Short Symposium on the Punishment

Kant on Punishment: Between Retribution, Deterrence and Human Dignity

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Abstract

This article aims at offering an organic understanding of different elements of the Kantian philosophical-juridical conception of punishment. After analyzing Kant's argument in favour of the legitimacy of the punishment, I will single out two distinct levels of analysis: on the one hand, that of the conditions of punishability in general, where the function of punishment as retribution is outlined; on the other, that pertaining to the identification of a criterion to adjudicate the severity of a punishment. Particular attention is paid to the different functions performed, in a juridical context, by the concept of humanity as a *sui generis* human right: either drawing the boundaries of what can be object of punishment, or imposing limitations to the punishments a criminal can undergo. Finally, a long-overlooked element of Kantian theory is considered: his acknowledgment of a preventive-specific role of punishment, albeit limited to a pragmatic sphere.

I. Introduction

For a long time, Kant has been interpreted as proposing an inflexible, absolute theory of punishment. Only in recent years, thanks to closer attention paid to his theory (and to German Idealism in general) by studies in penal theory, it has become possible to obtain a more comprehensive picture of a much discussed, criticized, and often misunderstood – at least in its single component elements – theory. A misunderstanding that has often engendered a more generalized confusion regarding the systematic relationship that holds, in Kantian moral philosophy, between ethics and law. To offer just a few examples of misunderstood concepts, we could mention Kant's definition of penal law as a 'categorial imperative', his employment of the *ius talionis*, his ideas about capital punishment, and the role played, in a juridical context, by the concepts of humanity and human dignity. That these ideas have been object of such divergent interpretations can be explained by the fact that Kant failed to offer a linear and exhaustive presentation of his conception of punishment.[1]

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[1] The main sources to understand Kant's positions on these topics are: the paragraph 'On the Right to Punish and to Grant Clemence' in his *Doctrine of Right,* which *exclusively* explores the question of the criterion for punishment (hence not to be considered the only source for Kant's penal theory); parts of the *Introduction to the Metaphysics of Morals*, where Kant demonstrates

We can discern four different levels of analysis in Kant's penal theory. First of all, it briefly examines the questions of the legitimacy of punishment, considered by Kant to be closely linked to the concept of law itself (I). Secondly, it analyses the concept of punishability in its juridical meaning of *criminal liability* (II). At this level of analysis, Kant answers the question of whether someone should be punished (the 'if' of the punishment) by establishing the conditions for punishability. In this context, he states his well-known proscription of instrumental punishments (II.1) – which is closely linked to the idea of the human being as an end in itself (II.2) – and he further defines penal law as a categorical imperative (II.3). Thirdly, Kant asks how criminals should be punished (the 'how' of the punishment) (III), identifying in the *ius talionis* (III.1) the sole *a priori* criterion applicable to establish the appropriate severity of a punishment, and to draw its boundaries – particularly those imposed by the idea of humanity (III.2). It is in this context that Kant outlines his refutation of Beccaria's theses against the death penalty (III.3). From a Kantian perspective this question, so central to the post-Enlightenment debate which led to radical juridical reforms in many European states, will be formulated from the fundamental principles of law alone. When evaluating the magnitude of the punishment there is also a fourth level of analysis, albeit secondary in importance: the pragmatic one (IV). Here Kant's acknowledgment – long ignored by the secondary literature – of a preventive-specific function of punishments emerges clearly. In this case, philosophical analysis steps beyond the boundaries of pure practical reason in order to consider a kind of pragmatic reason (or practical ability) as a fundamental pre-requisite of reforms in a juridical-historical context.

Of particular relevance for Kantian critical philosophy is the (doubly) limiting function of the idea of humanity. Far from being a concept like any other, the bond imposed by humanity is, for Kant, the very foundation of moral obligation. The constraint applied on the agent by his or her own humanity – to recognize him or herself as a moral (both ethical and juridical) subject – and the injunction to consider one's intrinsic worth as a limit in the relationships with others and oneself, constitute both the origin and the guiding principles for

the foundation for the authorization to punish; the *Reflexionen zur Moralphilosophie* and the *Reflexionen zur Rechtsphilosophie,* as well as other, mostly unpublished, texts where the preventive-specific function of punishment is clearly delineated. References to the works of Kant follow volume and page of the German Academy edition (AA), I. Kant, *Kants Gesammelte Schriften* (Berlin: Reimer, then de Gruyter, 1902), 1-29. Among recent studies on Kant's penal theory we should mention R. Brandt, 'Gerechtigkeit und Strafgerechtigkeit bei Kant', in G. Schönrich and Y. Kato eds, *Kant in der Diskussion der Moderne* (Frankfurt/M.: Suhrkamp Verlag, 1996), 425-463; B.S. Byrd and J. Hruschka, *Kant's Doctrine of Right. A Commentary* (Cambridge: Cambridge University Press, 2010), 261-278; O. Höffe, 'Vom Straf- und Begnadungsrecht', in O. Höffe ed, *Immanuel Kant. Metaphysische Anfangsgründe der Rechtslehre* (Berlin: Akademie Verlag, 1999), 213-233; G. Mohr, 'Nur weil er verbrochen hat. Menschenwürde und Vergeltung in Kants Strafrechtsphilosophie', in H. Klemme ed, *Kant und die Zukunft der europäischen Aufklärung* (Berlin-New York: Walter de Gruyter, 2009), 469-499; D. Tafani, 'Kant e il diritto di punire' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 55-84 (2000).

the normativity of practical action as a whole.[2]

In a juridical context, this right to humanity gives rise to a right to juridical humanity: a presupposition of a system of jurisprudence that also appears in several passages of the *Rechtslehre*, as a limiting condition for juridical measures.[3] Functioning as a guarantee against any possible obstacle to freedom, humanity is at once a right and not fully a (juridical) right, while still being able to constrain the juridical field.[4] It can impose a number of proscriptions, like that, for a State, to use its citizens as instruments in the event of war,[5] the obligation to dissolve, in time, all permanent armies, the obligations shared by states,[6] and – what is most pertinent to the current discussion – the proscription of using punishment as an instrument for the sake of some other good, or with the aim of demeaning the dignity of the criminal as human being.

II. The Legitimacy of the Punishment

In contrast to moral law, which regulates internal freedom and is aimed at the individual's moral intention (*Gesinnung*), legal law pertains to the form of the external relations between free wills, and excercises binding power over pathological motives of determination of the will. More precisely, it addresses motives arising not so much from the inclinations of the individual as much as from conflicts with other subjects. Unlike the ethical field's case, the motive for compliance with legal laws depends on a heterogeneous element that is added to external laws, to guarantee their observance. Now, Kant maintains, such motive is analytically included in those very laws:

> In all lawgiving (…) there are two elements: *first,* a law, which represents an action that is to be done as *objectively* necessary, that is, which makes

[2] About this see *Reflexionen* no 7862 in 19:538. This doesn't mean that right is grounded (and dependent) on ethics: from the Kantian standpoint ethics and right needs to be stritcly separated. (cf 6:93-100). On the relationship between right and ethics in Kant see M. Baum, 'Recht und Ethik in Kants praktischen Philosophie', in J. Stolzenberg ed, *Kant in der Gegenwart* (Berlin-New York: Walter de Gruyter, 2007), 213-226; B. Dörflinger, D. Hüning and G. Kruck eds, *Das Verhältnis von Recht und Ethik in Kants praktischer Philosophie* (Hildesheim-Zürich-New York: George Olms, 2017).

[3] Cf 4:431. As it was thoroughly demonstrated by Ponchio, the right to humanity is not, strictly speaking, part of right, because this requires an external constraint; it doesn't belong to ethics either, because this requires that duty be elected as a motive (*Triebfeder*) for action. See A. Ponchio, *Etica e diritto in Kant. Un'interpretazione comprensiva della morale kantiana* (Pisa: Edizioni ETS, 2011), 198-214.

[4] The move from right to humanity imposes on the subject a preliminary action as condition for the very existence of right, a kind of *Vor-Leistung,* a stance taken towards the relationships with others and oneself, as a holder of both rights and duties. Cf O. Höffe, *Königliche Völker. Zu Kants kosmopolitischer Rechts- und Friedenstheorie* (Frankfurt am Main: Suhrkamp, 2001), 157-160.

[5] 6:345.

[6] 7:345.

> the action a duty; and *second*, an incentive, which connects a ground for determining choice to this action *subjectively* with the representation of the law.[7]

By affirming the immediate inclusion of the motive in the law, Kant draws an analytical connection between the concept of right and the authorization to coerce. If, according to the *Introduction to the Doctrine of Right*,

> Right is (…) the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom[8]

or even

> the possibility of a fully reciprocal use of coercion that is consistent with everyone's freedom in accordance with universal laws,[9]

it follows that the legitimacy of the use of coercion coincides with the right to punish:

> There is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.[10]

Right and authorization to use coercion (*Zwangsbefugnis*) 'mean one and the same thing'.[11] So in the *Further Discussion of the Concept of the Right to Punish* (Section V of the *Doctrine of Right*), Kant writes that the right to punish has its foundation in the very concept of public right:

> The mere idea of a civil constitution among *human beings* carries with it the concept of punitive justice belonging to the supreme authority.[12]

In this context, the penal institution represents the supreme power's legal instrument used for producing constraint, and, from an inverse perspective, the legal motive that conditions the free will of a potential offender towards the observance of public laws.

On the basis of this close link between external law, legal motive and law/coercion, the transition from the state of nature to the state which, according to Kant, individuals are obliged by the postulate of public law, is conceived as the transfer by individuals to the state, not of the content – even to

[7] 6:218.
[8] 6:230.
[9] 6:232.
[10] 6:231.
[11] 6:230.
[12] 6:362.

the slightest degree – of each person's rights (a right already present in a provisional form of private right) but rather of the very authorization to use coercion, which in the state of nature belongs to the subjective law of each person. Kant then sees the transition to the juridical state as a modification of the form of coercion: moving from violence (*violentia*) to distributive justice (*austeilende Gerechtigkeit*), in which 'what belongs to each can be secured to him against everyone else (*lex iustitiae*)'.[13] According to the postulate of public right, in fact,

> you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice. The ground of this postulate can be explicated analytically from the concept *of right* in external relations, in contrast with *violence* (*violentia*).[14]

Hence, public justice is also defined as 'the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone'.[15] The State, therefore, takes on as its primary task – as a State – that of guaranteeing the rights of each individual; and precisely this guarantee represents the reason that pushes the individual to enter, willingly or unwillingly, into the juridical state.

Criminal law is therefore based on the right to punish, and aims at the creation of a legal motive. The state's right to punish is, in turn, based on the need to ensure that juridical law is actually binding.[16] The principle from which criminal laws derive consists in the establishment of a mechanism which, by associating punishment with the violation of the law, produces an act in accordance with the law. Here we recognize in Kant what today we consider to be a clear *utilitarian foundation* of criminal law, as well as an evident general-preventive function of punishment.[17] This preventive function is not mentioned in the passages of the *Doctrine of Right* concerning criminal law: there, Kant's primary interest is that of conducting a systematic criticism of the (*exclusive*) preventive penal theories. However, this general-preventive function emerges in other writings too. In a reflection on the philosophy of right (*Reflexionen* no 8026), Kant writes:

> *Strafe ist das Zwangsmittel, den Gesetzen Achtung zu verschaffen. Laesionen einer Person werden abgewehrt aber nicht bestraft in statu*

[13] 6:237.
[14] 6:307.
[15] 6:306.
[16] On the legitimacy of penal punishment in Kant, see W. Enderlein, 'Die Begründung der Strafe bei Kant' *Kant-Studien*, 303-327 (1985); H.G. Schmitz, *Zur Legitimität der Kriminalstrafe. Philosophische Erörterungen* (Berlin: Duncker & Humblot, 2001).
[17] Cf B.S. Byrd, 'Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution' *Law and Philosophy*, 151-200 (1989).

naturali, weil da kein äußeres Gesetz ist,[18]

and in *On the Common Saying*, too, Kant writes that external laws are

> *public coercive laws,* by which what belongs to each can be determined for him and secured against encroachment by any other.[19]

III. The Question of the 'if' of Punishment

1. The Neutral Meaning of Retribution (*Vergeltung*)

Based on the model of the separation of the State's three powers, which guarantees the reciprocal limitation of the exercise of power, Kant distinguishes between three different aspects of punishment. The first, from a legislative point of view, concerns punishment as an intended effect of the promulgation of a criminal law; the second, from a judicial point of view, concerns the punishment that is inflicted on the criminal through a sentence; the third aspect, from an executive point of view, concerns the execution of the punishment, namely 'the right a ruler has against a subject to inflict pain upon him because of his having committed a crime'.[20]

Kant systematically rejects any kind of preventive theory of criminal justice, wanting to demonstrate that a punishment can never be justified by its purpose. To construe the punitive institution as useful for a certain purpose would entail, for Kant, that the State – represented by the three bodies: legislative, judicial, and executive – would be entitled to eliminate or modify the law or its application according to the circumstances. At the judicial level in particular, the punishment would risk being sanctioned, in an individual case, for purposes that go beyond the crime in itself, and the person who committed it. Kant provides the conditions for the application of judicial punishment (*poena forensis*), by distinguishing it from natural punishment (*poena naturalis*), formulating here the famous prohibition of a punishment assigned for the sake of something else:

> *Punishment by a court* (*poena forensis*) (…) can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*.[21]

[18] 'Punishment is a means of coercion to establish respect for the law. In the state of nature the crimes towards a person are rejected but not punished, because here there is no external law' (19:585).

[19] 8:289.

[20] 6:331.

[21] ibid

From an anti-utilitarian perspective, a punishment must be imposed on the offender first and foremost on the basis of his or her having actually committed the offence. It follows that the condition of punishability of the accused is the sole condition for the sentencing to a punishment: the punishment cannot be imposed by the judge in order to pursue any aim other than that of judging an already performed act. The principle that a crime must be matched by an adequate punishment must override any other utilitarian consideration that may arise: the defendant

> must previously have been found *punishable* (*strafbar*), before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens.[22]

It follows that although the punishment can certainly be considered useful, this can only be relevant at a later stage and on a secondary level of reflection. By prohibiting an instrumental understanding of punishments, Kant reaffirms the characteristic principle of the liberal juridical state, aimed at satisfying the need to guarantee legality: the indispensable premise of any legal punishment is the ascertainment of the actual perpetration of a crime.

Two consequences derive from this argument. First, as a *post-factum* sentence, the imposition of a punishment to an individual case can only refer to the past, to the *fait accompli*: this is a characteristic element of every absolute theory of punishment, with exclusive reference to the past (*quia peccatum est*). Secondly, the attestation of punishability implies that the crime must be proven: as it is pointed out in a reflection of moral philosophy (*Reflexionen* no 7491) '*Es kan niemand gestraft werden als nach bewiesenem Verbrechen*' ('no one can be punished except on the basis of a proven crime')[23] – a claim which might lead us to consider Kant as a precursor of the presumption of innocence.

Kant therefore presents a neutral and restrictive meaning of retribution (*Vergeltung*), one judging a punishment legitimate only where the subject has *voluntarily* committed a *crime*. This implies, on the one hand, a subjective constraint concerning the accused person and, on the other, an objective constraint concerning the gravity of the act committed.

On the one hand, the person must be recognised as being liable, ie his or her capacity to act as the person responsible for his or her own actions must be verified. The actor must possess free will and a healthy intellect, thus being an autonomous subject capable of imputation and, as such, depositary of rights and duties. It follows that in the case, for example, of an accused whose mental health is doubtful, the judge is required, first of all, to ascertain his or her sanity with the competent authorities. In the case of an inherited and incurable illness,

[22] ibid
[23] 19:413.

the judge will be required to assume that the subject may have been hindered in his or her actions by internal factors or mental disorders, and thus to hold the accused as not (or only partially) responsible for his or her actions.[24] As a recent critical study has pointed out, this close link between criminal law and psychiatry represents a significant contribution of Kantian philosophy to modern forensic psychiatry.[25]

On the other hand, the object (the act performed) must have legal significance, that is to say it must be recognised as an act that can be evaluated by the law. It must be judged by a court as the result of an action freely carried out under public law.[26] In other words, the fact must fall under the definition of a crime as that 'which violates the security a state gives each in his possession of what is his'.[27] This is a so-called 'public crime' (*crimen publicum*) which – unlike a private crime (*crimen*) defined as damage to a person and therefore judged by civil justice (such as an abuse of trust) – represents damage to the common body and involves the removal of civil status (such as embezzlement and business fraud) and is thus judged by criminal justice. Thus, only an act that does not conform to the freedom of others constitutes an offence worthy of penal action: an external and particularly serious action that endangers the life of citizens. It follows that a punishment will be legitimate only and exclusively when falling under the jurisdiction of a public law, and therefore only in the context of a lawful State. This means that the principle holds: there can be no punishment without law.[28] For these reasons, while an injustice will be punishable by law according to the very concept of right, not having at all transitioned into the legal state is to be considered the greatest injustice: a life without public laws knows no punishments because there is nothing that can guarantee individual rights.

2. Retribution (*Vergeltung*) and Humanity

At the basis of this doubly restrictive condition, determined by the gravity of the crime on the one hand, and by the person who committed it on the other, there is another more original constraint, imposed by the very nature of a

[24] See the Kantian exposition of various forms of mania (*gestörte Gemüth*) in the *Anthropology from a Pragmatic Point of View*, 7:213-214.

[25] Cf A. Mooij, 'Kant on Criminal Law and Psychiatry' *International Journal of Law and Psychiatry*, 335-341 (1998).

[26] Cf 6:227.

[27] 6:362.

[28] The sources for Kant are likely *Romans* 4:15 ('Where nolaw is, there is no transgression') and T. Hobbes, 'Leviathan', in C.B. Macpherson ed (Harmodsworth: Penguin, 1968), chapter 27 ('Where there is no law there is no sin (…) If civil laws cease, crimes cease'). The first appereance of the latin formula '*nulla poena sine lege*' can be found in P.J.A. Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (Giessen: G.F. Heyer, 5th ed, 1812), 22. On Kant and Feuerbach cf J. Hruschka, *Kant und der Rechtsstaat und andere Essays zu Kants Rechtslehre und Ethik* (Freiburg im Breisgau: Karl Alber, 2015), 89-114.

human being as an end in itself (*Zweck an sich selbst*)[29] who, in virtue of his or her freedom – the moral foundation of right and ethics – is above all a responsible and imputable being.

Humanity, considered as an end in itself – as per the second formulation of the categorical imperative demonstrated in the context of the foundation of morals:

> *So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means*[30]

– is for Kant, in the context of criminal law, the reason for the ban on the instrumentality of punishment. The idea of humanity has a very precise and restrictive function in the juridical-penal sphere, and enters into the argument in a negative sense, and by refuting the theories of preventive justice and invalidating their possible consequences:

> (…) a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality.[31]

The human's innate personality functions as the guarantee of a fair punishment, even when such punishment has the effect of depriving the accused, *qua* criminal, of his civil personality or legal status as an acquired right. By virtue of the innate capacity to consider him or herself as an end in him/herself and to relate to others as such, every human being deserves to have the unique and primordial right to innate freedom –[32] the precondition for any determination of the concept of right – understood as

> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law.[33]

Referring here to the so-called humanity formula of the categorical imperative, Kant invokes the principle of humanity as an end in itself – which defines the

[29] 4:435. By virtue of his morality the human being is a subject of the moral law (cf 5:87; 5:132), subject of pratical-moral reason, (cf 6:432; 434) and therefore subject of all (possible) ends (cf 4:430-431; 437), having 'the capacity to realize all sorts of possible ends, so far as this is to be found in the human being himself' (cf 6:392), to be the end of his own existence, and to determine his ends by the employment of reason (cf 5:431).

[30] 4:429. Cf also 8:107-108 and 113-114.

[31] 6:331.

[32] The moral law as a *ratio cognoscendi* of human nature – a freedom grounding the normativity of practical action – is one and innate.

[33] 6:237-238.

capacity of each human being (unlike things or animals) to determine a particular form of interpersonal and self-related relationship – as a distinctive feature of human nature. As a moral capacity underlying any relationship, whether ethical or legal, the special type of determination of relations between humans expressed by the idea of humanity as an end in itself, is explicitly distinguished from any other practical determination of inter-subjective relations. At the basis of the distinction made here by Kant between innate and civil personality there is that between a subject as a free subject, considered in 'his personality independent of physical attributes (*homo noumenon*)', and the same subject as 'affected by physical attributes, a human being (*homo phaenomenon*)'[34] – a distinction that will come to play a central role in Kant's discussion of Cesare Beccaria's theses, as we will see shortly. The person as a legal entity should also always be considered as different from the person seen from the standpoint of his or her civil status, that is to say as a human being as such.[35]

Being a *natural* possession, superior to any other acquired right, humanity is considered by Kant to be a regulative principle operating in the field of law: a *sui generis* human right, unique and innate, just as unique and innate as the preliminary right to freedom. Deriving from the wider field of morality, this right is the supreme limiting condition for any exercise of freedom (both internal and external):

> *Das Recht der Menschheit (ist) dasienige, was alle freyheit durch nothwendige Bedingungen einschränkt* (The right of Humanity (is) that which limits all freedom by necessary conditions).[36]

This is as much an ethical as it is a legal requirement, that both legislations are called upon to enforce in their different areas of competence. Within the framework of law, humanity constitutes such an *internal* limit of *external* freedom in intersubjective relations. It is the limiting condition for the external freedom of the individual in relating to others, and at the same time it constitutes the limit of the freedom of others when relating to the individual. In other words, it constitutes the legal duty to consider the other as a *possible subject of juridical relations*. This sole right of humanity, by virtue of which everyone, by its very nature, advances the right to act in the exercise of his

[34] Cf 6:239. Sadun Bordoni has recently highlighted one of the fundamental aspects of the Kantian distinction between *homo noumenon* and *homo phaenomenon* (one already emerging in the *Naturrecht Feyerabend*): it aims at affirming that freedom alone, and not reason as such, is the element which characterizes *homo noumenon*. See G.S. Bordoni, 'Leggi della natura e leggi della libertà. Kant e il giusnaturalismo', in T. Gregory ed, *Nomos, Lex* (Firenze: Olschki, 2017), 261-270.

[35] Cf 6:427-432. The idea of the human being as an end in itself represents the very content of the categorical imperative, and thus it is the idea – source of every obligation – to which the human must conform (cf 6:404). It is an ideal (cf 6:405), and a duty (cf 6:386) which expresses a responsibility for humankind as a whole.

[36] *Reflexionen* no 6801, 19:165-166.

innate freedom – that is to say, independently from the coercive arbitrariness of others – is the basis of the prohibition of the instrumentality of punishment.

To be primarily considered as an innate personality implies the right not to be judged a criminal without having first performed a (legally recognized) act that damages the external relations of individuals. In the exercise of external freedom, on the basis of human dignity (innate personality) even before civil dignity, the relationship between subjects must be thought of first and foremost as a relationship of innate equality: it is about the

> innate *equality,* that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master* (*sui iuris*), as well as being a human being *beyond reproach* (*iusti*), since before he performs any act affecting rights he has done no wrong to anyone.[37]

This original and innate meaning of equality between human beings is also applicable to the relationship between the representative of a State power (legislative, judicial, or executive) and the citizen: the 'Relation of the Subject Imposing Obligation to the Subject Put under Obligation' is a 'relation in terms of rights of human beings toward beings that have rights as well as duties' as a 'relation of human beings to human beings'.[38] If the presupposition for the free association of human beings is that imputability depends on the innate personality of an individual, then the relationship between judge and criminal will be first of all a human one, an equal relationship between two persons, going from *homo noumenon* to *homo noumenon* (the criminal *wanted* to carry out the crime, through the full exercise of his freedom, and by choosing so he or she would have acted voluntarily as a free and imputable subject, unlike any animal behaviour or thing). As a human being, therefore, the criminal will never be considered to be an object but, respecting the humanity in its person, always a *subject*. Indeed, he or she is a *co-subject* of a free causality that no punishment can (or better should) take away, and endowed with that innate and fundamental right that is freedom.

3. The Meaning of the Law of Punishment as Categorical Imperative

The Kantian presentation of criminal law as a categorical imperative should be read as part of his broader anti-utilitarian concerns. Due to a certain ambiguity, the following passage has given rise to divergent interpretations within the literature. Object of dispute is the following: the sense in which Kant here uses the term 'categorical imperative', and the identification of the addressee of this command, either a criminal or a judge:

[37] 6:237-238.
[38] 6:241.

> The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises, in accordance with the Pharisaical saying, 'It is better for one man to die than for an entire people to perish'. For if justice goes, there is no longer any value in human being's living on the earth.[39]

Through this provocative association of criminal law with the categorical imperative, Kant is taking a stance against any type of punishment motivated by well-being, happiness, or other benefits that either the criminal or society at large may derive at any given time – or even a punishment simply prompted by an arbitrary decision of the judge. An exclusively utilitarian conception of punishment must be countered with an (*absolute*) idea of justice, which cannot be derived either empirically or pragmatically.

That of 'categorical imperative' is a very precise concept in Kantian moral philosophy: categorical imperative refers to, in an ethical context, the internal obligation imposed by the moral law, requiring the simple respect of the law itself. This free and voluntary adherence to duty itself overrides any empirical determination or conditioning. It 'would be that which represented an action as objectively necessary of itself, without reference to another end'.[40] Now, by defining criminal law as a categorical imperative (in the juridical context), Kant wants to say that criminal law must be considered as a '(morally practical) *law*',[41] which determines with apodictic validity and compelling strength[42] the sentencing of a criminal, seen as a necessary consequence of the objective commission of a crime, without reference to any other purpose.

With this juxtaposition of criminal law and categorical imperative, Kant certainly does not want to identify moral law with positive criminal law: rather, he is once again placing the emphasis, on the one hand, on the *necessary* and *unconditioned* nature of the allocation of the punishment under certain given conditions and, on the other, on the limits that the judicial body encounters in the exercise of its punitive power. Although a reading of the categorical imperative as a command addressed to the citizens may also seem plausible, it seems more convincing to argue that Kant is addressing the command to the public officials in charge of the administration of justice.[43]

[39] 6:332.

[40] 4:414.

[41] 'A (morally practical) law is a proposition that contains a categorical imperative (a command)' (6:227).

[42] Cf 6:222.

[43] The text is not clear on this point. On the one hand, the general meaning of the passage evidently concerns the authority that punishes; on the other hand, the textual meaning of the sentence concerns the liberation (even partial) from the punishment, therefore the guilty party. In this sense, this categorical imperative can be associated with the categorical imperative of public law (*Rechtslehre*, §2; §42): if you are unconditionally obliged to enter into the juridical state, you will

When speaking of a categorical imperative, Kant's implicit warning to those exercising judicial power is clear: do not confuse the form of absolute obligation (proper to a categorical imperative) to punish a proven crime with a form of relative obligation (proper to a hypothetical imperative) that would have another type of validity. If the sentence only had a relative validity, the absolute and priceless idea of justice that guarantees the value of the life of all human beings on Earth would disappear. The example given here by Kant is that of someone condemned to capital punishment who would propose to undergo dangerous medical experiments to promote the progress of medicine, in exchange for his life being spared. A court should reject in outrage such a proposal because, Kant argues, 'justice ceases to be justice if it can be bought for any price whatsoever'.[44]

The application of a punishment, therefore, is categorical in the sense that it refers to pure and rigorous justice: the power to sentence to a punishment, proper to the judicial body, must categorically submit to the simple *form* of criminal law and not yield to utilitarian calculations of any kind, for that would lead to the loss of its very character of justice.

Criminal law, therefore, established at the legislative level, *must* be *strictly* applied according to the formal principle of not leaving unpunished a proven crime. As the object of an unconditional and necessary duty, criminal law in its formal character – that is, independently of any empirical or material element that may be relevant to each case – categorically imposes on the judiciary the application of a punishment as a consequence of a crime. This will obviously be the case only in the case of a *proven* crime, committed by a *sane* criminal, and in full respect of the innate freedom of legal subjectivity *tout court*.

With criminal law as a categorical imperative Kant simply wants to warn against the lures of a utilitarian doctrine. Although highly provocative – and object of divergent interpretations – this definition is meant to limit the arbitrariness of the judges' decisions, and to reaffirm the division of powers in the specific field of criminal law.[45] Kant answers the question of the 'if' of the punishment with the idea of absolute justice, the simple and unconditional application of a formal law. If we are to think of a punishment's purpose, the only viable answer, for Kant, is the idea of justice itself.

IV. The Question of the 'how' of Punishment.

1. Retaliation (*Wiedervergeltung*) and Its Restriction

also be unconditionally obliged to act in it in accordance with public laws, including criminal laws. For an overview of the different interpretations of the criminal law as a categorical imperative, cf M.A. Cattaneo, *Dignità umana e pena nella filosofia di Kant* (Milano: Giuffrè, 1981), 225-317.

[44] 6:332.

[45] This is neither a direct derivation of the punishment from the moral imperative nor from the morality of the judge.

A much-discussed problem in the debate contemporary to Kant on punitive measures is that of defining how far one can go when punishing a criminal. From the Kantian perspective, if the investigation was left to empirical observation, and punitive measures were legitimized exclusively on the basis of their preventive effectiveness, there would be no limits to the monstrosity of punishments.[46] Once the guilt of the offender has been established, Kant then raises the question of the criterion for determining the adequate type of the punishment: 'But what kind and what amount of punishment is it that public justice makes its principle and measure?'.[47]

Ignoring the pragmatic value of the punishment, the only valid principle for determining its type and degree is 'none other than the principle of equality (*Prinzip der Gleichheit*) (in the position of the needle on the scale of justice), to incline no more to one side than to the other',[48] because only:

> the law of retribution (*Wiedervergeltungsrecht*) (*ius talionis*) – it being understood, of course, that this is applied by a court (not by your private judgment) – can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.[49]

In order to properly establish the adequate amount of punishment, independently from any empirical considerations, human reason can only mobilize the principle of the *ius talionis* 'by its form' ie

> always the principle for the right to punish since it alone is the principle determining this idea *a priori* (not derived from experience of which measures would be most effective for eradicating crime).[50]

The *ius talionis* therefore ensures the proportionality of guilt and punishment, avoiding a punishment disproportionate to the crime committed (on the basis of its preventive effectiveness) and thus guaranteeing equality (as an *a priori* principle of right) between the magnitude of the crime and the measure of retribution, as well as the equality of everybody before criminal law.

Therefore, the law of retribution (retaliation) is not a justification for punishment, but it is the formal criterion employed to establish the proper amount of punishment. That is, it defines a purely formal criterion of equality between the transgression of public law and punitive action. The Kantian employment of the *ius talionis* does not concern *Vergeltung*, ie necessary

[46] Hence Kant places himself on the side of other Enlightenment thinkers, and of Beccaria himself, who have denounced the inhuman tortures of the old penal system.

[47] 6:332.

[48] ibid

[49] ibid

[50] 6:362-363.

retribution under specifics conditions, but rather *Wiedervergeltung*, ie *retaliation* in the sense of delivering to the offender the same type of suffering that he has caused. The latter indicates a just and legitimate need: that of a proportion between crime and punishment, another fundamental theme of Enlightenment debates.[51]

From a formal point of view, therefore, the *lex talionis* will always be applied, if not according to its letter, at least according to its spirit. Among specific forms of application of the principle of equality, Kant includes, as is well known, the death penalty:

> If, however, he has committed murder he must *die*. Here there is no substitute that will satisfy justice. There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer.[52]

A closely related topic is that of the equal degree of punishment. If the *lex talionis* is admitted as the only principle of justice, then the equality of everybody before the criminal law – regardless of class or the different sensitivity of individuals to one type of punishment or another – will also be established. Kant's reference here is the Scottish rebellion and the freedom, to be established in court, for any offender to *choose* his or her penalty between *death* and *forced labour*. The criterion of choice here will be subjective, replies Kant, and so the choice would become a matter of honor: 'The man of honor would choose death, and the scoundrel convict labor'.[53] From the point of view of the objective principle of the *lex talionis*, the death penalty would be the only wholly proportionate and just punishment, for both offenders. In these specific cases, therefore, the principle of the equality of punishment – in this case the death penalty – intervenes to vanquish any doubt

> every murderer – anyone who commits murder, orders it, or is an accomplice in it – must suffer death; this is what justice, as the idea of judicial authority, wills in accordance with universal laws that are grounded *a priori*.[54]

This will also be true in the case of several criminals being judged together: 'When sentence is pronounced on a number of criminals united in a plot, the best equalizer before justice is *death*'.[55] Kant writes again:

[51] On the difference between *Vergeltung* and *Wiedervergeltung* see O. Höffe, 'Vom Straf- und Begnadungsrecht' n 1 above, 214-215.

[52] 6:333.

[53] 6:333-334.

[54] 6:333.

[55] 6:334.

> This fitting of punishment to the crime, which can occur only by a judge imposing the death sentence in accordance with the strict law of retribution (*Wiedervergeltungsrechte*), is shown by the fact that only by this is a sentence of death pronounced on every criminal in proportion to his *inner wickedness* (*Innere Bösartigkeit*) (even when the crime is not murder but another crime against the state that can be paid for only by death).[56]

However, a number of factors may limit the application of *ius talionis*. Kant mentions two exceptions. The first concerns the case of an island, where all citizens decide to disperse and thus dissolve the common legal body they compose. Before doing so, all the guilty inmates must first be executed, in order not to leave that common body – as long as it is legally so – unpunished. In this example, death would be the only penalty *corresponding*, not to the crime committed, but *to the time allowed* for serving the sentence *within* the State. In view of the imminent dissolution of the State itself, such a time is contracted to a single instant, that of the execution, the only timeframe corresponding to the disappearance of the State itself.

The second exception is that of a state plot orchestrated by all citizens: if he was to sentence everyone to death, the sovereign – the only innocent member of the community – would perform a 'carnage spectacle of a slaughterhouse'.[57] This would lead to the dissolution of the state itself, and to a return to the state by nature. Therefore, the sovereign would in this case have the exceptional right to assume the role of judge, and to issue a sentence condemning his subjects to a punishment other than death, such as deportation 'which still preserves the population'.[58] This would be a case of necessity (*casus necessitatis*), in which a sentence is issued by an executive decree and not as a public law, as 'an act of the right of majesty which, as clemency, can always be exercised only in individual cases'.[59]

2. Retaliation (*Wiedervergeltung*) and Humanity

Before analysing the Kantian refutation of Beccaria's theses against the death penalty, which completes the argument in these pages of his *Doctrine of Right*, it is worth considering the function performed here by the idea of humanity. The *ius talionis* is subject to a fundamental limitation: the penalty 'must still be freed from any mistreatment (*Mißhandlung*) that could make the humanity in the person suffering it into something abominable'.[60] That is to say, a

[56] 6:333. The *Innere Bösartigkeit* seems to suggest the necessity of considering the intention of the criminal. This, however, would imply an analysis of the intentions that does not pertian to the external freeom of the agent, but to his or her internal relationship with the maxims of action.

[57] 6:334.

[58] ibid

[59] ibid

[60] 6:333. Cf T.E. Hill, 'Treating Criminals as Ends in Themselves' *Jahrbuch für Recht und*

punishment must not involve torture, or a torment that would harm the humanity of the culprit. This raises the question of the respect for humanity, represented, so to speak, by the noumenical side (*homo noumenon*) of the natural person who will physically suffer the punishment (*homo phaenomenon*). This idea of humanity imposes that, despite the principle of equality, punishment must never be so severe as to harm – or even stand contrary to – humanity itself.

The Kantian argument now focuses on the limit posed to the principle of equality by the idea of humanity as an end in itself. If, for what pertains to punishability (the question of the 'if' of the punishment), the idea of humanity established the conditions for the punitive action in general – by prohibiting an abuse of the punitive instrument – when it comes to the *magnitude* of punishment (the question of the 'how'), the very same concept of humanity limits the validity of the *a priori* principle, by demanding an exact proportion between guilt and punishment. It thus establishes the prohibition of imposing, for crimes of enormous entity, penalties so great as to be morally unlawful.

A personal sphere is thus outlined, which cannot be violated by others and must also be respected by criminal justice: the sphere of human dignity (*Menschenwürde*).[61] Such dignity – connected by Kant in his moral works with the *autonomy of will*, in reference to the subject's self-relationship[62] – is associated in the *Metaphysics of Morals* with the human being's status as an *end in itself*, to be respected by others.[63] In this sense 'Humanity itself is a dignity'[64] and as such it is an 'absolute inner worth'[65] not comparable with others[66] and 'ineliminable').[67]

The primordial right to humanity, therefore, imposes to act (and to punish) within the limits of one's personal sphere of dignity, meant as the *status* of a human being as an end in itself. Respecting the inviolable sphere of human dignity thus implies, with regard to the amount of punishment, that the suffering inflicted to a criminal cannot exceed a certain extent, beyond which

Ethik/Annual Review of Law and Ethics, 17-36 (2003).

[61] Cf 6:236. On the meaning of humanity as an end in itself and human dignity see S. Bacin, 'Kant's Idea of Human Dignity: Between Tradition and Originality' *Kant-Studien*, 97-106 (2015); L. Caranti, *Kant's Political Legacy. Human Rights, Peace, Progress* (Wales: University of Wales Press, 2017); J. Glasgow, 'Kant's Conception of Humanity' *Journal of the History of Ideas*, 291-308 (2007); T.E. Hill, 'Humanity as an End in Itself' *Ethics*, 84-99 (1980); H.F. Klemme, 'Die vernünftige Natur existiert als Zweck an sich selbst' *Kant-Studien*, 88-96 (2015); G. Löhrer, *Menschliche Würde. Wissenschaftliche Geltung und metaphorische Grenze der praktischen Philosophie Kants* (Freiburg: K. Alber, 1995); O. Sensen, *Kant on Human Dignity* (Berlin-New York: de Gruyter, 2011).

[62] 'The dignity of humanity consists just in this capacity to give universal law, though with the condition of also being itself subject to this very lawgiving' (4:440).

[63] 6:434.

[64] 6:462.

[65] 6:435. *Person* and *personality* are other designations of human dignity (cf 6:462).

[66] V-NR- Feyerabend, 27.2,2:1319.

[67] 6:436. See also *Reflexionen* no 6801, 19:165-166.

his or her humanity would be demeaned.

In the *Further Discussion of the Concept of the Right to Punish* Kant, returning to the topic of the proper amount of punishment, explicitly raises the problem of respecting the criminal's humanity (albeit in a marginal paragraph):

> The only question is whether it is a matter of indifference to the legislator what kinds of punishment are adopted, as long as they are effective measures for eradicating crime (which violates the security a state gives each in his possession of what is his), or whether the legislator must also take into account respect for the humanity in the person of the wrongdoer (ie, respect for the species) simply on grounds of right.[68]

Referring to the prohibition of an instrumental punishment, Kant once again opposes the idea of punishment as a mere deterrent, this time in the context of a reflection on the kind of punitive treatment to be inflicted on the offender.[69]

Since the two levels (what would be required by the *ius talionis*, and the limit imposed by the idea of humanity) can come into conflict, Kant argues that the question must always be asked while *remaining within the framework* of the foundations of right, and never exceeding the limits of what can be established *a priori*. That is to say, the debate should never veer towards a pragmatic and empirical discussion on the effectiveness of punitive measures. Rather, the question here concerns the relationship, on an *a priori* level, between two ideas of reason: *humanity*, on the one hand, and *equality*, on the other. Since the idea of humanity as an end in itself is the only idea on the basis of which a juridical state *tout court* is possible, it follows that everything that is legitimate in criminal law, according to its *a priori* principle (the *ius talionis* as idea of equality), presupposes this idea of humanity and indeed owes it, so to speak, its status as a principle. The principle of equality (the *ius talionis*) is thus subordinated to the idea of humanity.

When following the principle of equality (*ius talionis*) as the sole *a priori* principle of right, the idea of humanity functions as a positive limit for the extent and the severity of punishments. The limits imposed to *ius talionis* by the idea of humanity will be particularly binding in extreme cases of crimes against humanity. Kant wonders:

> (b)ut what is to be done in the case of crimes that cannot be punished by a return for them because this would be either impossible or itself a punishable crime against humanity as such, for example, rape as well as

[68] 6:362-363.

[69] In this passage it is also clear that Kant is acknowleding the preventive-specific function of punishment (which I will explore below) as long as the punishment is equal and not more severe than the crime.

pederasty or bestiality?[70]

Kant offers the examples of rape, of pederasty, or of bestiality, called unnatural crimes because they are exercised against humanity itself. These cannot be punished with equal forms of suffering: '(t)o inflict *whatever* punishments *one chooses* for these crimes would be literally contrary to the concept of *punitive justice*'.[71] To sentence a punishment for crimes against humanity would go against the letter of criminal justice. Following its spirit, however, it is still possible to hold the criminal responsible and, exceptionally, to sentence him or her to an *arbitrary* punishment: such a punishment would have its intended effect, and the criminal, Kant explains, 'cannot complain'.[72] Through criminal law, then, the legislator establishes a punishment proportional to the crime while not demeaning the human dignity of the criminal. Such punishment will not violate the human dignity of the offender, even though it will determine his or her loss of dignity as a citizen. A *punishment against humanity*, on the other hand, would damage the very free subjectivity that founded and recognized the juridical state: paradoxically, according to Kant, one would be faced with a punishment against oneself as an Institution *of* Humanity *against* Humanity.

When confronted with such unnatural crimes, which demean the humanity of the other, the principle of equality – as a criterion for establishing a punishment – would demand a physically possible but morally impossible punishment. It is interesting, in this regard, that Kant wrote in his 1764 manuscript *Remarks on the Observations on the Feeling of the Beautiful and Sublime*:

> *Die Größe der Strafe ist entweder practisch zu schätzen nemlich daß sie groß gnug sey die Handlung zu verhindern u. denn ist keine größere Strafe erlaubt aber nicht immer ist eine so große Strafe als physisch nothig ist moralisch moglich.*[73]

Therefore, if a punishment proportionate to the crime is physically necessary (a crime cannot go unpunished), it must also be morally lawful (the *ius talionis* as the only principle for determining the severity of the punishment will be applicable only with respect to the inviolable sphere of *human dignity*).

3. The Kantian Refutation of Beccaria's Thesis

In the last part of Section E of *On the Right to Punish and to Grant Clemence* Kant explicitly – and with a somewhat ironic tone – aims to refute Beccaria's

[70] 6:363; cf 6:463.
[71] 6:363.
[72] ibid
[73] 'The magnitude of punishment is either to be evaluated practically, namely, that it be great enough to prevent the action, and then no greater punishment is allowed; but a punishment as great as is physically necessary is not always morally possible' (20:111).

argument on the illegitimacy of the death penalty. 'Moved by overly compassionate feelings of an affected humanity (*compassibilitas*)', Beccaria's theses are, for Kant, 'all sophistry and juristic trickery'.[74] Let us briefly explore Beccaria's ideas, in order to better understand this *juristic trickery* that Kant alludes to.

Beccaria, motivated by a strong utilitarian ethos – the idea of extending economic rationality to the criminal sphere and applying the instruments of logic and calculus to questions of social justice – claims, in *On Crimes and Punishments*, that the purpose of punishment

> is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise.[75]

He further defines justice as resulting from the '*the greatest happiness shared among the greater number*'[76] and offers an empirical grounding of the main arguments against the death penalty, promoting the greater deterring effect of alternative punitive measures. As we have seen, this kind of analysis is precluded by Kant's anti-utilitarian point of view.

On the other hand, Beccaria was also keen to determine the grounds and the limits of the right to punish, thus being concerned with punishments on the level of State legitimacy and of political obligation (and not, just like Kant, on the moral or the religious level), Beccaria bases his arguments against the death penalty on a specific conception of the social contract, according to which the limits to the sovereign authority's right to punish are imposed by the social contract itself. It is precisely such a theory, aimed at legitimizing the right to punish on the basis of the social contract – and not on *a priori* principles of law – that Kant is interested in refuting. The Kantian rejection of Beccaria's theses, far from being a defence of capital punishment, is a refutation of the theoretical principles of criminal law that are inconsistent with social contract theory. The sovereignty of the state, according to Beccaria, results from the sum total of all the freedoms that individuals renounced in exchange for security:

> (w)earied by living in an unending state of war and by a freedom rendered useless by the uncertainty of retaining it, they sacrifice a part of that freedom in order to enjoy what remains in security and calm.[77]

Against the Hobbesian thesis that individuals surrender *all* their freedoms to

[74] 6:335. Regarding Kant's critique to Beccaria see also AA 27:1391.

[75] C. Beccaria, *On Crimes and Punishments and Other Writings*, edited by Richard Bellamy (Cambridge: Cambridge University Press, 1995), 31. On Beccaria's Theses, cf B.E. Harcourt, 'Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law', in M. Dubber ed, *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014), 39-60.

[76] ibid 7.

[77] ibid 9.

the Leviathan, Beccaria argues that citizens need giving up only the minimum necessary to achieve security, and more precisely 'the smallest possible portion consistent with persuading others to defend him'.[78] Punishments, therefore, are the main instrument used for enforcing the social contract, keeping individuals from attempting to regain possession of that small part of the freedom they relinquished. However, being a small part, the right of the sovereign authority to punish is equally minimal, that is to say, the minimum necessary to ensure safety:

> (t)he sum of these smallest possible portions constitutes the right to punish; everything more than that is no longer justice, but an abuse; it is a matter of fact not of right.[79]

According to this argument, the contract cannot legitimize the death penalty because it affects a good – life itself – which is a logical presupposition of freedom *tout court*, of which only a small part has been renounced.

From the Kantian perspective, the idea of the contract does not at all imply that the laws, and therefore also the criminal law, are the *object* of the contract; the idea of the contract merely represents the act through which the people turn themselves into a State.[80] The universal principle of right exists, for Kant, regardless of the 'consent' of the parties, and it cannot concern the 'content' of the law but only its form, as an emancipation from a provisional rule of law: criminal law 'could not be contained in the original civil contract'.[81] In Kant's construal of the original contract, therefore, there is no sacrifice of freedom – no matter how small:

> Everyone (*omnes et singuli*) within a *people* gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a state (*universi*).[82]

In this new condition, the human being

> has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will.[83]

The transition from the state of nature to the juridical state amounts to the passage from an unsecured and provisional form to a peremptory juridical form of the *same content of the law*.

[78] ibid 11.
[79] ibid
[80] '*Status naturalis* is just an idea of reason' (MS/Vigil., 27.2,1:589).
[81] 6:335.
[82] 6:315.
[83] 6:316.

Hence the two main arguments of the Kantian refutation of Beccaria: on the one hand, the impossibility of considering a punishment as an object of the criminal's *will* and, on the other, the impossibility of *identifying* criminal public authority and criminal agent.

Following the first argument, Kant targets the intentionality of the offender, considered in Beccaria's theory. Punishment is, by its very definition, something that is attributed *against the will* of the offender, according to the close connection of punishment with suffering: from this perspective

> no one suffers punishment because he has willed *it* but because he has willed a *punishable action* (*strafbare Handlung*); for it is no punishment if what is done to someone is what he wills, and it is impossible *to will* to be punished.[84]

Beccaria proposes a paradoxical and therefore impossible ground for the illegitimacy of the death penalty, namely a 'promise to let oneself be punished and so to dispose of oneself and one's life'.[85] If the foundation of the right to punish was the criminal's promise to be punished, he or she should also be responsible for finding himself or herself guilty, thus becoming his or her own judge. If the co-legislator was also the criminal (albeit only potentially so, as a person capable of punishable acts) – that is, if the individual as punishable actor was the one to express a desire to be punished as per the social contract – then even the judge, who applies criminal law in court, would be considered a punishable individual. From a Kantian perspective, Beccaria's mistake is precisely that of presuming that the criminal is at the same time the co-legislator of criminal law.

Indeed, the second argument of the Kantian refutation outlines precisely the central distinction between, on the one hand, the subject as co-legislator (*Mitgesetzgeber*) who dictates the criminal law and, on the other, the subject as potential criminal – subject to that law and not entitled to challenge it:

> (w)hen I draw up a penal law against myself as a criminal, it is pure reason in me (*homo noumenon*), legislating with regard to rights, which subjects me, as someone capable of crime and so as another person (*homo phaenomenon*), to the penal law, together with all others in a civil union.[86]

Without this distinction, the impartiality of the judge, the sacredness of public law and the very distinction between the three powers of the State, a central element of Kant's doctrine of law, would be lost.

The person who issues criminal law cannot be the very same person who is

[84] 6:335.
[85] ibid
[86] 6:335.

punished as a subject under that law, because as a criminal it is not possible to participate in the act of legislation. When the subject creates a criminal law against himself as a criminal, it is his *homo noumenon* (endowed with pure reason) who submits him or herself to a criminal law as *homo phenomenon* (capable of crime).[87]

V. Prudence and the Preventive-Specific Function of Punishment

As it clearly emerged, the principle of retribution (*Vergeltung*) – what today would be called the principle of legality – plays a central role in the text of the *Doctrine of Right*. But as we have noted, with the prohibition of an instrumental punishment, on the one hand, and with the principle of equality on the other, Kant has established a relationship of priority of the element of retribution over the preventive element of the punishment: of its vindictive character turned towards the past (*quia peccatum est*) over its exemplary character of utility for the future (*ne peccetur*).

To a certain extent, Kant considers inevitable that human beings in their social life are (and should be) used as a means. With the imposition of a punishment, which by its very definition indicates a type of coercion, an obligation directed against the will of a person, the individual is inevitably *also* treated as a means. The important thing – and this is the central point of Kant's doctrine – is that the accused should *not only* be treated as a means, but *always also* as an end, and that this second aspect should be given priority over the first. Kant therefore does not exclude that the penalty could *also* play a deterrent role, and therefore be aimed at the prevention of a crime, looking towards the future. However, this type of pragmatic assessment must be systematically and clearly distinguished from the *a priori* investigation of metaphysical first principles of the doctrine of right. This emerges clearly from an important footnote from the already mentioned *Appendix*:

> Punitive justice (*iustitia punitiva*) must be distinguished from punitive prudence, since the argument for the former is moral, in terms of being punishable (*quia peccatum est*) while that for the latter is merely pragmatic (*ne peccetur*) and based on experience of what is most effective in eradicating crime; and punitive justice has an entirely different place in the topic of

[87] In his *Reflexionen zur Rechtsphilosophie* Kant writes: '*Die Strafe muß in dem Gesetze selbst bestimmt werden und zwar nicht um der Verbrecher sondern des Publici und ihrer Freyheit willen in Ansehung der Willkühr des Richters. Sonst dem Verbrecher kann nicht Unrecht geschehen*' ('A punishment must be determined within the law itself and not by the will of the criminal, but rather by the will of the public and its freedom in view of the deliberation of the judge. Otherwise no harm can be done to the criminal') (*Reflexionen* no 7995, 19:576).

concepts of right, *locus iusti*.[88]

With this distinction, Kant provides the fundamental *systematic collocation* of two functions of the penalty: the retributive or vindictive function, addressed solely to the fact committed and belonging to the field of the first principles of right (*a priori*), and the specific deterrent function, which instead is the fruit of a calculation on the preventive effectiveness, in the future, of the penalty – a pragmatic and empirical consideration (*a posteriori*).

The concern about the preventive-specific function of the penalty is therefore, for Kant, wholly legitimate, and it introduces the problem of legal reform – although only from a pragmatic point of view, one pertaining neither to the question of the foundation of the right to punish, nor to the questions of the 'if' and the 'how' of punishment.

In a passage of the *Reflexionen zur Rechtsphilosophie* Kant is very clear on this point, and sets out the three basic aims that criminal justice is called to assess from a pragmatic point of view:

> *Die iustitia punitiva hat zur Absicht: 1. den Unterthan aus einem schlimmen in einen besseren Bürger umzuwandeln; 2. durch warnende Beyspiele andere abzuhalten; 3. unbesserliche aus dem Gemeinen Wesen, es sey durch deportation, exilium, oder Tod wegzuschaffen (ob durch Gefängnis). Aber alles dieses ist nur Klugheit der politick. – Das Wesentliche ist die Ausübung der Gerechtigkeit selbst alsdenn noch, wenn die Verfassung aufgehoben würde. (g Ob auch Experimente mit Missethätern der medicin halber gemacht werden dürfen.*[89]

The political art (*Staatskunst*) of criminal prudence (*Strafklugheit*) amounts to the ability (*Geschicklichkeit*) to choose a punishment based on the calculation of its future utility: this is *simply* pragmatic and it is based on the experience of what is most effective, in certain circumstances, to dissuade the potential offender from performing illegal actions.

The fact that a punishment may also have a preventive utility, therefore, is not problematic for Kant: it is only problematic when the preventive aspect becomes exclusive and primary. This is also confirmed by a preparatory manupscript to the *Doctrine of Right*, which focuses precisely on the vindictive, but also *educational*, character of punishment:

[88] 6:363-364.

[89] 'The punitive iustitia has as its purpose: 1. to transform the subject from an evil citizen to a better citizen; 2. to dissuade others through warning examples (*durch warnende Beyspiele*); 3. to export from the common body those who cannot improve, whether by deportation, exile, or death (or by imprisonment). *But all this is only prudence of politics*. The essential thing is always the exercise of justice itself, even if the constitution were to be abrogated' (*Reflexionen* no 8035, 19:587-588).

> *Die Strafe ist ein actus der öffentlichen Gerechtigkeit also des Oberen im Staat gegen den Untergebenen ihm ein Übel zuzufügen was der Läsion gemäs ist die er an einem Anderen (Bürger, passiv oder activ) begangen hat. Sie ist an sich jederzeit rächend kann aber auch mit der Absicht den Verbrecher zu bessern verbunden seyn.*[90]

This passage is crucial to highlight how Kant borrows the *ius talionis* and the vindictive character of the criminal institution from medieval law – even though he distances himself considerably from it by insisting that the right to punish belongs exclusively to the ruler and to the organs of the state, even with all the limitations it encounters. At the same time, however, he also declares that a punishment can be associated with the intention of improving the offender, thus making a significant contribution to the historical transition towards modern law.[91]

This aspect of punishment *qua* warning emerges several times in the context of his *Reflexionen zur Moralphilosophie*:

> *Alle Strafen sind entweder warnende Strafen oder rächende; poenae exemplares, wenn sie nicht diesen gemäs seyn, sind politisch.*[92]

In another reflection, Kant writes:

> *Warnende oder rächende Strafen. (s deterrentes vel vindicativae) … poena est vel exemplaris vel animadversio vel vindicativa.*[93]

Or again, Kant distinguishes pragmatic and moral punishments as follows:

> *Pragmatische Strafen sind warnend und gehen auf das äußere der handlung, moralische auf böse Gesinnung.*[94]

The preventive and specific function of punishment emerges clearly in the pragmatic field. In addition to a general-preventive theory, implicit in the role of punishment *within* the juridical state, and to the retributive function, closely linked to the question of punishability of 'public crimes' and the criterion of punishment, Kant also considers the question of the *usefulness of the*

[90] 'Punishment is an act of public justice therefore of the superior (power) in the state against the subordinate in order to inflict upon him an evil in accordance with the injury he has committed to another (citizen, passive or active). In itself (the punishment) is always vindictive, but it can also be connected to the intention to improve the criminal' (*Vorarbeiten*, 23:343).

[91] Cf also *Vorarbeiten*, 23:347.

[92] 'All punishments are either warning-meaning or vindictive punishments; poenae exemplares, when they are not proportionate, are political' (*Reflexionen* no 6526, 19:56).

[93] 'Deterrent or vindictive punishments (*deterrentes vel vindicativae*) (...) *poena est vel exemplaris vel animadversio vel vindicativa*' (*Reflexionen* no 6527, 19:56).

[94] 'Pragmatic punishments are warning (*warnende*) and are directed towards the exteriority of action, moral punishments towards bad intention (*Gesinnung*)' (*Reflexionen* no 6681, 19:132).

punishment. He therefore considers punishments in their deterrent, preventive-specific, function, but only under the condition that such a pragmatic point of view should be properly distinguished from that of the first principles of the doctrine of right.