Short Symposium on the Punishment

The Mith of Re-Education

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Abstract

The prison model has won, as it has developed from the sixteenth-century workhouses to the ten million detainees currently imprisoned in the world. Despite these huge numbers, our penal and penitentiary legal framework is all about the myth of re-educational treatment. The treatment model is progressively overflowing, as was inevitable, towards a disciplinary model. Everything in prison is treatment and everything is discipline. Shifting the spotlight from the re-educational utopia to human dignity and the rights deriving from it helps to read the aporia of prison, helps to reestablish the foundation of the prison system in a clearer way, imposing ethical limits that cannot be crossed and making it compatible with the rules of the welfare state and the rule of law.

I. The Legal Functions of a Sentence. Prison Has Won

Penal law jurists, constitutionalists, philosophers of law, law historians, prison officers, ordinary and constitutional judges have been wondering for decades about the legal and formal function of punishment. However, they argue about an abstract punishment, a punishment written in rules and codes but that does not exist in reality.

More in touch with the political, social, criminal and prison reality was a scholar and politician, Arturo Rocco,[1] the father of the Italian penal code currently in force, who wrote as follows:

> It is evident how this character of necessary defence (of the vital interests of the nation) can be found, not only in those crimes that directly attack the existence or security or state, but also in those serious common crimes that, for the atrocious manner in which they are committed, and in the absence of mitigating circumstances, denote in the guilty such perversity as to render all hope of amendment and re-education vain. (…) The severity of sentences cannot be justified, except by a concrete and immediate purpose of more

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[1] He was Minister of Justice and for Religious Affairs for seven years between 1925 and 1932. His Penal Code is imbued with fascist ideology. His report to the code is an ideological manifesto of the fascist legal thinking.

vigorous repression.[2]

Alfredo Rocco did not need to lie about the effective function of punishment. He admitted that the punishment system must serve the apparatus of repression. He was the jurist ideologue of fascism, and the fascist regime could afford to claim an idea of punishment as an affliction, without those hypocrisies that are necessarily and inevitably present in democracies.

In the last seventy years, a wide-ranging debate has taken place about the legal functions of penal sanctions. Still today, there is broad and meticulous concern with the doctrine and jurisprudence on the old and noble theme of the function of punishment, trying to disengage the sentence from the needs of social defence and mere repression. Academics, judges and lawyers, at all levels, discuss, investigate, write essays and sentences on what the function of punishment should be, without questioning the material essence of what has been universally – in space and time (for at least two centuries) – considered the only punishment worthy of the name, namely imprisonment. To understand what the function of a penalty is, the material and daily nature of that penalty must be understood.

Any answer to the main questions about what the function of a criminal sanction is or should be cannot ignore knowledge of the system of penalties and imprisonment in its concreteness. No scientist would renounce direct field observation to better understand the good state of his theoretical studies.

First of all, a view of reality helps to clear the way for a first interpretative misunderstanding. Although the whole contemporary legal culture is oriented towards the search for alternatives to detention, prison dominates the planet. Prison is, indeed, the only sanction considered as such by politicians, public opinion and, not rarely, by judges and security actors. All the other criminal sanctions, starting from the pecuniary one, are marginal, envisaged for minor crimes.[3] They have favoured the extension of criminal law towards areas that traditionally belonged to civil or administrative law, without affecting the centrality of prison as the main penalty.

What happened in Italy in 2013 and 2014 is paradigmatic of the ineffectiveness of non-custodial criminal measures in reducing the use of prison as the main sanction. Non-custodial measures are incapable of taking away the centrality of a prison sentence. In the daily work of social services and courts, alternative measures to detention and trial have taken up what would probably have been the space of non-punishability. Yet the declared normative function

[2] Preparatory work for the Penal Code and the Code of Criminal procedure, V, Final project, Report by Alfredo Rocco. Part I, 68-69.

[3] The forecasts made by G. Rusche and O. Kirchheimer, *Punishment and social structure* (London: Routledge, 2003) were wrong. In any case, to them we owe the investigation of the relationship between social, economic and penal relations. The book was translated for the first time in Italy by Dario Melossi and Massimo Pavarini.

was different. Sanctions other than imprisonment have usually broadened the area of punishment without reducing the area of imprisonment.

In January 2013, Italy was condemned by the European Court of Human Rights in the Torreggiani case.[4] It was a pilot sentence because it concerned thousands of applications filed by prisoners forced to live in very limited spaces. According to the Strasbourg Court, every detainee must have at least three square metres, otherwise, the state will incur violation of Art 3 of the Convention, prohibiting torture and any inhuman or degrading treatment. Italy was called upon to take systemic steps to reduce overcrowding, as well as to ensure effective judicial remedies in the case of prisoners' complaints. Among the measures taken by the Italian Parliament was the extension of the institution of probation from the juvenile system to that of adults.[5] Judicial probation consists, at the request of the defendant, in suspension of the criminal proceedings at the first instance decision stage for crimes of low social alarm. In the space of a few years, great recourse has been made to probation in the adult system. The number of measures in progress rose from eight hundred four on 31 January 2015 to seven thousand three hundred forty five in 2016, nine thousand two hundred seven in 2017 and eleven thousand one hundred two in 2018. The increase continued during 2018, with thirteen thousand four hundred eighty-one measures in progress on 30 June and fourteen thousand nine hundred eighty on 30 November 2018. At the same time, however, the total number of prisoners also increased, despite the decline in crime rates. Therefore, probation did not result in an erosion of the prison area. It probably affected all those people who would not have been imprisoned anyway. Prison has continued to be the main, sometimes the only, penalty, the one that no one is willing to give up. It continues to be used as a threat and is applied without hesitation and without taking crime rates into account. All this happens because prison responds to a social, public, and political need for affliction, revenge, and neutralisation that has nothing to do with the legal function of the penalty itself.

Prison is a penalty that has become the only penalty around the world in the last two centuries. Even in our constitutional and penal law, the word penalty is written in its plural form; however, in reality, penalties tend to be just one: prison. A prison sentence is used as a threat, executed, condoned, suspended, amnestied and converted. But the main penalty is always the same,

[4] Eur. Court H.R., *Torreggiani et al* v *Italy*, Judgment of 8 January 2013, available at www.hudoc.echr.coe.it.

[5] It was introduced with Legge 28 April 2014 no 67, which modified respectively: the Criminal Code, with the provision that introduces the new institution in Arts 168-*bis*, 168-*ter* and 168-*quater*; the Code of Criminal Procedure, with the introduction of Arts 464-*bis* and following which regulate the activities of investigation of the proceedings and the trial, as well as Arts 567-*bis* which indicates the modalities of the evaluation of the probationary period; the norms of implementation, coordination and transition of the Code of Criminal Procedure; the Consolidated Text on the subject of the legislative and regulatory provisions on the subject of criminal records.

ie prison. Jurists need to come out of their bubble and look at the facts. Prison is the penalty. Prison has won in the criminal justice system in time and space, imposing itself as the penalty. Whether we look at trials and courts, but even more if we look at social perception of the penalty system and at numbers, the prison model has won. It has exceeded the limits of criminal justice by returning to its origins, which were those of administrative detention. The prison model is widely used in the field of administrative detention of migrants, and the institutionalisation of the elderly or minors. The birth of prisons has its origin in administrative detention. Today, the prison criminal model also incorporates its origins. In the English correctional workhouses and the Dutch workhouses (Rasphuis), in the past (in the XVI century) there were perpetrators of minor offences, vagrants, petty thieves, beggars by administrative or judicial decision.[6] The punishment of imprisonment has no competitors in its being a force of symbolic reassurance, in its capacity to respond to a plurality of functions or in its being without a precise legal aim.

II. The Social and Economic Function of a Sentence

Crime and punishment are not related. For the first time, in 1939, the two scholars from Frankfurt, George Rusche and Otto Kirchheimer, investigated punishment and how its origin was not criminality. They wrote that penalty has changed in modern times because the model of economic production has changed. They used the historiographic method to explain all the changes. Punishment is not a simple consequence of crime, nor the hidden side of it. It is undeniable that a penalty has specific functions but it is equally undeniable that it cannot be explained based only on these. In terms of punishment and social structure, the two scholars trace back the changes in punitive forms to economic-social systems' change. Their work suggests that it is possible to study economy and society through criminal law and punishment in practice.

> The criminal system of every historically determined society is not something isolated, subject only to its specific laws, but is an integral part of the entire social system.[7]

If punishment and crime are not univocally related, the purpose of a penalty requires more complex explanations. On the other hand, this lack of connection between punishment and crime is perfectly proven by statistical data. Detention rates and crime rates are not moving in parallel. Detention

[6] D. Melossi e M. Pavarini, *Carcere e fabbrica. Alle origini del sistema penitenziario* (Bologna: il Mulino, 1st ed, 1977, 2nd ed revised, 2018). See also M. Ignatieff, *Le origini del penitenziario. Sistema carcerario e rivoluzione industriale inglese* (1750-1850) (Milano: Mondadori, 1982).

[7] G. Rushe and O. Kirckhheimer, n 3 above.

rates also rise when (as in recent years in Italy) crime rates fall. Massimo Pavarini started his sociological studies from an awareness of the absence of a link between punishment and crime. However, he is not interested in giving explanations entirely within the capitalist model and goes to the heart of the anthropological needs of punishment present in society. To understand what a penalty is, the interpreters must know daily life in a prison.

Massimo Pavarini[8] defines the essential and factual attributes of a penalty from a sociological point of view. He is not theoretically interested in the legal nature of a penalty because the normative functions legitimise the legal penalty, but are unable to fully explain it. The sanction, according to him, has four attributes: the punitive one (production of deficits against the person punished, ie reduction of his/her rights and/or reduction of satisfaction of his/her needs), the programmatic one (the repressive action must appear explicit and intentional so that the punished person feels it as a censure against him/her), the expressive one (the sanction must distinctly and symbolically express the claim of authority of those who punish) and the strategic one (it must be such as to perform the function of maintaining certain power relationships). The four characteristics of punishment, according to Pavarini, explain the essence of the punishment itself.

A penalty is to punish, to inflict pain. If this were not the case, some details of life in prisons would not be explained. To prohibit a prisoner from meeting his son/daughter whenever (s)he wants has a purely punitive value. This is a rule designed only to create pain. It has nothing to do with the legal, preventive or re-educational function of punishment. The Constitutional Court in 1993, in a very relevant decision, stated:

> Those who are in detention, even if deprived of most of their freedom, always retain a residue, which is all the more valuable because it is the last area in which they can expand their individual personality.[9]

Therefore, it is the same court that recognises that the sanction of deprivation of liberty draws everything into it and can determine the loss of fundamental rights other than personal liberty. For this reason, judges' attention must be maximised.

A punishment, as Pavarini argued in depth, has a programmatic aspect. It makes sense to programmatically exclude a detainee from all sources of information. In this way, it is possible to programme his/her social exclusion over time. Prohibition to use a PC and an Internet connection for people with long sentences has a clear will to reduce the person to an unthinking animal and to exclude him/her from the community of the people already included. The rule responds to a need for socio-economic planning. In this way, in fact,

[8] M. Pavarini, *Governare la penalità* (Bologna: Bononia University Press, 2014).
[9] Corte Costituzionale 28 July 1993 no 349, available at www.cortecostituzionale.it.

prison management prevents any attempt to break the social barriers.

A punishment must be expressive. This is the only reason why prisoners are forced to humiliate themselves for every request they have to make in the prison context. They have to submit to authority, represented by prison guards. And if they leave the prison to work, they must do so for free and clearly visible by the crowds of innocent people. It is never clear in prison what the source of any provision is. An imposition does not always have its own legal legitimacy. Often it is the result of an internal regulation of the prison central administration, or even more frequently, it is the result of an order issued by the director (warden) of the prison. In prison life, it can happen that what is considered a rule is instead a mere practice, completely devoid of formal legitimacy. The deep sense, in the world of prisons, of such disinterest in the legality and formal hierarchy of the sources, is given by the will to distinctly highlight the unlimited power of the guards over the people deprived of their liberty. It is easier to do so if this punitive power is clearly arbitrary and not legally confined. In this way, the imbalance with the prisoners will appear even stronger.

Finally, a punishment must be strategic. The more migrants there are in prison, the more the poor are imprisoned, the more the balance of power between the different social groups is left unaltered. The entire system of procedural guarantees is designed for a type of person (indigenous, wealthy, well-educated on average) who rarely passes through the criminal system. All the others – that is, those already excluded from society and welfare –will find it difficult to avail themselves of those guarantees. Thus, once they have ended up in prison, the selection, which is not so much of class today, but of ethnicity, passport, wealth and status, is perpetuated.

According to Justice offical data reported in June 2019, by adding detained foreigners and prisoners from the four most populous regions of southern Italy, we obtain seventy-seven percent of the total number of people detained in Italy. By adding the prisoners from Sardinia, Basilicata, Abruzzo and Molise the percentage exceeds 80percent. The rest of the country, which tends to be richer, produces only one-fifth of the detained population, even though it makes up about two-thirds of the free Italian population. Recent data also tells us that over a thousand prisoners, three hundred fifty of whom are Italians, are illiterate. In free Italy, illiterates add up to zero point eight percent. In prison, the percentage is more than one point five percent. Moreover, six thousand five hundred prisoners, more than ten percent of the total, only have an elementary school certificate. University graduates amount to just over one percent (six hundred ninety-eight), while in free society they reach eighteen point seven percent. This is the strategic framework to imprison poverty. Investing in education and welfare would constitute an extraordinary form of crime prevention that in the long run would produce security. However, the penalty of imprisonment has no connection with security, but with symbolic reassurance

and social and political consensus.

III. Global Mass Incarceration

The prison model has therefore met with undeniable success, as it has developed from the sixteenth-century workhouses to the ten million detainees currently imprisoned in the world. An impressive number that cannot but have its own close link with the prevailing social and economic model. Given the exponential growth in prison numbers over time, and considering that no political system renounces prison as a form of social control, mass incarceration can be explained by the recourse to several competing causes. It could be linked to the planning of mass discipline[10] or to the complex demonstration of the use and abuse of prison by the capitalist system[11] or also to the gradual withdrawal of the welfare system.[12] The numbers are so high that it is not possible to be satisfied with simple explanations. The legal function of a sentence is challenged by mass incarceration and by the centrality of the custodial model even outside the penal system. In the United States, there are about 2.2 million prisoners. In light of the total number of people living in the US, the detention rate is incredibly high: for every one hundred thousand inhabitants, about six hundred fifty-five are in prison (data from the Bureau of Justice Statistics). After New York, Los Angeles, Chicago and Houston, the American prison population would be the fifth American city in terms of the number of people with a total cost of eighty billion dollars. The federal system has produced a multiplication of the detention level. More than fifty percent of prisoners are held in state prisons. There are as many as three thousand local prisons. A bargain for the security multinationals that manage about eight percent of the total number of prisoners, fuelling the vicious circle of judicial corruption and the financial market without scruples. In recent times, millions of US taxpayers' dollars are being invested in private prison operators involved in the detention of migrants around the United States. At the national level, at least twenty pension funds and plans have invested in the two largest private operator groups (Geo Group and CoreCivic).[13] Though African-Americans comprise only about twelve percent of the total US population, they add up to thirty-three percent of the federal and state prison population. Meanwhile, whites, who constitute sixty-four percent of American adults, amount to only thirty percent

[10] Michael Foucault is always worth reading, as his book is the most organic explanation of the birth and excellent fitness of the prison system. M. Foucault, *Surveiller et punir: Naissance de la prison* (Paris: Gallimard, 1975).

[11] See fn 6.

[12] But also L. Wacquant, Iperincarcerazione. Neoliberismo e criminalizzazione della povertà negli Stati Uniti d'America (Verona: Ombre Corte, 2013).

[13] See the journalistic enquiry of The Guardian available at https://tinyurl.com/57d68bhh (last visited 30 June 2021).

of those behind bars.[14] Given that detainees in almost all American states lose their voting rights (and do not regain them immediately after serving their sentences), this means that a part of the population, the most marginal, is deprived of the opportunity to participate in political choices. Prisoners and former prisoners are out of community life. Therefore, mass incarceration is a source of wild enrichment, as well as functional to neoliberal policies of social and political exclusion of non-productive sectors. The political and economic system uses the custodial model as an easy source of enrichment, to fuel its own gift of consent and to exclude those most reclutant to inclusion. The prison-centred penal system is, therefore, a selective system based on wealth, skin colour and nationality and is functional to leaving power blocks unaltered.

All this is happening not only in the United States but in a similar way and with similar aims, also in Europe and in developing countries. In Italy, the detention rate is one hundred prisoners for every one hundred thousand inhabitants. Much lower than in the United States but the trend (and the social composition of the prison population) is the same and leads to overlapping considerations. If these are the numbers, as David Garland suggests,[15] then criminal institutions should be analysed from the outside, in an attempt to understand their role in a broader perspective, as an expressive form of social change. Having seen the numbers, the costs, the gains and the social composition of the prison population, the re-educational function of punishment is fiction and the social afflictive function of punishment is evident.

IV. Observing Prison and the Myth of Re-Education

It is necessary to see a prison to fully understand its social function and measure its difference compared with the justifying legal functions attributed to punishment. Not having seen a prison is not a fault to be ascribed to the jurist or philosopher: but we cannot ignore the voices of those who have seen one. At the beginning of the last century, it was the powerful voice of Filippo Turati who opened the gates of prison to public opinion and the political world. Prisons 'are the greatest shame of our country', he denounced in a memorable speech to the parliament:

> They represent the expression of social revenge in the worst form that has ever happened: we believe that we have abolished torture, and our prisons are themselves a system of torture, the most refined; we boast of having cancelled the death penalty from the penal code, and the death

[14] Data from Pew Research analysis of Bureau of Justice Statistics. See also CNN available at https://tinyurl.com/ye28d8ph (last visited 30 June 2021).

[15] See D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001).

> penalty that our prisons administer drop by drop is less compassionate than that which was given by the hands of the executioner; we swell our cheeks to speak of a re-education of the guilty, and our prisons are factories of criminals or schools of improvement of criminals.[16]

With strong words, Filippo Turati expressed his warning to the bourgeois of the *belle époque* of the Italian Giovanni Giolitti's time. Therefore, nothing that recalled a noble perspective of re-education, of correction of bad souls, but only a living in misery and violence. A prison is a factory of recidivism and potential future repeating offenders.

What is Turati saying at the beginning of the XIX century? The abolition of the death penalty does not weaken, on the contrary, it strengthens a hard, degrading, inhuman and violent prison, as the right response, precisely because it is painful to crime. The spread of the prison system has not led to a reduction of the risk of dying in the hands of the state. Of the prison, Turati knew the law void and the concentration of power; the obtuse bureaucracy and despotic hierarchy; the ineffective rules and the painful practices, the unfulfilled aims and the loss of self-determination: how it is much easier to imprison a condemned person, to frighten him, to brutalise him, than to educate him and make him a new man; how ferocity requires neither intelligence, nor effort, nor financial means, while education demands all these things; how of all prison regulations, the brutal ones are widely applied, those in which the spirit of social vengeance against the unfortunate detainee survives. Instead, Turati explained, all those regulations which reflect the duty of the state to provide for the rehabilitation (he used the word redemption) of the guilty person, while at the same time providing public security against recidivism, are left completely aside and have remained a dead letter.

Direct observation makes it possible to reason beyond the functions that the law attributes to punishment and not to limit one's experience to the scholarly debate on the doctrines of general or special prevention, retribution or re-education. It allows us to examine those essential and factual attributes of punishment, identified by the penetrating look of Massimo Pavarini: afflictive, programmatic, expressive and strategic.

Prison also needs an ethnographic investigation to be properly understood. Anthropologists and ethnographers should make their investigations and studies available to expose the real function of punishment.[17] We have understood a great deal about prison thanks to the stories and the analyses of those who have told them from behind bars.

It is necessary to have seen a prison to understand its afflictive nature,

[16] Filippo Turati gave the speech in the (Italian) Chamber of Deputies on 18 March 1904. It was then published in a brochure with the title 'The cemetery of the living'.

[17] A recent ethnographic survey is that of G. Torrente, *Le regole della galera. Pratiche penitenziarie, educatori e processi di criminalizzazione* (Torino: L'Harmattan Italia, 2018).

made up of denied rights far beyond what is explicitly indicated in the law; its programmatic essence, based on oppressive messages and submission of the prisoner to the unwritten rules of the prison; its expressive force, consisting of the symbolism of the asymmetrical relationship between the prisoner and the guard; its strategic character, aimed at not changing the relationships of domination between social classes. Anyone who has visited a prison knows the useful and right indicators to understand the actual social function of a prison sentence: the downward or upward glances of the prisoners, the smell of coffee or rottenness in the cells, the silence or noise, the life or absence of life that there is in the sections, the provision or not of underground spaces for solitary confinement, the use of military uniforms or the absence of uniform for the prison staff. Indicators that go beyond any normative codification and which only direct observation can examine and recognise.

After the end of the Second World War and the fall of fascism, Piero Calamandrei published a monographic issue of the magazine '*Il Ponte*' dedicated to torture, prisons and the need for a parliamentarian reform. The volume contains extraordinary essays written by intellectuals and politicians who were imprisoned during the fascist regime.[18] Calamandrei asked for testimonies about prison from the most important anti-fascist people of his time. So, re-education is completely demythologised. Altiero Spinelli undertook the task of demystifying the praise of prison as a pedagogical tool:

> It is a very strange way of re-educating the one that consists of detaching (a man/woman) from the whole network of social relations, and putting him/her into a set of new rules, to respect in which (s)he no longer needs any sense of responsibility. The prisoner gets up, washes, sweeps, eats, works, rests, speaks, is silent, reads, writes and goes to sleep at the sound of a bell. They ask him/her to be a machine and nothing more.[19]

The myth of re-education had already been spiced for a century and a half with bombastic rhetoric about the amending virtues of work, education and religion: 'those who think that prison, however modified, can be an instrument of moral and social redemption are victims not of an illusion, but of hypocrisy', Spinelli wrote.

Vittorio Foa was of the same opinion:

> we lock them inside four walls, we entrust them to specialists in repression, not to see them, (...) to live in peace. And hypocritically we add

[18] The issue was recently published by P. Gonnella and D. Ippolito eds, *Bisogna aver visto. Il carcere nella riflessione degli antifascisti* (Roma: Edizioni dell'Asino, 2019). The book includes essays by Altiero Spinelli, Vittorio Foa, Giancarlo Pajetta, Ernesto Rossi and many others.

[19] A. Spinelli, 'Esperienza di prigionia', in P. Gonnella and D. Ippolito eds, *Bisogna aver visto. Il carcere nella riflessione degli antifascisti* n 18 above.

that we want them to improve.

One can also disagree from this point of view. But we must be aware that the utopia of re-education, in the reality of prison, always risks plunging into the dystopia of correctionalism.

The autobiographical method[20] can be a suitable instrument of knowledge of prison reality and its ontological irreconcilability with the re-educational function of punishment. The tales of those who have suffered the misadventure of spending a period in prison are one of the ways of verifying what the effective function of a prison is. The stories and reflections of Spinelli and Foa well explain, in the light of their ability to analyse, how much prison is mainly inflicting suffering, triggering the worst feelings in those who manage them. Indeed, guards have infinite power over the bodies of the prisoners. And, as an anthropologist or a psychotherapist could explain better than a jurist, guards can make arbitrary use of this power unless the wall of opacity is torn down. A prison is a closed place, out of reach of external looks. This makes it not very permeable to the demands of social help. It makes it a place potentially at risk of abuse. Eligio Resta is responsible for the great intuition of what has been called the illusion of criminal justice, that thought of progressing by transforming a trial from a private fact to public history and punishment from a public spectacle to a matter taken away from the eyes of the curious and the enthusiasts. The problem is that a penalty taken away from the outside world has become arbitrary, illegal, vengeful and irremediably painful.[21]

Fifty years after Foa and Spinelli, a person serving a life sentence who managed to emancipate himself from crime and took two degrees maintaining the lucidity of the raconteur gives his testimony:

> (the guards) were all dressed in the same way, they moved in the same way and said the usual things. They looked like priests, but they didn't work for God or the devil... For them, if you came to prison, you had done something and if you hadn't done anything it means that you are dumb to be in there. I have learned only now to forgive the men and women who work in prison... In prison, it is difficult not to bend and not to resign, only the bad guys manage not to do so, so I thought of trying to become even more-evil.[22]

There have been dozens and dozens of testimonies from prisoners starting

[20] See D. Demetrio, *Raccontarsi. L'autobiografia come cura di sé* (Milano: Raffaello Cortina editore, 2006). The author theorised the relevance of the autobiographical method both for self-knowledge (as well as self-satisfaction), and for knowledge of the outside world through the story of one's own life.

[21] See E. Resta, *Il Diritto vivente* (Bari: Laterza, 2008).

[22] C. Musumeci is a 'lifer' who wrote essays and books. Together with A. Pugiotto, *Gli ergastolani senza scampo. Fenomenologia e criticità costituzionali* (Napoli: Editoriale Scientifica, 2016).

from Filippo Turati to the present, in Italy and other countries, about the cruelty of punishment, its ambiguities and the attempt to infantilise the detainee.[23]

In 2013, after the sentence against Italy in the Torreggiani case from the European Court of Human Rights, a broad and interesting public and deep debate were opened, involving hundreds of experts convened by the Ministry of Justice within the framework of the General States on Penal Execution.[24] Among the proposals that emerged there was that of overcoming prison infantilisation, ensuring the opening of cells, sections, the self-management of the day according to the will to make detainees responsible for managing their relationship with the time of deprivation of liberty. All this took the name of dynamic surveillance. In a short time, the project was abandoned and the Italian penitentiary system returned to a model of segregated punishment. According to the majority of prison guards (and their unions), a detainee must stay in a cell, always ask permission to do anything during the day, must not express personal opinions, must always be accompanied in any even brief movement within the prison. So, the prisoner should be treated as a child or as a dog (kept on a leash). All of this confirms that punishment is thought of as suffering, based on distrust and not on the prospect of social reintegration.

There is a common thread that links the stories from prison in time and space. Both in the reflections of the anti-fascists during the 1930s and in those of Pierre Clementi, a famous French actor imprisoned in the 1970s in the Regina Coeli prison in Rome:[25] there is no trace of and no possibility for the re-educative function of punishment. According to their stories, the only practiced alternative to a harsh regime of life and suffering is a prison model based on authoritarian paternalism. Here we could turn to the pedagogical culture to understand how it is not through paternalistic management that a path of responsibility and social reintegration is built. Paternalism transforms rights into concessions, legality into discretion.

The same interpretative result can be obtained by reading the reports of the European Committee for the Prevention of Torture, which is authorised to visit, sometimes by surprise, all the places of deprivation of liberty within the framework of the Council of Europe.[26] The monitoring of prisons by international or national agencies responds to the objective of removing prison from the punitive arbitrariness of its managers. It is thus highlighted, through direct observation, what the true afflictive nature of the prison is. All this in an attempt to set limits in the name of human dignity and fundamental rights.

[23] About the process of infantilisation, see also A. Sofri, *Le prigioni degli altri* (Palermo: Sellerio, 1993).

[24] There is still a trace of it here https://tinyurl.com/dmajreu2 (last visited 30 June 2021)

[25] See P. Clémenti, *Pensieri dal carcere* (Roma: Il Sirente, 2007).

[26] See www.cpt.coe.int.

V. Human Dignity as the Only Limit That Works[27]

Prison as punishment is an invention of modernity connected with great questions that transcend it: from the model of economic production to the ideology of work, from the more general objectives of justice to the more specific theme of the rite of a criminal trial. Prison as punishment has to do with social and fiscal systems, with urban and architectural choices, with human rights and the residue of their executability, with the dignity of the body and the salvation of souls, with ethics and religion. Prison as punishment is within the system of law but is historically not inclined to be caged by law. It is the result of a judgment that turns into prejudice. Prisons are not to be reduced to a historical description; they should also be read through an epistemological investigation that uses the classical categories of space and time. As seen above, prison as punishment imposes a reflection on its function and its methods of execution.

A prison sentence in a democratic society has unsurpassed limits, imposed by the legal system and by ethical sense. Limits that can be traced back to protection of human dignity understood in its Kantian meaning of humanity and the impossibility of treating men as mere means to achieve an end. Art 27 of the Italian Constitution, in its third paragraph, envisages that

> punishments may not consist of treatments contrary to the sense of humanity and must aim at the re-education of the person sentenced,

and suggests not putting a re-educative function and respect for dignity in competition. The scholars of punishment, starting from jurists, but not exclusively them, over time have chosen the function of punishment as their main area of interest, which is the second of the constitutional objectives. Around it, reforms have been built and cancelled, and opposing theses have been endorsed. Some have erected, not only metaphorically, monuments to redemption[28], those who have sought to eliminate the non-educable and those who have developed a model of prison open to the territory and aimed at the social recovery of convicts. In all these cases the same constitutional expression was evoked and used. Re-educational rhetoric, unrelated to human dignity, has for decades hindered the emergence and consolidation of a conceptual, normative and jurisprudential reflection on the first of the constitutional objectives, ie a penalty according to humanity. Mass incarceration and penal populism have produced a macroscopically illegal prison.

This is difficult to tolerate for a liberal or constitutional democracy. Therefore, human dignity works as a limit to the excessive and arbitrary power

[27] This paragraph follows the first chapter of the book of P. Gonnella, *Carceri. I Confini della dignità* (Milano: Jaca Book, 2014). Regarding human dignity in prison see also M. Ruotolo, *Dignità e carcere* (Napoli: Editoriale Scientifica, 2014).

[28] This happened in front of the Pisa prison in the nineties.

to punish, but only if you give up the rhetoric of re-education. If re-education, even good and non-invasive re-education, was reduced to a myth and public attention inevitably shifted around humanity, there is a concrete possibility of more effectively guaranteeing prisoners' human rights. Since 2010, observers, judges and academics have placed human dignity and human rights in the spotlight. The absence of a personal minimum space evoked images reminiscent of the tragedy of the Holocaust or the great tragedies of the last century.[29] The limit had been exceeded.

The aim of re-education works worse than human dignity as a limit to oppose an illegal and violent punishment; this has been noticed by the Supreme Courts in the United States as well as in Europe[30] in Germany[31] and the courts in Italy.

What took place in the United Staes of America is paradigmatic. In 2011, the Governor of California, following an order of the United District Court of California of 8 April 2009, which required him to prepare a suitable plan within forty-five days to reduce the number of detainees by at least forty-six thousand people in two years, ordered a real emptying of Californian prisons. The judges of the United District Court of California found a violation of the eighth amendment of the US Constitution, which prohibits the use of cruel and inhuman punishment. The decision was then confirmed by a ruling[32] of the Supreme Court of the United States, which was also called upon to decide on the violation of rights in the overcrowded Californian prisons.

The re-educational paradigm works worse because of correctionalism – the idea according to which through the prison sentence the detainee should be 'corrected' of his deviant nature – is not conceptually and logically an antithesis to treatments contrary to the sense of humanity. It is so in its democratic version, it is so in the intentions of many scholars and social and legal workers,

[29] It is no coincidence that the UN minimum standard prison rules are named after Nelson Mandela.

[30] See the case-law about art 3 of the Convention from the Eur. Court H.R., *Sulejmanovic* v *Italy*, Judgment of 16 July 2009 to Eur. Court H.R., *Mursic* v *Croatia,* Judgment of 20 October 2016, available atwww.hudoc.echr.coe.it**.**

[31] Bundesverfassungsgericht 22 February 2011, 1 BvR 409/09 available at www.bundesverfassungsgericht.de. The German Constitutional Court, following the appeal of a detainee who complained of particularly harsh conditions of imprisonment (twentythree hours a day closed in a cell of eight square metres to be shared with another detainee who smokes), stated that the state must ensure full respect for human dignity even by renouncing application of the penalty. In Germany, the court has a stronger juridic instrument, as Art 1 states that: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority. The German people, therefore, acknowledge inviolable and inalienable human rights as the foundation of every human community, of peace, and justice in the world'.

[32] *Brown* v *Plata* 131 S. Ct. 1910 US Cal. (2011). See G. Salvi, 'La Costituzione non permette questo torto: la Corte Suprema degli Stati Uniti e il sovraffollamento carcerario' *Questione Giustizia*, 205 (2011) and M. Lombardi Stocchetti, 'Il carcere negli USA oggi. Una fotografia', *Diritto Penale Contemporaneo*, 23 December 2014, available at https://tinyurl.com/yf8vhpys (last visited 30 June 2021). For a critical analysis of mass incarceration and the role of the courts see S. Anastasia, *Metamorfosi penitenziarie* (Roma: Ediesse, 2013).

but it is not so everywhere and in any case. The correctional model – even in its most modern, less paternalistic and authoritarian versions – always carries the germ of the instrumentalisation of a human being for another function. The detained to be re-educated becomes a means to achieve his/her change, social tranquillity, the pursuit of a less tense environment in prison. A non-recoverable prisoner can also be condemned to an inhuman punishment without this theoretically undermining the corrective model.

The inhumanity of the prison regime, on the other hand, undermines the human-centred prison model based on dignity. The re-educational emphasis, when it is not linked to the protection of human dignity, is potentially in conflict with it. The attention given to the function of punishment and all that it entails did not help to design a penitentiary system that is clear in its rights and duties, that connects them indissolubly without subordinating them to one another. Blindly relying on the idea of re-education means believing fideistically or hypocritically in impossible investigations of the deepest feelings of the person. For example, the Italian prison system of 1975 subordinates the granting of a wide range of benefits (which reduce the extent and intensity of the prison sentence) to 'participation of the prisoner in rehabilitation work'.[33] Participating or not participating will therefore not be indifferent to a prisoner. His future, even his being free or a prisoner, will depend on his participation in the rehabilitation work. All this introduces elements of interest in the asymmetrical relationship between the prisoner and the guard. Individual destinies are entrusted to a synallagmatic game that has little to do with the sphere of law. Shifting the spotlight from the re-educational utopia to human dignity and the rights deriving from it helps to read the aporia of prison, helps to reestablish the foundation of the prison system in a clearer way, imposing ethical limits that cannot be crossed and making it compatible with the rules of the welfare state and the rule of law.

Once this paradigm shift has been made, then re-education becomes capable of acquiring a high, secularised and de-ideologised social sense. With a fixed gaze on the horizon of human dignity, any intervention aimed at offering opportunities for social reintegration comes out of the game of hypocrisy and becomes an intervention to promote the rights of the person. In recent years it has happened that the Italian Constitutional Court has legally 'threatened' parliament by imposing measures to contain prison overcrowding.[34] The decision of the Constitutional Court states that 'the questions of constitutional legitimacy of Art 147 of the Italian Criminal Code, raised by the Venice and Milan Surveillance Courts, have been declared inadmissible, insofar as that

[33] Art 13 of Italian Prison Law no 354, 1975 never emended. At the end of 2018, a new reform of the prison system was approved, but Art 13, with its correctionalist function, remained unchanged. See P. Gonnella, *La riforma dell'ordinamento penitenziario* (Torino: Giappichelli, 2019), chapter 1.

[34] Corte Costituzionale 22 novembre 2013 no 279, available at www.cortecostituzionale.it.

provision does not include the situation of overcrowding in prisons among the cases of optional postponement of the execution of the sentence'. The court considered that it could not replace the legislator in identifying a judicial remedy to the problem of prison overcrowding but, at the same time, reserved the right, in the event of legislative inaction, to adopt in any subsequent proceedings, the necessary decisions aimed at ending the execution of the sentence in conditions contrary to a sense of humanity. The keyword of this wave of jurisprudence precisely is 'humanity', that is human dignity, in whose name judges are trying to obviate those policies of mass incarceration that have produced prisons in which life is degraded and treatment is inhuman.

It is not conceivable, however, that the mere normative, doctrinal and jurisprudential revival of human dignity can be sufficient to bring the system back to effective legality. A gap between legal proclamations and punitive practice exists and persists. There remains the strident paradox of an illegal punishment inflicted in the name of a broken legality, which must lead policymakers and academics to find solutions not only at the legal level but also at the cultural and operational level.

VI. How to Get Rid of the Need for Imprisonment

Prison must, therefore, be freed from the correctionalist ideology that legitimises a penalty that would otherwise be difficult to justify in contemporary societies. Everything in prison is based on the pedagogical ideology of treatment. 'Treatment' is a word that linguistically, before evoking people, habitually refers to textiles. It is customary to say, about fabrics, that they are treated whenever they are subjected to colouring or other interventions. Treatment has its etymological origin in the Latin *tràctum*, which then derives from the verb *trahere*. Tract indicates a physical space crossed by those who are in motion, but tract is also the supine form of the verb 'to acquire', which means, among other things, 'to take something' even if in a non-material sense. The word treaty also has the same root as treatment. A treaty is a pact, an agreement between two or more parties. Each treaty has its own rules, but it also has its own threats of sanctions. A treatise is also a formal work; it must be complete, self-contained, without gaps or flaws within itself. The entire structure of our prison law, as well as the prison laws of democracies and non-democratic regimes around the world, is based on the ideology of 'treatment'. The treatment of prisoners evokes each of the meanings mentioned above. It evokes what happens to the treatment of textiles, because prisoners, like fabrics, are subjected to a proposal for change aimed at a possible embellishment or some improvement. 'Individualised treatment' also evokes a path, one that goes from deviance to resocialisation. It also evokes deception because that path is based on the ideology of treatment and correctionalism, which has no objective

parameters of verification and that is often based on the same hypothesis as pentitism, or hypocrisy, with personal calculation of costs and benefits of each behaviour. Treatment evokes a treaty, because prison treatment is a sort of informal contract between prisoners and guards, in a synallagmatic game with sanctions and prizes. Equally, concerning the logical and philosophical completeness of a Scientific Treatise, the treatment, both the penitentiary and even more the re-educational one, despite its irremediable imperfection, aims at absoluteness.

Social and prison officers, but also penal law jurists and criminologists, starting from the contents of the 1975 Penitentiary Law and its subsequent evolutions and regressions, have mainly been concerned with classifying every aspect of prison life in the 'treatment' container. Therefore, treatment is not a good word. It presupposes an intervention of an exogenous nature. It makes one think about the need to put one's hands on the person, to want to change him or her to improve him or her. It does not seem too different with other words strongly marked from the ideological or religious point of view, as moral re-education or redemption. It does not bring to mind anything good, or at least anything authentic. It does not suggest a free choice. The treatment of a non-free person will always be based on blackmail, even if not explicitly proposed as such, even if occasionally not perceived as such.

Our penal and penitentiary legal framework is all about the myth of re-educational treatment. The treatment model is progressively overflowing, as was inevitable, towards a disciplinary model. Everything in prison is treatment and everything is discipline. Everything in the same prison law is reduced or elevated, depending on the case, to an element of treatment. It is no coincidence that this is the keyword of prison life. Outdoor exercise, permits awarded, work, education, even religion, human rights are all qualified by the same law as elements of treatment, whose philosophy permeates every part of life within prisons.

Relying on human dignity, on the other hand, means re-qualifying all prison life (and what produces it) in terms of human rights, reducing the power to punish, setting limits on those who believe the objective of punishment to be re-education and treatment, prohibiting torture. It is no coincidence that it is only by resorting to the notion of human dignity (and not discussing re-education) that judges have succeeded in setting limits to life imprisonment.[35]

The notion of human dignity is a healthy bath of realism. Panpenalism has shifted criminal law towards the construction of artificial crimes that live and die during an election round. Faced with forty thousand criminal laws in Italian

[35] See the Eur. Court H.R., *Viola* v *Italy*, Judgement of 13 June 2019, available at www.hudoc.echr.coe.it and Eur. Court H.R., *Vinter* v *the United Kingdom*, Judgment of 9 July 2013, available at www.hudoc.echr.coe.it. Italian Constitutional Court justified life imprisonment as compatible with the re-education function of the punishment.

law, there are no theoretical or practical possibilities for those who believe in the myth of re-education and treatment. Instead, there is always space for human dignity to undermine established powers, in all circumstances.

It is no coincidence that the clearest sociological position on the question of punishment was taken by Pope Francis. He based his observations and criticisms on the notion of human dignity, without relying on the more usual (for religious people) notion of re-education. If even the Pope no longer believes in the salvific power of punishment, it is unreasonable for jurists, philosophrs and lay criminologists to believe in it.[36]

[36] See P. Gonnella and M. Ruotolo eds, *Carceri e giustizia secondo papa Francesco* (Milano: Jaca Book, 2016). The book comments on the 2014 speech of Pope Francis addressed to the international association of scholars of criminal law.