THE LEGAL RESPONSE TO JUVENILE DEVIANCE IN ENGLAND AND IN ITALY: BETWEEN THE NEED FOR PREVENTION AND THE NEED FOR PUNISHMENT

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HOW THIS PAPER WAS WRITTEN
This paper has been written during a four months internship (Erasmus Placement program) at the legal firm *TvEdwards Solicitors and Advocates LLP*, department of youth crime (London). It has been for me the occasion for knowing directly how the English criminal system deals with young offenders in practice, as it gave me the possibility to follow youth crime lawyers during police station interviews and appearances in the Youth Court. I tried, when possible, to enrich my work with details I met in this everyday-practical experience; considering that, however, the lawyer’s role has very less to do with pre-Court crime prevention (being, instead, more relevant when the offender has already entered the youth justice system), my work experience mostly gives it contribute for what concerns sentencing and the relationship between young offenders and the Court.

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¹ In particular the Stratford Youth Court, in Stratford (East London).
THE AIM OF THIS RESEARCH

This paper investigates the legal response to juvenile deviance given by two quite different criminal systems such as the English and the Italian one. Both of them dedicate specific legislative sectors to young offenders; both of them, moreover, provide measures aimed to prevent youths committing crime and measures aimed to punish those who have already committed.

What we want to focus on, with this research, is how much each of these two systems stresses on prevention rather than punishment. Do they approach young offenders with the intention of preventing them to commit crime or with the intention of giving them a punishment? Is, criminal law intervention upon young people, preventive (that is, before the offence has been committed) or does it only react to a committed offence? Do, these penal systems, deal with young people who committed criminal offences with welfare interventions or with punitive ones?

These are the questions to which we’ll try to answer. For the answer to be complete and satisfactory, however, a global examination of the youth criminal system in its complex will be necessary. In particular, a study of how the two systems historically chose to consider prevention and punishment according to the age of the offender, will be useful to understand the nowadays legislative approach to young offenders.
CHAPTER 1: THE YOUTH JUSTICE SYSTEM IN ENGLAND

Par. 1: ENGLISH SYSTEM AND GENERAL PRINCIPLES FOR YOUTH CRIMINAL SYSTEM

1.1 SOURCES OF YOUTH CRIMINAL LAW
Both Italy and England dedicate part of their penal system to young offenders. In England the Youth Justice System was introduced by the Children Act 1908; in Italy youth courts were established with the RD 1404/1934.

Because the two nowadays systems are the result of two opposite traditions (common law in England, civil law in Italy), a comparison between the way they work is not so simple. The British casuistic and practical approach contrasts with the substantial and doctrinal Italian one. The common law English tradition put at strain who is used to the Italian strict use of the principle of legality.

What causes the main difficulties in approaching the English penal system, however, is the lack of a criminal code. The consequence is a not homogeneous legislation corpus, composed by a jagged ensemble of separate statutes and common law principles.

Lacking a criminal code, the whole criminal system needs to be reconstructed by putting together all relevant provisions contained in different statutes. And even more complex to be reconstructed is that part of legislation specifically dedicated to youth crime, as in the disorderly collection of penal principles, which statutes have a relevance in this matter is not easy to understand.

This is why we chose to dedicate the whole first chapter to the analysis of
the most relevant sources in theme of juvenile criminal law. The intention is
to give a not exhaustive but enough complete scene of English legislation
regarding youth crime.

Internationals Sources

European convention of human rights (1950): Even though ECHR is not
exclusively aimed to protect children’s rights, it introduces a list of rights
that are to be guaranteed both to adults and young persons, with the
additional specification that, as the European Court of Human Rights has
clarified, convention principles need to be interpreted opportunely in those
cases where the defendant is under the age of 18.

Among the most relevant principles in youth justice we find: Art. 3.
Prohibition of torture; Art.5: right to liberty and security; Art.6: right to a
fair trial; Art.8: Right to respect for private and family life; Art.14:
Prohibition of discrimination. The most discussed, even because of other
international conventions and recommendations, is the right to a Fair Trial
introduced by article 6.

As a consequence of article 6 every young defendant, as every adult one,
has the right to a Fair Trial; ‘though it cannot be forgotten that even if the
Convention does not distinguish between adult offenders and young ones,
minors are entitled to the same protection of their fundamental rights as
adults but (...) the developing state of their personality and consequently
their limited social responsibility - should be taken into account in applying
Article 6 of the Convention’\(^2\); among the details characterizing a fair trial as
guaranteed by article 6, there is the need for the court ensuring the child to
understand what happens during the trial in order to ‘provide for the

\(^2\) T and V v United Kingdom, concurring opinion of judge Morenilla.
effective participation of the accused, who must be able to follow the proceedings and to give instructions where necessary to his lawyer.\(^3\).

The UK criminal system entails three possible risks of breach of this provision: the first one is connected with the MACR (minimum age of criminal responsibility); the second one refers to those young offenders whose IQ and capacity in communication and/or learning is considered lower the average level; the third one regards children and young offenders prosecuted before a Crown Court.

Regarding the first one of these doubts about the accordance between what provided for by the ECHR and the UK penal system, it must be noted that the UK criminal system assumes as MACR the age of ten, that’s the lowest one in Europe. It can be questioned whether a ten-years-old offender, with his level of maturity, is capable of understanding the trial and ‘participating effectively’; and this is exactly what was debated, inter alia, before the European Court of Human Rights in the case \textit{T and V v United Kingdom}, that involved two ten-years-old boys charged with Murder and found guilty by the English Crown Court. The defenders argued that the age of ten is not compatible with a Fair Trial, as the defendants are too young to understand the trial and ‘participate effectively’ in it. Moreover, it risks becoming a break of both art. 6 and art.3, being a punishment determined after a trial that the defendants could not understand, an ‘inhuman or degrading treatment’.\(^4\) Refusing those allegations, the ECHR clarified that ‘The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age

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\(^3\) Case V v United Kingdom, concurring opinion of Lord Reed: ‘There is on the other hand nothing in Article 6 to indicate that there can be any derogation, in cases involving children, from the principle that the trial process should provide for the effective participation of the accused, who must be able to follow the proceedings and to give instructions’.

\(^4\) ECHR, art.3.
of criminal responsibility. Even if England and Wales are among the few European jurisdictions that retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention.\textsuperscript{5}

The second risk we mentioned before is about children and young persons with learning and understanding difficulties. They can find hard to understand issues (especially legal issues), concepts and situations; that means that to ensure the right to a Fair Trial is been saved the court must give them extra help. This problem was taken into consideration by the Higher Court of Justice in 2005, in \textit{TP(R) v West London Youth Court}, that found out the minimum standards for a Fair Trial that needed to be ensured regarding a defendant with a low IQ, recommending that ‘he had to understand what he is said to have done wrong; the court had to be satisfied that the claimant when he had done wrong by act or omission had the means of knowing that was wrong; he had to understand what defences, if any, were available to him; he had to have a reasonable opportunity to make relevant representations if he wished; he had to have the opportunity to consider what representations he wished to make once he had understood the issues involved’\textsuperscript{6}.

Also the European Court, in \textit{S.C. v United Kingdom}, established that to consider that the right to a Fair Trial has been guaranteed, it is not necessary that the young defendant (with learning difficulties) understands the Trial in each of its element, provided he understands ‘the nature of the trial process and what is at stake for him or her, including the significance of any penalty

\textsuperscript{5} T v United Kingdom, ECHR, par. 72.
\textsuperscript{6} TP(R) v West London Youth Court, 2005, par. 7.
which may be imposed\textsuperscript{7}. The Court considers that, ‘when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly\textsuperscript{8}. In this case the Court considered UK in breach of article 6 because the defendant (a 11-years-old charged for attempting to steel a bag from an old woman causing her to fall down and brake her arm) ‘did not comprehend the situation he was in. Thus, the applicant seems to have had little comprehension of the role of the jury in the proceedings or of the importance of making a good impression on them. Even more strikingly, he does not seem to have grasped the fact that he risked a custodial sentence and, even once sentence had been passed and he had been taken down to the

\textsuperscript{7} S.C. v United Kingdom, ECHR, par. 29: ‘The Court accepts the Government's argument that Article 6.1 does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail. Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and all the exchanges which take place in the courtroom: this is why the Convention, in Article 6 § 3 (c), emphasises the importance of the right to legal representation. However, “effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (see, for example, Stanford, cited above, § 30)’.

\textsuperscript{8} S.C. v United Kingdom, ECHR, par. 35.
holding cells, he appeared confused and expected to be able to go home with his foster father.9

The UK system implements such duties that the ECHR imposes through article 6 by considering young defendants as ‘Vulnerable Defendants’10; even if there’s no a proper definition of ‘Vulnerable Defendant’, the Criminal Practice Directions 2013 applies the definition of ‘vulnerable witness’ introduced by the Youth Justice and Criminal Evidence Act 199911 to all ‘vulnerable people in the court’. As result ‘vulnerable includes those under 18 years of age and people with a mental disorder or learning disability, a physical disorder or disability or who are likely to suffer fear or distress in giving evidence because or their own circumstances or those relating to the case12. According to what’s provided for the protection of vulnerable defendants, it may be appropriated to arrange visits to the courtroom to make them familiarise with it; to use police officers in order to guarantee that the defendant is not exposed to intimidation, vilification or abuse (especially in those cases that may attract public or media interest); to change the courtroom structure.

About the last critical point in relation with young offenders prosecuted before a Crown Court, what was questioned is whether or not a formal Trial, characterized by formal elements such as the judges wearing wins and gowns, can be understood by a young defendant. In T and V v United Kingdom the Court considered the case of two ten-years-old boy accused of the murder of a two-years-old before a Crown Court, and clarified that  in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in

9S.C. v United Kingdom, ECHR, par. 33.
10 See Criminal Practice Directions 2013 (by Lord Chief of Justice), par. 3G.
11 Sections 16 and 17.
12 Criminal Practice Directions 2013, par. 3D.1.
such a way as to reduce as far as possible his or her feelings of intimidation and inhibition\textsuperscript{13}. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court and that special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings\textsuperscript{14}. Nonetheless, the formality and ritual of the Crown Court had been, at times, incomprehensible and intimidating for a child of eleven with the effect of increasing the applicant's sense of discomfort during the trial. The Court recognizes that, in conclusion, ‘the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6.1\textsuperscript{15}.

What is interesting to be noted is what Lord Reeds wrote in his concurring opinion: ‘Children who commit crimes present a problem to any system of criminal justice, because they are less mature than adults. Even children who may appear to be lacking in innocence or vulnerability are nevertheless evolving, psychologically as well as physically, towards the maturity of adulthood. One consequent difficulty lies in deciding whether children are sufficiently mature to be held responsible for their actions under the criminal law. If children are held criminally responsible, they then have to be tried; but ordinary trial procedure will not be appropriate if a child is too immature for such procedure to provide him with a fair trial’.

In conclusion, the Court disposed such positive duties for UK that must provide all necessary to adapt even the procedure of the Trial to the level of maturity and understanding abilities of a young people; the legal response to those recommendations are found in ‘Vulnerable Defendants’ discipline as above analysed.

\textsuperscript{13} T v United Kingdom, ECHR, par. 85.
\textsuperscript{14} for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively.
\textsuperscript{15} T v United Kingdom, ECHR, par. 89.
The European Convention of Human Rights has been incorporated in domestic legislation by the Human Rights Act 1998, that’s aimed ‘to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights’\(^{16}\). The Act provides that national courts, in applying what the conventions disposes, shall considerate how it is interpreted by the European Court of Human Rights and by the Commission\(^ {17} \). The most important provision of the Human Rights Act, however, is the one of section 3, that provides that ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’: it is trough this rule that the Act ensure the Convention to be applied in domestic legislation and the ordinary legislation in contrast with the European rights to be declared incompatible with the Convention by the court; if the court declares the incompatibility as disposed in section 4, the Parliament activates the procedure of section 19 to evaluate the possibility of amending the incompatible rule.

**U.N. convention on rights of the child (1989):** As signatory to the Convention, the UK is obliged to ensure that in its Courts the best interest of the Child shall be taken in primary consideration\(^ {18} \). This means, inter alia, that it has the duty to ensure the child such protection and care as it’s necessary for his or her well-being, also taking into consideration the duties of his parents or guardians and guaranteeing that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities\(^ {19} \). According to

\(^{16}\) Human Rights Act 1998, introductory text.

\(^{17}\) Human Rights Act 1998, section. 2.

\(^{18}\) UN Convention on the Rights of the Child art. 3.

\(^{19}\) UN Convention on the Rights of the Child art. 3.
what the Convention provides in its art.37, UK shall ensure to children the
right not to be to torture or other cruel, inhuman or degrading treatment or
punishment (including capital punishment and life imprisonment); not to be
deprived of his or her liberty unlawfully or arbitrarily; to be treated, during
imprisonment, with humanity and respect for the inherent dignity of the
human person; to have access to legal and other appropriate assistance.

The UN Committee on the Rights of the Child\(^\text{20}\) emphasises that courts must
be seen to take account of a child’s age and respond accordingly. They
stress that in order to participate effectively in a trial, a child needs to
‘comprehend the charges, and possible consequences and penalties’\(^\text{21}\).

In its general comment 2007, the Committee on the Rights of the Child
disposes that all Statutory Parties must do all necessary to ensure an
effective system for preventing youngster to commit offences. It’s clarified
that ‘a juvenile justice policy without a set of measures aimed at preventing
juvenile delinquency suffers from serious shortcomings’\(^\text{22}\), in accordance
with what disposed by the United Nations Guidelines for the Prevention of
Juvenile Delinquency (the Riyadh Guidelines) adopted by the General
Assembly in its resolution 45/112 of 14 December 1990, that open with
‘The prevention of juvenile delinquency is an essential part of crime
prevention in society’ and recommend a prevention policies involving all

\(^{20}\) Which task is to monitor implementation of the UN Convention on the Rights of the
Child

\(^{21}\) Committee on the Rights of the Child, GENERAL COMMENT No. 10 (2007) -
Children’s rights in juvenile justice, par. 46: ‘ A fair trial requires that the child alleged as
or accused of having infringed the penal law be able to effectively participate in the trial,
and therefore needs to comprehend the charges, and possible consequences and penalties,
in order to direct the legal representative, to challenge witnesses, to provide an account of
events, and to make appropriate decisions about evidence, testimony and the measure(s) to
be imposed’.

\(^{22}\) Committee on the Rights of the Child, GENERAL COMMENT No. 10 (2007) -
Children’s rights in juvenile justice, par. 17.
those structures (such as family, school, community, media, social policy) where youngster can find support in learning how to stay out of crime.

**Beijing rules (1985):** Finally, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") provide that the proceedings ‘shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely’\(^{24}\). They oblige state parties to guarantee that each young offender is correctly represented, that his parents/guardians are entitled to participate in the proceeding, that he is dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial\(^{25}\).

Regarding the function of youth criminal justice, the Beijing rules find out the ‘well-being of the juvenile and her or his family’ being the aim every member party has to aspire to\(^{26}\) and impose the duty to guarantee that juveniles are helped to find a ‘a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour’\(^{27}\).

\(^{23}\) Approved with A/RES/40/33, 29 November 1985.
\(^{24}\) Beijing rules, rule n. 14.2.
\(^{25}\) Beijing rules, rules 14 and 15.
\(^{26}\) Beijing rules, rule 1.
\(^{27}\) Beijing rules, rule 1.2.
Domestic Legislation

Domestic legislation is composed both by principles of Common Law and Statutes. Common Law is that part of English law that comes from the doctrine of the precedent, according to which “the reported decisions of certain courts are more than just authoritative legal statements whose effect is persuasive since they can be binding in subsequent cases” 28. Despite historically English system being a Common Law one, nowadays the role of statutory regulation usually typical of civil law systems is becoming more and more incisive.

Even though from a theoretical point of view the difference between common law and civil law is significantly marked, scholars observe how in their practical application the two systems are getting closer than they were in the past. On one hand in common law systems the doctrine of precedent is loosing of centrality as English Parliament had become much more active in the creation of statute law since the beginning of the century, and this general process was reflected in the evolution of the criminal law. On the other hand, in civil law systems, even if jurisprudence is not officially indicated as a law source, it has been observed that new sentences contribute in shaping the law and make it evolve, at least through interpretation.

However, not every one in the academic world agrees to loosing of centrality of common law in criminal sources system, that still be the principle source for general principles of criminal law; from this point of view ‘The Common Law remains the source of virtually all the general principles of criminal liability’ 29, and between scholars someone argues that ‘notwithstanding that most (but not all) crimes today are found in statutory form, it is still appropriate to refer to the English Criminal Law as the

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common law of crime\textsuperscript{30}, as they seem considering statutory law just as a reception of what common law elaborated through the precedent doctrine.

What is the predominant characteristic of English criminal system is the lack of a Criminal Code. Plurality and non-homogeneity of criminal sources make someone to write that ‘the criminal law desperately requires codification’\textsuperscript{31}, without which the principle of legal certainly appears deeply compromised as a system composed both by jurisprudential pronounces and statutory rules results ‘complex, ambiguous, uncertain, inconsistent or difficult to discover’\textsuperscript{32}. This is the reason why a Draft Criminal Code was elaborated by the Law Commission in 1985 and, again, in 1989 with the declared aim of ‘restating in a rational form the complex and often antiquated and confusing mixture of common law and statute in which the criminal law is presently to be found’\textsuperscript{33}; though in 2008, the Law Commission announced it was going to abandon the project because of the difficulty in summarizing in a unique code the whole complexity of common law, the increasing number of parliamentary statutes and rules coming from European legislation. Nowadays, thus, the Draft Criminal Code still is just a ‘draft’.

Because of the lack of a Criminal Code, the nowadays systems of Youth Criminal Law and Juvenile Justice results not from tidy system of laws, but from a complex of statutes approved by Parliament from the beginning of the 19th century till today.

What complicates the approach to the system of sources of youth crimes in England and Wales is its non-homogeneous structure. Several parliament

\begin{thebibliography}{9}
\bibitem{30} GILLES P., Criminal Law (fourth edition), pag.8.
\bibitem{31} CARD R., CROSS and JONES, Criminal Law, Oxford 2012, pag.30.
\bibitem{32} Ibid, pag.30.
\bibitem{33} Legislating the Criminal Code, Offences against the persons and general principles (Law Commission, November 1993).
\end{thebibliography}
acts regulate the matter, each of them insisting on a particular aspect of it, as the final result being a large number of statutes with different subjects and different aims. It seems interesting to note how all these Statutes regulating youth crimes are not exclusively dedicated to this matter, containing a general regulation about children welfare or children justice in general (involving, for example, regulation of parental responsibility or child employment)\textsuperscript{34}.

The starting point is the Children Charter 1908, which introduced a separate jurisdiction for offenders under the age of eighteen. Then followed the Children act 1933, the Bail act 1979, Crime and disorder act 1998, the Youth Justice and Criminal Evidence act 1999 the Powers of Criminal Courts (Sentencing) Act 2000, the Criminal Justice Act 2003, and the Antisocial behaviour Act 2003\textsuperscript{35}.

**The Children Charter, 1908:** The Children and Young Persons Act 1908, informally known as the Children Charter, regulated several different aspects of children’s life by introducing new rules concerning juvenile courts, foster parents and infanticide. The aim was to establish a new system where children were to be regarded and protected, and it was pursued by disposing duties upon local authorities, adults in general (such as the provision of the new offence to sell cigarettes, tobacco or cigarette papers to anyone under 16) and parents/guardians (e.g. parents would be considered to have caused injury to a child’s health if they had failed ‘to provide adequate food, clothing, medical aid or lodging’).

\textsuperscript{34} See, for example, the Child and Young Persons Act 1933: it regulates at the same time Employment of young people, Protection of Children and Young Persons in relation to Criminal and Summary Proceedings, Prevention of Cruelty and Exposure to Moral and Physical Danger for children.

\textsuperscript{35} This analysis considers only the main Status dealing with the matter.
At that time the minimum age of criminal responsibility was 7 (as disposed by a principle of common law), and until the Children and Young Persons Act both young and adult offenders were prosecuted before the same court. Among the measures introduced by the Act, in section 111 the most prominent: the formal establishment of the Juvenile or Youth Courts. For the first time in English History, in 1908 it was established that offenders between 7 and 16 years old had to be prosecuted in Juvenile Courts, separated from adult ones\textsuperscript{36}, and even if the design of the courtrooms was not changed, children when appearing before the courts had to be dealt with separately, unless charged jointly. The constitution of separate Juvenile Courts in English criminal system was not only a relevant reform for what was concerning to the whole criminal system, but it also testified the will of taking care about children and young persons as it hade never been done before, as the result of the awareness that children and young people need to be considered different from adults, as ‘Through treating childhood and adolescence as distinct and special periods in the life-course, the Act tapped into the growing fields of child psychology and psychiatry, anthropology and criminology. These views gradually insinuated themselves into mainstream thinking about childhood, providing what has been seen as a foundation for the so-called “century of the child” after 1900. Mid to late nineteenth century reformers shared a belief that children were inherently different to adults and needed special treatment’\textsuperscript{37}.

\textsuperscript{36} Children and Young Person Act 1908, section 111: “a court of summary jurisdiction when hearing charges against children or young persons (...) shall sit either in a different building or room from that in which the ordinary sittings of the court are held, or on different days or at different times from those at which the ordinary sittings are held, and a court of summary jurisdiction so sitting in this Act referred to as a Juvenile Court”.

**Children and Young Persons Act 1933:** The whole system dedicated to regulation of youth crimes and juvenile justice started with the Children and Young Person Act 1933, which built the main structure that’s still operating nowadays. The Children and Young Persons Act 1963 and 1969 modified most of its provisions, but without changing the basic structure coming from the original Act. It was introduced by the Parliament to prevent cruelty against children and protect their rights from different points of view.

The Act contains provisions for the Prevention of Cruelty and Exposure to Moral and Physical Danger (part I), for protecting children in their Employment (part II), for Protecting Children and Young Persons in relation to Criminal and Summary Proceedings (part III), and provisions concerning ‘Remand Homes, Approved Schools, and Persons To whose care children and young persons may be committed’ (part IV).

The main measures introduced in 1933 concerned Separate courts for juvenile offenders, Parental assistance, right to Privacy and the age of criminal responsibility.

According with the Act, the principle funded by the Children Act in 1908 for which young offenders had to be kept separated from adult ones is still considered as a basic condition in juvenile justice system, as section 31 provided ‘Arrangements shall be made for preventing a child or young person while detained in a police station, or while being conveyed to or from any criminal court, or while awaiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with any offence other than an offence with which the child or young person is jointly charged’. It was established the right for a parent/guardian to attend to the court and, for a ‘person responsible for the welfare of the child or young person’, to be informed that the child or young person has been arrested, why he has been arrested and where he is being
detained. With section 49, it was set up the minimum level of young defendants’ privacy with the prohibition of publishing reports with relevant details of the defendant and/or his pictures. Finally, the Children and Young Persons act, with section 50 raised the minimum age for criminal responsibility from 7 to 8, overcoming historical principle of common law that fixed MACR at 7; as we are going to below, however, it was just a (fundamental) step in historical MACR evolution.

The Children and Young Persons Act 1933, despite regulating juvenile proceedings with respect to the rights of the child, did not particularly focus on prevention of youth crimes. Through the new regulation it has introduced a complex set of rules that did not take position on which kind of treatment (repressive or preventive) was better for ensuring a meaningful response to juvenile deviance.

**The Crime and Disorder Act 1998**: in 1998, the Government approved the Criminal and Disorder Act, a complex statute through which several innovations were introduced in the system for dealing with youth crimes and young offenders. The Crime and Disorder Act was just the last step in a long reforming proceeding that gave its most relevant contributions to the changes introduced by the Act were clarified with the White Paper “No More Excuses: a new approach to tackling youth crime in England and Wales” published by a government’s commission in 1997. In its report the Audit Commission, by analysing youth crimes and considering the lack of efficiency of the system in force, decided that it was time for changing in a “no more excuses” approach able to give exhaustive responses to youths who had committed a crime and not only to excuse their behaviours as the expression of need for rebellion or for welfare interventions. All these results were translated in recommendations for the Parliament to adopt all
the Acts that were necessary in this direction, among which “the Crime and Disorder Bill will make clear that the aim of the youth justice system is to prevent offending by young people. The Bill will place a duty on all people working in the youth justice system to have regard to that aim. Thus, it’s in the White Paper that we find the principles that the Crime and Disorder Act simply turns in to law.

The Act is composed by five parts (dedicated to: prevention of crime and disorder; criminal law; criminal justice system; dealing with offenders; supplemental dispositions) and ten schedules. Most of its provisions have been repealed by other parliamentary Acts that we are going to keep in consideration during our analysis.

One of the main changes introduced is the one we find in section 34, with which the Act abolishes the presumption of doli incapax for children under 14 years old, that was the common law presumption according to which no child under the age of 14 could be considered criminally responsible of an offence unless the prosecutor could prove above any doubt his/her knowledge and consciousness about the crime.

But the most important innovation the Act took in criminal justice is the constitution of the Youth Justice System. As it was argued about the reforms contained in Criminal and Disorder Act 1998, they are ‘built upon three

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38 No more excuses: a new approach to tackling youth crime in England and Wales, part II (2.4).
40 such as the Police and Reform Act 2002, the Criminal Justice and Court Services Act 2000, the Powers of Criminal Courts Sentencing Act 2000 and others.
41 Section 34 Crime and Disorder Act 1998: “The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished”.
foundation stones\(^{42}\): the prescription of the prevention of offending by children and young people as the over-arching aim of the youth justice system (s. 37); the establishment of a national Youth Justice Board to advise the Home Secretary on the running and development of the youth justice system (s. 41); and the creation of inter-agency youth offending teams to co-ordinate and provide youth justice services in their locality (s. 39).

The Youth Justice System (YJS) was set up by part III of the Crime and Disorder Act 1998 that which sections 37 (and followings), draws a justice System dedicated to prevention of youth crimes and treatment of youth offenders. The aim of the YJS is clarified by section 37, disposing that “It shall be the principal aim of the youth justice system to prevent offending by children and young persons. In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim”.

According with what the Audit Commission had established in “No More Excuses”, the YJS assumes a new approach to youth crimes prevention. It’s clear, indeed, that with the Crime and Disorder Act the Parliament shows its interest in prevention of youth crimes and not only in repressing them. And in order to prevent younger offenders committing crimes (but also anti-social behaviours), the Act deals with provisions whose intentions are to create a system that ensures a central role for local authorities as “It shall be the duty of each local authority, acting in co-operation with the persons and bodies mentioned in subsection below (police officers, police authority, chief officers, health authority, local probation), to secure that, to such extent as is appropriate for their area, all youth justice services are available there”\(^{43}\).


\(^{43}\) Section 38 Crime and Disorder Act 1998.
What the Crime and Disorder Act does, in order to build a body of measures able to prevent youth offences, is to guarantee the possibility for young people to avoid offending or, if they have already offended, to repair the harm they caused making them conscious of the consequences of their actions and encouraging them to understand what’s wrong in their behaviour. The Criminal and Disorder Act designs a double-direction system of prevention that works both as an ante-delictum prevention and a post-delictum prevention; it offers on one hand measures through which avoiding youngster to offend for the first time (such as Anti-Social Behaviour orders and local children curfew) and, on the other hand, responses to young offences thought in accord with what we call ‘Restorative Justice’ which basic principle is to provide whatever the offender needs and to focus on prevention of future possible crimes more than on retributive punishments. Thus, it’s clear that one of the most important effects of the Crime and Disorder Act will be to establish at least some elements of the restorative justice approach as part of the mainstream response to offending behaviour by young people for the first time in England and Wales.44

Despite general enthusiastic reaction to this new approach to juvenile crimes, someone criticizes the 1998 Act because it appears to establish a system of control upon juvenile behaviours that following the purpose to teach to young people how and why to behave. In ‘Foucault’s Law: The Crime and Disorder Act 1998’ (2001) Roger Smith writes that “The incoming Government argued that it was introducing a major change in emphasis by enacting as the paramount aim of the youth justice system the ‘prevention of offending’. (…) This, in turn, it might be suggested, necessarily leads to the adoption of a particular kind of strategic and operational approach. We should, perhaps, be unsurprised to find a

preoccupation with surveillance, assessment, measurement, and scrutiny and behaviour management. In other words, we can expect there to be a policy-led concentration on quasi-scientific techniques of control, and behavioural change.”

Once the aim of this Act set in section 37 is clarified, it’s time to analyse how the Crime and Disorder Act enable the justice system to reach its aim.

As said above, the three foundation stones of the Act are the Youth Justice System (with the declared aim of preventing youth crimes), the Youth Justice Board and Youth Offending Teams. It is in the co-operation of these agencies that the new system can find its aim to be realized, as the whole YJS is build as a complex of institutions that give their contribution to ‘prevent offending by children and young persons’.

In section 41, the Crime and Disorder Act provides the constitution of the Youth Justice Board, an executive public non-governmental body that shall include as members “persons who appear to the Secretary of State to have extensive recent experience of the youth justice system” and which main tasks are (according to what the Government writes on its website) “to oversee the Youth Justice System in England and Wales, to work to prevent offending and reoffending by children and young people under the age of 18, to ensure that custody for them is safe, secure, and addresses the causes of their offending behaviour”. YJB’s specific functions are precisely listed in section 41(5), that, among other, disposes that the YJB ‘shall adver the Secretary of State on the steps that might be taken to prevent offending by children and young persons’ and ‘shall identify, make known and promote good practice in the following matters, namely: (i) the operation of the youth justice system and the provision of youth justice services; (ii) the prevention

45 Section 41(4).
46 www.justice.gov.uk/about/yjb
47 Section 41(5)(b)(iv).
of offending by children and young persons; and (iii) working with children and young persons who are or are at risk of becoming offenders.\textsuperscript{48}

As of the third foundation stone, according to section 39, each local authority has the duty to establish for its area one or more Youth Offending Team (YOT), whose aim is ‘to co-ordinate the provision of youth justice services for all those in the authority’s area who need them and to carry out such functions as are assigned to the team or teams in the youth justice plan formulated by the authority under section 40(1)\textsuperscript{49}. Section 39(5)\textsuperscript{50} disposes that YOTs members shall include at least an officer of a local probation board, a social worker of a local authority social services department, a police officer, a person nominated by a Primary Care Trust or a health authority and a person nominated by the chief education officer appointed by the local authority under section 532 of the Education Act 1996. How the YOT operates, in respect of preventing youth crimes and working with young people in trouble with the law, is planned by the same local authority, that have “the duty to formulate and implement for each year a plan – called Youth Justice Plan- setting out how the youth offending team or teams established by them (whether alone or jointly with one or more other local authorities) are to be composed and funded, how they are to operate, and what functions they are to carry out”.\textsuperscript{51}

By providing cooperation between these bodies (local authorities, YOT, YJB), the Crime and Disorder Act delineates a complex system where children and young persons are kept away from crimes through the work of local programmes built to help not only young people at risk of anti-social or criminal behaviours, but also their families and community in order to

\textsuperscript{48} Section 41(5)(f)(ii)and(iii).
\textsuperscript{49} Section 39(7).
\textsuperscript{50} as reformed by the Criminal Justice and Court Services Act 2000
\textsuperscript{51} Section 40
assure them a safe life context that encourage to avoid misbehaves. It is according to these proposes that the Act introduces provisions such as Anti-Social Behaviour Orders, Child Safety Orders and Parental Orders.

First of all, with the Crime and Disorder Act, were introduced Anti-Social Behaviour orders (ASBOs), which regulation is provided by section 1 and followings. ASBOs are civil orders which prohibit the defendant from doing anything described in the order itself that can be imposed against (not only) young people whose behaviour is anti-social, that means that the person has acted ‘in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself’; considering that definition it’s important to notice that for making an ASBOs against a specific individual the only requirement required by law is the commission of an anti-social behaviour, that’s not necessarily a crime.

Section 1(1) provides that ASBOs can be made by any ‘relevant authority’, being a relevant authority any of those listed in the same section as amended by section 61(1) of Police Reform Act 2002, that means ‘(a)the council for a local government area; (b)the chief officer of police of any police force maintained for a police area; (c)the chief constable of the British Transport Police Force; or (d)any person registered under section 1 of the Housing Act 1996 (c. 52) as a social landlord who provides or manages any houses or hostel in a local government area’.

An ASBO can be ordered against any person aged 10 or over, so for how the law draws it is not a measure dedicated in particular to young people. Anyway, its relevance in the youth justice system is really strong. Anti-social Behaviour Orders, have effect for a period (at least two years)

\[^{52}\text{Section 1 Crime and Disorder Act 1998 as amended by section 61 Police Reform Act 2002.}\]
indicated by the court in the order itself or until further orders\(^5\); during this period if the person who has received the order does, without any reasonable excuse, anything that’s prohibit doing by the order itself, he’s liable ‘on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both\(^6\). With ASBOs the Government introduces a measure with a complex structure: it is a civil order that can give access to a criminal proceeding if it’s not observed; that means that a young person who did not commit any offence, but simply behaved in an anti-social manner as defined by section 1, can be prosecuted in a criminal proceeding as result of a process starting with a civil order (that being civil, lacks criminal guarantees). This structure has been strongly criticized for facilitating the access to criminal system instead of preventing youngsters (and adults) to come into contact with it.

ASBOs show’s the real aim of the reform settled by the Criminal and Disorder Act 1998: a latu-sensu crime prevention that tries to avoid not only crimes, but also anti-social behaviours. In this sense it can be defined both as ante-delictum or post-delictum prevention, being possible but not imperative that the reason why it’s made is strictly the commission of a crime.

Different measures are provided by the Crime and Disorder Act 1998 for crimes and anti-social behaviours committed by a child under the age of ten. Child Safety Orders are disposed by section 11, which aim is to avoid children under the age of ten (the minimum age for criminal liability) to behave in an anti-social manner; Section 11 disposes that a Magistrates’ Court may make an order that “places the child, for a period (not exceeding


the permitted maximum) specified in the order, under the supervision of the responsible officer; and requires the child to comply with such requirements as are so specified". The conditions the Court needs to verify to dispose such an order, are the ones provided in the same section 11(3): ‘(a) that the child has committed an act which, if he had been aged 10 or over, would have constituted an offence; (b)that a child safety order is necessary for the purpose of preventing the commission by the child of such an act as is mentioned in paragraph (a) above; (c)that the child has contravened a ban imposed by a curfew notice; and (d)that the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself". So if Anti-Social Behaviour Orders aim is to prevent youth delinquency, Child Safety Orders is to prevent those behaviours that would be considered as offences (or behaviours for which an ASBOs could be made) if the offender were ten or older, in this sense both of them are new schemes for dealing with youth crime.

Section 11 disposes that an order can be made in respect to a child aged under 10 years whose behaviour causes alarm regarding the possibility for the child to be involved in anti-social behaviours. The child safety order is normally for up to three months duration, but in exceptional circumstances the court can impose an order for up to twelve months.

In disposing of a child safety order, the court has to take in consideration the welfare of the child, as section 11 (5) disposes that ‘the requirements that may be specified under subsection (1)(b) above are those which the court considers desirable in the interests of: (a)securing that the child receives appropriate care, protection and support and is subject to proper control; or

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(b) preventing any repetition of the kind of behaviour which led to the child safety order being made’.

Part of the new schemes for dealing with youth crime is also the Parenting Order of section 8. Where in a court proceeding an anti-social behaviour order (or sex offender order) is made in respect of a child or young person or a child or young person is convicted of an offence or other cases, the Court may order the offender’s parents ‘to comply, for a period not exceeding twelve months, with such requirements as are specified in the order and to attend, for a concurrent period not exceeding three months and not more than once in any week, such counselling or guidance sessions as may be specified in directions given by the responsible officer’.

Parenting Orders are a way to make parents accountable for their children’s behaviour and to help them take care and control their children. They’re thought as a youth crime prevention instrument, but instead of controlling youths’ behaviour directly, they represent the will to educate the parents for them to educate their children. The No More Excuses paper to which the Crime and Disorder Act gives practical application underlined that “It is neither possible nor desirable for the Government to involve itself in every aspect of family life or to dictate to parents how to raise their children: parents hold the primary responsibility for giving children the love and care they need, ensuring their welfare and security and teaching them right from wrong. But the Government can and should help parents to recognise and meet those responsibilities - and should strive to create the conditions in

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58 Or a child safety order is made in respect of a child or a person is convicted of an offence under section 443 (failure to comply with school attendance order) or section 444 (failure to secure regular attendance at school of registered pupil) of the Education Act 1996, Crime and Disorder Act 1998, section 8.
which families can flourish and all children have the chance to succeed”\(^{60}\). Thus, parenting orders find their justification in such idea that children and young person’s behaviour is likely to be considered as a consequence of parenting. As statistics and researches clearly show that poor parenting, family problems, parental weakness, and poor education are some of the most frequent features in young offenders’ background. This is the reason why with Crime and Disorder Act 1998 the Parliament chose to introduce such a particular Order. As written by K. Bradley, A. Logan and S. Shaw can be said that “(...) the creation of parenting orders under section 8 Crime and Disorder Act 1998 was developed to specifically address the deficiencies in the parenting styles of those whose children had committed offences. The implication was that the inability of these parents to adequately fulfil their duties had (directly or indirectly) led to their children’s offending behaviour. Such requirements resonate strongly with the care and protection provisions of the Children Act 1908”\(^{61}\).

Parental orders are directed both to support the welfare of the child or young person by offering him/her an adequate familiar context and at the same time to prevent them to commit crimes, as their propensity to commit crimes is seen just as a consequence of poor family conditions.

Another instrument introduced by the Criminal and Disorder Act 1998 is the Child Curfew note regulated in sections 14 and structured as an order made by a local police force or a local authority that prohibits children (under the age of 16) being in a specific area during specific hours (between 9pm to 6am) of the day unless under the control of a parent or any other person aged 18 or more. Section 8 subordinate Child Curfew notes to the


predisposition, by the local authority or the local police force, of a Local Child Curfew Scheme that enforce the authority to give notices, that has to be confirmed by the Secretary of State\textsuperscript{62}. Once the Child Curfew scheme has been approved, a notice shall be made against a child for up to 3 months and it may specify different hours of the day in relation to children of different ages. What this provision wanted to offer was an instrument through which local authorities can ban children and young persons at risk of anti-social behaviour from specific public areas during hours of the day where the risk is highest.

Such measures disposed in part I of the Act have been criticized by academics who find them too invasive in regard of the private life of children and families. They risk becoming a mechanism of strong control by the State upon privacy of individuals. On this basics R. Smith considers that the Crime and Disorder Act can be viewed as the practical embodiment of what M. Focault, in 1975, observed about the western penal systems in the modern age, that was: “The disciplinary institutions secreted a machinery of control that functioned like a microscope of conduct; the fine, analytical divisions that they created formed around men an apparatus of observation, recording and training”\textsuperscript{63}. Referring to the disposition of parenting orders and the building of a complex structure of agencies involved in preventing youngsters to commit crimes, he observes how “The systematic attempt to impose a rigorous and pervasive approach to the management of youth offending will be seen to relate very closely to Foucault’s vision of a technology of power. (…)Investment in communities and individuals is thus matched by a determination to prevent crime and control wrongdoing. Programmes to improve support for parents (…) are matched by

\textsuperscript{62} Section 14(1) and (5).
\textsuperscript{63} FOCAULT M., \textit{Discipline and Punish}, 1975.
expectations that parents themselves will behave responsibly in controlling their children’s behaviour”\textsuperscript{64}.

If we accept that these provisions show that there is a risk for society to shape families and individuals, attention has to be paid to respect the limit between ensuring children welfare and preventing crimes on one side and, on the other side, controlling individuals’ and family life.

Part IV of the Criminal and Disorder Act, significantly entitled ‘Dealing with Offenders’, disposes explicitly for young offenders three types of punishment: reprimands and warnings; non-custodial orders; detention and training orders.

Reprimands and warnings were abolished by Legal Aid Sentencing and Punishment of Offenders Act 2012, that replace them with Youth Cautions\textsuperscript{65}; thus the current legislation\textsuperscript{66} disposes that ‘A constable may give a child or young person (“Y”) a caution under this section (a “youth caution”) if: (a) the constable decides that there is sufficient evidence to charge Y with an offence, (b) Y admits to the constable that Y committed the offence, and (c) the constable does not consider that Y should be prosecuted or given a youth conditional caution in respect of the offence’. The effect of a caution is that the person who received the caution will be referred to a youth offending team, that has the duty to arrange for him a rehabilitation programme (unless they consider inappropriate to do so)\textsuperscript{67}. It can be given by a constable out of the Court, but the presence of an appropriate adult to whom the constable has the duty to explain the effects of the caution is necessary.

\textsuperscript{65} That adds sections 66ZA and 66 ZB to the Crime and Disorder Act 1998.
\textsuperscript{66} section 66ZA and 66ZB Crime and Disorder Act 1998.
\textsuperscript{67} Section 66ZB(b).
Among the non-custodial sentences disposed by section 67 and followings the most relevant, considering restorative justice principles and the aim of the whole Crime and Disorder Act, are Reparation Orders regulated by section 67 that impose on the offender to repair the offence by to a person or more persons specified (the victim of the offence or a person otherwise affected by it) or to the community. The reparation order can include the various activities like writing a letter of apology or meeting the victim in person to apologise, cleaning graffiti, collecting litters etc. Its aim is on one hand guarantee a sort of re-payment to the victim and on the other hand to give to the offender the opportunity to introspect about the crime.

Finally, the training and detention order: section 73 defines the detention and training order as an “order that the offender in respect of whom it is made shall be subject, for the term specified in the order, to a period of detention and training followed by a period of supervision”\(^68\); therefore it’s a custodial sentence that combines detention with training. It is available for young offenders that committed any offence that should be punished with imprisonment if the offender were 21 or over; if the offender is aged under 15 at the time of the conviction, a training and detention order can be made only if the court is convinced that he’s a persistent offender\(^69\), and if the

\(^68\) Section 73(3).

\(^69\) The notion of "Persistent offender" is not defined by law, but, but paragraph 6.5 Sentencing Guidelines Council Definitive Guideline states that: "In determining whether an offender is a persistent offender for these purposes, a court should consider the simple test of whether the young person is one who persists in offending: iii) in most circumstances, the normal expectation is that the offender will have had some contact with authority in which the offending conduct was challenged before being classified as persistent; a finding of persistence in offending may also arise from orders which require an admission or finding of guilt these include reprimands, final warnings, restorative justice disposals and conditional cautions. Since they do not require such an admission, penalty notices for disorder are unlikely to be sufficiently reliable; iv) a young offender is certainly likely to be found to be persistent (and, in relation to a custodial sentence, the test of being a measure of last resort is most likely to be satisfied) where the offender has been convicted of, or made subject to a pre court disposal that involves an admission or finding of guilt in relation to, impressionable offences on at least three occasions in the past 12 months."
offender is under the age of 12 the court must be persuaded that a custodial sentence is the adequate enough to protect the public from him. The duration of the order can be of 4, 6, 8, 10, 12, 18 or 24 months, half of which will be spent in custody, while the supervision shall begin with the offender’s release, whether at the half-way point of the term of the order or otherwise; and shall end when the term of the order ends. Both during training and supervision period the offender will be offered rehabilitation programmes (that can involve sessions about relationships with parents, drug abuse etc).

To summarize, we can certainly conclude that Crime and Disorder Act 1998 is more inclined towards prevention than repression. All the instruments this Statute introduces to work with young offenders or, more in general, with juvenile deviance are clearly directed to give concrete responses to the need for prevention of youth crime that had been clarified by the act itself in section 37 as the aim of the whole Youth Justice System.

This connotation of this Act follows as obvious result the “No More Excuses”, where commission it took particularly in consideration the fact that “those who start committing offences at an early age are more likely to become serious and persistent offenders”, and on these bases it suggested the Government to introduce actions capable of being a meaningful reaction for those children who need to be kept out from the criminal circuit from an early age. The need for an efficient prevention expressed in the document was clear and strongly recommended, as “at the moment, not enough is done to prevent children and young people becoming involved in criminal

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70 Section 73(1) and 73(2).
71 Section 76(1).
72 Crime and Disorder Act 1998, section 37 (1): “It shall be the principal aim of the youth justice system to prevent offending by children and young persons”.
and anti-social behaviour. If we are serious about preventing youth crime, then action must start early and must be targeted where it is likely to be most effective”. The Commission underlined that it had to be supported also in order to ensure the welfare of the public, that’s say “Preventing offending promotes the welfare of the individual young offender and protects the public”\(^\text{74}\).

If we consider all these recommendations from the Audit Commission and its whole content, it’s not surprising how and why the Crime and Disorder Act 1998 insists on youth crime prevention. Otherwise it appears curious to consider that the Act was presented by the Labour Government under which it was approved as the promised “zero tolerance approach”\(^\text{75}\) to crime that both the main parties had told about during the election campaign. What makes it “curious” is that this “zero tolerance” appears not to be a repressive response, as the definition could suggest, but a system where everything is directed to prevent crimes as main, declared aim. It seems to be clear that even if the political background was characterized by the need for giving to the public an impressive message about taking in consideration crime policy, the Crime and Disorder Act did not limit to provide a harsher punishment for the offenders, but a complex and more sophisticated structure built on crime prevention and refusing retributive justice as useless and sometimes even counterproductive in dealing with (especially young) offenders. By disposing such a prevention system, it gives force to a refined mechanism based on restorative justice principles (promote reconciliation between victims and offenders and facilitate acts of reparation) that tries to solve the root problem and not only to react to the harm caused with the offence by imposing retributive sentences. This new approach can be considered as an educational one, being even repressive reactions it provides


still in accord with the aim preventing children and young persons offending or re-offending.

**Youth Justice and Criminal Evidence Act 1999:** In 1999 the Government approved the Youth Justice and Criminal Evidence Act, to regulate the giving of evidence in criminal proceedings by vulnerable or intimidate witnesses and to offer new instruments to deal with young offenders (the Referral Orders). In Part I the act carries forward the Government’s ambitious plan to tackle youth crime and reform youth justice, which had been begun by the Crime and Disorder Act 1998. In Part II, the act addresses various problems relating to vulnerable witness not simply for the purpose of protecting such persons but also in the interest of maximising the evidence available in criminal courts and improving its quality. We are going to focus on the first part, dedicated to referral orders and youth offending panels.

The Government’s purpose, which the reform flows from, was to reduce crime starting with the offences committed by juvenile offenders, as “Early intervention means fewer crimes, fewer victims and less work for the courts and prisons”76. What the ministers argued was: “We are committed to the reduction of crime and the fear of crime. If we are able to achieve that ambitious goal, which I am sure that all noble Lords share, we must take effective action to deal with young offenders. Our primary aim is to prevent offending by children and young people. However, when they break the law, meaningful punishment is necessary to help young people to take

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76 DHOLAKIA (Lord), 15 December 1998, parliamentary discussion about the introduction of the Youth Justice and Criminal Evidence Act 1999.
responsibility for their actions, to make amends for their crimes and reparation to their victims and to return to the law-abiding community”.77

These ambitions were concretized in a new sentence called Referral Order, which will be applied to the great majority of first offenders under the age of 18 and with which the offender is referred to a youth offender panel in order to agree to a behaviour contract and to follow a re-offending prevention programme; the contract will run for a period of between three and six months. Behind this new sentence “the Government’s aim is to establish a coherent graded hierarchy of responses to juvenile offending, in which the new sentence falls between the diversionary practices of reprimand and final warning, and the more punitive sentences which may be expected to follow subsequent convictions”.78

A strong confidence was shown in the new sentence by members of Parliament: “If we can stop today's delinquents becoming tomorrow's recidivists, we will have done a good job for society, for prospective victims, and in terms of preventing the endless waste of human life and resource which is seen by anyone who regularly visits prisons, as I do. We believe that the youth offender panel is an imaginative tool for the criminal justice system (...) and that it can put first-time offenders back on the right track”.79

For a referral order, three conditions have to be satisfied, as section 1(1) 'applies where a youth court or other magistrates' court is dealing with a person under the age of 18 for an offence and: neither the offence nor any associated offence is one for which the sentence is fixed by law, the court is not, in respect of the offence or any associated offence, proposing to impose

77 LORD WILLIAMS OF MOSTYN, 15 December 1998, opening the Parliamentary debate about the new Bill.
79 LORD WILLIAMS OF MOSTYN, 15 December 1998, opening the Parliamentary debate about the new Bill.
a custodial sentence on the offender or make a hospital order in his case, and the court is not proposing to discharge him absolutely in respect of the offence.\textsuperscript{80}\textsuperscript{81}

Depending on different conditions, the court must or can refer the offender to a youth offender panel, as the Act distinguishes between compulsory referral orders and discretionary referral order. The conditions for a compulsory referral order are satisfied in relation to an offence if the offender: pleaded guilty to the offence and to any connected offence, has never been convicted by or before a court in the United Kingdom of any offence other than the offence and any connected offence, and has never been bound over in criminal proceedings in England and Wales or Northern Ireland to keep the peace or to be of good behaviour.\textsuperscript{82} On the other hand a discretionary referral order can be applied if the offender: is being dealt with by the court for the offence and one or more associated offences; although he pleaded guilty to at least one of the offences mentioned in paragraph (a), he also pleaded not guilty to at least one of them; he has never been convicted by or before a court in the United Kingdom of any offence other than the offences mentioned in paragraph (a); and he has never been bound over in criminal proceedings in England and Wales or Northern Ireland to keep the peace or to be of good behaviour.\textsuperscript{83}

\textsuperscript{80} YJCEA 1999, s.1(1).
\textsuperscript{81} It needs to be clarified that according with section 15(2) an offence is ‘associated with another if the offender falls to be dealt with for it at the same time as he is dealt with for the other offence (whether or not he is convicted of the offences at the same time or by or before the same court)’; the Powers of Criminal Court (Sentencing) Act, reforming referral orders does not refer to ‘associated offences’ but to ‘connected offences’ in section 16(4) at the same conditions. It means that both ‘associated offences’ and ‘connected offences’ include a situation where the defendant has been convicted on an earlier occasion or by a different court, and the matter has been remitted to the present court for sentence.
\textsuperscript{82} YJCEA 1999, s.2(1), and PCC(S) 2000 s.17(1).
\textsuperscript{83} YJCEA 1999, s. 2(2)
As it can be noted reading those conditions that oblige or allow the court to make a referral order, the act gives relevance to first conviction and to the remorse the defendant shows by pleading guilty to at least one of the offences he has committed. In the background lies the idea that “First conviction is identified as a key stage in the young offender’s criminal career at which vigorous positive intervention may be fruitful in terms of turning the youngster away from crime”\textsuperscript{84}.

A referral order must: specify the youth offending team responsible for implementing the order; require the offender to attend each of the meetings of a youth offender panel to be established by the team for the offender; and specify the period for which any youth offender contract taking effect between the offender and the panel under section 8 is to have effect (which must not be less than 3 nor more than 12 months)\textsuperscript{85}. If the offender is under the age of 16 the referral order must require at least one appropriate person to attend meetings of the youth offender panel; and if the offender falls within subsection, the person or persons so required to attend those meetings shall be or include a representative of the local authority mentioned in that subsection\textsuperscript{86}. The indication of a parent or a guardian is however not necessary if the court is satisfied that it would be unreasonable\textsuperscript{87}. It can be easily understood why it’s disposed the incompatibility of referral orders and parenting orders under section 8 of the Crime and Disorder Act 1998\textsuperscript{88}: the explanation is that the contract following the referral order will itself require participation by parents or guardians (appropriate persons) in helping the young offender to behave as

\textsuperscript{84} BIRCH D. and LENG R., \textit{Youth Justice and Criminal Evidence Act 1999}, 2000
\textsuperscript{85} YJCEA 1999 section 3(1) and PCC(S)A 2000 section 18(1).
\textsuperscript{86} YJCEA s.5(2).
\textsuperscript{87} YJCEA s.5(3).
\textsuperscript{88} YJCEA s.19(5)(c) and PCC(S)A 2000.
agreed with the panel. As disposed by of the PPC(S)A 2000\textsuperscript{89}, that introduces some changes to the original structure of referral orders, the panel may allow to attend such meetings any person who appears to be a victim of the offence or otherwise affected by it or any person who appears to the panel to be someone capable of having a good influence on the offender. This reflects what the purpose of referral order is: encouraging the offender to understand, by confronting himself with the victim and realizing how he/she felt in being a victim, what he has done and which is the real impact of his actions; this is the basis of what we call Restorative Justice, a justice which aim is “restoration, reintegration and responsibility”, “that means that victims and witnesses are entitled to have the care and respect that they deserve”\textsuperscript{90}.

When disposing a referral order, the court is requested to explain to the offender the content and the consequences following the breach or the less of effect of the contract under section 8\textsuperscript{91}.

When a referral order has been made in respect of an offender under the age of eighteen, it is the duty of the Youth Offending Team specified in the order (that has to be the one operating in the area where the offender lives) to establish a youth offending panel for the offender and to arrange the first and any further meeting.\textsuperscript{92} It is during the first meeting that the panel and the offender will reach an agreement about the future behaviour the offender will keep during the period when the contract runs\textsuperscript{93}, and it will be the responsibility of the YOT to supervise the contract to be respected. According with the explanatory note n.8 ‘the programme will be guided by

\textsuperscript{89} s.22(4)  
\textsuperscript{90} LORD WILLIAMS OF MOSTYN, 15 December 1998, opening the Parliamentary debate about the new Bill.  
\textsuperscript{91} YJCEA S.3(3).  
\textsuperscript{92} YJCEA S.6(1).  
\textsuperscript{93} a period between three and twelve months, according with section 3(1).
the following three principles (‘restorative justice’): making restoration to the victim; achieving reintegration into the law-abiding community; taking responsibility for the consequences of offending behaviour”94. What the contract can include is specified in section 8(2) that disposes, inter alia, it can include provisions about the offender making financial reparation, carrying out unpaid work or service in or for the community, being at home at times specified in or determined under the programme; what we can conclude is thus that the agreement signed by the offender can basically have the same content of a community sentence given by the judge.

If the young offender does not follow the agreement, consequences are provided by section 1395 and schedule 1 that dispose the offender being referred back to an ‘appropriate court’ to be re-sentenced. In this case the court is empowered to revoke the referral order and to sentence the young offender afresh96, or to take into account the extent of the young offender’s compliance with the contract up to the point of the referral back. Anyways the offender will have the right of appeal to the Crown Court against any of these sentences.

The agreement between the offender and the youth offending panel will be signed during a meeting arranged by the panel itself, that not necessarily admits the offender’s solicitor; on this basics it was argued that the referral order breaches article 6 of the European Convention of Human Rights. Article 6 disposes that each defendant has the right to a ‘Far Trial’, including the right ‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal

95 As repealed in 2000.
96 With the same sentencing options available for the court that originally sentenced the offender, paragraph 5 (schedule 1).
assistance, to be given it free when the interests of justice so require.97 The less of legal representation during the meeting with the offending panel (and particularly during the first meeting, that’s when the behaviour contract is supposed to be signed) was accused by part of the Parliament of contrasting the right to a legal representation guaranteed in article 6. To those who suggested the breach, Mr. Boateng replied that the right to a fair trial is not breached, as a legal representation is guaranteed before the court that makes the referral order and is not necessary before the panel, as it is not the authority who makes the sentence, but only an instrument through which the sentence is implemented98.

**Powers of Criminal Court (Sentencing) Act 2000:** The PCC(S)A introduces several changes in youth crimes and juvenile justice system in order to ‘consolidate certain enactments relating to the powers of courts to deal with offenders and defaulters and to the treatment of such persons’99. It is a concentrate of procedure rules, and we are going to focus on the role of these rules in crime prevention, in particular for young offenders.

First of all, part III contains a complete re-view of referral orders as they were introduced by the Youth Justice and Criminal Evidence Act 1999, as

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97 European Convention of Human Rights, article 6(3)(c).
98 Mr. BOATENG, parliamentary debate 8 June 1999: “We have carefully considered the implications of article 6 of the European convention on human rights. It is important to understand that the referral order is not designed to pass responsibility for sentencing from the court to the panel; the court passes sentence and the young person will have the opportunity to be represented before the court. Reference is then made to a youth offender panel, which will have responsibility for ensuring that a programme is devised, much as the person responsible for a supervision order must ensure that a programme is devised, from which the young person - and therefore society - gains maximum benefit. The process by which that is done is, of its nature, best carried out in the absence of lawyers. However, it will be for the court to determine the length of the order--which reflects the seriousness of an offence - because that is part of a sentence. In that context, of course, the court should hear representations from lawyers”.
we’ve just finished to analyse them in their last version. Basically what the PCCSA 2000 introduces is the distinction between mandatory and discretionary referral orders for young offenders as explained above (section 16) and a procedure reform affecting youth offending panels and the contracts they can agree with the offender.

According to what the PCCSA 2000 provides, now the system offers two types of sentences that the court is empowered to give to a young/adult offender: community sentences and custodial sentences. Community sentences are classified in two categories, depending on whether or not they are available both for young and adult offenders. Section 33 clarifies that ‘community sentence means a sentence which consists of or includes one or more community orders’; it represents an alternative to custodial sentences that can be given only for most serious offences as section 34 provides community sentence to be given only in those cases where there is not a custodial sentence fixed by law (included the ones fixed by the PCCSA itself in sections 109, 110, 111).

It results that a young offender can be given a custodial sentence only when it’s is fixed by law, that means in the following cases: detention and training orders regulated by the Crime and Disorder Act; section 90 PCCSA; section 91 PCCSA; section 226 and 228 of Criminal Justice Act.

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100 Section 33: “community order” means any of the following orders— (a)a curfew order; (b)a community rehabilitation order; (c)a community punishment order; (d)a community punishment and rehabilitation order; (e)a drug treatment and testing order; (ee)a drug abstinence order; (f)an attendance centre order; (g)a supervision order; (h)an action plan order. (2)In this Act, “community sentence” means a sentence which consists of or includes one or more community orders.

101 Custody sentence for offenders under 18 convicted of murder.

102 Custody sentence for offenders under 18 convicted of certain serious offences (an offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more, not being an offence the sentence for which is fixed by law; or(b)an offence under section 14 of the Sexual Offences Act 1956 (indecent assault on a woman); or (c)an offence under section 15 of that Act (indecent assault on a man) committed after 30th September.
2003. In any case when the court is not satisfied about the conditions required by these rules, it will give a community sentence.

What can be given to a young offender is a community sentence such as a curfew order, an exclusion order\textsuperscript{105}, a reparation order for young offender or, if the offender is 16 years old or over, a probation order, a community punishment or a drug-related order.

Community sentences are part of the instruments implemented in order to persecute a restorative approach to justice, which tries to offer to the offender not only a punishment, but also a reason not to offend again. Community sentences combine punishment and the most various activities carry out in the community: from a curfew to a reparation activity (that can include any activity through which the offender repairs the harm he caused to the victim), to an abstinence-order (that oblige the offender to abstain from misusing specified Class A drugs). The purpose is that any juvenile offender, in the majority of cases, will be given a sentence that more than a punishment is an help for him not to become a persistent offender, according with the principal and general aim of the whole Youth Justice System declared in section 37 of Crime and Disorder Act 1998.

\textbf{Anti-social Behaviour Act 2003}: in March 2003 the Government published a White Paper entitled ‘Respect and Responsibility - taking a stand against anti-social behaviour’ that suggested new measures and new powers for

\begin{footnotesize}
\begin{itemize}
\item 1997; or, if the offender is aged between 14 and 18 a)section 1 of the Road Traffic Act 1988 (causing death by dangerous driving) or (b)section 3A of that Act (causing death by careless driving while under influence of drink or drugs.
\item 103 Detention for life or detention for public protection for serious offences committed by those under 18.
\item 104 Extended sentence for certain violent or sexual offences: persons under 18.
\item 105 It is an order prohibiting him from entering a place specified in the order for a period so specified of not more than two years, section 40A.
\end{itemize}
\end{footnotesize}
local authorities and police to tackle with anti-social behaviours. Why the Government decided to address again its attention to anti-social behaviours? First of all because of the risk, as the Home Secretary D. Blunkett declared, that ‘a yobbish minority could make the lives of hard-working citizens a living hell’; and second because ‘Crime has dropped by 27 per cent since 1997, and the chance of being a victim of crime is the lowest it has been for more than twenty years, but anti-social behaviour undermines people’s confidence that crime is being tackled and fuels a fear of crime’\textsuperscript{106}. Moving from the need for preventing not only crimes but also anti-social behaviours that cause pain to the public, the Act partially reformed that regulation introduced in 1998.

It was observed, in the Crime and Disorder approach to anti-social behaviours, a lack of efficiency due to the central-perspective from which regulation came from; it was argued that to deal with anti-social behaviours the system needed to ensure more powers to police and local authorities, that are those agencies that can directly control what’s wrong in people’s acting in social communities. In essence, what the Anti-Social Behaviour Act introduced, in addition of what had already been proposed by the Crime and Disorder Act 1998, was: new powers for social landlords\textsuperscript{107}; a package of support and sanctions to enable parents to prevent and tackle anti-social behaviour by their children\textsuperscript{108}; more powers for police to disperse groups of

\textsuperscript{106} HOME OFFICE, White Paper 2003, Respect and Responsibility - taking a stand against anti-social behaviour.

\textsuperscript{107} According with the Anti-Social Behaviour Act 2003, the landlords have the power to publish anti-social behaviour policies in order to inform tenants and members of the public about the measures they will use to address anti-social behaviour issues (section 12). When a tenant is in breach of those policies published by the landlord, he can be given an anti-social behaviour injunction by the court.

\textsuperscript{108} Section 18 and followings introduce the new Parenting Contract, aimed in reducing truancy and exclusion from school, and Parenting Orders for parents of pupils that have been excluded from school. Parenting Contracts are agreements between the local educational authority and parents, that agree to comply with specific requirements indicated (section 19); Parenting Orders are those with which the court, asked by a local
people and to deal with specified anti-social behaviours such as noise in public space, graffiti, litters; and finally a new figure of crime in relation to the ‘sale of aerosol paint to children’ aged under 16\(^{109}\).

**Criminal Justice Act 2003**: this is the last Statute that we are going to consider in the frame of domestic legislation handle youth criminal law.

The Criminal Justice Act 2003, besides reforming Bail, distinguishes the purposes of criminal sentences depending on the age of the offender: according with sections 142 and 142A, while sentencing an adult the court must have regard to ‘the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences’\(^{110}\), in sentencing offenders under 18 it must consider further elements. Section 142, in fact, provides that the principal aim of the Youth Justice System (prevention of offending by persons aged under 18) and the welfare of the offender must be the basis on which the court gives its sentence\(^{111}\).

By assuming prevention of re-offending and welfare of the young offenders as the purposes of sentencing the system considers that even in repression of juvenile offences (sentencing the offender), punishment cannot be only a

\(^{109}\) Section 54.

\(^{110}\) Section 142.

\(^{111}\) Section 142A: ‘The court must have regard to:(a)the principal aim of the youth justice system (which is to prevent offending (or re-offending) by persons aged under 18, (b)in accordance with section 44 of the Children and Young Persons Act 1933, the welfare of the offender, and (c)the purposes of sentencing mentioned in subsection (3) (so far as it is not required to do so by paragraph (a))’.
retributive reaction to crimes, but needs to pursue those values recognizable in Restorative Justice aim.

Section 156(5), moreover, disposes that when the offender is aged under 18, the court must not form its opinion – about giving a community sentence rather a discretionary custodial sentence - unless taking in consideration the pre-sentence report, being the pre-sentence report a report written, in case of young offender, by a local social worker or a member of the YOT that ‘with a view to assisting the court in determining the most suitable method of dealing with an offender’ contains information about him (his criminal record, his family and social background, his meetings with the YOT and social workers etc)\textsuperscript{112}; its aim is offering to the court a complete frame of knowledge of the offender’s background in order to ensure the court to reach the most efficient sentence for him. Through social workers and YOT contribution the pre-sentence report guarantees that each sentence is directed to prevent re-offending, offering a punishment and a scheme of work with the offender that’s properly built in relation with his particular situation.

Pre-sentence reports, especially in youth justice, have a strong relevance in relation with the process of sentencing a youth: even if the court, after having considered the report, is allowed to give a sentence that’s not the one suggested by the YOT, in practice what’s contained in that report is what the court chooses in most of the time.

By the co-operation of the purposes of sentencing listed in section 142A and the pre-sentence report regulated in sections 156 and followings, Criminal Justice Act 2003 veers to an individual-oriented design of prevention through which each offender receives the treatment that most can help him

\textsuperscript{112} Section 158.
not to re-offend. ‘To prevent offending by children and young persons’
becomes a principle that, applied to each offender, can be changed in ‘to
prevent this specific offender to commit further crimes’.
1.2 MINIMUM AGE FOR CRIMINAL RESPONSIBILITY (MACR)

Young Offenders? The age of the offender
What justifies a separate criminal system for dealing with young offenders, is the acknowledge of young people’s specific needs and treatments due to their immaturity.
Both England and Italy have recognized the necessity of dedicating to young offenders a part of criminal system, with principles and rules specifically built on the typicality of young persons. Both of them, indeed, recognize that dealing with a young offender instead that with an adult requires particular devices that take into consideration the status of young offenders.

Once accepted that juveniles need, because of their age (and, sub sequentially, because of their immaturity), treatments different to adults’ ones, the notion of juveniles has to be defined. In other words, if particular rules apply to those who are young, we clearly have to establish what young means.

The relevance of the offender’s age, in a criminal perspective, requires different approaches according with different ages. The practical consequence is that law has to fix an age-range where the specific status of young people is recognized and protected by the Youth Justice System rules. And in fixing the starting point of this range, the establishment of the minimum age for criminal responsibility (that is the age when a child starts to be considered criminally responsible for his actions) is an essential precondition.

That when the offender is too young even for applying those rules that characterize the juvenile system he cannot be considered criminally responsible, is something commonly accepted. The problem, however, is to understand when children end to be too young for that.
If everybody would probably agree that a two-years-old who steals a toy in a shop cannot be considered criminally responsible for theft because too young to understand the meaning of his action, what about a twelve-years-old? Is he still too young or can we consider that twelve is an adequate age to believe that he knows that what has done is wrong and, then, must be punished for breaching the criminal law?

A solution is not commonly accepted; the problem of the minimum age for criminal responsibility (MACR) is differently resolved in each criminal system, and even our two reference systems (England and Italy) assume different ages for the starting of criminal responsibility: while Italian criminal code considers *non imputabile* (not criminally responsible) who, when the offence was committed was not at least fourteen, the English system fixes its MACR at ten.

Because of the problems that MACR involves and because of the debate that it rose in the last decades in England (that moves also from international recommendations), we are going to dedicate an entire chapter to the analysis of the antecedents and consequences connected with it.

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113 Codice Penale, art. 97: ‘Non è imputabile chi nel momento in cui ha commesso il fatto, non aveva compiuto i quattordici anni’.

114 Children and Young Persons Act 1933, as modified by the Children and Young Persons Act 1963, s.50: ‘It shall be conclusively presumed that no child under the age of years can be guilty of any offence’.
MACR: concept and history
The concept of personal responsibility is the heart of the whole criminal system\textsuperscript{115}. In “Principle of Criminal Law”, A. Ashworth defines the Principle of individual autonomy as the justification of criminal law itself; according with it, each individual must be considered (criminally) responsible for his own actions\textsuperscript{116}. And this principle finds its justification in the philosophical concept of Free Will, as “the factual element in autonomy is that individuals in general have the capacity and sufficient free will to make meaningful choices”\textsuperscript{117}. Because of the free will, each individual is capable of choosing his own behavior, and consequentially he’s considered responsible for his own actions according with (not only) criminal law. The basic general assumption in criminal responsibility, thus, is that “sane adults may properly be held liable for their conduct and for matters within their control, except in so far as they can point some excuse for their conduct”\textsuperscript{118}.

The problem of children’s criminal behavior has to be discussed in the frame of these considerations about individual criminal responsibility. Children below a certain age “do not have the status of being responsible agents and that excepts them from criminal responsibility without any investigation into whether have fulfilled the conditions of a criminal offence”\textsuperscript{119}. Using Tadro’s words, they lack of a “status responsibility” and

\begin{footnotesize}
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\item See ELLIOT C., Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice, Journal of Criminal Law 75 (289), 1 August 2011.
\item ASWORTH A. and HORDER J., Principles of Criminal Law, Oxford 2013, pag.23.
\item Ibid.
\item Ibid, pag.24.
\end{enumerate}
\end{footnotesize}
then, they’re not able to choose consciously and freely whether behave into a manner or another. In other words “children only have limited personal autonomy and therefore do not have the capacity and freedom to make this choice, and there is therefore a fundamental injustice when criminal responsibility is imposed on children”; and, again “at the heart of the criminal justice system is the power to punish - criminal responsibility should be imposed on people who deserve to be punished; to impose a punishment the criminal law should be looking for personal responsibility which requires capacity and choice which in themselves are a reflection of personal autonomy; young children lack capacity and they are not autonomous individuals”. Indeed criminal responsibility should only be imposed on those who have the “ability to live within reason”.

The need for a minimum age below which the child is not criminally responsible for his behavior comes from these principles; they require an age that fixes a line between the age of no-liability and the age of liability to be defined.

Although the general agreement about the need for establishing a minimum age for criminal responsibility (MACR), there is not, at international level, any common intent about which age has to be the one when responsibility begins. Various have been, in time and space, experimented by international criminal systems; we are going to analyze which is the British one and to underline its past and present critical aspects.

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120 ELLIOT C., Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice, Journal of Criminal Law 75 (289) 1 August 2011.
121 ELLIOT C., Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice, Journal of Criminal Law 75 (289) 1 August 2011.
About the particular status-responsibility of children, the Common Law elaborated two different principles. The first one is the one according with which no child under the age of 7 can be considered capable of a criminal intent, thus no child under this age can be prosecuted for a fact considered as a criminal offence. The second one is the presumption of Doli Incapax (abolished in 1998 by the Crime and Disorder Act) for offenders under the age of 14 that considered that they could not be prosecuted unless it’s proved that their ‘mischievous-discretion’ – in this case that presumption could be rebutted.

The Children Act 1908 plays a central role in the whole juvenile criminal system evolution; it set up a new juvenile jurisdiction separated from the one dedicated to adult crimes. By incorporating such common law principles, the Children Act 1908 disposed that on the one hand the criminal system cannot prosecute children younger than 7 and on the other hand juvenile offenders aged between 7 and 16 years old have to be prosecuted in the new jurisdiction dedicated to them. Among scholars there is who describes that mechanism writing that “if the period from birth to seven years was looked on as one of moral absolution, the ensuing nine years from seven to sixteen could best be characterized as a kind of moral quarantine”

Seven, thus, was the minimum age requested by criminal law and by the Children Act 1908 for imputing to an individual his criminal responsibility. It was only in 1933 that MACR was raised to 8, with the Children and Young Persons Act 1933

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124 Children and Young Persons Act 1933, s. 50: “it’s conclusively presumed that persons under the age of 10 cannot be guilty of any offence”.
In the following years, however, the necessity of raising MACR became stronger, even on the basis of the development of the welfare children system. Scholars began to observe that a criminal treatment against such a young child appeared completely disproportionate, and that no child aged 8 was mature enough to understand that responsibility lying in his choices and its consequences. Besides the lack of free will that we individuated as the basic justification of the criminal treatment imposed by State, moreover, that immaturity complicates the celebration of the criminal proceeding that a child cannot understand, with relevant effects in regard to the right to a Fair Trial disposed by European Convention of Human rights in article 6, where the ‘Effective Participation’ is an essential precondition.

In the early ‘60s a reform project was published, by an apposite commission that, inter alia, suggested to raise the MACR from 8 to 12; the ambitious project, however, was muted by the consequent Children and Young Person Act 1963, that limited the raising at 10. Such a weak reform did not gratify those who were fighting for the MACR to be significantly raised up, and the debate still opposed two different groups of opinion.

A new proposal was raised by who argued that the initial term for the criminal responsibility should correspond to the age of biological development (puberty), that’s the fifteenth year; on the other side the study group headed by Lord Longford, being the idea behind that “we should accept that school children are still being formed by their education

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126 Ingleby Committee was established in 1956; it published its final report in 1960.
127 Children and Young Persons Act 1963, s.16(1): ‘Section 50 of the principal Act shall be amended by substituting therein the word “ten” for the word ”eight”’.
128 See Longford Committee, established in 1963 by the Labour Party; it published its report in June 1964.
129 Instituted by the Labourist Government in 1963.
rather than the enforcement of personal responsibility through punishment or penal treatment”\textsuperscript{130}.

The pressures for a new reform were synthesized in the Children and Young Person Act 1969 as elaborated by the Labour Government that, inter alia, proposed the rising of the MACR to 14; accepted as the “the highest point of therapeutic familialism as a strategy for government through the family”\textsuperscript{131} it was hindered by the conservative government that took the power in 1970 and did not approve sections 4 and 5, considering not necessary to modify the MACR, probably because politically closed to police and magistrature, both of them in disagreement with the juvenile welfare system proposed by the Act\textsuperscript{132}.

Common law presumptions

The \textit{doli incapax} is that presumption according with which common law presumed all children under the age of fourteen incapable of committing any offence unless the prosecutor couldn’t prove their consciousness about their wrongdoing; for that “when \textit{doli incapax} is raised it places an evidential burden on the prosecution to show that the child knew that the prohibited conduct was more than merely naughty or mischievous, but that it was

\textsuperscript{130} JONES H., in a written submission, cit. in PRIESTELY P. \textit{Justice for Juveniles - the 1969 Children and Young Person Act: a case of reform?} United Kingdom, 1977, pag.13: “In this second hypothesis the problem still open with regard to which was the age when those school programs end, as since the early 50’s a the general tendency to continue the school even after the limit fixed by law (age of fifteen) was registered”.


actually wrong--seriously wrong". The doli incapax presumption was abolished by the Crime and Disorder Act 1998 s.34. From a procedural point of view, the concept of doli incapax includes both the presumption and the defense that we know with this name; after the Crime and Disorder Act, that in s.34 referred to the abolition of the presumption of doli incapax for children under the age of ten, it was doubt whether or not section 34 had abolished only the presumption or the whole concept. In R v JTB (2009) the issue rose in an appeal against the conviction of a child aged 12 at the time of the offence who claimed that he had not thought that what he was doing was wrong thus, not being the defense of doli incapax specifically abolished by s.34, he still had the possibility to arise it. But Lord Phillips of Maltravers, in giving the leading judgment when the matter reached the House of Lords that the concept of doli incapax did not have a separate existence from the presumption and consequently s. 34 of the Crime and Disorder Act 1998 must have been intended to remove both presumption and defense.

With the Sexual Offences Act 1993 Parliament had abolished also the common law presumption according with which a boy aged under 14 had to be considered physically incapable for committing sexual violence acts

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134 CDA 1998, s.34: “The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished”.
135 In other words, it was questioned whether or not, after the Crime and Disorder Act, the defence of doli incapax was still exist.
136 See Lord Philips of Worth Matravers in R. v JTB (Court of Appeal criminal division 2009, par.7: “The defense of doli incapax and the rebuttable presumption were two different things. In recent times they had, however, always coexisted. It had become customary to speak of "the presumption of doli incapax" as embracing both the presumption and the defense. In using the language of section 34 Parliament intended to abolish both the presumption and the defense. While it is not possible to reach this conclusion from the language of section 34 alone, it can be firmly founded once extrinsic aids to interpreting that section are taken into account”.

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(presumption of sexual incapacity)\textsuperscript{137}. By reading together those two abolitions, therefore, s.34 has the effect of making the child responsible for his actions as he was an adult.

In relation to that, some students argue that the gap caused by the abolition of doli incapax presumption needs to be reviewed, as “while there were clearly problems with the defense of \textit{doli incapax} (…), its abolition represents a move towards 'adultification' and the gap left by the abolition of the old defense needs to be filled with a new defense that more accurately reflects the reason why children should be treated differently from adults”\textsuperscript{138}; the idea supported by Elliot is that the doli incapax presumption failed in placing all its emphasis on children’s responsibility for their conduct while the correct (and needed) approach to a meaningful defense would be considering the lack of autonomy they suffer because of the influence of external factors (parents, school, society) on their choices. On this basics it would be important to introduce a new defense which focuses not discretionary on child's personal moral development but on child's capacity and ability to choose\textsuperscript{139}.

\section*{Criticisms}

Nowadays the English system, by fixing the MACR at 10, differs from most of the other European Countries, where teenagers are considered criminally responsible starting from older ages (13 in France, 14 in Italy and Germany,

\textsuperscript{137} Sexual Offence Act 1993, s.1: ‘The presumption of criminal law that a boy under the age of fourteen is incapable of sexual intercourse (whether natural or unnatural) is hereby abolished’.

\textsuperscript{138} ELLIOT C., \textit{Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice}, \textit{Journal of Criminal Law} 75 (289) 1 August 2011.

\textsuperscript{139} Ibid.
15 Scandinavia, 16 Spain and Portugal). As it caused several critics in the past, the term of “just” 10 still raises criticisms nowadays, being scholars and professionals in daily contact with the problem doubtful in that child’s maturity is enough for accepting he’s attributed such a consequences-dense responsibility as the criminal one is.

A. Ashworth and J. Hoper question with a series of interrogatives: “however, it remains important to think about fundamental issues in relation to the responsibility of young offenders. Are they able to stand in trial at the age of 10? Do they have sufficient understanding of the proceedings to participate meaningfully in them? In what sense are they responsible citizens at that age? Can it be said that, when they do criminal things with the required formal element, they are acting as moral agents, in a sufficiently full sense?”\textsuperscript{140}

International sources took position about MACR for the first time in 1985, when the United Nations approved a resolution dedicated to ‘Standard Minimum Rules for the Administration of Juvenile Justice’ (known as The Beijing Rules); in fact rule number 4, entitled ‘age of criminal responsibility’ provides that ‘\textit{In those legal systems recognizing the concept of Criminal responsibility for juveniles, the beginning of that age shall be non fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity}’\textsuperscript{141}. It is with the commentary, moreover, that the point is better clarified: ‘\textit{the minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held

\textsuperscript{141} UN resolution 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), rule 4.
responsible for essentially anti-social behavior. Thus as we have above observed in theme of criminal responsibility, the minimum age is strictly connected with the capability of choosing with consciousness, so that ‘if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless’.

Particularly interesting is the relevance that those rules give to the desirable ‘close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities’; in English system that relationship does not exist, and some scholars argue that “in a political climate that seeks to be tough on crime, such an aspiration seems impossibly ambitious”.

The commentary closes with the recommendation for a global agreement on the MACR, writing: ‘efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally’.

A general recommendation with the same scheme is the one introduced with the UN Convention on the Rights of the Child in 1989, that in art.40(3) provides that each member shall fix a minimum age under which the child is not capable of breaching criminal law.

None of the sources we have just considered specify what this minimum age must be; Beijing rules refer to a “not too law level bearing in mind the facts...

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UN resolution 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), rule 4 commentary.

Ibid.

Ibid.


UN resolution 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), rule 4 commentary.

UN Convention on the Rights of the Child (resolution 44/25 1989), art.40(3): ‘States part shall seek to promote the establishment of laws, authorities, procedures and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and in particular (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’.
of emotional, mental and intellectual maturity” and the UN CRC doesn’t mention a particular age, not even by general expressions. The UN Committee for the Rights of the Child, however, clarified that “from these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable”\textsuperscript{149}. It follows that States parties are encouraged to increase their MACR to the age of 12 years if lower or, if higher, not to lower it\textsuperscript{150}

In the same frame we consider what recommended by the Council of Europe in 2003, who without referring to a specific individuated age, pointed out that “culpably should better reflect the age and maturity of the offender, and be more in step with the offender’s stage of development, with criminal measures being progressively applied as individual responsibility increases”\textsuperscript{151}

The problem came to the attention of the European Court of Human Rights with \textit{T. v United Kingdom, V. v United Kingdom}, a case involving two ten-years-old boys convicted with the murder of a two-years-old; this case, happened in 1993, was appealed before the Court after a domestic proceeding celebrated before the Crown Court, on the assumption of breaching of art.3 of the convention\textsuperscript{152}. In their allegations, the two boys’ lawyers argued the breaching of that article by the cumulative result of the age of the defendants, the formality of the proceeding before the Crown

\textsuperscript{149} COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 10 (2007), par.32.
\textsuperscript{150} Ibid, par.32 and 33.
\textsuperscript{151} COUNCIL OF EUROPE COMMITTEE OF MINISTERS Recommendation Rec(2003)20, n.9.
\textsuperscript{152} ECHR, art.3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

Court, the media attention to the case. It was for the Court the first occasion to discuss MACR and conclude that:

“(…) at the present time, there is not yet commonly accepted minimum age for attribution of criminal responsibility in Europe. While most of the Contracting States have adopted an age limit which is higher than that in force in England and Wales, other States, such as Cyprus, Ireland, Lichtenstein and Switzerland, attribute criminal responsibility from a younger age. Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments. 

Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed, but merely invites States not to fix it too low, and article 40 (3)(a) of the UN Convention requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no provision as to what that age should be. The Court does not consider that there is at this stage any clear common standard amongst the members States of the Council of Europe as to the minimum age of criminal responsibility. Even in England and Wales is among the few European jurisdictions to retain a law age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention”

153 ECHR, V v United Kingdom, Application n. 24888/94 par. 72-74.
The Court, thus, considered English law compatible with the Convention, in particular with art.3.

Despite the ECHR judgment, however, seemed to cheer up who was worried about the effects of a criminal system in relation to such young children, the debate did not stop.

The Children Commissioner M. Atkinson, in an interview with the Times in March 2010, declared: “the age of criminal responsibility in this Country is ten, that’s too low; it should certainly be moved up to 12. In some European Countries it’s 14. People may be offenders but they are also children: even the most hardened of youngsters who have committed some very difficult crimes are not beyond being frightened”\(^\text{154}\).

And the same kind of recommendations came in occasion of a series of seminars organized by the All Party Parliament Group for Children (in 2009 and 2010) on the theme of “Children in the Youth Justice System in England and Wales”\(^\text{155}\); their theme was synthesized in a final report, reading:

> “There are two broad consequences of having a lower age of criminal responsibility […]. The first of these is the level of youth custody. England and Wales lock up more children than any other Country in the rest of Europe. We imprison four times more young people than Portugal, 25 times more than Belgium and 100 times more than Finland. The earlier a child is drawn into the system the greater the chance that they will re-offend, the greater the chance of creating an antecedent history that will lead to further custodial sentences.

\(^{154}\) ATKINSON M., interviewed for *Times*, 13/03/2010.

The second consequence of a lower age of criminal responsibility is society’s attitude towards young people. An elevated age of criminal responsibility indicates a society viewing problematic behavior through a welfare lens of disadvantage and need. A lower age indicates a society that views young people as criminals. This is self-reinforcing. Where a 14-year-old cannot be prosecuted, services are developed to respond to their problematic behavior" 156.

Scientific research, as well, has recently given its contribution to the debate. In 2010 the Royal Society published a report entitled ‘Neuroscience and the Law’, aimed to clarify brain mechanisms in relationship with the law 157. About the relationship between cerebral development and criminal responsibility, the authors write: “In conclusion, it is clear that at the age of ten the brain is developmentally immature, and continues to undergo important changes linked to regulating one’s own behavior. There is concern among some professionals in this field that the age of criminal responsibility in the UK is unreasonably low, and the evidence of individual differences suggests that an arbitrary cut-off age may not be justifiable” 158.

In the same direction, All Parliamentary Group for Children, working on youth crime committed by girls, in 2012 recommended the necessity to “raise the age of criminal responsibility in England and Wales in line with the European average age of 14 years” 159.

157 See THE ROYAL SOCIETY, *Neuroscience and the Law*, 2010, pag.11: “As the law is primarily concerned with regulating people’s behaviour, it follows that knowledge about how the brain works may one day be of some relevance to the law”.
159 ALL PARTY PARLIAMENTARY GROUP ON WOMEN IN THE PENAL SYSTEM, *Keeping girls out of the penal system*, 2012.
To those considerations, opinions of academics and scientific experts must be added. In particular, what had a strong impact in the debate was the letter signed by E. Vizard and others, published by the Times in 2010; its peculiarity is that it moves from the substantial point of view to the procedural one, underlying that the MACR main problem is the weight of a low understanding capability upon the right of a fair trial; from that they suggest a reform that raises MACR in order to align the English system with the most of other European Countries.

*Age of criminal responsibility Bill 2013*

“There is an urgent and convincing argument for raising the age of criminal responsibility to 14 (…). Such a change would reflect what we know about child development and be in line with international and domestic recommendations. (…)The case for reform is absolutely compelling”.

The vibrant debate about MACR found in 2013 one of its most important step; one of the reason was, inter alia, the acknowledge of those reforms approved in the last years in Scotland and Northern Ireland. Considering all criticisms raised both at international and domestic level,

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160 See what written above about A. Asworth and J. Horper

161 See DR. E. VIZARD AND OTHERS, Open Letter published by *The Times* on 7/6/2010: “Sir, We are concerned about the very low age of criminal responsibility, ten years old, for children in England and Wales. The assumption that a ten-year-old can face charges is widely discussed in terms of whether or not that child can ‘understand the difference between right and wrong’. The question is more complicated — most ten-year-olds can understand that difference. The test should go beyond this and should decide whether the defendant's intellectual capacity is such that he could not effectively participate in the proceedings and accordingly have a fair trial. We believe that the age of criminal responsibility should be raised substantially in line with most other countries and propose a consultation process, led by the Law Commission, to explore how this could be rectified”.

the liberal democratic Lord Dholakia presented in May a draft bill aimed to modify section 50 of the Children and Young Person 1933; the reason why he recommends to raise the MACR from 10 to 12 years, is that “it cannot be right to deal with such young children in a criminal process based on ideas of culpability which assume a capacity of mature, adult-like decision-making”\(^\text{163}\).

The idea where this propose comes from is the necessity of taking into consideration young offenders’ social and family backgrounds, as it is statistically proved that children who commit offences have been themselves, in most of the cases, victims of crime or mistreatments. Lord Dholakia highlights that “(…) children who go through the criminal process at young age are often young people from chaotic, dysfunctional and traumatic backgrounds involving some combination of poor parenting, physical or sexual abuse, conflict within families, substance abuse or mental health problems. The prospects for diverting the child from offending will be far better if these problems are tackled trough welfare interventions than by imposing punishments in a criminal court”\(^\text{164}\).

What is argued is that if and when a child commits a criminal offence, the best response the system is required to activate is not a punishment-oriented one, but a educational and support one that considers the offence as symptom of the child’s discomfort. The idea is that responses have to be given to such young children not by the criminal system, but by welfare assistance; again, ten-years-olds shouldn’t be given a criminal punishment, but “they need a welfare-based approach, in secure care if necessary, to help them to face their unresolved trauma to develop and mature emotionally, to reach an appropriate sense of guild to learn to control their emotions and aggressive impulses”\(^\text{165}\).

\(^{163}\) HANSARD Lord Dholakia, All Lord debate on 8/11/2013.

\(^{164}\) Ibid.

\(^{165}\) HANSARD Lord Dholakia, All Lord debate on 8/11/2013.
November 2013 parliamentary debate saw several voices raised to support that purpose, some of them stressing upon young offenders’ vulnerability\textsuperscript{166}, others underlying how to understand their behavior the context where they’re inserted cannot be ignored, being this context the result of those \textit{three pilaster} represented by Family, School, Voluntary sector\textsuperscript{167}. It is, however, the eternal dispute between retributive-reaction supporters and those who believe that for dealing with young offenders an educative reaction would be enough (and more efficient): to the demand for welfare, the Government replied by denying its consent to such a reform, that would keep responsibility off from juveniles, making them less conscious about their criminal behaviors\textsuperscript{168}. On the one side Parliament supports a reaction that keeps into consideration the young person as a individual who needs protection; but on the other hand the conservative ideology breaks with these claims considering that even from the educative point of view a punitive reaction will be stronger than a softer forgiveness. As clearly argued by the minister Lord Ahmad of Wimbledon: “The Government currently have no plans to raise the age of criminal responsibility from 10 to 12. We believe that children aged 10 and above are able to differentiate between bad behavior and serious wrongdoing and should therefore be held accountable for their actions. When young persons have committed an offence, it is important that they understand that is a serious matter and will be dealt with a such. The public must also have confidence in the youth system and know that offending will be dealt with effectively”\textsuperscript{169}.

\textsuperscript{166} HANSARD Francis Hare (the Earl of Listowel), All Lord debate on 8/11/2013.
\textsuperscript{167} HANSARD Alastair Redfern (the Lord Bishop of Derby), All Lord debate on 8/11/2013: “each human being is a person who’s who they are because of their relationships with others. Crime is when relationships go wrong or are handled destructively”.
\textsuperscript{168} See HANSARD, All Lord debate on 8/11/2013.
\textsuperscript{169} HANSARD Lord Ahmad of Wimbledon, All Lord debate on 8/11/2013.
Those different positions that have historically opposed different alignments today still do it. The MACR reform, indeed, even if desirable, does not seem to have an immediate epilogue.

Anyway it is not only an English problem. Reform purposes have been risen and concretized in Scotland, with the Criminal Justice and Licensing (Scotland) Act 2010; with it, the Scottish Parliament has increased from 8 to 10 the minimum age for the criminal responsibility not by changing the rules about the capability of committing criminal offences (that still fixed at 8), but the ones about the system capability of reacting against the offender with a criminal proceeding.170

Northern Ireland, on the other hand, although the Minister of Justice’s requirement of September 2011 for rising the MACR from 10 to 12, has not reached any solution yet; this reform, anyway, is one of those supported in “A Review of the Youth Justice System in Northern Ireland”171.

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170 Criminal Justice and Licensing (Scotland) Act 2010, sez.52 (2)(1): “A child under of 12 years may not be prosecuted for an offence”.

171 GRAHAM J., PERROTT S., MARSHALL K., A Review of the Youth Justice System In Northern Ireland 2011, pag.165: “Taking account of all the views and evidence at our disposal, we have concluded that the minimum age should be increased to 12 forthwith and, following a period of review and preparation, perhaps to 14”. Available at http://www.dojni.gov.uk.
Par.2: THE LEGISLATIVE APPROACH TO JUVENILE OFFENDING: FROM WELFARISM TO THE ‘JUSTICE MODEL’

The age of the offender expresses its relevance also in terms of how the legal approach to juvenile crime should be. Whether a young offender has to be excused because of his young age or punished as an adult, ignoring forgiveness connected with his/her age, is the eternal dilemma that has historically characterized the English system and that has been the basis for the most important reforms.

The problem with juvenile offenders is the “constant tension between the welfare and the punitive model”\textsuperscript{172}, a tension that took the whole English youth criminal system, historically inspired to the need for welfare, to a diametrical changing in 1997 with the paper significantly entitled “No More Excuses”\textsuperscript{173}.

We are going to analyze this historical changings in order to have a clearer image of the contemporary reality.

2.1 WELFARISM: FROM THE CYPA 1933 TO THE 1990S

“On the one hand, children are persons and so should be entitled to all those rights which adults have. (...) On the other hand, children as a group are developmentally and physically immature compared with adults, resulting in greater vulnerability and lower levels of competence. Adequately protecting the child’s interests might therefore demand differential treatment in order to take into account the special characteristics and needs which thus

\textsuperscript{172} STACHON V., \textit{The principles of punishment applied to children within the juvenile justice system}, UCL Jurisprudence Review 2007 13, 53-73. In general, for the tension between punishment and welfare see also NEWBURN T., Crime and Criminal Justice Policy, London 1995 pag.128 and followings.

Drakeford synthesizes the co-existence of those apparently opposite elements by referring to the ‘double status’ of young offender, who’s at the same time a child and an offender. Depending on which one of these status we focus on, the approach for dealing with the offender changes, as the child-status requires a welfare-oriented model approach and the offender-status a punitive one. Despite Drakeford’s argues that a “child’s primary status is still offender, not child: again, the child’s status as child affects only the content of but not entitlement to the right”, this is not the only possible conclusion. Different conclusions about the relevance of those two statuses in youth offenders lead to different conclusions about the aim of youth criminal justice: indeed, the British criminal system perspective about this matter changed in the past depending on political and social evaluation of childhood and offending. The purpose of this chapter is to retrace those historical changes that took the system of juvenile justice from a ‘welfare model’, to the actual ‘justice model’.

Moreover, childhood and youth have been seen by the law system alternatively as values or problems. “The tension between the innocence and danger posed by youth is reflected in the very history of the juvenile justice system, a history that is itself complex and full of contradictions; it is also as a result of this tension, that the system oscillated between two different approaches on young offenders.

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175 Ibid: “The sentence itself and the deprivation of liberty are the punishment (evaluative function), but the way t child is looked after, and what happens to him/her after the sentence has been served, relates to his/her status as child, not offender. At both of these stages then, the child’s primary status is child”.
The Children and Young Person Act 1933 disposed that “every court in dealing with a child or a young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training”\(^\text{177}\). The ‘Welfare Principle’ here established and then confirmed by the UN convention on the Rights of the Child (requiring that in all actions concerning children the ‘best interest of the child’ shall prevail\(^\text{178}\)), was of general application: it operated in all courts and whether the child was the defendant or a witness. For the following years Welfarism still characterized the general legal approach to young offenders, and particularly during the 1960s the prevailing political view saw in youth offending an indication of maladjustment, immaturity or damage personality to be treated in much the same way as an illness or disease instead of as a criminal problem\(^\text{179}\). In 1968 the White Paper *Children in Trouble* observed that “it is probably a minority of children who grow up without ever behaving in ways which may be contrary to the law. Frequently such behavior is no more than an accident in the pattern of a child’s normal development”\(^\text{180}\), and on this basic considerations *Children in Trouble* was followed by the proposal of reforming the Children and Young Person Act 1933 with a group of measures directed to increase the welfare approach, such as increasing the minimum age for criminal responsibility from 8 to 14 years and replace criminal with care proceedings for young offenders; it was the new Conservative Government elected in 1970 that chose not to implement those sections of the Children and Young Persons Act 1969, criticized for being too permissive.

\(^{177}\) Children and Young Persons Act 1933, s. 44.

\(^{178}\) UN Convention on the rights of the Child, art.3.

\(^{179}\) See . MUNCIE J., *Youth and Crime*, London 2004

\(^{180}\) HOME OFFICE, *Children in Trouble* 1968, pag.3-4.
What was observed is that, despite a legislative approach oriented towards welfarism, during the 1970s statistics registered a significant increment of young persons in custody as an indirect consequence of the Children and Young Persons Act 1969. The recommitment to custody was based on three main factors: the popular belief that youth crime was increasing, the tendency on part of magistrates to give custodial sentences, the role of welfarism in anticipating the legal intervention at an increasingly early age; the result was that while legislation stressed the importance of guaranteeing appropriate care to each individual child, magistrates and police tended to stress punishment\textsuperscript{181}. It was significantly argued that “the tragedy that has occurred since can be best described as a situation in which the worst of all possible worlds came into existence – people have been persistently led to believe that the juvenile criminal justice system has become softer and softer, while the reality has been that it has become harder and harder”\textsuperscript{182}.

The 1980s saw the growing of critiques of welfare, based in particular on the consideration of its contradictions and the belief that the justice system had become too soft on crime. The persistent ground of criticism on welfarism was that a “rhetoric of benevolence and humanitarianism often blinds us to its denial of legal rights, its discretionary and non-accountable procedures and its ability to impose greater intervention than would be merited on the basis of conduct alone”\textsuperscript{183}.

In 1979 Conservative Party published its political manifesto explaining the intention to bring a revival of punitive criminal justice values by increasing

\textsuperscript{181} See MUNCIE J., Youth and Crime, London 2004, who also argues, referring to the role of welfarism in drawing juveniles into the system at an increasingly early age, that ‘Welfare, rather than being benevolent, was an insidious form of control’.


\textsuperscript{183} MUNCIE J., Youth and Crime, London 2004 pag.258.
‘law and order measures’ to deal with juvenile offenders; it was the political response to the new ‘back to justice’ movement that commentators had begun to support against the welfarism model, a response confirmed by the incoming primer minister M. Tatcher who attacked those who had created a ‘culture of excuses’ and promised her government would re-established a code of conduct that condemns crime plainly and without exception. The Criminal Justice Act 1982, however, was inspired not only by this tendency to harsher punishments for young offenders, but also by opposite elements that still stressed the importance of a welfare and care attitude; it attempted to limit the use of custody for young offenders even on the consideration of those academic studies confirming that youth incarceration was not only harmful and counterproductive for juveniles but also quite expensive to maintain. The paradoxical consequence was a relevant decrease of custody during the period of Tatcherism.

Despite the successful results reached by criminal policies during the 1980s, in the first 1990s public opinion about legislative ways of dealing with young offenders was that they had become too lenient. The influence of ‘moral panic’ affected many politicians and the House of Commons Home Affairs Committee (HAC), that in 1992 announced it would be enquiring into issues surrounding juvenile offenders and particularly persistent

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184 Conservative Party Manifesto, 1979: “The most disturbing threat to our freedom and security is the growing disrespect for the rule of law. (...) We will therefore amend the 1961 Criminal Justice Act which limits prison sentences on young adult offenders, and revise the Children and Young Persons Act 1969 to give magistrates the power to make residential and secure care orders on juveniles. (...) In certain detention centers we will experiment with a tougher regime as a short, sharp shock for young criminals”.


offenders. In this frame, the final ingredient was the murder of J. Bulger (two-years-old) by J. Venables and R. Thompson, both of them aged 10 at the time of the fact; public opinion was so shocked that it looked like the first time people realized that even a child can be capable of evil resulting that those two kids were criminalized and demonized not only by public, but mostly by medias. "Society needs to condemn a little more and understand a little less" was the exhaustive comment of the Prime Minister John Major that marked the turning point in approaching young offenders.

In 1996, the Audit Commission published ‘Misspent Youth – Young People and Crime’ a report aimed to analyze juvenile deviance and crime with particular attention to their causes in order to suggest useful recommendations for reforming the juvenile criminal system; it closed with the castigation of the justice system as expensive and inefficient, the closure comment synthetizing: “The current system for dealing with youth crime is inefficient and expensive, while little is being done to deal effectively with juvenile nuisance”. In such a warm debate, even the Labor Party abandoned the welfare idealism to move towards a justice system where “The basis of this modern civic society is an ethic of mutual responsibility

187 “We decided on this inquiry both because of public concern about the level of juvenile crime in particular, and because of the apparent inability of the criminal justice system to deal adequately with it.” (HAC 1993).
188 See The Daily Star, that on 25 November 1993 ran a front page headline beneath photographs of the young defendants which asked, “How do you feel now you little bastards?”; see also The Guardian of 27 November 1993, who branded the two ‘the spawn of Satan’.
189 AUDIT COMMISSION, Misspent Youth 1996, par. 152: “The current system for dealing with youth crime is inefficient and expensive, while little is being done to deal effectively with juvenile nuisance. The present arrangements are failing the young people - who are not being guided away from offending to constructive activities. They are also failing victims - those who suffer from some young people's inconsiderate behaviour, and from vandalism, arson and loss of property from thefts and burglaries. And they lead to waste in a variety of forms, including lost time, as public servants process the same young offenders through the courts time and again; lost rents, as people refuse to live in high crime areas; lost business, as people steer clear of troubled areas; and the waste of young people's potential”.

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or duty, it is something for something. A society where we play by the rules, that's the bargain”\(^{190}\); it proposed a new approach to law and order (‘tough on crime, tough on the causes of crime’) and in particular a new significantly more effective system of youth courts\(^{191}\).

2.2: NO MORE EXCUSES

“To respond effectively to youth crime, we must stop making excuses for children who offend. Of course there are social, economic and family factors which affect the likelihood and the nature of youth crime. But understanding this helps us to comprehend, not to condone, youth crime. As they develop, children must bear an increasing responsibility for their actions, just as the responsibility of parents gradually declines but does not disappear — as their children approach adulthood. The Government is determined to reinforce the responsibility of young offenders — and their parents — for their delinquent behavior”\(^{192}\).

\(^{190}\) T. BLAIR’s speech “Blair’s “Single Mothers Won't Be Forced To Take Work”, 1997.

\(^{191}\) Labour Party Manifesto 1997: “Under the conservatives, crime has doubled and many more criminals get away with their crimes: the number of people convicted has fallen by a third, with only one crime in 50 leading to a conviction. This is the worst record of any government since the Second World War . (...) We propose a new approach to law and order: tough on crime, tough on the causes of crime . (...) Youth crime and disorder have risen sharply, but very few young offenders end up in court, and when they do half are let off with another warning. Young offenders account for seven million crimes a year. Far too often young criminals offend again and again while waiting months for a court hearing. We will halve the time it takes to get persistent young offenders from arrest to sentencing; replace widespread repeat cautions with a single final warning; bring together Youth Offender Teams in every area; and streamline the system of youth courts to make it far more effective”.

\(^{192}\) HOME OFFICE, No More Excuses — A New Approach to Tackling Youth Crime in England and Wales, 1997, cap. 4, parr. 4.1 e 4.2.
With these words the Audit Commission expressed a new approach that would be implemented starting from 1998, crystallizing it in a report exhaustively entitled *No More Excuses — A New Approach to Tackling Youth Crime in England and Wales*. Considering those unsatisfactory results where the historical ‘excuse-culture’ had brought by promoting the idea that a younger who offends is just a child who needs care and protection, ‘No More Excuses’ represented the awareness of the need for political efficient responses to juvenile crime that take into consideration the importance of a punishment in regard to a young offender’s consciousness about his (criminal) behavior. The welfare system, it was observed by the Home Office in its analyze, did not offer an educational approach to youth crime; by offering to young offenders only care and welfare-inspired responses, it would be reached a double counterproductive effect: on the one hand a culture of excuses that suggests a bland reaction against crimes, with significant negative effects in terms of general prevention; on the other hand the lack of instruments to make the offender conscious about why not re-offending again does not deal with particular prevention.

Each delinquent behavior needs a significant response, even if committed by a child. Young offenders have to be given responsibility for their behavior; beside being a proportionate return in relation to the harm caused with the crime, it seemed to the Home Office the only way through which law can ensure them to understand why not to commit further offences.

Appreciable emphasis was put on the role of this new approach in preventing crimes; it was argued that the criminal system needed to work preventing youths to commit offences, and that one of the necessary steps along the way of youth crime prevention had to be the avowal of their responsibility.
This new approach to juvenile justice brought the Home Office to design the principal aim of all legal interventions as following: “We know that those who start committing offences at an early age are more likely to become serious and persistent offenders. So the Government’s youth justice reforms will focus efforts on preventing offending, on early and effective intervention to stop children and young people being drawn into crime and, if they are, to halt their offending before it escalates” 193.

How was prevention supposed to relate with the traditional belief that children in trouble with the law needed more care than punishment? “The Government does not accept that there is any conflict between protecting the welfare of a young offender and preventing that individual from offending again. Preventing the offending promotes the welfare of individual young offender and protects the public”194; thus, in Home Office’s opinion, there’s not contradiction between preventing youngsters committing criminal offences and offering them adequate protection: to keep them far from crime is itself part of a welfare-inspired project that wants to guarantee them a global safe life context.

The definitive abandonment of welfarism came with the Crime and Disorder Act 1998, that implemented those imperative principles indicated in No More Excuses in order to refine the system but did not refer in any of its provisions to children welfare. On the basics of the Home Office recommendations, it introduced procedural reforms to create an efficient system built upon new structures such as the Youth Justice Board (YJB) and the Youth Offending Teams (YOTs) and the new emphasis given to crime prevention by section 37195. With Crime and Disorder the ‘excuse-culture’

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193 AUDIT COMMISSION, No More Excuses – A New Approach To Tackling Youth Crime In England and Wales, pag.6.
194 Ibid, pag.7.
195 Crime and Disorder Act 1998, s. 37: ‘ It shall be the principal aim of the youth justice system to prevent offending by children and young persons.In addition to any other duty to
was replaced by a youth justice system aimed to prevent youngster to offend or behave in anti-social manners, becoming the individuation and annihilation of the causes of crime and juveniles ‘at risk’ its main task, and being it “the first piece of criminal justice legislation in England and Wales to act explicitly against moral/social transgressions as well as law breaking”196.

If we consider that all these changes came from the ‘No More Excuses’ strategies, it’s interesting to observe how instead of being a changing from a culture of excuses to a culture of punishment, it is a shift from a tenue and insignificant approach to a new one that strongly reacts with juveniles who offended not only in order to ensure a repressive punitive response, but also (and this is the main aim of the new system) in order to offer a complete, exhaustive mechanism of prevention where the acknowledge of juveniles’ responsibility for their (criminal) actions is just one of the numerous steps. Even if public opinion asked for hasher reaction against youth crime in order to overcome that approach that had offered just welfare and care for years, forgetting the punitive aspects of punishment that criminal offences always requires, with suggestions contained in No More Excuses and its implementation in the Crime and Disorder Act, it was introduced a more refine reform of criminal justice, not only harder with offenders but also aimed in pursuing long-term goals.

2.3: RESTORATIVE JUSTICE: THE NOWADAYS SYSTEM

Beside implementing recommendations addressed by the Home Office in No More Excuses, the Crime and Disorder Act 1998 was also the first legislative statute inaugurating that alternative way of responding to

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which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim’.

offending behaviours that’s been called ‘Restorative Justice’; introduced by the principles contained in Section 37, it recognized prevention of youth crime as the main aim of the whole juvenile justice system, and in YOTs and YJB as new instruments used to persecute a justice model which aim was no longer the simple punishment of juvenile offenders, but the restorative one, synthesized in the scheme of “the three Rs”: restoration, reintegration and responsibility.

As Misspent Youth stressed in 1996 “Appropriate help and support for young people who are at risk of offending, but have not yet done so, can prevent some of them from getting involved in crime”; restorative justice is the legal response to those recommendations that underlined the need for significant interventions in giving to young offenders not only all they need be kept away from crime, but also the possibility to repair the harm they caused if the crime has already been committed.

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198 See chapter 1.

For an analysis of the historical evolution of the concept of Reparative Justice, see ZEDNER L., Reparation and Retribution: Are They Reconcilable?, The Modern Law Review, Vol. 57, No. 2 Mar., 1994 (228), that retraces it from its Anglo-Saxon origins to the late twentieth century, that “have proponents of reparative justice revived the argument that crime should be seen not only as a wrong against society but also as a dispute between offender and victim requiring resolution”.

199 AUDIT COMMISSION, Misspent Youth – Young People and Crime, 1996 par.79: “While public services clearly need to deal effectively with offending behaviour by young people, it would be better to prevent the offending behaviour in the first place. Appropriate help and support for young people who are at risk of offending, but have not yet done so, can prevent some of them from getting involved in crime. Although there is no way of predicting accurately which individuals are going to offend, young people in certain categories or circumstances are at much greater risk than others”.
By making the offender to repair (partially or totally) to the damages he caused, Restorative Justice persecutes different aims: to repay society ripristinating the pre-offence balance and to give the offender the occasion to understand his mistakes in order to avoid further crimes (or anti-social behaviours). “Restorative justice is about encouraging offenders to accept responsibility and make reparation for their offending but efforts must also be made to restore offenders’ sense of belonging and reintegration into the community”; it results to be such important in juvenile justice perspective that among commentators somebody argues that “in juvenile justice there should be no retribution”, as to persecute the principal aim of Youth Justice System the imperative is ensuring to juvenile offenders a way to “learn the lesson and never repeat the wrongdoing”. Even in terms of crime prevention, it has been argued that since “punishment has a very limited ability to control crime and, to the extent that it is disintegrative, it inflicts further damage on society” new solutions need to be given, thus “it is time to explore the integrative potential of reparative justice on its own terms.”

Not least, the benefits that such a kind of justice has in terms of costs. As Zedner highlights, in fact, considering custodial penalties, “to the social costs of crime are added the further costs of punishment. The financial costs

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200 See ZEDNER L., Reparation and retribution: are they reconcilable?, in VON HIRSCH A., ASHWORTH A., ROBERTS J., Principled Sentencing – reading on Theory and Policy, Oxford 2009, pag.190: “reparation is not synonymous with restitution(...). Reparation should properly connote a wider set of aims. It involves more than ‘making good’ the damage done to property, body or psyche. It must also entail recognition of the arm done to the social relationship between the offender and the victim, and the damage done to the victim’s social rights in his/her property or person”.


202 T. HAMMARBERG, A Juvenile Justice Approach Built on Human Rights Principles, Youth Justice 2008 vol8(3), pag. 194: “In juvenile justice there should be no retribution. The intention is to establish responsibility and, at the same time, to promote re-integration. The young offender should learn the lesson and never repeat the wrongdoing”

of traditional punishments (above all imprisonment) to the taxpayer or to society are generally a heavy burden. To the extent that these penalties are seen to fail, their costs become unjustifiable.\textsuperscript{204}

The first steps on the way of Restorative Justice were introduced, as written above, by the Crime and Disorder Act\textsuperscript{205}, and from since the entire legislation of the 2000s has been inspired by those principles more and more, constantly increasing in offering mechanisms through which making the offender to repay the victim and the community\textsuperscript{206}.

Once it has been assumed that Restorative Justice, thus, is the new model of Justice implemented in the last years, it has to be asked whether or not it represents a sort of coming-back to welfarism. Does Restorative Justice as nowadays implemented means that even the \textit{No More Excuses} attitude has been forgotten? Or is it compatible with the ‘Responsibility-oriented’ attitude recommended by the Home Office in 1997?

The green paper \textit{Every Child Matters} (2003) aimed to “reduce the numbers of children who experience educational failure, engage in offending or anti-social behaviour, suffer from ill health, or become teenage parents”\textsuperscript{207}, seems supporting the second one. Although its central aspiration is to ensure to children a safety background, regarding the ones who are in trouble with the law the report provides that “When children and young people engage in anti-social behaviour or commit offences, we need to ensure that they to face up to their actions and redress the harm they have caused. We also need

\textsuperscript{205} See introduction of Reprimands and Warnings, parenting orders, Child safety orders and Child curfews.
\textsuperscript{206} One of the most relevant examples is the Referral Order introduced by the Youth Justice and Criminal Evidence Act 1999.
\textsuperscript{207} CHIEF SECRETARY ON THE TREASURY BY COMMAND OF HER MAJESTY, Every child matters, September 2003, pag.5.
to ensure that the system tackles the underlying causes of such behaviour”; all of that “ensuring that there are more effective powers to intervene positively to address the behaviour of children under 10 who commit what would be offences if they were over the age of criminal responsibility”\textsuperscript{208}. Thus, on the one hand the Green Paper recognizes that the welfare of children cannot be ignored, but on the other hand it still recommends measures strong enough to attribute to the offender his responsibilities. The same approach can be find in \textit{Youth Justice – the ext steps}, accompanying the green paper and explaining that “When children and young people do become involved in crime we would continue to operate a distinct youth justice system broadly on present lines, with a clear and visible response to offending behaviour from age 10 upwards. This is the right way to maintain and indeed improve public confidence in our response to youth crime”.

Moreover, it can be concluded that even if Restorative Justice could represent the risk to bring the system back to the welfare-approach rejected in the last 1990s, that risk has not concretized. On the contrary, some students argue that Restorative Justice has, sometimes, caused offenders to be punished with harsher treatments than the ones typically provided in a punitive system\textsuperscript{209}. This is due to the basics assumption of Restorative Justice, that’s the role of the victim in the process of re-paying involving who committed a crime; as “restorative justice recognises that crime is a violation not simply of the law but rather of people and their relationships”\textsuperscript{210} the victim plays a central role in that retributive procedure.

\textsuperscript{208} Ibid, pag.33.
\textsuperscript{210} ROCHE D., \textit{Accountability in Restorative Justice}, Clarendon Press 2003. On the role of the victim in restorative justice see also ASHWORTH A., \textit{Victim Impact Statements and
that it’s asked the offender to follow, but this victim-central perspective risks to cause a “response to youth crime that is more punitive and hateful, fuelled by an emotional empathy for victim’s suffering”\textsuperscript{211}. And this risk appears even stronger if we consider that Restorative Justice, despite its aim is oriented to offer significant and useful occasions to repair, is coercively imposed upon the offender, who cannot refuse those treatments that the system provides in his favour. Rather or not coercion can be justified on the basis of those high ideals that Restorative Justice pursues is not common agreed\textsuperscript{212}.

\textsuperscript{211} FIONDA J., Devils and Angels – Youth Policy and Crime, Hart Publishing 2005, pag.174: “In theory, restorative justice seeks to reduce social exclusion through its integrative approach, protecting the needs and interests of both the victim and the offender, and re-balancing their social position as an outcome to their conflict. However, in practice there is a danger that restorative justice is misunderstood and that undue focus on the plights of victims induces a response to youth crime that is more punitive and hateful, fuelled by an emotional empathy for victim’s suffering”.

\textsuperscript{212} See DOOLIN K., Restorative Justice: what does it mean? – seeking definitional clarity in restorative justice, Journal of Criminal Law, October 2007, pag.428: “The permissibility of coercion is at the heart of the restorative justice debate. It is disputed whether restorative justice should remain an informal, voluntary process or whether it should, at times, be structured and coercive”.

Par.3: YOUTH CRIME PREVENTION

In the last chapters we analysed those concepts that lie on the basis of the whole youth criminal system such as the structure of the (youth) criminal law sources, the minimum age for criminal responsibility and the state attitude towards young offenders. Being, those basic and propaedeutic elements clarified, we can now focus on the central theme of this paper, prevention of youth crime, that without those essential premises would lack of concreteness.

We are going to investigate first of all the general notion of crime prevention, and then the concrete operation of the main crime prevention tools in the English system.

What’s crime prevention?

“Criminal policy and criminal justice are, in essence, an organized reaction-system”\textsuperscript{213}. Criminal law provides, for each crime, a proportional response through which the system reacts to the harm caused by the crime; this is a retributive perspective that, according with different policies, can reflect deterrence, rehabilitation or punishment. The whole criminal system, indeed, is conceived as an ex-post response that considering the offence in


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all its circumstances, re-establishes that harmony that has been broken causing a harm to individuals and society itself.

Thus, punishment is normally the concretization of this ex-post reaction to crime.

In crime prevention, however, legal intervention (that cannot strictly be defined ‘punishment’) is not ex-post but ex-ante; it does not represent a retributive response to an offence that has already been committed, but attempts to avoid it to be committed in the future.

As the word suggests, crime prevention consists in measures that come chronologically and logically before the offence, in an advance legal intervention that does not ‘react’ to something that has already happened but ‘pre-vent’ something that is probably (not only possibly) going to happen. This does not mean, however, that punishment and prevention are two complete separate concepts; in fact punishment itself, according to most of scholars, is not only retribution, being one of its justifications the need for general and particular deterrence. In other words, penal system reacts

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215 See, e.g., https://www.gov.uk/: “Any amount of crime in society is unacceptable. Not just because of the human cost, but also the cost to society”.


217 See NUVOLONE P., *Corso di Diritto Penale*, Milano 1966, pag.376


with a punishment not only to compensate the criminal offence, but also in order to prevent crime; the existence of a punishment has a deterrent effect upon individuals who, because of their free will, can choose how to behave: each individual is free, if he wants, to behave in a manner that breaches the criminal law, but in doing so he knows that he will be given a punishment. Punishment, indeed, is a deterrent element through which state exposes in advance what the consequence will be in case of a criminal offence in order to curb individuals in committing it, according with “the idea that the incidence of crime is reduced due to people's fear or apprehension of the punishment they may receive if they offend”.

Retributive measures and preventive ones are not completely distinct, as punishment itself is aimed also to prevent crime; they cannot even be distinguished on chronological basis, as preventive measure can also apply after an offence has been committed (post-delictum measures); thus the only distinctive element seems to be the fact that unlike preventive measures have pursue only crime prevention, punishment is primarily a reaction to the crime, and for this reason needs to be proportionate with the offence that has been caused.

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220 See ibid; see also VON HIRSCH A., ASHWORTH A., ROBERTS J., Principled Sentencing – reading on Theory and Policy, Oxford 2009, pag.40: “punishment is justified by reference to its crime-preventive consequences”.

221 See A. ASWORTH and J. HORDER, Principles of Criminal Law, Oxford 2013, pag.23: “the factual element in autonomy is that individuals in general have the capacity and sufficient free will to make meaningful choices”.

222 See NUVOLONE P., Corso di Diritto Penale, Milano 1966, pag.376: “il diritto penale, infatti – come ogni altro sistema di norme sanzionatorie dell’ordinamento giuridico – ha innanzitutto finalità preventive: predispone la tutela di determinate beni o interessi giuridici considerate fondamentali per la collettività con l’inibire, mediante la minaccia di sanzioni, l’offesa di quegli interessi o di quei beni”.

223 STACHON V., The principles of punishment applied to children within the juvenile justice system, UCL Jurisprudence Review 2007 13, 53-73.
Once clarified in what prevention differs from the ordinary mechanisms with which the penal system reacts to crime, the question is why a penal system would need preventive instruments. If each criminal system, by definition, sets up a series of instruments that are not only retributive, but also preventive, why is it supposed to organize also pure deterrent ones?

First of all, the constant need for Justice that all criminal justice systems are aimed to guarantee, requires efficient crime prevention. If the main aim of the penal system is to protect the public from crime, of course the most efficient (and fundamental) intervention is the one through which avoiding offences to be committed, so that it can be individuated a state’s responsibility to prevent.

Second, by advancing criminal law intervention to the moment when an offence has not been committed yet, there won’t be any victim or person otherwise affected by the offence itself; escaping the offence, its amounts and negative consequences will also be escaped.

Third, with an efficient prevention the whole criminal proceeding can be avoided, with positive effects on justice system organization and its costs.

In the last decades the English system has witnessed a relevant shift from a postcrime approach to a precrime one, radically changing its perspective in

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224 See NUVOLONE P., Corso di Diritto Penale, Milano 1966, pag.376, Ibid. A contrary opinion is given by BETTIOL G., Diritto Penale, Padova 1978, but here the author limits this criticism for prevention of offences committed by adults, and agrees with the idea of youth crime prevention measures (pag.843, reference).

225 See GUNThER K., in ASHWORTH A., ZEDNER L., TOMLIN P., Prevention and the limits of the Criminal Law, Oxford 2013, pag.71: “the state comes in as a bearer of a constitutional duty to protect citizen-victim again citizen-criminal. The intrinsic meaning of this request for state protection is preventive. The state shall guarantee the security of the individual, because of the individual’s right to security”.

226 Ibid, pag.71. It argues that “according to the recent responsibility to prevent paradigm, the protection of citizens against crime is considered as a human right at the international level, and a fundamental or basic right at the national level”.

227 For the shift from a postcrime approach to a precrime one see ZEDNER L., Criminal Justice, Oxford 2004, pag.288. See also R. BURNETT, Never too early? Reflections on
relation to crime\textsuperscript{228} and origin that phenomenon that has been defined ‘preventionism’\textsuperscript{229}. Nowadays criminal policy in the Uk, as in most of other criminal justice systems, is oriented toward deterrence, that despite having a long tradition in theory and practice, still not have a common definition; as P. C. Friday wrote “prevention measures involve some forms of social intervention which aim to reduce the number of offences by making the acts more difficult or impossible to perform or make them less viable for the actors”\textsuperscript{230}; it is difficult to define the whole category of preventive measures with a unique definition, as the aim of prevention is followed by the criminal system through such different measures that a common definition cannot be easily given. In general, indeed, these measures have in common not a definition but their principal aim - avoiding future offences to be committed - being their nature and their mechanisms significantly different.

\textsuperscript{228} Some scholars have talked about a “New preventive state”; see S. STEIKER C., Proportionality as a Limit on Preventive Justice – promises and pitfalls, in M. BLYTH, E. SOLOMON and K. BAKER Young people and risk, Bristol 2007, pag.194.

\textsuperscript{229} For a complete analysis of preventionism, see ASP P., Preventionism and Criminalization of Nonconsummate Offences, in ASHWORTH A., ZEDNER L., TOMLIN P., Prevention and the limits of the Criminal Law, Oxford 2013. See, in particular, pag.297: “is changing the way we think and argue about criminal law, and serves also as a yardstick for measuring the results of the criminal law system”.

\textsuperscript{230} P. C. FRIDAY, Delinquency prevention and social policy, in A. MORRIS and H. GILLER Providing criminal justice for children, London 1983, pag.37. See also ASP P., Preventionism and Criminalization of Nonconsummate Offences, in ASHWORTH A., ZEDNER L., TOMLIN P. Pag.297: “Prevention is sought not only through the conventional means of deterrence, punishment or reform, but also through reduction of opportunity, finely calculated disincentives, imposition of controls and modification of routines. Prevention is served by practices directly geared to reducing temptation and maximizing disinhibitors”. 
Classifications of crime prevention measures

Crime prevention measures have been classified according with several classification models. What is necessary to underline from the beginning, however, is that the Uk criminal system does not have a unitary classification, as it provides different measures in different statutes without explicitly distinguishing between their nature and their structure.

One of the classifications we find in English literature about crime prevention instruments is the one that distinguishes between ‘Primary Prevention’ and ‘Secondary Prevention’: while the first one refers to “modifications of the physical and social conditions affecting criminal opportunities”, the second one involves the “identification of likely offenders followed by forms of intervention to prevent recidivism”; one “emphasizes reducing the opportunity to commit crime, the other reducing the conditions to do so”231.

Further classification is the one that distinguishes on the one hand positive measures (measures aimed to prevent crime by reducing criminal opportunities and promoting social integration) and on the other hand negative measures (that involve restrictions of individual rights and freedom)232.

They can also be classified according to the recipient of the measure: some interventions are, indeed, universal (termed universal prevention); others target individuals or neighbourhoods where the risk factors for offending are relatively high (termed selective prevention); others target individuals who have already shown signs of offending or antisocial behaviour, or had

232 See L. PASCULLI, Le misure di prevenzione del terrorismo e dei traffic criminosi internazionali, Padova 2012.
brushes with the school authorities or with the youth justice system (termed indicative prevention).  

Deterrence measures are also classified in Personal and Patrimonial ones, depending on whether they affect individual’s liberty or only his properties. The main classification, however, confronts Ante-delictum measures (pre-court disposals, or out-of-court disposals) and Post-delictum ones (sentences).

Ante-delictum measures means, literally, measures that apply (chronologically and logically) before the offence has been committed; more precisely before ‘any’ offence has been committed; as result, an ante-delictum measure will be used on the occurrence of requirements not involving the commission of an offence.

On the other side, post-delictum measures need a previous offence to be applied; in this case prevention, of course, will work not for the offence assumed as a requirement for the treatment itself, but in relation to future possible further offences committed by the same offender.

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234 www.justice.gov.uk.


236 NUVOLONE defines ante-delictum measures as the ones aimed to prevent the individual committing the first offence (“le misure della prima categoria tendon ad evitare che l’individuo cada nel primo delitto”), in NUVOLONE P., La Prevenzione nella Teoria Generale del Diritto Penale, in Trent’anni di Diritto e Procedura Penale (vol.I), Padova 1969, pag.270.

237 See L. PASCULLI, Le misure di prevenzione del terrorismo e dei traffici criminosi internazionali, Padova 2012.

238 NUVOLONE P., La Prevenzione nella Teoria Generale del Diritto Penale, in Trent’anni di Diritto e Procedura Penale (vol.I), Padova 1969, pag.270: here the author defines post-delictum measures as the ones aimed to prevent the offender to re-offend (“le misure della seconda categoria tendono ad evitare che l’individuo incorra nella recidiva”).
Both ante and post delictum measures present some critical aspects. About Ante-delictum measures the main problem is what requirements can be sufficient to justify the imposition of measures before (that means, 

*without* requiring that) an offence has been committed; in the criminal law system, where the legality principle and criminal law guarantees ensure that no punishment or similar measures can be given to an individual if he’s not liable of any offence, how can we explain the existence of such mechanisms? How can we accept, in order to pursue the noble will to stop crime, that such treatments (not always clearly different from punishment) climbs over all those guaranties that avoid criminal consequences without a criminal offence?

The recurrent answer to those scholars’ questions comes from a close utilitarianism that recognizes the practical importance and relevance of ante-delictum measures and accepts their contrast with criminal law general principles or attempt to save them even in the frame of those principles\(^\text{239}\). And this is even more hard if we consider that a consistent part of them are not even introduced in the criminal law system but in the civil one\(^\text{240}\) (with the consequent lack of those safeguards that only criminal law is required to guarantee), with academics’ criticism\(^\text{241}\).

Further doubts arise when one considers that English system provides pre-court disposals not only to prevent crime, but also to prevent anti-social behaviours, that are even not criminal offences\(^\text{242}\). In these cases we observe

\(^{239}\) Ibid, pag.18: “Negli ordinamenti in cui le misure di prevenzione sono diventate uno strumento ordinario di lotta alla criminalità, tuttavia, si è passati dalla critica tout court alla consapevolezza della loro necessità, in certi casi, e, quindi, allo sforzo di ricondurne l’applicazione al rispetto dei diritti fondamentali della persona, per il tramite delle garanzie e delle tutele offerte dai principi giuspenalistici”.

\(^{240}\) See, for example, ASBOs.


\(^{242}\) See YOUTH JUSTICE BOARD, *Youth Out of Court - Disposals Guide for Police and Youth Offending Services* (2013) that empowers police to apply a disposals such as community resolution, youth caution or youth conditional caution.
that a (criminal) punishment is given without a criminal offence and even not to prevent a criminal offence, but just a conduct that’s not the breach of criminal law. The principle ‘No punishment without law’ (principle of legality)\textsuperscript{243}, indeed, is here questioned.

On the other hand, Post-delictum measures (in English system included in the category of sentences) are those that need a committed offence as a pre-condition, and starting from that offence they deal with prevention of further offences. In relation to this kind of measures, doubts have been considered concerning at least two points: the first one is which requirements can be needed for having a post-delictum measure; the second one is the difference between such type of measures and a classical criminal punishment. In these two critical aspects, the first one tends to fill the gap between ante and post measures, as the question is whether or not a deterrent measure can be imposed after any anti-social behaviour or only after a criminal offence. To handle with this matter, we need to pay attention to one fundamental truth: not all anti-social behaviours are criminal offences, as they could be behaviours that do not represent a breach of criminal law, even being anti-social (noise in public areas, graffiti, etc). One of the problems of the distinction between ante and post delictum measures, in fact, is fixing what \textit{delictum} means (criminal offence or any anti-social behaviour)\textsuperscript{244}. If we consider the literal meaning of \textit{delictum}, in fact, a post-delictum measure will necessarily require a criminal offence to apply; if we give to \textit{delictum} the non-technical meaning of any anti-social behaviour, preventive measures will be post-delictum even when following a simple anti-social behaviour that does not breach directly the criminal law.

The second critical aspect of post-delictum measures is that sometimes it is

\textsuperscript{243} Common Law principle recognized, e.g., in KNULLER V. DPP [1973] A.C 435; ECHR, art.7.

\textsuperscript{244} As result of this choice (considering \textit{delictum} meaning criminal offence or antisocial behaviour), some measures could be alternatively inserted in one or other category. It’s the case of ASBOs.
not clear in what they differ from a standard criminal punishment, as the punishment itself is aimed, inter alia, to prevent crime as an instrument of both general and particular deterrence. In other words once the offence has been proved and sentenced, can we consider punishment and preventive measure as two different elements of the sentence (one aimed to punish the offence, the other one aimed to prevent further offences)? And in this case, then, can we distinguish between the two measures? Or is the post-delictum measure only the concretization of one of the aims of a sentence that is still a punishment, but a punishment that aside from reacting proportionally to the offence is also aimed to prevent further offences?

Crime prevention and juvenile offenders
Legislation, as we saw in Chapter 1, particularly stresses on prevention of youth crime\(^\text{245}\). There are several reasons why the modern criminal policy chose to invest in deterrence, as we wrote above. In relation to young offenders, however, further elements come into relevance; the most important is the acknowledgement that “those who engage in anti-social or criminal behaviour at a young age are more likely to become serious and persistent offenders, therefore preventing youth offending is a key to crime reduction”\(^\text{246}\). Prevention of youth crime, indeed, has a long-term aspiration

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\(^{245}\) See CDA 1998, s.37: “It shall be the principal aim of the youth justice system to prevent offending by children and young persons”.

\(^{246}\) HOME AFFAIRS COMMITTEE, The Government’s Approach to Crime Prevention, pag.201. See also J. GRAHAM, What works in preventing criminality, in Reducing offending: an assessment of research evidence on ways of dealing with offending behaviour 1998 (Home Office Research Study 187), pag.7: “Also, those who engage in anti-social or criminal behaviour at an early age are more likely to become serious and persistent offenders”.
that overcomes the limits of a simpler and less effective reaction that provides only a retributive punishment\(^{247}\).

Another particular aspect that characterizes youth crime and needs to be considered also in relation to its prevention is the role of the group. Teenagers are more likely than adults to socialise in groups and “this social phenomenon is inevitably going to have an effect on the pattern of offending by young people\(^{248}\); in teenagers’ decisions, usually, the group plays a central role\(^{249}\), and this is why not only their personal characteristics but also their social relationships need to be taken into consideration\(^{250}\).

A recent report of the Department for Education underlines that in relation to young offenders it is necessary to offer a complete strategy of prevention; this strategy should offer ‘protective factors’ that buffer young people not to be engaged in the criminal system and, at the same time, should work on the so called ‘risk factors’\(^{251}\).

\(^{247}\) FITHC K., *Teenagers at risk - The safeguarding needs of young people in gangs and violent peer groups*, 2009, pag.2: “The government’s response to the problem has often centred on punitive action. However, while tougher sanctions may answer the public’s need for reassurance, a more holistic approach will be needed to reduce these problems in the longer term”.


\(^{249}\) See BOTTRELL D., ARMSTRONG D. and FRANCE A., *Young People’s Relations to Crime: Pathways across Ecologies*, *Youth Justice* 10(1)(56), 2010, pag.69: “That offending is typically with friends confirms the significance of peer groups but they are equally important to pro-sociality. Individual and collective decisions as cultural practices and interests intersect with others’ decisions and interests (through the commodification of culture and multiple controls of governance) and in this sense are social and cultural formations”.


\(^{251}\) DEPARTMENT FOR EDUCATION (DFE), *Prevention and Reduction: A review of strategies for intervening early to prevent or reduce youth crime and antisocial behaviour*, 2010: “There are two main ways in which interventions can prevent the development of patterns of offending behaviour. The first is by addressing the risk factors that have been shown to predict later offending and antisocial behaviour. The second is by reinforcing
In relation to Youth Crime, the most studied and supported deterrent strategy is the one known as *Risk-Factor Prevention Paradigm* (RFPP)\textsuperscript{252} where the basic idea is to “identify the key risk factors for offending and implement deterrent methods designed to counteract them”\textsuperscript{253}; the RFPP also has been recognized to be the basic principle of the whole system of crime prevention by the United Nations\textsuperscript{254}.

This scheme of prevention considers the fundamental assumption that once that the causes of crime are known, working on them will be sufficient to prevent crime; if “the risk of becoming an offender is statistically more probable if the child experiences or is exposed to certain factors”\textsuperscript{255}, the idea is that if we can know why and how people commit offences, it will be easier to improve a prevention system that considers that causes and makes them not to concretize in an actual criminal offence.

Assuming this method, however, the problem is how to find out what the causes of crime are. The RFPP strategy, in other words, works on the protective factors that have been demonstrated to buffer young people against criminal engagement".\textsuperscript{252}

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\textsuperscript{254} UNDOC, *Handbook on the crime prevention guidelines - Making them work*, 2010, pag.9: “The concept of prevention is grounded in the notion that crime and victimization are driven by many causal or underlying factors. These are the result of a wide range of factors and circumstances that influences the lives of individuals and families as they grow up, and of local environments, and the situations and opportunities that facilitate victimization and offending. Determining what factors are associated with different types of crime can lead to the development of a set of strategies and programmes to change those factors and prevent or reduce the incidence of those crimes”.

assumption that the causes of crime can be known; the point is to understand how (and if) it is possible.

In 2000 the YJB introduced Asset\(^{256}\), a “structured assessment tool to be used by YOTs in England and Wales on all young offenders who come into contact with the criminal justice system”\(^{257}\). Asset is a sort of questionnaire to be completed by YOTs with young offender’s details in order to find out the reasons that contributed to his behaviour. The reading of all those documents, once collected, helps to investigate which are generally the causes that move a young person to offend.

However, it doesn’t give a sure result, as “at best, the risk factor research has been able to account for a statistically significant proportion of the variance in respect of the antecedents correlating with offending”\(^{258}\). The challenge is, indeed, to find out these risk factors through the comparison of young offenders data.

In 2010 the Home Office\(^{259}\) identified the following as the principal causes of youth crime: poor parenting, family history with problems or family conflicts, low income (family factors); low achievement beginning in primary school, aggressive behaviour in school, lack of commitment to school, lack of engagement (school risk factors); disadvantaged neighbourhood, community disorganisation and neglect, availability of drugs, high turnover (community risk factors); hyperactivity and impulsivity, alienation and lack of social commitment, early involvement in crime and substance misuse, friendship with peers involved in crime, poor mental health (individual risk factors).

\(^{256}\) Available at http://www.justice.gov.uk/youth-justice.

\(^{257}\) http://www.justice.gov.uk.

\(^{258}\) ARMSTRONG D., A Risky Business? Research, Policy, Governmentality and Youth Offending, Youth Justice 2004 4(100).

It is, however, recognized that “there is no single factor that can be specified as the cause of anti-social or criminal behavior”, as it is the coexistence of more than one that arise the probability of crime.

Interest has been showed also into scientific researches aimed in finding the ‘criminal gene’; some scholars, in other words, wondered if some people are born criminal in the sense that they’re genetically predisposed to commit criminal offences\(^\text{260}\); if confirmed, it could be a direct way to identify the cause of crime. It could also help in preventing those people at (biological) risk to commit offences.

The possibility that science can reach this result is perhaps “less than utopian”\(^\text{261}\), but raises problems at philosophical and criminological level: if we admit that, once the criminal gene has been recognized, it can be the assumption for a measure aimed in preventing the offence, how to justify this measure against a ‘born criminal’? It has been argued that deterrence, in relation to those biologically criminals, would be ineffective\(^\text{262}\); and in fact it seems that the only effective preventive measure, in this case, could be the custodial one. Anything different from custody (that physically keeps the potential offender away from the offence), would be useless in terms of crime prevention and could find its justification only in the protection of the public\(^\text{263}\).

There is also the risk that once individuated the gene of crime propensity, some voices could be raise for looking for it even in unborn children,

\(^{260}\) See RICHTER J., Are some people born criminal? What impact would the discovery of a "criminal gene" have on existing justifications of punishment?, UCL Jurisprudence Review, 2003 10(191).

\(^{261}\) Ibid, pag.7.

\(^{262}\) Ibid, pag.8.

\(^{263}\) Ibid, pag.8: “Since deterrence would be ineffective, retribution inappropriate and rehabilitation impossible in the case of ‘born criminals’, the only justification for punishing them - if they were proved to exist – would be the protection of the public”.
analysing mother and baby during the pregnancy, that’s what Burnett defines as a “State interference of Orwellian proportions”\textsuperscript{264}.

Early intervention and Risks of crime prevention

“One thing is clear to us both: the policies of late intervention have failed and the alternative must be tried”\textsuperscript{265}.

“The Government outlined its approach to preventing youth criminality: Better prevention to tackle problems before they become serious or entrenched, (…)”\textsuperscript{266}.

Preventive measures are indicated to reduce the likelihood of involvement in crime for children and young persons. As seen above, by knowing the ‘factor risks’, legislation can propose specific interventions to give responses to each of these risks in order to stop crime before it starts. The strategies adopted by English legislation to prevent youths to be involved in crime are the most various, but the basic idea that seems lye underneath all of them (and, in particular, in deterrence schemes of the last years) is that the earlier preventive intervention manages to intervene with possible offenders, more probable is a successful result\textsuperscript{267}. Some scholars, however, point out that “if young people are offered intensive interventions

\textsuperscript{267} This concept has been often underlined by politicians. See, e.g., DEPARTMENT FOR EDUCATION (DFE), Prevention and Reduction: A review of strategies for intervening early to prevent or reduce youth crime and anti-social behaviour, 2010. See also YOUTH JUSTICE BOARD (B. ASHFORD), Towards A Youth Crime Prevention Strategy - raft for consultation, YJB March 2007 that stress on reducing the first-time entrants.
too early in their offending careers, this can do more harm than good and actually encourage them into further offending.”

But the real problem is that in the last years we’ve assisted to the increment of preventive legislation, so that somebody talks about “a recent shift from a post- to a pre-crime society,” and a note of caution is needed at this point: is there any risk to be careful with, in theme of prevention?

If risk factors become the only presupposition for applying measures of crime prevention and for justifying earlier and earlier interventions in the life of ‘at risk’ young people and their families, an intervention of the principle ‘innocent until proven guilty’ occurs. And the problem becomes even more evident if we consider that in the last years researches have been run on what is known as ‘pre-school intervention’, a very early intervention for preventing crime that involves children not even at school (three or four years old), with the intention to prevent them to become future offenders.

### 3.1 ANTE-DELICTUM MEASURES (PRE-COURT DISPOSALS)

Among those measures that we have already classified as ante-delictum, three categories can be distinguished. The first one is the one composed by

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272 For pre-school interventions see the UK *Sure Start program*; see also the *High/Scope Perry Project* begun in 1960 in the US (pre-school intervention using a participatory learning approach supplemented by weekly home visits).
those measures that we can strictly define as ante-delictum in the sense that neither offence nor antisocial behaviour are needed to apply; these measures involve young persons potentially ‘at risk’ in activities settled in the community. In this frame we can insert the most various activities carried out by local authorities under indication from the YJB. The two principals are the Youth Inclusion Programmes (YIP) and the Youth Inclusion and Support Panel (YISP), both of them aimed in preventing young people aged between 8 and 13 to commit offences or anti-social behaviours. In the same category, all those programmes that local authorities activate in accord to their duty to activate programmes for childcare in their area, as disposed by the Childcare Act 2006.

In general, all these programmes concretize themselves in different activities that each local authority chooses to set where considered a ‘risk’ area; they can be parenting support (parenting advices but also help for parents to move in employment), group activities where teenagers can socialize with ‘positive models’, support for young people in education and careers guidance.

The second category is the one of those preventive measures that apply after an anti-social behaviour that does not represent a criminal offence (ABCs and ASBOs).

Finally, we’ll consider the Stop and Search police power, a tool for preventing crime that finds its justification not in the general will to give young persons all possibilities they need to be good involved in the community, nor in a previous anti-social behaviour, but in the simple suspect, with respect to those requirements provided by the law.

Anti-social Behaviours: ABCs and ASBOs

Crime always causes a double injury that hits both the victim and the whole community.

Community life, however, might be compromised also by those behaviours
that, even without breaching directly criminal law, show their negative effects upon tranquillity of social life. Such behaviours (vandalism, street alcohol abusing, shouting or noising in common areas etc) have been unclearly defined, since the early 90s, as ‘Anti-Social Behaviours’.

Policy in the last twenty years has been interested in dealing with these kinds of conduct, supporting the idea that what State is required to tackle, as force-monopoly holder, is not only crime as a specific violation of criminal law, but also “such unacceptable conduct, which causes misery to so many communities”\textsuperscript{273}, in order to “protect the most fundamental liberty of all: freedom from harm by others”\textsuperscript{274}.

Politicians’ repeatedly condemned anti-social behaviours, as we can see:

“Anti-social behaviour also causes alarm and distress and heightens the fear of crime. Tackling this sort of conduct and preventing its escalating into more serious criminal behaviour is a central element in our policy towards making our communities safer”\textsuperscript{275}.

“Anti-social behaviour describes a range of everyday nuisance, disorder and crime, from graffiti and noisy neighbours to harassment and street drug dealing. It is sometimes dismissed as trivial, but anti-social behaviour has a huge impact on victims’ quality of life, and it is the public’s number one concern when it comes to local crime issues”\textsuperscript{276}.

“In terms of the behaviour itself, what is seen as ‘anti-social’ will vary from victim to victim, and neighbourhood to neighbourhood. The right response in each case will depend on a range of factors, but most importantly, on the needs of the victim and the impact the behaviour is having on their lives”\textsuperscript{277}.

\textsuperscript{273} Mr. STRAW, HC Deb 02 March 1998 vol 307 cc694-5.
\textsuperscript{274} T. BLAIR, \textit{Our citizens should not live in fear}, The Observer (11 December 2005).
\textsuperscript{275} Mr. Michael HC Deb 27 October 1997 vol 299 c738W.
\textsuperscript{276} HOME OFFICE, \textit{More Effective Responses to Anti-Social Behaviours}, 2011, pag.5.
\textsuperscript{277} HOME OFFICE, \textit{Putting the Victim First: More Effective Responses to Anti-Social Behaviours}, 2012 Pag.10, par.1.3.
“Anti-social behaviour is a menace on our streets; it is a threat to our communities. We aim to prevent it as far as we may. A civil order is part of the regime for doing that. But ultimately, we regard such behaviour as criminal”\(^{278}\).

**Anti-social behaviours contracts (ABCs)**

The necessity to give responses in this direction and handle anti-social behaviours (especially if committed by young persons) took practical experience towards the creation of Antisocial-behaviour contracts (or *agreements*). ABCs are private agreements between individuals and the local authority (or another public body), originally introduced in the London borough of Islington around the year 2000 to deal with children and young persons at risk of anti-social behaviours.

They are a tool that stresses on the young person’s responsibility: with ABCs, the young person ‘at risk’ is required to sign a contract where he/she concords with the local authority not to carry out a series of identifiable behaviours which have been identified as antisocial. Not mentioned nor regulated by law, they are “behavioural contracts designed to promote responsibility by making explicit and embedding a set of social norms”\(^{279}\) and “reinforc[ing] a set of common decencies”\(^{280}\).

ABCs are simply private contracts, and that gives them a strong flexibility: they don’t require any condition to be signed, can potentially be used even with children under the age of ten, and leave the parties totally free in respect to their content.

\(^{278}\) Lord Williams HC Deb 3 Feb 1998 c.603.


Individuals are not legally obliged to sign an ABC and there is no automatic penalty for failing in doing so. The cabinet office, in 2004, underlined as one of the positive elements of ABCs the fact that they leave the young person free in choosing whether or not signing the agreement. This is, however, only a formal advantage as the young person is obviously under a strong local authority influence; as police admitted it its statement, in fact “(...) if the nominal continued engaging with gangs, we will offer an Acceptable Behaviour Contract (ABC) which contains a set of conditions that the nominal will be prohibit from doing. This is a voluntary contract. Should the nominal not want to sign the contract and change their behaviour, they were considered for an Anti-social behaviour order (ASBO) and Gang Injunctions”.

Home Office guidance advises practitioners not to force individuals to sign but to combine persuasion with exertion to encourage them to do so; anyway at practical level the contractual force of the two parties is obviously in favour of the local authority.

Being a private agreement between private parties, no ABC involves general penalties for the breach of what the parties underwrote; anyway those penalties are usually specified in each contract, and they often correspond to the application for an ASBO or a Gang Injunction. The frequent mechanism in dealing with Anti-social behaviours, indeed, starts with asking the young person to sign an agreement and, if he refuses to sign or does not respect what he agreed by signing, an application for an ASBO or a Gang Injunction follows.

ABCs have been criticised because, beside they present themselves as ‘contracts’, as ‘two-parts agreements’, they contain obligations only for the

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281 Ibid, n 7.
282 Police statement in case C. F..
283 Ibid, n 8.
young person; they are felt as “very one-sided” as “the council don't offer anything in the contract, they ask them to sign that they'll not do all these things, but they're giving nothing in return”284.

In conclusion, we can say that Anti-social behaviour contracts were born as an un-ruled and, for that, flexible response to anti-social behaviours. It was, however, a response that came from practice, not from law.

Anti-social behaviour orders (ASBOs)
The (first) legal response to the need for protection not only from crime but also from anti-social behaviours came with the Crime and Disorder Act 1998285, which chapter one opens with the regulation of a new instrument called Anti-social Behaviour Order (ASBO). According with s.1, ‘An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely: that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and that such an order is necessary to protect relevant persons from further anti-social acts by him’286. ASBOs are, therefore, civil orders made in relation to a person who acted in an ‘anti-social manner’ in order to prevent him/her to repeat further similar actions. The application for an ASBO can be made by a ‘relevant authority’287, meaning one of those listed in section

284 BROWN K. J., "It is not as easy as ABC": examining practitioners' views on using behavioural contracts to encourage young people to accept responsibility for their anti-social behaviour, Journal of Criminal Law 2012 76(1) (53).
286 CDA 1998, s.1(1).
287 CDA 1989, s.1(1).
It is also an order that can be made by the court after convincing a person of an offence; in the case the defendant has been convicted with a relevant offence the court will be able to make an ASBO irrespective of any application.

The order shall have the effect of prohibiting the defendant from doing anything described in the order itself for a specified period of at least two years; if during this period he does, without any reasonable excuse, anything of what he’s prohibited doing by the order he is guilty of a criminal offence. Here the main peculiarity of this kind of orders: even though the initial anti-social order (ASBO) is a civil order, its breach is a criminal offence that can be punished with imprisonment for a term of maximum five years. The breach of an ASBO, moreover, is an offence that does not require any particular mental element to be proved, as for having such a breach it is sufficient that ‘a person does anything which he is prohibited from doing by an anti-social behaviour order without reasonable excuse’, in breach of the general criminal principle of mens rea, that states that “defendants should be held criminally liable only for events or consequences which they intended or knowingly risked, only if they were

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288 CDA 1989, s.1(1A), as reformed by Police Reform Act 2002: “In this section and sections 1B and 1E “relevant authority” means: (a)the council for a local government area; (b)the chief officer of police of any police force maintained for a police area; (c)the chief constable of the British Transport Police Force; or (d)any person registered under section 1 of the Housing Act 1996 (c. 52) as a social landlord who provides or manages any houses or hostel in a local government area”.

289 CDA 1989, s.1C(10)(b): “‘relevant offence’ means an offence committed after the coming into force of section 64 of the Police Reform Act 2002 (c. 30)”.

290 CDA 1998, s.1(4).

291 CDA 1998, s.1(10).

292 CDA 1998, s.1(7).

293 CDA 1989, s.1(10).

294 CDA 1998, s.1(10).

295 CDA 1989, s.1(10).
aware of the possible consequences of their conduct should they be liable. ASBOs are, indeed, examples of strict-liability offences.

Opposite conclusions can be reached by reading the CDA in a different perspective: by providing that to make an ASBO the relevant authority needs to be satisfied that it is the only efficient way to prevent further similar behaviours by the same defendant, the CDA can be seen substantially requiring a particular attitude in committing that anti-social behaviour, that can be punished only to prevent further future ‘wrongs’.

While general criminal law requires specific standard of culpability to address criminal responsibility for any offence, in this case it seems that “the criteria for granting an ASBO are whether or not it is needed to prevent future exposure of others to the disrespectful attitude of the defendant. It is the future relationship between the defendant and other people that renders the defendant liable”, thus it is not the defendant’s personal attitude (mens rea) to be considered as part of those elements necessary for having an ASBO, but his likelihood to commit further of those behaviours. Making an ASBO does not require any judgment about the attitude with which that conduct has been committed, but the judgment of possible future relationships between the defendant and community; in summary “it appears to be a response to the defendant’s conduct when it is more concerned with the defendant’s attitudes, character and relationships”.

According to s.1 no prohibition can be made unless it is necessary for the purpose to protect persons from further anti-social behaviours from the defendant. This means that ASBOs are aimed to prevent further anti-social

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296 ASHWORTH A., *Principle of Criminal Law*, Oxford 2013, pag.74. See also pag.155: “The essence of the principle of mens rea is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences”.


acts and not to punish the conduct that’s already been committed, thus as specified in *R v Boness* “the use of an ASBO to punish an offender is unlawful”\(^{299}\). From the same sentence emerge the following principles: the court should not impose an order which prohibits an offender from committing a specified criminal offence if the sentence which could be passed following conviction for the offence should be a sufficient deterrent\(^ {300}\); an ASBO should not be used merely to increase the sentence of imprisonment which an offender is liable to receive\(^ {301}\); the terms of the order must be proportionate in the sense that they must be commensurate with the risk to be guarded against\(^ {302}\).

In chapter one we have already stressed the nature of Anti-social behaviour orders (ASBOs) as introduced for the first time by the Crime and Disorder Act 1998, and then reformed by the Anti-social Behaviour Act 2003; on the background of the CDA there was, we wrote, the intention to give a significant response to the need for protection that public showed in relation to those behaviours that, although not criminal offence, cause ‘harassment or distress’. The Government seemed to consider crime and anti-social behaviours as different aspects of a unique problem; in 1997 it was publicly declared that “the Government believes that tackling disorder and anti-social behaviour is a crucial element in dealing with crime and making our communities safer”\(^ {303}\).

Anti-social behaviour orders were designed to deal with those conducts that cause nuisance and problems to community but cannot be criminally

\(^{299}\) *R v Boness* [2005] EWCA par.29: “the purpose of an ASBO is not to punish an offender (…). This principle follows from the requirement that the order must be necessary to protect persons from further anti-social acts by him. The use of an ASBO to punish an offender is thus unlawful”.

\(^{300}\) *R v Boness* ibid, par.30.

\(^{301}\) Ibid, par.33.

\(^{302}\) *R v Boness* Ibid, par.37.

\(^{303}\) Mr. Straw, HC Deb 07 July 1997 vol 297 cc601-2.
prosecuted because they do not correspond to a criminal offence as there is not any breach of criminal law\textsuperscript{304}. S.1 clarifies its purpose as preventive by providing that such an order can be made if and when the relevant authority is convinced that ‘such an order is necessary to protect relevant persons from further anti-social acts by the [defendant]’.\textsuperscript{305} This testifies that the CDA 1998 was aimed to prevent not only crime but also those behaviours that make hard to live in some communities, going towards a complete latu-sensu prevention.

In what has been said until now, however, a definition lacks: what’s an anti-social behaviour? When we refer to an anti-social behaviour, what are we referring to?

As it can be understood from s.1(a) of the Crime and Disorder Act, the statute defines an anti-social behaviour as that conduct that ‘caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as the defendant’. What does it mean? It is commonly accepted that “it is difficult to define anti-social behaviour with precision”\textsuperscript{306}, first of all because “harassment is well understood but very hard to define (…) - the true measure of harassment is its impact on the victim”\textsuperscript{307}, and second because “people’s understanding of anti-social behaviour is based on individual perception and can encompass a range of behaviours”\textsuperscript{308}; in other words “anti-social behaviour means different things to different people – noisy neighbours who ruin the lives of those around them, ‘crack houses’ run by drug dealers, drunken ‘yobs’ taking over town

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\textsuperscript{304} About ASBOs as a tool for the public protection, see RAMSAY P., Vulnerable Autonomy and the Right to Security in the Criminal Law, Oxford 2012.
\textsuperscript{305} Crime and Disorder Act, s.1.
\textsuperscript{306} HOME OFFICE (N. BLAND and T. READ), Policing Anti-Social Behaviour, 2000 (a); see also RAMASAY P., What is anti-social behaviour?, Criminal Law Review 2004 Nov (908).
\textsuperscript{308} HOME OFFICE, Defining and measuring anti-social behaviour, 2004, pag.3.
\end{flushright}
centres, people begging by cash-points, abandoned cars, litter and graffiti, young people using airguns to threaten and intimidate or people using fireworks as weapons” 309.

The problem of the Crime and Disorder definition, indeed, is that it contains itself vague definitions (‘harassment’, ‘distress’) that cannot be specified without a concrete view on the effects that that behaviour caused on the victim and that necessarily suffer a lack of impartiality. It has been argued that’s a “boundless definition” 310.

In the opposite direction there’s who believes that that nebulous definition can be easily compensated by using the common sense, as observed by Lord Williams of Mostyn who argued that an Anti-social behaviour order “requires the subject of it to do no more (...) than to behave in a decent way to the fellow citizens of our country - there is nothing vague about the description” 311. Those arguments, however, have been discredited by the Home Office itself, who admits an official uncertainty about exactly what constitutes anti-social behaviour and underlines that this uncertainty risks to compromise the ability of local authorities “to tackle anti-social behaviour effectively” 312; this is the reason why it studied possible methods for defining and measuring anti-social behaviours at local levels, that unfortunately have not been legally accepted as general common requirements and still be simply suggestions for local authorities. It has been observed that the vagueness of anti-social behaviour definition is reflected and repeated in the purpose itself of the order, as “the orders are

310 SIKAND M., ASBOs: a practitioner’s guide to defending anti-social behaviour orders, Nottingham 2006, pag.7.
312 HOME OFFICE, Defining and measuring anti-social behaviour, 2004, pag.1: “In order to be able to tackle anti-social behaviour effectively it is important that practitioners with responsibility for addressing the problem have a clear knowledge and understanding of the behaviours occurring in their locality. However, little work has been published to date on how anti-social behaviour can be defined and measured”.
intended to protect not just specific individuals, but entire communities”, following that “inevitably results in a very broad, and occasionally, excessive range of behaviour falling within their scope as the determination of what constitutes anti-social behaviour becomes conditional on the subjective views of any given collective”\textsuperscript{313}. A further problem in defining an Anti-social behaviour, is that s.1 does not require that harassment or distress have actually been caused as no member of the community needs in fact been intimidated or caused actual injuries; indeed an order can be made in respect to such behaviours that ‘caused or were likely to cause harassment, alarm or distress’\textsuperscript{314}. If that behaviour caused harassment and it can be proved, no problems; but what about those cases where an actual harassment or distress cannot be proved as it is just likely that it has been caused? In other words, what’s the meaning of section 1(1)(a)? It is not a simple problem of academic definition, as in such a scheme that risk to take the defendant from an anti-social behaviour (not constituting a criminal offence) to a criminal punishment on the simple justification of a breach of the civil order, it represents a further retrocession of general criminal principles\textsuperscript{315}. Anti-social behaviour orders have been criticised for being a medium through which an individual can be charged with a criminal offence (the breach of the order) without having committed any violation of criminal law a part of the breach of the (civil) order; they open the doors of criminal system for people responsible of behaving in an anti-social manner but not of criminal offences. Moreover, in the frame of this weakness of criminal principles, ASBOs accept not only an imprecise ‘conduct that

\textsuperscript{313} GIL-ROBLES A. (Council of Europe’ Commissioner for Human Rights) on his visit in UK in November 2004, par. 110.
\textsuperscript{314} CDA 1998, s.1(1)(a).
\textsuperscript{315} In ASHWORTH A. and ZEDNER L., Preventive Justice, Oxford 2014, authors argue that a custodial punishment up to five years in case of breaching a civil order, raises “considerable problems of proportionality” (pag.88).
caused harassment or distress’ but also one that’s even only ‘likely’ to cause it.

What’s the meaning of ‘likely’? How is ‘likely’ supposed to be proved? Being the proceeding to make an ASBO a civil proceeding, it follows that the standard of proof needed should be the civil standard of ‘more probable than not’ as confirmed in Chief Constable of Lancashire v Potter\(^{316}\). It means that an order can be made against who behaved in a manner that ‘more probable than not’ caused harassment or distress. However, the criminal standard of proof has been made safe for the criminal offence that emerges from the breach of an ASBO in McCann v Crown Court of Manchester the House of Lords determined that although ASBOs are made in civil courts where the burden of proof is the balance of probability the court must be satisfied to the criminal standard of ‘beyond reasonable doubt’ that anti-social behaviour took place due to the “seriousness of the matters involved”, and he also observes that “the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard”\(^{317}\).

\(^{316}\) The Chief Constable of Lancashire v Lisa Marie Potter [2003] EWHC 2272, par.31: “(…) But where, as here, the word is used in the important, but normally less acutely risky, context of proceedings against a person to prohibit him from engaging in anti-social conduct, it would be more appropriate to give it the meaning of more probable than not. But it does not follow that the mental process for a court in determining proof of likelihood in that sense is to have the same threshold of probability. The court has to be satisfied, on whatever basis, of something that is inherently speculative. Considered in that way, it is nonsensical, or at least unreal, to expect a court to determine whether a likely, in the sense of a more probable than not, outcome has itself been proved on a balance of probabilities. Paradoxically, the task for it is more manageable, though still difficult of analysis, if it is required to be sure to the criminal standard that a defendant's conduct has caused such a likelihood”.

\(^{317}\) McCann v Crown Court of Manchester [2002] UKHL 39, par.37 (Lord Steyn): “Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: (…). For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. (…). But in my view pragmatism dictates that the task of magistrates should be made more
The last Government’s proposals, however, seems to come back to a weaker standard of proof; the Anti-social Behaviour Crime and Policing Act 2014, in fact, provides that for making an injunction under s.1 the court must be satisfied that the respondent has engaged or threatens to engage in anti-social behaviour ‘on the balance of probabilities’. Eloquent criticisms come from Liberty, who underlines the incompatibility with the criminal law principle according with which a beyond reasonable doubt standard of evidence is needed and promotes a significant jump to a legal avowal of the higher standard of proof in respect of the substantial nature of the straightforward by ruling that they must in all cases under section 1 apply the criminal standard. If the House takes this view it will be sufficient for the magistrates, when applying section 1(1)(a) to be sure that the defendant has acted in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation. This approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law. In coming to this conclusion I bear in mind that the use of hearsay evidence will often be of crucial importance. For my part, hearsay evidence depending on its logical probativeness is quite capable of satisfying the requirements of section 1(1)”.

318 Section 1 of the ABCPA 2014 introduces injunctions to prevent nuisance and annoyance that will replace ASBOs.
319 ABCPA 2014, s.1(2).
320 LIBERTY (The National Council for Civil Liberties), Liberty’s Report Stage Briefing on the Anti-social Behaviour, Crime and Policing Bill in the House of Commons (available at http://www.liberty-human-rights.org.uk/sites/default/files/Liberty-s-Report-Stage-Briefing-on-the-ASBCP-Bill-in-the-House-of-Commons-Oct-2013_0.pdf), October 2013, pag. 9: “Clearly unhappy with this test, the Government is now seeking to lower the burden of proof to allow an injunction to be imposed where there is relatively little evidence of past or threatened anti-social behaviour”.

order. The new injunction also broadens the definition of the targeted behaviour, increasing those criticisms that we have considered above.

Questions need to be raised also about the compatibility of ASBOs with European Convention of Human Rights, and in particular with art.6 (right to a Fair Trial), that provides specific rights for defendants ‘charged with a criminal offence’, does it mean that those rights are valid only for criminal proceedings?

The European Court of Human Rights specified that ‘charged with a criminal offence’ not necessarily means that the defendant needs to be charged in a proceeding defined as ‘criminal proceeding’ by the local law, as “whether or not a right is to be regarded as civil [or criminal] within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right” and not to the classification given by domestic legislation. No problem, therefore, for

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321 LIBERTY ibid, pag.17: “As currently drafted, no particular burden of proof is specified for the requirement to show that an individual engaged in ASB, and it would therefore suffice to show this only on the balance of probabilities (the civil standard). This amendment provides that the fact that the offender engaged in ASB must be proved beyond criminal doubt (the higher, criminal standard)”.

322 ABCPA 2014, s.2(1): ‘In this Part “anti-social behaviour” means: conduct that has caused, or is likely to cause, harassment, alarm or distress to any person; conduct capable of causing nuisance or annoyance to a person in relation to that person’s occupation of residential premises; or conduct capable of causing housing-related nuisance or annoyance to any person’.

323 ECHR art.6(2) and (3).

324 See ECHR sent. König v Germany par. 89: “Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting“. See also ECHR Sent. Engel and others v Netherland, Par 82: “(...) in this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import”. 
those orders like ASBOs made in civil proceedings but having a criminal nature, as the substantive interpretation of art.6 ensure them to be extended all the rights provided for criminal proceedings.

An interesting perspective recognizes how ASBOs expand the defendant’s duties as citizen. Because he’s required to behave in a manner that respects community life and other people’s security, in respect of the defendant “this criterion is a negative formulation of a definition of the good citizen”; the minimal conception of the “good citizen” resulting from ASBO’s regulation is the attitude of respecting community not causing harassment or distress to any of its members. “The effect of s.1(1) is thus to differentiate people's ‘citizenship-as-legal-status’, the extent of their civil rights, on the grounds of their compliance with a minimal conception of good citizenship, or ‘citizenship-as-a-desirable-activity’ and “it appears to define a prohibition when for practical purposes it creates a positive duty”325.

Criticisms

Anti-social behaviour orders are civil orders given in civil proceedings criticized for being “without strong and principled justifications”326. The breach of one of these orders, however, constitutes a criminal offence punishable with (maximum) five years imprisonment327.

The scheme above described has been defined as a “hybrid”, as made by civil and criminal elements; precisely, according with its hybrid nature, an ASBO gets criminal relevance when the civil order has been broken.

327 Crime and Disorder, s.1(10) (as amended): “If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he is guilty of an offence and liable: on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both”.
Academics have always criticized ASBOs’ structure, even before the CDA came into force, although it is not the first occasion when legislation uses this hybrid structure\(^{328}\); and it has even been argued that ASBOs are the ‘talisman’ of civil preventive orders\(^{329}\).

The constant criticism in relation to ASBOs is precisely connected with this characteristic: being a civil order, made in a civil proceeding, make ASBOs weak in protecting those rights and guarantees that law provides for criminal proceedings?

Criminal system developed around the central fundamental principle *Nullum Crimen Sine Lege* (principle of Legality) that finds its declination in three distinct sub-principles: principle of non-retroactivity, principle of maximum certainty, principle of strict construction of criminal statutes\(^{330}\). The structure of ASBOs risks to put in danger the second one, as problems of compatibility with the principle of maximum certainty\(^{331}\) come because of the fact that a criminal punishment follows the breach of a civil law and because of the vagueness affecting the definition of ‘Anti-social Behaviours’. The claim is that “although these measures substantially extend the scope of state power to act in the name of security, they can be seen to threaten security in its older liberal conception as the security of the individual against an overbearing state”\(^{332}\).

The hybrid structure of an ASBO has been criticized also because it allows any anti-social behaviour to become the starting point for having a criminal offence; that means anybody simply acting in an anti-social manner not being a criminal offence risks to fall into contact with the criminal system.

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331 Defined by the EHRR in Kokkinakis v Greece (1994), 17 EHRR, par.52 as the principle according with which “only law can define a crime and prescribe a penalty”.
and to be given a criminal punishment; in other words “causing harassment, alarm or distress may encompass anything from youth gathering on a street corner and forcing passers-by to talk in the road, or begging in the street, up to serious crimes such as burglary and robbery. (…) The concept of anti-social behaviour is not limited to non-criminal conduct” 333; moreover ASBOs may be used also in respect of conduct that is criminal but non-imprisonable, such as begging or soliciting for prostitution. On the other hand, civil nature of ASBOs has been welcomed by those who argue that civil orders ensure more peaceful conditions to victims and a moving away from criminalization334.

A further point of criticism concerns the lack of a mental element (mens rea) among requirements asked by legislation for having the breach of an ASBO, in contradiction with the general principle of criminal law that considers mens rea as essential in all criminal offences335. Even if it has been observed that a mental element is never required for ‘hybrid’ orders336, Liberty suggests a relevant change with the last Bill presented before the Parliament337; however, in Government proposal emphasis is given in making the procedure easier and requirements even less specific instead of assuring general criminal guarantees. As we have seen above, although criticisms arisen about the too vague definition of Anti-social behaviour, the

335 See Brend v. Wood (1946) 62 T.L.R. 462 par.463: “It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.”
336 See ETHERINGTON L., [Statutory Nuisance and ‘Hybrid Orders’: True Crime’ Stories?], Statute Law Rev (2012) 33(3), october 2012: pag. 390] who points out how the lack of mens rea is a common element among the ‘hybrid’ orders such as ASBOs.
337 See LIBERTY, ibid.
Parliament is working on a project that’s probably changing that definition with a new one even more vague\textsuperscript{338}.

In 2004, the Council of Europe’ Commissioner for Human Rights wrote a report about English criminal system where he takes in consideration the structure and the practical consequences of ASBOs, and recommends that, in relation to youths, “it is not because a child is causing inconvenience that he should be brought to the portal of the criminal justice system”\textsuperscript{339}. He observed firstly that “ASBO breaches have resulted in large numbers of children being detained”\textsuperscript{340} and secondly, “ASBOs risk alienating and stigmatising children, thereby entrenching them in their errant behaviour”\textsuperscript{341}.

**ASBOs and young offenders**

One of the reasons why ASBOs are so attractive for local authorities and other government bodies is that there is no real age bar, so they can be obtained in respect to any offender aged 10 or more. This makes them a tool not specifically dedicated to young offenders, as the age of the offender

\textsuperscript{338} ASBCPA 2014, s.2(1): ‘In this Part “anti-social behaviour” means: conduct that has caused, or is likely to cause, harassment, alarm or distress to any person; conduct capable of causing nuisance or annoyance to a person in relation to that person’s occupation of residential premises; or conduct capable of causing housing-related nuisance or annoyance to any person’.

\textsuperscript{339} GIL-ROBLES A. (Council of Europe’ Commissioner for Human Rights) on his visit in UK in November 2004, par. 117.

\textsuperscript{340} GIL-ROBLES A. (Council of Europe’ Commissioner for Human Rights) on his visit in UK in November 2004, par. 118.

\textsuperscript{341} GIL-ROBLES A. (Council of Europe’ Commissioner for Human Rights) on his visit in UK in November 2004, par. 119.
does not influence the relevant authority in applying for an ASBO nor the court in making an order.\textsuperscript{342}.

However, more than their use proportion, ASBOs come into relevance in the frame of prevention of juvenile crime because of their evident failure in achieving the goal of ‘prevent offending by children and young persons’\textsuperscript{343}. According with the most recent statistics published by the Government\textsuperscript{344}, more than half of ASBOs made between 1999 and 2012 against children and young persons have been proved to be breached. It’s reported that among young people the 52\% of ASBOs have been breached, while among overage defendants breaches are just the 38.8\%; and what is even more interesting is that between the juveniles proved to have breached their ASBO, the 37.7\% received a custodial sentence.\textsuperscript{345}

These results prove how ASBOs are too often a direct way from a behaviour that not necessarily is a criminal offence to the criminal justice system, in clear contradiction with the noble purpose to keep juveniles far from it as long as possible.

Some ASBOs, moreover, have been defined as ‘made to be breached’; we refer to those made in respect of behaviours that can be defined as dysfunctional, obsessive-compulsive, and/or disordered; if those behaviours (even if anti-social) are manifestations of mental disorders, it is very unlikely that an ASBO can stop them and the breach is almost

\textsuperscript{342} The age of the offender is taking into consideration by the ACPO Youth Offender Case Disposal (Gravity Factor System) 2003, a guideline that helps Police Officers in deciding whether to charge, caution or conditionally caution apply, inter alia, in case of breach of an ASBO. It provides, in par.1.2(g), that one of the key factors that will be relevant in such decision will be the age of the child/young person.

\textsuperscript{343} CDA 1998, s.37.


\textsuperscript{345} While adults receiving a custodial sentence for having breached an ASBO between 2000 and 2012 are the 59.3\%. 
guaranteed\textsuperscript{346}. Significant is the case of an alcoholic woman prohibited by an ASBO of drinking in public areas who, because of her psychological and pathologic conditions, cannot stop drinking and keep collecting an endless series of breaches with the evident result that the order is filling her criminal record without any possibility of preventing her to commit further seminal behaviours. Same conclusions can be taken in respect to the use of ASBOs against children with conditions that affect their learning ability, supported by the BIBIC\textsuperscript{347}’s campaign ‘Ain’t Misbehaving’ begun in 2003.

Concluding, ASBOs are not adequate instruments to keep people (especially youths) away from crime, but just a vehicle through which simple anti-social conducts risk to turn into a criminal offence, with counterproductive consequences in relation with the aim they were introduced for. As observed, they don’t avoid people’s involvement in criminal system but, on the contrary, they force it; “the concern is that the excessive use of ASBOs is more likely to exacerbate anti-social behaviour and crime amongst youths than effectively prevent it”\textsuperscript{348}.

ASBOs are more effective as an answer to the need for political arguments than as a tool for crime prevention. By emphasizing the need for intervention against anti-social behaviour, “the Government is using the political irresistibility of the claim of public protection to promote increasing repressive measures”\textsuperscript{349}. The practical result is a dangerous mechanism of Orwellian proportion\textsuperscript{350} that claims to ensure peace and

\begin{footnotesize}
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\item \textsuperscript{346} See SIKAND M., ASBOs: a practitioner’s guide to defending anti-social behaviour orders, Nottingham 2006, pag.3.
\item \textsuperscript{347} British Institution for Brain Injured Children.
\item \textsuperscript{348} GIL-ROBLES A. (Council of Europe’ Commissioner for Human Rights) on his visit in UK in November 2004, par. 118.
\item \textsuperscript{349} ASHWORTH A., Sentencing and Criminal Justice (fourth edition), 2005, pag.219.
\item \textsuperscript{350} BURNETT R., Never too early? Reflections on research and interventions for early developmental prevention of serious harm, in M. BLYTH, E. SOLOMON and K. BAKER Young people and risk, Bristol 2007, pag.107.
\end{itemize}
\end{footnotesize}
security but offers social control without any satisfactory result in terms of (youth) crime prevention.

Example:

Here we consider an example of how, in the case of a seventeen-years-old boy accused of anti-social behaviours gang-related to whom we’ll refer as A, police applied for an ASBO in January 2014. What deserves to be mentioned in our analyse are the elements police attached in support of the ASBO application; among others, these anonymous statements have been received from people who live in the area where the anti-social behaviour is supposed to be committed:

- Resident 1: “I have seen my child physically jump just when they saw the group. I have seen a machete stored in nearby cupboard. They used to store other stuff in hedges, probably drugs and other weapons. My children don’t want to go outside and play because of this; I won’t let them go to football cage for fear of what they might to see or happen to them. I’ve stopped sleeping properly for a while now. I’ve had my shed broke and I’ve to call police a number of times”.

- Resident 2: “When it’s cold or raining the gang would move into the nearby tower block. If they couldn’t tailgate someone into our block then they used to force the communal doors open. Once they get into one block then they go out onto the roof that gives them access to all adjoining blocks. I’ve had the gang tailgate me into our blocks but there has been too many of them to say anything. It’s very intimidating. I’ve seen the same gang shoot pigeons with BB guns; in the morning I will often see dead pigeons lying around which they have shot. It’s awful. (...) there is evidence of drug everywhere with the Ritzla papers and empty Cannabis bags”

- Resident 3: “We can’t get pizzas delivered to our home address anymore as, a little while ago, a pizza-man was robbed by the gang of the pizza and money as he walked down the road”.

- Resident 4: “They drink alcohol and make so much noise. They are

Examples of ASBOs sentences are collected in RAMSAY P., Vulnerable Autonomy and the Right to Security in the Criminal Law, Oxford 2012.
always shouting and it sounds like they are starting a fight”.

The application was presented on the basics of the above statements and a Rap-video uploaded on youtube where young people (among which A), according with police, rap “promoting gang violence and referring to firearms and violence in general; some of these males are seen in this video making gun and gang gestures with their hands”.

The ASBO suggested by police in its application and confirmed by the court contains the following prohibitions:
- Entering the London Brough of Newham
- Intimidate any person or join or being present in any group of two or more people in a public place which is acting in a manner likely to frighten any person.
- Entering or remaining in the company of or contact directly or indirectly the following persons: (…).
- Behave in an intimidatory manner or otherwise use foul or abusive words in the presence of/towards police officers, person performing a public service role or members or the public.
- Cover any part of your face with scarf, mask, hood or hat including baseball caps 352.

That means that the defendant, aged 17, could be charged with a criminal offence for having contacted directly or indirectly (that means he could simply said something to a person for her referring to another person he’s supposed not to contact whom) or wearing a scarf. And what’s even worse is that this offence can be punished with a custodial sentence up to five years imprisonment. These are orders strongly likely to be breached by a seventeen-years-old defendant; the risk is he’s going to fill his criminal record with several breaches of an ASBO for having just behaved in a manner that violates the order. Is it an efficient way of ‘preventing offending by children and young persons’ 353?

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352 Rationale: impact statements show members of this gang including the D to cover their faces causing harassment/alarm/distress to local residents.
353 CDA 1998, s.37.
Gang Injunctions

Gang injunctions (Gangbos) were introduced after a case decided in Birmingham in 2009\textsuperscript{354}.

The whole case brought out the need for a tool similar to ASBOs but specifically indicated to deal with gangs and capable of overcoming the problem of reticent victims and witnesses that makes hard the prosecution of gang members\textsuperscript{355}; the Government introduced such a new instrument, but ignored what the Court of Appeal had suggested about the necessity of a criminal standard of proof in such injunctions\textsuperscript{356}.

Gang-injunctions were introduced by the Policing and Crime Act 2009 for adults, and extended to offenders aged 14-17 with the Crime and Security Act 2010\textsuperscript{357}. They are “aimed to break down violent gang culture, prevent the violent behaviour of gang members from escalating and engage gang members in positive activities to help them leave the gang”\textsuperscript{358}.

According with the 2009 Act such an injunction can be made when the court is satisfied on the balance of probabilities that the respondent has engaged in, or has encouraged or assisted, gang-related violence\textsuperscript{359}; the second

\begin{footnotesize}
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\item \textsuperscript{354} Birmingham City Council v Shafi and another [2008] EWCA Civ 1186 [2009] 1 WLR 1961: the Council, considering the increasing gang-related violence, used s.222 of the Local Government Act 1972 to make several civil injunctions against alleged gang members, restraining them in a number of ways. All these injunctions were seen to be “sought in aid of the criminal law”\textsuperscript{354} by the Court of Appeal, who established that the correct measure the Council was supposed to adopt was an ASBO.
\item \textsuperscript{357} Crime and Security Act 2010, s.34: ‘In section 34 of the Policing and Crime Act 2009 (injunctions to prevent gang-related violence), in subsection (1), after “grant an injunction” there is inserted “against a respondent aged 14 or over”’.
\item \textsuperscript{359} S.34(2).
\end{itemize}
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requirement is that the court thinks the injunction is necessary for either or both of the following purposes: to prevent the respondent from engaging in, or encouraging or assisting, gang-related violence and/or to protect the respondent from gang-related violence\textsuperscript{360}.

A definition of ‘gang-related violence’ is given by s.34(5), where it is indicated as that violence that ‘occurs in the course of, or is otherwise related to the activities of a group that consists of at least 3 people, uses a name, emblem or colour or has any other characteristic that enables its members to be identified by others as a group, and is associated with a particular area’.

A Gangbos can contain both prohibitions\textsuperscript{361} and positive measures\textsuperscript{362}; it is not required a minimum duration but no condition can be longer than two years\textsuperscript{363}.

Who can apply for a gang-injunction? Applications for injunctions can be made by: the chief officer of police for a police area, the chief constable of the British Transport Police Force, or a local authority\textsuperscript{364}; they must follow the consultation of any agencies (local authority, chief police, or any other body) that the applicant considers appropriate to consult\textsuperscript{365}. If the application is presented in respect to a youngster, the correct agency to be consulted will be the YOT of where the respondent resides\textsuperscript{366}.

Exactly as ASBOs, gang-injunctions are civil orders, but their breach is not a criminal offence even if it can be punished with custody; the difference with ASBOs, indeed, is that here the breach does not constitute criminal

\textsuperscript{360} S.34(3).
\textsuperscript{361} S.35(2).
\textsuperscript{362} S.35(3).
\textsuperscript{363} S.36(2).
\textsuperscript{364} S.37(1).
\textsuperscript{365} S.38.
\textsuperscript{366} Crime and Security Act 2010, s.36.
record.
If breached, the respondent can be arrested without a warning if a power of arrest was attached to the order\(^{367}\). If there is no power of arrest, the court can issue a warrant for arrest if there is reasonable ground to believe that a term of the injunction has been breached\(^{368}\).

Somebody enthusiastically welcomed Gangbos for being “a tool which could tackle the problem of gang violence before criminalising young gang members”\(^{369}\) and an instrument that, not having any effect on the defendant’s criminal record, will encourage families and friends to give evidence against gang-members\(^{370}\). Others underline how, even if we can generally agree that a desire to remove people from the criminal justice system is admirable, “the gang injunction appears simply to shift the problem to the civil courts”\(^{371}\); moreover evidence will not be given by relatives and friend because one of the consequences of such an injunction can be a (civil) custodial sentence\(^{372}\); and, finally, some scholars observe that the Government responded to the gang problem “by introducing new extensive powers to ‘criminalize’ those who are or might be involved in them; not ‘criminalize’ in the sense of introducing a new criminal offence with criminal sanctions through due process with criminal evidential standards, but ‘criminalize’ in the modern manner: through the civil courts,

\(^{367}\) S.43.
\(^{368}\) S.44.
\(^{370}\) HOME OFFICE, *Statutory Guidance: Injunctions to Prevent Gang-Related Violence*, December 2010, par.10.10: “(...)Since the sentence is civil and not criminal, the respondent will not receive a criminal record for breach even if committed to prison. This is advantageous for two reasons: relatives and close friends of the respondent are more likely to give evidence against the respondent if they know the penalty for breach will not lead to a criminal record”.
with the civil standard, with criminal consequences\textsuperscript{373}. In fact, considering the different proceedings, standard of proof and attention to the rights of the defendant in civil and criminal proceedings, we cannot agree with who argues that “if the conveyor belt still takes you straight to prison, whether you get there through the criminal or the civil courts doesn’t really matter”\textsuperscript{374}.

The civil nature shows its effects also in the frame of the legal aid, as by confusing civil and criminal proceedings “it would be ironic indeed if ringfenced civil legal aid budgets were eaten up by these criminal regulatory measures”\textsuperscript{375}.

Points of criticisms have been raised upon this new measure that doesn’t respond to a particular offence, but reacts to the simply participation of the defendant in a gang. No offence needs to be proved, thus it seems forgetting that “the main problem is not really gangs per se, but youth violence”\textsuperscript{376}. As in ASBOs legislation, moreover, a significant vagueness about the statutory definition of what is in fact a ‘gang’ can be observed; if it is true that “gang injunctions should only be used to prevent gang-related violence that is committed by groups that fall under the section 34(5) definition of a gang”\textsuperscript{377}, this definition itself still nebulous and “not gang-specific”\textsuperscript{378} as requires only a group of at least three people with in common a particular item/cloths colour and a particular geographic area, that could simply be

\textsuperscript{373} MACKIE J., \textit{Breaking up with the gang}, Solicitors Journal 153/44, Nov. 2009, pag.36.
\textsuperscript{374} WHITEHEAD L., \textit{In Practice: Practice points: the law on 'Gangbos'}, Law Society Gazette (2011) 8 Dec, 22.
\textsuperscript{375} MACKIE J., \textit{Breaking up with the gang}, Solicitors Journal 153/44, Nov. 2009, pag.36.
\textsuperscript{377} HOME OFFICE, Statutory Guidance: Injunctions to Prevent Gang-Related Violence, December 2010 par.2.3.
football fans, or indeed, later this year, school children. One point of criticism is that these orders cannot stop one of the most relevant vehicles for gang culture: internet. Even if the statutory guidelines provide that “it may be appropriate for the injunction to impose a prohibition restricting the use of the internet”, it risks being impossible for an order to control it.

A measure of this kind, even if we admit it’s an efficient tool to keep teenagers away from gang violence, is doubtless a short-term one. Many voices have risen to stress the need for long-term plans to help them in avoiding gang involvement.

Measures based on suspect: Stop and Search

In the frame of ante-delictum measures, we chose to consider also Stop and search because of its practical relevance. Even if it is not a proper ante-delictum measure that apply directly to those individuals identified as ‘at risk’, it was introduced to prevent crime by empowering police to stop those individuals who could be ‘at risk’ and search for evidence of this risk. Stop and search is frequently used in respect to young people, for which it becomes a technique of control heavily recurrent and intrusive.

The primary purpose of stop and search powers is to enable officers to allay or confirm suspicions about individuals without exercising the power of arrest. It “can play an important role in the detection and prevention of

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crime (...) but failure to use the powers in the proper manner reduces their effectiveness”\textsuperscript{382}.

Police have a number of stop and search powers; the most significant are those granted by: Police and criminal evidence act 1984 (s.1), Misuse of drugs act 1971 (s.23), Criminal justice and public order act 1994 (s.60), Terrorism act 2000 (ss.43 and 44).

Because of its intrusive approach to individuals’ liberty, the power has various limits and generally requires clear reasons to be exercised; it can be used only on the concurrence of statutory circumstances. In PCEA 1984, Misuse of Drugs Act 1971 and Terrorism Act 2000 “reasonable grounds for suspicion” is the necessary precondition for the exercise of a power of stop and search. “Reasonable grounds for suspicion” - as clarified by the Police and Criminal Evidence Act 1984 codes of practice\textsuperscript{383} – depend on the circumstances in each case. They must be based on objective basis and they can never be supported on personal factors or on generalisations or stereotypical images of certain groups or categories of people\textsuperscript{384}; they cannot be proved retrospectively nor it is possible to detain the person in order to find grounds for a search\textsuperscript{385}. All these specifications mean that the ground of suspicion is sufficient when objective and recognized before the power is exercised, being any power exercised (in advance) in order to find a reasonable ground of suspicion illegitimate.

\textsuperscript{382} RAMAGE S., United Kingdom's police “stop and search” powers in 2013, Criminal Lawyer 2013 215, (1).
\textsuperscript{383} Code A par.2.2.
\textsuperscript{384} POLICE AND CRIMINAL EVIDENCE ACT 1984 - CODE A, par.2.2: “But the suspicions can be on this bases, for example, unless the police have a description of a suspect, a person’s physical appearance including any of the ‘protected characteristics’ set out in the Equality Act 2010 or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person”.
\textsuperscript{385} Ibid, par.2.10
The code of practice also underlines that searches are more likely to be effective, legitimate, and to secure public confidence when reasonable suspicion is based on a range of factors\(^{386}\), than when the grounds of suspicion are reduced to only one.

Points of criticism have been raised upon the use of this power, that has been considered the expression of various discriminations, as it was proved that “for the most part, Stop and Search (…) was patterned by age, ethnicity and gender”\(^{387}\).

Because of its structure, that requires an evaluation of the ‘reasonable grounds of suspicion’ made by policemen, this power is likely to be influenced by personal sensibilities and feelings that bring to a no-objective way of proceeding, as even “pure prejudice might motivate a particular PC to stop a group”\(^{388}\).

First of all, it has been proved that the power is used to stop young persons more than adults, and a justification has been identified in that “crime, or at any rate the sort of crime that police on the street deal with, is a young man's game. Street searches focus heavily on young men as a rational response”\(^{389}\).

But the biggest and most frequent discrimination scholars recognize in the use of stop and search is the racial one, so that somebody argues that “it is no exaggeration to say that stop and search, as currently practiced, is the single most important source of conflict between black people and the police”\(^{390}\). These considerations come, in fact, from the analysis of statistics

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\(^{386}\) POLICE AND CRIMINAL EVIDENCE ACT 1984 - CODE A, par.2.
\(^{389}\) Ibid.
\(^{390}\) Ibid.
presented with Macpherson Report (the Steven Lawrence Inquiry)\textsuperscript{391}, where it has been point out that black people were five times more likely to be stopped and searched than whites; that report underlined that racial discrimination is unbelievable high in stop and search, and “the perception and experience of the minority communities (is) that discrimination is a major element in the stop and search problem is correct”\textsuperscript{392}.

In relation to those statistic elements that doubtlessly underlines the tendency of stopping young and black persons, Lustgarten suggest that “one must conclude that the current practice of stop and search (a PCP under the Race Directive) is also illegal under the standards of the Race Relations Act 1976”, as in its practical exercise it represents an example of that ‘indirect discrimination’\textsuperscript{393} that is maybe unavoidable considering the elements which the exercise of the power is based on (existence of ‘reasonable ground of suspicion’), that are “a bulwark of personal freedom, and designed as such”\textsuperscript{394}.

Concluding, in stop and search it is probably complex to give actual relevance to those instances that the code of practice raises by providing that “powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination”\textsuperscript{395}; this difficulty comes from the structure of that power itself, that gives relevance to suspects often connoted by personal feelings which, indeed, play a central role even though law stresses on the need for objective elements.

\textsuperscript{391} Available at www.gov.uk.
\textsuperscript{392} Macpherson Report (the Steven Lawrence Inquiry), 1999, par.45.8.
\textsuperscript{393} That is that discrimination which “focus is not on a specific act or decision by an individual or small group of persons against an identifiable victim, but rather on the differential adverse impact of policies and practices on persons who are members of identifiable racial or ethnic minorities”, as defined in L. LUSTGARTEN, The future of stop and search, Criminal Law Review 2002 Aug (603).
\textsuperscript{395} POLICE AND CRIMINAL EVIDENCE ACT 1984 - CODE A, par.1.1.
The problem of a social control based on individual sensibilities and, more seriously, on individual prejudices doesn’t seem acceptable.

3.2. SENTENCING AND PREVENTION (POST DELICTUM MEASURES)

SENTENCING YOUTHS

The aim of sentencing youths
Prevention of youth crime is the declared aim of the Youth Justice System as disposed by the Crime and Disorder Act 1998; then it is also one of the elements the court, in the sentence, must have regard to, according with the Criminal Justice Act 2003.

The criminal Justice Act 2003 disposes that the purposes of sentencing in general, both for young and adult offenders, are ‘the punishment of offenders, the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences’.

The same statute in 2003 established the Sentencing and Guidelines Council, aimed to publish guidelines that the courts must consider in sentencing an offender. In fact the council published the document

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396 Most of information has been collected by observing the practical working of the Stratford Youth Court (London), between February and May 2014.
397 CDA, s.37.
398 CJA 2003, s.142A.
399 CJA 2003, s.142(1).
400 CJA 2003, s.167.
401 CJA 2003, s.172.
entitled ‘Sentencing Youths’ where all recommendations for courts are synthetized. The guideline opens with the repetition of what disposed in the statute itself recommending that ‘when sentencing an offender aged under 18, a court must have regard to: the principal aim of the youth justice system (to prevent offending by children and young persons) and the welfare of the offender’.

So, reading these dispositions together, what comes out is that when dealing with offenders under the age of eighteen, the court must have regard to prevention of youth crime as the main aim of the whole Youth Justice System and to the Welfare of the offender; but it must also give a sentence that ensures that purposes listed in s.142 (that are the punishment, the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences).

The question, indeed is how can those apparently opposite elements coexist, that is how can a sentence that as first must have regard to prevention of youth crime, be aimed to punish the offender.

Sentences are the vehicle through which post-delictum prevention is applied.

General principles in the role of sentencing in deterrence are taken into consideration both by scholars and by legislation.

The most recent general idea is that “the judicial body is the last link of the chain, and we should try to do everything we can to prevent cases coming...”

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402 Published in 2009 and available at http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm
403 Par.1.2.
404 CJA 2003, s.142(A) as introduced by the Criminal Justice and Immigration Act 2008.
405 CDA, s.37.
406 Children and Young Persons Act 1933, s.44(1): “Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person, and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training”.
that far\textsuperscript{408}; and even when the entrance of the young person into the criminal system cannot be avoid, the circuit where he has got in must consider that “in juvenile justice there should be no retribution”\textsuperscript{409}, and its intention should be to “establish responsibility and, at the same time, to promote re-integration of the young offender rather than to impose retribution”\textsuperscript{410}.

Evidently these academic considerations partially ignore what seems to be so clear in legislation, that’s the punitive aim of a sentence\textsuperscript{411}. Anyway, considering the disposition of s.142A, it follows that the court has the duty to choose, among the possible sentences for the offender, the one that ensures the principal aim of the Youth Justice System – preventing further offences.

In that what ensures, at a practical level, that that aim is effectively persecuted is the role of the judge\textsuperscript{412}; it is the judge who’s required to analyse the offender’s background and to give a sentence able to keep into consideration the need for prevention that legislation stresses. It is the human sensibility of those who are required to decide that, in concrete, gives actuality to those needs that legislation can only consider as ‘general aims’ or ‘principle of sentencing’. It cannot be strictly disposed by statute which criteria have to be considered in that sense. More precisely, once identified the offence and then its seriousness and the level of criminal culpability\textsuperscript{413}, when more than one sentence could be chosen for the offender, the court is asked to decide on the assumption of the need for the


\textsuperscript{409} Ibid.

\textsuperscript{410} \textit{Sentencing Youths}, par.1.3.

\textsuperscript{411} CJA 2003, s.142(1).

\textsuperscript{412} Or magistrate, in Magistrates’ Courts.

\textsuperscript{413} The Sentencing Guideliness Council has identified four levels of criminal culpability. See SGC, \textit{Overarching Principles: Seriousness} (2004), par.1.6 and 1.7.
sentence to be the most suitable in order to ensure the general aims of sentencing youths.

The judge (or magistrate), when dealing with a young offender, is required to consider what can be the most appropriate sentence for the individual who’s standing before the court; it will be different for every singular offender. In that, a great contribute is given by YOT reports\footnote{YOT reports are introduced and regulated by the CJA 2003.} that, inter alia, summarize the offender’s background and his principal characteristics, his previous convictions, his feelings about the offence etc.

What is generally taken into consideration is giving to the offender something positive to do, not only in an educative perspective but also, simpler, for keeping the young person out from situations that can be an occasion of crime. Since the most important cause of offending is that young offenders have nothing to do, judges normally try to investigate what can be done for the teenagers to be occupied during the day; they try to direct them in useful activities that can keep them away from risky situations and inadequate people\footnote{All these information has been collected by observing the working of the Stratford Youth Magistrates’ Court (East London) between February and May 2014; it is also taken into consideration what declared by Mr RADWAY J. M. (district judge - MAGISTRATES’ COURT), 13\textsuperscript{th} of March.}. The other element the court pays attention to is, where possible, giving a sentence that does not constitute criminal record for the offender, as “a criminal record from early stages is not productive”\footnote{Mr RADWAY J. M. (district judge - MAGISTRATES’ COURT), 13th of March. For criminal record, see further.}.

For keeping them far from the street during the night a good solution is a curfew (with or without electronic monitoring); but it is not enough to ensure youths during the day time, when they usually spend most of their time, especially if excluded from school (frequent for those with the most
serious behavioural problems) hanging around in groups easily finding occasions for crime.

This attitude, at a theoretical level, seems to imply a deep control upon the young person’s life; it looks like a paternalistic approach that could be perceived as an excessive intromission into his private dimension. But by observing the real practical experience of Youth Courts, it is easily understandable how this is the only possible approach to guarantee those principle declared by low to be applied and given concrete relevance.

Indeed, judges and magistrates dealing with young offenders are required not only to consider the general purposes for sentencing, the need for the offender not to be criminalized\(^\text{417}\) and the seriousness of the offence\(^\text{418}\); they’re, in fact, required to consider also each young person’s personal attitudes and background in order to give a sentence that at a practical level is the best to ensure the principal aim of the whole YJS.

Young offenders and criminal record
As written above, one of the relevant elements the court should keep into consideration when dealing with young offenders is the effect that the sentence is going to have on their criminal record.

Criminal record is thought to ensure who needs to check somebody else’s trustworthiness (e.g. potential employers) the possibility to ask for a criminal history disclosure, in order to protect public from certain offenders. On the other hand, however, having a criminal record potentially affects employment research and other services such as insurances and credit from

\(^{417}\) According with the UN resolution 45/112 - United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), art.56.

\(^{418}\) CJA 2003, s.143. in considering the seriousness of any offence, the court must consider the offender culpability and any harm which the offence caused, was intended to cause or might foreseeably have caused. S.143 considers also aggravating factors (e.g. the offence has been committed on bail).
financial institution\textsuperscript{419}. It can be a significant disadvantage especially for young offenders, who will be affected by their previous convictions for a relevant period, since in English system the attendance of the age of 18 does not remove the criminal record.

If we consider, as already clarified, that to accomplish with its duty to prevent the young offender committing further offences, the court usually gives a sentence that keeps him occupied, making the searching for an employment more difficult is not the best way to promote young offender’s constructive activities.

Because of the relevant effects on the offender’s re-inclusion in society, the Rehabilitation of Offenders Act 1974 introduced the principle of ‘spent convictions’, giving certain categories of ex-offenders the right not to disclose their offence to employers after periods of time ranging between six month and ten years \textit{(rehabilitation period)} and usually starting with the conviction. The principle, that provides that the criminal record will be clean again after the end of the rehabilitation period, doesn’t apply for the most serious crimes\textsuperscript{420}.

Despite the introduction of the ‘spent conviction’, however, some scholars notice that “there have been a number of significant developments in recent years that have contributed to the growth and permanency of criminal records in England and Wales”\textsuperscript{421}, such as the increasing of recording and retention of criminal record of young offenders and the expansion of the type of offences which are recorded in criminal records. In addition a ruling in the Supreme Court of Justice Court of Appeal that allows all personal


\textsuperscript{420} Rehabilitation of the Offenders Act 1974, s.5(1).

\textsuperscript{421} WILLIAMS C., The growth and permanency of criminal records with particular reference to juveniles, Police Journal 2011 84(2) (171).
criminal records to be retained and potentially be disclosed for up to one hundred years.\textsuperscript{422}

What happened, because of the increasing emphasis on criminal records, is that “measures to protect children (disclosure of past records of those seeking to work with children) have, in part, indirectly contributed to ‘spoiling’ the future of many children.”\textsuperscript{423} In this frame, thus, as not all sentences give a criminal record, the role of the court in giving a sentence (where possible) that does not constitute criminal record has a strong impact in preventing crime at a practical level; if youth crime prevention, as we argued above, is a game that needs to be played in concrete more than in abstract, this is for sure one of the levels where the need for concreteness is highest.

Restorative Justice
Predominant role the post-delictum crime prevention is the one of what’s called \textit{Restorative Justice}, a set of several and different tools that tries to deal with crime in a more constructive way than a simple traditional punishment. The philosophy which it is based on can more helpfully be summarised in terms of the ‘three Rs’ of \textit{Responsibility, Restoration and Reintegration}.\textsuperscript{424} The possible sentences that law provides for young offenders are inspired to restorative justice principles.

Restorative justice for juvenile offenders goes toward the idea that “in juvenile justice there should be no retribution.”\textsuperscript{425} Or, at least, there should be \textit{not only} retribution. The intention is to establish responsibility and, at the

\textsuperscript{422}Supreme Court of Judicature Court of Appeal (Civil Division) ((2009) EWCA Civ1079).
\textsuperscript{423}WILLIAMS C., \textit{The growth and permanency of criminal records with particular reference to juveniles}, Police Journal 2011 84(2) (171).
same time, to promote re-integration; “the young offender should learn the lesson and never repeat the wrongdoing”\textsuperscript{426}. A number of sentences for juvenile offenders are provided by law, sentences among which some are community sentences, while others require a period in custody. In regulating custodial sentences, statutory law needs to consider that “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”\textsuperscript{427}. And even when the law provides that a custodial sentence can be given in abstract, the court must not impose a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence\textsuperscript{428}. It follows, considering restorative justice and Youth Justice System aim, that “the only reason for locking up children is that there is no other alternative to handle a serious and immediate risk to others”\textsuperscript{429} and the court is satisfied that it is the correct sentence to prevent the offender to commit further offences. Regarding custodial sentences for juvenile offenders two points need to be considered: first, state should only be able to restrict where the child lives as a result of his offending behaviour (that is, via Criminal Justice mechanisms) in circumstances where an adult offender would also be subject to control over his living arrangements because of his alleged or actual offending; there should not be additional grounds for detaining children that do not exist for adults.

\textsuperscript{426} Ibid.
\textsuperscript{427} UN Convention on the Rights of the Child, art.37(b).
\textsuperscript{428} CJA 2003, s.152. It applies both for young and adult offenders.
The second point to make is that where the child is in the care of the state, he should be entitled to the same rights and principles as any other child in care, subject to the ‘necessary requirements of imprisonment’.\textsuperscript{430}

HOW POST-DELICTUM PREVENTION WORKS IN PRACTICE

YOTs and Pre-Sentence reports

As we wrote in chapter 1, the Criminal and Disorder Act 1998 introduced, inter alia, Youth Offending Teams (YOTs)\textsuperscript{431}. Their duties, according with the original legislation, are: to co-ordinate the provision of youth justice services for all those in the authority’s area who need them and to carry out such functions as are assigned to the team or teams in the youth justice plan formulated by the authority under s.40(1)\textsuperscript{432}.

In 2003, the Criminal Justice Act disposed that the court must obtain and consider a \textit{pre-sentence report} before giving a custodial sentence or a community sentence in those circumstances listed in s.156(3)\textsuperscript{433}. A definition of pre-sentence report is given by the same statute, that specifies it as the report ‘with a view to assisting the court in determining the most suitable method of dealing with an offender, is made or submitted by an

\textsuperscript{430} HOLLINGSWORTH K., \textit{Protecting Rights at the Margins of Youth Justice in England and Wales: Intensive Fostering, Custody and Leaving Custody}, Youth Justice 2008 8(3), 229-244.

\textsuperscript{431} CDA 1998, s.39(1): ‘Subject to subsection below, it shall be the duty of each local authority, acting in cooperation with the persons and bodies mentioned in subsection below, to establish for their area one or more youth offending teams’.

\textsuperscript{432} CDA 1998, s.39(7).

\textsuperscript{433} CJA s. 156(3): ‘Subject to subsection (4), a court must obtain and consider a pre-sentence report before— (a) in the case of a custodial sentence, forming any such opinion as is mentioned in section 152(2), section 153(2), section 225(1)(b), section 226(1)(b), section 227(1)(b) or section 228(1)(b)(i); or (b) in the case of a community sentence, forming any such opinion as is mentioned in section 148(1) or (2)(b), or in section 1(4)(b) or (c) of the Criminal Justice and Immigration Act 2008, or any opinion as to the suitability for the offender of the particular requirement or requirements to be imposed by the community order’.
appropriate officer\textsuperscript{434}, and contains information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State\textsuperscript{435}.

Why the Government chose to introduce pre-sentence reports? In many cases background information is needed for the court to be able to comply with its statutory duty to consider the welfare of the defendant\textsuperscript{436} and s.37 of the Crime and Disorder. In other words, since a youth court is required to consider the welfare of the offender and prevention of further offences committed by the same young person, then it needs all necessary information about the offender and his background to do it. If sufficient information is not available, the court will usually adjourn\textsuperscript{437} to obtain a pre-sentence report\textsuperscript{438}. “A sentencing system based on special deterrence – it has been argued- would need to ensure that courts have detailed information on the character, circumstances and previous record of the particular offender, and would then require courts to calculate the sentence necessary to induce the particular offender to comply”\textsuperscript{439}; pre-sentence reports are the response this need.

The purpose of that report is, indeed, to collect all information the court needs to be able to choose the most suitable sentence for that specific individual offender.

\textsuperscript{434} CJA 2003, s.158(2)(b): ‘Where the offender is under 18, ‘appropriate officer’ means an officer of a local probation board, an officer of a provider of probation services, a social worker of a local authority or a member of a youth offending team’.

\textsuperscript{435} CJA 2003, s.158(1).

\textsuperscript{436} Children and Young Persons Act 1933, s.44.

\textsuperscript{437} Magistrates’ Court Act 1980, s.10(3): ‘A magistrates’ court may, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, exercise its power to adjourn after convicting the accused and before sentencing him or otherwise dealing with him; but, if it does so, the adjournment shall not be for more than 4 weeks at a time unless the court remands the accused in custody and, where it so remands him, the adjournment shall not be for more than 3 weeks at a time’.

\textsuperscript{438} And more unusually an education or medical report.

Pre-sentence reports and regulated by the 2010 National Standard for Youth Justice Service published by the YJB\textsuperscript{440} are written by YOTs. They must be completed with: sources information, offence analysis, assessment of the young person, assessment of the need for parenting support, assessment of risk to the community (including the likelihood of reoffending, risk of serious harm to others and dangerousness where required), a conclusion including proposals for sentencing\textsuperscript{441}.

There are two possible pre-sentence formats: the specific pre-sentence reports “should assess the young person’s suitability for a specific sentence”\textsuperscript{442}; all-options reports, on the contrary, take into consideration all possible sentences the offender can be given and considerations about the possible effects of all of them on the offender.

The practical YOTs operation, however, often works not really in the sense of an ‘all-options’ report, but in the sense of proposing all possible sentences alternative to custody; YOTs give a great importance in avoiding the young person to receive a custodial sentence, and for this reason in their reports non-custodial sentences are emphasised more than custodial ones.

It is the YOT’s responsibility to assist the court, by means of a pre-sentence report, in determining the most suitable method for dealing with a young person who has offended\textsuperscript{443}. And this responsibility is a significant one, as YOT has also its own physical desk before the court, during the hearing.

Pre-sentence reports play a central role in sentencing a young offender; they are one of the instruments the court uses to understand what’s the best sentence in the concrete case and that means they are an instrument that allows the court to give actuality to the need for (particular) deterrence stressed by legislation.

\textsuperscript{440} Available at \url{http://www.justice.gov.uk}.
\textsuperscript{441} YJB, \textit{National Standard for Youth Justice Service}, 2010 par.5.12.
\textsuperscript{442} Ibid, par.5.13.
\textsuperscript{443} Youth Justice Board, Case Management Guidance, 2010, section 5.
Criticisms

When a pre-sentence report is required, the court is not obliged to give that sentence that the report suggests, and can dissociate itself from that suggestion by giving a different sentence if considered more suitable. What YOT suggests with the report, thus, is not strictly compulsory for the court. Considering what fundamental role the pre-sentence report plays in sentencing young offenders, doubts could be raised on whether or not is the court who takes the final decision about the sentence. If the report is supposed to be the central element for helping the court in choosing what sentence to give, is the final decision a court decision? Or can maybe be affirmed that the main role in the decision-making proceeding is the YOT one?

Legislation provides the court is not obliged to follow YOT’s indications, and this factor could be an apparently reassurance. But it does not seem a satisfying answer if we consider that at practical level the report content does play a significant role in the decision-making proceeding; with particular regard to magistrates it could maybe be a risk. Magistrates are simply volunteers who periodically sit in court: can we exclude that they will be strongly influenced by the content of that report?

Apparently, we can perhaps consider as a positive factor, in this sense, the fact that even if in the majority of cases YOT suggestions are sollowed, the court sometimes gives in fact a sentence that’s not the one suggested by the YOT.

Here an example:

CASE J.:

FULL OPTION REPORT:

“J. has stated that he would like to meet the victim to help him understand
the full impact of the offence and assist him with making the right choices in the future”.

“(…) since committing this offence J. has benefited from consistent and intensive YOT intervention for the first time. On relation to the risk of re-offending, J. has engaged with his current intensive YOT intervention and is making positive progress at the PRU. J. presents as much more willing to engage with YPT support and intervention. Work will continue with J. to motivate him to address the areas of his life which increase his risk of re-offending, such as cannabis misuse and association with negative peer group”.

“Conclusion and recommendations: a detention an training order would remove J. from the public arena for a limited period of time, however, in my opinion, the impact of a custodial sentence upon J. would be more disadvantageous than beneficial in the long term. J. may lose his current motivation to take positive changes as well provoking a sense of hopelessness”.

Despite YOT recommendations, the court decided for a 4 months Detention and Training Order (10/04/2014).

3.3. SENTENCES AVAILABLE FOR YOUNG OFFENDERS

Sentences are the vehicle through which measures for youth crime prevention that we called ‘post-delictum’ come to concreteness. Crime prevention, in fact, is “regarded as an aim of the criminal justice system as a whole, including sentencing”\textsuperscript{444}. As clarified above one of the aims of sentencing youths is to prevent them from committing further offences\textsuperscript{445}; deterrence as an aim of sentencing is

\textsuperscript{444} See VON HIRSCH A., ASHWORTH A., ROBERTS J., Principled Sentencing – reading on Theory and Policy, Oxford 2009, pag.40, that argues that “Crime prevention is regarded as an aim of the criminal justice system as a whole, including sentencing but also extending to other elements of the justice system, such as pre-trial detention, policing and community-based prevention projects”.

\textsuperscript{445} CJA 2003, s.148.
“one of a number of consequential aims which share the goal of preventing crime”  

Sentences give actuality to both special and general deterrence. While “special deterrence is aimed at the particular offender before the court, general deterrence seeks to influence the behaviour of other potential offenders in the population”.  

We already went through the examination of different theories the scholars have proposed for sentencing youths. We underlined the eternal tension between the need for welfare and the need for punishment, and we also reported the opinion of those who argue that “the retribution and deterrence theories of punishment, and the principles of punishment which they embrace, are inapplicable to children, because of their presumed lack of responsibility”.  

Considering all we already illustrated about sentencing youths, we are now going to focus on some sentences that legislation designed for young offenders.  

A number of sentences are available for young offenders; they can be grouped in categories, according with their principal aim and mechanism. We are going to analyse community orders, custodial sentences thereby consider in brief the parental responsibility (parenting orders).  

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447 Ibid, pag.40. The authors add that “both objectives employ a mechanism of fear: the threat of punishment (or further punishment in case of individual deterrence) acts as a deterrent”.  
448 See chapter 3, “The legislative approach to juvenile offending: from Welfarism to the ‘Justice Model’”.  
449 STACHON V., The principles of punishment applied to children within the juvenile justice system, UCL Jurisprudence Review 2007(13) (53).
Community sentences

Community sentences are those sentences that contain a community order or a Youth Rehabilitation Order. With community sentences the young offender is given an order that has to be spent in the community; they combine punishment and re-socialization of the offender.

Community sentences are aimed to limit custodial penalties, coming from an idea that for less serious offences, a punishment spent into the community can be more proportionate and efficient than a custodial sentence; even for those cases where the community sentence will be the hardest possible “the proposition behind the [Intensive] Community Order has always been that a credible and demanding community order is a better alternative to short-term prison.”

Because of their aim, community penalties have always suffered of a sort of confront with custodial one, so that they have been even recognized to have the status of the “poor cousins” of prison.

This basic assumption upon which the whole system of community penalties has been built, however, is criticised by those who accuse all penalties different from custody to be “indistinct and poorly understood.”

Zedner, in particular, highlights their contradictions; first of all “the fact that community penalties are generally less nasty than imprisonment should not blind us to their capacity to be unwarrantedly punitive, intrusive or

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450 Criminal Justice Act 2003, s.147(1) as amended by Criminal Justice and Immigration Act 2008.

451 For community sentences as an alternative to custody see NEWBURN T., Crime and Criminal Justice Policy, London 1995, pag.109 and followings, where community penalties are defined as “alternatives to immediate custodial sentences”.


453 ZEDNER L., Criminal Justice, Oxford 2004, pag.198: “The label ‘alternative to custody’ or ‘non-custodial penalties’ were once used to signal a ‘poor cousin’ status of those punishments which were not prison but which were in place of and, by implication, lesser than”.

454 Ibid, pag.198.
degrading”455.

Other points of criticism are referred to the fact that community sentences are implemented by non-legal professionals456, so that the court seems to lose its control upon an order that is run in its name, being this a “surprising limit on the powers of the courts”457.

The strongest critiques, however, are those that doubt the benefit itself that a community sentence can bring; despite the deep intrusion into the life of the offender458, they are in fact accused of ineffectiveness459. The charge that community penalties are not credible punishments and they lack the ability to deter is however compensated by the acknowledge that “community penalties entail many of those deterrent effects that are the much vaunted capital of the prison”, being the deterrent potential of community penalties in the fact that “their variety makes it possible to target pains at the specific characteristics or habits of the individual offender”460. Not least, the fact their parsimony and economy, defined as “the very strengths of financial and community penalties over prison”461.

According to the Criminal Justice Act 2003 ‘a court must not pass a community sentence on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences

455 Ibid, pag.203.
457 Ibid, pag.202: “Although the court has the power to specify certain aspects of these orders, in most cases the detailed content and implementation are left to the discretion of probation officers, social workers, educationalists and therapists. As a consequence, the court has little oversight of what is practised in its name. Seen one way this is an appropriate allocation of expertise, seen another it represents a surprising limit on the powers of the courts”.
458 Ibid, pag.203: community penalties are accused to permit “a deeper intrusion into the lives of offenders and impose greater infringements of their liberty than do financial penalties”.
459 ZEDNER L., Criminal Justice, Oxford 2004, pag.198: “To the extent of community penalties claim to serve other purposes, not least to reform or rehabilitate, doubts also arise about their effectiveness”.
460 Ibid, pag.230.
461 Ibid.
associated with it, was serious enough to warrant such a sentence, the order has to be the most suitable for the offender and the restrictions on liberty imposed by the order must commensurate with the seriousness of the offence. Offenders aged 18 or above, moreover, can be given a community sentence only for offences punishable with imprisonment. The court must obtain a report unless it is of the view that one is unnecessary.

According to the Council’s guidelines community sentences must be determined following the seriousness of the offence and strike the right balance between proportionality and suitability. They can contain various orders, being all aimed to impose re-educational or re-pay activities in order to re-socialize the offender; this is the reason why when imposing requirements as part of a sentence, the court must balance with the offender’s personal circumstances and avoid the conflict with work, schooling or religious belief.

Among community sentences the ones we are going to mention, as most frequent, are Referral Order and Youth Rehabilitation Order (introduced by the Criminal Justice and Immigration Act 2008, that with it replaced a number of other community sentences).

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462 CJA 2003, S. 148(1).
463 S. 148(2).
464 S. 150A(1): ‘The power to make a community order is only exercisable in respect of an offence if: (a) the offence is punishable with imprisonment; or (b) in any other case, section 151(2) confers power to make such an order’.
465 S. 156(1).
466 SENTENCING GUIDELINES COUNCIL, Overarching Principles – Sentencing Youths (Definitive Guideline), 2009.
Youth Rehabilitation Order: YRO legislation empowers courts to impose on the young person any one or more of the requirements listed in CJIA 2008 s.1.\textsuperscript{469} Resulting from the fusion of different provisions, the YRO’s main benefit is that it can contain a combination of orders that the court believes to be meaningful for the offender\textsuperscript{470}, being a tailor-made sentence specifically built upon the individual who stands before the court. It entitles the court to design an order according to the young offender’s specific characteristics; all the court comes to know through the offender’s criminal history and the YOT’s pre-sentence report comes to relevance when the same court decides how to fill the YRO. In this sense, remembering what we said about the role of the individual magistrates in concrete prevention post-delictum, this is surely one of those cases where the understanding of the offender’s life-style and vulnerabilities is the key for a pondered decision. Here, indeed, when the pre-sentence report highlights the offender to be associated with risky groups particularly connected with a certain area, the YRO will contain an exclusion requirement\textsuperscript{471}; when the offender results being likely involved in risky activities during the night, the YRO will probably be a curfew\textsuperscript{472}.

\textsuperscript{469} Criminal Justice and Immigration Act 2008, s.1: ‘(a) an activity requirement, (b) a supervision requirement, (c) in a case where the offender is aged 16 or 17 at the time of the conviction, an unpaid work requirement, (d) a programme requirement, (e) an attendance centre requirement, (f) a prohibited activity requirement, (g) a curfew requirement, (h) an exclusion requirement, (i) a residence requirement, (j) a local authority residence requirement, (k) a mental health treatment requirement, (l) a drug treatment requirement, (m) a drug testing requirement, (n) an intoxicating substance treatment requirement, and (o) an education requirement’.


\textsuperscript{471} CJIA 2008, s.1(1)(h).

\textsuperscript{472} CJIA 2008, s.1(1)(g).
In fact, among those possible orders listed in section one, supervision unpaid work and curfew are probably the most frequent.

When supervision is given, the offender is required to attend a series of appointments with the local YOT, who will establish an intervention program based on his level of re-offending (intensive, enhanced or standard), and depending on this level he will, then, be required to attend appointments 8, 4 or 2 times a month. The content of these appointments will be targeted on the offenders particular needs (e.g. if the offender is reported to be an alcohol user or a cannabis user, they will probably be one-to-one sessions on the negative effects of substance misuse) and must consider a form of reparation chosen by the YOT itself depending on the age of the offender and whether or not the victim agrees to being involved.

When a YRO contains a curfew, the young person is required to be in a certain place at a certain time every day.

The ratio behind the curfew is to keep the young person out of trouble in those periods of time (by night) that could be the occasion for falling (again) into crime.

Criticisms have been raised by who argue that “whether the curfew has qualities beyond its incapacitive effects is open to doubts”. It is accused to be “only minimally punitive; the degree of public censure it conveys is

For a complete analysis of supervision for young offenders, see ZEDNER L., Criminal Justice, Oxford 2004, pag.224 ss.

YJB, National Standards for Youth Justice Services published in April 2013, par.8.9.

Forms of reparation chosen by the YOT can be: written a letter to the victim in order to apologize, unpaid work, meet the victim directly. In order to plan the reparation activity the offender will be required to follow, the YOT shall contact the victim and check his/her disponibility

That usually means that he’s prescribed to be home between 7pm until 7am.

See ZEDNER L., Criminal Justice, Oxford 2004, pag.219: “carefully targeted, it has the power to retain offenders at precisely those moments when they are most likely to offend. By keeping them away from sources of temptation and places of risk, it has the potential to reduce opportunistic crimes lie assault after pub-closing hours”.

Ibid.
slight; and the pain it inflicts relatively small (...). Nor have the curfew any positive reformative effect. It does not address the problems that led to the offending behaviour and may leave the offender as likely to offend at its conclusion before\footnote{479}\footnote{Ibid. The author also adds: “Devoid of rehabilitative content, the curfew maintains control over offenders, in the name of risk reduction and protecting the public, but does little more”.}

“The curfew – it has also been argued – can even be said to transform the offender’s house in a prison” \footnote{480}\footnote{Ibid, pag.219.}\footnote{Ibid.}\footnote{Ibid.}; it follows that it impacts not only the offender but also other members of the household, “turning them into fellow inmates or even quasi-warders”\footnote{481}\footnote{Ibid.}.

A curfew can be reinforced by electronic monitoring; in this case the convicted is tagged with an electronic disposal that informs a specific surveillance agency about its position\footnote{482}\footnote{When an offender is tagged, an electronic disposal is fixed on his ankle and another one is installed where the curfew provides he must be during certain periods of time (usually it is his home). During the curfew time if the two disposals are not connected (that means that the offender is not where he’s supposed to be) the surveillance agency receives a signal, and informs the local YOT about the breach of the curfew.}

On the one hand, we have the enthusiastic opinion of those who consider it “leading to a lowering of running costs” because it makes the “concept of prisons without bars [may be moving] a little nearer”\footnote{483}\footnote{GOSLING M., We Know Where You Are!, Justice of the Peace 2007, 171 JPN (850), 1 December 2007.}\footnote{As Zedner highlights, in fact, in custodial penalties, “to the social costs of crime are added the further costs of punishment. The financial costs of traditional punishments (above all imprisonment) to the taxpayer or to society are generally a heavy burden. To the extent that these penalties are seen to fail, their costs become unjustifiable.” See ZEDNER L., Reparation and Retribution: Are They Reconcilable?, The Modern Law Review, Vol. 57, No. 2 Mar., 1994 (228).}, with consistent positive effects in costs cutting\footnote{484}.  

\textsuperscript{479} Ibid.\textsuperscript{480} Ibid, pag.219.\textsuperscript{481} Ibid.\textsuperscript{482} When an offender is tagged, an electronic disposal is fixed on his ankle and another one is installed where the curfew provides he must be during certain periods of time (usually it is his home). During the curfew time if the two disposals are not connected (that means that the offender is not where he’s supposed to be) the surveillance agency receives a signal, and informs the local YOT about the breach of the curfew.\textsuperscript{483} GOSLING M., We Know Where You Are!, Justice of the Peace 2007, 171 JPN (850), 1 December 2007.\textsuperscript{484} As Zedner highlights, in fact, in custodial penalties, “to the social costs of crime are added the further costs of punishment. The financial costs of traditional punishments (above all imprisonment) to the taxpayer or to society are generally a heavy burden. To the extent that these penalties are seen to fail, their costs become unjustifiable.” See ZEDNER L., Reparation and Retribution: Are They Reconcilable?, The Modern Law Review, Vol. 57, No. 2 Mar., 1994 (228).
On the other hand, electronic monitoring has relevant consequences in terms of incidence on the offender’s personal liberty; they are such relevant that somebody compared it, in an article significantly entitled “We know where you are” that highlights how invasive tagging is, to a “probation officer on your leg”; it may also be argued, in this frame, that electronic monitoring violates human rights in so far as the affixing of the tagging invades bodily autonomy.

Not least, tag raises practical problems: first, it requires that the offender have a stable home address, that makes impossible the use of monitored curfew for all offenders that don’t have one; and even more important, at least in its current form of observation, is more limited in its ability to curb crime than its proponents care to admit: in fact “it allows the authorities to know where the offender is, not what he/she is doing. It does nothing to stop offending from or indeed within their home.”

Unpaid work, on the other hand, represents the will to give the offender the possibility to repay the society for the harm he has caused by committing crime. It has recently come to scholars’ attention by the debate about the need for a distinctive element that makes unpaid workers recognisable by public, that concretized in an orange jacket.

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485 Electronically monitored curfew can be inserted in those electronic tools of surveillance that cause an “Surveillance Society” to which Zedner refers in ZEDNER L., Security, Oxton 2009, pag.75.


487 See ZEDNER L., Criminal Justice, Oxford 2004, pag.119. The author wonders whether or not the electronic monitoring can be considered compatible with the rights to privacy guaranteed by ECHR in art.8.

488 Ibid, pag.119.

The other community sentence we consider is Referral Order. Where a young person is before a court charged with a criminal offence for the first time and pleads guilty, the Court must pass (in most cases) a referral order; as legislation provides\(^{490}\) it is an order with which the court refers the young offender to a panel of people from the local authority with which he is required to agree a program of behaviour in order to avoid reoffending. It was introduced as “a fundamentally different way of considering how to intervene most productively and effectively in the life of a young person to stop crime and offending”\(^{491}\), and welcome by scholars as the “most significant of all New Labour’s restorative youth justice initiatives”\(^{492}\). The Powers of Criminal Court (Sentencing) Act 2000 distinguishes between the compulsory referral order\(^{493}\) and the discretionary one\(^{494}\), depending on whether or not the offender pleaded guilty to all the offences or just to one (and not guilty to, at least, one of the connected offences). Since we have already given a panoramic explanation of referral orders in chapter 1, in here we are going to resemble only the principal characteristics of such an order.

First of all, it can be given only in case of first conviction, as the first conviction is, by law, a sort of “key stage in the young offender’s criminal career at which vigorous positive intervention may be fruitful in terms of turning the youngster away from crime”\(^{495}\). What really makes it a good instrument in terms of crime prevention, however, is the fact that a referral order doesn’t give any criminal record; it is the only court order that will not

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\(^{490}\) Youth Justice and Criminal Evidence Act 1999 s.1 and followings, as modified by the Powers of Criminal Courts (Sentencing) Act 2000 s.16 and followings.  
\(^{491}\) Hon Paul Boateng MP, Home Office, Minister of State, Standing Committee E, HC, Second Sitting, 8 June 1999, col 12.  
\(^{493}\) S.17(1).  
\(^{494}\) S.17(2).  
be recorded as a criminal conviction, if the agreement will be completed by the offender.

Several criticisms have been raised upon this measure, with the first one being the lack of legal representation during the meetings with the panel, that’s when the behaviour agreement is signed; while on the one hand politicians consider “nothing more destructive to the objectives of the Bill than involving lawyers in youth offender panels”\textsuperscript{496}, some scholars argue that the “lack of legal representation for offenders in their dealings with panels is identified as an area in which it is possible that challenges will be made under the Human Rights Act 1998”\textsuperscript{497}.

Furthermore, other points of criticism are the temptation for a not guilty plea even in minor cases in order to avoid social “invasive” interventions by the YOT\textsuperscript{498} and the lack of discretion in those where s.17(1) applies, that’s accused to “flaw the initiative”\textsuperscript{499}.

The biggest doubt in terms of utility and efficiency of referral orders, however, are raised by those who accuse them of being coercive and, for that, openly in contradiction with its purposes\textsuperscript{500}.

The breaching of community sentences is regulated by the CJA 2003, schedule 8\textsuperscript{501}. For the breach of a community order where the offender failed to comply with the terms of the order, the court has a number of options open to it, such as: take no action, impose a fine, impose more

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\textsuperscript{496} Standing Committee E, HC, Second Sitting, June 8, 1999, col. 36.
\textsuperscript{498} Ibid: “Defendants charged with relatively minor offences may enter pleas of “not guilty” simply in order to avoid the intervention in their lives”. See also: ZEDNER L., Criminal Justice, Oxford 2004, pag.228.
\textsuperscript{499} Ibid.
\textsuperscript{500} EPSTEIN R., Young offenders on referral orders, Coventry Law Journal 2005, 10(1), (39): “The main problem with the measures introduced to remedy these ills is that the coercive nature of the approach to young offenders, so apparent in the 1998 Act, permeates the referral order provisions in a way that is likely to result in their failing to achieve the declared objectives of restorative justice and the reduction of youth offending”.
\textsuperscript{501} As amended.
\end{flushleft}
onerous requirements, revoke the order and deal with the offender in any manner in which it could deal with him if he had just been convicted by the court of the offence, if the order was made by the Crown Court, commit the offender for sentence.

The breach of a community order is quite frequent for young offenders, who don’t comply with the duty to attend the appointments with YOT or, even more frequently, breach their curfew. The number of breaches mirrors the difficulty for a young person to follow a supervision or a curfew order; some young offenders, because of the diligence that such an order requires, are even oriented in preferring a custodial sentence to a community order: custodial sentences, in fact, are shorter than community ones, and young offenders often see in them the easiest way to serve their punishment faster.

Custodial sentences
A young offender can also be given a custodial sentence. Under both international conventions and domestic law, a custodial sentence must be imposed on a young person only as a “measure of last resort” and for the shortest appropriate period of time\(^{502}\). When giving a custodial sentence the court is also required to consider the guidelines stress upon the need for considering the offender’s maturity (as well as chronological age) in choosing the length of the sentence\(^{503}\). However, someone argues that “imprisonment can be justifiably described as the predominant form of punishment for serious offences, in England”\(^{504}\).

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502 See UN Convention on the Rights of the Child, art.37; for domestic legislation, see CJA 2003, s.152(2) and s.153(2); see also references in SENTENCING GUIDELINES COUNCIL, Overarching Principles – Sentencing Youths (Definitive Guideline), 2009, par.11.5.
503 See par. 11.6.
504 SINCLAIR J., Why has imprisonment emerged as the predominant form of punishment for serious crimes in England?, UCL Jurisprudence Review 2007 13(37). See the entire article for a deep analysis of the history of imprisonment as a form of punishment.
A court may not impose a custodial sentence upon a child or young person unless he is not legally represented\textsuperscript{505}.

A number of custodial sentences are available for young offenders: detention and training order (DTO), detention under Powers of Criminal Courts, detention for public protection, detention for life and detention during Her Majesty’s pleasure.

Detention and Training order has a strong relevance for young offenders, so that nowadays it is considered as the “standard custodial sentence for young offenders”\textsuperscript{506}.

Detention and Training Order: when a DTO\textsuperscript{507} is given, half of the order is served to custody and for the remaining order the young offender is subject to supervision by the local YOT until the term of the order ends.

Detention and Training Orders can probably be seen as the synthesis of two historical theories about youth crime: punishment and welfare. This is a sentence, indeed, that resumes both of them, giving the offender a punishment followed by a welfare element; however, some scholars argue that “it is this very ‘welfare’ element which has meant that the sanction has proved to be even more severe than previous sentences which required juveniles to serve their whole sentence in custody”\textsuperscript{508}, as “given the desire of judges to rehabilitate the young offender, they have been more willing to impose such a sentence on children aged between twelve and fourteen”\textsuperscript{509}.

\textsuperscript{505} Power of Criminal Court (Sentencing) Act 2003, s.83.
\textsuperscript{507} DTO were originally introduced by the Crime and Disorder Act 1998 and then reformed by PCC(S)A 2003 s.100 and following.
\textsuperscript{508} BELL E., ‘Large, unpleasant thugs’? The Penal Responsibilisation of Young People in France and the United Kingdom, Université Jean Moulin Lyon III 2010.
\textsuperscript{509} See Ibid.
This sentence is available for offenders aged 12 to 17, but if the offender is under 15, he can be given a DTO only if he is considered a persistent offender\textsuperscript{510}.

Parental order

“Crime prevention begins at home. Parents have the most powerful influence on their children’s development. From their children’s earliest years, parents can and should help them develop as responsible, law-abiding citizens. They should ensure that their children are aware of the existence of rules and laws and the need for them; and that they respect other people and their property. (...) When young people offend, the law has a part to play in reminding parents of their responsibilities”\textsuperscript{511}.

Based on the above considerations, English system completes youth crime prevention with the regulation of a series of tools aimed to weight on parents in order to produce indirect benefits to children and young persons. This legislative approach towards parents deserves to be properly observed: considering families as part of the project build around young people for them not to commit crime or anti-social behaviours\textsuperscript{512}, legislation gives concreteness to the idea that for complete and efficient crime prevention,

\textsuperscript{510} PCC(S)A s.100(2)(a).


\textsuperscript{511} HOME OFFICE, White Paper Crime, Justice and Protecting the Public 1990, paras 8.1 and 8.2.

\textsuperscript{512} We already wrote, in chapter one, about the statistically-proved connection between poor parenting and offending by youths. The White Paper 1990, however, shows the idea of considering parents responsible for educating their children to be good citizens and to respect rules.
looking at the young person ignoring his family and social background is not enough. As No More Excuses reaffirms “parents hold the primary responsibility for giving children the love and care they need, ensuring their welfare and security and teaching them right from wrong”\(^\text{513}\). In this frame, indeed, we can consider that all provisions introduced into youth crime prevention after the No More Excuses report are justified by “the need to reinforce individual responsibility of both parents and young offenders themselves, the lack of which is considered to be the principal cause of crime”\(^\text{514}\).

Several provisions take into consideration this point, addressing to parents their responsibility as result of their children’s misbehaviour. However, if we see it from the prevention point of view, it is not only the addressing of responsibilities (that is the punitive element of these provisions), but also a welfare-oriented perspective that helps parents for them to help their children.

The first of these provisions is the attendance at court of parent or guardian, that is the obligation for courts, unless it would be unreasonable, to require parents to attend court where a child or young person is charged with an offence or is for any other reason brought before a court\(^\text{515}\).

The principle which that rule comes from, has been re-affirmed in the following years; “attendance to court – the White Paper 1990 argues, in fact – is a powerful reminder to parents of their duty both to their children and to the wider community. It marks the degree of responsibility which the law regards parents as having for the behaviour of their children in this age group. A court appearance is a major event in the life of a young person.


\(^{514}\) BELL E., ’Large, unpleasant thugs’? The Penal Responsibilisation of Young People in France and the United Kingdom, Université Jean Moulin Lyon III 2010.

\(^{515}\) CYPA 1933 s. 34A, introduced by the CJA 1991.
Parents who take their responsibility seriously would wish to make every effort to attend, whether or not the law requires them to do so.\footnote{516} As a second example of parental involvement, the Power of Criminal Court (Sentencing) Act 2000 established the parent’s liability for financial penalties\footnote{517}, empowering courts to order parent or guardian to pay fine when the young person under their responsibility is convicted with a criminal offence for which a fine is a proper punishment\footnote{518}. Where the court imposes a fine, compensation order or costs and the offender is under 16 the court \textit{must} order the parent or guardian to pay the financial penalty unless this would be unreasonable in the circumstances or the parent or guardian cannot be found\footnote{519}. Where the offender is aged 16 or 17, the court \textit{may} order the parent or guardian to pay\footnote{520}. Even a local authority can be sentenced for financial penalty for a crime committed by a young offender for whom it has the parental responsibility\footnote{521}. According with CJA 1991, moreover, where the offender is under 18, the court has the power to bind over parents, that means it can order the parent or guardian to enter into a recognizance to take proper care of or exercise proper control over the offender\footnote{522}. The parent or guardian must consent to any such a order but s.58(2) empowers courts to fine a parent or guardian who unreasonable refuses consent up to £1.000.

The most relevant provisions in terms of juvenile crime prevention and parental responsibility are the ones that regulate parental contracts and orders.

Both of them are based on the idea that “inadequate parental supervision is strongly associated with offending”\(^{523}\), and designed “to develop parents’ skills to reduce parenting as a risk factor and enhance parenting as a protective factor”\(^{524}\), as “effective parenting can help prevent early problems in a child or young person’s behaviour before they escalate into more serious negative outcomes for the child or young person, families and the communities around them”\(^{525}\).

If we look it from a social point of view, moreover, “the underlying message is that parents should parent effectively because that is their moral calling and their civic duty”\(^{526}\).

The basic distinction between the two forms of intervention upon parenthood is that while a parenting contract is a voluntary agreement negotiated between a YOT worker and the parents of the child involved in/likely to become involved in criminal conduct or antisocial behaviour, a parenting order is a civil order\(^{527}\). Both of them can consist of two elements: parenting programmes or specific requirements for the parent (designed to address particular factors associated with offending or antisocial behaviour).

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\(^{524}\) Ibid, par.2.3.

\(^{525}\) Ibid, par.2.9.


\(^{527}\) Ibid, par.2.13.
Parenting contracts are voluntary and expressly aimed to “prevent the child or young person from engaging or persisting in criminal conduct or anti-social behaviour”\(^{528}\).

They were introduced by the Anti-social Behaviour Act 2003, s.19 and 25, respectively dedicated to parenting contracts in cases of exclusion from school or truancy and parenting contracts in respect of criminal conduct and anti-social behaviour.

A parenting contract is a document which contains a statement by the parent or guardian that s/he agrees to comply for a specified period with requirements specified in the contract and a statement by the local education authority, school or youth offending team to provide support to the parent or guardian for the purposes of complying with the contract\(^{529}\).

Because they are voluntary, there is no penalty for refusing to enter into or failing to comply with one. However, previous failure to cooperate with support offered through a contract is a relevant consideration for a court when deciding whether to make a parenting order\(^{530}\). In here, we find the same hypocritical scheme we found in anti-social behaviour contracts: the contract is latterly voluntary, but in practice where the parent refuses to sign it, that will raise the probability to receive a parental order. Can we really consider that parents are free in choosing whether signing or not?

**Parental orders**, on the contrary, are civil orders. They were introduced originally by the CDA 1998, and then modified by the Anti-social behaviour Act 2003.

\(^{528}\) YOUTH JUSTICE BOARD, *Parenting Contracts and Orders Guidance*, February 2004 and revised in October 2007, par.3.4.

\(^{529}\) Anti-social Behaviour Act 2003, s.19(4) and 25(3).

\(^{530}\) See YOUTH JUSTICE BOARD, *Parenting Contracts and Orders Guidance*, February 2004 and revised in October 2007, par.3.32.
Two kinds of parental orders can be made. The first one, is the parenting order in cases of exclusion from school\(^{531}\); however the most relevant, to which the Home Office Guidelines is dedicated, is the parenting orders in respect of criminal conduct and anti-social behaviour\(^{532}\). They are available when the court is satisfied that ‘the child or young person has engaged in criminal conduct or anti-social behaviour, and that making the order would be desirable in the interests of preventing the child or young person from engaging in further criminal conduct or further anti-social behaviour’\(^{533}\), with the intention being “to steer the child away from criminal conduct or antisocial behaviour”\(^{534}\).

The application for a parental order is made by the YOT, that according to the Guidelines must make a judgement about whether parenting is a significant factor in the child or young person’s behaviour\(^{535}\) and prepare evidence in support of the application\(^{536}\).

Every parental order must name a responsible officer, whose task will be the supervision of the parents in following the order. A parent is in breach of the order when, without reasonable excuse, fails to comply with any requirement included in the parenting order, or specified in directions given by the responsible officer\(^{537}\). The major difference between parental contracts and parental orders lies in this: the breach of a parental order is itself a criminal offence\(^{538}\).

Despite the rhetoric about parental orders we want to raise a couple of doubts. First of all, it seems to us that a deep contradiction lies into the idea

\(^{531}\) ASB Act 2003, s.20.
\(^{532}\) ASB Act 2003, s.26.
\(^{533}\) ASB Act 2003, s.26(3)(a)and(b).
\(^{534}\) YOUTH JUSTICE BOARD, Parenting Contracts and Orders Guidance, revised in October 2007, par.4.5.
\(^{535}\) Ibid, par.4.6.
\(^{536}\) Ibid, par.4.7.
\(^{537}\) Ibid, par.8.15.
\(^{538}\) Crime and Disorder Act, s.9.
that a court can order parents how to be better parents; it is when the court gives such an order in the presence of the young person for whom it is supposed to be indirectly helpful that the contradiction appears: how can a parent be more incisive with a problematic son if the court itself, by giving a parental order, makes clear his/her vulnerability before the son himself? In other words: a parenting-lesson taught by the court to a parent that’s already in difficulties in handling with his son, risks maybe to be counterproductive by further weakening that respected that the parent needs to gain by the son; it risks to be, indeed, sort of public humiliation to which the young person attends. It results that a tool introduced to help parents’ strength, ends making, maybe, harder for a parent to be respected, in contradiction with the declared aim\(^{539}\) of parental orders itself.

Not less important, moreover, the fact that a parental order (such as a parental contract, as well) “represent a significant extension of state intervention into ‘family life’”\(^{540}\).

\(^{539}\) YOUTH JUSTICE BOARD, *Parenting Contracts and Orders Guidance*, revised in October 2007 par.2.3: “Parenting programmes are designed to develop parents’ skills to reduce parenting as a risk factor and enhance parenting as a protective factor”.

CHAPTER 2: THE YOUTH JUSTICE SYSTEM IN ITALY

As the English criminal system, even the Italian one dedicates to juvenile offenders a body of law apart from the general penal system\textsuperscript{541}. It is, however, a non-homogeneous regulation that comes out from different singular provisions contained in: the Italian Criminal Code 1930; the R.D.L. 1404/1934 (so called “Legge Minorile”) revised in 1956; the D.P.R 448/1988 dedicated to the rules for the criminal proceedings in case of young offender and its application regulation (d.lgs 279/1989).

The Italian System

An analysis of the Italian juvenile criminal law starts from the basic constitutional principles that come to play in the young persons’ penal treatment. The starting point is art.2 that, ensuring for all individuals the human inviolable rights, imposes to consider the adolescent as a \textit{person}\textsuperscript{542}. It is, however, a person who has not completed his psychophysical development yet; thus, his natural disparity with adults needs to be

\textsuperscript{541} An historical analysis of young persons’ treatment in the justice system, in PANEBIANCO G., Il minore reo, in PENNISI A., La giustizia penale minorile: formazione, devianza, diritto e processo, Giuffrè Milano 2012, pag.116.

considered as a substantial difference claiming for a different treatment as imposed by art.3\textsuperscript{543}.

The need for a specific treatment of young persons can be extracted also from other constitutional principles; we refer, in particular, to art.27.3: the need for the offender’s social re-education has a particular meaning if we consider the general duty of youth protection imposed by art.31.2\textsuperscript{544}.

Art.31.2, in fact, has been considered the basis for a general duty of protection in young persons’ favor; it means, first of all, that state must guarantee juvenile offenders’ social recuperation by teaching them how to respect criminal law\textsuperscript{545}. But by reading this disposal together with art.3, it also means that state must differentiate regulation when dealing with offenders under age, keeping always in consideration (in this diversification process) the duty of protection of young persons.

Once analyzed the constitutional frame for the youth justice system, we can now focus on the criminal code 1930.

Art.97 fixes the minimum age for criminal responsibility defining \textit{non imputabile} the young person aged less than 14 when the offence has been committed\textsuperscript{546}. This is a \textit{iuris et de iure} presumption of no-responsibility for all children under 14.

\textsuperscript{543} The equality principle established by art.3, in fact, impose to give equal treatments to equal situations and different treatments to different situations.

\textsuperscript{544} See LARIZZA S., \textit{I principi costituzionali della giustizia penale minorile}, in PENNISI A., \textit{La giustizia minorile: formazione, devianza, diritto e processo}, Giuffrè Milano 2012, pag.112: “nei confronti del minore l’esigenza del reinserimento sociale sottesa all’art.27.3 Cost. si colora di toni più intensi alla luce di quel compito di tutela della gioventù imposto dall’art.31.2 Cost.”.

\textsuperscript{545} Ibid, pag.107.

\textsuperscript{546} Codice Penale, art.97: ‘Non è imputabile chi nel momento in cui ha commesso il fatto, non aveva compiuto i quattordici anni’.
The criminal responsibility of young persons aged between 14 and 18 is regulated by the following art.98\(^{547}\). Here legislation considers the offender responsible for his criminal behavior if the judge recognizes him to be capable of understanding the meaning of his actions and of willing freely (capace di intendere e di volere). Scholars and courts agree in considering that art.98 requirement doesn’t refer to mental health difficulties, but to the extent concept of maturity\(^{548}\); the young offender shall be considered responsible if sane, psychologically equilibrated, able to understand social values and legal prohibitions, capable of controlling himself as he was overage\(^{549}\). His capability shall be proved in concrete and shall be include

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\(^{547}\) Codice penale, art.98: ‘E' imputabile chi, nel momento in cui ha commesso il fatto, aveva compiuto i quattordici anni, ma non ancora i diciotto, se aveva capacità d'intendere e di volere; ma la pena è diminuita.

Quando la pena detentiva inflitta è inferiore a cinque anni, o si tratta di pena pecuniaria, alla condanna non conseguono pene accessorie. Se si tratta di pena più grave, la condanna importa soltanto l'interdizione dai pubblici uffici per una durata non superiore a cinque anni, e, nei casi stabiliti dalla legge, la sospensione dall'esercizio della responsabilità genitoriale.


\(^{549}\) BARSOTTI-CALCAGNO-LOSANA-VARCELLONE, Sull’imputabilità dei minori tra i 14 e i 18 anni, in Riv. It. Proc. Pen., 1972, from pag.1232: ‘è maturo il ragazzo sano di mente, psicologicamente equilibrato, che ha acquisito un complesso di calori idonei a determinare socialmente il suo comportamento, sa interiorizzare e far proprio il senso di un
the understanding of the meaning of his actions and the willing freely.

When over 14 and able to understand his own actions according to art.98, the young offender found guilty of a criminal offence can be given a criminal punishment. The peculiarity of the Italian system, different from the English one, is that criminal punishments provided by law are generally built for both adult and young offenders; there are not particular punishments dedicated only to young offenders.

The difference with adults, when criminal responsibility has been recognized, is given by provision of art.98.1 second part, that considers the young age as one of those mitigating circumstances for which the punishment will be softer. Criticisms have been raised upon the so built system because of the mechanism imposed by art.69. It provides, in fact, that when attenuating and aggravating circumstances coexist, the judge shall consider only the prevalent one; the result is that the only weak difference in criminal treatment of young offenders lacks of any effect if, with the attenuating circumstance given by the young age, any aggravating circumstance coexist.

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ordine o un divieto, è capace di autocontrollo in ordine ad una certa situazione come se fosse già diciottenne”.


The only difference is that young offenders cannot be given a life-custody punishment, as declared by the Constitutional Court in 1994 (Corte Cost., sent. 28 April 1994 n.168).

Scholars wrote that this regulation doesn’t correspond adequately to the maturity gap between adults and young persons\textsuperscript{553}, who, because of their young age, need a regulation that is a different world in respect of the adult one\textsuperscript{554}.

The so called “Legge Minorile” 1934 established for the first time in Italian system specific courts dedicated to deal with youth crime. It recognized for the very first time young offenders’ specific needs for a justice system that keeps into consideration their typicality and offers a different treatment in respect of the adults’ one, especially in proceeding rules\textsuperscript{555}.

Art.2 provides that each youth court (Tribunale per i Minorenni) is composed by both professional judges expert on teenagers law and social workers\textsuperscript{556}. The introduction of social workers into the court itself is just one of the strategies the law found out in order to guarantee the scientific normativo: l’unica ed esile differenziazione del trattamento penale del minore rispetto all’adulto non svolge più alcun effetto: un esito ancora una volta riconducibile alla scelta legislativa di mutare le risposte ai reati commessi dai minori dal sistema previsto per gli adulti”.

See also pag.140: “una simile impostazione non risulta soddisfacente, non solo perché distante dal dato costituzionale, ma perché dimentica di decenni e decenni di dibattiti che si sono svolti in ogni dove, tesi a sottolineare la peculiarità della condizione minorile, la sua intrinseca diversità da quella dell’adulto e la consequenziale necessità di risposte calibrate sui bisogni del minore; risposte che possano costituire un aiuto per il suo reinserimento sociale”.

\textsuperscript{553} LARIZZA S., Il Diritto Penale dei Minori, Padova Cedam 2005, pag.141: “il legislatore non colma con misure adeguate il divario che c’è tra adulti e minori”.

\textsuperscript{554} BETTIOL G., Diritto Penale (9 edizione), Cedam Padova 1976, pag.406 that defines the criminal justice system “un mondo a sé”.


\textsuperscript{556} R.D.L. 1404/1934, art.2: ‘In ogni sede di Corte di appello, o di sezione di Corte d'appello, è istituito il Tribunale per i minorenni composto da un magistrato di Corte d'appello, che lo presiede, da un magistrato di tribunale e da due cittadini, un uomo ed una donna, benemeriti, dell'assistenza sociale, scelti fra i cultori di biologia, di psichiatria, di antropologia criminale, di pedagogia, di psicologia, che abbiano compiuto il trentesimo anno di età’. About the composition of youth courts, see MORO A.C., Manuale di diritto minorile (4 edizione), Zanichelli Bologna 2008, pag.119 and following.
observation of the offender and to ensure a collaboration between the court and other welfare agencies. In order to re-design the youth justice system according with constitutional principles come in force in 1948, the 1956 reform gave it a welfare-oriented perspective; scholars observe that since this moment, the whole system acquired a re-educational approach.

The new law did not forget the theme of crime prevention, introducing from art.25 to 31 an administrative competence for the new constituted youth courts in order to prevent young persons to offend. In particular, art.25 provides that when showing evidence of an *irregular conduct or behaviour* ("manifeste prove di irregolarità della condotta o del carattere"), youths can be given a probation order.

In response to those international movements claiming for new attentions in dealing with young offenders, the 1980s witnessed a substantial reform regarding those rules dedicated to criminal proceedings for young offenders. The d.P.R. 448/1988 integrated such international principles. In particular, in introduced two new sentences in order to give practical relevance to the principle of the fastest possible of the (young) offender’s realize from the criminal proceeding: the discharge for the irrelevance of the offence and the suspension of the trial on probation.

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557 Ibid, pag. 120: “appare evidente come nella trattazione di ogni caso sia indispensabile una valutazione interdisciplinare che non può essere assicurata da un solo individuo, perché nessuno può essere al contempo giurista, psicologo, pedagogista, sociologo e così via”.


559 “affidamento del minore al servizio sociale minorile”. We are going to analyze further this prevention measure.

560 We refer, in particular, to the Beijing Rules approved by the U.N. Assembly in 1985 (United Nations Standard Minimum Rules for the Administration of Juvenile Justice) and U.N. Convention on the rights of the Child, approved in 1989. Both of them have been sufficiently explicated in chapter 1.

561 d.P.R. 448/1988, art.27.

The discharge for the irrelevance of the offence was introduced by the D.P.R 448/1988, art.27. The mechanism with which art.27 works is the following. When the offence is a non-serious one\(^563\), the criminal behavior is just occasional\(^564\) and the court is satisfied that going on with the proceeding will cause a prejudice to the offender\(^565\), a discharge sentence is given.

It was introduced as a legal tool oriented to avoid the damage caused to the young person’s educational route by a not necessary criminal proceeding, and to avoid the stigmatizing effects that are typical of this process\(^566\).

If the conditions are satisfied\(^567\), the needs for general prevention and community protection are set aside\(^568\), and the focus is only on the young person: a discharge sentence is given.

This new sentence was introduced with the declared aim, in other words, to avoid criminal proceedings as much as possible\(^569\), according with

\(^{563}\) The first pre-requisite (non-seriousness of the offence) has been analyzed by LARIZZA S., Ibid, from pag.215; the main problem concerning this requisite is the lack of a legal definition of minor transgressions to which art.27 applies. The author underlines that to define it, the interpret has to pay attention not to the effects the offence produced, but only to the offence itself, considering all elements listed in art.133 c.p.

\(^{564}\) See Cass. Pen., sez. IV, 7 February 1995, pag.1557: “il comportamento deve essere destinato a rimanere un episodio isolato nella vita del suo autore”.

\(^{565}\) Here the judge is required to give a prognostic judgment about the prejudice the young person is going to suffer because of the proceeding. It could be argued that a criminal proceeding always damages adolescents, being this characteristic in re ipsa (LARIZZA S., Ibid; LA CUTE, Considerazioni sulla sentenza di non luogo a procedere per irrilevanza del fatto, in Riv. Polizia 1993, pag.411); Jurisprudence, however, disagrees with this theory, considering that the last requisite imposes the due to compare the hypothetic effects of the continuity of the trial (Corte d’Appello Caltanissetta, sent. 24 April 1990, pag.635).

\(^{566}\) TONINI P., Manuale di Procedura Penale, Giuffrè Milano 2012, pag.822.

\(^{567}\) As required by art.27, necessary conditions are: a minor offence; an occasional criminal behavior; the risk of prejudice for the young offender in case of continuation of the trial.

Art.27.1: ‘Durante le indagini preliminari, se risulta la tenuità del fatto e la occasionalità del comportamento, il pubblico ministero chiede al giudice sentenza di non luogo a procedere per irrilevanza del fatto quando l'ulteriore corso del procedimento pregiudica le esigenze educative del minorenne’.

\(^{568}\) TONINI P., Ibid.

\(^{569}\) See LARIZZA S., Il Diritto Penale dei Minori, Padova Cedam 2005, pag.207: “vengono poste alla base dell’istituto le esigenze educative, la cui valorizzazione mira ad impedire, fin dove possibile, la messa in moto del meccanismo processuale”.
international recommendations claiming for new tools able to deal with young offenders protecting them from criminal proceedings. The further positive effect of this sentence is the reducing of criminal proceedings for non-serious offences, that makes it possible for the system to better handle more serious offences.

Without a criminal record, the young offender gets out of the criminal justice network without a stigma that could prejudice his future. This does not mean that the young person will get off scot-free; the re-educational (or educational) intervention will be simply assigned not to a sentence, but to a different conciliatory proceeding aimed to promoting and encouraging reconciliation between the offender and the victim.

Penal mediation is mentioned in art.28, regulating the suspension of the trial on probation; however, many youth courts have extended the use of

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570 See U.N. Convention on the Rights of the Child, European Council Recommendation (87)20, but also the meeting about mediation and diversion, organized by the Association internationale de droit penal Tokyo 1983.

571 See LARIZZA S., Ibid, who identifies the aim of this new sentence in this: “deflazione dei procedimenti per i reati bagatellari, consentendo una più accurate gestione dei fatti criminosi più gravi”. MORO A.C., Ibid, pag.531 criticizes the deflective use of the discharge for irrelevance of the offence because “sarebbe del tutto diseducativo per il ragazzo avere la percezione che lo Stato non si preoccupa di analizzare con obiettività e profondità il suo caso, ma solo di archiviare frettosamente una pratica senza guardare troppo per il sottile, anche al costo di commettere un’ingiustizia”. The author also underlines that, considering that statistically youths commit usually non-serious offences, this new sentence represents a general deflective instrument (see pag.212).


573 About Restorativ Justice in Italian system in general see MANNONZI G., La giustizia senza spada – uno studio comparato su giustizia ripartiva e mediazione penale, Giuffrè Milano 2003. Despite the re-educational proceeding alternative to a sentence, MORO A.C., ibid pag.530, argues that for the young person, the discharge for irrelevance of the offence has the meaning of a social insignificance of his conduct.
mediation to those cases of irrelevance of the offence regulated by art. 29. Penal mediation for young offenders is, indeed, a phenomenon regulated not by law but by praxis, with two important consequences: first, the extended use of mediation by youth courts makes it losing its own original nature (mediation, should be literally a spontaneous form of conciliation); even when accepted by the young offender, in fact, it is moved by utilitarian reasons more than by the acceptance of responsibility. Secondly, by adapting mediation to youth justice general principles, the result is a very large use of it in practice, so that we can say that mediation applies in youth criminal proceedings without any limit referred to the offence.

Mediation represents an important synthesis between the need for educational responses, the will to recognize the offender’s responsibility and the victim’s claims of reparation. It is aimed to make the adolescent to feel responsible for the damage he caused by committing a criminal offence; meeting the victim and understanding his/her feelings gives to the offence a human dimension the young offender could have ignored.

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576 See MANNOZZI G., Ibid.


It was introduced as a pedagogic tool to deal with an individual, the adolescent, who is required to orient his personality changes in better\textsuperscript{579}; basic pre-assumption is, in fact, that his principal characteristic is to be in fieri and, indeed, constantly in changing\textsuperscript{580}.

D.P.R 448/1988 art. 28 regulates the **Suspension of the trial on probation**, considered the “most representative example of how the Italian legislation tries to establish an appropriate relationship between justice and the needs of the juvenile delinquent”\textsuperscript{581}. It has been welcome as a revolutionary innovation in our system, that does not know any other suspension of the trial before the conviction\textsuperscript{582}.

When the judge believes it necessary to consider the young person’s personality\textsuperscript{583}, he is empowered to suspend the trial for a period up to one or

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See, for a comparative view, chapter one par. 2: THE LEGISLATIVE APPROACH TO JUVENILE OFFENDING: FROM WELFARISM TO THE ‘JUSTICE MODEL.

\textsuperscript{579} See LARISSA S., Profili sostanziali della sospensione del processo minorile nella prospettiva della mediazione penale, in PICCOTTI L., La mediazione nel sistema penale minorile, Cedam Padova 1998, pag. 112.

\textsuperscript{580} See ORSENGO A., Ibid.

\textsuperscript{581} PALERMO E., Juvenile Deviance in Italy: the need for social control for the Tutelage of young offenders, in HELMUT K and EVELYN S., Punitivity: international developments Vol.1, Crime & Crime Policy Vol. 8, 1-3 University Press Dr. N. Brockmeyer, pag. 353.

\textsuperscript{582} PENNISI C., Riflessioni Sulle Finalità Educative e Riparatrici della Giustizia Penale Minorile, Diritto di famiglia fasc.2, 2011, pag. 614.

\textsuperscript{583} For an analysis on the requirements for the suspension on probation see BASCO M.G. and DE GENNARO S., La messa alla prova nel processo minorile, Giappichelli Torino 1997, pag. 15 and following. They identify, first of all, an objective requirement (capability and responsibility of the offender), writing that ‘l’ordinanza di sospensione del processo deve essere pronunciata come se fosse stata già accertata la responsabilità penale dell’imputato, anche se nessuna norma prescrive che essa debba contenere una dichiarazione di colpevolezza nè che questa sia contenuta in apposite provvedimento separato’. The authors also recognize two necessary subjective requirements for the suspension: the young age on the one side, and the prognostic judgment about the final result of probation on the other side: ‘il giudice, cioè, deve poter offrire al minore un beneficio che, con rilevante grado di probabilità, gli permetterà, nel tempo e progressivamente, di reinserirsi nella società; per questo motivo, quando decide di mettere alla prova il ragazzo, deve essere convinto della effettiva utilità del provvedimento,
three years, depending on the nature of the offence. During this period, social workers and other educational agencies specified in the sentence are required to follow an interventional project that gives dispositions about the young person’s involvement in educational activities, his specific tasks and the eventual operation of penal mediation. The consensual nature of this project represents its own strength; the young person is the first one to be informed about it, in order to agree with content spontaneously. The possibility to impose any prescription that is not accepted by the minor, is excluded. Thus, the project can be considered as a ‘conduct regulation’ only once accepted by the young person.

Scholars underline the importance of the logic and chronologic precedence of the agreement, that has to be defined before the decision about

soprattutto alla luce della personalità del destinatario e della sua disponibilità ad adeguarsi ad un progetto di sostanziale cambiamento di vita’. About the problem of the first requirement (young person’s responsibility) see: LANZA E., *La sospensione del processo con messa alla prova dell’imputato minorenne*, Giuffrè Milano, 2003, pag.57.

Art.28.1: ‘Il giudice, sentite le parti, può disporre con ordinanza la sospensione del processo quando ritiene di dover valutare la personalità del minorenne all’esito della prova disposta a norma del comma 2. Il processo è sospeso per un periodo non superiore a tre anni quando si procede per reati per i quali è prevista la pena dell’ergastolo o della reclusione non inferiore al massimo a dodici anni; negli altri casi, per un periodo non superiore a un anno. Durante tale periodo è sospeso il corso della prescrizione’.

D.L.vo 272/1989, art.27: ‘1. Il giudice provvede a norma dell’articolo 28 del decreto del Presidente della Repubblica 22 settembre 1988 n. 448 , sulla base di un progetto di intervento elaborato dai servizi minorili dell'amministrazione della giustizia, in collaborazione con i servizi socio-assistenziali degli enti locali. 2. Il progetto di intervento deve prevedere tra l'altro: a) le modalità di coinvolgimento del minorenne, del suo nucleo familiare e del suo ambiente di vita; b) gli impegni specifici che il minorenne assume; c) le modalità di partecipazione al progetto degli operatori della giustizia e dell'ente locale; d) le modalità di attuazione eventualmente dirette a riparare le conseguenze del reato e a promuovere la conciliazione del minorenne con la persona offesa.


585 About the lack of a serious consent (so called ‘consenso coatto del minorenne’) see COLAMUSSI M., *La messa alla prova*, Cedam Padova 2010, pag. 114.

586 Ibid, pag.29.
suspension\textsuperscript{589}.

The possibility to re-adapt the intervention project in case of relevant changes in the offender’s personal development or external situation, is given to the judge once claimed by social services\textsuperscript{590}.

This project is also an invaluable opportunity for really listening to the young person and for involving him in a program of responsible living that will help him gradually to move away from deviant behavior\textsuperscript{591}.

The very typical effect of this sentence is that the successful conclusion of the probation period\textsuperscript{592} is followed by the judicial declaration of the extinction of the offence\textsuperscript{593}. It represents a welfare-oriented measure that gives attention to the teenager’s educational needs more than punishment\textsuperscript{594}.


\textsuperscript{590} D.L.vo 272/1989, art.27.

\textsuperscript{591} PALERMO FABRIS E., L’ascolto del minore e la giustizia penale, Unicopli 2001, pag.1249.

See SAMBUCO G., Minori agli Effetti Penali - Sulla messa alla prova dell'imputato minorenne, Giur. It., 2008, 12: ‘Nel paradigma della giustizia penale minorile, l’accertamento del fatto di reato costituisce l’ input per lavorare sulla rieducazione del soggetto minorenne che, a causa del suo comportamento antigiuridico, è catapultato all’interno di un meccanismo particolare che tende a riattivare in lui quelle risorse necessarie al fine di giungere allo sviluppo armonico della sua personalità, interrotto con la commissione del fatto di reato’.

\textsuperscript{592} For the meaning of ‘successful conclusion of the probation period’ see BASCO M.G. and DE GENNARO S., La messa alla prova nel processo minorile, Giappichelli Torino 1997, pag.70. They underline to evalue whether or not the conclusion is successful, the judge must refer to the elements considered in art.29 D.P.R 448/1988 (comportamento del minorenne and evoluzione della sua responsabilità). See also COLAMUSSI M., La messa alla prova, Cedam Padova 2010, pag.226.

\textsuperscript{593} BASCO M.G. and DE GENNARO S., Ibid pag.71, define it as a “causa personale di estinzione del reato”.

See MORO A.C., Manuale di diritto minorile (4 edizione), Zanichelli Bologna 2008, pag.534, writing: “inoltre apparirebbe sommamente ingiusto punire un soggetto che, sottoponendosi ad un programma di totale mutamento di vita, è divenuto ‘altro’ rispetto a quello che ha commesso il reato”.

\textsuperscript{594} See CHESSA M., GASPARINI M., POLI A., La messa alla prova nella esperienza del giudice per l’udienza preliminare presso il Tribunale per i minorenni di Milano, in Minorigiustizia, 2008 n. 4 pag.103.
MEASURES FOR YOUNG OFFENDERS

When writing about the English Youth Justice System, we distinguished deterrent measures in: ante-delictum measures and post-delictum ones. To keep the same classification, considering Italian system we need to distinguish among measures to apply before any offence have been committed and, on the other side, those measures that require an offence as needed prerequisite.

Ante-delictum measures

The only pre-delictum measure that is in force nowadays for young persons is the one regulated by art.25 R.D.L. 1404/1934, so called ‘measure for young persons who are irregular in behavior or character’\(^\text{595}\). It is the only measure properly built to prevent young persons committing crime; in other words, referring to prevention of youth crime into the Italian system, art.25 is the only measure explicitly aimed at this purpose\(^\text{596}\).

The decree inserts the measure for irregular youths into the administrative competence of the youth court.

The Supreme Court recognized that these measures are aimed to remove those anti-social beaviours that don’t constitute criminal offences, and for this reason can be considered as part of a generic social alarm\(^\text{597}\).

Taking into consideration the young person, two different aspects have to be considered: his personal situation and the danger he represents for society. To be complete and efficient, legislation needs to deal with both of them\(^\text{598}\).

\(^{595}\) Art. 25 R.D.L. 1404/1934, *Misure Applicabili ai Minori Irregolari per Condotta o per Carattere*.

\(^{596}\) SPIRITO, *Responsabilità e Tutela del Minore tra Esigenze di Difesa Sociale e Garanzia del Diritto Penale*, in Arch. Pen. 1997, 3, who considers art.25 obsolete, not sufficiently different from civil measures and even illegitimate because of the aim of social defense it persecutes.

Art.30 and 31 of Italian Constitution impose to statutory law the duty to guarantee that every measure limiting young person’s personal liberty has to be firstly aimed to re-educate the young person\textsuperscript{599}. It means that the legal intervention is directly aimed to guarantee the youth’s right to education and indirectly aimed to remove those causes that can determinate him to commit criminal offences\textsuperscript{600}. It persecutes special prevention by preventing children who have already manifested a deviated conduct to fall into crime\textsuperscript{601}. Literally, what the law provides is that when a young person shows to be \textit{irregular}\textsuperscript{602} because of his behavior or character, he can be given an order that imposes one of the following measures: contact with social workers\textsuperscript{603} or residence in a re-educational or medical-psycho-pedagogical institute\textsuperscript{604}. Actually, after the d.p.r 616/1977, that introduces the competence of local authorities for the execution of such an order, all those institutes closed; the result is that nowadays the only possible administrative measure for preventing youth crime is the one provided by art.25.1(a): probation\textsuperscript{605}.


\textsuperscript{602} See NUVOLONE P., \textit{Corso di Diritto Penale}, La Goliardica Milano 1966, pag.381, who underlines how the notion of irregularity necessarily refers to a judgment about the relationship between the individual and all other people of his age.

\textsuperscript{603} Literally “affidamento del minore ai servizi sociali”.

\textsuperscript{604} Collocamento in una casa di rieducazione od in un istituto medico-psico-pedagogico.

Probation can be given on the necessary requirement of the “manifest evidence of irregularity in behavior or character”. It means that the judicial verification of criminal responsibility for a criminal offence is not a needed prerequisite. It has been argued that such a general and vague prerequisite breaches the principle of legality and that it is affected by an excessive discretion.

One of the most problematic aspects of the art.25 measure is that the law expressly provides a maximum age for it (18 years), but it doesn’t consider a minimum one. It means that theoretically such a measure could apply in respect to any-aged young person. Academics, however, agree about the need for a fixed initial age for the measure to be applied; part of them considers that it should correspond to the minimum age for criminal responsibility (14 years), others accept that also a 12 years old is mature enough for understanding the meaning of probation. Claims for a reform that changes the requirements for the measure to be applied are raised by scholars; in particular a minimum age under which those measures cannot be applied seems to be the most urgent.

Before giving the order, the judge is required to investigate properly the adolescent’s personality. To do it, he needs the assistance of social workers.
workers and local authorities’ services dedicated to young persons; the importance of experts intervention lies on the fact that the judge, trough the analysis on the adolescent’s personality, is required to take into consideration his real personal, familiar and general background situation, in order to give him an efficient educational project. The first aim of this intervention is a better control upon the individual behavior, a better self-confidence for him and a decrease of his emotional problem, as crime prevention is just the indirect result of a better personality development of the child.612

Depending on what he finds out trough investigations, the judge gives a probation order with the contents listed in art.27; he gives instructions for professional development, studies, work and free time and eventual therapies, and to provides necessary assistance for him. All instructions are given to a component of the court, chose by the President of the court itself, who is required to arrange an educational project for the young person. In this moment there is not any requirement for the young person to be present; the taking into consideration of his opinion, indeed, lacks in the most delicate stage, with negative effects on both defensive guaranties and educational value of the project.613

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613 See CIVIDALI, Come un giudice ascolta un ragazzo, Minorigiustizia n.4 1998 (35). See also PALERMO FABRIS E., Ibid pag.100, who argues that the education process
The local authority is required to monitor the child’s behavior in order to offer him the help he needs and also to periodically refer to the judge about the project observance; on the basis of this periodical adjournment, the court is empowered to modify the content of the order in any time. The law does not provide a maximum duration for the measure a part from the reaching of the 21th year; the court, however, has the power to declare it finished in any time if the young person has been re-adapted or if the measure stopped to be suitable for his re-education.

Post-delictum measures

In the Italian double-track penal system, security measures are the legal response to those conducts that being criminal offences or “quasi-crimes” (quasi-reati), need to be dealt not in a retributive but in a preventive perspective. Security measures are, indeed, an example of post-crime prevention aimed to prevent the re-offending. They find their premise not in criminal responsibility but in the dangerousness the individual represents for society; the objective requirement for such a measure is, moreover, the commission of a criminal offence or the so-called quasi reato. As they are not based upon individual responsibility, there is not a minimum age for the measures to be imposed: it follows that even if younger than fourteen, should not be imposed but built on the young person’s consent; the author stresses on the importance of the youth to be listened by his judge as it was a criminal proceeding.

614 Art.27.4: ‘L’ufficio di servizio sociale minorile controlla la condotta del minore e lo aiuta a superare le difficoltà in ordine ad una normale vita sociale, anche mettendosi all’uopo in relazione on la sua famiglia e con gli altri ambiti della sua vita. l’ufficio predetto riferisce periodicamente per iscritto o a voce al componente del Tribunale designato, fornendogli dettagliate notizie sul comportamento del minore, delle persone che si sono prese cura di lui e sull’osservanza da parte di essi delle prescrizioni stabilite, nonché su quant’altro interessi il riadattamento sociale del minore medesimo, proponendo, se del caso, la modifica delle prescrizioni o altro dei provvedimenti previsti all’art.29’.

615 Art. 29.


617 Art.202 cp.
children recognized as dangerous for community can be given a security measure.

The notion of social dangerousness was originally defined, in general both for adult and young offenders, in art.203 cp, that identified it with the probability of the commission of new criminal offences. In 1988, however, the D.P.R. n.448 introduced a new definition of dangerousness to apply in case of young offenders; it is a more specific definition that requires several compulsory requirements for the measure to be applied. The first one is that there must be the concrete probability that the young person commits a serious offence; in addition, the basis upon which the judgment of dangerousness has to be conducted, regards the conditions of art.224 cp and also specific factual circumstances and the offenders’ personality.

The practical effect caused by the introduction of this new notion of dangerousness is a very modest use of security measures for young persons. It has been viewed as the failure of the entire 1988 security measures reform.

Two security measures are available for young offenders: Monitored Liberty (executed in the form of home-staying) and Judicial Reformatory (executed

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618 Art.203 cp: ‘Agli effetti della legge penale, è socialmente pericolosa la persona, anche se non imputabile o non punibile, la quale ha commesso taluno dei fatti indicati nell’articolo precedente quando è probabile che commetta nuovi fatti preveduti dalla legge come reati. La qualità di persona socialmente pericolosa si desume dalle circostanze indicate nell’articolo 133’.

619 D.P.R. 448/1988, art.37.2: ‘la misura è applicata se ricorrono le condizioni previste dall’art.224 del codice penale e quando, per le specifiche modalità e circostanze del fatto e per la personalità dell’imputato, sussiste il concreto pericolo che questi commetta delitti con uso di armi o di altri mezzi di violenza personale o diretti contro la sicurezza collettiva o l’ordine costituzionale ovvero gravi delitti di criminalità organizzata’.

620 For a complete analysis of these requirements, see LARIZZA S., Il Diritto Penale dei Minori, Padova Cedam 2005, pag.175.

as foster care). They are both regulated by the criminal code\textsuperscript{622}, that defines the first one as a not custodial measure and the second one as a custodial one\textsuperscript{623}.

Under 14 young persons who committed a criminal offence, if recognized to be dangerous for society, can be given a monitory liberty or judicial reformatory order\textsuperscript{624}. Young persons aged between 14 and 18 can be given one of those orders once the punishment has already been executed if their dangerousness still exists\textsuperscript{625}.

Monitored Liberty (libertà vigilata)\textsuperscript{626} is the most ordinary measure since the 1988 reform. It applies to young offenders even if they committed serious offences for which they can be given the most serious measure of judicial reformatory (riformatorio giudiziario). The 448/1988 decree, art.36, provides that it is executed “in the forms provided in art.20 and 21”; it means that the court can give specific prescriptions for study, work or other activities in order to ensure young person’s re-education, and it can also order the minor to stay at home and not to communicate with specific people\textsuperscript{627}. The possibility for the court to arrange the measure in conformity with the young person’ concrete needs (the judge can authorize him to leave home in order to participate to educational or work experiences) makes the measure flexible and able to respond to the necessities of the case in particular\textsuperscript{628}.

\textsuperscript{622} Art.224 cp and following.
\textsuperscript{623} Art.215 cp.
\textsuperscript{624} Art.224 cp.
\textsuperscript{625} Art. 225 cp.
\textsuperscript{626} Art.228 cp and following.
\textsuperscript{627} A similar order in English system can be given with an ASBO that prohibits “to contact directly or indirectly” specific persons (see example pag.119).
\textsuperscript{628} See LARIZZA S., Il Diritto Penale dei Minori, Padova Cedam 2005, pag.178; GRASSO, Commentario all’art.233 c.p.; MARINUCCI-DOLCINI, Manuale di Diritto Penale.
Judicial Reformatory has been modified in 1988 both in its aim and mechanism, so that it is not a proper custodial measure anymore. D.P.R. 448/1988 art.36 provides that Judicial Reformatory can be given for those criminal offences listed in art.23 and it has to be executed according to art.22, with the intention to consider this measure as ultima ratio. It follows that this measure applies only when the offence is so serious to be one of those for which precautionary custody is available; for all less serious offences, only Monitored Liberty is possible.

As provided by art.22, it is executed through the collocation of the young person into a community where he is required to follow the court’s instructions in order regarding educational activities.

Among post-delictum measures, even Judicial Pardon has to be treated. This measure, characterized by a clear social-preventive nature, was originally introduced by art.169 c.p. (“Perdono giudiziale per i minori degli anni diciotto”). It is a state surrender to the punishment, as art.169 provides that when all conditions exist, despite the offender has been found guilty, the judge does not give a punishment.

A number of essential conditions need to verify for the judge to be empowered by art.169. First, the young age: this is a measure available only for young offenders, in perfect accordance with its aim; as the Constitutional Court underlined in 1977, it comes from the idea that for young offenders the simple contact with the criminal justice system can be a

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629 Ibid.
630 Art.22 entitled ‘collocamento in comunità’.
631 LARIZZA S., Ibid, pag.179.
632 LARIZZA S., Il Diritto Penale dei Minori, Padova Cedam 2005, pag.147 refers to a “netto orientamento social preventivo”.
633 MANZINI V., Trattato di diritto penale italiano secondo il codice del 1930 vol. III, pag.591; BELLAVISTA G., Perdono giudiziale pag.993-994.
more efficient re-educational tool than a custody sentence. Secondly, the original offence has to be punishable with a custodial sentence up to two years; the logical is that only non-serious offence are pardonable.

The third requirement is the offender’s criminal responsibility and his capability to be punished; it is the pardon idea itself that implies the responsibility one: only a guilty can be forgiven. Art.169, referring to the prevision that the offender won’t commit any further offence, is the proof. It can be given only once, as pardon makes sense only once. But the last and most important antecedent for the judicial pardon is the one required by art.169.1, final part: the judge has to be satisfied, according with art.133, that the offender will not commit any further offence. It is a non-dangerousness prognosis the judge is required to make on the basis of art.133 elements, but scholars do not agree about which ones of those elements have to be taken into consideration: part of them consider that all those parameters concur for the needed prognosis; others consider the capability to commit crime (capacità a delinquere) to be the only one that does. Jurisprudence agrees with the first theory, claiming for an analysis of all requirements listed in art.133.

Conditional suspension of the punishment: the last measure we consider, in the frame of post-delictum measures, is the conditional suspension of the criminal punishment, regulated by the criminal code in art.163 and 164. It

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635 See also LARIZZA S., Ibid, pag.147.
636 Or a financial punishment up to 5€ (art.169.1).
637 Ibid.
638 See PIGHI, Il perdono giudiziale.
639 Constitutional Court, however, clarified that it can be extended to further offences connected with the first one because its continuation (sent. 108/1973).
640 DOLCE R., Perdono giudiziale, p.1000.
641 BELLA VISTA G., Perdono Giudiziale, p.930.
is, for the offender, less convenient than the judicial pardon we have just explained as it presupposes the investigation of criminal responsibility. When receiving a sentence containing the suspension of the punishment, the offender is recognized guilty for the criminal offence but the execution of the punishment is suspended for five or two years, depending on the nature of the offence. The special-preventive nature materializes in this: if the offender doesn’t commit any further offence in the period when the sentence is suspended, then the crime is cancelled. Its *ratio* is basically the same we identified for the judicial pardon: law gives this opportunity to avoid custodial sentences for first-time offenders when some requirements exist; at the same time it gives a strong incentive to keep away from crime.

Requisites are needed for the suspension of the sentence: first, it’s available only if the offence is punishable with a custodial sentence up to 3 years imprisonment; moreover the judge has to be satisfied that the offender will not commit any further offence. This second requisite, claiming for a prognostic judgment, is substantially the same we saw for the judicial pardon.

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642 Art.163.1 cp: ‘Nel pronunciare sentenza di condanna alla reclusione o all'arresto per un tempo non superiore a due anni, ovvero a pena pecuniaria che, sola o congiunta alla pena detentiva e ragguagliata a norma dell'articolo 135, sia equivalente ad una pena privativa della libertà personale per un tempo non superiore, nel complesso, a due anni, il giudice può ordinare che l'esecuzione della pena rimanga sospesa per il termine di cinque anni se la condanna è per delitto e di due anni se la condanna è per contravvenzione. In caso di sentenza di condanna a pena pecuniaria congiunta a pena detentiva non superiore a due anni, quando la pena nel complesso, ragguagliata a norma dell'articolo 135, sia superiore a due anni, il giudice può ordinare che l'esecuzione della pena detentiva rimanga sospesa’.

643 It is a general measure (available also for adults), but with easier requirement in case of young offenders; in fact art.163.2 provides that the measure applies, for young offenders, when the offence is punishable with a custodial sentence up to 3 years, instead of the two years required as maximum for adults (art.163.1).
CONCLUSIONS

Two main problems play a central role in youth crime and, consequently, in youth crime prevention: on the one hand, it represents a social issue for victims and society, both affected by crime in general; on the other hand, however, it is also the symptom of a juvenile disadvantage that cannot be ignored. It is this second aspect that makes youth crime special compared with the general criminal system.

A fundamental consideration lies on the basis of the whole matter: children, by nature, are different from adults, as they have special characters, special needs, and special interests that cannot be ignored by any legal system, in view of the superior objective of the harmonic development of the minor’s personality; then children cannot be treated as adults. It keeps being true even when a child commits a criminal offence: he is still a child, even if he is also an offender.

In youth crime, indeed, it is the offender to be special. His or her specialty needs to be taken into account for the system to be inspired to a justice model; criminal law cannot ignore the special (lack of) maturity characterizing young persons; a system considering adult and young offenders in the same way would not be legitimate.

Children and adolescents are in fieri individuals who need to be accompanied in their development from childhood to adulthood. They need to be given educational instruments for growing up as responsible adults capable of living in a society where law has to be respected. But children also need protection. A general public duty to protect children and young persons has been recognized by Italian legislation with art.31,2 Constitution and by English legislation with all those statutes dedicated to children welfare starting with the Children Act 1908.
Children need protection not only from the outside; the general duty to protect minors is also a duty to protect them from themselves, that is, from becoming criminal offenders, and from coming in contact with the criminal system.

Considering children engaged in criminal behaviors, what the principle of youths protection entails is a public duty to prevent them to fall into crime. That is: they need protection especially from the crime itself; if it is a social duty to guarantee, in general, safe life conditions for children, then it is a social duty to prevent youths to commit crimes.

We have already clarified in what youth crime differs from adult crime, that is the speciality of the offender. So, as in general the whole juvenile system needs to be differentiated from the adult one, even in crime prevention differentiation is still a key concept.

Crime prevention is generally aimed to prevent criminal offenses in order to ensure social peace.

Preventive measures can have several contents. In the aim of preventing crime, both negative and positive measures try to avert the risk of commission of criminal offences with a different approach. On the one hand negative preventive measures act on the potential offender through incapacitation (which also gives a dissuasive reason not to commit criminal offenses); on the other hand, positive measures offer a re-socializing support to help the (possible) offender to keep away from crime.

Especially when dealing with juvenile offenders, however, law needs to consider their protection as an additional aim. Rather, youths’ protection should be the principal aim of youth crime prevention.

If we accept all of that, then we have to assess prevention strategies keeping in mind that in case of young offenders, prevention has this double aim.
In this sense, let us try to analyze what preventive model is the most efficient with young offenders.

First of all, preventive legislation has to respect the general duty of protection of children and young persons. Second, it has to be persuasive enough to restrain them from breaching the penal law. For these reasons, we believe it should be built not only on negative measures, but above all on positive ones.

Negative measures (both ante and post delictum) do not assume an educative approach for youths; the mechanism they use is deterrence and incapacitation based on repressive tools such as orders, restrictive measures, sentencing. They do not give attention to the claims for pedagogical interventions the general duty of protection dictates.

With such measures, nobody explains to the minor what is wrong in the behavior to be prevented, and nobody explains him why he should not commit it. That is, he is not given any reason not to commit that criminal offence, but the threat of a punitive treatment.

Such measures, moreover, do not pay much attention to the deepest causes of crime; not being focused on the minor’s personality, they do not give any relevance to what causes crime commission by young people. Such an approach misses the long-term vision: it is by investigating on the causes of crime and intervening to solve them that a preventive mechanism will be effective.

It seems to us, indeed, that any legal system, to respect its duty of protecting youths but also to be incisive in crime prevention, cannot erect youth crime prevention only on negative measures. It is, in fact, only through positive measures that the legal intervention can walk along the way of an educational project aimed to teach young persons to peacefully live in a community; and this teaching is necessary in order to guarantee their best
interest to live in a society without difficulties, but also to guarantee community from crime in an efficient and long term perspective. Youths, it means, if helped to understand the conduct they are supposed to keep, can have a good social life and become innocuous for community; as they are going to be tomorrow’s adults, it is even an investment for future: we prevent today, for having a result that will last in future. Education, youths’ personality support, assistance for a correct development, in conclusion, are not only due for the young person benefit, but also the only efficient preventive measures. It is by intervening on young persons’ education that, indirectly, community is protected.

In the light of all the above considerations, we can now analyze how much space is given, both in ante and post delictum prevention, to negative measures and to positive ones in the two jurisdictions we chose to compare.

The English system, as we observed, significantly stresses on prevention of youth crime. Or, at least, it dedicates a number of norms to youth crime prevention. By simply reading criminal statutes, the impression is of a strong commitment of the English law in the prevention of all possible means of the youth crime phenomenon. English system establishes prevention of youth crime as the principal aim of the Youth Justice System, also defining prevention as the principal aim of sentencing youths.

To understand what kind of prevention (positive or negative) the English system enforces, we need to have a look at the several measures adopted. The impression is that English system, historically inspired by a welfare approach, has recently moved to a more repressive one, in a perspective of responsibilisation of the minor for breaching criminal law; consequently, a system historically characterized by positive preventive measures, has moved to negative ones.
ASBOs are the main proof of that: even for juvenile behaviors that are not even necessarily criminal offences, the English system provides a measure that can fall into a custodial sentence. And even when it does not reach the custodial sentence, the Anti-social Behavior Order is still testifying a punitive approach: in order to protect community (not youths) the young person, who is not even an offender, is given a behavioral order that nothing has for the aim of re-educating him. ASBOs are not, in fact, educational orders; they have nothing for teaching the young person how to socialize peacefully and according with criminal law. They only want to order youths to behave in a manner that does not cause harassment or distress to community; the focus is all on community, and the young person is only a dangerous element to control.

No attention is given to the educational aspect; no ASBO has even a singular provision aimed to help the offender to understand what is wrong in his behavior and why he should change it. And no ASBO has a singular provision for his re-socialization.

Not least, it is the evidence coming out from the national statistics that tells how useless ASBOs are a prevention tool: a deterrent instrument, that is supposed to prevent crime and to keep young persons away from any contact with the criminal system, is instead the reason why a number of youths that have never directly breached the penal law, are called before a criminal court for the breach of a civil order they are not motivated to follow.

ASBOs are, indeed, in contradiction with what we observed above: this preventive instrument does not focus on young persons’ personality, forgetting the duty to assist them; and, consequentially, it is not even successful in prevent them to commit criminal offences, as it does not give them strong reasons to keep away from crime. On the contrary, ASBOs give
access to the criminal system to a number of youths that are not even young offender, rather for having breached a civil order.

The reason why the English system provides such repressive and inefficient measures has to be searched in politics since the No More Excuses White Paper; all the main criminal reforms found place in the frame of political campaigns that stressed on protection of the public from crime. In this political context also the matter of youth crime has been exploited.

As we saw in chapter 1 (par.2), at the end of the welfarism period, both scholars and public opinion begun to consider legislation too lenient on crime; the culture of excuses of the last decades, they though, had increased crime among young people. This beliefs, fueled by the murder of J. Bulger (two-years-old) by two ten-years-old boys, took politics to take advantage of moral panic for electoral reasons; the result was a more repressive prevention system, used to gain the votes of those who were worried about the youth crime problem.

Giving a curfew order to teenagers for keeping them home instead of letting them hanging around by night, can appear a good idea at a theoretical level. But it does not take into consideration that most of youth crimes are committed by day, when the curfew does not work. And it also does not consider that most of young offenders won’t follow their curfew order, so that they will fall into a breach that is the starting point for a (new) criminal proceeding. What we are arguing is not that the curfew shouldn’t apply because young offenders refuse to respect it, but that it is not an appropriate measure for an efficient prevention in concrete.

All measures provided by the English system seem to be built without a clear picture of what youth crime is in reality, at basis. And it seems criminal law doesn’t consider that juvenile deviance prevention cannot be limited to penal tools.
The English system was for a long time inspired by the need to guarantee the young person welfare, crime prevention coming then as a consequence of a good education. Since the No More Excuses change, however, it took a more punitive way that breaches with the past. So that, in English juvenile system we find some elements that are an heritage of the welfare period (see, e.g., those agencies as Youth Offending Teams, the Youth Justice Board itself, all probation measures etc.) and the new measures clearly inspired to the negative approach to prevention (ASBOs, Gang Injunction, Stop and Search, sentences as the youth rehabilitation order when containing a curfew etc).

Another point of criticism we found in the English preventive model, concerns parental orders (and, partially, parental contracts as well).

Parental orders are civil orders made in respect to parents whose sons have committed criminal offences, after a YOT application; parental contracts, on the other hand, are voluntary agreement between parents and the YOT. Both of them are aimed to help parents in order to indirectly guarantee children; both of them should not have any relevance in the criminal proceeding against the youth, being a matter of civil courts or private agreements with YOT. However, in practice, it is frequent that during the criminal proceeding against the youth, being his/her parents present as “appropriate adults”, the judge dedicantes some time to recommend the parent to sign a parental contract or even threatening him with the possibility of a parental order, at the son's presence.

A state that wants to teach to parents how to be incisive with their problematic sons, cannot humiliate them before the sons themselves by giving a judgment that has, indirectly, the effect of condemning the parent as a bad parent. In other words, how can you help a weak parent by empowering the judge to declare in court how a bad parent he/she is? How is it possible that an adolescent with behavioral problems show respect to
his parents if even the judge confirms, in the officiality of a criminal court, that they don’t deserve it?

Working with parents to indirectly assist the young person is clearly a good (and due) strategy. We believe, however, it should be left to social agencies instead to the court; a delicate matter as family cannot be judge by a court but need to be assisted in a private, less invasive, social workers’ action.

A consistent number of offences are committed by youths that spend most of their time in the street because they have been excluded from school; an interesting perspective could be, indeed, to intervene in order to avoid, or at least to limit the most possible, school exclusion. On the contrary, the Government has recently reformed the school system (by introducing Academy schools, not directly controlled by Councils), making easier and easier for schools to exclude problematical students. It follows that being at the same time ‘at risk’ and without a daily occupation, difficult teenagers are more likely to behave in antisocial manners or commit criminal offence. Instead of giving negative preventive measures completely disconnected from the reality, it seems to us that English system should consider to change its school system. Or, at least, to realize that the practical problems claiming for legal interventions are not the ones it is working on, at the moment.

A different perspective is the one followed by Italian legislation. In Italy, there is not a welfare tradition so developed as the English one; all English agencies explicitly dedicated to work with young persons ‘at risk’ (e.g. Youth Justice Board and Youth Offending Teams) do not always find a correspondence in Italian system.

However, in theory the Italian legislative approach distinguishes itself for being, at least at an abstract level, positive-prevention oriented. By observing legislative approach at a theoretical level, it means, what comes
out is a philosophy according with which when the offence is not a serious one, in general, the system itself renounces to punish the young offender (judicial pardon) or even to go on with the proceeding (r.d.l. 448/1988, art.27 and 28); these are measure introduced in order to avoid the young person to be involved in a criminal proceeding when not strictly necessary. The idea is that keeping adolescents far from the criminal system itself is one of the most powerful tools for prevent them to fall into crime; an unnecessary criminal proceeding, it means, can be counterproductive in terms of crime prevention.

Legislation, indeed, provides a set of instruments that respond to antisocial behaviors with welfare assistance (r.d.l. 1404/1934, art.25) and give the possibility to go out from the penal system in order to apply positive measures considered more efficient with young persons (as above described). It is not, however, a simple matter of being soft with young offenders; it is, on the contrary, a matter of being incisive in giving the most suitable response for them.

If this is the theoretical background, however, two considerations are needed. The first one concerns the application requirements of these positive measures: all these measures (judicial pardon, r.d.l. 448/1988, art.27 and r.d.l. 448/1988 art.28), in fact, only apply if the crime committed is punishable with a short term imprisonment; that is, they work only in non-serious cases. For most of cases, indeed, the punitive approach is the only one available.

The second necessary consideration is that even at a theoretical level Italian legislation applies positive principles aimed to save the young person from the contact with the criminal system, at a practical one it knows a more repressive practice. Minors are often harshly treated in practice, in disaccord with general positive principles.
In conclusion, it seems to us that both of the systems we have considered, share the objective not of punishing, but also of preventing youth crime. It being understood that when necessary, young offenders have to be punished, the idea is that youth crime has to be prevented the most possible. What we argued, however, is that a crime prevention model to be respectful of youths’ needs and efficient in preventing them to commit crime, should be implement through positive measures.

The English system does not concentrate on positive measures, even not at a theoretical level; since the 1997 change of perspective, in fact, it has moved towards a negative form of prevention (both ante and post delictum). The Italian one, on the contrary, at least at an abstract level, offers positive forms of prevention; it calls, however, for a special attention in order to be respected by practical decisions that risk to breach its positive orientation.
LA RISPOSTA DEL LEGISLATORE INGLESE ED ITALIANO ALLA DEVIANZA GIOVANILE, TRA ESIGENZE DI PREVENZIONE ED ESIGENZE DI REPRESSIONE: I DUE ORDINAMENTI A CONFRONTO
(Traduzione sostanziale critica)

Questo lavoro vuole essere un’indagine sulle diverse risposte che il legislatore inglese ed italiano offrono rispetto al fenomeno della devianza giovanile. Entrambi gli ordinamenti che andremo a comparare dedicano uno specifico settore del sistema penale ai minori autori di reato; entrambi, inoltre, prevedono misure dedicate alla prevenzione del crimine minorile, prevenzione ante-delictum e prevenzione post-delictum.

Ciò su cui vogliamo concentrarci è un’analisi che sappia riferire se i due sistemi sono più preventivi o repressivi, e quale atteggiamento assumono nei confronti dei minori autori di reato. Quale approccio hanno nei confronti del giovane che abbia commesso un reato? Offrono istituti rivolti alla prevenzione del crimine minorile o si limitano a trattarlo in un’ottica retributiva? I due ordinamenti considerano il crimine minorile come un fenomeno da prevenire o, piuttosto, da punire ex post?

Per dare una soddisfacente risposta a tali quesiti si rende necessaria una preliminare analisi del sistema di giustizia minorile nel suo complesso. Andremo, dunque, a dare un quadro generale delle principali questioni aperte in materia di diritto penale minorile nel sistema inglese e poi in quello italiano, per poi affrontare il tema della prevenzione
1. EVOLUZIONE STORICA E RIFORME: I DUE ORDINAMENTI A CONFRONTO

Il percorso storico con cui entrambi gli ordinamenti, inglese ed italiano, sono giunti a separare il sistema di giustizia penale minorile da quello generalmente dedicato alla repressione dei reati commessi da autori in età adulta, è piuttosto simile.

L’Inghilterra conobbe l’introduzione delle prime Youth Courts nel 1908, con il Children Act, sezione 111\textsuperscript{644}. Dedicato alla regolamentazione di diversi aspetti della vita dei fanciulli (dall’età minima della responsabilità penale fissata a sette anni, alla tutela nei confronti di genitori e tutori violenti), l’atto segnò l’inizio di quello che oggi assume il nome di \textit{Youth Justice System}. Fondamentale contributo fu, in seguito, quello del Children Act 1933, che oltre a portare l’età minima della responsabilità penale a otto anni, introdusse nuovi diritti per il minore imputato di reato, che tutt’oggi costituiscono l’ossatura dell’intero sistema\textsuperscript{645}.

Il sistema italiano, invece, all’istituzione del \textit{Tribunale per i Minorenni} arrivò solo nel 1934, con il R.D.L. 1404/1934. Anche la disciplina introdotta poco prima dal Codice Rocco del 1930, tuttavia, risultava di indubbia modernità per quanto riguarda l’imputabilità dei minori: mentre il sistema inglese negli anni ’30 era ancorato ad una età minima della responsabilità penale fissata a 8 anni, il nostro codice già nello stesso periodo introduceva una presunzione assoluta di incapacità di intendere e di volere per tutti i minori che non avessero ancora compiuto il

\textsuperscript{644} Children and Young Person Act 1908, s.111: “a court of summary jurisdiction when hearing charges against children or young persons (…) shall sit either in a different building or room from that in which the ordinary sittings of the court are held, or on different days or at different times from those at which the ordinary sittings are held, and a court of summary jurisdiction so sitting in this Act referred to as a Juvenile Court”.

\textsuperscript{645} Per esempio, il diritto alla presenza di un genitore (o un tutore) in udienza.
quattordicesimo anno di età all’epoca del fatto di reato\textsuperscript{646}, ed una presunzione relativa per gli infradiciottenni maggiori di quattordici anni\textsuperscript{647}. Forte impatto sul sistema minorile da poco venuto alla luce ebbe, chiaramente, anche la novità costituzionale. In particolare, alla definizione del sistema minorile come oggi è nel suo complesso, contribuirono gli artt. 2, 3, 27 e 31. Innanzitutto l’art.2, garantendo a tutti gli individui i cd. diritti inviolabili dell’uomo, impone di considerare il minore come una persona alla quale gli stessi diritti vanno garantiti\textsuperscript{648}. Si tratta, tuttavia, di una persona che non ha ancora completato il proprio percorso di sviluppo psicofisico; è l’art.3, dunque, ad imporre di tenere in considerazione questa sostanziale differenza rispetto agli adulti, che vale a caratterizzare la situazione del minorenne e a fondare l’esigenza per un trattamento che anche sia calibrato su tale differenza. Se l’art.3 fonda quel principio di uguaglianza per cui vanno trattate nello stesso modo situazioni uguali, ma in modo diverso situazioni diverse, non si può ignorare che pur essendo persona, quindi destinatario dei diritti di cui all’art.2, il minore, in quanto tale, necessita di un trattamento speciale\textsuperscript{649}.

È anche l’art.27 ad assumere particolare rilievo a favore del minore autore di reato; “nei confronti del minore – infatti - l’esigenza del reinserimento

\textsuperscript{646} Art. 97.Minore degli anni quattordici: Non è imputabile chi nel momento in cui ha commesso il fatto, non aveva compiuto i quattordici anni.

\textsuperscript{647} Art. 98.Minore degli anni diciotto. E' imputabile chi, nel momento in cui ha commesso il fatto, aveva compiuto i quattordici anni, ma non ancora i diciotto, se aveva capacità d'intendere e di volere; ma la pena è diminuita.

Quando la pena detentiva inflitta è inferiore a cinque anni, o si tratta di pena pecuniaria, alla condanna non conseguono pene accessorie. Se si tratta di pena più grave, la condanna importa soltanto l'interdizione dai pubblici uffici per una durata non superiore a cinque anni, e, nei casi stabiliti dalla legge, la sospensione dall'esercizio della responsabilità genitoriale.


\textsuperscript{649} LARIZZA S., cit.
sociale sottesa all’art.27.3 Cost. si colora di toni più intensi alla luce di quel compito di tutela della gioventù imposto dall’art.31.2 Cost.650. Ed infatti l’art.31.2 Cost., imponendo alla Repubblica il compito di “proteggere la maternità, l’infanzia e la gioventù, favorendo gli istituti necessari a tale scopo”, costituisce un punto di riferimento imprescindibile capace non solo di orientare e condizionare la lettura da darsi alle norme costituzionali, ma anche di erigersi a parametro alla cui stregua valutare la compatibilità di qualsiasi norma pensata per i minori651. Dal disposto dell’art.31.2 deriva infatti un obbligo di protezione nei confronti dei minori, interpretato innanzitutto nel senso di un dovere dello Stato di recuperare il minore alla società facendo in modo che, una volta cresciuto, possa rendersi capace di scelte e comportamenti rispettosi delle norme penali; ma l’obbligo di protezione di cui all’art.31.2 considerato in combinato disposto con gli artt.2 e 3 come sopra interpretati, è anche un obbligo di diversificazione della disciplina penale minorile rispetto a quella generale applicabile agli adulti652.

Presentate così riassuntivamente le principali linee caratterizzanti la materia penale minorile a metà del secolo scorso in Inghilterra ed in Italia, cerchiamo di capire, ora, come due sistemi così diversi per tradizioni e per meccanismi si siano orientati, negli anni immediatamente successivi, alla gestione dei crimini commessi da adolescenti.

Il problema dell’approccio alla gestione dei crimini commessi da minori, è sostanzialmente dovuto alla coesistenza, nel giovane autore di reato, di

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651 LARIZZA S., cit., pag.105.
652 Cit.
quello che è stato definito un *doppio-status*\(^{653}\): da un lato l’ordinamento ha a che fare con un minore bisognoso di tutela\(^{654}\); dall’altro si tratta pur sempre di un autore di reato, meritevole di pena se riconosciuto responsabile.

Ulteriore doppia caratterizzazione del minore si ha se lo si rapporta agli individui di età adulta. “On the one hand, children are persons and so should be entitled to all those rights which adults have. (...) On the other hand, children as a group are developmentally and physically immature compared with adults, resulting in greater vulnerability and lower levels of competence. Adequately protecting the child’s interests might therefore demand differential treatment in order to take into account the special characteristics and needs which thus arise”\(^{655}\). Infine, resta sempre la consapevolezza del fatto che anche quando l’adolescente mantiene un comportamento anti-sociale o addirittura criminoso, non si può dimenticare come sia proprio l’età adolescenziale a poco aiutare a ponderare le scelte e tanto spingere alla ribellione\(^{656}\). “The tension between the innocence and danger posed by youth is reflected in the very history of the juvenile justice system, a history that is itself complex and full of contradictions”\(^{657}\).

La difficoltà nella scelta dell’approccio all’autore di reato, sta quindi nelle contraddizioni intrinseche allo stesso. Si tratta di un individuo, ma speciale.

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\(^{654}\) E, nell’ordinamento italiano, addirittura tutelato da quell’obbligo di protezione sancito all’art.31.2 Cost.


Di un autore di reato, ma minorenne. Di un soggetto pericoloso, ma bisognevole di tutela.

Abbiamo già visto come l’ordinamento italiano abbia scelto, fin dall’inizio, di orientare l’approccio alla questione della devianza minorile verso la protezione. Dichiaratamente introdotto dalla Costituzione all’art.31.2 e portato a concretezza dalle pronunce della corte Costituzionale\(^{658}\), è il dovere di protezione (e, di conseguenza, di differenziazione) il fulcro della disciplina minorile italiana.

Non diverso è l’iniziale atteggiamento dell’ordinamento inglese. Il Children and Young Person Act 1933, infatti, introduceva altrettanto esplicitamente quello che fu definito Welfare Principle, prevedendo che “every court in dealing with a child or a young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training”\(^{659}\). Questo principio di welfare, di applicazione generale, operava davanti al giudice civile come a quello penale, sia a favore di minori-vittime che nel caso di minori-autori di reato.

Anche a livello internazionale assumeva rilevanza, a partire dallo stesso periodo, la considerazione dei diritti dei minori e, conseguentemente, della necessità di un approccio penale rispettoso della loro fragilità. Si sono poi concretizzate negli anni ’80 le prime disposizioni internazionali esplicitamente dedicate alla protezione dei diritti dei bambini e degli

\(^{658}\) Per una esaustiva analisi delle più rilevanti sentenze costituzionali in materia vedi LARIZZA S., I principi costituzionali della giustizia penale minorile, in PENNISI A., La giustizia minorile: formazione, devianza, diritto e processo, Giuffrè Milano 2012.

\(^{659}\) Children and Young Persons Act 1933, s. 44.

Fonti internazionali, quelle appena esposte, i cui effetti si riversano sia nella legislazione interna inglese, che in quella italiana. Possiamo quindi riconoscerle come linee chiave dell’evoluzione di entrambi gli ordinamenti, mossisi verso l’allineamento su tali principi comuni.

La seconda metà del secolo passato si è caratterizzata per un comune atteggiamento del legislatore inglese ed italiano, di welfarism nei

660 Del 1950 è, però, la Convenzione Europea sui Diritti dell’Uomo, non esclusivamente dedicata ai minorenni ma anche a loro rivolta.
661 Vedi, in particolare: art.3.1: ‘In tutte le decisioni relative ai fanciulli, di competenza delle istituzioni pubbliche o private di assistenza sociale, dei tribunali, delle autorità amministrative o degli organi legislativi, l’interesse superiore del fanciullo deve essere una considerazione preminente’.
662 vedi anche art.37, che fonda in particolare il divieto per gli stati membri di: sottoporre il minore a tortura, pene disumane o degradanti o alla pena della reclusione a vita; privare il minore della libertà personale in maniera arbitraria o illegale; trattare in modo non dignitoso o privare dell’assistenza legale il minore d’età. È infine sancito che “l’arresto, la detenzione o l’imprigionamento di un fanciullo devono essere effettuati in conformità con la legge, costituire un provvedimento di ultima risorsa e avere la durata piú breve possibile.
663 Consideriamo in particolare l’art.11, che fonda il principio del procedimento penale come extrema ratio prevedendo che: ‘Dovrebbe essere considerata l’opportunità, ove possibile, di trattare i casi dei giovani che delinquono senza ricorrere al processo formale da parte dell’autorità competente prevista dall’art. 14,1 comma.’
664 Vedi, in particolare, la raccomandazione n. 20/87, emanata nella convinzione che “che il sistema penale dei minori deve continuare a caratterizzarsi per il suo obiettivo di educazione e di inserimento sociale e che in conseguenza deve, nei limiti del possibile, sopprimere la carcerazione dei minori” (3° capoverso del preambolo)”.
665 Vedi, per esempio il White Paper Children in Trouble 1968, pag.3-4, che si riferiva ai crimini minorili sottolineando che “it is probably a minority of children who grow up without ever behaving in ways which may be contrary to the law. Frequently such behavior is no more than an accident in the pattern of a child’s normal development”. Di conseguenza, proponeva di riformare il Children and Young Persons Act 1933 con un insieme di misure dirette ad aumentare ulteriormente l’assistenzialismo a favore dei giovani
confronti dei minorenni autori di reato; l’allontanamento dei due sistemi si è invece verificato, poi, a partire dalla frattura che ha interessato l’ordinamento inglese concretizzatasi nel 1997 ne “No More Excuses”. Se, dunque, l’approccio di partenza era condiviso da entrambi gli ordinamenti, le differenze iniziarono a partire dagli anni ’90, quando nel panorama inglese dottrina e, soprattutto, politica, iniziarono a fare i conti con gli effetti negativi che la logica clemenziale ispirata al welfarism aveva causato.

Si arrivò alla svolta con il White Paper pubblicato nel 1997 e significamente intitolato No More Excuses, la cui nuova filosofia di approccio al crimine commesso da minori era inequivocabile:

“Per rispondere efficacemente alla delinquenza minorile occorre smettere di creare scuse per i bambini autori di reato. Certo, vi sono fattori sociali, economici e familiari che influenzano le caratteristiche e la natura della delinquenza minorile. Ma la consapevolezza di ciò significa comprendere e non condonare la delinquenza minorile. Nel loro sviluppo, i bambini devono assumersi l’età minima per la responsabilità penale a 14 anni e addirittura sostituire i procedimenti penali a carico di imputati minorenni con procedimenti civili di natura assistenziale).

665 Le critiche, peraltro, non mancavano durante la vigenza dell’approccio welfare-oriented, ma assunsero particolare rilevanza politica e dottrinale solo in seguito.

666 Alcune delle più significative tappe intermedie, in questo passaggio dall’approccio welfare-oriented a quello più responsabilizzante, qui di seguito: omicidio, ad opera di J. Venables e R. Thompson (entrambi di dieci anni all’epoca del fatto) di J. Bulger (due anni); AUDIT COMMISSION, Misspent Youth 1996, par. 152: “The current system for dealing with youth crime is inefficient and expensive, while little is being done to deal effectively with juvenile nuisance. The present arrangements are failing the young people - who are not being guided away from offending to constructive activities. They are also failing victims - those who suffer from some young people’s inconsiderate behaviour, and from vandalism, arson and loss of property from thefts and burglaries. And they lead to waste in a variety of forms, including lost time, as public servants process the same young offenders through the courts time and again; lost rents, as people refuse to live in high crime areas; lost business, as people steer clear of troubled areas; and the waste of young people's potential”.
una crescente responsabilità per le loro azioni, nello stesso modo in cui la responsabilità dei genitori gradualmente diminuisce, ma non scompare, mentre i loro bambini si avvicinano all’età adulta. Il Governo è determinato a rinforzare la responsabilità dei giovani autori di reato – e dei loro genitori – per i loro comportamenti criminali.\textsuperscript{667}

Da qui in avanti, il percorso segnato dai due ordinamenti non può più dirsi parallelo. Da un lato quello italiano continuò, in un’ottica di protezione (così come raccomandato dai principi costituzionali), a guardare al minore autore di reato come un soggetto fragile; ne deriva, per l’ordinamento, l’obbligo di assicurare la realizzazione della finalità rieducativa della pena, prevalente anche rispetto alle esigenze di prevenzione generale\textsuperscript{668}. Dall’altro, il sistema inglese, ispirato non più dalla volontà di tutela, ma sempre di più da una volontà punitiva.

Questa disarmonia nell’evoluzione dei due sistemi è dovuta anche al ruolo ricoperto, nell’ambito del dibattito avente per oggetto il trattamento penale degli adolescenti, da diverse agenzie. Innanzitutto, nei due sistemi di riferimento, peso ben diverso hanno avuto politica e opinione pubblica. Ripercorrendo la storia del \textit{Youth Justice System} emerge chiaramente come le più radicali riforme siano state spinte dalle manovre elettorali dei principali partiti politici, che non hanno mancato di sfruttare la materia nelle loro campagne\textsuperscript{669}. Inoltre, ruolo chiave

\begin{footnotesize}
\begin{enumerate}
\item Questo principio è stato riconosciuto dalla stessa Corte Cost. n.49 del 30 Aprile 1973, che afferma che davanti alla esigenza del recupero sociale del minore, la stessa pretesa punitiva può arretrare.
\end{enumerate}
\end{footnotesize}
nelle medesime riforme ha avuto l’opinione pubblica\(^\text{670}\) (peraltro, tutt’altro che indipendente dalla prima).

L’ordinamento italiano, invece, si è dimostrato più solidamente ancorato ai principi di diritto evolvendosi sì, ma sulla base di pronunce giurisprudenziali della Corte Costituzionale, che ha “via via tracciato le linee essenziali di un sistema costituzionalmente orientato di giustizia minorile”\(^\text{671}\). Forse proprio a ragione delle spinte che lo hanno mosso, il nostro ordinamento ha avuto uno sviluppo più morbido e lineare, mancando di una rottura così forte come quella che ha segnato il prima e il dopo nella storia inglese.

La nostra legislazione minorile rimane tutt’oggi inserita nella cornice di quei principi costituzionali che l’hanno caratterizzata fin dal suo esordio, con un sistema welfare-oriented perfezionato (e sempre più costituzionalizzato) negli anni a seguire.

Diametralmente opposto l’approccio inglese, invece, a partire dal 1997: la strumentalizzazione politica della materia ha dato al sistema un taglio sempre più punitivo, concretizzatosi in una serie di riforme\(^\text{672}\) che rompono nettamente con il passato. Basti pensare a quegli istituti introdotti a partire.

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civic society is an ethic of mutual responsibility or duty, it is something for something. A society where we play by the rules, that's the bargain”; Labour Party Manifesto 1997.


Tra le più importanti sentenze della Corte Cost. che hanno contribuito all’evoluzione del sistema vedi: sent. 21 luglio 1983 n.222 (afferma che la tutela del minore può realizzarsi solamente attraverso il giudizio emesso da un organo specializzato), sent. 14 aprile 1965 n.25 (che afferma la legittimità delle deroghe alla pubblicità del dibattimento per tutelare l’imputato minorenne),la sent. 30 aprile 1973, n.49 (che afferma la superiorità del recupero del minore sulla realizzazione della pretesa punitiva).

\(^{672}\) Prima fra tutte l’approvazione del Crime and Disorder Act 1998.
dal 1998\textsuperscript{673} che non solo punitano (con pene anche detentive) fatti previsti dalla legge come reato, ma addirittura condotte “anti-sociali” che nemmeno costituiscono reato\textsuperscript{674}. Paradossalmente introducendo sempre più riferimenti normativi alla prevenzione del crimine\textsuperscript{675}, il sistema inglese del post “No More Excuses” è un sistema che non solo punisce senza sconti i reati minorili, ma è addirittura orientato a punire condotte che reati non sono nemmeno, in totale disaccordo con il l’approccio iniziale concentrato sul welfare del minore.

Possiamo quindi concludere che se anche l’Inghilterra arrivò prima all’introduzione delle Youth Courts e alla predisposizione di norme a tutela dei minori (anche) autori di reato, il suo welfare-approach subì un brusco arresto all’inizio del nuovo millennio. Più lento, ma più omogeneo fu invece il percorso dell’ordinamento italiano.

\textsuperscript{673} Con il Crime and Disorder Act.
\textsuperscript{674} Si tratta degli Anti-social Behaviour Orders (ASBOs), introdotti con il Crime and Disorder Act 1998 s.1, di cui tratteremo più avanti.
\textsuperscript{675} Il riferimento è alla s.37 del Crime and Disorder Act 1998, che definisce “the principal aim of the youth justice system to prevent offending by children and young persons” e alla s.142A del Criminal Justice Act 2003, per cui lo scopo principale dell’intero sistema deve essere tenuto in considerazione dalla corte al momento della definizione della sentenza.
2. LA QUESTIONE DELL’ETA’ MINIMA PER LA RESPONSABILITA’ PENALE

Discorso a parte merita il tema dell’età minima per la responsabilità penale. Abbiamo già visto come storicamente entrambi gli ordinamenti siano addivenuti alla predisposizione di un sistema penale dedicato esclusivamente agli autori di reato minorenni; e abbiamo già visto anche che la giustificazione sostanziale della differenziazione del trattamento penale dei minori sta nel riconoscimento della loro naturale immaturità. Possiamo dire, dunque, che entrambi gli ordinamenti hanno considerato la giovane età come presupposto per un diverso trattamento penale; a questo punto, però, dobbiamo concentrarci su quale sia l’età cui il trattamento speciale va rivolto; in particolare, è opportuno soffermarsi su una analisi della cosiddetta età minima per la responsabilità penale. 676.

Responsabilità penale ed età minima

Il concetto di responsabilità individuale è il cuore di tutto il sistema penale. Nel suo “Principle of Criminal Law” A. Ashworth definisce come giustificazione del diritto penale il cd. Principle of individual autonomy, secondo il quale ciascun individuo deve essere ritenuto responsabile per le sue azioni. E a sua volta tale principio trova giustificazione nella dimensione filosofica del libero arbitrio: “the factual element in autonomy – scrive A. Ashworth – is that individuals in general have the capacity and sufficient free will to make meaningful choices” 677. In quanto dotato di libero arbitrio e, dunque, capace di scegliere che comportamento tenere, ciascun individuo è ritenuto responsabile per le proprie azioni e può essere chiamato a risponderne, anche (ma non solo) dalla legge penale.

676 Minimum Age for Criminal Responsibility (MACR).
Assunto generale alla base, dunque, della responsabilità penale è questo: ciascun adulto mentalmente sano dovrà essere ritenuto responsabile per la sua condotta e per tutto quanto sotto il suo controllo, ad eccezione del caso in cui possa avanzare scusanti [per la propria condotta].

È in questa riflessione sulla responsabilità penale degli individui dotati di libero arbitrio che si inserisce la considerazione della condotta criminosa di bambini di tenera età; non potendo essere ritenuti agenti responsabili (per usare il linguaggio di Tadros, mancano del cd. \textit{Status responsibility}), sono esenti da responsabilità penale a prescindere dagli elementi caratterizzanti la loro condotta in concreto.

Ciò è a dire che se il libero arbitrio è presupposto necessario della responsabilità penale, questa non si potrà rinvenire in quei soggetti che per diverse ragioni (immaturità, malattia, etc) non possono essere ritenuti capaci di scegliere coscientemente e liberamente quale comportamento tenere. In altre parole, “children only have limited personal autonomy and therefore do not have the capacity and freedom to make this choice, and there is therefore a fundamental injustice when criminal liability is imposed on children”; e, ancora, “at the heart of the criminal justice system is the power to punish - criminal responsibility should be imposed on people who deserve to be punished, (…) to impose a punishment the criminal law should be looking for personal responsibility which requires capacity and

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678 “the general assumption is thus that sane adults may properly be held liable for their conduct and for matters within their control, except in so far as they can point some excuse for their conduct”, A. Ashworth and J. Horder, \textit{Principles of Criminal Law} (ed. 2013), pag 24.
679 TADROS V., \textit{Criminal Responsibility} (ed. 2005), pag. 21: “…for example, children below a certain age do not have the general status of being responsible agents, and that exemps them from criminal responsibility without any investigation into wheter they have fulfilled the conditions of a criminal offence. Let’s us call this ‘status-responsibility’”.
choice which in themselves are a reflection of personal autonomy; young children lack capacity and they are not autonomous individuals”

Ne consegue che la responsabilità penale vada riconosciuta solo a quei soggetti che risultano avere la “ability to live within reason”.

Ecco, dunque, sorgere l’esigenza di stabilire un’età minima al di sotto della quale il bambino non è responsabile della propria condotta, quantunque criminosa, che segni quindi il confine tra l’età dell’irresponsabilità e l’età della responsabilità. Il problema che gli ordinamenti si trovano ad affrontare, in ciò, è la necessità di risolvere preliminarmente un duplice interrogativo: fino a quale stadio evolutivo la persona non è in grado di percepire l’illiceità del comportamento né il significato della reazione dell’autorità pubblica e in che modo graduare l’intervento penale in ragione delle caratteristiche proprie di un soggetto in formazione sia sotto l’aspetto fisico che psichico.

Se tutti i sistemi penali sembrano concordare con questa esigenza fissando un termine iniziale per la cd. criminal responsibility, non v’è invece accordo, a livello internazionale, su quale sia di fatto l’età a cui questo termine debba corrispondere. Gli stessi ordinamenti inglese ed italiano hanno gestito in modo diverso in passato, e gestiscono in modo diverso attualmente, il problema dell’età minima.

\[\text{\footnotesize Cfr.} \]
\[\text{\footnotesize GARNER J., Offences and Defences: Selected Essays in the Philosophy of Criminal Law, Oxford, 2008, pag.112.} \]
\[\text{\footnotesize BOUCHARD M. and PEPINO L., L’Imputabilità, in PALERMO E. and PRESUTTI A., Trattato di Famiglia (vol.V) - Diritto e Procedura Penale Minorile, Giuffrè Milano 2011, pag.151.} \]
Età minima per la responsabilità penale in Inghilterra ed Italia

Vediamo le origini del sistema inglese. La storica norma di common law, a proposito dello speciale status-liability dei bambini, prevedeva che un bambino al di sotto dei sette anni di età fosse da ritenersi incapace in assoluto di formulare un intento criminale, il che significa che questi non poteva essere sottoposto ad alcun procedimento penale. Questa presunzione assoluta di incapacità (e, dunque, di non responsabilità penale) per i minori di sette anni, fu positivizzata dal Children Act 1908; recependo il principio sviluppato dalla common law, all’inizio del ventesimo secolo il Children Act statuisce che mentre nei confronti dei bambini di età inferiore ai sette anni l’ordinamento penale nulla possa, per i giovani di età compresa tra i sette ed i sedici anni sia competente la nuova giurisdizione penale giovanile. In dottrina c’è chi descrive il sistema introdotto dal Children Act 1908 sottolineando che “se il periodo di tempo intercorrente tra la nascita e il settimo anno sia visto come una sorta di moral absolution, i successivi nove anni (dai sette ai sedici) sono caratterizzati da una sorta di moral quarantine”\textsuperscript{684}.

Sette anni di età, quindi, il minimo richiesto dalla common law e dal Children Act 1908 per il riconoscimento della responsabilità penale. Si dovrà attendere il 1933, poi, perché l’età minima venga aumentata ad otto anni, con il Children and Young Person Act 1933\textsuperscript{685}.

Diverso è, invece, l’approccio italiano anche delle origini. Seppur ancora lontano dalla introduzione di tribunali dedicati alla materia penale minorile,

\textsuperscript{684} PRIESTLY P., FEAR D., FULLER R., Justice for Juveniles: the 1969 Children and Young Person Act: a case of reform? (ed. 1977): “if the period from birth to seven years was looked on as one of moral absolution, the ensuing nine years from seven to sixteen could best be characterized as a kind of moral quarantine”.

\textsuperscript{685} Children and Young persons Act, 1933 s.50: “it’s conclusively presumed that persons under the age of 10 cannot be guilty of any offence”.
era già il Codice Zanardelli 1889 a riconoscere una presunzione assoluta di non imputabilità ai minori di nove anni\textsuperscript{686}; per i minori di età compresa tra i nove e i quattordici anni, se dimostrato il loro “discernimento” scattava la responsabilità penale attenuata da una diminuzione di pena\textsuperscript{687}; tra i quattordici e i diciotto anni, infine, detto “discernimento” veniva presunto\textsuperscript{688}.

La disciplina rimase questa fino all’approvazione del Codice Rocco, nel 1930: da qui in avanti, l’ordinamento italiano introdusse e mantenne un’età minima per la responsabilità penale fissata a quattordici anni\textsuperscript{689}, e un’età, quella compresa tra i quattordici e i diciotto, nella quale l’ imputabilità è subordinata all’accertamento della capacità di intendere e di volere nel caso concreto\textsuperscript{690}.

Se in Italia, dunque, negli anni ’30 già si era raggiunta la soglia dei quattordici anni come età minima per la responsabilità penale, nello stesso periodo in Inghilterra sembrava una radicale riforma quella che aveva aumentato il MACR a otto anni\textsuperscript{691}.

\textsuperscript{686} Codice penale 1889, art.53.1: ‘53. Non si procede contro colui che, nel momento in cui ha commesso il fatto, non aveva compiuto i nove anni’.
\textsuperscript{687} Codice penale 1889, 54.1: ‘Colui che, nel momento in cui ha commesso il fatto, aveva compiuto i nove anni, ma non ancora i quattordici, se non risulti che abbia agito con discernimento, non soggiace a pena.
\textsuperscript{688} Vedi codice penale 1889, art.55.
\textsuperscript{689} Al di sotto dei quai vige la presunzione assoluta di inimputabilità fissata dall’art.97 cp.
\textsuperscript{691} Children and Young Persons Act 1933, s.50.
Nei decenni successivi, tuttavia, si cominciò ad osservare la sproporzionatezza di un trattamento penale rivolto ad un bambino di così giovane età, ancora troppo immaturo per comprendere a fondo la responsabilità delle proprie scelte e gli effetti a queste conseguenti. Senza contare che, in aggiunta alla mancanza di quel free will che abbiamo visto essere giustificazione ultima del trattamento penale operato dallo Stato, una tale immaturità complica la celebrazione di un procedimento penale che il bambino fatica a comprendere; ciò, con effetti rilevanti nei confronti del diritto all’Equo Processo sancito dall’art. 6 Cedu, per l’esercizio del quale la cd. Effective Partecipation è da ritenersi una pre-condizione essenziale.

Nei primi anni ’60 fu pubblicato, da una commissione appositamente istituita, un progetto di riforma del sistema che proponeva di aumentare l’età della responsabilità penale da otto a dodici anni; l’ambizioso progetto, tuttavia, fu smorzato dal successivo Children and Young Person Act 1963, che si limitò ad aumentarla a dieci anni.

La così tenue riforma, tuttavia, non lasciò tutti soddisfatti, e negli anni successivi il dibattito continuò. Le spinte favorevoli ad una riforma trovarono sintesi nel Children and Young Person Act 1969 elaborato dal governo laburista dell’epoca, il quale, tra le altre cose, proponeva di alzare l’età minima per la responsabilità penale ai quattordici anni; accolto come “the higest point of therapeutic familialism as a strategy for governament throught the family”, fu però ostacolato dal governo conservatore salito al potere nel 1970, il quale

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694 Ingleby Committee, istituita nel 1956.
695 Children and Young Persons Act 1963, s.16(1): ‘Section 50 of the principal Act shall be amended by substituting therein the word “ten” for the word ”eight”’.

procedette all’approvazione dell’Atto con esclusione delle sezioni 4 e 5, considerando non necessaria la modifica dell’età minima per la responsabilità.

In totale disarmonia non solo con la disciplina italiana, ma con quella della maggior parte dei Paesi europei, l’Inghilterra rimane ancora oggi ancorata ai dieci anni di età per la responsabilità penale. Come ha sollevato diverse critiche in passato, il termine di soli dieci anni non manca di sollevare nel presente, essendo la dottrina ed i professionisti in contatto quotidiano con la materia in dubbio sulla sufficienza della maturità di un fanciullo in relazione al riconoscimento di una responsabilità densa di conseguenze come è quella penale.

Ed, in realtà, a suffragare l’opinione di chi dubita della opportunità della soluzione ad oggi assunta dal legislatore inglese ed invoca una (ulteriore) riforma della materia valgono anche le fonti internazionali.

Le prime considerazioni a favore di una presa di coscienza sull’importanza di un’età minima sufficientemente garantista nei confronti dei diritti dei bambini autori di reato risalgono già al 1985, quando le Nazioni Unite approvarono la risoluzione dedicata alle “Regole Minime per l’Amministrazione della Giustizia Giovanile”, conosciute come “Le Regole di Pechino” (The Beijing Rules). La regola numero 4, rubricata “Age of Criminal Responsibility”, prevede infatti che ‘In those legal systems recognizing the concept of Criminal responsibility for juveniles, the beginning of that age shall be non fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’. Ma è il commentario alla medesima norma che chiarisce meglio il suo significato affermando che ‘the minimum age of criminal responsibility differs widely

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697 Alcune età minime in Europa: 13 anni la Francia, 14 Italia e Germania, 15 Scandinavia, 16 Spagna and Portogallo.

owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behavior\(^{699}\). Ed ecco che come già sottolineato in tema di responsabilità penale, emerge la stretta connessione tra la capacità di scegliere il proprio comportamento consapevolmente e l’età minima per la responsabilità penale: “if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless”\(^{700}\).

Una raccomandazione generale che rispecchia il medesimo schema di quella appena citata è quella della Convenzione ONU sui Diritti del Fanciullo 1989, che all’articolo 40(3) impone a ogni Stato membro di fissare una età minima al di sotto della quale il bambino non possa ritenersi capace di violare la legge penale\(^{701}\).

Nessuna delle norme appena riportate specifica quale debba essere questa età minima, ma nonostante le Regole di Pechino la individuino vagamente come quell’età che debba essere “not too law level bearing in mind the facts of emotional, mental and intellectual maturity” e la Convenzione ONU non menzioni alcuna età in particolare, è la Commissione ONU per I Diritti del Fanciullo a specificare, interpretando dette norme, che “from these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not ...

\(^{699}\)UN resolution 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), rule 4 commentary.

\(^{700}\) As above.

\(^{701}\) UN Convention on the Rights of the Child (resolution 44/25 1989), art.40(3): ‘States part shall seek to promote the establishment of laws, authorities, procedures and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and in particular (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’.
to be internationally acceptable". Ne segue che gli Stati membri sono invitati ad alzare l’età minima per la responsabilità penale se attualmente minore di 12 anni, o a mantenerla maggiore di tale soglia se il requisito minimo di dodici anni risulta già rispettato dalla legislazione interna. Con tale precisazione della Commissione cozza direttamente il sistema inglese e rischia di venire a cozzare lo stesso sistema italiano, che ha visto negli ultimi anni dei disegni di legge che diminuiscono il limite della imputabilità a dodici anni ed escludono le diminuzioni di pena per gli ultra sedicenni.

Nella stessa direzione va la raccomandazione del Consiglio d’Europa del 2003 che sottolinea come “culpably should better reflect the age and maturity of the offender, and be more in step with the offender’s stage of development, with criminal measures being progressively applied as individual responsibility increases”.

Con tutte le sopracitate raccomandazioni internazionali sembra essere in contrasto l’ordinamento inglese. La questione della (in)sufficienza dell’età di dieci anni per il riconoscimento di una responsabilità penale è stata portata all’attenzione della Cedu con il caso T. v United Kingdom, V. v United Kingdom, che coinvolgeva due ragazzini di 10 anni colpevoli dell’omicidio di un bambino di appena due anni. Il caso, avvenuto nel 1993, e per il quale i due ragazzini furono condannati a seguito di un procedimento penale celebrato con tutte le formalità previste dalla legge inglese per i procedimenti di fronte alla Crown Court, fu impugnato davanti

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702 COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 10 (2007), par.32.
703 As above, par.32 and 33.
alla Cedu per sostenuta contrarietà all’art. 3706. Nelle loro allegazioni, gli avvocati difensori sottolineavano come il caso violasse il diritto sancito dalla Carta in forza dell’effetto cumulativo della giovane età degli imputati, della natura accusatoria del procedimento, delle formalità con le quali era stato celebrato e della particolare attenzione mediatica che il caso aveva ricevuto707. In questa occasione la Corte ebbe modo di analizzare il problema dell’età minima per la responsabilità penale fissata in Inghilterra708.

La conclusione della Corte Europea dei Diritti dell’Uomo fu:

“(…) at the present time, there is not yet commonly accepted minimum age for attribution of criminal responsibility in Europe. While most of the Contracting States have adopted an age limit which is higher than that in force in England and Wales, other States, such as Cyprus, Ireland, Lichtenstein and Switzerland, attribute criminal responsibility from a younger age. Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments (…) .

Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed, but merely invites States not to fix it too low, and article 40 (3)(a) of the UN Convention requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no

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706 Art. 3 Cedu: “nessuno può essere sottoposto a tortura nè a pene o trattamenti inumani o degradanti”
707 V v United Kingdom, Application n. 24888/94, par. 63.
708 Avendo le parti sostenuto in particolar modo nelle loro allegazioni come una tale giovane età non sia sufficiente per il rispetto dell’art. 3, anche in considerazione del fatto che molti Stati Membri assumono età più avanzate.
provision as to what that age should be. The Court does not consider that there is at this stage any clear common standard amongst the members States of the Council of Europe as to the minimum age of criminal responsibility. Even in England and Wales is among the few European jurisdictions to retain a law age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit fallowed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention”709.

La Corte, dunque, ritenne il diritto interno Inglese compatibile con la Convenzione, ed in particolare compatibile con l’art. 3.

**Inghilterra ed età minima per la responsabilità penale: critiche**

Nonostante l’intervento della Corte Europea dei Diritti dell’uomo sembrasse voler rasserenare chi si diceva preoccupato per gli effetti di un sistema penale che reagisce nei confronti di bambini così giovani, il dibattito sul tema non cessò.

La Children Commissioner M. Atkinson, in una intervista rilasciata al *Times* nel Marzo 2010 si espresse così:

“The age of criminal responsibility in this Country is ten – that’s too low, it should certainly be moved up to 12. In some European Countries it’s 14. People may be offenders but they are also children. Even the

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most hardened of youngsters who have committed some very difficult crimes are not beyond being frightened\textsuperscript{710}. Interventi della stessa portata si ebbero, poi, con l’occasione di una serie di seminari organizzati dal \textit{All Party Parliament Group for Children} sul tema “Children in the Youth Justice System in England and Wales”\textsuperscript{711} nel 2009/2010, chiusisi con un report finale del seguente tenore:

“There are two broad consequences of having a lower age of criminal responsibility […] The first of these is the level of youth custody. England and Wales lock up more children than any other Country in the rest of Europe. We imprison four times more young people than Portugal, 25 times more than Belgium and 100 times more than Finland. The earlier a child is drawn into the system the greater the chance that they will re-offend, the greater the chance of creating an antecedent history that will lead to further custodial sentences.

The second consequence of a lower age of criminal responsibility is society’s attitude towards young people. An elevated age of criminal responsibility indicates a society viewing problematic behavior through a welfare lens of disadvantage and need. A lower age indicates a society that views young people as criminals. This is self-reinforcing. Where a 14-year-old cannot be prosecuted, services are developed to respond to their problematic behavior”\textsuperscript{712}.

Anche il mondo della ricerca scientifica ha recentemente dato il suo contributo alla riflessione sul problema. Nel 2010 la Royal Society ha

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\textsuperscript{710} Times, 13/03/2010.
\textsuperscript{711} See \textit{Children and Young People in the Youth Justice System} - Report of seminars organized by the All Party Parliamentary Group for Children 2009/10, available at \url{http://www.ncb.org.uk}.
pubblicato un rapporto intitolato “Neuroscience and the Law”, il cui scopo era quello di chiarire il funzionamento del cervello per quanto interessante in rapporto con il diritto. A proposito dello sviluppo celebrale e della sua rilevanza con il tema della criminal responsibility gli autori scrivono che:

“In conclusion, it is clear that at the age of ten the brain is developmentally immature, and continues to undergo important changes linked to regulating one's own behavior. There is concern among some professionals in this field that the age of criminal responsibility in the UK is unreasonably low, and the evidence of individual differences suggests that an arbitrary cut-off age may not be justifiable.”

Inoltre il report del All Party Parliamentary Group for Children 2012 che si occupa dei crimini commessi da giovani ragazze ribadisce, tra le raccomandazioni finali, la necessità di “raise the age of criminal responsibility in England and Wales in line with the European average age of 14 years”.

Alle sopraindicate valutazioni si aggiungono, infine, i dubbi avanzati dalla dottrina e le considerazioni del mondo scientifico, che si è esposto anche attraverso una lettera aperta firmata da E. Vizard ed altri e pubblicata dal

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713 Nell’introduzione del prospetto, la Royal Society chiarisce, infatti, che tale lavoro si colloca al fatto che “As the law is primarily concerned with regulating people’s behaviour, it follows that knowledge about how the brain works may one day be of some relevance to the law” Neuroscience and the law, 2010, pag.11.


715 Keeping girls out of the penal system – All Party Parliamentary Group on Women in the Penal System


717 Lettera aperta pubblicata da The Times il 7/6/2010: “Sir, We are concerned about the very low age of criminal responsibility, ten years old, for children in England and Wales. The assumption that a ten-year-old can face charges is widely discussed in terms of whether or not that child can “understand the difference between right and wrong”. The
Times nel 2010, nella quale si auspica una riforma che innalzi l’età minima per la responsabilità penale in modo da allineare il sistema inglese con la maggior parte degli altri sistemi penali europei. E tale riforma, in realtà, pare sul punto di concretizzarsi da quando, il liberaldemocratico Lord Dholakia ha presentato a Maggio 2013 una proposta di legge per modificare la sezione 50 del Children and Young Persons Act 1933 sostanzialmente innalzando l’età minima da dieci a dodici anni, sostenendo che “It cannot be right to deal with such young children in a criminal process based on ideas of culpability which assume a capacity of mature, adult-like decision-making”\textsuperscript{718}.

L’age of criminal responsibility bill sembra, in realtà, rispondere a quella parte della dottrina che invoca un innalzamento del MACR, sostenendo che “There is an urgent and convincing argument for raising the age of criminal responsibility to 14 (…); the case for reform is absolutely compelling”\textsuperscript{719}.

Al momento, tuttavia, lo scarto tra il sistema inglese e quello italiano, rimane più che significativo.

\textsuperscript{718} Lord Dholakia, All Lord debate on 8/11/2013.
3. LA PREVENZIONE DEL CRIMINE MINORILE; UNA BREVE COMPARAZIONE

Analizzati nei precedenti capitoli il tema dell’approccio dei due ordinamenti di riferimento ai minori autori di reato e dell’età minima per la responsabilità penale, possiamo ora affrontare principale di questo lavoro: la prevenzione del crimine minorile.

Andremo ad analizzare innanzitutto il concetto generale di prevenzione del crimine, ripercorrendo l’analisi compiuta dalla dottrina italiana ed inglese, per poi concentrarci in particolar modo sulle concrete misure di prevenzione che i due sistemi propongono.

Cos’è la prevenzione del crimine?

Il sistema penale è, in generale, un sistema che reagisce alla commissione del crimine. La legge penale, infatti, prevede per ciascun reato una risposta proporzionata che costituisce la reazione dell’ordinamento alla ferita causata dal reato stesso. L’intero sistema penale, dunque, è costruito come un sistema di reazione ex-post che considerando il fatto di reato e le sue circostanze, ristabilisce quell’armonia che è stata rota.

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compromettendo i singoli individui ma anche la società nel suo complesso.\textsuperscript{722}

La pena è il concretizzarsi di tale reazione ex-post.

Nell’approccio preventivo, invece, l’intervento del legislatore si inserisce non in una prospettiva ex-post, bensì ex-ante; detto intervento non rappresenta una risposta retributiva all’offesa che già è stata commessa, ma si ripropone di evitare la stessa offesa.\textsuperscript{723}

Come la stessa parola suggerisce, la prevenzione del crimine consiste in un insieme di misure che vengono cronologicamente e logicamente prima del fatto di reato,\textsuperscript{724} in un intervento anticipato dell’ordinamento che non reagisce ad un’offesa che sia già stata commessa ma la previene.

Ciò non significa, tuttavia, che pena e prevenzione siano due concetti del tutto separati; la stessa pena,\textsuperscript{725} infatti, non è solo retribuzione essendo ispirata da criteri di prevenzione generale e speciale.\textsuperscript{726} Il sistema penale reagisce con una pena, cioè, non solo per rispondere proporzionalmente all’offesa arrecata, ma anche per prevenire la commissione di ulteriori reati; l’esistenza di una pena trova il suo effetto deterrente in ciò, che

\textsuperscript{722} Vedi per esempio https://www.gov.uk/: “Any amount of crime in society is unacceptable. Not just because of the human cost, but also the cost to society”.

\textsuperscript{723} Vedi FIANDACA G. and MUSCO E., Diritto Penale – parte generale, Bologna 2011, pag.857; per i problem connessi con la definizione di prevenzione del crimine vedi D’ARGENTO N., Minus Quam Delictum, Bari 1997.

\textsuperscript{724} Vedi NUVOLONE P., Corso di Diritto Penale, Milano 1966, pag.376


\textsuperscript{726} Vedi FIANDACA G. e MUSCO E., Diritto Penale – parte generale, Bologna 2011.

\textsuperscript{727} Vedi cit; vedi anche VON HIRSCH A., ASHWORTH A., ROBERTS J., Principled Sentencing – reading on Theory and Policy, Oxford 2009, pag.40: “punishment is justified by reference to its crime-preventive consequences”.
l’individuo libero di scegliere il proprio comportamento in ragione del suo libero arbitrio\textsuperscript{728}, sarà orientato nella scelta dalla consapevolezza di essere sottoposto a un dato trattamento penale in conseguenza di un dato comportamento\textsuperscript{729}. La pena, allora, è un elemento deterrente attraverso il quale lo Stato rende note in anticipo le conseguenze della rottura della legge penale, allo scopo di evitarla; sintetizzando, “the idea is that the incidence of crime is reduced due to people’s fear or apprehension of the punishment they may receive if they offend”\textsuperscript{730}.

Misure preventive e misure retributive non sono affatto due mondi del tutto distinti, giacché la stessa pena è orientata anche alla prevenzione. Non possono, dunque, distinguersi su presupposti cronologici, dal momento che misure preventive possono applicarsi anche dopo che un reato sia già stato commesso (misure post-delictum); il solo elemento che sembra rimanere distintivo, in conseguenza, è il fatto che mentre le misure preventive sono dirette solo alla prevenzione, la pena è primariamente una reazione al reato e dunque rimane necessariamente proporzionata a questo.

Una volta chiarito tutto questo, resta l’interrogativo del perché un sistema penale abbia bisogno di disporre di misure preventive se già le pene sono strumento di prevenzione.

\textsuperscript{728} Vedi A. ASWORTH and J. HORDER, Principles of Criminal Law, Oxford 2013, pag.23: “the factual element in autonomy is that individuals in general have the capacity and sufficient free will to make meaningful choices”.

\textsuperscript{729} Vedi NUVOLONE P., Corso di Diritto Penale, Milano 1966, pag.376: “il diritto penale, infatti – come ogni altro sistema di norme sanzionatorie dell’ordinamento giuridico – ha innanzitutto finalità preventive; predispone la tutela di determinate beni o interessi giuridici considerate fondamentali per la collettività con l’inibire, mediante la minaccia di sanzioni, l’offesa di quegli interessi o di quei beni”.

\textsuperscript{730} STACHON V., The principles of punishment applied to children within the juvenile justice system, UCL Jurisprudence Review 2007 13, 53-73.
Innanzitutto è l’esigenza di Giustizia che tutti i sistemi penali sono chiamati a tutelare a richiedere un’efficace strategia di prevenzione del crimine\footnote{Vedi NUVOLONE P., \textit{Corso di Diritto Penale}, Milano 1966, pag.376, cit. opinione contraria quella di BETTIOL G., \textit{Diritto Penale}, Padova 1978, ma qui l’autore limita la critica alla prevenzione delle offese commesse da adulti, accogliendo favorevolmente l’idea di una prevenzione del crimine (pag.843, reference).}. Se lo scopo principale del sistema penale è la protezione della collettività dal crimine, è del tutto evidente che la migliore protezione è quella che riesce ad evitare il reato alla radice\footnote{Vedi GUNTHER K., in ASHWORTH A., ZEDNER L., TOMLIN P., \textit{Prevention and the limits of the Criminal Law}, Oxford 2013, pag.71: “the state comes in as a bearer of a constitutional duty to protect citizen-victim again citizen-criminal. The intrinsic meaning of this request for state protection is preventive. The state shall guarantee the security of the individual, because of the individual’s right to security”.}; in questo senso si può individuare in capo allo Stato una \textit{responsibility to prevent}\footnote{Cit., pag.71 dove si sostiene che: “according to the recent responsibility to prevent paradigm, the protection of citizens against crime is considered as a human right at the international level, and a fundamental or basic right at the national level”}. Inoltre, anticipando l’intervento penale al momento in cui il reato non è ancora stato commesso, si evitano vittime e persone offese dal reato. Infine, con un’efficace prevenzione l’intero procedimento penale risulta non più necessario, con effetti positivi anche sull’organizzazione del sistema di giustizia penale e sui suoi costi.

Strategie preventive sono in vigore sia nell’ordinamento inglese che in quello italiano. In particolare, negli ultimi anni in Inghilterra si addirittura è assistito ad una sorta di passaggio dall’approccio \textit{postcrime} ad un approccio...
precrime\(^{734}\), con un cambio radicale della prospettiva in relazione all’offesa penale\(^{735}\), tanto che si è iniziato a parlare di preventionism\(^{736}\).

Tra le diverse classificazioni che delle misure di prevenzione la dottrina ha proposto\(^{737}\), assumiamo quella che distingue tra misure ante-delictum e misure post-delictum. Le prime sono misure preventive che intervengono prima del reato\(^{738}\), dove prima ha un’accezione sia cronologica che logica; ne consegue che le misure ante-delictum non richiedono come presupposto applicativo la commissione di un reato\(^{739}\). Le seconde, invece, si applicano proprio sul presupposto di un reato già consumato; concretizzano, dunque, una prevenzione rivolta ad ulteriori offese future\(^{740}\).


\(^{736}\) Per un’analisi comparativa del fenomeno del preventionism, vedi ASP P., Preventionism and Criminalization of Nonconsummate Offences, in ASHWORTH A., ZEDNER L., TOMLIN P., Prevention and the limits of the Criminal Law, Oxford 2013. Vedi, in particolare, pag.297: “is changing the way we think and argue about criminal law, and serves also as a yardstick for measuring the results of the criminal law system”.

\(^{737}\) Ci riferiamo alla distinzione tra “prevenzione primaria” e “prevenzione secondaria”; misure positive e misure negative; misure di prevenzione generale e misure di prevenzione speciale; misure patrimoniali e misure personali.

\(^{738}\) NUVOLONE definisce le misure ante-delictum come quelle rivolte a prevenire il primo reato (“le misure della prima categoria tendo ad evitare che l’individuo cada nel primo delitto”), in NUVOLONE P., La Prevenzione nella Teoria Generale del Diritto Penale, in Trent’anni di Diritto e Procedura Penale (vol.I), Padova 1969, pag.270.

\(^{739}\) Vedi L. PASCULLI, Le misure di prevenzione del terrorismo e dei traffici criminosi internazionali, Padova 2012.

Se già in generale è riconosciuta l’importanza delle misure di prevenzione del crimine, argomentazioni forti sostengono la predisposizione di misure preventive da applicare ai minori. L’idea più diffusa, a sostegno di un’efficace apparato normativo in grado di prevenire il crimine minorile, è che “those who engage in anti-social or criminal behaviour at a young age are more likely to become serious and persistent offenders, therefore preventing youth offending is a key to crime reduction”\textsuperscript{741}; in quest’ottica la prevenzione del crimine minorile sarebbe da vedere come un progetto a lungo termine dedicato fermare sul nascere il contatto tra giovani (potenziali) autori di reato e il sistema penale\textsuperscript{742}.

Nel tentativo di costruire un’efficace struttura di prevenzione del crimine minorile, l’Inghilterra ha addirittura introdotto Asset\textsuperscript{743}, definito come “a structured assessment tool to be used by YOTs in England and Wales on all young offenders who come into contact with the criminal justice system”\textsuperscript{744}. Si tratta di uno strumento di intervento rivolto a tutte le agenzie che entrano in contatto con giovani autori di reato, il cui scopo primo è permettere una raccolta statistica di dati in merito alle più frequenti cause del reato minorile; in perfetta adesione al cd. Risk-Factor Prevention Paradigm ("le misure della seconda categoria tendono ad evitare che l’individuo incorra nella recidiva").

\textsuperscript{741} HOME AFFAIRS COMMITTEE, The Government's Approach to Crime Prevention, pag.201. vedi anche: J. GRAHAM, What works in preventing criminality, in Reducing offending: an assessment of research evidence on ways of dealing with offending behaviour 1998 (Home Office Research Study 187), pag.7: “Also, those who engage in anti-social or criminal behaviour at an early age are more likely to become serious and persistent offenders”.

\textsuperscript{742} K. FITHC, Teenagers at risk - The safeguarding needs of young people in gangs and violent peer groups, 2009, pag.2: “The government’s response to the problem has often centred on punitive action. However, while tougher sanctions may answer the public’s need for reassurance, a more holistic approach will be needed to reduce these problems in the longer term”.

\textsuperscript{743} Available at http://www.justice.gov.uk/youth-justice.

\textsuperscript{744} http://www.justice.gov.uk.
(RFPP)\textsuperscript{745}, secondo il quale ogni strategia preventive deve iniziare dall’analisi dei cosiddetti risk-factors\textsuperscript{746}.


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4. PREVENZIONE DEI CRIMINI MINORILI: MISURE ANTI-DELICTUM

Una comparazione critica delle singole misure preventive in vigore nei due sistemi, necessariamente comincia dall’analisi delle misure. Ci rifacciamo, come già precisato, alla classificazione che distingue tra misure ante-delictum e misure post-delictum.

Misure ante-delictum nel sistema inglese.

Tra le misure ante-delictum specificatamente previste dall’ordinamento inglese per i minori, ci concentriamo in particolare su quelle che hanno richiamato l’attenzione della dottrina. Si tratta di una serie di misure (ABCs, ASBOs) dedicate alla prevenzione non solo di fatti previsti dalla legge come reato, ma di comportamenti cosiddetti antisociali che non necessariamente integrano una fattispecie criminosa. Si tratta, anzi, di misure preventive il cui presupposto applicativo è un comportamento antisociale.

Il dato di partenza è questo: ciascun reato arreca una doppia lesione, alla vittima da un lato, e alla comunità dall’altro. Ma la comunità è lesa anche da quei comportamenti che pur non rompendo direttamente la legge penale, arrecano disturbo alla quiete della comunità sociale (si pensi a comportamenti come il vandalismo, l’alcolismo di strada, urla e schiamazzi in luoghi pubblici).

La politica, a partire dagli anni ’90, ha iniziato ad interessarsi di tali comportamenti proponendo soluzioni utili per placare “such unacceptable conduct, which causes misery to so many communities”747, sostenendo di averne il dovere in quanto si tratta di “protect the most fundamental liberty of all: freedom from harm by others”748.

747 Mr. STRAW, HC Deb 02 March 1998 vol 307 cc694-5.
748 T. BLAIR, Our citizens should not live in fear, The Observer (11 December 2005).
Riportiamo, in breve, alcuni riferimenti politici agli anti-social behaviours:

“Anti-social behaviour also causes alarm and distress and heightens the fear of crime. Tackling this sort of conduct and preventing its escalating into more serious criminal behaviour is a central element in our policy towards making our communities safer”\(^{749}\).

“Anti-social behaviour describes a range of everyday nuisance, disorder and crime, from graffiti and noisy neighbours to harassment and street drug dealing. It is sometimes dismissed as trivial, but anti-social behaviour has a huge impact on victims’ quality of life, and it is the public’s number one concern when it comes to local crime issues”\(^{750}\).

“In terms of the behaviour itself, what is seen as ‘anti-social’ will vary from victim to victim, and neighbourhood to neighbourhood. The right response in each case will depend on a range of factors, but most importantly, on the needs of the victim and the impact the behaviour is having on their lives”\(^{751}\).

“Anti-social behaviour is a menace on our streets; it is a threat to our communities. We aim to prevent it as far as we may. A civil order is part of the regime for doing that. But ultimately, we regard such behaviour as criminal”\(^{752}\).

La necessità di dare delle efficaci risposte contro gli anti-social behaviours si è concretizzata innanzitutto nella disciplina dei Anti-social Behaviours Contracts (ABCs); si tratta di contratti di diritto privato conclusi tra il singolo individuo a rischio di comportamenti antisociali e l’autorità locale.

\(^{749}\) Mr. Michael HC Deb 27 October 1997 vol 299 c738W.
\(^{750}\) HOME OFFICE, *More Effective Responses to Anti-Social Behaviours*, 2011, pag.5.
\(^{751}\) HOME OFFICE, *Putting the Victim First: More Effective Responses to Anti-Social Behaviours*, 2012 Pag.10, par.1.3.
\(^{752}\) Lord Williams HC Deb 3 Feb 1998 c.603.
Originariamente introdotti dalla pratica\textsuperscript{753}, sono strumenti che investono sulla responsabilità individuale: nel firmare un ABC con l’autorità locale, il minore a rischio di comportamento antisociale si assume la responsabilità di evitare tale comportamento. Non essendo disciplinati dalla legge, tali contratti sostanzialmente rendono esplicito ciò che già sarebbe imposto da norme sociali\textsuperscript{754}, “reinforce[ing] a set of common decencies”\textsuperscript{755}. Trattandosi di semplici accordi di diritto privato, tali contratti hanno una grande flessibilità, che permette all’autorità locale di costruire sull’individuo a rischio lo stesso contenuto contrattuale. Possono, inoltre, essere utile strumento nei confronti dei bambini che ancora non hanno raggiunto l’età minima per la responsabilità penale (dieci anni).

Solo letterale è, tuttavia, il vantaggio derivante dal fatto che trattandosi di accordi di diritto privato, il minore non è formalmente obbligato ad impegnarsi\textsuperscript{756}; egli, infatti, si trova pur sempre sotto la forte influenza dell’autorità locale. Inoltre è quasi la regola, nella prassi, che la proposta di sottoscrivere un contratto comportamentale di questo tipo sia solo l’inizio di un percorso che, se il consenso contrattuale viene negato, si conclude con la richiesta al Tribunale di una Gang Injunction o di un ASBO\textsuperscript{757}.

\textsuperscript{753} Sono contratti introdotti inizialmente nel quartiere di Islington a Londra, a partire dall’anno 2000, proprio per gestire comportamenti anticosal di minori.

\textsuperscript{754} CABINET OFFICE Prime Minister’s Strategy Unit, Personal Responsibility and Changing Behaviour: the state of knowledge and its implications for public policy, February 2004, disponibile online su: 

\url{http://webarchive.nationalarchives.gov.uk/20100125070726/http://cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/pr2.pdf}, pag.58: “behavioural contracts designed to promote responsibility by making explicit and embedding a set of social norms”.


\textsuperscript{136}

\textsuperscript{756} Cit. n 7.

\textsuperscript{757} Vedi, a proposito, quanto dichiarato dalla stessa Polizia nell’applicazione per l’applicazione di un ASBO ad A, che vedremo per altri aspetti in seguito: “(…) if the nominal continued engaging with gangs, we will offer an Acceptable Behaviour Contract
Del tutto diversa è la natura e il meccanismo degli Anti-social Behaviour Orders (ASBOs). Si tratta, qui, della prima ufficiale risposta del legislatore inglese alle esigenze di disciplina dei comportamenti antisociali. Risposta che arrivò nel 1998 con il Crime and Disorder Act, s.1: ‘An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely: that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and that such an order is necessary to protect relevant persons from further anti-social acts by him’\textsuperscript{758}.

Nel caso, dunque, in cui un soggetto si comporti in modo antisociale, sì da causare (concretamente, o solo verosimilmente) “harassment, alarm or distress”, l’autorità rilevante\textsuperscript{759} può richiedere al Tribunale di emettere un ordine civile che vieti allo stesso soggetto di mantenere quel dato comportamento\textsuperscript{760}.

L’Anti-social Behaviour Order, come dicevamo, contiene delle proibizioni che impediscono al soggetto a rischio di (ulteriori) comportamenti

(ABC) which contains a set of conditions that the nominal will be prohibit from doing. This is a voluntary contract. Should the nominal not want to sign the contract and change their behaviour, they were considered for an Anti-social behaviour order (ASBO) and Gang Injunctions”.

\textsuperscript{758} CDA 1998, s.1(1).
\textsuperscript{759} CDA 1989, s.1(1A), riformato dal Police Reform Act 2002: “In this section and sections 1B and 1E “relevant authority” means: (a)the council for a local government area; (b)the chief officer of police of any police force maintained for a police area; (c)the chief constable of the British Transport Police Force; or (d)any person registered under section 1 of the Housing Act 1996 (c. 52) as a social landlord who provides or manages any houses or hostel in a local government area”.

\textsuperscript{760} L’anti social behaviour order può anche essere pronunciato dalla corte penale dopo la condanna. In questo caso non sarà necessaria alcuna ‘application form’ come requisito essenziale.
antisociali determinati agire in determinate modalità\textsuperscript{761} per un periodo di almeno due anni\textsuperscript{762}; se durante la vigenza dell’ordine egli, senza ragionevoli scuse, viola uno di questi divieti, commette un (nuovo) reato\textsuperscript{763}. In altre parole: l’ASBO è un ordine emesso dal giudice civile sul presupposto di comportamenti antisociali e con lo scopo di evitare la ripetizione; la sua violazione, tuttavia, integra un reato punibile addirittura con la pena detentiva per un massimo di cinque anni\textsuperscript{764}. La caratteristica più interessante (e criticata) dell’ordine è proprio questa: la sua struttura comporta, in caso di violazione, uno slittamento dal civile al penale che rende penalmente rilevanti condotte che in principio nemmeno costituivano fatti di reato\textsuperscript{765}.

Concentriamoci, ora, sui presupposti per la richiesta di un ASBO: innanzitutto il soggetto deve essersi comportato in un modo antisociale, dove il comportamento antisociale è definito come quello che causa “harassment, alarm or distress to one or more persons not of the same household as the defendant”. Cosa significa?

È comunemente accettato che “it is difficult to define anti-social behaviour with precision”\textsuperscript{766}, innanzitutto perché “harassment is well understood but very hard to define (...) the true measure of harassment is its impact on the

\begin{footnotes}
\footnote{CDA 1998, s.1(4).}
\footnote{CDA 1998, s.1(7).}
\footnote{CDA 1989, s.1(10).}
\footnote{CDA 1998, s.1(10).}
\footnote{Gli anti-social behaviours, infatti, non necessariamente corrispondono a fatti previsti dalla legge penale come reato. Se alcuni sicuramente coincidono con criminal offende (per esempio: spaccio di droga, violenze, furti) altri si limitano ad essere antisociali, e dunque ad arrecare disturbo alla comunità, senza integrare fatti di reato (per esempio: ascoltare musica ad alto volume, graffiti).}
\footnote{HOME OFFICE (N. BLAND and T. READ), Policing Anti-Social Behaviour, 2000 (a); vedi anche P. RAMASAY, What is anti-social behaviour?, Criminal Law Review 2004 Nov (908).}
\end{footnotes}
victims”, e perché “people’s understanding of anti-social behaviour is based on individual perception and can encompass a range of behaviours”; dunque “anti-social behaviour means different things to different people – noisy neighbours who ruin the lives of those around them, ‘crack houses’ run by drug dealers, drunken yobs taking over town centres, people begging by cash-points, abandoned cars, litter and graffiti, young people using airguns to threaten and intimidate or people using fireworks as weapons”.

Il primo problema degli ASBO, quindi, sta proprio nella vaghezza della definizione alla base dell’intero istituto. Qualcuno ha poco soddisfacentemente osservato che, invece, una definizione di anti-social behaviour non necessaria in quanto auto evidente. Tanto più criticabile, se consideriamo che non è nemmeno necessario che l’harassment, alarm or distress si sia concretamente realizzato, bastando, in effetti, un comportamento che verosimilmente potesse causarlo.

L’altro requisito necessario per un ASBO è che un ordine di questo genere sia l’unico modo per prevenire future condotte dello stesso tipo. Il criterio per la pronuncia di un ASBO, dunque, pare essere la possibilità che in futuro il soggetto arrechi ulteriore disturbo alla comunità; l’attenzione è,

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768 HOME OFFICE, Defining and measuring anti-social behaviour, 2004, pag.3.
770 M. SIKAND, ASBOs: a practitioner’s guide to defending anti-social behaviour orders, Nottingham 2006, pag.7 parla di “boundless definition”.
771Lord Williams of Mostyn, HL Report, 3 Feb 1998: Column 514: “it requires the subject of it to do no more (…) than to behave in a decent way to the fellow citizens of our country - there is nothing vague about the description”.
772 CDA 1998, s.1(1)(a).
dunque, sul futuro possibile rapporto tra il soggetto stesso e la comunità. Essendo, il presupposto, esclusivamente preventivo, dunque, si è affermato che “the use of an ASBO to punish an offender is unlawful”. La funzione dell’ASBO, ripetiamo, è dunque meramente preventiva: solo se strumento idoneo, a prevenire ulteriori comportamenti antisociali, un ASBO può essere pronunciato a favore della comunità che da quei comportamenti antisociali risulterebbe lesa.

Veniamo, ora, alle principali critiche dottrinali che hanno colpito l’istituto. Abbiamo già detto della sua struttura ibrida; l’Anti-social behaviour order è un ordine di natura civile, ma la sua violazione costituisce reato disciplinato dalla legge penale (punito, peraltro, con la pena detentiva fino a cinque anni). Sostanzialmente, ciò che questa struttura ibrida comporta, è che un comportamento anti-sociale non costituente reato in origine, può diventare penalmente rilevante per intercessione di un ASBO violato. E il problema è che, data la vaghezza della definizione di comportamento anti-sociale ai sensi della s.1 del Crime and Disorder Act 1998, la condotta iniziale da cui l’ordine scaturisce può davvero essere qualsiasi: “causing harassment, alarm or distress may encompass anything from youth gathering on a street corner and forcing passers-by to talk in the road, or begging in the street, up to serious crimes such as burglary and robbery. (…) The concept of anti-social behaviour is not limited to non-criminal conduct”. Ciò comporta che si possano concretizzare le seguenti situazioni: condotta antisociale non costituente reato, che per violazione dell’ordine diventa offesa penale.

773 RAMASAY P., What is anti-social behaviour?, Criminal Law Review 2004 da pag.908: “the criteria for granting an ASBO are whether or not it is needed to prevent future exposure of others to the disrespectful attitude of the defendant. It is the future relationship between the defendant and other people that renders the defendant liable”.

774 R v Boness [2005] EWCA par.29: “the purpose of an ASBO is not to punish an offender (…). This principle follows from the requirement that the order must be necessary to protect persons from further anti-social acts by him. The use of an ASBO to punish an offender is thus unlawful”.

punibile con una custodial sentence; contotta costituente reato non punibile con una custodial sentence\textsuperscript{776}, che per intercessione dell’ordine violato diventa punibile con sentenza detentiva; condotta che già integra un fatto previsto dalla legge come reato che viene assistito da un ASBO in un’ottica puramente specialpreventiva.

Nel 2004, il Commissario per i Diritti Umani del Consiglio d’Europa, scrisse degli ASBOs: “it is not because a child is causing inconvenience that he should be brought to the portal of the criminal justice system”\textsuperscript{777}. Osservò che “ASBO breaches have resulted in large numbers of children being detained”\textsuperscript{778}, e che “ASBOs risk alienating and stigmatising children, thereby entrenching them in their errant behaviour”\textsuperscript{779}.

Particolare rilevanza hanno gli ASBOs per quanto riguarda i minori. Il fatto che non esista alcun limite minimo di età\textsuperscript{780}, li rende applicabili anche a bambini al di sotto dei dieci anni, e largo uso ne è fatto, in realtà, nella prassi. Del tutto in disaccordo, però, si sono dimostrati con il loro stesso scopo social preventivo e, di conseguenza, con quello scopo di prevenzione del crimine commesso da bambini e giovani che la s.37 del Crime and Disorder Act\textsuperscript{781}. definisce scopo principale dell’intero Youth Justice System.

Le statistiche più recenti\textsuperscript{782}, mostrano come più della metà degli ASBOs

\textsuperscript{776} Per esempio: esercizio della prostituzione o elemosina.
\textsuperscript{777} A. GIL-ROBLES (Council of Europe’ Commissioner for Human Rights) on his visit in UK in November 2004, par. 117.
\textsuperscript{778} Cit., par. 118.
\textsuperscript{779} Cit., par. 119.
\textsuperscript{780} Gli ASBOs non sono una misura esclusivamente rivolta ai minori, essendo applicabili a soggetti anche in età adulta.
\textsuperscript{781} CDA 1998, s.37: “the principal aim of the Youth Justice System is to prevent offending by children and young person”.
pronunciati tra il 1999 e il 2012 nei confronti di minori, siano stati violati\textsuperscript{783};
considerando le violazioni, inoltre, è interessante notare che il 37\% sono state punite con una pena detentiva. Questo prova come, nella pratica, l’antisocial behaviour order sia in realtà uno strumento tutt’altro che in grado di prevenire il contatto tra il minore e il sistema penale; anzi, tendono ad assicurarlo anche qualora il suo comportamento sia solo antisociale. Spesso apparentemente semplici da seguire, gli ASBOs contengono proibiizioni che i soggetti a cui sono rivolti faticano a rispettare, tanto che sono stati definiti ‘made to be breached’; il loro unico risultato è, allora, quello di riempire il criminal record di soggetti che comunque continueranno a comportarsi come sempre. Il rischio è che “the excessive use of ASBOs is more likely to exacerbate anti-social behaviour and crime amongst youths than effectively prevent it”\textsuperscript{784}.

**Misure ante-delictum nel sistema italiano.**

L’unica misura di prevenzione ante-delictum che l’ordinamento italiano dedica specificatamente ai minori di diciotto anni è quella disciplinata dall’art.25 del r.d.l. 1404/1934, legge istitutiva del Tribunale per i Minorenni (cd. “Legge Minorile”).

L’art.25 disciplina le *Misure Applicabili ai Minori Irregolari per Condotta o per Carattere*, prevedendo che quando un minore degli anni 18 dia manifeste prove di irregolarità della condotta o del carattere, il procuratore della Repubblica, l'ufficio di servizio sociale minorile, i genitori, il tutore, gli organismi di educazione, di protezione e di assistenza dell'infanzia e dell'adolescenza, possono riferire i fatti al Tribunale per i minorenni, il

\textsuperscript{783} Risultano violate il 52\% degli ASBOs.

\textsuperscript{784} A. GIL-ROBLES (Council of Europe’ Commissioner for Human Rights) on his visit in UK in November 2004, par. 118.
quale, a mezzo di uno dei suoi componenti all'uopo designato dal presidente, esplica approfondite indagini sulla personalità del minore, e dispone con decreto motivato l'affidamento del minore al servizio sociale minorile oppure il collocamento in una casa di rieducazione od in un istituto medico-psico-pedagogico.


Dunque si prevede che a conseguenza di tale irregolarità della condotta o del carattere, se riferita da uno dei soggetti elencati dall’art.25, il Tribunale per i Minorenni può disporre l’affidamento del minore al servizio sociale minorile oppure il collocamento in una casa di rieducazione od in un istituto medico-psico-pedagogico. Il testo originale della legge, tuttavia, ha in realtà perso parzialmente di significato da quando a seguito dell’approvazione del d.p.r. 616/1977, le strutture di rieducazione e gli istituti medico-psico-pedagogici chiusero; ne consegue che ad oggi l’unica misura ante-delictum

786 NUVOLONE P., La prevenzione nella teoria generale del diritto penale, pag.13;
VIRGILIO, Condizioni e presupposti della ‘irregolarità della condotta e del carattere’: le misure di prevenzione dei minori, pag.399.
787 PALERMO FABRIS, cit, pag.90, che sottolinea la necessità di una riforma che renda inequivoci tali presupposti.
dedicata alla prevenzione del crimine minorile in vigore ai sensi dell’art.25 è l'affidamento del minore al servizio sociale.\textsuperscript{788}

Uno degli aspetti dell’art.25 più criticati della dottrina è il seguente: il legislatore ha previsto un’età massima (i diciotto anni) oltrepassata la quale tale misura non trova più applicazione, ma non ha previsto alcuna età minima. Ciò significa che teoricamente la si potrebbe applicare ad un qualsiasi minore di diciotto anni, indipendentemente dall’età. In dottrina, tuttavia, si sottolinea la necessità di un’età minima, proponendo chi di considerare per le misure di cui all’art.25 la stessa età minima per l’imputabilità prevista dall’art.97 c.p.\textsuperscript{789}, chi, invece, sostenendo che la si dovrebbe fissare a dodici anni.\textsuperscript{790}

Prima di emettere l’ordine, il giudice è chiamato ad esplicare approfondite indagini sulla personalità del minore, per meglio garantire un controllo che sappia costruire una buona specialprevenzione considerando che l’allontanamento dal comportamento criminale è solo conseguenza indiretta di un appropriato sviluppo della personalità del minore.\textsuperscript{791}

Nel pronunciare l’ordine di cui all’art.25, il giudice dovrà riferirsi all’art.27 quanto al suo contenuto, a quanto previsto dall’art.27, che prevede che all’atto dell’affidamento è redatto verbale nel quale vengono indicate le


\textsuperscript{790} PALERMO FABRIS E., cit., pag. 93.

prescrizioni che il minore dovrà seguire, a seconda dei casi, in ordine alla sua istruzione, alla preparazione professionale, al lavoro, all'utilizzazione del tempo libero e ad eventuali terapie, nonché le linee direttive dell'assistenza, alle quali egli deve essere sottoposto. Tali prescrizioni e linee direttive dell’assistenza sono rivolte ad un componente del Tribunale, nominato dallo Presidente, che ha il compito di redarre il progetto educativo cui il minore dovrà essere sottoposto; critica è la dottrina che sottolinea l’inaccettabilità della norma nel non richiedere la presenza obbligatoria del minore in questo momento di redazione del progetto.\textsuperscript{792}

L’autorità locale di assistenza sociale è tenuta a controllare la condotta del minore e aiutarlo a superare le difficoltà in ordine ad una normale vita sociale, anche mettendosi all’uopo in relazione con la sua famiglia e con gli altri suoi ambienti di vita.\textsuperscript{793} È anche tenuta ad riferire periodicamente per iscritto o a voce al componente del Tribunale designato; sulla base di questo aggiornamento periodico può modificare il contenuto del progetto o addirittura a far cessare la misura qualora il minore risulti interamente riadattato o quando per le sue condizioni fisiche o psichiche nessuna misura possa considerarsi idonea alla sua rieducazione.\textsuperscript{794}

Cenni comparatistici

Difficile è, in realtà, porre a confronto due misure così diverse come gli antisocial behaviour orders da un lato, e le misure di cui all’art.25 r.d.l. 1404/1934 dall’altro. O forse, anche troppo facile.

\textsuperscript{792} Vedi CIVIDALI, Come un giudice ascolta un ragazzo, Minorigiustizia n.4 1998 (35). Vedi anche PALERMO FABRIS E., cit. pag.100, che sottolinea come il processo educativo non dovrebbe essere imposto ma costruito con il consenso del minore; l’autrice dà particolare imprentanza all’ascolto del minored a parte del suo giudice, come se si trattasse di un procedimento penale.

\textsuperscript{793} Art.27.4.

\textsuperscript{794} Art.29.
Se da un lato il sistema inglese propone un meccanismo di prevenzione dei comportamenti antisociali che pur volendo essere costruttivo, si rivela nettamente punitivo per il fatto di dare rilevanza penale a condotte che la legge penale non prevede come fattispecie criminose, dall’altro il sistema italiano considera i comportamenti antisociali in una prospettiva esclusivamente amministrativa.

Nel sistema degli ASBOs, il minore che si comporta in un modo antisociale si da arrecare molestia alla comunità, viene caricato di responsabilità attraverso un ordine civile che rischia di sconfinare nell’area del penalmente rilevante; l’accento è posto sulla responsabilizzazione del minore, che con il richiamo formale del giudice civile, che con la pronuncia dell’ordine manifesta il disappunto dell’ordinamento per l’antisocialità della condotta tenuta, è invitato al rispetto del vivere sociale. Il minore che riceve un ordine comportamentale è tenuto non più solo in forza delle regole morali, ma anche dell’ordine stesso, a comportarsi in maniera sociale. Gli è chiesto di essere responsabile, e l’ordine comportamentale è inteso quasi come uno strumento per insegnare al minore come comportarsi.

Del tutto diverso l’approccio italiano: il minore, qui, se dimostra condotte irregolari è preso in carico dai servizi sociali che, seguendo il programma educativo stilato dallo stesso tribunale, lo controllano e aiutano a superare le difficoltà, anche tenendo i contatti con la sua famiglia se necessario. Qui la logica è molto più assistenziale che responsabilizzante: il minore non è lasciato solo a mettere in pratica un sistema di comportamento che il giudice gli impone, ma assistito nel percorso di ri-socializzazione.

E il diverso approccio si può apprezzare anche guardando alle diverse agenzie da cui la richiesta al Tribunale è ammessa: autorità locali in Inghilterra, servizi sociali, genitori/tutore, agenzie educative in Italia. È chiaro come la prospettiva inglese sia nel senso di tutelare la comunità dal
minorenne anti-sociale, mentre quella italiana assuma eventuali comportamenti anti-sociali del minore come semplici sintomi di un disagio che questi dev’essere aiutato a superare.

In conclusione, possiamo affermare che quanto alle misure di prevenzione del crimine minorile, i due ordinamenti si confrontano con prospettive diametralmente opposte: responsabilizzare il minore per tutelare la comunità da un lato; prendere in carico il minore per educarlo al vivere sociale, in una prospettiva più assistenziale, dall’altro.
5. PREVENZIONE DEI CRIMINI MINORILI: MISURE POST-DELICTUM

Venendo all’analisi delle misure cd. post-delictum, una premessa si rende essenziale: la maggiore differenza tra il sistema inglese e quello italiano sta nel fatto che mentre il sistema inglese predispone un numero di sentences specificatamente dedicate agli autori di reato minorenni,795 quello italiano non gli riserva alcuna pena in particolare, essendo le pene previste dal codice penale ugualmente applicabili ad adulti o minori.796

Alcune caratteristiche dell’ordinamento inglese meritano di essere approfondite.


Sembra, quindi, che l’ordinamento inglese, di fronte a minori autori di reato, si spogli della pretesa punitiva caratterizzante la relazione con i criminali di età adulta, per rispondere in un’ottica di sola prevenzione ex post.

È sempre con il Crime and Disorder Act 1998 che l’Inghilterra ha conosciuto l’introduzione degli Youth Offender Teams (YOTs)799, agenzie

795 Pensiamo, ad esempio, tra le pene non detentive al Referral Order, o al DTO tra le pene detentive.
796 Vedi art.17 cp.
797 CDA S.37: ‘It shall be the principal aim of the youth justice system to prevent offending by children and young persons’.
798 CJA S.142A(2): ‘The court must have regard to: (a)the principal aim of the youth justice system (which is to prevent offending (or re-offending) by persons aged under 18: see section 37(1) of the Crime and Disorder Act 1998), (b)in accordance with section 44 of the Children and Young Persons Act 1933, the welfare of the offender, and (c)the purposes of sentencing mentioned in subsection (3) (so far as it is not required to do so by paragraph (a))’.
799 CDA S.39.
composte da assistenti sociali, esponenti della polizia locale, ed esponenti dell’autorità locale che, sotto le direttive di quest’ultima, si occupano di coordinare programmi di prevenzione del crimine rivolti ad adolescenti a rischio. Ma il frangente in cui più di tutti il ruolo dello YOT risulta fondamentale è quello dei Pre-sentence Reports\textsuperscript{800}: si tratta di report stilati da membri dello YOT e contenenti informazioni riguardanti la vita del giovane imputato, utili al giudice per definire la sentenza che meglio di tutte assicura una funzione pedagogica (specialpreventiva). La norma li definisce come quei reports “with a view to assisting the court in determining the most suitable method of dealing with an offender”\textsuperscript{801}. L’introduzione di tali reports, rivolti a dare al giudice sufficienti informazioni per comprendere il background del giovane autore di reato e sapergli dare una risposta (la sentenza) adeguata ed efficace, muove appunto dalla concezione della stessa sentenza come strumento di specialprevenzione. “A sentencing system based on special deterrence – in alter parole - would need to ensure that courts have detailed information on the character, circumstances and previous record of the particular offender, and would then require courts to calculate the sentence necessary to induce the particular offender to comply”\textsuperscript{802}. Il ruolo degli YOTs è, nella pratica, molto rilevante\textsuperscript{803}. Dalla loro analisi dell’imputato e dal contenuto del Report che presentano al giudice una volta richiesti, dipende nella maggior parte dei casi la sentenza. La collaborazione fra il Tribunale per i Minorenni e le agenzie di assistenza sociale, è assicurata anche dal sistema italiano, dove si prevede che il

\textsuperscript{800} CJA S.156.
\textsuperscript{801} CJA 2003, s.158(2)(b): ‘Where the offender is under 18, ‘appropriate officer’ means an officer of a local probation board, an officer of a provider of probation services, a social worker of a local authority or a member of a youth offending team’.
\textsuperscript{803} Basti pensare al fatto che lo YOT, in ogni aula, uno spazio dedicato.
giudice ed il pubblico ministero debbano acquisire gli elementi sulle condizioni e le risorse personali, famigliari, sociali e ambientali del minorenne per accertarne l’imputabilità e il grado di responsabilità, per valutare la rilevanza sociale del fatto, per disporre le misure penali adeguate e per adottare gli eventuali provvedimenti civili. La funzione di tali accertamenti è appunto quella di individuare la risposta più adeguata alla ri-socializzazione del giovane, in esecuzione degli obblighi costituzionali.

Veniamo, ora, all’analisi delle principali misure di prevenzione post-delictum in vigore nei due ordinamenti.

Il sistema inglese distingue sostanzialmente due tipi di sentenze: community sentences e custodial sentences.

Tra le community sentences (sentenze che condannano ad una pena non detentiva), la più utilizzata nei confronti dei cd. young offenders è il Youth Rehabilitation Order, disciplinato dal Criminal Justice and Immigration Act 2008, sezioni 1 e seguenti. Si tratta di una sentence (cioè di una misura) nella quale è il giudice ad inserire, sulla base degli elementi di cui è venuto a conoscenza attraverso il report presentato dallo YOT, uno degli ordini previsti dalla sezione 1; così lo YRO potrà obbligare il minore condannato a frequentare una certa attività, a presentarsi ad una serie di appuntamenti con i servizi sociali, ad essere presente in un certo luogo per un certo periodo di

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804 D.p.r. 448/1988 art.9: ‘Il pubblico ministero e il giudice acquisiscono elementi circa le condizioni e le risorse personali, famigliari, sociali e ambientali del minorenne al fine di accertarne l’imputabilità e il grado di responsabilità, valutare la rilevanza sociale del fatto nonché disporre le adeguate misure penali e adottare gli eventuali provvedimenti civili. Agli stessi fini il pubblico ministero e il giudice possono sempre assumere informazioni da persone che abbiano avuto rapporti con il minorenne e sentire il parere di esperti, anche senza alcuna formalità.’

tempo ogni giorno (*curfew*, ovvero coprifuoco), a frequentare dei trattamenti per la disintossicazione da droga o alcol\(^{806}\).

L’estrema flessibilità di questa misura, pensata tipicamente per giovani autori di reati non gravi, la rende disegnabile dal giudice sul singolo individuo di volta in volta.

Il contenuto più frequente, in realtà, è il *supervision order*, con cui il minore è condannato ad una serie di appuntamenti con lo YOT, il quale stabilirà un programma rieducativo calibrato sul suo rischio specifico di ricaduta nel reato\(^{807}\). Quasi con la stessa frequenza è imposto un *curfew* (coprifuoco), ovvero un ordine che li obbliga a rimanere in un dato luogo per uno specifico periodo durante la giornata (tipicamente: sono obbligati a stare a casa da sera a mattina); la ratio di tale misura sta nel tentativo di evitare che ragazzini a rischio possano frequentare luoghi pericolosi durante la notte, chiudendoli in casa per tenerli lontani da nuovi reati.

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\(^{806}\) S.1: ‘Where a person aged under 18 is convicted of an offence, the court by or before which the person is convicted may in accordance with Schedule 1 make an order (in this Part referred to as a “youth rehabilitation order”) imposing on the person any one or more of the following requirements: (a) an activity requirement (see paragraphs 6 to 8 of Schedule 1); (b) a supervision requirement (see paragraph 9 of that Schedule); (c) in a case where the offender is aged 16 or 17 at the time of the conviction, an unpaid work requirement (see paragraph 10 of that Schedule); (d) a programme requirement (see paragraph 11 of that Schedule); (e) an attendance centre requirement (see paragraph 12 of that Schedule); (f) a prohibited activity requirement (see paragraph 13 of that Schedule); (g) a curfew requirement (see paragraph 14 of that Schedule); (h) an exclusion requirement (see paragraph 15 of that Schedule); (i) a residence requirement (see paragraph 16 of that Schedule); (j) a local authority residence requirement (see paragraph 17 of that Schedule); (k) a mental health treatment requirement (see paragraph 20 of that Schedule); (l) a drug treatment requirement (see paragraph 22 of that Schedule); (m) a drug testing requirement (see paragraph 23 of that Schedule); (n) an intoxicating substance treatment requirement (see paragraph 24 of that Schedule), and (o) an education requirement (see paragraph 25 of that Schedule).

\(^{807}\) Vedi YJB, National Standards for Youth Justice Services published in April 2013, par.8.9.
Tra le custodial sentences, invece, quella più utilizzata è il Detention and Training Order\textsuperscript{808}, che accosta la pena detentiva ad un periodo di probation, nell’ottica di un recupero del minore. Il minore, allora, sconterà metà della pena (che può avere una durata complessiva di 4, 6, 8, 10, 12, 18 o 24 mesi\textsuperscript{809}) in carcere e l’altra metà in libertà, ma dovendo seguire il piano di rieducazione propostogli dallo YOT locale.

Anche qui è evidente il tentativo del legislatore inglese di non limitare la reazione ad una pena detentiva insignificante dal punto di vista rieducativo.

Il sistema Italiano, invece, è di stampo diverso. Le due misure previste dal d.p.r.448/1988 agli artt.27 e 28 concretizzano la retrocessione della pretesa punitiva davanti ad esigenze di rieducazione del minore, offrendo non una condanna il più possibile rieducativa, ma addirittura soluzioni alternative alla condanna stessa.

La prima di queste due misure è la sentenza di non luogo a procedere per irrilevanza del fatto, disciplinata dall’art.27. Si prevede che durante le indagini preliminari, se risulta la tenuità del fatto e l’occasionalità del comportamento, il pm chiede al giudice sentenza di non luogo a procedere per irrilevanza del fatto quando l’ulteriore corso del procedimento pregiudica le esigenze educative del minore\textsuperscript{810}.

In questo caso, sussistendo i presupposti di cui al primo comma dell’art.27 (offesa o pericolo cagionati di lieve entità e prognosi favorevole quanto alla non reiterazione del reato), le istanze di prevenzione generale e di tutela della comunità sono ritenute soccombenti\textsuperscript{811}.

Si tratta di uno strumento volto al fine di non pregiudicare, attraverso un processo penale non indispensabile, il percorso educativo del minore ed

\textsuperscript{808} Originariamente introdotto dal Crime and Disorder Act 1998 e poi riformato dal PCC(S)A 2003 s.100 e seguenti.

\textsuperscript{809} Powers of Criminal Courts (Sentencing) Act 2000, s.101(1).

\textsuperscript{810} Art.27.1.

evitarne l’effetto stigmatizzante tipico di tale processo\textsuperscript{812}. In altre parole, “vengono poste alla base dell’istituto esigenze educative, la cui valorizzazione mira ad impedire, fin dove possibile, la messa in moto del meccanismo processuale”\textsuperscript{813}.

L’arresto in partenza del meccanismo processuale, tuttavia, non significa che il giovane autore di reato sia rilasciato scot-free\textsuperscript{814}; la funzione rieducativa è semplicemente assegnata, invece che ad una sentenza\textsuperscript{815}, ad un diverso meccanismo di conciliazione che promuove e incoraggia l’incontro tra l’autore di reato e la vittima (mediazione penale)\textsuperscript{816}.

La mediazione penale in Italia è concepita e disciplinata solo con riferimento all’istituto della sospensione del processo con messa alla prova (d.p.r. 448/1988, art.28); ciononostante, nella prassi dei Tribunali per i Minorenni, la mediazione è applicata anche nel caso della sentenza di non luogo a procedere per irrilevanza del fatto\textsuperscript{817}.

La questione della mediazione penale, che si inserisce più ingenerale in quella che viene definita Restorative Justice\textsuperscript{818}, vale a distinguere

\textsuperscript{812} Cit.
\textsuperscript{813} LARIZZA S., Il Diritto Penale dei Minori, Padova Cedam 2005, pag.207.
\textsuperscript{814} PALERMO E., Juvenile Deviance in Italy: the need for social control for the Tutelage of young offenders, in HELMUT K and EVELYN S., Punitivity: international developments Vol.1, Crime & Crime Policy Vol. 8, 1-3University Press Dr. N. Brockmeyer, pag.352.
\textsuperscript{815} Di diversa opinione MORO A.C., Cit. pag.530, che sostiene come per il minore autore di reato la sentenza di cui all’art.27 significhi sostanzialmente un giudizio sociale di insignificanza della sua condotta criminosa.
\textsuperscript{816} Per una analisi della mediazione penale in Italia vedi: MANNOZZI G., La giustizia senza spada – uno studio comparato su giustizia ripartiva e mediazione penale, Giuffrè Milano 2003.
\textsuperscript{817} Vedi MANNOZZI G., Mediazione e diritto penale – dalla punizione del reo alla composizione con la vittima, Giuffrè Milano 2004, pag.26: “mediazione e riparazione della vittima sono istituti che alberghino nelle pieghe del sistema in assenza di una previsione espressa”.
l’ordinamento italiano da quello inglese in maniera piuttosto rilevante: in Italia quasi ignorato dalla disciplina positiva, in Inghilterra più che positivizzato819. La dottrina inglese accoglie con entusiasmo l’ormai rodata Restorative Justice, riconoscendo che “restorative justice is about encouraging offenders to accept responsibility and make reparation for their offending but efforts must also be made to restore offenders’ sense of belonging and reintegration into the community”820; la sua efficacia preventiva è sostenuta da chi osserva che “punishment has a very limited ability to control crime and, to the extent that it is disintegrative, it inflicts further damage on society”, onde per cui “it is time to explore the integrative potential of reparative justice on its own terms”821. Addirittura si arriva a sostenere la centralità della Restorative Justice, giacché “in juvenile justice there should be no retribution”822.

Altra misura preventiva post-delictum che l’ordinamento italiano ha fatto propria a partire dal 1988 è quella disciplinata dall’art.28: la sospensione del processo con messa alla prova. Si tratta di un istituto per il quale il giudice, sentite le parti, può disporre con ordinanza la sospensione del processo quando ritiene di dover valutare la personalità del minorenne all’esito della prova presso i servizi sociali. Il processo è sospeso per un periodo non superiore a tre anni quando si procede per reati per i quali è prevista la pena

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819 Si vedano, ad esempio, i molti interventi degli YOTs volti ad organizzare l’incontro tra il young offender e la vittima, o al fatto che nel Referral Order (sentenza tipicamente prevista per i minori), il condannato è tenuto alla firma di un contratto comportamentale con un gruppo di persone di cui può fare parte la stessa vittima.


dell’ergastolo o della reclusione non inferiore nel massimo a dodici anni; negli altri casi, per un periodo non superiore ad un anno (durante il quale è sospeso il corso della prescrizione)\textsuperscript{823}. Il minore è affidato ai servizi minorili dell’amministrazione della giustizia per lo svolgimento, anche in collaborazione con i servizi locali, delle opportune attività di osservazione, trattamento e sostegno\textsuperscript{824}; questi sono tenuti a seguirlo in esecuzione di un progetto educativo approvato a norma dell’art.27 d.l.vo 272/1989\textsuperscript{825}. La dottrina sottolinea l’importanza dell’accordo col minore a proposito del contenuto di detto progetto educativo\textsuperscript{826}, affermando che il minore dovrebbe essere il primo ad essere in formato sul suo contenuto, sì da potervi aderire liberamente\textsuperscript{827}; il programma educativo potrà considerarsi una vera e propria regola di condotta, infatti, solo una volta accettato dal minore\textsuperscript{828}, e potrà essere modificato e riadattato alle sue sopravvenute esigenze se richiesto dai servizi sociali\textsuperscript{829}.

\textsuperscript{823} Art.28.1.
\textsuperscript{824} Art.28.2.
\textsuperscript{825} d.l.vo 272/1989, art.27: ‘Il giudice provvede a norma dell’articolo 28 del decreto del Presidente della Repubblica 22 settembre 1988 n. 448, sulla base di un progetto di intervento elaborato dai servizi minorili dell’amministrazione della giustizia, in collaborazione con i servizi socio-assistenziali degli enti locali. Il progetto di intervento deve prevedere tra l’altro: le modalità di coinvolgimento del minorenne, del suo nucleo familiare e del suo ambiente di vita; gli impegni specifici che il minorenne assume; le modalità di partecipazione al progetto degli operatori della giustizia e dell’ente locale; le modalità di attuazione eventualmente dirette a riparare le conseguenze del reato e a promuovere la conciliazione del minorenne con la persona offesa.
\textsuperscript{826} BASCO M.G. and DE GENNARO S., La messa alla prova nel processo minorile, Giappichelli Torino 1997, pag.28.
\textsuperscript{827} About the lack of a serious consent (so called ‘consenso coatto del minorenne’) see COLAMUSSI M., La messa alla prova, Cedam Padova 2010, pag. 114.
\textsuperscript{828} Cit., pag.29.
\textsuperscript{829} D.L.vo 272/1989, art.27.
La caratteristica più importante dell’istituto è la seguente: se il minore completa con successo il periodo di probation durante il quale il processo penale è sospeso, il reato è estinto\textsuperscript{830}.

Anche qui il legislatore demanda ai servizi sociali la risocializzazione del minore autore di reato, garantendogli la possibilità di una definizione anticipata del processo per non esporlo inutilmente alla stigma che ne deriva.

Un discorso a parte merita, infine, l’istituto del perdono giudiziale introdotto dal codice Rocco all’art.169\textsuperscript{831}, dunque disciplinato tra le cause di estinzione del reato. Se il minore ha commesso un reato per cui la legge stabilisce una pena restrittiva della libertà personale non superiore nel massimo a due anni (ovvero una pena pecuniaria non superiore nel massimo a euro 5 anche se congiunta a detta pena), il giudice può astenersi dal pronunciare il rinvio al giudizio, quando, avuto riguardo alle circostanze indicate nell’articolo 133, presume che il colpevole si asterrà dal commettere ulteriori reati. Due sono i requisiti principali, dunque: la non gravità del reato commesso e la prognosi favorevole.

\textsuperscript{830} D.L.vo 272/1989, art.29: Decorso il periodo di sospensione, il giudice fissa una nuova udienza nella quale dichiara con sentenza estinto il reato se, tenuto conto del comportamento del minorenne e della evoluzione della sua personalità, ritiene che la prova abbia dato esito positivo. Altrimenti provvede a norma degli articoli 32 e 33.

\textsuperscript{831} Art.169 cp: ‘Se, per il reato commesso dal minore degli anni diciotto la legge stabilisce una pena restrittiva della libertà personale non superiore nel massimo a due anni, ovvero una pena pecuniaria non superiore nel massimo a euro 5 anche se congiunta a detta pena, il giudice può astenersi dal pronunciare il rinvio al giudizio, quando, avuto riguardo alle circostanze indicate nell’articolo 133, presume che il colpevole si asterrà dal commettere ulteriori reati.

Qualora si proceda al giudizio, il giudice, può, nella sentenza, per gli stessi motivi, astenersi dal pronunciare condanna.

Le disposizioni precedenti non si applicano nei casi preveduti dal n. 1 del primo capoverso dell'articolo 164.

Il perdono giudiziale non può essere conceduto più di una volta’.
A dati presupposti, il legislatore accetta di perdonare il minore per il reato commesso considerando sufficiente, dal punto di vista retributivo ma anche specialpreventivo, il suo contatto con il sistema penale.\footnote{LARIZZA S., Il Diritto Penale dei Minori, Padova Cedam 2005, pag.147.}

Cosa possiamo concludere, da questo breve riepilogo degli istituti chiave in materia di prevenzione post-delictum del crimine minorile, è una netta differenza di prospettiva tra il sistema italiano e quello inglese: se da un lato si cerca di evitare non solo che il minore riceva una sentenza, ma addirittura che rimanga in contatto con il sistema penale oltre il necessario, dall’altro in Inghilterra si studiano sentenze appositamente ritagliate sui minori che, tuttavia, danno per presupposto che ad una sentenza si debba arrivare. È curioso osservare come sia proprio l’ordinamento inglese che, come abbiamo visto, dedica diverse norme alla prevenzione del crimine minorile e addirittura istituisce un intero apparato (il Youth Justice Board) a questo scopo non riesca a rinunciare mai alla pretesa punitiva nei confronti dei minori. Di conseguenza, nel confronto risulta nettamente più preventivo il sistema italiano, nel quale l’esigenza retributiva arretra se necessario ad assicurare quella risocializzazione del minore intesa dovere costituzionale sulla base del disposto dell’art.31.2.
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