Justice and Prison

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Abstract
A theme that arises in the reflections presented in this short paper is the penitentiary legal system and the social justice system; the paper attempts to give answers to related issues through restorative justice.
Certainly, one of the brightest authors in contributing to this reflection on modern law in the early twentieth century is Max Weber. Even if his remarks are sometimes fragmentary, Weberian thought still manages to produce a representation of the logical and methodological categories of the legal system.
Further contributions, certainly more incisive in our current judicial and prison system, are attributable to the so-called legal and social prophets: Cesare Beccaria, Foucault, Bentham, etc.

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1. Justice and functions of the prison in the Roman law

Understanding the concept of justice in the evolution of the historical, legal, and social path that determined the status quo of the concept of imprisonment in Roman criminal law, and the evolution of the concept of punishment constitutes a debate in which philosophers, historians, jurists, and sociologists place themselves at the center.

Another obstacle is the alteration over time of the many factors that characterize the evolution of Roman law and, in this case, criminal law and repressive action.

These aspects, although being general, constitute only some of the problems that emerge when one approaches the study of the genesis, ideology, and praxis of prison in Roman law.

It becomes essential to ask, therefore, when the existence of the prison was established, what function it performed, what was the ratio through which the poena carceris was imposed, if it existed, and by whom, what its peculiarities, what function had the ductio in carceris had and what advantages had the use of the prison as an instrument of prevention and suppression of crime in Rome in the context of legal and social history.

Unfortunately, doubts of a theoretical and formal nature may also concern the architecture of the prison itself, the use of its environments, the spatial location, the figures in charge of controlling and administering the structures.

Specifically, if we attempt to anticipate some of the answers, it would mean possessing a series of findings and elements capable of revealing whether prison

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constituted a penalty modulated over time, as in modern penitentiary systems, if it were a tool to deprive the offender of personal freedom for committed offenses, or represented a place of custody of the offender, awaiting trial, or, finally, if the prison constituted the implementation of a particular order of coercito, arrest, or preventive detention, with the aim of ensuring reus to justice.

Even the simple analysis of the terminology used, such as for example the use of carcer et vincula.

Reading these words in the original sources, one is persuaded to ask oneself whether these words have both indifferently indicated the physical structure of prison, or whether they represented different methods of detention. Or, their use in the sources presents no differences, as both can be used as synonyms, where vincula would often be used instead of carcer, as synecdoche.

In this sense, the sources, both legal and historical, become an indispensable element on which to base one's study.

The following reflection does not intend to have the claim to arrive at a complete understanding of the functions and purposes of prison and imprisonment in the ancient Roman world but intends to constitute itself as a tool capable of ideas and possible insights.

For obvious reasons, it is excessive to draw a historical, social, and legal framework regarding the different uses of the prison in ancient Rome.

If prisons were used as punishment in a manner resembling that of the Athenians, it is certain that the Romans never had them except as a place of custody for the accused. It is sufficient to scan the whole book de poenis where, in the digests, there are death and retaliation and infamy and fines, and exile and deportation and bonds and condemnation to the mines, but never prison: the name "prison", which in the language of the Roman legislators is not generic, has the unique and exclusive meaning of a place for the custody of the incriminated, and as it is nowadays defined, preventive jail. It seems they used to arbitrarily condemn and sentence to prisons: but custom is not deeply rooted as follows from the famous law of Ulpian 8 dig. De poenis, 9 Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. Nam hujusmodi poenae interdictae sunt: carcer enim ad continendos homines, non ad puniendos haberi debet (Minghelli, 1852, p. 3).

In 1852, an essay entitled *Sulla riforma delle carceri e l'assistenza pubblica* (on the reform of prisons and public assistance) was published, by G. Minghelli, Inspector of prisons, from whose *Introduzione* we can make several observations.

It is a document in which the Author, in a few lines, summarizes the thought and, above all, the penal practice adopted by the Roman people in specific moments of the historical and social evolution in the field of criminal administration and, in particular, during the exercise of acts of coercion in the circumstances of criminal repression.

To try to reconstruct the existence of the prison, or the *poena carceris*, and its functions in Roman law, the background of legal and historical sources becomes an indispensable prerequisite.

In the sources, despite the use of the word carcer, followed by its various declensions, it is stated clearly enough to make an assertion that the use of the prison

sentence was largely unknown to the Roman criminal system or, more precisely, prison does not seem to have constituted a penalty modulated over time. This occurred because, in the Roman juridical experience, the deprivation of personal freedom, for a fixed period of time, or forever, did not require formal confinement in a closed place and, at the same time, *poena carceris* was not criminalized as a form of sanction or penalty.

In the course of legal and penal history, the Romans used other means to implement forms of limitation of personal freedom, materialized both in physical containment and in social and legal limitations and confinement. In this sense, the detention measures and, often, deprivation of personal freedom, could be other than prison, such as the employment of men in the same lautumiae, that is, stone quarries to which various criminally prosecuted subjects were sent. Furthermore, it is considered useful, in order to better understand this legal custom of the Roman people, to look and reflect on the meaning and value that these people have always attributed to the concept of libertas and on the need and obligation to punish if not in the interest of the Republic, then as a duty towards which state systems have inclined in the course of legal and social history.

Additionally, it is essential to specify that, in order to arrive at a draft on the genesis and use of prison in Roman law, it is not possible to ignore historical and legal studies, not only evaluating the use and presence of concepts such as carcer, but other terms such as vincula, custodia, as well as the various verbal constructions that have accompanied them, also trying to understand the value and meaning that penalties have had throughout the history of criminal law. Roman criminal law, according to the judgment given by Biondi (1957), does not seem to possess any autonomy in the complex legal system, «above all because of the lack of aptitude for systematics» (Biondi, 1957, p. 541) typical for Roman jurisprudence.

From the historical point of view, the first attempts to systematize or at least to arrive at a draft of systemized penalties, are found in advanced imperial times, when the jurists felt the need to devote reflections and attention to criminal matters; Callistrato wrote de cognitionibus, Venuleio and Modestino de poenis, significant and indicative works that attracted attention to criminal matters.

Certainly, the most concrete effort to organize the legal matter was represented by the work of Justinian, with the Corpus Iuris, where in the Codice, in Book IX, he created an important discourse on criminal matters is dedicated.

In the Digesti, Books LXVII and LXVIII deal with the various penalties, which for the content and the severity of the penalties are defined as “terrible books”.

According to Biondi, the history of Roman penal law lacked an organic and at the same time natural development, along with the institutions of private law, lacking a unitary character; in fact, given the specific sanctions for an offense, the Roman criminal system could be defined as bipartite.

Following Biondi, even the same notions of crime and punishment do not have a single concept. «Common element is the unlawfulness of the fact and the punitive function of the sanction; but a distinction is made between public and private and public and private penalties. The dualism […] can be traced back to the separation between ius pubblicum and ius privatum, between utilitas publicum and utilitas privata» (Biondi, 1957, p. 541).

Ferrini as well believes that the Roman punitive law, precisely because of its lack of cohesion, and historical documentary gaps, does not pose a considerable subject to be adequately elaborated from a scientific perspective unlike the study of public law (Ferrini,1976,p.76).

For G. Grosso, «primitive criminal law shows us, on the one hand, a more rooted and comprehensive action of religious and sacred elements, on the other hand, demonstrates the emergence of the distinction between the public and the private; hence the fundamental distinction in Roman law, between private and public crimes» (Grosso, 1965, p. 148).

2. **The current system of justice and prison: the Norwegian example**

In Italy, Art. 27 of the Constitution represents the direction, the orientation through which it is possible to build a model that interprets differently the meaning of punishment and imprisonment. In fact, the founding fathers, in constructing the Italian legal architecture, emphasized that penalties cannot be contrary to the ideas of humanity and must aim at the re-education of the condemned.

Dostoevsky, in 1821, in *Crime and Punishment*, wrote that *the degree of civilization of a society is measured by its prisons*. Analyzing the prison experiences of northern Europe, such as the case of the Norwegian prison in Halden, where murderers, rapists, pedophiles are incarcerated, and where Anders Behring Breivik[2], is also placed, it is notably obvious that prison conditions differ greatly when observed in relation to our model of penitentiary system; in fact, the Halden prison was called the most humane prison in the world.

In Norway, the murderers, rapists and all criminals who commit the worst atrocities end up here. Anders Behring Breivik, the Oslo bomber and Utoya killer, is no exception, destined for a 21-year "stay" in this prison. Halden Prison is a maximum security prison indeed, but a "five stars" prison. The building had already surprised the world when it was opened in 2010; its 252 cells are equipped with every comfort - ultra-flat TVs and private bathrooms for each inmate. And now, given that Breivik could be its next "guest", attention is being rekindled towards a prison where guards walk around unarmed and often eat side by side with the criminals they guard. Furthermore, half of the staff employed in the structure are women. A deliberate choice that is aimed to create a less aggressive atmosphere inside the prison. An article published in the British newspaper *The Telegraph* pointed out how the *soft* detention of Halden Prison, also defined by *Time Magazine* as "the most humane prison in the world", is paying off. In fact, only 20% of the criminals who were detained here return behind bars after release. Against about 50% that is registered in the US or England. Halden cost the Norwegian government over $ 200 million. An investment that led to the creation of a prison that looks like a residence, with contemporary art on the walls, a gym, and cooking workshops where the inmates take courses. «It was the most important thing when we thought of it - explained Hans Henrik Hoilund, one of the architects who designed it during the inauguration - to make sure that the prison resembled the outside world as much as possible».

[2] Responsible for the attack on the island of Utoya, where, in 2011, killed seventy-seven young people during a meeting.

As A.K. Nilsen, former director of *Bastoy Island Prison* also said, true justice is to respect prisoners: in this way we teach them to respect others. It is important that when they are released they are less likely to commit other crimes. Thus, a more just society is created (James, 2013)[3]. The reassuring data of the Norwegian treatment model concerns the recidivism rates which are below 20%, compared to the rest of Europe where recidivism rates reach over 70%.

The process of social reintegration, in my humble opinion, cannot be fully achieved without considering the emotional sphere of the prisoner, as well as without re-establishing those contacts with the family which he had, redesigning the affectivity that prison has inevitably compromised. A proposal for a courageous act, lodged on 4 November 2013[4], aims to reaffirm the right to affectivity and pushes for *the family environment of the condemned to be taken into consideration, especially by promoting detention in a place close to the family's home and promoting the organization of family and intimate visits in special rooms.* Undoubtedly, while considering that prison detention represents a form of necessary deprivation of personal freedom, it must not involve the deprivation of the dignity of the person – it is a fundamental principle.

3. Criminal mediation and restorative justice

The condition of the prison system and the Italian penal system is on the news every day. The crisis of justice creates a series of domino effects such as: too long lawsuits, difficulties in receiving compensation, scarce attractiveness to foreign investors who do not believe in our system, etc.

In brief, it is urgent to open a new season in which the path of social compensation must be redesigned, using a tool called criminal mediation. Most likely, taking the experience of other countries where this tool has been adopted for many years.

The process of introducing mediation in the US began in 1979 with Sanders, of Hardward University, who devised the theory, then applied it in practice, of the "multidoorhouse". According to the aforementioned theory, in order to prevent or resolve conflicts right before they start to grow, in each Court, before referring to the judge, the parties should act in the frames according to the theory.

Criminal mediation represents an operational technique, a device for the application and implementation of the paradigm of restorative justice. Restorative justice stands for, at the highest level of abstraction, a model of analysis and intervention on the crime, understood as the legal formalization of a specific micro-social conflict, characterized by the use of tools that promote reconciliation between the conflicting subjects (accused and accuser), the symbolic and/or material reparation of the negative consequences of the conflict, as well as the strengthening of the sense of collective security.

The crime is no longer considered as an offense committed against society in the abstract, or as behavior that breaks the established order - and which requires a penalty to be expiated - but as the emergent and legally relevant part of a more complex social relationship, which, in its deterioration due to the most varied factors, can cause

[3] Erwin James, Bastoy: The Norwegian prison that works, in "The Guardian", 4 septembre 2013. https://www.theguardian.com/society/2013/sep/04/bastoy-norwegian-prison-works

[4] Cfr. proposal for legislation n. 1762, born with the intention of modifying the previous law 26 July 1975, n. 354.

deprivation, suffering, physical pain and therefore it is necessary to activate forms of dialogue, reparation, and reconciliation linked to the specific situations and conflicts.

Some scholars see restorative justice as a paradigm of criminal justice: exactly alongside Retribution and Re-education. This understanding appears to be strongly reductive and misleading in many ways. Restorative justice is not criminal justice, it is another perspective of analysis and intervention, endowed with its own criteria of rationality. It has intertwined connections with criminal justice; however, they should not be confused.

In fact, restorative justice is not carried out through a process, it does not recognize the essentially crystallized roles of the law, first of all, it does not recognize punishment. On the contrary, it tries to overcome the logic of establishing truth, distinguishing between winners and losers, and punishment. The starting point is, first of all, the relative understanding of the criminal phenomenon, primarily intended as a legal expression of a conflict that causes a gap in common expectations.

Restorative Justice is therefore presents an innovative language for thinking about the crime and its consequences. It dialogically deconstructs the roles of the parties, which offers new words to think and conceptualize the conflict.

To put it metaphorically, Criminal Justice and Restorative Justice, or jurist and operator of the Restorative Justice, look in the same direction but see different things: on the one hand the crime on the other the conflict, on the one hand, the trial, the ascertainment of the truth, the allocation of responsibility, possibly punishment, on the other hand, the mediation process, the work of reconciliation, reparation.

4. The electronic bracelet and justice

Surely one tool that can or could provide a resolution to overcrowding of the prison population is the electronic bracelet.

In recent years, technology has allowed us to activate new ways of surveillance, in prison and outside, like a modern Benthamian Panopticon. The so-called continuous surveillance through video surveillance allows us to guarantee effective control for complete security.

Electronic surveillance shares with prison the effect that Foucault acknowledged to Bentham's Panopticon inducing a conscious state of being under surveillance in the prisoner that ensures the functioning of power (Foucault, 2014, p. 219). Today, forms of electronic surveillance (ES) require the subject to be held and monitored at a specific place at a specified time in execution of the sentence, using measures that include tracking movements using GPS satellite technology, only, in this case, monitoring is effective at all times of the day. In short, a person who is being monitored with an electronic bracelet is, in every sense, considered detained, even if he is not in jail.

Constitution of the Italian Republic, art. 27, c. 3 «The penalties cannot consist of treatments contrary to the ideals of humanity and must aim at the re-education of the condemned». However, this principle risks being disregarded due to the overcrowding condition that affects Italian prisons. The negative consequences on the life of prisoners posed by overcrowding include both the reduction of living spaces and less care that staff can dedicate to individuals.

Law 10 October 1986, n. 663 (Amendments to the law on the penitentiary system and the execution of measures that deprive or limit freedom).

The penalty of imprisonment is governed by art. 23 of the Criminal Code which, despite the modifications and additions that occurred subsequently, in its original formulation was approved on 19 October 1930, with Royal Decree no. 1398.

The Panopticon is, in fact, a figure of political technology that can and must detach itself from any specific use (Foucault, 2014, p. 224), therefore this model, brought back to its ideal form, can include all modalities of control, which go alongside traditional forms of imprisonment in prison. The sentence moves from a place created specifically to fulfill this function to the condemned person's home. The electronic bracelet adds the certainty of control to alternative measures to prison: every violation, even the slightest, is detected.

However, it is possible that only those who provide a certain degree of reliability will be admitted to alternative measures. The presence or absence of requirements for access to ES can then become an indicator of risk prediction in what has been defined by actuarial criminal policy 7, that is, a new model of social control based on measurable characteristics that produce a generalized intervention aimed at correlating deviant behavior - or viewed as such - is attributed to entire categories of people, regardless of individual behavior, and does not intervene through individual treatment designed for a person or to solve certain specific problem situations, finding collective solutions based on statistical data and aimed at efficiency and cost reduction. The focus is no longer on the individual, but on the category, the class of individuals to which he belongs. The risk assessment of committing crimes is carried out by means of a probabilistic calculation linked to the group to which they belong: foreigners, Roma, drug addicts (Santoro, 2004, p. 123).

The purpose of the sentence shifts from re-education for the social reintegration of the offender to the efficiency and economy of the system of social control. The effectiveness of criminal systems and policies does not take into account the convict's ability to re-socialize and re-socialize but is limited to measuring the level of security achieved by society as a whole in relation to the costs incurred. Consequently, prison management is increasingly based on statistically predetermined profiles (Santoro, 2004, p. 120).

In actuarial criminology, people are not considered, the social or individual circumstances of deviation are not studied. Instead of people, potentially dangerous circumstances are considered, which are recognized as such by calculating statistical correlations of several elements (Santoro, 2004, p. 127). We do not act on the causes of deviations but limit ourselves to preventing the commission of crimes by creating barriers that restrict the freedom of movement of subjects belonging to risk categories.

However, the shift in focus from the individual to the group increases the risk of making mistakes that can lead to discrimination. An overly safety-oriented intervention can create a bias towards certain categories, causing injustice to 'decent' people of the same category, while underestimating behavior that then actually manifests itself as criminal behavior makes the system ineffective (Santoro, 2004, p. 127).

For further information on actuarial penal policy, see De Giorgi (2003) and Santoro (2004, pp. 120-131).

A typical case is migrants without a residence permit. If convicted of any crime, the lack of a realistic prospect of integration into Italian society ends their detention to the point of mere containment, refusing any possibility of re-socialization and

increasing stigma against the entire category of foreigners, including those who meet immigration standards, legislation and comply with national laws.

The result of this transformation is that Italian prisons have been overcrowded for many years. According to surveys conducted on June 30, 2018, the number of inmates exceeded 68,000, while the prison capacity is just over 45,000. Some argue that new ones need to be built to improve prison conditions, while other sectors of the public, including many professionals, are pushing for legislation that has deflationary implications for the penitentiary system and also facilitates access to alternative measures of detention and control.

The overuse of detention is based on different considerations depending on the type of subject to which the restrictive measure applies. It is assumed that pre-trial detention in prison can only be imposed on defendants if other measures are not considered effective, but some have argued that this tool is being used beyond what is necessary. For those convicts who usually have access to alternative measures, certain subjective conditions associated with the type of crime committed or the social and family situation may prevent them from leaving prison early. As a result, in Italian prisons, many prisoners await final sentencing - defendants who are in a condition that should coincide with the presumption of innocence.

Due to the conditions of the prisons, the Italian government declared a "state of emergency" (DPCM on 13 January 2010) and, in order to deal with it, appointed the head of the Department of Penitentiary Administration "Commissioner for the Consequences of Prison Overcrowding" and instructed him prepare an action plan indicating when and how to build new prison infrastructure and reorganize, adapt and strengthen existing infrastructure. The European Court of Human Rights, by its ruling of 8 January 2013, convicted Italy of conditions of detention caused by overcrowding. The Italian state asked for a re-examination of the case in the Grand Chamber, but the appeal was dismissed, and on May 27, 2013, the judgment came into legal force. The court ordered Italy to find a solution within a year. Reaffirming the conviction of the European Court of Human Rights for the conditions in which prisoners live in Italian prisons requires an urgent review of the penitentiary system, both with regard to the use of preventive detention and methods of overturning the sentence, facilitating access to alternative measures to prison. On 5 June 2014, the Council of Europe recognized the progress made by the Italian government in tackling prison overcrowding, including through structural measures.

For example, a person sentenced to three years' imprisonment or a residual sentence of the same length may receive a suspended sentence for social service outside prison for a period equal to the sentence to be served under section 47 of the penitentiary system.

In addition, a large proportion of the population is held in custody for violations of immigration and drug laws.

It is likely that some of these people could be released from prison using an electronic bracelet. Given the prospect of a speedy return to full freedom, it can be assumed that, although they do not have the reliability characteristics that would enable them to be admitted to alternative measures to detention with traditional methods of control, they are not interested in leaving or participating in criminal behavior during the observation period.

An electronic bracelet is a control tool that can be used to facilitate the release of people from prison while maintaining a high level of surveillance. In this sense, it can also be used to release prisoners awaiting final sentencing from prison and allow them, even if they are subject to precautions, to go to their home or to another location designated by the judicial authority. Likewise, foreign prisoners who do not have a family network in Italy to welcome them out of prison could be admitted to a special institution with a limited risk of evasion.

The use of electronic control systems combines ideas that, since the 1960s, have protected prisoners' rights and promoted more humane punishment - in favor of access to alternative measures of detention - with a security policy based on a culture of control (Garland, 2004). The purpose of electronic monitoring is to achieve effective control over people deprived of their liberty outside the prison, while ensuring security for the community. ES promotes social reintegration by increasing the number of subjects admitted to alternative measures of detention, ensuring access to public sanctions even for those who, due to their individual characteristics, are considered less reliable or at risk of recidivism, such as foreigners with family or home links in our country or drug addicts. Several studies have shown that access to alternative measures to detention promotes social reintegration by significantly reducing the risk of relapse (Frudà, 2006; Leonardi, 2007).

Control procedures by electronic or other technical means are widely used internationally as an alternative to prison. In Europe, electronic tools are used to control persons subjected to the limitation of personal freedoms by the judicial authority in numerous countries with very different criminal systems, however in Italy, although there is an express provision of the law, up to December 2013 this happened only in rare cases.

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