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RESEARCH ARTICLE

The Inner and Outer Dimensions of Rehabilitation

Las dimensiones interior y exterior de la rehabilitación

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ABSTRACT: This article argues that the constitutional principle of re-education (Art. 27(3) of the Italian Constitution) cannot be understood, or even meaningfully conceived, apart from the fundamental rights of prisoners. Starting from the etymology of "re-education" as a leading out (*ex-ducere*), it reads the principle as an aspiration to free the convicted person from two kinds of "prison". The first is outer: the physical prison and, by extension, the social isolation awaiting the person after release. As regards the physical prison, this generates a duty approaching an obligation of result and entails, in the author's view, the unconstitutionality of perpetual punishment, life imprisonment included; the duties of social reintegration after release, by contrast, are not of equal intensity. The second is inner: the gap in personal development, stemming from the deficient realisation of inviolable rights, that led to the offence. Here the State owes only an obligation of means, which presupposes the voluntary and genuine adherence of the convicted person and excludes both "correctionalist" coercion and any bargaining over sentence reductions in the enforcement phase. The article then confronts this "ought" with the "is" of Italian prisons (overcrowding, degrading conditions, suicides), which it characterises, following Luigi Ferrajoli, as "system crimes". It concludes that re-education cannot serve as a rhetorical device to legitimise the evil of punishment, but must be nourished by the actual implementation of constitutional principles.

KEYWORDS: re-education; prisoners' rights; Article 27 of the Italian Constitution; human dignity; life imprisonment; prison overcrowding; system crimes.

RESUMEN: El artículo examina el principio constitucional de reeducación, consagrado en el artículo 27.3 de la Constitución italiana, desde su vinculación con los derechos fundamentales de las personas privadas de libertad. A partir de una interpretación etimológica y constitucional del concepto de reeducación (*ex-ducere*, conducir hacia fuera), se sostiene que este principio persigue la liberación de la persona condenada de dos

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formas de privación. La primera, de carácter exterior, comprende el encarcelamiento físico y la exclusión social posterior al cumplimiento de la condena. Desde esta perspectiva, se argumenta que, respecto del encarcelamiento físico, el Estado asume un deber próximo a una obligación de resultado, incompatible con la perpetuidad de las penas, incluida la cadena perpetua, según la tesis del autor. Los deberes de reintegración social posteriores a la excarcelación, en cambio, no revisten idéntica intensidad. La segunda, de carácter interior, se relaciona con las deficiencias en el desarrollo personal derivadas de la insuficiente garantía de los derechos inviolables que contribuyeron a la comisión del delito. En este ámbito, la actuación estatal configura una obligación de medios, condicionada a la participación libre y voluntaria de la persona condenada, que excluye las intervenciones correccionalistas coercitivas y la negociación de reducciones de pena durante su ejecución. Igualmente, se contrasta esta interpretación normativa con la realidad penitenciaria italiana, caracterizada por el hacinamiento, las condiciones degradantes y los suicidios, fenómenos examinados a partir de la categoría de "crímenes de sistema" desarrollada por Luigi Ferrajoli. Se concluye que la legitimidad constitucional de la reeducación depende de la garantía efectiva de los derechos fundamentales y no de su utilización como justificación retórica del castigo penal.

PALABRAS CLAVE: cadena perpetua; crímenes de sistema; derechos fundamentales; dignidad humana; reeducación penitenciaria; sistema penitenciario italiano.

I. INTRODUCTION: RE-EDUCATION AND THE RIGHTS OF PRISONERS

The reflection developed here draws on a stimulating remark by Francesco Palazzo, made at an important event held in Bologna:[1] the community of criminal law scholars, he observed, has so far dealt "too much" with the re-education of the convicted person[2] and "too little" with the rights of prisoners.[3] Following this remark, the author considers it appropriate (indeed, a matter of "imperative"[4] urgency) to offer a treatment that embraces both the principle of re-education

1 This refers to the conference held on 17 May of 2024 as part of the Advanced Excellence Training Course *Nuove prospettive per la tutela dei diritti umani in materia penale* [New perspectives on the protection of human rights in criminal matters], entitled *Il diritto penale e la tutela dei diritti fondamentali. Introduzione al corso* [Criminal law and the protection of fundamental rights. Introduction to the course]. Unless otherwise stated, translations of Italian sources are the author's.

2 The Italian "*rieducazione*" (Art. 27(3) of the Constitution) is rendered here as "re-education" rather than as "rehabilitation", because only the former preserves the etymological image of a leading out (*ex-ducere*) on which this entire work rests. The term should not be read in the sense of ideological or coercive re-education: as will be argued below, the principle excludes any attempt to change the convicted person by compulsion. "Rehabilitation", which is how the concept is usually designated in English-language literature, is retained in the title for ease of recognition.

3 There is certainly no lack of significant treatments of the subject, including in connection with the re-educative principle: see at least Calcaterra, (2024); Cataldo, (2024); Dolcini, (2019); Flick, (2012); Ruotolo and Talini, (2017); Fornasari and Menghini, (2025); Gaboardi *et al.*, (2013), pp. 45-46; Malinverni, (1973); Menghini, 2022; Pennisi, (2002); Ruotolo, (2002); Melchiorre, (2014). Several authoritative commentaries (some of which are taken up in the course of this work) can also be found in the special issue on prison punishment (*Carcere oggi: tra emergenza sistemica e prospettive necessarie* [Prison today: between systemic emergency and necessary prospects]) edited by Palazzo and Risicato, (2025), and therein, in particular, Gianfilippi, (2025), p. 929.

4 Thus, aptly, Pelissero, (2025), pp. 921 ff., where Pelissero observes, of this imperative emergency, that "it is not the title of this contribution that signals it, but the data. The numerical indications are not always unambiguous, indeed they can at times be misleading, when they fail to reflect a more complex reality. Nevertheless, the numbers of the

and the necessary respect for the "baggage of inviolable rights"[5] of the human person *in vinculis*, not by mere juxtaposition (even a topographical one[6]), but in light of the intimate legal and conceptual relationship that binds them.

On the one hand, as has been lucidly argued in the literature,[7] respect for prisoners' rights is the indispensable precondition for any re-educative horizon; on the other hand, as has likewise been observed,[8] re-education, besides being the goal[9] towards which any punishment must constitutionally tend, is itself the object of a specific right of convicted persons, the so-called right to re-education, that is, the legitimate claim that the public authority act to offer the convicted person a programme of re-educative treatment. To these shared considerations one may add that re-education not only *presupposes* respect for rights but, in the terms set out below, inescapably (i) *feeds on* those rights and (ii) is indissolubly tied to other fundamental principles enshrined in the Italian Constitution. Without a value-based link to inviolable rights and to the other constitutional principles, the re-educative aim is not merely impoverished in meaning; more radically, it is not even meaningfully conceivable in the first place (except in a purely rhetorical sense).

prison are hard to refute in their coldness".

5 This telling expression is taken from Constitutional Court, judgment no. 26 of 1999, point 3.1 *Considerato in diritto* [Conclusions on points of law], in which the Court observes, with regard to the condition of prisoners, that "[h]uman dignity (Art. 3(1) of the Constitution) in this case too (indeed: above all in this case, whose distinguishing feature is the precariousness of individuals, deriving from the lack of freedom, in environmental conditions by their nature intended to separate them from civil society) is protected by the Constitution through the *baggage of inviolable rights* [emphasis added] of man that the prisoner too carries with him throughout the entire course of the execution of the sentence". In this work the expressions "inviolable rights" and "fundamental rights" are used as synonyms, although, in the author's conception, there is a difference between them, the former relating to legal positions inherent in the *essence of the human person*, and the latter also to legal situations not always directly connected to that essence, yet nonetheless laid down by the Constitution as foundations of the legal system: the prime example is the right of property. For further discussion, the reader is referred to D'Andrea, (2022), p. 164, and specifically p. 170, where a component of Lombardi's thought is emphasised that had so far been, in the author's view, overlooked by scholars.

6 Respect for the fundamental rights of the human person may well be regarded as encapsulated in the constitutional reference (immediately preceding the mention of the re-educative principle) to the requirement that punishments must not be "contrary to the sense of humanity".

7 *Ex multis*, Martufi, (2015), p. 6, who speaks of an exit from the "perimeter of constitutional legality" of any punishment executed in conditions contrary to the sense of humanity, as well as Menghini, (2022), p. 426, according to whom "only the adequate recognition and protection of subjective rights, pre-existing their further functionalisation to re-educative treatment, creates the objective conditions of context and the subjective ones, linked to the maturation of a valid and free consent on the part of the convicted person, for the possible realisation of a fruitful re-educative path".

8 See again Menghini, (2022), *passim*.

9 The distinction, authoritatively drawn in the literature, between the *function* of punishment and its *purpose* is not overlooked, Donini, (2024a), pp. 280; the same author devoted to it a lecture delivered on 12 June of 2024 at the "Alimena" Institute of Penal Studies (ISPA). Donini, (2024b).

II. DEFINING RE-EDUCATION: LEADING THE CONVICTED PERSON OUT

To grasp this point, it is useful to start from a guiding methodological idea:[10] in order to analyse a phenomenon adequately, one must first give it a stipulative definition.

The scholarly reconstructions of the concept of re-education are very well known (and the author will dwell on them where this serves the unfolding of the argument). They range from the outdated notion of moral amendment, redolent of old Catholic thought,[11] through the theory of the convicted person's social reintegration[12] (also in its minimal version as non-desocialisation[13]), to the bloodless conception of a minimal disposition to respect criminal prohibitions (so-called legal probity).[14]

The approach adopted here is different, aiming to probe the innermost essence of re-education: it lies, in the author's view as well, in its origin.[15] In its etymological root, the idea of re-education centres on (re-)*leading out* (*ex-ducere*). To re-educate thus means, in essence, to (re-)*lead* the convicted person *out* of something. This is evidently an *exit* understood as a *liberation*. The fundamental question that now naturally arises is therefore: *out of what* should the legal order (attempt to) lead the convicted person? *From what* should it (aspire to) free the person?

The answer is not trivial and can be articulated on two levels. The first is *outer*; the second, and the principal one, is of a decidedly *inner* nature. The common thread is the sombre image of the *prison*. Finally, each of these levels corresponds to a specific *aspect of the (apparent) paradoxicality of re-educative punishment*.

III. THE OUTER PRISON: LIBERATION FROM DETENTION

The first and most immediate prison from which the legal order must seek to free the convicted person is the physical *prison* and, more broadly, any other place in which the convicted person is held in detention.[16] Although this is an aspiration that is *only contingent*, since it inevitably does

10 Taken from Hobbes, (1651), ch. 4, according to whom "seeing then that truth consisteth in the right ordering of names in our affirmations, a man that seeketh precise truth had need to remember what every name he uses stands for, and to place it accordingly; or else he will find himself entangled in words, as a bird in lime-twigs; the more he struggles, the more belimed".

11 The immediate reference is to Bettiol's thought, which is moreover characterised by a "reductionist" conception of the principle, confining it to the enforcement phase alone (thus Bettiol, (1951), pp. 378 ff., on which see Riondato, (2005), and Fiandaca, (1991), p. 229). Such a reductive view has long since, and rightly, been set aside, thanks also to the landmark judgment of the Constitutional Court no. 313 of 1990, point 8 *Considerato in diritto*, according to which "the constitutional requirement that punishment must 'tend' to re-educate, far from being a mere generic tendency referring only to treatment, indicates precisely one of the essential and general qualities that characterise punishment in its ontological content, and accompany it from the moment it is born, in the abstract statutory provision, until it is extinguished in concrete terms".

12 On which, critically, *ex plurimis*, Fiandaca, (1991), p. 314.

13 On this point, among others, Moccia, (1992); Talini, (2022), p. 275.

14 Thus Dolcini, (1979), p. 472; Fiandaca, (1991), p. 278; Moccia, (2012), p. 925.

15 According to the valuable teaching of Padovani, (2024), p. 2.

16 On the break in the almost synonymous equivalence between detention and prison, Dolcini, (2020), p. 115; but see

not concern all convicted persons (but only those subject to a custodial sentence), it is nonetheless the most emblematic aspiration in criminal matters.

Here the *first coefficient of paradoxicality of punishment* (re-educative and custodial) emerges with dazzling clarity: punishment, while structurally consisting in the *imprisonment* of the convicted person, must functionally aspire to *lead* the person *out of that prison*. The gap between the structure and function of punishment is, however, only partial since, by virtue of the point just made, the two coordinates converge in the firm and peremptory constitutional prohibition of any form of perpetual punishment: if *liberation* is the functional compass to which punishment is deontically oriented, *temporariness* cannot but be the corresponding structural feature by which it is genetically marked.

From this follows *de plano*, on the author's own thesis (which departs from current constitutional case law), the incurably unconstitutional character of life imprisonment, which the Constitutional Court has so far "saved", as has been aptly argued in the literature, only on condition that it *not be life imprisonment* (!).[17] The unconstitutionality (*rectius*, the *anti*-constitutionality) of life imprisonment, however, cannot be confined to its variant without parole (that is, the one precluding release for those who do not cooperate with the authorities), because even in its "simple" and original guise this type of punishment, besides being *factually* prone to perpetuity[18] despite the penitentiary benefits that may in the abstract be granted, carries an irremediably flawed *genetic code*, being by definition destined to *perpetuate* imprisonment rather than to bring it to an end. *This* seems to the author to be the cardinal and most elementary reason for the unconstitutionality of life imprisonment, prior (in logical terms) even to the certainly valuable right to hope[19] and to sacrosanct humanitarian concerns. It is a *radical* unconstitutionality precisely because it conflicts *at the root* with punishment's first and necessary aspiration to free the convicted person, ultimately, from its own corrosive grip.

It is worth stressing, to conclude on this point, that this meaning, or sub-purpose, of the re-educative principle, having an *outer* significance (*id est*, relating to a physical place) and being *circumscribed* (concerning only places of detention), is by far the easiest to achieve; for this very reason, the constitutional imperative here takes on *maximum intensity* and approaches an *obligation of result*.

Liberation from this first prison, however, by no means entails *ex se* an easy life for convicted persons: a sub-prison that often seems to await them is the one *that follows the completion of the sentence, upon their return to civil society*. As is well known, the prisoner's re-entry into society proves anything but easy, if not outright traumatic: society is often wholly unprepared to wel-

also Brunelli, (2018), p. 265; Pelissero, (2016a), p. 733.

17 This is the pointed observation of Andrea Pugiotto in Anastasia, Corleone and Pugiotto, 2021, p. 42, which summarises the position expressed on life imprisonment by the Constitutional Court in its (numerous) pronouncements on the matter (*inter alia*, judgments nos. 115 of 1964, 204 and 264 of 1974, 274 of 1983, 149 of 2018 and 253 of 2019, and, most recently, order no. 122 of 2022). On so-called life imprisonment without parole, see also Bortolato, 2017, pp. 155 ff.; Brunelli, Pugiotto and Veronesi, (2019); Dolcini, (2017), pp. 1500 ff.; Fiorio, (2020), p. 649; Flick, (2017), p. 1505; Galliani, 2017, pp. 1522 ff.; Neppi, (2017), p. 1509; Pelissero, (2021), p. 1001 ff.; Pugiotto, (2016a), p. 17; Risicato, (2021), p. 653.

18 On this point again Pugiotto in Anastasia, Corleone and Pugiotto, (2021), p. 42.

19 On which Fiorio, (2020), pp. 650 ff.; Dolcini *et al.*, (2019).

come them back, and an approach marked, at the very least, by distrust and hostility towards them thus prevails. Moreover, a criminal conviction often carries with it a broad array of social and occupational restrictions, which certainly do not facilitate the convicted person's social reintegration.[20]

Here too the legal order is called on to make its contribution to the offender's social reintegration (this being, after all, the meaning of the re-educative demand that remains the most "inflated" to date). In the reconstruction proposed here, however, it represents not so much the *primary* aim of re-education as its unavoidable logical and axiological corollary: having freed the convicted person from the outer prison, the legal order must not release that person into a new, and perhaps no less afflictive, invisible prison. It should be noted, however, that this duty is conceptually distinct from the one concerning the physical prison: while the duty to bring detention to an end approaches an obligation of result, the duties of social reintegration after release do not necessarily constitute obligations of result of equal intensity, since their fulfilment also depends on the response of society.

Both *in vinculis* and after returning to society, therefore, the prisoner is an extremely *vulnerable* person,[21] and as such must be protected by the legal order.

IV. THE INNER PRISON: REMOVING THE OBSTACLE TO PERSONAL DEVELOPMENT

The second dimension of the re-educative demand centres on a prison of a different nature from the physical, outer one of the places where the convicted person is deprived of personal liberty in the negative sense: punishment must seek to lead the person subject to it out of a prison that is at times even gloomier and more oppressive, of an *inner* character. The legal order, that is, must (attempt to) facilitate the convicted person's exit not only from the *outer* prison to which the offence has led that person, but also from the *inner* one that has led that person *to* the offence.[22]

This prison seems essentially to consist in a *gap* in the development of the personality, deriving from factors (*inter alia*, a lack of education, of mental health, of adequate working con-

20 Not to mention the array of further accessory sanctions, which contributes to *separating* convicted persons from society rather than integrating them into it. Nor should one forget that, *in vinculis*, as aptly remarked in his time by Bricola, (1977), p. 1227, penitentiary matters are dominated by "an effectiveness of the repudiating kind", which is "undeniably connected to a type of regulation such as the penitentiary one", since it constitutes "one of the sectors most exposed to the various practices through which, in the rule of law, official illegality is realised through the non-application and administrative manipulation of norms".

21 On the vulnerability of prisoners, Bonomi, (2018); Lorenzetti, (2024), p. 15. With regard to persons subject to detentive security measures, see instead Di Capua, (2022), p. 294.

22 In this respect, the perspective advocated in this work is not far from Bettiol's conception, recently summarised by Ronco, (2025), p. 15: "for the Master not only should intent and negligence be reread in dialogue with the real conditions in which the dynamics of action unfold, from a perspective that places at the centre man's freedom and culpability for the wrongful choice made, but *the whole of criminal law should centre its focus on the dramatic nature of the existential vicissitudes of offenders, who are ordered to the good but frequently dragged towards evil by the unruly drives of the ego, by inner fragilities, by the emotional storms provoked by external events or by the conditions of poverty and degradation of the outer environment*" [emphasis added].

ditions or, in general, of a healthy social environment, all of which, moreover, often interact) that the legal order is constitutionally bound to (strive to) remove (Art. 3(2) and Art. 27(3) of the Constitution, read together). Re-education must therefore be modulated in various ways according to the "obstacle" on which it is necessary to intervene in the concrete case, always on a voluntary basis (the reasons will become clear below), for the full development of the convicted person.

This brings out the *twofold link* between this second reconstruction of the re-educative demand and the Constitution. The first connects it to the supreme principle of substantive equality, promoting the removal of the obstacles which, by limiting the full development of the convicted person's personality, may have contributed to the commission of the offence; the second is implicitly bound up with the first, since Art. 3(2) of the Constitution cannot but live and operate in deep harmony with the whole set of inviolable rights recognised and guaranteed to all human beings. The "obstacle" to be removed, therefore, ultimately concerns the deficient realisation of one or more inviolable rights, owing (also) to which the convicted person is led to act in a manner contrary to criminal precepts.

It is necessary, however, to reject any form of causal determinism between gaps in personality development and criminal conduct: such a deficiency, in fact, merely represents an "increased risk" of committing a crime, but it is certainly not an exclusive or inevitably determining factor, since modern criminal law cannot disregard the fundamental philosophical reference to free will (which, however, must be understood not in an "olympian", absolute sense, but in a more moderate and relative sense, that is, as freedom conditioned by human factors).

Fundamental rights, in turn, are to be recognised and guaranteed in two ways: both to the extent required to remove the obstacle to the development of the convicted person's personality, and in a manner analogous (as far as compatible with detention or, in any event, with the execution of the sentence) to what applies to all other members of society.[23]

The second meaning of re-education, in short, lies in the combination "removal of a gap, of an obstacle + respect for and full realisation of fundamental rights". The former is a *specific* intervention, in that it aims to address the particular needs of the convicted person, *which pre-date* the offence; the latter is a *general* intervention, since it is directed at preserving *in vinculis* (beyond the shortcomings that distinguish one convicted person from another) the whole set of the pris-

23 The liberties that the prisoner may enjoy *in vinculis* must moreover be protected all the more intensely because, as the Constitutional Court wisely stated, "[w]hoever is in a state of detention, although deprived of most of his freedom, always retains a residue of it, which is all the more precious as it constitutes the last sphere in which his individual personality can expand" (judgment no. 349 of 1993, point 4.2 *Considerato in diritto*). This passage has repeatedly been taken up by perceptive scholars, who have linked it to the concept of human dignity and to the consequent principle of humanisation of punishment, Menghini, (2022), p. 14, where it is argued that the principle of humanisation of punishment acts as the ultimate bulwark for the protection of human dignity "not only by banning types of inhuman sanctions, but also by marking, with specific reference to detention, the lower limit that the demands of order and security cannot cross"; Menghini has, however, clarified, in note 39, that "this is, moreover, a limit of uncertain and elusive definition, also because the concept is obviously historically relative", echoing on this point the realistic considerations of Palazzo, (2021), p. 40, who stresses that criminal sanctions display "an ineliminable component of inhumanity, that is, of suffering and humiliation deliberately inflicted". On the operative breadth of the principle of human dignity (especially *in vinculis*), such as to permeate the whole criminal legal system, see Martufi, (2015), p. 59.

oner's fundamental rights.[24] The difference seems, however, largely *one of degree*, since the legal order must devote *closer attention* to the *specific* spheres of life in which prisoners have shown gaps, while still having to deal generally with *all* the areas covered by their rights.[25]

V. THE SECOND PARADOX: SUFFERING AND WELL-BEING

The second aspect of the paradoxicality of re-educative punishment thus emerges naturally: the legal order entrusts it with the task both of *inflicting inevitable suffering on the convicted person* and of *promoting* that person's *well-being*. Punishment must therefore at once generate an *evil*[26] and foster the *good*. But note: this is not, in the author's view, the atavistic theorem of *pathei mathos*, that is, of learning (and hence improvement, growth) through suffering.

Suffering and well-being should in fact be two consequences stemming from different aspects of punishment.[27] Suffering, in particular, can only be linked to its *prophylactic aspect*, that is, to its purpose (in personalist terms, rather than of social defence) of *protecting legal interests*. The suffering inflicted by punishment, which is unavoidable, is in no way justified by pedagogical or paideutic aims, but finds its sole *raison d'être*, according to the acute teaching of Luigi Ferrajoli, in the *minimisation of the level of violence in society*.[28] Punishment is thus, in its afflictive dimension,

24 Strictly speaking, of course, the category of the detainee is broader than that of the convicted person; in this work, however, in light of the subject discussed, the two expressions will be considered essentially synonymous. On pre-trial detention see at least Caterini, (2025); Messana, (1991), pp. 63 ff.

25 Including the "sacrosanct" right to intra-mural affectivity, as recently recognised by the Constitutional Court in the well-known and courageous judgment no. 10 of 2024. For a commentary, the reader is first of all referred to D'Andrea, 2024, pp. 122 ff.; see also Bortolato, (2024), p. 100; De Vito, (2024); Giugni, (2024); Manca, (2024); Pugiotto, (2024); Ruggeri, (2024), p. 161; Veronesi, (2024), p. 1. More broadly, on the theme of intra-mural affectivity, Balbo, (2002), p. 85; Beccari, (2025); Brancati, (2024); Grieco, (2023), p. 423; Ruotolo, (2024), p. 74.

26 The "doubling of evil" often seems, in fact, hard to avoid (the famous expression of Donini, (2013), p. 1200, is evidently taken up here; see also Donini, (2015), p. 237: "[w]hat is, in fact, the doubling of evil? It is criminal law. Its 'logic' is: whoever has committed an evil that is a crime will suffer a punishment proportionate to that evil, and thus that evil will be turned back and doubled against him").

27 One might argue (though the theme would deserve, given its breadth, a separate treatment) that the function of punishment can be viewed from at least two broad angles, namely that linked to its *aetiology* and that concerning its *teleology*. The first perspective relates to what *makes punishment necessary*, which essentially determines its birth, and is therefore centred on the channel of *negative prevention*, with respect to which the afflictive aspect of punishment proves unavoidable; it is thus, ultimately and inevitably, a perspective with utilitarian, eudaemonistic contours (although it must not be forgotten that, in personalist terms, criminal sanctions must always protect other *individual flesh-and-blood human beings*, and not be subordinated to vague and generic demands of social defence: for a reconstruction aimed at valuing the *security of rights*, and not only the *right to security*, see Risicato, (2019)). The second angle is tied, instead, to what punishment, once introduced on grounds of social necessity, must then tend towards, namely the re-education of offenders, ensuring their well-being.

28 This is Ferrajoli's well-known, penetrating conception of criminal law and punishment, expressed already in the monumental Ferrajoli, 1989, and taken up both in other works by the same author (above all Ferrajoli, (2021) and, most recently, in Ferrajoli, (2024), p. 187, and in Ferrajoli, (2025)). The central thesis, which is fully shared, locates the *raison d'être* of punishment (and of criminal law in general) in the minimisation of violence within the social body (one might call it an evolved version of the *ne cives ad arma ruant*), pursued through the protection of the weakest party, who is the victim in the offence, the accused in the trial and the prisoner in the execution of the sentence. For a commentary, in a critically sympathetic vein, on Ferrajoli's latest book, see Mongillo, (2025), as well as

instrumental in averting a greater evil than the one that would result from its relative absence. Any individual improvement flowing from the burden of suffering that punishment entails is merely contingent and is therefore only a possible, and desirable, *beneficial side effect*.

The re-educative aspect, conversely, stems from the State's *duties of economic and social solidarity* towards prisoners (Art. 2 of the Constitution), and thus stands largely outside the perspective of the protection of legal interests, which, in this respect, will at most constitute (mirroring what was seen with regard to the infliction of suffering) a mere *beneficial collateral consequence* (and, it is submitted, a highly probable one) of a successful re-educative path. Re-education (like the principle of humane punishment[29]) is tied, as is well known, to the Kantian imperative to treat the human person always as an end and never merely as a means, and can therefore consist only of a set of *positive* interventions *in favour of* the convicted person, aimed at generating the greatest possible degree of *physical and psychological well-being*. The difference from the traditional *pathei mathos* is thus sharp, since the pursuit of prisoners' individual development is not merely a possible beneficial side effect but the object of a genuine *constitutional command* addressed to the (political, judicial and administrative) authorities.

VI. INNER ADHERENCE: VOLUNTARINESS, GENUINENESS AND THE REJECTION OF COERCION

This is, however, an obligation of means only and not (unlike what tends to hold for the first meaning of re-education) of result. Liberation from the inner prison that led the convicted person to commit the offence proves far less easy than exit from the outer one. The main difficulty is that only exit from the inner prison, and not the outer one, inescapably requires the convicted person's *inner adherence* as well. If the State has a duty to "do its part" in removing the obstacle and filling the gap that gave rise to the offence, thereby fostering suitable "external conditions", it is then for the convicted person to assent to the offer of change made to that person. State intervention is therefore necessary but not sufficient. What is needed, in other words, is a *resolve to change* on the part of the convicted person. The State's offer of work,[30] education[31] and treatment may, for example, be met with the convicted person's refusal to work, to study or to be treated.

Inner adherence by the prisoner, moreover (and here lies a further difficulty), can be authentic only if it is, first of all, *voluntary*: this means (a first, *minimal* point) that no programme of

Risicato, (2024).

29 On which Ruotolo, (2005), p. 51; Ruotolo, (2023), p. IV; Donini, (2020). On the indissoluble unity between the principle of humane punishment and the re-educative purpose also in constitutional case law, see Constitutional Court, judgment no. 179 of 1973, point 2 *Considerato in diritto*, according to which the two segments of Art. 27(3) of the Constitution (that is, the prohibition of punishments contrary to the sense of humanity and the mandatory re-educative purpose) form "a unitary context, not dissociable into a first and a second part, separate and distinct from each other"; an assumption reaffirmed, more recently, in judgment no. 279 of 2013, point 7 *Considerato in diritto*, on which Nardocci, (2014), p. 1.

30 On prisoners' right to work, Bernardi, (1987), p. 81; Cardanobile *et al.*, (2007); Malzani, (2022).

31 On the right to education, Citrigno, (2023), p. 444, and Maratea, (2023), p. 79. The problems of *effectiveness* in the exercise of this right *in vinculis* are stressed by Marcheselli, (2005), and Santalucia and Marchetti, (2019), p. 320.

an authoritarian, coercive nature is capable of bringing about real change. On the contrary, it prevents or at least hinders it.

Re-education cannot, therefore, be understood as a congeries of "correctionalist" measures designed to modify the convicted person's personality. This is so not only because such authoritarian, coercive treatments would amount to an assault on moral freedom[32] and, generally, on the dignity of the convicted person, but, fundamentally, because their very nature would irremediably clash with the aim they are meant to pursue: any pressure towards change inevitably drives it away, and any violence directed at producing it generates in its recipient a contrary and hostile reaction.

Up to this point, the approach followed here does not depart from that of Ferrajoli, a staunch advocate of convicted persons' right to remain themselves (even in the utter abjection of their convictions) and of the corresponding duty of the State to respect them for what they are, without setting out to change them with a sledgehammer.[33] As will soon be seen, however, it does not seem acceptable to equate coercively correctionalist interventions with the promotion of conditions in which the convicted person may spontaneously come to a critical reworking of the offence committed and embark on a different path in life.[34] It is this second aspect of re-ed-

32 In breach of Art. 13(4) of the Constitution, which prohibits any physical or moral violence against persons in any way subjected to restrictions of liberty. For an analysis of the normative implications of this provision, Zanon, (2024), p. 901; Ruggeri, (2025), p. 13. On the close relationship between this provision and the re-educative principle, see also D'Amico, (2006), p. 574.

33 This thesis too has been consistently upheld by Ferrajoli in all the works cited in note 28 above. Ferrajoli, in particular, in his latest book, Ferrajoli, (2024), p. 206, maintains that "so-called prison 're-education' in fact entails an impairment of the prisoner's inner freedom, which adds to that of his outer freedom and violates the first principle of liberalism: the individual's right to be and to remain himself and the correlative prohibition on the State from investigating his personality and from treating and transforming him morally through rewarding or punitive measures imposed for what he is, rather than for what he does". The passage is refuted, in terms that the author finds persuasive, by Mongillo, (2025), pp. 10-11, according to whom "[c]orrectly understood, it stands at the opposite pole of an inquisitorial model of amendment and of any moralistic perspective that looks to the expiation of the offender or to his inner correction. The undeniable chasm between the re-educative ideal (what ought to be) and a large part (though not the whole) of today's prison reality does not require that it be thrown on the scrap heap". To similar effect, Fiandaca, (2024), p. 91, according to whom re-education should be understood "not as a task to be imposed at all costs, but as an offer by the State of forms of assistance and opportunities that always require the prior voluntary acceptance of their recipients", and would for this reason represent "a coherent projection, in the specific field of crimes and punishments, of the more general personalist and solidarist inspiration that characterises the entire constitutional system", as well as Moccia, (1992), p. 83.

34 The author draws here on a fine passage from Mongillo, (2025), pp. 12-13: "the State must provide instruments enabling the convicted person to develop a greater capacity to find his way through the complexity of reality, in a manner compatible with respect for the rules of coexistence. Depending on the case, this goal may require an increase in education, the acquisition of new work skills and abilities, medical treatment, post-penitentiary aids and/or also the overcoming of false beliefs about how to relate to others or to society, as well as techniques respectful of dignity and devoted to the neutralisation of antisocial impulses: in short, various instruments of reinforcement, to help face the insidious challenges of life. This multifaceted project may also include opportunities for the offender's critical, cognitive revision of his own behaviour, avoiding slipping into pathologising perspectives or, as clarified above, into a forced introjection of values. The framework of principles and values of a solidaristic democracy, built on the guarantee of the fundamental rights of the person and on the promotion of equal liberty for all, must always be respected. It is not a matter, it bears repeating, of hoping for an 'inner conversion' of the prisoner or even merely of investigating his inner motivations in order to penetrate the depths of his moral conscience (the *Gewissen*, as the Germans would say). Besides, a State so selective in dispensing penality, in which inequality wedges in through

ucation that seems, in the author's view, to be neglected by Ferrajoli's reconstruction, which is inspired, *apertis verbis*, by strictly retributivist criteria (retribution being understood here as a limit on punishment rather than as its aim, which remains the minimisation of violence: see Section V and note 28) and by strict legality.[35]

There is, however, a second point to be considered, less obvious than the first and, above all, in the author's view, less valued by the currently dominant scholarship and case law: for the change to be *real*, it must be (and this is a key element) *genuine*. Adherence to the re-educative treatment must be detached from any opportunistic or utilitarian consideration. It must, in other words, *be independent* of any prospect of a sentence reduction, since any such utilitarian incentive makes it impossible, or at the very least extremely difficult, to distinguish genuine adherence from self-interested adherence. It is certainly not suggested that the sanctioning treatment should be inelastic, for the individualisation of punishment is a fundamental criterion for adapting the abstract norm to each concrete case submitted to the judicial authority.[36] Nevertheless, the individualising aspect should normally belong to the phase of judicial sentencing and not, in principle, to the enforcement phase. Making a sentence reduction *in executivis* conditional on adherence to a re-educative programme ends up making it impossible, or at the very least extremely difficult, to distinguish a genuine change from a consent shrewdly designed to secure earlier release *only* from the *outer* prison.

countless gaps, lacks any 'moral' legitimacy to claim to transform the prisoner (like any other human being) morally. Ultimately, according to the view advocated here, the re-educative purpose, intertwining with the values of autonomy and human dignity and with the solidaristic objectives of a constitutional democracy, is realised through the offer (not the imposition) of existential chances, of a change of perspective, of the possibility of perceiving a different position of the self in the world and of reducing that 'vulnerability' to repressive apparatuses emphasised by an 'agnostic' of punishment-as-function such as the Argentine criminal law scholar Raúl Zaffaroni. It must, moreover, not be forgotten that the principle of re-educativeness plays a crucial role not only in the enforcement phase, but also in those of statutory sentencing ranges and judicial sentencing (*an*, *species* and *quantum* of punishment). Without that short strophe, farsightedly carved into Art. 27(3) of the Constitution, would we have more or less strength, today, in denouncing the illegitimacy of norms expressive of the crudest punitivism, in shouting our 'no' to the death penalty and to 'life without end', and in calling for alternatives to prison? Firmly graspable normative footholds are indispensable in order not to get lost among the clouds of concepts".

35 See Ferrajoli, (2024), pp. 206 ff., and Mongillo, (2025).

36 On the principle of individualisation of punishment, Fornasari, (2024); Venturoli, (2020); Venturoli, (2022).

VII. ALTERNATIVES TO DETENTION, SENTENCE REDUCTIONS AND PENAL EXPANSION

Nor is it the intention to overlook the valuable canons of flexibility and progressiveness of treatment:[37] on the contrary, as has been lucidly argued in the literature,[38] alternatives to detention, as well as the many and various penitentiary benefits granted only to "virtuous" prisoners, should, from a *de iure condendo* perspective, form part of the *principal penalties* or, in any event, be provided *by default* for all convicted persons, regardless of their adherence to treatment programmes. Nor is it ignored that such mitigating measures serve to temper the harshness and brutalisation of punishments, which on the one hand are inherent in the original design of the Fascist-era Criminal Code and on the other have been further sharpened by repeated "aggravating" criminal reforms.

Such a compensating factor, however, paradoxically ends up feeding the very phenomenon it is meant to mitigate: aware that the sentence actually served will in practice be far lighter than the one threatened, the legislator continues, for that very reason, to feel entitled to introduce ever greater increases in severity, being able to count on the fact that *in reality* its intervention will be less incisive than it appears "on paper"; it will thus reap, *apparently* at no cost, its share of political and electoral support. This is, evidently, a hypocritical and odious vicious circle.

To the problems just noted must be added the fact that, as is sadly well known within the community of scholars[39] and legal practitioners, the progressive extension of the non-custodial penal arsenal[40] (alternative measures, substitute sanctions, *restorative justice*) has not been

37 According to a well-developed line of constitutional case law: see, to this effect, the decisions (involving a range of institutions) of the Constitutional Court, judgments nos. 306 of 1993 (with a note by Fiorio, 1993, pp. 2505 ff.), 504 of 1995, 445 of 1997, 257 of 2006 and 79 of 2007. For a general overview of the principle of progressiveness of treatment, Conte, 2018, and Menghini, 2022, pp. 38 ff., where account is given of the derivation of the so-called principle of non-regression of treatment, "by itself capable of setting a barrier to unfavourable retroaction whenever it is a matter of substantially recognising in the prisoner a 'vested right' resulting from a re-educative path already matured". On the neighbouring concept of flexibility, Pace, (2014), p. 2948; Panzera, (2007), p. 289.

38 See Ferrajoli, *passim*, and in particular the works cited in note 28 above.

39 See, in particular, Eusebi, (2024): "[t]oday, moreover, the number of criminal measures being executed in non-custodial forms (by virtue, above all, of probation (*messa alla prova*), probation under supervision (*affidamento in prova*) and community service, with a first, appreciable impact of substitute home detention and with the incidence of conditional release remaining negligible) considerably exceeds the number of persons in prison (but the gap would be even greater if one took into account the huge, not officially provided data on suspended sentences and on the phenomenon of the so-called *liberi sospesi*, as well as on autonomously imposed fines). Yet since 1990 the prison population has constantly increased (in March 2024 some 61,000 inmates *pro die* were recorded, with a rising trend), save for temporary counter-trends linked to the last collective pardon (2006), the *Torreggiani* judgment of the ECtHR (2013) and the Covid-19 pandemic. This portrays a phenomenon common to other European countries: the spread of non-custodial penal measures has not so far produced a decrease in the number of inmates, since it has been accompanied by an increase, resulting above all from *securitarian* policies, in criminalising provisions and in the *quantum* of custodial sentences threatened: although overall crime rates have been falling for years".

40 On which, among others, Bonomo, Breda and Di Gennaro, (1991); Tigano, (2022), p. 1321; Gianfilippi, (2024), p. 103. As regards the innovations introduced into the legal system by the Cartabia reform, see at least Conz and Levita, 2021; as well as the articles published in *Politica del diritto*, 2021, no. 4, devoted to the "reforms of justice"; Spangher, 2022, and Castronuovo *et al.*, (2023); see also the articles on the subject in *Rivista italiana di diritto e procedura penale*, 2023, and, therein, in particular Siracusano, (2023), p. 159, and Della Torre, (2023), p. 267, as well as Bartoli,

accompanied by a corresponding reduction in the number of prisoners, which, on the contrary, perniciously approaches "pre-*Torreggiani*" levels.[41]

In light of the data and observations just set out, the principal way forward appears to be (rather than, as has been suggested, eliminating both the remedy and the evil[42]) to eliminate the evil (that is, drastically to reduce penalties, to remove certain offences, etc.) and to reshape the remedy, removing areas of very broad discretion, bordering on arbitrariness, vested in the enforcement judge, the penitentiary administration and the supervisory judiciary, and configuring the present (mere) *concessions* as genuine *rights*, to be guaranteed in an (at least broadly) unconditional manner.

VIII. A MERELY CONTINGENT OBLIGATION OF MEANS

From the nature and scope of all the difficulties illustrated above it follows that liberation from the inner prison that led the convicted person to the offence can take, in legal terms, only the form of a mere obligation of means (and not of result) incumbent on the legal order, owing to the presence of factors, *internal* to the convicted person's personality, that are wholly beyond legal control.

This second, "inner" meaning of the re-educative principle is, moreover, merely *contingent* in nature (the contingency concerns the need for an individualised intervention in the concrete case, not the general validity of the constitutional mandate of re-education): convicted persons might well *have no need of any re-education* so conceived,[43] that is, *be in no inner prison* and therefore, speaking without metaphor, *present no gap in personality development that led them to that specific offence*. There might, in other words, be *no obstacle to remove in the concrete case*. One need only think, purely by way of example, of the (admittedly narrow) range of so-called *offenders by conviction*; or of the (far less narrow) cases of *merely bagatelle* and criminologically insubstantial offences with which the Italian criminal legal system teems, where a project of re-education of the convicted person is not even meaningfully conceivable, and it might be more appropriate to speak of the re-education... of the legislator.

(2023), p. 1399; finally Bianchi, (2024), and Gialuz, (2022).

41 The data are merciless: see, *ex plurimis*, Amarelli, (2024), where it is stated that "[a]ccording to the data released by the Prison Administration Department (D.A.P.) on 29 February 2024, the prison population has grown by a further 5,000 units, that is, in statistical-percentage terms by some 10% since that Antigone report, reaching the considerable figure of 61,000 inmates, and this despite the contraction recorded this year too in the number of persons in pre-trial detention [...]. Whatever the contributing factors, the figures given are an alarm signal that cannot go unheard and that abruptly brings Italy back close to the values that were already the object of censure by the Strasbourg Court in the famous judgment *Torreggiani v. Italy* of 2013 (that is, the 66,585 inmates counted by the ECtHR on 13 April 2012), no longer only in some penitentiaries, such as Lucca and San Vittore, according to the Antigone 2023 report, but in many other facilities". See ECtHR, *Torreggiani and Others v. Italy*, 8 January 2013.

42 See again Ferrajoli, (2024), p. 213.

43 This is a further theoretical element distinguishing the thesis defended in this work from any Manichaean separation between "delinquent" subjects and the generality of members of society.

Consider also offences committed through acts of *civil disobedience* (above all the case, *rectius*, the cases, of "*Cappato*", concerning assisted suicide), where offenders, far from displaying a gap in their personality, often reveal through their actions a gap in the legal order; in such cases offenders have by no means been left behind by society but, on the contrary, are often situated *ahead* of it, so that the commission of the offence constitutes a *propulsive instrument* of a political and social nature. The perpetrator of such offences is thus not always, in a quasi-"Lombrosian" manner, underdeveloped, but on the contrary has at times developed a political and human sensibility that is even "over-developed". In light of such cases (and others), re-education of the convicted person, so understood, is not always practicable or desirable (that is why the Italian Constitution stipulates that punishments must tend to the re-education of the convicted person).

IX. FROM "OUGHT" TO "IS": THE REALITY OF ITALIAN PRISONS

Having outlined the constitutional perspective of liberating convicted persons from the prisons that oppress them, which belongs to the sphere of *ought*, the author must now set it against the plane of *is* (in all its "*immane*" *concreteness*[44]), namely, the terrible and desolate reality of prisons.

It is common knowledge that prison suffers from problems that are not contingent but structural, never tackled systematically by the legislator and indeed recently aggravated by a genuine "criminalising binge":[45] a proliferation of offences, harsher penalties and a general expansion of penality.[46]

The problems are evident: overcrowding approaching "pre-*Torreggiani*" levels,[47] decaying facilities, appalling hygienic and sanitary conditions or a lack of adequate ventilation and lighting,[48] an irrational expansion of the differentiated penitentiary circuits (Arts. 41-*bis* and 4-*bis* of

44 An expression evidently borrowed from the well-known Forti, (2000) ("immane" meaning, in Italian, both enormous and dreadful). For a first overview of the structural shortcomings of (numerous) Italian prisons, Botrugno and Caputo, (2020); Menghini and Fornasari, (2023); Ronco, 2018; Ruotolo, (2012), p. 55; from a supranational perspective, see Buffon, (2025).

45 The colourful expression is borrowed from Recchia, (2020), p. 3, who in turn draws on German scholarship and specifically on Jahn, (2017), p. 3638.

46 These are veritable *notorious facts* in the criminal law literature. To recall only a few of the most recent works, Bartoli, (2024); Forzati, (2020); Manes, (2024), p. 10; Mazzacuva, (2024), p. 1; Palazzo, (2023), p. 11; Pulitanò, (2017); Risicato, (2019), *passim* and specifically p. 16. Notable, moreover, are the criticisms of this deplorable phenomenon from the best sociological and anthropological scholarship: for example, Foucault, (1993), p. 305, which amply accounts for the *criminogenic* nature of prisons and for punitive fury, as well as Fassin, (2017).

47 See note 41. On prison overcrowding in Italy, see at least Albano, Lorenzetti and Picozzi, 2021; Caprioli and Scomparin, (2015); Pugiotto, (2016b), pp. (1204). With regard to the *Torreggiani* ruling, Della Morte, 2013, pp. 147 ff.; Dova, (2013), p. 948; Manes, (2024), p. 219; Polacchini, (2023), p. 283; Polacchini, (2021), p. 59; Tamburino, (2013), p. 11; Viganò, (2013).

48 A ruling offering an exemplary picture of the systemic macro-violations of the Italian legal order in relation to the conditions of prison facilities (and one that is still entirely topical, despite the years elapsed) is ECtHR, *Scoppola v. Italy*, 10 June of 2008, §§ 40 ff. For a commentary, Buzzelli, (2010), p. 389; also relevant in this sense is ECtHR, *Contrada v. Italy (no. 2)*, 11 February 2014, §§ 75 ff., on which see, in particular, Manca, (2014). More generally on the condition of prisoners, see, in the by now immense literature, Castellano, (2015); Della Bella, (2017); Manes and Napoleoni, (2013), p. 336; Pelissero, (2016b), p. 1125; Pugiotto, (2016b), p. 1204. Finally, for an examination aimed

the Penitentiary Act[49]) and a constant rise in suicides among both prisoners and prison officers. To this is added, as noted by the Antigone Association, the fact that "those who end up in prison come from situations of economic and cultural poverty",[50] often accompanied by unemployment. From the catalogue of problems thus briefly outlined, it emerges that these conditions seriously undermine the possibility of fulfilling the re-educative purpose in prison.

Originally conceived, in the Enlightenment era, as an instrument of civilisation meant to overcome corporal punishment and to guarantee equal conditions in the serving of sentences, prison has become, through the heterogenesis of ends, the means (classist, in defiance of egalitarian canons[51]) through which the most appalling and varied humiliations are perpetrated against convicted persons. The paradoxical and grotesque result is a progressive return, concealed and unacknowledged, both to the infamous corporal punishments and to the proscribed death penalty.

As regards the former, it is hardly easy to deny the character of corporal punishment, to take just one example, to the condition of someone forced to endure, in a cell crowded with other prisoners, the stifling heat of ever-hotter summers or the (still) harsh winter temperatures, in the absence, respectively, of air conditioning and of a heating system.

As regards the latter, any hypocritical counter-argument based on the alleged voluntariness of the choice of suicide[52] has no merit. First, voluntariness cannot but give way in the face of numbers that speak clearly: the suicide rate in prison is about twenty times that of the non-detained population.[53] Second, and above all, prisoners' choice of death is by no means the fruit of a ratio-

at stressing the difficulties in realising the constitutional purpose of punishment deriving from the chronic lack of resources, Martufi, (2015), p. 132.

49 On this subject, among many, Cesaris, (2019), p. 537; Della Bella, (2025), p. 937; Renoldi, (2023); Napoli, (2012), p. 15. More generally still, on the need to prevent prison from becoming a vehicle for instructions and orders for the perpetration of serious crimes (terrorism, for example), see already Padovani, (1981), p. 285.

50 The statement is drawn from the documentation published by the Antigone Association: see Associazione Antigone, (2024a), available at https://antigone.it/upload2/uploads/docs/Reportfine2024.pdf, which describes the prison population as composed mostly of persons from the poorest areas of the country; further documentation is available at www.antigone.it.

51 The classist character of prison reality is fully documented by Risicato, (2025a), p. 919: "almost 70% of inmates are imprisoned not for fault but for *status*, being drug addicts and foreigners. Punishing someone for what he *is* and not for what he *does* follows no logic, not even a re-educative one: because one cannot leave prison *no longer a foreigner or no longer a drug addict*. If anything, the opposite is true: one leaves prison with a heightened propensity to illegality and drug addiction compared with when one crossed its threshold. Nor is any logic recovered for incarceration by abandoning the re-educative finalism of the Constitution in order to adopt a *vindictive* idea of imprisonment. Contemporary prison has a paradoxical feature. It contains, indeed, a majority of inmates who should not be in jail and for whom what would be needed instead are places of reception, care, life, community, a thousand other hypotheses of integration, but not a closed space. Prison as a place of separation from the world should, if anything, be reserved only for persons of robust criminal depth or who have committed crimes against the person or the environment, or particularly serious economic crimes or financial frauds".

52 Not to mention the "suspicious" deaths linked to abuse by prison officers, a phenomenon anything but sporadic in Italy.

53 See on this point the data shared in the recent report of the Antigone Association (Associazione Antigone), which records a total of 88 suicides in the year 2024 alone (Associazione Antigone, (2024a)), a sad record destined in all likelihood soon to be surpassed; see also the document in which the Italian Association of Professors of Criminal Law (AIPDP) and the Association of Scholars of Criminal Procedure "G.D. Pisapia" (ASPP) take a strong and firm

nally and freely matured decision, but, on the contrary, the product of mistreatment inflicted by others. Consent is thus systematically (to borrow the language of the Fascist-era Code) invalid, being essentially *extorted by violence*. This violence is all the more serious because it comes from the very institutions that are supposed to protect prisoners.

The squalid condition of Italian prisons thus appears capable of constituting the sombre Ferrajolian category of the so-called *system crimes*,[54] that is, that "class of massive violations of rights and fundamental goods established by constitutional or international charters and yet not consisting, like criminal offences, in individual acts producing harmful events precisely determined by law and attributable to the responsibility of equally determined persons"; violations that are, moreover, "no less and indeed, usually, far more serious than those prosecuted by criminal law", but which, unlike the latter, cannot be regulated and prosecuted by criminal law by reason of their fundamental constitutive elements, namely "the indeterminate and indeterminable character of both the action and the event, which is usually catastrophic, and the indeterminate and multi-subjective character of both their perpetrators and their victims".

Although such systematic violations (which undoubtedly include the state of Italian prisons) cannot, as such, give rise, for the reasons recalled, to specific cases of criminal liability, they nonetheless generate (*rectius*, should generate) political, economic and social responsibility on the part of those who govern; moreover, their qualification as "crimes" should serve to make their profound, and very grave, *illegality*, (also) in legal terms, perceptible.[55]

To address such "system crimes", the path indicated by the Government in office since 2022 (the Meloni Government), but periodically proposed by politicians of every colour, consisting in the construction of new prisons does not seem reasonably viable. First, as has been lucidly noted in the literature,[56] in this field supply will always create new demand, with the consequent vicious circle of an ever-growing number of new prisons that are in turn ever more crowded, generating the need for further prisons that will in their turn house ever more prisoners, and so on in an endless spiral. Second, and above all, prison overcrowding must not be understood

position against the desolate phenomenon just described (AIPDP and ASPP, (2024)). The problem of suicides in prison, moreover, had long since been brought to the attention of the most perceptive scholars, above all Pugiotto, (2014), p. 24. On the comparison with the non-detained population, see Associazione Antigone, (2024b), which calculates for 2023 a suicide rate in prison about eighteen times higher than in the free population (a ratio of the same order of magnitude as that mentioned in the text).

54 A new dogmatic category developed systematically from Ferrajoli, 2019, pp. 401 ff., and then progressively enriched and deepened in later works, namely Ferrajoli, (2021), as well as Ferrajoli, (2022), and finally Ferrajoli, (2024), *passim*.

55 Ferrajoli, (2019), pp. 407-408.

56 On this point, acutely, Anastasia, (2025), p. 945, where it is observed (after demonstrating the slim chances that the building projects devised by the Government in office since 2022 (the Meloni Government) can come to fruition and the in any event non-decisive nature of the intervention in the short term) that "the increase in the capacity of penitentiary institutions, if not accompanied by stringent rules on limiting recourse to deprivation of liberty for reasons of justice, accompanies the growth of the system, even in conditions of further overcrowding, rather than giving rise to liveable environments and conditions. In economic terms we could say that it is supply that creates its own demand" (Anastasia then offers ample statistical detail in support of the scientific soundness of such a penological observation). In general, on the osmotic relationship between demands for justice arising in civil society and institutional responses in terms of incarceration, see Pavarini, (1997), which remains topical.

as a purely administrative phenomenon (or, worse still, as a mere factual inconvenience, legally anodyne), but as the direct spatial projection of the fundamental problem of modern criminal law: the tentacular expansion of penality.[57] One may say, borrowing a well-known and colourful Foucauldian *calembour*,[58] that prisons are overcrowded because people are "over-imprisoned". It is not, therefore, only on the first segment (concerning prison overcrowding) that action is needed, but also, and as a priority, on the second (concerning the over-imprisonment of persons).

It is for this latter reason that abolishing prisons is not only a radical measure, incapable of immediate or near-term implementation,[59] but ultimately a solution that is *not decisive*: whatever the structures designed to house those who break the criminal law are, or are called, the (derivative) problem of overcrowding is bound to persist as long as no adequate remedy is found for the (original) problem of the pathological recourse to criminal sanctions as a mere political instrument of social control.

X. RE-EDUCATION WITHIN THE SYSTEM OF PENAL PRINCIPLES

From the analysis conducted so far of the two coordinates in which the re-educative demand is articulated (and of their total repudiation by means of the prison), important indications can be drawn about the general relationship between re-education and the other fundamental principles of criminal law: from those, so to speak, "downstream", linked to the humanity of punishment and to the prohibition of physical or moral violence against persons subjected to restrictions of liberty, to those "upstream", limiting the sphere of political-legislative discretion in criminal matters (offensiveness, materiality, fragmentariness, proportionality and worthiness of punishment[60]).

The re-educative demand cannot, that is, be severed from the overall system in which it lives and operates. Where the other fundamental principles and values governing criminal law are violated, re-education too is bound to lose its lifeblood. This is so not only because, as is rightly often stressed,[61] convicted persons cannot be re-educated if they perceive the criminal sanction

57 Also called "penal nomorrhea", thus Carrara, (1889), p. 493. On the latest, grotesque manifestation of this phenomenon, with a critical approach, Risicato, (2025b), p. 948.

58 The wordplay appears as the epigraph of Travaglia Cicirello, (2018).

59 It should nonetheless be recalled that, as authoritatively maintained, prison punishment will remain useful in our society only so long as "we do not manage in the future to invent, to face crime, more intelligent and more humane devices with which to replace it" (thus Fiandaca, (2024), p. 58).

60 Elsewhere an attempt has been made to define these fundamental principles as the "'pentapharmakon' against pan-penalism", in D'Andrea, (2024), p. 139.

61 By way of example only, Viganò, (2021), pp. 246-247, who speaks of the offender's "feeling of rebellion" in the face of punishments perceived as unjust. One may also recall the words of the Constitutional Court, where, upholding the question of constitutionality raised by the referring court, it observed that "[t]he referring judge is therefore not mistaken in holding that the application, even at the statutory minimum, of the sanction laid down by the challenged provision proves manifestly unreasonable by excess, in breach of Art. 3 of the Constitution, and is also *in conflict with the principle of the re-educative purpose of punishment, since it instils in the convicted person the conviction of being the victim of an unjust abuse, a feeling that precludes the start of any effective re-educative process, in breach of*

imposed on them as unjust, but also, at root, because a punishment that is inhuman, disproportionate, or productive of physical and moral violence against the prisoner, or imposed for non-offensive acts, or inflicted symbolically in order to "send a message", or, finally, consequent upon conduct that is harmless or not deserving of punishment, can never prove capable of leading its recipient out of any prison: neither the outer one, in light of the recidivism data, which speak clearly;[62] nor the inner one, into which punishment often, indeed, ends up leading its recipient.

Ultimately, re-education cannot be the rhetorical crowbar with which to legitimise the burden of evil that criminal law entails,[63] but must be nourished by the historical realisation and positive implementation of constitutional principles and values.

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Art. 27 of the Constitution" [emphasis added] (judgment no. 236 of 2016, point 4.2 *Considerato in diritto*).

62 On the intrinsic *violence* of prison reality, Bortolato and Vigna, (2020), p. 65. This character, moreover, was only *partially* attenuated by the advent of the so-called penitentiary reform of 1975, in this regard Fassone, (1980), p. 145; Padovani, (2014), p. 241. As to recidivism, Antigone's XXII report (2026) finds that only 40.8% of detained persons are serving their first term in prison, so that almost six in ten have been imprisoned before (Associazione Antigone, (2026)), while the CNEL estimates a recidivism rate of about 2% for persons who take part in training and work programmes (CNEL, (2025)).

63 See note 26. As rightly observed, moreover, by Fornasari, (2024), p. 3, "any superfluous excess in the quantity and harshness of punishment beyond this limit [namely, in an Enlightenment and rationalist sense, a disadvantage even slightly greater than the advantage the offender expects to obtain by committing the offence] must be considered tyrannical".

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