The Punitive Metaphor: from 'Punishment Lost' to 'Punishment Found'?

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SUMMARY: 1. "Abolitionism" and "zero tolerance": in other words, ends do not meet. – 2. The critical merit of the abolitionist approach. – 3. The inherent unfairness of criminal systems and the perspective of "minimal criminal law". – 4. The "zero tolerance" approach: origin and objectives. – 5. Violence in criminal law and the tasks faced by criminal legal science.

1. At present, the international criminal legal science is still reaching inconsistent conclusions in its struggle to establish the true rationale behind criminal law: at the same time, the growing public request for justice[1] has – often unjustly – persuaded the legislator to rely on criminal remedies, in the reasonable belief that such a strategy can meet with society's approval, thus reinforcing its faith in the legal order.

In this context, the concepts of "abolitionism" and of "zero tolerance" have emerged as overly simplified, opposite slogans, both exposing the radical and extreme nature of their approach. In particular, if the key concepts of "abolitionism" lie in the "unfairness of criminal law systems", as well as in the "inhuman" and "ineffective" nature of criminal punishment, the "zero tolerance" approach is set apart by its distinctive criminal pragmatism, in addition to the evident repressive quality of its punitive structure.

Likewise, while the former approach identifies itself as the focal point of an extensive project of social regeneration, accomplished by denying

[1] On this matter, see the recent work by MARTINI C. M., ZAGREBELSKY G., (2003), *La domanda di giustizia*, Turin.

criminal law, the latter is in effect determined to do quite the opposite, specifically, to lay emphasis on what constitutes the fundamental purpose of criminal law: general deterrence. However, when promoting the said primary function, the "zero tolerance" strategy does not intend to assess which political-criminal objectives are worthy of legal pursuit, nor to consider the general causes from which crime universally originates.

Finally, while "abolitionism" represents a rather conceptual, if not an abstract approach, "zero tolerance" is instead based on a disenchanted and realistic vision, in favor of a strong, decisive and wide-ranging response to criminal behavior.

In view of this, the acute radicalism that defines each approach constitutes a serious obstacle, likely to frustrate every effort made to reduce the distance existing between supporters of each strategy. However, those who do not belong to either group can actually perceive the maximum reach achieved by the analysis of the "spiritual condition" in which the current criminal legal science is.[2]

Therefore, "abolitionism" and "zero tolerance" can be considered as coordinates, used to define the boundaries of criminal law as we are accustomed to think of it today: more specifically, as a progressively intricate and challenging phenomenon, as a consequence of its believed necessity and of the historical evidence of this marking trait, yet in constant need of critical scrutiny.

Finally, there is yet another important point to be made at this time. In view of the earlier line of reasoning, the resulting framework appears to be defined by the abolitionist approach, on one hand, and by the "zero tolerance" approach, on the other: clearly then, the said structure is described by two "strong" concepts that are deeply rooted in criminal law. More to the point, the entire punitive system seems to be formed by two different perceptions of the same *jus puniendi*, both of which are unconditionally persuaded of the fact that the purpose of criminal law can only be beneficial.

However, criminal legal science is in truth scattered with several, "weak" positions, pertaining to the purposes of criminal punishment, to criminal sentencing, even to the actual values that inspire the enforcement of a sanction: such weak definitions reveal many disillusioned, often

[2] This definition is taken from the title of the famous research completed by WÜRTEMBERGER T., (1959), *Die geistige Situation der deutschen Strafrechtswissenschaft*, Karlsruhe. Italian translation, *La situazione spirituale della scienza penalistica in Germania,* by LOSANO M. and GIUFFRIDA REPACI F., (1965), Milan.

skeptical opinions regarding the true effectiveness of criminal law, the existence of which has nonetheless been accepted as a stable condition of human history.

2. When tackling the matter of punishment legality, the viewpoint adopted by the abolitionist approach is certainly among the most advantageous.[3] This method requires the completion of two different stages. The first one consists of the review of current criminal legal orders (*rectius*: of every single criminal legal order, present and future). The second stage, instead, involves envisioning a society with no criminal law system. Now, while this latter stage of the approach possesses a strongly idealistic nature and can therefore be subject to criticism, the first step entails a strictly rational methodology, and thus can undergo rigorous scrutiny.

More specifically, the analytical examination of the criminal law system as performed by the abolitionist approach is indeed noteworthy, as it is neither groundless nor intrinsically incoherent. As held by many supporters of this theory, the actual way a specific criminal law system operates and functions reproduces and perpetuates the unfairness and inequalities existing in the very social order it derives from. Consequently, "abolitionism" condemns "oppressive criminal law systems", such as those typically in effect in totalitarian legal orders, as well as the punitive criminal law systems in force in most democratic orders, where criminal regulation further promotes the rejection of the most exposed and defenseless members of society. From this viewpoint, the abolitionists' critical analysis is impeccable: this argument is confirmed by taking a quick glance at the current jail population, mostly made up of social outcasts, driven by society-caused neediness to become a new, profitable category of "criminal unskilled workers" (a significant example of this

[3] On the matter, consider HULSMAN L., BERNAT DE CELIS J., (1982), *Peines perdues. Le système pénal en question,* Paris, Italian translation, *Pene perdute. Il sistema penale messo in discussione*, Paderno Dugnano, 2001; HULSMAN L., (1983), "Abolire il sistema penale?", interview reported by *Dei delitti e delle pene*, p. 71 and foll.. Also see MATHIESEN T., (1974), *The Politics of Abolition*, Oslo, as well as CHRISTIE N., (1981), *Limits to Pain*, Oxford, Italian translation by G. URZÌ, (1985), *Abolire la pena? Il paradosso del sistema penale*, Turin; SCHEERER S., (1984), "Die abolitionistiche Perspektive", in *Kriminologisches Journal*, p. 91 and foll. More recently, see the introductions by ZAFFARONI E.R., (1989), in *En busca de las penas perdidas. Delegitimación y dogmatica juridico-penal*, Buenos Aires, Italian translation *Alla ricerca delle pene perdute. Delegittimazione e dogmatica giuridico-penale,* Napoli, 1994.

phenomenon is represented by the vast presence among prisoners of illegal aliens devoted to widespread criminal behavior, such as drug-dealing). Likewise, it is difficult to deny that in many, modern European countries prisons serve as control system for the urgent social adjustment of underprivileged individuals.

Similarly, it is difficult to disagree with the abolitionist opinion questioning the true rehabilitation effectiveness of custodial sentence, given that such purpose is often frustrated by the inadequacy of correctional facilities, as well as being frequently sacrificed (by the legislator o by procedure) in the name of the principle of certainty of punishment. However, although such criticism can be easily answered seeing that it merely concerns solvable flaws of the criminal system, there is yet another, stronger argument: this refers to the inhuman nature of imprisonment, as it is likely to cause unforeseen and inestimable suffering and harm,[4] in addition to being completely ineffective in the pursuit of criminal rehabilitation.

The Italian legal experience represents a significant example of this problem. The struggle against organized crime – which was terrorist in nature during the '70s, but mafia-linked in the 80's – broadened the application of the "new" penitentiary law, amended in 1975, by introducing measures providing for differentiated prison treatment (the so-called "tough detention"). These innovative remedies were aimed at isolating those convicts, who, merely on account of their association with criminal organizations, were regarded as being 'dangerous' inside, but mostly outside, of the correctional facility. However, the opinion according to which 'dangerous offenders' can be managed by simply establishing so-called 'maximum security penitentiaries' in which to lock them up, has now lost most of its supporters. In fact, the current, common interpretation of the amended penitentiary law allows for the suspension of ordinary custodial treatment rules: this occurs whenever said rules "can in practice conflict with safety and order requirements" (art. 41bis of the penitentiary law).[5] Despite this, even those legal commentators showing greater awareness towards the recognition of the basic rights of convicts have

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4 On the matter, see LÜDERSSEN K. , (1999), "L'irrazionale nel diritto penale", in *Logos dell'essere, logos della norma*, edited by LOMBARDI VALLAURI L. , Bari, p. 1551.

5 The abovementioned article 41-bis was introduced in the penitentiary law as temporary rule by Law 7 August, 1992, No. 356. Once the law was confirmed, the legislator accorded legal "stability" to the rule, making it effective by way of Law 23 December 2002, No. 279.

eventually acknowledged this amendment, which significantly increases the (already considerable) afflicting and limiting nature of imprisonment, thus restricting the fundamental rights of prisoners, such as the right to socialize within the correctional facility and the right to freely communicate with the outside world.

If, according to "classic" criminal law, criminals are to be found mostly among lower class individuals, however, it cannot be reasonably claimed that the same law shows greater consideration for high-class citizens. Albeit such assumption may be partially true – as affluent individuals are rarely sentenced to prison – it is a matter of fact that, at present, criminal provisions are increasingly affecting political matters, specifically by punishing economic crime connected with political misconduct. Therefore, it is essential to examine the changes occurred in the link between criminal law's repressive function and current political activity, as the latter has a tendency to influence all legislative production, hence criminal law as well. In fact, it is common for the mere opening of an investigation (especially whenever it is associated with the humiliation of preventive detention) to have a severe rebounding effect within political forces. Not to mention the role presently played by precautionary measures (such as the pre-judgment attachment or precautionary seizure of objects used for the committal of a crime, so as to avoid the aggravation of the committed crime's negative effects or else, to deter from the committal of other offenses). The above-mentioned precautionary remedies are really not essential for the carrying out of criminal proceedings: instead, they are increasingly employed in the fight against (alleged) crime, or even more, they are used to manage unquestionably dangerous activities (for example, economic crimes, environmental crimes, crimes committed in violation of safety regulations, etc.). The most obvious example of this modern trend is represented by the increased importance assumed by criminal proceedings: in fact, procedure is no longer merely instrumental to substantive criminal law, given that it has proven its greater ability to "stand out" in the media's representation of punitive authority.

3. This brief overview should provide adequate evidence for an indisputable abolitionist assumption: namely, that criminal law possesses an intrinsic, and thus unavoidable, degree of violence and, to some extent, of unfairness. Actually, even those legal commentators who criticize the incontestable nature of the abolitionist approach have, nonetheless, upheld such claim. In fact, they support a considerable limitation in the use of criminal remedies, especially of imprisonment, which should be applied

only when strictly necessary. This opinion is firmly defended by legal commentators advocating the so-called "minimal criminal law",[6] a punitive legal system that resorts to other, alternative dispute resolution remedies. Accordingly, a new project has been submitted and recently experimented in Italy: it is aimed at promoting an extensive decriminalization of minor offences, while strengthening administrative penalties. However, the greatest improvement concerning possible alternatives to traditional criminal law remedies has been represented by the introduction of criminal mediation techniques,[7] and specifically, of the attempt at reconciliation of parties involved in a crime. With specific reference to the Italian criminal jurisdiction, such remedy has been employed in cases heard by the newly introduced 'criminal justice of peace': as part of the reform, the legislator defined the judge's competence to proceed against (typically) minor offences, as well as petty crimes committed among individuals (for example, words of abuse, battery and some minor crimes against property). And in fact, clause 4 of Article 29, introduced by Legislative Decree 28 August 2000, No. 274 on the "criminal justice of peace", calls for a mandatory judicial attempt at reconciliation of the parties in crime, by awarding damages or by means of compensatory measures. Additionally, while defining the criminal penalties available to the new judge, the amended law eventually crossed out the possibility of enforcing custodial sentences.[8] At last, even the Italian criminal law system finally experienced the first, tangible broadening of its range of primary sanctions: this has resulted in the application of penalties that are neither custodial nor pecuniary in nature, even if the offence amounts to a serious crime. Only

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[6] Above all, see FERRAJOLI L. , (2002), *Diritto e ragione: teoria del garantismo*, Bari, p. 325, and also see "Quattro proposte di riforma delle pene" in *Il sistema sanzionatorio penale e le alternative di tutela*, Quaderni di "Questione Giustizia", edited by BORRÈ G. and PALOMBARINI G. , Milan, p. 38 and foll. Also, refer to BARATTA A., (1986), "Principi del diritto penale minimo. Per una teoria dei diritti umani come oggetti e limiti della legge penale", in *Il diritto penale minimo. La questione criminale tra riduzionismo e abolizionismo*, edited by BARATTA A., Naples, p. 443 and foll.

[7] Many legal writers have contributed to this subject. Limiting our reference to the Italian school of thought only, consult EUSEBI L., (1997), "Dibattiti sulle teorie della pena e "mediazione", in *Riv. It. dir. proc. pen.*, p. 811 and foll., for further bibliography as well.

[8] On this matter, refer to GIUNTA F., (2001), "La giurisdizione penale di pace. Profili di diritto sostanziale", in *Studium Iuris*, p. 3950 and foll.; "Le sanzioni", in *La competenza penale del giudice di pace*, edited by GIOSTRA G. and ILLUMINATI G. , (2001), Turin, p. 403 and foll.

time will tell if enforcing a 'weekend house arrest' as punishment for serious crimes (for example, in case of grievous negligent personal injury) will adequately lessen the distance between the possibility of using dispute resolution remedies as an alternative to imprisonment, and the hope for tangible crime deterrence.

4. In the last few years, while most European legislators amended their criminal laws to include alternative remedies to imprisonment – even if such innovative policy did not interfere with the application of traditional criminal law – the U.S. administration strongly recommended a progressive move towards "zero tolerance". Such a shift necessarily represents the celebration of a legal order based on the enforcement of criminal law, thus compelling state action and conferring maximum priority to the protection of personal safety, specifically construed to suggest physical security.[9] The main objective is to defeat urban crime, and particularly, juvenile delinquency, in order to encourage greater social peace and respect: ultimately, the key-target is to defeat street crime. It would be inappropriate and deeply shortsighted to believe that this approach is founded on the Republicans' neo-liberalist beliefs, given that if, on the one hand, they demand less governmental interference in social policies, on the other, they do not oppose letting the police loose on the streets to repress petty crime. Without doubt, the success of the "zero tolerance" slogan derives from the massive panic attack that hit the American society, and last of all Europe, once they faced crime. Hence, this is the major concern: criminal legal theory is currently experiencing somewhat of an "anti-secularization" process, at the risk of annulling centuries of emancipation brought on by the age of Enlightenment in its struggle against the supremacy of imposed morals.

However, the key-issue is not that a criminal regulation traditionally based on reason is now succumbing to rules grounded on impulsiveness and repressive impatience, but mostly it concerns the explanation that has been given for such a change. According to an opinion, the "zero tolerance" approach belongs more to political oratory, as it virtually represents a modern sub-culture or a widely held belief: at this point, it has indeed ceased to constitute a specific, criminal law policy.[10] Consequently, the

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[9] See WACQUANT L. ,(2000), *Les prisons de la misère*, Italian translation *Parola d'ordine: tolleranza zero. La trasformazione dello stato penale nella società neoliberale*, Milan, p. 12 and foll.

[10] Refer to DE GIORGI A. , (2000), *Zero tolleranza. Strategie e pratiche della società di controllo,* Rome, p. 105.

"zero tolerance" tactic cannot be considered as a fully comprehensive expression of the traditional tasks faced by criminal law. Indeed, what makes criminal law different from private revenge or sheer State-approved violence is the fact that all punishment is rationally, and legally, justified. The development of modern criminal law is defined by the introduction of restrictions on the right to punish, introduced as (substantial and procedural) guarantees, but initially, as critical review of the circumstances that allow the determination of criminal behavior. Whenever a criminal system fails to acknowledge the causes of the crime it is expected to punish and, most of all, it neglects to promote a parallel social policy aimed at preventing criminal behavior, then such system is not only bound to broaden the standard of social injustice, but its many efforts to deter crime are likely to result ineffective.

5. At this point of the essay, it should be clear that the "zero tolerance" vision of crime punishment is completely opposite from that defining the abolitionist approach. More precisely, while the former supports active punitive action without political-criminal validation, the latter defends the need for restrictions on the right to punish, despite the fact that such approach leads to an unrealistic and ineffectual procedural policy. These arguments have ultimately given good reason to the opinion that, if "zero tolerance" cannot be included in criminal legal science, similarly, abolitionism amounts to nothing more than a noble and evocative, yet abstract vision. Then again, it would be futile to reply that even criminal law, with its many failures, embodies a similar vision, although its nature is not always as noble. Taking into consideration the shortcomings possessed by the abolitionist approach (it does not offer reasonable remedies for the resolution of social conflicts) and the criminal law system (it casually expects to solve all social strife resorting to punishment alone), the key difference is represented by the constant role that criminal law has played all through human history.

This argument is compelling, not because it justifies the consideration of criminal law and its intrinsic unfairness as an inevitable reality, but because, setting aside all unachievable dreams, criminal law helps to bring together useful, yet possible progress. However, it is correct to believe that such area of law will continue to be an indefinite science, given that the grounds for its validation will always be rooted on weak, empirical data requiring (if at all possible) criminological corroboration.

However, keeping a realistic and disenchanted point of view, the truth of the matter is that criminal law, or law as a whole, is the result of political relations: the authority of law, that is to say, legitimate power, cannot be

separated from violence, as violence is founded on power.[11] Consequently, given it's an expression of power, criminal law is intrinsically legitimate. As a result, criminal legal science holds an important responsibility: it must work together with (positive) criminal law – intended as mere expression of power – so as to moderate its innate brutality, ineffectiveness and unfairness. The ammunition offered for this desperate fight is now well-known: while on the one hand, all substantive and procedural guarantees must be upheld, in addition to the fundamental rights of prisoners, on the other, every criminal provision must be subject to strict, rational scrutiny. Modern criminal law continues to move along this path and designates the road to follow in the future, never failing to acknowledge the contaminated nature of the punishment "found".

RÉSUMÉ

Abolitionnisme et "tolérance zéro" résonnent comme autant de slogans aux significations opposées, mais unis par la radicalité du programme scandé par chacun d'eux. Si "injustice des systèmes pénaux", "inhumanité de la peine" et "inutilité de la punition" sont les principaux mots clés de l'"abolitionnisme", un pragmatisme punitif à matrice résolument répressive est à la base de la perspective de la "tolérance zéro". L'extrémisme opposé qui caractérise les deux approches rend pratiquement impossible toute tentative de communication entre les partisans de l'une ou de l'autre de ces approches. Ce qui n'empêche nullement ceux qui n'adhèrent à aucune de ces deux approches de voir dans chacune d'elles les frontières extrêmes d'une réflexion sur la "situation spirituelle" actuelle de la science pénale. Dans cette perspective, le juriste d'aujourd'hui doit se mesurer au problème de la légitimation du droit pénal (et notamment de la peine de détention), pleinement conscient de l'imperfection et de la brutalité de cet instrument mais, tout autant, de sa nécessité.

[11] See DERRIDA J., (1992), *Deconstruction and the Possibility of Justice*, New York, London. Italian translation, *Forza di legge. Il "fondamento mistico dell'autorità"*, edited by GARRITANO F., (2003), Turin.

RESUMEN

"Abolicionismo" y "tolerancia cero" suenan como eslóganes de significado opuesto, pero tienen en común la naturaleza radical de los programas que cada uno propone. Si las principales "palabras clave" del "abolicionismo" son "injusticia de los sistemas penales", "inhumanidad de la pena" e "inutilidad del castigo", la perspectiva "tolerancia cero" se fundamenta en un pragmatismo punitivo de carácter fuertemente represivo. La índole extremista que caracteriza a estas dos posiciones opuestas hace que cualquier intento de comunicación entre sus respectivos sostenedores sea prácticamente imposible. Ello no impide, sin embargo, que quienes no se identifican ni con la una ni con la otra vean en ellas la expresión más extremada de una reflexión sobre la "situación espiritual" actual de la ciencia penal. En esta perspectiva, el jurista hoy se ve obligado a afrontar el problema de la legitimación del derecho penal (y en particular de la pena de prisión), siendo plenamente consciente de que se trata de un instrumento imperfecto y brutal, pero al mismo tiempo necesario.