Chapter IV

Punishment in Criminal Law. Differences with Deterrents

1 Historical Analysis and Main Typology

1.1 Evolution of Punishment

1.1.1 From Punishment as Inflicting Pain to Punishment as Deprivation of Rights: Life – Capital Punishment; Freedom – Prison; and Property – Fines

For millennia, punishment of criminal acts was carried out through private revenge. Collective intervention was only used to placate the wrath of a god who was supposedly offended. An identification was made between crime and sin, an idea which informed penal physiognomy in a decisive way for years. In this evolution, the talion represented a timid attempt to overcome the absolute arbitrary nature with which punishment had erstwhile been applied. Nevertheless, what has been called “medieval punishment” continued until practically the second half of the XVIIIth century, when Criminal Law was humanized and secularized, breaking with its harshness and with its magical and sacred connections. It is then that punishment was conceived as a guarantee for collective order and the idea of hatred for, or revenge on, the criminal was overcome. The upholding of the guarantee became the responsibility of the State. Until then, the law essentially valued a prisoner’s social position most, giving rise to brazen inequalities; punishments were very harsh and cruel and not always befitting the crime for which they were imposed. Punishment basically sought moral expiation and collective intimidation. Corporal punishments were extreme: mutilation, whipping, and so on. Capital punishment, accompanied by atrocious tortures was the punishment par excellence.¹

In other times, the passive subject of punishment greatly exceeded the living individual, responsible for and guilty of a crime. In ancient times, collective responsibility was ordained, animals and the dead were punished and inanimate objects were offered up to destruction, by way of punishment. As regards collective punishment, as we go back in time, we find it everywhere. Thus, in ancient China, all male relations of those guilty of high treason were decapitated: father, grandfathers, sons, grandsons, uncles and all their sons. Collective responsibility took many forms in ancient Israel. Jehovah punished all for the sins of one. Of Ivan the Terrible it is told that, in the course of his lunacy, he began to kill people “by families”, instead of individually. A modern example of group punishment is that which took place at the death of Czar Nicholas II. Another example would be the holding responsible of all galley-slaves should one member escape. In Roman times, all the slaves under the master’s roof were killed if he were killed. In the Middle Ages, offspring were exterminated in cases involving high treason and rebellion. The deaths of Louis XVI and Marie Antoinette, of General Schleicher and his wife, of Mussolini and his lover are not far from this ancient practice.2

In some cases, apart from the psychological mechanisms which lead to the destroying of whatever surrounds the victim, in an attempt to restore public safety, the responsibility of the domestic community comes into play. This consisted of a closed group, all made to face the punishment to come: not only kinfolk but also slaves, servants and others. Even the animals belonging to the household were killed, along with the fruit trees in the garden. Here, we might speak of complete economic eradication.

Today, there is no killing of even the dead. Still, in the past, they thought in a different way. Sometimes, this was carried out to further punish the condemned, others, when the guilty one had died before having suffered, and only his lifeless remains were available, it was a means of venting ire and the unquenchable lust for revenge. In those times, the dead had the right to a decent burial, according to the norms and customs in force. In the other case, following ancient beliefs, the

---