RCMOS
Revista Científica Multidisciplinar o Saber

ISSN 2675-9128
DOI 10.51473

Volume 4 - Número 4
Abril de 2021

PURPOSE OF PENALTY AND ITS EFFECTIVENESS THE CURRENT SITUATION OF SOCIETY BRAZILIAN

PURPOSE OF THE PENALTY AND ITS EFFECTIVENESS BEFORE THE CURRENT SITUATION OF BRAZILIAN SOCIETY

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SUMMARY

This article's theme is the analysis of the effectiveness of the purpose of the sentence, according to the theory adopted by the criminal legislation in force, given the current situation of Brazilian society. To this end, the work has the general objective of verifying whether the purpose of the sentence is effectively achieved in our current society and, as specific objectives, the analysis of the different theories of the purpose of the sentence, its framing in the criminal legislation in force and the repercussions on society contemporary. The methodology applied was bibliographical research, using the hypothetical-deductive approach method. The concepts listed demonstrate that the mixed theory of the purpose of punishment adopted by the Brazilian legislator is the one that best meets the fundamental principles of human dignity. However, due to several problems, the purposes of punishment, especially preventive punishment, are not achieving full effectiveness in our current society. **Key words:**Pity. Theories. Goal. Efficiency.

ABSTRACT

This article has its theme the analysis of the effectiveness of the purpose of the penalty, according to the theory adopted by the penal legislation in force, given the current situation of Brazilian society. For this purpose, the work has as general objective to verify if the purpose of the penalty is effectively achieved in our current society and, as specific objectives, the analysis of the different theories of the purpose of the penalty, its framing in the penal legislation in force and the reflections in contemporary society. The applied methodology was bibliographic research, using the hypothetical-deductive approach method. The concepts listed demonstrate that the mixed theory of the purpose of punishment adopted by the national legislator is the one that best meets the fundamental principles of the dignity of the human person. However, due to several

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problems, the purposes of the penalty, especially the preventive one, are not reaching full effectiveness in our current society.
Keywords: Feather. Theories. Goal. efficiency.

1. INTRODUCTION

Starting from the premise that the penalty is a legal consequence of the criminal offense, Numerous studies have been developed over the years regarding its purpose. The need for a State response to crime led Criminal Law to develop different solutions as a way of reacting to crime, the so-called theories of punishment.

Despite being a historical discussion, it is based on the emergence of three basic theories that better seek to define the purpose of punishment, namely, the absolute theory or retribution, the relative theory or prevention and, finally, the mixed or conciliatory theory.

Being aware of the relevance of this topic, the present work presents as a research problem the analysis of the effectiveness of the purpose of the sentence, according to the theory adopted by the criminal legislation in force, given the current situation of Brazilian society.

Taking this issue into account, some hypotheses arise, namely, the theory adopted by Brazilian Criminal Law is the one that best meets the principles that guide the purpose of the sentence, while seeking at the same time to punish the perpetrator of the criminal offense and prevent the commission of new crimes and, the current situation of the State encounters structural and procedural difficulties to guarantee the effective applicability of such precepts.

Because of this, the general objective of this work is to verify whether the purpose of the penalty is effectively achieved in our current society. To this end, the specific objectives are the analysis of the different theories of the purpose of punishment, their framing in current criminal legislation and the repercussions on contemporary society.

This work proves to be of great importance in view of the growing crime rates, combined with the State's duty to guarantee the safety of the population, punishing

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duly the perpetrator of a given crime and, at the same time, creating means that prevent the commission of new infractions.

To carry out and develop this work, bibliographical research will be used, using the hypothetical-deductive approach method, to verify whether the purpose of punishment is effective in our current society.

2 THEORETICAL FRAMEWORK

The increase in crime over the years has made numerous discussions necessary, especially regarding the need and the ways in which Criminal Law should behave, through State Power, in relation to the perpetrators of crimes.

From the moment a criminal offense is committed, whether a crime or misdemeanor, the State, through its power/duty to punish, must apply a penalty to the perpetrator, which in the doctrine is called*jus puniendi*.

In other words, the penalty is a legal consequence of the criminal offense, which consists of the deprivation of certain legal assets due to the commission of some typical fact, always paying attention to the principle of legality, according to the Federal Constitution in its article 5, item XXXIX, which precepts that "there is no crime without a previous law that defines it, nor a penalty without prior legal punishment" (CONSTITUAÇÃO FEDERAL, 1988), as well as the principle of priority of the law, under the terms of article 1 of the Penal Code, "there is no crime without previous law that defines it. There is no penalty without prior legal punishment" (DECREE-LAW No. 2,848, 1940).

However, for the*jus puniendi*of the State effectively reaches the world of facts and causes concrete effects on the perpetrator of the fact, the penalty must be constructed with a purpose, and which does not simply seek to deprive the individual of certain legal rights in a simplistic form of cause and effect.

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2.1 THEORIES OF THE PURPOSE OF PENALTY

Based on the State's duty/power to punish, numerous doctrinal and legislative constructions have been developed over the years to try to define what would be the purpose of the penalty imposed on the perpetrator of the illicit act, culminating in the emergence of three basic theories, namely , the absolute or retribution theory, the relative or prevention theory and, also, the mixed or conciliatory theory, which will be analyzed briefly and individually.

2.1.1 Absolute or retribution theory

This first theory understands that the penalty is nothing more than retribution to the criminal due to previously committed illicit conduct. In other words, the perpetrator of the act will be caused harm due to his or her own conduct.

Based on the retributive characteristic, "the purpose of the penalty is to punish the author of a criminal offense. The penalty is retribution for the unjust evil committed by the criminal, for the just evil provided for in the legal system (*punitur quia peccatum est*)" (CAPEZ, 2009, p. 364).

Therefore, the absolutist or retribution theory does not effectively have a purpose, while its application has the simple purpose of repairing an evil with another evil. In this regard:

> The penalty is conceived as a form of fair retribution for committing a crime. It is understood that evil should not go unpunished, so that the offender must receive punishment as a form of retribution for the evil caused so that justice can be carried out. For this conception, the penalty does not have any socially useful purpose, such as, for example, the prevention of crimes, but rather to punish the criminal for committing the crime. Kant and Hegel are the two great exponents of the absolute theses of punishment (AZEVEDO; SALIM, 2016, p. 398-399).

Likewise, Bitencourt (2019) understands that the aforementioned theory conceives punishment as being an evil in retribution for a certain harm caused by the criminal, without idealizing a future end, but simply punishing the past fact. As mentioned above, the aforementioned theory understands that the penalty is based only on a certain requirement of justice, while it punishes the

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individual who previously caused harm to another citizen through illicit conduct, without a useful purpose such as, for example, preventing new crimes.

2.1.2 Relative or prevention theory

Also called finalist or utilitarian theory, unlike the previous one, this one has a specific purpose, namely, the prevention of new crimes and the resocialization of the perpetrator.

Prevention is approached in two different ways, one general and the other special. The first is aimed at society as a whole, which is intimidated from committing crimes due to the punishment that will be applied. On the other hand, special prevention is aimed at criminals, so that they are resocialized and do not commit new crimes again. Following this understanding:

> [...] the penalty has a practical and immediate purpose of general or special prevention of crime (*punishment*). Prevention is special because the penalty aims at the social readaptation and segregation of the criminal as a means of preventing him from committing crimes again. General prevention is represented by intimidation directed at the social environment (people do not commit crimes because they are afraid of receiving punishment) (CAPEZ, 2009, p. 364).

In the same sense:

> While general prevention aims to prevent crimes by intimidating society, special prevention targets the criminal in particular, thus aiming to resocialize and re-educate him. The penalty, in this approach, has the purpose of preventing the offender from committing crimes again. (AZEVEDO; SALIM, 2016, p. 400).

It can be seen that this theory is not based on the idea of doing justice, but rather on the social need to apply it at the right time so that the perpetrator does not offend again, as well as so that new crimes are not committed, fulfilling thus its preventive purpose.

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2.1.3 Mixed or conciliatory theory

Also known as eclectic or intermediate theory, it is a fusion of previous theories, considering that it seeks, at the same time, to punish the perpetrator and prevent new crimes from being committed again.

With this theory "the two currents merged. It began to be understood that punishment, by its nature, is retributive, has a moral aspect, but its purpose is not only prevention, but also a mix of education and correction" (MIRABETE, 2005, p. 245). About this topic:

> Mixed or unifying theories attempt to group the ends of punishment into a single concept. This current tries to choose the most outstanding aspects of absolute and relative theories. Merkel was, at the beginning of the century, the initiator of this eclectic theory in Germany, and, since then, it has been the more or less dominant opinion. In Mir Puig's words, it is understood that retribution, general prevention and special prevention are different aspects of the same and complex phenomenon, which is punishment [...] (BITENCOURT, 2004, p. 88).

Following this understanding:

> Modernly, an eclectic position has been adopted regarding the functions and nature of punishment. This is what is conventionally called pluridimensionalism, or *mixtum compositum*. Thus, the retributive and intimidating functions of the penalty seek to be reconciled with the resocializing function of the sanction. The penalty began to be applied *quia pecatum est et ut ne peccetur* [...] (COSTA JR, 2000, p. 119).

Analyzing the final part of article 59 of the Penal Code, which states that "the judge [...] will establish, as necessary and sufficient for the reprobation and prevention of crime" (DECREE-LAW No. 2,848, 1940), it appears that This was the theory adopted by our legislator.

Our legal system seeks, through the enactment of laws, general prevention, while directing a possible sanction to any individual who commits an offense. Secondly, if a typical event has already occurred, retribution is attributed to the perpetrator of the event, through a court decision.

Finally, the resocializing purpose of the sentence is perceived when it is executed, a moment in which special prevention is verified on the individual individually.

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2.2 EFFECTIVENESS OF THE PURPOSE OF THE PENALTY

From the analysis of article 59 of the Penal Code, it is concluded that national law adopted the mixed theory of the purpose of punishment, considering that the current norm seeks to punish the perpetrator of the crime, repaying the unfair harm caused by him at the same time. , resocialize the offender and prevent new crimes from being committed.

Having overcome this discussion and analyzed the main theories that seek to define the purpose of the sentence, there is no doubt that the theory adopted by Brazilian legislation is the one that best fits with the general precepts that guide our legal system.

The State, being the exclusive holder of the power/duty to punish, is solely responsible for repaying the evil committed by a given agent through a penalty, but, more importantly, it must also have the capacity to resocialize him, re-educate him. him, so that he can return to social life and not commit new crimes again.

However, in practice, this is not what happens. Although the mixed theory is the most advisable, as it punishes the agent for the evil committed, creating in him the awareness that the evil caused will not go unpunished and, at the same time, with its preventive characteristic, the current situation in our society makes us believe that the purpose of the penalty is not reaching the level of effectiveness.

With the main penalty being deprivation of liberty and, knowing the current precarious situation of practically all penal establishments in the country, it is easy to conclude that the State encounters structural difficulties in guaranteeing the effective applicability of the resocialization and preventive purpose.

Simply taking into account the deplorable physical conditions and overcrowding, it is logically concluded that an individual who has committed a crime will not find effective means of reintegration into society in the prison system, even if he is interested.

On the contrary, escapes, rebellions and high rates of recidivism prove that the current system is not capable of guaranteeing resocialization and preventing the commission of new crimes. It is evident that it is not just a matter of preventing cruel, degrading or infringing punishments

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the fundamental precepts of our Magna Carta or the Universal Declaration of Human Rights, but rather to ensure that the penalty achieves its preventive purpose. In that regard:

> In our country, after slow evolution, the Federal Constitution, aiming to protect the rights of citizens, prohibited the imposition of a series of penalties, understanding that all of them, in a broad sense, offended the dignity of the human person, in addition to fleeing, in some hypotheses, its preventive function (GRECO, 2011, p. 469).

Given this, it appears that the theory adopted by Brazilian criminal law is the one that best represents the principles of the Democratic Rule of Law. However, the purpose of punishment, especially preventive punishment, is not being effectively achieved in our current society.

CONCLUSION

In view of all the above, we see that the penalty is a legal consequence of the criminal offense, applied by the State, which has the exclusive power/duty to punish. Numerous discussions were motivated in the search to define what the purpose of punishment would be, culminating in the emergence of three basic theories, namely, the absolute or retribution theory, the relative or prevention theory and, finally, the mixed or conciliatory theory. .

From the analysis of article 59 of the Penal Code, already mentioned above, it is concluded that the Brazilian legislator adopted the mixed theory, while the norm seeks, at the same time, to punish the perpetrator of the crime by repaying him for the unfair harm caused by him , resocialize the individual who committed a crime and prevent new crimes from being committed.

There is no doubt that the theory adopted by Brazilian legislation is the one that best adapts to the fundamental principles listed in our Federal Constitution, as well as to the rights protected by the Universal Declaration of Human Rights, which, among other rules, prohibit degrading, cruel or that in any way harm the dignity of the human person.

However, what is observed in practice is that the State is not managing, for various reasons, including lack of physical structure and overcrowding of prisons, to effectively guarantee that the main purpose of the sentence reaches the level of effectiveness.

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It is therefore concluded that, with the main penalty applied in our current system being deprivation of liberty, there is no way to conceive that, in the degrading conditions found in the majority of prisons in the country, that an individual would be able to resocialize, re-educate, to return to social life.

In this way, despite the theory of the purpose of punishment adopted by our legislation focusing on prevention, currently, its effects are not achieving great effectiveness, given the increase in crime, the large number of recidivism and the difficulty of reinserting an individual into society. who had once committed crimes.

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