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Abstract

The first chapter of this paper analyzes the modern theories that gravitate around the concept of the function of punishment. In particular, the main theories about the function of the penalty (remuneration, preventive, write) are recalled, trying to verify if and to what extent they can be compatible with the new purposes that the current Italian legal system attributes to the penal sanction, in light of the emerging need to protect human rights through a re-educational and re-socializing penalty.

In the first chapter, an attempt is made to underline the change in the purpose of punishment as an instinctive and vindictive act detached from any moral and utilitarian principle.

The concept of punishment that pursues the simple aim of remuneration seems to give way to the idea of 'punishment as purpose'. The sanction no longer aims at the simple suffering of the offender as an end in itself, but pursues re-educational and re-socializing purposes. The testimony of the trend mentioned above is given by the cd. decriminalization of some criminal cases considered 'minor offenses' (think of the crime of offense, falsehood in private writing and simple damage).

The analysis to trace the profiles of the multifunctionality of the punishment continues in the second chapter, through a historical investigation that starts from the individual criminal cases present in archaic Roman law. From the study of the individual criminal precepts and the relative penalties it is possible to identify the different functions that the penalty assumed in the archaic age. The sanction, in most of the criminal figures, was intended to protect the pax deorum and to prevent the

harmful conduct from damaging the relations between men and gods. Think, for example, of the law attributable to Numa, which punished the removal of stones from the borders of the various plots of land. The sanction provided for the consecration of the offender to the god Jupiter Termino in order to appease his anger.

In the event of a loss, however, the norm had a substantially secular content, namely that of protecting the community from the conduct of treason and conspiracy or in any case from actions that had placed the entire social structure in a state of danger. The penalty was death and the function of this sanction can be found in the persuasion and prevention of any criminal conduct that could undermine the stability of the community. As we can see, in the event of a loss, the penalty did not tend to reestablish relations with the gods or appease the wrath of the latter, but had a purely preventive purpose.

The reconstruction of the multifunctionality of the sentence continues in the last chapter through the analysis of some sanctions used for multiple purposes.

The prison, for example, although not considered as a penalty, was used for precautionary purposes such as the detention of the offender, while waiting for the trial to take place or for the sanction to be imposed.

During the third chapter I dealt with the function of punishment in classical and late antiquity. The statement that the function of amending the penalty was a purpose born under the influence of Christian values does not take into account that this function was already rooted in other schools of thought. Think of Seneca who accepted the re-educational idea already formulated by Plato. For Seneca the punishment had to

have a curative purpose and aim at the re-education of the condemned and not at his affliction: Sen. de ira 1.15.3.

Furthermore, I have tried to demonstrate how the modern concept of re-educational function can be connected to the atavistic principle of infirmitas humani generis developed by Justinian. The infirmitas were considered as the spiritual fragility of men in relation to human weakness, inherent in human nature itself. Just the inclination of the human being to be 'fragile' led Justinian's legislation to mitigate some penalties. For example, Nov. 134.13 of 556 A.D. ordered the mitigation of corporal and property penalties precisely because of the infirmitas. With it, corporal punishments that included impairments such as amputation or fracture of limbs were prohibited, and also pecuniary penalties were mitigated since, in case of confiscation, the assets were not attributed to the 'State', but to the descendants of the offender.

The awareness that the infliction of punishment for the sole purpose of afflicting the offender could not restore the legally violated situation appeared clear already in late antiquity, with the affirmation of the thought that the punishment should pursue 'medical-curative' purposes and that the punishment of death were to be inflicted only in cases of irrecoverability of the offender.

Therefore, it seems somewhat complex to privilege one function of punishment over the other. It is rather necessary to definitively recognize the coexistence of different functions of the penalty in each historically contextualized legal system.