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Individualization and types of punishment included in the constitutional text

Individualization and unique penalty species in constitutional text

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Summary

From the analysis of the Constitution it is possible to observe that it functions not only as a foundation, but, mainly, as a limit to the*jus puniendi*, especially through its principled dictates, therefore, this article used the bibliographic method to search for a theoretical framework, based on both Brazilian and foreign doctrine, that was capable of modifying the debate about the application of the*potestas puniendi*. Thus, we analyze the evolution in the way in which the state's power to punish is treated in traditional discourses and seek to discuss the way in which contemporary constitutionalism brings about countless modifications and how it intertwines with criminal law, based on the assumption of a Democratic State of Law as a Constitutional State and, therefore, several structural changes are generated, with a view to adopting this paradigm. Furthermore, it is presented that, given the innovations that occurred with the advent of the promulgation of the Magna Carta of 1988, criminal law cannot remain closed, and must allow its performance and application of sanctions to be modified, given the dictates of democratic values, receiving a new feeling, not only merely repressive and punitive, but also resocializing.
Key words: Prison. Individualization of the Penalty. Resocialization. Constitutional principles. Limits of Punitive Power.

Abstract
From the analysis of the Constitution, it is possible to observe that it works not only as a foundation, but mainly as a limit to the jus puniendi, especially through its principiological dictates. Therefore, this article used the bibliographic method to search for theoretical framework, based on both in Brazilian and foreign doctrine, that was able to modify the debate about the application of potestaspuniendi. Thus, the existing evolution in the way in which the state's punishing power is treated in traditional discourses is analyzed and sought to discuss the way that contemporary constitutionalism entails numerous modifications and how it intertwines with criminal law, based on the assumption of a Democratic State of Law as a Constitutional State and, therefore, several structural changes are generated, in view of the adoption of this paradigm. Furthermore, it is presented that, in view of the innovations that occurred in view of the advent of the promulgation of the 1988 Constitution, criminal law cannot remain closed, and should allow its performance and the application of modified sanctions, given the dictates of democracy values, receiving a new feeling, not only merely repressive and punitive, but also re-socializing.
Keywords: Prison. Individualization of Penalty. Resocialization. Constitutional principles. Limits of Punitive Power.

1. INTRODUCTION

In the area of the State's jurisdictional activity, one of its functions is the protection of a legal asset, that is, protected by it. In case of violation of this asset, Brazilian law authorizes the application of penalties to those who violated a right, that is, attacked the protected legal asset. Therefore, Magna Carta expresses in its art. 5th, XLV, even if not exhaustively:

> Article 5 XLV: The law will regulate the individualization of the sentence and will adopt, among others, the following:
> a) deprivation or restriction of liberty;
> b) loss of property;
> c) fine;
> d) alternative social provision;
> e) suspension or interdiction of rights.

Furthermore, the Penal Code, in the same way, presents in a definitive way, in Title V, in its chapter I, the types of penalties:

> Title V
> Das Penas

> Chapter I
> Types of penalties Art. 32:
> The penalties are: I -
> Deprivation of liberty; II -
> Restrictions of rights; III -
> fine.

In view of the above, it is extremely important to reiterate that the right to freedom is one of the guiding values of the national order, therefore, incarceration has an exceptional and temporary nature, and its application is possible only within the parameters established in criminal legislation.
In this light, it is observed that the legislator allows the application of alternative penalties in the Brazilian legal system, not focusing only on corporal punishments. These alternative penalties have been protected since 1984, with law 7,210 (criminal execution), opening a range of options regarding the application of sanctions, thus facilitating and operationalizing the Principle of Individualization of penalties, as it amplifies the possibilities to shape legislation to specific cases. However, in 1988 the alternative penalties expanded, adding two more, all set out in art. 43 of the Penal Code:

> I- Cash benefit; II-loss of
> goods and values;
> III- provision of services to the
> community; IV- Temporary interdiction
> of rights; V- Weekend limitation;

In this way, the national legal system comprises in its normative text, combining the constitutional text with the infraconstitutional law of a criminal nature, three types of penalties: Deprivation of Liberty Penalty, Restrictive Penalty of Rights or Alternatives and finally, Fine Penalty, discussed later .
Overcrowded prisons and the large number of recidivist inmates focus and open discussion regarding the effectiveness of institutionalized forms of sentencing, as the increase in prisons and the irreducibility of the law do not seem to be having positive effects, when analyzed in isolation.
In this work, we will outline the history of punishment, starting from the beginning, with disproportionate sentences and based on rituals of cruelty, with no idea of resocialization of the defendant, now convicted, to humanized sentences, guided by international entities, basing resocialization on sentences alternatives. Thus, we will portray the Brazilian reality in the face of these international incentives and point out possible solutions for, in fact, effective resocialization to occur.
Therefore, given the aforementioned crisis in criminal law and its legitimizing discourses, it is extremely necessary to analyze the problem thoroughly in order to find the root of the problem, that is, in the causative agent itself.

2 CONSTITUTIONAL PRINCIPLES AS LIMITS TO PUNITIVE POWER

With the advent of historical events in the 20th century, for example, the two great wars and the horrors caused by them, brought to light several changes in the social sphere and in the way in which it is organized, among the changes we can highlight the limitation of punitive power, providing a significant change in the theory of law itself, detaching from merely positivist theories and giving way to principles, which have become the core of constitutional systems.
It is worth highlighting that constitutional principles cannot be confused with the general principles of law, as these are formed from another vector of rationality, whether factual, normativist or axiological, that is, the idea of causality that is incorporated to a greater or lesser extent measured by the different positivisms, basing the concept on a purely mathematical character. (Cf. OLIVEIRA, 2008; ABBOUD et al., 2015). Distinctly from the general principles of law, constitutional principles open up the possibility of an existential dimension to law, as "overcoming the model of rules implies a profound change in law, because, through principles, it starts to channel the element of the practical world" (STRECK, 2014b, p.288).

> In this sense, it is important to say that these constitutional principles [...] differ from the principles of law, being, now, normatively material principles underlying legality itself, normative expressions of 'the law' in which the legal system demands its meaning and not just its rationality. (SNOWS*apud*ABBOUD et alii, 2015, p. 315.).

In this way, it is valid to highlight that constitutional principles are not met with rational adequacy, being normative and distancing their normativity "[...] from an intersubjective coexistence that emanates from the bonds existing in the political morality of the community" (STRECK, 2014, p. 67), demanding, in addition to rationality, a conformation of the being of the legal system itself. In the same way, "(Constitutional) principles have a deep ontological rooting (in the sense of hermeneutic phenomenology), because this ontological perspective is focused on man,

for the way this man is in the world, in facticity" (op. cit., p. 234).

However, to understand the core of the concept of legal good from the Constitution within any of the two Constitutional Theories of legal good, it is necessary to understand the meaning of the expression Criminal Policy. That, according to Liszt, cited by Luiz Regis Prado (1997, p. 33) "Criminal Policy becomes a systematic compendium of principles according to which the State carries out the fight against crime". According to Luiz Regis Prado, for Liszt the legal good lies on the limit between Criminal Policy and Criminal Law (1997, p. 33). When it comes to the legal good in the argument of the Constitution, the thinking does not differ much, since according to the same author "the concept of legal good must be inferred in the Constitution, operating a condition of normalization of political-criminal directives" (1997, p. 51).

This means that the criminal legal good in a constitutional expectation must start from the observance of constitutional principles that test the most convenient paths for the State in its action against crime.

In the same way, as can be seen from the evolutionary contextualization of both the legal good, made in the first item of this article, and the evolutionary record of legal thought from the most primitive jusnaturalism to post-positivism, the criminal legal good, today must be framed in a post-positivist perspective, which, given the study carried out, best develops within the broad Constitutional Theory.

This argument is supported by the statement made by Luiz Regis Prado (1997, p. 54) when he talks about fundamental principles and legal assets: "Modern legal thought recognizes that the immediate and primordial scope of Criminal Law lies in the protection of legal assets – essential to the individual and the community –, guided by the fundamental principles of personality and individualization of punishment; of humanity; of insignificance; of culpability; legalized criminal intervention; of minimal intervention and fragmentation".

3 CRIMINAL LAW AND PENALTY

We can measure the level of humanitarian evolution according to the evolution of penalties in the social sphere. In this way, the more serious and inhumane the penalties, the more precarious the ethical-philosophical development was. The abandonment of distressing penalties, controversial to the dignity of the human person, would thus represent social evolution, even if there are still remnants of these penalties in modernity, present in custodial sentences.

In the historical links of punishment in Classical Law, the influence of three currents is notable: retributive, preventive and mixed or eclectic.

For retributionists, as the name itself makes clear, the crime, being transgressive conduct, deserves a response, a kind of revenge, leaving the private sphere and becoming public. In the ideology of the absolutist State, crime is an offense to the sovereign, which provokes anger that must be met with severe corporal penalties, which already explains the numerous conflicts of the time. However, even though the State began to organize itself into a liberal State, the same idea remains, but now it is an attack against the legal order and life in society, and is also at the mercy of a punishment that matches the gravity of the act. .

Originating from the idea of Talião ("an eye for an eye, a tooth for a tooth"), it bases the conception of justice on the equality of the evil of the crime and the evil of the penalty. Because it resembles revenge, this theory is infused with rationality, as it does not seek pacification, but rather asserts violence even more.

It is observed that in reprobation lies the idea of retribution of the penalty, as Roxin quotes, "the theory of retribution does not find the meaning of punishment in the perspective of some socially useful end, but in that through the imposition of an evil deservedly retributed, balances and monitors the author's culpability for the act committed. We speak here of an absolute theory because for it the end of punishment is independent, disconnected from its social effect. The conception of punishment as compensatory retribution has actually been known since antiquity and remains alive in the consciousness of the profane with a certain naturalness: the punishment must be fair and this presupposes that it corresponds in its duration and intensity to the gravity of the crime, that the compensate" (ROXIN, *apud* GRECO, 2008, p. 489).

Distinctly from the retributive theory, the preventive current asserts the search for a positive consequence for the crime, postponing its effects, since what has already been done is not reversible, thus reducing the act performed. In this case, prevention of a general nature is sought, in order to dissuade them from criminal acts. General negative prevention is based on a language of threat, establishing rigorous penalties, a type of Criminal Law of Terror. The general positive believes in restoring the trust of the components of society, where serving the sentence is nothing more that the guarantee that the agent will pay for what he committed. The idea of mere revenge is abandoned to be based on social defense forums.

Still from a preventive perspective, there is a concern not to comment on those who commit the crime, but also on those who have already committed the crime, so that they do not do it again. Thus, in a negative dimension, instruments of social segregation are used, in the form of a penalty restricting freedom, with the aim of restraining the agent from committing new crimes. In terms of positive prevention, we talk about prevention aimed at the agent, in order to resocialize them by applying pedagogical methods in order to rescue social values that are now abandoned.

Based on the aforementioned currents, eclectic or mixed ones emerge, which include both aspects of revenge and

that of prevention, which, governed by the limited punishment of guilt, are dosed symbiotically.

4 CONCEPT OF PENALTY AND PRISON SYSTEMS

In the view of Luiz Vicente Cernicchiaro, the penalty can be analyzed in terms of three aspects, "substantially it consists of the loss or deprivation of the exercise of the right relating to a legal object; It is formally linked to the principle of legal reserve, and is only applied by the Judiciary, respecting the adversarial principle; and teleologically, it is shown, concomitantly, punishment and social defense." (Cernicchiaro apud MIRABETE, 2000, p. 46).

According to Soler, the penalty is "a distressing sanction imposed by the State, through criminal action, on the author of an infraction, as retribution for his illicit act, consisting of the diminution of a legal asset and whose purpose is to prevent new crimes". (SOLER, apud MIRABETE, 2000, p. 246). And, Fernando Capez (2002, p. 319), establishes the penalty as:

> criminal sanction of a distressing nature, imposed by the State, in execution of a sentence, on the person guilty of committing a criminal offense, consisting of the restriction or deprivation of a legal asset whose purpose is to apply punitive retribution to the offender, promote his social readaptation and prevent new transgressions through intimidation directed at the community."

5 PRISON SYSTEMS

In view of the aforementioned, penalties were imposed in a distressing manner, where the agent's body paid for the transgressive act committed.

In this connection, the penalty of deprivation of liberty has its foundation in the Middle Ages, as best explained by Manoel Pedro Pimentel, when he states that the penalty "had its origins in the monasteries of the Middle Ages, as a punishment imposed on erring monks or clerics, causing to retire to their cells to dedicate themselves, in silence, to meditation and repent of the offense committed, thus reconciling themselves with God." (PIMENTEL, apud GRECO, 2008, p. 494). The penitentiary systems have their deep roots in the 18th century, which, according to Cezar Roberto Bitencourt, had, "in addition to the antecedents inspired by more or less religious conceptions, a very important antecedent in the establishments of Amsterdam, in the*Bridwels*English, and in other similar experiences carried out in Germany and Switzerland. These establishments are not only an important antecedent of the first penitentiary systems, but they also mark the birth of the custodial sentence, overcoming the use of prison as a simple means of custody". (BITENCOURT, apud GRECO, 2008, p. 492).

During this evolution, we can find emphasis on the Pennsylvanian, Auburnian and Progressive systems.

In Pennsylvania, also known as cellular, the inmate was isolated, separated from the rest of the prisoners, deprived of work and visits, and forced to persuasively repent by reading sacred scriptures. The system received several criticisms, as in addition to being harsh and inhumane, it made the agent's rehabilitation impossible.

Later, the Auburnian system emerged, where the prisoner was allowed to work in his cell, even in a group, but in total and absolute silence. This system also prohibited family visits and abolished leisure and physical exercise, and opened discussion about its ineffectiveness.

In the progressive system, as the term itself defines, it was a progression of the sentence, divided into three stages, where in the first the prisoner was totally isolated, in the second he was allowed to work, but in silence, and in the third he was allowed to be released. conditional.

6 CLASSIFICATION OF PENALTIES

According to art. 32 of the Penal Code, penalties can be: Deprivation of liberty; restrictive rights; and Fine. The custodial sentences for crimes or offenses are imprisonment and detention.

Penalties restricting rights, according to the new wording given to art. 43 of the Penal Code by Law 9,714/98 is classified as: Cash Payment; Loss of goods and values; Provision of Services to the community or public entities; Temporary interdiction of rights; and Weekend limitation.

6.1 Deprivation of liberty sentences

The penalties for deprivation of liberty, as already mentioned in the Penal Code, are imprisonment and detention.

It is provided for in the secondary precept of each criminal classification, giving rise to the analysis of proportionality between the sanction imposed in compliance with the legal interest now protected.

The penalties of imprisonment and detention are different when taking into account the scope in which they are found, whether in the Penal Code or the Code of Criminal Procedure, as follows:

i. The prison sentence will be served in a closed, semi-open or open regime. Detention must be carried out in a semi-open or open regime, except when there is a need for transfer to a closed regime.

(art. 33, *caput*, CP);

ii. If there is a material contest, the penalties of imprisonment and detention apply cumulatively, executing them if the first one (arts. 69, *caput*, and 76 from CP);

iii. In relation to the security measure, if the act committed by the unaccountable person is punishable by detention, the judge may subject him to outpatient treatment;

iv. In reference to preventive detention, the requirements of art. 32 of the CPP, may decree intentional crimes punishable by imprisonment; on the other hand, in cases of detention, preventive detention will only be permitted when the accused is a truant, and there is doubt about his identity (art. 313, I and II, of the CPP);

v. The police authority, in turn, may grant bail in the event of infractions punishable by detention (art. 322 of the CPP);

saw. In the case of intentional crimes against life punishable by imprisonment, and therefore non-bailable, the summons will always be served on the defendant personally (art. 414 of the CPP).

It is worth mentioning that the Criminal Misdemeanor Law provides for simple imprisonment as a custodial sentence. This must be carried out in a special common prison establishment, in a semi-open or open regime. The convicted person must be separated from those sentenced to imprisonment or detention.

6.2 Penalties restricting rights

In order not to make prisoners less dangerous compared to those with a greater degree of dangerousness, our order provides alternatives for replacing custodial sentences with alternative sentences. The alternatives are considered autonomous because they constitute a main effect on the conviction and substitutive because they are only allowed in substitution, which is why we perceive the application of a sentence depriving one of liberty, and, subsequently, a sentence restricting rights. In this way, Damásio de Jesus defines restrictive penalties as "sanctions and measures that do not involve the loss of freedom".

Fernando Capez also adds to the discipline that:

> Alternative sentences seek to achieve the following goals: a) reduce prison overcrowding and reduce the costs of the penitentiary system; b) favor the resocialization of the perpetrator, avoiding the harmful prison environment and the resulting stigmatization; c) reduce recidivism, since the custodial sentence, among all, has the highest rate of recidivism; d) preserve the victim's interests."

6.2.1 Classification of penalties restricting rights

Penalties restricting rights are classified as generic and specific, where the specific are those that apply only to specifically determined crimes, and the generic are the others, substituting penalties for any crimes. In this sense, we can classify rights-restricting penalties into: Monetary benefits; Loss of goods and values; Provision of services to the community or public entities; Temporary interdiction of rights; and Weekend limitation.

Cash benefit: This involves a monetary payment to the victim, their dependents or public or private entities with a social purpose. The judge may set the benefit between 1 and 360 minimum wages. However, for this application the following requirements must be observed:

– The victim and their dependents will have priority, with public and private entities following them;

– The fixation cannot exceed the value mentioned above (1 to 360 salaries);

– If the beneficiaries coincide, the amount paid, either to the victim or his descendants, will be deducted from the total amount in the civil reparation action.

Loss of goods and values: It implies a loss to the inmate in relation to the National Penitentiary Fund of the amount capped at the loss caused or the advantage obtained from the criminal act.

To differentiate between the loss of goods and values and confiscation, Luiz Flávio Gomes states that: "only the confiscation of instruments of crime (instrumenta sceleris) and the proceeds of crime (producta sceleris) or the profit obtained from it (CP, art. 91), that is, intrinsically anti-legal goods; in turn, the loss of goods and values does not require that they be fruits of crime (fructus sceleris). What the convicted person will lose are their legitimate assets or values, those that are part of its legal assets. In this case, therefore, proof of their illicit origin is not required" (GOMES, apud GRECO, 2008, p. 540).

Provision of services to the community or public entities: It consists of the prisoner participating in unpaid tasks in public institutions such as schools, hospitals, etc. The assigned tasks take into account the convict's abilities and are calculated based on one hour of task per day of conviction, so that it does not affect the normal working day.

As for its specifications, it can only be applied to sentences exceeding six months of deprivation of liberty, and

If this is longer than one year, the convict's choice is to serve the sentence in a shorter period of time (art. 55 of the Brazilian Penal Code), but never less than half of the sentence previously imposed.

Temporary ban on rights: This is subdivided into four types, namely:

– Prohibition of holding a public position, function or activity, or elective mandate;

– Prohibition of exercising a profession, activity or craft that depends on special qualification, license or authorization from public authorities;

– Suspension of authorization or license to drive a vehicle;

– Prohibition of going to certain places.

According to legal provisions, it should have the same duration as the replaced sentence.

Weekend Limitation: According to art. 48 of the CP, the weekend limitation is the obligation to stay, on Saturdays and Sundays, for five hours a day, in a hostel's house or other suitable establishment. During this stay, courses and lectures may be given or educational activities may be carried out.

6.3 Fine penalty

It consists of paying to the Penitentiary Fund the amount fixed in the sentence and calculated in fine days. The number may vary between 10 and 360 fine days, being fixed by the judge, and cannot be less than one-thirtieth of the value of the highest monthly minimum wage in force at the time of the incident, nor greater than five times that wage (art. 49, paragraph 1, of the CP). When setting the fine, the judge must take into account, essentially, the economic situation of the defendant, and its value may be increased up to three times if the judge considers that it is ineffective although applied at the maximum.

The application of the fine penalty must also find the number of fine days to be applied, taking into account the three-phase criterion of art. 68 of the Penal Code, and assign the value of each fine day considering the economic capacity of the sentenced person.

As highlighted by Luiz Regis Prado (Prado, Regis, 1995, p. 02). in an article by the tribunals magazine:

> 1.It has an undoubtedly distressing character, as it imposes certain deprivation on the offender, which ensures its intimidating effect. Some get used to prison, but no one gets used to paying fines.
>
> 2. It is divisible and flexible to the extreme, which allows it to be easily adapted to the personal conditions of the convicted person, their resources, the circumstances of the crime committed, etc!
>
> 3. Unlike prison, it does not degrade the condemned person or dishonor their family; the person fined does not become corrupt or contaminated, he remains with his, does not lose his job, nor does he abandon his normal means of subsistence.
>
> 4. It is the most reparable of sentences, because, once served if a judicial error is proven, it can be returned in full, which does not happen with custodial sentences.
>
> 5. It is economical, because it not only avoids the enormous expenses that the State must allocate to the maintenance of prison establishments, but it can also constitute a form of income for the State
>
> Furthermore, this penalty does not harm a legal asset considered elementary to the human person, such as freedom, but it does not cease to have an intimidating force, as it affects economic assets and, in a society centered around money, deprivation of such goods has a peculiar significance. “

7 THE CONSTITUTIONAL PROVISION OF PENALTIES AND THE UNRESERVED RATIFICATION OF THE ROME STATUTE

The Brazilian Federal Constitution in art. 5th, item 84, XIX, also prohibiting perpetual punishments of forced labor, banishment and cruel labor.

It soon appears that the legislator was careful to reject certain types of punishment that could be considered a violation of rights considered primordial, thus embracing more humane penalties. There was no agreement that Severe penalties could bring greater peace to combat the intensifying crime.

In this way, it was understood that fairer sentences should be applied to the convict, which observes principles fundamental aspects of the national legal system, such as the dignity of the human person.

Such prohibition, as it is one of the individual rights and guarantees, is considered an immutable clause, being, therefore, immutable and not subject to reform or amendment (art. 60, §4, item IV, CF).

However, in the Rome Statute there is a penalty provision that is not compatible with Brazilian constitutional precepts, as an example we can see art. 77, excludes 'b', which welcomes the application of the sentence of life imprisonment, if there is a high degree of illegality of the fact and the personal conditions of the convicted person justify it, which proves that not all international standards ratified by Brazil are consistent with national ones.

However, it is worth clarifying that Brazil ratified the Treaty in its entirety, and the possibility of ratification with reservations being carried out is not conjectured. In this way, the country that is part of the Statute is subject to all the regulations contained therein, and cannot resist the rule on the grounds that it contradicts its internal laws. Even because there is an understanding that if this occurs, incompatible international standards will automatically not be accepted. It is worth mentioning the understanding of COMPARATO (2003, p. 468): "A careful examination of the Brazilian constitutional provisions that appear to conflict with the Statute, as the authorities cited above rightly highlighted, leads to the conclusion that those international norms must be applied in the Brazil".

The ratification of the Rome Statute by Brazil made it agree to all the provisions provided for therein, and those applicable in a more rhythmic manner with the Federal Constitution could not be chosen. The reading of the text and the objective of the Treaty was opportune, opening the possibility of the State party to accept or not its integration into international instruments to combat the violation of human rights.

8 BRAZILIAN NATO BEFORE THE INTERNATIONAL CRIMINAL COURT AND THE APPLICATION OF THE LIFE SENTENCE

With the ratification agreed without reservations, after the Treaty came into force in Brazil, the debate began on whether it is possible to hand over a native Brazilian to the International Criminal Court; and the application of a perpetual sentence to him.

It is important to mention that the Federal Constitution prohibits the extradition of native Brazilians, remaining silent regarding surrender. Therefore, the concept of these institutes is distinct in doctrine so that there is no doubt as to the objectives, purposes and procedure of each one.

Extradition occurs because a State, in order to cooperate with another, hands over the person to be criminally prosecuted and judged. This can either be active, when requested by Brazil, or passive, if requested by another country. Both species are regulated by treaties signed between the countries, however, if no treaty has been established between the two, it will be up to the International Law of the country to which the request is made to regulate the matter. In Brazil, this matter is regulated in Law 8,815/80 and Decree 86,715/81. And, in the Federal Constitution in art. 5th, items LI and LII, it is foreseen that "no Brazilian will be extradited, except for a naturalized person in the case of a common crime, committed before naturalization, or proven involvement in illicit trafficking of narcotics and similar drugs, in accordance with the law"; and also that "extradition of a foreigner for political or opinion crimes will not be granted", presenting the content of art. 60, § 4, inc. IV, CF.

Surrender, unlike extradition, is not an agreement between two countries, but rather a State Party to the Rome Statute with a body of international jurisdiction, the International Criminal Court. Thus, in accordance with art. 89, § 1 of the Statute, the Court may request the surrender of an individual to any State in which he/she is located. The Statute of the International Criminal Court itself distinguished surrender from extradition in art. 102, paragraphs a and b, "surrender" means the delivery of a person by a State to the Court, and "extradition" means the delivery of a person by a State to another State.

This differentiation is very clear and precise between the surrender and extradition institutes. Therefore, considering that the Federal Constitution provides for the prohibition of extradition of a native Brazilian, nothing would prevent the latter from being handed over to the International Criminal Court. In fact, as COMPARATO (2003, p; 469) understands, the rules that recommend delivery do not fall within the scope of the Federal Constitution:

> Now, since the International Criminal Court is, of course, an organ of the international human rights system, it cannot but be concluded that the surrender of a Brazilian citizen to that court falls outside the scope of application of art. 5th, LI, of our Constitution.

Another issue that causes consternation is the possibility of imposing a life sentence on Brazilians who may be tried at the International Criminal Court. The possibility arises from the provisions of article 77 of the Statute, noting that article 80 of the same statute provides that the application by States of the penalties provided for in their respective domestic laws and the legislation of States that do not have the penalties provided for in the Statute will not be affected.

Given these predictions, it cannot be ruled out that a native Brazilian may be handed over to the International Criminal Court, and also be convicted and serve a type of sentence (perpetual in nature) that is strictly prohibited in the legal system.

internal legal. This is legitimized because the International Criminal Court aims to protect human rights when there are crimes of a serious nature, rejecting impunity.

In this sense, it is worth highlighting the teachings of PIOVESAN (2010, p. 233):

> The International Criminal Court appears as a complementary apparatus to the national courts, with the objective of ensuring the end of impunity for the most serious international crimes, considering that, sometimes, in the occurrence of such crimes, national institutions show failure or omission in carrying out the justice.

At the national level, the perpetual sentence is definitely contrary to the constitutional principle of the dignity of the human being.

human person, however, it seems that the intention is the understanding that, in the face of international norms, the protection of international society overrides, aiming to punish and curb affronts to the elected rights inherent to all nations, human rights. So much so, that the doctrine points out that this system is aimed at an international legal system, not to be confused with regulations of internal legislation. In this sense, MAZZUOLI (2006) clarifies that the most accurate interpretation regarding the prohibition of perpetual punishment in the Federal Constitution is that it is directed only to the Brazilian domestic legislator, not extending to foreign and international legislators, who are focused on the purpose of building an international legal system.

So much so, that the "Supreme Federal Court, on more than one occasion, has already authorized extradition from States that adopt the death penalty, with the condition that this sentence be commuted to life imprisonment". (MAZZUOLI, 2006, p. 42)

However, even given this justification and the purposes to which the jurisdiction of the International Criminal Court is directed, one cannot lose sight of the fact that the principle of the dignity of the human person also forms part of this desired international legal system, and that the perpetual penalty , although permitted, is not in line with the precepts for the protection of human rights.

Therefore, it cannot be forgotten that above the guarantee of the right to justice, the end of impunity and State sovereignty, which the Statute seeks to equate (PIOVESAN, 2007), other values must prevail in order to avoid the contradiction of protecting certain rights, violating others, making it nonsense for an International Human Rights Treaty to apply a type of penalty that goes against the entire system that aims to bring more humanity to the present day.

FINAL CONSIDERATIONS

Regarding the work presented, we put on the agenda a necessary question concerning the topic: in the absence of classification and penalization of illegal acts, what would become of the crimes? The answer would be: a collection of rules without designs.

In view of this, with the aim of limiting state power, the original constituent power was brought into the constitutional text, specifically in art. 5th,

In view of this, it is clear that, on this subject, the constitutional text not only has the aspect of establishing grounds for the application of sanctions, but also, by delimiting the actions of the*jus puniendi*, does not allow excesses that previously occurred to be repeated, such as torture and even death sentences.

Furthermore, the consolidated idea of the existence of a Democratic State of Law, brings the application of state punitive power closer to the real and main objective of punishment, which is, through the penal system, to allow the individual to reestablish social values, thus being able to return in the natural way of man, living in society.

With this, it is clear that by linking punitive state action to the principled foundations of the Constitution, it can be stated that criminal law would find its maximum effectiveness and giving meaning to the assumption that it would be an instrument of freedom, bearing in mind that incarceration must be exceptional and provisional in nature.

Therefore, it is concluded that interpreting the*potestas puniendi*, in the terms presented here, is to consolidate the application of the Democratic State itself, where individual and collective freedoms are respected and ensured by the state's own actions and not suppressed by it, through the application of degrading and torturing penalties, which have no social function and will not repay society in any way.

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