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The present book has been translated into English by Prof. Adrian Bedford

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The right of a state to punish by death

A case of the political contamination
of the science of penal legislation

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ISBN 978-88-548-5439-0

I edition: October 2012

To Professor Vincenzo Patalano
and all the Italian criminal lawyers
who have struggled against the death penalty

Setting up a statue to Beccaria is equivalent to abolishing the scaffold.
If, once set up, the scaffold came up from the ground, the
statue would go back into it

*(*Victor Hugo, *1865)*[1]

The grateful Nation raises a Monument to Cesare Beccaria,
to the first who dared to ask lawmakers and peoples to abolish
bloody torture, in forceful and heeded words.

*(*Pasquale Stanislao Mancini, *1871)*[2]

1. An extract from the letter sent by Victor Hugo on 4th March 1865 in thanks for being nominated as a component of the commission called upon to examine and approve the project for a statue dedicated to the memory of Cesare Beccaria to be set up in Milan.

2. This is the opening of the speech by Pasquale Stanislao Mancini *Given upon invitation of the committee at the solemn inauguration of the monument to Cesare Beccaria* in Milan on March 19th 1871.

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Introduction

The death penalty is a subject usually considered to belong to the field of criminal justice alone; a field which considers it necessary to include the death penalty among the punishments available within a given legal system, with the sole purpose of conferring adequate effectiveness and greater firmness to the punitive response. And yet we are still seeking to understand the reasons for, and the degree of, this punitive response, as Eugen Wiesnet says: for millennia men have been punishing one another - and for millennia they have been wondering why they do it.[1]

The question is, in my opinion, open to a possibly different reading, which not only links the aspect of the justification of one type of sanction to the scenario of penal legislation, but projects it onto the broader sphere of the relationship between the powers of the modern State and the fundamental rights of the citizens, and especially the rights that the State is called to exercise in relation to the citizens and the constraints impinging on the State because of the constitutional rights these citizens enjoy.[2]

In reality, capital punishment can not only provide the opportunity to look again at the conception of punishment that leads a legislator at a given moment in history to envisage it as the culmination of a punitive system, but also to re-examine the logic that can lead to it

1. E. Wiesnet, *Die verratene Versohnung: zum Verhaltnis von Christentum und Strafe* (Dusseldorf: Patmos, 1980).

2. P. S. Mancini, "therefore, I will not seek to understand whether the inviolability of human life should be proclaimed as an absolute principle; or whether society has the right to take away that which it cannot create nor render, that it to say, the gift of life reserved to the Creator as is the arcane mystery of death; I shall not ask whether the human personality can be reduced from end to means; nor whether the life of a man may legitimately be extinguished in any other case than that of the current and necessary defence of the self, to conclude that the whole of society in no wise can ever find itself in such circumstances before a delinquent now harmless and powerless to threaten it with extreme and awful danger" (*Per l'abolizione della pena di morte: discorsi del deputato Mancini pronunciati alla Camera dei deputati nelle tornate del 24 e 25 febbraio e 13 marzo 1865*, Turin: Botta, 1865, p. 3).

being considered the prerogative of a State to use it to affirm its own sovereignty and to be able to safeguard society from crime.

In ancient literature the right to punish was grafted onto the stratified basis of a variety of justifications centred on the "bond of obedience" that a citizen owed to the organisation of the State to which he belonged.[3] The evolution of the relationship between the State and the citizen changes in exactly the same way as the changes in the social and economic order, and with them the need to provide, preventively and constantly, new rules of behaviour to adopt, and as a precaution, new definitions of criminal acts and new forms of punishment.[4]

Radical change in the punitive relationship therefore becomes the new focal point in the theoretical debate on the death penalty, because time and the new balance of power have altered the importance of individual subjective positions, and the State today does not hold a position of pre-eminence over the person. In fact, the human being is presented as the bearer of new rights and new powers in a way totally unknown in the past. In order to create a new and modern balance in the relationship between State and citizens, it is necessary to turn to the established fundamental values and constitutional rights, which are the means for solving conflicts between concurrent rights.

Today, reparation of a wrong through the satisfaction of the archaic "blood debt" comes up against the fundamental values and human rights covered by the Conventions, at State and supranational level, which, being inviolable and constitutive, tolerate neither abuse nor temporary suppression.[5]

The need that organised States have to defend this prerogative certainly constitutes one of the reasons justifying recourse to the death penalty. It remains however to be considered under which conditions the concurrent rights which tend to go against the death penalty or which make it useless or inopportune are to be considered relevant.

3. P. Ellero, *Delle origini storiche del diritto di punire. Prelezione all'Università di Bologna nel novembre 1861* (Bologna: Stab.Tip. G. Monti, 1862).

4. P. Ellero, "the restraining effect which religious and moral beliefs have on human passions would be insufficient to guarantee the peaceful coexistence of men in the absence of laws" (*Della pena capitale*, Venezia: Forni, 1858; repr. Pordenone: Forni, 2007, p. 3).

5. L. Ferrajoli, "Thus, the philosophical basis for the death penalty is an absolute rock, which identifies with the very ethical and political basis of law and the State and, in general, civil co-existence" (*Principia juris. Teoria del diritto e della democrazia. 2. Teoria della democrazia*, Rome-Bari: Laterza, 2007, p. 324).

In this way, the free and arbitrary exercise of power is surrogated by a legitimate right to punish, whose degree of importance is sanctioned by a specific limit, consisting in the right of one who, despite violating criminal law, must face sanctions which are, however, able to guarantee the full respect of his/her fundamental rights.

A study cannot, then, limit itself to examining only the purpose of the penalty, but must involve the rules that govern the legitimate faculty to resort to this form of punishment, to analyse and compare the reasons that justify recourse to the death penalty, considering it the free exercise of a legitimate faculty, and the arguments, on the other hand, that reject it.

If the paradigm is represented by the requirements of the justification of having death as a form of punishment, naturally the discussion of the issue legitimately draws on tradition. If, however, the paradigm changes and the object of the investigation becomes that of legitimating the State to *exercise the right to punish by death*, the principle of the validity of juridical reasoning changes. It will not be a question of simply considering the congruity of the foundations of the death penalty with the criteria legitimating the ultimate purpose of the criminal justice system as a whole, but of assessing under which conditions, and in accordance with which concurrent rights and duties, the State can make recourse to the exercise of a faculty which comes within the overall framework of State powers and which, in particular, is characterised by the right to punish.[6] And the right to punish, it may appear paradoxical, in contemporary legal culture is fully complementary to the right to adopt provisions of clemency, which means giving up the exercise of punitive power as a compensatory expedient in the criminal justice system, or as a different form of the right to punish that emphasises the aspect of the social integration of the offender rather than that of definitive afflictiveness.[7]

It is perhaps time to examine again from the exegetic point of view the statement - which at the time appeared cryptic - used by Manzini in his main work: "The question of the death penalty is in the nature

6. G. Vassalli, *La potestà punitiva* (Turin: Utet, 1942).

7. On this subject see the extensive investigation carried out by V. Maiello, *Clemenza e sistema penale. Amnistia e indulto dall'indulgentia principis all'idea dello scopo* (Naples: ESI, 2007).

of criminal justice policy, and not philosophy, and still less that of criminal 'law'".[8]

8. V. Manzini, *Trattato di diritto penale italiano* (Turin: Utet, 1934), vol. III, p. 55.

Chapter I

A necessary observation on methodology

A modern view of the rule of law must focus on the issue of the nature and value of the category of the fundamental rights and duties that link the citizen to the State he or she belongs to.[1]

In the complex network of the system of rights the problematic and current question arises of whether a State can dispose of the life of its citizens when crimes of such gravity and ferocity have been committed as to deserve no less than the death of the offender. It is natural, however, that only if the right to life is considered alienable can it become the object of such radical criminal policy. It very often happens that in the name of substantive justice there is a clash between the principles informing the system, so, even when the right to life is considered absolutely inalienable as far as the holder of this right is concerned, it may be violated by the State.

Ultimately, a State based on the rule of law can be justified ontologically by a systematic order of principles and rules based on the coherence of the values which it expressly recognises as fundamental.[2] When the State is formally defined by its law, i.e. the legitimation of legal categories guaranteeing the equal treatment of citizens, values must be considered either alienable or inalienable to the same degree, in order to avoid even a single departure giving rise to others,

1. N. Luhmann, *Politische Planung* (Opladen: Westdeutscher Verlag), 1978; P. Costa and D. Zolo (eds), *Lo Stato di diritto. Storia, teoria, critica* (Milan: Feltrinelli, 2003). On the evolutionary aspects of the rule of law and, above all, on the relationships of contiguity between law and right, see E. Forsthoff (ed.), *Rechtstaat im wandel* (Stuttgart: W. Kohlhammer, 1964); P. Cavara, *La civiltà del delitto. Il liberalismo della pena di morte* (Naples: ESI, 2002), p. 23.

2. It has been sustained that modern natural law has been wholly replaced by the idea of the Rule of Law which, in reality, manifests itself as the rule of the rights of citizenship. For all the relevant legal and political implications, where the centre of the new framework of the system is parliamentary representation, see J. Habermas, *Faktizitat und Geltung. Beitrage zur Diskurstheorie des Recht und des demokratischen Rechtsstaats* (Suhrkamp: Frankfurt am Main, 1992).

thus causing irreparable damage to the integrity of the very value of uniformity and coherence upon which the system is based.

There is, however, no coherence when it is deemed that life may sometimes be alienable if it is a matter for the State to decide and absolutely inalienable if it is the person who enjoys human rights who makes the decision (see the cases of Welby and of Englaro). In fact precisely the hypothesis of the impossibility of the right holder giving up the right to his/her own life, as in the case of euthanasia where the consenting party may be charged with murder, highlights even more the importance of the values at stake, which are particularly high up in the hierarchy, like the dignity of the human person and human solidarity. In this way, intangibility and inviolability prevent life, along with the other rights on a similar level, being considered different according to the circumstances a right holder finds him/her-self in.[3]

The above example provides the reasonable demonstration that it is precisely within this conceptual incoherence that the justification of the death penalty lurks, and paradoxically, within a State founded on the law and rights.[4]

1.1. Guidelines for an epistemological investigation

The relationship between the State's right to punish and the theme of death is certainly ancient and it is essentially based on the categorical necessity to guarantee civil co-existence, preventing individuals from taking justice into their own hands. On this point, Mario Sbriccoli affirmed that "The history of 'criminal law' can be thought of as

3. On the subject of the alienable nature of rights and especially on their limits, or their alienability insofar as they are connected to the constituent pact and so to the same fundamental principles of living in a modern community, see the broader picture presented by G. Resta, 'La disponibilità dei diritti fondamentali e i limiti della dignità', *Riv. di Dir. civ.*, VI, 2 (2002), 801. The subject of human dignity will be addressed specifically later on. Cf. also L. Ferrajoli, *Principia juris. Teoria del diritto e della democrazia. 1. Teoria del diritto*, p. 762.

4. For a clearly authoritarian definition of the exercise of rights (imposed, not negotiated) by a State, cf. F. D'Alessio, 'Lo Stato fascista come stato di diritto', in Various Authors, *Scritti giuridici in onore di Santi Romano* (Padua: Cedam, 1940), vol. I, pp. 495-524.

the long history of a move away from vengeance".[5] There was in fact a moment in history when the link that bound the avenger and the injured party was broken, because the dichotomy comporting the duty of the injured party to obtain satisfaction for the wrong suffered gave way to a true right in the name of justice.[6] This happens because the State assumes among its basic functions that of governing criminal policy, thus opening up to a new and different form of social control: "City governments felt that criminal justice was a decisive means of government and that there was no sense in leaving it to the initiative of the victims alone".[7] So every organised human co-existence must be able to count on adequate dissuasive measures and on forms of punishment that guarantee and re-establish the balance of the objective right that has been violated.[8] These are the reasons why "criminal and punitive policies are oriented towards one purpose. They use the law, and chiefly the criminal law, as a means to an end.

5. For this work I have considered it interesting to follow both the content and the model of analysis developed by Sbriccoli. My intent is to reflect on a possible different systematic view of the issue of capital punishment, where the idea of its purpose seems to prevail: M. Sbriccoli, 'Giustizia criminale', in M. Fioravanti (ed.), *Lo Stato moderno in Europa. Istituzioni e diritto* (Rome-Bari: Laterza, 2007), pp. 163-205. The fascination that this subject holds is so strong that the words of G. Bettiol appear prophetic: "every scholar of criminal law at some point in his career finds himself addressing the problem (fundamental to our discipline) of the death penalty, still allowed in many, perhaps too many, countries despite opposition not only from the academic and political communities, but also from a large part of public opinion" ('Sulla pena di morte', *Riv. it. Dir. e proc. pen.*, 3, 1967, 751).

6. On this and on the opposing sides, with the need for vengeance on the one hand and the rights of the injured party on the other, see Antonio Rosmini and all the associated theoretical discussion: cf. F. Grispigni, 'Il diritto di punire nel pensiero di Antonio Rosmini e Raffaele Garofalo', *Riv. dir. penitenziario* (1940); U. Spirito, *Storia del diritto penale italiano da Cesare Beccaria ai nostri giorni* (Milan: Sansoni, 1954), p. 85.

7. M. Sbriccoli, 'Giustizia criminale', p. 167; G. D. Pisapia, 'Il problema della pena di morte e la sua attualità', in *Studi in onore di Biagio Petrocelli*, vol. III (Milan: Giuffrè, 1972). There is a fairly extensive literature, especially from the UK and the USA, on the concept of social control, recognising that the social role of punishment has diverse characteristics. In other words, social control also includes the social role of punishment or the role of the penalty (although not only these), cf. S. Cohen, *Visions of Social Control: Crime and Classification* (Cambridge: Polity Press, 1985).

8. V. Mathieu, *Perché punire. Il collasso della giustizia penale* (Macerata: Liberilibri, 2008), p. 188; P. Nuvolone, 'Le sanzioni criminali nel pensiero di Enrico Ferri e nel momento storico attuale', *Riv. it. dir. pen.* (1957), 3; L. Eusebi, *La funzione della pena: il commiato da Kant e da Hegel* (Milan: Giuffrè, 1989); L. Monaco, *Prospettive dell'idea dello "scopo" nella teoria della pena* (Naples: Jovene, 1984); M. Ronco, *Il problema della pena. Alcuni profili relativi allo sviluppo della riflessione sulla pena* (Turin: Giappichelli, 1996).

This end is always to 'protect' (mainly legal goods), but it is not necessarily or only an end concerning justice. Criminal law is, in fact, also used as an instrument to fight for the defence and harmony of society".[9]

This passage becomes the focal point of the new vision of the State monopoly on the rights of the citizens and private vengeance, with all its most cruel nuances, which history has accrued over the centuries, giving way to punishment devised by an organised human community in a political community (that is, a community organised as a 'polis').[10] In this way the *lex talionis* constitutes the first point of transition from a situation of personal will, even if expressed by a *clan*,[11] to a phase in which punishment was organised in accordance with rational characteristics and aims, inspired by an orientation towards a model of *punitive symmetry* making up the true point of transition in the direction of a retributional aim (or "just deserts" as the English

9. As stated significantly by M. Donini, "Criminal policy is a broader concept than that of punishment: it focuses on prevention, neutralising or also reducing the causes and the occasions of criminality, but also its consequences. It therefore includes all the instruments, legal (of all branches of the legal systems) and otherwise, i.e., social, political, economic, moral, etc., oriented to that purpose. All the institutions are involved, individual private associations and the citizens as individuals. It is therefore not limited to the State or only to some of its organs (also the judiciary, and not only the politicians who implement it). The repressive aspect of criminal law, however, is only one component of criminal policy: it is limited to 'criminal' policy (punitive-criminal), which represents only one part of criminal justice, and its government is the exclusive duty of Parliament" ('Il diritto penale di fronte al "nemico"', *Cass. pen.*, 2, 2006, 735- 77, 735); cf. also M. Bellabarba, "in reality, the education of communal Italian society also means an education towards vengeance" (*La giustizia nell'Italia moderna*, Rome-Bari: Laterza, 2008, p. 103).

10. M. Sbriccoli: "It is postulated that the main wrong is not that suffered by the victim, but that inflicted on public order, and thus on society, of which politics or power declare themselves representatives and guarantors, as there is the intention to punish the least resistance to the monopoly, claimed in the same way, on the legitimate use of force" ('"Storia del diritto italiano": articolazioni disciplinari vecchie e nuove', 1993, now in *Storia del diritto penale e della giustizia*, Milan: Giuffrè, 2009, vol. II, p. 1184); cf. also E. Cantarella, *Uccidere per punire: come e perché, ieri e oggi*, Introduction to V. Hugo, *Contro la pena di morte* (Milan: Mondadori, 2009).

11. M. Sbriccoli: "In a framework characterised by the clash between the interests of private individuals and families, or between the 'general' good and 'other' goods, justice was in the same way accomplished through vengeance or reprisals, by transaction or peace, and only as a last resort, or in the absence of anything else, by punishment" ('"Vidi communiter observari": l'emersione di un ordine penale pubblico nelle città italiane del secolo XIII', 1997, now in *Storia del diritto penale e della giustizia*, Milan: Giuffrè, 2009, vol. I, p. 96).

say).[12] It should be added, if only to give the lie to a meaningless preconception, that it is clearly possible to distinguish between the concept of retribution and that of vengeance, because in the latter there is a *disproportion* between the wrong committed and the degree of punishment.[13] A canonical example of resorting to vengeance, or at any rate the asymmetrical application of a punishment, is to be found in the *Code of Hammurabi*. The text of the ancient stele, in fact, is deeply iniquitous since, depending on the social class of the offender, different criteria of attribution were applied in the relationship between the gravity of the offence and the nature and degree of the penalty inflicted.

In effect, the vendetta reiterates the question of unreasonable reprisal after a wrong has been suffered: "vengeance is automatic, vengeance is an exaggeration, vengeance is inhuman".[14] The retribution of the *lex talionis* calls to mind a well defined principle of correlation between compensatory measures - ill-conceived, and ill-rooted also in the traditions of jurisprudence in ancient law.[15] Chapter 21 of *Exodus* states that if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand due to hand, foot for foot, wound for wound, bruise for bruise.[16] In this way the hostility once shown by the

12. As W. I. Miller observes, according to the Biblical formulation, the talion places at the centre of everything, and before all things, the body, life, eyes, hands, the teeth of a man - as a measure of absolute value (*Eye for an Eye*, Cambridge: Cambridge University Press, 2006).

13. As E. Bloch observes, clearly one answers a blow with a blow. Punishment is vengeance; that is how it began, all the rest came later or became a pretext: an eye for an eye, a tooth for a tooth, better yet if there is a supplement - a rogue takes them as a rogue and a half (*Naturrecht und menschliche Wurde*, Frankfurt am Maine: Suhrkamp, 1961).

14. A. Moro, *Lezioni di Istituzioni di diritto e procedura penale*, collected and written by Francesco Tritto (Bari: Cacucci, 2005), p. 115.

15. The different values of the two concepts are once again clearly distinguished by G. Bettiol: "A wrong idea of the problem is perpetuated when one states that with the notion of retribution the foundations or the reasoning for the penalty itself are established in terms of vengeance. Vengeance is the expression of a reaction by the injured party - often disproportionate to the offence - whereby a phenomenon is presented and interpreted in purely individualistic and subjective terms, a phenomenon which is of a social and therefore collective nature, which cannot thus be left to the will of the individual. Vengeance externalises a phenomenon of terrible desire where reason should prevail in order to avoid *bellum omnium contra omnes*" ('Punti fermi in tema di pena retributiva', in *Scritti giuridici in onore di Alfredo De Marsico*, ed. by Prof. Giovanni Leone, Milan: Giuffrè, 1960, vol. I, p. 57).

16. *The Bible*, *Exodus*, ch. 21, 23-25, emphasises the symmetrical relationship between

criminal towards the family of the victim, making him an "enemy" to be eliminated, is transformed into the hostility that the criminal bears against organised society and that makes him, in his turn, an "enemy" to be eliminated.[17] In a new guise, the crime assumes the destabilising dimension of an "act of war": the original penalty, as an indirect extrinsication of the instinct to preserve society, must have a social nature right from the start - that is, it must present itself as a reaction by society to actions which are directly harmful to it. As the so-called *bellum omnium against omnes* has only existed in the unhistorical speculation of the past, likewise has private vengeance with no social element never existed.[18] It is necessary, therefore, to intervene in order to preserve order and to make sure that the cultural instances of "defence of society" arise from the objective *need* to defend the

the harm caused and the punishment inflicted. The choices regarding punitive symmetry do not only concern the repressive aspect, but sometimes also preventive punitive action, as in the case of the passage in St Mark's Gospel (9.43-48) which states that: "if thy hand offend thee, cut it off: it is better for thee to enter into life maimed, than having two hands to go into hell, into the fire that never shall be quenched: Where their worm dieth not, and the fire is not quenched. And if thy if thy foot offend thee, cut it off: it is better for thee to enter halt into life, than having two feet to be cast into hell, into the fire that never shall be quenched: Where their worm dieth not, and the fire is not quenched. And if thine eye offend thee, pluck it out: it is better for thee to enter into the kingdom of God with one eye, than having two eyes to be cast into hell fire: Where their worm dieth not, and the fire is not quenched" (from *King James Bible*).

17. According to F. Resta, one can "identify a dual track, enemy/citizen, that reproduces and transforms, reiterates and withdraws at the same time, the political code of the friend/enemy" ('Nemici e criminali. Le logiche del controllo', *L'Indice penale*, I, 2006, 181-227, 181). M. Donini observes that, "according to this binary logic, there are no nuances between enemy and friend, or between the citizen and the enemy; they are categories incapable of communicating, with irreconcilable logic: one of dialogue and the other of war; one respecting all the fundamental and political rights, the other not. The criminal law of the enemy, thus, should be limited to the phenomena where, in reality, the perpetrator of the crime is only considered as an enemy to be fought: so, to exclude this label every time, it is not possible to say (or admit) that the State operates with the mere purpose of neutralisation, combat or annihilation" ('Il diritto penale di fronte al "nemico"', *Cass. pen.*, 2 (2006), 735-77, 736).

18. In practice, reaction by a state legal order is precisely the "purpose" that criminal law pursues, in part affirming itself as an instrument regulating the relationships between members, but above all as that part of law that studies the prohibited act and the most suitable form of punishment. The aim and purpose of punishment have been ably clarified by F. von Liszt. As Liszt points out, a focused reaction by society is influenced in fact by the clear vision of the meaning that the crime has for the existing groups of individuals - the family, tribal society, the State (*Der Zweckgedanke im Strafrecht*, Berlin: J. Guttenberg, 1905).

general public from unjustifiable aggression.[19] The contractualistic elements that link the citizen to the State also dictate, in an essentially preventative way, the need to defend oneself: according to Rousseau, the death penalty inflicted on criminals may be considered in more or less the same way: in order not to become the victim of a murderer, we accept that we can die if we become one. In the social contract, he adds, far from disposing of one's own life, we think solely of guaranteeing it and it cannot be presumed that any of the participants is already thinking of "being hanged".[20]

The death penalty certainly belongs to that broad range of actions where the extreme cruelty of the crime committed, the death of an innocent citizen, merits the death of the killer as its punishment in the name of a rigid canon of compensatory justice produced by a state of need that cannot be addressed otherwise.[21]

Nevertheless, this point of view is quickly rejected in favour of an economically feasible solution. In fact, pecuniary penalties representing the means to extinguish obligations due for killing a man were replaced by corporal punishment to be carried out in public, certainly of greater value as an example but at the same time able to guarantee a satisfactory discharge of the obligation.[22] In economic terms, history

19. G. Rusche - O. Kircheimer, *Punishment and Social Structure* (New York: Russel & Russel, 1968); M. Ancel, *La défense sociale nouvelle* (Cujas: Paris, 1954). In Italy, cf. P. Nuvolone, 'Il principio di legalità e il principio di difesa sociale', *Scuola positiva* (1956), 237-48; A. Baratta, 'Criminologia liberale e ideologia della difesa sociale', *La Questione criminale*, 1 (1975), 7.

20. J. J. Rousseau, *Du contrat social, ou principes du droit politique* (1762), ed. J. M. Fataud and M. C. Bartholy (Paris: Bibliothèque Bordas, 1972), bk II.

21. L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (Rome-Bari: Laterza, 2008, p. 382ff.), where the original penalty is not defined by a chronological date, but by the form and cases and the ways in which it is applied. Cf. also G. Todeschini, *Visibilmente crudeli. Malviventi, persone sospette e gente qualunque dal Medioevo all'età moderna* (Bologna: Il Mulino, 2007, p. 26ff.); A. Zorzi, 'La pena di morte in Italia nel Tardo Medioevo', *Clio & Crimen*, 4 (2007), p. 47.

22. D. Tafani: "The principle of retribution therefore carries out the function, in Kantian criminal doctrine, of determining whom to punish and when, while a specific principle of retribution, *jus talionis*, establishes the quality and quantity of penalties" ('Kant e il diritto di punire', *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Milan: Giuffrè, 2000, p. 69); therefore, "the talion principle [...] establishes the degree of the penalty, but cannot, according to Kant, constitute its justification: lying to someone who has lied to us, for example, treating him as he has treated us, is intrinsically wrong, and the retributive nature of such an action cannot make it less wrong" ('Kant e il diritto di punire',

has left various conversion tables for the injured parts of the body to be compensated for by paying out sums of money, whose degree represented the consideration corresponding to the gravity of the offence. In mediaeval Germany, the *Wiedergeld* was a compensatory mechanism that imposed "the indemnity that the offender had to pay the injured party or his family to prevent feuding; repairing the damage, and also including a share due to the sovereign for the breach of the peace (also known as *Wehr-geld*, war money)".[23] But equally interesting is the system of compensation set up by the English King Aethelbert who reigned over Kent from 590 to 616, with the adoption of ninety different laws making it possible to establish the sum in shillings that the offender had to pay the injured party or his family if he had caused him some injury, ranging from a bruise (*3 shillings*) to breaking a bone (*20 shillings*).[24]

The exercise of the right of a State to punish originates from a sense of justice meant to guarantee a double-purpose intervention: to punish the person responsible and to stop those close to the injured party taking vengeance. It is also true that in modern law, State justice is practised only as a form of implementation of positive law, whose criteria of stability and the predetermination of the prescriptive law to be observed guarantee uniform application of the regulations and ensure equal treatment of all those who commit the same wrong action.[25] But at the same time the application of the death penalty must be the reasoned and guaranteed result of an investigation into the prohibited act and the responsibility of the one who committed it, otherwise it would only create worry, and that sense of justice called upon to prevent acts of vengeance would be crushed under resentment against a State which does not intervene to respect justice,

p. 72).

23. Apposite and rich references to the theme may be found in S. Aleo, *Diritto penale. Parte generale* (Padua: Cedam, 2008), p. 6ff.

24. For more details, cf. Miller, *Eye for an Eye*. On close examination, modern civil law also makes use of a similar compensation table when it is necessary to assess compensation for damage in the case of material damage to the person. Also in this case the retributive canon is called upon to solve questions regarding amounts between different material entities, because also in modern law, as in the past, this is the only way to compensate for a tort.

25. F. von Liszt, *Der Zweckgedanke im Strafrecht*.

in the ideal sense, or positive law.[26]

The death penalty, furthermore, has a highly symbolic value, in the same way that the symbols of justice and the force of law evoke the strong image of the established order of the relationships between members of society and, with them, the best guarantee of maintaining the compactness of an organised community.[27] From the emotional and personal angle, feelings towards the death penalty rightly draw on the anthropological aspect of the issue and deeply affect the personal and collective life of the human community. Biagio Petrocelli observed that

> the exaggerations and degeneration of the impulse to vengeance and the reaction that rightly developed against them with the development of civilisation have meant that little by little, in our conscience, a unilateral and limited view of vengeance has become more deeply rooted, restricting the meaning almost exclusively to exaggerated and uncontrolled acts, and leaving in the shadows its deep and primitive core and with it the human need which is in no way inferior.[28]

26. The weak point of legislation allowing capital punishment such as that of many of the United States of America, consists in the adversarial criminal procedure for crimes punishable by death. This will be discussed later, even if it may be appropriate to refer now to a document produced in 2009 by renowned US jurists, who, after careful assessment of laws and competence, affirm the substantial failure of the punitive system envisaging the death penalty. See the *Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty* (15 April 2009), in www.ali.org.

27. M. Sbriccoli, 'La benda della giustizia. Iconografia, diritto e leggi penali dal Medioevo all'Età moderna', in *Ordo juris. Storia e forme dell'esperienza giuridica* (Milan: Giuffrè, 2003, p. 43); A. Prosperi, *Giustizia bendata. Percorsi storici di un'immagine* (Turin: Einaudi, 2008). The blindfold of Justice and 'blindness' in judging - or impartiality between the parties - is the best iconographic representation of human justice, which aims to apply the law using the mighty sword, which will fall upon one of those taking part in the trial.

28. B. Petrocelli, 'La funzione della pena', in *Saggi di diritto penale* (Padua: Cedam, 1952), p. 90. Cf. also P. D'Ercole, *La pena di morte e la sua abolizione dichiarata teoricamente e storicamente secondo la filosofia hegeliana* (Pavia: Hoepli, 1875). After a decided personal change of heart on this difficult issue, G. Carmignani, *Una lezione accademica sulla pena di morte detta nell'Università di Pisa il 18 marzo 1836* (Pisa: Tip. Nistri, 1836).

1.2. The *damnatio* of the cultural transversality of the question of capital punishment

And yet the sinister fascination aroused by the death penalty is the true reason why it is impossible to situate in a methodologically appreciable way all the elements which establish the need for it and all the reasons for not using it.

With the passing of the centuries, more and more justifications have been added. Thus, reducing the different circumstances to a question of rationality always leads to addressing the vast conceptual corollaries of the subject in an excessively analytical, and perhaps unhelpfully overabundant, way.[29] This naturally ongoing process has led to the issue of capital punishment as a punishment being discussed across the board. All disciplines have amply taken up and investigated the utility of resorting to the death penalty as a possible form of punishment.[30] The strong emotional connotation that accompanies the 'expiry' of the convict's existence has found fertile terrain in narrative literature addressing the question of the death penalty.[31] It is no surprise then that in the criminal law of all eras, there have been many arguments in favour of abolitionism, thus leading to the proliferation of arguments against the death penalty.[32]

29. It is difficult not to agree with Bobbio when, in the first footnote of his 'Il dibattito attuale sulla pena di morte', he states that "The literature on the death penalty is vast, but repetitive" (N. Bobbio, *L'età dei diritti* (Turin: Einaudi, 1990), p. 201. Cf. also A. Danese, *Non uccidere Caino. Scenari e problemi della pena di morte, con scritti vari* (Milan: Ed. Paoline, 2002). On the justifications debated during the drafting of Alfredo Rocco's Penal Code, where restoration of the penalty was considered necessary, cf. A. Casalinuovo, *Il problema della pena di morte*, with a preface by E. Carnevale (Catanzaro: Brusia, 1935), p. 95ff. Some years before, there had been another attempt to show the complete view of the arguments for and against the death penalty in a systematic and exhaustive way in the work by P. Rossi, *La pena di morte e la sua critica* (Genoa: Libreria Mario Bozzi, 1932). See also O. Viola, *Bibliografia italiana della pena di morte* (Catania: Preminto, 1904).

30. On the scenario where philosophical and legal issues have overlapped, leading to a literary treatment of the subject of justice, punishment and death, cf. F. Ost, *Reconter la loi. Aux sorces de l'imaginaire juridique* (Paris: Jacob, 2004); F. Amarelli and F. Lucrezi (eds), *Il processo contro Gesù* (Naples: Jovene, 1999).

31. Key examples are V. Hugo, *Le dernier jour d'un condamné* (1829; Paris: E. Michaud, 1843); A. Camus, *Réflexions sur la guillotine*, ed. by Calmann-Lévy (Paris: Gallimard, 1972); C. Duff, *A Handbook on Hanging* (New York, NY: The New York Review of Books, 1948); L. Sciascia, *Porte aperte* (Milan: Adelphi, 1987).

32. P. Ellero, *Della pena capitale*, p. 23ff; P. Ellero, 'Programma', *Giornale per l'abolizione*

In public opinion, in fact, the issue of death is treated as one of the possible forms which criminal sanctions may take, being often influenced by cultural aspects which derive from considerations beyond the legal sphere. The culturally transversal nature of the subject also determines conceptual transversality, so the contamination of disciplinary areas distracts from the centrality of the legal nature of the institutionalisation of death as a punishment.

These are fundamentally the reasons why the abuse of the question in other disciplines has greatly undermined the essence of its legal basis, turning the categorical imperative of retributive justice into "thou shalt not kill", without however explaining why it is not right - or fair - to resort to death as an extreme form of punishment.[33] The method ascertaining the legitimacy and validity of a choice today strongly feels the effect of non-legal elements, each of which has a basis in dialectic, but none of which can justify a choice in favour of abolitionism able to show once and for all the unsuitability of such a measure as part of the normative fabric of a modern State.[34]

The gap between *justice* and *law* has decidedly widened and - in line with the complex nature of the issue - so have the interpretations, especially between logics based on an ethical/moral approach, or natural law and grounds which, on the contrary, are the fruit of a markedly pragmatic spirit.[35]

The truth is that in the field of criminal law there is no theoretical elaboration convincingly pinpointing the grounds for justifying the death penalty in a coherent legal system, other than the first and sterile observations that arose in a social context which is not yet fully struc-

della pena di morte 1 (1861), 7-8; I. Mereu, *La morte come pena. Saggio sulla violenza legale* (Rome: Donzelli (1982), 2007); G. Marinucci, 'La pena di morte', *Riv. it. dir. e proc. pen.* (2009), p. 3.

33. M. J. De Larra, "once the convict has been informed of [...] the sentence and last vengeance that the whole of society exercises over him in an unequal fight, the wretch is led to the chapel, where religion takes possession of him as a now certain prey; divine justice is there waiting to receive him from the hands of earthly justice" ('Los barateros , o el desafio y la pena de muerte', in *El Espanol. Diario de las doctrinas y de los intereses sociales*, n. 171, 19 April 1836).

34. Interesting observations on the international legislative premises on the abolitionist side are provided by S. Annibale, 'La pena di morte nei rapporti internazionali posti in essere dagli Stati', *Riv. pen.*, 12 (2005), 1295-1302.

35. On the close relationships between positive law and justice, see G. Zagrebelsky,' Introduzione', in R. Alexy, *Concetto e validità del diritto* (Turin: Einaudi, 2004), p. VIII.

tured in its complexity or organised on a legislative basis. On closer examination, ultimately, the reasons proposed are all characterised by needs actually dictated by contingent circumstances or as the result of legitimate but unmotivated emotional reactions. It is no exaggeration to state that society's needs for laws justifying capital punishment are not uniform and that they are in any case insufficient to justify the punitive basis of the death penalty.

In reality, the justification currently given for abolitionism in a number of countries is represented by one specific legislative limit imposed by criminal justice legislation: the fact of not considering it one of the possible punishments, regardless of all the possible grounds leading the legislator to accept it as an option.[36] It is also necessary to recognise that in the end *the only true limit to the admissibility of the death penalty is positive law, legal prescription* and not the 'supreme value' of justice, in whose name, on the other hand, death would continue its punitive course solely because of its apparent utility: "In a scenario as serious and concrete as that of punishment, trying to work out a 'theory' may perhaps seem useless. What need is there, in fact, to formulate a theory when the meaning of punishment is evident, and when criminal systems must face above all problems of a practical nature? Why resort to interpretation when anyone can recognise the aim of the punishment and its contingent defects?"[37] This is presumably why art. 27 of the Italian Constitution has been a safeguard against past and future solicitations in the form of the necessary defence from a threat to security in the face of new and

36. For a description of the way the death penalty has been excluded from legislation, see G. Salcuni, 'Il cammino verso l'abolizione della pena di morte', *L'indice penale* (2009), p. 7.

37. This concept represents the essence of all the American literature on the theory of punitive systems. Quite unlike J. Waldron, 'Lex talionis', *Arizona Law Review* (1992), p. 28, who insists on the need to recognise a theoretical basis to justify "punitive justice", W. I. Miller sustains that although this may be true for punitive systems disciplined by the rule of law, he does not understand the reason why those who desire that a wrong be punished must build and justify a complete theory of the punishability of acts. He also adds that - given the way most human societies have organised themselves in order to establish norms of co-existence - it should be those who are against it who should provide greater explanation (*Eye for an Eye*). Obviously, the same standpoint colours the view of American jurists, who express similar scepticism on the superfluity of a theoretical conception of punishment (cf. D. Garland, *Punishment and Modern Society: A Study in Social Theory*, Chicago: The University of Chicago Press, 1990).

modern forms of hostile acts.[38] However, experience shows that what power aims to achieve with the death penalty is security, even though it does not really manage to do so, but rather finds something else it was not looking for.[39]

On the other hand, it is necessary to recognise that a legal prohibition of constitutional rank coexists with rules belonging to ordinary legislation which treats life like any other human right, to the point that it can come into conflict with other constitutional rights albeit with a different value. The concept of the inalienable right to life cannot but take into consideration the fact that there are criminal circumstances such as the "state of need" envisaged under art. 54 of the penal code, which holds the life of a third party as bound to come out worse in a comparative assessment, and even a superficial reading seems to attribute disposable character to life. The same may be said for justifications in the name of "legitimate defence" in art. 52 of the penal code. Nevertheless, we must point out that in these cases life is placed at the centre of a utilitarian dynamic only because the other element of comparison is the life of another person. But this does not imply the existence of the unmotivated disposability of such an important good for the legal system or that it leads to the comparison of unequal goods; or that it comes out worse in comparison with goods of a lower rank, which by their nature are fully disposable. Quite the opposite, it has been confirmed that the existence of the above-mentioned crime of 'homicide of the consenting party', situated in the same area of reasoning, places a solid and insurmountable barrier to the disposability of the good of life, excluding the faculty to dispose of it also by the one who requested to be killed. This strengthens the concept that even the hypothesis of its justification safeguards life in the same way as the law that prohibits murder directly imposes its protection.

In reality, in the Italian legislative tradition, the Constitution has given a particular normative level to the protection of life also in the punishments set out in the criminal code.[40] The choice expressed in

38. G. Fiandaca, *Art. 27, III comma Cost.*, in *Commentario della Costituzione* (Bologna: Zanichelli, 1989), p. 346; F. Schiaffo, 'La necessità di un omicidio: l'ordinamento italiano verso l'abolizione totale della pena di morte', *Critica del diritto*, 2-3 (1999), 224-60.

39. F. Guizot, *Des conspirations et de la justice politique*.

40. R. Canosa, 'La pena di morte in Italia: una rassegna storica', *Critica del diritto*, 25-26

the 1889 Zanardelli Code eliminated capital punishment[41] according to criteria guided by indulgent political choices after the emergency regulations set up in the wake of the Unification of Italy.[42] With the Republican Constitution, however, Parliament lost for ever the power to reintroduce the death penalty through ordinary legislation, as this option belongs to the constitutional basis of the Republic, making up part of the constitutional pact.

Article 27, with its lapidary fourth paragraph "The death penalty is not allowed" has, in the past, also provided an efficacious barrier to the acknowledgement of the legitimacy of the capital punishment in other legal orders connected with our legislative system through extradition. Since this fundamental decision was taken, the Italian Constitutional Court has always denied the extradition of foreigners who had committed crimes punishable by death in their home countries.[43]

(1982), 29-43.

41. The discussion followed the lines of the various penal codes used in the pre-unification States, some of which allowed, while others had abolished, capital punishment. On this, cf. G. Pisanelli, *Sulla pena di morte (1848)* (Lecce: del Grifo, 1990).

42. P. S. Mancini, *Primo congresso giuridico italiano in Roma. Relazione sulla tesi I. Abolizione della pena di morte e proposta di una scala penale* (Rome: Tipografia Fratelli Pallotta, 1872), p. VIII. This was the emergency legislation still in force in the southern provinces for around three years, which envisaged the death penalty inflicted by Special Military Courts. The first Congress voted unanimously for the following resolution: "The Congress of Italian Jurists expresses the wish that the abolition of the death penalty, which for many years has been in place in a part of Italy, be extended to the whole of Italy; and that the new Italian Criminal Code effectively guarantee order and safety in society without recourse to blood punishments for crimes punished therein. It orders the Commission to make this desire known in the form of a petition to the Parliament at a time it shall consider appropriate; at the same time continuing its Studies on the Criminal Code to be referred to the future Congress". The political factor weighs once again in a particularly significant way in M. Sbriccoli: "The unification of criminal law, after the failure of the first attempts in part due to the post-unification emergency, did not seem imminent. It was delayed, furthermore, by some unresolved issues (first and foremost that of whether to maintain the death penalty or not) which showed once again [...] how the choices concerning criminal law were tied up with political ones and concerned sensitive questions on the relationship between power and society" ('La penalistica civile. Teorie e ideologie del diritto penale nell'Italia unita' (1990), now in *Storia del diritto penale e della giustizia*, Milan: Giuffrè, 2009, t. I, p. 511).

43. Corte Cost. (Constitutional Court),' Sent. n. 54 of 27 June 1979', *Riv. it. dir e proc . pen.*, 1 (1980), 216-28, with a note by Guido Salvini: "The Royal Decree of 30 June 1870, nr. 5726, relating to the extradition between Italy and France of criminals is constitutionally illegitimate, in the part where it makes extradition possible for crimes punishable by death in the legal systems of the applicant State, due to violation of Arts. 3, paragraphs I and 27, paragraph IV. Cost." A case which has recently been the subject of legal and scientific debate

In this way, positive law has affirmed a principle of *constitutional legality* hierarchically higher and more significant than that of ordinary legality sanctioned by article 1 of the Italian Penal Code that was traditionally called upon to regulate the application of the law in a liberal age. This is a source of law high enough to link the canvas of fundamental constitutional values inextricably to the value of life itself, which passes implicitly through the prohibition of the use of death as a punishment, and which cannot but be considered a *supraconstitutional* principle. To add further prescriptive force to the prohibition of the death penalty, the Constitution has invoked the principle of "human dignity" which animates all constitutional paradigms referring to respect for the person, in its different social and personal manifestations (like for example in the case of enforcement of the sentence).[44]

is one involving an Italian citizen, Pietro Venezia, charged with murder in Florida and sheltering in this country. It all stems from Corte Cost. (Constitutional Court)„ 'Sentence nr 223 of 27 June 1996', in www.cortecostituzionale.it. Cf. also V. Del Tufo, *Estradizione e reato politico* (Naples: Jovene, 1985); M. Pisani, 'Pena di morte ed estradizione nel Trattato Italia-USA: il caso Venezia', *Indice pen.*, 3 (1996), 671-87; F. Schiaffo, 'Una sentenza storica in materia di estradizione e pena di morte', *Riv .it. dir. e proc. pen.*, 4 (1996), p. 1126-40.

44. In article 1 of the Constitution of the Federal Republic of Germany of 23 May 1949, the first paragraph affirms solemnly and explicitly that "Human dignity shall be inviolable. To respect and protect it shall be the duty of every State authority". The same German doctrine underlines that "dignity" must be considered a principle value above other rights of constitutional rank, precisely because of the "untouchable nature" of dignity, even more significant than the concept of inviolability, a superior value in itself. In this way, any attempt to reintroduce the death penalty into the German penal system will come into evident conflict with the concept of human dignity. On this, see C. Amirante, *La dignità dell'uomo nella Costituzione di Bonn e nella Costituzione italiana* (Milan: Giuffrè, 1971).

Chapter II

The turning point represented by the concept of the *dignity* of the person

From the state of "reification" to the concept of "personification" of the "servus poenae"

The expression "servus poenae" was used in the ancient sources of law to mean a person tainted with crime who bore a debt towards the system of justice of his social community.[1] The debt was an obligation which could only be extinguished through the concrete enforcement of the sentence inflicted by the judge: "for this very reason, the need to react against wrongdoing, in the end, being one of the fundamental needs of human life, is one the areas of needs which social organisation, even in its earliest stages, tended to assume and control for itself".[2]

In reality, the subjective title of "servus" indicated a precise category of relationships between the owner of rights over the subject and the slave, who was considered neither more nor less than a thing or a good. A marked change of cultural perspective came about when persons became endowed with "human dignity".[3] The concept of

1. G. G. Heinecke, "The servus poenae. The lex Porcia established that Roman citizens could not be beaten with rods, nor undergo the death penalty to which they had been condemned [...]. On account of this eminent prerogative of Roman citizens arose the fiction whereby those condemned to death became slaves" (*Lo studio del diritto romano ovvero le Instituta e le Pandette*, ed. by N. Comerci, Naples: Stabilimento letterario tipografico dell'Ateneo, 1830, 3 vols, vol. I, p. 139).

2. B. Petrocelli, 'La funzione della pena', p. 95.

3. F. Bartolomei, *La dignità umana come concetto e come valore costituzionale* (Turin: Giappichelli, 1987); L. Ferrajoli, *Principia juris. Teoria del diritto e della democrazia. 1. Teoria del diritto*, p. 791. On the constitutional concept of the 'dignity' of the human person, the German Constitutional Court repeatedly returned to this subject, focusing on the

dignity represents the intrinsic limit to the consideration of man as a thing and at the same time the selection criterion to prevent human persons from undergoing measures adversely affecting their dignity.[4] Also a State exercising the right to inflict a punishment that limits freedom must reckon with more suitable ways to stop punitive measures injuring the inviolability of the moral heritage of man in terms of his absolute value. It is no mere chance that the slave enjoyed no rights nor possessed goods, so his only value was represented by his body, and it was precisely over the body that disputes arose which made it possible to consider that value a possible object of the transaction of goods.[5] In reality, the affirmation of absolute value that the human person takes on serves to undermine the relationship with the State which sees him solely as an element subordinated to the arbitrary choices of the system.

According to Francesco Carrara, the principle of "conservation", thanks to which "the power to kill" is denied, becomes limited when death becomes necessary to prevent others from being killed. For this reason "when the real need to defend other people does not require such a sacrifice", the principle of natural "conservation" comes back to the fore and the death of a man cannot be permissible.[6] What

fact that dignity is a conceptual container for the profile of the person from different perspectives, such as from the right to health to the rights of prisoners in prison. Of particular importance among the latest rulings see Constitutional Court, 'Sent. Nr 293 of 17 July 2000', in http://www.cortecostituzionale.it/. For the concept of the dignity of the person in relation to punishment, see M. A. Cattaneo, *Pena, diritto e dignità umana. Saggio sulla filosofia del diritto penale* (Turin: Giappichelli, 1990).

4. For the concept of 'human dignity' which began to take root in the eighteenth century, in relation to the notion of equality, from which it already appeared clearly distinct, see R. Sennet, *The Fall of Public Man* (New York: Knopf, 1978). For further perspectives on this complex question, cf. also R. Sennet and J. Cobb, *The Hidden Injuries of Class* (New York: Knopf, 1972), p. 251ff.

5. It was no coincidence that slaves lost their lives for crimes that cost a free man 45 'soldi' (e. g. a small amount of money), as mentioned in P. Del Giudice, *La vendetta nel diritto longobardo* (Hoepli: Milan, 1876).

6. F. Carrara, *Programma del corso di diritto criminale* (Lucca: Tip. Giusti, 1874), p. 431. Giuseppe Bettiol's criticism of this hypothesis is well known: "Carrara himself - while being a liberal - when he wants to show the illegitimacy of the death penalty does not appeal to the political principles of liberalism, but resorts to the strange hypothesis of the conservative character of the laws of nature which shows the effect of the scientific climate the great jurists worked in" (G. Bettiol, 'Sulle massime pene: morte ed ergastolo', *Riv. it. dir. e proc. pen.*, 1 (1956), 555-66; now in *Scritti giuridici*, Padua: Cedam, vol. II, 1966, p. 889).

the criterion to verify the relationship between defence and sacrifice is remains in the shadow of an affirmation of great symbolic value. What is important, however, is to have ascertained that at the root of the infliction of this punishment there is an inescapable *relationship between a punishable act and its punishment*. Only in this way is the criterion of proportion between the gravity of the wrong and the punishment respected, together with the requirement of uniformity between the elements that lead to the sentence.

The sentence must be passed in relation to the offence committed and not the person. From this derives the confirmation that the "servus poenae" is a person and not a "good" or "res" and, thus, the apportionment of the punishment must be related to the "person's" assets (his/her freedom and the possibility to act freely), the rights he/she enjoys, in terms of correspondence between goods of the same nature, and not the elements constituting the person, i. e. his/her body and life.[7] Basically, the cardinal concept of "defence of society" is the idea that tends to consider the person as a means and not an end: "The person has value only insofar as he is part of the system and is of value only to the system. From this point of view the idea of the defence of society leads to the negation of the concept of the 'person' as a synonym of 'responsible individuality', insofar as he is 'free'".[8] However, there can be real danger from the point of view of the defence of society, i. e., the incapacitation of probable criminals due to such a strong need to prevent crime as to affect a person who is only potentially dangerous and not one who is held responsible for disrupting social co-existence: "a person is eliminated by virtue of the danger he poses, not the things that he has done, but the things he can do in future".[9]

Immanuel Kant had already warned from considering the person merely as a means or a thing to be used to serve a purpose, which,

Cf. also D. Pulitanò, 'Ergastolo e pena di morte: le *massime pene* tra referendum e riforma', *Democrazia e diritto*, 1-2 (1981), 155-71.

7. On the sacredness of life and the impossibility of sacrificing it, see G. Agamben, *Homo sacer. Il potere sovrano e la nuda vita* (Turin: Einaudi, 2005), especially p. 119ff.

8. G. Bettiol, 'Sulle massime pene: morte ed ergastolo', p. 884.

9. M. Sbriccoli, 'La piccola criminalità e la criminalità dei poveri nelle riforme settecentesche del diritto e della legislazione penale' (1980), now in *Storia del diritto penale e della giustizia* (Milan: Giuffrè, 2009) vol. I, p. 412.

albeit apparently useful for society, led to the exploitation of the individual. In fact, he observed that man, and in general every rational being, exists as an end in all his actions (whether they concern himself or other rational beings), not merely as a means to be used arbitrarily by this or that will - for all these reasons, he argued, man should always be regarded as *an end in himself*.[10]

In this sense, the theory of punishment is enriched by a further value profile, as it does not represent only the legal limit of the punitive intervention of the State, but also constitutes the limit to such a punitive act.[11] *The ability to punish thus bears in itself the limit of the degree of possible action*, so that the act committed is punished and not the person who committed it as an example to society, with a punishment so severe and exemplary as to dissuade all other potential offenders.

Only preventive theories of punishment can really consolidate the concept that punishment is addressed to the person for the act committed, corresponding perfectly to its gravity, with the purpose of dissuading the person responsible and discouraging the same conduct in others.[12]

10. I. Kant, *Grundlegung zur Metaphysik der Sitten* (1786), ed. by P. Menzer (text by the "Akademie Ausgabe", Berlin: Hrgb. Vonder Koniglich Preubischen Akademie der Wissenschaften, vol. IV, 1911). The concept of human dignity as a central element in Kantian thought is outlined in M. A. Cattaneo, *Dignità umana e pena nella filosofia di Kant* (Milan: Giuffrè, 1981).

11. For the implications of the right to punish and the basis of the punitive precept, see M. J. Falcon Y Tella and F. Falcon Y Tella, *Fundamento y finalidad de la sancion. Un derecho a castigar?* (Madrid: Marcial Pons, Ediciones Juridicas y Sociales, 2005).

12. The concept of the individualisation of punishment is expressed in the Italian Constitution, with a strong emphasis on special prevention, as an instance of considering personal punishment alongside dissuasion with regard to potential future behaviour. Cf. M. A. Cattaneo, 'La dottrina penale di Karl Grolman nella filosofia giuridica del criticismo', in G. Tarello (ed.), *Materiali per una storia della cultura giuridica*; S. Moccia, *Il diritto penale tra essere e valore. Funzione della pena e sistematica teleologica* (Naples: ESI, 1992). See also G. Delitala: "this means that the threat must normally be countered by the application of the sentence, but that it is also perfectly possible to waiver the punishment in the case of those subjects for whom, in the light of experience, it would be useless or still worse, harmful, and as long as - naturally - the waiver for such categories of subject does not frustrate the ultimate aim of general prevention. Within these limits we have to be prepared to willingly acknowledge the need for special prevention" ('Prevenzione e repressione nella riforma penale', *Riv. it. di dir. pen.*, 6, 1950, 699-714, 708). This assertion regarding the decision not to punish clarifies that with the individualisation of the punishment from the point of view of re-education it is possible also not to apply it, when the hoped for result may also be

The two perspectives, then, take as their starting point the different roles played by the so-called 'primary criminalisation', i. e. that expressed in the comminatory phase of the threat of punishment. However, in reality the main difference emerges clearly in the phase when the sentence is served, i. e. in the so-called 'secondary criminalisation', where the punishment is carried out according to utterly disproportionate indices of severity.[13]

If, then, the relationship in question is between the set of rights that a person has and the punishment, as a form of chastisement for the act committed, it will be possible to confirm the concreteness of this relationship only if the life of the person is safeguarded.[14] The eruption on the scene of a utilitarian purpose of punishment, set within a broader concept of social utilitarianism, knits well with the diversified choices of prevention.[15] Attention shifts onto the good or the right that man possesses by nature, i. e., personal freedom with all its various corollaries. This is the reason why the modern version of the social contract between men focuses on safeguarding the life of the person, an indispensible condition if he is to serve the sentence for the crime committed, unlike Rousseau's original version whereby: "since he has recognised himself as such (no longer a member of the State), at least as regards residing there, he must be excluded from it either by exile, as a contravener of the pact, or by death, as a public enemy; such an enemy is not in fact a moral person, but a man, and so it is a right of war to kill the vanquished".[16] Outside this model, the ancient, but

reached in this way. It is not a question of the improper use of the power of clemency, but of implementing the punishment in such a way as to re-educate rather than to inflict unjustifiable suffering, perhaps exemplary for society but of no use to the offender. For an overview of prevention in modern terms, see M. Pavarini, 'Lo scopo della pena', in G. Insolera, N. Mazzacuva, M. Pavarini and M. Zanotti (eds), *Introduzione al sistema penale* (Turin: Giappichelli, 2002), vol. I p. 321ff.

13. These notions are analysed in detail by M. Sbriccoli, 'Giustizia criminale', p. 181.

14. M. Donini, 'La condanna a morte di Saddam Hussein. Riflessioni sul divieto di pena capitale e sulla "necessaria sproporzione" della pena nelle *gross violations*', *Cass. pen.*, 2 (2007), 6.

15. M. Ripoli, 'Utilitarismo e pena capitale. Il tema della pensa di morte in Jeremy Bentham e John Stuart Mill', *Annali della Facoltà di Giurisprudenza di Genova*, 1-2 (1989-90), 397ff.

16. J. J. Rousseau, *Du contrat social*, bk II. As we shall see later on, the idea of the delinquent as an enemy to declare war on would contaminate all the theories of the death penalty especially from the American perspective.

never surpassed, category of the "servus poenae" loses its social role as a component of the community and becomes a potential destroyer of the ordered way of life in society. The relationship between the crime and its punishment will thus be founded on maintaining the system as it is on the one hand, and the person, able to express his potential destructive force or rather his existence, on the other. There can be no departure from this axiological order enshrined under the form of imperative in cases of need: to eliminate adversaries and everything that threatens ordered co-existence. Punishment becomes a term in a new equation with the life of the enemy: "The death of a citizen can only be thought necessary for two reasons. First, even when deprived of freedom he still has such relationships and power as to threaten the security of the nation. And then, when his existence may lead to a revolution able to threaten the form of established government".[17] And his living presence, also in limited or segregated form, could continue to express a level of anger able to compromise the basis of an organised community.[18] Yet extinguishing an existence would not be a legal sanction, but a natural need to find a suitable defence of the solidity and integrity of the social order.

17. C. Beccaria, *Dei delitti e delle pene* (1766), with a Preface by S. Rodotà (Milan: Feltrinelli, 1991), p. 62. See also I. Mereu, *La pena di morte a Milano nel secolo di Beccaria* (Vicenza: Neri Pozza, 1988); M. R. Weisser, *Crime and Punishment in Early Modern Europe* (Hassocks: The Harvester Press, 1982). On this point it may be useful to come back to M. Donini, 'La condanna a morte di Saddam Hussein', and underline the indignation caused by the death sentence of Nicola Ceausescu and his wife in December of 1989, as recalled by Antonio Cassese on 30 December 2006 in 'L'uccisione del tiranno' (http://www.lettera22.it/): "but when it is a question of a dethroned King in the heart of a revolution which is far from being consolidated by law, of a King whose mere name attracts the scourge of war on a nation in turmoil, neither prison nor exile can make his existence a matter of indifference to public happiness". See also the French motto "Louis must die, because the homeland must live", which represents for Robespierre the only possible departure from the prohibition of resorting to the death penalty: "As for me, I abhor the death penalty brought into being by your laws and I have neither love nor hate for Louis: I hate only his crimes. I have asked for the abolition of the death penalty before the assembly that you still call 'constituent' and it is not my fault if the first principles of reason seemed to them like moral and political heresy", in M. Robespierre, *Speech to the National Convention of 3 December1792* (now published in *Tre discorsi politici*, Rubettino, Soveria Mannelli, 2008, pp. 12 and 13).

18. On this, see also the position held by I. Kant, who (in *Die Metaphysik der Sitten*, 1797) argued that even if civil society broke down with the consent of all its members, the last murderer left in prison should be executed, so that each one would bear the penalty for his conduct.

In this way, any attempt to transform a thing into a person will flounder against the need to protect the system and thus takes up the alternating idea of the term of correlation of the punishment, always in the light of a reason or a purpose which can impose its restoration.

The concept of "reification" of the human being has also undertaken a singular journey in juridical terms, having by now become a distant memory where the death penalty had a markedly public law connotation whose fundamental criterion was the assimilation of capital punishment into the institution of *expropriation for public utility*.[19] The definition of a person as "servus poenae" was confirmed in his social and legal subordination since he belonged to the category of things expropriated for public use, where the good or the "thing" was himself. From a cultural point of view, a concept such as that set out by Francesco Carnelutti is the product of a time where the central position that the State took on in the legal order of the liberal political system gave little importance to the concept of individual and social dignity as constituent characteristics of the human person, which only with the passing of time and a new era for human rights would make an exclusive point of reference in legal systems.

A ready and convincing answer to this eccentric hypothesis may be found in De Marsico (he himself sentenced to death by the "Special Extraordinary Court" at the Verona trial which ended on 10 January 1944).[20] He rightly sustains that the legal framework of the question requires the rejection of any analogy between the death penalty and execution for public utility. In this case, limiting the enjoyment of a good calls for the citizen to enter into dialogue with the authorities as participants in the *civitas*, but in the case of the death penalty, there can be no question of a right to be exercised because it is the very owner of the right who is suppressed.[21]

With the recognition of the human dignity of the person, the basis of any action against the inviolable values is eliminated, because the establishment of such a right comes to be part of the constitutional

19. F. Carnelutti, 'La pena di morte nel diritto pubblico', *Riv. di dir. pubbl.*, XXIII, second series, part one (1931), 349-56.

20. The judgment may be read in full in V. Cersosimo, *Dall'istruttoria alla fucilazione. Storia del processo di Verona* (Milan: Garzanti, 1961), p. 218ff.

21. A. De Marsico, 'Pena di morte ed espropriazione per pubblica utilità', *Giornale dell'Avvocato* (1 Sept. 1931, n. 15).

pact and is thus non-negotiable, without the irremediable "breakup" of the Constitution.

Chapter III

Main justifications for capital punishment: A Summary

The intrinsically political nature of recourse to the death penalty

The first and fundamental reason for resorting to the death penalty is rooted in the archaic tradition of law as a way of governing human society still lacking in order. All the ancient texts, while having a cultural profile of the ethical-religious type, underline the need for the wrong inflicted to be remedied through private vengeance.[1] However, also in the ancient sources, conceptual positions emerge in sharp contrast with the retributional spirit of punishment, laying the ground for a new and different approach to punishment. This new approach to punishment is based on the idea of a man's future and not his past; thus, it does not focus on punishing what he has done but rather tries to prevent him from repeating what he has committed. After all, it is a question of representing a model of defence adopted by an organised society in order to forestall or prevent socially harmful conduct. In *Protagoras*, Plato is implacable in his denunciation of the fact that vindictive punishment means relying on vengeance as wild animals do, while he considers it more appropriate to prevent the repetition of such behaviour by the same person in future, as well as to create a deterrent for other members of society, which means capitalising on the benefits to formulate a precise and studied theoretical model of behaviour, able to protect the community preventively: as Nuvolone observes, "the application of the death penalty, on the basis of the principle of 'whoever has killed shall be killed' means no more and

1. E. Cantarella, *Il ritorno della vendetta. Pena di morte: giustizia o assassinio?* (Milan: Rizzoli, 2007), p. 22. On the period of the Italian communes, cf. A. Zorzi, *La cultura della vendetta nel conflitto politico in età comunale*, in R. Delle Donne and A. Zorzi (eds.), *Le storie e la memoria. In onore di Arnold Esch* (Florence: Firenze University Press, 2002), p. 135.

no less than applying the *lex talionis* and the vendetta, and not truly defending society, which must to be the purpose of all wise legislators".[2] The grounds for such reasoning are connected, obviously, with contingent needs lying outside cultural and ideological models: "In the remotest period of post-Mycenaean Greek history, documented in the Homeric epics, the elementary reasoning which [. . .] drove tribal societies to practice the vendetta - e. g., the need, in the event of a murder, to re-establish the numerical balance that it had altered - was already a thing of the past."[3]

The ancient sources of law offer an interesting, and at the same time, current view of the varied reasoning which leads to resorting to punishment and then to the death penalty.[4] Aulus Gellius carried out a study of the ancient texts in his *Noctes Atticae* where he faithfully traces the philosophical thought of his contemporaries and the ancient writers.[5] Gellius highlights three distinct *causae poeniendis peccatis* which set out the reasons for, and function of, punishment in Roman law. The first is to correct and punish, while the second is the need to restore the honour of the injured party, and the third is to set an example through the punishment of the offender.

This option shows a clear didactic approach which does not consider the education of the offender, but the growth of other members of society, using the theoretical model that would later go under the name of general prevention.[6] It expresses a decisive, dissuasive and

2. P. Nuvolone, 'La pena di morte', *L'Indice penale*, 3 (1975), 453-55, 455.

3. Cf. E. Cantarella, *Il ritorno della vendetta*, p. 30.

4. Sulla's imperial Roman legislation replaced the death penalty by perpetual banishment from the homeland of Roman citizens, the so-called *interdictio aquae et ignis*.

5. O. Diliberto, 'La pena tra filosofia e diritto nelle *Noctes Atticae* di Aulo Gellio', in O. Diliberto (ed.), *Il problema della pena criminale tra filosofia greca e diritto romano* (Naples: Jovene, 1993), p. 123.

6. See in particular G. Piffer, 'L'efficacia generalpreventiva della pena di morte', *Jus.*, 2-3 (1981), 361-77. For a more general perspective, see O. Diliberto, 'La pena tra filosofia e diritto', p. 127. See also the deep observations of S. Moccia, *Il diritto penale tra essere e valore. Funzione della pena e sistematica teleologica* (Naples: ESI, 1992), p. 47, on the theoretical perspective advanced by Anselm Feuerbach relating to the general preventive theory of the punishment. Cf. also A. Pagliaro, 'Le indagini empiriche sulla prevenzione generale: una interpretazione dei risultati', *Riv. it. dir. e proc. pen.*, 2 (1981), 447-55; V. Militello, *Prevenzione generale e commisurazione della pena* (Milan: Giuffrè, 1982). On the various aspects legitimising this supposition in relation to a constitutionally orientated Italian model of

intimidatory power in general:

the strongest reason for believing in general prevention is the well-known experience that the fear of unpleasant consequences, in the majority of circumstances in life, provides motivation which increases with the gravity of the feared consequences. It is almost absurd to think that this common mechanism must lose its meaning when it is a question of committing or not committing a prosecutable action.[7]

The meaning of punishment as vengeance may then be considered the second of the different functions illustrated, where reparation is equivalent to retribution for the wrong committed - which, from the point of view of modern punitive logic, may be defined as "retribution for guilt". We may not however neglect the fact that the evolutionary model of the conception of punishment runs through the history of humanity, both in the Greek and Roman civilizations, and is reiterated in the Roman period, so "merely exemplary precautionary punishment is proper to archaic societies", while a "punishment proportional to the crime committed" would seem to be based on "retribution and not the intimidation inherent in penal sanctions".[8]

This different consideration of the offender thus marks the point of transition from the cultural question to the issue of the punishment of serious crimes, but is also a clear sign of the failure of a punitive system that up to that moment had entrusted its *mission* of justice to solutions which had guaranteed no effective result in the prevention of crime.

In reality, the question of the necessity to kill the offender is also found in the sphere of Christian theology, whose point of equilibrium is dictated by Saint Thomas Aquinas, who bases his ideas on punishment on needs of a different nature from those based on absolute theories of punishment.[9] Aquinas' aim is to reconcile retributional and preventive needs, importantly because of their effects which would

punishment, see V. Maiello, *Clemenza e sistema penale*, p. 161ff.

7. J. Andenades, 'Almenprevensjon - illusjon eller realitet?', *Nordisck Tidsskrift for Kriminalvideskab*, XXXVIII (1950), 103-133, 103; see also T. Mathiesen, *Kan fengsel forsvarses* (Oslo: Pax, 1987).

8. F. Casavola, 'Cultura e scienza giuridica nel secondo secolo d. C.: Il senso del passato' (1976), now in *Giuristi Adrianei* (Naples: Jovene,1980), p. 25.

9. Catholic doctrine would consider the purpose of punishment in terms of morality and amendment, cf. C. Roeder, 'Sul fondamento e sullo scopo della pena in riguardo alla teoria dell'emenda', *Riv. pen. di dott. legisl. e giurispr.* (1874-1875), vol. II, p. 273.

ideally be punitive and dissuasive at the same time, but where man, as a good of creation, is destined once again to become simply a means of affirming the power of justice, or rather, the exemplary character of law.[10]

The Thomistic conception of punishment is an attempt to remove it from the impasse of the necessity for a State or of an order to resort to norms focusing on sanctions, and sometimes even the most extreme, in order, rather, to affirm control over the social order and eliminate the risk of the subversion of the principles that guide an organised community. All this, however, is difficult to reconcile with Christian moral dictates which impose the observance of categorical imperatives admitting no exception, such as "Thou shalt not kill" or "Forgive thine enemies".[11]

A community that consolidates its position as a state and which imposes a climate of conservation of its order sees in the death penalty an answer to its "state of institutional necessity", so that external attacks do not compromise the political-institutional balance it has achieved. The state of necessity is a subject that is often invoked to justify execution, but does not appear consistent with the principle governing legal apparatus. First of all because, from a strictly cultural point of view, this kind of justification assumes that there is an offence to be committed and only by committing it can the action then be justified. Imagining that a State can be justified in committing an offence does not make the cause of immunity a valid justification.

Secondly, bringing into play the rules of the cause of justification is in any case inappropriate, as the necessary condition of defensive action i. e., a state of real danger and the indispensible urgency of reaction characterising the act is lacking. Moreover, in affirming the need for defence, the concept of punishment gradually loses sight of its reason for being, and moves towards justification of a political nature, thus departing from the framework of the rule of law. It is at this point that the gap between the basis and the purpose of the death

10. L. Eusebi, 'Appunti critici su un dogma: prevenzione mediante retribuzione', *Riv. it. dir. e proc. pen.*, 4 (2006), 1157-79.

11. A. Bondolfi, *Pena e pena di morte* (Bologna: Centro Editoriale Dehoniano, 1985); Antonio Acerbi and Luciano Eusebi (eds), *Colpa e pena? La teologia di fronte alla questione criminale* (Milan: Vita e pensiero, 1998); E. J. Hernandez, *Non uccidere. "Il discorso della montagna"* (Naples: Chirico, 2008).

penalty widens and, even more so, the disparity between the ultimate purpose of the death penalty and the purpose of penal sanctions. The death penalty thus no longer belongs to the range of sanctions within an organised system of criminal justice, but becomes one of the instruments used to defend the established order, as do the armed forces of a given State. In this way, the death penalty becomes a tool at the service of a different logic, using extreme severity to defend, and not an ordinary normative means of dissuasion. It is thus a real means of safeguarding the system, and its intimidatory character is used as a specific instrument of social control.

This is the conceptual starting point, in my opinion, from which to provide a modern framework for the death penalty. If, in the traditional order of the principles of legal sanctions, death was considered one of the possible means of repression, and fully expressed the essence or the punitive basis upon which an organised community was based, *today the death penalty is a political act that a State uses to affirm its own power*. The right to punish as a possible and main form of social control has an intrinsic political meaning, and capital punishment is the most typical expression of this natural connotation of the law: "The death penalty itself, far from having any rational or even sentimental ideology, normally has no basis but political or social necessity".[12]

There are no more territories to be conquered, but there is, on the other hand, a need to guarantee stability in a system which has reached a sufficient degree of structural organisation which cannot tolerate crises or threats to co-existence. The death penalty is a warning message to all who may try to reject the established order. It is in this notion that the new element within the conceptual framework of the death penalty emerges. 'Established order' does not here refer to the political-administrative order of a State that invokes sanctions which traditionally belong to the category of 'political crimes' or crimes of a 'political nature'. It is *safeguarding society* that constitutes the new reference point that in modern democratic systems - unlike totalitarian systems - represents the basis for the stability of the social and political system.

12. G. Lombardi, *La pena di morte e il suo fondamento* (Naples: Guida, 1932), p. 9.

Chapter IV

Ritualised violence

What is fossilised and what is alive in the traditional idea of death as a punishment

A detailed examination of the reasoning behind punishment shows that over the centuries the feeling towards the logic imposing "suffering" for the offence committed has not changed.[1] The suffering of the guilty party satisfies the sense of justice and the need to educate people to observe the law, discouraging conduct harmful to social coexistence, in accordance with the development of the rules governing ritualised violence.

It is the blood crime which, among the natural crimes, constitutes the retributional paradigm of punishment, where symmetry seems to express the highest degree of correspondence to the offence (in a logic of *lex talionis*), while the "artificial crimes" draw the attention of jurists to a more specific goal of deterrence and prevention towards society as a whole.[2] The category of artificial crimes is unlike that of natural crimes because it was constructed by the legislator with the aim of providing protection under criminal law for acts which arise as a consequence of life in society and which, unlike blood crimes, in nature would have no specific and individual protection.

1. A. Ross, *Skyld, ansvar og straf* (Kobenhavn: Berlingsek, 1970); G. Vassalli, 'Funzioni e insufficienze della pena', *Riv. it. dir e proc. pen*, 2 (1961), 297-346.

2. For a careful and systematic investigation of penal legislation under Alfredo Rocco, see the particularly useful study by A. Casalinuovo, *Disciplina giuridica della pena di morte* (Naples: Jovene, 1939). On the other hand, it should be pointed out that retribution in its absolute sense, such as that attributed to Hegelian philosophy, not only rejects the idea of vendetta as a rash punishment, but even opens up to a perspective that goes beyond retribution in terms of pure affliction, towards an idea of the recovery of the person. On this theme, see the rich and detailed study by S. Moccia, 'Contributo ad uno studio sulla teoria penale di G. W. F. Hegel', *Riv. it. dir. e proc. pen.*, 1 (1984), 131-74.

The modern conception of punishment retains a fossilised element that regularly re-emerges because of public alarm and which, now, has taken on a role also capable of conditioning the choices of the legislator in criminal matters. It is not, therefore, a question of bringing a fossil back to life, since the natural vengeance instinct once more numbers among the reasons given to justify capital punishment and serves to cultivate the consent that public opinion can recognise in the power structure.[3] The basis of the political motivation for the death penalty, clearly, also depends on consenting to the political orientation of a nation, that is on a sort of symbolic-expressive solution within which the State considers it has to set up suitable defence mechanisms.[4]

The fact remains, however, that the *function* of criminal sanctions does not arise from the same need as that of the death penalty, because the latter is dictated by its *purpose*, the ultimate institutional aim that distinguishes between its nature and its function.[5] It is no coincidence that in modern times the death penalty has been applied when a State has wanted to send a signal of political power in defence of the established order.[6] This has occurred so that justice could be seen to be done with a precise dissuasive aim for acts that appear intolerably serious in public opinion. Clear examples are provided by the trials against dictatorial regimes such as the Nuremberg trial against the Nazi regime[7] and the trial of Adolf Heichmann whose death sentence

3. In contemporary history and in the structural evolution of a modern legal order, *public opinion* has been a decisive force for the affirmation of the political orientation of the State and its legislation. Alfredo Rocco himself, in clarifying why the death penalty had to be reinstated in criminal law, pointed out that it was "cried out for by the national conscience [. . .]. It satisfies an ancient desire of Italian thinking that - from Filangieri to Romagnosi, Pellegrini Rossi, Vera, Manzini, Garofalo, Lombroso, for centuries, and without distinction of thought or school - declared itself against the abolition or favourable to the restoration of the death penalty" ('Sul ripristino della pena di morte in Italia', in *Opere legali,* vol. III: *Scritti giuridici vari*, Rome: Società Editrice del Foro Italiano, 1933, p. 545).

4. M. Porzio, *Sistemi punitivi e ideologie* (Naples: Morano, 1965).

5. L. Eusebi, *La pena 'in crisi'. Il recente dibattito sulla funzione della pena* (Brescia: Morcelliana, 1989).

6. On the wide-ranging scenario of international law, see L. Ferrajoli, 'Il fondamento filosofico del rifiuto della pena di morte e le sue implicazioni nella teoria del diritto', in F. Perez Alvarez (ed.), *In memoriam Alexandri Baratta* (Salamanca: Ediciones Universidad Salamanca, 2004), p. 1065.

7. A. de Zayas, 'Der Nürnberger Prozess', in A. Demandt (ed.), *Macht und Recht, Grosse Prozesse in der Geschichte* (Munich: Beck, 1990), pp. 249-70.

did not wholly meet with public approval.[8]

On the opposing ideological front, we should recall the emergency criminal legislation of fascist Italy, when it was deemed indispensible to defend the lives of the representatives of its own political institutions using the death penalty.[9] The reintroduction of the death penalty into Italian law by the Rocco Code of 1930[10] within a legal framework based on the Zanardelli code, which did not envisage it, was made possible thanks to the promulgation of law no. 2008 of 25 November 1926.[11] It should immediately be remarked that capital punishment

8. As is well known, H. Arendt pointed out that the most common argument was that Heichmann's guilt was too great to be punished by men, and that the death penalty was not proportional to crimes of that dimension; although this, of course, in one sense was true, nevertheless it was absurd to sustain that, for that reason, someone who had killed millions of human beings must evade punishment (*Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, NY: Lotte Kohler, 1963); G. Hausner, *6,000,000 Accusers: Israel's Case Against Eichmann - The Opening Speech and Legal Argument of Mr. Gideon Hausner, Attorney-General* (Jerusalem: Jerusalem Post, 1961).

9. Upon the murder of Giacomo Matteotti, Benito Mussolini declared in the House of Deputies that he was against the reintroduction of the death penalty: "Death penalty? But, we must be joking, gentlemen! First of all, the death penalty has to be introduced into the criminal code and then anyway the death penalty cannot be a Government reprisal. It must be applied after a fair, indeed, an extremely fair trail, when it is a matter of the life of a citizen! It was at the end of that month which is deeply etched in my memory, that I said: I want peace for the Italian people, and I wanted to establish normality in Italian politicial life" (B. Mussolini, 'Discorso alla Camera dei Deputati del 3 gennaio 1925', now published in G. Fedel, ed., *Tre discorsi politici: frammenti di etica della responsabilità*, Soveria Mannelli: Rubettino, 2008, pp. 28-29).

10. As M. Sbriccoli observes, "The death penalty, coming back into the legal systems with the 'most fascist laws' of 1926, *was solidly reintroduced in the code*, to mark a repressive turning point which was meant to be drastic" ('Codificazione civile e penale', 2002, now in *Storia del diritto penale e della giustizia*, Milan: Giuffrè, 2009, vol. II, p. 987). One learns in V. Manzini, that "the first execution by firing squad shooting in the back under the 1930 penal code was of Diego Migneni, a self-confessed murderer, on 2 January 1932, in Caltanissetta. He had mistreated and killed a girl in Tallarita (Sicily), together with an accomplice, for whom the death penalty was reduced to life imprisonment. The sentence was passed by the Assize Court of Caltanissetta on 1st October 1931. There followed the execution by firing squad of Pietro Gavazzeni (Bergamo, 5 January 1933), Fioravante Arvati (Mantua, 6 January 1933) and Giulio Sanna (Cagliari, 20 April 1933)" (*Trattato di diritto penale italiano*, p. 64).

11. Law 25 November 1926, n. 2008, 'Provvedimenti per la difesa dello Stato'. Cf. A. Rocco, 'Legge sulla difesa dello Stato', in *Scritti e discorsi politici di Alfredo Rocco* (Milan: Giuffrè, 1938), p. 778. On this, see L. Crifò: "but before the Penal Code, published on 28 October 1930, the death penalty had already been restored to the State by the Revolution in 1926, through exceptional provisions dictated by one of those supreme needs that, in the life of the State as in the life of individuals, have no laws and, responding to one of those excited

in this case does not correspond in any precise way to the gravity or the particular way in which the offence was committed, e. g., savage and pre-meditated killing. In this case, in fact, the death penalty is only reserved as a punishment for extremely serious cases established in accordance with the criteria set out in Art. 133 of the penal code, i. e. in consideration of the particularly aggravating circumstances.

For political crimes, on the other hand, the criterion of assessment is connected with the teleological profile of the offence and has nothing to do with the objective gravity of the way the offence was committed and the guilt of the perpetrator. The assessment of gravity is inherent in the matter which is safeguarded by law, whose importance is due to the consideration which the legal order gives it during the course of its history.[12] Beccaria was careful to warn against this:

Another principle serves admirably to increasingly stress the important connection between the offence and its punishment, that is to say that this should correspond as much as possible to the nature of the crime. This analogy admirably facilitates the contrast that there must be between the impulse to crime and the repercussions of punishment, i.e. that this should create a distance and lead the mind to the opposite purpose to that where the seductive idea of breaking the

collective states of mind, which in particular moments in history, with total unanimity and with eloquent and instinctive gestures in the defence of society, confirm the indisputable value of certain penal institutions" (*La pena di morte nello Stato fascista*, Rome: Stabilimento Tipografico Europa, 1931, p. 87). Cf. also M. Sbriccoli, 'Il problema penale' (2001), now in *Storia del diritto penale e della giustizia* (Milan: Giuffrè, 2009), vol. I, p. 688; A. Aquarone, *L'organizzazione dello Stato fascista* (Turin: Einaudi, 2003), p. 101. It should be borne in mind that, before the advent of fascism, even academic writing on crime had began to reconsider the re-establishment of the death penalty, through the voice of one who would become a high-profile theorist in later years: cf. V. Manzini, 'La politica criminale e il problema della lotta contro la delinquenza comune e la malavita', *Riv. pen.*, LXXIII, 1 (1911), p. 3ff.; G. Tessitore, *Fascismo e pena di morte. Consenso e informazione* (Milan: Franco Angeli, 2000); F. Cordero, *Criminalia. Nascita dei sistemi penali* (Rome-Bari: Laterza, 1986, p. 550ff). Of certain interest for an understanding of the issue of the relationship between the right to punish and the political system is M. A. Cattaneo, *Terrorismo e arbitrio. Il problema giuridico del totalitarismo* (Padua-Milan: Cedam, 1998). On the origins of the special fascist legislation, see P. Troncone, *Controllo penale e teoria del doppio Stato* (Naples: ESI, 2006).

12. The grounds for the various death sentences passed by the Special Court are particularly illuminating. They are contained in Tribunale Speciale per la Difesa dello Stato, 'Decisioni emesse nel 1932', in *Ministero della Difesa. Stato Maggiore dell'Esercito. Ufficio storico* (Rome, 1986).

law would take it.[13]

On this, the then Minister of Justice Alfredo Rocco wrote:

The individual is in fact a means to social ends, which go well beyond life [...]. When it is necessary, for the supreme reasons of the defence of society and the State, to give a solemn warning and example, and *placate the just indignation of public opinion* [...], it is perfectly legitimate to inflict on the individual the supreme sacrifice by applying the death penalty.[14]

This is why justifications for the need for the death penalty all lie beyond the juridical context and are, in my opinion, fundamentally two in number, as we shall see later on. But once again it is necessary to return to Cesare Beccaria, who was the first to intuit that the death penalty is not a legal institution but a choice grounded in the political will, sometimes in open conflict with the system of law, but which is however designated to dictate the rules. Where the threat of death is meant to be purely dissuasive and generalised, the proportionality of the gravity of the fact and the punishment is lost and even more so the relationship between the punitive response and the teleological perspective within which a modern legal order moves.[15] Also preparatory activities, including those constituting a concrete danger, even if they do not result in a harmful event meriting death, are punished by the maximum possible punishment. The collapse of the principle of proportion that guarantees the rationality of retribution was brought about by the special fascist law that equated an attempt on the life of the King and the Head of State with their assassination.

But even before Beccaria the cruelty of the punishment was justified by the need to safeguard a vital public interest, and this synallagma was already present in the doctrine expressed by the ancient sources of law. Sextus Caecilius Africanus addresses the issue of the punishment provided for in the XII tables and inflicted on Mettius Fufetius who, despite being an ally of Tullus Hostilius, betrayed the Romans

13. C. Beccaria, *Dei delitti e delle pene* (1766), with a Preface by S. Rodotà (Milan: Feltrinelli, 1991), p. 69.

14. 'Relazione al Disegno di Legge sulla Difesa dello Stato' (9 November 1926), in *La formazione dello Stato fascista*, 1938, p. 851. I cite a passage from A. Rocco, as quoted by F. C. Palazzo, 'Pena di morte e diritti umani (a proposito del Sesto Protocollo addizionale alla Convenzione europea dei diritti dell'uomo)', *Riv. it. dir. e proc. pen.*, 2 (1984), pp. 767-68.

15. S. Moccia, *Il diritto penale tra essere e valore*, p. 16.

and was condemned to death by being torn apart. The need to resort to this terrible torture was thought to be justified by the fact that only through the threat of a terrible exemplary punishment could the general interest of the public be safeguarded.[16] Quite a different situation arises when the perfect balance of the values at stake is called to vouch for the 'sense of justice' in the application of the law.

16. See also O. Diliberto, 'La pena tra filosofia e diritto nelle *Noctes Atticae* di Aulo Gellio', 166.

Chapter V

Why the death penalty cannot be considered a legal punishment

All the studies on the issue of the death penalty focus on rigorous analytical investigations of the various theoretical positions that have developed over time, subjectively assuming an abolitionist or anti-abolitionist position, and ultimately justifying it from the simple sum of the reasons militating in favour or against.

The method adopted is to my mind decisive: first of all, to ascertain whether today the death penalty may be considered a punishment in the *legal* sense (i. e., if law can justify it to some degree); secondly, to distinguish its *foundations*, as in the case of all criminal sanctions, from its *purpose*, which orients the death penalty towards a precise criminal policy of an obviously functional type.[1]

Concerning the appropriacy of assessing the punitive grounds of the death penalty in the wider catalogue of sanctions, Fausto Giunta rightly states:

like any other type of punishment, the justification or otherwise of the death penalty depends above all on the criteria adopted for

1. The difference between the "purpose" and the "function" of criminal punishment is masterfully illustrated, in the context of much wider-ranging reasoning on the cultural orientation of punishment ("no punishment without a purpose"), by G. Fiandaca (*Una introduzione al sistema penale. Per una lettura costituzionalmente orientata*, Naples: Jovene, 2003, p. 15ff.). From another angle, a revisitation of criminal doctrine from the constitutional perspective over the last fifty years in Italy has favoured a teleological framework for punishment. A criminal politics which is sensitive to the instances of the social rule of law focused on the person cannot neglect the ultimate aim concerning the social integration of the individual which penal sanctions are called to safeguard. In fact, the individual takes on the dimension of 'person' and conserves it only when the fundamental rights and principles expressed by the Constitution are respected. Only in this interpretation centred on the person is it possible to elaborate a criminal policy of crimes and punishments respecting the constitution and the prerequisites of the constitutional pact: cf. V. Maiello, *Clemenza e sistema penale*, p. 362ff.

penal sanctions. So, essentially, also if we take the functions of punishment as a starting point, there are no completely unequivocal and satisfactory answers for or against the death penalty.[2]

This approach, while being a child of its time, takes on the same diachronic dimension posited by Francesco Carrara when, in identifying the *origin* of punishment, he distinguished between its historical and its legal origins. The former were based on the emotional desire for vengeance inspiring it; the latter on arguments trying to justify punishment in a rational way and orienting it towards aims of a broader significance for the system.[3]

It seems to me that the various theoretical studies set out in this way lead to a different direction from that of a precise conceptual position within a system of punishment. In fact, the ontological meaning of punishment expresses before all else the need for expiation, i. e. suffering affliction as a punishment for the offence committed. If suffering in relation to the gravity of the offence is lacking, and with it the temporal aspect of suffering, then the law has no justification for its intervention, and - juridically speaking - the measure applied does not comply with the canons of punishment. Punishment in the legal sense, however, is legitimate when it is capable of showing the meaning of the punishment, which is not limited only to the person against whom it is directed. Lawful punishment roots its original meaning in the need of society to show that it is able to prevent crime in a dimension with a dual dynamic: one that causes the offender ongoing suffering and one that provides a guarantee and assurance to the others.

The doubtful nature of capital punishment as a legal sanction is an issue taken up - albeit on the margins of the wide-ranging theoretical

2. F. Giunta, 'Riflessioni sulla pena di morte. A proposito del film *Dead Man Walking*', in R. Acquaroli (ed.), *Casi criminali. Penalisti al cinema* (Macerata: Eum, 2007), p. 98ff.

3. F. Carrara, *Contro la pena di morte: Scritti di Francesco Carrara*, ed. with an Introduction by E. Palombi (Milan: IPSOA, 2001). On this point, see F. Mantovani, 'Francesco Carrara e la funzione della pena', in *Umanità e razionalità del diritto penale* (Padua: Cedam, 2008), pp. 829-842, p. 835. Carrara identified at least ten different theories - not always distinguishable one from another - to justify the grounds for punishment. Cf. also A. Prosperi, 'Carrara e la pena capitale', in *Francesco Carrara nel 1° centenario dalla morte*, Proceedings of the International Conference held in Lucca and Pisa, 2-5 June 1988 (Milan: Giuffrè, 1991), pp. 399-410; S. Moccia, 'La polemica tra Carrara e Roeder sulla funzione della pena: disputa ideologica?', in *Francesco Carrara nel 1° centenario della morte*, pp. 714-32.

debate in the criminal law tradition - during the fascist years between the entry into force of the "most fascist law" and the 1930 criminal code. In particular, Conci hints at it in a very modest but significant way in stating that: "the death penalty inspires repulsion and heated debate and necessarily leads to a discussion of a philosophical, moral, and political character, setting aside its true, juridical, nature".[4] It is certainly a felicitous intuition which, given its historical context, could not go far, but which today begs other questions and thus other answers.

After taking our distance from the emotional aspects which the death penalty involves (especially in the wake of the wide-spread moratorium produced by modern legislation) if, on the other hand, we take into consideration the analytical models that provide a way of looking at punishment today we have all the necessary theoretical prerequisites enabling us to identify the true nature of the death penalty. The characteristics of the punitive model of the criminal system are in no way recognisable in the meaning that capital punishment assumes; in other words, capital punishment is a measure which responds to the specific aims of a State, but which bears no relation to the constituent and ontological characteristics of punishment in a legal order.

From the point of view of justice, the death penalty lacks the element of degree which is the first criterion for selecting penal sanctions, in the sense that substantial justice is only satisfied if the suffering inflicted is commensurate with - and proportional to - the gravity of the act committed.

On the subject of the authentic legal nature of the death penalty and the fact that it cannot be included in the category of penal sanctions, for reasons of conceptual uniformity, another theory appears particularly interesting, that of Hoche, which was described by the criminal science of the time as belonging to "criminal futurism".[5]

4. F. Conci, 'Ancora la questione della pena di morte', *Rivista Giuridica del Mezzogiorno*, 1 (1935), 6-11, 6. Conci further observes that "death is not a punishment, but the opposite, because there is no more amendment, no repentance, no introspection, no shame, no reparation; punishment must be certain and not mysterious and enigmatic like the Beyond" (p. 7).

5. A. E. Hoche, 'La pena di morte non è una pena', *Rivista di diritto penitenziario*, 1 (1934), 32- 37. Hoche's article was sarcastically answered, in the same review, by G. Cuboni, 'Veramente la morte non è una pena?', *Rivista di diritto penitenziario*, 5 (1935), 843-53.

Hoche considered the death penalty a safety measure rather than a circumstance rendering the offender punishable as a consequence of the offence. On closer examination, the idea that the death penalty may, however, satisfy the criterion of the 'danger to society' represented by the offender seems to fit perfectly with the functional use that legislators have made of it over the centuries. This supposition also removes the doubt on the criterion of the commensurate nature of punishment, since in this case there is no relation between the actual gravity of the act and the ultimate punishment. Only safety measures which aim to punish the dangerous nature of the subject justify the application of the death penalty with respect to acts which, while being potentially serious, do not as yet cause concrete harm - as in the case of attempting to take the life of the Head of Government as provided for in the legislation of 1926.

The reasonable doubt as to whether in fact the death penalty is a sanction in the legal sense or whether it is a measure taken to defend the system - which gives it a political aspect - contributes also to its uncertain attribution to one discipline or the other. In fact, this extreme measure is better situated in the field of public law, because it does not respond to the logic of infraction-punishment but to the need to remove the subject from the established order.[6]

6. This point will be thoroughly analysed with relation to the experience of the US; however, the concept has already been exhaustively discussed by P. Ellero: "from the right which society has to defend itself no right to punish arises, but one of war. The power to punish is a specific right, distinctive, of its own kind; it is not the transformation of another right. That society has this right in order to defend itself, in order to defend its legal order is granted, but not however, that this can consist in the right to defence, in the true sense, if there is no intention to change the necessary relationships among things" (*Della pena capitale*, Venezia: Forni, 1859, p. 19).

Chapter VI

Problems of the compatibility between the purpose of the death penalty and the punishments available in a system of criminal justice

The model of the American exception. The idea of punitive efficientism

Legislation on the death penalty is normally connected with choices relating to the legal order, in the sense that it appears to be greatly influenced by the democratic or authoritarian character of the State or of public order.[1] On this, Manzini observed: "the death penalty thus does not go against any political system, but only against the idea of a number of philosophers or those who would philosophise, for whom political needs have no value".[2]

The level of democratisation, which coincides with the centrality of respect for fundamental human rights, should then appear inversely proportional to choices concerning the death penalty. Despite this, the United States of America maintains the death penalty in its ordinary legislation, thus constituting an exception to the democratic character

1. G. Fiandaca, *Art. 27, section III Const.*, p. 351. Aldo Moro wrote in *Lezioni di Istituzioni di diritto e procedura penale*: "The question of legalised murder is, in fact, an unthinkable shame in a social and political democracy even if, it must be said, not only primitive and unsophisticated orders, but also highly civilized legal systems with a great democratic tradition contemplate, at least generally speaking, the death penalty which, despite efforts even at international level, has not yet been abolished in numerous sovereign States" (p. 115). As for the issue of the death penalty in socialist countries, cf. S. De Sanctis, 'La pena di morte nei Paesi socialisti', *Archivio penale*, 2 (1988), 703-52; on abolitionism in Eastern Europe, see S. De Sanctis, 'L'abolizione della pena di morte nella repubblica democratica tedesca ed il suo permanere nella progettata riforma penale sovietica', in *Studi in memoria di Pietro Nuvolone* (Milan: Giuffrè, 1991), vol. III, p. 551.

2. V. Manzini, *Trattato di diritto penale italiano*, p. 56.

of the political orientation of the State. The ultimately contradictory nature of this circumstance is highlighted by Sennet; concerning the control exercised by totalitarian states, Sennet observes that, although one might think that in the absence of a totalitarian regime political control would loosen, in reality it is only the form that changes.[3]

The issue of the death penalty is not the only aspect that contributes to forming the idea that the American nation has many and such singular characteristics that it would be inappropriate to speak in terms of *the American exception*.[4] In all cultural areas, in technological research, in the racial make-up of its population and, lastly, in its laws, the United States is always particularly original, so much so that its experience is in no way comparable to the experience of other democratic and industrialised countries: "the American exception also consists in the ways and the times that the new civilisation has developed in only a few centuries".[5] In other words, its cultural matrix is as varied as to affect not only the different cultural aspects of life, but especially the choices that the legislator is called upon to make in the various fields of law. The religious traditions and the ethical/moral profile of a number of individual life choices become collective, and their impact on political and legal initiatives is certainly significant and culturally rooted in the stuff of American society.[6]

The question of the need for the death penalty in the third millennium has come to the fore again due to the issue of security po-

3. R. Sennet, *The Fall of Public Man*. The choices of a political and legal system, then, are not always a valid way of connoting it. Paradoxically, it very often happens that the adoption of certain punishments is common to legal systems which take their inspiration from very different concepts of freedom, and which make extreme choices - such as the death penalty - in the light of completely different ideological prerequisites.

4. The subject of capital punishment, widely addressed from the point of arguments for and against, with much practical information, is discussed in R. M. Baird and Stuart E. Rosenbaum (eds), *Punishment and the Death Penalty. The Current Debate* (Amherst, N.Y.: Prometheus Books, 1995); A. Sarat (ed.), *The Killing State. Capital Punishment in Law, Politics and Culture* (Oxford: Oxford University Press, 1999).

5. M. Teodori, *Raccontare l'America. Due secoli di orgogli e pregiudizi* (Milan: Mondadori, 2005), p. 9.

6. In the ninenteenth century, this point had been developed by A. De Tocqueville, *De la democratie en Amerique* (1835-1840); English tr. *Democracy in America*, intr. by Eric Plaag (New York: Barnes & Noble, 2003). See also P. Ellero: "North American criminalists, in line with the spirit of the reforms and the calculating nature of the nation, laying aside the juridical aspect, normally discuss the question of the legitimacy of the death penalty from the practical or religious point of view" (*Della pena capitale*, p. 9).

licies, in reality a version on the theme of public order as a modern form of social control.[7] Furthermore, the current concept of security has also found a constitutional basis in Italy which not even the nineteenth-century concept of public order had been able to affirm.[8]

In countries where death is considered an ordinary instrument of punishment it is not always easy to grasp what the real reasons justifying recourse to the death penalty are.[9] Over time various reasons have been found, each presumably useful for justifying the basic choice - all certainly indispensible to justify its specific use, case by case.[10] Among these, sometimes stands out the superabundance of religious reasons which impose - as we have seen - the *lex talionis*, according to a grossly compensatory-mercantile model of punishment.[11] In other cases, as has been seen recently, the choice has a functional basis with an

7. L. Re, *Carcere e globalizzazione. Il boom penitenziario negli Stati Uniti e in Europa* (Rome-Bari: Laterza, 2006). Moreover, the question is not extraneous even to the sixteenth-century Italian tradition, as described by W. Kaiser, 'Violenze urbane: alcune riflessioni sui linguaggi del conflitto e le pratiche politiche nel mondo urbano', *Storica*, VI, 17 (2000), 115-24; E. Dolcini, 'Rieducazione del condannato e rischi di involuzioni neoretributive: ovvero della lungimiranza del costituente', *Rassegna penitenziaria e criminologica*, 2-3 (1999), 69-82, now updated in E. Cantarella, *Il ritorno della vendetta. Pena di morte: giustizia o assassinio?* (Milan: Rizzoli, 2007), pp. 155-72.

8. Corte Cost. (Constitutional Court)„ 'Sentence nr. 25 July 2001, nr. 290', *Foro it.*, 2001, I, c. 3435: "the functions and the administrative duties relating to public order and public safety concern preventive and strict measures for the maintenance of public order, which is to be understood as all the fundamental wealth of law and primary public interests on which ordered and civil co-existence in the nation rests, as well as the safety of the institutions, the citizens and their property. It should be clarified that this definition adds nothing to the traditional notion of public order and safety as handed down in the case law of this Court, which reserves to the State functions primarily aiming to safeguard basic goods, such as the physical or emotional well-being of the people, the protection of property and all other goods that take on primary importance for the very existence of the system".

9. M. Cerase, 'La pena di morte negli Stati Uniti: nuovi sviluppi e vecchi contrasti', *Giurisprudenza costituzionale*, 2 (2005), 1511-31; E. Botti, 'L'ottavo emendamento della costituzione americana: la pena di morte', *Danno e responsabilità*, 8-9 (2006), 823-30.

10. G. Marinucci, 'La pena di morte', p. 17ff.

11. For example, according to Islamic law, three choices are offered to the relations of the victims: to ask for the enforcement of the sentence, to save the life of the killer with the blessing of God; or to pardon him in exchange for a payment in money, called 'blood money' (*diya*). Over the last few years, numerous cases of blood money have been favourably resolved in Saudi Arabia. The Iranian version of blood money states that for a female victim it amounts to half that of a man. Also, if a woman is killed, a man may not be executed, even if condemned to death, unless the woman's family first pays the murderer's family half of the blood money.

economic and financial emphasis - as in contemporary China, where the maintenance of a convict in prison is seen as a cost to the State and where guaranteeing organs for transplants constitutes a new and terrible frontier of human exploitation.[12] The Chinese penal system has seen an enormous increase in crimes punished by death during the eighties, not only for blood crimes, but above all for 'social' crimes - i. e. crimes to the detriment of the economic and social system of the country.[13] All in all, this is a confirmation of the political and ideological option for a form of exemplary punishment to discourage any kind of conduct which is harmful to the stability of the system of government.

On closer examination, from the contemporary historical point of view, there appear to be two reasons - or, as said above, *purposes* - for

12. Laogai Research Foundation, *Cina, traffici di morte. Il commercio degli organi dei condannati a morte*, ed. by M. V. Cattania-T. Brandi (Turin: Editori Guerini & Associati, 2008). On this point it may be useful to reflect on the aspects of an economic analysis of the law but also, with regard to the specific sector of criminal legislation, on the economic costs of crime and punishment, according to the approach suggested by D. D. Friedman (*Law's Order. What Economy Has To Do with Law and Why It Matters*, Princeton, N. J.: Princeton University Press, 2000). There is no shortage of examples in legal literature concerning the effective deterrent of punishment from the economic point of view, i. e. the impact of the actual benefit that the criminal would gain from the offence through a prison sentence: cf. J. Elster, who observes that if we aim to dissuade an individual from stealing significant funds which he has in his care, in order to offset the attraction that they hold, we should punish this crime with a penalty which is proportional to the consistency of the funds - thus, it is the fear of the penalty that leads individuals to resist temptation (which he considers as one of the forms of the weakness of the will) (*Agir contre soi. La faiblesse de volonté*, Paris: Odile Jacob, 2007). In reality, this approach appears nearer to a moral criterion than to any legal basis for punishment. Concerning the context where criminal behaviour develops, mathematical parameters to identify the interaction of multiple individual and environmental factors reveal themselves to be inadequate, as shown by the National Research Council (U. S.) in *Deterrence and incapacitation: estimating the effect of criminal sanctions on crime rates*, ed. A. Blumstein, J. Cohen and D. Nagin (Washington, D.C.: National Academy of Sciences, 1978). Nineteenth- century criminology in Italy used the same expression to designate the inclination to crime: see C. Lombroso, *Sull'incremento del delitto in Italia e sui mezzi per arrestarlo* (Turin: Bocca, 1879). Lombroso attributed behaviour oscillating between vice and virtue, and so the inclination that leads to crime, to the "weakness of character" of the perpetrator.

13. C. Zhonglin, 'Una svolta storica nel diritto penale cinese: l'introduzione di un nuovo codice', *Riv. it. dir. e proc. pen.*, 2 (1998), 584-95; Id., 'Profili storici e problemi contemporanei del diritto penale cinese', *Riv. it. dir. e proc. pen.*, 2 (1992), 654-67. On the application of the death penalty in other countries, detailed information is provided by F. E. Zimring, *The Contradictions of American Capital Punishment* (Oxford-New York: Oxford University Press, 2003).

the State, be it democratic or totalitarian, to include the death penalty among its legal punishments. And these are, in my modest opinion, two reasons which, while having ancient roots, certainly respond to the current needs of a system of government and criminal policy qualified by their aim.

Given that - as already stated - the death penalty arises from a different basis than the traditional function of penal sanctions, its application is grounded on the need to punish conduct that betrays the fundamental values of the State system as well as hostile conduct that puts the stability of the system of Government in jeopardy. This conduct may include hostile or destabilising factors from outside or from within the State itself.

The lucid awareness that induces a legislative system to include the death penalty among its remedies centres on a basically *political* choice, where the law and the coherence of a teleologically ordered and oriented system merely introduce a remedy whose conceptual justification is rooted in a different set of arguments, which are different from its premises.

This is presumably the reasoning that keeps capital punishment alive in legal systems representing values in apparent conflict with the right of the State to take life. In fact, the centrality of life as a supreme value in the foundation of the social and legal order appears to be culturally and ideologically irreconcilable with the possibility of resorting - even as an *extrema ratio* - to taking life by the State albeit as a criminal sanction. It may be deduced that the concept of the American exception rests on an apparent contradiction, but in substance the choice to execute is the natural consequence of a concatenation of events that may be traced back to political strategy.[14] The political choices in fighting against crime are all based on a logic of 'efficiency', that is they try to assuage the social need for punishment as an instrument to fight the forms of violent crime that burgeon in society and to guarantee the peace and the pacific continuation of social and personal life.

Both the death penalty in ordinary procedure envisaged by American criminal legislation and the emergency procedure provided for

14. For a detailed historical treatment of the death penalty, cf. S. Banner, *The Death Penalty. An American History* (Cambridge, Mass.: Harvard University Press, 2002).

under the *Patriot Act* of 13 November 2001 are perfectly in line with the purpose which that legal order has assigned to its own system.

Failure to comply with the social contract as a form of infidelity to the fundamental values of American co-existence must necessarily bring about extreme punishments to guarantee the safety of the basis of the system's stability. All the options, whether retributive or preventive, are in some way understandable. But the ultimate choice which leads the legislator to opt for capital punishment is not coherent with other forms of punishment, since the utilitarian nature of legal sanctions cannot be reconciled in any way with the functionalism characterising the choice to adopt the death penalty.

The American case is not the only one to make up the paradigm of choices on the subject of capital punishment. The first version of the *Charter of the European Union* signed in Rome on 29th October 2004 went in the same direction: in fact, Art. 2 proclaimed the "right to life" ("1. All people have the right to life.2. No-one shall be condemned to the death penalty, nor executed"), and in the note thereto it reiterated the content of Art. 2 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* signed in Rome on 4th November 1950 as "the right to life":

1. Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.
2. *Deprivation of life shall not be regarded as inflicted in contravention of this article* when it results from a use of force which is no more than absolutely necessary: a. in defence of any person from unlawful violence; b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c. in action lawfully taken for the purpose of quelling a riot or insurrection.

It thus appears evident that also in this context the death penalty seems to be forbidden as an ordinary form of punishment, but need for it is admitted in situations of alarm or danger to the established order. It is not a repressive measure as often found in a typical punitive system, where each punishment is specific to each possible crime, but a general protective measure with extreme effects in relation to

acts which are not expressly defined, such as the concept of riot or insurrection whose nature, and especially in the case of the concept of unlawful violence, gives rise to political measures for protecting the system. To come full circle in terms of the sources which, while moving towards a drastic reduction in the practice of the death penalty, allowed it in specific and limited cases, we recall Protocol 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms relating to the abolition of the death penalty, amended by protocol nr. 11*.[15] This Act, concluded in Strasbourg on 28 April 1983, established the possibility of allowing capital punishment solely "for acts committed in time of war" or when there was "imminent danger of war".[16]

An examination of the supranational sources shows that recourse to the death penalty does not always appear to be prohibited, as solemnly but uselessly proclaimed, but is normally tolerated. This means that the aim is not retribution, but that even here the death penalty has the exclusive function of intimidation. No crimes are mentioned which, according to long-standing tradition, deserve punishment by death, such as murder or massacre, but essentially preparatory conduct, characterised by great danger to the stability of the political institutions. So, once again, we have the question of the betrayal of sovereignty and the sense of generalised intimidation aiming to dissuade people from committing socially harmful acts, destabilising acts of hostility or war which require a strong and definitive response regarding the fate of the enemy.[17] If then one considers that these rules are contained in the

15. The considerations that may be expressed almost thirty years after the normative content of Protocol VI must take into account the historical framework of the period in which the European agreement was drawn up. Although today it appears inadequate in relation to the main principles of a democratic legal system based on respect for the dignity and the life of the human person, Protocol VI represented in its day a decisive step forward towards the abolition of the death penalty. On the importance of the dispositions of the treaty, it is necessary to return to the considerations of F. C. Palazzo: "the pre-eminent importance of additional Protocol VI to the Treaty of Rome - in our opinion - resides in the fact that it, the only international document affirming the abolitionist principle, is thus able to make a particular contribution to the rationalisation of the question of the death penalty" ('Pena di morte e diritti umani', p. 766).

16. The text may be read, albeit in reduced form, in *Riv. it. dir e proc. pen.*, 1 (1983), 297-301.

17. This subject has been addressed with outstanding modernity by G. Carmignani: "A man is killed in battle as he is killed on the scaffold. This observation leads to another, which is of great importance in discussions on the death penalty from the legal point of

draft of the European Constitution - i. e., in the highest constitutional level of the organisation of a State - there is evident confirmation of a functional consideration of death as a form of punishment, with clear indications that the death penalty is essentially meant to be a safeguard for the system, lying outside the field of criminal law and choices in criminal policy.

In the context of a well organised social system with a mature structure to its personal relationships and respecting the basic rights of the individual it is possible to give the lie to the formula attributed to Seneca "Nemo prudens punit quia peccatum est, sed ne peccetur" ("No prudent person punishes because a wrong has been committed, but so that no-one commits a wrong"). This maxim, even if considered from the utilitarian point of view, seems to mark the failure of the death penalty, as shown by the statistics, because death is not that terrible deterrent that many would wish it to be.[18] From a strictly legal point of view, the preventive function does not connote - and cannot reasonably connote - the death penalty. If, on the other hand, we consider the political end, capital punishment serves its purpose perfectly, as the hostility shown by the aggressor justifies the hostility with which the State is called to defend itself. The death penalty must radically change direction, and mark a clear break with the past and tyrannical power structures which must give way to new social scenarios.

The debate on the punitive basis of death is also obscured by much

view" (*Una lezione accademica sulla pena di morte*, p. 28).

18. P. Nuvolone: "There is no doubt that an efficacious criminal policy cannot prescind from the intimidation exerted by the threat of punishment and its actual enforcement in relation to those who break the law. It is extremely doubtful, furthermore, whether the death penalty has such an effect" ('La pena di morte', p. 454). Over time, the competent offices of the United Nations have commissioned numerous studies on the death penalty throughout the world, in order to ascertain its actual utility, but above all to understand the justifications and the plausibility of its use in countries where it does exist. These are empirical field studies which have allowed the production and the publication of three separate reports: M. Ancel, *Capital Punishment* (New York: United Nations - Department of Economic and Social Affairs, 1962); N. Morris, *Capital Punishment. Developments 1961-1965* (New York: United Nations - Department of Economic and Social Affairs, 1967); R. Hood, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 1996; rev. ed. 2002). On the developments of the debate on deterrent and dissuasion, see A. Marchesi, *La pena di morte. Una questione di principio* (Rome-Bari: Laterza, 2004), pp. 37ff.; F. E. Zimring, *The Contradictions of American Capital Punishment*.

more concrete - or worrying - circumstances, such as those concerning protection from legal error:

The only valid argument against the death penalty is the irreparability of such a punishment in the event of judicial error. But this is a practical argument. Beccaria himself, considered to be an abolitionist, in reality is not, when - after accepting the ideological and methodological prerequisites of the social contract - he recognises that the death penalty may be called upon in cases of need when it is necessary to defend society.[19]

It turns out that it is precisely judicial error which constitutes the only true obstacle to the generalised adoption of the death penalty.[20] In reality, what is lost in this case is the right to judicial review (another of the rights rooted in the normative terrain of the *fair trial*), and the President's pardon, if, at a time after the judgment, irrefutable proof of innocence of the condemned person should come to light.[21] But anxiety about the irreparable nature of the penalty was appeased by the Minister of Justice Alfredo Rocco in this way:

The argument of irreparability is perhaps the most compelling. Yet, it is not decisive either. Error is unfortunately an inevitable element in human nature and if the fear of falling into it were to stop us from acting, all individual and social life would remain in paralysis. The irreparability of the punishment cannot but lead to a single conse-

19. G. Bettiol, 'Sulle massime pene: morte ed ergastolo'; G. Marinucci, 'Beccaria penalista, nostro contemporaneo', in S. Moccia (ed.), *Diritti dell'uomo e sistema penale* (Naples: ESI, 2002), vol. I, pp. 15-33.

20. This argument was supported forcefully by Beccaria and even more so by Robespierre (*Discours sur la peine de mort*, 31 May 1791, in *Oeuvres de Maximilien Robespierre*, VII, Paris: PUF, 1952, p. 436ff). The reports on the work of the Commission set up by Governor George Ryan of Illinois to establish the utility of the death penalty are interesting reading. The work of the Ryan Commission coincided with a moratorium on the death penalty for all convicts awaiting execution. The Commission reached the conclusion that it was inopportune to apply the death penalty due to the enormous number of judicial errors recorded over the years, for which no remedy was possible. In 2003, Governor Ryan, in the light of these results, commuted all capital sentences into life sentences: cf. S. Turow, *Ultimate Punishment. A Lawyer's Reflections on the Death Penalty* (New York: Farrar, Straus & Giroux, 2003); N. Christie, *Limits to Pain. The Role of Punishment in Penal Policy* (Oxford: Robertson, 1981).

21. This question too was widely discussed by nineteenth-century thinkers, being just one piece of the puzzle in the wide-ranging debate which never found peace. Cf. M. P. Geri, 'Carmignani, Birnbaum e altri incidenti (momenti del dibattito ottocentesco intorno alla pena di morte)', *L'ind. pen*, 1 (2010 January-June), 399-416, 415.

quence: that of subordinating enforcement to particular precautions. This must also be so for the death penalty, which must not be applied unless the evidence is clear and the responsibility of the guilty party robustly ascertained.[22]

It thus appears very probable that from a modern legal perspective, the grounds justifying death as a punishment are precisely in the middle between the punitive basis and the purpose, but are always based on *a need external to the penal system* to make use of the maximum degree of punishment possible.

The truly controversial aspect of the question is the fact that traditional arguments are being posited which had previously been rejected, considering the current cultural and ideological framework of advanced social systems as in the case of many contemporary legal orders.[23] Yet, a return to the past has been made possible by neo-conservative cultural models which have opened the way for the widespread security initiatives of recent years, according to which the protection of the current system - i. e., the protection of the rights of the public - can be guaranteed only by acknowledging its predominance over the rights of the individual. As a consequence of this, the punitive response must be of *an asymmetrical retributionary kind*, affecting the most alarming aspects of the general-preventive option, namely deterrence.

A significant fact needs to be mentioned in relation to the legislations that have historically and variously included the death penalty and then suddenly removed it.[24] Especially in Italy, considering the codes from the time pre-dating unification, and taking into consideration the temporarily introduced special laws, it is clear that feelings and

22. 'Relazione al re del Codice Penale', in V. Manzini, *Trattato di diritto penale italiano*, p. 58.

23. In his *Punishment and Modern Society*, D. Garland recalls that Durkheim, like the historians of his time, considers that 'intense' and 'severe' punishments are typical of simple societies, while in modern societies punishments are considerably milder. In order to prove this, Durkheim lists - in a more descriptive than analytical way - the various sufferings and atrocities envisaged in the penal systems of ancient societies; for instance, in the various populations of Syria criminals were stoned, pierced by arrows, hanged, crucified, and so on.

24. The long journey towards abolitionism imposed by the Italian Constitution of 1948 is well illustrated by L. Goisis, 'La revisione dell' Art. 27, comma 4 della Costituzione: l'ultima tappa di un lungo cammino', *Riv .it. dir. e proc. pen.*, 4 (2008), 1655-93.

value judgments on capital punishment have tended to alternate.[25]

This legislative variable can actually correspond to the cultural variable which manifests itself in a historical period when humanitarianism takes the upper hand over conservative and state-oriented instincts.[26]

The response to this affirmation is provided in the ratification of Protocol nr. 13 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* concluded in Vilnius on 3rd May 2002. The protocol commits the various States of the European Union to abolish the death penalty in all cases, including the riots and insurrections mentioned above. With Act nr. 179 of 15th October 2008,[27] Italy, in granting the ratification of the additional protocol, solemnly proclaimed in Art. 1 that the death penalty "is abolished in all circumstances", thus revoking the reserve of Art. 2 of the "European Union Charter" of 2004.

Also the cultural spheres which cultivate the idea of forgiveness as a central element for reflection sometimes inevitably concede the necessity of the death penalty, despite a general orientation to the contrary: *Ecclesia non sitit sanguinem*.[28] The paradox lies in being forced to recognise the ultimate contradiction of such a choice within an overall framework of values, as when the orders "Let no-one

25. The first strong legislative signal favouring the abolition of the death penalty, shortly before the implementation of the Republican Constitution, was the *Presidential Decree of 22nd June 1946, Nr. 4 - Amnistia e indulto per reati comuni, politici e militari*, which in art. 9 commuted the death penalty to the life sentence for all crimes committed after the liberation.

26. M. A. Cattaneo, 'Karl Ferdinand Hommel, il Beccaria tedesco', in G. Tarello (ed.), *Materiali per una storia della cultura giuridica*, pp. 263-349, p. 328. The theme throughout the whole work is the humanitarianism that links the two protagonists, Hommel and Beccaria, on the abolitionist front, even if Hommel admits the death penalty as an exception for a broader range of crimes. What is of major interest is the fact that, in affirming retributional principles, Hommel recognises as binding - and perhaps for the first time - the criterion of proportion between the gravity of the act and the degree of punishment.

27. Published in *Gazz.Uff.* (10th November 2008 nr. 263 - Suppl. ordin. nr. 248).

28. On topics concerning guilt and punishment in general, see E. Pessina, 'Lezioni sulla pena di morte', in *Pel cinquantesimo anno di insegnamento di Enrico Pessina* (Naples: Trani, 1899), vol. I, pp. 381-443; E. Wiesnet, *Die verratene Versohnung*; F. Cavalla, *Pena e riparazione* (Padua: Cedam, 2000); R. Botta, *La norma penale nel diritto della Chiesa* (Bologna: il Mulino, 2001), p. 45ff; K. Rahner, 'Schuld-Verantwortung-Strafe in der Sicht der katholischen Theologie', in *Schriften zur Theologie*, VI (Benziger, Einsiedeln, 1965), pp. 238-61. From a historical perspective, see I. Mereu, *La morte come pena*, p. 16ff.

harm Cain; whosoever slayeth Cain, vengeance shall be taken on him sevenfold!" (Genesis 4.15) or "forgive seventy times seven" or again "judge not and ye shall not be judged, condemn not and ye shall not be condemned; forgive and ye shall be forgiven" (Gospel of St. Luke 6, 37) inexplicably cohabit with the dictat of the catechism of the Catholic Church (nr. 2267) which still requires, albeit in an exceptional case, the death penalty.[29] On the theme of guilt and pardon, the evangelical sources contain one of the *topoi* of the expiation of a guilt which can only be brought about through death because of the impossibility of finding human pardon on account of the enormity of the act committed: the suicide of Judas.[30] Iscariot sentenced himself to death by suicide that he himself saw as the only penalty adequate for having betrayed Jesus, convinced that no-one would be able to grant him forgiveness. In this case, the death penalty represents the inevitable consequence of a "necessary guilt".[31]

From another angle, the question of the death penalty causes irresolvable cultural disagreement in the United States of America where it is also seen in terms of reparation, but this justification finds little credit in a nation that puts fundamental human rights at the heart of its values.[32] The well-known American exception, as we have said,

29. With the Vatican law of 7 June, 1929, n. II, art. 4, the death penalty was envisaged for attempts on the life, the safety or personal freedom of the Pope and for attempting to take the life of Heads or governors of foreign States.

30. Capital punishment in Church law has always been a thorny and controversial issue in the relationship between the legal order of the Vatican State and the theological and pastoral Magisterium. A radical and decisive revision of the question was imposed by the encyclical *Evangelium vitae* in which John Paul II carried out a thorough criticism of the whole cultural journey concerning punishment in relation to the choices of the international Charters on human rights. Despite this, the death penalty was not completely cancelled out, rather it was deemed only a vestige to be kept alive in positive law but which could be used "in cases of absolute need". For all further implications, see G. Thibon, 'Pena di morte?', *Studi cattolici* (1980), 571 and M. Pisani, 'Appunti sul tema: Chiesa cattolica e pena di morte', *Riv. it. dir. e proc. pen.*, 3 (2008), 1321-26.

31. The human and theological issue is amply and wisely discussed by G. Zagrebelsky: "in a religion that professes a charitable God, it is not easy to think that He may have chosen someone to commit a guilty act" (*Giuda: il tradimento fedele*, ed. by G. Caramore, Brescia: Morcelliana, 2007, p. 65).

32. The motto which clearly confirms this is "I don't want vengeance, but justice", in F. Stella, *La giustizia e le ingiustizie* (Bologna: il Mulino, 2006), p. 179. The roots of the ancient law suggest that vengeance was described as "poinè", exactly as today one uses the term "penalty", and that it represented the concept of the litigant who imposed compensation,

is a cause for reflection on the punitive basis of the death penalty in a modern democracy, where one hopes for the manifestation of an Age of Rights rooted in constitutional values in which respect for the human person is central. A clear conceptual framework is traced in this respect by Garland, who observes that, from another standpoint, the death penalty may be seen as an efficacious symbol of the last crusade against crime which, in turn, encapsulates many fears, as well as many racial and class conflicts within American society. Therefore, in policy on crime the question of the death penalty is more "symbolic" than "instrumental" - which is largely confirmed by the great number of delinquents condemned to death without the sentence ever being carried out. As Garland further notes, the fact that this punishment is so popular in the United States does not mean that this country is different from the others, given that in all countries public opinion has shown the same attitudes for many years after its abolition. In many abolitionist countries, therefore, the death penalty survives only as *a symbol which can be evoked whenever it turns out to be politically useful*.[33]

cf. F. Ost, *Reconter la loi*.

33. D. Garland, *Punishment and Modern Society*.

Chapter VII

The death penalty: from a punitive measure to a means of safeguarding the established order

The destiny of an inexpressive symbology

Having established that the death penalty has, especially over the last two centuries, become a typical *political* choice, it is reasonable to consider the death of a condemned person as an aberration with respect to the other penalties available in contemporary legal systems.[1] The ultimate political purpose of safeguarding the system in a historical period where opposing forces could destabilise its foundations, determines the discrepancy between the concept of *purpose* and that of the *function* of criminal punishment.[2] Whenever a state resorts to capital punishment, it invariably places the purpose before the function (which draws on the numerous and traditional theories of absolute punishment and relative sentences). The purpose penalises and frustrates the intention of the legislator who sees death as the form of intimidation *par excellence*, so the penalty becomes only a symbol expressing the power of the State, useless and meaningless from the point of view of preventative dissuasion. From this standpoint, the

1. Cf. A. Blumstein *et al.* (eds), *Deterrence and incapacitation*, where it is affirmed that the death penalty is markedly influenced by political and social factors much more important than the "deterrent" of the punishment itself.

2. On this point see F. C. Palazzo: "Usually, the hypotheses of exceptionalness, and thus the limits of the lawfulness of the death penalty, are found on two distinct levels: that of the type of crime, which - being particularly serious - could justify capital punishment, and that of the objective situation in which the crime is committed, which - being characterised by a contingent state of particular weakness of the structure of the State or the extraordinary dimensions of the phenomenon of crime - would make capital punishment legitimate" ('Pena di morte e diritti umani', 761).

considerations of Norberto Bobbio perfectly grasp the meaning of Cesare Beccaria's reasoning which, although rooted in still unfertile cultural terrain in terms of human rights, sounds very modern to contemporary societies.[3]

There are numerous examples to confirm this hypothesis, all of which may be found among the choices of capital punishment which have been adopted in various States to address situations of extreme gravity concerning security and as a guarantee of the stability of their order.[4] They are, however, choices driven essentially by the need for pragmatism and readiness in the punitive response which also looks in a new and different way at the phenomenon of crime. The opening of the gap between policy on crime and a policy to safeguard the security of the system has been much discussed in recent years, but it is an ancient question enriched by the experience accrued in the past under various regimes and always governed by a different set of laws.[5] It is also true that the ideological view of the "political crime"[6] has always been the ideal functional link to capital punishment,[7] with

3. N. Bobbio, *L'età dei diritti*, p. 191.

4. In this vast area, it may be useful to consult S. Staiano (ed.), *Le politiche legislative di contrasto alla criminalità organizzata* (Naples: Jovene, 2003). On the relationship between lawful violence and the public interest cf. S. Cotta: "(tolerated violence) is justified when the general interest (i. e., the common political well-being) is opposed to the particular interest of those in power, expressed by their power of command. Secondly, when an ultimate and true value of *epistème* is in opposition to the contingent and apparent value of *dòxa*, of opinion" (*Il diritto come sistema di valori*, Turin: San Paolo, 2004, p. 72).

5. L. Wacquant, *Le prisons de la misère* (Paris: Editions Raisons d'agir, 1999); M. Maiwald, 'Diritto e Potere', *Riv. it. dir. e proc. pen.*, 1 (2004), 6-22; M. Donini, 'Metodo democratico e metodo scientifico nel rapporto tra diritto penale e politica', *Riv. it. dir. e proc. pen.*, 1 (2001), 27- 55; M. Donini, *Il volto attuale dell'illecito penale. La democrazia penale tra differenziazione e sussidiarietà* (Milan: Giuffrè, 2004).

6. G. Vassalli, 'Le aporie del delitto politico', in *Sodalitas. Scritti in onore di Antonio Guarino* (Naples: Jovene, 1984), vol. IX, pp. 4569-82.

7. Of particular interest are the considerations formulated by the French legal doctrine of the mid-nineteenth century on the purpose of the death penalty called to stand watch over the punishment of political crimes. France had developed its policies on punishment for political crimes in the light of the French revolution. See on this, in his work on capital punishment, F. Guizot. Guizot observes that in the past the death penalty found its justification, if not in the violence of political passions (as violence of political passions continues - and will continue - to be great), in the human substance of the personalities on which they operated. In the past, he argues, political struggles, like war, were man-to-man fights, between more or less equal opponents, and the destinies of lives were bound to the destinies of power. The death penalty was like a kind of *lex talionis*, adequate not only

all the limits which the category of those crimes has demonstrated over the centuries across the various legislations:

It is above all for political crimes, given the elasticity and the variability of the notion in time and space, that the death penalty must be abolished in all circumstances. The true abolitionist is not so much worried about the death penalty for the perpetrator of a massacre or a rapist murderer, as about the death penalty for one who has carried out "politically criminal acts" against interests which can be considered political by those who hold the reins of power.[8]

Today, the true bastion is represented by the incontrovertible affirmation of the *fundamental human rights* which are still a yardstick for the choices regarding crime control. But, against any extreme penal measure, the fundamental human rights are required to play the opposite role, that of defending the position of all the other members of society against the undeserving minority whose position is diametrically opposed to the values of the system. *A sort of ultra-rigid disapplication to the detriment of a few against a disproportionate application to the advantage of all the others*: "the criminal law concerning the enemy always creates a logic of war, of separation, a state of exception in the persons responsible: they should be neutralised and fought, excluded or annihilated".[9]

The pragmatic approach of the United States of America to the social need for law, and in particular to the death penalty, explains why it uses death penalty in terms of purpose, as pure intimidation which expresses itself in the fact that atrocious crimes must no longer be committed. It is an approach that sets aside philosophical doctrines and theoretical justifications. With the national tragedy of the destruction of the Twin Towers in 2001, President George Bush deemed the death penalty a special deterrent in the fight against the crime of orga-

on the level of ideas, but also to the *de facto* conditions; and danger was impending and personal as in battle (F. Guizot, *Des conspirations et de la justice politique*).

8. G. Bettiol, 'Sulla pena di morte', p. 752.

9. M. Donini, *Il volto attuale dell'illecito penale* (Milan: Giuffrè, 2004), p. 54; M. Donini, 'Il diritto penale di fronte al "nemico"', *Cass.pen.*, 2 (2006), 735-77. For the implications in international law, see A. Aponte, 'Jakobs, il diritto penale del nemico e il "caso colombiano"', *Studi sulla questione criminale*, I, 3 (2006), 31-52; A. Cavaliere, 'Diritto penale "del nemico" e "di lotta": due insostenibili legittimazioni per una differenziazione secondo tipi di autore, nella vigenza dei principi costituzionali', in A. Gamberini and R. Orlandi (eds), *Delitto politico e diritto penale del nemico* (Bologna: Monduzzi, 2006), pp. 265-92.

nised terrorism, further strengthened by the *Patriot Act 2005*, whose second article extended the death penalty to terrorists responsible for hijacking.[10] Yet there is a marked contradiction, because what is called into play as the most serious option provided for in law is the most significant paradigm of the violation of human rights through systematic use of the death penalty.

On the other hand, in the strategy of the American punitive model, there is a central factor that calls for recourse to the death penalty and is represented by the role of the victims, so it all seems to be part of a logic of compensation and retribution as a guarantee on the part of the State (the avenger/injured party oxymoron).[11] The centrality of the role of the injured parties or the relatives of the victims is certainly a characteristic typical of the American system, even if similarly vengeful overtones are not lacking in other countries where the death penalty is enforced and where the "blood debt" is expected. American scholars have remarked that, although vengeance is something of the past, and has a terrible reputation, there is the need for a better solution to qualify in a positive way the involvement of the relations of the victims in capital punishment, something which could sound civilized and advanced at the same time.[12] Reference is often made to *closure*, that is to say the feeling of satisfaction arising from the definitive conclusion of a bad and shocking experience.[13] Years after the end of the trial, for the relatives and the friends of the victims, the execution becomes the occasion to reach a conclusion on the psychological and emotional level (psychological closure) to the events in which they had been involved, a time when the tension and the uncertainties of the period leading up to the execution are dissipated, and when it is thought that relatives may be liberated from the weight

10. A. M. Dershowitz, *Why Terrorism Works. Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002).

11. H. Prejean, *The Death of Innocents* (New York, N. Y: The Random House, 2005).

12. F. E. Zimring, *The Contradictions of American Capital Punishment* (Oxford-New York: Oxford University Press, 2003).

13. F. E. Zimring, *The Contradictions of American Capital Punishment*. Zimring further observes how the majority of people is likely to feel a sense of relief at the thought that, after the execution, all the uncertainty about the result of the case, the constant and invasive interest of the public and the continued repetition by the media of the facts regarding the murder, will eventually come to an end.

of the pain and anger they felt for the loss caused by the killing.[14] Nor can we disregard the recent results of clinical neuropsychological research which localise the mental processes of vengeance in the same part of the brain where the area governing pleasure is located.[15]

A new move towards a humane way of working through suffering and towards reconciliation with the perpetrator of a crime is being made today through initiatives for national reconciliation, in the wake of mass crimes, and on an inter-individual scale through a process of mediation, needed to build up a framework where the recognition of the damage done and the prevention of wrongdoing are central.[16]

Nevertheless, what is not pointed out is that the issue of capital punishment does not give due consideration to the "harshness of suffering" which punishment for crime must guarantee. Paradoxically, the greatest possible suffering through expiation, as has been observed since Beccaria onwards, is perpetual imprisonment, which certainly offers greater guarantees as far as affliction is concerned.[17] In this way, in fact, the concept of punishment is turned on its head so that the penalty to be paid is not death, and the true punishment is to live since, after the sentence is passed, life consists simply in suffering with no possibility of redemption. The death penalty is in reality one of the typical forms of, perhaps, a vestige of corporal punishment, possibly the most cruel, and one that is considered the most dissuasive due to the evocative power of the ways it is carried out.[18] Ancient texts

14. Cf. F. E. Zimring, *The Contradictions of American Capital Punishment*.

15. The problem of working through the killing of a loved one from the psychological point of view is also discussed in medical studies, as indicated by W. I. Miller, *Eye for an Eye* (ch. 10, n. 12). International law too has produced solutions which, in the working through of ferocious crimes, can lead to an end to hostilities between different ethnic groups: cf. A. Garapon, *Des Crimes qu'on ne peut ni punir ni pardonner. Pour une justice internationale* (Paris: Odile Jacob, 2002).

16. Lastly, of particular significance is G. Fiandaca and C. Visconti (eds), *Punire mediare riconciliare. Dalla giustizia penale internazionale all'elaborazione dei conflitti individuali* (Turin: Giappichelli, 2009).

17. Concerning life imprisonment, among the founders of the positivist school is R. Garofalo, "It is not easy to see the utility in keeping alive beings who must no longer be part of society, nor can one understand the purpose of maintaining this purely animal existence: it is inexplicable why citizens, and consequently the family of the victims, should pay yet more levies to accommodate and feed eternal enemies of society" (*Criminologia. Studio sul delitto, sulle sue cause, e sui mezzi di repressione*, Bocca: Turin, 1885, p. 58).

18. On the various ways of inflicting suffering, see the authoritative work by M. Foucault,

provide precise and detailed reports of the various ways of producing suffering in the body of the accused; cruel methods and treatment intended to cause suffering before the execution of the death sentence. The traditional reference is that which emerges in the story of the trial of Jesus of Nazareth. Crucifixion was the most painful punishment imaginable at that time and was adopted by the Romans as a warning message to the potential enemies of Rome.[19]

The basis for choosing to allow capital punishment is first and foremost the organisation of the hierarchy of values typifying the legal system of a State at a specific moment in its history.[20] When the

Surveiller et punir. Naissance de la prison (Paris: Gallimard, 1975); English tr. *Discipline and Punish. Birth of the Prison*, New York, N.Y.: Vintage, 1977); G. R. Scott, *The History of Corporal Punishment. A Survey of Flagellation in Its Historical, Anthropological, and Sociological Aspects* (repr. London: T. Werner Laurie, 1938). On sensationalism and the great emotional response to public suffering in city streets, see A. Ademollo, *Le annotazioni di Mastro Titta carnefice romano (1886)* (Sala Bolognese: Forni, 1984); A. Panico, *Il carnefice e la piazza* (Naples: ESI, 1985); G. Romeo, *Aspettando il boia. Condannati a morte, confortatori e inquisitori nella Napoli della Controriforma* (Florence: Sansoni, 1993); L. Cajaini, 'Pena di morte e tortura a Roma nel settecento', in L. Berlinguer and F. Colao (eds), *Criminalità e società in età moderna* (Milan: Giuffrè, 1991), pp. 517-47; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, pp. 382ff. A. Pastore observes that: "The educational aspect of a form of justice able to prevent crime was based on, and confirmed in, authoritative scholarly references: as the jurist Giovan Battista De Luca wrote, "human punishment is inflicted as a medicine to maintain peace and tranquillity - so as to hold men back from crime - , rather than as a cure for a crime which has irrevocably been perpetrated" (*Crimine e giustizia in tempo di peste nell'Europa moderna* (Rome-Bari: Laterza, 1991, p. 197).

19. Cf. C. Cohn, *The Trial and Death of Jesus* (New York, N.Y.: Harper & Row, 1971). On the specific aspects of crucifixion as a method of carrying out the death penalty compared with other cruel practices, see D. J. Halperin, 'Crucifixion, the Nahum Pesher and the Rabbinic Penalty of Strangulation', *Journal of Jewish Studies*, XXXII (1982), 32-46.

20. For a complete picture of the American context, Zimring links the death penalty to the historical and traditional question of the ancient punishment of lynching, carried out by the guilty party's community: more particularly, he observes that the current death sentence is the direct descendent of the lynching of the past as well as a tradition of private justice in the hands of *vigilantes*, at least where this is still present in the local culture (*The Contradictions of American Capital Punishment*). Certainly this is an unusual position, perceived by the writer on the basis of the governmental dualism represented by the home States and the Federal State. This asynchrony between the two parallel and sometimes conflicting legal powers creates distrust in citizens towards the Federal Government and privileges the role of the "domestic" justice of the home community, where law and order are maintained by the so-called *vigilantes*, i.e. those who protect the Community by means of immediate and harsh action. Reflection on these actions and the disruptive effects that American criminal procedure has on the legal heritage of the American legal system is particularly meaningful in M. Donini, 'Antigiuridicità e giustificazione oggi. Una "nuova"

institution of the State is at the centre of things, the death penalty is the most effective instrument to show the exercise of power.[21] In this way, the value of the human person survives only as part and parcel of the overall system of values meant to bolster the State.[22] Secondly, it is justified by the cultural roots of a people. If the experience of a nation is that of making war or is rooted in feelings of hostility or defence against the hostility of other countries, it is natural to consider that death will make up part of the cultural experience of that nation.[23] In that case, the system of values responds to much more pragmatic and concrete choices, so that the centrality of life cannot be a conditioning element, and the priority of a need, rejecting humanitarian concerns, satisfies the demands of the State order. A general model of hostility becomes standard, which anyway represents an internal contradiction to the legal system, in which the "external enemy" finds his perfect counterpart in the "internal enemy" of the State to be neutralised and

dogmatica, o solo una critica, per il diritto penale moderno?', *Riv. it. dir. e proc. pen*. 4 (2009), 1646-78, where he refers to F. E. Zimring (1675). On the double system of Government see M. Teodori: "America has a dual legal system: federal, administered from Washington, and State, in fifty different versions. An Italian finds it difficult to understand how the death penalty can exist in only a few States and how the President of the USA can reply that the issue is not within his province. This depends on the fact that capital punishment is regulated differently in the fifty States, so only the governor of the State is able to grant a pardon or suspend punishment" (*Raccontare l'America*, p. 148). Teodori elsewhere observes that: "It is equally execrable, as well as inexplicable that the death penalty still exists in the legislation of many States, even if it is enacted with varying degrees of frequency and cruelty. This terrible vestige of the pioneering tradition when the Americans carried out summary justice on true or alleged criminals, is very slow to die" (*Benedetti americani. Dall'Alleanza Atlantica alla guerra contro il terrorismo*, Milan: Mondadori, 2003, p. 145).

21. The fact that the death penalty is in strident contradiction with the values of the American constitutional order is now widely recognised, but the problem remains unresolved, as shown by F. E. Zimring. Zimring points out that the debate on the death penalty is the result of the clash between two incompatible sets of values, which cannot coexist. On the one hand, capital punishment is incompatible with a fundamental principle of American culture. On the other hand, ending the death penalty is tantamount to violating another cultural tradition which has deep roots in the country's history. Therefore, any important development concerning the impossible coexistence of these systems of values requires a change in deep-rooted cultural traditions (*The Contradictions of American Capital Punishment*).

22. E. Ferri, 'Pena di morte e difesa dello Stato', *La Scuola positiva*, VI (1926), 396.

23. The concept of war "by the nation against a citizen" was already well known and lucidly expressed by Cesare Beccaria. Cf. also J. Sèmelin, *Purifier et détruire. Usages politiques des massacres et genocides* (Paris: Seuil, 2005); Engl. tr. *Purify and Destroy. The Political Uses of Massacre and Genocide* (New York: Columbia University Press, 2007).

disabled through the death penalty.[24] The issue of dichotomy refers to the theoretical study of Carl Schmitt, who had drawn a precise picture of the political importance of the concepts of feud and hostility which, when applied to the criminal law, become rationally concrete in the different choice of penalties that a State uses to face the threat of crime.[25] It should be added that the typical model of hostility to the system has been updated to become the new "citizen-enemy" binomial; but above all we should emphasize the singular position of one who becomes the "enemy of criminal justice".[26] This attitude places him outside the established system, causing a marked tension between freedom and security, whose consequences can lead to the loss of the guarantees of the rights of the individual.[27] The solution is inevitably to neutralise and render the dangerous person innocuous at all costs. This is the height of the extreme contradiction within the rule of law, which demands particular flexibility in the system of crime control, in perfect harmony with the choices dictated by a firm and certain pragmatism. Rousseau, as we have already said, placed

24. G. Jakobs, 'Diritto penale del nemico: un'analisi sulle condizioni di giuridicità', in A. Gamberini and R. Orlani (eds), *Delitto politico e diritto penale del nemico. Nuovo revisionismo penale* (Monduzzi: Bologna, 2007), pp. 109-29; F. Resta, 'Nemici e criminali'. On this question, cf. V. Mathieu: "The dividing line between war and law thus depends on the action of those who want war, not those who want law: and it is well to take note" (*Perché punire*, p. 236). For an important discussion of this complex subject, see M. Pavarini, 'La giustizia penale ostile: un'introduzione', *Studi sulla questione criminale* (new series of *Dei delitti e delle pene*), 2 (2007), 7-20; M. Delmas-Marty, 'Le paradigme de la guerre contre le crime: lègitimer l'inhumain', *RSC*, 3 (2007), 461-72. This idea recalls the events of a well-known period in the history of Italian justice, cf. F. Colao, *Il delitto politico tra Ottocento e Novecento. Da "delitto fittizio" a "nemico dello stato"* (Milan: Giuffrè, 1986).

25. C. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Berlin: Duncker & Humblot, 1938). It is worth pointing out here that the concept of contrast does not emerge only in Italian criminal legislation on punishment, but the essence of hostility is present also in the concrete execution of punishments based on detention, as shown by L. Delli Priscoli-F. Fiorentini, 'Pericolosità sociale e diritto penale del nemico', *Riv. pen.*, 9 (2009), 425-431.

26. A. Aponte, 'Jakobs, il diritto penale del nemico e il "caso colombiano"', p. 35, who significantly entitles section 5 of his work "Diritto penale del nemico vs diritto penale del cittadino: il delinquente giudicato all'interno del patto sociale". Cf. also G. Fiandaca, 'Diritto penale del nemico. Una teorizzazione da evitare, una realtà da non rimuovere', in A. Gamberini and R. Orlandi (eds), *Delitto politico e diritto penale del nemico* (Bologna: Monduzzi, 2006), pp. 179-97.

27. W. Sofsky, *Das Prinzip Sicherheit* (Frankfurt am Main: S. Fischer, 2005).

two substantially different categories on the same plain, that of the criminal and that of the belligerent enemy, aligned by the rule of a fictitious state of war, but useful to justify trampling underfoot the rights of the individual; more particularly, Rousseau maintained that the proceedings and the judgment were the proof and the declaration that "the criminal had broken the social contract" and, thus, that he was "no longer a member of the State".[28]

In reality even at the turn of the nineteenth century, the classification of the delinquent as "enemy" was entering criminal doctrine, underlining the need to resort to the same means of neutralisation that are used in formalised wartime conflict. The loss of the status of "citizen" and member of society due to the evident violation of the social contract would make for a slide towards a concept of permanent war against crime, and from there the adoption of the death penalty becomes necessary to the need for defence.[29] On this, Garland observes that if the criminology of everyday life downplays crime, identifying it as a normal event, the criminology of the rest re-dramatises it, describing it in emphatic terms, judging it as a catastrophe, and making use of "military and defensive metaphors".[30]

This theoretical model still appears rooted in the American penal system, which not even the cultural changes of a mature democracy have been able to overcome: in fact, the delinquent is seen as an enemy bound to lose on the battlefield of the war on crime, one who deserves this end more so than those who fall in other battles. As Zimring observes, all these convictions are compatible with the idea of using the killing of a condemned man as a just punishment for criminal behaviour.[31]

The purpose of deterrence is the *leitmotiv* that weaves its way

28. J. J. Rousseau, *Du contrat social*, bk II.

29. D. Tafani, 'Kant e il diritto di punire', p. 78; T. Schmalz, *Das reine Naturrecht* (Königsberg: Nicolovius, 1795).

30. D. Garland, *The Culture of Control. Crime and Social Order in Contemporray Society* (Chicago: The University of Chicago Press, 2001).

31. See F. E. Zimring, *The Contradictions of American Capital Punishment*. As observed by M. Donini: "coming to the system of sanctions, suffice it to refer to two exemplary institutions: the death penalty and the other penalties geared towards definitive exclusion from society, like the American criterion of the third strike" ('Diritto penale di lotta', *Studi sulla questione criminale*, new series of *Dei delitti e delle pene*, 2, 2007, 55-87).

through the political culture of the United States of America.[32] As Federico Stella acutely observes:

Now, I challenge anyone to show that sentencing an individual to obtain a general deterrent or, if we prefer, general prevention in all its forms, does not constitute an unheard violation of Kant's maxim. It is extremely surprising that the vast majority of criminal lawyers anchored to the idea of the individual and *in whose mind the chimera of general prevention continues to grow* have never even stopped to think that in this way democracies undermine one of their mainstays and lay the ground for the spread of a logic that has been, is now, and may be in the future, a source of utmost grief, extreme evil, and such atrocious injustice as to challenge the very essence of democracy.[33]

This is what amply justifies the so-called "American exception" which does not constitute an exception to the principle of constitutional democracy, but embodies a specific cultural and ideological choice so that a nation may be recognised as the only one able to guarantee peaceful co-existence and at the same time ensure the defence of institutional integrity.[34] It is claimed that the defence of "civilization" can also lead to the abandonment of "civilized" behaviour, through an initial but essential ideological operation, represented by the "dehumanisation of the enemy".[35]

Among the various justifications is the question of the "crimen laesae maiestatis", in the dual guise of the protection of the "security of the State" and the betrayal of the sovereign values expressed by

32. The National Research Council (U. S.) has sustained that the studies available up to that moment (1978) provided no useful and unequivocal proof concerning the deterrent effect of the death penalty (*Deterrence and incapacitation*).

33. F. Stella, *La giustizia e le ingiustizie* (Bologna: Il Mulino, 2006), p. 186.

34. For a lucid reflection on loyalty to the system and above all to the fundamental values of civil co-existence in the United States, see A. Tocqueville, *Democracy in America*. Cf. also: S. M. Lipset, *American Exceptionalism: A Double Edged Sword* (New York, N.Y.: Norton, 1996); J. Simon, *Governing Through Crime. How the War Transformed American Democracy and Created a Culture of Fear* (Oxford-New York: Oxford University Press, 2007). In the United States the debate on capital punishment goes hand in hand with that of the mental capacity of the criminals. Useful on this theme is the cultural issue of the relationship between psychiatry and criminal law raised by M. Foucault, *Moi, Pierre Rivière, ayant égorgé ma mère, ma sœur et mon frère* (Paris: Gallimard, 1973); Engl. tr. *I, Pierre Rivière, Having Slaughtered My Mother, My Sister and My Brother* (Harmondsworth: Penguin, 1975).

35. N. Elias, *Il processo di civilizzazione. Potere e civiltà* (Bologna: il Mulino, 1983).

the ruling authority.[36] The death penalty thus becomes one of the requirements that must be satisfied to achieve full recognition of the legitimacy of a State and its right to govern when faced with dangerous hostility considered potentially able to disrupt the established order.[37]

Once again the central idea of Cesare Beccaria is wholly confirmed by modern cultural criticism as well as the passage of time. A modern perspective is offered by Emile Durkheim, Ralf Dahrendorf, and David Garland.[38] This new idea is in reality the thematic adaption of a traditional one whose authentic roots are to be found outside the field of law, in a territory where if a jurist is to find his conceptual bearings he must be conscious of the fact that the death penalty can be justified only by the purpose, by the ultimate ends dictated by political choices at the service of the system, and neither the options pertaining to criminal policy nor strategic legislative policies to control crime rates are of any importance and still less so the virtuous connotations of the rule of law.

36. This complex issue has, as always, been taken up by M. Sbriccoli, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna* (Milan: Giuffrè, 1974), in particular from p. 158 and p. 175ff. The author reiterates the concept in M. Sbriccoli, 'Giustizia criminale', when he states that "This concept rests on a shift in the importance from the penal point of view of an act or behaviour from 'damage' to 'disobedience', which constitutes an extension of the model of the political offence to all significant criminal acts" (p. 164).

37. Naturally, the hostility must be politically and legally sanctioned; it should focus on the deterrent and dissuasive aspect of the punishment, with a view to prevention in the broadest sense: "The administration of Barack Obama, the President of the United States seeks the death penalty for the five terrorists charged with the attacks on the twin towers and the Pentagon. Announced today in Washington by the US Attorney General Eric Holder. Announcing that all five terrorists imprisoned at Guantanamo (including the "mastermind" Sheikh Khaled Mohammed) will be tried "by an impartial jury" in Manhattan, a few blocks away from Ground Zero, Holder stated that for this type of crime the USA envisaged the death penalty" (http://www.ansa.it/). Cf. also H. Popitz, *Phänomene dar Macht. Autoritat, Herrschaft, Gewalt, Technik* (Tübingen: J. C. B. Mohr, 1986).

38. Cf. E. Durkheim, *L'éducation morale* (Paris: Alcan, 1923); R. Dahrendorf, *Law and Order* (London: Sweet & Maxwell, 1985) (Dahrendorf observes that impunity, or the systematic softening of sanctions, connects crime with the exercise of authority); D. Garland, *Punishment and Modern Society*.

Chapter VIII

The respect of human rights as a form of cultural delegitimisation of the juridical basis of the death penalty

In the cultural stratification supporting the death penalty, especially in the American system, its purpose is best expressed in a clearly ritualised context. The whole conceptual framework accompanying the political or juridical aim of the death penalty is marked and represented by a veritable ritualism, whose protagonists, through vengeance, become participants and public witnesses of a message, i. e. that every crime will be unfailingly followed by its punishment.

If, as would appear possible from the evidence, with the passing of time, the conceptual gap between the "basis for" and the "purpose" of the death penalty has continued to increase, closure has been brought to the debate on the juridical basis of the death penalty as a possible punishment envisaged by the State (naturally this is true for all those nations that maintain capital punishment in their legal tradition), by the centrality of human rights.[1] It is also authoritatively posited that the second transformation was the new consideration of the death

1. See G. Jellinek, *The Declaration of the Rights of Man and the Citizen* (1895; New York: Henry Holt, 1901); N. Bobbio, 'La rivoluzione francese e i diritti dell'uomo' (1988), now in *L'età dei diritti*, pp. 89-119; G. Vassalli, 'Costituzione, sistema penale e diritti dell'uomo' (1995), in *Ultimi scritti* (Milan: Giuffrè, 2007), pp. 519-41; G. Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriß* (Berlin: Duncker & Humblot, 1978); C. Amirante, F. Rubino, 'Diritti umani e pena di morte. Una riflessione preliminare', *Crit. del dir.*, 2-3 (2001), 436-49; F. Mantovani, 'La proclamazione dei diritti umani e la non effettività dei diritti umani (Accanimento contro la vita o cultura della vita?)', *Riv. it. dir. e proc. pen.*, 1 (2008), 40-61. Reference to human rights calls into play a particularly reliable new and modern criterion and a model of legitimation which binds the system, according to N. Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main: Suhrkamp, 1983). Cf. also M. Flores, *Storia dei diritti umani* (Bologna: Il Mulino, 2008).

penalty as a violation of human rights to be banished in all civilized States. This international principle, stated in Protocol nr. 6 (1983), has become the basis "of anti death penalty evangelism" throughout the world.[2]

An illustrious Italian example is the parliamentary intervention of Enrico Pessina during the work preparatory to the Zanardelli Code of 1889:

The desire to transfer the principles of an enlightened liberalism to the code may be seen in the defence that he (Pessina) made of the abolition of the death penalty, of the characteristics (including that of re-education) that punishment must have, and the requirement that the defence of the State not be at the expense of the fundamental rights of the citizens. It is no coincidence that his speech requesting the assent by the Senate to the Zanardelli project began with a studied reference to the Universal Declaration of Human Rights.[3]

The subsequent republican Constitution in force today categorically and definitively stated in its preceptive and unalterable section that "The Republic recognises and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality".

The debate, then, shifts once again from the field of law to the political issue of fundamental human rights,[4] where the right to life of the human person is placed higher in the hierarchy of values than the power of the State to kill.[5] This is a decided and premeditated

2. F. E. Zimring, *The Contradictions of American Capital Punishment*.

3. M. Sbriccoli, 'Dissenso politico e diritto penale in Italia tra Otto e Novecento. Il problema dei reati politici dal "Programma" di Carrara al "Trattato" di Manzini', *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2 (1973), 607-72, containing the result of the debate in the Senate of the Kingdom and in particular the speech by Enrico Pessina on 16 November 1988, in *Lavori parlamentari del nuovo Codice penale italiano. Discussione al Senato (from 8 to 17 November 1988)*, Turin, 1989, from p. 237.

4. The profound contemporary link between the rejection of the death penalty and the respect for human rights and the dignity of the person was reiterated in an important document signed by all the Italian academics specialising in criminal law in the *'Document for the Abolition of the Death Penalty throughout the World'* drafted on the occasion of the "Fifth Centenary of the institution of the first teaching of criminal law (1509-2009)" at the University of Bologna, and published with a comment by S. Canestrari in *L'Indice penale*, 1 (2010), pp. 417-20: "A document reiterating the absolute condemnation of the death penalty and the need for commitment to law and criminal process based on respect for human rights and the dignity of the person" (p. 417).

5. For more on this subject, see L. Ferrajoli, *Diritti fondamentali* (Rome-Bari: Laterza,

change of strategy by the abolitionist movement, whose effects will be contextualised in a much broader juridical perspective.[6] In fact, all this means that the subject of the juridical foundation of capital punishment can no longer be considered central to any reflection on the justification of the death penalty along the spectrum of the different theories of punishment. It becomes pointless to debate whether it is theoretically justified from the retributional point of view or from that of the generalised preventive profile of the right of a State to condemn to death, because the reasoning that validates it is beyond the range of the debate on criminal punishment, as is the consequence of criminal responsibility which is only a premise for the application of a measure to safeguard the system.

The problem on the other hand is deeply rooted in the context of the political act, as is confirmed by the American experience, where the legislative aspect exists in an institutionally dissociated context, i. e. between State legislation and Federal legislation. An element that distinguishes the death penalty from other violations of human rights committed by States, such as torture and the persecution of political opponents, is that their governments openly claim the right to carry out the death sentence.[7] Nor does the Federal Constitution

2001); S. Tzitzis, 'Droit du morte et droits de l'homme', *Rivista internazionale di filosofia del diritto*, LXVII (1991), 516-35.

6. The subject of politics raises its head again and this time seeks a new conceptual direction in a period of the globalisation of rights, and the new dimension opens up to the possibility of establishing principles and values to create a different intercultural political order; on this O. Hoffe emphasizes that a criminal law bound to the principle of human rights becomes part of a theory of the State based on the idea of citizenship (*Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch*, Frankfurt am Main: Suhrkamp, 1999). In this process of rethinking concepts and rights through the prism of human rights, the concept of human dignity occupies a new position, as underlined by M. Kaufmann (*Diritti umani, in der Reihe*, Naples: Guida, 2009), p. 63. Also the Magisterium of the Catholic Church, despite the reserve of canon law and the catechism, increasingly emphasises the human right to life as inalienable, relating it directly to the concept of "human dignity". Dignity thus becomes the fulcrum for all questions relating to human rights that gives meaning, albeit from another point of view, to the distinctive characteristics of the right to life. Cf. the speech by Pope Benedict XVI at the *General Assembly of the Pontifical Academy for Life* on 13th February 2010: "The recognition of human dignity as an inalienable right is founded primarily on this law, which is not written by a human hand, but is engraved in human hearts by God the Creator. Every juridical order is required to recognise this law as inviolable and every individual is called to respect and promote it".

7. F. E. Zimring, *The Contradictions of American Capital Punishment*.

prevent it, as the eighth amendment only regulates the nature and procedural form of the application of the death penalty: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". In this way it is

in any case the method and not the type of punishment in itself which must conform to the requirements of the constitution, and it is no surprise that, in 1972, the Supreme Court declared capital punishment as it had hitherto been applied unconstitutional; nor is it surprising that each of the Justices making up the august bench felt the need to present a 'doctrine' on the matter, with the result that nine different opinions were produced.[8]

The modern tendency to widen the sphere of the absolute value of human rights started with the *Universal Declaration of Human Rights* of 10th December 1948.[9] However, at the centre of the juridical reflection is the point that in none of the provisions of the Declaration is the death penalty expressly prohibited. Indeed, in Art. 3 it was deemed appropriate to resort to a "no mention" strategy, thus emphasising the right to life, but without prohibiting the right to suppress life as a form of punishment. During the eighties, the debate in Europe explores another field of investigation whereby the death penalty represents a particular form of torture, expressly prohibited by the international Treaties including the European Charter. Conceptually, it may appear somewhat difficult to understand what the relationship between the right to life and the right not to be subjected to suffering and pain might be. Nevertheless, the thorny question regards the period that the person condemned to death must wait, even decades, so long as to constitute a state of permanent, inhuman and unjustifiable suffering, in the form of a rite to be carried out.[10]

8. R. Gambini Musso (ed.), *Il processo penale statunitense. Soggetti ed atti* (Turin: Giappichelli, 2009), p. 265.

9. See the excellent historical contextualisation by M. Flores, *Storia dei diritti umani*. The debate around the predominant question of the unconditional respect of human rights also arises in other fields. The latest to address this issue taking as his starting point the brilliant insight of examining the relationship between justice, the law and the economic system of globalisation is Amartya Sen, *The Idea of Justice* (Harmondsworth: Penguin, 2009: cf. in particular chapter XVII).

10. International public opinion was particularly touched by the news of the 21 years' wait of G. W. Hathorn, *Dead man walking. La mia voce dal braccio della morte* (Marina di Massa: Edizioni Clandestine, 2007).

Not surprisingly the question of human rights obliged the American judiciary to pronounce on the legitimacy of the death penalty, which once again seized the opportunity to reiterate their anti-abolitionist stance.[11] It was in reality a question of detail rather than the issue itself, i. e. whether the means used to execute prisoners was in conflict with humanitarian values or, at least, in harmony with the eighth amendment of the US Constitution. The definitive solution was reached on 16 April 2008, when the Supreme Court of the United States in the "Baze vs Rees" judgment (553 US) "declared the death penalty carried out by lethal injection constitutionally legitimate".[12]

Once again, the question of *how* overshadows the question of *if* and once more the question of the compatibility of the death penalty with the principles behind the choice of admissible criminal punishments is not addressed. In reality, there has been a reduction in the number of cases of the application of the death penalty for certain categories of criminal. These include persons with mental incapacity due to a multiplicity of causes ranging from anomalous mental development to serious *learning* difficulties, or else the inability to form relationships, thus making them unable to live normally in society.[13]

Only political choices, seeking a difficult balance between the powers of the State (i. e. between the powers of the individual State and those of the Federal State), are of use in determining whether or not it is opportune to keep the death penalty. As observed by Zimring, the image of closure and its political manipulation protect the death penalty from the fears associated with the excessive use of

11. Here emerged the paradox represented by the 'humanitarian techniques' introduced by the United States in carrying out the death penalty; 'technical' solutions which do not inflict further suffering on those condemned to death. For the various arguments on the subject see F. E. Zimring, G. Hawkins, *Capital Punishment and the American Agenda* (New York, N.Y. - Cambridge: Cambridge University Press, 1986). It should also be added that on 29 June 1972 the famous *Furman vs Georgia* judgment (408 U.S.238, 361) gave voice to the abolitionist movement for the first time, focusing on the unreliability of the criminal procedure for the investigation of crimes envisaging the death penalty. There followed the stay of execution for all death row cases and an intense campaign in favour of abolition in all States; on this, see J. Simon, *Governing Through Crime*.

12. See C. De Maglie, 'Presentazione', to the Italian trans. of F. E. Zimring's *The Contradictions of American Capital Punishment*: *La pena di morte: Le contraddizioni del sistema penale americano* (Bologna: il Mulino, 2009), p. 7.

13. Thus in Atkins vs Virginia, 536 U.S. 304 (2002), for which see R. Gambini Musso (ed.), *Il processo penale statunitense*, p. 271.

government power.[14] But in reality what is confirmed in the end is that once again "the local governments feel that criminal justice is an important means of government and that it makes no sense to leave it to the sole initiative of the victims".[15] For these reasons there will never be a logical symmetry between value-based choices concerning the purpose of, or basis for, punishment and the political utility or contingent purpose of applying the death penalty.[16] If the key issue becomes that of the reliability of criminal procedure in investigating acts punishable by death, the issue of judicial error re-emerges from the new perspective of human rights and the inviolability of life.[17]

In this way, the values of justice and life are measured against each other twice, and the principle already affirmed in the *Federal Death Penalty Act* (federal law on the death penalty approved by the Congress of the United States in 1994) is stated forcefully: that is, that the death penalty creates an excessive risk that innocent people might be executed, thus substantially violating the principle of a fair trial.[18]

Setting aside any other consideration on the foundations or the purpose of punishment which, as stated above, became prevalent in the last century, the fact remains that from the politico-criminal point of view, the death penalty has no power to dissuade. Its failure can be seen both from the preventive and punitive perspectives. While the death penalty exists, and States make large-scale use of it, considering it to be of use in the fight against crime, it will be clear that it has had no real effect in dissuading people from committing crimes punishable by

14. F. E. Zimring, *The Contradictions of American Capital Punishment*.

15. M. Sbriccoli, 'Giustizia criminale', p. 167. Here we clearly see how the political aspects prevail over those of criminal justice and over sanctions punishing the harm done to the common good.

16. Cf. F. C. Palazzo: "The death penalty is characteristic of eras when the State wishes to emphasise certain values justifying the recourse to capital punishment to underline the importance of the values to be safeguarded - as well as to mask the emotive, contingent reasons of such a political choice" ('Pena di morte e diritti umani', p. 767).

17. In the past, Mario Pagano warned future legislators against the uncertainty of the penal system and the rash methods of obtaining evidence, all prerequisites unable to guarantee justice in applying the death penalty. On this, see M. Pagano, *Considerazioni sul processo criminale* (1801), with an introduction by E. Palombi (Naples: Grimaldi, 2006), p. 153ff. It may be useful to recall what has already been said on the Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty (April 15, 2009).

18. For all further references to case law, see H. Prejean, *The Death of Innocents*.

death.[19] And if crime rates show an increase, and not a reduction, in the crimes for which it is envisaged, this means that the legislator needs to change direction as far as punishment is concerned.[20] It is therefore true that the need for punishment depends on its effectiveness, and that if a punishment does not achieve its purpose, it may safely be said that it is not necessary.[21]

As the starting point of his debate on State sovereignty, Rousseau proposes a politico-institutional interpretation of the ineffectual nature of punishment, attributing it entirely to the incapacity of Government: more particularly, Rousseau argues that the frequency of punishments is always a sign of weakness or laziness by government (since there is *not* a single ill-doer who could *not* be turned to some *good*). Thus, he adds, no-one has the right to kill, not even as an example, except in the case of one whose life cannot be saved without risk.[22]

In this way, the failure of the prevention principle leads only to an asymmetrical form of retribution,[23] a kind of retribution which, however, aims only to assuage the desire for vengeance and, albeit indirectly, the intent of vengeance cultivated within the cultural matrix of a democratic and modern legal order.[24] So much so as to demonstrate that capital punishment finds no juridical justification for inclusion

19. See G. Lombardi: "the frequency of punishment clearly showed the weakness of governments, lacking in moral or intellectual consensus" (*La pena di morte e il suo fondamento*, p. 9).

20. Cf. A. Blumstein *et al.* (eds), *Deterrence and incapacitation*, according to whom it is the crime rate that affects the quantity and intensity of punishment. This happens when State institutions overloaded with work due to the enormous number of crimes committed become unable to handle them efficiently. If the same assessment criterion is applied to the death penalty it is easy to infer its absolute inability to act as a deterrent or to intimidate.

21. Cf. F. Guizot, *Des conspirations et de la justice politique*.

22. J. J. Rousseau, *Du contrat social*, bk II, ch v. Although statistically marginal, the data concerning the abolition of the death penalty in the Italian pre-unification States are significant: "with the abolition of the death penalty in Tuscany in 1786 by Pietro Leopoldo di Lorena, capital offences diminished considerably; with its restoration in 1795 by Archduke Ferdinand, very serious crimes increased" (P. Rossi, *La pena di morte e sua critica*, p. 201).

23. A very interesting observation on this comes from L. Ferrajoli: "unlike its fabled function of defending society, it is no exaggeration to say that the sum of the executions carried out through history have cost humankind incomparably more blood, life and mortification than all the crimes put together" (*Diritto e ragione. Teoria del garantismo penale*, p. 382).

24. For a return to a 'terrorist' dimension of the death penalty see E. von Hagg, *Punishing Criminals* (New York: Basic Books, 1975).

among the punishments to be administered to those guilty of crime.

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Compilato il 8 novembre 2012, ore 15:22
con il sistema tipografico LaTeX 2ε

Printed in October 2012
by «ERMES. Servizi Editoriali Integrati S.r.l.»
00040 Ariccia (RM) – via Quarto Negroni, 15
on behalf of «Aracne editrice S.r.l.», Rome