

Steps towards an exclusive democracy: the new use of prison

Passos rumo à democracia exclusiva: o novo uso da prisão

Emilio Santoro¹

Università degli studi di Firenze (UNIFI/Italia)
emilio.santoro@unifi.it

Resumo

Neste ensaio argumentarei que a situação atual das prisões italianas (e, em geral, a dos países do norte ocidental) e as políticas criminais que as produziram são o resultado da transformação das sociedades democráticas de sociedades inclusivas, ou seja, caracterizadas pela progressiva “concessão de poder econômico e social aos mais frágeis”, nas palavras de Du Bois, à sociedades excludentes, caracterizadas pela marginalização progressiva de grandes grupos de indivíduos, principalmente migrantes.

Palavras-chave: Sociologia jurídica, Políticas Criminais, Democracia Exclusiva.

Abstract

In this essay I will argue that the current situation of Italian prisons (and, more generally, those in north-western countries) and the criminal policies that produced it, are the result of the transformation of democratic societies from inclusive societies, that is, characterized by the progressive «giving of economic and social power to the powerless», in the words of Du Bois, to exclusionary societies, characterized by the progressive marginalization of large groups of individuals, primarily migrants.

Keywords: Legal Sociology, Criminal Policies, Exclusive Democracy.

¹ Ph.D em Ciência Política pelo Instituto Universitário Europeu. Fundador e diretor do centro de pesquisas sobre violência e criminalidade *L'altro diritto*. Professor Titular de Filosofia do Direito da Università degli Studi di Firenze, Via delle Pandette, 32, Edificio 4, Dipartimento di Scienze Giuridiche, 3 andar, CEP 50127, Florença, Toscana, Itália.

Prison as a tool for building inclusive democracy: the working citizen

Since Michel Foucault's famous text, *Discipline and punish*, a vast historiography has taught us that prison, or better, the "penitentiary", was born and became established as a punitive tool aimed at "reform", "re-education", "social reintegration" of the convicted person. And this happened at the same time as liberal-democratic nation states were becoming established. Since the eighteenth century, through the clever use of the myth of the nation and of disciplining, the different "peoples" were built, each understood as a group of individuals capable of using in an appropriate way the rights that an increasingly liberal (and then liberal-democratic) state granted to them. The democratization of the nation-state, the extension of suffrage, went hand in hand with the disciplining of the people and the emerging of the myth of the nation.² The processes of inclusion in the nation, that is, in the people, and of disciplining, made it possible to give rights, up to the right to choose one's government, to ever larger groups.

Since the early nineteenth century European countries, especially those of Western Europe, have seen the progressive social and political inclusion of the poorest classes. On the political level, what in the eighteenth century were considered the dangerous classes slowly became, through the extension of suffrage, an integral part of the *demos* that exercised political sovereignty. The ideal point of arrival of this process is, as Thomas H. Marshall (1950, p. 8) wrote in his classic work, "citizenship" understood as "a kind of basic human equality associated with the concept of full membership of a community".

The precondition for the development of democracies has been, more or less explicitly, the conviction that in the exercise of their rights, individuals must behave according to moral and rational principles (two adjectives that in the eighteenth-nineteenth century Enlightenment contractualism have almost synonymous value): "discipline" conforms individuals to the criteria of the order in which they are placed. As Thomas L. Dumm (1987, p. 6) pointed out, Alexis de Tocqueville was the first to realize that "the penitentiary system formed the epistemological project of liberal democracy, creating conditions of knowledge of self and other that were to shape the political subject required for liberal and democratic values to be realized in practice."

From Tocqueville's analysis, prison and, more generally, disciplinary institutions emerge as a constitutive element of the project of American liberal democracy: "the American project, a system of self-rule, involved not only the establishment of representative government with an extensive suffrage, but also the establishment of institutions which would encourage the internalization of liberal democratic values, the creation of individuals who would learn how to rule their selves. (Dumm, 1987, p. 6)

Examining the first democratic government that, transcending the urban dimension that

² Anderson (2006, 81-82) underlines the democratic and egalitarian significance of nineteenth-century nationalism: "If 'Hungarians' deserved a national state, then that meant Hungarians, all of them; it meant a state in which the ultimate locus of sovereignty had to be the collectivity of Hungarian-speakers and readers; and, in due course, the liquidation of serfdom, the promotion of popular education, the expansion of the suffrage, and so on".

this regime had had for centuries, had spread over a much larger territory and population, Tocqueville observed how democracy exerts a strong pressure towards conformism and involves the criminalization and institutionalization of the 'too' different. In the nineteenth century United States, those who were not believed to have the competence to exercise their rights were thrown back into the darkness of prisons and excluded from the possibility of choosing who could govern.

In *De la démocratie en Amérique* (1840), the rationale behind disciplinary institutions emerges as a structural feature of liberal-democratic regimes. Tocqueville, in fact, studying the first great liberal-democratic regime, affirms that the power that "took hold of bodies", which had guaranteed the survival of the absolutist regimes, was not suitable for liberal-democracies: to govern these regimes, we do not need a bloody power, but a power capable of "taking hold of souls". Discipline, that is the system of practices that invests the individual's body to make it socially compatible and economically productive, is the technology which expresses this power. And to him the grip on souls, although less bloody, does not seem more limited and softer than that on bodies. In the chapter on the tyranny of the majority, the French philosopher stresses that, paradoxical as it may seem, a democratic republic like the United States, which considered law and order as the embodiment of the people's will, treated disobedient minorities more severely than monarchic regimes, which took no account of their subjects' will. From this perspective, it would therefore not be by chance that modern disciplinary institutions originally developed in the United States, that is, in the first major country to give itself a republican government.

The origins of the modern prison must be seen in the process that began in Europe with the establishment of the Westphalian system. When the Western world appeared as a space for competition between states, the main problem became to identify techniques that would allow the development of the forces of individual nation states. Enrichment through trade was expected to increase the population, the workforce, production and export, and therefore the possibility of acquiring strong and numerous armies. State power became based on the assumption that it has a population and must intervene on it, regulating the mechanisms of birth and death, setting the conditions of life. Disciplinary technologies and police science are intended to guarantee the well-being of the national population and, through this, state power. A certain 'population', as an entity distinct from the 'labour force' and as a delimited portion of the 'human species', is defined by the sovereignty of the nation-state: it is the policies that invest and mobilize it for the achievement of state power that constitute and identify it.

Social control and criminal policy in particular were openly aimed at strengthening, or creating if necessary, individual responsibility. The weaker classes were driven (forced?) to adapt to new social conditions through preaching and the institutional enactment of virtues capable of replacing the morals of the medieval society now in crisis. It was a widespread conviction that the belief in free will and personal reliability, associated with the concomitant imperative of self-discipline, once incorporated into social institutions and practices, primarily criminal ones, would help many to live with the impersonal conditions of life in an urban and industrial society.

Institutions such as prisons, schools, hospitals, etc., promised to recreate order, substituting discipline for traditional systems of social control, which had been swept away by the industrial revolution and the development of suburbs. At the same time, the new institutions made it possible to conceptualize crime in irreducibly individual terms. That they were the solution to the problems of crime meant that this was not a collective social disobedience resulting from famine and poverty driving whole masses of individuals to commit various types of offences, but an entirely personal loss in sin and error. The fascination of institutional solutions lay in their promising to restore order and at the same time in their strictly individualistic interpretation of crime. The key idea was that for every offender punishment should consist primarily in the duty to face the tragedy of guilt: the detainee should live the tragedy of suffering, repentance, reflection and amendment, under the tutelary control of the chaplain.

In this context, prison, or rather the penitentiary, was the institution that seemed capable of reconciling the rhetoric of punishment with that of its execution. The penalty of deprivation of liberty, on its appearance, brought about a revolutionary reversal in the practice of punishment, a reversal that was in tune, if not with the letter of Enlightenment theories, at least with their inspiring values. Prison turned the strategy of social defence upside down: it went from conceiving the offender as a person to be annihilated to the idea that he remained, despite his violation of the rules, an integral part of society, so that punishment should be aimed at his reintegration into the social context. This crucial function of the penitentiary became the pivot of the strategy of social control with the rise of the capitalist production system. At the time of the 'original accumulation' and the enclosures, the penitentiary institutions seemed to be the right tool to transform the masses of former peasants immigrating to the cities into industrial workmen. As Georg Rusche and Otto Kirchheimer (1939) have famously shown, the penitentiary emerged as a place of forced socialization and was structured on the productive model, first of manufacture and then of the factory, from which it borrowed its internal organization. The penitentiary is the place where the liberal rhetoric of punishment, understood as the forced deprivation of a predetermined quantum of freedom, and that of its execution are compound. It is the place where the contract is combined with discipline, retribution and re-education. Thanks to the characteristics of the penitentiary, in other words, the prison sentence proves capable, on the one hand, of subjecting the destructiveness of punishment to the contractual standard (the principle of retribution), and, on the other, of making punishment serve the productive process (the principle of re-education). (Cf. Pavarini, 1980, p. 67) The penitentiary is, therefore, the place, theoretical and physical, that allows the full deployment of the liberal theory of punishment. For this theory the best social defence is for the transgressor – defaulting contractor – to compensate the damage caused to society, paying with his own time and simultaneously subjecting himself, while serving the sentence, to discipline. Only in this way can the offender be reintegrated into the fabric of legal relations as a docile subject, no longer aggressor of property, but ready to sell his workforce on the market to support himself. (Costa, 1974, p. 357-78)

The crisis of work ethics: the end of the idea of work integration

Thus, throughout the nineteenth century and much of the twentieth century, work and its ethics were the connective tissue of disciplinary techniques, they represented the integrative mechanism of society and therefore the tool of social reintegration. This role, indeed strongly questioned during the second half of the twentieth century, has been finally lost with globalization. As Bauman (1998) pointed out, the ultimate reason for the crisis of the re-educational conception of punishment and its reconceptualization in purely containing terms is the loss of centrality of work ethics.

Efforts to reintegrate prisoners into the labour market only make sense if there is availability, or rather 'hunger', of jobs. In the nineteenth century, entrepreneurs were eager to invest capital in new industrial production ready to absorb increasing amounts of labour force. Today, on the contrary, the stock exchanges reward companies that cut the number of jobs. In these conditions it makes no sense to try to bring the often reluctant categories of the 'without a boss' back to work. In these conditions, detention can hardly lay claim to its social rationality as a school for starting work, as a sort of second-best mode, imposed by force, to increase the ranks of productive labour in social sectors that prove impermeable to voluntary recruitment, as was the case in the nineteenth century. The problem today seems to arise in exactly opposite terms: companies are mostly committed to getting rid of superfluous workers, for whom there are no job opportunities and no point in retraining, and the only concern is to mitigate the threat to social stability posed by the unemployed masses. Moreover, when labour is needed, recourse can be had to the inexhaustible basin of immigration, which provides cheap, self-disciplined and, in some cases, already highly qualified workers.

This does not mean that any ethical emphasis on work has disappeared; rather, it means that work ethics has ceased to be a pillar of the social order as it has been for over three centuries and has left behind a contradictory cultural context. Today individuals are supposed to observe work ethics in an unfavourable context: its development is a purely private and almost ascetic exercise. Within global markets, it is above all 'external objective conditions' which, by determining the productivity of an investment, decide the location of an entrepreneurial activity. Labour ethics does not guarantee access to work, nor does it promote stability in employment, once obtained. If the conditions of infrastructures and services, the level of taxation, the cost of labour, typical of a certain area, make it more profitable for entrepreneurs to invest elsewhere, work ethics, whether developed autonomously by individuals or imposed by panoptic institutions, is no guarantee of job placement. The link between ascetic discipline and worldly success, which Smith took as the basis of the social order and Weber considered as the main characteristic of the early capitalist ethic, seems to have been dissolved. Society continues to demand rigour and discipline from those who work or prepare for work, but is no longer able to ensure any success for those who are capable of self-discipline. This new picture could not but have consequences also on 'total institutions': they are less and less disciplinary institutions and more and more containing institutions. If inculcating work ethics does not guarantee any job placement, even the last tenuous hopes of punishment's ability to 're-educate individuals' and reduce recidivism

disappear. Economically, there is no longer any point in investing in 're-socialising' institutions. It is much more convenient to devote resources to improving the containing aspects of institutions, their security. This ensures at least that, while serving the sentence, 'criminals' will not cause new damage.

In this context, prison institutions are being developed that are 'panoptic' from a technological point of view, being based on the idea of continuous surveillance, but are very far from the spirit of Bentham's project, since they have no disciplinary purpose, they are not absolutely aimed at developing work ethics, at building the 'docile body' to be employed nor at the productive reintegration of the prisoner. They aim exclusively at guaranteeing the maximum security of imprisonment.

Prison and welfare state

Thus, the welfare state apparatus was born out of the conviction that each state must take charge of managing its own population, in order to ensure its well-being and so increase its economic and military power. Prison in this context was the tool to try to regain those living on the margins of society through crimes and expedients to the cause of State power, transforming them into productive citizens.

After World War II, the military power of Western European states became progressively less important (initially with the partial exception of France and Great Britain), since the collective defence of Western Europe was entrusted to NATO and ultimately to the United States. But the economic competition between states (in addition, of course, to pressure from socialist parties and the trade union movement) still pushes them to be concerned about their people's welfare. The development of welfarist policies peaked in the 1970s, when Keynesianism and Fordism were combined.

For over a hundred years the two locomotives – 'discipline' and market – ran on parallel tracks, favouring the state's development. In the first phase the economy seemed to need above all disciplined workforce, so that the developments of market and discipline seemed, as in Bentham's design, perfectly symbiotic. When it turned out that this synergy was an illusion and that disciplining the labour force often did not meet market needs, welfarist policies were complemented by the Fordist ones. This was a complete reversal of the eighteenth-century Smithian idea that poverty, by activating human resources, is a key element in stimulating economic growth. The Fordist approach shifts focus from the labour market to the goods market, assuming that it is wealth, and not poverty, that represents the fundamental stimulus for economic growth, because only wealth is able to produce consumption and therefore to stimulate the demand that activates production. The eighteenth century approach, in its Smithian, Malthusian and Benthamian versions, was linked to the idea that the only limit to production was the lack of manpower. If there had been manpower, wealth could have increased indefinitely. The Fordist thesis instead takes into account the overproduction crisis of the late nineteenth and early twentieth centuries, that is, the fact that without demand production does not generate wealth. It was clear by then that the problem was not so much a scarcity of

producers, as Bentham and Smith thought, but of consumers. And full employment and the progressive growth of workers' wages were seen as the elements to create an ever-expanding market.

The most significant aspect of Fordist policies, however, is an assumption that often goes unnoticed: they finally accept that labour and its market cannot play the role of the driving force behind the integration of society. Underlying Fordism is an awareness that the worker-citizen equation could no longer perform the function of lintel of the social order: full integration into the labour market no longer seems in itself a sufficient basis to guarantee full participation in the social and political life of the community. Between the late nineteenth and early twentieth century this idea was already the foundation of the development of Welfarist policies, which are not by chance contemporary to the birth of sociology.

Instead, with Fordism it becomes clear that the core of the social order cannot be an individual who finds the meaning of his existence in his work (which may consist in one of the seventeen operations necessary to produce a pin). (Smith, 1776) In his place there emerges a 'consumerist' individual, driven by the awareness of the often alienating character of his work to seek the meaning of life in consumption. This compensation for the 'miseries' of work is the implicit promise of Fordist policies, based on full employment guaranteed by sufficiently high wages, such as to allow employees to be consumers of a certain importance on the market of goods, including discretionary goods, and therefore able to fuel a significant demand for goods and services.

It is natural that, in parallel with this transformation, the penal system should change from a tool for creating responsible individuals to a tool for creating social consumers. This transformation is marked by the progressive shift of the causal origin of crime from an individual's free moral choice to his more or less pathological condition. (Cf. Garland, 1990) With the emergence of the social paradigm, the privileged mode of social regulation changes from general deterrence to strategies of prevention, rehabilitation, re-education or re-socialisation of deviants. As the state, in order to allocate social rights, shatters the unity of the citizen status, which characterized the classical liberal theory, and differentiates individuals according to their needs, creating the categories of 'women', 'unemployed', 'pensioners', etc., so its penal system shatters the category of the offender. On the basis of deviant individuals' needs, the punitive system of the welfare state has built the categories of the 'incapable', the 'habitual criminals', the 'moral fools' (later transformed into 'psychopaths'), the drug addicts, the AIDS patients, the social misfits, a whole series of figures traceable to social deprivation, etc., and has tried to differentiate punitive answers so as to give each one an appropriate treatment.

The welfare crisis and the end of re-education

This new technique of governance quickly run into a crisis because consumption soon began to appear by its very nature a social control tool difficult to manage. In the 1970s, the state's ability to finance social services seemed to run into a crisis, and the so-called "fiscal crisis of the

state” (O’Connor, 1973)³ broke out. The increase in state deficits seemed to impose a drastic rethinking of Keynesian policies and a substantial tightening of social spending. In fact, as Albert Hirschman (1991) pointed out, the crisis of the welfare state is not a consequence of fiscal problems: the sudden discovery of the inefficiency of its structures was but an indication that their underlying political project appeared unsustainable. Disciplinary technologies were widely perceived as not capable of managing consumer-based integration. On the one hand, the standardisation of needs that they brought about began to be perceived as a limitation of individual freedom and a paternalistic interference. On the other hand, this same standardization proves incapable of controlling the qualitative and quantitative multiplication of social consumption (a multiplication reinforced by the vast migratory phenomena that have affected north-western countries). Disciplinary technologies have lost their overall meaning: the type of subject they favour, instead of being functional to the social order, seems to contribute to undermining it, overloading it with demands that it cannot cope with.

The crisis of the welfare system gradually deprives the various disciplinary technologies of their reference system. At this point, the re-socializing prison, the prison of inclusive democracy, begins to run into a crisis because it finds itself without a compass; it no longer has a model of “social reintegration” to guide it. The model of the working individual, a rational actor capable of deferring satisfaction over time, has lost all credibility, and the model of the “consumer” citizen has itself suddenly appeared implausible.

This does not mean that punitive systems have lost all of their re-socializing connotations. Even in the criminal field, the crisis of the welfare state, as Stanley Cohen (1985) pointed out, has not led to the dismantling of the apparatus of normalization, investigation, individualization and classification developed in previous decades. Disciplinary techniques still have a certain degree of local efficiency and an enduring ability to deal with immediate problems, at least for some individuals, and are therefore not eliminated. It is indeed unthinkable that a system of social control should eliminate its structures, without a new one having taken its place. Of course, with the outbreak of the “fiscal crisis of the State”, the investments destined to the non-immediately repressive treatment of deviants are the first to be axed by expenditure containment. In times of lack of resources, offenders are those who ‘deserve’ to be helped less than any other.⁴ According to Roger Matthews (2002) we are living a phase of trans-incarceration.⁵ The agencies of the welfare state (medical, educational, social institutions) that take charge of the marginal

³ The book was anticipated by an article with the same title that appeared in the journal *Socialist Revolution*. James O’Connor (1973, p. 10) saw the problem of consumption-based social integration from a Marxist perspective. He pointed out that the modern capitalist State had to “carry out two fundamental and often contradictory functions”: 1) ensure the formation of capital, that is, investment flows (the “accumulation function” of the State); 2) safeguard its own legitimacy by guaranteeing appropriate standards of consumption, health and education (the “legitimation function” of the State). These two contradictory requirements generate, in his view, budget deficits, inflation and fiscal revolt, and this leads him to argue that “the accumulation of social capital and social expenditure is a highly irrational process in terms of administrative coherence, fiscal stability and potentially profitable private accumulation” (1973, p. 15). O’Connor’s views were taken up in 1975 by Samuel Huntington, who wrote the chapter on the United States of the famous report to the Trilateral Commission (drafted, besides Huntington, by Crozier and Watanuki), entitled *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (1975). Read from the right, the crisis identified by O’Connor is not a crisis of capitalism, an economic crisis, but a crisis of an essentially political nature. Huntington (1975, p. 73) sees the “welfare turn” as the main culprit of the “crisis of democracy”: the United States and the other Western democracies risked, in his view, becoming “ungovernable”, under the weight of the “overload” of demands from their people.

⁴ On the rhetorical use of the ‘fiscal crisis’ of the state and then of the ‘overload crisis of democracy’, see Hirschman (1991).

⁵ See also Matthews and Francis (1996).

population have changed their soul: originally in charge of providing services, today they operate mainly as links in the prison chain. As Foucault had pointed out, and then Cohen reiterated, the institutions of post-prison social control have always been closely related to prison, straddling the boundary between assistance and repression. With the crisis of welfare as a plausible basis of the social and political order, however, the institutional focus seems to shift decisively: the aim of institutions is no longer treatment (disciplining), but mere incapacitation, the delimitation of the possibility to act, to move, of the individuals taken in charge.

Globalization and exclusive democracy: Prison as an instrument of the dictatorship of a frightened class

The lack of a model of 'citizen to produce' is a traumatic factor for the political and social order. Without a guiding model, all the 'disciplines' that have allowed the preservation of order in the modern era come into crisis. As Foucault (1994, p. 39) observes, the crisis of the 'disciplines' «calls knowledge into question, the form of knowledge, the 'subject-object' norm; it questions the relations between our society's economic and political structures and knowledge (not in its true and untrue contents but in its 'power-knowledge' functions)». We are therefore facing "a historical political crisis". In this context, prison seems to be the disciplinary institution that managed to immediately redesign its function: it transformed itself by adapting to the crisis while retaining its role as a fundamental bulwark of order.

The spread of major migratory phenomena has meant that in recent years the political function required of prison has completely changed. It is no longer called upon to produce 'good citizens' whose judgement and behaviour can be trusted, but to protect the welfare state, whose decline is allegedly irreversible, for those accustomed to using it. It is called upon to set the limits of social citizenship, to raise barriers defining the universe of 'consumer citizens'. And prison has promptly taken on this demand.

With the great migrations that have affected north-western countries in the last few decades (the United States for much longer), the notion of population has changed substantially: it is no longer a predefined set of individuals to intervene on by regulating birth or death. It has become a set that can be continuously redefined through receiving migrants and expelling residents. This change overturns the foundations of the modern state, but at the same time offers a solution, at least contingent, to the problem of order. Thanks to migration, the population's manipulability has increased disproportionately. A state can select its own population much more easily: it can build, through a series of inclusive and excluding mechanisms, a population of all actors capable of staying on the market, without the need to 're-educate' the members of its supposedly predetermined population who prove incapable of doing so. This possibility mitigates the impact of the lack of a model citizen to be produced. In fact, it is no longer necessary to produce 'good' citizens: it is enough to enable the market to select useful individuals. Individuals are placed in society in a condition of great weakness. Then, their interaction with society itself is monitored: if they create too many problems they are ousted. The lack of a model of citizen to produce, and the inability to produce it, make social inclusion experimental: every experiment must be controlled.

Only those who succeed in entering market mechanisms, and only as long as they succeed, are admitted to the population.

At the same time the perception, induced by the ideology of globalization, that the resources the state can use for social purposes are inevitably scarce has spread the belief that the rights of 'autochthonous' majorities can only be guaranteed through the exclusion of migrant subjects (and often also of 'undeserving' citizens) from these rights. In north-western countries, the criminalization of migrants has become one of the main flags of the reunification of society (Melossi, 2002, p. 259): a reunification carried out at the expense of migrants themselves, who are used as resources of the productive system and at the same time excluded from welfare and social security circuits. The majority of public opinion in north-western countries could never accept that access to citizenship rights be regulated by xenophobic or racist criteria. They would never accept, in other words, the idea that migrants should be excluded from social rights because of their black or yellow skin, or of their 'uncivilised' practices. Nor would it be easy to accept a purely selfish perspective (with some slavery vein): we have few resources and therefore migrants cannot expect us to give up our pensions, our ability to care for ourselves – which are already in danger – to allow them an acceptable level of social security. Such approaches only resonate with some minority, and often exasperated, sectors of north-western public opinion. Instead, linking access to citizenship rights to law abidance seems aseptic and politically correct: we cannot show solidarity with those who commit crimes and attack, often violently, our people and goods.

In largely anonymous societies, the distinction between the honest citizen and the 'criminal' does not depend so much on the criminal conviction as on the prison sentence. The criminalisation of foreigners could not therefore stand without a high rate of imprisonment.

This use of detention marks a major break in prison history. Given the unlimited possibility of recruiting manpower provided by migration and the obsession with the scarcity of resources to use for social purposes, today's society has decided not to grant offenders a second chance of social life. As the prison loses its resocialization purpose, the detention of migrants is deprived of any meaning other than to stigmatize them as 'dangerous' individuals. While for Italian (or European) citizens there is no 'elsewhere' where they can be placed, for migrants 'elsewhere' there is. The hunger for manpower of nineteenth century industrialization having disappeared, due to changed production methods and migratory phenomena, there are no more reasons to keep deviant migrants within the state political space. In addition, the disappearance of any guiding model of their social reintegration makes it not even conceivable that they might be 'disciplined'. In the past criminal policy had been forced to choose between physical suppression and the need to make the offender harmless, either through deterrence or through re-education (or disciplining). Now it regains a dimension that had been lost after the late eighteenth century failed attempts at deportation, and was unknown to the penalty of the last century: the expulsion of deviants from political space.

Expulsion from political space, however, can also consist in a simple marginalization of migrants from the sphere of legality. If, as Foucault (1994, p. 35) writes, "the prison form of penalty corresponds to the wage form of labor", perhaps we can also say that the precariousness form (or the 'McDonaldization') of labour corresponds to the marginalisation form of at least part

of penalty: in fact, it is the existence of this area of intra-state marginality that serves as a laboratory to test prospective citizens. The typical path of migrants in Italy is characterized by a period of irregularity and marginality in which they are tested: those who prove to be ‘good citizens’, that is, who accept to live without guarantees, without rights and in total precariousness, without disturbing, are admitted to the rank of ‘regular’. Marginalisation is therefore institutionally created in the national territory:⁶ it becomes an organised social zone, on the one hand, for use as a tool of migration governance and, on the other, for the management of certain population groups considered unworthy of social citizenship.

This situation is not surprising: the new criminal policies only reflect the sclerosis of what Peter Glotz (1985) has called “the two-thirds society”, a society in which a significant but minority share of individuals is excluded from well-being and the political tools needed to achieve it. Opulent democracies have turned into dictatorships of a frightened class: what interests the European middle classes, who have become the majority thanks to welfare policies, is to prevent indiscriminate access to citizenship rights from considerably reducing their traditional social guarantees. After the vanishing of the Fordist and welfarist narrative, which promised a positive sum development of well-being whereby the improved conditions of the weakest sections of the population would lead to the improvement of everyone’s conditions, the citizens of European countries have come to believe that social rights are a zero sum game. They fear that extending welfare benefits will worsen the reduction of their benefits, already underway as a result of the phenomena of economic and financial globalization. For this reason, they entrust prison with the role of legitimizing the exclusion, first of all, of migrants, but also of all those who seem undeserving. This has created a mass of economically and politically very weak subjects, excluded from the effective enjoyment of almost all rights. An underclass,⁷ a more or less extensive social subclass, often also ethnically characterised, is denied legitimate access to available economic and social resources and is represented as dangerous, perceived as a threat to social security and, *as a result of its exclusion*, to the security of citizens’ life and property. The key to understanding the new criminal policies is, indeed, a reflexive dynamic whereby the strategies of controlling marginalization produce control-generated marginalisation. Lemert’s teaching seems to have been fully understood, not as a reason to doubt criminalization policies but as a strategy for producing legitimacy. The social construction of the ‘marginal’ as ‘dangerous’ ends up accentuating his real dangerousness, and therefore legitimising new strategies of excluding and criminalizing classes of marginal individuals.

From a sociological point of view, it must be recognised that north-western democratic citizens have always feared crime and encouraged politicians to adopt repressive laws. Protecting the fundamental rights of those recognised as deviants has always been the heritage of an expert and enlightened knowledge which, in particular sectors of the political world and the

⁶ In fact, there also seems to be a marginalisation that is functional to illegal markets. This is clear from the stubborn issuance of expulsion orders against foreigners whose effective deportation is known to be impossible. All these people end up in a sort of black well: they will not comply with the expulsion order but this order will force them to live as irregular immigrants and to rely, willingly or unwillingly, on the illegal market.

⁷ The notion of underclass has been placed at the centre of recent criminological debate by Wilson (1987). However, it has illustrious ancestors such as the theory of differential associations of Sutherland (1924), the ecological theory of social disorganization of Shaw and McKay (1942) and the theories of cultural conflict.

administration, has been opposed to the punitive impulse (which has always shown up with particular force in the face of serious criminal acts). The crisis of the 'citizen-consumer' model has undermined the credibility of 're-educational' criminal policies and has disrupted the balance between vindictive impulses and rights protection in the phase of sentence execution. Current criminal policies seem to jeopardise the division of powers characteristic of twentieth-century liberal democracies, radically transforming the mechanisms that connoted them as constitutional governments.

Cynically, one should probably rejoice at the fact that power seems finally willing to renounce the mask of equality behind which it has always hidden, but perhaps what we call (legal) civilization is nothing more than a set of masks that everyone must wear, first of all the state Leviathan.

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