The Necessity for Punishment in Hegel as a Right of Freedom

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Abstract

The article presents the theory of punishment in the *Elements of Philosophy of Right* focusing on Abstract Right and Administration of Justice. The first part of the essay underlines how punishment allows restoration of the universality of right and plays a role of education to the universal, directed against the natural and immediate will. Through reference to Eumenides' tragedy, the second part points out the limits of Abstract Right in order to then focus on Civil Society, in which, thanks to a court and a trial, punishment is the real conciliation. The conception of punishment reflects the status of the different moments of Objective Spirit, since, while in Abstract Right Hegel sets the problem of the rational foundation of punishment, in Civil Society he questions himself about its purpose and its applicability. This leads not only to rediscussing the opposition between the retributivist interpretation on the one hand and the utilitarian one on the other, but also to highlighting that punishment constitutes the key to access the issue of the validity of right as well as to identify its contradictions.

I. Introduction

The Hegelian conception of punishment has deeply influenced German criminal law up to the most recent times. Although in alternating phases, the legacy of the German philosopher played an important role in Germany and inspired a good number of jurists throughout the 19th century and early 20th century. Even when they disagreed or totally rejected the Hegelian theses, they still showed deep concern for them. Without Hegelianism and its reception by jurists, though to different degree, it would not be possible to understand either the present, or the history of penal legal science.[1] In the field of philosophical literature the topic of punishment is a litmus test of all those prejudices that long characterised Hegel's figure as a statist thinker who reduces the complexity of the existing to a logical and metaphysical structure. According to this interpretation, Hegel would also apply the triadic model of dialectics to the

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[1] See M. Kubiciel et al, *Hegels Erben*? (Tübingen: Mohr Siebeck, 2017). About the reception of the theory of punishment in Hegel see also A. von Hirsch et al, *Strafe – Warum? Gegenwärtige Strafbegründungen im Lichte von Hegels Straftheorie* (Baden-Baden: Nomos, 2011) and W. Schild, 'Verbrechen und Strafe in der Rechtsphilosophie Hegels und seiner "Schule" im 19. Jahrhundert' *Zeitschrift für Rechtsphilosophie*, 30-42 (2003).

conception of criminal law, conceiving the State as a superior entity that sacrifices the freedom of individuals. A famous essay of 1968 thus wishes for a final farewell to Kant and Hegel, who should have nothing more to say on the subject of criminal law: not only would the Hegelian argument be 'a pure logical error' or an 'empty statement', but it would coincide with a 'pure metaphysical fantasy', filled with 'irrational lyric-philosophical excesses'.[2]

The value given to the reflection on punishment pinpoints the state of Hegelian studies in general: starting from that movement aimed at a *Rehabilitierung der praktischen Philosophie* already in the 1970s and more recently in the context of the *Hegel Renaissance* which characterised Hegelian philosophy as a whole, even the Hegelian penal conception received renewed interest. Hegel's new depiction as a thinker of freedom and a theorist of recognition and no longer a conservative and totalitarian philosopher had the effect of questioning the long-standing interpretation among interpreters, according to which the Hegelian conception of punishment was a retributivist theory, justifying punishment by basing it on the principle *quia peccatum est*, or as a response to the evil that was done.[3] Numerous studies have been carried out in recent decades alongside this interpretation aiming at pointing out the utilitarian aspects that are present in the Hegelian conception: Hegel's theory of punishment is thus interpreted as a combination of special prevention and rehabilitation,[4] as well as minimal specific deterrence aimed at the resocialisation and reforming of the criminal[5] or again as a general deterrence, in which punishment aims at the restoration of a legal community.[6] Depending on the text passages we take into consideration and following the publication of the lectures in philosophy of right, the critique highlighted how Hegel's theory of punishment is not only – and not really – a retaliatory theory, as it takes into consideration the aspect of dangerousness to society in general, aims at reintegration of the criminal and has a corrective role. For this reason, Hegelian penal theory is thus presented also as a unified theory,[7] which also includes a

[2] U. Klug, 'Abschied von Kant und Hegel', in J. Baumann ed, *Programm für ein neues strafgesetzbuch* (Frankfurt A.M.: Fischer Bucherei, 1968).

[3] For a review of the interpretations of punishment in Hegel see J.-C. Merle, 'Was ist Hegels Straftheorie?' *Jahrbuch für Recht und Ethik*, 11, 145-176 (2003).

[4] G. Mohr, 'Unrecht und Strafe', in L. Siep ed, *Klassiker Auslegen. G.W.F. Hegel, Grundlinien der Philosophie des Rechts* (Berlin: Oldenbourg Akademieverlag, 1997), 95-124.

[5] J.-C. Merle, 'La complexité de la théorie non rétributiviste du droit pénal de Hegel', in J.-F. Kervégan and G. Marmasse eds, *Hegel penseur du droit* (Paris: CNRS Éditions, 2004), 81-96. See also J.J. Kominkiewicz et al, *German Idealism and the concept of Punishment* (Cambridge: UP, 2009), 107-146.

[6] K. Seelmann, *Anerkennungsverlust und Selbstsubsumtion. Hegels Straftheorien* (Freiburg-Munchen: Karl Aber, 1995).

[7] W. Schild, 'The Contemporary Relevance of Hegel's Concept of Punishment', in R.B. Pippin and O. Höffe eds, *Hegel on Ethics and Politics* (Cambridge: Cambridge University Press, 2004), 150-179.

deterrent or rehabilitative function.[8]

In any case, punishment is undoubtedly a recurring topic in Hegelian thought, as it is present in all his practical-political writings, from the juvenile fragments to the years of Jena up to the *Elements of the Philosophy of Right*. The richness of the Hegelian reflection in this context is evident even if we only focus on the text of 1820, since in order to delineate a theory of punishment, it is necessary to go through the whole work: if in Abstract Right the subject of punishment is addressed after the wrong, it is in Morality that Hegel defines the criteria of imputation and in Ethical Life that he describes the functioning of the penal trial and the role of the court. The reasons for such an ambivalent judgment by scholars towards the Hegelian penal conception have to be linked to the fact that in *Elements,* in order to define what punishment is, Hegel uses the lexicon of his philosophy, in particular he uses the most dense and meaningful terms of speculative thought. For example, punishment is defined as *Aufhebung des Verbrechens*, 'cancellation of the infringement',[9] or *Versöhnung des Rechts mit sich selbst*, 'reconciliation of right with itself',[10] and again as *Verletzung der Verletzung*, 'infringement of an infringement',[11] *Vernichtung jener Verletzung*, 'nullification of the infringement'[12] and finally *Negation der Negation*, 'negation of the negation'.[13]

The importance given to the concept of punishment is all the more surprising when one considers Hegel's definition of right, which is presented as 'the realm of actualized freedom' and coincides with 'the existence of the free will', with 'freedom as Idea'.[14] Therefore, it is possible to identify an apparent paradox according to which the person who identifies right and freedom is the same who not only admits the possibility of punishment, but also makes it a necessary aspect of right. How is it possible to state that right does not constitute a limitation on freedom, but on the contrary its realisation, and at the same time justify a form of constraint that may appear as a denial of freedom? In other words, if right is not a restriction of freedom and freedom does not coincide with the arbitrary will, then what is the foundation on the basis of which Hegel introduces the possibility of repression? If for the authors who consider right as

[8] T. Brooks, 'Is Hegel a retributivist?' *Hegel Bulletin*, 25, 113-126 (2004); Id, 'Hegel and the Unified Theory of Punishment', in T. Brooks ed, *Hegel's Philosophy of Right* (London: Blackwell, 2012). For a non-retributivist interpretation of punishment in Hegel see also S. Moccia, 'Contributo ad uno studio sulla teoria penale di G.W.F. Hegel' *Rivista italiana di diritto e procedura penale*, 27, 131-174 (1984); S. Fuselli, 'La struttura logica della pena in Hegel' *Verifiche*, 28, 27-106 (1999); P. Becchi, 'Il doppio volto della pena in Hegel' *Verifiche*, 28, 191-209 (1999).

[9] G.W.F. Hegel, *Elements of the Philosophy of Right*, edited by A.W Wood, translated by HB Nisbet (Cambridge: Cambridge University Press 1991), § 98, 124. From now on abbreviated as *Rph*.

[10] ibid § 220, 252.

[11] ibid § 101, 127.

[12] ibid § 97, 123.

[13] ibid § 97, 123.

[14] ibid §§ 29, 4 and 58, 35.

regulation of external behaviour or organisation of force, introducing constraint is the way to ensure the effectiveness of right, then for Hegel who makes the right of freedom the cornerstone of his legal theory, it seems apparently contradictory to conceive a duty of coercion.

The paradox seems even more evident if we think that in Abstract Right punishment is explicitly related to the topic of justice, since Hegel explicitly states that the different modalities of infringing right at the same time raise the question of the 'objective consideration of justice'.[15] Far from being presented as a pathological and marginal phenomenon, the problem of wrong is addressed by Hegel, focusing on the relationship between punishment and justice and between right and freedom: precisely as a transgression of right, a crime represents an experience of injustice and punishment as the annihilation of the non-right constitutes the denial of injustice. Instead of starting from a definition of justice and therefore from a substantive and essentialist conception of it, Hegel reverses the reasoning: if denying right means doing violence against what has value and the meaning of fair, punishment acquires the role of restoration of what is *Richtig* and it is therefore an act of justice.[16] Wrong, *Unrecht*, is not only the reverse of *Recht*, that is the denial of right and therefore its opposite, but an unavoidable moment of the juridical as it allows its realisation. Consequently, punishment is not only a tool aimed at denying the transgression and restoring the validity of legal principles, but it is also what allows us to highlight its finitude and its limits and it is therefore intrinsically linked to the broader topic concerning the definition of right as freedom.[17] From this point of view, crime and punishment are two sides of the same coin: if right cannot fail to admit its maximum denial, or crime, the moment of coercion and punishment is not a necessary evil, but a constitutive aspect of the juridical, which makes it possible to examine the statute of right, its foundation and legitimacy as well as its applicability and effectiveness. As was pointed out, Hegel rejects any attempt to moralise punishment, since the field of penal treatment is properly juridical and constitutes the key to access the issue of the validity of right, to question its immediacy as well as to highlight its contradictions, above all in the gap between universality and application.

So far, only the aspects that are related to the necessity of punishment and are defined as subjective have mainly been highlighted, since attention was focused on the abrogation of the crime starting from the perspective of the particular will of the offender, while it is necessary to take into consideration the juridical necessity for punishment from an objective point of view, since it coincides with restoration of the juridical universal. Punishment must be

[15] G.W.F. Hegel, n 9 above, § 99, 125.

[16] See J.-F. Kervégan, 'La théorie hégélienne de la justice', in P. David and B. Mabille eds, *Une pensée singulière* (Paris: Harmattan 2003), 101-113.

[17] See on this point M. Foessel, 'Penser la peine' *Revue de Métaphysique et de Morale*, 4, 529-542 (2003), in particular 530.

justified precisely because the very possibility of admitting right is at stake. If for Ricoeur Hegel's choice to place the discussion of punishment within Abstract Right, that is outside of Ethical Life, would seem to demonstrate Hegel's intention to contribute to the 'deconstruction of the myth of punishment', this choice was actually born from the intention to question the rationality of the latter and therefore to lay the foundations outside its concrete application.[18] In spite of the *Elements'* scan, the topic of punishment makes it possible to identify a common thread inside the work, which directly relates to two sections that are apparently very distant from each other, but actually characterised by continuous references: Abstract Right and Administration of Justice in Civil Society. If in Abstract Right Hegel deals with the rational foundation of punishment, he shows at the same time its limits, stating the need to insert the same penal law within the proper institutional context of Ethical Life. The age-old problem that opposes a retributivist Hegel on the one hand and Hegel as an advocate of the corrective function of punishment on the other can hence be solved through a reading that takes simultaneously into account the paragraphs of Abstract Right and the ones of Civil Society as textual sources to fully reconstruct, in a unitarian way, the penal theory in Hegel.[19] According to the perspective of a 'philosophical science of right' which Hegel's work wishes to be, indeed the discussion of punishment has to be inscribed within the developmental stage of the 'Idea of right', which implies, as is well-known, 'the concept of right and its actualization',[20] and therefore it has to be read in light of the different moments of the Objective Spirit: according to the formal and abstract point of view, which is the concept of right belonging to *abstraktes Recht*, and according to the point of view belonging to the historical-social reality that characterises *Rechtspflege*.

To this aim, a first part of this essay will focus on the concluding paragraphs of Abstract Right in order to then show the limits of this perspective and focus on its discussion within Civil Society. If Ricoeur stresses how the logic of punishment is 'a logic without myth',[21] it is possible, on the other hand, to highlight how, according to Hegel's use of the Greek tragedy, as in the case of Antigone and Creon in *The Phenomenology of Spirit*, it is precisely the use of the myth of the Eumenides that allows him to directly link Abstract Right to Administration of Justice. Therefore, this essay aims to show first that, depending on the textual passages that are examined, it is possible to identify a double justification of

[18] P. Ricoeur, 'Interprétation du mythe de la peine', *Le Conflit des interprétations* (Paris: Seuil, 1969), 354.

[19] The relevance of the paras about Civil Society with respect to the theory of punishment was highlighted by: D. Klesczewski, *Die Rolle der Strafe in Hegels. Theorie der bürgerlichen Gesellschaft. Eine systematische analyse des Verbrechens – und des Strafbegriffs in Hegels Grundlinien der Philosophie des Rechts* (Berlin: Duncker & Humblot, 1991) and K. Seelmann, *Le filosofie della pena di Hegel*, in P. Becchi ed (Milano: Guerini e Associati, 2002).

[20] G.W.F. Hegel, n 9 above, § 1, 25.

[21] P. Ricoeur, n 18 above, 360.

punishment by Hegel in order to then underline as a conclusion, how both arguments converge in a single objective: to legitimise the duty of punishing as a right of freedom and to show how both in Abstract Right and in Civil Society punishment accomplishes the task of overcoming the opposition between universal will and particular will.

II. Coercion as Retribution in Abstract Right

Abstract Right constitutes, as is well known, the first part of *Elements of the Philosophy of Right* and it corresponds to the first stage in the process of objectification of freedom since 'the will which is free in and for itself' is 'in the determinate condition of *immediacy*'.[22] The notion of the person is the protagonist, which indicates 'the universality of this will which is free for itself' and 'the simple reference to itself in its individuality'.[23] Defined by Hegel as capacity for right in general, the person is 'the inherently individual will of the *subject*', 'a consciousness of itself as a completely abstract "I" '.[24] The fundamental rule of Abstract Right can be exemplified by the imperative that proclaims 'be a person and respect others as persons!' and translates on the juridical side into a 'permission or warrant'.[25] At this level, right is formal because it just recognises the universality of the person, ie of the subject of right, without taking into consideration a particular interest, or the intention, or motive of the action. It does not establish what can be done, nor what should be done, but what should not be done, in such a way that the only obligatory constraint that is envisaged is to refrain from violating the person.[26]

Abstract Right presents the characters that refer to an original condition, outside of any social relationship and in the absence of political power. However, this is not an ideal moment placed at the origin of history, as is the state of nature for contractualist thinkers, but rather it presents the rational principles of private right. Abstract Right, on the one hand, is the result of the historical process, but, on the other, it presents its categories as if they were independent of history, in the same way as a rational normative order. Only the evolution of the spirit recognised the universality of individual freedom and of the juridical capacity, but in the modern world they have become a foundation that has been removed from political bargaining, thus assuming features that not only place them outside the historical dimension, but that make them an

[22] G.W.F. Hegel, n 9 above, § 34, 67.
[23] ibid § 35, 68.
[24] ibid §§ 34-35, 67-69.
[25] ibid §§ 36-37, 69.
[26] In Abstract Right the person is not yet a moral subject and therefore the aspects related to the proposal and responsibility of the action are not taken into consideration, but they will be discussed within morality, in particular in paragraph 132, where Hegel introduces the notion of imputation.

element of legitimacy of the established order. Abstract Right is therefore simultaneously the result of universal history and the formal and universal prerequisite of modern ethical life.

After presenting the institutions of private right such as property and contract, the third section of Abstract Right, which is entitled 'Coercion and Crime', corresponds to 'coercive right'[27] and coincides with 'the sphere of *penal law*'.[28] Wrong arises because of an opposition between the particular will of one of the contracting parties and common will, as a result of the agreement of the particular wills of the owners that was reached in the contract. In Abstract Right, particular will complies with universal will, therefore it complies with right, only accidentally and consequently 'right *in itself* is present as something *posited*', whose universality presents itself *als Gemeinsames*.[29] The immediacy of the person is initially established as identical to the universal and therefore corresponds to common will, but, by a kind of retaliation, the same person then discovers himself as particular, contradicts common will and breaks the pact. Wrong determines a detachment between 'right *in itself* or the will as universal *in itself*', and 'right in its *existence*, which is simply the *particularity* of will'.[30] Wrong is the negation of that contractual relationship which aspired to mediate, albeit in a still apparent form, particular will and universal will and represents the radical opposition between the particularity of the person and the universality of right:[31] the particular will takes the place of universality and therefore the criminal denies the common will, behaving as if he himself was right, or as if his particular will coincided with the universal. The limit of Abstract Right is therefore on the one hand the lack of a coercive force that is capable of ensuring respect for the contract and on the other hand, the way in which subjective will relates to universal.

Hegel presents three types of wrong, even if the most serious is the crime, *Verbrechen*, which constitutes infringement of right as such, that is the denial of the right in its very formality. Unlike unintentional wrong and deception,

[27] ibid § 94, 121.

[28] ibid § 95, 122. On this aspect G. Mohr insists, n 4 above. On the contrary, G. Marmasse, 'Hegel et l'injustice' *Les Études philosophiques*, 3, 331-340 (2004), for whom the third part of Abstract Right is the conflict between the fair and the unfair and throughout the notion of fair distribution presents some similarities with the Aristotelian conception.

[29] G.W.F. Hegel, n 9 above, § 82, 115.

[30] ibid § 81, 113.

[31] Hegel states that the right is *Erscheinung*, appearance, as an immediate agreement between essence and existence, between right and particular will, as shows with respect to the contract. With wrong, right is the semblance, *Schein*, as the identity and the agreement between right and particular will is lost and the same right receives *die Form eines Scheines*. By referring to the categories of the logic of essence, Hegel underlines the inadequate relationship of mediation between the terms involved: if, with respect to the exposition of the *Science of Logic,* the order is reversed, it is because Hegel wants to stress how in common will right still presents itself as immediacy and wrong coincides with a moment of involution and retreat with respect to the identity gained in the contract.

crime does not only concern the value of property or of an asset, the object of a dispute between one individual and another, but damages right as a right, because it is a violence against the person and his freedom. In this case punishment is necessary,[32] indeed, it not only has the aim of intervening with respect to the specific episode, for example by establishing a compensation or redress, but therefore has a universal vocation that is completely absent from the civil law dimension. The violence of the crime is consummated 'directed against the existence of my freedom in an external thing' and therefore it 'infringes the existence of freedom in its concrete sense', that is 'right as right':[33] a crime is an action in which 'not only the particular – ie the subsumption of a thing under my will' is negated, as happened in the case of civil wrong, but 'also the universal (...) my capacity for rights' and it does not happen without 'the mediation of my opinion', that is, without my knowledge, as happened with fraud.[34] Thus, crime denies both the subjective and the objective side: the particular right of the person, but at the same time more generally the universal sphere, ie the juridical capacity of the person and therefore the presupposed recognition of the right, since his freedom is not recognised, which is an implicit condition in every legal relationship.[35] It coincides with a form of violence against another will, aimed at denying the possibility of the manifestation and externalisation of subjective freedom: with crime, says Hegel, 'the principle of will is attacked', as committing a crime against someone means not admitting or denying that someone has a right.[36] The criminal action is presented as contradictory, in that it denies the very possibility of giving a legal relationship. By being itself a substitute for universal will, the criminal claims to be a substitute for the right, but thus ends up denying de facto the juridical bond: a crime is not simply a refusal to be submitted to legal constraints, it is instead the criminal's claim to deny the juridical relationship as such, so that at first he refuses the right to then direct his own action to the same universality of the right he had previously denied.

[32] ibid § 97, 123. Concerning the studies on Hegel's penal conception, we refer, among many works to O.K. Flechtheim, *Hegel's Strafrechtstheorie* (Berlin: Duncker & Humblot, 1975); R. Hohmann, *Personalität und strafrechtliche Zurechnung* (Frankfurt A.M.-Berlin: Peter Lang, 1993); P. Stillman, 'Hegel's Idea of Punishment' *Journal of History of Philosophy*, 14, 169-182 (1976); A. du Bois-Pedain, 'Hegel and the Justification of Real-world Penal Sanctions' *Canadian Journal of Law & Jurisprudence*, 29, 37-70 (2016).

[33] G.W.F. Hegel, n 9 above, §§ 94-95, 121.

[34] ibid § 95, 121-122.

[35] Since this is not the right place to go in depth in the relationship between recognition and Abstract Right, it is sufficient to quote Hegel himself, who states that 'Contract presupposes that the contracting parties recognise each other as persons and owners of property; and since it is a relationship of Objective Spirit, the moment of recognition is already contained and presupposed within it', G.W.F. Hegel, n 9 above, § 71, 103.

[36] G.W.F. Hegel, *Lectures on Natural Right and Political Science. The First Philosophy of Right*, transcribed by P. Wannenmann, translated by J.M. Stewart and P.C. Hodgson (Oxford: Oxford University Press, 1995), § 45, 96.

Crime is an infringement of right as it coincides with the unilateral affirmation of particular will and testifies to the latter's failure to adhere to the right. If the crime corresponds to force and it is defined as *Zwang or Gewalt*, as *Gewalt überhaupt*[37] or even in the *Encyclopaedia*, as *unmittelbaren Zwang*,[38] punishment is defined first in § 93 as *zweiter Zwang*: while then the first coercion is simple force against my freedom and as such it is *unrechtlich*, that is to say contrary to right, the second coercion tends to delete the previous force through a constraint, in such a way that force represents in this second moment a properly juridical element.[39] On the one hand with the wrong my will 'may either experience force in general' or 'it may be forced to sacrifice or do something',[40] on the other hand punishment enacts 'a force which supersedes the original one'.[41] In this perspective, extra-juridical force as a power to materially prevent freedom is followed by properly legal force, a tool which the same right uses in order to reaffirm itself. If force is the anti-right, since committing violence means placing oneself outside the juridical horizon, the punishment as juridical coercion is *Zwang* and not only *Gewalt*: for sure this is a form of force, because it involves coercion, but it does not exhaust itself in the simple production of evil or suffering. On the one hand then, we can say that violence is not only what distinguishes the pre-juridical reality, as it receives full legitimacy within the juridical field, but on the other hand it appears in right as a means and not an end, as the use of coercion is the *modus operandi* of the right as such. Punishment is force used and directed against another force, in such a way that it is the right to coerce, *zwingen*, through the use of *Gewalt*.[42] *Zwang* is the form of force belonging to the legal field and an instrument of reaffirmation of right.[43]

Instead of being justified on the basis of utilitarian or instrumental reasons, as is the case of the Enlightenment theories, punishment is founded, for Hegel, on the idea that 'punishment in and for itself is just'.[44] This means that it must

[37] G.W.F. Hegel, n 9 above, § 90, 119.

[38] G.W.F. Hegel, *The Encyclopedia of the Philosophical Sciences (1830)*, translated by W. Wallace (Oxford: Clarendon Press, 1971).

[39] G.W.F. Hegel, *Elements* n 9 above, §§ 92-94, 120-121.

[40] ibid § 90, 119. The German term *Gewalt* is translated into English mainly with the word 'force' and sometimes with 'violence' while the term *Zwang* is translated with 'coercion'.

[41] ibid § 94, 121.

[42] ibid § 90, 119.

[43] See L. Marino, 'Violenza e diritto in Hegel' *Rivista di filosofia*, 205-233 (1977). The author refers to the definitions of *Zwang* and *Gewalt* that can be found in J.H. Campe, *Wörterbuch der deutschen Sprache*: *Zwang* means 'der Zustand, da die freien Handlungen eines Wesens durch Gewalt eingeschränkt werden, es möge diese Gewalt eine körperliche oder sittliche sein', while *Gewalt* 'gehet hier vor Recht'. As Marino stated, the specific scope of the force is thus explicitly identified with the extra-juridical or pre-juridical one.

[44] G.W.F. Hegel, n 9 above, § 99, 125. Hegel criticises the Enlightenment criminal theories such as those of Klein, Beccaria and Feuerbach: if the former confuses injustice with evil, thus giving a moral value to the juridical categories, the limit of the second lies in the use of natural law

be justified not only from the point of view of universal will, ie from the point of view of universal represented by right, but also starting from the perspective of the criminal, as a result of his own will. In paragraph 100 Hegel states that 'the injury which is inflicted on the criminal' is 'a right posited in his existent will', it is 'his right', since through punishment he 'is honoured as a rational being'.[45] The Hegelian strategy consists of justifying punishment as a sort of right of the criminal, who has the duty to be submitted to the punishment as a necessary consequence of the behaviour itself carried out by him, since his action implicitly has a universal value and therefore implies that the same action is subsumed under the same law. This is a Kantian topic that follows the principle of the universalizability of the maxim:[46] if at the moment in which he formulates a norm that is useful to act, he is obliged to be subject to it, it can therefore be said that, in the case he steals, he should himself be liable to theft of property. By stealing he claimed a universal rule, which consists of rejection of private property and which becomes a source of obligation even for him. The criminal disregards the individual as a subject of right, he violates the principle that characterises cohabitation and the objective dimension, placing himself above the juridical and social bond, since with his action he states the principle by which 'it is allowed to harm the will'.[47] On the one hand, the crime denies 'the recognition of the right to the universal and deciding factor' and therefore rejects the intersubjective relationship of reciprocity starting from which the juridical dimension is generated, since it claims to manifest its freedom as a natural and particular will. On the other hand, punishment is what makes the offender a victim and restores the recognition relationship.[48]

arguments, since he grounds the lawfulness of the sentence on the basis of an implicit consent of the offender which the latter would have granted on the basis of the social contract. Finally Feuerbach gives a dissuasive psychological value to the sentence, transforming the penal sanction that follows the crime into an anticipated threat aimed at intimidating and removing the drive to violate the law, thus ending up treating the human like a dog.

[45] ibid § 100, 126.

[46] In this regard, Seelmann identifies in Abstract Right two distinct justification strategies of punishment: the first set out in para 97 is what he calls the argument from recognition, the second, in para 100 is what he defines the argument from the law, (n 6 above). K. Seelmann, 'Does Punishment Honor the Offender?', in A.P. Simester et al eds, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart, 2014), 113-114. According to Foessel, the definition of punishment as a criminal's right inaugurates the field of morality, since the criminal becomes aware of himself as subjectivity (M. Foessel, n 17 above, 538).

[47] G.W.F. Hegel, *Vorlesungen über Rechtsphilosophie nach der Vorlesungsnachschrift von H.G. Hotho 1822/1823*, in K.H. Ilting ed, *Vorlesungen über Rechtsphilosophie 1818/1831* (Stuttgart-Bad Cannstatt: Fromman-Holzboog, 1973), III, § 100, 316.

[48] G.W.F. Hegel, *Elements* n 9 above, §§ 84-85, 117. Regarding the relationship between recognition, crime and punishment K. Seelmann, 'Wechselseitige Anerkennung und Unrecht' *Archiv fiir Rechts und Sozialphilosophie*, 79, 228-236 (1993) and L. Siep, 'Anerkennung, Strafe, Versöhnung. Zum philosophischen Rahmen von Hegels Strafrechtslehre', in M. Kubiciel ed, n 1 above, 7-28; L. Di Carlo, 'Il riconoscimento nella *Filosofia del diritto* di Hegel' *Teoria politica*, 145-154 (2003). For Fossell crime shows the insufficiency of the recognition as it is realised in Abstract Right (n 17 above, 533).

As we read in a margin note, the coercion that characterizes punishment is a force against a natural being.[49] In this perspective, declaring that the force of right is a power that is enacted as a reaction with respect to wrong means simultaneously stating that the force of right is directed against the affirmation of a will that is still natural, immediate and abstract, in such a way that this violence constitutes an element by which the will itself is formed to the universal. Thus, legal force allows us to go beyond the natural horizon, so that it can be understood as education to obedience, formation to the universality incarnated by right: that same *Gewalt*, which could be considered as oppression, abuse of power and injustice, acquires in the context of Abstract Right the value of a culture, which allows us to access spiritual universality. Punishment is juridical coercion and it is presented and justified first of all as a means by which it is possible to restore right, as it allows one to manifest 'its necessity which mediates itself with itself through the cancellation (*Aufhebung*) of its infringement',[50] ie to give right 'the determination of something fixed and valid', since from being immediate it can become 'actual as it returns out of its negation'.[51] In the same way, from the point of view of the person, the right as *Zwang* is simultaneously both a foreign power, which imposes itself as violence, and a process of liberation by which consensus and obedience to the right are developed.

The infringement of right is something negative because it exists only as an activity that denies, only in relation to something else, that is right, and brings with it the same criminal since 'the positive existence of injury consists solely of the particular will of the criminal'.[52] Therefore, if the only thing that has a positive value in the context of wrong is particular will, it can be said that the injustice corresponding to the denial of right is precisely the particular will against which right must carry out its work of integration towards the universal in opposition to the particular and natural drive. If right remains 'an obligation', an ought, and therefore it is abstract, as long as 'the will is not yet present as a will which has freed itself from the immediacy of interest in such a way that, as particular will, it has the universal will as its end',[53] the penal right implements a coercion in order to overcome the naturalness of the will and therefore uses punishment as *Bildung* against the particularity that resulted in the violation of the right.

Hegel then explains that while a crime is a *Verletzung des Rechts* and therefore it is an existence within itself null, which exists only as far as it denies right, punishment is the 'manifestation of its nullity' and therefore the *Vernichtung* of the *Verletzung* itself.[54] As well as crime having a claim to

[49] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, in *Werke in zwänzig Bänden*, hrsg. von E. Moldenauer und K.M. Michel (Frankfurt a.M.: Suhrkamp, 1969), § 92 Randbemerkung, 179.

[50] G.W.F. Hegel, *Elements* n 9 above, § 97, 123.

[51] ibid § 82Z, 116.

[52] ibid § 99, 124.

[53] ibid § 86, 117.

[54] ibid § 97, 123.

universality, also punishment has the same vocation as it restores universal will. Since crime is not something positive, but essentially negative, then punishment is the negation of negation: thanks to punishment, right reaffirms its validity and is confirmed as necessary, but at the same time it appears as the result of mediation. If a positive value were to be attributed to a criminal action, it could be argued that its merit lies in bringing out the inadequacy and insufficiency of Abstract Right. It can then be said that *die Äußerung* of crime coincides with *die Verwirklichung* of right, since, thanks to punishment, it is restored and confirmed, after overcoming the initial immediacy. Punishment and before it wrong must not then be considered as an unforeseen inconvenience, but as the manifestation itself of right. Force shows itself to be necessary as long as it allows the overcoming of abstraction and immediacy: thanks to punishment, right develops a process of actualisation and it does not remain a mere 'must be', a postulate, a requirement – *Forderung*[55] – at the mercy of subjective will, but comes to terms with its maximum negation. Precisely as a lesion of the lesion, punishment compensates and indemnifies, determining a positive condition that is the result of a negative one. It performs a double task: the first function, which can be considered the strictly juridical objective, consists of the fact that, thanks to coercion, right overcomes its abstract character, gaining real application and effectiveness, while the second shows how the penalty is the means by which it is the person who overcomes arbitrariness and naturalness. Punishment represents the moment in which the same right is shown as an instrument aimed at the universality of freedom, since it works in order to favour the integration between the individual and society through the attempt to neutralise the conflict and to stabilise the recognition relationship.

At this level of the *Elements* punishment is presented as retribution, ie as a consideration for the wrong that was committed in order to reintegrate the violation. The purpose of punishment is *wiederherstellen*, that is to restore the established order after the lesion, but in this way also *wiedervergelten*, retribution, the lemma that in German contains the term *gelten,* ie to make valid and to give value as it operates so that to be valid, *gelten*, is not the *daseienden Wille* of the criminal, but the right in itself.[56] The repressive function of punishment therefore justifies itself as it is the restoration of the universality of the right – regardless of the intentions or expectations of the actors that are involved – and it is the universalisation of the subjective will. Punishment is something that at the same time is due to the individual as he is free, it restores the relationship of recognition between the contracting parties and gives the right effectiveness and existence, since the possibility of forcing cannot but be up to the right, because it is a matter of its very existence.

[55] ibid § 89, 119.
[56] ibid §§ 99 and 101, 124 and 127.

III. From Revenge to Punishment

When Hegel seems to have demonstrated the legitimacy of punishment, he introduces a topic that apparently questions the argument he has discussed so far. He states that 'in this sphere of the immediate, the cancellation (*Aufheben*) of crime is primarily *revenge*'.[57] In Abstract Right punishment seems to contradict itself, appearing as revenge rather than justice. In order to avoid contradicting ourselves, and therefore as Hegel always states, it is possible to fully speak of 'punitive justice' and not of 'an avenging justice',[58] it is necessary to highlight the limits of the presentation we carried out so far and of punishment when it is exclusively meant as retribution. We can say that these limits may be identified in two distinct elements, one characterised by a formal character, the other by a content nature.

Regarding the latter, the problem concerns the 'determined qualitative and quantitative magnitude' of the punishment and the relationship of proportionality and correspondence between the wrong and the punishment. Hegel is aware that in criminal science we are dealing with 'the realm of finite things', which excludes any 'absolute determination' and only allows 'an approximate fulfilment'.[59] The error of this conception of punishment lies in the fact that it conceives the payment between infraction and coercion as 'an equality in the specific character', when it should concern that of the 'character in itself' and it should be established starting from 'inner equality of things which, in their existence, are specifically quite different'.[60] The problem of the proportionality of the punishment led to a misunderstanding of the notion of equality, leading to a representation of retribution as 'robbery for robbery' and therefore leading to apply the logic of 'an eye for an eye and a tooth for a tooth'. In order to establish a just and fair punishment, one must proceed to the *Vergleichbarkeit* of the value and an 'inner identity' between the two terms must be considered, while not being confined to applying the law of retaliation.[61]

From the point of view of form, instead, punishment as it is presented in *Abstract Right* remains 'the action of a subjective will', which 'exists for the other party only as a particular will', so that which should be a legal constraint appears to be 'a new infringement': justice then presents itself as 'in altogether contingent' and then turns out to be revenge, generating 'an infinite progression'.[62]

[57] ibid § 102, 130.
[58] ibid § 103, 131.
[59] ibid § 101, 128.
[60] ibid § 101, 128. Hegel highlights how it is important not only to distinguish a crime against the person from the one towards property, but it is fundamental to respond to the wrong with fair punishment: to punish a robbery with death means confounding a wrong against a property relationship with the punishment given in the case of a lesion against the person, just as it cannot be permissible to punish a crime with a mere indemnity.
[61] ibid § 101, 128.
[62] ibid § 102, 130.

Although punishment allows retribution of the lesion, it does not go beyond the logic of the settling of accounts because punishment is put in place by another single will, which does exactly what the former has done. In the moment in which it is another single individual who presides over the attribution of the punishment, from the formal point of view the two wills do not realise anything but two reciprocal lesions. Each one is for the other a particular individuality that acts against the other, in such a way that neither of the two actions is placed on a different horizon from that of resentment, retaliation or payback: hence this produces the effect that the restoration of right is left to the contingency of the will that punishes. Set in this way, the issue of punishment does not come out of the vicious circle of a continuous reiteration, of the bad infinity, since it will not be possible to interrupt the chain by which every wrong deserves a subsequent sanction. In order for the sanction to stop being considered the same as and analogous to the wrong, it must be taken away from the merely individual intervention: the overcoming of revenge for the benefit of justice therefore occurs when punishment is no longer imposed by a subjective will, but is established by the will as universal. In this way Hegel emphasises the insufficiency of the private sphere, since the relationship between two persons not only does not exhaust the juridical sphere, but cannot even found it as it reiterates the same act in an action-reaction dynamic which reduces right to personal revenge.

In order to explain this passage, Hegel uses the example of the Greek tragedy and cites Aeschylus's *Eumenides*, claiming that 'among the ancients, revenge and punishment are not yet distinct: *Dike* is revenge and punishment, the Eumenides are goddesses of revenge and punishment'.[63] This reference, which was already present in the essay on natural law written in Jena, leads to emphasise the political value of the work of the Greek dramatist in order to explain through the interpretation of the tragedy the conclusive passage of Abstract Right. Indeed, the *Eumenides* display an incurable conflict because each one of its protagonists is at the same time innocent and guilty, a murderer but without guilt, who killed just in order to correct a previous crime. This raises the issue of the 'right right', that is the right that must win, whether the one of Apollo, which absolves Orestes, or the one of the Erinyes, who want to do justice, making Orestes suffer the shame of his crime. If every case of revenge seems to be legitimate, at the same time, when it proposes private justice, it cannot be considered the adequate form of resolution of a conflict, because it redresses evil with another evil and produces a spiral of violence. The tragedy represents precisely the situation depicted in paragraph 102, in which Hegel states the impossibility of restoring right with a private sanction, since in this case revenge 'is inherited indefinitely from generation to generation'.[64] In the same way the turning point told by the tragedy will coincide with the solution claimed by

[63] G.W.F. Hegel, *Lectures* n 36 above, § 48.
[64] G.W.F. Hegel, *Elements* n 9 above § 102, 130.

Hegel. The *Eumenides* stage both the conflict and the composition of the conflict, which presents two opposing instances, the one of Apollo and the one of the Erinyes: the court established by Athena, the Areopagus, issues the sentence about the innocence of the accused Orestes. In this way it overcomes the two principles personified by the modern and ancient divinities for the benefit of consolidating the ethical dimension, exemplified by the new function that the Erinyes will perform as Eumenides. In the *Oresteia,* Aeschylus represents the transition from summary and primitive punishment to the dominant one in the *polis*, from taking justice into one's own hands up to being members of a community that intervenes – in the form of the court – in order to settle disputes, from revenge, as the only way of retribution, to justice, as a power standing above private interests. Athena's action leads to the establishment of a political dimension as a place of justice, in which right is not the prerogative of the individual, but it is the instrument that helps to restore the violated freedom. What is decisive is not only the outcome of the judgment, that is the absolution of Orestes, but the fact that the justice of the *polis* interrupted the chain of revenge and defeated the law of retaliation.

A reading of the *Eumenides* therefore makes it possible to enlighten the Hegelian passage from revenge to justice, precisely because Hegel understands the urgency of removing the universal juridical dimension from particular feelings, in which subjectivity is wrapped, and becomes aware of the risk, that the sanction undergoes, when it is the discretionary prerogative of the victim of the wrong. Only in so far as the punishment becomes justice does it lose its revenging character, it overcomes the accidentality and the contingency in which it arises and acquires a universal value for the entire collective dimension, because, when a right is violated, restoring justice is the general and common interest. As in the *Eumenides*, so Hegel concludes the discussion of wrong by postulating the occurrence of an institute that, as a public authority, presides over the application of justice. This institution, however, can only arise within Ethical Life, where individual interest is reconciled with the general one: institutions and the laws express a stable content, that is independent of the subjective opinion, objectively realise freedom and manifest the rationality that distinguishes the course of universal history. In this perspective the Hegelian strategy consists of exposing, through Abstract Right, the fundamental categories of private right in order to present their strength and limits: Abstract Right is a presupposition of Ethical Life, but at the same time it refers to the latter in order to be able to find an application, as a non-self-sufficient horizon due to the lack of conciliation between the universal and the particular. The penal right constitutes the *trait d'union* between Abstract Right and Administration of Justice: precisely because indeed, a right in itself, as a punitive right, requires the overcoming of revenge as a form of retribution, it leads to admitting the need for a public right.

IV. Punishment as Institutionalisation of Force

In Civil Society, Hegel presents the 'objective actuality of right',[65] since right itself assumes the form of positive right, which is universally valid and applies to particular cases. Those rational principles set forth in Abstract Right are included in the field of *Dasein*, as 'right in itself is posited in its objective existence', so that right shows its validity as *Allgemeines* as is recognised, known and willed even by consciousness.[66] In Administration of Justice, *abstraktes Recht* on the one hand assumes the characteristics of historically existing right, on the other hand it is no longer subordinated to subjective will nor is it deprived of coercive power but acquires a necessary and autonomous value from arbitrariness of the individual will. The categories that are exposed in Abstract Right, such as property, contract and punishment, acquire reality because they are defined as laws in a system, so that the same right becomes effective in actual Civil Society. Likewise, while in Abstract Right person coincided with legal capacity, the person who is the protagonist of Civil Society is now a 'concrete person',[67] that is an individual moved by specific interests and needs: since the context around him is historically, socially and economically developed, the concrete person acts as a member of a family, a worker placed in a productive system or a citizen of a state. In some paragraphs of Administration of Justice Hegel explicitly returns to the considerations set out about coercion. If Abstract Right indeed ends with the reversal of punishment into revenge, bowed to a particular interest and to the arbitrariness of subjective will, the administration offers a different picture of it:

> since property and personality have legal recognition and validity in civil society, *crime* is no longer an injury (*Verletzung*) merely to a *subjective infinite*, but to the *universal* cause (*Sache*) whose existence (*Existenz*) is inherently (*in sich*) stable and strong.[68]

In this perspective it is necessary to revise the penal conception which identifies itself with the principle of retribution, since the crime – and consequently its punishment – now acquires new meaning. In Administration of Justice, a crime violates a positive law and therefore of course the victims, but, in an overview, it violates the same system that codifies the behaviours and the exchanges between citizens, ie the true universal will, that represents the cornerstone of Civil Society as such. While in fact in Abstract Right the criminal action was an act directed against another subjective will, against any other person, so much so that Hegel claims that 'there is still no mention of

[65] G.W.F. Hegel, *Elements* n 9 above § 201, 240.
[66] ibid §§ 209-212, 240.
[67] ibid § 182, 220.
[68] ibid § 218, 250.

punishment in the form of punishment', now it appears as an act against the entire system that sanctions subjective rights. If in fact right in the 'the form of revenge' is merely 'right in itself', or 'not just (gerecht) in its existence (existenz]', in Civil Society it is universal to be harmed, thus generating a redefinition of the same concept of punishment, which 'ceases to be merely subjective and contingent retribution of revenge' to become 'the genuine reconciliation of right with itself'. It objectively corresponds to the 'conciliation' of the law 'which restores and thereby actualises itself as valid', and subjectively 'it applies to the criminal in that *his law* which is known by him and is valid for him and for his protection'.[69] Indeed, already in Abstract Right, Hegel identified the anti-juridical nature of the crime in the lesion of the universality of right in itself, but punishment turned into revenge, since it was itself an action that was committed by a subjective will, since the conditions were not identified nor was a person responsible for imposing it. On the contrary, in Administration of Justice, the fact that a crime is a lesion of the universal means that the universal has the task of punishing the infringement of the right through the institution of the trial and thanks to the court.

It is in Ethical Life that punishment fully realises itself as *Versöhnung* of the will of the offender and of universal will: the penal sanction is then founded and legitimised in Civil Society, since they are the judges, officials of the state and not private persons, to determine the modality and the extent of the punishment in the trial, according to what is stated by positive law in light of the gravity of the crime. In Abstract Right, wrong involved the loss of right in itself, whereas in Civil Society the latter has the tools to bring the particular back to the universal. In a penal trial the universal constitutes at the same time both the injured party, since the crime is itself a lesion of the universality of the right, in this case of the law, and what intervenes to re-establish the right as a *super partes* instance, which has the task of remedying the opposition. In this way a crime generates a break within the universal, which splits and duplicates itself as a part and as a whole, so that the conciliation takes place on a double track, the will of the offender and the law, on the one hand, and the right with itself on the other hand. The law also appears in multiple ways, since it is both what has been transgressed, and what allows the recomposition of the violation, establishing the ways in which to serve the sentence.[70] The offended person then participates in the trial, but in a mediated way, since his protection is delegated to a State's official, so that, says Hegel,

> the right is the Eumenides, the well-intentioned, which is equally protection of the criminal and it only realises what is in the necessity of the

[69] ibid § 220, 252.

[70] About this passage and, more in general, about the structure and articulation of the process, that are only mentioned, see a more detailed discussion by S. Fuselli, *Processo, pena e mediazione nella filosofia del diritto di Hegel* (Padova: CEDAM, 2001).

thing, in order to ensure that with respect to the offender there is no 'valid individual arbitrariness.[71]

This conciliation is also possible because in Ethical Life right rests on an inner adherence by the individual will and presupposes a trust in the universal that is rooted in the very structure of the will. If in Civil Society right is universally recognised, it is because the opposition between the abstract universality of right and the particular will of the individual is overcome. Obviously, this does not mean that right cannot be subjected to transgressions or that the individual spontaneously adheres to every imposed obligation, but simply that, beyond individual infractions, the individual has developed a subjective disposition which is at the basis of the relationship of obligation. In this way the wrong must be brought back to the arbitrary will, but this does not undermine the fact that the individual became capable of abstracting from his own particularity, recognising himself as equal to the others and being aware of being able to find his own wellbeing within the State. As long as subjectivity has undergone a process of formation, in Civil Society it can recognise the same right as universal: the possibility for the right of being objectively valid and independent from the particular individual will must be understood as the outcome of the awareness of his universality gained by the individual. Also, in Civil Society, the criminal right therefore retains the function of *Bildung*, since the different phases of the juridical process create the conditions for the members of Civil Society to be 'spiritually present, with their own knowledge' and to consider the law as 'the most proper', 'the substantial and rational'. The publication of the laws and that of the sentence, as well as the participation to the trial of courts of jurors made up by every educated person shows how the right in the *Rechtspflege* requires knowledge and the will of the individual and requires that this knowledge contributes to the application of right.[72] The general principle of *Öffentlichkeit* therefore ensures a dual function in Administration of Justice. On the one hand, it guarantees the correctness of the trial as a protection from any eventual abuse by the judge who is called to express his opinion on the legal aspect of the dispute regardless of the subjective opinions; on the other hand, it forms public opinion and carries out a role of education to the universal towards the same individuals, strengthening the trust they have in the law.[73]

[71] G.W.F. Hegel, *Vorlesungen* n 47 above, § 220, 670-671.

[72] G.W.F. Hegel, *Elements* n 9 above, §§ 222-227, 253-256.

[73] In particular in the Lectures on natural right of 1817 Hegel stresses the role played by jury courts 'to foster a trust and awareness' of right and to avoid that right appears to individuals as a 'an alien power'. That is the reason why Hegel affirms that 'the judicial system is nearly as important as the law itself and among civilised peoples should be as fully developed as possible' see G.W.F. Hegel, *Lectures* n 36 above, §§ 115-116, 200-207. See also G.W.F. Hegel, *Elements* n 9 above § 319, 355-358.

If in positive right accidental and contextual elements come into play, that are linked to historical conditions and to the character of Civil Society,[74] this also has an effect on the definition of penal law, since the punishment is not determined 'in terms of its concept', but 'in terms of its outward existence'.[75] What is defined as a crime, its gravity and the punishment that it entails are established in a contingent manner with respect to a series of variable historical and social factors and in relation to the way in which that same act is considered by the citizens. Because of this, Hegel specifies, 'this gives rise to the viewpoint that an action may be a danger to society',[76] since the extent of the punishment depends on specific assessments that let the same crime be punished differently depending on the historical epochs and in particular on the level of culture and 'education of the people'.[77] Therefore, if in a particular age an action can be considered as a serious crime, while the same act in a successive period might theoretically not even be subject to sanction, this depends on the fact that 'a penal code is therefore primarily a product of its time and the current condition of civil society'.[78] From a general point of view, it is possible to see how the strengthening of civil society in modern times has meant that the punishment of crimes has become progressively milder, as is shown by the opposition to torture and abolition of the death penalty.[79] Hegel claims that 'with the progress of education, however, attitudes toward crime become more lenient, and punishments today are not nearly so harsh as they were a hundred years ago. It is not the crimes or punishments themselves which change, but the relation between the two'.[80] The more a society is stable and strong, the milder the penalties will be, the more a crime puts the political system in crisis, the more it will be severely punished.

The justice of punishment is not determined on the basis of universal and rational principles, but on the contrary it is closely linked to particular circumstances. Therefore, a punishment that is right in itself does not exist, as a strictly retributive principle would lead to admit: since punishment is defined in relation to 'the conditions of their time' and cannot be valid 'for every age',[81] it may not be unfair to punish criminals differently for the same crime. This means that aspects that are completely absent in Abstract Right are now taken into consideration, as in the first place the consequences that a given wrong can have with respect to the stability of society. Just as in Abstract Right crime had a universal value, the same happens, or even more, in Civil Society: in Civil

[74] ibid § 212, 243.
[75] ibid § 218, 250.
[76] ibid § 218, 250.
[77] G.W.F. Hegel, *Vorlesungen* n 47 above, § 101, 322.
[78] G.W.F. Hegel, *Elements* n 9 above § 218, 250.
[79] ibid.
[80] ibid § 96Z, 123.
[81] ibid § 218Z, 251.

Society a crime 'is an injury to all others' and not only the victim, ie to the individual, so that crime is never a private matter between two individuals but calls into question the very foundations of civil coexistence, ie the 'basis and the ground'[82] of Civil Society. This implies that the same action produces external effects that go beyond the criminal's own intentions and that his action has implications that go beyond the action itself. The case of theft or robbery is paradigmatic: it certainly violates the principle of private property, but it also has an additional effect on Civil Society, because it affects the feeling of security of the members of the society. This fact is taken into consideration by the judge in the sentence and with respect to the determination of the punishment.

However, by identifying the factors that contribute to establishing the entity of the punishment, Hegel also makes a shift with respect to the foundation of the justification of the punishment itself. To the extent that criminal law depends on the degree of stability and cohesion of the society or on the actual threat that the crime produces, it follows that 'the attitudes and the consciousness of civil society' come into play. From this point of view, then, punishment must be considered not simply as a 'lesion of the lesion' and therefore as retribution, as if the same offender was subjected to the same law that he set, but in relation to the social consequences that the wrong involves, both with respect to the danger to civil society and to the representation that individuals make of a particular crime.[83] In his lectures, Hegel is even more explicit in that he states on the one hand that a criminal act 'embodies a bad example', thus assuming a dissuasive value up to the extent that punishment appears to be a deterrent to the repetition of the crime by other individuals.[84] Indeed, Hegel states that 'under the conditions of civil society the aim and purpose of improvement can enter the question of punishment. It is important that it does so, and is even necessary'.[85] Precisely for this reason it can be admitted that the punishments that are established for repeat offenders are harsher than those established for the ones who commit the same crime for the first time. This shows that the purpose of punishment consists of educating the criminal and therefore in his reintegration into society in order to ensure that 'a person can be reintegrated by society' and to avoid that the realisation of crimes 'becomes a habit'.[86] Since it is established in relation to the social consequences that the crime implies and to the power it has to condition the behaviour of the entire community, punishment now holds a social function aimed at influencing the future action of other citizens, as well as re-educating and reintegrating the offender into

[82] G.W.F. Hegel, *Lectures* n 36 above, § 114, 198.

[83] G.W.F. Hegel, *Elements* n 9 above, § 218, 250.

[84] G.W.F. Hegel, *Vorlesungen über Rechtsphilosophie nach der Vorlesungsnachschrift von K.G. Griesheims 1824/25*, in K.H. Ilting ed, *Vorlesungen über Rechtsphilosophie 1818/1831* (Stuttgart-Bad Cannstatt: Fromman-Holzboog 1973), IV, § 218, 549.

[85] Ibid § 218, 553.

[86] G.W.F. Hegel, *Lectures* n 36 above, § 113, 197 and § 114, 200.

society, so much that here the Hegelian conception of punishment assumes the traits of a utilitarian theory: since punishment is no longer distinguished as an element of private law, but by its public function and value, punishment certainly retains its 'quality of justice', but it can also have other ends like the ones of reformation and deterrence.[87]

V. Conclusion

Hegel's penal theory shows to be two-sided: on the one hand, as it was presented in Abstract Right, it can be considered among the retributive conceptions; on the other hand, as was stated in Administration of Justice, it seems to approach utilitarian positions. As in the case of the different moments of Objective Spirit, while in the case of Abstract Right, Hegel sets the problem of the rational foundation of punishment, and in Civil Society he questions himself about its purpose and its applicability. However, these are not two opposing positions or two antithetical theories, but two different points of view: on the one hand that of Abstract Right, rational and formal, on the other hand, that of positive, historical and contingent right as it is characterised in Administration of Justice. In the first case, Hegel identifies the conditions by which it is possible to justify coercion, in the second case the same principle, by finding application on the terrain of the society, can only change by taking into consideration aspects that were previously irrelevant and concern the improvement of the offender or prevention in general. This passage is the result of a depersonalisation of the determination and application of the punishment, which must make abstraction precisely from the subjectivity of the victim, the guilty and the one who imposes the punishment, because the latter is not imposed because of the accidentality of a subjective will: it is not only a right of the criminal, but a right of the right.

Despite such a double justification of punishment, both in Abstract Right and in Civil Society, punishment plays an analogous function as far as it presides over the universalisation of consciousness and the effectiveness of right. From the point of view of right, indeed, it is directed not only to re-establish legality, but also to overcome its abstract character, showing the necessity for it to gain the concrete level of action, whereas from the point of view of the individual, coercion conceived as violence accomplishes a task of *Bildung* against the natural and immediate impulse. Therefore, punishment guarantees the role of

[87] G.W.F. Hegel, *Vorlesungen* n 84 above, § 218, 554. This aspect of the punishment is more developed in the lectures of philosophy of right than in the published text, in particular in the Manuscript by Wannenmann (§ 114) and in that by Griesheim (§ 218, 548), where Hegel states that the criminal 'injures society as such' and the 'crime receives then the determination of the danger', so that a single case presents 'the character of universality'.

mediating between the universal and the particular will on a double level: it allows one to heal, on one hand, the separation between right and reality, ensuring the effectiveness of justice and, on the other hand, the opposition between right and subjective will, contributing to the development of that individual disposition that Hegel calls rectitude in Ethical Life. It is also thanks to punishment that right is not only an ought: punishment thus represents the unification of the abstract rationality of right and the particularity of the will, having the function – perhaps the ambition – of guaranteeing the realisation of right as injustice is the violence committed both against someone and against the right tout court. Thus, far from being what opposes itself to freedom, legal coercion is necessary precisely as a right of freedom, because on the one hand – and this is what is evident mainly in Abstract Right – it is presented by Hegel as a result of the dialectic of the will of the criminal: not only a duty, but at the same time a right of the individual thanks to which the universality of the will is acknowledged, as far as punishment is a limitation of freedom only if freedom is identified with arbitrariness. On the other hand, punishment is also something by which right in itself as the realm of realised freedom ensures its own existence, it is the restoration of the universal like the idea of freedom, thanks to which the latter is embodied in social and political structures.

Through a subsequent reading of Abstract Right and Administration of Justice, it is possible to state that punishment highlights the necessity for Hegel that private right be open to public law, as an axiologically, logically and chronologically prior horizon, as a presupposition that orders, organises and regulates intersubjective relations. Consequently, right can only be accompanied by a strictly political moment, as a place of decision aimed at establishing an order, in such a way that right represents an institution that is functional to guaranteeing stability through its own authorities that are capable of resolving disputes and conflicts. From this point of view, Hegelian penal theory seems to be possible to interpret as the justification of the thesis that the State is the only subject that has the monopoly of legitimate force, as opposed to those positions that support the possibility of the private use of force:[88] the constraint is *Zwang* only because it is framed within a political-institutional dimension, without which it would be nothing but mere *Gewalt*. Precisely for this reason, Hegel states the necessity of an institutionalisation of punishment that through the authorities of the State ensures respect of the law and that, taking charge of punishment, demonstrates that crime is not only a violation of another individual, but of that universal that is represented by the juridical order in which he places himself.

The ambitious project of combining the legal constraint with the concept of justice shows at the same time how Hegel is far from a naively natural law approach, as it is the frame of the positive right that outlines the conditions not only for the application of right, but also for the identification of the parameters

[88] J.-F. Kervégan, n 16 above.

of justice. Hence justice does not depend on a natural order, nor does it correspond to universal, transcendent and absolute principles, but we could say that it is defined in the context of Ethical Life: it depends on what is established by the law and is ensured by respect of the procedures of the State of right – therefore from respect of legality – but precisely for this reason, being always contingent and historically determined, it is exposed to the risk of being unfair. Thus, we can conclude with the umpteenth paradox, which is even more relevant for those who, like Hegel, have been portrayed for decades as the thinkers of logic and absolute reason and who in this case appear to be well aware of the incurable contradictions that are present in Objective Spirit. The use of violence does not appear as an episodic or isolated event, but rather as a trait which is proper to the juridical, witnessing the fact that in the same Ethical Life, the quintessential dimension of conciliation and pacification, the conflict and the division are not deleted at all. It is precisely through punishment that order is maintained in the State and any form of subversion is expelled: right is the instrument through which the existing system is renewed and continuously restored, as well as the device by which any opposition is contained and any centrifugal force that is dangerous for the state itself is cancelled.

Punishment is at the same time a clear example of the tension that is typical of the Hegelian approach between two opposing instances, the one of the universality of the principle, which imposes internal equality between crime and punishment, and the one of adherence and rightness with respect to the concrete case. The central aspect is indeed the dialectic that is established between rationality and generality of right, on the one hand, and the particularity and specificity of the individual case, on the other hand. In this sense, the logical normative principle underlying the crime-punishment relationship, by which the crime must be punished on the basis of a retributivist logic, can only be placed in historically determined contexts, as is highlighted by the fact that the same types of crimes will be punished, in different societies and in different historical epochs, in different ways depending on the contingent elements that inevitably exceed the abstract dimension. Right then inevitably lies in the contradiction by which, when it comes to establishing, for example, the right measure of punishment, this cannot be entirely rationally determined. The act of determining the quantitative of the punishment and thus its entity finally belongs to the judge's decision, which represents, in the field of the imponderable, the only way through which it is possible to solve the issue. Hegel then specifies that it is not possible to establish by reason 'whether the just penalty for an offence is corporal punishment of forty lashes or thirty-nine', although 'even one lash too many' is 'an injustice', *eine Ungerektigkeit*.[89] If, as a result of a decision, the punishment is then always questionable, accidental, contingent and therefore involves an element of arbitrariness that is impossible to remove,

[89] G.W.F. Hegel, *Elements* n 9 above § 214, 245.

once again we can say that it constitutes an access key to question the statute of the right, which is constitutively open to injustice: the latter is indeed a possibility that is present within the same juridical field, which is dependent on a residue of irrationality that can never be completely removed, since it derives from the implicit contradiction between universality of the norm and adherence to the particular case.