The Historical Evolution Of Punishment

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Abstract. This article aims to critically analyze the phenomenon of criminal punishment throughout human history, prioritizing a critical analysis and addressing the various theories of punishment. The methodology used was bibliographical research and the analysis of the theory of several authors, seeking a broad and critical understanding of the subject.

Keywords. Criminal Law, Punishment, Theory of Penalty.

1. Introduction

The history of the penalty is irremediably linked to the history of the State, so that the emergence of the penalty in societies is mixed with the very development of human groups. According to Masson[1], the history of the penalty is intertwined with the history of humanity, making it impossible to trace a starting point to study the penalty, as both are mixed.

Therefore, the penalty as a sanctioning expression is related to the state model, appearing as a cultural and historical element, never moving away from man.

In addition, legal doctrine agrees that the penalty is justified by its necessity as a guarantor of social harmony. The State resorts to criminal sanctions to protect certain fundamental legal interests, without which social interaction would be impossible.

The modern conceptions of criminal law, therefore, are related to the purposes and functions of the penalty, which appear as the raison d'être of Criminal Law and mechanisms of social harmonization.

In this sense, there were several theories justifying the penalty that emerged throughout the development of Criminal Law. This chapter will make some considerations about the main justifying theories of punishment, dealing with retributive conceptions of punishment, utilitarian orientations, as well as unifying theories and positive general prevention.

2. Historical Evolution

The human being, as a naturally social animal, has always been organized in groups, and therefore, the idea of punishment for those who behave in a way that is harmful to the group has existed since the dawn of humanity. This idea of punishment, however, is not static, it evolved throughout history and adapted as societies evolved.

When analyzing the historical evolution of the penalty, it can be divided into three main phases: the primitive phase, the humanitarian phase and the contemporary scientific phase. Each phase reflects the organization and values of societies in their respective historical moments.

The primitive phase can be subdivided into three moments: divine revenge, private revenge and public revenge[2]. The first refers to a period in which human groups were mostly religious, strongly influenced by the totemism, and punishment was justified by the offense of a law proposed by the deity. There was, however, no model of administration or standardization of Justice. Penalties were imposed by priests as a way to prevent the offender from contaminating the rest of the community.

The private revenge, in turn, comes after divine revenge, as a result of the growth of peoples and the increase in the complexity of human groups[3]. In this period, the “law of the strongest” was dominant, “blood revenge”, in which the offended person turned against the aggressor. Often, reprisals were not directed only at the offender, but also at his family and community, generating even more violent responses, even leading to wars and the extinction of entire groups. The penalty of banishment was also common, when the crime was committed by someone from the group itself, leaving the offender abandoned at the mercy of rival tribes.

It is during this period that the well-known Talion Law appears, with the aim of creating more proportionate punishments for offenders.

In any case, private revenge was presented as an

excessively degrading way of punishing offenders, making it unfeasible to maintain over time. As a result, primitive criminal legal institutions emerge, the first attempts at intervention by the public power to discipline private revenge.

Thus, with the social and political evolution of communities, the State claims the function of maintaining order and social security, giving the penalty a clearly public character. Penal sanctions ceased to have an eminently religious nature or link to particular disagreements, and power began to be concentrated in the hands of sovereigns.

Criminal reprimand aims to protect the collective, being an official State response to criminal behavior. However, since the sovereign, in that period, concentrated almost absolute powers, there was an abusive use of state power, which could repress as criminal the conduct it wanted in any way it wanted.

These true atrocities ended up bothering the population, so that more and more people were dissatisfied with the "punitive spectacles" presented by the public authorities. According to Foucault[4], the protest against torture is found everywhere in the second half of the 18th century. It is considered revolting, excessive, being the product of tyranny, the thirst for revenge and the cruel pleasure of punishing. Faced with this discontent, there is a need to find a new way of punishing, which results in the so-called Humanitarian Period.

During this period, also called the Century of Enlightenment, there were great scientific advances in several areas of knowledge, such as the arts, philosophy, mathematics, as well as law. The encyclopedist Beccaria stands out, who made several criticisms of the penal system, calling attention to the disproportion between crimes and applied penalties, the inconsequential use of the death penalty, prison conditions and the indiscriminate use of torture, among others. . In addition, he stressed that only laws could determine which penalties would be applicable to which crimes.

Montesquieu, Voltaire and Rousseau also deserve to be mentioned, who in their works fully criticized the inhuman, cruel and arbitrary punishment applied by the current criminal law, acting in defense of the freedom of the individual and the execution of a fair and proportional penalty.

In this sense, the Humanitarian Period is characterized by the emergence of the Classical School of Criminal Law, which adopted an idea of punishment based on rationality, proportionality and free will. Punishment was essentially the response of a rational legal system to irrational criminal behavior.

The Classical School, thus, develops the following postulate of social control: crime is inadmissible irrational behavior in a rational and self-determined human being, so that criminal behavior triggers a simple social reaction, delimited by an abstract rational equation between social gravity of the damage produced and the extent of the resulting social reaction. There is no concern to understand the motivation of the criminal behavior or the concrete circumstances of the action, there is only talk of a valuation of the crime according to abstract and formal criteria.

However, the abstract premises preached by the Classical School brought an internal contradiction that corrupted its theory: the real extent of criminal behavior, a concrete social phenomenon, which occurs within a rational social order. Now, how is it possible for a rational social order to produce irrational social situations? It is not possible to admit the irrationality of the order, just as it is not possible to admit the rationality of the crime. Thus, the paradoxical structure of classical thought is exposed.

In view of the contradictions of the Classical School, this theory lost ground to the Positive or Anthropological School, which granted the penalty the function of re-educating the criminal. Strongly inspired by the natural sciences, positivist criminology works with the casual-deterministic method in an attempt to discover the biological or psychological causes of criminal behavior. As a great exponent of this school, Cesare Lombroso stands out, who developed the theory of the born criminal.

According to Juarez dos Santos[5], Lombroso's theory was developed in comparative research of samples of prisoners and soldiers, with the objective of verifying physical characteristics capable of identifying the criminal as an individual with biological or psychological defects. This theory, as a criminological development of a Darwinian intuition, assumes that crime is the product of the criminal's atavistic fixations: antisocial behavior is defined as a form of regression to the wild state, produced by biological degenerations identifiable by stigmas (physical characteristics) of the subject , such as, asymmetrical face, abnormal dentition, extranumerous teeth or fingers, large ears, defective eyes, inverted secondary sexual characteristics, etc. The original formulation of the theory underwent modifications and additions, and, in the end, together with the modality of the born criminal, the epileptic, the insane and the occasional criminal appear.

The penalty, therefore, is justified by the need for re-education of the criminal and social defense. The Positive School inaugurated the scientific-contemporary phase, from which several other theories emerged, such as genetic theories of violence, behaviorist theories of aggressiveness, psychoanalyst explanations of aggressiveness, etc.

It is noteworthy, however, that the Positive School, despite focusing on possible explanations for criminal behavior and attributing a utilitarian character to the penalty, by doing so through biological determination, totally disregarded the real economic, political and social conditions of individuals, in addition to uncritically assuming the norms of the social order that determine the

parameters of deviant behavior. The theory ignores that crime is a conduct valued according to parameters of the social order, represented by the legal and political forms of social control of the capitalist State, and defines deviation as an individual defect, with diagnoses that legitimize preventive or repressive interventions that harm human dignity[6].

Finally, the Eclectic Schools appear, which argue that the penal system should work to guarantee social defense, but should, however, treat the criminal based on ethical principles that are part of the social-legal system.

Having made this brief historical recapitulation, we will now study the theories of punishment.

3. Retributive Theory

Absolute or retributive theories deal with the penalty as retribution for the criminal act, such a penalty being considered only in its intrinsic axiological value of punishing the crime, not having a future objective.

Kant and Hegel are great exponents of these theories, expressed in their works Metaphysics of Morals and Principles of the Philosophy of Law, respectively. However, thinkers differ as to the justification of the penalty: for Kant, it would be ethical, while Hegel considers that the foundation of the sanction derives from the legal system.

According to the Kantian understanding, it is the sovereign's obligation to punish those who break the laws, considered unworthy of citizenship. Kant considered Law as the set of conditions through which the will of one can agree with the will of another, following a universal or general law. The Law, therefore, must take into account the actions of people insofar as they can affect each other in a reciprocal way, and, moreover, accept that within the Law there is the possibility of coercion. The Criminal Law, following his thought, must be applied against the culprit for the simple reason of having committed a crime, since man is considered an end in himself.[7]

Hegel's thesis, in turn, can be explained by the following sentence: "penalty is the negation of the negation of Law". The penalty is justified by the need to re-establish the validity of the legal order, which was denied by the delinquent act. Criminal punishment, therefore, comes to repay the illicit committed, in order to restore the general will of the legal order.

It is also worth mentioning the retributionist conception of ancient Christian ethics, which defends the need to retribute sin with a punishment for its atonement to occur. Despite the strictly religious, not legal, foundation, it is interesting to note its proximity to other retributionist theories, since the penalty does not have secondary purposes, serving only as a response to sin.

Absolute or retributionist theories, in short, define punishment as a response to the crime. Such theories were important in establishing limits to the imposition of the penalty, based on the consideration of the freedom of individuals and the dignity of the person. Such theories also contributed to questioning the suitability and proportionality of penalties to the crimes committed, thus curbing state discretion. However, the absolute theories failed to attribute an external justification to the criminal sanction, which allows, as an adverse effect, the legitimation of authoritarian systems of criminal law in which the reason for the punishments is never questioned.

4. Preventive Theory

The relative or preventive theories of punishment understand that Criminal Law must have a preventive character, so that the establishment of penalties must serve to re-educate the offender and to discourage criminal activity. The penalty, therefore, ceases to be conceived as an end in itself and to be justified by its necessity: the prevention of crimes. For this reason, such theories are also known as utilitarian theories, as the penalty becomes a means to achieve a future end.

Relative theories developed from the natural law and contractualist thinking of the 17th century, inspired by the liberal ideals that served as the basis for the formation of the Rule of Law. Relative theories are subdivided into two categories: general prevention and special prevention, aspects that differ in relation to the recipients of the penalty action. Furthermore, these two aspects are divided according to the nature of the penalty benefits, which can be positive and negative. We will address each of these hypotheses separately.

4.1 General Prevention

General prevention theories aim to prevent crimes. These theories are subdivided into general negative prevention and general positive prevention. The former corresponds to a deterrent to possible delinquents through the threat of punishment, while the latter is based on the function of strengthening the trust that citizens have in the legal system.

Preventionist ideas are based on the development of Enlightenment thought, in which rational human activity is valued and opposed to the ideals of the absolutist State. It presupposes the existence of an individual who, endowed with rationality and free will, can recognize the advantages and disadvantages of the crime in relation to the imposed penalty.

According to Feuerbach[8], the solution to the crime problem must be given through Criminal Law, which is achieved through the threat represented by sanctions; the penalty is, therefore, an “ideological coercion” to avoid the crime. In this sense, the theory of general negative prevention is based on the use of punishment to intimidate individuals not to commit crimes, serving as a form of psychological coercion

against the incidence of crimes.

The general positive prevention theory aims to send a message to the members of the community, not being, however, an intimidation or fear message: it is a reaffirmation of the values of the legal norms, so that the confidence that the people have in the legal system is reinvigorated. In this sense, Roxin's teaching stands out , who stated that positive general prevention has three main effectsd: the learning effect through the socio-pedagogical motivation of members of society; the effect of reaffirming confidence in Criminal Law; and the effect of social pacification when the applied penalty is seen as a solution to the conflict generated by the crime.

4.2 Special Prevention

Special prevention also seeks to prevent the crime, but acts only on the criminal individual, so that he does not relapse in crime. Unlike general execution, which begins with the legal commission of the criminal type, special prevention arises at the time of execution of the sentence. The penalty must, in the wake of this theory, act directly on the individual to "correct the deviations" that led him to the criminal practice, serving for his re-education, readaptation and resocialization, and may also serve for his neutralization.

Thus, it is understood that the theory of special prevention does not seek to intimidate the social group, it only focuses its action on the delinquent individual so that he does not relapse in criminal activity.

5. Unified Theory

The Unified theories of punishment seek to group, in a unifying way, the most outstanding aspects of absolute and relative theories in a single concept. Retribution, general prevention and special prevention are analysed as distinct faces of the penalty phenomenon. These theories criticize the thesis supported by absolute and relative theories, arguing that they are incapable of covering the complexity of social phenomena, which cannot be understood from monistic formulas. In addition, the unified theories make a clear distinction between grounds and ends of punishment.

The basis of the penalty, according to these theories, must refer exclusively to the criminal act committed.

As for the objective of the sentence, the unifying theories identify it with the protection of society. In this sense, several currents arise: the conservative position, represented by the Official Project of the German Penal Code of 1962, characterized by those who believe that the protection of society must be based on fair retribution and, in determining the penalty, preventive purposes play a role exclusively complementary role, always within the retributive line; on the other hand, the progressive current appears, materialized in the so-called German Alternative Project, of 1966, which reverses the terms of the relationship: the foundation of the penalty is the defense of society, that is, the protection of legal interests, and the retribution corresponds to the function only to establish the maximum limit of prevention requirements, preventing such requirements from raising the penalty beyond what is deserved by the fact committed. In this sense, it is possible to deduce that the unifying theories accept retribution and the principle of culpability as limiting criteria for the intervention of the penalty as a legal-penal sanction [9].

It should be highlighted, in this context, Roxin's thought, which identified several limitations related to the doctrinal constructions of mixed theories of punishment. According to the jurist, "the simple addition not only destroys the immanent logic of the conception, but also increases the scope of application of the penalty, which thus becomes a means of reaction suitable for any use. The effects of each theory do not suppress each other absolutely, but, on the contrary, they multiply". [10]

In order to overcome such shortcomings, Roxin erected his own dialectical theory, which starts from the differentiation between the end of the penalty and the end of criminal law: Roxin argues that the end of the penalty can only be of a preventive nature, in the sense that the penalty can only pursue the purpose of preventing crimes, because in this way it would achieve the protection of individual freedom and the social system that they justify. the criminal rules. In this line of understanding, it also manifests that both special prevention and general prevention must appear as purposes of the penalty. The sentence declared in a conviction must be adequate to achieve both preventive purposes. And it should do it in the best possible way, that is, balancing said purposes. Thus, on the one hand, the penalty must serve the purpose of resocialization when it is possible to establish cooperation with the convict, not allowing reeducation or forced resocialization. Here Roxin manifests her adherence to positive special prevention and her rejection of negative special prevention measures. On the other hand, the penalty should project its effects on society, because with the imposition of penalties the effectiveness of penal norms is demonstrated, motivating citizens not to infringe them. The penalty would, from this perspective, have more than an intimidating purpose, the purpose of reinforcing society's confidence in the functioning of the legal system through compliance with the norms, which would finally produce, as an effect, social pacification [11].

In summary, Roxin argues that the penalty should serve the purposes of general and special prevention, limited by the measure of culpability, and may be set below this limit when preventive and special measures are necessary.

6. Conclusion

This article sought to analyze the different expressions of punishment throughout the historical development of humanity, emphasizing a critical view focused on the objectives given to penalties.

it is evident, therefore, that the penalty assumed different discourses and forms throughout its evolution: there are many theories that seek to give meaning to punishment, however, until today, the questioning remains, and scholars fail to point out a concrete and immutable foundation for the act of punishing. And maybe this is the asnwer they´ve been looking for.

No matter what moment in human history is being analyzed, the act of punishing will always be irremediably linked to the form of the state, the economic model and the form of social organization. It can even be said that the forms of punishment are an expression of all these factors. In this way, the grounds for the penalty will always be an expression of the social economic model of a given society, and as the economic and social factors of societies change over time, the grounds for the penalty also change. Therefore, it is safe to say that the penalty is a reflection of the interests of the domminant groups of a given society.

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