UiT The Arctic University of Norway

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Justice and suffering. The aim and consequences of punishment.

A philosophical investigation of the aim and consequences of punishment in the case of Italian legislation and prison practices.

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“Venite adesso alla prigione

State a sentire sulla porta

La nostra ultima canzone

Che vi ripete un’altra volta:

per quanto voi vi crediate assolti

siete per sempre coinvolti”

Nella mia ora di libertà

Fabrizio De Andrè

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INTRODUCTION

The idea for researching the topic of this thesis came to me quite early on in my life. Around 2012 I remember reading a piece of news for school that talked about the Norwegian criminal law system. It talked about how even for the gravest crime, the maximum sentence that could be delivered by Norwegian courts was 21 years in prison. Twelve-year-old me was somewhat shocked by this, especially when my father calmly explained that, according to the Norwegian judicial system, even having committed a horrendous crime, criminals were still considered human beings and given the opportunity for repentance and redemption. A life sentence would have denied that possibility. This idea resonated with me, as I was raised Catholic, where forgiveness was a central theme in everything I had learned about life and human relationships. However, what didn't make sense to me at that time was why I had always been told that criminals deserved to "rot in jail" for the rest of their lives for despicable acts. Why was I under the impression that prisons were meant to be places of intense suffering for those who had committed crimes? Though I was young, I was old enough to understand that eternal suffering doesn't teach a lesson. Even in the religious context, the devil, the ultimate condemned sinner, hadn't learned his lesson by being cast into hell.

Twelve years have passed from that initial realisation that maybe punishment was not what I always believed it should be. In those years much has changed, years during which I have embarked on an academic journey that has brought me to the very country whose policies shocked me as a kid and has taught me so much about how different governments can act towards their citizens. With those new insights acquired from experience, I now attempt to look back on those issues I have been thinking of for years.

This is a work of political and moral philosophy that attempts to investigate the very concept of punishment, and some of the theories proper of philosophy that have attempted to justify its imposition as a governmental response to the violation of the laws of the state. To this work there are two main theoretical premises.

The first basis this project stands on is the conviction that political philosophy cannot, and in my opinion should not, limits itself to only being a science that investigates abstract concepts as ends in themselves. What I believe is that there is a need to connect philosophy to its social and historical context, to focus on the applicable normative aspects of its theorisations. In other words, philosophy needs not only to analyse things and concepts as they are, but also delve more into the realm of what "ought to be", provide concrete analysis and solutions to the very human problems that concern the world around it. The goal of this project is to do just that: I will attempt to analyse the concept of punishment and its practical applications in order to try and contribute to the solution of a dire problem that has plagued the Italian society for too long, the ineffectiveness and brutality of its prisons.

The other pillar that holds up this work is the assumption that punishment, as state practice, must be justified in order for it to be legitimately exercised by liberal states. As we will see, punishment can generally be understood as the imposition, on its citizens, of something that generally violates their individual right to liberty as a consequence of a violation of a norm on their part. As a violation of a citizen's right, this imposition must be justified in order for a liberal state to legitimately enforce it. This opens up the doors for philosophy to theorise regarding the ways in which such a justification can be provided.

The first chapter of this work will be a theoretical overview of punishment as it has been understood in philosophy. We will look at its definition, its goals and the way in which philosophers have attempted to justify it, to prove that it is morally just, and even auspicial, to punish. The two major protagonists of this debate are two groups of theories referred to as retributivism and consequentialism: following the parallel distinction between deontological ethics and utilitarianism, retributivism believes that the suffering of the offender is intrinsically good and thus justifiable, while consequentialism believes that the suffering of a criminal is bad and can be

justified only if it produces some other good.[1] We will look at retributivist and consequentialist theories' arguments for doing so, but we will have to gloss over another, equally important school of thought that has gained popularity especially during the 20th century: abolitionism. Theories of abolitionism, contrary to retributivism and consequentialism, argue that the practice of punishment is not justifiable and thus should be abolished. Although it will not be considered here for issues of time and scope of the work, theories of abolitionism are incredibly important for the discourse around punishment, because they open up the scary possibility that a practice that has accompanied humanity for as long as we can remember is actually unjustifiable and immoral.[2] What will come of this analysis, if my theory is correct, is that justifying punishment from a retributive standpoint is a very dangerous road for states to take: this way of justification in fact based on concepts such as moral responsibility and desert that call onto the stage the debate around free will, determinism and indeterminism, a debate that is still very much unresolved even though it is almost as old as philosophy itself. This will show how the basis of a retributivist account of punishment are plagued by questions that are extremely difficult to answer and seem quite unstable foundations to build the justification of state intervention into its citizens' liberty on. On the other hand we will observe how consequentialist theories, especially theories of rehabilitation, have a much bigger potential to be proper and solid basis for a state's justification of punishment because of their avoidance of any reference to the moral responsibility of the criminal: by focusing on the good consequences the penalty can bring both to the individual offender and the society around them they provide a justification for punishment that rests on much more solid ground compared to retributivism.

After this theoretical analysis, there will need to be an observation of a practical example, that is, to see how a justification of punishment may work in the real world. As the object of our scrutiny I have chosen Italy, because of my close connections to it as my homeland, but also because it is a very striking case of a theoretical justification of punishment being explicitly adopted as the foundation of the entire judicial system of a liberal state. The Italian Constitution in fact contains at article 27 an explicit reference to the rehabilitative goals that punishment within the Italian

[1] Altman, 2022, p.6

[2] Hoskins, 2021, p.3

system must aspire to, and the jurisprudence around this article has built a true and proper rehabilitative theory of punishment on which the entirety of the legal system is supposed to stand on. The second chapter of this work is dedicated to analysing the specific theory of rehabilitation that has been adopted by the Italian state.

In the chapter that follows the focus will shift towards the practical applications that this rehabilitative theory of punishment has had in the Italian context. What will become apparent is that the most popular punishment "method" in Italy is imprisonment. Imprisonment as we will see was born as a way of punishing convicted criminals in a more lenient way, give them a space to work, study, rehabilitate themselves and hopefully lower crime rates and recidivism as a consequence. What will become apparent, however, is that that is not the reality of penitentiaries in Italy nowadays: rather than being a place of passage where inmates can learn about their mistakes and are helped by the state become better citizens as a result of their punishment, the prison has become hell on earth for many of them. Little resources available, overcrowding and poor management make traditional imprisonment very far from a practice justifiable by theories of rehabilitation. This is where philosophy will have to take the stand once again and try to solve this crisis.

In chapter four we will try to analyse whether or not there are viable alternatives the state could use to aid traditional imprisonment in its pursuit of rehabilitation or replace it altogether. What will come forwards from this analysis is the fact that what seems to work in terms of rehabilitation are not the highly punitive practices that Italian policymakers have implemented in the punishment system, but rather more organic, less punitive solutions. Restorative justice practices have shown great results when it comes to rehabilitating convicts and lowering recidivism rates, when harsh punishments and poor prison conditions have failed.

The argument that will transpire from these pages is one which endorses a radical shift in the way in which Italian society looks at crime and punishment. It shows that rather than condemnation and stigmatisation of criminals, rather than harsh punishments and life sentences, what works best to resolve the issue of crime within the state is instead the contrarian approach. A minimally punitive system.

1 MAIN THEORIES OF PUNISHMENT

The following is a work of political and moral philosophy, interested in governmental action and lawmaking. Therefore the focus hereafter will be on legal punishment and especially prisons, and we will largely ignore punishment in its non-legal contexts.[3] Although there is no universally agreed upon definition of legal punishment, there exists a so-called standard definition of this concept, developed in the 1950s by Anthony Flew, Stanley Benn, and H.L.A. Hart. According to these authors, legal punishment is a practice that typically includes 5 elements:

1. It must involve of pain or other consequences normally considered unpleasant.
2. It must be for an offence against legal rules.
3. It must be of an actual or supposed offender for his offence.
4. It must be intentionally administered by human beings other than the offender.
5. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[4]

In summary, legal punishment involves the imposition of something that is intended to be burdensome, on an offender for a crime, by a person or body that claims the authority to do so.[5]
Historically, punishment has taken many different forms, some more brutal (like torture, execution), some intended to deprive the individual (exile, imprisonment), some to shame them (branding), some more trivial (like penalties and fines). What all of these practices have in common, is the fact that they involve actions against individuals that would, in any other context, be considered wrongful.[6] These practices have developed from social customs and evolved throughout history, they did not originate from philosophical theorisation. Despite this, philosophers must evaluate punishment and punishment practices and try to find an answer to the

[3] Altman, 2022, p.2

[4] Hart, 2008, p. 4–5

[5] Hoskins, 2021, p.4

[6] Altman, 2022, p. 3

pressing question of "how can a practice that not only burdens those subjects to it, but aims to burden them, and which conveys society's condemnation, be justified?"[7].

The longevity of the debate on the justification of punishment suggests that the matter is anything but a simple issue to discuss. Justifying punishment, in fact, does not entail only answering one simple question, but it is a matter that is complicated by many layers of justification. As Hart famously argued, when trying to justify punishment we should look for answers to three different questions (three different layers of justification):

1) What justifies the general practice of punishment?
2) To whom may punishment be applied?
3) How severely may we punish?[8]

Different answers have been provided to these questions by different theorists.

1.1 Retributivism

Retributivist accounts of punishment contend that this practice is justified because it is an intrinsically appropriate response to wrongdoing, because it is deserved[9]. In other words, those who are guilty of committing a wrongdoing are understood as deserving some burdensome, negative response to their action. The desert of the offender is the basis for punishment, it renders it permissible, right, and good.[10] Retributivist theories have also been defined as "backward-looking", in the sense that it justifies punishment with reference to what offenders have done. As Kant, whose penology has served as the basis for many retributivist theories of punishment, puts it,

> *(1) "Punishment by a court can never be inflicted merely as a means to promote some good for the criminal himself or for society. It must always be inflicted upon him only because he has committed a crime"*[11][12]

[7] Hoskins, 2021, p. 5

[8] Hart, 2008, p.9

[9] Ibid

[10] Dahan Katz, 2022, p.101

[11] Altman, 2022, pp. 6–7

[12] Kant, 1996, p.473

Retributivism as a theory of punishment adheres to a retributive form of justice, best understood as a justice that is committed to three main principles:

1. That those that commit certain kinds of wrongful acts, paradigmatically serious crimes, *morally deserve* to suffer a proportionate punishment.
2. That it is intrinsically morally good – good without reference to any other goods that might arise – if some legitimate punisher gives them the punishment they *deserve*; and
3. That it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.[13]

1.1.1 Positive Retributivism

Positive retributivism (also referred to as simply "retributivism"), the most commonly adopted form of retributivism, can be defined as a theory that involves both a positive and a negative claim. The positive desert claim asserts that criminals deserve to be punished because of what they have done. The negative claim that those that have done no wrong may not be punished. These two claims together make it so that it is fundamental for positive retributivists that criminals are punished because they deserve it, and that would it be impossible for them to argue for the punishment of the innocent and the application of disproportionate punishment.[14]
Retributivist justifications of punishment come in many different forms, and all attempt to answer the question of "why do the guilty deserve to be punished?".[15]

Perhaps the most famous theory of retributivist punishment, one that is entirely backwards looking and makes no reference to the consequences of punishment in order to justify it, is Immanuel Kant's [16] theory of punishment found in the first parts of his *Metaphysik der Sitten,* the *Metaphysische Anfangsgrunde der Rechtslehre* (often referred to as just the *Rechtlehre*). This

[13] Walen, 2023, p.1
[14] Ibid
[15] Hoskins, 2021, p. 9
[16] Tunick, 1996, p.1

theory has been, and still is, the basis for many retributivist theories, and is thus important to look into.

In this work, Kant affirms the existence of a legal alternative to his famous categorical imperative, the "universal principle of right" (UPR):

> *(2) "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law"*[17]

In this context, he also affirms that coercion (legal punishment) can be carried out against anyone who violates the UPR, because it ensures that the principle is not violated more by counteracting such violations towards those that perpetrated them. Promotion of the community's freedom, however, is not the justifying element of punishment, but rather one of its functions.

The main reason why punishment must be carried out, is because judicial punishment is a "categorical imperative", which ought to be in place because of a categorical obligation to punish criminals:[18]

> *(3) Punishment by a court (poena forensis) . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him because he has committed a crime. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality. He must previously have been found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative […].*[19]

The categorical imperative to which Kant refers to in this passage is one that involves both a restriction to punishment and a positive obligation. The positive obligation involved means that punishment as a categorical imperative *must* be carried out: if punishment is deserved by the

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[17] Kant, 2002, pp. 6:230

[18] Koritansky, 2005, p.320

[19] Kant, 2002, pp. 6: 331–332

offender, society is categorically obliged to carry it out even if no good consequence will follow from it:

> (4) *"Even if a civil society were to be dissolved by the consent of all its members, […] the last murderer remaining in prison will first have to be executed, so that each has done to him what seeds deserve and blood and guilt does not cling to the people for not having insisted upon this punishment, for otherwise the people can be regarded as collaborators in this public violation of justice"*[20]

Then, according to Kant, if a society fails to punish, it fails to fulfil its obligations to justice.[21]

In punishing wrongdoers, however, society must also stick to the restrictions that derive from the same categorical imperative that imposes the obligation to punish. The categorical imperative formulation Kant refers to in passage 3, is the one which forbids one from using other persons as mere means to one's own subjective ends: criminals and offenders are no less people than those that must punish them, thus no utilitarian calculations should be involved in retributive punishment as to not use the offenders as means and respect their personality. Punishing morally thus requires to be motivated solely by the criminal's desert, with no other utilitarian motives involved as to not incur in moral offence.[22]

Although Kant's theory is one of the most famous theories of retributivist punishment and has been referred to as a "paradigmatic theory of retributivism"[23], it still leaves some questions unanswered.[24]

Kant has provided us with arguments against incorporating utilitarian arguments within our retributive justification of punishment, as to not disrespect the moral personality and autonomy of the offender but fails to tell us why we should *always* demand retribution for crimes. What is the ultimate rationale of retributive punishment? How does the pure reason derive this categorical imperative for the entirety of society to punish its criminals? Is there an answer to this question

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[20] Ibid, p. 6:333

[21] Koritansky, 2005, p.325

[22] Koritansky, 2005, p.325

[23] Corlett, 2013, p.63

[24] Koritansky, 2005, p.325

that would not bring us back to utilitarian or ulterior motivations?[25] Let us consider: if we try to infer this categorical punitive obligation from Kant's formulation of the UPR, it will derive that we must punish to promote the freedom of the community. This, however, is a utilitarian argument and Kant himself relegates it as mere function of punishment, rather than one of its justifying elements. Then which is the ultimate rationale? Why is a just society obligated to punishing its criminals if they commit an offence? The categorical imperative that Kant provides in passage (3) is primarily one that prohibits punishing criminals for utilitarian reasons[26]. But it does not explain to us why punishment is *always necessary*. Or at least, as just mentioned, does not give us a strictly retributivist reason as to why it is.

Other arguments for retributivist punishment have been developed throughout the years, both before and after Kant. In this work we will look at some of the main arguments in favour of retributive punishment provided by contemporary philosophers of punishment.

One of the most notorious justifications of retributive punishment is provided by Michael Moore in his 1997 "Placing Blame: A Theory of the Criminal Law". His justification of punishment is one that "shows that it best accounts for those of our more particular judgments that we also believe to be true".[27] He states that most people intuitively believe that it is important that wrongdoers are punished (even if such punishment would bring about no good), and that there is no reason to doubt that we should trust such widespread intuitions.[28]

He thus argues that, because it would not be morally right for people to abolish punishment, because most of us have the intuition that it is right to punish wrongdoers, thus retributivist punishment is justified. Of course, such an argument is very sensitive to accusations of being based upon emotions which appear to be morally dubious: what if our intuitions of retribution, which are

[25] Ibid, p. 325

[26] Ibid, pp.321–322

[27] Moore, 1997, pp.132–133

[28] Walen, 2023, pp. 2-3

informed by emotions of anger and resentment fuelling a desire for vengeance, are completely misplaced reactions?[29] Moore turns to a thought experiment to respond to such criticisms:

> *"Imagine an offender who does a serious wrong in a very culpable way – for example, Dostoevsky's Russian nobleman in The Brothers Karamazov, who turns loose his dog to tear apart a young boy before the boy's mother's eyes; imagine further that circumstances are such (for example, Kant's island-society about to disband) that no non-retributive purpose would be served by punishing this offender. Now imagine two variations: (1) you are that offender; (2) someone else is that offender. Question: should you or the other offender be punished, even though no other social good would be achieved? The retributivist's "yes" runs deep for most people"*[30]

He goes on to argue that while in the case of the first-person perspective, deep emotions of guilt we would be feeling would lead us to firmly believe that we are to be punished and suffer for the acts we have committed, because we believe ourselves to be morally responsible for them. If we were then to argue that the same judgment ought not to be applied to others, then we are assuming a "elitist and condescending" attitude, denying the humanity and moral agency of others. This condescension is unacceptable for Moore and justifies generalising the desert for punishment because of guilt to all people.[31]

This argument, although rhetorically powerful, is still dubious. First and foremost, it is unclear to me how me imagining that I would feel guilty if I committed a heinous crime justifies a moral principle according to which everyone should be punished. It seems like quite the leap on quite unstable foundations: what if guilt is not actually felt by anyone who has committed a crime? And if it was, why would the pain and suffering that comes with trying to come to terms with one's action not be enough punishment, so that it would be the duty of the State to perform it?

And what if the reaction of guilt was not a morally sound one? As Nietzsche puts it, guilt could be a "bad conscience…the will to self-violation".[32] It would seem then that Moore construes his

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[29] Ibid

[30] Moore, 1997, p. 163

[31] Ibid

[32] Walen, 2023, p.20

justification of punishment on unstable foundations, those of human judgments which are more often than not informed by emotions which we cannot control, and which are usually morally dubious.

Another way of justifying punishment in a retributive way would be to show that it follows from some more general principle of justice that we think to be true. An example of such justification is Herbert Morris's 1968 theory, which appeals to fairness.[33]

He also uses a thought experiment, which however closely parallels our current system. He imagines a society in which men's behaviour is regulated by some rules he calls "primary", which provide the members of the society with some benefits (such as non-interference), assuming that they take upon themselves the burden of self-restraint that is necessary to follow such rules. He goes on to argue that in such a system, those that do not follow the primary rules ought to be punished, because they have reaped the benefits and advantages without taking up the burden of self-restraint: this would make matters uneven, and thus punishment is necessary for re-equilibrating the relations in society.[34]

Although Morris's has grown to be the most popular framework for justifying retributivism[35], the main issue with this theory remains a seriously problematic one: how are we to consider vicious crimes like murder or rape, to be punishable because of undeserved benefits the perpetrators have reaped, but not because of how violent and immoral violations of another person's rights they are? It seems wrong to believe that a rapist is to be punished in a retributive sense because the person has violated a law that prohibits it, and not because it is a morally wrong action.

A theory that starts from this point of contention and attempts to solve it is Jean Hampton's victim-focused theory of retributivist punishment. Her argument is presented so:

> *(1) "All wrongful actions are actions that violate a moral standard applicable to the circumstances. […] some moral actions violate those standards in a particular way*

[33] Ibid

[34] Morris, 1968, pp.477-478

[35] Walen, 2023, p.20

insofar as they are also an affront to the victim's value or dignity. I call such an affront a moral injury"

(2) *"A wrongful action that produces moral injury and which merits retributive punishment is an action that has a certain kind of meaning, which I define as follows: a person behaves wrongfully in a way that effects a moral injury to another when she treats that person in a way that is precluded by that person's value, and/or by representing him as worth far less that his actual value […]"*

(3) *"Retribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity"*[36]

This argument, however, seems to be victim of the same trap as Morris's argument, that of substituting a wrong for another: the wrong of a rape or a murder is not the "meaning" of the action that aims at diminishing the victim, but the rape or murder itself.[37]

Setting weaknesses and problematic points aside, it is clear that, fundamental to any theory of retributivist punishment is the concept of desert: no matter what our basis for believing punishment (the imposition of something that is intended to be burdensome, on an offender for a crime, by a person or body that claims the authority to do so) to be an intrinsically good and appropriate as a response to a wrongdoing, another fundamental element for the justification of punishment is desert. We shall look deeper into this concept in the following section.

1.1.1.1 Just desert

From a retributivist perspective, when people or institutions punish, they do that to repay the wrongdoer, giving them their just desert. The concept of desert is fundamentally linked to the assumption that in the world there exists good and bad, and that those who act according to "the Good" deserve to have it done to them in return, and those who have acted according to "the Evil"

[36] Hampton, 1992, pp. 1666,1992, 1686

[37] Walen, 2023, p.22

deserve the same done to them. The central source of this idea can be easily traced back to the traditions of Judaism, Christianity, and Islam. All of these religions have at their basis the assumption that there is a perfectly just God who will, at some ultimate point of judgment, reward the virtuous with perfect happiness and punish the vicious with eternal suffering.[38]

Desert is thus a concept that is tightly linked to action, it is a result of what we, as men, voluntarily do or produce. Most of us share the general intuition that people deserve things for the hard work they put in to achieve them: the student that studies long hours deserves to do well on the test, the athlete that practices regularly deserves to win, and so on.

Fundamental to retributivist theories is this idea that desert is a pre-institutional notion, "logically prior to and independent of public institutions and their rules".[39] The belief that someone deserves something because of the actions they have performed to achieve it. It would be quite normal for us to think it was somewhat "unjust" if the athlete that had put hours of work in was surpassed by someone that just randomly entered the competition without any prior training. This feeling of injustice is often translated by retributivists into the context of crime and punishment. The challenge of demonstrating that the criminal justice system stands on a concept of desert that is pre-institutional, meaning that criminals deserve punishment not only based on the rules of our present legal systems, but because of a higher, pre-law, moral principle, is one that is fundamental for the retributivists.[40] It is important to keep in mind, however, that the belief in the existence of a pre-institutional concept of desert is anything but undisputed. We will return to this point later.

The attribution of desert has been analysed into a three-way relationship between the person who deserves something (desert subject), what they deserve (desert object), and the reason why they deserve it (desert basis). [41]

[38] Bennet, 2013, p.3

[39] Feinberg, 1970, p.87

[40] Walen, 2023, p.11

[41] Ibid

The desert subject is, quite intuitively, the wrongdoer: the offender who has committed a wrongful action responsibly, which means that they acted knowingly, intentionally, and voluntarily.[42] Fundamental to finding someone responsible for a wrongful action, is the concept of moral responsibility: traditionally, a morally responsible agent is a voluntary agent, one that is able to do act according to their own will in contexts of voluntariness-reducing factors[43], and someone that can discern between morally good and morally evil actions. Thus, moral responsibility is seen as a non-institutional foundation for legal punishment: someone is punishable for a wrongdoing if they are morally responsible for it.[44] On the basis of this conception of the desert subject, retributivists affirm that it is morally unjustifiable to punish the innocent (who are not responsible for a wrongdoing because they did not commit it), children or the mentally impaired (who cannot be held morally responsible for their actions).[45] This piece of the retributivist argument is the most problematic and widely discussed of all: being responsible for an action inherently means that the criminal has done something voluntarily, acting of his own free-will. This argument opens a "pandora-box" of philosophical arguments as old as philosophy itself, on whether free will exists or not. The two main schools of thought that have dominated the debate on free will are determinism, which believes that individuals cannot be regarded as free agents but rather that all events are connected in a causal way to antecedent conditions, and the doctrine of free will, which instead assumes that there are choices that transcend causal influences, which makes individuals free agents.[46] Such a debate has translated into the field of criminology between the 19th and 20th centuries, with the foundation of the Classical and the Positivist schools of Criminology, both born from Italian thinkers.

The classical school of criminology was born out of Enlightenment philosophy. It was Cesare Beccaria who first formulated its principles in his *Essay on Crimes and Punishment* in 1804. It adheres to the doctrine of free will and asserts that "the individual is responsible for his actions

[42] Corlett, 2013, p.9

[43] Ibid

[44] Ibid

[45] Walen, 2023, p. 11

[46] Viney, 2003, p.1

and is equal, no matter what his rank, in the eyes of the law. Mitigating circumstances or excuses are therefore inadmissible".[47] The classical argument is one that fits the most within a retributivist theory.

The positivist school of criminology, on the other hand, was founded by Cesare Lombroso and believes that human behaviour is restricted and impacted by social and natural factors, human nature is thus determined and free will does not exist. This allows positivist theorists to argue that crimes are determined by factors entirely external to the criminal, and that punishment therefore cannot be based on moral responsibility.[48]

As mentioned before, the debate between these two schools of thought is very old, and still unresolved. It is a metaphysical, political, and social debate that we cannot examine in depth in this work. It is important to mention, however, that there exists a group of theories, called compatibilist, that have tried to find a solution to this ancient debate: compatibilism, in the classical version, is the thesis that free will is compatible with determinism, because freedom is "nothing more than an agent's ability to do what she wishes in the absence of impediments that would otherwise stand in her way"[49]. This means that according to compatibilists, humans are influenced by the world around them in their actions, but still possess freedom to do otherwise when they decide what course of action to take.

The compatibilist contribution shows that it is not entirely necessary to abandon or eliminate the concept of free will in order to affirm that society and the world around us influence our choices and the behaviours we assume. This, however, brings me to reflect upon the other side of the coin, that is, the classical retributivists' focus on individual responsibility and desert. If we do not need to eliminate free will to admit influence from the outside on our actions, then we should consider external influence on individual moral culpability. In other words, it seems that in the general retributivist discourse there is a tendency, when it comes to appointing the desert subject, to "swipe under the rug" another, very important type of responsibility: that of society towards the wrongdoer. Focusing solely on individual desert, we fail to acknowledge our responsibility as a

[47] Taylor, Walton & Young, 2013, pp. 1-2

[48] Chen, 2023, pp.23-24

[49] McKenna and Coates, 2024

society in that offence: many aspects of societal structure statistically make certain types of people[50] more likely to commit crimes than other due to the circumstances they live in. The wider society is therefore, although partly, responsible for the actions of the criminals we punish, and are also responsible for how they are punished. This leads me to be sceptical towards the concept of an individual desert subject, who is considered the unique morally responsible agent for the wrongdoing.

All things considered, it would seem sensible to argue that the basis for the retributivist argument regarding moral desert are quite unstable. Retributivism bases the justification for inflicting punishment on a desert subject on the grounds of their moral responsibility: from a retributivist standpoint an offender deserves punishment because they have committed a crime out of their own free will. What is problematic however is how easy it is to confute the very basis of this argument, the existence of free will itself. How do we confidently justify punishment if we cannot confidently demonstrate that the subject committing a crime is responsible for it?

Desert object is, of course, the punishment. The main issue for retributivists when attempting to justify the attribution of punishment, is the challenge of identifying punishment that is proportionate to the wrongdoing: it is, in fact, morally impermissible for retributivists to punish someone disproportionately, being it too little or too much, compared to the wrong they have committed. In order to resolve such an issue, retributivists have to find an appropriate principle of proportionality.

There are two basic senses of proportionality: cardinal proportionality gives us measures for punishment to be proportional to a crime; ordinal proportionality requires that more serious crimes are punished in a harsher manner than less serious crimes.[51]

One of the most famous and most ancient principles of proportionality in punishment is the Latin law of retaliation, lex talionis: this cardinal proportionality principle specifies that a wrongdoing must be paid back in kind.[52] Lex talionis has a long and controversial history. It can be found in

[50] https://open.lib.umn.edu/socialproblems/chapter/8-3-who-commits-crime/

[51] Walen, 2023, pp.12-13

[52] Ibid

the Biblical scriptures in the form of the injunction "eye for an eye, tooth for a tooth"[53], and in Kant's works on the principle of equality of punishment:

> *"Whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself* [thus, he who steals] *deprives himself of security in any property,* [and if] *he has committed murder he must die"*[54]

This principle, as mentioned before, is controversial, especially because it results in way too lenient punishments in some cases (for example, take 10$ from a thief who stole 10$) or way too extreme in others (torture and rape someone who has committed such acts themselves).[55]
Moreover, doubts about the moral righteousness of such a principle have existed for as long as the principle has. Examples of the destructive nature of responding to violence with violence are widespread in Greek tragedies such as Aeschylus's Oresteia (where a series of murders perpetrated on the basis of the lex talionis that cause death and destruction across various families, a cycle of vengeance that reveals very hard to put an end to[56])

Lastly, the desert basis is the reason why the wrongdoer deserves to be punished, that is, the basis for the general conviction that someone who commits a crime deserves to be punished. It is incredibly interesting to see how, as we mentioned before, this idea that justice is giving everyone their just desert is embedded in human history, so much so that it seems like such a notion is a sort of primordial, pre-institutional idea of justice. This meritocratic idea that in Christianity and Judaism takes the form of principles such as "whatsoever a person sows, that shall he also reap", or the doctrine of Heaven (for the virtuous), hell (for the evil) and purgatory, is common also to the Greeks, to Ancient Roman Law, to Islam, and to the Hindu and Buddhist idea of karma. The fact that such different and distant cultures share the principle of "just desert" connected to human actions and justice, suggests that this may be a foundational, meta-moral, self-evident thesis,[57] a

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[53] Exodus 21:23-25

[54] Kant, 2002, p.141

[55] Walen, 2023, p.2

[56] For an in-depth analysis of punishment, vengeance and justice in ancient Greek literary tradition, see Umberto Curi's "Il colore dell'inferno", published by Bollati Boringhieri in 2019.

[57] Pojman, 1999, p.86

sort of universal principle of justice that justifies a retributivist justification of punishment. A wrongdoer deserves to be punished because he has acted unjustly. Many philosophers have supported such argument.

W.D. Ross offers a thought experiment to demonstrate how it is intuitively obvious for the appropriate distribution of happiness and unhappiness should be according to virtue and vice, and how such a principle is self-evident. First, he identifies pleasure and virtue as being two intrinsically good things, and then affirms:

> *"If we compare two imaginary states of the universe, alike in the total amounts of virtue and vice and of pleasure and pain present in the two, but in one of which the virtuous were miserable and vicious miserable, while in the other the virtuous were miserable and the vicious happy, very few people would hesitate to say that the first was a much better state of the universe than the second"*[58]

Thus, the American philosopher demonstrates how it is following an innate principle of justice that is intuitively obvious to all that a wrongdoer (a vicious) deserves to suffer, and a just person (a virtuous) deserves to live happily.

Joel Feinberg has attempted to ground this intuition in aestheticism. He believes that intuitions of rewards and punishment according to desert follow a notion of propriety:

> *"Even when the object of the attitude is logically appropriate, it may still lack a certain kind of propriety. Glee, for example, is an inappropriate response to another's suffering… […] I suspect that they resemble certain aesthetic judgments […] more than they resemble judicial pronouncements"*[59]

Thus, according to Feinberg, we can justify our intuition regarding desert basis just like we can justify our aesthetic sentiments of pleasure when admiring a beautiful landscape. For him, the feelings of propriety we feel when we see justice being served to an offender are the same ones we feel when we observe the harmonious colours of a landscape. And a sentence such as "an offender

[58] Ross, 2002, p.138

[59] Feinberg, 1970, p.82

deserves to be punished" has the same valence as "red and green are harmonious colours": they give us the same sense of propriety.

All of these theories for the justification of the desert basis, however, sound extremely arbitrary in the context of legal punishment. It seems to me that the connection Feinberg practices when comparing intuitions regarding justice and aesthetic judgments is unjustified: how can a feeling of propriety be enough to ground the notion of desert as a normative idea? They may serve to explain why we have such an intuition, but it does not justify it.[60]

Moreover, the simple fact that we have intuitions regarding morality and immorality, does not mean that they are sufficient for grounding a normative principle that justifies inflicting punishment. When observing human judgments on morality in a comparative, or historical context, we can see how they look like very arbitrary basis for grounding a moral principle, since they change according to time, place and context. What we might intuitively consider as good, evil, worthy of rewards or punishment is everchanging, because our intuitions regarding the morality of things are relative to the context we find ourselves in. The first example of this, the changing notion of what is and is not a crime: in the Italian context, for example, homosexuality was considered a crime, and thus homosexuals were being punished for it, up until 1890 with the promulgation of the Zanardelli code. Moreover, homosexuality as of 2024 is criminalised de jure in 63 UN member states, of which at least seven of these have a death penalty for homosexuality. If universal principles of good and evil exist and are, as we said, universal and self-evident, how can we explain these enormous differences in the status of homosexuality?

1.1.2 Negative retributivism

In the precedent sections, we have seen how positive retributivism is fundamentally linked to the concept of desert. This concept, however, intuitively appealing, is deeply problematic, and the desert claim is contested on many levels and from many perspectives. The general feeling

[60] Pojman, 1999, pp.98–100

regarding this claim is that it is intuitively strong, but this intuition cannot, alone, justify the imposition of suffering on a wrongdoer or its intrinsic goodness.

Here I propose an ulterior argument to demonstrate how we cannot link intuitions of desert to justifications of punishment. What follows is the evolutionary debunking argument, as developed by I. Wiegman:

> *"Evolutionary explanations of human behaviour invoke punishment as critical for explaining the scale and scope of cooperation. Dispositions to dissociate from wrongdoing and dispositions to punish as an end in itself exist because they allow humans to sustain cooperation in large populations where reputation cannot be tracked."*[61]

The sciences have therefore demonstrated that our intuitions regarding punishment do not derive from a transcendental principle of justice linked to desert that is universal and common to every human being. They are instead instrumental to communal living. There is thus no reason for us to determine that punishment is a good in itself or that desert is a universal and just principle for imposing punishment.

The belief that desert cannot be a necessary and sufficient condition for the justification of punishment is common to a different, less popular variant of retributivism, also known as negative retributivism. Friends of this theory of punishment believe only the negative claim of retributivism to be true (that those that have done no wrong cannot be punished), but that the positive claim must appeal to some other good that punishment achieves, such as deterrence or incapacitation, in order for it to work as a justification of punishment, because desert alone does not suffice.[62]

Negative retributivism is sometimes categorised as a "mixed" theory, one that needs arguments from retributivism, but necessarily also from the consequentialist theories in order to justify the practice of punishment. Concepts such as deterrence and incapacitations are, in fact, concepts belonging to consequentialist, utilitarian theories of punishment. These theories discard all talk of

[61] Wiegman, 2022, p. 141 in Altman, 2022

[62] Walen, 2023, p.7

desert while focusing instead entirely on the outcomes that punishment might bring about in order to provide a moral justification for this practice. In the next section of this chapter we will look at whether eliminating issues of desert from the normative discourse around punishment protects consequentialism from the problematic aspects of retribution.

1.2 Consequentialism

Consequentialism is the second of the most popular and longstanding theories that have informed the debate on the justification of punishment. Already in ancient times the retributivist conception of punishment had been questioned: in his Protagoras, Plato had introduced us to a new conception of justice. The sophist Protagoras, in his attempt to demonstrate that justice is a virtue that can be taught, affirms that a justification of punishment that takes place in the past (or is backwards looking, like retributivism) is not rational, since nothing can be done to fix a harm that has already been. Therefore, he affirms that punishment, to be rational, must act as a deterrent, or have rehabilitation as its main goal: it must concentrate on preventing future crimes rather than punishing those that have already happened.[63] This view of punishment has developed vastly throughout the centuries since Plato's works.

Modern consequentialism, as the name suggests, is the view that normative properties depend only on consequences: it has been defined as a forwards-looking normative theory, as it judges the righteousness of an act based on the consequences it produces.[64]

Penal philosophies that follow from consequentialist premises focus primarily on the potential for punishment to reduce future offending through either deterrence, incapacitation, or rehabilitation.

[63] Stalley, 1995, Protagoras 320c-328d

[64] Altman, 2022, p.6

1.2.1 Deterrence

Justifications of punishment based on deterrence assume the rationality of offenders: friends of these theories believe that criminals are rational beings that weigh up cost and benefits of certain course of action. It is crucial for them that the suffering imposed through punishment outweighs any potential gain from offending, thus deterring criminals from taking up wrongful behaviour.[65]

The father of all deterrence theories is also the father of utilitarianism, Jeremy Bentham. He claimed that an act was morally right if and only if that act maximised the good, that is, if and only if the total amount of good for all minus the total amount of bad for all was greater than this net amount for any incompatible act available to the agent on that occasion.[66] This is what he calls the "principle of utility", which would go on to become the moral, guiding principle for all his writings, his focus being mainly politics and law.

In 1781 he published "An Introduction to the Principles of Morals and Legislation" (also referred to as IPML): in this work, he was to apply the principle of utility to design a utilitarian code of criminal law. Although some of his other writings contain some of his ideas regarding punishment, it is in IPML that we find an exhaustive collection of his arguments for the justification of punishment.[67]

The fundamental assumption on which Bentham's entire theoretical framework is based is also called "act utilitarianism", according to which a right action is one that produces the most happiness possible, and a wrong action is one that fails to do so. Act utilitarianism derives from the so-called "hedonistic theory of intrinsic value", which posits two main kinds of intrinsic value: intrinsic goodness (with the only intrinsically good thing being pleasure) and intrinsic badness (with the only intrinsically bad thing being pain).[68] Bentham refers to these two principles as the "sovereigns of mankind"[69]: all actions humans perform are instrumental to creating pleasure and pain.

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[65] Ibid, p.153

[66] Sinnot-Armstrong, 2023

[67] Draper, 2002, p.3

[68] Sverdlik, 2023

[69] Bentham, 1781

Bentham goes on to argue that a good action is one that has the best results: it does not mean that a good action must create only pleasure and no pain, but that all things considered it creates more pleasure than all other alternative actions available.

From this we can infer a simplified version of Bentham's general justification of punishment:

a. A crime is a wrongful ("mischievous"[70]) action, that produces pain.
b. Punishment also produces pain.
c. Punishment is justifiable only if it serves to reduce overall pain in society by lowering the overall number of wrongful actions.

Therefore, the main logic that must guide the action of the utilitarian legislation when writing criminal law must be deterrence, the reduction of the number of wrongdoings. Since pleasure and pain guide all human decision-making and actions, the legislator must construe punishment so that it will influence the rational cost-benefit calculation of the criminal.

Bentham, in fact, believes that human action is a causal process guided by psychological hedonism and affected by social and legal practices: since every person is trying to produce the most happiness for herself when she acts, if the legislator declares that offenders will be punished, this can alter potential offenders' decision-making. If correctly designed, potential offenders will choose not to commit crimes in order to not risk undergoing punishment, and their wrongful acts will thus be avoided.[71]

Of course, Bentham understands that for deterrence to work, punishment must not only be announced, but sometimes also carried out. It is important to note, however, that Bentham emphasises how both victims, society and offenders' pleasures and pains must be taken into consideration by the utilitarian legislator:

> *"It ought not to be forgotten, although it has been frequently forgotten, that the delinquent is a member of the community, as well as any other individual – as well as the injured party himself; and that there is just as much reason for consulting his interests as that of any other. His welfare is proportionably the welfare of the*

[70] A wrongful act is called "mischievous" by Bentham in his IPML.

[71] Sverdlik, 2023

> *community – his suffering the suffering of the community. It may be right that the interest of the delinquent should be in part sacrificed to that of the rest of the community; but it never can be right that it should be totally disregarded."*[72]

This avoids excessive punishment being prescribed by the legislator for the sake of deterrence: punishing a criminal too harshly may have an effect contrary to the one desired and bring about more suffering than happiness for society.

Although many centuries have passed since the writings of Jeremy Bentham, the logic behind punishment he developed has survived the test of time: theories of deterrence of our time still adhere to his basic assumption that humans are rational beings, weighing up the costs and benefits of an action in order to maximise happiness over pain, and that therefore it is crucial for punishment to impose a level of suffering that can outweigh any potential gain from offending.[73] Theorists that justify punishment on the basis of deterrence generally separate two main goals, or desirable consequences that punishment may bring about that can justify its imposition.

General deterrence is the goal that is reached when punishing an actual offender deters other, potential offenders, from committing crime[74]. Thus, the punishment ascribed to a crime by legislators should be severe enough to put off the general public from committing that offence.[75]

Specific deterrence, on the other hand, is the hope we have that punishment will deter the criminal from committing crime in the future[76]: the suffering imposed on them through punishment must be enough to dissuade the criminal from committing wrongdoing again in the future in fear of being subjected to it again, in order for such punishment to be justified. Policies that aim at this goal tend to increase the harshness of the sentence for recidivist criminals, thus increasing the cost of offending for every crime.[77]

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[72] Sverdlik, 2023 citing *The Rationale of Punishment*. In *The Works of Jeremy Bentham*. Edited by John Bowring. Edinburgh: William Tait, 1838-43. Vol. 1, p. 398.

[73] Behan and Stark, 2023, p. 35

[74] Anthony, 2012, ch.9 p.1

[75] Behan and Stark, 2023, p. 35

[76] Anthony, 2012, ch.8, p.7

[77] Behan and Stark, 2023, p.35

Deterrence theories have the strength of all consequentialist theories: they do not rely on the problematic concept of desert in order to justify punishment. They do, however, still raise some doubts.

First and foremost, although already Bentham himself had posed some limits on the harshness of punishment, justifying punishment based solely on deterrence opens the door for increased harshness of sentencing, because it will decrease the likeliness of further offences and will still act as a deterrent to potential offenders in the general public.

Considering the suffering of the convicted criminal into utilitarian calculations is, of course, admirable: it, in theory, upkeeps the prisoner's rights and their stance as a human being, while still carrying out the duty of punishment that is to prevent further crimes. However, if when calculating costs and benefits, we take into consideration the whole of society's wellbeing against that of the criminal, it is very easy to justify calls for harsher sentencing in the name of deterrence. This potentially slippery slope can be further problematised if we consider the fact that there is little evidence to suggest that worse sentences are linked to deterrence and lowering crime rates: data suggests, in fact, that it is not the increased harshness of sentencing nor their severity that deter criminals from offending or offending again, but instead it is the certainty of punishment that does.[78] This is not to deny the deterrence effects of punishment altogether, but it appears that there is no automatic relation between increased penal levels and lower crime rates.[79]

Another, more serious problem with deterrence theories and utilitarianism alike, is its basic assumption of rationality. It assumes that all offenders are rational actors, who calculate the costs and benefits of every course of action and entertain them only if they maximise their overall pleasure. That is the same assumption used by modern economists that follow Adam Smith's idea of the self-interested man. These assumptions, however, can be disproven, especially in the context of punishment. It would be quite hard to justify punishment by deterrence when looking at compulsive criminals or obsessive serial killers, whose offences do not depend on calculations of costs and benefits, but on some other element, like mental illness. Would crimes like those

[78] Ibid

[79] Mathiesen, 2006, p.62

perpetrated by individuals like Ted Bundy, for example, have been deterred had the punishment been harsher, or the certainty of being caught higher? Would impulsive crimes such as kleptomania be deterred by the prospect of a fine? Many of those individuals that commit crimes, often do so because of motives that have nothing to do with rational cost-benefit calculations: this would mean that not only would they not be deterred by seeing someone guilty of the same crime be punished for it (even harshly), but they also would not be put off from committing the same crime again even after being punished themselves.

Moreover, even if we were to assume that human beings are rational, and that criminals commit offences only if the cost-benefit calculations bring them the maximal amount of happiness, deterrence justifications of punishment would only work if we were to consider only those criminals that have much to lose from punishment. This, however, would not be a complete picture. For many members of society, who are marginalised or in difficult circumstances, the risk of any negative experience from punishment may not outweigh the benefits of offending. In the case of punishment through imprisonment, for example, for many a cell may mean a roof over their head and regular meals every day, whereas their position in the "outside world" may provide no other means of getting by if not by offending.[80] In other words, punishment may act as a deterrent for a certain part of the population, but it would not have a scope big enough to sustain the entire justification of punishment as a practice.

1.2.2 Incapacitation

The second group of consequentialist theories of punishment we will be looking at are those that justify the practice based on incapacitation. The main idea is that certain types of punishment, namely imprisonment, have directly preventive or restraining effects on offenders and thus lower criminality rates and protect the wider community from further harm.[81] The rationale is simple and quite easily legitimised by politicians and policymakers: if we imprison criminals and physically impede them from harming the wider community, we are actively reducing crime rates and thus

[80] Behan and Stark, 2023, p.38

[81] Behan and Stark, 2023, p.39

can justify this type of punishment from a consequentialist perspective. There are two "varieties" of incapacitation theories that have developed during since the 1980s when the criminological concept of incapacitation was developed.

Collective incapacitation is the simplest: the basic idea is that if long prison sentences are given to certain categories of people (such as offenders convicted of major crimes or criminals that have committed a high number of offences), thus removing them from the wider society, crime rates will lower because of the incapacitative effects of incarceration. Selective incapacitation, on the other hand, believes that it is possible to construct predictive indices based on those factors that are statistically showing strongest relationship with recidivism, predict which individuals are at higher risk of recidivism and give them higher sentences, leading to significant reductions in crime rates.[82]

Many questions and problems arise when taking into consideration incapacitation theories of punishment. The first main problem is one of scope: it seems to me that the only form of punishment that has undoubtedly incapacitative properties is imprisonment. Other often used forms of punishment, such as fines, have little to no incapacitation effects at all[83]: although imprisonment is a widespread form of punishment, especially for grave crimes, a theory that justifies only one form of punishment might be inherently weaker than all other theories.

If we go even deeper into the analysis of the varieties of incapacitation theories, we find even more problematic factors that suggest we might want to cast these groups of theories aside in our analysis.

When it comes to collective incapacitation theories, many doubt that it may have any crime reduction effects at all. First and foremost, it may just reduce the space in which violence and crime can be perpetrated, confining it within jail walls: recent reports have recorded high levels of violence within prison systems, both among staff and prisoners, which raises doubts regarding the ability of incapacitation to deter crime in the *whole* of the community (of which prisons are a part

[82] Mathiesen, 2006, pp. 89–95

[83] Anthony, 2012, ch.8, p.1

of).[84] This problem is worsened if we consider that collective incapacitation suggests incarcerating many people for a long period of time, contributing to the already dire problem of prison overcrowding. This, coupled with the fact that not only incarcerating criminals does not stop the "substitution" process in wider society (where if one is imprisoned, another offender will be recruited to take their place especially in situations of organised crime)[85], and that many criminals manage to maintain ties with the outside world and continue coordinating criminal activities from inside the prison[86], serves to reduce faith in the crime reducing effects of collective incapacitation. It is however selective incapacitation that seems to be the most problematic of theories, mainly because it has become clear that our ability to predict recidivism is highly limited and can result in disproportionately discriminatory practices.

The main point here is that it is actually nearly impossible for us to know whether one will offend again in the future until they actually do so.[87] The inaccuracy of statistic predictions of recidivism was shown in a 1974 report compiled by Norwegian criminologist Nils Christie, where it became apparent to him that "we do not have any sound basis for predicting later dangerous behaviour at all"[88]. The fact that we have no sound grounds for predicting recidivism creates two main problems: on the one hand, policies have a high probability of failing to imprison those who are actually at high risk of recidivism, and on the other, they may incarcerate those who are not in danger of committing new crimes. These are what Thomas Mathiesen refers to as the "false negatives" and "false positives" problem. These are hard problems to resolve, because, as pointed out by Mathiesen himself, reducing false negatives increases false positives and vice versa:

> *"The problem of the false negatives could be reduced by making the definition of probable repeaters broader. This way, the certainty of having the actual "bad risks" included would be higher. But this increased dramatically the already high*

[84] Behan and Stark, 2023, p. 40

[85] Anthony, 2012, ch.8, p.2

[86] Behan and Stark, 2023, p. 41

[87] Ibid

[88] Penal Council Report NOU 1974, No. 17:128

proportions of false positives. Conversely, the problem of the false positives could be reduced by making the definition of "bad risks" more restrictive. But this increased the number of false negatives"[89]

Moreover, factors that are usually indicated to be influencing recidivism, are often based on probabilistic calculations which are highly biased. Risk assessments are in fact usually based on calculations of an individual's likelihood of committing crime, from offending data of those with similar characteristics: these assessments are thus impacted by the groups of society these individuals are drawn from and contribute to criminalisation and marginalisation of certain already marginalised groups. [90] Instead of imprisoning those individuals who actually are dangerous and in risk of committing more even serious crimes, this system would imprison individuals based on factors such as race, ethnicity, social or familiar background, all elements which have arbitrarily been linked to crime without any sound evidence that they do actually impact crime rates. The question then comes naturally: is this a good calculation of costs-benefits? It is very expensive for a state to keep offenders in prison, especially as they age, and it is unclear whether extending prison sentences may be the best investment in order to reduce crime rates.[91]

The most fundamentally problematic feature of selective incapacitation and of incapacitation theories in general becomes apparent when analysing it in the context of penal law. The problem here is, as Mathiesen rightly pointed out, what is the basis for sentencing to prison on the basis of acts that have not happened yet?

Penal codes are generally past-oriented, following two fundamental principles of the rule of law. First, no one is to be sentenced for an act not yet committed, and it is the act, not the circumstances exterior to the act that determine the sentencing of an individual.[92] Having pointed this out, it becomes clear that incapacitation theories work on assumptions that go against the ethics of penal law: these theories assume that someone can be sentenced for crimes that have yet to happen, on the basis of situational factors which individuals rarely have any control over. Penal codes

[89] Mathiesen, 2006, p.96

[90] Behan and Stark, 2023, p.40

[91] Anthony, 2012, ch.8, p.2

[92] Mathiesen, 2006, pp.88-89

generally do not allow for such reasoning: it is a common feature of penal law to be past- and act-oriented. Regulations provide instructions concerning punishments for acts in a narrow sense which have been committed by the individual: a potential future crime or circumstances statistically linked to crime cannot provide the basis for sentencing.[93]

To sum up, we can confidently say that this strand of theories of punishment also results too problematic to provide a morally sound basis for justifying the imposition of suffering on an individual. We shall continue our analysis of rehabilitation theories of punishment in the next section.

1.2.3 Rehabilitation

The third and final group of consequentialist theories of punishment we will be looking at in this part of the work are those which attempt to justify the imposition of punishment on the grounds of rehabilitation.

Rehabilitation is an English word that results from a combination of the French "re" (which means "return" or "repetition") and the Latin "habilis", competent. The original meaning of the word would thus sound something like a "return to competence": in the context in which we apply it in this work, however, the word rehabilitation refers in a broader sense to a process of bringing the offender back to a functioning order.[94] What penal rehabilitation entails can differ from theory to theory and can involve a variety of interventions. A list of examples of rehabilitation interventions is one such as the following identified by Christopher Bennet:

A) *Attempts to change the offender's attitudes or personality by deep intervention: for instance, by electric shock therapy or partial lobotomization.*
B) *Moral (re-)education that gets the offender to reflect on the human consequences of his actions.*
C) *Attempts to make the offender remorseful for the crime, perhaps through a meeting with its victim.*

[93] Ibid

[94] Ibid

D) *Required programmes of, for example, drug rehabilitation anger management or Cognitive Behavioural Therapy (CBT).*

E) *Optional programmes of, for example, drug rehabilitation, anger management or CBT.*

F) *Literacy or work education aimed at increasing the offender's chances of getting a job or returning to normal life after imprisonment and/or punishment. participating in such educative activities can be made required or optional. Other support with re-settlement or re-integration can involve encouragement to keep up family ties while in prison, and so on.*[95]

Taken generally, we can say that these theories see punishment as a way to reduce overall crime rates and individual reoffending or recidivism through rehabilitation. Although they are seen as a generally more progressive aim for punishment, rehabilitation theories are not new nor uncontested.[96] Especially theories such as example A), which follow a treatment approach[97] which often stems from assumptions similar to those brough about by the positivist school of criminology and assume crime to be a sort of "sickness" that makes the criminal in need of harsh medical treatment, are very vulnerable to scepticism, and rightly so: they suffer from much of those critiques that have been directed to many other theories of punishment, such as their failure to acknowledge the wider society's role in causing criminal behaviour or facilitating it, and considering the offender as a sick being, in a condescending discourse that deprives the criminal of their humanity and societal stance. Due to their problematic nature, we will not be considering these types of rehabilitation interventions as a viable justification of punishment in this work.

Most of the other alternatives for rehabilitation theories do not, however, involve problematic assumptions such as the treatment model. Rehabilitation approaches often work from both a humanitarian perspective and a utilitarian approach: they concern themselves with the welfare of

[95] Bennet, 2010, pp.59–60

[96] Behan and Stark, 2023, p.43

[97] Ibid

the individual offender, while also aiming to promote the general welfare of the population by reducing crime rates and risk of recidivism.[98] Their ultimate goal is thus twofold.

This may spark some critique from those who adopt a "Kantian" perspective regarding punishment. In a Kantian optic, rehabilitation may seem like using the offender as a "means", an object not capable of acting for their own good that needs to be "fixed" for the good of society. This, I believe, is a misunderstanding of the very basis of rehabilitation. While still being a theory mainly based on consequentialist premises, utilising punishment for the outcomes it may bring about, rehabilitation justifications of punishment have the peculiar characteristics of envisioning a process where it is the criminal who has primary responsibility for the outcome of punishment: they will be hold doubly responsible, both for their actions (in the past) and for their return to competence. This is one of the main strengths, I believe, of this approach. It has validity both from a utilitarian perspective, since it aims at reducing crime rates and recidivism and involves punishment as a means to this outcome but could also seem like an acceptable justification to someone holding a more retributive perspective on punishment.

The reasons why rehabilitation seems to me like a much stronger theory for the justification of punishment compared to all the other theories we have looked at in the previous sections are many. As we have mentioned, a rehabilitation justification may be looked at as a consequentialist aid to a retributivist justification. In this case, in fact, we do not *only* punish for the past action and the offender's moral responsibility for it, but also for a future good outcome for both the prisoner and society at large. This approach may work whether we adhere to the determinist or indeterminist perspective regarding free will: if the prisoner was to be considered morally responsible for the action, then they would deserve to bear the moral responsibility of fixing their mistakes; if they were not morally responsible for their crime (because it was caused by a causal chain of events they had no control over) then punishment would simply be a means to bring about a better outcome that produces more happiness for society.

Moreover, the fact that the "humane" element is very strong in this perspective may help solve the problem of many strictly utilitarian theories that risk falling into the trap of disproportionately

[98] Bennet, 2010, pp.60-61

harsh punishment in the name of the society's happiness. If the ultimate aim of punishment is humane treatment and the re-insertion of the criminal into society as a productive member of their community, then punishing them too harshly would not be a viable option.
Finally, this approach finds another strength in that it does not look away from the causes of criminal behaviour: many rehabilitation theories admit that there are personal and social problems that can make it difficult for some people to obey the law.[99]

Rehabilitation thus seems to be, from the purely theoretical perspective adopted in this part of the work, as the more progressive and normatively sound theory for the justification of punishment.
Punishment may be justified by utilizing it as a means to make the offender understand that what they have done was wrong and make them learn how to become a productive member of a safer and happier society.
What we are missing at this point is the test of practice. Can a rehabilitative approach to punishment work in the real world?
Attempts at this are not new, although their popularity has definitely risen in recent decades, so much so that they have entered the penal framework of states and serve as the basis to inform punishment policies every day. In the next parts of this work, we will look into the example of the Italian legal system and how humanity and rehabilitation were applied to the practice of punishment after having made their way into the constitution of the state.

[99] Bennet, 2010, p.54

2 PUNISHMENT IN ITALIAN LEGISLATION

We have, up until this point in the work, analysed the philosophical discourse around the aims that punishment can pursue and whether those aims can be justifiable from a philosophical perspective. The philosophy of punishment, however, as we have already said, cannot be entirely separate from the practical political and legal endeavours of states. Theories of punishment and its justification find their way into the legal systems of states for quite obvious reasons: it is when it comes to punishment that the relationship between state authority and liberty are at their highest level of tension, and justification for state intervention in this area of legislation is thus essential.[100] Punishment serves to protect the legal assets of the victim (their possessions, which comprise also of their personal rights) by harming the legal assets of the condemned offender. It is, in other words, the sphere of maximum interference of the state in the subjective sphere of its associates.[101] In the context of liberal states, states founded on principles that consider with the highest regard the right to freedom of the individual, justifying such an intervention of state authority becomes a crucial matter.

Here is where philosophy of punishment finds its way into the legal systems of states. In order for punishment to be applied within a legislation, there needs to be a precedent political decision made by legislators to favour a certain justification and scope of punishment and consider it the foundation for all the laws regarding punishment. Having made such a decision, the justification of punishment adopted needs to be put into words and inserted as a binding law within that legal system so as to bind all other decisions taken on the matter of punishing offenders.[102]

The Italian Constitution is an example of a constitution that, unlike many other "sister" constitutions in the comparative landscape, has a specific article comma which defines the limits ad aims that punishment practices must respect within the Italian legislation:

[100] Manes, 2023, p.7
[101] Ibid.
[102] Manes, 2023, p.8

"Art 27(3): Punishment may not be inhumane and shall aim at re-educating[103] *the convicted"*[104]
With this article, the Italian constituents clearly wanted to take a political stance regarding punishment and its justification in itself, but also regarding the relationship between the State and its population that the practice of punishment entails. It is the expression of a new political perspective, which looks at punishment not from a paternalistic perspective but as a social tool. The goal that the constituents had in mind with the codification of the principle of rehabilitation was twofold: on the one hand, they wished for a clear separation from the ideals that had guided the actions of the fascist regime when it came to penal practices; on the other, they wanted to highlight how the new, republican state, was fully identifiable with its people. Punishment in the 1948 Constitution is thus not understood as a way for the state to shape its population and its prisoners to fit the principles of a regime, but rather an instrument put to the service of the offender in order to remove any obstacles to proper emancipation and socialisation[105], indispensable for active democratic participation, necessary for the sovereignty of the people to function properly.

Article 27(3) is clearly a very progressive disposition in a context that was unfortunately not yet ready to apply its full potential yet. This is why, during the decades following its publication, many interpretations coming even from the highest authorities in regard to the Italian Constitution, such as the Constitutional Court, have restricted the scope of application of this article noticeably. Such interpretations have become, however, more and more progressive as more and more progressive voices have appeared in the Italian legal and political landscape. However, as we shall see, more and more work needs to be done in order for the bindingness of such article to have the desired effect on general penal legislation and penal practices.

The foreign and highly international context in which this thesis is being written calls for the first section of this part of the work to be a brief and general introduction regarding the Italian

[103] From now on we shall use the words "re-education" and "rehabilitation" interchangeably. These words indeed share meaning in the context of philosophy of punishment. The word re-educating is simply the closest to its Italian counterpart and is thus used in the official translations of the Constitution.

[104] Constitution of the Italian Republic, 1948, art.27

[105] Fassone, 1980, p.89

Republican Constitution, its main characteristics, and its place within the Italian legal system more in general. After having given such an overview, it will be easier to understand how important it is that the rehabilitative aim of punishment has a place in this legal document. In the second part, I shall talk more about the constitutional principle of rehabilitation, the impact that such a finality has had on legislations of lower rank and how such a principle has been understood and applied during the years. The last section of this part will be left to the analysis of current penal practices within the Italian system and their compatibility with the constitutionally interpreted principle of punishment as rehabilitation.

2.1 Constitutional basis for punishment: the principle of Rehabilitative aim

2.1.1 The relation between the Italian Constitution and Italian Penal law

The Republican Constitution of Italy entered into force the 1st of January 1948, after a referendum in 1946 saw the population of Italy vote to have the State be a republic (rather than remaining a monarchy as it had been before the second world war) and elect the members of the assembly that would have been responsible from then onwards for the writing of a new constitution for the newly founded republican state.

This assembly, also known with the name of "La Costituente" was made up of representatives from those political forces that came out strongest after the second world conflict: the DC (Christian Democratics), PSIUP (Italian Socialist Party) and PCI (Italian Communist Party), and some minor liberal and conservative forces. Such political forces represented much different and contrasting interests and beliefs, but still managed to approve a final text in 1947 with 90% of votes: this means that the new Italian constitution was a legal text created by allowing for compromises between different and often contrasting political ideals, a general compromise that was intentionally preferred (instead of having some ideals win over others) with the future of the state in mind.

The Italian constitution was thus born not as the product of contingent political alliances, but rather as the offshoot of a forwards-looking debate[106]: different and contrasting political forces, unsure of who could have won the majority at the first round of election, preferred a wide-ranging and all-accommodating constitution rather than one based upon polarised ideals.

As such, this constitution presents some key aspects that are specific to post-war constitutions. First, the Italian constitution is what is called a *long* constitution: in it we do not only find dispositions aimed at regulating the organisation of the State (form of government, administration, and such), but also laws aimed at disciplining the very broad and delicate area of the relations between the state apparatus and civil society (the area of rights of liberty and social rights). In the area of legislation regarding rights, the Constitution provides us with general principles to follow, and also a more articulated discipline to follow, which allows for much less freedom for subsequent legislators than the constitutional texts that came before (that which was in place before the decision to go from a monarchic state to a republic).[107]

This is also because of the *rigidity* of the constitutional text: the 1948 Constitution in fact requires special and aggravated mechanisms for the modification of its original text – constitutional review procedures – and a system of controls of compliance of subsequent legislative acts with the constitutional text. This means that not only is the discipline of the state machine and social and liberty rights spelled out in its entirety in the constitution, but also that no common law can go against its dictate: only with aggravated procedures can the legislator have the constitution changed, and only in that case will a law be able to provide for something different than what was originally contained in the constitution. Furthermore, regular controls are operated by a system of constitutional justice, with a special organ (the Constitutional Court) appointed to judge the validity and conformity of laws with the constitutional dictate.[108]

All of these characteristics make the Italian Constitution the highest law of the State, the superior legal act that influences both the validity and the interpretation of all other laws in the system.

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[106] Carretti and De Siervo, 2023, p.78

[107] Ibid, pp. 79-87

[108] Ibid

In relation to the field that is of most interest for the purpose of our work, criminal law, the constitutional text thus serves two different and coexisting functions.

On the one hand, the Constitution is a limit to penal law: the rights, liberties and guarantees in the Constitution are the basis on which the punitive system has to stand on. Therefore, rights and liberties guaranteed to the individual by the constitution are impassable limits that penal law cannot cross nor go beyond. We can understand this function played by the Constitutional text as a map of the borders of application of criminal law.[109] We can see how this plays out in practice by looking at the remediation of the penal code that has been operated following the entrance into force of the Constitution. The Italian penal code, (the 1930 Code Rocco), in fact, was created under the fascist regime and, at the time of the composition of the constitution still contained laws of clear authoritative influence that would not have been compatible with the new liberal and democratic system. Thus, the code was re-examined in light of the Constitution and much of its laws were changed and reformed as to make it compatible with constitutional principles.[110]

On the other hand, the Constitution could also be considered the "foundation" of penal law. By assigning sovereign power to the people, the constitution conversely also gives them the power to decide what sort of justification is valid for legal punishment in the Italian system. Under article 27, the Constitution seems to explicitly understand rehabilitation as the justification that supports the greater part of criminal law: and since no criminal law may go against the dictates of the Constitution, thus no punishment may be inflicted in contradiction to the rehabilitative principle.

2.1.2 The Principle of Rehabilitative aim

In the second part of article 27, paragraph 3, the Constitutional Assembly has made a very explicit and clear choice in favour of the rehabilitative aim when it comes to justifying punishment within the Italian legal system, by asserting that "*punishment may not be inhuman and shall aim at re-educating the convicted".*

[109] Manes, 2023, p.14

[110] Ibid, p.15

The article is clearly divided into two parts, which describe the characteristics punishment must have in order to be valid within the Italian legal system. It is worth our while, before looking at the latter part of the article (which will be our main focus in this work) to also spend some lines explaining the scope of the first part of the article: the principle of humanity of treatment. The prohibition of inhumane treatment does, at first, seem a quite vague and elastic disposition, which does not expressly specify what sort of treatments are allowed or not. It is important however to consider that such a disposition is found in the context of a state that has ratified many treaties regarding human rights and is also part of international organizations such as the EU and the European Council. It is in international treaties we can find the explication of the actual scope of the prohibition. Let us be quite short here and sum up what the prohibition of inhumane treatment within the penitentiary entails in practice by reporting the wording of the Recommendation Rec (2006) of the Committee of Ministers to member states on the European Prison Rules:

> *«1. All persons deprived of their liberty shall be treated with respect for their human rights […]*
>
> *3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.*
>
> *4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources.*
>
> *[..]*
>
> *6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty»*[111]

In the first part of the article in question, thus, the rights of the people convicted of a crime are made clear, and the framework under which those rights are upheld has since then been made apparent by the Constitutional Court itself.

[111] Recommendation Rec (2006) of the Committee of Ministers to member states on the European Prison Rules. https://www.refworld.org/legal/resolution/coeministers/2006/en/11978

The structure of the article aims at showing how, in the eyes of the Constituents, no rehabilitation is possible without humane treatment: values of humanity and dignity are not only explicitly at the basis of the whole legal system (art. 1 of the Constitution) but are also the very framework on which the whole punishment system shall be based on. Such an element will be extremely important in our analysis later on and is thus fundamental to keep it in mind.

The second part of article 27(3) contains the so-called principle of rehabilitative aim. As a constitutional principle, the rehabilitative aim of punishment is extremely significant. Not only does it influence the interpretation of many laws present in the legal system (namely all of those that involve punishment), but it also has the power to influence the creation of new laws regarding punishment practices, thereby aiding in the creation of a penal system built around a rationale entirely different from the one that guided criminal law before the creation of the Republic.[112]
First and foremost, during the time when the Constitution was being laid out, the debate within the field was still dominated by the fiercely rival Classical and Positivist schools of criminology. To rapidly sum up and recall what was already said in chapter one of this work, the Classical school was founded by Cesare Beccaria and adheres to the doctrine of free will and asserts that the individual is responsible for his actions and is equal in the eyes of the law, while the Positivist school was founded by Cesare Lombroso and believes that human behaviour is restricted and impacted by social and natural factors, human nature is thus determined and free will does not exist, which allows it to argue that crimes are determined by factors entirely external to the criminal, and that punishment cannot be based on moral responsibility. In this context, rehabilitation was always taken to be a principle deeply intertwined with the beliefs of the Positivist school: they in fact believed in the justification of punishment as prevention of further crimes by rehabilitating and socialising the offender in question, without any reference to retributive aims or moral responsibility of the convicted.
Let us also recall the nature of the Constitutional text of ’48: this was supposed to be a text that compromised between very different political ideals, which could bring different ideas together

[112] Manes, 2023, p.15

under one law. Taking a strong stance on matters of punishment would not have been a wise choice in this context, in the eyes of the Constituents.

Thus, because of the need for the law of the state to be neutral and work as a compromise between stances, the Constituents were wary about putting rehabilitation (a concept then, fundamentally positivist) at the forefront of the justification of punishment within the Constitution. Thus the principle was included, but only second to humanity of punishment and not fleshed out to its full potential: this resulted in a principle that was purposefully left ambiguous and open to interpretation in the name of "the neutrality of the state regarding scholarly disputes".[113]

Therefore, the principle as it is stated in the Constitution at article 27 lends itself, for better or for worse, to being defined according to the views of the interpreters over the years, and to be highly conditioned by the state of the philosophical and criminological debate regarding punishment.[114]

This has resulted in a myriad of different interpretations of varying validity and justifiableness that ought to be looked at from both a historical and a philosophical perspective, in order to prepare us to the analysis of the legality and philosophical justifiability of the current punishment system that will follow later in this work.

2.1.2.1 Historical Interpretations

The fifties represented a very difficult period in the history of the country. Not only were criminality rates spiking, so was social alarmism, and the revival of retributivist ideas that were fuelled by feelings of social insecurity, instability, and a general need for punishment to work better as a deterrent for criminality than it had been up to that point in time. On top of all of this social and political turmoil, culturally the country was under the hegemony of Catholicism.[115] This social, political, and cultural context paved the way for harsh criticisms to the idea of rehabilitation and pushes for a generally more restricted interpretation of the scope of the rehabilitative aim principle in article 27.

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[113] Fassone, 1980, p.89

[114] Fiandaca, 1986, p.222

[115] Ibid

Many such criticism based their arguments on purely legal and textual basis. Relevant examples of such criticisms usually relate to the use of the word "tends" within article 27: according to many, the correct interpretation of the verb would relegate rehabilitation to a mere possible, collateral aim of punishment, far from having to be the main guiding aim of the legislator, but rather an aspect that may be implemented during the execution of the sentence.[116] In other words, the inclusion of "tends" in the wording of the article makes the entire principle sound more like wishful thinking, a hopeful objective that may be reached someday, rather than a rule to be followed thoroughly by legislators. The doctrine, however, has confuted many of these criticisms already.

On the one hand, the verb tends is used in the context of rehabilitation not to make rehabilitation a conditional, but rather because of the wish of those who wrote it to highlight the importance of self-determination of the individual. The verb "tends" here refers to the prohibition of adopting coercive forms of (re-)orientation of the offender by the state, and the fact that the possibility of re-education is an aim that can be pursued only as long as the offender is willing to accept the re-education offer.[117] Rehabilitation is to be read as being not a secondary, but rather the main aim of punishment, which cannot be taken into consideration only during execution but must guide the issuing of any regulation within the criminal law system: no law must be in place which provides for a sentence and punishment not suitable for promoting the re-education of the offender.[118]

It is enough to say, for the purpose of this work, that none of these highly technical criticisms provides any decisive critique that would justify a complete disregard of the rehabilitative principle.

A more significant blow, however, was represented by the harsh criticism thrown at the principle at the hands of so-called "Retributivists", groups of jurists and philosophers of law that already during the debate within la Costituente had expressed their doubts regarding the principle. The main exponent of these views was Giuseppe Bettiol, a catholic retributivist who interpreted consequentialism (and therefore, also rehabilitation theories), as inherently Marxist political ideologies. The context in which this philosophical position is expressed is undoubtedly important

[116] Fiandaca, 1986, p.230 and following

[117] Ibid

[118] Ibid

in order to understand why it was so convincing. In a time of both practical and ideological cold war between liberalism and communism, defining a constitutional principle as Marxist would have created much controversy. On top of that, Bettiol was one of the few that attempted to give a specific meaning to the concept of rehabilitation, in the absence of a constitutionally given definition.

In a series of essays he published over a period of forty years, he asserts multiple times how any justification of punishment that does not refer back to retributivist ideals is essentially a theory that wants to "make the man[119] a folding object for the purposes of the group, society, the State, in the name of purported laws of social necessity"[120]. He also believed that "the idea of re-education and resocialization would vulnerate man in his inner freedom and would lie in wait to stifle his individuality in the name of political bullying and totalitarianism"[121]. In other words, rehabilitation is a concept that supports the reintegration of the offender into society through submission of the individual to pre-established rules, independent from their internal will or beliefs: he believes that re-education should be understood as a forced pedagogical process that directly undermines the right of the individual to their freedom of conscience in the name of the "good of society".[122]

As an alternative to this Marxist, totalitarian form of punishment, Bettiol proposes a retributivist one. He believes the focus of legal punishment practices should be individuals. They, morally independent beings capable of choosing right and wrong, have chosen the path of crime, and thus shall be punished: not because their punishment will benefit the wider society, but because the offender has deserved it. Only the Christian state guided by Christian morality, he believes, will have the moral authority to punish the human being while also respecting his individuality and his freedom[123]. Through such a highly moral punishment, then, the violated order will be reinstated, and morality may be restored in the soul of the convicted: this is the only way in which punishment may prove to be pedagogical and aid re-education.

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[119] Here intended as "the human being".

[120] Vassalli, 1982, pp.445-447

[121] Ibid

[122] Ibid

[123] Fiandaca, 1986, p.230

The theory explained by Bettiol in his essays, with its clear adherence to Kantian and Christian catholic ideals, is very in tune with the social, political, and cultural worries of his time. It does, however, suffer from many of the defects that such theories, as we have highlighted before, tend to have.

The first difficulty that comes to mind as soon as one starts reading his theories, is his project for a Christian state punishing according to catholic criminal law: in a state that declares itself as secular, with no official state religion and guided by the principle of equality between every individual no matter their beliefs, proposing a criminal system based on principles of catholic morality would be unconstitutional. Moreover, identifying law with morality and the state as the representative of such a (in this case, God-given) moral law is a problematic step in itself: this is something that we will come back to later in this chapter. Let it be enough to ask, at this stage, what sort of justification could be provided for the establishment of such a catholic criminal law system. How could we justify asking the offender to repent and absolve themselves to Christian morality in the context of a state that asserts its neutrality regarding religious and moral understandings?

Secondly, just like any other retributivist theory, Bettiol's interpretation seems a lot more unstable when we consider the question of moral responsibility and humans' freedom of action. From his Christian perspective, it would make sense that the offender chose the bad freely: the offender here is a descendant of Adam and Eve, who ate the fruit from the tree that made them aware of what is good and what is evil, and thus is in possession of such knowledge themselves. This of course opens up a plethora of questions regarding the existence of God, Christian symbolism and theology which have been debated for centuries if not millennia. Here I want to focus on one question specifically: on what basis beyond the old scriptures do we assume that us humans inherently can distinguish good and evil and can freely choose how to act? Let us take the example of a child, who has not yet learned socialisation and how to be with others: that child will very easily kick and scream at other children especially, maybe hurting them. Does that child willingly choose evil? Is that child morally responsible for the hurt he might have inflicted his classmate? It seems to me that the inherent knowledge of good and evil is not something that we can prove without referencing Christian scriptures. This only adds to the problematic side of the debate on moral

responsibility, free will and indeterminism-determinism debate and seems to still be too trembling of a base to justify the state's infliction of harm upon an offender.[124]

One third, last point I want to mention in regarding to the problems of Bettiol's theory of punishment, is in regard to his idea that consequentialism is a Marxist ideal that will lead to totalitarianism and suppression of all individual freedoms. While it is understandable that Bettiol is afraid that rehabilitation theories might fall into the trap that Bentham's penal law had fallen into and end up infringing on the rights of individuals, this does not justify a rejection of consequentialism and thus of re-education theories in toto. This rather seems to suggest that we should build a system that allows for the rehabilitative aim to be compatible with self-determination of the individual and their freedom, while also keeping the good of the society in mind. Then again, history itself has disputed the idea that a juridical theory can, by itself, stop the temptation of men wishing to oppress other men: we cannot forget how retributivism has been used as a theoretical alibi in order to justify the repressive authoritarian actions of the Fascist regime.[125]

Apart from the stance taken by Giuseppe Bettiol, we do not find any other attempt at clearly defining the contents of the principle of rehabilitation. This trend will continue on in the discussion regarding re-education that took place in the sixties.

Although the social and political context had changed, with the decade of the sixties being a time of economic progress and general dominance of centre-left leaning ideals in Italian politics, with many expecting reforms and modernisation of the legal system that would ameliorate the living

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[124] As seen in chapter 1 of this work under the section "just desert": "The two main schools of thought that have dominated the debate on free will are determinism, which believes that individuals cannot be regarded as free agents but rather that all events are connected in a causal way to antecedent conditions, and the doctrine of free will, which instead assumes that there are choices that transcend causal influences, which makes individuals free agents". In this case, Bettiol's argument seems to be siding with the indeterminism theories, since he regards criminals as individuals who have actively chosen a life of crime and are thus entirely morally responsible for their actions. The main problem here, as we have seen in chapter 1, is that neither indeterminists nor determinists have been able to find proof of their theories beyond mere speculation over the nature of human action and therefore human responsibility. In the debates regarding legal punishment, however, we cannot base our entire justification of the state's infliction of punishment on a citizen on mere speculation. Thus it seems quite hard for a sensible and just theory of punishment to be based upon speculation regarding free will.

[125] Fiandaca, 1986, pp.230 and following

conditions and rights of the whole citizenry[126], no radical shifts in the debate regarding rehabilitation are registered. It would be false, however, to negate the existence of some elements of novelty within the theories of punishment elaborated in the search for a theoretical basis on which to base the interpretation of the meaning of article 27.

Notable in this context is the position of Giuliano Vassalli, who advanced the proposal for a "polyfunctional" understanding of punishment: he attempted to reconcile the debate between retributivists and non-retributivists, affirming that punishment can be justified on three different grounds that coincide with its three different functions: retribution, general deterrence, and special prevention.[127] In other words, Vassalli believed that punishment served a multitude of functions. Firstly, it could give the offender what they were due and assign a proportionate and adequate punishment for the crime they committed. Secondly, it could also work as a deterrent for the wider society, publicly showing them the consequences of wrongful acts through the example of the convicted criminal. Thirdly, it could also be rehabilitative, with the punishing execution focusing on the re-education of the convicted, preventing the offender themselves from committing crime again after their sentence.

Although such a theory may look like a valid compromise that could bring the two sides of the debate together in theory, it fails to provide practical guidance in the concrete phases of sentencing. The illusion of a possible coexistence of different justifications for state action towards the convicted comes crushing down when we look at the actual practice of punishment. While the theory presented by Vassalli shows punishment as a practice neatly divided into phases, this is not what happens in reality: if the polyfunctional nature of punishment theory were to be applied, not only the legislator that establishes the law, but also the judge that applies it would have to balance a multitude of interests in order to make a justifiable decision. Should the punishment be decided on the grounds of the actions of the offender, on how many people it could deter or on the possibility of re-education of the convicted? It seems like in practice, one of the three rationales is bound to be prevailing in such decisions. Leaving the arbitrary inclines of individual legislators or

[126] Ibid

[127] Ibid

judges to decide on a matter as sensitive as state punishment does not seem to be the wisest approach in this case.

Moreover, the theory of polyfunctionality still fails to address the most important issue at hand: the conceptual and practical meaning of rehabilitation. There seems not to be much debate regarding this issue in the early to mid-sixties: everyone participating in the debate regarding rehabilitation seems to be more concerned as to whether it should be understood as a prevalent or secondary justification of punishment, with not much dissent regarding the conceptual contents of rehabilitation itself. The search for the meaning of rehabilitation, in absence of any constitutional guidance, ends up looking at common sense in order to understand this concept. With no theoretical reflection on the matter, public, academic, and legal opinion seems to turn to a somewhat Socratic understanding of crime: only ignorance of what is good and lawful can explain the refusal of criminals to abide by the rules of society and the state, and only a pedagogical or therapeutic effort on behalf of the state can help convicts rise from this state of ignorance[128]. Re-education was thus understood in the literal sense, with little to no reflection done regarding the conditions that caused such ignorance, the responsibility of society, the state, or the political class towards the criminals before, during and after punishment. Furthermore, no investigations were done into the capabilities of the state's punishment system to provide for an effective rehabilitation in practice nor to what that rehabilitation process should aim.[129],

This, however, was bound to change within the span of a few years: the movements of '68 would change much of the discourse regarding state punishment and criminal laws. While up until that point discussions regarding punishment were mainly carried out in academic environments, the movements of the late sixties brough about a change in public culture that overturned the previous status quo and promoted the participation of the general public in politics and consequently law-making. Prison riots highlighted the fallacious nature of the jailing system and brought to the attention of the masses the problems of those within the punishment system.[130]

[128] Fassone, 1980, pp.89 and following

[129] Fiandaca, 1986, pp. 242 and following; Fassone, 1980, pp.89 and following

[130] Fassone, 1980, pp.89 and following

This change in the cultural environment and heightened understanding of the functioning problems of the criminal system lead a wave of movements aimed at pushing for reforms of the penal system that could be more in tune with the constitutional principles regarding punishment and a full appreciation of the rehabilitative principle. A general search for what rehabilitation could mean in practice was on its way: this meant pushes for the abolition of life sentences and a focus on providing more and more effective alternatives to classical sanctioning instruments available to judges.

These waves also marked the beginning of the period of highest consideration for the principle of rehabilitative aim, and of fullest appreciation of its potential scope: it will not only be recognised prevalence by the Constitutional Court itself, but policymakers and legislators alike will aspire to using the principle as a guiding framework for proposals aiming at the reformation of the penal system itself.[131] This period, it is important to note, is the happiest for the principle of rehabilitation because of a general humanistic tendency of the masses to consider prisoners and criminals in their individuality, and understanding punishment as a way to help such individuals while also helping the entire society.

This happy period of "enlightened humanism" and focus on bettering the criminal law system would be, however, destined to a short life. Notorious is the inversion of the trends both in the theory and the practice of punishment that manifested itself in the years after the year 1974 and around the time of the penal reform of 1975. Suddenly, there begins to be a general disenchantment with the idea of rehabilitation and a strong re-evaluation of deterrence and incapacitation as guiding principles for punishment practices. The causes of this sudden switch in tendency are to be found, again, in the changing social, political, and cultural context of the time.

In the seventies the country witnessed a rise in crime rates which involved not only common crimes, but also a rise in political crime, a higher level of organised criminal organisations prominence and various terror crimes being perpetrated. This of course sent a shock wave of discontent and social alarmism among the population.[132]

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[131] Fiandaca, 1986, pp.242 and following

[132] Ibid

Moreover, in 1973 a rough economic crisis shook the country and contributed to highlighting the cost of maintaining public institutions focusing on the rehabilitation of criminals, which would have required high levels of professionalism from those working within them and a lot of resources for their upkeep.[133] Having those that had broken the law benefitting from such a system paid by taxpayers money would have not been very popular among the masses tired by the general economic difficulties most found themselves in.[134]

On top of all of this, new statistical studies began coming to light showing how, in those countries that had a long tradition of rehabilitating efforts such as Scandinavia, those such institutions had not yielded the expected results when it came to crime rates and recidivism. It seemed that rehabilitation and all the possibilities of fixing the criminality problems for western states it had promised were simply a short-lived dream, a myth from which people and theorists alike were becoming disenchanted.[135]

Of course this fuelled requests from the general public for harsher sentences, more severe punishments, a more effective use of public money and solutions to protect citizenry. As a response, the Italian state, rather than embarking on a project of political criminology, thoroughly studying the causes of such a rise in crime and the best, constitutionally compatible solution to this problem, took the quickest and most popular route: securitisation. From 1975 onwards, the most popular way to deal with the crime crisis was ad hoc legislation guided by only one rationale, neutralisation, abandoning all rehabilitation and even retributivist justification of state punishment in favour of what would have been the cheapest, most effective way to counter criminality. Legislators began devising coercive solutions to physically impede offenders from committing crime, with punishments focused on convicted incapacitation and neutralisation. [136]

Of course, although extremely popular given their populistic nature, such solutions were highly problematic and destined to be quick fixes rather than long time solutions to the problem of criminality and recidivism, on top of being constitutionally dubious.

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[133] Fassone, 1980, pp.89 and following

[134] Mongillo, 2009, pp.185-187

[135] Fassone, 1980, pp.89 and following

[136] Fiandaca, 1986, pp.290-295

One such problem is represented by the fact that the scientific basis on which rehabilitation theory was disputed, namely statistical studies that came out around the mid-seventies, were of contested validity. Much evidence gathered since then revealed a possible bias that might have guided if not the studies themselves, the reading of the results: it seems therefore that there is no sound, proved, scientific evidence that supports rejecting rehabilitation as a way to counter crime.[137] On the other hand, incapacitation has both theoretical and practical evidence suggesting its lack of soundness, as we have observed already in chapter one.

It is also important to note that the wave of penal populism that has dominated the discourse around criminal law in Italy, on top of being not extremely theoretically sound[138], also coexists with an article 27 of the Constitution which has not yet been changed nor removed. It is thus fundamental, for the legitimacy of Italian criminal legislation as a whole and the credibility of the political class, that the meaning of such article and its scope is laid out clearly and used as a litmus test to prove whether contemporary laws and practices regarding punishment can justifiably exist in the Italian legal system.

2.1.2.2 Current understanding of the principle

A starting point for the investigation into the constitutional meaning of "rehabilitation" as it is currently understood could be found in Article 1(4) of the Penitentiary System Law, which asserts that:

> *"A re-educational treatment must be implemented for condemned prisoners and internees which aims, also through contacts with the external environment, towards their social reintegration"*[139]

A possible meaning parallel to this can be found in Article 1 of the Penitentiary Regulation, which understands rehabilitative treatment as:

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[137] Ibid

[138] See paragraph on "incapacitation" in chapter 1 of this work

[139] Law n.354 of the 26th of July 1975

"Aimed at promoting a process of modification of the attitudes [of the convicted] which may pose an obstacle to a constructive social participation"[140]

These laws, however, cannot, at this moment in time, be considered an exhaustive explanation of the meaning of the principle as it should be applied in all those situations that fall under its scope. Both these articles presuppose that crime comes from a lack of socialisation or an underdevelopment of the social aptitudes of the convicted offender. Whereas this may be true of some cases (many criminals do come from backgrounds of social isolation), it does not apply to many other which nonetheless fall under the scope of article 27. As an example, let us consider economic crimes: many of these crimes may only be perpetrated by individuals who are especially well integrated in socio-economic circumstances, and are thus not in need of resocialisation, but of something different.[141] The wide nature of the scope of article 27 therefore calls for a wider interpretation of the principle of rehabilitation in itself, one that would comprise resocialisation but that would not be reducible to only that.

One of the most prevalent ones has been one that makes explicit reference to what the ancient Greeks would have called *metanoia*: many think that the rehabilitative aim of punishment is to be found in a profound change of the moral compass of the individual.[142] In other words, punishment should aim at changing the understanding the convicted has of the moral foundation of social coexistence. Only by correcting their moral compass will they be able to be rehabilitated. This understanding of rehabilitation, however, is subject to objections that are hard to overcome.

Such an interpretation of the principle of rehabilitation is underscored by an implicit assumption that crime is a morally wrong action, not just a law-breaking one. This assumes that there is a necessary connection between law and morality, from which we derive that a person who is a lawbreaker must also be a morally deviant individual, and that by educating them to morality we also educate them to the respect of laws. In other words, law is directly connected and derives from moral standards that make it just and worthy of being obeyed.

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[140] D.p.r. n. 431, 29th of April 1976

[141] Fiandaca,1986, p.270

[142] Ibid

Such an understanding, I believe, is only partially true. On the one hand, it is undoubtedly true that law and morality are somewhat related. As the legal philosopher H.L.A. Hart explained, law and morality have a close relationship[143]:

> *"The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process […]. The further ways in which law mirrors morality are myriad, and still insufficiently studied: statuses may be a mere legal shell and demand by their expressed terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to the conceptions of morality and fairness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility."*[144]

It is important to note here, however, there this does not create reason enough for us to infer that law shall be considered morally conclusive. The fact that law and morality are often related to one another, with morality informing the creation of many laws in many different legal systems, does not mean that all valid laws are to be considered expressions of universal moral principles. Morality, in fact, is not a requirement for legal validity of laws that enter into a certain legal system. We should not therefore assume all laws to be morally sound nor just. This is true for both practical and moral reasons.[145]

From a practical point of view, we can observe that laws change course and direction continuously. As we have mentioned before in this work, it is sufficient to look at the status of homosexuality throughout different legal system to understand how we cannot assume that everything that is considered a crime *ex legis* should also be universally considered morally deviant. How would we conciliate the fact that in some countries it is considered perfectly legal to have a same-sex relationship while in others it is not, if laws are to be considered morally conclusive? The coexistence of different laws regarding same-sex unions suggests that what makes a law valid (and

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[143] Starr, 1984, p.681

[144] Hart, 1961, pp.199-200

[145] Starr, 1984, p.689

thus to be followed) is not a test of morality, but rather the process through which it is created (in Hart's words, that system's rule of recognition[146]): in the Italian case, a democratic process of legislation carried out in parliament. Such a process may end up giving rise to "immoral" laws, which are however still valid laws. All of this to say that an offender who has broken the law cannot be automatically considered also morally deviant, in that it may be that the law (although still valid and thus to be obeyed) is immoral, not the act committed.

This brings us to our second reason for rejecting theories that presuppose the moral conclusiveness of law: legal validity should not equal to elimination of moral scrutiny of the law itself.

> *"So long as human beings can gain sufficient cooperation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which other will enforce. What is surely most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny"*[147]

This is a moral argument for rejecting the idea of a necessary connection between law and morality proposed by H.L.A. Hart. In other words, Hart states that it would be a mistake to equate the enactment of law to morally justness, because law is the product of men, not derived from universal principles of morality. Thus, assuming any law to be morally just because it is law would be enabling the workings of any individual that may have risen to a position in which they can abuse their power in an "immoral" way.

Moreover, I believe this would be giving the liberal state a power that is not its to have: the power to hold moral authority over its citizens. Because what the liberal state has, instead, is legal authority. It can tell its citizens what is legal or illegal within state borders, but nothing suggests that it should also decide what its citizens consider morally just or unjust, as that is profoundly

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[146] Ibid, pp.677 and following

[147] Hart, 1961, pp.205-206

related to their private sphere. Morality from a liberal perspective is private, does not fall into the realm of the "political" and should not be imposed in the context of a liberal western democracy. Therefore I believe that a definition of rehabilitation that aims at identifying the best way in which the state can reduce crime rates while also being compatible with liberal theory and would make sense in the general practice of legality in general cannot appeal to a process of profound change of the moral compass of an individual for two reasons: firstly, committing a crime is not always morally wrong; secondly, allowing for an understanding of law as morally conclusive, would eliminate the possibility of any moral scrutiny on behalf of the citizens, dissolve any possibility of civil disobedience and give the liberal state a level of power over the moral compass of its citizens it should not have.

Another objection to this interpretation of rehabilitation as *metanoia* comes directly from the pluralistic nature of the Italian State, enshrined in the Constitution itself: the Italian State is a pluralistic democracy that does not admit the existence of one and singular morality to be considered right and just, but rather accepts and fosters the existence of different conceptions of ethics and morality. Understanding punishment as rehabilitation and teaching of one type of morality to offenders by the state is thus not only unjustifiable from a liberal perspective, but also may be even considered unconstitutional.[148]

What is left after these objections, is rehabilitation as re-education to legality: under this rationale, the rehabilitation iter is going to help the convicted acquire an aptitude that will aid him in living a life without incurring in crime again. Thus, both the liberty of conscience of the individual is respected, and further crimes are prevented from happening again.[149]

This understanding of rehabilitation allows for the aim to be the same across the different types of crime, and remains general, while the modality through which such aim is pursued can be changed and adapted to the needs of the individual and their personal situation.

Such a perspective is further enriched by the principles of what is known as "emancipating social theory". According to proponents of this theory, rehabilitation shall not only aid the criminal in

[148] Fiandaca, 1986, p.290

[149] Ibid

understanding the law and accepting it as a guide to their future behaviour, but also respect the individual's autonomy while providing them with the tools to help them solve the problems which have brought them to assume criminal behaviour in the first place.[150]

In sum, "*punishment shall aim at re-education*" means that the rehabilitative aim of the state should be a non-coercive one, should have a special focus on the autonomy of the individual offender, who shall not be manipulated nor coerced into a new set of moral rules, but offered tools that will be up to them to accept in order to live a crime-free life and re-establish their connection with the wider society.

At this point it is important to highlight that favouring the rehabilitative aim of punishment does not entail a rejection of any other aim that punishment may pursue. Other aims may in fact be pursued by those imposing punishment. For example, the afflictive nature of punishment does aim at holding the criminal responsible for their actions following a "retributive" understanding of punishment; the threat of punishment may aim at deterring the general public from committing cries; different rationales can thus characterise different phases of punishment. What is of fundamental importance here, however, is that other aims cannot surpass nor obscure the rehabilitative aim of punishment established by the Constitution. [151]

This was confirmed by sentences of the Constitutional Court, which has found some laws and practices constitutionally illegitimate because they gave too much weight to aims of punishment that were obscuring the main, rehabilitative goal. In Sentence n.149 of 2018, the Court highlighted the principle of:

> *"non-expendability of the rehabilitative function of punishment in favour of any other, however legitimate, function of punishment"*

Rehabilitation, understood as the re-education to legality in the respect of the autonomy of the convicted, is understood as the main purpose and justification of punishment in the Italian legal

[150] Ibid

[151] Manes, 2023, p.197

system and cannot be subjected to any exceptions nor interpretations that may compress its scope or essential content.[152]

[152] Ibid

3 THE PARADOX OF COEXISTENCE OF THE CONSTITUTIONAL PRINCIPLE OF REHABILITATION AND THE CURRENT STATE OF THE ITALIAN PRISON SYSTEM

We arrive, at this point in the work, to the analysis of the practices of punishment that characterise the Italian system nowadays. Here the natural focus will become the practice of imprisonment, that is, limitation of a person's freedom of movement by convicting them to spend a given amount of time in a penitentiary institution. Imprisonment is the preferred method of punishment of the Italian legislator and is used at a staggering rate against offenders.[153] However, the Italy is also infamous for the dramatic conditions in which the inhabitants of its penitentiaries live, and for the high rates of recidivism that plague its criminal system.[154] These characteristics that have made the Italian case so notorious seem to challenge the project that was described by the constituents of 1948 concerning the criminal system. It is here that we arrive to the focal question that has driven the whole project: is the penitentiary, as Italians know it today, an institution compatible with the core law of the state, and the philosophical principles that have been used by the constituents to justify punishment on paper?

3.1 Historical evolution of prisons as rehabilitative structures

Nowadays, in our modern minds, punishing means incarcerating.[155] The penitentiary is what we consider the place of punishment par excellence, the first place that comes to mind when we think of where the state's justice system can do its course.

This idea, however, is misled: not only is the jail as a space for punishment a quite recent invention, but it is also one of the most controversial and criticised types of punishment there is. Then how

[153] 60.9 admissions per 100,000 inhabitants annually, as indicated by the 2022 European Council SPACE Project Report

[154] 68.7% as of June 2023, CNEL

[155] Vieira, 2007, p.4

did we arrive to a point where the penitentiary has gained such a hegemonic presence in penal sentiments of the public?

In antiquity and the Middle Ages, incarceration and punishment did not exist. Let us not misunderstand, prisons did exist, but they dd not have the distinctively punitive character we assign them nowadays. The best way to understand the main rationale behind the use of prisons throughout antiquity and the Middle Ages is through the words of Justinian:

"Carcer enim ad continendos homines non ad puniendos haberi debetur"[156]

"Prisons exist only to keep men, not to punish them": prisons were the place where offenders awaited trial, rather than a place of punishment. And as such they remained up until the eighteenth century.[157] Most historians agree instead that the origins of the penitentiary as we understand it today are to be found rather in other types of closed institutions, namely all of those that collected "deviants" with the scope of either taking care of them or simply removing them from society. Hospitals, asylums, houses for the poor: they all aimed at removing from the streets, educating or curing the most unwanted individuals in society, the poor, the sick and criminals.[158] It is with the advent of the industrial revolution that the potential for profit began becoming clear in the minds of those who could gain capital from these institutions of rehabilitation, and the "grandfather" of our modern penitentiary system was born.[159] The idea of rehabilitating criminals and beggars through hard work and discipline, while also profiting from the exploitation of their labour became a reality in the workhouses and houses of correction that began appearing throughout the whole of Europe in the sixteenth century.

Punishment and incarceration in early modern times was monopoly of those who had the power to enforce it. Punishment was left to the arbitrary will of powerful classes, who paid little attention to the offences perpetrated, to differentiating between types of punishment based on the crime committed and other such details. This, of course, led not only to a loss of legitimacy of the punishing powers among the masses, but also among the upper classes, with the advent of the

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[156] Justinian, Digest, 48:19:8:9

[157] Rusche-Kirkhheimer, 1968, p.62

[158] Vieira, 2007, p.2

[159] Rusche-Kirkhheimer, 1968, p.63

Enlightenment.[160] This chapter in western history brought about radical changes in the way in which the penitentiary systems of Europe were administered. Enlightened theorists brought about theories that would change the approach to incarceration from caprice and vengeance of the powerful[161] to a more "just" administration of punishment: Jeremy Bentham and Cesare Beccaria are the most famous names among those who have contributed to such revolution, and what they both have in common is a committed focus on rationalising criminal law systems.[162]

While the enlightenment claimed to make punishment more human, it is important to note that this did not mean more lenient: the goal was not to punish less, but to punish *better*. Punish not for vengeance, but to protect the wider society.

This type of approach still focuses on controlling every aspect of the life of those incarcerated: the goal is to control the body (the atoms that make up society) in order to bend it to the law of utility, to the common good of society. This approach then raises the question of whether an institution based on such premises of control and obedience be compatible with a rehabilitative aim, which is supposed to pose great importance on the right to self-determination of the offender and their ability to decide their own re-education in order to be effective?

The failure of such a system based on control and isolation began showing around the mid-nineteenth century. Solitude, isolation, and meditation, coupled with punitive work may have worked for some, but for most it was just a slow descend into illness and agony.[163] And so the myth of the "rational and just" prison started crumbling.

It was at the end of the same century when changing politics and political bases fostered a new, sociological approach to criminal legislation: statistical inquiries into the causes of crime allowed for clarity to be shun upon the societal roots of criminal activity, and allowed for new systems to be created where the core question was not one of proportionality between crime and punishment, but rather of the future of the convicted criminal and of the community around them.[164]

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[160] Ibid

[161] Ibid

[162] Vieira, 2007, p.2

[163] Rusche-Kirkhheimer, 1968, p.137

[164] Ibid

The rights of the individual and their personal rehabilitation started coming to the forefront. In Italy this process of humanisation of penal practices culminated in the years between the two world wars. Legislation was even passed that proclaimed convicted as objects of care, not repression, prisons as places that had to be void of any arbitrary coercion, repression, or punishment outside the limitation of personal liberty, where isolation had to be handled with the outmost carefulness.[165] These changes, however, were short lived: the authoritarian involution of the fascist regime, with their support of a return to retributive ideas of vengeance and outmost control of guilty bodies within the penitentiary was just around the corner.

Although the end of the second world conflict seemed to put an end, from a legislative point of view to such an authoritative approach to punishment, it seems that of the Italian penitentiary system will not be a story with a happy ending to it. Yes, the Constitution itself establish rehabilitation as the main aim of punishment, and the movements of the '68 contributed to the codification of such an aim within the 1975 laws on the Penitentiary Reform, but such openings towards a more progressive view of punishment were followed by further authoritarian policies in the following years.[166] Although the Italian legislation does contain many innovative aspects when it comes to penitentiary treatment and incarceration, following the path laid out by the Constitution, it would be excessively optimistic to affirm that the 1975 reform has been the gateway to a drastic change in the direction followed by practice and legislation regarding penitentiary administration. The policies regarding such aspects as they stand today do not put focus on rehabilitation nor are they supported by a public opinion that regards rehabilitation as the best, most just, aim for punishment.

[165]Fassone, 1980, p.89 and following

[166] Ibid

3.2 Current penitentiary practices and its incompatibility with the rehabilitative aim

As we have seen in chapter 2, punishment in the Italian context is prohibited from the use of inhumane treatments and must tend to the rehabilitation of the convicted. Such characteristics and the aim punishment must have, are crystalised in the Italian Constitution itself, at article 27 (3). However, if one observes the actual characteristics of Italian jails nowadays, what will become apparent is that the journey to a system that is compatible with the constitutional dictate is still far from completed, and that policy and practices regarding punishment are still at a level which is unacceptable both from a legal and a human standard. As a guide to our analyses of the penitentiary practices in this context we will use article 27 (3) itself: we will start by investigating why current practices are not compatible first with human rights and the standards of humane treatment of convicted individuals, and then we will move on to look at why the current state of the system does not allow for the rehabilitation of those confined within its walls. What we will find out s that the requests of the article are not respected in penitentiary practice and punishment in Italy is performed through a system that is in utter violation of legal and human rights standards.

The first part of the article which has been the main focus of this work states that:

"Punishment may not be inhuman"

As we have mentioned before in chapter 2, this part of the article shows how, in the eyes of the Constituents, no just punishment and therefore no rehabilitation is possible if standards of humane treatment of individuals are not met. In practice however we see that, even though prisons were born as a more humane and dignified method of punishment compared to corporal punishment and death sentences, its execution is still far from the standards set by the Constitution and international organisations.[167]

The first issue which must be talked about regarding the inhumane treatment to which inmates are subjected in Italian penitentiaries is overcrowding.

[167] Schirò, 2019, pp.2-4

As of the last report of 2023, curated by Antigone Association, the conditions in Italian penitentiaries have reached critical levels. The official, national, overcrowding rate stood at a staggering 117,2% at the end of 2023[168], with certain regions such as Apulia and Lombardy even reaching overcrowding rates of 153,7% (4447 detainees for 2912 spots) and 142% (8733 detainees for 6152 spots). These numbers mean that, on a national level as of November 2023 there were 51272 spots available in penitentiaries over the Italian territory, but the people detained were 60116.[169]

This data would be alarming already by itself, but it is made even worse by observing the rates at which the prison population has grown during 2023: from September to November 2023, prison population grew by 1688 units; in the trimester before that it grew by 1198; the one before by 911. This means that, if the growth rate remains at it is today, at the end of 2024 we will have more than 67000 individuals detained within Italian penitentiaries, which do not seem to grow in numbers. It took a period that went from 2016 to 2023 to go from 50228 available detention spots to the current 51272, a rate which does not keep up with the rate at which people get convicted.[170]

Overcrowding of course directly impacts the drastic reduction in of the space which is available for individual inmates. While the official regulations establish a standard of 9m2 of usable space per inmate in single cells, and 6m2 of usable space per inmate in cells with multiple bed-spots[171], such standards cannot be met in a situation of such overcrowding. What has become apparent from investigations into Italian penitentiaries during 2023 is that in the 76 prisons visited by Antigone Association, 33% of cells did not guarantee even 3m2 of usable space per prisoner.

The lack of space within the cell would be a lesser evil, or lesser of an issue if cells were used only to sleep the inmates, as the Penitentiary Legislation would want[172], but this is not the case in

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[168] Antigone, 2023, p.1

[169] Ibid

[170] Ibid

[171] Dolcini, 2018, p.2

[172] Art. 6 Penitentiary Legislation, https://www.brocardi.it/legge-ordinamento-penitenziario/titolo-i/capo-ii/art6.html#:~:text=Fatta%20salva%20contraria%20prescrizione%20sanitaria,a%20camere%20a%20pi%C3%B9%20posti. The relevant legislation speaks of sleeping cells, which are clearly differentiated from the spaces where the inmates are to spend the majority of their day and complete their daily activities.

practice. The issue of overcrowding is in fact further aggravated by the "closed cells" regime that is adopted in an ever-growing number of institutions in the national territory, which means that inmates are forced to remain in their cells for the majority of their day.[173] Inmates in Italian institutions then spend upwards of 12 hours a day in cells where they have less than 3m2 per person, with only two hours a day to spend outside in fenced, enclosed yards.[174]

The reduction of space for individual inmates, of course, means that overall space is also reduced drastically to make space for this ever-growing prison population: thus spaces for activities to be performed outside of the cell and spaces for community relations are also reduced overall. This means that not only inmates are deprived of space to do anything outside the perimeter of their bed, sometimes even to stand up, read, write, or watch tv in a non-horizontal position, but are forced to lay down and do nothing for most of their day by the impossibility of leaving their overcrowded cell.

This is coupled with the extremely poor conditions in which may Italian penitentiaries verse: according to Antigone, in the 76 jails visited in 2023: "

- *The 31,4% of jails visited had been built before 1940. Many even before the year 1900.*
- *In 10,5% of the institution visited not all cells had heating.*
- *In 60,5% of cells there was no guarantee of running hot water for the entirety of the day and not year-round.*
- *In 53,9% of the institutions visited there were cells that did not have a shower.*
- *In 34,2% of institutions there were no spaces to work.*
- *In 25% there is no gym, or it is out of order. In 22,4% of them there is no sports field, or it is out of order."*[175]

It is also important to note that, unlike many other neighbouring countries, the penitentiary system of Italy does not have any policy in place regarding the right to affectivity and intimacy of inmates. Article 37[176] of the penitentiary regulations establishes a maximum of six visiting hours for the

[173] Antigone, 2023, p.1

[174] Colombo, 2011, p.64

[175] Antigone, 2023, p.2

[176] D.p.r. n. 230, 30th June 2000, https://www.normattiva.it/uri-res/N2Ls?urn:nir:presidente.repubblica:decreto:2000-06-30;230

families of those convicted, while other, external individuals can only happen when authorised. All of these visits, moreover, must happen with constant control of the guards and do not allow for any intimate moments between the inmate and their loved ones.[177]

All of this directly impacts the heaviness of the penitentiary on the psychological well-being of those convicted. An alarm bell regarding the extremely poor conditions in which inmates are kept is the sky-high number of suicides that happen every year within the walls of Italian penitentiaries. After 2022, the record year with 85 confirmed suicides, 2023 and 2024 continue to record impressive numbers. In 2023, at least 701 people took their own lives inside a penal institution. In the first months of 2024, at least 30. "At least" because there are numerous deaths with causes yet to be ascertained, among which other cases of suicide could therefore be hidden.[178]

The situation is clearly at emergency levels. These conditions, however, are not news. Nor are they unknown to national and international authorities. The state of Italy, in fact, has already not one, but two convictions by the European Court of Human Rights for violating article 3 of the European Convention, which protects individuals and inmates from torture and inhumane or degrading treatments.[179]

The first case was Sulemanovic v. Italy. The Bosnian inmate had spent over two and a half months in the Rebibbia penitentiary in Rome with a personal space of just 2,70m2. In this occasion the court underlined how the auspicial amount of space available for every inmate for European standards should be of 7m2, a number which cannot for any reason go below 3m2 in order to not be considered inhumane and degrading treatment.[180] What made the decision of the Court the more stringent, however, was considerations regarding the amount of time the convicted was forced to spend inside his cell, without having the possibility of any activity other than laying within the perimeter of his bed.

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[177] Colombo, 2011, p.64

[178] Antigone, 2024 at https://www.rapportoantigone.it/ventesimo-rapporto-sulle-condizioni-di-detenzione/nodo-alla-gola-emergenza-suicidi-in-carcere/#:~:text=Nel%202023%20con%2070%20suicidi,pi%C3%B9%20alto%20dell'ultimo%20ventennio

[179] Art. 3 of the ECHR, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

[180] ECHR, 2009, p.9

The second case was Torreggiani and others v. Italy. Again, the Court condemns Italy for violations of article 3 of the ECHR for the lack of space provided to inmates of the prisons of Busto Arsizio and Piacenza, which was, again, of less than 3m2. This was also a sentencing which took into consideration the wides dysfunctionality of the Italian penitentiary system and bound the Italian state to better conditions inside its penitentiaries within a year of the sentence.[181]

Seeing that these sentences are both more than ten years old, comparing them with data regarding the last couple of years it is evident how not much progress has been done to better the conditions in which inmates verse and outright violations of human rights are ongoing in broad daylight every day. This means therefore that the first request of article 27(3) is not respected in penitentiary practice. Punishment, in Italy, is inhumane and has been declared as such by a high international court. This in turn makes it unacceptable for Italy to maintain such a situation without significant attempts to improve it, both from a legal and a theoretical perspective: not only is this treatment of prisoners unacceptable from a human standpoint, but it is also incompatible with a justification of punishment based on rehabilitation. Theories of rehabilitation, as we have seen, focus on both the wellbeing of wider society and the wellbeing of inmates within jails.[182] A treatment contrary to a sense of humanity is then not compatible with rehabilitation theories of punishment (which are at the basis of the Italian legislation regarding punishment), on top of not being legal or moral in general.

But how have such violations of dignity and humanity seeped into daily practice and policy within the Italian state? To find the answer to this question we must understand the general, although mistaken, approach that the public has towards punishment. So widespread is the idea that the average man has regarding legal punishment as a way to scare people into respecting the law that it has managed to find its way into politics and the decisions that politicians take regarding punishment on the daily. Deterrence, thus, is what the public believes to be the main reason to punish: the harsher the punishment, the worse the conditions within the penitentiary, the higher the deterrence factor and the lower the crime rate.[183] However, has we have seen before, deterrence

[181] ECHR, 2013, p.27

[182] See chapter 1, “rehabilitation”.

[183] Colombo, 2011, p.71

as a justification of punishment is not the best way to foster respect of others, and does not work in lowering crime rates. Not only it allows for such brutal violations of the human rights of offenders in the name of "repression" and deterrence of the rest of those criminals who have not been caught to give up their criminal endeavours, but it has been shown to not yield the desired effects in practice.

Anno	Denunce di reato	Detenuti	In misure alternative e di comunità	Omicidi	Furti	Rapine	Violenze sessuali
2008	2.709.888	58.127	7.706	614	1.393.544	45.857	4.893
2009	2.629.831	64.791	10.476	597	1.318076	35.822	4.963
2010	2.621.019	67.961	14.404	532	1.325.013	33.754	4.813
2011	2.763.012	66.897	19.896	552	1.460.205	40.549	4.617
2012	2.818.834	65.701	22.683	531	1.520.623	42.631	4.689
2013	2.892.155	62.536	26.739	506	1.554.777	43.754	4.488
2014	2.812.936	53.633	28.492	487	1.573.213	39.236	4.258
2015	2.687.249	52.164	34.995	471	1.463.527	35.068	4.000
2016	2.487.389	54.653	39.123	404	1.346.630	32.918	4.046
2017	2.429.795	57.608	43.926	370	1.265678	30.564	4.634
2018	2.371.806	59.655	50.915	331	1.192.592	28.441	4.887

[184]

The present table shows how the number of offences committed is not inversely proportional to the number of people imprisoned: in some cases the number of offences even lowers at the lowering of the number of detained people.[185] We can therefore say with confidence that punishing through imprisonment in order to deter people from committing crime does not work. This is the case for a number of reasons that we will briefly list here as to recall and complete the discussion regarding deterrence theories that was started in chapter one of this work.

First, scaring into obedience does not teach legality, but rather teaches to observe a rule (or a law) when observed[186]: just like a kid that is scared into not eating candy when the parent is around, will definitely eat all the candy once the control and observation of the parent is taken away. A kid that instead is taught that eating too much candy is bad for their health and is convinced as much, will not binge on candy even when left unsupervised. By the same token, a criminal scared into

[184] Colombo, 2011 (Data from the Italian Statistic Bureau):

(Year; Crime Reports; Inmates; People subjected to alternative measures; Homicides; Thefts; Robberies; Sexual Attacks), p.78

[185] Ibid

[186] Ibid, p.71

not acting a certain way by prison guards will probably start doing it again once that control is lifted.

Second, a harsh prison treatment such as that to which Italian inmates are subjected generally only serves to foster negative feelings such as anger and resentment towards the state that has subjected them to such conditions, and the wider society that has allowed their fate to be as such. Once out, the offender will not have learned that crime is wrong, but rather than the society in which he will be put back into is a careless one, which does not care for their wellbeing. Such sentiments will definitely allow for more crime to happen, as the criminal may want to return all the bad (or even worse) back to who gave it to them in the first place.

Thirdly and lastly, crime rates do not decline simply because many crimes cannot be deterred through scaring those who commit them: many crimes are carried out by people who do it because of substance abuse, illness, hunger, or simply on a whim, a spurge of uncontrolled violence. Such individuals, even knowing the extent of the punishment and the harshness of it, may not be able to help it.

Deterrence thus is not a viable justification that can be adopted in order to lower crime rates by a contemporary, western state which is a member to international human rights conventions, nor is it justifiably used, since it is shown not to work. The fact that such a rationale seems to be the main one guiding the public opinion, and many of the politicians' actions too, is also contrary to the dictate of the highest court of the state: as we have seen, the Constitutional Court itself has declared that no justification other than rehabilitation may be the main rationale guiding policies of punishment within the Italian State.[187]

But what does rehabilitation entail in the everyday practice of prisons, and are the requirements of treatment able to be met in any way in the Italian penitentiaries, despite the dire conditions in which they are? The answer is that, regarding the second part of article 27(3), the Italian prison system seems to be highly inadequate too.

[187] Sentence n.149 of 2018

The practices that a rehabilitative treatment within Italian prisons is supposed to follow are contained in article 15 of the Penitentiary System Law of 1975:

> *"The treatment of the condemned and the interned is carried out mainly by making use of education, professional training, work, participation in public utility projects, religion, cultural, recreational and sporting activities and by facilitating appropriate contacts with the outside world and the relationships with family.*
>
> *For the purposes of re-educational treatment, except in cases of impossibility, the condemned and the interned are guaranteed work.*
>
> *The defendants are allowed, upon their request, to participate in educational, cultural, and recreational activities and, unless there are justified reasons or otherwise provided by the judicial authority, to carry out professional training work, possibly of their own choice and, in any case, in adequate conditions. to their legal position."*

Let us start with work: it has been shown in many studies that work not only is one of the best ways to avoid recidivism once the offender gets out of prison. The reason for this direct relevance of employment when it comes to recidivism is that a decent job can be the source of non-criminal contracts, can reinforce legitimate goals and values, and promote the adoption of a law-abiding lifestyle. Professional training within penitentiaries has also been shown to have positive results in the employment rates of ex-convicts and the quality of the jobs they were able to get.[188]

Giving inmates the possibility to work, or work towards a professional qualification, is thus a fundamental part of the rehabilitative process. Through work, inmates get to train their skills, their intelligence and creativity, and the prospect of a liveable wage once out heightens the sense of autonomy and lowers the risk that the individual will resort back to crime outside prison walls.

The reduction of recidivism would directly impact crime rates and prison population as well, since it is a well-known fact that in prisons all over the world much of the population is represented by individuals who have recidivated and are not at their first conviction.[189]

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[188] LeBel and Maruna, 2012, p.4-5

[189] Ibid.

But is the right to work one that is granted to inmates in Italian prisons? The answer, unfortunately, seems to be negative.

The data reported by Antigone shows that the instances in which inmates are employed and work are quite rare. In many institutions, those that are allowed the possibility to work have to do so as employees of the penitentiary institution (taking away from them the possibility of creating a network outside prison walls, one that could be useful for them to continue their employment once free), and are occupied in tedious work, often with very few technical skills involved which does not prepare them to any professional work afterwards. Moreover, professional training is also very rare, with few institutions providing possibility for training to their inmates.[190] Although numbers have slightly increased in the last couple of years regarding professional training, with 3359 people enrolled in professional training courses in 2023 contra 2248 of 2022[191], there are still great steps that need to be taken in order to rise the standards of Italian prisons to an acceptable rate.

When it comes to the possibility of education, and even higher education, which is directly contributing to lesser recidivism rates just like work and is listed as one of the key characteristics of rehabilitative treatment within penitentiaries, the numbers are slightly better than those relating to work, but still as dark. Education is a primary way of emancipating oneself and redeeming oneself with respect to a precedent life of poverty, isolation, and crime: many inmates, in fact, come from low-education backgrounds and did not have, before prison, the possibility of going to school.[192] The problem, however, is again in the way in which Italian penitentiary institutions approach giving the possibility of education to inmates. Many times what ends up happening is that the inmate who wants to study, is forced many times to choose between frequenting classes and free time, time spent outside in the courtyard, employment, professional training and sometimes even the possibility of a hot shower.[193]

[190] Antigone, 2019, p.5

[191] Antigone, 2023, p.2

[192] , 2013, p.15

[193] Ibid, p.17

Regarding other activities, being it sports simple recreational activities, we have already taken a look at the data provided by Antigone in the precedent paragraph, and numbers are not good enough on this point either.

But if all of the elements which should make up a rehabilitation treatment are below standard across the whole territory of the state, how do offenders get rehabilitated before they go back to a free life? The answer, I believe, is simple: they do not.

And numbers show that that is the case. As of 2023, the recidivism rates within Italian prisons are sky-high: 68,7% of those living within prison walls are recidivists[194], meaning offenders which are not at their first experience in the penitentiary. It has been shown through statistical analysis that the Italian prison system, instead of reducing recidivism and deterring the committing of future crimes, has the opposite effect and instead exacerbates recidivism.[195] In other words, prison as it is structured in the observed context, does not reduce crime rates but is rather criminogenic.

There are various theories proposed as to why that is.

First, many understand prisons as a criminal learning environment: prisons where the inmates are controlled and subjected to harsh treatment often develop an "inmate subculture" in which individuals get socialised. Often such subcultures are adopted as a way of coping with harsh prison life or are brought in from the outside. Nevertheless, such subcultures are widespread, and individuals teach each other crime-supporting values and transmit them to each other through their daily interactions.[196] Of course this is not something that cannot be avoided. On the contrary, I believe the formation of such subcultures could be avoided if rehabilitation efforts were successful and those individuals living inside prison walls were allowed a chance to understand their wrongdoings and work towards their re-education. The adoption of effective rehabilitation methods could allow for a virtuous cycle to create. Let us take the example of two, twenty something year olds that get convicted for a minor crime. One gets put in a cell with a known chief of a criminal group, who is set in his criminal ways and decides to teach the kid "the way of the

[194] CNEL, 2023

[195] Drago et al., 2021, §6

[196] Nagin et al, 2009, pp.125-127

prison"; the other ends up sharing his cell with a man that has been convicted of a crime he has regretted and is working towards becoming a better citizen and positively contributing to society. While the first young man will probably be sucked into a subculture that will foster his criminal tendencies and even teach him how to commit even worse crimes, the second will more likely join a subculture that accepts the value of legality and sees rehabilitation as the best and just way to go.[197] Of course, in a situation like Italy where rehabilitation methods are sporadically used and are more of a rare occurrence than the rule, fostering such virtuous subcultures would be practically impossible and the criminogenic nature of the penitentiary is thus a sad reality.

A second theory as to the reasons for the criminogenic nature of prisons is the so-called labelling effect. The labelling theory believes that the stigma offenders are subjected to both before and after prison fosters their criminal behaviour in two main ways: on the one hand, public stigma and the labelling of an individual as "a criminal" makes them identify with the characteristics and behaviours related to such a label. Offenders that internalise the identity of "the criminal" subsequently act in a way consistent with this self-conception. On the other hand, the same label and stigma act as criminogenic factors once inmates re-enter society after prison treatment: ex-convicts often face job discrimination, broken social relationships within their communities, and often are placed back into contexts where criminality and criminal associations are readily available.[198] With no tools acquired while in prison to effectively combat the stigma and the harshness of the outside environment, many ex-convicts fall back into their old criminal life.

Whatever the reasoning behind the criminogenic effects of Italian prisons on their inmates, one conclusion is clear as day at this point in our discussion: punishment, in the Italian context, does not respect the humanity of the punished, and does not aim at their rehabilitation. This means that the way in which the penitentiary system is structured nowadays is unjustifiable on a number of grounds.

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[197] Colombo, 2011, pp.69 and following

[198] Nagin et al., 2009, p.127

It is unjustifiable from a human rights perspective. All the international conventions of which Italy is a member underline the prohibition of any inhumane treatment towards individuals at the hands of states. However, the treatment to which convicts are subjected in Italian penitentiary still is at a level that is considered inhumane. This is a situation that must be addressed immediately, as already ordered by the ECHR.

It is unjustifiable from a constitutional perspective. The treatment to which Italian offenders are subjected within Italian prisons not only does not respect the humanity of the individual but does not aim at rehabilitating them either. It seems that the rehabilitative rationale has been left in a corner in favour of deterrence and incapacitation, fuelled by security instances that give into populistic propaganda which is not only incompatible with the constitutional dictate as understood by the Constitutional Court itself[199], but has no legitimacy from a theoretical perspective either.

In fact, legal punishment guided by deterrence and incapacitation rationales is unjustifiable by the standards of the philosophy of punishment. As we have seen, these rationales do not foster a climate of respect of the dignity of individuals but rather sees the good of the wider society as important enough to sacrifice the rights of those who do not follow the law, allowing the state to punish disproportionately in the name of reducing crime rates by scaring and incapacitating criminals, but also do not have any direct effect on the actual reduction of those crime rates.

It is clear that there is an incredibly urgent need to change and reform the system if the state is to keep holding in its hands the monopoly over legal punishment, and to legitimately do so.

[199] Recall Sentence n.149 of 2018, containing the principle of *"non-expendability of the rehabilitative function of punishment in favour of any other, however legitimate, function of punishment."*

4 IS THERE ANOTHER WAY?

By now, we have gone through the major themes and concepts that were needed in order to reach an informed conclusion regarding the relationship between the philosophical theorisations on retribution and their legal and practical application.

I have argued that, among all other theories that attempt the justification of punishment, rehabilitation theories seem to be the most solid ones. That is because they take the strength of both retributivist and consequentialist theories while leaving their most problematic parts behind. Rehabilitation is an essentially consequentialist theory which mainly justifies punishment as a tool to promote general societal welfare through reduction of crime rates and recidivism. Although consequentialist, rehabilitation holds in very high regard the humanity of the offenders and is very attentive to their rights and autonomy. To sum up, rehabilitation combines consequentialism's strength in that it avoids referring to concepts such as moral responsibility and desert to justify punishment with retributivism's attention to the human being in himself, characterised by a dignity that the state cannot disregard by punishing them too harshly. It balances both the welfare of general society and of the individual offender. This makes it a very strong theory compared to the rest of the theories in the philosophical panorama. So much so that it easily makes its way into the legislation of modern liberal democracies.

As we have seen, it has found a place in the Italian Constitution, the legal text that constitutes the very basis of the entire Italian legislation. At article 27(3), in fact, the Italian Constitution explicitly states that punishment shall be humane and have rehabilitative aim, replicating the two main tenants proper of philosophical theories of rehabilitation.[200] Moreover, upon further inquiry into the actual meaning of the wording of the article it becomes very clear that the Constituents meant for the aim of punishment within the Italian state to be the re-education to legality of offenders, while respecting their human rights and their autonomy.

It is thus clear how in this example the philosophical theorisations regarding punishment have worked as the ideological basis and inspiration for practical lawmaking. The practical application of the principles stated in article 27(3) by policymakers shall therefore respond not only to the scrutiny of the jurisprudence, but also to philosophy itself. Does the theoretical strength of theories of rehabilitation translate into the real world of crime and punishment?

[200] See chapter 1, "Rehabilitation"

We have seen how, historically speaking, the rise of the prison as a form of punishment happened specifically because of its rehabilitative potential. Prison was less brutal compared to public executions, stoning, whipping, all common in older times. It also provided an avenue for rehabilitating criminals, through work, meditation or care compared to other punitive practices. It is important to have this in mind. Prison is born as a practical attempt by policymakers to put into practice the tenants of rehabilitation: it was supposed to be less harsh, respecting of the humanity and autonomy of offenders because it avoided corporal punishment; it was meant as a way to protect wider society by removing dangerous individuals from the streets; it was meant to improve crime and recidivism rated by rehabilitating those condemned to it.

On the level of practice, however, things are more complicated. The delicate balance between retributivism and consequentialism that rehabilitation theories represent becomes hard to uphold.

The dark sides of these theories, which philosophy and law had purposefully left out from the discourse, end up being the ones that have the highest political and populistic appeal, and the ones that politicians and policymakers allow to take over for the sake of political dominance. On the one hand, instead of focusing on humanity, the retributive aspect that seems predominant in contemporary policies is the focus on the moral culpability of the offender who is often convicted of harsh sentencing for no other reason than being a criminal. Parallel to that, rather than focusing on proper rehabilitation efforts, policies seem to lean more into repressive and incapacitating solutions.

In the context of Italy this has spiralled out of control. As we have seen overcrowding, poor living conditions and low resources have created a system not only does not do anything to help the high recidivism rates, but also violates human rights and the dignity of those that are imprisoned.

The conclusion of the analysis of imprisonment in practice is that it fails miserably at upholding both fundamental tenants of the theory of rehabilitative punishment and, in the Italian context, violates the principles expressed in the constitution. On the one hand it violates the humanity and autonomy of individuals offenders, forced into terrible living conditions that violate their dignity and human rights. On the other it also fails to protect the wider society and reduce recidivism rates: on the contrary, the criminal cultures that form within penitentiaries only help radicalising offenders, which come out of the penitentiary as even bigger threats to social security than they were beforehand. If, as I argued in the first chapter of this work, punishment

must be in line with these tenants in order to be justified without stumbling upon quite problematic obstacles (such as the debate on moral responsibility), then we can say that imprisonment, as it is practiced in the Italian system, is not justifiable.

It is clear at this point that imprisonment, as it is now, is entirely inadequate as a form of rehabilitative punishment. This does not mean that we *are* to abandon it altogether, leaving dangerous criminals unpunished roaming the streets and posing a threat to wider society. As a matter of fact, there has been no suggestion that the simple restriction of the freedom of movement of offenders violates the tenants of rehabilitation. What it means instead is that as philosophers we must take up the task to investigate whether other alternative methods of sanctioning and punishing which may substitute or work in parallel with imprisonment, are viable solutions that may alleviate some of the difficulties faced by traditional prisons.

4.1 Restorative Justice practices

Restorative justice practices did not result from the coordinated effort of any centralised movement but were rather born as a series of innovative social practices[201] that attempted to find a relational response to wrongdoings that would focus on the relationships that the offence had harmed and what can be done to heal those relationships.[202] As defined by Howard Zehr, restorative justice is a "process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible".[203] In other words, restorative justice practices are a series of alternatives to traditional justice methods of punishment that focus on mediation, restoration, inclusion of stakeholders and collective decision-making in their approach to punishment after a wrongdoing. These practices can take many different forms. Due to issues of time and space, it is impossible for us to provide an in-depth analysis of all of the forms that restorative justice can take. We will instead focus on those that may be more effective and relevant to the case at hand in this project.

[201] Schweigert, 2002, p. 1

[202] Calhoun and Pelech, 2010, p. 289

[203] Zehr and Gohar, 2003, p. 40

4.1.1 Conferences

Conferencing models are at the core of restorative practices, and they are common to most RJ programmes. Conferences do vary in their structure, but generally contain the same key element. It is important to point out at this point that the variation is due to the high specificity to the context of these practices: RJ conferences tend to be tailored to the specific victim-offender situation[204], and because of this cannot follow a strict, common-to-all pattern.

The general entry requirement to access these system as an alternative to the traditional trial and conviction is voluntariness. Both the victim and the offender need to voluntary take part in this process, which means that there is an implicit requirement for the offender to have admitted guilt before accessing the conference. There follows a truth-telling phase, where both parties involved are allowed to tell their story individually to the facilitator, during the preparation stages of the conference. The conference itself begins with the meeting phase, where both offender and victim confront each other in the same room with a facilitator. This generally leads to negotiations, where a written agreement is produced about what needs to occur for the harm to be redressed: this is generally referred to as the restoration agreement, which is then considered and adjusted with the help of the experts present.[205] During RJ conference then it is the people involved, aware of their legal entitlements, that discuss penalties together and reach an agreement on the conviction.[206]

For the purpose of our analysis, there is reason to believe that these types of processes have great theoretical potential to be effective methods of rehabilitative punishment. Firstly, the way in which the process works seems to be very in tune with the requirements of respect of humanity and autonomy of individuals set by the rehabilitation theories we have adopted in this work: victim and offender meet and discuss, their voices are heard, and their autonomy and freedom of choice is respected due to the voluntary nature of these processes. Secondly, the voluntary and agreement-like nature of the outcome of these conferences create fertile ground for the full rehabilitation and re-education of the offender party.

[204] Calhoun and Pelech, 2010, p. 290

[205] Calhoun and Pelech, 2010, p. 290

[206] Daly, 2003, pp. 3 and 9.

Even in practice, these processes have proved themselves to be just as, if not more, effective than traditional trails and conviction processes in "regular" judicial courts: often both the victims feel they are able to "fully recover" from the offence, and the offenders are less likely to reoffend when the outcome of the conference was reached through general consensus.[207]

They do, however, have their limitations. The greatest one of all is their voluntary nature. Only when parties agree to it can a RJ conference take place. The entry requirement of admission of guilt means that these methods are clearly not viable for those offenders who will not admit to an offence, which limits greatly the potential of restoration conferences to act as a viable alternative to traditional trial and imprisonment. Moreover, the rehabilitative potential of the outcome depends entirely on the restoration agreement.

There is still however very compelling evidence that such forms of minimally punitive, restorative sanctioning work for a very wide range of offences.[208] This makes RJ conferences a clearly very valid alternative that, although with its limitations, could be extremely effective when implemented parallel to traditional justice practices in order to reduce recidivism rates and therefore alleviate the overcrowding problems faced by prisons at this time.

4.1.2 Therapeutic jurisprudence

Therapeutic jurisprudence is another form of RJ practices that have grown in popularity in the last decades. This movement supported the creation of several so-called "dual track" systems, where offenders that committed specific types of offences may choose whether to undergo a traditional trial or be diverted to a "specialty court". These courts have become extremely popular for cases of the substance abuse crimes and are often referred to as "drug courts".[209] These courts require the defendant to complete a treatment regime overseen and supervised by a judge: failure to complete this treatment results in the transferral back to traditional sentencing where they will be convicted for the offence they have committed.[210]

These types of non-traditional sentencing also have a high potential to be highly effective when it comes to rehabilitation. They are again voluntary in nature, and specific to the situation of

[207] Ibid, pp. 13-14

[208] Sherman and Strang, 2007, p.8

[209] Husak, 2011, p. 216-217

[210] Ibid, p.217

the individual: this way the humanity and the autonomy of the individual is respected by preventing individuals at elevated risk from entering the prison system, something that has a high risk of violating their human rights and pejorating their situation even more. Moreover, their therapeutic nature is inherently rehabilitative in their goal: the objective these courts pursue is a rehabilitation of the offender through a situation-specific treatment regime.

Although these courts are very appealing in theory, there unfortunately is no evidence of their actual effectiveness in rehabilitating individuals. As Douglas Husak reports, "drug treatment specialists have struggled for generations to find viable solutions to the complex problems of substance abuse; it would be surprising if untrained judges have managed to identify an effective strategy when experts have failed to devise a viable approach".[211] This however suggests that the problem may lie not in the courts themselves, but in the complexity of the problem of drug abuse. It may be the case that such courts tend to be ineffective in the case of drug addicts, either having to send them back to traditional sentencing after a short period of time because of relapse or having to protract treatment regimes for incredibly long periods making them extremely expensive for the state. It may be that these types of processes are way more efficient in treating other types of offences that may be less complex to treat.

In conclusion, I see reason to be wary of extensive use of this approaches, especially because of their very low threshold for diverting back to traditional imprisonment when dealing with extremely delicate situations such as drug abuse, but I do believe that the implementation of such courts for different, maybe less grave offences, may yield good results when it comes to rehabilitation. The adoption of this alternative course of treatment for specific offenders moreover could spare these individuals the trauma of imprisonment by channelling them through a more specific, non-punitive avenue, while also reducing the number of convicted individuals sent to overcrowd traditional prisons.

[211] Husak, 2011, p.219

5 CONCLUSION

What this project has been trying to build, in its essence, is a base to make a case for the argument that contemporary democratic states should go towards a minimally punitive justice system if they still want to legitimately exercise their monopoly over legal punishment. Let us review it.

In the beginning of the first chapter of this work the issue of defining legal punishment was addressed. Because legal punishment is the imposition by the hands of the state of a burden, or an unpleasant consequence to an action, onto its citizens, it needs to be justified for a liberal state to be able to exercise it legitimately. We have observed how there are various theories that attempt to give such a justification. From the analysis of these theories, we have been able to discern that most of them encounter quite serious difficulties both in theory and in practice, which make most of them not viable for the state to use in order to legitimise punishing its citizens. The only theories that passed our initial, theoretical scrutiny were theories that justify punishment only if it reduces crime rates by re-educating the convicted criminals while respecting their humanity and autonomy, which we have referred to as rehabilitation theory in this work. The question remained, however, of whether rehabilitation focused punishment would survive the test of practice and remain a valid justification of legal punishment.

In chapter two and three we have done just that: observe a practical example. We have taken the state of Italy as our object of observation, a state which has officially adopted rehabilitation as the justification and the guiding principle for its legal punishment practices. At this point we observed how, even though the theoretical and legal basis for an effective system were in place, the tendencies of policymakers to make the system highly punitive, harsh, in nature brought about a series of problematics that jeopardise the entire legitimacy of the system. The shift in focus from care for human dignity and rehabilitation of individuals to punishing criminals more and more harshly has, in the Italian case, brought about human rights violations, low rehabilitation rates and high recidivism rates, which would suggest that even though rehabilitation works in theory, it is not effective in practice.

That is when, in chapter four, we have looked at possible alternative practices to traditional imprisonment to see whether or not they would be able to redeem rehabilitation and show that it still is a viable justification for legal punishment. The results this investigation yielded were incredibly important. Restorative justice practices, a new genre of minimally punitive,

rehabilitative punishment practices, have shown great potential as forms of punishment that fulfil the goals of rehabilitation if implemented in parallel with more traditional forms of penitentiary reclusion. Not only do they respect humanity, dignity and autonomy of all parties involved, included the offender, but they have shown great results in reducing recidivism rates even in the case of grave crimes.

To sum up, we can confidently conclude that, although legal punishment is still a highly controversial topic and its justification far from being uncontested, there seems to be evidence that at least in its rehabilitative form it could still remain a part of the state's monopoly over its citizens. The way in which the state can continue to legitimately and effectively punish those that break its laws, however, seems to require a shift towards a minimally punitive system, which does not make use of harsh methods of punishment and suffering, but rather less invasive, and less painful practices such as those endorsed by restorative justice advocates.

Some states have already caught up with this. In this, Norway stands out amongst them, showing that the transition to a minimally punitive system is not only possible, but highly effective. The Norwegian justice system includes elements of minimal punitiveness that are in clear contrast with those that we can observe in countries like Italy, our study case, and others. Elements like the maximal prison sentence set at 21 years, even for the gravest crimes[212], or the institution of so-called "open prisons" like the prison of Bastøy, which does not have any fences, walls, or anything to prevent prisoners from simply walking away[213] have yielded amazing results for overall recidivism rates in the country, which are as low as 20% [214]compared to the 68,7% of Italy.[215]

There seems then one very important conclusion to make in these final remarks: there is a need for contemporary liberal states to turn in the direction of minimally punitive regime, if they want to preserve the legitimacy of their justice and punishment systems. In order to achieve that as a society, us theorists are charged with the task of leading the way. Just like Cesare Beccaria centuries before us, we must keep scrutinizing the rotten parts of our systems and

[212] Norwegian Parliament, Innst. O. nr. 72 (2004-2005).

[213] First Step Alliance, 2022, §1

[214] Ibid, §4

[215] CNEL, 2023

come with new ideas for reforms that can push humanity forwards. This project has attempted to contribute to those efforts.

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