40th Anniversary of the council for penological Co-operation (PC-CP)

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Distinguished Participants,

First of all, I would like to thank the Council of Europe and this notable audience attending the meeting celebrating the PC-CP's forty years of activity.

You are representatives of those Bodies and Administrations which, in the Council of Europe Member States, are committed to a particularly relevant task for social cohesion and the exercise of justice. This task is how to fulfill a response to the commission of a crime keeping together a plurality of aspects. Indeed, such a response must be at the same time restorative for the community - struck by the torn-apart-ties consequence of a crime. It must be a firm warning to the offender about the negative implication of the action perpetrated and the further need for a rehabilitation pathway in order to be restored to the community, so preventing reoffending. However, it shall also be restorative to the victim, as in this response the victim should perceive that the evil suffered has not produced other evil but has found an evolution in an enhanced recomposition in the community.

These are all elements that must be comprehensively considered if we want to avoid – just as the advanced notion of criminal law requires – that the response to crime is only a payback to the offender for the evil produced or a subtraction of life as an example for the community.

Indeed, for this positive perspective that even the difficult moment of the imprisonment requires, special thanks I would like to address to those who continue to keep the debate on these issues alive. I am referring to the European Committee on Crime Problems and in particular to the Council for Penological Co-operation throughout its forty years of activity. Only an imagined picture of custody taken forty years ago could provide us all with the concrete and visible element of what changes PC-CP has produced in this field. Not only in raising the standards of material living conditions or in organizing an everyday life more similar to the life outside the prison walls; rather because, above all, it produced an overall evolution in recognising the rights of all persons deprived of liberty.

However, each Institution in this Building do not walk alone: it is the whole system of monitoring, control, prevention and positive proactive Bodies that the Council of Europe envisages to provide with the framework within which the culture of rights can spread and develop as a cornerstone for the European scenario.

This also includes my personal experience as President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment - the main visiting and oversighting Body on places of deprivation of liberty - and subsequently as chairman of the European Institution we celebrate today, tasked with building on administrative harmony in those places where penal execution is carried out in the harshness of the deprivation of liberty. Two different goals, different actors participating to the relative Committees and different working methods. But their common synergistic action is not only aimed at preventing the risk of any treatment negatively affecting the dignity and the integrity of the person detained, but rather to make effective and implemented the elaborated and agreed common rules that govern such a difficult task.

Still discussing around the penal function

As many philosophers and sociologists of law have repeatedly affirmed, the concept of punishment refers to the duplicity in meaning of the Greek term *pharmakon*, which is poison and remedy. The risk, often existing in the contemporary debate, is in the stress which have been progressively put on the first: the poison. Almost as if the accomplished fulfilment of the *pain* that punishment brings about is a premise and a necessary condition for its rehabilitative purpose. Therefore, no longer a merely retributive function – somehow characterising the backwardness of criminal law and the iconography of justice in the scales – but a function that is necessarily symmetrical to the crime by virtue of that precise aspect of *pharmakon* which in order to cure it must also poison.

Starting from the reflection on this risk, I ask myself what are the directions along which the penal law recomposition should move, keeping coherent to its intrinsic *relational* connotation. Certainly, as the great theorist of law Hans Kelsen recalled, «positive law, is a social order whose purpose is to guarantee peace between the individuals subject to the order»[1]. Thus defined, law can never lose sight over the *human* specificity of its recipients, nor its *relational* dimension which gives value and meaning to the social context it affects.

A first direction of the possible penal recomposition looks to the past, the second to the future.

Concerning the past – that is the committed crime – that direction should go through the unavoidable awareness that what happened is a negative value, a violation of the regulatory pact and a damage caused to those who have suffered it. This is basically, beyond any expression given by anguish and pain, what the victim requests and wants to hear solemnly

[1] H. Kelsen, *L'anima e il diritto*, Edizioni Lavoro, Roma 1989, pages 102 and following. Translation into English by the National Guarantor.

declared in the place where justice is having its due course. What they have suffered must be affirmed in its negative value and those who have perpetrated the crime must be recognized as the ones who made the victim live through this negative experience. The victim has the right to have such a suffering recognized. Just as the community, whose relational ties were torn apart by the commission of the crime, has the right to have it affirmed that its cohesion pattern has been lacerated and the perpetrator was responsible of that wound.

This is the value of *sentencing*. Sentencing cannot consist of a determination on how to punish the offender. Rather, it should ascertain the facts of what has happened, establish what kind of laceration has been produced, what the victim has suffered and of how to deal with the offender at the present. Opening to the future, looking ahead.

The direction of the penal law recomposition – that is the direction towards the future – is, in fact, precisely its looking forward.

First, in terms of avoiding the repetition of what happened. However, also avoiding solutions that totally undermine the person's self-determination. Since what is needed the most is to respond in a way that looks to a different positive reintegration into the social environment, albeit postponed in time. This is not a simple matter.

> It has been already debated in ancient times. We find it in the words of Protagoras, in Plato's elaborated description of what we today call *deterrence* and rehabilitation. He said: "He who undertakes to punish with reason does not avenge himself for the past offence, since he cannot make what was done as though it had not come to pass; he looks rather to the future and aims at preventing that particular person and others who see him punished from doing wrong again»[2].

But without said recomposition, without its prediction and without any action aimed at its planning, the criminal scene and the court proceedings remain a theater for the exercise of the exclusive power of legal violence by the State and for building a consensus legitimating justice policy. It becomes like a theatrical scene that takes place around the suffering of its actors. Suffering actors, all of them: *the victim* who entrusts to that scene a possible soothing part of his/her pain or anger for the wrong suffered and who instead is *de facto* prevented from having a role on the stage; *the offender* who at the very moment of appearing on the trial scene is in itself a 'weak' subject, delegated to others who risk seeing in him the reification of the crime and not the person; *the outside community* to which the role of spectator or sometimes of supporter is left, which in any case observes from a distance.

[2] Plato. Plato in Twelve Volumes, *Protagoras*, Vol. 3, 324b. Translated by W.R.M. Lamb. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1967.

A theater is the opposite of a place of social recomposition. Without any recomposition, the trial scene becomes an updated version of the old place for 'punishment': no longer epiphany of the bodily pain, but epiphany of the individual nullification. Gabriel Bonnot De Mably wrote in the period of the Enlightenment and at the time of the transition from corporal punishment to imprisonment: «Punishment, if I may so put it, should strike the soul rather than the body»[3].

The absence of a recomposition perspective, gives space again to that theatricality that Michel Foucault refers to as a regulatory system that addresses the offender and the outside world as a warning and a disciplinary message. In addition, it opens up to the extensive function of resorting to criminal law[4]. Because theater requires more and more spectators: really, what happens on the stage is addressed to them. Especially when there are no other suitable and effective regulatory tools in the community. Strictly punitive penal systems expand through consensus where other regulatory systems do not work: their expansion is indicative of other absences, at social and political level. The expansion of the penal system is symptom of this absence, but – in a sort of short circuit – is productive of more absence. Thus, contributing to the indecipherability of social conflict that leads the public opinion to represent the conflict itself only in terms of a binary code like aggressor-victim. Migrants, dropouts, marginal lives, difficult persons, are seen as responsible of the individual feeling of daily insecurity and are seen as potential aggressors. The resort to criminal law is thus affirmed because of its simplicity, in a context that struggles to find meaning in its own social identity and sees the withdrawal of politics from its tasks of social evolution[5].

In this context, the risk of a punitive sanction that inflicts suffering is still alive.

Here comes the possibility of alternative sanctions and measures. And as well, the debate about detention as a meaningful time to be defined around a concrete hypothesis of recomposition and return to the community. But this is possible only by acknowledging the person's subjectivity while executing a sentence – and of the detained person in particular – and giving his/her effective responsibility in the pathway to reintegration into the outside community. Here comes again the intrinsic mistake made by those who see in a permanent and closed custody the possibility of reducing the risk of recidivism while, on the contrary, such a closed regime implies the lack of knowledge about the detainee and about his/her capacity to re-assume responsibility even in the external context.

[3] G. Bonnot de Mably, *De la législation ou Principes de lois* (1776) in *Oeuvres complètes*, Amst ed., Lausanne., tomo IX, ,p. 326. Translation into English by the National Guarantor.

[4] M. Foucault, *Discipline and Punish* (1975)[Trad. it. *Sorvegliare e punire*, Einaudi, Torino, 1976.

[5] M.Palma*, The evolution of new penal patterns, VII Annual Conference* of the European Penitentiary Training Academies (EPTA) Network*,* Rome, November 2015.

Some aspects of a justice really restorative *of* the ties that were torn with the commission of the crime are also recurring.

Recommendations, standard, rules

These few thoughts of mine hold together different instances acknowledged in the context of the overall reflection conducted within the Council of Europe, through its Bodies and Committees. Bodies and Committees which yet have different mandates and functions.

In considering their different roles a as a whole, I would like to quickly highlight the conceptual thread that links the *recommendations* to the *standards* and these last to the *rules* commonly adopted by the Committee of Ministers.

The *recommendations* are the key outcomes of Committee for the Prevention of Torture. They are produced on the basis of the monitoring visits systematically carried out by the Committee, under the relevant Convention ratified by the Council's member States. The CPT recommendations arise from its concrete observation; they are the product of that intrusive scrutiny that the Committee carries out. A scrutiny which determines the groundwork of every indication addressed to the relevant administrations. They are of a preventive nature, pointing at possible risks of a negative development of what has been observed. Taking into account that article 3 of the European Convention on Human Rights cannot be derogated in any circumstance.

The recommendations are never theoretical elaborations nor an indication with a political perspective. They consist of some elements of evaluation that the Committee's delegations collect when visiting prisons and other facilities, having in mind the purpose of protecting those who, being deprived of their liberties, are specifically vulnerable with respect to the protection of their rights.

The *standards* may be considered as the evolution of the recommendations. So, they do not arise only from the pure and proper theoretical reflection – and this is both the peculiarity of the Council of Europe and the added value that its Committees express. Nonetheless, they also consider this theoretical reflection, that is the evolutionary dynamics of the very concept of 'penalty' which dutifully follows the evolution of the social models it rules and the values in which a community recognizes itself. Moreover, the standards must also take into consideration the consistency that is to be achieved in a regional geographical context such as the European one. This need of consistency shall never reduce them to *minimum standards* – such as the lowest level to be achieved. On the contrary the standards shall accept the challenge of being *generative standards*: they are indicative of a basis that is generative of a possible future development.

Standards should move within three polarities: recommendations, theoretical reflection, generative development of increasingly advanced social models.

The *rules* constitute the arrival point of this path that started from recommendations and went towards standards. The rules indicate the specific properties a criminal execution model shall have, precisely because it has been elaborated through the previously steps. The rules must give concrete indications to the Administrations and, therefore, they shall not be enunciative, but operational. To this extent, it is also necessary to keep in mind the backwardness and limitations that some Administrations highlight, but never remain linked to them. The comparison between the full implementation of a specific rule in one of the member States of the Council shall thus become suggestive of its possibility of implementation also for another country, which perhaps still has a lower capacity in terms of administrative evolution. The rule – as we know – are adopted by the Committee of Ministers: this means that the Committee of Ministers is implicitly responsible for monitoring their gradual but full implementation.

In outlining this very short process that goes from the visits to the recommendations, to the standards and then to the rules adopted by the highest representatives of the Council's member States, I didn't mention an added element: the *principles*, which are the framework within which we place the rules. The *European Prison Rules*, for instance, have set this framework of principles in their preface. It is sufficient to mention only the fifth principle in order to understand the profile of detention they envisage: «Life in prison shall approximate as closely as possible the positive aspects of life in the community».

This positive principle represents in some way the high point of convergence of our action. Just like the peremptory affirmation that the Convention on Human Rights dictates to us as an absolute obligation «No one shall be subjected to torture or to inhuman or degrading treatment or punishment» sets up the lower boundary, the risk that can occur in some contexts.

The action of the Committees having to deal with penal sentences and their enforcement unfolds between these two poles of preventing this lowest boundary and helping towards the achievement of that highest point.

This was the footprint I wanted to impress while carrying out my duty, first in the CPT then in the PC-CP.

Thank you very much.