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DOES INCARCERATION REHABILITATE THE PERPETRATOR? THE ALTERNATIVE PUNISHMENT METHODS EFFECTIVENESS COMPARED TO INCARCERATION

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ABSTRACT

There is a greater emphasis on the prevention of crime, but prison population has still not decreased. This questions the efficiency of incarceration to rehabilitate the perpetrators. The aim of this thesis is to find out how does incarceration affect the offenders, and would alternative punishments be more effective as a rehabilitative method. The work gives an overview using different academic literature and articles of the main elements of crime and the purpose of punishments in criminal law, also, the effectiveness of the punishments. However, the studies showed that reoffending rate after the release from prison is very high, and due to that it disproves the theory of specific deterrence. Using different studies done in years it showed that rehabilitation theory of imprisonment is a failure because of the inefficiency of incarceration punishments in reforming and rehabilitating the inmates, due to the criminal environment of jails, monetary expenses and damages it does to the individual and its close ones. As an alternative position to incarceration there are alternative punishment methods, like probation, electronic monitoring and fines, which have been found more effective than incarceration, because the offender does not lose one's social skills, can attend school, work and contribute to the community, but still carries out a punishment for the unlawful act.

Keywords: alternative punishments, efficiency of incarceration, effect of imprisonment, specific deterrence

INTRODUCTION

I chose this topic to identify the bottlenecks of criminal law, which affect the offenders. Specifically, the thesis aim is to clarify the social and legal aspects that should be taken into account when mitigating the sanction. The author of the thesis will give examples of relevant jurisprudence, which also allows analysis whether and how the change of punishments would affect the first-time offender as well as chronic offenders.

In order that human society could function and develop hastily, there is a need of generally accepted and established norms. Social regulations cannot be limited to describe norms, but their effect must be guaranteed at national level. In order to stimulate tolerance behavior societies, therefore, require standards that not only describe inappropriate behavior but also prescribe a form of social response.[1] The formal concept of the rule of law relates in particular to legal certainty as an essential feature of the rule of law, which is expressed in the privacy of the private sphere, in the person's confidence that there are certain limits of state intervention. The rule of law is seen as a peace treaty, in which state intervention is restricted. The criminal elements of the rule of law are punitive in principle *nullum crimen nulla poena sine lege*.[2] So in order for some sort of behavior to become a crime, the state must qualify acts that are punishable by law. According to the principle *nullum crimen nulla poena sine lege,* which means – there is no crime without the law, it is the moral principle of criminal law and also international criminal law, which means that a person should not get a criminal punishment for an act which has not been criminalized by the law. The latter principle is included also into the European Human Rights Convention and into many countries Constitution and Penal Code.[3]

Defining acts, as crimes must be in line with the criminal political views that prevail in society and based on the prevailing opinion of justice. The application of sanction means, in criminal law, the transfer of a punishable offense to the act of succeeding. This act addresses the issue of individual responsibility; on the other hand, national criminal policy is also being implemented. Penalties are enforced through the application of the sanction, which reaches its logical end in each particular case. The application of criminal law – the act of committing a crime as an

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[1] Sootak, J. (2007). *Sanktsiooniõigus*. Tallinn: Kirjastus Juura, p 13

[2] Mokthar, A. (2005). Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects. – Statue Law Review, Vol. 26, Issue 1. Oxford: Oxford University Press, p 41

[3] Sootak, J. (2015). *Kriminaalpoliitika*. Tallinn: Kirjastus Juura, p 47

offense and sanctioning it – has a twofold nature in social control. First, it is a state power monopoly. The most severe violations of conflicts of social cohesion, the state only responds with its punitive force, because vigilante justice is prohibited in nowadays society and punishable by arbitrariness. On the other hand, it should not be forgotten that criminal law acts on the *ultimate ratio* principle. This means a criminal law paradox; society generally favors non-formal conflict solutions based on moral norms or solutions, which are based on the norms of other legal branches, thus, the application of a criminal sanction is on the one hand an act based on the monopoly of state power and based on the principle of legality; on the other hand, criminal law gives people a pre-emptive capacity for arbitrary detention in order to find another non-punishable solution based on moral norms and legal provisions of the conflict. [4]

Since the second half of the 20th century, various criminal theories have emerged and their goal is to put more force into the prevention of crime. European punishment principles prioritize the protection of human rights and their fundamental freedoms and the importance of prevention; the use of punishment is used as *ultima ratio*. For example the abolition of the death penalty is now replaced by a life sentence of imprisonment because the death penalty does not fit into the list of sanctions acceptable in the European cultural area. In the opinion of the rest of Europe, the number of detainees should be as small as possible, so Europe has been pursuing a path to mitigating sanctions. Also, in case when first-time offender is sentenced to jail for a petty crime and one is incarcerated altogether with lifetime recidivists; one's criminality will increase at the time one is incarcerated because of the skills learned in prison.

The thesis hypothesis is: Incarceration does not rehabilitate the perpetrators and alternative punishment methods are more effective than incarceration.

The political development of Estonia in practice has brought a reduction of sanctions and a greater emphasis on the prevention of crime at the national and local level, despite the latter fact and that Estonian population is only 1,3 million people, Estonia is still at the forefront of the number of detainees in Europe. [5] The authors' opinion is that the possible reason for that includes both the underuse of alternative punishments and the lack of social programs within detainees. Also, a big factor is that, Estonia is following European goal to reduce crime, but for

[4] Sootak, J. (2007). *supra nota 1*, p 16

[5] *Highest to Lowest – Prison Population Rate/ World Prison Rate.* International Centre For Prison Studies. Accessible: http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14, 11 January 2018.

some reason, the number of prisoners remain almost the same in Estonia, with a little difference, compared to other countries. When the old system did not work, in the sense that prisons were constantly overcrowded and crime was in an ever-increasing trend, then a question arises why the new system of crime prevention also have not succeeded. Therefore, the research questions the author will be finding answers in this thesis is: How does incarceration affect the offenders? How big is the risk that the released inmates will reoffend? Are alternative punishment methods more effective than incarceration?

The author's interest in this subject arises from contact with various legal-policy approaches to the purposes of the punishment and the severity of sentences and their enforcement. The author believes that this is one of the sharpest contrasts between contemporary jurisdictions and the results from different approaches would certainly require a thorough analysis.

This bachelor thesis analyses the various alternative punishment methods and their effectiveness, as well as looks for an answer to the question whether imprisonment rehabilitates an offender or gives an impetus to one's recidivism career. In the first part of the work the author gives an overview, using different academic literature, of the elements of crime, which is the basis for determining the punishment for the unlawful acts. In the second part, there is an examination of the purposes of punishments and the function and types of it, likewise, an overview of the criminal theories, which contains both an absolute criminal theory and the relative criminal theory. In addition, using different studies done in years to find out the effectiveness of the various types of punishments, which are sentenced to the perpetrators. Finally, the author introduces the alternative forms of punishments and compares them to imprisonment. There is an evaluation of the monetary cost of the state in comparison of alternative punishments and incarceration, and a collation of the advantages and disadvantages of different punishments.

1. ELEMENTS OF CRIME AS BASIS FOR DETERMINING PUNISHMENT

Basically, a crime is what legislature defines as a crime. A crime may be defined as an act, which infringe the law and can be followed prosecution in criminal proceedings, which may be followed by conviction and the consequences are punishments for breaking the law.[6] A Latin phrase *nullum crimen, nullum poena, sans lege,* which means – no crime, no punishment, without legislation it sets out that a behavior cannot be a crime, unless there is a statue that prescribes the forbidden behavior and sets a punishment for violators. [7] Throughout the history, the principle of *nullum crimen* has been preserved differently from the Anglo-American and Continental European system. If in both cases this principle has been used to protect a person from arbitrariness in the administration of justice, this protection has, nevertheless, been implemented differently. Continental European law links the protection of person to a rigorous realization of the principle of self-administration in the administration of justice, while Anglo-American law relates not only to valid law, but also to common law. Essentially, in Anglo-American law, one of the most important guarantees for the protection of a person is the existence of a law against the state of arbitrariness. However, the different treatment of the punishabilty of the act substantiation of law or the necessity of justness does not consist only in the fact that under the law of Continental Europe, legislative power belongs solely to the Parliament, and in Anglo-American system the judge establishes the justice. The difference is in the fact that if there is a prohibition of retroactive effect only on the issue of justice, then the legal theory of the Continental Europe sees something else, namely, the principle of legal certainty.[8]

In the Constitution of the Republic of Estonia § 23 states that – "No one may be convicted of an act which did not constitute a criminal offense under the law in force at the time the act was committed". Additionally, the Constitution establishes a prohibition on retroactive effect of a law punishable by an act. [9] But, is there a single definition of crime overall? In Estonian Penal Code a criminal offense is defined as: "A criminal offence is an offence, which is provided for this Code and the principal punishment prescribed for which in the case of natural person is a

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[6] Allen, M.J. (2013). *Textbook on Criminal Law*. 12th ed. Oxford: Oxford University Press, p 1

[7] Newman, D.J, Anderson P.R. (1989). *Introduction to criminal justice*. 4th edition. New York: Random House, p 7

[8] Sootak, J. (2015). *Karistusõiguse alused.* Tallinn: Kirjastus Juura, p 48

[9] *Ibid.,* p 49

pecuniary punishment or imprisonment and in the case of legal person a pecuniary punishment".[10] Of course, in nowadays Europe it is important to keep in mind that the legal principles are enshrined in the European Convention of Human Rights, however, article 7 of the Convention does not require a person to be convicted solely on the basis of written law, although that article prohibits a conviction based on retroactive effect. This article prohibits from relying on the retroactive force of punishment when it comes to the national or international law applicable at the time of the commission of a crime. However, the law does not necessarily require a written basis for it the article means that the civilized people recognized the act, which was at the time of its commission, as offense. Also under the other rules of international law, for example article 15 of the United Nations Human Rights Declaration of 10.12.1948 and article 99 of the 12.09.1949 Convention on the Prevention and Punishment of the Crime of Genocide, it can be argues that a person conviction can occur only on the basis of the norm in force at the time of the commission of the act, regardless of whether it is written or unwritten norm, where the type and rate of the punishment does not need to be determined.[11] As have Jaan Sootak stated: " Crime is not just a simple arithmetical sum of individual notices, it has it's own regularities, which are different from the regularities that manifest themselves in the individual crimes. Hence, crime can be defined as a social phenomenon that affect the values of society and violates social standards. Crime is violation of social peace." [12]

The criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by the criminal law before liability may arise. Whether liability arises will depend further on the accused's state of mind at the time of the misconduct; usually intention or recklessness is required.[13]

Crimes are broken into elements, which the prosecutor has to prove beyond a reasonable doubt. Criminal elements are brought out in the criminal statutes, or cases in jurisdiction that allows for common-law crimes. Crime has at least three elements, which are: a criminal act, also called

[10] Karistusseadustik. RT I, 30.12.2017, 29

[11] Sootak, J. (2015). *supra nota* 8, p 49

[12] *Ibid.*, p 137

[13] Allen, M. J. (2013). *supra nota* 6, p 18

actus reus, a criminal intent, also called *mens rea*, and the concurrence of the two. The term conduct is often used to reflect the criminal act and intent elements.[14]

No one can be guilty of a crime unless they have committed a particular guilty act, with the necessary mental element. Latin phrase *"Actus non facit nisi mens sit rea"*, which means that an act does not make a person guilty unless the mind is also guilty. Only those who have freely chosen to do wrong should be punished.[15] Although, the term *actus reus* has much wider meaning than the act prohibited by the law which implies. It comprises all the elements of the definition of the offence except those, which relate to the mental element required on the part of the accused. But criminal law does not punish people for their evil thoughts or intentions. In case a person has a criminal intent for a particular offence but does not act out, he is not guilty of committing the crime. However, where the *actus reus* of an offence requires conduct on the part of the accused, whether an act or omission, liability will only accrue where the conduct is willed, it is not sufficient that the accused by his bodily movements performed the prohibited conduct of brought about the prohibited consequence defined by the *actus reus* of the offence.[16]

In general, *mens rea* means a subjective or inner action of a certain act, and it is also called guilty mind. It consists of the following forms: intention, recklessness, and negligence.[17] Therefore, in offences requiring *means rea*, if the conduct is not willed there will also be an absence of *mens rea* on the part of the accused, but even if the offence is one of strict liability, requiring no proof of *meas rea*, it is still necessary to prove that the accused's conduct was voluntary. To convict and impose punishment on an accused who was not responsible for his conduct would be unjust.[18]

In criminal law, an offense is an act, which is defined as an offence in the statutory, although the offences are legally differently defined. The most significant is the delinquency system, because it is the base of the general criminal law. The elements of the offense have long been evolving in the penal law – the offence must be foreseen in criminal law, it must have been committed intentionally or through negligence, in a state of emergency or in a state of insanity, precluding a person from being punished. However legal scholars have worked long and hard on structuring

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[14] *Criminal Law.* (2015). Minnesota: University of Minnesota Libraries Publishing, p 137

[15] Loveless, J. (2008). *Criminal law: Text, Cases, and Materials.* United States: Oxford University Press, p 34-36

[16] Allen, M .J. (2013). *supra nota* 6, p 20-22

[17] Sootak, J. (2003). *supra nota* 8, p 133

[18] Allen, M. J. (2013). *supra nota* 6, p 20-22

these elements into well-organized system. It is clear that the circumstances precluding the punishment of the act are not legally equivalent they have different content. Some circumstances preclude the prohibition of the act, while other leave the act forbidden, but exclude only punishment of a particular person. Therefore, it is very important that the delinquency system is placed into a certain system. The development of this system has undergone a long history of development, and there is no reason to believe that this development has now come to an end.[19] However, the idea of criminal punishment on the probability of future recidivism is nothing new. A selective incapacitation, which is the attempt to identify those offenders who most likely will reoffend again and due to that give them longer prison sentences, at least, that is what judges typically do when they consider an offender's prior past, these points are important to predict their future recidivism factor. Although, which kind of information should be used in the sentencing process and furthermore, who should be involved in it? Punishments have been based on the harm-base system of punishment, with unceasing emphasis on the severity, proportionality and the risk. The people who should be incarcerated are those who society truly scares, who are violent offenders and those who have little hope for rehabilitation, such as chronic offenders.[20] There are many people, who are punished disproportionately for their activities, for example when offenders are incapacitated and the system does not even give a change for the offender to get better and pay one's debts to the society, then there has been made a big mistake in the criminal justice system and it does not work to rehabilitate people, but just to punish them. The punishment should so call fit the crime, which means that the punishment cannot be harsher than the crime, which was committed, is.

[19] Sootak, J. (2003). *supra nota* 8, p 108-109

[20] Kelly, W. (2015). *The Way We Sentence Criminals Needs to Change, and This is How We Do It.* Accessible: https://news.utexas.edu/2015/09/17/the-way-we-sentence-criminals-needs-to-change, 30 April 2018.

2. PURPOSE OF PUNISHMENT IN CRIMINAL LAW

One of the legal branches of penal law is the part of the legal system, the norms of which establish the conditions for the punishment of the act and its consequences, punishment and other sanctions. Consequently, in criminal law, there are two basic concepts – a criminal offense and punishment. From the point of view of society, criminal law is a social norm aimed at the protection of the fundamental values of society and the prevention and suppression of the most seriously damaging acts – the offenses. As a social norm, the criminal law rule must ensure that the most important moral standards work, but limited to the law in its own right, only to manifestation of external behavior of person. The inner world of the human being, his values, attitudes and feelings can not be the object of the correction regulation, even less their morality can ensure the criminal law with the threat of punishment contained therein. At the same time, one should not forget that criminal law does establish values and norms of behavior itself, it considers them in society and ensures its effectiveness.[21]

The goal of penal law derives from the fact that criminal law, like any branch of law, exists in society and plays a huge role in society. Determining the task is extremely important from a legal point of view. The question is whether this task has gradually developed over the years with the democratic foundations of society, or there are social groups or political forces that have taken the right to determine what the criminal law of a country should be and what task it should fulfill. It is obvious that defining the task at the first level is in accordance with democratic societies and the rule of law. The task of legal criminal law in a democratic state is to protect society as a basis for socially co-existing people. Several aspects need to be taken into account in defining this task. Human society as a whole cannot exist without cooperation and mutual trust, it manifests itself in a peaceful coexistence. Protecting the social safeguard clause is a fundamental task of criminal law, but the criminal law itself does not establish this peace of mind and criminal law is not the primary law in keeping the peace treaty. Here, the first aspect of the goal is manifested in criminal law – to defend the foundations of social cohabitation, the basic social values like human life, health, freedom and property. These are the freedoms and rights that exist irrespective of the country and which the state does not impose, but must be protected in accordance with the social agreements. These core values are called basic legal rights. A basic legal right is a vital benefit to people's social cohesion, therefore, a social value

[21] Sootak, J. (2010). *Karistusõigus üldosa*. Tallinn: Kirjastus Juura, p 32

which protection must be punished by the state. A legal strain can be individual, like life, health and bodily security or collective like state and public peace. Legislative justification and the difference in the object of attack must be taken into account. From the point of view of criminal law, it is important that it protects the legal rights solely against attacks by man. Other damages to does not represent a persons attempt to ignore the legality of the right to life is not subject to criminal law. Thus, it is necessary to distinguish legal rights from temporal-spatial phenomena and as a normative weal.[22]

As it was mentioned before, the significance of the law-governed state is the moderation of state power and subordination to this right. Furthermore, important is legal certainty principle, which is the inviolability of the person's individual sphere. In the law-governed state, every person must feel secure, without the fear of arbitrary interference by the state. Such peace order is valid until the person acts by the law, in case a person commits an act, which is against the law and one is guilty of the act, there is an exploitation of the national condemnation, which is expressed in the criminal law applicable to one by the court. The offense is followed by the punishment, which in particular means that the guilty part is obliged to withstand restrictions.

J. Sootak has brought out based on H.Welzel the two sides of punishment. The individual side shows the loss of the offender, which is to detriment of his fundamental status. The punishment must be the injustice made by the offender and the size of his guilt. The punishment has to be rational and emotionally perceived by the perpetrator, and must be affecting his feelings and aspiration, preferably in the positive direction. The other side of the sentence is national, which means that the justification of the punishment, the state can punish, does not mean that, the state must punish. The latter will only be considered if the punishment is necessary to ensure the legal order and the basis of social life.[23]

The punishment for the criminal act exists, regardless have the state inherited a criminal doctrine or not, the essence of the penalty was and still is the revenge of society. The penalty is a liability that the state demands from the wrongdoer paying retaliation for the violation.[24]

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[22] Sootak, J. (2010). *supra nota* 21, p 34-36

[23] Welzel, H. (1967). *Das Deutche Strafrecht: Eine systematische Darstellung*. Berlin: De Grutyer Lehrburch, p 231-232 referenced in Sootak (J.Sootak. Sanktsiooniõigus. Juura Kirjastus, Tallinn 2007, p 73)

[24] Sootak, J. (2003). *supra nota* 21, p 178-179

2.1. Punishment theories

The basis of the penal power depends on two main categories – offence and punishment. The first is primary, but only in terms of definition of the concept of criminal law. The difference have to be made between two different penal powers – *ius poenale* and *ius puniendi.*

The concept of penal law is given to *ius poenale* by a statute containing punishments. However, due to the specificity of penal law, that is not simply a norm, but with norms that establishes the punishability and punishment of an act. Such a right belongs to a knowledgeable state. That gives raise to a straightforward question on what grounds the state carries out such regulation, what is based and how it is realized the country's punitive power.[25]

Ius puniendi is penal power. This is a question of the legitimacy of criminal law and can be seen, as criminal law as a whole, through two view points: firstly, what kind of actions a state proclaims as offences – this is a matter of the material definition of the offence and secondly, on the basis of which the perpetrator is punished – this is the subject of punishment theories.[26]

The question of the content of punishment is actually a question of the justification of a punishment, that is, the question of justification. This justification is threefold: state policy, socio-psychological and individual. The state policy foundation is based, firstly and foremost, on the fact that this is necessary in the legal system as a way of maintaining people's social cohesion. The state authority would cease to exist if it could not respond to hardcore violations. Such a reaction shows that not only morality but also law is a common norm. The expression of legal force constitutes a penalty to each legal system. The socio-psychological justification is based on the fact that the state must also be responsible for satisfying society's perceptions of justice. It is hardly possible to speak of a peaceful cooperation based on a normal ethical basis, if the state would confine itself to preventing or suppressing planned offences and to refrain from responding to violations already committed. Members of the community cannot be expected to face after the birth of injustice, as if nothing had happened and to live side by side with the offender. In the absence of state intervention, there will be private criminal law or vigilante justice. A national punishment to avoid such a situation is justified by social psychology. An individual justification stems from an offender, who, due to the moral nature of a person, needs the opportunity to redeem his guilt. Irrespective of the will or the ability of a particular

[25] Sootak, J. (2010). *supra* nota 21, p 41

[26] *Ibid.*

perpetrator to be ethically purged, the state must provide such an autonomous for everyone. However, the justification for the punishment shows in particular the content of punishment and justifies it generally. The specific nature of the country's penal power can be very different. These differences in the grounds of punishment are referred as punishment theories.[27]

2.1.1. Absolute theory of punishment

According to absolute theory of punishment, the punishment is therefore an issue in itself; the legal and ethical basis for punishment does not require further justification of punishment.[28] *Punitur quia peccatum est,* which means punishment is to be inflicted, because a crime has been committed. The classical definition of this principle, the *lex talionis*, is found in the Old Testament: "Life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, strife for strife." Two philosophers who most radically advocated and formulated this idea were Immanuel Kant and Georg Wilhelm Friedrich Hegel.[29] According to Kant " Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground he has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable, before there can be any though of drawing from his punishment and benefit for himself or his fellow-citizens." [30] According to Kant, penal law was a categorical imperative, hence the meaning of all objective considerations, including the general precepts of the law of free justice. The punishment is a categorical imperative which prohibits the offense from being punished and does not apply the sanction to any criterion of expediency or usefulness.[31]

Hegel justified the punishment through a dialectic scheme, according to which the law is a general intention to which the offender opposes his special needs. The latter must punish and overcome the punishment. If the offense is the denial of the legal system, then the punishment

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[27] Sootak, J. (2007). *supra nota* 1, p 25-26

[28] Sootak, J. (2015). *supra nota* 8, p 147

[29] Schaefer, U. (1996). Crime and Punishment. – *Bahá í International Order. Proceedings of the First European Bahá í Conference on Law and International Order,* 08-11 June 1996, Depoort. London: Bahá í Publishing Trust, p 41

[30] Martin, J. (2005). *The English Legal System.* 4th ed. London: Hodder Arnold, p 174

[31] White, J., E. (2009). *Contemporary Moral Problems.* 9th ed. USA: Thomson Wadsworth, p 210-211

must confirm the denial of the offense and the legal system. Kant's theory is different from Hegel's theory of punishment in that way that Hegel replaces the practically unrealistic principle of the tying with the comparison of the values of the offense and punishment, and the idea of payment with its content has survived to this day. Kant and Hegel were unanimous in denying the punishment as both general preventive and special preventive goals.[32]

2.1.2. Relative theory of punishment

Relative theory postulates are radically opposed to absolute theories, which are so called defenders of punishment. They are in favor of deterrent measures, with their basis in Enlightenment humanitarian and utilitarian doctrines. During the Enlightenment, the sense of punishment no longer resided in the idea of guilt and the carrying out justice, but rather in the protection of society and the idea of security. The Latin phrase – *poena relata ad effectum*, which refers that punishment cannot be the goal itself, but should prevent the punishable acts. The preventive aim of punishment was placed foremost amongst its functions. The goal of this policy was not to punish the criminals because he had done something bad, but to deter others, or he himself, from committing future crimes.[33]

2.2. The functions and types of punishments

The classic functions of punishment, which, on the one hand, represents the philosophical justification for punishment, but at the same time the desirable practical goal, have been highlighted in four ways.[34]

Most widely advocated justification for the punishment is deterrence.[35] It is advocated by Plato: "No one punishes the evildoer under the notion, or for the reason, that he has done wrong, - only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, may be deterred from doing wrong again

[32] Sootak, J.(2015). *supra nota* 8, p 149

[33] Tella, M., J., F., Tella, F., F. (2006). *Punishment and Culture: A Right to Punish?* Madrid: Martinus Nijhoff, p 138-139

[34] Saar, J. (2007). *Kriminaalpsühholoogia*. Tallinn: Kirjastus Juura, p 249

[35] Hassan, F. (1983). The Theoretical Basis of Punishment in International Criminal Law. – *Case Western Reserve Journal of International Law,* Vol. 15, No. 1. United States: Case Western Reserve University School of Law, p 48

He punishes for the sake of prevention...."[36] The goal of deterrence is to maintain social control. Punishment and intimidation of criminals have traditionally been the most interconnected aspects. Throughout the years, society has dominated the perception that an unpleasant, painful consequence of an offense in an effective way of controlling the future behavior.[37] Furthermore, there are two types of deterrence, these are – specific deterrence and general deterrence. Special deterrence is aimed to an individual defendant, which in theory one is less likely to commit another crime because of the fear of the punishment.[38] However, direct negative incentives for offenders are considered to be the most effective way for future conduct in many discussions. Although, this theory has been considered poorly suited for serious crimes against humanity, where the rational choice is often left behind.[39] Under general deterrence theory people are punished for the violation of criminal law and they have to serve an object lesson for the rest of society. According to the theory, society conveys the following message: it is wrong to behave in a certain way, and if one does that and fails to obey the law, the society will punish one accordingly. The expression of society's disapproval is the punishment.[40] Punishment, as a notion transmit, creates the conscious and unconscious obstacles to the commission of crimes and due to that will bring the standard conformity of the society as a whole.[41]

The second theory is retribution as the justification for punishment.[42] Retribution means, that the perpetrator is punished with proportionate punishment for the act one made.[43] Retribution should prevent the crime by the removal of the desire of vigilant justice against the defendant. The punishment is morally justified because of the unlawful act the person did and one has just deserts the pain for it.[44] When the victims or the overall public see that the defendant has been punished appropriately for the crime, they achieve a certain satisfaction that the state's criminal

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[36] Plato., Jowett, B., Edman, I. (1956). *The works of Plato*. New York: Modern Library, p 211-212

[37] Saar, J. (2007). *supra nota* 34, p 250

[38] Hassan, F. (1983), *supra nota* 35, p 51-55

[39] Saar, J. (2007). *supra nota* 34, p 251

[40] Kennedy, K., C. (1983). The Critical Appraisal of Criminal Deterrence Theory. – *Digital Commons at Michigan State University College of Law*, Rev. 1. USA: Michigan State University College of Law, p 3

[41] Andenses, J. (1952). General Prevention – Illusion of Reality. – *The American Catholic Sociological Review*, Vol. 43, Issue 2. Oxford University Press, p 179

[42] Hassan, F. (1983). *supra nota* 35, p 48

[43] Saar, J. (2007). *supra nota* 34, p 249

[44] *Ibid.*

procedures are working, which increases faith in the law enforcement.[45] This includes for example, imposing minimum statutory penalties for certain offenses in order to reduce the possibility for courts to impose a leniency penalty.[46] Although, retribution is neither an enforced expiation intended to eliminate the evil from man, nor punishment to deter, but is aimed at restoring equilibrium. Furthermore, the famous "Three Strikes Law" is adopted in 1993 in the state of Washington and California, as well as in other 24 states, are even more specific, allowing a person to be punished for a third serious crime from 25 years to life imprisonment.[47]

The third theory about the purpose of punishment is rehabilitation and it is based on psychology and sociology of the crime. The punishment should rehabilitate the person by changing the wrongdoer's behavior. Rehabilitation is motivated by a belief in the worth and dignity of every person and a willingness of society to expend its time and energy to reclaim him for his own sake, not merely to keep him from harming the society again.[48] This means that the defendant have to attend in social programs, for example educational program, counseling, treatment center for addictions. It can be done at the time of incarceration or with probation. Although, this system needs a lot of improvement, since the programs have not showed a lot of advancement in the case of long time offender.

The forth function is the incapacitation theory. Isolation means placing the offender into conditions where the commission of crimes is unlikely, it protects the members of the society from dangerous individuals.[49] Sometimes in criminal policy there is a distinction between selective incapacitation and the general incapacitation, the idea of the selective incapacitation comes from the recurring criminals, who make up approximately 8-10% of all criminals. By their isolation, it would be computationally possible to reduce the number of crimes by up to 50%.[50] Additionally, William Spelman thinks that when to double prison population, it may

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[45] Hassan, F. (1983). *supra nota* 35, p 49

[46] Saar, J. (2007). *supra* nota 34, p 249

[47] Turner, S., Greenwood, P.W., Chen, E.Y., Fain, T. (1999). The Impact of 'Truth-in-Sentencing' and Three-Strikes Legislation on Prison Populations, State Budgets, and Crime Rates. – *Stanford Law and Policy Review,* Vol. 11, No. 1. Stanford: Stanford Law School, p 75-83

[48] Meyer, J. (1969). Reflections on Some Theories of Punishment. – *Journal of Criminal Law and Criminology,* Issue 4, Vol. 59. (Ed.) C., Korban. United States: Northwestern University School of Law, p 597

[49] Saar, J. (2007). *supra nota* 34, p 251

[50] Peterson, M., Braiker, H., Polich, S. (1981). *Who Commits Crimes: A survey of prison inmates*. Cambridge: Oelgeschlager, Gunn & Hain, p 46-55

decrease the crime level 20-40%.[51] Although, raising the level of imprisonment leads to a number of undesirable social side effects, including the unrestrained growth of prison population, in order to increase security.[52]

2.3. Effectiveness of the types of punishment

As the author mentioned before, deterrence is supposed to deter potential criminals from committing crimes, however, the faultlessness of this theory is questionable. There are numerous empirical studies on the general preventive effect of deterrence in the criminal law that operates with differing methods, and the outcome come to a different results. However, not all criminals acts can be influenced by deterrence effect, it has the most influential effect on minor crimes like infringement of social norms and administrative crimes. Nonetheless, in cases of homicide, the meta-analysis does not indicate that the death penalty has a deterrent effect.[53] However, Jeffrey G. Zilkowsky has brought that it has been found that the deterrent effect exists more with the certainty of punishment, which means the probability to get caught, more than the severity of punishment. He has stated: "If we want to reduce crime, measures should be taken to ensure that more offenders are caught and subsequently prosecuted, rather than making amendments to the Criminal Code, creating harsher sentences." However, in the 1999 studies there was an analysis of over 50 studies, involving over 336 000 offenders, showed that prison sentences do not decrease recidivism, if anything, prison sentences actually produce an increase of recidivism, discrediting the idea of specific deterrence.[54]

Retribution has a very significant place in the punishment theories. It is the only appropriate moral justification for punishment. Indeed, even in cutting edge legitimate frameworks, the infringement of law do not naturally approve anybody to rebuff the violator, just certain authorities using assigned forces as indicated by the applicable positive law are assigned skilled to rebuff others. Every day people witness injustice behavior by others, for example: parking in

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[51] Spelman, W. (2000). What Recent Studies Do (and Don't) Tell Us about Imprsionment and Crime. – *Crime and Justice 27*, Vol. 27. Chicago: University of Chigaco Press, p 419-421

[52] Saar, J. (2007). *supra nota* 34, p 251

[53] Dölling, D., Entord, H., Hermann, D., Rupp, T. (2009). *Is Deterrence Effective? Results of Meta-Analysis of Punishment.* Accessible: https://link.springer.com/article/10.1007%2Fs10610-008-9097-0, 27 April 2018.

[54] Zilkowsky, J., G. (2011). *Do severe punishments deter crime?* Accessible: https://www.castanet.net/news/Law-Matters/68717/Do-severe-punishments-deter-crime, 27 April 2018.

a wrong place, misbehaving spouses, cheating colleagues and so on, but it does not authorize ordinary people to punish the so called wrongdoers, it would become a vigilante. Retribution encompasses a major impact, and therefore the adoption of retribution because the philosophical base for penalization provides a strong multilayer justification way on the far side that proffered by the alternatives. What is more, retribution conjointly includes components of deterrence, incapacitation and rehabilitation, however it conjointly ensures that the guilty are going to be penalized and therefore the innocent protected, and the social group balance has been restored through noncontinuosity of crime.[55]

Until the mid 1970s rehabilitation was a key part of prison policy. Prisoners were inspired to develop activity skills and to resolve psychological issues, like substance abuse or aggression, which could interfere with their reintegration into society. Several inmates received court sentences that mandated treatment for such issues. Since then, however, rehabilitation has taken a step back, and has inherited more "get touch on crime" approach, that sees punishment as prison's main function. This approach has associated an explosive growth within the prison population, whereas having at the most a modest impact on crime rates.[56] A key role in rehabilitation programs plays the state's effort to reduce recidivism, so as to maximize recidivism reduction, in-prison rehabilitation programs ought to be designed according per sure key principles. Firstly, the program should be so called proof based, which potential it is modeled after an application shown to reduce recidivism and simply operated in the same manner as the proven program. Secondly, the program has to be evaluated for cost-effectiveness. Thirdly, the program ought to center of attention the highest-risk and highest-need inmates, as this has the greatest potential to reduce recidivism.[57] In Estonia, there are multiple programs, like anger management, which is meant for people that are unable to control their irritation and feelings in general. The program teaches one to keep anger in check so that it might not take control of the person, also social skills training, where people learn to express themselves in everyday life, analyze and control their thought and behavior. Researched, which have taken place over the past 25 years, has shown some rehabilitation groups are effective. Research done at the Adult Correctional Institute, in Craston, showed that sex offenders, violence and substance

[55] Bradley, G., V. (2003). Retribution: The Central Aim of Punishment. – *Harvard Journal of Law*, Vol. 27, No. 1, Harvard Journal of Law & Public Policy, p 25-27

[56] Benson, E. (2003). *Rehabilitate or punish?* Accessible: http://www.apa.org/monitor/julaug03/rehab.aspx, 30 April 2018.

[57] Taylor, M. (2017). *Improving In-Prison Rehabilitation Programs.* Accessible: http://www.lao.ca.gov/reports/2017/3720/In-Prison-Rehabilitation-120617.pdf, 27 April 2018.

abuse treatment programs support the latter claim.[58] However, people who attend there must have motivation to become better. Most of the research and scholars state that correctional training improves the possibilities that inmates who are released from prison will not return. However, the vast majority of studies may also be biased due to the fact of the selection; inmates who take correctional education guides have attributes that would enlarge their post-release success regardless of their route participation.[59]

Since the 1980s the major crime-reduction strategy has been to increase the use of punishment, especially incarceration, under the assumption that offenders incarcerated will be prevented by incapacitation from committing further crimes.[60] Incapacitation refers to the prevention is the most straightforward way, because the effect that results from keeping offenders locked up and therefore unable to offend, but this is pretty naive conclusion out of it. However, because crime and imprisonment rates vary from one country to another there is no common outcome of the study analysis on the effectiveness of incapacitation.[61] However, based on the study done in Estonia, when ordinary citizens were questioned, what is the most effective way to punish, then 32% answered incapacitation is very effective and 51% that it is effective. Therefore, it can be assumed that a person considers the incapacitation to be effective if one feels safer to be in society.[62] However, with all these restrictions in prison, a question arise – is incarceration worth it? Does it rehabilitate the perpetrators future behavior? Gendreau, Goggin, Cullen and Andrews found that the more time the individual spends incarcerated, the more likely they are to recidivate.[63]

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[58] Miceli, V. (2009). Analyzing the Effectiveness of Rehabilitation Programs. – *Senior Honors Project*. Rhode Island: University of Rhode Island, p 8-34

[59] Gaes, G., G. (2008). *The Impact of Prison Education Programs on Post-Release Outcomes.* Accessible: http://johnjay.jjay.cuny.edu/files/TheEffectivenessofPrisonEducationProgramsNov_09.pdf, 27 April 2018.

[60] Marvell T., B., Carlisle E., M.(1994). Prison Population Growth and Crime Reduction. – *Journal of Quantitative Criminology*, Vol. 10, No. 2. Germany: Springer, p 109

[61] Weathernburn, D., Hua, J., Moffatt, S. (2006). *How much crime does prison stop? The incapacitation effect on prison on burglary.* Accessible: https://pdfs.semanticscholar.org/7027/0ef9e08f1f04695ec861e0636adda6a0549b.pdf, 27 April 2018.

[62] *Vangide arv Eestis 1991-2005 ja selle vähendamise karistusõiguslikud ja kriminoloogilised alused.* Tartu Ülikooli Õiguseinstituut. Accessible: http://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/vangide_arv_eestis_1991-2005_ja_selle_vahendamise_karistusoiguslikud_ja_kriminoloogilised_alused._tartu_ulikooli_oigusinstituut._2007.pdf, 27 April 2018.

[63] Gendreau, P., Goggin, C., Cullen, F. T., Andrews, D.,A. (2000). The effects of community sanctions and incarceration on recidivism. – *Forum on Corrections Research*, Vol. 12, No. 2. Canada: Correctional Service of Canada, p 10-13

3. ALTERNATIVE FORMS OF PUNISHMENTS

Despite the fact that incarceration punishment has had a long history and a widespread scope in all societies, it has raised serious problems against such punishments, resulting the doubts in its efficiency. Firstly, prison is a centralized environment for the offenders, which is always a place for creating felony and crimes. The first-time offenders faced with experienced and professional offenders will learn new skills and employ them in time. Secondly, due to the fact, that a close one has to do jail time, it also affects the people under his guardianship who lose their financial and economic support, and will be faced with disintegration, whereby this could lead into a secondary motive for crimes. Thirdly, imprisoning people will incur social problems as well, like the personal life being affected, changes to his perspective of the society and distortion of his social prestige. From there also rises the problem of government-incurred losses; states must pay costs for the management of prisons and it is really expensive. Enrico Ferry was the one who employed the term – criminal alternative. He thought that it is those preventive measures and social defense, which are considered at the social level as a whole and in the area of judicial structure. Gramatica, the founder of the social defense school, offered a new interpretation of the concept of alternative policy and he stated sociopathic should be at first replaced with responsibility and second, the sociopath signs and its degrees should be regarded instead of felony; third, the social defense tactics in line with the needs of any offender should replace the appropriate punishment of the felony. Alternative punishment are intermediate punishments, which means that they are in-between incarceration and so called under arrest used instead of dispatching the convicts to the jail.[64]

A pecuniary punishment, in other words fine, is one of the most common forms of alternative punishments imposed by the courts. The offender is required to pay a fixed sum of money and in case of failure to do so could result in a prison sentence. Fine, by its nature is offering sufficient opportunities scaling and individualizing the punishment in relation to the form of guilt and current possibilities of the offender. The fine can be easily repaired in the event of judicial error and also has the feature to be more tolerable, since the execution of the criminal fine is accomplished in the regular convict's life and work. The fine fully complies both the repressive function, consisting in restrictions arising from the deprivation of the amount of money paid as

[64] Milani, A., Moghadam, M., R. (2014). Functions of alternative punishments to imprisonment in reducing the criminal population of the state prisons. – *International Letters of Social and Humanistic Sciences,* Vol. 44. Switzerland: SciPress Ltd, p 74-76

fine, and preventive function, through its intimidating action. Although, the fine has also some disadvantages. Its purpose is to exert a constraint only to the offender, but it sometimes hits also indirectly the family of the condemned, this is because not only the offender but also the members of the family may feel the consequences caused by the payment of the fine.[65]

The second alternative punishment method is electronic monitoring, it is a supervision tool utilized in the criminal justice system, it involves putting a tag around the ankle of the wrist of an offender which, together with a receiving device, tracks whereabouts at specified times. It permits the monitoring and enforcement of curfews between specific times and locations, meaning the wrongdoer can be released into the community instead of serving time in a penal facility. Electronic monitoring devices use radio frequency or global positioning system, which can send data in real time or lagged, and might be applied at any time in the criminal system from pre-trial to post-prison release, as well as additionally including as an alternative to incarceration or parole without electronic observation.[66] There are many types of electronic management technologies on the market for community corrections offices to incorporate their supervision plans. A typical other option to imprisonment or independent endorse in numerous purviews are house arrest that expect someone to stay inside a specific number of foot from their homes. It requires that the offender wears a battery-powered transmitting device that emits radio frequency singlet two or more times a minute and they must be worn at all times. A receiver is installed to the offender's home and is attached to a landline telephone. The continuous signaling radio frequency can be a useful supervision tool, especially because it provides officers additional control over an offender's life. This alternative punishment method is compared to jail and prison in the sense, that it takes also the offenders time, so to speak. Although, offenders on house arrest are more likely more comfortable that those who are incarcerated, these people nonetheless have some of their freedom taken away. House arrest offers an alternative to imprisonment and can provide an effective strategy for keeping certain communities in pre-trial proceedings, as a part of probationary period or as a part of pre-release policy, it gives some expectations that the user is responsible for fulfilling their monitoring requirements. Obviously, there are some disadvantages when using this equipment, namely, that they do not tell exactly what the person is doing when one is outside of home, one can leave home at the right time for

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[65] Peneoasu, C. (2014). The Execution of Criminal Fine Penalty. – *9th International Conference on European Integration – Realities and Perspectives*, Danubius University of Galati, Romania May 16, 2014-May 17, 2014. The Youth of Today – The Generation of the Global Development, p 433-435

[66] *Electronic tagging.* What Works Centre; College of Policing. Accessible: http://whatworks.college.police.uk/toolkit/Pages/Intervention.aspx?InterventionID=9, 29 April 2018.

work or treatment, but they may not show up, and depending on the level of the community between these services and the officer, it could be a couple of weeks before this is detected.[67] Another type of monitoring device is mobile monitoring device, which is used by parole or probation officers, it is a portable device than can be hand held or used in a vehicle. It can determine the exact location of the supervisee, and it gives an alert when the offender is in an unauthorized location. The third type is location-tracking system, which is used especially in case of sex offenders. Generally they are comprised portable tracking devices that the supervisee must carry within them in combination with a tag. The location tracking system is able to record the location of the offender at all times. The fourth type is called – programmed contact system, its device determines whether a person is at an assigned location. These are automated call-in systems to check in a supervisee is at a given location at a certain time. The supervisee may have the need to answer the call for voice recognition or be visible for video verification, or be close to verification software. In addition, there are continuous or periodically tests for remote alcohol or drug detection devices. Through that courts or criminal justice agencies try to monitor and limit the use of drugs and alcohol by pretrial and convicted offenders. Courts may prohibit the use of alcohol and other drugs as a condition of community release. Lastly, there is also a victim protection device, which is usually used in domestic violence cases. They are located in the victim's house and if the offender is alerted when the supervisee is in their area.[68] The utilization of GPS tracking as an alternative to detainment is winding up progressively by state restoration and rectification organizations.[69]

Another alternative punishment method is community service, which requires an offender to do unpaid work for a particular number of hours or to perform a specific task; the work has to furnish a service to the community. It requires an intensive supervision to verify that the perpetrator does the work as required and that one is not forced to work beyond what is required. Community work is also a positive thing, because the members of the community can provide work opportunities for the offender, however they should not perform enforcement of disciplinary function.[70]

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[67] DeMichele, M., Payne, B. (2009). *Offender Supervision with Electonic Technology: Community Corrections Resource.* 2nd ed. USA: Bureau of Justice Assistance, p 28-29

[68] *Ibid.*, p 30-45

[69] Axtman, K. (2004). *The move to high-tech tracking of inmates.* Accessible: https://www.csmonitor.com/2004/0507/p02s02-usju.html, 29 Apri 2018.

[70] *Handbook for basic principles and promising practiced on alternatives to imprisonment.* (2007). New York: United Nations, p 35-36

Another alternative is shock incarceration, means that if a criminal is sentenced to a term of imprisonment for several years, the court decides with the consent of the prosecutor that in reality one should sit there a few months to a year. In general, shock incarcerations are set to people who has not been sentenced before; it is relatively effective in preventing a person from entering to a criminal road again. Estonian Prosecutor Andres Ülviste have said, that criminals do not feel that the probation is like a punishment, so short term incarceration is much more effective and one could see how ugly and bad place is jail, so one would not want to go back there.[71] Shock incarceration in Estonia is mostly used in case of drunk driving, one of the most well-known and respected lawyers Indrek Sirk have also commented on the topic in relation to drunk driving, in means that, that the fear of punishment is not always the instrument that would keep away a person from driving drunk. Generally speaking, a person who is drunk driving, usually is an alcoholic and needs a treatment. A tough punishment does not treat the addiction. There are different and flexible ways to influence a person, and imprisonment is also a possibility but is not necessarily mandatory measurement. Shock incarceration in his opinion is an effective measure, but imprisoning all the perpetrators is not resolving the problem.[72]

Probation and parole are both alternatives to incarceration; probation exists preceding to and regularly instead of imprisonment, while parole is an early discharge from jail. Probation is a form of court-ordered supervision that allows an offender to remain in the community instead of going to jail. A judge will give the individual a specific set of conditions to follow for a designated period of time. It is an opportunity for low-level offenders to prove themselves while living and working, however, if a condition of probation is violated, the individual can be brought back to court and sentenced to jail for a length of time determined by the court. Parole is a form of community supervision, for an inmate who has already served a certain amount of time in jail for a felony. Like in case of probation, parole carried specific conditions that include regular check with a parole officer.[73]

There are so many alternatives to incarceration, but what accounts for the resistance to alternative sanctions? The conventional answer is a failure of democratic politics. Individuals

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[71] Piirsalu, J. (2004). *Tingimisi karistust asendab üha sagedamini lühike vangistus.* Accessible: http://epl.delfi.ee/news/eesti/tingimisi-karistust-asendab-uha-sagedamini-luhike-vangistus?id=50999674, 29 April 2018.

[72] *Vandeadvokaat Indrek Sirk: "Automaatne šokivangistus ei lahenda joobes autojuhtimise probleemi.".* Eesti Advokatuur. Accessible: https://www.advokatuur.ee/est/blogi.n/vandeadvokaat-indrek-sirk-automaatne-okivangistus-ei-lahenda-joobes-autojuhtimise-probleemi, 29 April 2018.

[73] Varghese, B. *What's the Difference between Probation and Parole in Texas?* Varghese Summersett PLLC. Accessible: https://www.hg.org/article.asp?id=44065, 29 April 2018.

from the general population are uninformed of the accessibility and possibility of alternative punishments, subsequently, they are a simple prey for self-intrigued lawmakers, who misuse their dread of wrongdoing by supporting more serious jail sentences. The only possible solution, on this analysis, is a relentless effort to educate the public on the virtues of the prison's rivals. Yale Law School Professor Dan Kahan advanced a different explanation. The political unsuitability of alternative approaches mirrors their insufficiency along the expressive measurement of discipline. The public rejects the alternatives not because they perceive that these punishments won't work or aren't severe enough, but because they fail to express condemnation as dramatically and unequivocally as imprisonment. This claim challenges the central theoretical premise of the case for alternative sanctions: that all forms of punishment are interchangeable along the dimension of severity or "bite". The purpose of imprisonment, on this account, is to make offenders suffer. The threat of such discomfort is intended to deter criminality and the imposition of it to afford a criminal his just deserts but liberty deprivation, the critics point out, is not the only way to make criminals uncomfortable. On this account, it should be possible to translate any particular term of imprisonment into an alternative sanction that imposes an equal amount of suffering.[74] The alternatives, moreover, should be preferred whenever they can feasibly be imposed and whenever they cost less than the equivalent term of imprisonment.[75]

3.1. Alternative punishment versus imprisonment

Rather than having a deterring effect on inmates, prison may turn people into worse criminals, while costing taxpayers an enormous amount of money per year, despite the fact that correction departments pay the vast majority of costs for state penitentiaries, other departments pay related expenses. Depending on the state, these can include employee benefits, capital expenses, in-prison education services, or medical care for inmates. While it is essential to recognize the full amount that a state spends on its detainment facilities, it is additionally critical to perceive that authorities are in charge of guaranteeing their prisons safe, secure and humane.[76] The average

[74] Kahan, D. M. (1996). What Do Alternative Sanctions Mean? – *The Univesity of Chicago Law Review.* United States: Yale Law School, p 592-593

[75] Morris, N., Tonry, M. (1991). *Between Prison and Probation*. New York: Oxford University Press, p 89-90

[76] Hendrichson, C., Delaney, R. (2012). The Price of Prisons: What Incarceration Costs Taxpayers. – *Federal Sentencing Reporter,* Vol. 25, No. 1. California: University of California Press, p 68-70

cost per prisoner in Estonia is 1 417€ per month or 17 004€ per year.[77] To assess this amount of money in the context of national revenues, then for the maintenance for one prisoner it takes 2,5 average employee income tax revenues. Incarceration is expensive because the institution if active for 24 hours a day, which involves a large staffing need. Similarly, the maintenance cost of immovable property has increased in relation to the previous decade, which in turn is related to the construction of new prisons. At the same time, the cost of alternative punishment is 52,5€ per month per one probation service, which is 25 times cheaper for the society. This is why the justice system must seek community-based alternatives to reduce the proportion of institutional punishments. Considering the amount of resources required for the execution of the sentence, the society should be demanding on the execution of imprisonment. To assess whether a society gets so called good service by imprisoning the offender, it is necessary to re-address the objectives of imprisonment and the rule of law in the way, which expresses the expectation that the probability of committing new crimes after the imprisonment will diminish. If the criteria for adhering to a prison is easy to assess and supported by the physical environment of the prison, prison officers must work hard every day to assess the law-abiding behavior and evaluate its results. Unfortunately, one-third of the prisoners who are released commit a new crime within one year. Looking at the recidivism over time, the numbers are even getting worse. However, it is difficult to assess whether this number is small or large and whether this figure is due to imprisonment. Therefore, alternative to incarceration as a service must be used. For example, it is possible to evaluate the process how the time is being used when a person is incarcerated and one's life living arrangements are stable, one is available to the state and there is the opportunity to be in contact with one. One of the indicators for assessing the quality of imprisonment in today's Europe is the application of the principle of normality.[78] The principle of normality means there should be minimal interference, the loss of freedom is the main element of punishment, which means that all other detentions must be as slight as possible to the rights and activities.[79]

[77] *Vangistuse kulud.* Justiitsministeerium. Accessible: http://www.vangla.ee/et/uudised-ja-arvud/vangistuse-kulud, 1 May 2018.

[78] Tüllinen, K. (2016). Deinstitutsionaliseerimine ja normaalsusprintsiip karistuse täideviimise praktikas. – *Sotsiaaltöö,* 3/2016. Lind, R., Olli, K., Väljataga, S., Raias, M. Eds. Tallinn: Tervise Arengu Insituut, p 5-6

[79] Lindström, P., Leijonram, E.(2008). *The Swedish prison system.* Ministry of Justice. Accessible: http://rageuniversity.com/PRISONESCAPE/PRISON%20THEORY/Swedish%20prison%20system.pdf, 1 May 2018.

3.2. The advantages and disadvantages

The advantage of incarceration is that, it deters other would-be criminals with the fear of being punished by their crimes with jail time. Crime prevention by incapacitation has an appealing directness; the incarceration of an individual will prevent crime through their physical separation from the rest of the society.[80] Another positive side of incarceration is that the inmates are kept busy and productive in jail, the people who have not finished school, can get their education now in jail. Also they have a possibility to learn new skills in different official prison programs. In addition to that, the inmates who have never worked in their life have the opportunity to get a work experience in prison.

There are many disadvantages of incarceration, to start with, there is a conflict of imprisonment and human rights. In order to take away that right, even temporarily, governments have an undertaking to legitimize the need of detainment as a vital device to accomplish an essential societal target. The loss of freedom, which is the outcome from imprisonment, is at any rate unavoidable, however in practice, detainment frequently encroaches several other human rights also. In a lot of prisons all over the world, the inmates are deprived of basic amenities of life. They are held in an overcrowded and dirty environment, also poorly clothed and unfed. In addition to that there is a lack of medical care and there is difficulties to keep in touch with their close ones – these conditions may literally place the lives of inmates in danger. Implementing effective alternative punishments to prison will lessen the overcrowding and make it easier to manage prisons in a way that it will enable states to meet their essential commitments to the prisoners in their care.[81] Also connected to overcrowded prisons it contributes a highly criminalized prison environment, where inmates are forced to co-exist and during that time spent in jail, inmates learn the norm of the antisocial subculture from other detainees, therefore the longer offender stays in prison, the higher their degree of prisonization, thus the more prominent is the probability of reoffending. Also the fact that a person is removed from the "outside" world, the weaker one social bond gets. This means the relations with family, colleagues and also economic relationships. Again as an outcome, debilitated social bonds coming about because of the imprisonment are probability going to expand a perpetrators penchant to carry out new

[80] *The Growth of Incarceration in the United States: Exploring Causes and Consequences.* (2014). /Eds. Travis, J., Western, B., Redburn, S. USA: National Research Council, p 140

[81] *Handbook for basic principles and promising practiced on alternatives to imprisonment.* (2007). *supra nota 70*, p 4

violations after discharge.[82] According to the Bureau of Justice Statistics, the studies have shown high rates of recidivism among released prisoners. One study tracked 404 638 prisoners in 30 states after their release from prison in 2005 and it was found that – within three years of release, about 67,8% of released prisoners were rearrested. Inside five years of release, around 76,6% of released inmates were rearrested, and the greater part – 56,7% were captured by the end of the first year.[83] The share of reoffenders is really high, this shows that the incarceration does not rehabilitate the offenders, but leads them to reoffend again after being released of prison. Because of the mass incarceration, the system itself produces more criminals and more crime. Another thing, prison is expensive. The use of incarceration has a direct financial influence on state budget. The prison budget of 50 million euros should cover approximately 3000 prisoners and 5000 probation services. If in 2015 the state, according to the Ministry of Justice, spent 400€ per month per prisoner, then now it is around 1 417€ per month, which is higher than the average salary in Estonia.[84]

One of the advantages of alternative punishment is that it fortifies the families and communities. Prison isolates the perpetrator from family, once in a while for quite a long time at any given moment. Alternatives to incarceration keep individuals with their families, in their neighborhood and jobs, which enable them to earn money, pay taxes and contribute to the community. Likewise, alternative punishments give courts all the more condemning choices, on the ground that each offender and crime is one of a kind, and incarceration is not always the most effective response to a crime. If courts have more options than only incarceration, then they can sentence a cost-effective sentence that fits the offender and the crime, also protects the public and provides rehabilitation for the offender. As it was mentioned latter, the studies have shown that prison has failed as rehabilitative measure for the perpetrator, alternatives to prison such as drug and mental health courts are proven to confront the underlying cause of crime and it helps to prevent offenders from committing new crimes.[85] Alternative punishments keep offenders away from the influence of prison, where they may learn new criminal skills. Particularly, it can be useful if

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[82] Song, L., Lieb, R. (1993). *Recidivism: The Effect of Incarceration and Length of Time Served.* Accessible: http://wsipp.wa.gov/ReportFile/1152/Wsipp_Recidivism-The-Effect-of-Incarceration-and-Length-of-Time-Served_Full-Report.pdf, 29 April 2018.

[83] Durose, M. R., Cooper, A. D. Snyder, H. N. (2014). *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010.* Accessible: https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf, 30 April 2018.

[84] Haavalu, V. (2015). *Panustame vangidele 5 mln eurot enam*. Accessible: https://www.aripaev.ee/uudised/2015/04/01/kolme-aastaga-5-mln-eurot-rohkem-pattide-huvanguks, 30 April 2018.

[85] *Alternatives to Incarceration in a Nutshell.* FAMM. Accessible: http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf, 30 April 2018.

there should arise an occurrence of first-time offender. While prison can influence these people capacity to be profitable individuals of society, alternative punishment enables them to receive a fair punishment, without keeping them away from school, work and other different commitments.[86] Alternative to imprisonment are often more effective at achieving important public safety objectives, such as greater security for the population than imprisonment. Properly designed and implemented, they may infringe less human rights.[87] Nations, for example, Norway, Sweden and the Netherlands haven been lessening the detainee populaces and shutting down prisons, while likewise observing reoffending rates decay. Investments in probation and rehabilitation in those countries seem to have been paying off.[88]

Although, alternative sentencing is not appropriate in every case, it is designed for offenders who do not pose a threat to society or endanger public safety. Similar to the way the parole board would evaluate candidates for parole, people who choose whom is eligible for alternative are sentencing will need to evaluate the risk the offender pose to society. Numerous contend that option condemning does not work and rather just postpones the unavoidable truth that the offenders will recidivate and wind up in a correctional facility. Some argue that, the treatment of criminals could be effective, but only in the case if they want to change themselves. Another argument against alternative punishment is that it allows criminal to avoid a just punishment for their actions. Those involved in the criminal justice system also values condemnation of unjust acts. The efficiency of alternative sentencing is far from verified; multiple questions are still in need for answers. Based on the limited statistics that have been discovered reduces recidivism, but there has been enough to suggest that it does not increase it, but evaluating alternative sentencing programs is tricky because each person who is arrested is different and that means that certain programs that work for some individuals will not work as well for others. The differenced in perpetrators is not as tricky as it might appear in light of the fact that groups, for example, parole sheets have been step by step creating approaches to decide and anticipate the hazard that detainees and wrongdoers posture on the group, and they are normally genuinely precise. These individuals who are searching for a sudden change, will most likely be

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[86] Breese, C. (2016). *What You need to Know About Alternative Sentencing.* Accessible: https://www.lawguru.com/articles/tips/what-you-need-to-know-about-alternative-sentencing, 30 April 2018.

[87] *Handbook for basic principles and promising practiced on alternatives to imprisonment.* (2007). *supra nota 70*, p 79

[88] Chu, B. (2017). *Here's how we can spend less on prisons and still cut crime.* Accessible: https://www.independent.co.uk/voices/prisons-hmp-overcrowding-too-expensive-rehabilitation-reoffending-a7993286.html, 30 April 2018.

disappointed, because, alternative sentencing programs are not a speedy arrangement, they require time, energy and commitment to become productive.[89]

[89] Jones, C. (2014). Does Alternative Sentencing Reduce Recidivism? A Preliminary Analysis. – *Xavier Journal of Politics*, Vol. 5. Ohio: Xavier University, p 22-27

CONCLUSION

Although, nowadays there is a greater emphasis on the prevention of crime, but the prison population still has not decreased. Over time, punishments have been based on the harm-based system, with unceasing emphasis on the severity, proportionality and the risk. The vast majority of people, who are released from prison, will reoffend within three years. This raises the question, is incarceration as a punishment an effective way to rehabilitate the perpetrators and maybe alternative punishment methods would be more effective way to punish but at the same time rehabilitate a person.

In order to qualify an act unlawful, it has to be identified by the state, that this kind of act is unlawful. Criminal law cannot condemn a person for his evil thoughts; crime has to have three elements, which are: a criminal act, a criminal intent and the concurrence of these two. Based on the harm-based system the perpetrator must feel the damage one has done, but the punishment must the proportional to the crime - the severity of crime, the harder the punishment. There are several principles of punishment, from the social point of view, it is a social norm aimed at protecting the basic values of society and the prevention of the most seriously damaging acts – the offenses. As a social norm, criminal law rule must ensure that the most important moral standards work, but limited to the law in its own right, only to manifestation of external behavior of a person. The task of legal criminal law in democratic state is to protect society as a basis for socially co-existing people. In the law-governed state, every person must feel secure, such peace order is valid until the person acts by the law, in case a person commits an act, which is against the law and one is found guilty of the act, there is an exploitation of the national condemnation, which is expressed in the criminal law applicable to one by court. The offense is followed by the punishment, which in particular means the guilty part is obliged to withstand restrictions. As it has been brought out the punishment has to be rational and affect the perpetrator emotionally and physically, which preferably will affect the offender in a positive way, which means one will not commit any crimes in the future. The state can punish if the punishment is justified, although it does not mean that the state has to punish. The punishment will be considered only if it is necessary to ensure the legal order and the basis of social life. After all, only the state can punish its perpetrators, if the state authority would not respond to hardcore violations of law, the state would cease to exist.

There are four function and types of punishments. At first there is deterrence, which is the inhibition of criminal behavior by fear of the punishment, its goal is to maintain social control.

There are two types of deterrence – specific deterrence and general deterrence. Special deterrence is aimed to an individual offender, which in theory, one is less likely to commit another crime, because of the fear of punishment and under general deterrence should prevent the society to commit a crime, because of the fear what happens with the person who do it, and then end up getting punished for it. However, not all criminal acts can be influenced by deterrence, it has shown to have the most significant effects on minor crimes. It was found that prison sentences do not decrease recidivism, furthermore, they actually increase it, by discrediting the idea of specific deterrence.

Another function of punishment is retribution, which has a very significant place in the punishment theories, it means that the perpetrator is punished with proportionate punishment for the act one committed. It should prevent the crime by the removal of vigilant justice against the offender. This theory is justified in the point of moral views, because an unlawful act that a person has committed one deserts the pain for it. Through this the society sees that defendant has punished appropriately and they achieve a certain satisfaction that the criminal law procedures do work, which increases the faith in the law enforcements. Retribution has compassed a major impact, because retribution includes the components of deterrence, incapacitation and rehabilitation, it conjointly ensures that the offenders are going to be punished and therefore the innocent protected, and social group balance is restored.

The third theory is rehabilitation, which should rehabilitate the person by changings one's behavior. It should motivate by belief to get better, these people have to attend in the educational programs, and it can be done in time of incarceration but also within probation time. Until the mid 1970s rehabilitation was a big part of the prison policy, and prisoners were encouraged to resolve their physiological problems and activity skills, however, since then rehabilitation has taken a step back. Due to the "get tough on crime" approach, there was an explosive growth in the prison population, which meant that there are not enough funds to rehabilitate all the offenders. Many scholars have stated that correctional training improves the possibility that inmates released from prison will not reoffend, but the majority of studies may be biased due to the selection, which means that there is no solid ground to state that the success after their post-release has something to do with the educational programs in the prison.

The forth function is incapacitation, which means isolating the offender from the society by placing one in the correctional facility, where the commission of crimes is unlikely and it protects the members of society from dangerous individuals. Incapacitation works at the time the

offender is imprisoned, but after the release the studies show that the reoffending rate is very high and the more time they spend incarcerated, the more likely they are to reoffend again.

Despite the long history of incarceration punishments and its widespread scope all over the world, it has raised serious problems against such punishments, resulting in the doubts in its efficiency. Especially, in case of first-time offenders, because when they are faced with the experienced and professional offenders, they will learn new criminal skills and employ them in time. Also it will affect the offender's relations with close ones and economic condition. Alternative punishments have been found more effective than incarceration, because the offender still feels that one is punished for an unlawful act, by the restrictions applied to one, but still has the change to get better, while being in the community, working and not losing one's social skills. Another big factor is the cost of prison, it has been found that alternative punishments are 25 times cheaper than incarcerating a person. This gives the state free funding's to invest somewhere else, preferably in the alternative punishment methods, and also the offender has an opportunity to get better.

This thesis hypothesis is: Incarceration does not rehabilitate the perpetrator and alternative punishment methods are more effective than incarceration. The hypothesis is confirmed, the thesis has shown that within three years of release about 67,8% of released prisoners were rearrested and around 76,6% were rearrested within five years. A good example for Estonia would be countries like Sweden, Norway and the Netherlands who have been lessening the detainee population and invested more into the probation and rehabilitation programs, which have shown that it has been paid off, in the means that reoffending rates have decreased. Alternative punishments have been found to be more effective than incarceration, because in most cases, the problem behind the crime is physiological problems, like addictions, which need solution through social programs. And also a big factor is that while person carrying out alternative sentence, one does not lose work, can attend school and contribute to the community. However, alternative punishments methods and programs are not a quick solution, it takes time, money and energy.

To conclude, alternative punishment methods is the field that needs a lot of development, but basis of the superficial research it is a topic that may be very advantageous in means of rehabilitation and cost comparing to imprisonment.

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