



REFUGE IN LAW AS AN ANSWER TO NEGATIVE REALITIES  
ACCORDING TO JUSTICE. THE PROGRESS TOWARDS THE  
INADMISSIBILITY OF DEATH PENALTY

[ITA] *IL RIFUGIO NEL DIRITTO COME RISPOSTA SECONDO GIUSTIZIA ALLE  
REALTÀ NEGATIVE. IL PROGRESSO VERSO L'INAMMISSIBILITÀ DELLA PENA DI  
MORTE*

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*Abstract:* The text addresses the peculiar bond that link together the philosophy of law and the history of law and it proposes again the current need to “rethink the thought” on law, so that it can be the dialogic tool to structure a vision of the world able to generate awareness, responsible action, that creates and performs reality. The text analyses the topic of the positive utopia of reality, in connection with the principle of fraternity, and a way to think about the relation of otherness as “thinking in reciprocity” is defined. Lastly, as practical field of this proposal, it is proposed the overcoming of the death penalty, in the light of the theory of restorative justice.

*Keywords:* Philosophy of law; Utopia; Fraternity; Personalism; Restorative justice.

*Sommario:* Il testo affronta il peculiare legame che lega insieme la filosofia del diritto e la storia del diritto e ripropone il bisogno attuale di “ripensare il pensiero” sul diritto, perché esso sia strumento dialogico per strutturare una visione del mondo generatrice di consapevolezza, azione responsabile, creative e performativa della realtà. Nel testo è affrontato il tema dell’utopia positiva della realtà, in connessione con il principio di fraternità, ed è delineato un modo di pensare la relazione di alterità come “pensare in reciprocità”. Come ambito pratico di questa proposta è infine proposto il superamento della pena di morte alla luce della teoria della giustizia riparativa.

*Parole chiave:* Filosofia del diritto; Utopia; Fraternità; Personalismo; Restorative justice.



## 1. A NECESSARY UTOPIA

The activity of the International Chair Innocent III is characterised by the study and analysis of new canonical concepts adequate to allow a correct dialogue between the Church and the non-ecclesial legal world, through a proposal based on anthropology. Throughout the years, this original approach has created positive energies and has allowed to broaden the horizon of law through a constructive and cooperative path shared by various disciplines; regarding canon law, it has favoured the reinforcement of the peculiar orientation of the *Institutum Utriusque Iuris*, which is based on the *norma missionis*<sup>1</sup>. This principle can be understood better as “*mens legislationis canonicae*”, a space of hermeneutic mediation between the revelation of the Trinitarian God (Trinitarian ontology<sup>2</sup>) and the experience of man who knows himself through otherness (ontology of pluralism), which allows to question the parameters of the individual self (plural and dialogical hermeneutics), enriching them with different approaches, with critical openness and creative impulse towards the novelty present in human relations (positive and concrete utopia). In this sense, the *norma missionis*<sup>3</sup> represents a hermeneutic parameter and a paradigmatic experience not exclusively for the canonical legal system; its proposal, instead, is

<sup>1</sup> Cf. ARROBA CONDE, M.J., «Il metodo del diritto: comparazione e Utrumque Ius», in *Apollinaris* 90 (2017), pp. 265-272; ID., «L’esperienza e l’identità dell’Institutum Utriusque Iuris», in *Il diritto amministrativo tra ordinamenti civili e ordinamento canonico. Prospettive e limiti della comparazione*, ed. DE BENEDETTO, M., Torino 2016, pp. 17-34; ID., «La Iglesia como presencia (reflexión desde el derecho canonico)», in *Vida Religiosa* 86, 3 (1999), pp. 185-187.

<sup>2</sup> Cf. CODA, P., «La Trinità come pensiero. Un manifesto», in *Sophia* 9 (2017), pp. 9-17.

<sup>3</sup> “*With the expression norma missioni we refer to a nucleus of a normative nature inasmuch as, although referring to a transcendent event (the destiny of salvation) and understood as having a liberating object (precisely from the slavery of the Law), it is formulated and understood as a mandate: going throughout the world, proclaiming the Gospel and making disciples, baptizing them and teaching them to act in accordance with what has been learned. This normative nucleus gives meaning to the existence of the Church as a testimony of salvation that, despite it reaching a complete fulfilment in the eternal life, is built in this world, and at the service of this arises a discipline developed to be faithful to the essential contents of the announcement, to be consolidated as a community and to respond to challenges that, over time, the fulfilment of telling the mission has posed*”. ARROBA CONDE, M.J., RIONDINO, M., *Introduction to Canon Law*, Milano 2019, p. 2.



also the occasion to broaden the cultural horizon of the other legal systems, to affirm the universal value of the legal experience and, consequently, of the person<sup>4</sup>.

Starting from the research based on the historical data, on the faithfulness to the sources, jurists with different backgrounds and origins, animated by the commitment to be faithful to the truth, have explored borderlands and have accepted the challenge of the relation, which is based on reciprocal listening, knowledge and dialogue, on the firm conviction that truth emerges and grows only in relations - even imperfect ones - based on dialogue. This experience of “*ontology of the relation*”<sup>5</sup> has allowed to start a radical “rethinking” of law that, based on necessary foundations, can always and inevitably find concrete solutions to the new problems and legal challenges that appear in the lives of man and faithful in the ecclesial community; a commitment that must be assumed in a realistic, but not renunciatory way.

The selection of the topics that have characterised the scientific research of the conferences are an effective and simple proof of the necessity, perceived and reciprocated, to rethink law and consider it as a relational, dialogic and historic

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<sup>4</sup> “*La missione giustifica lo sforzo di inculturazione che la Chiesa, ispirata dallo Spirito, ha ritenuto necessario fare, nel tempo e nello spazio, per essere fedele alla sua essenza salvifica. La fedeltà allo Spirito esige rispetto del proprio patrimonio giuridico; ma più che strumenti di ordine e di controllo assoluti, sono piuttosto il diritto e le istituzioni canoniche ad aver bisogno di essere controllati, continuamente cioè valutati in forza dei tre criteri che derivano dal loro fondamento missionario: la coerenza con il Vangelo, l’efficacia apostolica e la corrispondenza ai bisogni dei fedeli e delle società*”. ARROBA CONDE, M.J., «Basi ecclesiologiche e limiti intrinseci di una rinnovata produzione normativa locale», in *Folia Canonica* 10 (2007), p. 160; cf. RENARD, G., «Contributo allo studio dei rapporti tra Diritto e Teologia. La posizione del Diritto canonico», in *Rivista Internazionale di Filosofia del Diritto* 16 (1936), p. 517; IACCARINO, A., «Introduzione al diritto canonico», in *Manuale di diritto canonico*, ed. ARROBA CONDE, M.J., Città del Vaticano 2014, pp. 16-22. With the words of L. Avitabile: “*Persona è ciò che presuppone una relazione: essere persona non significa essere unici ed irripetibili da soli, ma essere tali in un ambito riconoscitivo reciproco, attraverso l’aspetto dell’empatia*”. AVITABILE, L. «Fenomenologia giuridica e comunità nell’opera di Edith Stein», in *Percorsi di fenomenologia del diritto*, ed. AVITABILE, L., BARTOLI, G., CANANZI, D.M., PUNZI, A., Torino 2007, p. 40.

<sup>5</sup> Cf. IACCARINO, A., «Responsabilità e istituzionalità in prospettiva filosofica», in *Apollinaris* 82 (2009), p. 181; CURCIO, G.G., *Etica del dialogo. Diritti umani, giustizia e pace per una società intraculturale*, Bologna 2019.



experience<sup>6</sup>. Relational, because we live it through experience<sup>7</sup>; dialogic, because it unites the feeling of justice of the human communities; historic, because only through the experience that acknowledges the necessary value of the person it is possible to adopt a transcendent perspective, which is wider in its authentic dimension of meaning.

Since 2015, the “Murcian” conferences have allowed us to reflect together on some key concepts of the dialogue such as justice, mercy, dialogue, relational inclusion and equity, which are typical of the procedural protection of rights<sup>8</sup>. All these topics are characterised by a common interpretative nucleus that has the person-in-relation at its core and a cognitive architecture of recognition of the *other* that structures the relations of otherness as bridges that cross the borders of the intimate and relational self and that require from law not only a descriptive language, but also an argumentative one<sup>9</sup>. This year’s study proposal on the topic of migrants and refugees goes towards the same direction and pushes us to reflect on another important concept, the one of fraternity.

Truth, justice, equity, mercy and fraternity are frequently considered as intrinsically totalitarian categories, that cannot be proposed to a post-modern society which is frequently liquid and is afraid of living “formative” principles, those that shape a way of thinking that requires innovative participation of everyone and care for the *other*. This perspective is urgent for the reflection on law, for it to be increasingly dynamic and guided by a justice to be seen as a *relational performative*

<sup>6</sup> Cf. IACCARINO, A., «Discernimento e pluralismo», in *Apollinaris* 87 (2014), pp. 591-592.

<sup>7</sup> Cf. HONNETH, A., *Anerkennung. Eine europäische ideengeschichte*, Berlin 2018.

<sup>8</sup> Cf. ARROBA CONDE, M.J., «Sviluppo in tema di tutela processuale dei diritti», in *Il diritto ecclesiastico* 1-2 (2017), pp. 25-42.

<sup>9</sup> «A ben vedere, è proprio a motivo della pluridimensionalità della realtà che è necessario mettere in opera una pluralità d’accessi e d’interpretazioni della medesima; così com’è a motivo della costitutiva apertura dell’essere umano alla realtà stessa, che quest’ultima può essere colta ed espressa nella sua ricchezza ontologica e semantica”. CODA, P., «Introduzione», in *La questione ontologica tra scienza e fede*, ed. CODA, P., Roma 2004, p. 13; cf. VIOLA, F., ZACCARIA, G., *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Roma-Bari 2002, pp. 3-4.



*experience of reality*, with no nostalgia for a mechanistic efficiency, for a social engineering, without lingering on retrotopia<sup>10</sup>, that though that states that what was there before, no matter what it was, was better.

Therefore, the keywords of the four conferences held until now are linked together with forethought and they demonstrate that the historic research is the transcendent springboard that, with its foundation well rooted in time, allow the utopian jump beyond law, towards that justice that rises in the horizon of truth. This justice should not only be described, but it should also be searched for because it is hidden, and it must be found and searched for again, because it is infinite. To quote Saint Augustine, “*quaeramus inveniendum, quaeramus inventum. Ut inveniendus quaeratur, occultus est; ut inventus quaeratur, immensus est*”<sup>11</sup>. This constant search offers to though spaces of independence and creative continuity, as opposed to the eternal return of the equal, whose only logic is strength<sup>12</sup>.

Law helps to create connections, to understand what we have in common and to understand what project we can carry out considering the pluralism of our reality; nevertheless, we must open our horizon to a comprehension of law that goes beyond the strength of mere normativity, to affirm it as the authentic tool of dialogue in the lexicon of the valorisation of goods and values. For this reason, the conferences of the Chair Innocent III are an occasion to rethink the thought, so that it can be able to progress and create a vision of the world that generates awareness, care, responsible and creative action. This is particularly important for the historian, so that through the study of the sources he can recognise the germs of novelty which are not expressed in them yet and project them towards the future; it is necessary for the philosopher of law, so that he keeps his eyes open as the prophetic look of philosophy of law, and he can find the passion able to prompt that transcendent jump

<sup>10</sup> Cf. BAUMAN, Z., *Retrotopia*, Cambridge 2017.

<sup>11</sup> AUGUSTINE OF HIPPO, *In Evangelium Ioannis tractatus centum viginti quatuor*, 63, 1.

<sup>12</sup> MANCUSO, V., *Il bisogno di pensare*, Milano 2017, p. 35.



that starts from the knowledge of the historical data and interprets its foundation of justice in the novelty of the human experience.

Therefore, we must rediscover the positive utopia of reality<sup>13</sup>, which does not adapt itself to the present and responds to apathy with passion, which prefers participation to ataraxia, which responds to indifference with commitment, so that justice is not reduced to a relation with no further perspective.

## 2. THE PRINCIPLE OF FRATERNITY AND THE RECOGNITION OF THE OTHER

We are witnessing the proliferation of borders and of tensions on the political, economic, social border lines that characterise the present; the topic of this fourth conference of the Chair Innocent III “*Migrants and refugees in the Law. Historic evolution, current situation and unsolved questions*” focuses our attention of the challenges that law must face in all those situations in which complexity seems unmanageable and pluralism seems incompatible with the idea of relations stability<sup>14</sup>.

These challenges are the subject of a historical study and an important challenge to reflect in our era of globalisation, which has some difficulties placing itself on a progress line, not a technical and scientific one, but rather a social and relational one, so that relations can be harmonious and peaceful, development can be sustainable and the institutions can be fair. Consequently, the jurist cannot renounce to ask questions on the objective and strength of law, as a normative technique, able to translate the law in an experiment of dialogue between legal systems, universal

<sup>13</sup> Cf. VECA, S., *Il senso della possibilità. Sei lezioni*, Milano 2018, pp. 78-96; VIOLA, F., ZACCARIA, G., *Diritto e interpretazione*, cit., p. 455.

<sup>14</sup> Cf. PAROLARI, P., «Migrazioni, interlegalità, pluralismo giuridico», in *Rivista di filosofia del diritto* 7 (2018), pp. 42-45; ARNAUD, A.J., «Le sfide della globalizzazione alla modernità giuridica», in *Saggi sulla globalizzazione giuridica e il pluralismo normativo*, ed. VOGLIOTTI, M., Torino 2013, pp. 77-94.



openness to compose the plurality in unity, so that no one is excluded and everyone takes care of the *other*<sup>15</sup>.

Therefore, the idea is not “*to think reciprocity*”, but rather to “*think in reciprocity*”, through the dialogue and the listening of the *other*. Depending on the different aspects that can give a formal characterisation to law, like the one of production, of its interpretation, of its application and of the individuation of the types of interests that the individual disciplines protect, *re-thinking* law means to *re-verify* the values that argue the authentic meaning of relation, beyond the mere and simple order. It is a new style of thinking, not a speculation that starts from an abstract conceptualisation, but a community *quaerere*, a communal search<sup>16</sup>.

In this sense, it can be useful to recover the frequently forgotten principle of fraternity<sup>17</sup>, not seen as charity, compassion or simple solidarity, but as the fact of assuming responsibilities<sup>18</sup> towards others, any *other* that, even if foreign, is recognised as *other-than-self*. Rethinking law also means to reject indifference and to be open to the reciprocal influence of the relations and to commitment, so that there will never be walls, but borders seen as a space for influence and a time for dialogue and care for the *other*.

It is important to re-update fraternity from the point of view of care for the *other*, as a category that does not prescribe public ethics, but that rather shapes society and performs a law that is not a formalistic balance between claims for rights, but rather care for living and relating in society. Fraternity is a forgotten principle that must be rediscovered<sup>19</sup>; it is an inclusive principle that cannot be reduced to the

<sup>15</sup> Cf. IACCARINO, A., *Nessuno resti escluso. La giustizia oltre i confini*, Città del Vaticano 2013.

<sup>16</sup> Cf. CLEMENZA, A., «Pensare l'ontologia trinitaria sulla scia di Klaus Hemmerle», in *Un pensiero per abitare la frontiera*, ed. CODA, P., CLEMENZA, A., TREMBLAY, J., Roma 2016, p. 12.

<sup>17</sup> Cf. COSSEDDU, A. (cur.), *I sentieri del giurista sulle tracce della fraternità. Ordinamenti a confronto*, Torino 2016.

<sup>18</sup> Cf. PALOMBELLA, G., «On the Potential and Limits of (Global) Justice through Law. A Frame of Research», in *Rivista di filosofia del diritto* 6 (2017), pp. 21-23.

<sup>19</sup> Cf. BAGGIO, A.M., (ed.), *Il principio dimenticato. La fraternità nella riflessione politologica contemporanea*, Roma 2007.



profit that we can invoke as a rule in social relations, and it is the core of a new concept of citizenship seen as responsible equality between persons, in the perspective of reciprocal recognition, of listening and of solidarity. The historical experience shows us that when there is a lack of fraternity, as a performative principle of the reality of social relations, law becomes weaker as well, and the force of law is replaced by the law of force<sup>20</sup>.

If every man is the recipient of care in different moments of life and none of us would be what we are today unless we hadn't received care immediately after birth, then being a son is the first model of human relations, and fraternity is the principle of reality related to it: I can't choose to be a brother and I am defined as such by my brother. Being a brother is the structure and modality of being typical of man, and our existence is qualified based on our answer, yes or no, to this condition of otherness. Like other principles such as friendship, solidarity and generosity, fraternity gives value to the strength of difference without succumbing to an overwhelming uniformity, to such an extent that the *other* says something that I can't state by myself, and when I affirm the *other*, I reflect my humanity<sup>21</sup>.

The same principle can be applied in the field of public ethics, which asks law to witness the otherness and the altruism of justice, and not the singularity and individualism of formalism. When law acquires the shape of a principle of order, a synthesis between culture and technique, fraternity is not experimented based on blood but on law, and it becomes the condition for the foundation of the political community; at the same time, the *other*, the person, is the subsisting human law, the essence of law<sup>22</sup>, and it represents the interpretative key to rethink the reflection on law in the terms of relational discovery and argumentation that must be shared.

<sup>20</sup> Cf. RESTA, E., *La certezza e la speranza. Saggio su diritto e violenza*, Roma-Bari 2006, pp. 139-149.

<sup>21</sup> Cf. RESTA, E., *Il diritto fraterno*, Roma-Bari 2005, pp. 17.

<sup>22</sup> Cf. ROSMINI, A., «Filosofia del diritto», in *Opere di Antonio Rosmini* 28, ed. NICOLETTI, A., GHIA, F., Roma 2015; LANDI, P., *La filosofia del diritto di Antonio Rosmini*, Torino 2002, pp. 63-67.





Fraternity can become for law a living principle that creates the bonds of human relations, so that *anyone* can become *each one*, allowing to consider as a brother also the one who is not admitted to existence<sup>23</sup>. Fraternity is based on imperfect relations and asymmetrical relations because they are based on the principle of taking care of the *other*; precisely because of this characteristic, it speaks about inclusion where there is separation, to reduce the distances in the relations and to repair the gaps of justice in social relations by filling them<sup>24</sup>.

Living in the border of law requires the fact of taking care of the *other*, as solemnly affirmed in article 1 of the Universal Declaration of Human Rights<sup>25</sup> and, if we look back to more ancient history, in the bull *Veritas ipsa* of 2 June 1537 issued by Pope Paul III; the Pope, facing the problems of the enormous border of the New World, offers care and a refuge in law to all the Native Americans, recognised from then on in their full dignity of human persons, through the prohibition to deprive them of their freedom and of the ownership of their goods: “*Indios veros homines esse*”<sup>26</sup>.

Fraternity, therefore, is the human and typical structure of the approach to justice seen as a performative relation of reality in the social and legal context, therefore law can be seen as the expression of gratuitousness of the recognition of

<sup>23</sup> Cf. RESTA, E., *Il diritto fraterno*, cit., V.

<sup>24</sup> “*La cosa importante è che oggi diventa sempre più concreto il tentativo di pensare il diritto come riferito alla civitas maxima e non alle piccole patrie degli Stati: tanti, troppi, in aumento da quando vanno sfaldandosi le costellazioni post-nazionali, come ha mostrato Habermas. [...] Il diritto fraterno, dunque, mette in evidenza tutta la determinatezza storica del diritto chiuso nell’angustia dei confini statali e coincide con lo spazio di riflessione legato al tema dei diritti umani, con una consapevolezza in più: che l’umanità è semplicemente luogo «comune», solo all’interno del quale si può pensare riconoscimento e tutela. [...] Il diritto fraterno può crescere un processo di auto-responsabilizzazione, a patto che la consapevolezza della condivisione si liberi della rivalità distruttiva tipica del modello dei «fratelli nemici»*”. RESTA, E., *Il diritto fraterno*, cit., XII-XIII.

<sup>25</sup> “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*”.

<sup>26</sup> PAULUS PP. III, «*Bull Veritas ipsa*», 2.6.1537; cf. FOCARELLI, C., *La persona umana nel diritto internazionale*, Bologna 2013, pp. 26-27; FLORES, M., *Storia dei diritti umani*, Bologna 2008, pp. 34-35.



the *other* in his irrepressible dignity<sup>27</sup>. The principle of fraternity is inalienable so that the foreignness between human beings is never legitimated, the divisions are not irreducible and substantial justice is not an unachievable utopia of the here and now of decisions; to Cain's question, “*Am I my brother's keeper?*”, it will be possible to answer by saying “*yes, I am my brother's keeper, I am the first responsible for him because I take care of him*”.

### 3. THE REFUGE OF LAW AND THE DEATH PENALTY

On the door of the school wanted in Barbiana by father Lorenzo Milani the words “*I care*” are carved, I take care, I worry about it, and I do it by taking part, participating, rejecting the indifferent deaf to the voice of the *other* who asks for justice and who remains alone, excluded. This slogan, used in the twentieth century by many civil rights activists, emblematically represents a change of perspective that allows to move from the claim of the right to the affirmation of duty, inspiring a network of relationships that are outside the change and convenience, to establish a different and broader degree of citizenship.

The fact of taking care of Cain, therefore, touches and alters the traditional paradigm that presides over the human coexistence and that identifies the action according to justice as a necessary symmetry of behaviour on the basis of a judgement towards the *other*. In daily life relationships, in intercultural and political relationships, as well as in law and in the criminal system in particular, the principle of correspondence requires that every relationship be born from a judgement responding to the positive/negative alternative and that delimits a priori the

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<sup>27</sup>Cf. EUSEBI, L., «Rinunciare alla pena di morte», in *Aggiornamenti sociali* 59 (2008), pp. 104-115; SOUVIRÓN MORENILLA, J.M., «Notas sobre la fraternidad como principio político e jurídico», in *Sophia* 7 (2015), pp. 44-75.



possibility of a relationship<sup>28</sup>; and in this sense it will always be easy to find an element in the *other* to justify his/her negative action against it, generating attitudes of indifference, rejection and expulsion<sup>29</sup>. The image of the scale plastically expresses the positive sense of a good response to the good, but it mainly shows the condemnation of what we judge negative acting against those who are considered authors or only the expression of that negative.

If we assume that Law is the gratuitous recognition of the *other*, of each *other*, the Law presents itself today as a refuge and justice becomes a *different* justice that is not limited to a retaliation against those who have committed injustice, but that commits to act for the good of the *other*. The different justice rejects the retributive model which conceives punishment as suffering and is characterised by a restorative and reconciling character. As Luciano Eusebi stated, it is a justice understood not to remunerate, according to the criterion of the equivalent, but in the literal sense of the word, to justify, that is, to make fair again relationships marked by abuse of power, fractures and hatred. In this sense, to do justice<sup>30</sup>.

In the knowledge that the damage done cannot be erased and that each retaliation is in fact a doubling of the damage<sup>31</sup> and not a compensation, justice cannot be recognised in the static nature of the scale, but it demands a concrete commitment in planning pathways of reparation and responsibility with regard to the damage done, so they do not respond to a negative reaction to the negative. It is necessary to annul the enchantment that leads to the coincidence of the renunciation

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<sup>28</sup> Cf. EUSEBI, L., «Fare giustizia: ritorsione al male o fedeltà al bene?», in *Una giustizia diversa. Il modello riparativo e la questione penale*, ed. EUSEBI, L., Milano 2015, p. 3; MANNOZZI, G., LODIGIANI, G., (ed.), *Giustizia riparativa. Ricostruire legami, ricostruire persone*, Bologna 2015.

<sup>29</sup> Cf. EUSEBI, L., «Rinunciare alla pena di morte», cit., pp. 104-115; ID., «Motivazioni politico-criminali della rinuncia della pena di morte», in AA.VV., *Per un XXI secolo senza pena di morte*, Milano 2009, pp. 63-78; ID., «Prefazione», in ORTNER, H., *Il potere che uccide. La pena di morte nel mondo*, Torino 2015, pp. 7-13.

<sup>30</sup> EUSEBI, L., «Fare giustizia», cit., p. 7; cf. GRIGOLETTO, S., «Una questione di conio. Modelli di Giustizia a confronto per un ripensamento della pena», in *Paradoxa* 11 (2017), pp. 103-114.

<sup>31</sup> Cf. DONINI, M., «Per una concezione post-riparatoria della pena. Contro la pena come raddoppio del male», in *Rivista italiana di diritto e procedura penale* 3 (2013), p. 1207.



of reciprocity of behaviour, and therefore also the same willingness to forgive, with a superficial and do-gooder renunciation of justice. The model of restorative justice outlines a project and defines a significant path about the relationship of the offender with the victim and with the whole society<sup>32</sup>, so that the response to the crime is not thought *against* its perpetrator but as an opportunity for the same, able to positively affect the links injured by the illegal behaviour, restoring relationships that the damage has interrupted and reactivating the dialogue<sup>33</sup>.

Damage creates division, tears relationships, and corroding trust in the relationship, leads to exclusion beyond new walls of an idealised justice in the image of the scale; a different justice, refuge for law, has as its symbol a bridge that reconnects bonds rather than establishing divisions, in the sure conviction that there is a “necessary asymmetry between crime and punishment” which cannot be ignored<sup>34</sup>.

On the basis of these guidelines, the prison would recover the function of *extrema ratio* in cases where there is a serious danger of reiteration of serious crimes, with priority being given to non-custodial sentences and other instruments such as mediation<sup>35</sup> or probation. No longer would it make sense to refer to the purposes of proportionate exemplarity or the vindictive instances that justify death penalty not only when life is the price to pay, but also in cases in which life imprisonment is a

<sup>32</sup> Cf. FASSIN, D., *Punir. Une passion contemporaine*, Paris 2017.

<sup>33</sup> Cf. IACCARINO, A., «Il diritto penale canonico come sistema di giustizia riparativa», in *Una giustizia diversa*, ed. EUSEBI, L., pp. 103-113; MANNOZZI, G., «La giustizia riparativa come forma di Umanesimo della giustizia», in *Paradoxa* 11 (2017), pp. 19-30; LODIGIANI, G.A., «Nozioni ed obiettivi della Giustizia riparativa. Il tentativo di un approccio olistico», in *Paradoxa* 11 (2017), pp. 31-42; EUSEBI, L., «La colpa e la pena: ripensare la giustizia», in *Paradoxa* 11 (2017), pp. 43-63; DA RE, A., «Giustizia riparativa e relazione», in *Paradoxa* 11 (2017), pp. 79-90; L. SANÒ, «Perdono e riparazione», in *Paradoxa* 11 (2017), pp. 115-124.

<sup>34</sup> Cf. RICOEUR, P., «La giustizia dello Stato e l’etica della vittima», in *Vita e Pensiero* 2 (2005), pp. 54 ss.; COSSEDDU, A., «Ripensare la legalità nello “spazio” giuridico contemporaneo: un “ponte” fra teoria e prassi», in *I sentieri del giurista sulle tracce della fraternità*, ed. COSSEDDU, A., pp. 40-43.

<sup>35</sup> Cf. MANNOZZI, G., *La giustizia senza spada. Uno studio comparativo su giustizia riparativa e mediazione penale*, Milano, 2003; RIONDINO, M., «La “mediazione” come decisione condivisa», in *Apollinaris* 84 (2011), p. 630



hidden death penalty, since it shows indifference towards the recovery of the perpetrator of the crime, who is sentenced to be socially expelled. As Paul Ricoeur wrote, at this point, the couple made up of the victim and the offender should be again in the focus in the perspective of a recovery and of a reconstruction of the social bond, rather than in the perspective of a chain repression of the crime<sup>36</sup>.

Death penalty drastically and definitively cuts off the relationship with the *other*; by cancelling the life it cancels subjectivity itself and derogates from the imperative of mutual recognition between individuals as subjects with fundamental rights, *in primis* life. Death penalty, therefore, radically expresses what radical damage represents in intersubjective relationships, and it carries out a thoughtful exercise of this damage. The rejection of the death penalty must therefore be placed on an ethical level, as a rejection of an analogical renewal of the damage and of the use for any purpose of means constituting damage in itself, because they can assimilate the *other* to an object that can be destroyed<sup>37</sup>. As Cesare Beccaria has already mentioned, in addition to the uselessness of the death penalty from the point of view of the preventive usefulness of the crime, this practice of imposing penalties makes civil conscience lose the principle of intangibility of life expressed by the criminal laws protecting that good. Recalling the words of the author of *On Crimes and Punishments*,

*“the countries and times most notorious for severity of punishments were always those in which the most bloody and inhuman actions and the most atrocious crimes were committed. [...] If the passions [...] have taught men to shed the blood of their fellow creatures, the laws [...] should not increase it by examples of barbarity, the more horrible as this punishment is usually attended with formal pageantry. Is it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?”*<sup>38</sup>.

<sup>36</sup> RICOEUR, P., «La giustizia dello Stato e l'etica della vittima», in *Vita e pensiero* 88, 2 (2005), p. 64.

<sup>37</sup> Cf. EUSEBI, L., «Pena di morte», in *Enciclopedia filosofica* 9, ed. MELCHIORRE, V., Milano 2006, pp. 8458-8459; ID., «Motivazioni politico-criminali», cit., pp. 63-64.

<sup>38</sup> BECCARIA, C., *On Crimes and Punishments*, XXVII.



In the perspective of a restorative and relational justice, aimed at the realisation of the good of every *other*, victim, offender and society, the personal choice not to commit a crime in the future and to recognise the negativity of the previous criminal behaviour represents the most suitable basis to build in society the respect of the criminal precepts, strengthening the authority of the rule previously breached<sup>39</sup>. The death penalty, however, irreparably separates the guilty and innocent parties and by giving up on “justifying”, making fair again the intersubjective relationships that have been distorted by damage, paradoxically condemns even the victim, either it is an individual or a social group, to remain isolated and closed in its suffering which is indeed exalted by the suffering of the offender, while waiting in vain for the good to come from the infliction of a damage. In short, restorative justice takes care of the *other*, of every *other*, pursuing the good, trying to rebuild the good in inclusive and engaging terms, without any censorship or exclusion<sup>40</sup>.

#### 4. THE CHURCH IN THE FACE OF RADICAL DAMAGE

This perspective, proper to a right intrinsically founded on dialogic-relational bases, must clearly characterise Christian reflection on punishment within the horizon of restorative justice<sup>41</sup>. Pope Francis has made a decisive contribution to reorienting the pontifical magisterium in criminal matters in the conviction that “*the Church, therefore, proposes a humanizing, genuinely reconciling justice, a justice that leads the criminal, through educational development and brave atonement, to rehabilitation and reintegration into the community*”<sup>42</sup>. The Pontiff has clearly

<sup>39</sup> Cf. EUSEBI, L., «Rinunciare alla pena di morte», cit., pp. 104-106.

<sup>40</sup> Cf. MOCELLIN, S., «Ripensare la giustizia nella prospettiva della comunità: dai nuovi paradigmi del welfare alla Restorative Justice», in *Paradoxa* 11 (2017), pp. 137-148.

<sup>41</sup> Cf. STELLA, F., *La giustizia e le ingiustizie*, Bologna 2006, pp. 210-213; WIESNET, E., *Die Verratene Versöhnung: zum Verhältnis von Christentum und Strafe*, Düsseldorf 1980.

<sup>42</sup> FRANCISCUS PP., «Letter to participants in the 19th International Congress of the International Association of Penal Law and of the 3rd Congress of the Latin-American Association of Penal Law and Criminology», 30.5.2014; cf. EUSEBI, L., «Un’asimmetria necessaria tra il delitto e la pena», in *Rivista Italiana di Diritto e Procedura Penale* 57 (2014), pp. 1022-1029.



reiterated a concept that has already been widely clarified within the canonical legal system, as a system of authentically relational justice that refers to the ever new establishment of personal and plural relationships<sup>43</sup>, that is, the response to crime must always represent a project with characteristics intrinsically different from those of the crime, meaning to speak of the *negative* that is expressed in it<sup>44</sup>. These are the words used by Pope Francis:

*“As things stand, the criminal justice system oversteps its proper sanctioned function and places itself on the ground of the freedoms and rights of the people, especially of the most vulnerable, in the name of prevention whose effectiveness it has not yet been possible to ascertain, not even for the most severe punishments, such as the death penalty. There is a risk of failing to preserve even the proportionality of punishment, which historically reflects the scale of values protected by the State. There has been an abatement of the ultima ratio concept of criminal law as the last resort to punishment, limited to the most serious cases against the individual and collective interests most worthy of protection. The debate over replacing prison with alternative punitive*

<sup>43</sup> Cf. RIONDINO, M., *Giustizia riparativa e mediazione penale nel diritto penale canonico*, Città del Vaticano 2018<sup>3</sup>; IACCARINO, A., «Il diritto penale canonico», cit., p. 111. These are the words used by Giuseppe Capograssi to describe the canonical legal system: “*Questo ordinamento è una continua formazione di ordine: non è mai una statica organizzazione dell’esistente, ma un’incessante dinamica trasformazione dell’esistente, perché lo ordina e lo organizza nella realtà vivente della società perfetta in Cristo*”. CAPOGRASSI, G., «Considerazioni conclusive», in *La certezza del diritto*, ed. DE OÑATE, F.L., Milano 1968, p. 261.

<sup>44</sup> “*Nel caso dell’ordinamento canonico, l’annuncio della giustizia salvifica è il motivo per cui non può essere compreso globalmente l’intervento penale della Chiesa, pur prospettato nell’ottica del ristabilimento della giustizia, senza considerare che l’identità della Chiesa, e dei beni di cui essa è portatrice, è radicata in un’autentica teologia della riconciliazione*”. ARROBA CONDE, M.J., RIONDINO, M., *Introduzione al diritto canonico*, cit., p. 168. Cf. RIONDINO, M., *Giustizia riparativa e mediazione penale*, cit., p. 185; EUSEBI, L., «Giustizia “riparativa” e riforma del sistema penale canonico. Una questione, in radice, teologica», in *Monitor Ecclesiasticus* 130 (2015), pp. 515-535; ACERBI, A., EUSEBI, L., (ed.), *Colpa e pena? La teologia di fronte alla questione criminale*, Milano 1998. In addition to this, L. Eusebi writes: “*il diritto della Chiesa, pertanto, non si rappresenta il christifidelis delinquens come solo e tale da essere lasciato solo, come sofferente nella pena, a seguito del suo crimine, bensì lo considera sia in relazione alla vittima (la singola persona e la communitas), sia in relazione alla stessa autorità: soggetti i quali, dunque, non assumono il ruolo di semplici spettatori in attesa di scuse, ma quello di compartecipi nella (e della) dinamica riconciliativa (cf. 2 Cor 1,4)*”. EUSEBI, L., *La Chiesa e il problema della pena. Sulla risposta al reato come sfida giuridica e teologica*, Brescia 2014, p. 168; cf. RIONDINO, M., «Justicia restaurativa y derecho penal canónico. Aspectos sustanciales», in *Anuario de Derécho Canónico* 3 (2014), pp. 13-30; LODA, N., «Il canone 1401 CCEO quale “ianua” dell’ordinamento penale canonico ed il superamento del modello retribuzionistico. Semantica e valutazione delle fonti», in *Apollinaris* 80 (2007), pp. 242 ss.



*sanctions has also abated. In this context, the mission of jurists cannot be other than that of limiting and containing these tendencies*<sup>45</sup>.

In this respect, we can read the words of John Paul II, who describes canon law as an “*efficacious means in order that the Church may progress in conformity with the spirit of the Second Vatican Council, and may every day be ever more suited to carry out its office of salvation in this world*”<sup>46</sup>.

A decisive step for the affirmation of the full rejection of the death penalty, in the consolidation of the ethical foundation of the otherness and relationality that this penalty destroys, it is represented by the recent disposition of Pope Francis for the modification of number 2267 of Catechism of the Catholic Church on the death penalty, now considered “*inadmissible because it is an attack on the inviolability and the dignity of the person*”, with the derivation of the commitment to its abolition all over the world<sup>47</sup>. Previously, number 2267 established, following the traditional teaching, that the Church did not exclude, assuming full verification of the identity and responsibility of the guilty person, recourse to the death penalty, when this was the only viable way to effectively defend the life of human beings from the unfair aggressor. In this perspective, therefore, it seems urgent to complete the work of revising the Catechism and to undertake a courageous overall and prophetic reflection on the subject of canonical criminal justice, with attention given to number

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<sup>45</sup> FRANCISCUS PP., «Address of Pope Francis to the delegates of the International Association of Penal Law», 23.10.2014; cf. EUSEBI, L., «Sull'imputazione soggettiva nel diritto penale canonico. Un confronto con i sistemi penalistici statuali», in *Monitor Ecclesiasticus* 129 (2014), pp. 197-209. Su questo aspetto, con particolare riferimento allo Stato della Città del Vaticano, cf. EUSEBI, L., «Giustizia “riparativa” e riforma», cit., pp. 533-535; ID., «Cautela in poena», in *Rivista Italiana di Diritto e Procedura Penale* 58 (2015), pp. 469-481.

<sup>46</sup> IOANNES PAULUS PP. II, «Apostolic Constitution *Sacrae disciplinae leges*», 25.1.1983, in AAS 75 (1983), II, XIII.

<sup>47</sup> Cf. EUSEBI, L., «Finalmente inammissibile. La svolta del Catechismo sulla pena di morte», in *Humanitas* 73 (2018), pp. 515-518.





2266, which concerns criminal sanctions in general and which makes the penalty coincide with expiation<sup>48</sup>, suffering, and not with the *project*<sup>49</sup>.

Over the time, in the light of specific historical conditions, and sometimes feeling strains and contradictions, the Catholic Church came later than other bodies to develop a reflection on the penalty in line with its mission of salvation and to never justify the death penalty. In this current, necessary and urgent change of pace implemented by Pope Francis it is also possible to grasp the contribution of the cultural value of the canonical norms<sup>50</sup>. Without distorting the purely juridical nature of the legal system of the Catholic Church, canon law proposes its foundations and contents from the perspective of the *norma missionis*, to heal the inconsistencies within the ecclesial reflection and extend a constructive dialogue also to the legal systems of the States dealing with the reform of the systems of criminal sanctions, so that paths of mediation between victim and offender are increasingly valued in them, in the search for sanctions that favour the more effective accountability of the offender and the wider and more authentic satisfaction of the victim<sup>51</sup>.

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<sup>48</sup> “*The efforts of the state to curb the spread of behaviour harmful to people's rights and to the basic rules of civil society correspond to the requirement of safeguarding the common good. Legitimate public authority has the right and duty to inflict punishment proportionate to the gravity of the offence. Punishment has the primary aim of redressing the disorder introduced by the offence. When it is willingly accepted by the guilty party, it assumes the value of expiation. Punishment then, in addition to defending public order and protecting people's safety, has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party*”. *Catechism of the Catholic Church*, n. 2266.

<sup>49</sup> This reflection has already been desired by Pope Benedict XVI and to this end a theological commission has worked and it has produced on this subject an important issue of the journal *Gregorianum* ([2007] 1), together with the text on the problems of the penalty and on the death penalty drawn up under the guidance of the Pontifical Council “Justice and peace” at the moment, but which could not have, at that time, further developments.

<sup>50</sup> Cf. RIONDINO, M., «Connessione tra pena canonica e pena statale», in *Questioni attuali di diritto penale canonico*, AA.VV., Città del Vaticano 2012, pp. 199-225; EUSEBI, L., «La legittima difesa come categoria alla prova. Fine della nozione di guerra giusta e problemi aperti», in *Monitor Ecclesiasticus* 129 (2014), pp. 450-452; ZAGREBELSKY, G., *La legge e la sua giustizia*, Bologna 2008; COTTA, S., *Perché il diritto?*, Brescia 1996.

<sup>51</sup> Cf. RIONDINO, M., *Giustizia riparativa e mediazione penale*, cit., 157; GRANDI, G., «Libero consenso e volontarietà. Aspetti della “partecipazione attiva” ai processi riparativi», in *Paradoxa* 11 (2017), pp. 91-102.



## 5. CONCLUSION

The healthy and human positive utopia of reality that commits us to justice and to the search for the good so that no one is excluded from is not a dream, but a prophetic transcendent impulse, it is the prophecy of the *other*, which is already implemented in dialogic cooperation and which is open to the cooperative action to build a renewed juridical humanism. Saint Bonaventure in his *Legenda Maior* tells us of the dream of Innocent III and of a dream that does not dwell in apathy, but that becomes prophecy and commitment to recognise the value of another dream, that of Francis who no longer supports the Lateran that is falling, but who demands the approval of a Rule that will renew the whole Church. In short, this is the reason why it is so important to take shelter in Law, with a capital letter, a Law that welcomes and in which we experience the *other*, an experience for which it is worth living and not dying.