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EVOLUTION OF PUNISHMENT IN 21ST CENTURY: NEW PERSPECTIVES FOR RESEARCH

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Abstract

This paper deals with a panoptic carceral state of the XXI century, whose functions are reduced to maximum social control through the wide use of imprisonment and quasi-imprisonment practices and the spread of non-institutional forms of restriction of freedom (including non-punitive ones).

The methodology of the research is based on works of Rusche, Kirchheimer, Melossi, Pavarini, Foucault, Cohen, Bauman, Albrecht and other scholars. Proposing the ideas of “quasi-deviant”, “the carceral state” and “penological pessimism”, the author analyses the priority of “protection of the society from deviants” in public policies in the XXI century, simulacraisation of measures of “protection of the society” and lowering the threshold of deviance.

The aims of the research are to analyse: 1) the nature of contemporary penal practices; 2) the justification of punishment; 3) how social control spreads in the XXI century; 4) how the boundaries between imprisonment and non-institutional applications of imprisonment as well as between punishments and non-punitive forms of social control blur; 5) how the tension between “freedom” and “security” develop.

The research covers such issues as 1) clarification of the content of the terms “prison policy” and “social control” in the XXI century; 2) political and economic nature of new trends in social control policies and practices; 3) global consequences on crime prevention, sentencing and prison policies; 4) probable scenarios for the evolution of social control policies in the global and national dimensions; 5) the concept of a quasi-deviant as a special new collective object of social control; 6) penological pessimism as a fundamental characteristic of social control policy and practices; 7) growing supranational nature of modern prison policy; 8) institutional violence in the XXI century.

Keywords: prison, criminal punishment, justification of punishment, new-widening, incarceration, gated community, punitive city, prison population, prison privatisation, penological pessimism.

Presentation of the author’s research

With this paper, we start presenting our ideas of a *panoptic carceral state* of the XXI century within the author’s concept.

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In our opinion, a panoptic carceral state is a form of a contemporary state, whose functions are reduced to *maximum social control* through the wide use of imprisonment and quasi-imprisonment practices, the spread of *non-institutional* forms of restriction of freedom (including *non-punitive* ones), and the development of *digital control practices*.

Accordingly, in the announced research, we intend to clarify the content of the definitions “*prison policy*” and “*social control*”, considering social control as a set of political practices of coercive influence on the behavior of people, which are aimed at supporting the state as a socially responsible institution. Punishments and criminal sanctions are considered as a component of social control policy and practices, which is formalised in a system of decisions and actions to protect society by from real or potential deviants.

In line with well-known scholars, who developed the ideas of the *economic conditionality* of the punishment and penal practices (Georg Rusche, Otto Kirchheimer, Dario Melossi, Massimo Pavarini, Michel Foucault, Nils Christie’s, Zygmunt Bauman, Peter-Alexis Albrecht, Stanley Cohen and other academics), we intend to explore *the political and economic nature* of new trends in social control policies and practices in the XXI century.

In previously published and the following our papers, we research the global impacts on crime prevention, sentencing and prison policies:

- transformation of social control according to Foucault’s scheme “*binary code of legality – disciplinary mechanism – security device*” but to the new level of the *fourth modulation (panoptic risk modulator)*, which is reflected in a system of *panoptic management of deviants*, which consists in *controlled and economically viable reproduction of deviance as a commodity* with *commercial* characteristics and qualities;
- further transformation of the “*criminal law of freedom*” into the “*criminal law of risks*” (Albrecht, 2012) and the full-scaled involvement of civil (non-penal) instruments in social control over real, potential or declared deviants;
- differentiation of social control policies and practices of different states on different continents (the issue of the panoptification of society and prison population rates);
- further evolution of private territories of social control in XXI century and further demonopolisation of the state’s right to determine the principles of social control (*prison-industrial complexes*).

In our research, we are developing further the Cohen’s concept of “*punitive city*” (Cohen, 1993) and adjusting it to the needs of XXI century as an element of the contemporary panoptic carceral state.

We are analysing probable scenarios for the evolution of social control policies in the global and national dimensions (there might be an increase in the number of centres of social control, including states, corporations, “*punitive cities*”, “*separated settlements*”, “*gated communities*”, *prison-industrial complexes*, prisons, migration centres, and other places for persons who are identified as “*dangerous elements of society*”).

We are presenting the concept of a *quasi-deviant* as a special collective object of social control in the XXI century with the key characteristic of “*dangerous state of a person*” (*pericolosita*) (Petrunik, 1984; Webster & Dickens, 1983).

We are also elaborating *penological pessimism* as a fundamental characteristic of social control policy and practices in the XXI century.

We are also analysing the growing *supranational* nature of modern prison policy and the factors influencing the spread of the phenomenon of *supranationalisation* of prison policy.

An issue of *institutional violence*, which seems to continue to grow in contrast to attempts to prevent this phenomenon by international and national actors, is also one of the main aims of our research (Yagunov, Melnychuk & Meliukhov, 2023; Yagunov, Polovyi, Tupchiienko et al., 2023).

Originality of the research field

Proposing our ideas of “*quasi-deviant*”, “*the carceral state*” and “*penological pessimism*”, we intend to prove that in the XXI century the priority of “*protection of the society from deviants*” in public policies will lead to further transformations of the concept of a *socially responsible state* into a *panoptic carceral state* by simulacraing measures of ‘protection of the society’ and lowering the threshold of deviance among its citizens.

In the context of transit in criminal justice model in contemporary states, the degree of institutionalisation of social control policy is increasing, the level of *real* protection of the society is decreasing, the prison system is acquiring characteristics of dysfunctionality, and the *simulacraisation* of the categories of “*freedom*” and “*human rights*” is increasing.

The current state of research and the aims of the research

For several decades, the tension between “*freedom*” and “*security*” has been one of the most discussed topics in science and politics. In the modern risk society (Beck, 1992), security is frequently prioritised over freedom. However, gains in security often come to the expense of freedom. In view of the advance of digitalisation and the ground-breaking development of artificial intelligence and surveillance (Lyon, 2018), the question arises as to how freedom and security are balanced in the XXI century in the context of sentencing and penal practices in order to exercise social control over the deviants of a new generation but with respect for their rights.

Accordingly, the aims of our research are to analyse: 1) the nature of contemporary penal practices; 2) the justification of punishment; 3) how social control spreads in the XXI century; 4) how the boundaries between imprisonment and non-institutional applications of imprisonment as well as between punishments and non-punitive forms of social control blur; 5) how the tension between “*freedom*” and “*security*” develop.

In the XX century, among others Georg Rusche, Otto Kirchheimer, Dario Melossi and Massimo Pavarini made a comprehensive analysis of the impact of the economics of penal practices (Rusche & Kirchheimer, 1993; Melossi & Pavarini, 1981).

Michel Foucault considered penal practices in the context of “*spreading panoptic discipline*”. His ideas concern different tools of disciplinisation and appear to be topical in the XXI century (Foucault, 1991). Especially, the technological development and the emergence of worrying polycrises turn the view to Foucault’s security narrative (Foucault, 2009).

Nils Christie’s concept of “*Western Style Gulags*” helps to understand the repressive (private) prison industry (Christie, 2000).

No less important are works of other prominent scholars in the context of the justification of punishment (Mathiesen, 2015; McLaughlin & Muncie, 2002).

Attention should be given to Zygmunt Bauman and Peter-Alexis Albrecht who combined legal, economic and sociological tools to demonstrate a shift to “*protection of the society*” in a postcapitalist society (Albrecht, 2012; Bauman, 2013).

Stanley Cohen and his “*punitive city*” – “a newly evolving penal world with dispersal and penetration of social control beyond and without prison walls” – is one of the pillars of our research (Cohen, 1993).

The academic discourse of the early 1970s put *interdisciplinarity* on the agenda, with deviance and crime as forms of reactions to the political system. For half a century, the political discourse in Western states highlighted the categories of “*criminals*”, “*prison policy*” and “*social responsibility of the state*”, taking for granted as the axioms of ideas of *classical* criminal justice. Although the academic discourse argued on (neo-)classical thinking and research studies explored the options and limits of rehabilitation of offenders (Martinson, 1974; Allen, 1981), an *interdisciplinary* study of how the complex policy of social control will develop in the XXI century has not been conducted yet (especially in the light of the re-emergence of the concept of dangerous offenders). In the XXI century, the restrictions on freedom appeared much more topical than ever in the light of the progress of all-encompassing digital technology, as it was analysed in the works of the early scholars, when classical criminal justice became unable to assist the policymakers in their policies of “*protections of society from dangerous deviants*”.

It is argued that the change in the discourse of punishment and related institutions at the end of the XX century reflected the growing dominance of *the protection of society* in relation to deviant behavior and the corresponding methods of ensuring social order, which fuelled the tension between freedom and security and the academic urge to find a balance between them.

Western states, which declare themselves socially responsible, have *not* been concerned with classic justice principles of reaction on deviants even if the slogans of “*individualisation of punishment*” and “*returning offenders to society*” are declared. Instead, the updated concept of *protection of the society* has become a *political priority* in the XXI century, much more than it was described by scholars in the XX century.

At the end of XX century, declared *apolitical* classical criminal justice has undergone a profound transformation of meanings. “*Treatment of offenders*” was replaced by managerialist indicators of *economically justified protection of society* and by *socio-technological control*, which did *not* exclude slogans of democratic values and human rights. The acquisition by social control of the qualities of a policy was accompanied by a change in the philosophy of “*fighting crime*” into “*social control policy*”, and “*the process of returning deviants to society*” into “*protection of society from real or potential deviants*” in many states.

This necessitates the analysis of sentencing and prison policies using the tools of criminal law, criminology, economics and political science. Trends in sentencing and prison policies of modern states (growth of the prison population, transformation of probation, parole and other forms of non-institutional supervision into auxiliary attributes of imprisonment, abstraction of the general preventive paradigm, decline in offender rehabilitation (even considering recovery after “*nothing works*”) and, as a result, a revision of the traditional goals of punishment, the dominance of concept of “*dangerous offenders*”, greater privatisation of prison systems, growth of violence in prisons), make topical study the essence of a punishment and its goals, the system of control and supervision measures against deviants in the XXI century.

Towards the fourth modulation of social control

Thus, at the beginning of the XXI century, it is necessary to put on the agenda the issue of changing the nature of the third (“new European”) modulation of security and its spatial expansion.

We believe that a more profound analysis of the essence of the third (security) modulation of social control and the peculiarities of modern globalised society gives us grounds to speak about the *fourth modulation* of social control, which corresponds to the spirit of the XXI century society.

Firstly, the third modulation of social control, which Foucault defined as “modern modulation”, was “*modern*” precisely as of the period from the 1950s to the mid-1970s (actually when his modular concept was developed). At the beginning of the XXI century, considering the obvious reduction in the timeframe of modulations of social control, even from the standpoint of logic, it is necessary to raise the question of outlining the contours of a new modulation – *the modulation of the Postmodern*.

During the more than two hundred years of dominance of the classical school, retribution, general prevention and rehabilitation surrounded the alleged *rationality* of the criminal. This *rationalism* was the basis on which the European *criminal law of freedom* was built. Today, however, we have a situation where ‘securing society’ has created the conditions for the transition to *the criminal law of security*.

Therefore, the XXI century objectively requires the continuation and expansion of Foucault’s modular concept and the identification of *the fourth modulation* of social control, within which *not* only the discussion of the rehabilitation paradigm, but also the goals of criminal punishment and other measures of social control look archaic.

This necessitates the continuation of Foucault’s modular concept with what we can define as a *postmodern modulation of panoptic risk management*.

Secondly, although the general outlines of the fourth modulation of social control were shaped within the close framework of the category of security, most of the issues and problems that stem from the essence of the modulation of social control in the early XXI century no longer fit within this framework and require a *modulatory autonomy*.

Thirdly, the intrusion of technology, electronics, invisible surveillance and digital networks into public consciousness and social relations affected the nature, forms and manifestations of social control, which is increasingly becoming *panoptic* and forcing changes in the category of freedom.

The main feature of the modality of social control in the XXI century is that social control practices have been shaped in the context of the destruction of their public foundations. The monopoly on the “*right to punish*”, which until recently belonged to the state, has ended up in the hands of private actors, with a further tendency to deepen this phenomenon.

And the problem is that the first three modulations – no matter how formally they were treated – were aimed at *reducing crime* or *establishing stable control over crime*. No matter how it was done – through theatrical cruelty directed against the body of the criminal, moral and religious reformation of the criminal’s consciousness, psychological and psychiatric rehabilitation, social inclusion or other tools and mechanisms. Even the idea that “if we cannot do anything to reduce the recidivism potential of the offender, we should at least do it as cheaply as possible” (Martinson, 1974), despite its extreme pragmatism, pursued what was traditionally analysed in terms of socially oriented ideals.

Today, however, it can be argued that the modulation of social control in the postmodern era is associated with *the reproduction of crime*. The attempt to “at least do something” with criminals, and, if possible, “as cheaply as possible”, to which the “security device” tried with all its might to give a social “face”, failed to maintain its balance, swaying towards the simplistic thesis of “*as cheaply as possible*”. The total privatisation of prisons that has taken over national penal systems shows that states are forced to allow the private sector to take over a previously monopolistic state function, where the only goal is to maximise profits and minimise costs.

Previously, they tried to destroy the “criminal” (first without quotes, then with quotes). Capital and corporate punishments aimed at *the body*, disciplinary punishments aimed at *the soul*, security punishments aimed at *freedom*. However, all penal practices tried to supplant the “criminal” because of the undesirability of the actions of the criminal and/or his personality as such.

Today, on the contrary, we are witnessing a trend that has already become systematic and widespread, which is publicly proclaimed. The “criminal” is *no* longer a marginal in social relations. He/she is an openly desirable person for modern national criminal justice systems (although their nationality has long since begun to be “erased” due to the transnationalisation of the phenomenon of prison privatisation). Modern prison systems are no longer, to use Foucault’s terminology, “perfect and complete institutions”. They are still such in form, but in content they are *incubators of crime*, not because of the outdated stigma of “prison subculture” or “universities of crime”, but because of their economic usefulness for many interested political actors.

An overview of the transformation of modulations of social control shows a tendency of gradual complication of each subsequent modulation of social control, and thus – complication of the statuses of managers of the respective modulations.

For example, a medieval executioner was required to be a high-quality expert on *the body* and the impact on *the body*, to have the appropriate skills and tools, which, incidentally, cost a lot of money.

The second modulation of social control required experts in *discipline*, which ensured the mass reproduction of religious missionaries, psychologists, psychiatrists, doctors, and social workers. We can recall the transformation of the model of a probation officer who “managed” to be a religious missionary, a moral educator of criminals, a social worker, a clinical psychologist, and a social worker again.

For the third modulation of social control, these were already *security experts*, where probation officers and prison officers became “*resource managers*” and, finally, “*managers of the risk of reoffending and the risk of causing significant harm*”.

In addition, it is not only the transformation of the role of the expert that is important for a particular modulation of social control, but also *the number of experts* required, which is somehow related to the number of offenders themselves, as well as their characteristics and statuses.

For example, we have seen a massive increase in the number of prisoners in many states, the growth of transnational prison corporations and their activities, and the revival of positivist concepts of the ‘dangerous offender’. Politicians and administrators of criminal justice systems have openly talked about “*sexual predators*” and “*dangerous individuals*”, and it seems as if deviants of this type *did* not exist before. If earlier, relatively speaking, there were only a few categories of criminals, today their classification has been expanded to include many intermediate states, and each new category is filled with new “*knowledge*” from new “*experts*”. Instead of a *single group of “criminals”*, there are now “criminals”, “deviants”, “abusers”, “paedophiles”, “sexual predators”, “persons with suspicious behaviour”, “persons with abnormal behaviour” and other persons whose definition is generally difficult to provide through classical criminal law, but who have begun to be mentioned in the legal acts of modern countries whose population has become much more concerned with “protecting society”.

As a result, there are more experts, and special experts at that.

All of this characterises the fourth modulation of social control, which we are talking about, and which *no* longer conceals the obvious fact: for the fourth modulation, we can talk about experts in *the controlled and economically profitable reproduction of deviance and crime*, which, in turn, have acquired the characteristics of a *commodity* with the relevant characteristics and qualities.

The academic methods to be used to achieve the goals

The research will be based on comparative legal method, as well the methods of legal modelling, legal interpretation, statistical methods, which will make it possible to revise social control policies in the XXI century.

The geopolitical method will be used to identify the interference of geopolitical factors in national prison policy and to provide a forecast of the scope and of the loss of control over prison policies by national governments.

The method of comparative analysis will allow establishing the specifics of the transformation of prison policy in different continents and regions (considering the role of the religion in social control practices).

The concept of research is how to adapt their methods in relation to the beginning of the XXI century and to make a prognosis for the next decades at least.

The author will prove that the evolution of punishment in the XXI century as an instrument of social control cannot be investigated beyond the complex historical, economic and political approaches as they were used in the works of Rusche, Kirchheimer, Melossi, Pavarini, Foucault and other scholars.

The synergetic method used by the mentioned authors will be adapted to understand the mechanisms of building hierarchical links between the elements of the social control system in the XXI century.

The original methods in the context of this research were developed by Rusche, Kirchheimer and Foucault, in relation to researching of the spread of social control and discipline in society (Rusche & Kirchheimer, 1993; Melossi & Pavarini, 1981; Foucault, 1991; Foucault, 2009; Bauman, 2013).

The author will use the Foucault's methods for the needs of the XXI century because the Foucauldian discourse analysis is extremely useful for analysis of the social control issues (Khan & MacEachen, 2021).

A special attention will be paid to the method of analogy that will help to identify similarities between different mechanisms of social control (police, prisons, psychiatric institutions, factories, barracks, colleges, etc.) shaped by Foucault relating to XVIII – XIX centuries. At the same time, the Foucauldian discourse is urgently necessary to continue the list of contemporary disciplinary institutions, including “positive” “*gated communities*” and “negative” “*isolated settlements*” (Shawish, 2020).

In addition, the Stanley Cohen's methods of research will supplement the Foucault's methods (e.g. methods of evaluation of Net-Widening in the XI century) (Cohen, 1993).

Conclusions

Having summarised mentioned above, we have concluded that an issue of transformation of criminal punishment in the XXI century occupies one of the central places in academic discourse and necessitates an interdisciplinary study of penal practices in a *broader context* of social control.

Having considered the fundamental works of the prominent scholars of the XX century, we conclude that they should serve as a basis for further development of the issue due to the realities of the XXI century.

One of the author's concerns is a problem of the future of the paradigm of offender rehabilitation in the light of increasing demands to “*save money*” and to “*protect the honest taxpayers more*” from “*dangerous and violent predators*”. The re-emergence of the concept of a *dangerous offender* and its practical implication even on the level of international organisations (for example, the Council of Europe) underlines the problem additionally and demands a new complex view on penal practices across the world.

Blurring the borders between penal and non-penal instruments of social control is the area where freedom and rights are in danger of profound transformation in favour of “*security*”. We should investigate how, in-fact, penal instruments are camouflaged into non-penal ones for the aims of further compressing the freedom in the XXI century.

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