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A slow revolution and the security dilemma: Rethinking punishment and the prison system through a human rights-based perspective

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Abstract: *The relationship between punishment, human rights, and socio-economic marginalisation within contemporary criminal justice systems is increasingly scrutinised, revealing significant flaws in traditional punitive models. These systems, which heavily rely on incarceration, disproportionately affect vulnerable populations, such as immigrants, the socioeconomically disadvantaged, and incarcerated women. The paper critically examines different theoretical frameworks – retributivism, utilitarianism, and rehabilitation – demonstrating how they fail to address systemic inequalities, often resulting in overcrowded prisons and the over-incarceration of marginalised groups. A focal point of the analysis is Article 41-bis of the Italian Penitentiary Act, which serves as a case study of how exceptional security measures can become normalised, eroding human rights protections and diminishing rehabilitation opportunities. Originally implemented to counter organised crime, the regime has raised concerns regarding its impact on the long-term prospects of prisoners, with its widespread use now seen as undermining fundamental rights. The study argues that addressing organised crime requires not only stringent legal measures, but also socio-economic policies aimed at tackling the root causes of criminal behaviour. Advocating for a shift towards transformative justice, the paper highlights models that prioritise crime prevention, social investment, and restorative justice over punitive approaches. In promoting a human rights-focused rethinking of criminal justice, it calls for systemic reforms that address structural inequalities and offer more sustainable, equitable solutions to crime prevention. Ultimately, the study suggests that addressing socio-economic disparities is key to breaking the cycle of punitive justice and creating a more just and democratic model of public safety.*

Keywords: *punishment; prison; marginalisation; transformative justice; security.*

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1. Introduction

The increasing prominence of ethical, social, and legal debates surrounding punishment within modern criminal justice systems has prompted a growing body of research aimed at critically examining the intersections between punishment, human rights, and socio-economic marginalisation (Garland 2001; Crutchfield and Weeks 2015; Lacey 2022). As traditional punitive models continue to dominate policy discourse (Monterosso 2009, 15–16), questions have arisen about their effectiveness and fairness, particularly in relation to vulnerable groups who disproportionately bear the brunt of incarceration. This ongoing dialogue underscores the urgent need to reassess the role of punishment in contemporary legal frameworks and its broader societal implications.

While punishment is a cornerstone of legal frameworks, it remains a contentious issue, often lacking consensus among scholars, practitioners, and policymakers. A central motivation behind this study is the need to understand how traditional punitive systems, which primarily focus on incarceration, disproportionately affect vulnerable groups and perpetuate cycles of inequality. Furthermore, as public discourse increasingly embraces punitive populism, the paper seeks to highlight the limitations and risks of relying on incarceration as a default solution to complex social issues.

Existing literature on the subject spans a broad range of disciplines, from legal theory to criminology and sociology. Scholars such as Melossi (2015), Wacquant (2001), and Davis (2003) have explored the interplay between crime, punishment, and socio-economic inequalities, particularly concerning vulnerable populations such as immigrants, the poor, and women of colour. However, while these studies provide valuable insights, the role of punishment in perpetuating exclusionary systems and its implications for human rights remain underexplored in the context of contemporary legal frameworks. The present study builds on existing debates by integrating theoretical, historical, and case-specific analyses to offer a more comprehensive understanding of the limitations of punitive systems, particularly with reference to alternative justice models and human rights concerns.

The ultimate purpose of this article is to argue that the reliance on punitive measures, particularly incarceration, not only fails to address the underlying causes of crime but also exacerbates social inequalities. It further suggests that shifting towards transformative justice frameworks – centred on rehabilitation, social investment, and restorative justice – could provide more effective and equitable alternatives to current crime prevention strategies and criminal justice policies.

2. The rationale of punishment under different legal theories: A critical human rights-based perspective

The concept of punishment occupies a central yet contentious place in legal theory, particularly in the context of modern systems that aspire to uphold human rights principles. This section adopts a critical human rights-based perspective to evaluate classical and modern penal theories, interrogating the extent to which retributive, utilitarian, incapacitative, rehabilitative and reparative frameworks align with international human rights obligations. By "critical human rights-based perspective," this article refers to a normative and analytical framework that assesses penal theories and practices against international human rights obligations, with particular attention to the rationale that is also behind "The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty" developed by the International Commission of Jurists (ICJ 2023). This perspective maintains that criminal law must respect the rule of law and fundamental rights by ensuring legality, necessity, proportionality, non-discrimination, and minimum intrusiveness of State action. Moreover, it demands that criminal sanctions, even when lawful, do not reinforce structural inequalities, stigmatise marginalised groups, or result in the arbitrary or disproportionate deprivation of liberty (ICJ 2024, 7–9). From a critical standpoint, this approach scrutinises the legitimacy of punishment not only in light of its formal legal basis, but also in terms of its real-world impact on dignity, equality, and social justice, especially when criminal law is applied in discriminatory or harmful ways (ICJ 2024, 14–15). Hence, the human rights-based perspective outlined by this article aims at questioning the moral and legal legitimacy of traditional penal rationales, when these rationales produce or justify outcomes that contradict the human rights imperative to protect individuals from cruel, inhuman or degrading treatment and from discriminatory practices. Rather than merely applying human rights to existing theories, this critical human rights-based approach asks whether those theories themselves should be rethought in light of human rights standards. It thus frames punishment not as a neutral legal response, but as a practice that must be constantly re-evaluated for its systemic impacts on equality, dignity, and justice.

At its core, punishment involves the intentional infliction of hardship or deprivation by an authority in response to an offence. Despite its ubiquity, the concept remains elusive, with scholars grappling to define it in ways that are universally applicable across legal contexts (Canton 2022). This lack of consensus on what we should expect from punishment in modern legal systems poses significant challenges, particularly from a human rights perspective, as it directly affects individual freedoms and shapes the scope of substantive and procedural criminal law.

In 1954, Flew's definition of punishment outlined four key elements: the infliction of pain or hardship, the connection to an offence, the imposition on the offender, and the role of authority in executing the punishment (Flew 1954). This framework, while foundational, emphasises the punitive element (pain or hardship) in ways that might conflict with contemporary human rights standards such as the prohibition of cruel, inhuman or degrading treatment or punishment, as articulated in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (UN 1966). This provision reflects a broader international legal principle rooted in the inherent dignity of the human person, as affirmed also in the Preamble and in Article 10 of the ICCPR, which states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Punitive frameworks that emphasise suffering may therefore be seen as incompatible with the human rights imperative to prioritise dignity, proportionality, and the rehabilitative purpose of punishment (Rodley and Pollard 2009, 14–16). Hart later built on Flew's foundation, refining the concept to include additional conditions, such as the intentionality of punishment by legal authorities and the emphasis on an offence against legal rules (Navarrete 2011). However, both frameworks highlight the inherently punitive nature of punishment, which raises questions about its compatibility with international human rights instruments that affirm the obligation to treat all persons deprived of liberty with dignity and prohibit the infliction of pain or suffering as a legitimate penal aim. More specifically, according to the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners, better known as the "Nelson Mandela Rules," those in detention must be treated with respect for their inherent dignity, rejecting any punitive practices that undermine their humanity (UN 2015, Rule 1). Furthermore, as Ashworth and Kelly argue in their work, "the importance of punishment being in the hands of State institutions rather than victims or other individuals, resides in rule-of-law values" (2021, 64), which include legality, proportionality, and non-arbitrariness (UNGA 2012; Venice Commission 2011). These principles function as safeguards to prevent punishment from degenerating into retribution driven by vengeance or humiliation. Within this framework, this critical human rights-based perspective rejects the conceptualisation of punishment as a mere mechanism of suffering and instead affirms that it must be grounded in the recognition of the inherent dignity of the individual, regardless of the offence committed. Consequently, punishment must be understood not as a vehicle for pain, but as a regulated institutional process, consistent with international human rights obligations and compatible with democratic legitimacy.

Against this backdrop, it becomes essential to critically examine how the two dominant penal theories, retributivism and utilitarianism, engage with or diverge from these evolving human rights-based standards. By unpacking their foundational premises and normative assumptions, one

can better assess the extent to which these classical frameworks align with, or contradict, contemporary imperatives grounded in dignity, legality, and proportionality.

Retributivism, as epitomised by Kant, grounds punishment in the principle of moral responsibility and retributive justice. According to this view, offenders "deserve" punishment commensurate with the gravity of their crimes, as this restores moral balance within society (Kant and Sullivan 1996). Nevertheless, when assessed through the human rights-based perspective outlined above, the retributive framework raises significant concerns, particularly regarding the compatibility of such moral rationales with international legal obligations that prioritise the minimisation of suffering, the promotion of rehabilitation, and the safeguarding of human dignity. Central to these concerns is the notion that punishment must involve a degree of suffering that is "deserved," which risks legitimising infliction of pain as a moral good, rather than as a regrettable necessity to be minimised. Retributivist theories often prioritise moral rebalancing over considerations of broader societal equity or rehabilitation. The principle of proportionality – central to retributivism – has been criticised for its inability to account for the complexities of modern justice systems, where subjective interpretations of "severity" can overshadow fairness and systemic equity (Cavadino and Dignan 2007). Moreover, even modified retributive frameworks, such as Moore's attempt to temper punishment through proportionality principles, fall short when applied to real-world justice systems. Moore argues that while emotions may influence punitive motives, they cannot serve as a rational justification for punishment itself (Moore 1988). The challenges in applying proportionality in practice lead to punitive measures that often fail to align with broader social and ethical objectives. In this context, Lacey and Pickard (2015) contend that while proportionality is a key principle in justice systems, it is insufficiently institutionalised and cannot serve as the sole mechanism for regulating punishment. In the absence of the necessary institutional and social contexts, proportionality becomes more of an ideal than a practical standard. Relying on it within retributive frameworks, they argue, can result in arbitrary or disproportionate measures that violate human rights, especially the prohibition of cruel or degrading punishment. Instead, they advocate for a more nuanced approach that prioritises human dignity and rehabilitation over mere moral rebalancing. (Lacey and Pickard 2015).

Utilitarianism, championed by Bentham, offers an alternative framework, emphasising societal utility through rationales such as deterrence, rehabilitation, and public safety (Bentham 2015). This approach finds its roots in Beccaria's Enlightenment-era critique of cruel and disproportionate punishments. While both philosophers advocate for deterrence and humanitarian reforms, they diverge significantly in their approaches: Beccaria emphasises proportionality and rejects excessive punishment, while Bentham's calculus prioritises societal happiness,

potentially at the expense of individual dignity (Beccaria 1766). According to utilitarian logic, punishment should aim to prevent future harm by deterring criminal behaviour and rehabilitating offenders (Hudson 2003). Despite its theoretical appeal, the utilitarian rationale often fails in practice, particularly in modern criminal justice systems. For instance, the principles of deterrence and rehabilitation are rarely realised in systems plagued by prison overcrowding and systemic inequities (Von Hirsch et al. 2000). In such environments, the dehumanisation of detainees undermines both the stated objectives of punishment and the foundational principles of human dignity. The failure of punitive systems to deliver on utilitarian promises underscores the inadequacy of classical theories and punitive logics, particularly in light of recent data from Penal Reform International (2025). In 2024, the global prison population reached a record high of approximately 11.5 million, with 155 countries reporting overcrowded prisons, only 68 of which were operating within official capacity. Furthermore, violence, organised crime, and corruption persist throughout prison systems worldwide (Penal Reform International 2025, 7–8). These figures reveal not only the ineffectiveness of prison sentences in achieving deterrence and ensuring public safety, but also how current detention conditions may actively foster criminal behaviour within prisons. In addition, prison sentences impose significant economic burdens on both detainees and their families. Rising costs of living, combined with insufficient institutional support, limit access to essential goods such as food, medicine, and communication, further deepening socio-economic vulnerabilities (Penal Reform International 2023, 6). These dynamics contribute to what Heimer (2019) describes as "intersecting inequalities," structural disadvantages that are closely linked to both crime rates and recidivism.

The incapacitation rationale is focused on preventing further harm by removing the offender from society, often through imprisonment. While this approach aligns with the goal of protecting the public, it has been heavily criticised for its tendency to lead to over-incarceration, particularly in cases where the individual may not pose an ongoing threat (Barton 2005). Additionally, the human rights-based implications of incapacitation practices, which include mass incarceration and reinforcing structural inequalities pre- and post-detention (The Sentencing Project 2024), are concerning especially when viewed through the lens of mass incarceration and its disproportionate impact on marginalised communities (Cohen 1985). Such practices may violate the right to liberty and security of person, protected under Article 9 of the ICCPR, which prohibits arbitrary detention and requires that deprivation of liberty be both necessary and proportionate in each individual case (UN 1966). Where incarceration is applied in a widespread, preventive manner without case-specific justification, it may also undermine the principle of legality and the requirement of minimum intrusiveness, foundational to a human rights-based approach (ICJ 2024, 14–15).

Violations of the right to health, including mental health, are also associated to incapacitation practices, particularly where detention conditions deteriorate due to overcrowding or lack of medical care. This right is protected by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and operationalised in Rule 24 of the Mandela Rules, which requires that prisoners enjoy the same standard of health care available in the community (UN 1966; UN 2015). Furthermore, incarceration frequently interferes with the right to privacy and family life, as protected under Article 17 of the ICCPR, due to the disruption of family ties, contact with children, and social reintegration. In cumulative terms, systems that rely heavily on incapacitation may violate the obligation to treat all persons deprived of liberty with respect for their inherent dignity (ICCPR, art. 10(1); Mandela Rules, Rule 1), especially when deprivation of liberty is no longer exceptional, but systemic.

From this perspective, the human rights-based implications of incapacitation are not limited to detention itself, but extend to the long-term social, economic and psychological consequences that such measures impose on individuals and their communities. Systems that rely on incapacitation often face ethical challenges, as they may disproportionately affect certain groups without addressing the root causes of criminal behaviour.

On the other hand, rehabilitation has long been a goal of modern penal systems, with the belief that punishment can be used to reform offenders and reintegrate them into society as law-abiding citizens. However, the effectiveness of rehabilitation programmes is widely debated. Some scholars argue that while rehabilitation aims to reduce recidivism and offer a more humane approach, it often fails to produce meaningful results due to poorly funded or ineffective programs (Martinson 1974). Furthermore, the focus on rehabilitating the individual offender can sometimes neglect broader social injustices that contribute to criminal behaviour, such as poverty or systemic discrimination (Garland 2001).

Lastly, the reparative model, which focuses on repairing the harm caused by the offence, emphasises the needs of victims and the restoration of social bonds rather than punitive retribution. This approach has gained traction in restorative justice circles, advocating for practices like victim-offender mediation and community service. Reparative justice aims to address the harm caused by the offence while promoting healing for both the victim and the offender. Nonetheless, while this model aligns more closely with human rights principles, it is not without its criticisms, particularly regarding its ability to deliver justice in serious criminal cases (Zehr 2002).

Punishment, as traditionally conceptualised, frequently overlooks the disproportionate impact on marginalised communities and fails to address

systemic issues such as prison overpopulation and the dehumanisation of detainees. From a human rights-based perspective, these shortcomings are not merely policy failures, but structural contradictions that undermine key principles such as human dignity, equality, and justice. As this section has shown, classical penal rationales often fall short of the normative standards imposed by international human rights frameworks, both in theory and practice. This issue extends beyond a technical legal debate: it directly implies fundamental human rights principles, necessitating a rethinking of punitive systems, one that foregrounds the rights of both offenders and victims and reorients criminal justice around models rooted in human dignity and social justice.

The following sections will explore these challenges and propose paths for aligning punishment with a human rights-oriented approach, posing a specific focus on the correlation between punishment and socio-economic marginalisation and the fallacy of prison as a punishment tool.

3. The relation between punishment and socio-economic marginalisation

A critical dimension warranting greater attention in the analysis of punishment is the link between imprisonment and the socioeconomic factors underpinning its application. Especially significant is the connection between incarceration and systemic issues such as poverty, social marginalisation, and the struggles faced by socioeconomically vulnerable groups.

In his 2015 work, *Crime, Punishment and Migration*, Melossi investigates the interrelation between human mobility and the social construction of crime and punishment, with a specific focus on immigrant populations in the United States and Western Europe. He contends that crime and migration are intertwined phenomena, shaped by the evolution of social structures under the pressures of global capitalism. Central to his argument is the assertion that power dynamics and class struggles have historically positioned punishment as a mechanism for regulating labour (Melossi 2015).

In comparing the United States and Europe, Melossi observes that the United States, despite its heightened punitive climate, incarcerates relatively few immigrants in proportion to its documented and undocumented migrant populations. This disparity, he suggests, reflects the United States' historical identity as a nation of immigrants, its comparatively flexible labour laws, and its structural differences from European nations, where immigrants constitute a higher percentage of the prison population (Melossi 2015, chap. 2). While some scholars argue that punishment in the United States should also be understood through the collateral consequences of deportation and the "deportability" of non-citizens (Brotherton 2017),

Melossi's comparative analysis underscores how punishment is intricately linked to socio-economic marginalisation, with penal systems reinforcing exclusionary cycles, particularly for vulnerable migrant populations.

Regarding Europe, Melossi identifies a significant transition: the shift from being nations of emigrants to becoming nations of immigrants. This transformation, he argues, has precipitated a range of humanitarian, political-economic, and security crises. Moreover, Melossi underscores the role of societal labelling and the social construction of the "other" in fostering moral panic and fuelling the rise of populist sentiments against immigrants across several European countries. Such dynamics have contributed to an increasingly securitised discourse around immigration and crime, thereby legitimising punitive policies as a default response to complex societal challenges (Melossi 2015, chap. 3).

Furthermore, the rise of populist movements, which are becoming increasingly prominent in global policy debates, serves only to amplify and instrumentalise anxieties surrounding public safety, positioning imprisonment as the unquestioned solution to all forms of crime and security concerns (Hamilton 2002).

A 2001 study by Wacquant explored how, unlike the United States, where the criminalisation of poverty has become deeply ingrained within the State structure and public culture, Europe could still prevent such a trend. The use of the prison system in advanced societies is not inescapable, but rather a result of political choices. To oppose the penalisation of social precarity, the article proposes a threefold battle. First, it calls for careful examination and critique of the language and discourses used, which often narrow the scope of debate and normalise the use of punishment for addressing social inequalities. Second, it advocates for policies and practices that resist the expansion of the criminal justice system and instead promote social, health, and educational alternatives. Lastly, the article highlights the importance of collaboration between activists and researchers working on both the penal and social fronts, at a European level, to optimise intellectual and practical resources for the struggle. Ultimately, the construction of a European social State that strengthens and expands social and economic rights is presented as the most effective means of countering the penalisation of poverty and reducing the reliance on incarceration (Wacquant 2001).

The link between the criminal justice system and social inequalities has been extensively examined in recent years, with a growing scholarly focus on gender-related issues in fields such as criminology and public safety. In particular, Dastile and Agostino's 2019 work on incarcerated women argues that their identities are deeply influenced by the colonial power dynamics embedded in imperialism. Their research underscores the necessity of reconstructing the identities of incarcerated women in order to challenge

the dominant, law-and-order narrative surrounding their criminalisation. Through a series of case studies, they explore the ways in which race, gender, and class intersect to shape the lived experiences of Black women within the criminal justice system, leading to distinct subjectivities and embodied identities. Ultimately, they highlight how the interplay between these women's identities and a Western-centric perspective significantly informs their criminalisation (Dastile and Agozino 2019).

This intersection between socio-economic marginalisation and the use of imprisonment as a tool for social control, exacerbated by the rise of punitive populism, highlights a troubling shift away from the principle of *extrema ratio* (UN 2021, 3). While punishment has historically been intended as a last resort, increasingly it functions as a primary response to complex socio-economic issues, particularly in relation to marginalised groups such as immigrants and the economically vulnerable. The growing reliance on incarceration as a solution to poverty, migration, and social exclusion not only perpetuates cycles of disadvantage but also risks reinforcing a punitive culture in which prison becomes the default mechanism for addressing societal problems. As punitive populism continues to gain traction, the promise of a human rights-based justice system is replaced by a system that too often resorts to penal measures as the first, rather than the last, line of defence. This shift threatens the very notion of punishment as a proportionate, exceptional response, distancing it from its original *extrema ratio* function (UN 2021, 3) and reinforcing the systems of control and exclusion that disproportionately affect already marginalised populations.

4. "Are prisons obsolete?": The revolution of critically thinking punishment in modern legal systems and societies

The most ground-breaking piece of contemporary legal and political literature presenting this theme is certainly *Are Prison Obsolete?* by Angela Davis (2003). In her seminal work, Davis provides a profound critique of the prison system, arguing for its abolition. She questions the commonly held belief that prisons serve as an effective solution to social problems, drawing attention to the deep-seated injustices and inequalities embedded within the prison-industrial complex (chap. 5). Davis traces the historical evolution of prisons, exploring their role in perpetuating systemic oppression, particularly with regard to marginalised groups such as people of colour and the economically disadvantaged (Davis 2003, 28, 36). She contends that prisons do not address the root causes of crime but instead function as instruments of social control, reinforcing existing power structures and exacerbating social inequalities (Davis 2003, 10, 16, 19). Building upon feminist and abolitionist frameworks, Davis proposes alternative strategies for addressing crime and achieving justice (Davis, chap. 6). Central to her vision is the concept of transformative justice (Davis 2003, 56), which prioritises addressing the underlying causes of harm,

fostering healing, reconciliation, and community restoration. She stresses the need for investment in education, healthcare, and social services as proactive measures, rather than resorting to punitive mechanisms such as imprisonment (Davis 2003, 88). Furthermore, Davis critiques the profit-driven nature of the prison-industrial complex, exposing the economic forces that sustain mass incarceration (Davis 2003, chap. 5). She highlights the racial disparities within the criminal justice system, shedding light on the disproportionate impact of incarceration on communities of colour and she asserts that the prison system is fundamentally flawed, serving to perpetuate harm rather than promote genuine justice. She advocates for a radical reimagining of society, proposing a shift towards community-based alternatives to incarceration. Ultimately, Davis calls for the complete abolition of prisons and the establishment of new systems centred on healing, rehabilitation, and social justice (Davis 2003, 106–08). Her abolitionist theory has served as a catalyst for a global debate on the legitimacy of prisons, laying the groundwork for a revolutionary theory of punishment. Although there is still a huge lack of consensus in literature on whether this new paradigm might be possible to realise, her work planted the seeds for other related studies to be started and the voices of thousands of legal and political theorists to be heard.

Ruth Wilson Gilmore, in her book *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, shares a similar abolitionist perspective and argues for the dismantling of prisons as a response to systemic issues such as racism, capitalism, and inequality (Gilmore 2018).

In her influential work *We Do This 'Til We Free Us*, activist and writer Mariame Kaba advocates for abolitionist practices and transformative justice (2021). Through her writing and activism, Kaba stresses the necessity of community-based alternatives to punishment, emphasising the importance of addressing the root causes of harm rather than relying on incarceration. She challenges common misconceptions surrounding prison abolition, clarifying that its goal is to establish humane alternatives to imprisonment, all the while maintaining accountability for the actions of individuals (Kaba 2021, 70, 178–80). Central to her argument is the call to shift the focus away from punitive measures and toward tackling the systemic issues that underpin crime, fostering alternative frameworks that prioritise healing, accountability, and the well-being of the community (Kaba 2021, 241).

Kaba underscores that most crime is a consequence of desperation and adverse societal conditions endemic to marginalised communities (2021, 109–10). Rather than resorting to punitive measures, she proposes that violence prevention is best achieved by providing support and resources to meet individuals' basic needs (Kaba 2021, 164). By addressing the underlying issues of stress, scarcity, and oppression, communities can be empowered to confront these challenges and reduce crime rates (Kaba 2021, 242).

A key component of Kaba's perspective is the concept of "invest/divest," which advocates for reallocating resources from harmful systems, such as the police and prison-industrial complex, and redirecting those funds toward community-driven programmes. These initiatives would offer vital support and address the root causes of crime, thereby reducing police violence and creating space for unarmed individuals trained in social services to respond to incidents and provide necessary assistance (2021, 154, 200-05).

She also highlights the intersectionality of the criminal legal system, particularly the compounded vulnerabilities faced by women, trans, and gender-nonconforming individuals of colour (Kaba 2021, 207–11, 226) and she acknowledges the disproportionate punishment of survivors of sexual violence who act in self-defence, advocating for a rejection of the dehumanisation of victims and a challenge to societal narratives that perpetuate such injustices (Kaba 2021, 224–27). Moreover, Kaba's framework rejects vengeance as a response to gender and sexual violence. Instead, she promotes a process of healing and restoration for both victims and perpetrators (Kaba 2021, 199–200), focusing on preventing future harm by addressing its root causes and dismantling oppressive systems. Ultimately, her approach underscores the importance of valuing every member of the community, fostering a culture of care, and taking collective responsibility.

Abolitionists like Davis and Kaba have, on the other hand, strong theoretical opposition. The main concerns on the opposite front are that focusing solely on prison abolition may not effectively address the complexities of crime and public safety (Gottschalk 2016) and that there may be instances where incarceration is necessary to address specific forms of violence and protect communities (Forman 2017). Robert Perkinson, in his book *Texas Tough: The Rise of America's Prison Empire*, offers a critical examination of prison abolitionist theories, arguing that prisons serve multiple functions beyond punishment, including social control and economic exploitation, and that simply abolishing prisons may not address these underlying issues (Perkinson 2010). The role of social control and economic exploitation as foundational rationales for punishment has been thoroughly examined by Melossi in *Stato, Controllo Sociale, Devianza* [*State, Social Control, and Deviance*]. In this work, he illuminates the intricate relationship between the State and mechanisms of social control, exploring the various strategies and institutions the State employs to sustain its dominance and regulate populations. He further asserts that State control extends well beyond formal legal systems, encompassing a wide range of social, political, and economic mechanisms. Throughout his analysis, Melossi demonstrates how prisons serve to perpetuate social inequalities and reinforce prevailing power structures (Melossi 2002).

Ultimately, while the concerns surrounding abolitionist theories and transformative justice remain complex and multifaceted, these perspectives

challenge a criminal justice paradigm that, as Davis aptly argues, has become "obsolete." However, it is essential to acknowledge the intricacies involved in balancing the protection of human rights with public safety, particularly when the latter is invoked to legitimise exceptional penal regimes or materially disproportionate restrictions on individual liberties. This tension necessitates a constant recalibration in light of the principles of legality, necessity, and proportionality, as enshrined in international human rights law. Nonetheless, it is also important to assert that such concerns should not serve to justify phenomena like hyper-criminalisation and mass incarceration driven by security-driven moral panics. These periodic waves of public hysteria exacerbate systemic inequalities and fail to address the root causes of crime.

In light of this, the following case study will provide a concrete example of how these theoretical frameworks intersect with contemporary penal practices and the ongoing challenges in reforming prison structures.

5. The case study of the "hard prison regime" under Article 41-bis of the Italian Penitentiary Act: Human rights or public order issue?

An example that has sparked extensive debate regarding human rights and public safety in Italy for several decades is the so-called "hard prison." While this issue has been thoroughly examined in both legal scholarship and jurisprudence since its inception (Chinnici 2015; Kalica 2019; Giustizia Insieme 2020; Dolcini et al. 2020; Santangelo 2022; Metrangolo 2023; Caterini and Gallo 2025), the case of Alfredo Cospito, a prominent member of the Informal Anarchist Federation imprisoned under this regime, brought renewed attention to the human rights concerns associated with it. In October 2022, Cospito initiated a hunger strike to highlight what he deemed to be an issue of inhuman and degrading treatment (Seregni 2023; Human Rights in Context 2023).

The term "hard prison" refers to a more restrictive prison regime compared to the regular regime, as defined in Article 41-bis of the Penitentiary Act (Law No. 354 of 26 July 1975 and following modifications). Originally, the provision allowing for derogation from the ordinary regime was introduced to address situations of revolt or serious internal emergencies in Italian prisons under the so-called "*Gozzini*" law (Law No. 663 of 10 October 1986). However, following the *Capaci* massacre on 23 May 1992, a second paragraph was added to Article 41-bis, granting the Minister of Justice the authority to suspend the treatment rules and legal institutions provided for by this law which may be in concrete conflict with the needs of public order and security, specifically for prisoners belonging to Mafia-structured criminal organisations.

The suspension of the prison ordinary rules – which may involve restrictions on permits, mail, visits, and outdoor time – leads to a more

restrictive treatment for members of the criminal organisation. The law on public safety (Law No. 94 of 15 July 2009) has modified the duration limits, allowing the suspension of ordinary treatment and the application of Article 41-bis for up to four years, with the possibility of extensions for two years each.

The purpose of the "hard prison" regime is to hinder communications between inmates and criminal organisations outside the prison, as well as contacts between members of the same organisation inside the prison and conflicts between different criminal organisations. It aims to prevent crimes and ensure both intramural security and public order. The regime involves restrictions on interviews, censorship of correspondence, reduction of visits, and isolation from other prisoners to limit contact with the outside world and severely restrict interactions with other inmates. The "hard prison" applies to individuals convicted of specific crimes listed in Article 4-bis, paragraph 2, including terrorism, mafia-type criminal association, slavery or servitude, child prostitution, human trafficking, group sexual violence, and drug-related offences (Law No. 354 of 26 July 1975 and following modifications).

The European Court of Human Rights (ECtHR) has examined the compatibility of the 41-bis regime with human rights standards, particularly regarding personal searches, video surveillance of cells, restrictions on correspondence, and contact with the outside world. Before 2019, the ECtHR's jurisprudence recognised that the suspension of ordinary prison rules as a response to the mafia phenomenon does not violate the European Convention on Human Rights (ECHR) (Council of Europe 1950) (*Messina v. Italy* (no. 2), 25498/94, 28.9.2000 [Section III]; *Bastone v. Italy*, 59638/00, 11.7.2006 [Second Section]). However, the specific application of these restrictive measures to individual prisoners must be evaluated on a case-by-case basis to determine if they qualify as inhuman and degrading treatment in violation of Article 3 of the ECHR. The severity of the treatment is assessed based on factors such as its duration, its impact on the physical and mental well-being of the prisoner, and the personal characteristics of the prisoner, including their sex, age, and health. Still, with its judgment of 13 June 2019 in the *Viola v. Italy* case, the Court established that the non-reducible so-called "*ergastolo ostativo*" violates the prohibition of degrading and inhuman treatment and the general respect for human dignity (*Viola v. Italy (no. 2),* 77633-16, 13.6.2019 [Section I]). According to the ECtHR, "the current system focuses solely on the lack of co-operation with justice and does not consider the reintegration process nor any progress made of prisoners sentenced to this form of life sentence when deciding on conditional release" (Council of Europe 2020a). Therefore, "the irrefutable presumption of dangerousness has the effect of depriving the applicant of any realistic prospect of release and was thus in breach of Article 3 of the European Convention of Human Rights" (Council of Europe 2020a). In this context, the Italian Constitutional

Court has requested on several occasions an intervention of constitutional adjustment of the impedimental prison regime.

With the Decree Law No. 162/2022 (Decree-Law No. 162 of 31 October 2022), published in the Official Gazette General Series No. 255 of 31 October 2022 and entered into force on the same date, the Government introduced new rules for life imprisonment to remedy the lack of parliamentary outcome on the unified text of the Senate Act 2574 (Atto Senato n. 2574 XVIII Legislatura) (Senato della Repubblica 2024) which had the declared objective of reconciling the needs of collective security with the principle of re-education of the sentence.

The purpose of this historical and legal *excursus* on the concept of "hard prison" is to emphasise that, in certain very specific circumstances, it is especially challenging to carry out a valid assessment of the rationale behind punishment and, above all, the necessity of the prison system. For instance, those who lived in Southern Italy, from the 1970s to the 1990s, gained distinct awareness of the climate of terror instilled by organised crime syndicates and this law represents the legal outcome of the widespread state of emergency that prevailed during that period.

However, with the succession of political experiences and judicial events including the so-called "*Mani Pulite*" (Barbacetto et al. 2022) trial, which has kept the alert of new seasons of terrorism, Italy has inherited a logic of criminal justice that poses its fundamentals on the deterrence of Mafias. Therefore, the entire Italian regulatory system has strengthened its punitive walls, to the detriment of internal, international and supranational norms, constitutionally guaranteed, on the protection of human rights, such as Article 3 of the ECHR, Article 4 of the European Union Charter of Fundamental Rights, (European Union 2012) Articles 13 and 27 of the Italian Constitution, (Senato della Repubblica 1947) as well as international instruments like the UN Convention Against Torture and the ICCPR.

It is noteworthy that, while the 41-bis regime has undeniably impacted on the leadership of Mafia organisations, its overall efficacy in curbing organised crime remains limited. The growing use of isolation measures reflects the broader challenge posed by overcrowded prisons and the desire to prevent new forms of criminal organisation within the prison system.

As reported by *Associazione Antigone* in its 2024 report on the conditions of detention, the number of prisoners under the 41-bis regime remains high and stable over the last decade, with recent figures published by the Ministry of Justice showing 733 detainees as of 11 December 2023, including 12 women at the *Casa di Reclusione de L'Aquila* and 7 interned at the *Casa Circondariale di Tolmezzo*. This number dropped slightly to 721 by 4 April 2024, according to data from the Department of Prisons.

These detainees are distributed across 12 41-bis sections throughout Italy. Regarding affiliation with criminal organisations, the majority of detainees under 41-bis are linked to Italy's most prominent Mafia-structured groups. Of the 733 prisoners, 203 belong to the *Camorra*, 209 to the *Ndrangheta*, 205 to *Cosa Nostra*, 25 to the Apulian Mafia, 22 to the Sicilian Mafia, 19 to the *Sacra Corona Unita*, five to the *Stidda*, four to the Lucanian Mafia, three to other Mafias, and four to terrorism (both domestic and international). One significant factor contributing to the stable number of prisoners in 41-bis is the high rate of automatic renewals, with little scrutiny of whether the individual's ties to criminal organisations remain active. The Italian National Guarantor for the Rights of Persons Detained or Deprived of Liberty has reported that many individuals have been under 41-bis for more than 20 years, with a significant number serving their entire sentence in these sections (Associazione Antigone 2024). Interestingly, fewer than 30% of those under this regime are serving life sentence (Associazione Antigone 2024). Given these statistics and the evolving context, the 41-bis regime, which was initially introduced as an exceptional measure, seems to have undergone a process of normalisation.

For many of the detainees affected, it has become an ongoing form of suffering, no longer considered as an extraordinary measure, but as a standard element of their incarceration. This shift reflects the broader implications of mass incarceration and the extension of 41-bis beyond the anti-mafia context, revealing its growing integration into the general penal system as a tool of prison management rather than an exceptional measure.

This does not imply that a suitable framework for punishing such offences should be excluded, nor that the issue should be oversimplified or polarised. Rather, it underscores the urgent need to approach the matter with a fresh perspective, one that aligns with recent international human rights standards and recommendations (OHCHR 1990; Council of Europe 2020b; Italian Constitutional Court 2025). Such an approach could draw on research that challenges the traditional assumptions regarding the effectiveness of imprisonment, as explored in the previous sections of this paper. It calls for the exploration of innovative legal methods to redefine criminal law and the criminal justice system, advocating for a focus on reinforcing the rule of law rather than perpetuating mass incarceration and the erosion of human rights for individuals convicted of organised crime, terrorism, or other serious offences that pose a significant threat to public order and security.

Furthermore, research extensively underscores the critical importance of addressing the socio-economic and cultural conditions that enable organised crime to embed itself within societies. In Italy, for instance, studies have demonstrated a robust association between socio-economic inequalities and the prevalence of organised crime, found that regions

with higher levels of income inequality and lower social mobility tend to experience greater infiltration by criminal organisations. (Battisti et al. 2018, 205–39). This suggests that economic disparities create fertile ground for such entities to flourish.

Further analysis by Moccetti and Rizzica (2024) indicates that organised crime adversely affects the socio-economic development of affected areas through multiple channels, including the distortion of local economies and the erosion of social capital. This research highlights the complex interplay between economic disadvantages and criminal activity, suggesting that merely implementing punitive measures is insufficient to combat organised crime effectively.

In light of these findings, it becomes evident that a comprehensive strategy to combat organised crime must extend beyond traditional penal approaches. Transformative justice, in this context, refers to a framework that seeks not only accountability and harm repair, but also systemic reform. It addresses the structural and socio-economic conditions that foster criminal behaviour, such as marginalisation, poverty, and inequality. Gready and Robins (2014) advocate for integrating social and economic policies that promote social justice, reducing the appeal of organised crime. They argue that transformative justice should be holistic, encompassing a range of approaches that directly impact communities and promote long-term social transformation. Concrete examples may include community-based education programmes, hate crime prevention initiatives, funding alternatives to incarceration, and efforts to address systemic disparities through housing and employment within legality. Additionally, promoting sustainable development in rural and peripheral areas may help reducing economic dependence on illicit activities and fosters long-term social cohesion. While stringent legal measures are necessary to address immediate threats, they must be paired with initiatives aimed at addressing the socio-economic factors that enable crime, dismantling the structural inequalities that sustain.

In this framework, rethinking punishment through a human rights-based perspective means moving beyond punitive excess and populist criminal policies and advocating for a shift toward prevention and addressing the root causes of crime while resisting mass incarceration.

6. Conclusions

Revolution is a slow machine. This article has endeavoured to critically reframe the concepts of punishment and the prison system from a human rights-based perspective, demonstrating that traditional punitive models are often beset with shortcomings and structural inequities. By examining punishment from both a theoretical and historical standpoint, the discussion has illuminated how the concept itself remains elusive within legal theory and no single definition fully encapsulates its application across criminal law and

policy. This conceptual ambiguity raises both formal and substantive legal concerns, particularly when considering the balance between retributive justice and the protection of fundamental rights.

Through an analysis of the rationale behind punishment and the function of prisons, a clear correlation has emerged between incarceration rates and socio-economic inequalities. The disproportionate imprisonment of marginalised groups underscores how punitive measures often function as instruments of social control rather than as mechanisms of justice. This trend, exacerbated by populist penal policies, highlights the urgent need for a paradigm shift in criminal justice.

One of the most thought-provoking considerations to emerge from this research is the potential revaluation – or even abolition – of the prison institution in favour of alternative justice frameworks. Rather than perpetuating cycles of incarceration, a reallocation of resources towards strengthening the rule of law, social welfare, and crime prevention could offer a more effective and democratic approach to public safety. Such a transformation, however, must navigate the risks posed by populist rhetoric, which often exploits fears of crime to justify increasingly punitive policies.

To contextualise these debates, the paper examined Article 41-bis of the Penitentiary Act of Italy, a case study that exemplifies the tension between human rights and public security concerns. While initially conceived as an extraordinary measure to counter organised crime, the normalisation of Article 41-bis has revealed the dangers of indefinite punitive mechanisms, which risk undermining the protection of fundamental human rights. The rulings of the ECtHR on life imprisonment underscore the need for criminal justice policies that prioritise rehabilitation over permanent exclusion. Moreover, research has demonstrated that organised crime thrives in contexts of socio-economic disparity, suggesting that legal deterrents alone are insufficient. A comprehensive strategy must integrate economic and social policies aimed at addressing the root causes of criminality.

Looking ahead, the future of criminal justice must move beyond the dichotomy of punitive severity versus leniency. Transformative justice frameworks, which emphasise social investment, crime prevention, and rehabilitation over mass incarceration, offer a promising alternative. Integrating such models into legal systems requires structural reform, including a reconsideration of sentencing policies, greater investment in community-based justice initiatives, and the promotion of restorative justice practices. Furthermore, interdisciplinary research, bridging law, criminology, sociology, and economics, can provide new insights into how justice systems can evolve to be both effective and respectful of rights.

Ultimately, this article has argued that a criminal justice system perceived as “secure” can, paradoxically, become the most unstable when

it disregards human rights and social justice principles. Strengthening the rule of law, rather than expanding punitive measures, remains the most effective safeguard for public safety. The urgent challenge ahead is to recalibrate the justice system in a way that restores the principle of *extrema ratio* in punishment, ensuring that incarceration is a measure of last resort rather than a default response to social and economic vulnerabilities.

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