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A Paradoxical Ambivalence in Criminal Law Purposes and Functions of Punishment

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Abstract

Over time, the State has completely replaced the victim in the protection of his property, supplanting his instinct for revenge with the ability to "repair the damage suffered" through criminal law. Criminal law, through the imposition of sanctions, has achieved an essential dimension of guarantee and protection of justice, so much so that it is emblematically referred to as the *magna charta* of victims and criminals. So the penalty, in a predominantly retributive perspective, has achieved a dual purpose and function: the restoration of social peace in the community broken by the crime, and the reparation of the wrong suffered by the victim elevated to the rank of abstract entity. However, many questions remain open. On the one hand, victims of crime, even if compensated, seem destined to suffer without the possibility of ultimate spiritual reparation. That is, victims will not be able to return to living life as they did before the crime, without the suffering it caused. On the other hand, the human dignity of criminals, or alleged criminals, has encountered and still encounters serious dangers precisely because of the procedures implemented by criminal law. There is, in fact, a paradoxical ambivalence: if criminal law is necessary for the protection of a healthy and harmonious civil coexistence, and to try to bring justice to the victims of crime, on the other hand it indisputably always threatens to do - and in the history of the world has often done - serious damage to fundamental human rights.

Keywords: Criminals, Victims of crime, Punishment, Criminal Law, Human Rights

1. Introduction

The process of exclusion of victims from criminal events, has its origins at the time of the formation of States as nations, and is characterized by its increasing intensification over the centuries, until reaching its maximum expression in the nineteenth century. The interests of the individual victim are absorbed, from the substantive point of view, in the concept of legal property protected by criminal law, while, from the procedural point of view, in the prosecution (Garapon, Salas 1997, 12ff): thus, the offended becomes "little more than an ordinary witness", a mere "patient" as Carnelutti effectively defines it (Carnelutti 1933, 245). After the institution of the law, prevarications and crimes are judged "as offenses against the law, as disobedience to the supreme power itself", distracting the victim from the damage suffered on a personal level, and obtaining, in time, the opposite of what every revenge wants. The soul, in fact, even that of the victims, is accustomed to evaluate the misdeed in an increasingly impersonal way. With the advancement of social institutions, therefore, and with the rise of the power of criminal law, the application of punishment to the offender will no longer be carried out directly by the injured party, but by a higher authority. However, the joy of the injured party's reward will be just as strong and will consist of "seeing the offender despised and mistreated". Compensation must therefore consist of "a mandate and a right to cruelty" (Nietzsche 2003, 5, 292).[2]

In short, the State has completely replaced the victim in the protection of his property (Donini 2004, 80) and criminal law reaches an essential dimension of guarantee and protection of justice, so as to be emblematically indicated as the *magna charta* of victims and offenders. Thus punishment, in a predominantly retributive perspective, reaches a double level (Bazemore, Dooley 2001, 101-126):

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[2] Nietzsche, Friedrich. 1968. *Zur Genealogie der Moral*, Nietzsche Werke, Abt. VI, Bd. II. Trad. it. *Genealogia della morale*, in *Opere filosofiche di F. W. Nietzsche*, *Classici della filosofia*, ed. by Nicola Abbagnano & Timothy Gregory. 2003. Preface by Sossio Giametta, vol. II. Torino: Utet.

On the one hand, restoring social peace in the community broken by the crime and, on the other hand, repairing the wrong suffered by the offended person elevated to the rank of abstract entity (Venafro 2004, 12ff; Sánchez 2014, 24ff).[3]

2. A "triple-track" system

The victim[4] remained for centuries in complete oblivion not only from the point of view of the legislator, but also from that of criminological scientists, as well as criminal law professionals, who focused their attention only on the study of the perpetrator and his prerogatives (Bassiouni 2010, 599 ff.). In recent decades, however, there has been a process, more or less intense in the different European legal systems, of enhancing the sanctioning component of compensation for damages, which in particular cases is seen as an "alternative" to punishment. A "triple-track" system seems to emerge, in which compensation to the crime victim can embody the epilogue of the criminal case instead of the traditional punitive sanction.[5] Beyond the perplexities, more or less shared, expressed in this regard (Romano 1993, 3ff), it is undeniable that this model is able to enhance the position of the victim, with respect to which the restorative service is mainly directed.[6]

In the field of criminal justice, in any case, the victims of a crime, even if compensated, seem destined to suffer without having the possibility of a definitive spiritual reparation;[7] in other words, the victims will not be able to return to living their life as before the crime, without the suffering caused by it, something that even the most heinous criminal will be able to enjoy one day, after having served his sentence (if he has not been sentenced to life imprisonment) (Braithwaite 1998, 323-344). This can be experienced as an injustice inherent in the nature of the crime, perceived by the victims in the dramatic awareness that they will never recover from the burden of a serious grief, loss or wrong suffered, even when the criminal will have repaired his guilt by serving the entire sentence. There is no punishment or compensation sufficient to erase the victims' grief; and in the face of this evidence, any genesis or evolution of criminal and prison law may seem insufficient.

3. The weird ambivalence in criminal law

It is true, however, that human dignity has met and still meets serious dangers precisely because of the procedures implemented by criminal law. There is, in fact, a paradoxical ambivalence:[8] on the one hand, criminal law is necessary for the protection of a healthy and harmonious civil coexistence, and to try to do justice to the victims of crime; on the other, it always threatens to do - and in the history of the world has often done - serious damage to human rights and human dignity (Andenaes 1972, 342-357). If one could make a comparison between the history of crimes, on the one hand, and the history of punishments imposed by criminal law, on the other hand, one would probably not know what to choose, it would not be so obvious which of the two has committed the greatest atrocities and vileness. It should not be underestimated, moreover, that the offender cannot feel that his act is blameworthy in itself, as long as he sees committed and approved, by judicial and executive procedures, "exactly his own kind of actions in the service of justice: i.e. espionage, deception, corruption, traps, all the captious and shrewd art of the policemen and accusers, and then the robbery, the overpowering, the outrage, the imprisonment, the torture, the systematic murder, without even the excuse of passion, which are imprinted in the various types of punishment - all actions then in no way reproved and condemned" (Nietzsche 1968, 14, 308).

3.1. The problem of prisons where to atone for punishment

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[3] See https://www.treccani.it/enciclopedia/vittima-profili-di-diritto-penale_%28Diritto-on-line% accessed 29/07/10/2020. For an interesting comparison, read Sánchez Bernardo Feijoo. 2014. *La legitimidad de la pena estatal*. Madrid: Iustel. Venafro, Emma 2004. *Brevi cenni introduttivi sull'evoluzione della vittima nel nostro sistema penale*, in Venafro, Emma & Carmela Piemontese (eds), *Ruolo e tutela della vittima in diritto penale*. Torino: Giappichelli.

[4] See Murat, Mungan C. 2019. "Salience and the severity versus the certainty of punishment" *International Review of Law and Economics*, 57, 95-100.

[5] The main proponent of this concept is Roxin, Claus. 1987. "Risarcimento del danno e fini della pena" *Riv. it. dir. and proc. pen.*, 1, 3ff., trad. by Luciano Eusebi, *Die Wieder-gutmachung im System der Strafzwecke*, in Heinz Schöch (Hrsg.). 1987. Wieder-gutmachung im Strafrecht. München: Fink Verlag, 37ff.

[6] On the recent trends of reparation of damage in the criminal sphere, see IP/10/14, 3 ff. Donini, Massimo. 2015. "Il delitto riparato. Una disequazione che può trasformare il sistema sanzionatorio" *Dir. pen. cont.*, 2, 236ff. See https://www.treccani.it/enciclopedia/vittima-profili-di-diritto-penale_%28Diritto-on-line% accessed 29/07/10/2020.

[7] For an interesting comparison with the situation of the crimes, victims and punishment in the Maoist China period, see Leese, Daniel & Puck Engman (eds). 2018. *Victims, Perpetrators, and the Role of Law in Maoist China: A Case-Study Approach*. Boston: de Gruyter.

[8] For an interesting comparison on the topic, see Amato, Salvatore C. 2015. "Criminal Punishment in Crisis" in Incampo, Antonio & Wojciech Żelaniec (eds), *Univerality of Punishment*. Bari: Cacucci, 15-28.

On the day when organized society, in order to safeguard peace and social security, decided to isolate from the community those who had violated the established order, locking them in special institutions, the problem of criminal law and prisons arose (Volpe 1991, 194-206). This problem, however, was initially felt only from the point of view of detention or prison police: punishment, in fact, was still understood almost as a social revenge and set the penal system the goal of annul the offender rather than re-educate him.

Only in the mid-eighteenth century prison was understood as a place of atonement for prison sentences and acquired a social importance. At that time, thanks to the thought of Cesare Beccaria in Italy, with his work *Dei delitti e delle pene* in 1764, and Giovanni Howard in England, who published the first edition of *The state of prisons* in 1777, two fundamental innovative principles emerged that would inspire all subsequent orientations in prison matters: 1) the principle of the humanization of punishment understood as a penalty imposed within the limits of justice in proportion to the crime committed and not according to the will of the judge;[9] 2) the principle of punishment as a means of prevention and social security and not as a public spectacle, thus discouraging its cruelty. With the affirmation of detention as a punishment and not as a means for the exercise of punitive power, several theories have declared the common intention of rationalizing prison conditions and trying to abolish the most violent aspects of it, especially torture and the death penalty, typical of the societies of the ancient regime.[10] This ferment of ideas generated within the Enlightenment movement led to the awareness of the need for prison reforms aimed at transforming prisons from places of infamy and cruelty to places of regeneration of the guilty. It was therefore concluded that the State certainly has the right to imprisonment, but also the obligation of re-education. The concept of "punishment", which has always been synonymous with "suffering", thus became the protagonist of a historical and radical turning point, establishing itself in a perspective of punitive rationality aimed at balancing a repressive efficiency to guarantee individual rights. It was therefore considered not licit to give the State a mere right to punish (*ius puniendi*) because criminal law must have as its primary purpose the prevention of crime through the protection of man (Maculan, Gil Gil 2020, 132-157).

4. Can the State exercise the "*ius puniendi*"?

First of all, then, it is necessary to ask whether the State has the right to punish. The belief that States have the right to punish very often results in something improper and dangerous.[11] Society has the right and the duty to correct the evil and to use punishment, among other means. But reasoning about the right to punish as an essentially moral and absolutely scientific principle is like making treaties about the right to beat or chain in the abstract. In modern times, according to Nietzsche, the calamity that threatens to loom behind the crime world becomes increasingly irreparable. He who is condemned becomes a real *enemy* of society, and one is convinced that the State can exercise the right to punish him. "Today, punishment isolates even more than crime: the calamity behind crime has indeed irreparable. One becomes as an *enemy* of society [...] From now on there is one more *enemy*" (Nietzsche 1967, 17[98], 18[52]).

Another denial of the right of the State to punish comes from a German writer of Jewish origin, Kurt Tucholsky, who denies the existence of such a right and rejects any moralistic conception of punishment.[12] He argues that the judge, among other things, does not have the right to make moral judgments. Those of Tommaseo and Tucholsky[13] are two clear positions, in stark contrast to those of two jurists supporters of a political power and a totalitarian conception of law: Karl Binding and Arturo Rocco, who argued that there is a right of the State to punish, and that it is the result of its supremacy over the citizens. The most correct position, in reality, is that the State cannot be given a pure and simple right to punish, which could disguise a complete authoritarian arbitrariness. According to this perspective, we must refer to an expression of Montesquieu's: State legislation can intervene with punishment only when it is dictated by absolute necessity, that is, when it comes to preventing acts detrimental to citizens' rights.

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[9] See Pino, Giorgio. 2017. "Los derechos fundamentales y el principio de proporcionalidad" *Derecho y Sociedad*, 211-223; Sartor, Giovanni. 2018. "A Quantitative Approach to Proportionality" in *Handbook of Legal Reasoning and Argumentation*. Dordrecht: Springer, 613-636.

[10] For a deepening of Beccaria's thought, see Velluzzi, Vito. 2014. "La preziosa ingenuità: Beccaria, lo spirito della legge e il sillogismo giudiziale" *Rifd. Rivista Internazionale di Filosofia del Diritto*, 687-699.

[11] Tommaseo, Niccolò, for example, in a work of 1865 dedicated to a battle against capital punishment entitled *Della pena di morte*, Firenze: Le Monnier, 1-495.

[12] See Macioce, Fabio. 2013. "Los valores religiosos y la laicidad de la esfera pùblica" *Stato, chiese e pluralismo confessionale*, 20, 1-15.

[13] Tommaseo, Niccolò. 1865. *Della Pena Di Morte: Discorsi Due*. Firenze: Le Monnier. See also Tucholsky, Kurt. 1970. *Deutsche Richter (1927)*, *Politische Justiz*, ed. by Martin Swarzenski & Franz Josef Degenhardt, Reinbek bei Hamburg: Rowohlt.

Cesare Beccaria himself, referring to the great Montesquieu in his book *Dei delitti e delle pene*, affirms this: "every punishment, which does not derive from absolute necessity, is tyrannical; a proposition that can be made even more general in this way: every act of authority from man to man, which does not derive from absolute necessity, is tyrannical" (Beccaria 1764, ch. II).

Albin Eser, a German lawyer, and a former *ad litem* judge at the International Criminal Tribunal for the former Yugoslavia, also argues that criminal law does not exist to punish, but to protect legal assets, subjective rights: "*dass das Strafrecht nicht um der Strafe, sondern um des Rechtsguterschutzes willen da ist*"[14]. Criminal law does not exist for the sole purpose of punishing, but to prevent crimes, i.e. to protect the individual rights of citizens (von Hirsch 1998, 659-682). It is therefore presented as an extreme remedy, as a last resort, and not as an obvious and primary instrument. Criminal law can therefore prohibit, and consequently punish, only external actions, i.e. those actions that violate an individual right of others. This must be allowed only to ensure the peaceful coexistence of citizens and the full enjoyment by each of their rights.

4.1. The separation between morality and law

The worst crimes are those that violate fundamental rights, that is, the right to life and the right to liberty: homicides, acts of violence, kidnappings. Therefore, the separation between law and morality, which has been the primary requirement of the process of secularization that has affected all of our civilization since modern times, must always be kept firm (Borsellino 2003, 65-89). Secularization has led to the abrogation of legal norms that punished acts as violations of moral and religious principles or laws, such as heresy, suicide, homosexual relations, adultery, blasphemy[15]. The well-known Italian criminal lawyer, Francesco Carrara, used the term "criminal law" rather than "penal law" to justify the prevalence of the theme of the elimination of the crime over that of the application of the penalty. A magistrate of the Supreme Court of Israel, Haim Cohn, points out that if the imposition of a penalty is a necessity, it is still to be considered a sad necessity, useful only in order to apply the law and ensure order in civil life, since there are no other instruments outside the penalty[16]. But someone wrote these suggestive words: "in the great economy of the universe, it matters less that the wicked be punished than that he redeems himself. Punishment does not balance or equalize anything; only strict justice can come out of it, which without redemption would establish his kingdom in the desert of desolation: *fiat iustitia, pereat mundus*.

Punishment does not go beyond the boundaries of evil; on the contrary, it can incite the evil one, locking him up in the gloomy obstinacy of impenitence, making him become a cue for resentment, an occasion for rebellion, the beginning of a fire" (Pareyson 1989).

In the current punishment system, punishment does not produce the "improvement" of the criminal but has the sole consequence of hardening his character and isolating him from society against which he can only increase his hostility and opposition. If the criminal also loses this feeling of resistance, it means that the punishment has come to shatter his energy and provoke a state of miserable prostration and self-degeneration. It is true that the delinquent act operates in an involutionary way, making civilization return to a degree of progress prior to that in which it now finds itself, but this is mainly due to the tools the criminal justice system provides to ensure self-defense: the "crafty" policeman, the jailer and the executioner, the arrogance of certain prosecutors and the cunning of many lawyers. The judge himself, the punishment and the whole judicial process are, in their effects on "non delinquents", depressing and certainly not exciting phenomena. In fact, Nietzsche writes, it will never be possible to make legitimate defense and revenge wear the cloak of innocence.[17]

4.2. Punish according to the criterion "*ne iterum peccet*".

The harshness of the punishment was justifiable in archaic communities where "oblivion" was the easiest and made it difficult to "promise" and "keep", that is, to observe the principle *pacta sunt servanda*; an essential principle if the community wants to assert itself and develop in higher stages (Nitsh 2014, 119-145). In modern society, where fixation in the memory of the fundamental rules of social life is guaranteed, less cruel criminal laws are sufficient.

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[14] Eser, Albin. 1980. *Empfielt es sich, die Straftatbestande des Mordes, des Totschlags und der Kindestotung (§ 211 bis 213, 217 StGB), neu abzugrenzen?* Gutachten zum 53. Deutschen Juristentag, Berlin: Beck, 87.

[15] For an interesting deepening of the theme, Preterossi, Geminello. 2016. "The Power and the Sacred: the impossible Goodbye? Between Political Theology and Economic Theology" *Soft Power*, 5, p. 99-107; Zanetti, Gianfrancesco. 2017. "Problemi di eguaglianza e religione nell'età dei diritti umani" *Veritas et Jus*, 14, 51-71.

[16] Cohn, Haim Hermann & S. Giora Shoham. 1971. *Of Law and Man: Essays in Honor of Haim H. Cohn: Under the Auspices of the Faculty of Law*. Tel Aviv University: Sabra Books, pp. 387.

[17] Nietzsche, Friedrich. 1967. *Menschliches, Allzumenschliches*, Zweiter Band, Abt. IV, Bd. III. Trad. it. Giametta, Sossio & Mazzino Montinari, *Umano troppo umano II*, vol. IV, t. III. Milano: Adelphi. *Il viandante e la sua ombra*, 186.

The criminal must be regained as soon as possible to social profit, avoiding that he becomes an *enemy* of society, the object of "useless rigor", and that he dissipates his vital energy in aversion. Moreover, an attempt must be made to eliminate a wrong to the extent that the damage is repairable, and to compensate the bad action against the victims with a good action; and since crime rarely harms a victim as an individual, but more often as a member of society, it follows that the good action must not only be reserved for the person who has suffered the damage, but also for any person. All this, however, should not be "roughly understood, as if a theft were to be rewarded with a gift; rather, the person who has demonstrated his bad will should finally demonstrate his good will" and this would be the only real punishment for him. Moreover, the punishment should be administered according to the criterion *ne iterum peccet*, so it should be adapted to the individual case, and be different for each convicted person. However, the terms and measures of punishment are not yet established in an attempt to produce the improvement of the individual criminal; on the contrary, according to the theory of free will, the deserved punishment is administered considering that all men are equal. According to this equality, therefore, "the punishment should be one for all crimes".

Instead, in the new criminal laws, the objective to be pursued seems to be that the punishments do a proportionate damage to the extent of the crime, an objective coveted by all, after all (Garland 1990). Well, punitive justice should be replaced by an educational justice that improves reason and habits of men. It would be enough to make the criminal feel a minimum of pain, which is the strongest stimulus of memory, to "fix" in him a prohibition, without resorting to the *ius talionis* and the commensuration between guilt and punishment-expiation-revenge. "From this would derive the maximum mitigation of all punishments: and their maximum equalization! Only as mnemonic means! In this case little would suffice!".[18]

5. The absurdity of the penal system of ancient regime

The political-cultural matrices of modern criminal law, as mentioned above, date largely to the 18th century Enlightenment. Before that time, the world of crime and punishment presented confused and gloomy scenarios. The scope of punishable acts was made uncertain by the lack of codification, the chaotic overlapping of heterogeneous normative texts and the persistent confusion between crime and sin. Even darker was the picture of punitive sanctions, characterized by arbitrariness, excess, cruelty and exasperated spectacularity. The ostentation of torture tended to intimidate the population but at the same time exerted a strong seduction. Many executioners of the time used the instrument of torture to extort even false confessions, transforming an inquisitorial - albeit barbaric - means into an instrument capable to obtain convictions where it was necessary to have a scapegoat or a pretext for an execution. The absurdity of the penal system focused on the adoption of the death penalty not only for very serious crimes (such as patricide, infanticide), but also for minor crimes. Finally, the trial was dominated by strict principles such as secrecy and almost absolute preponderance of the prosecuting body. This aberrant and irrational inquisitorial trial system, in which the magistrate cumulated in itself the required and judging function, remained alive throughout the historical period in which the political regimes of the absolute States prevailed, based on the union between the throne and the altar.

It was only after the French Revolution of 1789, with the birth of the Enlightenment movement, that liberal principles arose that guaranteed the legality of the crime and the penalty, the proportionality of the criminal sanction with respect to the crime committed and the humanization and rationalization of the criminal process.

The pre-eminent socio-political aim of the Enlightenment was to realize the centrality of man by exalting his moral and juridical autonomy, and considering the role of reason against metaphysical and mystical-religious orientations fundamental. The work *Dei delitti e delle pene*, was the first great step of an inevitable and powerful revolution of the penal system. A series of consequential needs derive from it: first of all, the imperativity of criminal law, the need for the law to be *general* (so as to oblige all members), *clear* (easy to interpret) and *written* (as a condition of inalterability). There is also a concrete reference to the need for a judicial body (a third party to judge the truth of the fact) and finally a clear identification of the dual purpose of the penalty, in modern terms of general and special prevention. In the trial field, Beccaria announced for the first time the principle of the free conviction of the judge. The confession could no longer be considered a *conditio sine qua non* for the sentence; consequently, torture was not considered only a moral absurdity, but a legal absurdity (because a man cannot be found guilty before the judge's sentence, according to the principle of the presumption of innocence) proving to be, at the same time, an insecure and fallacious instrument.[19]

[18] Nietzsche, Friedrich. 1967. *Nachgelassene Fragmente Frühling 1878 bis November 1879*, Abt. IV, Bd. II. Trad. it. Giametta, Sossio & Mazzino Montinari, *Frammenti postumi 1878-1879*, vol. IV, t. III. Milano: Adelphi, 42[61-62].

[19] The basic principles of Beccaria's thesis succeeded not only in revolutionizing the theoretical debate of the time, but also in awakening the attention of some enlightened sovereigns. During the empire of Joseph II, the first modern penal code is

Of enlightenment matrix are also some political-criminal principles contained in the famous Declaration of Human and Citizen's Rights, drafted in 1789 in revolutionary France (Thomann 1989, 131-145). We recall in particular: l'art. 5 which elevates the principle of "social harmfulness" to the criterion of criminalization; l'art. 7 which sanctions the principle of "legality"; l'art. 8 which affirms the principle of the "necessity" of punishment; l'art. 9, finally, which sanctions the principle of "presumption of innocence". The French constituents had drafted the declaration in universal terms with the intention of creating a new power structure rooted in self-evident principles of reason. The Declaration of Human and Citizen's Rights, based on the American Declaration of Independence, has inspired numerous constitutional charters and its content has represented one of the highest recognitions of human freedom and dignity. The ideas and battles of legal enlightenment finally found their rightful place; *freedom*, together with *life*, were proclaimed fundamental human rights.

6. The scientific study of the personality of the criminal

Natural deepening of the liberal conception, inspired by the principles of the Enlightenment with Catholic influence, was the classical school of criminal law that developed in the nineteenth century. Moving from the postulate of free will, i.e. of the absolutely free man in the choice of his actions, the classical school placed at the foundation of criminal law the "moral responsibility" of the subject as reproach for the evil committed and, therefore, the "ethical-retributive conception" of the penalty (Savarese 2018, 11-13). Considered critically with today's eyes, this school shows live parts next to many dead aspects. Excluding any evaluation of the agent's personality, criminal law and the offender are placed in the abstract sphere of a rationalistic law, far from the naturalistic reality in which they, on the contrary, are immersed. The postulate of the absolutely "free" man, in fact, leads to ignore the undeniable conditioning of human action by extravoluntary factors. By limiting the social defense against crime to punishment only, intended as the only means of prevention, the classical system remained alien to any neutralizing and resocializing measure, appropriate to the personality of the criminal (Sarzotti 2010, 123ff). In this way, among other things, society was left defenseless against dangerous criminals deemed not to be responsible, as the penalty was considered inapplicable in case of inability to understand and want.

Finally, no attention was paid to the recovery of the criminal, as it was considered that the criminal problem is closed with the passage of judgment.

Ultimately, classical criminal law was more concerned with past behavior than with possible future behavior. Many European codes were inspired by the classical school in the second half of the nineteenth century, but its most consistent expression was the Zanardelli code of 1889. In clear antithesis with the teachings of the classical school and natural law were conceived the cardinal principles of positivist thought. If the classical school of criminal law was based on an abstract conception of "free will" and intended punishment as a form of reintegration of the violated law, with Cesare Lombroso and his school, the problem of crime was tackled concretely, in a naturalistic perspective, with the shift of attention from the abstraction of crime to the scientific study of the "personality of the criminal".

6.1. The "crime therapy"

Considered by many to be the father of modern criminology, together with his collaborators, Lombroso drew up a classification of criminals, which was updated over time over and over again, thus giving rise to *L'uomo delinquente*, an atlas published in several volumes and editions, containing all his studies and his countless researches. However, what specifically struck the Veronese scholar - as is known - was the skull of a Calabrian peasant suspected of brigandage, Giuseppe Villella, still preserved in the study of the Lombroso Museum in Turin.

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undoubtedly remembered: the *Joseph II code*. This code realized the autonomy but above all the completeness of the criminal discipline, distinguishing it from the civil one, which was fragmented in the "common law" and abolishing judicial torture.
Also worth mentioning is the Reform of Tuscan criminal legislation of November 30, 1786, known as the *Leopoldine Reform* (the work of Peter Leopold of Habsburg Emperor of Austria - with the name of Leopold II - and brother of Joseph II). This reform translated into normative reality the Enlightenment principles of the mitigation of sentences and the relationship in proportion between crime and sanction, proceeded at the same time to a detailed typing of the figures of crime and modified the discipline of the trial, eliminating the death penalty. With regard to the death penalty, this reform deemed it necessary to resort to capital punishment only when the elimination of the person could represent the true and only brake to deter others from committing crimes, as in the case of those who fomented social unrest and tensions. Beccaria himself was against the death penalty but not in absolute, that is "in any case". In fact, he believed that life imprisonment and forced labor were much more effective as a deterrent more lasting and severe torments than the death penalty itself. For an interesting comparison on the topic, see Moro, Paolo. 2015. "Contro la pena capitale. Fondamenti e limiti della concezione abolizionista di Cesare Beccaria" in Rossi, Giovanni & Francesca Zanuso (eds), *Attualità e storicità del «Dei delitti e delle pene» a 250 anni dalla pubblicazione*. Napoli: ESI, 155-178.

The anthropologist's first study of the criminal was the theorization of the similarity between criminal and savage.[20] This discovery, for Lombroso, was clear proof of the existence of frequent monstrous regressions in criminals: the criminal is therefore a subject that has remained stationary in time, inevolved, unable to adapt to modern society with which it often inevitably comes into conflict. This would explain the character and the spread of some crimes characterized by an inhuman and inexplicable ferocity.

Lombroso therefore took action in order to achieve a "crime therapy", in his writings in fact he states several times that "Rather than cure the crime when he is already an adult, it is necessary to try to prevent it". Criminal asylums, for example, were born to respond to the need to separate the criminally insane from ordinary prisoners. The need to set up such structures was motivated both by the danger that insane offenders represented for ordinary criminals and the lack of care for the former. Lombroso believed that criminal insane asylums were therefore structures with the dual connotation of "cure-prison", implemented in essence through an indispensable medical check-up and legal supervision entrusted to prison staff (Lacey, Pickard 2015, 665-696).

7. The reformist perspectives of criminal law: purposes and functions of punishment

The indeterminateness of the sanction, indefinite over time, became the fulcrum of the positivist conception. However, the indeterminateness of the sanction was in clear contrast with the requirements of legal certainty and the protection of individual freedom.[21] Often, therefore, the reformist perspective of criminological positivism proved lacking in the humanistic value that its supporters were pleased to propagandize[22]. From the point of view of the modernization and humanization of criminal law, for example, the provision of very drastic sanctions such as the death penalty (in irreparable cases) or perpetual segregation, recommended for the most dangerous criminals, could certainly not represent progress. Criminological positivism appeared to be a contradictory cultural phenomenon: born with the aim of fighting the criminal phenomenon with the weapons of science, and enemy of the old metaphysics, it often ended in the most radical positions, acting with a sort of metaphysics of opposite sign, that is, replacing the rationalism of natural law with a naturalistic determinism equally devoid of empirical foundation.[23] It was no coincidence that it turned out to be ideologically ambiguous and provocative of more than questionable reformist outcomes.

Here are the theories developed in the course of the history of thought regarding the purpose and function of punishment. The various theories present punishment as an evil inflicted for an evil committed, that is, as a just counterbalance to a criminal act that relates to a past event.[24] It appears to be based on the principle of a just connection or proportion between crime and punishment, but contains the strong risk of conceiving punishment as mere revenge. The punishment consists of the same evil that has been committed and, from this point of view, the death penalty must be provided for murder. So the theory of punishment looks to the past. Instead they look to the future, for a purpose therefore to be achieved, the theories of criminal prevention: the theory of general prevention and the theory of special prevention.[25] The theory of general prevention attributes to the punishment the purpose of preventing citizens of a particular state from committing crimes in the future. However, this theory runs the risk of using the perpetrator as a means to achieve a purpose alien to him and affecting the whole of society. According to Kant's thinking, the penalty cannot be imposed on the offender for a purpose alien to him, since no human being can be treated as a means to an external purpose, but only as an end.

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[20] Lombroso in fact, analyzing the skull of Villella noticed a strange anomaly: instead of the usual protrusion, known by the anatomical term internal occipital crest, found a concavity with a smooth bottom, which took the name of internal occipital dimple or median cerebellar dimple. Finding in humans the median dimple, usually present only in primates and gorillas, aroused the hypothesis that there was a link between the natural evolution of the species and the behavior of the individual within the social context. For an exhaustive examination on the topic, see Santoro, Emilio. 2016. "Un altro passo sulla strada dell'avvicinamento asintotico all'uccisione di Lombroso" *L'altro diritto. Centro di documentazione su carcere, devianza e marginalità*, vol. 2016.

[21] On the topic, see Schiavello, Aldo. 2017. "Volpi e ricci, ovvero: che cosa rimane del positivismo giuridico?" *Revista Telemática de Filosofía del Derecho*, 20, 129-141.

[22] For an in-depth examination of the issue, see Ratti, Giovanni Battista. 2016. "Concepciones del sistema jurídico en el positivismo del siglo XX" *Ruptura*, 59, 123-152.

[23] An extensive analysis of the topic can be found in Chiassoni, Pierluigi. 2016. *El discreto placer del positivismo jurídico*. Bogotà: Universidad Externado de Colombia, 1-547.

[24] See Selvik, Gunnar, Michael-James Clifton, Theresa Haas, Luísa Lourenço & Kerstin Schwiesow (eds). 2019. *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher*. Berlin: Springer, 53ff.

[25] See Sutton, Adam, Adrian Cherney & Rob White. 2014. *Crime prevention: Principles, perspectives and practices*. Cambridge: University Press; Faralli, Carla & Martha C. Nussbaum. 2007. "The New Frontiers of Justice" *Ratio Juris*, 1, 145-161.

The most serious risk is that the penalty will be imposed on the offender in order to set an example to others and therefore with a greater severity and measure of the seriousness of the offence committed by him. The use and sacrifice of a man as a means to the end of society's well-being, as Kant teaches, causes, according to Nietzsche, *the cry of all higher humanity* (Nietzsche 1967, *Der Wanderer und sein Schatten* 186).

7.1. The merits of special prevention theory

To overcome this disadvantage, we can analyze the theory developed by Feuerbach, which distinguishes between threat and execution of the sentence, attributing only to the former, i.e. to the threat, the purpose of general prevention (Feuerbach 1843).[26] The threat of a penalty for the possible commission of a crime takes into account its potential future perpetrators, does not target specific people, causing a kind of psychological constraint in the minds of members of a society which diverts them from committing crimes that are linked to as many penalties. Psychological coercion precedes the violation of the law and is defined as the convergent effectiveness of executive and legislative power. The purpose of intimidation, which is the task of the State, is therefore to prevent those with criminal and anti-legal tendencies from operating on the basis of such dangerous inclinations. Another theory of punishment is that of special prevention theorized especially by Karl Grolman.[27] This theory, like the general theory of prevention, attributes to punishment the purpose of preventing the perpetrator of a crime from committing other crimes in the future, but has the advantage of taking more account of the circumstances of individual cases and the personality of criminals. The risk is that it leaves too much room for the personality of the interpreter, i.e. the judge. Grolman is criticized by Feuerbach, who strongly argues that there is a serious risk of legal uncertainty in the theory of special prevention. Feuerbach states that, according to this doctrine, the state would not need specific criminal laws: but the measure of punishment should be decided only in concrete cases and the legislator cannot foresee all possible concrete cases of crime. In that case criminal law would become a chimera and the criminal code a castle in the air. Grolman, on the other hand, defends his theory by saying that legislation is always able to understand future cases of crime without specifically mentioning them.

It provides a minimum and maximum penalty for each type of crime, thus reconciling both legal certainty and the need to establish a penalty appropriate to each particular case. Grolman is therefore the founder of a legislative system that characterizes modern codes, even if the theory of special prevention is not free from defects and risks (Reiman 1985, 115-148).[28] On the one hand, the criminal code could provide for excessive and disproportionate penalties for certain crimes, on the other the judge could exercise his function with too much discretionary power. The risk of this theory is to transform the State into an educator, into a moral preceptor who claims to train, to shape the conscience of citizens. Grolman, however, rejects the juxtaposition between these two doctrines, special prevention and the emenda theory, because the theory of special prevention tends towards a civil recovery of the culprit, and denies the State the function of preceptor or educator.[29]

8. To respect the dignity of the human being

Special prevention, is probably the best solution of criminal law because it presents the idea of turning punishment into an asset, so that the culprit can also redeem himself. The obligation to inflict an evil, i.e. a punishment, is born against those who have committed a crime, but only with the aim of arousing in the soul the thirst for a pure good: only in this can consist the punishment. If the punishment is limited to inflicting an evil, criminal justice is a repressive justice more horrible than a crime. Before choosing one type of theory of punishment over another, one must first of all make sure that criminal law is really "on a human scale". Punishment must not only be an evil to inflict, and therefore never cruel. In this sense, one must be concerned, within the penal system, to always respect the dignity of the human being, even those guilty of the most heinous crimes. John Paul II in his encyclical *Evangelium Vitae* affirms that God is always merciful even when he punishes, in fact he imposed a sign on Cain, so that no one who met him would strike him, therefore to protect him (Gn. 4,15). Not even the murderer loses his personal dignity and God himself is the guarantor of this (Giovanni Paolo II 1995, 57-58).

As far as imprisonment is concerned, a negative answer must also be given to the legitimacy of life imprisonment, i.e. perpetual imprisonment. This is a very serious penalty for cruelty that also contains contradictory elements such as the length of the sentence.

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[26] See Feuerbach, Ludwig. 1843. *Grundsätze der Philosophie der Zukunft (Principi della filosofia dell'avvenire)*, Zürich und Winterthur, *passim*.

[27] See, Conrady, Emil Von. 1894/96. *Leben und Wirken des Generals Karl von Grolman*. Berlino: Droysen.

[28] See Cattaneo, Mario A. 1996. *L'umanesimo giuridico penale di Karl Grolman*. Pisa: Edizioni ETS.

[29] See Morris, Herbert. 1994. "A Paternalistic Theory of Punishment" in *A Reader on Punishment*, ed. by Duff, Antony & David Garland. Oxford, England: Oxford University Press, 92-111.

The value of the penalty cannot be the same for a convicted person who is eighty years old and one who is only twenty. In this difference there is already a serious contradiction to which another is added: it can also be considered, in fact, a deferred death penalty. The sentence of life imprisonment indicates the death of the condemned person as the end point of its duration. In a sense, then, life imprisonment is a death penalty with the addition of a long prison sentence served in prison without any hope of release.

Another essential question concerning the principles of guarantee in the criminal trial is the treatment to be given to the accused during the trial. Several scholars and jurists believe that a thorough reform of criminal law and the prison system is necessary. There are two essential ways of reform: to rationalize as much as possible and shorten pre-trial detention. Pre-trial detention, reduced to the limits of what is strictly necessary, must be structured in such a way as not to run the risk of becoming the exercise of moral perversion. The Scottish scholar Antony Duff states that pre-trial detention unfairly treats not only an innocent person, of course, but also a guilty one. In essence, even the guilty person is very often detained before his guilt is established by proper procedure, thus ignoring the presumption of innocence.[30] Beccaria writes: "a man cannot be found guilty before the judge's sentence, nor can society take away his public protection, except when it is decided that he has violated the pacts by which this was granted to him. What right is there, then, if not that of force, to give the judge the power to punish a citizen, when it is doubtful whether he is guilty or innocent?".

8.1. The parallelism between torture and pre-trial detention

This dilemma is not new: either the law is certain, or it is uncertain; if it is certain, there can be no other punishment than that provided for by law, and the torment is useless, because the confession of the guilty person is useless; if it is uncertain, an innocent person must not be subjected to torment, because such is a man, according to the law, whose crimes are not proven.[31] In this second passage, there is implicitly a parallel with preventive detention. Now, torture is an absolute cruelty, an unbearable suffering, and from this point of view pre-trial detention is not directly comparable, but it certainly does not lack psychological suffering, such as worry, despair, anguish. Torture translates into an unjust institution of criminal law, i.e. an undue penalty imposed on a person who is still presumed innocent. But the same can be said of pre-trial detention, which the Italian code of 1988 calls "measure of pre-trial detention". It is legally an institution of procedural law aimed at avoiding dangers for the acquisition of evidence, the risk of flight of the accused or the commission of new crimes. But even in this case it is an undue custodial sentence that is imposed on a person who is still presumed innocent. Therefore, from a legal point of view, the parallelism between torture and pre-trial detention has its own subsistence. In both cases, these are institutions of procedural law that are transformed into undue, unfair and illegitimate punishment (Lo Giudice 2018, 14-26). Humanity is instead the value that must inspire criminal law, and the guarantee is the value that must inspire criminal procedural law. If the principles of the guarantee are not applied, there is a risk that the course of justice will be transformed into a series of serious injustices and that human dignity will be increasingly disrespected in criminal proceedings.

9. The danger of violating Human Rights

The current state of emergency and crisis that humanity must unfortunately face, due to wars, terrorism or health emergencies such as the pandemic caused by covid19, has led to the intention to strengthen the executive power of States and to reduce legislation to legitimate *ad hoc* measures, favouring exemplary cases of punishment, a situation that has occurred since the time of the two world wars. It happens that, in the examination of cases, in situations where freedom and security must be assessed,[32] in the judgments of internal judges - generally more condescending towards governments - security reasons prevail, while the reasons of freedom win only in the orders of international judges, notoriously less deferential.[33]

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[30] See Duff, Antony. 1991. "Retributive Punishment - Ideals and Actualities" *Israel Law Review*, 25, 3-4, 431.

[31] For an exhaustive examination of the theme, see Lalatta Costerbosa, Marina. 2018. "Argumentos contra la tortura. La definición de tortura, el estado de derecho y el tribunal europeo de derechos humanos" *Derechos y Libertades*, 39, 17-33.

[32] White, Rob. 2017. *Transnational Environmental Crime*. London and New York: Routledge. The topics covered in this exemplary work range from pollution and waste to crimes against biodiversity and wildlife, from human rights violations associated with natural resource exploitation to the criminogenic implications of climate change. The collection provides an interesting overview of the nature and dynamics of this type of crime, examining in detail who is harmed and what can be done about it. On this topic, see also, Omaggio, Vincenzo. 2014. "Il rule of law e la legalità globale" *Rivista di Filosofia del Diritto*, 65-75.

[33] See, for example, the Arar, El-Masri and Abu Omar cases.

But, on closer inspection, violations of personal freedom and the use of torture by Western security services, as many cases reveal, actually end up favouring terrorism more (Travis 2002, 175-187).[34] Only the recourse to general rules, specifically legal, and the application of the principles of equality, proportionality and reasonableness, would exclude a case-by-case decision, which inevitably leads to abuse.[35] It would therefore be desirable that individual assessments be categorical only for cases of self-defense, where the exclusive guarantee is that they are examined one by one by the judges. The courts, in general, should only allow restrictions on personal freedom ratified by the legislative power; restrictions that should be enunciated through the formulation of general and abstract rules, valid for all - without any difference between citizens and foreigners, majorities and minorities - that are then necessarily in accordance with both the strict control of the Anglo-American Supreme Courts and the supervision of European courts (Ciaramelli 2015, 171-175).

Any particular discrimination and violation of individual freedom, in fact, can only cause further violations of human rights. And any further violation of human rights, especially on the part of bodies delegated to respect justice, only triggers a chain of proceedings fuelled by serious destabilizing oppressions that cannot easily be compensated, with very likely irreversible effects at the level of world security itself.

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[34] For an interesting deepening of the topic, see Malarino, Ezequiel J. 2012. "Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights" *International Criminal Law Review*, 12, 665-695; Amato, Salvatore C. 2017. "La tutela dell'innocente. Un punto di osservazione sul ruolo della Corte costituzionale" *Politica.EU*, 8-21.

[35] On this issue, see the insightful analysis of Avitabile, Luisa. 2015. *La situazione-limite dell'ingiustizia*. V.V.A.A. *Norma originaria e norma fondamentale*. Torino: Giappichelli, 39-58; Baccelli, Luca. 2015. "Los derechos entre hard powers y soft law" *Soft power*, 2, 33-47; Barberis Mauro 2017. *Non c'è sicurezza senza libertà*. Bologna: il Mulino, 83-124; Porciello, Andrea. 2015. "The principle of equality between resources, welfare and opportunities: theoretical projects and political demands" *Derechos y Libertades*, 32, 17-47.

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