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**THE CONCEPTION AND FUNCTIONS OF PUNISHMENT
IN POSITIVIST AND CRITICAL CRIMINOLOGICAL TRADITIONS**

Summary of Doctoral Dissertation
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INTRODUCTION

Punishment has a long history in the human cultures. Practices to punish the offender were present and still are in every epoch and every society. The issue of punishment is inevitably related to the issue of crime or offence. Nevertheless the relation of crime and punishment is not so explicit and easily explained. The perception and understanding the concept of “crime” may consequently determine how the concept and functions of “punishment” are understood. For instance the issue of punishment can be analyzed in the context of state theory: state has a power and right to punish an offender in the name of society the interests of which it protects. The issue of punishment is widely discussed in the moral philosophy as well. Two main traditions can be named: consequentialism and retributivism. The former legitimize punishment by its consequences: punishment can prevent future crime and guarantee the safety of the society. The representatives of the latter approach regard punishment as a natural outcome of crime. It is retribution. The offender himself storms the punishment by committing a crime. The issue of punishment is analyzed in criminal law, penology, sociology and criminology.

The criminal law uses this definition of the punishment: „*Criminal punishment is a state coercive measure that is imposed by the court conviction on a person who has committed a crime and whose rights and freedoms are limited for the sake of the society*“ [Abramavičius 1998; 343]. This is a normative definition of the modernity. It presumes that there exists a certain “criminal activity” or “crime” that serves as a criterion to define a certain person as a “criminal” and gives the right to punish him. Penology is another narrow branch of science that analyses punishment, crime prevention and prisons. As well as criminal law it takes for granted the presumption that there exist definite norms that are common for all. On the basis of these norms certain actions are defined as “crime” which should be punished. Penology is applicable in its nature. Its purpose is to monitor the activities of criminal justice system institutions and give recommendations for its improvement. The scientists of this field do not question the institutions they monitor [Duff 1994; 21].

Differently sociologists place the problem of punishment into the field of social relations. They raise the fundamental questions: where does the power to punish originate from, how do other social institutes determine the forms of punishment.

Generally they do not perceive punishment as a given entity. On the contrary they explain it as socially, politically or economically determined. Punishment in a sociological view is a social institution that has a defined function in a social system [Duff 1994; 28]. The aim of the sociologist is not to legitimize certain form of punishment but to explain why certain practice of punishing takes place in certain society.

Criminology explains punishment as well. Interdisciplinary nature of this science allows to integrate the knowledge of criminal law, sociology, psychology, biology, anthropology and other social and natural sciences and to analyze punishment at different levels: to regard it as the means of penalty in a narrow penological sense as well as social and cultural fact or institution in a wider social context.

Though the issues of punishment have been analyzed along with the questions of the origin of criminal behaviour in criminology since its foundation in XIXth century, it especially becomes topical during the times of social change. The efficiency of punishment greatly relies on the social and cultural context it is applied in. Therefore as the latter changes there is a need to find new ways of deviance and crime control, problem solution and conformity assurance. Then scientific knowledge for the solution of the problem of crimes is needed.

While explaining the nature of crime criminological theories just offer probable ways of problem solution. Nevertheless it depends on political will to what extent scientific recommendations would be put into practice. As Barbara Hudson notes, criminology explores and searches the relations between two visually different phenomena: *punishment* and *control*. According to her, in different time these two grew into the common phenomenon of “crime control” [Maguire 2002; 233].

Differently from criminal law or penology, punishment studies in criminology allow referring to more general structures of control and analyzing wider aspects of social control. Social theory is invoked for this purpose. It explains crime in a wider context of deviance and punishment – context of control. Single criminological theories and schools in different times have been and are still used as theoretical grounds for penal policies or penal practice. They also serve as working ideologies.

There are two main paradigms in criminology that serve as axes on the basis of which or while criticising which there grew the whole body of theories and trends that constitute current criminological knowledge. They are *classical* and *positivistic* paradigms.

The concept of punishment is based on the principle of *retribution* in classical criminological paradigm. It is explained as an automatic answer to crime that was committed by an offender. *Free will* is the starting point of classical paradigm. This concept is basic for the nature of crime and functions of punishment explanation. Classical paradigm does not question the law that is perceived as a materialization of social contract.

Differently *positivistic* paradigm is based on the vision of a *determined individual*. On the ground of this vision the function of punishment is explained not as retribution (for the crime that is initially determined) but as future crime prevention. Improvement, correction, rehabilitation or isolation and elimination in extremis – these are the main functions of punishment. All this is for the sake of the safety of the society.

Outstanding works of Italian jurist Cesare Beccaria mark the beginning of classical school in the XVIIIth century. In the end of the XIXth century this paradigm has been changed with the new one – positivism. The founder of this school is another Italian scientist – Cesare Lombroso. Positivistic approach dominated criminological discourse till the middle of the XXth century. This time span could be named as an *era of correction and rehabilitation* in penal policy and practice. The dominant correctional and rehabilitative practices were based on the ideas of positivistic criminological theories. The aim of punishment was no longer retribution (as in a classical approach) but rather the correction, help or reintegration into the society. Nevertheless in the midst of the XXth century this “project of rehabilitation” collapsed. Much empirical data had undermined the credibility of key institutions of crime control. The revival of retributive approach raised the ideas of neoclassical school in USA and West Europe in the 6th decade [Garland 2002; 53 – 72].

However neoclassicism was not the only follow-up of classical school. *Critical criminology* has emerged on the initial premises of classical school as well. It is also known as *radical* or *new criminology*. It criticizes arguments of the positivistic school

on: deterministic nature of crime, objective features of criminal personality and punishment as a means of help while preserving the security of the society. Nevertheless differently from representatives of classical school, critical criminologists analyze crime and punishment in a wider context of power relations.

Critical criminology has criticized both: premises of positivistic school and practices that followed the collapse of correctionalist project as well. On the one hand, these were practices suggested by *managerial criminology*. Managerial criminology was a new version of positivistic approach but better attuned to the social needs. Its aim was to solve problems that positivistic school has failed to. It had to give recommendations on criminal justice system improvement. The system had to be reformed, but not refused. On the other hand, neoclassical approach has awaked punitive mood in penal policy. These initiatives have resulted in an extension of criminal justice system. Criminalisation and growing incarceration rates were the indexes of this growth. Reacting to this, critical criminologists H.Bianchi, W.Bonger, D.Melossi, N.Christie, T.Mathiesen and other proposed to refuse coercive measures gradually and to perceive *crime* as *social conflict* [Swaaningen 1997; 3]. Critical criminology has been topical in the 6th – 7th decades. Later on its popularity has faded. Nevertheless in the beginning of the XXIst century it faces its renaissance again.

Critical criminology is not homogenous in its essence. It has several branches: left realism, neoliberal critical criminology, communitarism, cultural criminology and etc. French philosopher and sociologist Michele Foucault – the founder of cultural criminology – opposes managerial criminology fundamentally and draws attention that modern criminology is the part of control apparatus itself as far as it deals with control studies. The scope of orthodox criminology is criminal actions and cases. Differently critical criminology draws attention on crime in the context of control and oppression. It seeks to understand the origin of punishment and control in the modern society. Critical criminologists were the first who have questioned the relation of crime and punishment: is punishment the only and necessary reaction to crime [Swaaningen 1997; 116].

Theories are the ideal types that suggest certain viewpoints. It depends on social, economic, political and cultural factors to what extent they are accepted or to what extent their ideas are introduced into penal policy and practice. Scientific insight can have

large, little or no influence on penal policy. Therefore theories of punishment should be regarded only as guidelines. It must also be admitted that there exist initiatives to synthesize the heterogenic field of ideas and create meta-theory. Penological theory of American criminologist and sociologist David Garland can be set as an example here. His theory integrates both positivistic and classical approaches.

Theories also make a theoretical ground on the basis of which practice can be monitored. The aim of politicians is to choose the working ideology – theory of punishment – that they would use in practice. Nevertheless concrete penal policy reflects quite different ideas of different and even opposing theories in practice. So the relation between penal policy and scientific discourse is not straight. Nevertheless the knowledge of a broader criminological discourse on punishment is important both to politicians and practitioners.

The concept of punishment still lacks scrutinized and focused scientific approach in Lithuania. The topical issues nowadays are: penal policy, penal practice and different forms of punishment. During the eighteen years of Independence when Lithuania gained the possibility to create its own national penal policy no fundamental attention on punishment itself has been paid. Only J.Bluvšteinas had more fundamental insight to the issue of punishment. He drew attention to the declared and latent functions of punishment. S.Kuklianskis has analyzed the scientific conception of crime control. More detailed studies have been made only on capital punishment. R.Drakšas, A.Vaišvila, and V.Andriulis have studied this form of punishment. No less significant is a common work of A.Dobryninas and S.Katuoka “Capital punishment in Lithuania”. Nowadays G.Sakalauskas analyses national penal policy from critical perspective.

Differently in foreign discourses issue of punishment is rather topical. There are eminent schools and traditions that study the concept of punishment, its origins and functions. The liveliest discussions nowadays are in the USA and in the states of West Europe: Great Britain, The Netherlands, Germany, Norway, Finland and etc.

Much attention on punishment and “punitive society” is paid in the works of these American and European sociologists and penologists: D.Garland, D.Melossi, J.Young, S.Cohen, F.Sack, and R.Swaaningen. They analyse issues of punishment and criminal justice system in critical criminological perspective. In this context the abolitionist trend

is distinguished. The founders of this perspective in Europe are N.Christie, T.Mathiesen, L.Hulsman, and H.Bianchi. The former N.Christie and T.Mathiesen have devoted much of their work to the study of the particular imprisonment issue.

Punishment and criminal justice system are the points of attention in the studies of other scientists as well: A.Duff, B.Hudson, F.Allen, G.Beaumont, D.Beyleveld, R.Brown, F.T. Cullen, P.Dickens, B.Fine, R.Kinsley, S.Picciotto, L.Taylor and others.

The main objective of the research:

to analyse the concept and functions of punishment in positivistic and critical criminological traditions and to show introduction possibilities of these ideas into Lithuanian penal policy.

The main tasks of the research:

1. to discuss the concept of crime and punishment offered by the classical criminological school;
2. to show what concept of punishment and its functions are determined by the positivistic view to the offender and deterministic explanation of crime;
3. to discuss the origins of critical criminology and to present its main ideas and punishment functions as well as the main goal of criminal justice system;
4. to present abolitionist perspective in critical criminology and to highlight its main ideas;
5. to discuss the concept of “culture of control” on the basis of D.Garland penal studies;
6. to show the peculiarities of Lithuanian penal policy and identify the fundamental theoretical premises on punishment it is based on.

The theses defended in this dissertation:

1. The immanent relation of crime and punishment that is postulated in classical criminological tradition allows no other reaction to crime than punishment and legitimizes pain delivery.
2. Postulating the distinction between the norm and pathology positivist approach forms the scientific basis to legitimise the intervention into human body and mind. It also gives the way to legitimise the violation of human rights and coercive means while punishing.

3. Positivistic criminology excludes an offender from the society and turns him from a citizen to an object of social engineering by redefining retribution as: resocialization, rehabilitation or correction. The offender is no longer an equal member of the society.
4. By questioning the necessity of crime and punishment relation critical criminologists show that punishment is not inevitable and the only reaction to crime. This idea discloses the coercive nature of criminal justice system. It also shows that behind the declared aims of criminal justice system there is also a latent of it – control.
5. Punishment is not an independent introduction into the practice of punishing idea, but the result of many interrelated factors. It is determined by social, economic, cultural, and politic factors.
6. Lithuanian penal policy is mainly based on the premises of classical criminological school. It stresses the goal of retribution in the first place. The positivistic ideas of rehabilitation are implemented only episodically. The agents of penal policy perceive the ideas of critical criminology only as the basis for current practice monitoring but not as a starting point for fundamentally new policy.

Research methodology:

The analysis of academic literature was used to analyze classical, positivistic, and critical criminological tradition and to highlight the main ideas that determine the conception of punishment in their view.

The analysis of documents was used to describe current status and trends of crime, penal policy and the attitudes of the society to punishment in Lithuania and other countries by presenting statistical data.

The analysis of secondary data Research findings of other authors and institutions are used to discuss distinct aspects of penal policy in Lithuania and Europe.

Structured in depth interviews with experts These interviews have been made on the basis of qualitative research. The target group – 12 experts who were responsible for national criminal code formation – was interviewed. Interview data allows identifying criminological ideas that have been introduced into criminal code and serve as guidelines for penal policy. Expert opinion helps to evaluate Lithuanian penal policy.

Scientific novelty of the study

The paper discusses the institute of punishment in a wide context of criminological theories from classical to positivistic and critical school. The paper presents the concept of punishment and “culture of control” in the studies of outstanding modern sociologist and penologist David Garland. Also the current Lithuanian penal policy is analyzed in the view of different criminological approaches.

Theoretical and practical significance of the dissertation:

Theoretical: this paper is a sociological and criminological input into Lithuanian penology that was dominated by scientists of criminal law up to this day.

Practical: the paper gives a possibility to evaluate Lithuanian penal policy from the critical criminological standpoint.

Approbation of the research results

This study has been considered and approved by the Department of Sociology in the Faculty of Philosophy at Vilnius University and by the Interinstitutional Committee of Vilnius University and The Institute for Social Research.

On the basis of the theoretical part of this paper two articles have been published. They analyze the main critical criminological ideas and show how the concept and functions of punishment can be interpreted in positivistic and critical criminological traditions. The data of empirical research presented in the paper will be also published in a separate article describing peculiarities of current penal policy and practice in Lithuania. The results of this study will be used in the research of the Law Institute “Penal policy in Lithuania”. The discussions that are raised in this paper were also presented in international seminars in Stockholm (Sweden) and Keele (Great Britain).

Structure of the dissertation

This dissertation consists of the introduction and two parts. It closes with conclusions, bibliography, interview guidelines, and a list of academic articles published by the author on the dissertation topic.

CONTENT SUMMARY OF THE DISSERTATION

The content of the work consists of theoretical and empirical part.

The first theoretical part is dedicated to unfold the concept and functions of punishment in positivistic and critical criminological perspective.

The first chapter “Concept and functions of punishment in a positivistic criminology” presents what interpretation of punishment and its functions is determined by positivistic thinking about crime, analyses causes of criminal behaviour and criminal personality. As classical criminological school was a predecessor of positivistic school classical criminological approach on crime and punishment is also discussed. The parallel of these two allows to highlight the peculiarities of the latter and to show its impact on penal policy and practice.

Penal ideas of classical and positivistic school have existed simultaneously all the time since the end of the end of XIXth century. But because of interchangeable character they alternately became the guiding ideologies of criminal justice system.

Classical criminological school has introduced two main principles into criminal law: (1) the rule of the law and (2) punishments proportionality to the gravity of crime. Classical criminology relies on the premise that individual is a rational actor having a free will. Therefore future crime prevention is the main aim of punishment. Retribution is a way of justice administration. Classical criminological school has stressed the importance of deterrence.

The main ideas and the core of the classical approach is represented through the works of eminent Italian jurist of the XVIIIth century **Cesare Beccaria**, “On Crimes and Punishments” is the most eminent of which. C.Beccaria has named 11 principles that became a starting point for his followers – the founders of modern criminal law. The most important was the idea that the inevitability but not the severity of the punishment determines its effectiveness. The whole society but not a single offender is the target of punishment.

Positivistic criminology has opposed classical theory. The opposition arose from different premises. Positivists have stressed that crime is not a question of free will but rather a determined phenomenon. “Rational actor” is a theoretical fiction. In positivistic view the main aim of punishment is to protect society from its aggressors. If correction of the offender does not work offender’s exclusion is justifiable.

Punishment in positivistic view should be understood as the means to eliminate causes of crime. Forensic psychiatrists, medicals, social workers and other specialists that judge on personal normality accumulate a huge amount of power. Positive criminology has introduced a principle of punishment individualisation.

Positivistic penal theory has a huge impact on penal policy and practice. On the one hand it introduced a custodial view on a state as caring and helping. On the other hand it gave theoretical underpinning for more violent and coercive forms of disabling and incapacitation.

This chapter also discusses the works of Italian medical **Cesare Lombroso** who is the founder of individualistic tradition in positive criminology. In his theory of atavism the scientist hypothesizes that there are objective differences among criminals and non-criminals. The distinction of normal and abnormal is a methodological basis of lombrosian penal theory.

Though positivists deny the individual fault they stress the right of the state to punish the offender. This right emerges from the premise of justice. Justice is the will of the majority. E.Ferry states *“When an institution is desired by the majority of citizens as a being necessary for the public welfare, it is – and only because of this – just.”* [Manheim 1973; 366].

Positivistic criminology has introduced such aspects into discussions on punishment:

1. Crime explanation and the choice of punishment should be based on measurable facts but not on metaphysical argumentation.
2. Individualisation of the punishment: punishment should correspond to criminal personality but not the criminal act.
3. Punishment should be regarded as a means of correction or rehabilitation for offenders who have convicted crime because of individual uncontrolled factors.
4. Punishment as isolation and elimination can be applied only in extreme cases to habitual criminals.

The other is a socio – cultural tradition in positivistic school. This tradition starts from the works of French classic of sociology – **Emile Durkheim**. In his socio cultural penal theory the sociologist states that punishment emanates from the society itself and is not a result of individual determinants.

The concept of punishment is explained in a wider context of social solidarity and order. Punishment is immanently related to crime. They are the cause and consequence of each other. E. Durkheim analyses the most common and universal characteristics of punishment. *Collective consciousness* makes the core of punishment. By violating the most expressed collective sentiments the offender automatically calls out a passionate social reaction – the punishment.

The sociologist names the main functions of punishment: (1) retribution for the offence and harm, (2) activating moral sense of the society, (3) guaranteeing social solidarity. By punishing the society reassures its priorities and moral values once again. Punishment unifies members of the society against the offender.

Punishment as well as crime is a necessary feature of society. It emanates as a regulator of deviant behaviour and a safeguarder of social order. As long as society is bound to punish for a certain kind of offence it is an indicator that the norms are still alive and are a part of social moral.

The second chapter of the first part “Concept and functions of crime in critical criminology” is dedicated to show how issue of punishment and criminal justice system are interpreted in critical criminological discourse. In the beginning of the chapter ideas of critical criminology on punishment are presented. Trend of abolitionism that has merged in this school is discussed as well.

In the middle of the XXth century alternative and contradicting discourse to orthodox criminology has occurred. They were the founders of critical criminology who have questioned the state’s right to punish and its monopoly of coercive measures. The focus of their attention is a power that is exhibited by state and its elite or the governing social class. They are those who control the definition of crime. The criminal justice system is selective by its nature and is bound to protect the interests of the powerful. In such a perspective critical criminologists interpret the crime not as an individual’s problem but as an outcome of that historical and social process that was accompanied with the emergence of capitalism.

Critical criminologists criticize the bound of dominant criminological theories to reduce the problem of crime to “bad individuals” and in this manner to protect the existing conventional social order. They notice that in this manner dominant theories do

not question the state and its power to punish. Critical criminologists stated the study should begin from the “norm” and “deviance” analysis, what is described as such.

Works of French philosopher and sociologist **Michele Foucault** are the source of the first critical thought in European criminology. Power is the core issue in the works of this scientist. In Foucauldian approach power is anonymous – unrelated to any social classes or groups of political interest. It is realised through the forms of dominance and subordination, through the asymmetric knowledge. It penetrates personal interaction and manifests in different areas of interactions. The aim of power is to control the body and make it obedient. Punishment is one form of political power. It is a political tactic that is placed in the field of power relations.

Prison is a symbol of modern criminal justice system. It is the most eminent fact of disciplinary society. Prison is perfectly arranged for surveillance and control of the individual. M.Foucault makes a conclusion that prison as an institution still exists not despite of its crisis but because of it. By explaining this paradox he raises the question “*maybe the seeming failure of the prison is a part of its functioning?*” [Foucault 1998; 320]. To his mind prison was a successful project because it succeeded to identify a new kind of phenomenon in an illegitimate movement, that is – criminality.

M.Foucault states that the aim of the modern punishment is to produce obedient and useful bodies [Foucault 1998; 165 – 188]. They can be used and exploited and if it does not work – isolated or incapacitated. Foucauldian penal theory was a starting point for the school of critical criminology.

The ideas of current critical criminology are discussed through the works of the eminent Norwegian abolitionist **Niels Christie**. He declares that the state just “steals” or appropriates the conflict from conflicting parts. It is the essence of “regulatory justice”. Instead of it the criminologist suggests “participatory justice” that allows to involve conflicting parts into negotiation and the solution of the conflict. In his study “Limits to pain” N.Christie asks: why pain delivery is still applied and justified in the criminal justice system. To his mind it is because it is perfectly disguised and has strong theoretical underpinning.

Discussing the trends of penal policy in modern countries in the second half of the XXth century and commenting the boom of incarceration criminologists question the relation between crime rate and rate of imprisonment. To his mind there is no direct

relation between these two phenomena [Christie 1992; 33]. There are more intervening factors among these two variables. In his “Crime control as industry” N.Christie makes a parallel between imprisonment and heavy industry. The main argument of the critical criminologist is so that: there are no natural or optimal limits to imprisonment extension [Christie, 1999, 25]. This industry has resources that can be never depleted. Those are crimes. The problem of prison population size is a normative one. The society itself must decide to what extent the imprisonment rate is tolerable in a certain country. This decision is of moral but not of technical kind.

By taking Z.Bauman’s insights on German holocaust and Russian gulag system, N. Christie also states that it was a product not of insane mind but rather a natural product of rationalisation, industrialisation and modernisation process. N.Christie stands for a moral position. He states that the quantity of pain is not of utilitarian nature. It is not the question of effectiveness of crime control. But rather it’s a question of culture [Christie, 1999, 170]. In this manner he calls up to end with normative decisions and become more empathic.

The third chapter on American penologist David Garland’s penal theory ends the theoretical part. In the synthetic theory of punishment D.Garland shows how positivist and critical approaches can be combined in explaining punishment as a social institute.

D.Garland succeeds to integrate insights on punishment of different classics and to give a holistic view on this complex institute. By employing durkheimian rules of sociological method he explains the social fact of punishment with the help of other social facts. Foucauldian concept of “disciplinary society” serves him as the basis to explain the “project of rehabilitation” that dominated American and British penal policy in the first half of the XXth century. His most important input to penological studies is a sociological cultural interpretation of punishment.

D.Garland analyzes punishment by showing its functions in a society and its causal relations to other social facts. The sociologist penologist notices that the perception of crime problem and crime control practice is determined by structural changes in culture, politics and economics of late modernity.

D.Garland also explains the emergence of “culture of control” in the USA and Western Europe in the late 1970ies. The social changes resulted in a sharp increase of

crime rate and the old welfare means of crime control based on rehabilitation became dysfunctional. “Culture of control” is a complex of programs, initiatives, actions and models of behavior that were applied by politicians, representatives of criminal justice system, businessmen and ordinary people to adjust to the high crime rate [Garland 2002; 169].

The second part is empirical– “Aspects of positivistic and critical criminology in Lithuanian penal policy”. The main aim of this part is to show what was the reception of criminological ideas on punishment in Lithuania. During the 50 years of being a part of Soviet Union Lithuania had no possibility to shape its own penal policy consciously and independently. Because of political isolation criminological knowledge and experience could hardly reach local scientists as well. After the regain of independence the new national penal Code has been adopted in 2000 and it came into force in 2003. It was the first symbolical as well as practical step in founding national penal policy.

In order to highlight the context in which changes of penal policy have been made **the first chapter** overviews the trends of crime rate, penal practice, and public opinion on punishment. These changes are viewed in a broader European or world context by presenting statistical data.

The **following three chapters** analyse the results of the qualitative research “*The goals of the punishment and the reality of penal policy in Lithuania*” that has been implemented in 2008 by the author herself. The research combines twelve interviews in depth with the founders of national penal code. The main goal of the research was *to evaluate the main premises and goals of Lithuanian penal policy.*

Content analysis of qualitative interviews falls into three thematic blocks: the first **“Peculiarities of the Lithuanian penal policy”**, the second **“The aims and tasks of punishment in the view of the penal code founders: reality and aspirations”** and the third **“The “mechanism” of penal code creation”**

The coverage of these themes helps to identify what were the intentions of penal code creators: what guidelines they have sought to introduce and what kind of crime control they have anticipated in future. The analysis also tries to find out what major factors shape the current penal policy of Lithuania.

The ending chapter of the empirical part is the closing discussion on Lithuanian penal policy and the reflections of theoretical concepts of punishment in it.

CONCLUSIONS

1. In the classical criminological view there is no other way to react to crime as punishment. The offender is a free will rational actor. By committing a crime he himself incurs juridical consequences – punishment. Punishment is the consequence of crime. This retrospective deterministic approach to punishment justifies pain delivery that is executed by state in the name of society. Crime and punishment explanations of this kind and such justification of the latter prevent alternative ways of reaction to crime.

2. By stressing the deterministic nature of crime positivistic criminological tradition describes punishment as a help to offender. Correction is the main function of punishment. Positivistic criminology explains punishment prospectively: punishment is the needed for future crime prevention and society's defence. In positivistically based penal policy social experts possess the power of decision about a person's danger to the society. The experts are those who establish criteria of personal "normality" or potential danger. Violence and pain delivery that lie in the core of punishment are justified by the notions of offender correction and protection of the society.

3. C.Lombroso states that the implementation of social justice and warranty of social security are the main aims of punishment. State's right to punish emanates from its right to protect the society from aggressors. The second aim of the punishment is the correction of the offender and his/her reintegration into the society. Humanity in positivistic approach displays that offender is regarded as an object of correction and cure but not as the target of retribution. The offender should be excluded from the society only in an extreme case – when no other means work. Powers of natural selection can be supported with rational means of social selection. Capital punishment is the last means that helps to protect the society from habitual offenders. To C.Lombroso's mind rehabilitation and education of habitual offenders can bring more harm than use as more dangerous and skilled recidivists can be "produced" in this way.

4. Sociological penal theory of Durkheim shows the social origin of punishment. Punishment is a necessary and inevitable social institute that is functionally related to other social institutes. There cannot be no punishment. Its inevitable association to crime (that in itself the necessary feature of the society) proves the necessity of punishment.

The offender offends the most expressed sentiments of collective conscience and arouses society's defensive reaction. Punishment is an expression of society's defence, norm confirmation, and activation of the feeling of solidarity.

5. E. Durkheim regards punishment as universal social institution, which has common features in any social context. They are: (1) Punishment is a passionate reaction, of graduated intensity; (2) This passionate reaction emanates from society; (3) This reaction is enforced through the intermediary of a constituted body. The sociologist states that proportionality of punishment to crime emanates spontaneously as collective consciousness reacts to an offence. Crime is socially useful as it reactivates the sense of social solidarity. The society consolidates by punishing an offender.

6. Critical criminologists pay attention on the constructional nature of crime and punishment as a means to assure status quo. They note that dominant criminological theories are ideologies that underpin the dominant position of criminal justice system and prevent alternative thinking about crime and reaction to it. Stressing the question of power (who has the power to make rules and whose interests serves penal law), they state that not a "crime" should be studied as a "problem", but attention should be paid to what is described as "norm". They criticize state's power to punish and its monopolized coercive means as well. The concentration of the power to punish in the hands of the state prevents the possibility to regard crime as a social conflict and to solve it by non-coercive means.

7. Punishment is regarded as one of the forms of political power in M. Foucault theory of punishment. It is a political tactics imbedded in the field of power relations. The power is anonymous. The invisible hand of power governs the body by accumulating information. The French sociologist employs this kind of explanation to analyze penal practice of medieval and modern times. He relates different forms of punishment to the target object of the power that has changed. In medieval public tortures were targeted on the body, in modernity incarceration aims to change offender's soul. Prison is a culmination of modern society and criminal justice system though visually dysfunctional. It is the salient fact of disciplinary society. Prison is perfectly attuned for personal surveillance and control. Though declared goals of prison are resocialization and correction, the real purpose of incarceration is to differentiate, classify, control, and isolate deviant groups of society and illegal movements.

8. Critical criminological perspective reveals the paradox that criminal justice system responsible for crime control and prevention is dysfunctional in its essence. It does not meet its aims but is a social problem itself. Abolitionists suggest decreasing the extent of criminal justice system. They call for decarceration, depenalization, and deprofessionalization. They object that crime would be automatically reacted by punishment. They suggest not to distinct the problem of crime from other social problems as qualitatively different. They see only a formal difference between “crime” and social problems. To their mind, problem of crime should be solved in the social context it has appeared. Abolitionists do not deny the need of social control in the common sense, as it guarantees social order. They see the problem in the regulated justice, in the “top – down” approach. Alternatively they suggest informal, reflexive participatory justice.

9. Niels Christie states that legitimization of criminal punishment in a modern and post-modern society that regards itself as humane is nothing else than justification of pain delivery. Classical and positivist paradigms that dominated criminological discourse of the XXth century were nothing else than pain delivery underpinning ideologies. In this way any other forms of reaction to offence have been blocked but punishment. To N.Christie’s mind the dominant vision of regulatory justice and the stolen conflict by state leads to the situation that crime problem is not solved but brutally suppressed. Instead the criminologist suggests understanding “crime” as a social conflict that primarily should be solved by conflicting parts. That is the concept of *participatory justice*.

10. D. Garland suggests an alternative sociological approach on punishment to that of criminal law. He describes punishment not as a holistic undivided entity but rather as a heterogenic complex combined of many interrelated processes and institutes. The penologist shows the dialectic relation of punishment and social environment. Punishment is the reason as well as a consequence of social changes. Penal theory of D.Garland is a macro level theory that allows grasping the relation of punishment institute with other institutes and social context. Though it is too abstract to explain punishment in micro (individual) level and can not suggest practical solutions, this kind of approach makes it possible to look wider and to understand what social, economic, political and cultural factors shape the current field of crime control.

11. Social organization of post-modern society in the end of XXth century has conditioned the high rate of crime. The emergence of “culture of control” was the natural adaptation to this situation. “The culture of control” contains programmes and initiatives, models of thinking and behaviour on the basis of which politicians, representatives of criminal justice system, businessmen and common citizens have adapted to high crime rate. The control society is a punitive society. The main feature of it is a tendency to solve social conflicts by punitive means. Social problem criminalization, high rate of incarceration and reactionary political rhetoric are its evidence.

12. In the beginning of the XXIst century the world states demonstrate different national penal policy and stress different priorities. In Scandinavian and West European countries penal policy is based on human and rather moderate penal system, which is simultaneously combined with other social means. In other states – the USA, Russian Federation, post soviet bloc countries – coercive and retribution based penal policy is implemented and general prevention is stressed. In accordance to its penal policy results (incarceration rate, frequency of imprisonment punishment, arrestee rate) Lithuania falls into the group of countries that implement “punitive” policy. Nevertheless the crime rate shows that the current situation in Lithuania is no worse than in other west European countries. That proves that there is no real danger that could justify strict penal policy. The court practice of current years shows positive changes: offenders are sentenced to imprisonment more rarely and alternatives are imposed more often. Though the society still has strict attitudes towards violent offenders and is bound to suggest severe punishments: from imprisonment to death penalty, some changes to humanism can be traced as well. In 2005 there were more society members who were for shorter terms of imprisonment than in 1997. These facts show that though Lithuania is still regarded as a post soviet block country associated with severe penal policy, fundamental changes towards humane policy can be traced.

13. The founders of the national code regard Lithuanian penal policy as inconsistent and lacking clear priorities. Though the new (2000) penal code introduced a new balanced system of punishment and has set grounds for less coercive penal policy these intentions of the founders are not yet realised in the full extent. Politicians responsible for penal policy formation are more vulnerable to public opinion than scientific recommendations. Strict and punitive penal policy can be associated with

soviet heritage as well as with the influence of public opinion and politicians' illiteracy in the sphere of criminal law or criminology. Justification of one's inactivity can also be the reason of punitive attitudes.

14. The founders of the national penal code with one accord agree that retribution and punishing are the most clearly expresses ideas in Lithuanian policy. Nevertheless they have different opinions on the aims and functions of punishment. Some of them support the argument that the main functions of punishment are retribution and realisation of justice. The others support positivistic consequential approach and state that rehabilitation should be the main aim of punishment. The offender should be corrected and reintegrated into the society. Some experts accept critical criminological approach to reduce society's level of criminalisation, to use wider conditional release and to replace imprisonment with alternative sanctions. However, there is also an opposite position that sceptically evaluates critical ideas and regards them only as a theoretical basis to monitor current practice but not to replace it.

15. In Lithuania there exists a tradition that criminal code is created by a limited circle of experts. They are scientists educated in criminal law and practitioners of criminal justice system. On the one hand in this way inner contingency of the code is assured and correctness of law in juridical sense is guaranteed. But on the other hand because of such a limited circle that does not involve other social scientists the penal code lacks interface with social reality, social moral attitudes and social needs. The gravity of offence that determines the sanctions is estimated "traditionally". The founders of the law rely on subjective personal attitudes in criminalizing actions and setting sanctions.

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REZIUMĖ

Disertacijoje teigiama, jog egzistuoja skirtingi teoriniai bausmės sampratos ir jai priskiriamų funkcijų aiškinimai. Vienas dominuojančių yra pozityvistinė kriminologijos mokyklos aiškinimas. Jis analizuoja bausmę kaip nusikaltimą sukėlusią priežasčių šalinimą ar nepataisomų individų eliminaciją su tikslu apsaugoti visuomenę. Šis požiūris nekvestionuoja paties bausmės instituto ir baudžiamosios justicijos sistemos egzistavimo, bet apriori suvokia juos kaip būtinus ir neišvengiamus. Tačiau nekeliant klausimo, kokių tikslų egzistuoja ir kokią platesnę (ne vien nusikaltimų kontrolės) funkciją visuomenėje atlieka bausmė, o taip pat nenagrinėjant jos sąsajos su socialiniu, ekonominiu, politiniu ir kultūriniu kontekstu, išskyla pavojus, kad pastarajam pasikeitus, pozityvistinėmis prielaidomis grįsta baudžiamoji politika ir praktika taps neveiksmingos ar net disfunkciškos.

Skirtingai, kritinis kriminologinis diskursas aiškina bausmę platesniame galios santykių kontekste ir mėgina atsakyti į klausimą, kokią latentinę funkciją visuomenėje atlieka bausmė ir kokia yra jos sąsaja su kitais socialiniais institutais. Kritinė kriminologija ne tik padeda peržiūrėti egzistuojančią baudžiamąją politiką bei praktiką, bet ir kritiškai įvertina jas pagrindžiančias teorines prielaidas.

Darbo tikslas:

Aptarti bausmės sampratą ir funkcijas pozityvistinėje ir kritinėje kriminologijos tradicijose bei parodyti šių idėjų įgyvendinimo galimybes Lietuvos baudžiamojoje politikoje.

Darbo uždaviniai:

1. Aptarti klasikinės kriminologijos mokyklos siūlomą nusikaltimo ir bausmės sampratą;
2. Parodyti, kokią bausmės sampratą ir jai priskiriamas funkcijas lemia pozityvistinis požiūris į pažeidėją ir pozityvistinis deterministinis nusikaltimo aiškinimas;
3. Aptarti kritinės kriminologijos ištakas, pristatyti jos pagrindines idėjas ir kritinių kriminologų įvardijamas bausmės funkcijas bei kriminalinės justicijos paskirtį;
4. Pristatyti abolicionizmo tradiciją kritinėje kriminologijos mokykloje ir išryškinti jos pagrindines idėjas;
5. Aptarti „kontrolės kultūros“ sampratą, remiantis Davido Garlando darbais;
6. Atskleisti Lietuvos baudžiamosios politikos ypatumus ir identifikuoti pamatines kriminologines idėjas apie bausmę, kuriomis ji remiasi.

Disertacijoje yra ginami šie teiginiai:

1. Klasikinėje kriminologijoje postuluojamas imanentinis nusikaltimo ir bausmės ryšys neleidžia numatyti kitos reakcijos į nusikaltimą kaip tik bausmė ir įteisina skausmo suteikimą.
2. Postuluodama perskyrą tarp normos ir patologijos pozityvistinė kriminologija sudaro mokslinį pagrindą baudžiamojame praktikoje pateisinti intervencijas į žmogaus kūną bei psichiką, o baudžiamosios politikos kontekste legitimuoti žmogaus teisių pažeidimus ir taikyti prievartą.
3. Pozityvistinė kriminologija performuluodama *nubaudimą* į *resocializaciją*, *reabilitaciją* ir *pataisymą* baudžiamą asmenį eliminuoja iš sociumo, iš pilnateisio piliečio paversdama jį socialinės inžinerijos objektu, kuriam negalioja lygios su visais pilietinės teisės.
4. Kvestionuodami nusikaltimo ir bausmės ryšio būtinumą, kritiniai kriminologai parodo, jog reakcija į nusikaltimą nebūtinai turi būti bausmė. Šis atradimas atskleidžia prievartinį ir primestinį baudžiamosios justicijos sistemos pobūdį ir parodo, kad be deklaruojamų nusikaltimų prevencijos tikslų egzistuoja ir latentinis jos tikslas – kontrolė.
5. Bausmė nėra nepriklausoma baudimo idėjos realizacija, bet daugelio veiksnių sąveikos rezultatas, kurio pobūdį lemia socialiniai, ekonominiai, kultūriniai ir politiniai veiksniai.
6. Lietuvos baudžiamoji politika remiasi klasikinės kriminologijos mokyklos prielaidomis ir iškelia atpildo ir bendrosios prevencijos bausmės funkcijas į pirmą vietą, kai pozityvistinėje kriminologijoje akcentuojami pataisymo ir resocializacijos tikslai yra įgyvendinami tik epizodiškai. Kritinės kriminologijos idėjos baudžiamosios politikos formuotojų suvokiamos kaip baudžiamosios politikos ir praktikos kritikos pagrindas, bet ne tinkamos teorinės prielaidos baudžiamajai politikai formuoti.

APIBENDRINIMAI IR DARBO IŠVADOS

1. Klasikinės kriminologijos mokyklos požiūriu, nėra kito būdo reaguoti į nusikaltimą kaip tik kriminaline bausme. Nusikaltėlis – laisvos valios racionalus veikėjas – įvykdydamas nusikaltimą užsitraukia sau teisinės pasekmes – kriminalinę bausmę. Bausmė yra nusikaltimo pasekmė. Toks retrospektyvus deterministinis požiūris į bausmę pateisina skausmo suteikimą, kurį piliečių vardu taiko valstybė. Toks nusikaltimo ir

bausmės aiškinimas ir pastarosios legitimavimas užkerta kelią alternatyviems reakcijos į nusikaltimą būdams.

2. Pozityvistinė kriminologijos tradicija, akcentuodama deterministinę nusikaltimo prigimtį, apibrėžia bausmę kaip pagalbą nusižengėliui ir pagrindine jos funkcija įvardija individo pataisymą. Pozityvistinė kriminologija aiškina bausmę perspektyviai: bausmė reikalinga, kad būtų užkirstas kelias nusikaltimams ateityje ir apsaugota visuomenė. Pozityvistinė kriminologija grįstoje baudžiamajoje politikoje galia spręsti apie individo pavojingumą visuomenei sukaupta socialinių ekspertų rankose, nustatančių individo normalumo ar potencialaus pavojingumo kriterijus. Kriminalinės bausmės branduolyje glūdinti prievarta ir skausmo suteikimas pateisinami pagalba individui ir visuomenės apsauga.

3. Anot Č.Lombrozo, pagrindinis bausmės tikslas – socialinio teisingumo įgyvendinimas ir visuomenės saugumo užtikrinimas. Valstybės teisė bausti kyla iš jos teisės ginti visuomenę nuo agresorių. Antras bausmės tikslas – pažeidėjo pataisymas ir reintegracija į visuomenę. Pozityvistinės prieigos humanizmas pasireiškia tuo, kad pažeidėjas traktuojamas kaip pataisymo/ gydymo, o ne atpildo objektas. Pažeidėjas turi būti eliminuojamas iš visuomenės tik kraštutiniu atveju – kai jokios kitos priemonės neveikia. Natūralios atrankos jėgos gali ir būti papildytos apgalvotais socialinės atrankos būdais. Mirties bausmė yra ta kraštutinė priemonė, kuri suteikia visuomenei galimybę apsiginti nuo nepataisomų individų. Č.Lombrozo teigimu, nusikaltėlių iš prigimties rehabilitacija ir švietimas, gali atnešti daugiau žalos nei naudos, kadangi taip gali būti „gaminami“ tik dar labiau išsilavinę recidyvistai.

4. Sociologinė E.Durkheimio bausmės teorija parodo bausmės socialinę kilmę. Bausmė yra būtinas ir neišvengiamas socialinis institutas, funkciškai susijęs su kitais visuomenės institutais. Bausmės nebūti negali. Jos būtinumą E.Durkheimas įrodo jos neatsiejama sąsaja su nusikaltimu, kuris yra neišvengiamas ir kyla iš pačios visuomenės. Nusikaltimu pažeisdamas labiausiai išreikštus kolektyvinės sąmonės sentimentus, pažeidėjas automatiškai sužadina visuomenės gynybinę reakciją. Bausmė – tai visuomenės savisaugos, normų užtvirtinimo ir solidarumo jausmo suaktyvinimo priemonė.

5. Anot E.Durkheimio, bausmė yra universalus socialinis institutas, kuriam būdingi šie universalūs bruožai, nepriklausomai nuo socialinio konteksto: (1) Bausmė yra

graduoto intensyvumo ūmi ir emocionali reakcija; (2) Bausmė kaip emocionali reakcija kyla iš visuomenės; (3) Bausmė taikoma per tarpinį organą. Sociologas teigia, jog bausmės proporcingumas nusikaltimui atsiranda spontaniškai, kolektyvinei sąmonei reaguojant į padarytą pažeidimą ir juo pažeistą sentimentą. Nusikaltimas yra socialiai naudingas, nes atnaujina visuomenės bendrumo jausmą: bausdama pažeidėją visuomenė solidarizuojasi.

6. Kritinės kriminologijos atstovai atkreipė dėmesį į konstruojamą nusikaltimo prigimtį bei kriminalinę bausmę kaip priemonę užtikrinti status quo. Jie parodė, kad dominuojančios kriminologinės teorijos yra ideologijos, pagrindžiančios baudžiamosios justicijos sistemos dominavimą ir užkertančios kelią alternatyviems mąstymo, apie nusikaltimą ir reakcijos į jį, būdams. Iškeldami *galios* klausimą (kas turi galią kurti taisykles ir kieno interesams tarnauja baudžiamasis įstatymas), jie teigia, kad reikia studijuoti ne nusikaltimą kaip „problema“, bet būtina atkreipti dėmesį, kas yra apibrėžiama kaip „norma“. Jie taip pat kritikuoja valstybės sau prisiimtą galią bausti ir jos monopolizuotą prievartos taikymo sritį. Baudimo galios sukauptimas vienoje – valstybės – rankose atima galimybę traktuoti nusikaltimą kaip socialinį konfliktą ir spręsti jį nerepresinėmis priemonėmis.

7. M.Foucault teorijoje bausmė yra viena iš politinės galios raiškos formų. Ji yra politinė taktika, patalpinta į bendrąjį galios santykių lauką. Galia yra anoniminė. Kaupdama žinias, o pati išlikdama anonimiška, nematoma galios ranka valdo kūną. Šią metodologiją sociologas taiko viduramžių ir modernųjų laikų baudimo praktikų analizei. Skirtingas bausmių formas M.Foucault sieja su pasikeitusiu galios veikimo objektu. Viduramžiais viešais kankinimais buvo veikiamas kūnas, o moderniaisiais laikais įkalinimu – kaltininko siela. Tačiau iš pažiūros disfunkcionali kalėjimo institucija – moderniosios kontrolės valstybės ir jos baudžiamosios justicijos sistemos kulminacija, ryškiausias disciplinarinės visuomenės artefaktas. Kalėjimas tobulai pritaikytas individų stebėjimui ir kontrolei. Nors resocializacija ir pataisymas yra deklaruojami įkalinimo tikslai, tačiau tikroji kalėjimo paskirtis – diferencijuoti, klasifikuoti, kontroliuoti ir izoliuoti deviantines visuomenės grupes, antiįstatyminius judėjimus.

8. Kritinė kriminologijos perspektyva atskleidžia paradoksalų faktą: baudžiamosios justicijos sistema, turinti vykdyti nusikaltimų kontrolės ir prevencijos funkcijas, iš esmės yra disfunkcionali. Ji ne tik nepasiekia savo tikslų, bet pati yra socialinė problema.

Kritinėje tradicijoje gimusi abolicionizmo srovės atstovai siūlo sumažinti kriminalinės justicijos sistemos apimtį. Pasisako už judėjimą link dekarceracijos, depenalizacijos ir deprofesionalizacijos. Jie prieštarauja, kad į nusikaltimą automatiškai būtų atsakoma bausme. Nors nereikalauja visai atsisakyti bausmės, tačiau siūlo neatriboti „nusikaltimo“ kaip kokybiškai kitokio nuo kitų socialinių problemų. Skirtumas tarp „nusikaltimo“ ir kitų nekriminalizuotų socialinių problemų, jų manymu, tik formalus. Nusikaltimas turi būti sprendžiamas tame socialiniame kontekste, kur jis subrendo ir įvyko. Abolicionistai neneigia socialinės kontrolės bendrąja prasme, nes be jos būtų neįmanoma socialinė tvarka, tačiau problemą jie išvelgia reguliuojamame teisingume, represyvioje, nelanksčioje baudžiamosios kontrolės prigimtyje – požiūryje „iš viršaus į apačią“. Kaip alternatyvą siūlo neformalų, refleksyvų dalyvaujantį teisingumą.

9. Niels Christie teigia, jog humanistiška besiskelbiančioje modernioje ir postmodernioje visuomenėje įteisinta kriminalinė bausmė yra ne kas kita, bet skausmo suteikimo žmogui pateisinimas. XX a. dominavusios klasikinė ir pozityvistinė paradigmos tarnavo kaip skausmo taikymą legitimuojančios ideologijos. Tokiu būdu buvo užkirstas kelias siūlyti kitas reakcijos į nusikaltimą formas kaip tik kriminalinė bausmė. N.Christie nuomone, įsigalėjusi reguliuojamo teisingumo vizija ir valstybės iš pažeidėjo ir aukos pavogtas judviejų konfliktas veda prie to, kad nusikaltimo problema neišsprendžiama, bet brutaliai užgniaužiama. Vietoj to kriminologas siūlo „nusikaltimą“ suvokti kaip socialinį konfliktą, kurį visų pirma turėtų spręsti konfliktuojančios pusės, bet ne valstybė. Tai yra dalyvaujantis teisingumas.

10. D.Garlandas pateikia alternatyvų baudžiamajam teisiniam sociologinį požiūrį į bausmę. Jis apibūdina bausmę ne kaip vieningą, neskaidomą darinį, bet kaip daugybės tarpusavyje sąveikaujančių procesų ir institutų kompleksą. Penologas parodo dialektinį bausmės ryšį su socialine aplinka: ji – tiek socialinių pokyčių priežastis, tiek pasekmė. D.Garlando bausmės teorija – makro lygmens, leidžianti užčiuopti bausmės instituto sąsają su kitais institutais ir socialiniu kontekstu. Nors ji pernelyg abstrakti, mėginant suvokti, kaip bausmė veikia mikro (individo) lygmeny, ir todėl negali pasiūlyti konkrečių praktinių sprendimų, tačiau jos makro lygmens požiūris sudaro galimybę pažvelgti plačiau ir suprasti, kokie socialiniai, ekonominiai, politiniai ir kultūriniai veiksniai formuoja esamą nusikaltimų kontrolės lauką.

11. XX a. pabaigos postmodernios visuomenės organizacija lėmė aukštą nusikaltimų lygį. Natūralus prisitaikymas prie tokios padėties – „kontrolės kultūros“ susiformavimas. „Kontrolės kultūra“ apima programas, iniciatyvas, veiksmų ir elgesio modelius, kurių pagalba prie didelio nusikaltimų skaičiaus prisitaikė ar „išmoko su juo gyventi“ politikai, kriminalinės justicijos atstovai, verslininkai ir eiliniai piliečiai. Kontrolės kultūros visuomenė – „baudimo“ visuomenė. Pagrindinis jos požymis – polinkis socialinius konfliktus spręsti baudžiamosiomis priemonėmis. To įrodymas – socialinių problemų kriminalizacija ir aukštas įkalinimo lygis bei reakcinga, emocionali politinė retorika.

12. XXI a. pasaulio valstybės vykdo skirtingą baudžiamąją politiką ir yra pasirinkusios skirtingas kryptis. Vienoje valstybių grupėje – Skandinavijoje ir Vakarų Europos šalyse – humaniška ir nuosaikiomis bausmėmis paremta baudžiamoji politika derinama su kitomis socialinio poveikio priemonėmis. Kitoje valstybių grupėje: JAV, Rusijoje, postsovietinio bloko valstybėse, įgyvendinama griežta baudžiamoji politika ir akcentuojami bendrosios prevencijos tikslai. Lietuva pagal savo baudžiamosios politikos rezultatų (įkalinimo lygis, laisvės atėmimo bausmės, suimtųjų skaičius ir kt.) rodiklius patenka į „baudimo“ politiką vykdančių valstybių grupę. Nepaisant to, pagal nusikaltimų skaičių (remiantis statistiniais duomenimis bei viktimologinių tyrimų rezultatais), Lietuvoje kriminogeninė padėtis nėra blogesnė nei kitose išsivysčiusiose Vakarų Europos valstybėse. Tai įrodo, jog valstybėje nėra realios grėsmės, kuri pagrįstą griežtą baudžiamąją politiką. Pastarųjų metų teismų praktika rodo teigiamus pokyčius: vis rečiau skiriamos laisvės atėmimo bausmės, bet siūlomos alternatyvos. Nors Lietuvos visuomenė vis dar griežtai nusiteikusi smurtinius nusikaltimus įvykdžiusių asmenų atžvilgiu ir yra linkusi siūlyti griežtas bausmes: nuo laisvės atėmimo iki mirties bausmės, tačiau stebimi humanizmo poslinkiai ir šioje srityje. Nuo 1997 iki 2005 m. sumažėjo dalis tų, kurie siūlo 3 m. ir ilgesnius laisvės atėmimo terminus ir padidėjo dalis tokių, kurie būtų linkę skirti trumpesnes laisvės atėmimo bausmes. Šie faktai rodo, jog nors Lietuva vis dar priskirtina postsovietinio bloko šalių grupei, pasižyminčiai griežta politika, valstybėje prasidėjo fundamentalūs pokyčiai humanizmo link.

13. Nacionalinio baudžiamojo kodekso kūrėjų nuomone, Lietuvos baudžiamoji politika yra nenuosekli ir neturi aiškių prioritetų. Nors naujasis (2000m.) baudžiamasis kodeksas pasiūlė naują subalansuotą bausmių sistemą ir sudarė sąlygas nuosaikiai ir humaniškai baudžiamajai politikai, šios įstatymo kūrėjų intencijos nėra pilnai

įgyvendintos. Už baudžiamosios politikos formavimą Lietuvoje yra atsakingi politikai, kurie dažniau įsiklauso į visuomenės nuomonę nei mokslininkų argumentus. Griežtą baudžiamąją politiką įstatymo kūrėjai sieja tiek su sovietiniu paveldu, tiek su visuomenės nuomonės įtaka, tiek su politikų neišprusimu baudžiamosios teisės ar kriminologijos srityje. Taip pat viena iš tokios politikos priežasčių gali būti baudžiamosios justicijos sistemos neveiklumo pateisinimas.

14. Baudžiamojo įstatymo kūrėjai vieningai sutaria, kad Lietuvoje šiuo metu geriausiai įgyvendinami bausmės tikslai yra nubaudimas ir atpildas. Tačiau skiriasi jų nuomonės, kokie bausmės tikslai turėtų būti. Vieni remiasi retribuciniu požiūriu ir teigia, jog pagrindinis bausmės tikslas – atpildas ir teisingumo įgyvendinimas. Kitiems artimesnės pozityvistinės ir konsekvencionalistų mintys apie tai, jog bausmės tikslas turėtų būti ne teisingumo įgyvendinimas, bet siekis pataisyti nusižengusį asmenį ir sugrąžinti jį į visuomenę. Kai kuriems įstatymo kūrėjams nesvetimos kritinių kriminologų mintys apie tai, jog reikia mažinti visuomenės kriminalizacinę patirtį, kuo plačiau taikyti atleidimo nuo bausmės pagrindus, laisvės atėmimo bausmes keisti alternatyviomis. Tačiau yra ir tokių įstatymo kūrėjų, kurie skeptiškai vertina kritinių kriminologų siūlymus ir teigia, jog geriausiu atveju jie gali tarnauti kaip egzistuojančios praktikos kritika, bet ne baudžiamosios politikos formavimo teorinis pagrindas.

15. Lietuvoje egzistuoja tradicija, jog baudžiamąjį įstatymą kuria uždaras ekspertų ratas – baudžiamosios teisės išsilavinimą turintys mokslininkai bei praktikai. Viena vertus, taip užtikrinama vidinė įstatymo harmonija, normų tarpusavio suderinamumas ir užtikrinamas įstatymo korektiškumas teisiniu požiūriu. Tačiau, antra vertus, neįtraukiant į darbo grupę kitų socialinių mokslų atstovų, baudžiamojo įstatymo nuostatos stokoja sąsajos su socialine realybe, visuomenės moralinėmis nuostatomis bei visuomenės poreikiais. Veikų „pavojingumas“, pagal kurį formuojamos sankcijos, nustatomos „tradiciškai“. O tai reiškia, jog įstatymo kūrėjai pasikliauja subjektyvia, asmenine nuomone, kriminalizuodami veikas ir numatydami bausmes įstatyme, kuris bus taikomas visai visuomenei, kuri yra diferencijuota.

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