultimately all values we have tried to present to the world, provided him with impairment”.

The Classic school was a purely moral system, and this applies both to Consequentialism and the Retribution views. However, as rightly said Nietzsche, “any purely moral value system leads to nihilism”. Meanwhile, attempts to think about morality, not falling under the spell of her action, not trusting her treachery beautiful signs have not been successful for the European penalty. The morality has played with the European penalty the same thing that made sirens with seamen in ancient mythology. At the time, European penalty was charmed by the sweet singing of morality, the effects of which it is now under extreme pressure trying to overcome, met face to face with pragmatism of the Postmodern penalty.

Penal Revolution of the mid XVIII century is analyzed today primarily through the prism of “humanization” and freeing people from the shackles of medieval religious cultural symbols. But this is, we believe, is not sufficient for a deeper dive into the analysis of this transformation.

Therefore, it becomes clear why Friedrich Nietzsche morality was only an attempt to justify the human pride. He emphasized that the theory of “free will” (in light of the philosophical views of modern times) from the very beginning was anti-religious. This theory attempted to create a human right to interpret themselves as the cause of their elevated states and actions: “It is a form of growing sense of pride”. “This hyperbolic naivete to imagine a Man as a meaning and measure of all things”. How it is important for characteristics of transformation of the European penalty in the early twenty-first century!

And it seems that having escaped from religious “hugs” of the first penal modulation, the theory of free will became the explosion detonator of such pride. To give up such pride is extremely painful because of habit into this category.

This is not surprising: “Who feels the lack of freedom of will is sick; who does not feel there is a fool”. The Postmodern European penalty with its “rationalism” does not want to present itself as a fool, while feeling more than uncomfortable in the company of “morality” and “humanization” that the European penalty must bear a huge beautiful but uncomfortable flag.

European penal theories, which were shaped within the classical tradition and based on the relevant legends, myths and related characters, had been always tried to win: a moral victory over the “criminal” and the theatrical victory over the “criminality”. The Classic school had been always looking the answer to the question: how can we take a “crime” under siege “warning”, “prevention” or “prevention.” This is like a meeting

of generals and senior officers of the General Staff before a decisive battle that plans to put an end to this “enemy”. Meanwhile, to have enemies is the oldest human habit, and then – its strongest need. Therefore, as rightly said Nietzsche, “which is punishable – never punished. Our crime against criminals is that we treat them as villains”.

The “humanity” in our penal practices has reached enormous proportions and filled penal landscape. However, all these attempts to “find” and “defeat” “enemy” have always been a high degree of immorality. In a philosophical sense it is the best, we believe, reflected Nietzsche: “The victory of the moral ideal is achieved through such immoral means just as any other victory: violence, lies, slander, and injustice”. By modulating the above penal on the field, we can mention the old problem of violent socialization. This category is actually the basis for the concept of re-socialization category, which, in turn, serves to punish any criminal code based on pure Classical principles.

Positivism, which is known for this name as Lombroso, Ferri, Garofalo, Drill – even worse in this regard. What a worthy medical rehabilitation model! Let’s recall “The Mechanical Orange” of Anthony Burgess and Stanley Kubrick. Total victory over criminal. Offender “crushed”. But by what means? And at what cost?

But the Positivism never exhibited the Morality in the first place, not even hide his contempt for her.

“Law Abiding Citizen” ... Why are we trying to create this Idol through “punishment”, “goals of punishments” and “instruments of rehabilitation”? Whether it should be, this Bigfoot of penal theories? ... Modest? Diligently? Friendly? Moderately? It must be, above all, “a good man”. So, in other words, a good slave? It may be recalled that the main metamorphosis of slavery was cloaking it in religious garments. However, this example does not provide us an idea of penitence that we use pointing at the “explosion” of humanism, which seems to have taken place since the end of XVIII century?

Attempts to “humanize” (which is a very naive question decided that a “humane” is a fraud, under cover of which a certain kind of people trying to get dominance. This corresponds to the modulation concept of Michel Foucault in terms of deep underlying the causes of changes penal formations where “humanization” divert attention from the real causes of this penal transformation.

Summarizing the above, we should note that understanding the nature of postmodern transformation of penalty does not require much formal analysis of certain data. We believe that understanding the postmodern penalty is associated with trying to feel the spirit in which it is actually

characterized. This spirit is felt only through the prism of the most critical analysis of classical moral views on punishment, contents and goals.

Contemporary European penal culture is deeply nihilistic. The Classical morality evaporated or almost evaporated, but it is this morality ensured its viability is quite bright for more than two centuries.

The fact that during the more than two and a half centuries served as the engine of European penality, based on culture, the center of which was a Man as a rational creature, a man who freely making rational choices (with some exceptions, when outbreaks of European positivism lit penal landscape).

Therefore, analyzing the transformation of European penality, you can feel the tension that characterizes theories of punishment, which is increasingly moving away from rationality of penal and disciplinary practices.

### **Bibliography:**

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