International Journal of Latest Research in Humanities and Social Science (IJLRHSS)
Volume 05 - Issue 01, 2022
www.ijlrhss.com || PP. 126-159

The Educational Function of the Penalty and Its Applications

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Abstract: In this scientific research, it will be analysed the pedagogical function of penalty, addressing the theoretical framework of critical criminology, by exploring aspects of the penalty, the offender, prison, and criminal classification to study the effects of the penalty and its consequences, in order to achieve a parameter of the role of the penalty in the current moment in Brazil. The research considered the Brazilian Constitution and the Democratic Rule of Law, emphasizing the importance of the pedagogical function that in daily life ends up being breached in Brazil, since the thought of incarceration is seen as an immediate and definitive solution. Furthermore, the research addresses the fundamental principles and rights under the Constitutional, observing their consequences in the Law and Criminal Procedure, seeking to understand, initially, if the criminal sentences fulfil their pedagogical function in society.

Keywords: Penalty, pedagogical function, crime, resocialization, critical criminology.

Introduction

In the present scientific research, the goal is to understand the pedagogical function of the penalty, making a brief journey through the history of criminology, using concepts of penalty and crime as focuses for our study, to reach a parameter of the role of the penalty in the current moment in Brazil.

Considering that Brazil is under the aegis of the 1988 Constitution, democratically enacted in a Democratic State of Law, the importance of the pedagogical function is highlighted, which in practice ends up being ignorednowadays in Brazil, since the thought of incarceration is seen as an immediate and definitive solution.

It is also emphasised, in the course of the work, the immediacy of the need for a broader application of the principle of insignificance and restorative justice.

Therefore, it should be mentioned that the work will be subdivided into:

I. Methodology used, in which it will be analysed the activities developed in the period covered by the report, as well as the method chosen to face the research;
II. Scientific report, in which the object of study (the pedagogy of punishment) will be presented and critically discussed, as well as expressing sources and dogmatic authors to which we are affiliated;
III. Abstract of the research, to be published at the Annual IC Meeting of PUC-SP.

Methodology

a) Systematic

To achieve the goal of the research,it was used deductive research methodology, starting from the study of legal doctrines, and the study of real cases related to the social reality of imprisonment, to demonstrate the current problem and outline paths to be followed to advance in the problem solving of the strugglein Brazilian Criminal System. As for the purpose of this research, it is worth highlighting that it will address the descriptive research, as the research aims to “describe the characteristics of a given population or phenomenon” (GIL, 1999). This because it is necessary to describe certain penalties applied in Brazil, in order to understand the real problem of their pedagogical function.

The feasibility of this purpose will, also, be carried out through the qualitative research method, through which the data will be collected and ananalysed case-by-case. It is noteworthy that the zetetic practice about the studied literature, will also be a methodological support of the present research, in a way that different critical planes will be analysedmaking it possible to obtain a more comprehensive and complete perspective on the matter. The present scientific research will also be supported by the so-called tertiary sources of data, that is, the extensive bibliographic research.

With that put, the steps followed were:
1. Research of modern and contemporary authors about the penalty;
2. Research of international and national doctrines;
3. Research of models of application of the penalty in its pedagogical function;
4. Propositions of new models and ideas;
5. Jurisprudential position on the central topics dealt with.

b) Objective

This research aims to probe into the functions of the penalty, focusing on its less explored feature in Brazil, that is, its pedagogical function. Through studies of criminology, it is possible to observe the functionalities of the penaltyislittle discussed in the common environment of punishment. Through critical criminology, also addressing the precepts of Criminal Abolitionism, this research aims to illustrate alternative ways to incarceration and demonstrate the inefficiency of the penalty in its propositions of art. 49 of the Brazilian Criminal Procedure Code, especially with a focus on prevention and resocialization, considering the theoretical pedagogical effect of the penalty.

The inspiration for this project came from the external observation of the inefficiency of the application of sentences in Brazil, specially with the high rates of relapse and overcrowding of prisons.

c) Changes to the original work

Some of the original intentions of the project were changed as the research deepened, especially when one penetrates the studies of critical criminology and penal abolitionism. Thus, it should be noted that part of the original claim contained in the research plan no longer reflects the position initially defended, which will be demonstrated throughout the work.

Also, due to social distancing, cause by COVID-19, some of the research steps were not possible as planned, such as the difficulty of contacting some professionals, and especially making it impossible to research with the incarcerated and inside prisons.

c.1) New Schedule

Given the changes made, there was a need for a brief change in the original schedule:

SCHEDULE	
09/2020	Approval of the Research Project Making the online form for the public
10/2020	Analysis of form answers Directing research with modern doctrines
11/2020	● Analysis of doctrines for theoretical positioning
12/2020	● Adequacy of research in the face of critical criminology
01/2021	● Search for articles related to the topic
02/2021	● Note takingand selection of citations
03/2021	● Formattingthepartialreport
04/2021	● Model research - national and foreign paradigms
05/2021	● Confrontation with the problems presented in the paradigms
06/2021	● Verification of the possibility of applying found models
07/2021	● Research in Brazilianjurisprudence ● Verification of data from the National Secretary of Justice and Public Security
08/2021	● Improvementofconclusions

09/2021	• Final Project Review

d) Complementary Activity: Cultural and Academic Activities

The researchers of the present scientific initiation, with the intent of adapt to the pandemic scenario and social distancing due to COVID-19, sought to participate and search for online activities that would add content to the scientific work.

The academic-cultural activities consisted of documentaries, such as "O prisioneiro da grade de ferro (2003)", a Brazilian documentary about Carandiru Penitentiary, with scenes filmed by the prisoners themselves, which dialogues with the research demonstrating without filters the human rights violations that the incarcerated suffer and consequently the failures in the re-socialization process of those. Another documentary that served as a source for this work was "Pelo direito de recomeçar (2013)", released by the Public Defender of Tocantins, which also portraits the effect of resocialization. Additionally, the documentary "Kids for cash (2014)", which demonstrates the problematic of incarceration, by showing the problematic of criminalization, particularly showing a case that happened in the USA, where "everyday" misconducts end upleading children to be taken to reformatories, an emblematic example is of a girl who fought with a classmate and slapped her in the face, and as a consequence was removed from her family and placed in a reformatory for 7 years. Cases like this one demonstrate the arbitrariness of justice, which we have expressed throughout this work, and which deals with an essential part of the problematic of prison.

Another complementary activity carried through was the course: Introduction to Criminology by Introcrim, in which the several trends of criminology were presented together with their proposals, flaws and successes. The 26th International Seminar of Criminal Sciences, by IBCCRIM, was also of great help in the research through the lectures given, such as that of the great Nilo Batista, who elucidated the importance of looking at criminology from the perspective of penal abolitionism. In complement, the course of Penal Abolitionism ministered by Professor Ricardo Genelhú, along with the Introcrim, was ennobling in what concerns the understanding of alternative models to prison.

Scientific Report

a) Preliminary Report of the Search with the Public

To begin the research, it was decided to briefly capture the general perception of the population about the purpose of punishment. Due to the situation of social distancing in which the planet was plagued from March 2020 due to the Covid-19 Pandemic, a survey was conducted through a simple form (Google forms) shared online, containing some questions about the perception of the effectiveness of the penalty and its theoretical and practical effects.

Moreover, this form did not seek to quantify the opinions or people who participated, but rather, to have a broader view of what people think about the subject outside the academic world. Based on this, we do not seek an exact number of answers, but rather try to encompass different points of view on the subject, bringing complementary reflections to our research.

In the results we have a sample involving 220 people of different age groups, socioeconomic conditions (this answer is not compulsory to maintain the individual's privacy) and mostly unfamiliar with the Law, as shown in the graphs below:

Figure 1.Household Income

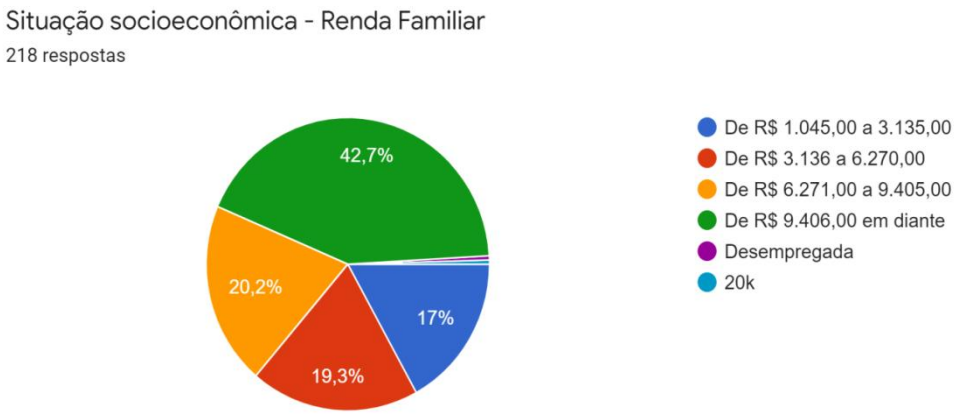


Figure 2. Age group

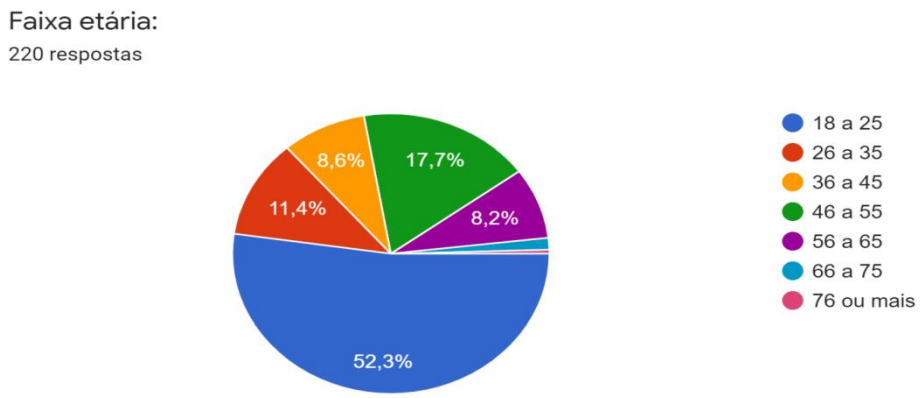
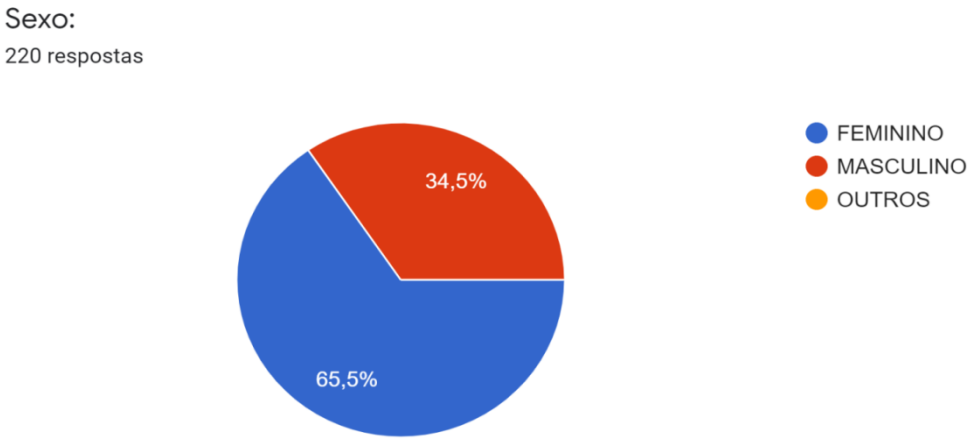
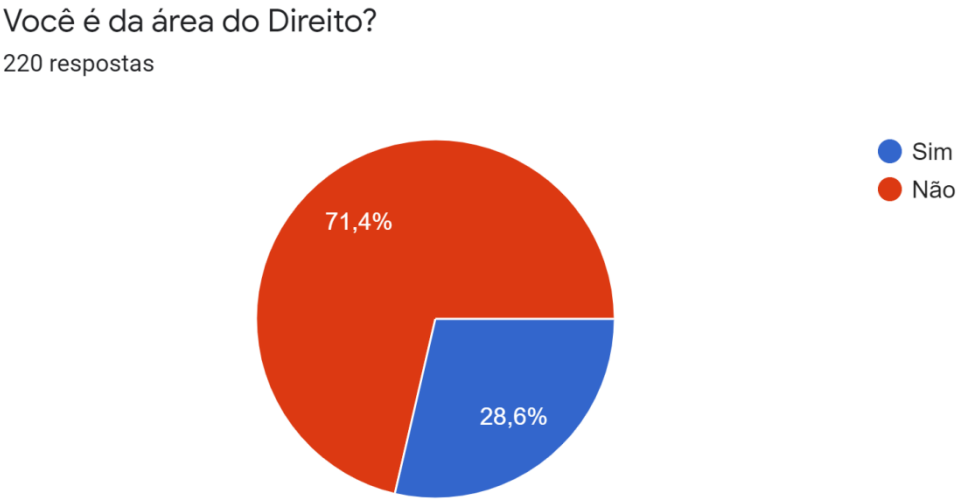


Figure 3. Sex



Dictionary to understand chart:
Feminino = Female
Masculino = Male

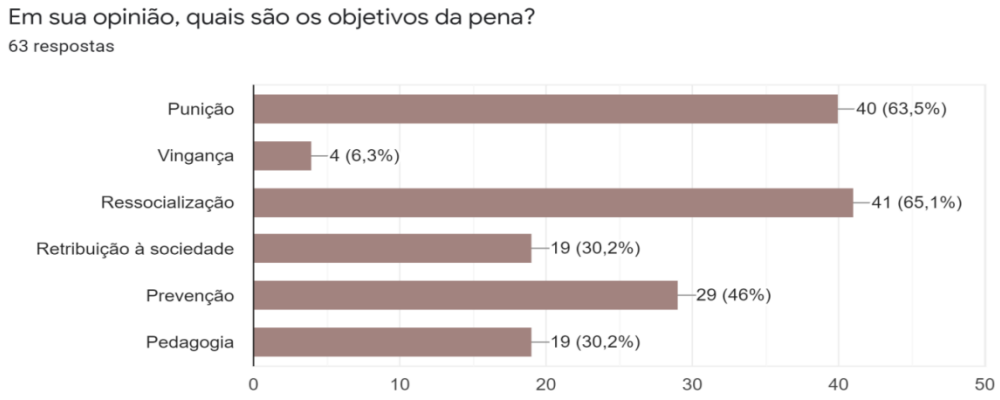
Figure 4. Do you work with anything related with law?



Dictionary to understand chart:
Sim = Yes
Não = No

Once definedthe public who answer the survey, it is possible to move on to analyse the answers. The first position captured is the general view of punishment, which is still one of extreme punitivism, as shown in the graph below:

Figure 5. In your opinion, what is the function of penalty?



Dictionary to understand chart:
Punição = Punishment
Vingança = Revenge
Ressocialização = Re-socialisation
Retribuição à sociedade = Retribuitionto Society
Prevenção = Prevention
Pedagogia = pedagogy/ education

As can be seen, there is also a high number of responses regarding the re-socialising objective of punishment. However, as already predicted, although many believe that the objective of the penalty is resocialisation, a large part does not consider that this objective is achieved.

In order to have a clearer view of the theme, the responses were separated into two blocks: those who declared themselves to be from the area of Law (63 individuals) and those who declared themselves from other areas (157 individuals). The reason for this comes from the curiosity to understand whether the view of those who may have studied the topic or even acted in some way affects the way they view penalties in the criminal justice system.

With that being clarified, the table below provides a comparison of views and percentages as the questions asked:

Table 1.

QUESTIONS ASKED	FROM THE AREA OF LAW			FROM OTHER AREAS (157)		
	YES	NO	PARTIALLY	YES	NO	PARTIALLY
Do you know what the resocialising effect of the sentence is?	**87,30%**	**12,70%**	**-**	**54,10%**	**45,90%**	**0**
Do you know what the pedagogical effect of the penalty is?	**87,30%**	**12,70%**	**-**	**50,30%**	**49,70%**	**0**

Did you know that the crime recidivism rate in Brazil is up to 70%?	**79,40%**	**20,60%**	**0**	**53,50%**	**46,50%**	**0**
Do you consider the Brazilian prison system effective in the pedagogical effect of the penalty?	**0**	**96,80%**	**3,20%**	**0,60%**	**91,70%**	**7,60%**
Do you consider the Brazilian prison system to be effective as a whole?	**0**	**96,80%**	**3,20%**	**0,60%**	**94,90%**	**4,50%**
Do you consider that the Brazilian prison system has failed as a whole?	**79,40%**	**0**	**20,60%**	**78,30%**	**3,80%**	**17,80%**

With the aim ofassist those who answered the questions in the questionnaire, a brief explanation about the effects of sentencing was placed at the beginning of the form:

Figure6. Explanation about the pedagogy of penalty

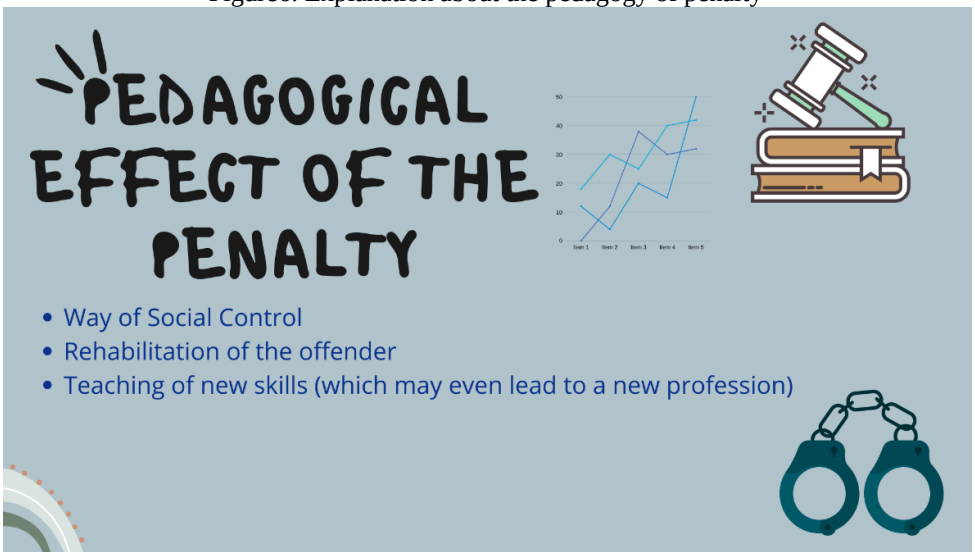
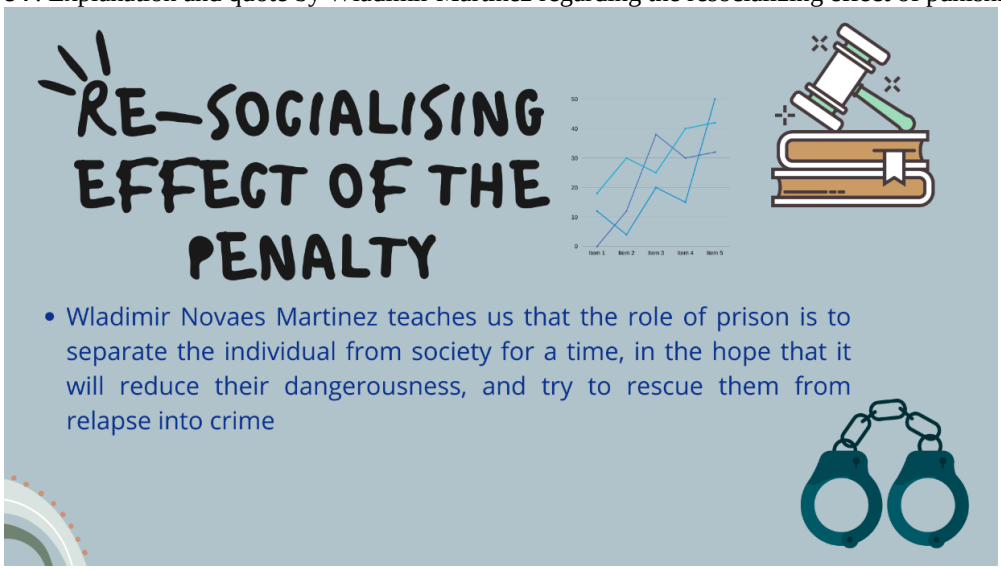


Figure 7. Explanation and quote by Wladimir Martinez regarding the resocializing effect of punishment.



Furthermore, at the end of the survey more open questions were provided in which people could convey their opinions on the topic addressed. Here we classify the opinions that were raised about the questioning we made below:

● What difference would you point to for the high recidivism rate in Brazil compared to countries with lower rates?

Table 2.

Resocialisation arising from the sentence;
Less social inequality;
Ineffectivepenalties;
Countries have better sanitary conditions, hygiene, education, and opportunities for rehabilitation inside prisons compared to the Brazilian prison;
The offender does not serve his entire sentence for various sentence time benefits. There is no isolation of prisonersand they have many freedoms inside the prison. All this together makes jail a not so bad place for them, contributing to recidivism;
Prison ends up being a school of crime given the high recidivism in Brazil;
Investment in re-education and re-socialisation within prison so that prisoners can leave in search of real job opportunities, and not need to return to crime;
Countries that focus on re-educating (even if through imprisonment) "white collar" crimes, like most Nordic countries, which the elite and the powerful usually set an example for, tend to have lower crime rates, consequently lower prison rates, and recidivism is even lower;
The exclusively punitive nature of the penalty and the policy of mass incarceration based on racial issues;
The main issue to be debated and reflected upon is inequality. I believe that inequality factors are directly linked to the high rate of recidivism in Brazil;
Our prison system does not work;
Lack of stimulus for reintegration into society;
Failed prison system, commanded by factions and without any public interest for the subjects that are crammed in there;
Apparently, it may not be related, but the massive investment in education and a greater opportunity for re-socialisation in other countries makes the recidivism rate lower than in Brazil, which unfortunately does not aim to reintegrate these individuals into society, but only treats prison as a form of punishment and imposition of state force;
Lack of investment in the implementation of welfare measures, offering courses and specializations in prison, non-introduction and prejudice of the prisoner in selective processes or jobs that do not accept this type of "record" passed in the person's life;
Lack of will of these politicians to create laws and ways to combat violence;
Overcrowding in prisons and no social re-education;
Prison is not fair for everyone: social class, race, etc. interfere in the judge's decision. If the law were truly isonomic, I believe that it would be a start for improving recovery or the effective objective of punishment (pedagogical/ re-socializing). It is also in jail in Brazil that many associate with new criminals, leading them, therefore, to commit new crimes;
Tougherlaws;

Lack of discipline and monitoring;
The system of castes it in Brazil does not bring any perspective of future out of the criminality, it generates integration of criminals with light penalty next to criminals of heavy penalties, in highly noxious environments, revolting, totally devoid of respect the humanity or you is not an effective work of effective resocialization with creation of professional perspectives for example many prisoners in Brazil with penalties far beyond the stipulated because the system does not work and the trials are slow and inefficient for the most vulnerable class of the population

Therefore, most answers show that the popular belief is that the high recidivism in Brazil is mainly due to the lack of application of the pedagogical function of the penalty (the data refer to the sample collected), the lack of public investment in the prison issue (especially regarding welfare measures inside the private prison and professionalizing courses) and in education, social inequality as a whole and ineffective penalties, in general. Still, there are those who believe that the problem is the imprisonmenttime is not long enough.

In addition, the last question asked in the form was open to possible comments and suggestions, which we highlight below:

Would you like to make any additional comments that we did not address in the survey?

Table 3.

I don't know if it is feasible, but privatising the penitentiaries might have its benefits;
Differentiate between the practical objectives of the penalty and the idealized objectives. Also consider biases of "penal abolitionism" as in this case the objectives of the sentence would never be resocialization/pedagogy and this may alter the final outcome;
I believe that sentences should be served in full, regardless of social status, the way one behaves during the sentence, health conditions and age. I am in favour of reducing the length of the sentence if the detainee works for society while serving the sentence, I believe that today for every 3 days worked 1 day is deducted from the sentence.
If you have the opportunity, fight for laws that cover resocialisation!
I think prisoners have to pay for their stay in prison and not the people paying for them to be there. Work for prisoners, hard work.
Is there such a thing as a "good" prison system? What is an "effective" prison? I don't consider the prison system effective because I don't agree with the existence of any prison system, but for the ruling class the prison system works very well!
Penal Abolitionism is the solution

b) Penalty: What is it?

In Criminal Law, the concept of penalty may vary according to the theory followed. The purposes of the penalty also suffer variations according to the line of thought. A priori, it is advanced that the authors of this research sustain that the main purpose that the penalty is proposed is to re-educate. To discuss the functions of the penalty, it is necessary to previously establish the definition of penalty that will be used in this study, namely, the penalty is a species of the penal genus sanction, often associated with the loss of freedom, but it should be remembered that the penalty may be a loss or restriction of legal assets as money and alternative measures.

In the Brazilian law there is four kinds of penalties: death (art. 5, XLVII of the Federal Constitution), deprivation of liberty (art. 33 and following of the Penal Code), restrictive of rights (art. 43 of the Penal Code) and fine (art. 49 of the Penal Code). Remember that security measures are not considered penalties, and in Brazil it is not allowed the life sentence (in theory). The Penal Code adopted the unitary theory regarding the function of the penalty, and it is assimilated that it is expressed in art. 59, of the Penal Code and in the Penal Execution Law in its art. 1:

***Art. 59** - O juiz, atendendo à culpabilidade, aos antecedentes, à conduta social, à personalidade do agente, aos motivos, às circunstâncias e conseqüências do crime, bem como ao comportamento da vítima, estabelecerá, conforme seja necessário e suficiente para **reprovação e prevenção** do crime (...)*
***Art. 59** - The judge, attending to the guilt, antecedents, social conduct, personality of the perpetrator, motives, circumstances and consequences of the crime, as well as the behaviour of the victim, shall establish, as necessary and sufficient for the reproduction and prevention of the crime (...)*
***Art. 1º** A execução penal tem por objetivo efetivar as disposições de sentença ou decisão criminal e proporcionar condições para a harmônica **integração social do condenado e do internado**. (grifosnossos)*
***Art. 1** The purpose of penal enforcement is to carry out the provisions of the sentence or criminal decision and provide conditions for the harmonious social integration of the convicted person and the internee.*

In another perspective, attesting the reeducational character of the penalty, still talking about the articles of the Criminal Enforcement Law, we have in its article 10 that "aassistênciaaopreso e aointernado é dever do Estado[1]", aiming to "***prevenir o crime e orientar o retorno à convivênciaemsociedade***[2]". Continuing in thesame procedural law, the art. 22 providesthat "a assistência social tem por finalidade ***amparar o preso e o internado e prepará-los para o retorno à liberdade***[3]". (emphasis added)

Starting from the assumption that we are inserted and live in a Democratic State of Law, it is extremely relevant to mention the criminal constitutional provisions set forth in our Citizen Charter. The Federal Constitution promulgated in 1988 establishes five principles, namely:

Legality: which is provided for in art. 5, section XXXIX and in the 1st article of the Brazilian Penal Code. The principle of legality means the organised reaction of the State, must follow previously established by law penal system.

The personality or individualization of the penalty: pronounced in art. 5, XLVI of the Constitution demonstrates that each penalty must be appropriate exactly for that concrete case.

Personality: advocated in art. 5, XLV of the Brazilian Federal Constitution denotes the non-transcendence of the penalty, that is, the penalty imposed will not be transmitted to the heirs of the convicted. In the civil scope, only the damage may extend to the estate.

Proportionality: stated in art. 5, clauses XLVI and XLVII, announces that when applying the penalty, all facts must be considered for its reasonable applicability**.**

Humanity: signalled in art. 5, XLVII, it prohibits the death penalty (except in the case of military crimes committed in acts of war, as provided in art. 5, subsection XLVII, letter a of the Federal Constitution).

In the international sphere, the provisions of article 5, paragraph 6, of the American Convention on Human Rights, which deals with the right to personal integrity, states that "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.". Thus, it is inconceivable to disregard the re-socialising aspect of criminal sanctions.

That said, in a brief context, in the history of humanity, since the emergence of civilizations, there was already evidence of punitive practices, the so-called blood vengeance, however, the legislative practice of punishment came only later, very closely linked to the theological states still in antiquity.

According to the historical records of ancient times, the sanction methods applied were corporal, such as the death penalty for more serious crimes, flogging in public squares, mutilation according to the crime committed, torture, slave labour and exile (BITTENCOURT, 2011). That said, the imposition of sanctions that fall on the individual himself predominated in ancient civilizations, repression did not reach the property. It is curious to mention that in Greece, Sophistic philosophers such as Protagoras already questioned the relevance of a possible pedagogy of punishment (MIRABETE, 2009). According to the evolution of civilizations, it was in Antiquity that the first legislations appeared, which even today remain as a historical landmark in the studies on penalties, and they are the Code of Hammurabi, with the criminal sanction based on the Laws of Talion, is considered the symbol of Mesopotamian civilization (FINKELSTEIN, 1961) and is marked by the severity of their penalties and the Code of Manu, one of the oldest legal texts, prepared in India to regulate the conduct of individuals.

[1]the assistance to prisoners and internees is the duty of the State
[2] prevent crime and guide the return to living in society
[3] social assistance aims to support the prisoner and internee and prepare them to return to freedom

As a new era always carries traces of the previous one, the Middle Ages was also marked by penalties almost exclusively corporal, as Júlio Mirabete explains:

"Por vários séculos, porém, a repressão penal continuou a ser exercida por meio da pena de morte, executada pelas formas mais cruéis e de outras sanções cruéis e infamantes[4]" (MIRABETE, 2009, p. 230)

Still in the Middle Ages, influenced by the canon law with the monasteries, we had the first prison sentences in the form of the House's of Correction, in London, around 1550 and 1552. As a result, the appearance of prisons as a form of detention imposed by the State, had as a purpose the custody - temporal or even perpetual - of the so-called "enemies of the sovereign". In view of this, it is also noted that such historical period carried strong influence of the Catholic Church, being the criminal offense a response with divine connotation in the face of sins committed. During the 16th century, the ecclesiastical prison arose, as a destination for clerics who committed infractions. The purpose of these prisons was to imprison the sinner so that he could seek divine forgiveness through prayer. Then, it is observed that clerics were given the silence and the penalty of deprivation of liberty had historical traces in Canon Law (BITTENCOURT, 2011).

Later, in the Modern Age, punishment assumed a utilitarian purpose. Machiavelli shows us that the sanction took on a form of intimidation and maintenance of the status quo of the sovereign:

"[…] não se preocupar com a fama de cruel se desejar manter seus súditos unidos e obedientes. Dando os pouquíssimos exemplos necessários, será mais piedoso do que aqueles que, por excessiva piedade, deixam evoluir as desordens, das quais resultam assassínios e rapinas; porque estes costumam prejudicar uma coletividade inteira, enquanto as execuções ordenadas pelo príncipe ofendem apenas um particular"[56]

The condemnation, then, was applied to demonstrate the power and sovereignty of the monarch. With the end of absolutism, punishment became a reprisal from society towards the criminal and not from the king to intimidate society. The period was marked by the work of the Marquis de Beccaria, "Of Crime and Penalties", in which the author defended the end of cruel punishment and stressed that the measure of punishment should follow the criterion of necessity to safeguard society affected by crime. It is in this period that much of what applies today in the knowledge about penalties was developed. Beccaria was also a great advocate of legislation and positivisation of penalties:

Only laws can fix the penalties corresponding to crimes; and this can only belong to the legislator, who represents the whole of society united by a social contract.[7]

Beccaria's work is clothed with a humanitarian nature with pragmatic and formalistic guidelines regarding punishment in relation to the time. Furthermore, the penalty would serve as retribution to the offender, which is, in Brazilian popular parlance, "*to pay for what he has done*". However, we must bear in mind that due or not, the penalty is an evil, but that inserted in our system becomes a necessary evil, as well cites the distinguished Professor and judge Guilherme Nucci:

A concepção retributiva advém da própria natureza da pena, que é um mal, porém necessário. Ela não significa, em nosso ponto de vista, a realização de justiça, porque se combate o mal com o mal. Se assim fosse, consistiria numa versão moderna da pena de talião ("olho por olho, dente por dente").[89]

For this reason, some academicsare used to better understand the function of the penalty, from its creation to the present day. In this way, it is possible to explain the definition of the most suitable penalty.

As previously mentioned, the penalty is the sanction that the State-judge imposes on the perpetrator of a criminal offence. Punishment has a dual purpose, namely, to repay the offender for the "harm caused" and to re-educate him, in order to prevent him from committing further offences. As Eugenio Raúl Zaffaroni and José Henrique Pierangeli clarify, " *o fim da pena é a retribuição e o fim da execução da pena é a ressocialização*

[4] For several centuries, however, criminal repression continued to be exercised by means of the death penalty, carried out in the most cruel ways, and other cruel and infamous sanctions

[5]MAQUIAVEL, Nicolau. O príncipe, 3ª. Ed. Trad. Maria Júlia Goldwasser Ver. Da trad. Zélia de Almeida Cardoso. São Paulo: Martins Fontes, 2004.

[6] "[...] not to worry about the reputation of being cruel if he wishes to keep his subjects united and obedient. By giving the very few examples necessary, he will be more pious than those who, out of excessive piety, allow disorders to evolve, from which murders and rapine result; because these usually harm an entire collectivity, while the executions ordered by the prince offend only one private individual."

[7] BECCARIA, Cesare, Dos delitos e das penas, trad. José de Faria Costa, Lisboa, Fundação Calouste Gulbenkian, 1998, p. 66

[8] Nucci, Guilherme de Souza. Manual de direito penal. – 16. ed. – Rio de Janeiro: Forense, 2020.

[9] The retributive conception comes from the very nature of punishment, which is an evil, but necessary. In our view, it does not mean the achievement of justice, because evil is met with evil. If it were, it would consist of a modern version of the talian punishment ("an eye for an eye, a tooth for a tooth").

(doutrinaalemãcontemporâneamaiscorrente)"[11], therefore, the penalty constitutes the deprivation or restriction of legal property, based on the law, imposed by the competent jurisdictional bodies on the perpetrator of a criminal offence.

Therefore, the purpose of the penalty is the retribution for the crime committed and the prevention of new crimes. Thus, it is worth discussing the preventive character of the penalty that is divided into two prisms, being the general and special preventive character, which in turn unfold into two others. Consequently, there are four angles to be analysed: a) negative general, expressing the intimidating power that the penalty symbolizes to all society, receiver of the criminal law; b) positive general, proving the existence and efficiency of the Criminal Law; c) negative special, revealing the intimidation to the author of the same offense so that he does not repeat the same action, taking him to prison, when necessary to prevent the practice of criminal infractions again; d) positive special, which consists in the proposal of resocialization of the convicted, so that he returns to social coexistence, when the sentence is completed (NUCCI, 2020).

An issue worth mentioning is the need to be careful when using the principle of legality to legitimise actions that should not be morally accepted, as occurred during the Nazi regime, which used laws to legally practice deplorable acts. As we could observe, in the Reich Code of 1871, in socialist Germany (Nazi), we had the following provision in the second article

"Whoever commits an act that the law declares punishable or deserves punishment according to the basic concept of a penal law and according to the feelings of the people shall be punished. If no law can directly apply to the fact, the fact shall be punished according to the law whose basic concept best corresponds to it".

Therefore, it is vital that the principle of legality is accompanied by the other principles to ensure the legal security of the acts performed by the State.

On the grounds, retribution and prevention are the declared ends of punishment, but are these the only aims of punishment? This is a recurring question in criminology and the answer, according to critical criminology and some authors such as Baratta, Vera Malaguti, Nilo Batista, Zaffaroni and Hulsman, is that there are hidden purposes to the penalty (especially the custodial sentence).

A reintegração na sociedade do sentenciado significa, portanto, antes de tudo, corrigir as condições de exclusão social, desses setores, para que conduzi-los a uma vida pós-penitenciária não signifique, simplesmente, como quase sempre acontece, **o regresso à reincidência criminal, ou o à marginalização secundária e, a partir daí, uma vez mais, volta à prisão** (BARATTA, 2004, p. 3).[12]

In thesamedirection:

Sendo assim, prender amplia o espaço de vulnerabilidade social, pois as condições de vida não se alteram e a ressocialização não promove uma transformação que permita ampliar as possibilidades de escolha do sujeito. **O que fica cada vez mais evidente é que o objetivo ressocializador da prisão é apenas uma maneira de manter a existência de tal instituição, pois os objetivos que realmente se cumprem é o do isolamento, da disciplina, do sofrimento e da vigilância** (FOUCAULT, 2007; ZAFFARONI, 2001).[13]

Imprisonment as a pretension of re-socialization is flagrantly flawed, as the prison does not reproduce a society, not being able to teach and re-educate the criminal to live harmoniously in community. Consequently, prison creates what is called criminal culture, in which prisoners absorb as conduct to be performed those learned in prison, which are often conducts that in society will be considered deviations.

In this sense, the internal culture of the prison transforms prisoners into passive beings, as brilliantly exposed by Bitencourt:

A instituição total, envolvente por natureza, transforma o interno em um ser passivo. Todas as suas necessidades, de vestuário, lazer, etc., dependem da instituição. O interno pode adaptar-se facilmente a modos de ser passivos, encontrando o equilíbrio ou gratificação psicológica em seu exercício. Na instituição total,

[10] Manual de direito penal brasileiro - parte penal. São Paulo : Revista dos Tribunais, 1997, p. 92

[11]the end of the penalty is retribution and the end of the execution of the penalty is rehabilitation (most current contemporary German doctrine)". T

[12] The reintegration in the society of the sentenced person means, therefore, first, to correct the conditions of social exclusion, of those sectors, so that leading them to a post-penitentiary life does not mean, simply, as almost always happens, the return to criminal recidivism, or the secondary marginalization and, from there, once again, back to prison.

[13] Thus, imprisonment broadens the space of social vulnerability, as the living conditions do not change, and resocialisation does not promote a transformation that allows the subject's possibilities of choice to be expanded. What becomes increasingly clear is that the re-socializing goal of prison is only a way to maintain the existence of such an institution, because the objectives that are really fulfilled is the isolation, discipline, suffering and surveillance.

geralmente, não se permite que o interno seja responsável por alguma iniciativa, e o que interessa efetivamente é sua adesão às regras do sistema penitenciário. (BITENCOURT, 2004: 166)[14]

He goes on to show how this is a process that can even be considered dehumanizing, in such a way that the prisoner loses his social capacity:

A submissão do interno a um processo de desculturalização, ou seja, a perda da capacidade para adquirir hábitos que correntemente se exigem na sociedade em geral. (BITENCOURT, 2004: 167/168)[15]

Thus, prison, which should help in the re-socialisation process, moves so far away from social reality that it causes the criminal ideology to be associated as the "correct" one:

Assim, o processo de assimilação e de "socialização" que sugere a prisionalização faz com que o recluso aprofunde sua identificação com os valores criminais (ideologia criminal) (BITENCOURT, 2004:187)[16]

With this, the prison becomes a dysfunctional society, in which the inmate does not have responsibility for his choices inside, already having pre-defined schedules, specific activities, jobs, etc. Thus, when he leaves that environment to live in society, one realizes that they are nothing alike. In this logic, there is a demonstration that there is no true intention of resocialization as stated legislatively.

Still on the hidden functions of the penalty, Baratta, brilliantly exposes:

Se nos referimos, em particular, ao cárcere como pena principal e característica dos sistemas penais modernos, corresponderia, em primeira instância, comprovar o fracasso histórico dessa instituição diante das suas principais funções declaradas: conter e combater a criminalidade, ressocializar o condenado, defender interesses elementares dos indivíduos e da comunidade. Não obstante, em uma consideração mais profunda, estudando a instituição carcerária do ponto de vista das suas funções reais, comprova-se que essas têm sido historicamente cumpridas com êxito. Com efeito, afastando a hipótese irracional da ausência de conexões funcionais entre essa instituição e a sociedade, a análise científica pôs em evidência funções reais distintas e opostas àquelas declaradas e que, portanto, explicam sua sobrevivência histórica (M. Foucault, 1975). A instituição serve, antes de tudo, para ***diferenciar e administrar uma parte dos conflitos existentes na sociedade como "criminalidade"****, isto é, como um problema ligado às características pessoais dos indivíduos particularmente perigosos, o qual requer uma resposta institucional de natureza técnica, isto é, a pena ou o tratamento do desviado. Em segundo lugar, o* ***cárcere serve para a produção e reprodução dos "delinqüentes"****, ou seja, de uma pequena população recrutada, dentro daquela muito mais ampla do que os infratores, nas camadas mais débeis e marginais da sociedade. Por último, o cárcere serve para* ***representar como normais as relações de desigualdade existentes na sociedade e para a sua reprodução material e ideológica****. (grifo nosso)*[17]

In continuation Baratta furtherputs:

[14] The total institution, enveloping by nature, transforms the inmate into a passive being. All his needs, for clothing, leisure, etc., depend on the institution. The inmate can easily adapt to passive modes of being, finding psychological balance or gratification in its exercise. In the total institution, generally, the inmate is not allowed to be responsible for any initiative, and what effectively matters is his adherence to the rules of the penitentiary system.

[15] The submission of the intern to a process of deculturalisation, that is, the loss of the ability to acquire habits that are currently required in society in general.

[16] Thus, the assimilation and "socialization" process suggested by imprisonment causes the inmate to deepen his identification with criminal values (criminal ideology).

[17] If we referto prisonas the main penalty and characteristic of modern penal systems, it would be, in the first instance, to prove the historical failure of this institution in relation to its main declared functions: to contain and combat crime, to re-socialize the convict, to defend the basic interests of individuals and the community. However, in a deeper consideration, studying the prison institution from the point of view of its real functions, it is proven that these have been historically fulfilled successfully. In fact, dismissing the irrational hypothesis of the absence of functional connections between this institution and society, scientific analysis has highlighted real functions distinct and opposite to those declared and which therefore explain its historical survival (M. Foucault, 1975). The institution serves, first, to differentiate and manage a part of the conflicts existing in society as "criminality", that is, as a problem linked to the personal characteristics of particularly dangerous individuals, which requires an institutional response of a technical nature, that is, the punishment or the treatment of the deviant. Secondly, prison serves for the production and reproduction of "delinquents", that is, of a small population recruited, within that much larger population than offenders, from the weakest and most marginal layers of society. Finally, the prison serves to represent as normal the relations of inequality existing in society and for their material and ideological reproduction.

A tentativa de operar uma ressocialização mediante o trabalho não pode, portanto, ter sucesso, sem incidir sobre a exigência própria da acumulação capitalista de alimentar periodicamente o saco da exclusão. O nó por desatar é o do pleno emprego; um nó que nenhuma experiência capitalista desatou até agora. (p. 189) [18]

In this same sense, Machiavelli states that punishment is intended to intimidate and control society, as mentioned above. Although it is said that this purpose no longer exists, practice shows the opposite.

The system that Brazil has adhered to is the bourgeois punitive system, as it descend from the capitalist system to which we are inserted, thus generating an inhumane system, instituted in disgusting political-criminal choices, having as synthesis the lack of socio-economic and educational policies, the inflammation of the so-called populism-media that disseminates a vengeful content, in addition to the uncontrollable edition of criminal laws with more incriminating types that in turn results in massive incarceration without legitimate grounds. Thus, this bourgeois system is composed of the variable application of the penal norm, favouring the dominant classes.

The first point to address is if the ends of the penalty are resocialisation, repression and prevention (pedagogy is implicit), then these ends should be being achieved, but empirically by the high recidivism rates, we know that the current penalties do not obtain these results, and yet they are continuously applied.
These penalties are counterproductive, with ever higher crime rates. Punishment as equivalent retribution by the general criterion of time, on the other hand, takes up the ideas of Evgeni Pachukanis. From a legal point of view, recidivism refers to the provisions of the Brazilian Penal Code:

Art. 63

Verifica-se a reincidência quando o agente comete novo crime, depois de transitar em julgado a sentença que, no país ou no estrangeiro, o tenha condenado por crime anterior.[19]

Art. 64
Para efeito de reincidência:
I – não prevalece a condenação anterior, se entre a data do cumprimento ou extinção da pena e a infração posterior tiver decorrido o período de tempo superior a 5 (cinco) anos, computado o período de prova da suspensão ou do livramento condicional, se não ocorrer revogação;
II – não se consideram crimes militares
próprios e políticos.[20]

In this follow-up, in a survey conducted by IPEA (Institute of Applied Economic Research) with the CNJ (National Council of Justice) in 2015, they presented that the recidivism rate in Brazil would be 70% (but because it is a broad concept, it could have a variation rate leading up to 80%), and it was also informed that Brazil would be in third place in the ranking of the number of prisoners worldwide.

It should be emphasized that empirically we realize that the more one punishes, the more the need to punish grows. Ricardo Genelhú, in his extensive research shows us that this phenomenon arises from a cycle created by the punitive system, in which it uses the defect itself as a justification for obtaining more power. That is, the system says that it does not work because it does not have enough punitive power to act, society gives up a little more of its freedom in exchange for a promise of an end to crime, leading to a hardening of punishment and when crime increases, again resorts to the excuse of lack of punitive power. So, the hardening of penalties is exponential, even though it is possible to empirically see that it is a flawed system.

Robert Talisse, regarding the stiffening of penalties, tells us that if the penalty for a crime is stiffened even to double, the crime rate for that crime should fall minimally. In other words, the stiffening of penalties is ineffective in combating crime.

[18] The attempt to bring about resocialisation through labour cannot succeed, therefore, without impacting on the very requirement of capitalist accumulation to periodically feed the sack of exclusion. The knot to be untied is that of full employment; a knot that no capitalist experiment has untied so far.

[19] Recidivism is verified when the perpetrator commits a new crime after the sentence that, in the country or abroad, had condemned him for a previous crime has become final and conclusive.

[20] For the purpose of recidivism
I - the previous conviction shall not prevail if a period of time exceeding 5 (five) years has elapsed between the date on which the sentence was served or extinguished and the subsequent offence, including the probation period of the suspension or conditional release, if no revocation has occurred;
II - the following are not considered to be military crimes
own and political crimes.

However, in practice, it is recognised that there is an attempt to harden the penalty in order to make it more effective:

Ementa

Apelação criminal. Pena inferior a quatro anos. Reincidência. Regime prisional fixado no semiaberto. Modificação para o aberto. Impossibilidade. Substituição da pena por restritivas de direitos. Impossibilidade. Reincidência genérica. Ineficácia da medida para repreensão e repressão de novos delitos. Recurso não provido. 1.O condenado reincidente (específico ou não) à pena inferior a quatro anos deve iniciar o cumprimento da pena em regime prisional semiaberto, obstando, de igual modo, a substituição da pena privativa de liberdade por restritivas de direitos ante a **ineficácia da medida para repreensão e repressão de novos delitos**. 2.Recurso não provido.

(Apelação, Processo nº 0002413-02.2011.822.0005, Tribunal de Justiça do Estado de Rondônia, 2ª Câmara Criminal, Relator (a) do Acórdão: Desª Marialva Henriques Daldegan Bueno, Data de julgamento: 13/04/2016) (Grifo nosso)[21]

At other point of view, the victim in the current functioning of the system is violated in several ways, and one of the most flagrant is just in the reparation claim of the penalty. While it is intended to repair the crime by imprisonment, the victim has no power within the process, that is, the State assumes the role of the victim in such a way that the victim loses its material and procedural role, with the Public Prosecutor as its representative, but in no way is the damage suffered, in the psychological and moral sense, truly repaired. There is no way to "divert" the victim's dignity. And, even in manifest violation, the process causes the victim to relive the facts.

In this way, the victim's dignity is violated again, along with the defendants, without any reparation. Imprisonment does not prevent the victim's dignity from being violated, nor does it restore it.

The crimes become against the State, in the sense that the victim has no procedural space to give up the action, or choiceon the way he or she prefers to proceed, in the case of unconditioned public action, which is most crimes. In this way, Nilo Batista interprets that every crime is a political crime, as every crime is against public order, against the State.

Even the Police Officers who are part of the maintenance of the system have their dignity disrespected, with disproportionate salaries, unhealthy conditions and lack of adequate security in the work environment, high suicide rates, having even exceeded the number of on-duty deaths, according to data from the São Paulo Civil Police Ombudsman and the Brazilian Public Security Forum, without any support and psychological help to deal with the violence witnessed daily:

"O órgão chama a atenção para a alta taxa de suicídio entre policiais, que é de 23,9, enquanto no total da população o número é de 5,8 por 100 mil habitantes

Os números mostram que o suicídio é a principal causa de morte dos policiais civis paulistas, superando as mortes decorrentes de confronto em serviço e de folga. Na Polícia Militar, as autolesões fatais representam a segunda maior causa de morte, atrás dos assassinatos sofridos na folga, mas à frente dos óbitos ocasionados por confrontos em serviço.[22],[23]

Besides being barbaric, the Penitentiary Agents are treated as disposable and fungible pieces. In addition to demanding a heroicization of police officers, who are often only remembered only on the day of their funeral,

[21] Judgment Criminal appeal. Sentence of less than four years. Recidivism. Prison Regime fixed in the semi-open regime. Modification to open regime. Impossibility. Substitution of penalty by restrictive rights. Impossibility. Generic recidivism Inefficacy of the measure for reprehension and repression of new crimes. Appeal not granted. A convicted re-offender (specific or not) sentenced to less than four years shall begin serving the sentence in a semi-open prison regime, likewise precluding substitution of the custodial sentence by rights restrictive sentences in view of the inefficacy of the measure for the reprehension and repression of new offenses. 2.

[22]Estadão Conteúdo. No Brasil, mais policiais se suicidam do que morrem em confrontos. Disponível em: <https://exame.com/brasil/no-brasil-mais-policiais-se-suicidam-do-que-morrem-em-confrontos/> Publicado em: 26/09/2019. Acessoem: 29 ago. 2021.

[23] The agency draws attention to the high suicide rate among police officers, which is 23.9, while the total for the population as a whole is 5.8 per 100,000 inhabitants

The figures show that suicide is the main cause of death among São Paulo's civil police officers, surpassing deaths resulting from confrontations on duty and off duty. In the Military Police, fatal self-injuries represent the second highest cause of death, behind killings suffered while off-duty, but ahead of deaths caused by confrontations on duty

without providing real support to their families. Nevertheless, it is increasingly common when watching the news to come across strikes of public security agents, demanding better working conditions.

Besides the obvious violation of human dignity of the prisoner, it is worth remembering that the Federal Constitution to precept the stony clause of the principle of human dignity, does not exclude **ANY** human being, that is, the prisoner is included and cannot have this right violated, which in practice is flagrantly disregarded. Despite this disrespect and dehumanization of the prisoner, Bitencourt states:

[...] por vários motivos, os reclusos podem desenvolver um quadro depressivo clássico de indiferença, inibição, desinteresse, perda de memória ou incapacidade para usá-la, perda de apetite, bem como uma idéia autodestrutiva que pode chegar ao suicídio. A manifestação do desejo de suicidar-se é um fenômeno especial que nunca deve ser subestimado. Quando o indivíduo se isola, deixa de ler, perde o apetite, desinteressa-se de tudo, e ainda tem algum problema imediato, deve ser vigiado com extremo cuidado. O suicídio é relativamente freqüente entre os condenados a longas penas. Essa é mais uma das tantas contradições existentes entre o propósito reabilitador que se atribui à pena privativa de liberdade e a imposição de penas muito longas.[24]
(BITENCOURT, 2004: 197)

In this sense, Landreville adds that
[...] o respeito da dignidade do ser humano e do direito à integridade são os mais agredidos na maior parte das prisões do mundo, eis que, desde a admissão, começa o despojamento da personalidade do preso, algemas nos pulsos, revista no corpo nu, à vista de todos, a troca de traje pessoal, chuveiro na presença de guardas, etc.[25]

Therefore, punishment is neither necessary nor sufficient. It is not enough because it does not fulfil what it promises, that is, its functions of prevention and rehabilitation.

Resocialisation is an especially sensitive topic, being a determining factor in recidivism, and in the case of incarcerated women, it must be admitted that it is even more lax:

Quando um homem é preso, comumente sua família continua em casa, aguardando seu regresso. Quando uma mulher é presa, a história corriqueira é: ela perde o marido e a casa, os filhos são distribuídos entre familiares e abrigos. Enquanto o homem volta para um mundo que já o espera, ela sai e tem que reconstruir seu mundo.[2627]

On this point, the questionnaire that was carried out brought interesting results, as a large part of the answers denote a disbelief that the penalty in the way it is applied is effective.

In this sense the psychologist Lidiane Barbalho exposes:

Quando sai da prisão, o egresso se encontra imerso no mundo excludente e desafiador do trabalho, em que a lógica é a da contradição entre capital e trabalho[2829]

[24] [...] for various reasons, inmates can develop a classic depressive picture of indifference, inhibition, disinterest, memory loss or inability to use it, loss of appetite, as well as a self-destructive idea that can reach suicide. The manifestation of the desire to commit suicide is a special phenomenon that should never be underestimated. When the individual isolates himself, stops reading, loses his appetite, becomes disinterested in everything, and still has some immediate problem, he must be watched with extreme care. Suicide is relatively frequent among those sentenced to long sentences. This is one of the many contradictions between the rehabilitating purpose of imprisonment and the imposition of very long sentences.

[25] [...] respect for human dignity and the right to integrity are the most violated in most prisons in the world, since, from the moment of admission, the stripping of the personality of the prisoner begins, handcuffs on the wrists, search of the naked body, in full view of everyone, change of personal clothing, shower in the presence of guards, etc.

[26]QUEIROZ, Nana. Presos que menstruam: A brutal vida das mulheres - tratadas como homens - nas prisões brasileiras

[27] When a man is arrested, his family usually remains at home, awaiting his return. When a woman is arrested, the common story is: she loses her husband and her home, her children are distributed among relatives and shelters. While the man returns to a world that already awaits him, she leaves and has to rebuild her world.

[28] BARBALHO, Lidiane. Entre a cruz e a espada: a reintegração de egressos do sistema prisional a partir da política pública do Estado, 2012, p. 14)

[29] When he leaves prison, the ex-offender finds himself immersed in the excluding and challenging world of work, in which the logic is that of the contradiction between capital and labour

Another issue to be discussed in the bias of the debate is brought by Bitencourt:
[…] A ressocialização do delinquente implica um processo comunicacional e interativo entre o indivíduo e sociedade. Não se pode ressocializar o delinquente sem colocar em dúvida, ao mesmo tempo, o conjunto social normativo ao qual se pretende integrá-lo. Caso contrário, estaríamos admitindo, equivocadamente, que a ordem social é perfeita, o que, no mínimo, é discutível[30][31]

This explanation leads to the second topic, where the basis for some questions will be established, such as: what really is crime? What generates crime?

c) What creates the crime?Tipification?

At this point, it is important to reflect on what crime is. For criminology, crime does not exist, what exists is the conduct, the act, which, depending on the normatization, will be or not taxed, labelled as criminal behaviour. Thisisanimportant point.

For Francesco Carrara, "*o delito não é um ente de fato, mas sim um ente jurídico*[32]". The Brazilian legal system has typified more than 1600 crimes[33] and the prison population is over 700 thousand prisoners, according to the National Penitentiary Department (Depen), an agency linked to the Ministry of Justice and Public Safety[34]. Having said this, it is necessary to accept the dimension of social classes and to certify their incidence not only in the processes of criminalization but also in the processes of victimization, it is necessary to agree that most crimes are not inter-class, but intra-class and that, therefore, at the same time that the working class is the most criminalized, it is also the most victimized. Secondly, it is necessary to take seriously the existence of problematic situations and acknowledge them as such, including by using the category of crime. However, treating the problem seriously implies creating theories and categories that encompass concrete alternatives for change, such as useful and usable criminology.

According to IBGE[35] data, the unemployment rate in Brazil in the first quarter of 2021 was 14.7%. In view of these data, it can be seen that exclusion from the labour market leads to a distancing from social rights and, consequently, a greater observation of the conduct of these people by society, which often tends to criminalize them. Due to this distancing and the resulting consequences of this social exclusion, the individual becomes considered an outcast, that is, the one who does not belong to a certain group. According to Luiz Antonio Bogo Chies, the prison, besides the declared basic functions (retribution, prevention and recovery), also has a fourth attribute, which aims at the ideological transmission of values and social standards in force in the society in which the prison is present. In accordancewiththe words of Howard Becker:

Quero dizer, isto sim, que grupos sociais criam desvio ao fazer as regras cuja infração constitui desvio, e ao aplicar essas regras a pessoas particulares e rotulá-las como outsiders. Desse ponto de vista, o desvio não é uma qualidade do ato que a pessoa comete, mas uma consequência da aplicação por outros de regras e sanções a um "infrator". O desviante é alguém a quem esse rótulo foi aplicado com sucesso; o comportamento desviante é aquele que as pessoas rotulam como tal.[36][37]

[30] BITENCOURT, Cezar Roberto. Tratado de Direito Penal. 16ª ed. São Paulo: Saraiva, v. 1, 2011.
[31] […] The resocialization of the delinquent implies a communicational and interactive process between the individual and society. One cannot re-socialize the offender without putting in doubt, at the same time, the normative social set into which one intends to integrate him/her. Otherwise, we would be admitting, mistakenly, that the social order is perfect, which, to say the least, is debatable
[32]the crime is not an entity of fact, but a legal entity
[33]YAROCHEWSKY, Leonardo. Por uma política-criminal responsável. *In*: YAROCHEWSKY, Leonardo. Por uma política-criminal responsável., 17 fev. 2016. Disponível em: https://www.brasil247.com/blog/por-uma-politica-criminal-responsavel. Acesso em: 13 fev. 2021.
[34] NASCIMENTO, Luciano. Brasil tem mais de 773 mil encarcerados, maioria no regime fechado. 14 fev. 2020. Disponível em:
https://agenciabrasil.ebc.com.br/geral/noticia/2020-02/brasil-tem-mais-de-773-mil-encarcerados-maioria-no-regime-fechado. Acesso em 13 fev. 2021
[35] IBGE. O que é desemprego. Disponível em: <https://www.ibge.gov.br/explica/desemprego.php> Acesso em 29 de junho de 2021.
[36] BECKER, Howard Saul. Outsiders: estudo de sociologia do desvio / Howard S. Becker; tradução: Maria Luiza X. de Borges; Revisão técnica Karina Kuschnir. – 2ª ed. – Rio de Janeiro: Zahar, 2019.
[37]Rather, I mean that social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular persons and labelling them as outsiders. From this point of view, deviance is not a quality of the act that the person commits, but a consequence of the application by others of

Hulsmanalsoproposes:

desconstruir a definição de delito: o delito não seria o objeto, mas o produto de uma política criminal que pretende justificar o exercício do poder punitivo, e não possuiria realidade ontológica.[38]

For a realistic concept of crime, it is required to externalize the theory and realize that the world is not reducible to social construction, crime exists, happens daily and victimizes people. Just as the concept of class, which also exists, functions as a social determination and is not a fiction. However, the concept of crime must be problematized, but not in a way that leads to relativism, where truth does not exist, where everything is speeches.

Then, what would be the best definition of crime and what is the one that best supports us in this work? So far, it is believed to be the one that assumes its difference from the broad sets with deviation, the relevance of class determinations in its composition, that manifests its socially constructed nature, but that does not refuse its materiality as a social fact, that is directed to effective and possible practices and finally, that takes into consideration a conception of Human Rights in its constitution. Nevertheless, during the research, an impasse is encountered: the impossibility of an exact definition of crime, as well as what is linked to the criminal.

According to the criminological school that covers the study of the *Labeling Approach*, it is understood that such definition derives from society's need to label, or as the theory became known here in Brazil, as "etiquetamento", which is imposed on a certain class in order to classify it as criminal. The Labeling Approach emerged in a historical moment of many social struggles and according to these paradigms of social rights, crime came to be thought as something that was stipulated by the complex processes of social interaction, that is, it is not a consequence of a conduct. This means that an offence is only an offence because someone has determined it to be so.

Precisely, the Labeling Approach studies criminality taking into consideration factors different from traditional criminology because it creates an understanding that crime is part of society's consensus, therefore, it is a social conduct. In Brazil, the search for alternative sentences (Law 7.209/1984 and Law 9.714/1998), as well as for alternative measures (penal transaction, conditional suspension of the process and civil composition) are consequences of this theory.

It is, therefore, starting from labeling that the question asked by criminologists begins to change. They no longer ask why the criminal commits crimes. The question becomes: why are some people treated as criminals, what are the consequences of this treatment and what is the source of its legitimacy? [39]

In H. Becker's work (Outsiders, 1963), he consolidates the thesis of interactionism:

São grupos sociais que criam a deviance ao elaborar as normas cuja violação constitui a deviance e ao aplicar estas normas a pessoas particulares, estigmatizando-as como desviantes[4041]

This is based on the social etiology which assumes that man is a social being and, therefore, is subject to a strong influence of his environment, and crime, as a social fact, also depends on a factual and historical context. Thus, going against the ideas of the Italian positivists, the criminal would be a person like any other, but that in a certain situation saw himself compelled to delinquent by the benefits that it would bring.

In today's capitalist system, it is easy to see that those who really goes to prison, that is, those who suffer with imprisonment, are the non-consumers, the poor, the black, the unemployed, etc., in short, all those forgotten by society, because it is cheaper for the State to imprison than to make a policy of social reintegration. They are labelled by the community, so much so that never have so many black and poor people been arrested and tortured as today. (BARROSO, 2009, p. 92.)

It turns out that the problem of capitalism is not crime, although that is what the state claims. Crime is the mere symptom of a much more serious problem. For the state, crime is the problem and not structural inequality. Here, one deprecates in depth the studies on critical criminology to try to decipher this phenomenon.

Critical criminology will point out that Criminal Law is incapable of neutrality. The very starting point of penal dogmatics which is the legal definition of crime (typical fact, anti-juridical and culpable), that may seem at first sight absolutely objective, impartial and technical, is in fact a definition covered by ideology. This is because, for critical criminology, the legal definition of crime as understood by the average person is a

rules and sanctions to an 'offender'. The deviant is someone to whom that label has been successfully applied; deviant behaviour is that which people label as such.

[38] deconstruct the definition of crime: the crime would not be the object, but the product of a criminal policy that intends to justify the exercise of punitive power, and would not possess ontological reality.

[39]SHECAIRA, Sérgio Salomão. Criminologia. 5ª edição da revista. Sérgio Salomão Shecaira; prefácio: Alvino Augusto de Sá. São Paulo: Revista dos Tribunais, 2013. pág. 254

[40] It is social groups that create deviance by drawing up the norms whose violation constitutes deviance and by applying these norms to particular persons, stigmatizing them as deviants

[41] H. Becker, Outsiders. Studies in the Sociology of Deviance, New York: Free Press, 1963, pág. 09.

definition that is thought from a very specific conception of social order: the bourgeois/capitalist one. What defines the typicality or unlawfulness of a conduct or what determines the culpability of an individual, all this will necessarily reflect the values that impregnate this whole social structure. This can even be observed in the work of Evgeni Pachukanis:

As leis penais são também o produto da falsa consciência e do fetichismo que o capitalismo cria nos seres humanos. [42]

In this way, Pachukanis made a deep criticism of the idea of contract, both in terms of private law relations - in reality, of inequality and not equality - and as a metaphor of social life.

In practice, if crime is the general object of criminology, by Marx's idealist dialectical method, the criminologist has to overcome or deny the immediacy of the phenomenon of crime, overcome the way it concretely presents itself, to extract from it all the diverse determinations (political, economic, social, structural, etc.), and then the criminologist can observe crime in its totality and perceive how it relates to all the other aspects of social reality. To do critical criminology, that is to say, to think criminology from Marxism by the method of dialectical materialism, will also mean to elaborate a political economy of the crime and relationship through the penalty, through the exercise of the punitive power of the State.

Another view of criminality was that conceived by Marxism which considers responsibility for crime as a natural consequence of certain economic structures, so that the offender becomes merely an innocent and fungible victim of those structures. Society is the one who is culpable. Therefore, a kind of social and economic determinism is created. [43]

So, if there is no pre-existing ontological crime, and there is no born criminal, then the State itself is responsible for the production of crime and the criminal and for the reproduction of crime and the criminal in the form of recidivism. This breaks the myth of equality in Criminal Law because it fragments the idea of punishment as necessary and democratic. It is evident that criminal law and the penal system as a whole does not defend all legal goods and not even those that are protected are equally protected - deficient protection (if a police officer kills, he or she will most likely not be punished even though he or she has afflicted one of the most important legal goods).

In this way, when the Criminal Law is juxtaposed, this application will be unequal and fragmented: a) Unequal because in practice only individuals of a certain profile are punished (penal selectivity); b) Fragmentary because only some criminal types are actually punished (homicide, trafficking, robbery, etc.) c) The status of criminal is distributed unequally among individuals and this will not depend on the harmfulness of the action committed, but on the political choices for the conducts that are criminalized and effectively punished, in addition to the social position of that individual.

In the view of penal selectivity, Ricardo Genelhú presents an important notion for the understanding of the phenomenon, the so-called "impunização/impunization", parasynthesis which he uses in his thesis to describe the idea of the action of not punishing.

When defending the prison system, it is common to hear the idea that this is the only option, because Brazil will be the country of impunity. Facing this untruth, Genelhú unravels the concept of impunity, creating the concept of “impunização/impunization”. The big difference between impunity and “impunização/impunization” is the labeling that the word impunity carries. When we think of impunity, it is associated with the idea of an absence of punishment for the criminal's theft from the system, that is, the criminal cunningly "got away with it". When the word impunization is used to give back the responsibility for whom it belongs, demonstrating that the criminal was not punished because the State failed in its function.

In this way, using the word impunization, which is a verb, is extinguished with the stigma carried by the noun impunity. In this same sense, one must realize that the stigma of the word is so great that although it is a noun, it acts as an adjective, because it varies from person to person, in the bias that if it were truly noun, everyone who was not punished would be considered unpunished, but this is not true, because there are people who have never been and will never be punished, who are not declared unpunished, even if they have committed crimes, they have never received this label. On the contrary, there are people who will always be considered unpunished, because they will never have been punished enough, for example a violent murderer. The stigma is so great that it will always be considered that what he paid in jail is not enough, that he should have suffered more.

[42]Criminal laws are also the product of the false consciousness and fetishism that capitalism creates in human beings..

[43] Shecaira, Sérgio Salomão Criminologia [livro eletrônico] / Sérgio Salomão Shecaira. -- 8. ed. rev., atual. e ampl. -- São Paulo : Thomson Reuters Brasil, 2020.

d) Is imprisonment the solution?

The current criminal justice system has several flaws, one of which is perpetuating the idea that only prison is the solution to the problems that criminality brings. Moreover, the 70% recidivism rate (IPEA, 2015) shows us that the main function of prison is to preserve this reality of mass incarceration. Allied to the thought proposed by Critical Criminology, prison has as its main purpose the maintenance of the prison system. However, what is prison? As elucidated by the French philosopher Michel Foucault:

A prisão é menos recente do que se diz quando se faz datar seu nascimento dos novos códigos. A forma-prisão preexiste à sua utilização sistemática nas leis penais. Ela se constituiu fora do aparelho judiciário, quando se elaboraram, por todo o corpo social, os processos para repartir os indivíduos, fixá-los e distribuí-los espacialmente, classificá-los, tirar deles o máximo de tempo, e o máximo de forças, treinar seus corpos, codificar seu comportamento contínuo, mantê-los numa visibilidade sem lacuna, formar em torno deles um aparelho completo de observação, registro e notações, constituir sobre eles um saber que se acumula e se centraliza. A forma geral de uma aparelhagem para tornar os indivíduos dóceis e úteis, através de um trabalho preciso sobre seu corpo, criou a instituição-prisão, antes que a lei a definisse como a pena por excelência. (FOUCAULT, 2013)[44]

ComplementingthisisHulsman'svoluminousdefinition:

A prisão representa muito mais do que a privação de liberdade com todas as suas seqüelas. Ela não é apenas a retirada do mundo normal da atividade e do afeto; a prisão é também principalmente, a entrada num universo artificial onde tudo é negativo. Eis o que faz da prisão um mal social específico: ela é um sofrimento estéril (HUSLMAN, 1997, p. 62).[45]

Returning to the lessons of the work of Beccaria, it is denoted something that within the overcrowded prisons becomes something common and routine, which are the frequent deaths of prisoners. The death factor for crime is something less powerful than the long time of the individual deprived of his right to freedom. In the words oftheMarquis:

Se eu cometesse um crime, estaria reduzindo toda a minha vida a essa miserável condição", – essa idéia terrível assombraria mais fortemente os espíritos do que o medo da morte, que se vê apenas um instante numa obscura distância que lhe enfraquece o horror (...). Assim, pois, a escravidão perpétua, substituindo a pena de morte, tem todo o rigor necessário para afastar do crime o espírito mais determinado. Digo mais: encara-se muitas vezes a morte de modo tranquilo e firme, uns por fanatismo, outros por essa vaidade que nos acompanha mesmo além do túmulo. Alguns, desesperados, fatigados da vida, vêem na morte um meio de se livrar da miséria. (BECCARIA, 1993, p.50-51)[46]

Another important aspect to remember is that the more the prisoner assimilates attitudes, behavior models and values characteristic of the prison subculture, in other words, the prisonization, the smaller the chances of "reinsertion" in the free society will be (BARATTA; 2002). At the same time, prison reinforces the process of exclusion of capitalism itself, to the extent that the person who is already a victim of this process of exclusion is much more subject to imprisonment and when he or she leaves prison he or she becomes even more vulnerable to this process of exclusion, this process will impact with much more violence on this person.

[44] Imprisonment is less recent than is claimed when its birth is dated to the new codes. The prison-form predates its systematic use in criminal laws. It was constituted outside the judicial apparatus, when processes were elaborated throughout the social body to divide individuals, fix them and distribute them spatially, classify them, take the maximum amount of time and the maximum amount of strength from them, train their bodies, codify their continuous behaviour, keep them in a visibility without gap, form around them a complete apparatus of observation, register and notations, constitute a knowledge about them that is accumulated and centralised. The general form of an apparatus to make docile and useful individuals, through a precise work on their body, created the institution-prison, before the law defined it as the penalty par excellence.

[45]Prison represents much more than the deprivation of liberty with all its sequels. It is not only the removal from the normal world of activity and affection; prison is also mainly the entrance in an artificial universe where everything is negative. This is what makes prison a specific social evil: it is sterile suffering

[46] If I were to commit a crime, I would be reducing my whole life to this miserable condition", - this terrible idea would haunt the spirits more strongly than the fear of death, which is seen only an instant in an obscure distance which weakens its horror (...). Thus, perpetual slavery, replacing the death penalty, has all the rigour necessary to keep the most determined spirit away from crime. I say more: death is often regarded in a calm and firm manner, some out of fanaticism, others out of that vanity which accompanies us even beyond the grave. Some, desperate, weary of life, see death as a means of ridding themselves of misery. (BECCARIA, 1993, p.50-51)

A key topic is that of the egress:

Como discutido no capítulo anterior, a prisão imprime uma marca eterna no egresso que, mesmo quando a ficha de antecedentes não consta, não se apaga. O estigma produzido pelo cárcere não ressocializa o sujeito ou, como afirma Barros (2009, p. 100), "o passado destes sujeitos não é anulado ao participarem de "projetos de ressocialização". Na cadeia, são submetidos à humilhação, preconceito, vergonha e estigma. E quando saem, exige-se de um sujeito que passa por uma instituição que produz e reproduz a violência e o crime, um projeto para o futuro fora do crime. É preciso reconhecer que um patrimônio fora construído na instituição prisional e que será utilizado nas escolhas cotidianas do egresso[47].[48]

As already mentioned in this paper, the prison had its historical emergence in the period of the Middle Ages and according to its main purpose, the prison serves to punish human beings and was a creation of canon law, in which the "legislation of the Church prevailed the penalty prison" (FUNES, 1953).

Nowadays, the maintenance of prison as a criminal sanction, which has as one of the main objectives the prison institution has the role in capitalism of regulating the development ensuring that everyone will work and have the maximum of the work force in order to follow the development. It happens that the obstacle of capitalism is not crime itself, although it is what the State justifies. In this way, crime ends up being a mere symptom of a more serious disease, since for the State, crime is the problem and not social inequality and its structural system. In this way, prison ends up being one of the strongest instruments of class domination in the capitalist system.

When starting the studies on Criminal Law and consequently on Criminal Procedure, it is common to say that the greatest concern of the Criminal Law is the protection of the greater legal good, which is, life. However, the Criminal Law is an instrument of repression and not of protection, it does not bring freedom and much less emancipation. It is no wonder that only some legal goods are protected, so the criminal selectivity does not happen randomly (BATISTA, 2015).

Once spread this inequality by the criminal system, it directly reflects onto the punitive power of the State, through its institutions, is the motivator in multiplying such inequality, reproduction of crimes and social control. Meanwhile, critical criminology demonstrates that prison does not fulfil any of its declared functions, which are to contain the spread of crime, reduce criminality and increase public safety, and ends up being a failed technical-corrective project. Attempts to reduce inequality through criminal law will never get around the fact that prison necessarily reproduces inequality and social marginalization. It will only work as a containment of the masses, and no matter how good the intention, it is useless, because prison will always turn against the most vulnerable (PERES, 2012).

It is worth noting that in Brazil, criminal law should function as the"*ultima ratio"*, with the custodial penalty being applied only in the most serious cases, according to Sérgio Salomão Shecaira:

A subsidiariedade está a exigir que só se faça uso do direito penal quando não tenham tido êxito os meios coativos menos gravosos de natureza não penal. Onde a proteção de outros ramos do direito revelar-se insuficiente, se a lesão ou exposição a perigo do bem jurídico tutelado apresentar certa gravidade, deverá atuar o direito penal. É ele, pois, a ultima ratio regum, ou a última instância de controle social.[49][50]

However, this is not what happens in practice, being the criminal justice system applied much more extensively than necessary, disrespecting one of the central guiding principles of criminal law, the principle of insignificance, being often necessary to appeal to higher courts to remedy this defect, as assimilated in the Judgment of the Supreme Court:

Ementa: HABEAS CORPUS. PENAL. CRIME DE DANO. PRINCÍPIO DA INSIGNIFICÂNCIA. INCIDÊNCIA. PREJUÍZO ÍNFIMO. CIRCUNSTÂNCIAS DA CONDUTA. ORDEM CONCEDIDA. 1.

[47] BARROS, Carolyne. O real do egresso do sistema prisional. Circulação de normas, valores e vulnerabilidades

[48] As discussed in the previous chapter, prison imprints an eternal mark on the ex-offender that, even when the criminal record does not appear, is not erased. The stigma produced by prison does not re-socialize the subject or, as Barros (2009, p. 100) states, "the past of these subjects is not annulled when they participate in "re-socialization projects". In jail, they are subjected to humiliation, prejudice, shame and stigma. And when they leave, it is required of a subject who passes through an institution that produces and reproduces violence and crime, a project for the future outside of crime. It is necessary to recognize that a heritage was built in the prison institution and that will be used in the daily choices of the ex-offender.

[49] Shecaira, Sérgio Salomão Criminologia [livro eletrônico] / Sérgio Salomão Shecaira. -- 8. ed. rev., atual. e ampl. -- São Paulo : Thomson Reuters Brasil, 2020. Página 345.

[50] Subsidiarity requires that criminal law should only be used when the less onerous coercive means of a non-criminal nature have not been successful. Where the protection afforded by other branches of law is insufficient, if the injury or exposure of the protected legal good to danger is of a certain gravity, criminal law must be applied. It is therefore the ultima ratio regum, or the last instance of social control.

Segundo a jurisprudência do Supremo Tribunal Federal, para se caracterizar hipótese de aplicação do denominado "princípio da insignificância" e, assim, afastar a recriminação penal, é indispensável que a conduta do agente seja marcada por ofensividade mínima ao bem jurídico tutelado, reduzido grau de reprovabilidade, inexpressividade da lesão e nenhuma periculosidade social. 2. O que se imputa ao paciente, no caso, é a prática do crime de dano, descrito no art. 163, III, do Código Penal, por ter quebrado o vidro da porta do Centro de Saúde localizado em Belo Horizonte em decorrência de chute desferido como expressão da sua insatisfação com o atendimento prestado por aquela unidade de atendimento público. 3. Extrai-se da sentença absolutória que o laudo pericial sequer estimou o valor do dano, havendo certificado, outrossim, o péssimo estado de conservação da porta, cujas pequenas lâminas vítreas foram fragmentadas pelo paciente. **Evidencia-se, sob a perspectiva das peculiaridades do caso, que a ação e o resultado da conduta praticada pelo paciente não assumem, em tese, nível suficiente de lesividade ao bem jurídico tutelado a justificar a interferência do direito penal. Irrelevância penal da conduta. 4. Ordem concedida para restabelecer a sentença absolutória do juízo de primeiro grau, por aplicação do princípio da insignificância**.[51]
(STF - HC 120580 MG, Relator: TEORI ZAVASCKI, Julgamento: 30/06/2015, Órgão julgador: Segunda Turma, Publicação: 12/08/2015) (grifo nosso)

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Ementa: HABEAS CORPUS. PENAL. FURTO. PRINCÍPIO DA INSIGNIFICÂNCIA. INCIDÊNCIA. VALOR DOS BENS SUBTRAÍDOS. INEXPRESSIVIDADE DA LESÃO. CONTUMÁCIA DE INFRAÇÕES PENAIS CUJO BEM JURÍDICO TUTELADO NÃO É O PATRIMÔNIO. DESCONSIDERAÇÃO. ORDEM CONCEDIDA. 1. Segundo a jurisprudência do Supremo Tribunal Federal, para se caracterizar hipótese de aplicação do denominado "princípio da insignificância" e, assim, afastar a recriminação penal, é indispensável que a conduta do agente seja marcada por ofensividade mínima ao bem jurídico tutelado, reduzido grau de reprovabilidade, inexpressividade da lesão e nenhuma periculosidade social. 2. Nesse sentido, a aferição da insignificância como requisito negativo da tipicidade envolve um juízo de tipicidade conglobante, muito mais abrangente que a simples expressão do resultado da conduta. Importa investigar o desvalor da ação criminosa em seu sentido amplo, de modo a impedir que, a pretexto da insignificância apenas do resultado material, acabe desvirtuado o objetivo a que visou o legislador quando formulou a tipificação legal. **Assim, há de se considerar que "a insignificância só pode surgir à luz da finalidade geral que dá sentido à ordem normativa" (Zaffaroni), levando em conta também que o próprio legislador já considerou hipóteses de irrelevância penal, por ele erigidas, não para excluir a tipicidade, mas para mitigar a pena ou a persecução penal.** 3. Trata-se de furto de um engradado que continha vinte e três garrafas vazias de cerveja e seis cascos de refrigerante, também vazios, bens que foram avaliados em R $16,00 e restituídos à vítima. Consideradas tais circunstâncias, é inegável a presença dos vetores que autorizam a incidência do princípio da insignificância. 4. À luz da teoria da reiteração não cumulativa de condutas de gêneros distintos, a contumácia de infrações penais que não têm o patrimônio como bem jurídico tutelado pela norma penal não pode ser valorada, porque ausente a séria lesão à propriedade alheia (socialmente considerada), como fator impeditivo do princípio da insignificância. 5. Ordem concedida para restabelecer a sentença de primeiro grau, na parte em que reconheceu a aplicação do princípio da insignificância e absolveu o paciente pelo delito de furto.[52]

[51] Summary: HABEAS CORPUS. PENAL. CRIME OF DAMAGE. PRINCIPLE OF INSIGNIFICANCE. INCIDENCE. NEGLIGIBLE DAMAGE. CIRCUMSTANCES OF CONDUCT. ORDER GRANTED. According to the jurisprudence of the Federal Supreme Court, in order to characterize the hypothesis of application of the so-called "principle of insignificance" and thus rule out penal recrimination, it is indispensable that the conduct of the agent be marked by minimal offensiveness against the legal interest protected, a low degree of reproach, inexpressibility of the injury and no social dangerousness. 2. What is imputed to the patient, in this case, is the practice of the crime of damage, described in art. 163, III, of the Penal Code, for having broken the glass of the door of the Health Center located in Belo Horizonte as a result of a kick given as an expression of his dissatisfaction with the service provided by that public health care facility. 3 From the sentence of acquittal, it can be inferred that the expert report did not even estimate the value of the damage, having certified, moreover, the very poor state of conservation of the door, whose small vitreous plates were fragmented by the patient. **From the perspective of the peculiarities of the case, it is evident that the action and the result of the conduct practiced by the patient do not assume, in theory, a sufficient level of harm to the legal good protected to justify the interference of criminal law. Criminal irrelevance of the conduct. Order granted to reestablish the sentence of acquittal of the trial court, by application of the principle of insignificance**.

[52] Summary: HABEAS CORPUS. PENAL. THEFT. PRINCIPLE OF INSIGNIFICANCE. INCIDENCE. VALUE OF GOODS STOLEN. INEXPRESSIVENESS OF THE INJURY. CONTUMACY OF CRIMINAL OFFENSES WHOSE PROTECTED JURIDICAL GOOD IS NOT THE PATRIMONY. DISREGARD.

(STF - HC 114723 MG, Relator: TEORI ZAVASCKI, Julgamento: 26/08/2014, Órgão julgador: Segunda Turma, Publicação: 12/11/2014) (grifo nosso)

Moving on to the implementation of security measures, in the Federal District, the work of Leonardo Melo Moreira, "Entre o medo e aindiferença" (Between fear and indifference), describes the consequences of not properly treating those with mental disorders. For these individuals, not receiving dignified treatment also constitutes a prison in itself. Still, many of them are sent to ordinary prisons, which often entails worsening the individual's clinical picture. Accordingtotheauthor:

Doentes que, se adequadamente tratados, poderiam estar inseridos à sociedade, ainda que na medida de suas capacidades, gerando divisas e tornando mais plenas suas vidas e de seus próximos, acham segregados masmorras do mundo moderno, com o mesmo objetivo de tempo remotos, ainda que agora de maneira velada, qual seja, o afastamento do perigo abstrato que causam à sociedade suas simples presenças[53][54]

In the face of such situations, the Criminal Law often exercises a symbolic violence legitimated by the State, since it corroborates as an instrument of domination, reflecting the existing power relations. There are a number of acts that are considered criminal despite not having any violent characteristic, do not have what the Theory of Crime in general would classify as material unlawfulness. In this regard, Baratta, wrote an article in 2003, whose delimited theme is: Principles of minimum criminal law for a theory of human rights as object and limit of the criminal law.

a) Penalty, especially in its most drastic manifestations, which has as its object the sphere of personal freedom and the physical incolumity of individuals, is institutional violence, that is, the limitation of rights and the repression of the real fundamental needs of individuals through the legal or illegal action of the officials of the legitimate and de facto power in a society.

b) The institutions that act at the different levels of organization of criminal justice (legislature, police, prosecutors, judges, enforcement agencies) do not represent or protect the interests common to all members of society, but rather, prevalently, the interests of dominant and socially privileged minority groups. Nevertheless, at a higher level of abstraction, the punitive system presents itself as a functional subsystem of the material and ideological production (legitimation) of the global social system, that is, of the existing relations of power and property, rather than as an instrument to protect the particular interests and rights of individuals.

ORDER GRANTED. According to the jurisprudence of the Federal Supreme Court, in order to characterize the hypothesis of application of the so-called "principle of insignificance" and thus rule out penal recrimination, it is indispensable that the conduct of the agent be marked by minimal offensiveness against the legal good protected, a reduced degree of reproach, inexpressiveness of the injury and no social dangerousness. 2. In this sense, the assessment of insignificance as a negative requirement of typicality involves a judgment of conglobant typicality, much more comprehensive than the simple expression of the result of the conduct. **It is important to investigate the value of the criminal action in its broadest sense, in order to prevent that, under the pretext of the insignificance only of the material result, the objective that the legislator intended when he formulated the legal classification is distorted. Thus, it is necessary to consider that "insignificance can only arise in light of the general purpose that gives meaning to the normative order" (Zaffaroni), also taking into account that the legislator himself has already considered hypotheses of criminal irrelevance, erected by him, not to exclude typicity, but to mitigate the penalty or criminal prosecution.** 3. it is a case of theft of a crate containing twenty-three empty bottles of beer and six empty soda bottles, also empty, goods that were valued at $16.00 and returned to the victim. Considering these circumstances, it is undeniable the presence of the vectors that authorize the application of the principle of insignificance. (4) In light of the theory of non-cumulative repetition of conducts of different kinds, the contumacy of criminal offenses that do not have property as a legal good protected by the penal norm cannot be evaluated, because the serious injury to other people's property (socially considered) is absent, as a factor that impedes the principle of insignificance. 5. the Order was granted to reestablish the first degree sentence, in the part in which it recognized the application of the principle of insignificance and acquitted the patient of the crime of theft.

[53] Moreira, Leonardo Melo. Entre o medo e a indiferença: a implantação das medidas de segurança no Distrito Federal. Rio de Janeiro, Lumen Juris, 2015.

[54] Sick people that, if adequately treated, could be inserted to society, even if in the measure of their capacities, generating money and making their lives and the lives of their relatives fuller, find segregated dungeons of the modern world, with the same objective of remote times, even if now in a veiled way, that is, the removal of the abstract danger that their simple presence causes to society.

c) The operation of criminal justice is highly selective, whether in terms of the protection granted to goods and interests, or in terms of the process of criminalization and the recruitment of the system's clientele (the so-called criminal population). It is directed almost exclusively against the popular classes and, in particular, against the weakest social groups, as evidenced by the social composition of the prison population, despite the fact that socially negative behaviour is distributed among all social strata and that the most serious violations of human rights occur at the hands of individuals belonging to dominant groups or forming part of state agencies or private economic organizations, legal or illegal (A. Baratta, 1986, p. 10 ff.).

d) The punitive system produces more problems than it claims to solve. Instead of resolving conflicts, it represses them, and often these conflicts take on a more serious character than their original context.

e) The punitive system, because of its organizational structure and the way it functions, is absolutely inadequate to develop the socially useful functions declared in its official discourse, functions that are central to the ideology of social defense and utilitarian theories of punishment.

In a bias of alternative criminal policies, there are some proposed solutions that have had successful practical applications, two emblematic examples being Frankfurt airport and the German factory.

At airports, petty theft is common during the early hours of the morning while passengers fall asleep while waiting for their flights. Observing this phenomenon, Frankfurt Airport established a new policy that led to a substantial decrease in thefts. Instead of trying to arrest all those responsible for these petty thefts, as a solution, flight schedules were changed in order to avoid long waits during these periods in which the highest theft rates were observed.

With this example, the aim is to show that small changes can generate substantial impacts, and that the application of criminal policies can prove to be more efficient than penalties, especially imprisonment, since if those responsible were simply arrested, after a period of time the chances are high that thefts would soon return, as will occur on other occasions.

The other example we have is of a factory in which several pieces of equipment were being stolen. Through internal investigations it was found that these thefts were carried out by employees who borrowed the tools to do "odd jobs" on weekends and ended up forgetting to return them. To solve the problem, the management of the company in a meeting thought of some hypotheses: the report of the theft to the Police Authority so that they could be arrested, dismissal for just cause, discounting the value of the equipment from their salaries, etc. However, all these options would bring damage to the company, since these employees performed activities that needed training, and the company would have to train new professionals, spending huge amounts of money on courses and training. With this in mind, a last alternative was proposed, which was less harmful to the company (victim) and to the employees, the application of a warning to the employees who committed the deviation and the implementation of a system of renting the tools for a symbolic value, so that the thefts ceased.

The application of a measure such as this shows that reparation for the damage, which would be an end of punishment, can be achieved in a way that does not indignity any of the parties involved, arriving at a solution that is less harmful to all.

That said, these examples, although simplistic, show us that alternative means can and are much more efficient in resolving conflicts. A few more important examples will be presented later on to highlight this perspective.

Ricardo Genelhú says that the proposal of alternative sentences would also be meaningless because they continue with the stigmatization of the penalty, the penalty itself being a problem, and alternatives such as those proposed above would be more appropriate to escape the stigmatization, the labelling.

e) The pedagogyofthe Penaltyandthe Brazilian Failure in its application

As exposed, the failure of the prison system regarding the declared purposes of re-socialization is evident. In Brazil, the exorbitant recidivism rates and growing criminality denounce the evident Brazilian failure in the pedagogical application of punishment. Prison in particular has a counterproductive effect, being a kind of "school of criminality".

O sistema carcerário junta numa mesma figura discursos e arquitetos, regulamentos coercitivos e proposições científicas, efeitos sociais reais e utopias invencíveis, programas para corrigir a delinquência e

mecanismos que solidificam a delinquência. O pretenso fracasso não faria então parte do funcionamento da prisão? (FOUCAULT, 2013)[55]

Watching this movement of failure of punishment, theorists developed a theory that gained strength for decades, that of penal abolitionism. The theory is based on the idea that imprisonment does not bring any benefit to the individual, curtailing and infringing their rights such as human dignity and only serving to maintain a power structure:

Raramente vê-se alguém sair de um cárcere melhor do que quando entrou, provando que o encarceramento do homem não tem o poder curativo que tanto se apregoa. O cárcere não pode melhorá-lo, aperfeiçoá-lo, não corrige a falta cometida, não o ressocializa, nem limpa sua culpa perante a sociedade a perturbou com sua conduta delituosa. O abolicionismo traz em seu âmago uma abordagem crítica desse esquema auto-destrutivo. (CAMARGO, 2000)[56]

Salete Magda Oliveira lecture:

... enquanto o sistema penal proclama os benefícios do 'efeito dissuasivo da punição', subscrevendo-se sob a política soberana do medo, o abolicionismo investe na prática analítica da persuasão que privilegia o acordo generoso baseado na argumentação, que não se reduz à instrumentalidade técnica, mas amplia a possibilidade de discussão no cotidiano, entendido como prática do próprio pensamento criativo, que não prescreve limites para si mesmo ou para a convivência com o risco.[57]

As a result of the research done so far, it is understood that the abolitionist theory, if currently applied in Brazil, would be nothing but utopia, since its practice today would be impossible due to the fact that society as a whole, including mainly its institutions as a means and the capitalist system as the end, do not have preparation to untie themselves from the rules and criminal sanctions, since they represent a form of social control. Moreover, recognizing the failure of imprisonment as a form of command and crime reduction, by the horizon of alternative criminal policy should be a perspective for the abolition of penal imprisonment. As much as critical criminology supports the transformation of society, such transformation could not pass-through prison if the institution of prison remains the way it is today.

Hermann Bianchi claimedthat it was not enough to abolish prisons, but that the very idea of punishment should be a bolished, because "*enquanto se mantiver intacta a ideia de castigo como uma forma aceitável de reagir diante do delito, não se pode esperar nada de bom de um novo sistema alternativo de controle do delito que não se baseie em um modelo punitivo, mas sim em outros princípios legais e éticos, de forma tal que a prisão ou outro tipo de repressão física torne-se essencialmente desnecessária*"[58].

A theory must be judged on the basis of its explanatory potential of the world, that is, it cannot be detached from empirical reality, but it must go beyond the immediate by exploring the hidden faces of its object and seeking to understand how they interact with it and with each other. It is necessary that our theory, besides being concrete, empirically based and serious, is also useful and usable. Baratta, however, proposes some guiding principles that would help in a more effective system, the extra-systematic principles of minimum penal intervention. These principles would be divided into a group of principles that assist in decriminalization, meeting the principle of insignificance, and a second group of principles of alternative construction of conflicts and social problems.

[55]The prison system brings together in the same figure discourses and architects, coercive regulations and scientific propositions, real social effects and invincible utopias, programmes to correct delinquency and mechanisms that solidify delinquency. Would not the alleged failure then be part of the prison's functioning?

[56] One rarely sees someone leave prison better than when they entered, proving that incarceration does not have the healing power it is so often claimed to have. Prison cannot improve or perfect him, it does not correct the fault committed, it does not re-socialize him, nor cleans his guilt before the society that was disturbed by his criminal conduct. Abolitionism brings in its core a critical approach to this self-destructive scheme. (CAMARGO, 2000)

[57] ... while the penal system proclaims the benefits of the 'deterrent effect of punishment', subscribing itself under the sovereign politics of fear, abolitionism invests in the analytical practice of persuasion that privileges the generous agreement based on argumentation, which is not reduced to technical instrumentality, but broadens the possibility of discussion in everyday life, understood as the practice of creative thinking itself, which does not prescribe limits for itself or for living with risk.

[58]as long as the idea of punishment as an acceptable way of reacting in the face of crime remains intact, nothing good can be expected from a new alternative system of crime control that is not based on a punitive model, but on other legal and ethical principles, in such a way that imprisonment or other physical repression becomes essentially unnecessary

a) O princípio da não-intervenção útil indica que a alternativa à criminalização nem sempre é representada por outra forma de controle social formal ou informal. (...)
b) Princípio da privatização dos conflitos. Sobre esse aspecto, aludiu-se na parte precedente, em referência aos princípios de proporcionalidade concreta e do primado da vítima. (...)
c) O princípio da politização dos conflitos marca uma direção oposta, porém complementar, àquela indicada pelo princípio da privatização dentro da estratégia da
mínima intervenção penal. Esse princípio toma em consideração uma característica
fundamental do sistema penal: seu modo de intervir nos conflitos.(...)
d) O princípio da preservação das garantias formais exige que, em caso de deslocamento dos conflitos fora do campo da intervenção penal para outras áreas do controle social institucional ou comunitário, a posição dos sujeitos não seja reconduzida a um regime de menores garantias em relação àquele formalmente previsto pelo direito penal. (...)
[...]
a) O princípio da subtração metodológica dos conceitos de criminalidade e de pena propõe o uso, em uma função heurística, de um experimento metodológico: a subtração hipotética de determinados conceitos de um arsenal preestabelecido, ou a suspensão (epoché) de sua validez. Recomenda-se aos atores implicados na interpretação dos conflitos e dos problemas e na busca de soluções realizar tal experimento, prescindindo, por certo tempo, do emprego dos conceitos de criminalidade e de pena, a fim de que se possa verificar se e como poderiam construir-se não somente os conflitos e os problemas, senão também suas respostas, de uma ótica distinta da punitiva.
b) O princípio de não-especificação dos conflitos e dos problemas toma em consideração o fato de que o sistema penal pode ser interpretado sociologicamente como um aglomerado arbitrário de objetos heterogêneos (comportamentos puníveis) que não têm outro elemento em comum que o de estarem sujeitos a respostas punitivas.
c) O princípio geral de prevenção oferece uma indicação política fundamental para uma estratégia alternativa de controle social. Trata-se, essencialmente, de deslocar, cada vez mais, a ênfase posta nas formas de controle repressivo para formas de controle preventivo. As primeiras respondem às expressões individuais dos conflitos manifestados por ações definidas como desviadas; as segundas atendem a situações complexas nas quais os conflitos se produzem.
d) O princípio da articulação autônoma dos conflitos e das necessidades reais é, quiçá, o mais importante dos princípios extrassistemáticos. O sistema penal constitui, tradicionalmente, um aspecto da expropriação ideológica que sofremos sujeitos de necessidades e de direitos humanos por parte do sistema e da cultura dominante, com referência à percepção dos conflitos em que se acham envolvidos.[59]

[59] a) The principle of useful non-intervention indicates that the alternative to criminalization is not always represented by another form of formal or informal social control. (...)
b) Principle of the privatization of conflicts. On this aspect, it was alluded in the preceding part, in reference to the principles of concrete proportionality and the primacy of the victim. (...)
c) The principle of the politicization of conflicts marks an opposite but complementary direction to that indicated by the principle of privatization within the strategy of
the strategy of minimal penal intervention. This principle takes into consideration a fundamental
fundamental characteristic of the penal system: its way of intervening in conflicts.(...)
d) The principle of the preservation of formal guarantees requires that in the case of displacement of conflicts outside the field of criminal intervention to other areas of institutional or community social control, the position of the subjects should not be relegated to a regime of lesser guarantees in relation to that formally provided for by criminal law. (...)
[...]
a) The principle of the methodological removal of the concepts of criminality and punishment proposes the use, in a heuristic function, of a methodological experiment: the hypothetical removal of certain concepts from a pre-established arsenal, or the suspension (epoché) of their validity. It is recommended that the actors involved in the interpretation of conflicts and problems and in the search for solutions carry out such an experiment, dispensing for a certain time with the use of the concepts of criminality and punishment, in order to verify if and how not only conflicts and problems but also their answers could be constructed from a different viewpoint from the punitive one.
b) The principle of non-specification of conflicts and problems takes into account the fact that the penal system can be interpreted sociologically as an arbitrary agglomeration of heterogeneous objects (punishable behaviors) that have no other element in common than being subject to punitive responses.

It is thought that this second version would be more feasible, since it is based on small changes over a longer period, being a less utopian version. However, even this proposition is not applied in our reality despite being proposed for years.

Moreover, the perspective of crime under a correction a list view was not well accepted in Brazil, despite having had great influence in Spain and later, in the countries of Spanish America.[60]

For correction a lists, the criminal is inferior, deficient, incapable of directing his life - freely - by himself, whose weak will requires an effective and disinterested tutelary intervention by the State. Therefore, the State must adopt a pedagogical and pitying posture towards crime.[61]

Although this trend has not had many supporters in Brazil, its central tenets continue to echo in debates and bills that seek greater punishment for offences committed by minors, in accordance with the doctrine of maximum and integral protection. This choice to punish the offender with sanctions that are often inappropriate or disproportionate does not accompany the evolution of society, because right after the infraction committed, the first thought of the average man is to punish. However, reports made year after year demonstrating the situation in which prisoners are in subhuman situations, the crime rates show that the penalty currently applied does not reduce or does not have its intended effectiveness in society.

The penitentiary system was founded on this idea of revenge against the offender, but it is verified daily that this force spent by the State in order to punish and not to re-educate, is flawed, as Anitua points out:

Resta a justificativa do castigo que já não procura produzir nenhum efeito em relação ao futuro, mas que só olha para o passado. Os primeiros teorizadores que se voltariam para as velhas justificativas kantianas e hegelianas não tinham nada em comum com a imagem do vingador sanguinário que só quer fazer o mal a quem fez o mal, mesmo que tudo pereça.[6263]

So far, we have examined the question of why the State punishes. This question belongs not only to the branch of Criminal Law, but also to Constitutional Law, Sociology, Philosophy and other areas of knowledge. However, in the present research, we consider Criminal Law and Criminal Procedure, with a focus on Critical Criminology. And, in this sense, the debate presupposes a reading of LEP. The Law of Criminal Enforcement No. 7.210/1984, is provided with an instrumental function described in its Article 1, namely, "to implement the provisions of the sentence or criminal decision. Thus, the execution of the penalty is derived, above all, a final conviction, whose sanction originates the enforcement order to be executed, based on the monopoly of punitive power by the State (jus puniendi). Taking into consideration the criminal jurisdiction of the State, Andrei Zenkner Schmidt reveals the State enforcement claim, having the prisoner as the subject of the criminal enforcement.

As previously mentioned, Brazil has one of the largest prison populations in the world and mass incarceration has at no time reduced the rates of criminal offences committed. This reflects the great escalation of the systematization of punishment and abuse in the granting of provisional arrests - according to the report of Depen, more than 250 thousand prisoners still await conviction, representing more than 30% of the total of prisoners. This reality is the modus operandi of our judiciary, who have preferred the violation of the constitutional right of presumption of innocence and non-observance of the principles of contradictory, ample defense and due legal process. The Brazilian reality shows that preventive detention, which should be an exceptional institute, ends up becoming the rule.

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c) The general principle of prevention offers a fundamental political indication for an alternative strategy of social control. It is essentially a matter of increasingly displacing the emphasis placed on repressive forms of control to preventive forms of control. The former respond to individual expressions of conflicts manifested by actions defined as deviant; the latter attend to complex situations in which conflicts are produced.

d) The principle of the autonomous articulation of conflicts and real needs is perhaps the most important of the extrasystematic principles. The penal system traditionally constitutes an aspect of the ideological expropriation that subjects of needs and human rights suffer on the part of the system and the dominant culture with regard to the perception of the conflicts in which they are involved.

[60] Vide, nesse sentido, a obra de Pedro Dorado Montero, Derecho protector de los criminales.

[61] Shecaira, Sérgio Salomão Criminologia [livro eletrônico] / Sérgio Salomão Shecaira. -- 8. ed. rev., atual. e ampl. -- São Paulo : Thomson Reuters Brasil, 2020. Página 59-60.

[62]ANÍTUA, Gabriel Ignacio. História dos pensamentos criminológicos. Tradução Sérgio Lamarão. Rio de Janeiro: Revan: Instituto Carioca de Criminologia, 2008.

[63]There remains the justification of punishment that no longer seeks to produce any effect with regard to the future, but only looks to the past. The first theorisers who would turn to the old Kantian and Hegelian justifications had nothing in common with the image of the bloodthirsty avenger who only wants to do evil to the one who did evil, even if all perishes.

The most salient note of the system of reaction to crime in contemporary society is that of its professionalization and bureaucratization. The traditional structures of application of the law did not resist the avalanche of the massification of criminality; phenomenon, moreover, common to all contemporary societies and whose extension and gravity seem to be much more a function of the degree of development and social complexity than of the underlying ideological assumptions. Without trying to know - but also not forgetting or minimizing such a possibility - if such an exponential growth of crime must be attributed, in its majority, to the effective increase of criminality or, on the contrary, to the increase of criminalization, both primary and secondary.

In his course "Abolicionismo à Brasileira", Ricardo Genelhú puts an indispensable point in the discussion about imprisonment, which is the assumptions behind the legitimation of imprisonment, subdivided into topics as briefly exposed below.

The first point of the so called "lies in defense of the maintenance of the prison" is the history of an evolution of the prison. As exposed in the beginning of this work, the original function of the prison was custodial, being a mere guard of the prisoner so that the penalty itself was applied, whether this penalty was capital, stoning in a public square, etc. That is, the prison was a guarantee that the prisoner would not escape.

With the absorption of the penalty function by prison, has it in fact lost its custodial function? The answer to this question is empirical, although it is stated that prison no longer has a custodial function, practice shows the opposite, the real penalty for the prisoner is not only prison, but cotanasia, that is, a slow and painful death.

The conditions of a prison, in addition to dehumanizing the prisoner in his psychological aspect, as already demonstrated above, eventually leads to the deterioration of the prisoner's health, and when not, minimally the civil and social death, with the labeling of criminal. In addition, the extermination that occurs in prisons with thousands of deaths and rebellions, see the recent rebellion in 2019 in Manaus that ended with 40 dead prisoners[64].. In this vein, the prison has not ceased to have its custodial function of "waiting for death", minimally a social death.

The second point, and the most important to the present work, is the idea that prison will end with criminality, being its function of prevention and retribution possible to be achieved. Since the application of the penalty of imprisonment it has only been possible to observe the increase in criminality, even though it proposes to end with criminality in the terms of art. 59, "caput" of the CP. If prison truly had the function and capacity to end crime, shouldn't it be minimally decreasing? In fact, the more it is imprisoned, the more crimes happen, since it multiplies and reproduces criminality through the prison subculture.

In Brazilian prisons there are remote commands, from inside to outside, that is, crime is organised from inside the prison itself, so the criminal is not effectively "neutralised".

This leads to another topic: does prison work? If prison truly worked it would be able to prevent new crimes from being committed, and we would not have such high recidivism rates. Since the mid-1800s, attempts have been made to prove that Foherbar's psychological coercion works, and they have not succeeded. Kant said that any form of trying to prevent is an instrumentalization of man, since an individual will "pay" for the others, having to serve as an example. It is a form of dehumanisation.

In this sense, when someone is arrested for murder, I am not protecting the legal good, even because the legal good of life has already been irreversibly afflicted, but I am protecting the legislation, the state power. The very normatization, the typification, as already demonstrated, ends up being a problem, in the sense that the excessive typification as occurs in Brazil makes it so that there is an incentive for the conduct to be committed, while prison would be the counterweight. Without this typification, the counterweight would not be necessary.

Roxin argues that the only real function of the penalty is the negative special prevention, i.e. the neutralization of criminals, however, in the Brazilian reality, as already placed, nor this end is reached, since there is command of criminality within the prisons.

In continuation, the idea that prison would have positive effects, can be deconstructed by the idea that even if prison conditions were the best, a person's freedom is not buyable. An example given is of a dog that is cared for with treats, affection and toys, if you forget the door open, it will run away, as it is instinctive to freedom.

Another idea is that changing the actors would solve the problems surrounding the prison, however, in a context of domination, the only change that occurs is who dominates, but the prisoners will always be at a disadvantage. Changing the holder of power only changes the dominated, it does not change the selectivity of

[64] RYLO, Ive. 40 presos são achados mortos dentro de cadeias do Amazonas. Disponível em: https://g1.globo.com/am/amazonas/noticia/2019/05/27/mais-presos-sao-achados-mortos-dentro-de-cadeias-em-manaus-15-morreram-neste-domingo.ghtml Publicado em: 27/05/2019 Acesso em: 29/08/2021

the prison system, there will always be those who paid for their deviation and that of others. The difference between civil selectivity and penal selectivity is that penal selectivity kills.

Finally, there is the idea that with the abolition of prison, Brazil would become the country of impunity, which has already been exposed but needs to be reinforced. With the current attrition rates it is noted that Brazil is already the "country of impunity".

A proposed solution to the issue is restorative justice as a theoretical support to abolitionist theory:

A justiça restaurativa, por sua vez, é abordada como política criminal concreta, cujos subsídios abolicionistas oferecem suporte teórico importante para a construção de um novo modelo de administração de conflitos.[6566]

The issue will be addressed in the following topic.

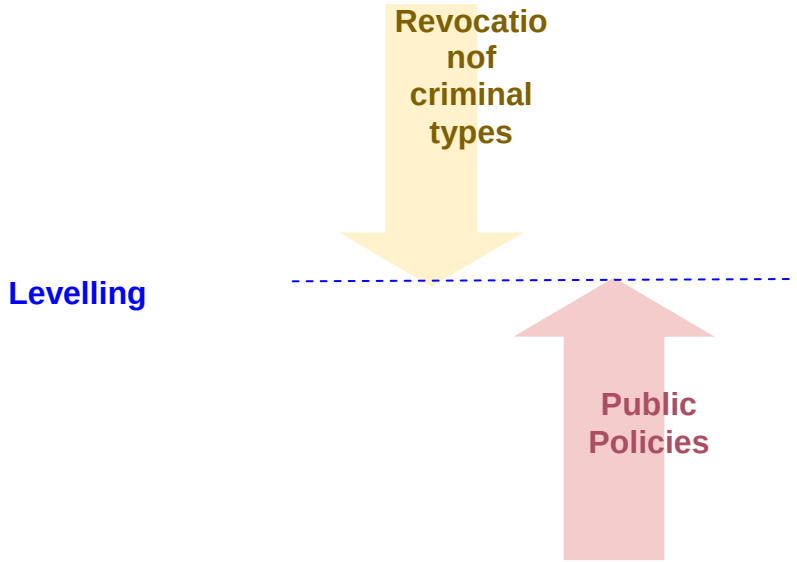
f) Model Proposition

The reflection on solutions to incarceration quickly leads to the consideration of the abolitionist theory, therefore, one cannot fail to briefly expound on it. The abolitionist theory can be divided into two major blocks, the homeopathic proposals and the surgical proposals, that is, a gradual yes on prisons or a complete end at once.

In homeopathic theory we have the need for a system of social re-levelling that is inversely proportional. This is because, at present, there is a completely selective treatment regarding laws based mainly on income and race.

So, at the same time that public policies are being implemented, there would be the repeal of criminal types and consequently the number of prisons.

Figure8. Representation of the social levelling



After the levelling, it would remain the minimum possible of criminal types, it can be supposed that for example only the types that involve violent deviations remain, which would continue in this period with the prison penalty. The remaining "crimes" would be dealt with in the civil, tax, labour, administrative, etc., spheres, through indemnifications, fines, interdictions, closure of activities, and the like. When a truly democratic rule of law is achieved, these 10 types would finally be revoked. The problem with this model is penal hyper selectivity, in which a few people are responsible for the deviation of all.

The second model to be applied would be the surgical one, in which we have the revocation of all criminal types, even without the implementation of public policies, and all these deviations would pass to other areas of law, through non-criminal sanctions.

[65] ACHUTTI, D. Justiça Restaurativa e Sistema Penal: contribuições abolicionistas para uma política criminal do encontro. Pg 5

[66] Restorative justice, in turn, is addressed as a concrete criminal policy, whose abolitionist subsidies offer important theoretical support for the construction of a new model of conflict management.

In Ricardo Genelhú's proposal, for those prisoners already convicted (those for violent crimes), departments would be created to which they would be transferred. These departments would be a kind of "resort", with swimming pool, field, etc., with a minimum security so that they do not escape, with daily evaluations by a team of psychologists, psychiatrists, doctors, sociologists, anthropologists, criminologists, to verify their ability to return to living in society. It would be different from a prison because, just like a school, you do not have the "freedom" to leave whenever you want, but it is a temporary sequestration and in an environment that truly allows re-socialisation.

Continuing the theme of proposals for alternative criminal policies to prison, we come across the topic of restorative justice, in particular the theory formulated by Nils Christie, who focused his research on formulating a criminal policy with less state damage and more effective to the people effectively involved in the conflict and the damage caused to them.

Christie proposes a return to the victim for the conflicts involving the victim, decentralizing conflict resolution, so that the victims themselves could seek ways in which their damages could be repaired. The State would have to return the stolen power to the parties, and these mediated their conflicts in such a way that a determination of responsibility and punishment for the offender was reached, without the State needing to get involved.

In this same sense, Daniel Achutti puts it:

retorno da vítima na participação da resolução de seu caso (...) foco não o ofensor, mas a vítima e as necessidades que surgiram com o conflito.[67]

In other words, restorative justice:

"(a) a vítima poderá participar dos debates envolvendo o conflito; (b) o procedimento poderá não resultar em prisão para o acusado, mesmo que ele venha a admitir que praticou o delito e provas robustas corroborem a confissão; © há a possibilidade de realização de um acordo entre as partes; e (d) os atores jurídicos especializados deixarão de ser os protagonistas, abrindo espaço para um enfrentamento interdisciplinar do conflito; dentre outras características."

As for the model proposed by Christie:

Na primeira, seria averiguada a plausibilidade da acusação, a fim de evitar que terceiras pessoas possam ser responsabilizadas pelos atos de outros e que os direitos do acusado sejam violados; a segunda envolveria a elaboração de um relatório das necessidades da vítima, a ser fornecido por ela própria, considerando o dano que lhe foi causado e as formas como ele pode ser restaurado ou minimizado; na terceira, seriam realizadas uma análise pelos tribunais comunitários acerca de uma possível punição ao ofensor, independentemente do que ocorrera a etapa anterior; por fim, uma discussão sobre a situação pessoal e social do ofensor seria realizada pelos mesmos participantes das etapas anteriores, com a finalidade de averiguar as suas eventuais necessidades. Através destas etapas, estes tribunais locais representam uma mistura de elementos de tribunais civis e penais, mas com uma forte ênfase nos aspectos civis (1997, p.11).[68]

In the same position we have Ruggiero:

certamente há na postura abolicionista a proposição de que a administração da justiça penal por um Estado centralizado deve ser substituída por formas descentralizadas de regulação autônoma de delitos.[69]

Finally, in view of the models proposed, it seems more appropriate to apply restorative justice, since it is more adjustable to the Brazilian reality and with gradual and constant application, being also less radical and therefore more digestible to society.

[67] return of the victim to participate in the resolution of his or her case (...) focus not on the offender, but on the victim and the needs that have arisen from the conflict.

[68] In the first, the plausibility of the accusation would be ascertained, in order to avoid that third persons could be held responsible for the acts of others and that the rights of the accused would be violated; the second would involve the preparation of a report of the victim's needs, to be provided by the victim herself, considering the harm that has been caused to her and the ways in which it can be restored or minimized; in the third, an analysis would be carried out by the community courts about a possible punishment of the offender, regardless of what happened in the previous stage; finally, a discussion about the personal and social situation of the offender would be held by the same participants of the previous stages, with the purpose of ascertaining his or her possible needs. Through these stages, these local courts represent a mixture of elements of civil and criminal courts, but with a strong emphasis on the civil aspects (1997, p.11).

[69] There is certainly in the abolitionist stance the proposition that the administration of criminal justice by a centralised state should be replaced by decentralised forms of autonomous regulation of offences.

Conclusion

Having said the above, to understand the real functioning of the Criminal Justice system, one must start mainly from the concepts of penalty and crime, with a focus on Critical Criminology. An analysis of criminal policy and, ultimately, an analysis of punishment, cannot be limited to the study of the functions that are attributed by official discourse, the so-called declared functions of punishment. If the aim is to understand the existence and the real functioning of these movements, one must go further: one must study criminology.

Although criminal law is fundamental as an objective limit to the punitive power of the state, it has its own logic, it is a closed system that only communicates with it. Criminology is necessary because penal dogma alone cannot explain why the Brazilian legislator when he established in art. 59 of the Penal Code a mixed theory of punishment. The penalty represents at the same time the retribution for the crime by expiation of the subject's guilt. The special prevention in the positive modality by its correction and rehabilitation, and negative by its neutralization. At the same time, it also serves the function of intimidating other potential criminals and ensuring the population's trust in the legal system. The role that the penal system fulfils and what it claims to fulfil are different things.

Therefore, when it is verified that none of these functions of the penalty in fact occur, one gets the impression that the penalty serves no purpose. However, it is correct to say that the penalty does not serve the purposes for which it is intended. But, as it has been applied continuously for at least the last 200 years, we see that it constitutes some functionality within the social system as a whole: that of maintaining the system as it is.

Summary

6.00.00.00-7 –SOCIAL SCIENCES
6.01.00.00-1 – Law
THE EDUCATIONAL FUNCTION OF THE PENALTY AND ITS APPLICATIONS CONTEMPORARY CHALLENGES IN THE FACE OF DIGITAL LAW
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The penalty is a species of the genus sanction, often associated with the loss of freedom, but it is worth remembering that the penalty can be a loss or restriction of legal property as money and alternative measures. Generally speaking, the penalty has a double purpose, which is to repay the offender for the "harm caused" and, what we will try to explain throughout this project is the re-education of the offender, to prevent the practice of new offences. Therefore, the purpose of the penalty is the retribution for the crime committed and the prevention of new crimes. With this research, it is aimed to deepen the functions of the penalty, focusing on its little explored character in Brazil, its pedagogical function. Between the pedagogical function of the penalty and its objective-end applied currently, it is pointed the existing incongruities between the reason to punish and its consequences. This was the major discussion behind this work. And, departing from the theoretical referential of critical criminology, the aspects of the penalty, the offender, the prison and the penal typification are explored to study the effects of the penalty and its consequences. In addition, it approaches the principles and fundamental rights under the Constitutional light, observing its unfoldings in Law and Criminal Procedure. With this theoretical basis and taking into account mass incarceration and high recidivism rates, it is demonstrated that the penalty is not necessary or sufficient. It is not enough, as it does not prevent new crimes or restore the victim's dignity. PIBIC-CEPE no fomento.

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