Criminal Law and Philosophy
https://doi.org/10.1007/s11572-023-09686-4

ORIGINAL PAPER

The Legal Artifice of Liberty: On Beccaria's Philosophy

Dario Ippolito[1]

Accepted: 21 June 2023
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Abstract
Beccaria's penal philosophy hinges on the doctrinal paradigm of liberty through law. Inconceivable in the absence of laws and unattainable in the presence of arbitrary powers, liberty is profiled as the legal situation of the person who may act, within the sphere of what is not forbidden and not bound, without suffering illicit interference from private individuals or organs of the state. Thus, the form of law becomes an essential matter in the construction of the political space suitable for free living. In the analysis proposed in this article, the notion of "political liberty"–which Beccaria takes from Montesquieu–is declined in relation to the legal order, criminal law and the social contract.

Keywords Beccaria · Liberty · Legal order · Criminal law · Social contract

1 Introduction

In the elegant pages of *Violenza e giustizia*,[1] the French philosopher Philippe Audegean returns to argue for his interpretation of Beccaria as a political thinker outside the doctrinal horizon of natural law.[2] Against the peremptory thesis according to which *On Crimes and Punishments* (herein: *On Crimes*) must be placed in the "disciplinary and discursive framework […] of the law of nature and of peoples",[3] Audegean shows that Beccaria's contractualism establishes the principles of criminal justice on the terrain of a utilitarian anthropology based on the axiological primacy of the individual. In this reading, Audegean does well to refer to the lessons of Luigi Ferrajoli, who "restored normative fruitfulness to Beccaria's ethical–political assumptions",[4] and of Gianni Francioni, who "laid the groundwork for

[1] See Audegean (2023).
[2] See Audegean (2010).
[3] Silvestrini (2021), 192 (translation mine).
[4] Audegean (2023), 15 (translation mine). The reference is to Ferrajoli [1989], (2018).

Dario Ippolito
dario.ippolito@uniroma3.it

[1] Dipartimento Di Giurisprudenza, Università Roma 3, Via Ostiense 161, 00154 Rome, Italy

Published online: 08 July 2023

a comprehensive re-reading of the entire *On Crimes*",[5] with his seminal essay *Beccaria filosofo utilitarista*.[6]

It is in the wake of these philosophical reflections on criminal justice, that I intend to examine Beccaria's normative discourse on individual liberty. In my opinion, a study of this kind makes it possible to prove–in a particularly relevant respect–the extraneousness to the natural law tradition of the author of *On Crimes*. On the methodological level, I will employ an interdisciplinary approach, inspired by Norberto Bobbio's philosophy of law[7] and Pietro Costa's legal historiography.[8] Conceptual examination, doctrinal comparison and hermeneutic reconstruction will therefore be anchored in linguistic analysis.

The three sections in which I articulate this essay highlight the correlations established by Beccaria between liberty and the legal order (§ 1), between liberty and the criminal law (§ 2), and between liberty and the social contract (§ 3). In the first section, I identify the main ideological features of Beccaria's philosophy, define his conception of liberty, and explain the centrality of the legal order in his thought on *civitas*. In the second section, I clarify the reasons why Beccaria, by specifically addressing the penal question, urges the political philosophy of his time to be concerned about the exorbitance of prohibitions, the arbitrariness of judgements, and the cruelty of punishments. In the third section, I emphasise the crucial function of contractualism in the arguments developed in *On Crimes*, showing that the conception of the state as an artificial entity allows Beccaria to emphasise the liberty of the individual as the purpose of law and the criterion of legitimacy of power.

Today, perhaps more than in the nineteenth and twentieth century, Beccaria's thought attracts the attention of philosophers, arouses historiographical debates, and ignites controversy among jurists.[9] The bibliography of studies on *On Crimes* that appeared on the occasion of the 250th anniversary of its publication and in the years that followed is vast (and difficult to master). Globally, we may be talking about hundreds of titles.[10] As any reader of Italo Calvino is well aware, "a classic is a work that incessantly provokes a dusting of critical discussions about itself, but continually shakes it off".[11] This should induce anyone who engages in the

[5] Audegean (2023), 39 (translation mine).

[6] See Francioni (1990). Since his masterful critical edition of *On Crimes* (see Beccaria (1984)), Gianni Francioni's work has become an indispensable point of reference for all Beccaria scholars.

[7] See, in particular, Bobbio (1963, 1965, 1989).

[8] See, in particular, Costa (1969, 1974, 1986).

[9] See Zucca (2022), 37: "Beccaria's slim book *On Crimes and Punishments* is being rediscovered today. The natural question to ask is 'Why?' I suspect that his radical reformist spirit strikes a deep chord with many people".

[10] Significantly, in 2015, Beccaria's name became the title of a historiographical journal: "Beccaria. Revue d'histoire du droit de punir". Moreover, many other scholarly journals have, in recent times, dedicated entire numbers or thematic sections to Beccaria's work (see, for example, "Rivista internazionale di Filosofia del diritto", 2014, 91; "Antigone. Quadrimestrale di critica del sistema penale e penitenziario", 2014, 3; "Materiali per una storia della cultura giuridica", 2015, 1; "Jahrbuch der Juristischen Zeitgeschichte", 2015, 16; "Diciottesimo Secolo", 2019, 4; "Dix-huitième siècle", 2021, 53).

[11] Calvino [1981], (1991), 14 (translation mine). Note that in the English translations of this famous essay, the quoted definition does not appear.

interpretation of a classic to conceive their work first and foremost as an invitation and a guide to the direct reading of the interpreted classic.[12] With this in mind, I hope that the pages that follow may constitute an attractive invitation and a reliable guide.

2 Liberty and Legal Order

In any evaluative and normative discourse aimed at influencing the order of civil coexistence and the physiognomy of public power–that is, in any political doctrine–it is possible to distinguish (and examine the cohesion among) an *aspect of value*, an *aspect of structure* and a *social–historical aspect*.[13] The value aspect consists of the objective accredited as the good to be pursued; the structure aspect consists of the prefiguration of the institutional order suitable for its attainment; the social–historical aspect consists of the individualisation of the conditions for the realisation of the end pursued through the prefigured means. If we approach Beccaria's work with these instruments of observation, we can recognise (1) in liberty the aspect of value within his ideological conception, (2) in the rule of laws the aspect of structure, (3) in the subversion of the existing legal order the social–historical aspect.

(1) In the 47 chapters into which *On Crimes* is divided, there is constant reference to liberty as a political ideal and as an individual good. On many occasions, the term is used in dichotomies and hendiadys, polarisations and particularly eloquent associations. On the one hand, it is contrasted with "tyranny", "despotism", "subjection", "anarchy", "slavery"; on the other hand, it is associated with "life", "security", "equality", "happiness", "enlightenment". Among the 51 statements in which the term appears, two passages stand out that allow us to immediately and fully grasp the axiological charge of the discourse: (a) the first chapter of the work, where Beccaria extols individual liberty as the social reason for the civil consortium; (b) chapter XX, where the condition of existence of liberty is anchored in the (legal) recognition of human dignity, in the *summa divisio* (ethics) between persons and things.

(2) The valorisation of the legal order as an instrument of liberation of individuals from the unpredictability of the actions of others and the precariousness of an existence threatened by violence is the starting point of Beccaria's discourse. "Laws" is the word that opens the initial chapter; "laws" is the last word of the "Conclusion".[14] In the "dependence on laws"[15] – the only locution in which

[12] "Schools and universities ought to help us to understand that no book that talks about a book says more than the book in question, but instead they do their level best to make us think the opposite" (Calvino [1981], (2011)).

[13] See Albertini [1962], (2007), IV, 231–259.

[14] See Audegean (2014), 49.

[15] Beccaria [1764], (2012), XVI, 42.

the term "dependence"[16] is not imbued with disvalue – Beccaria recognises the presupposition of the non-conflictual realisation of subjective ends. Without dependence on common laws, men suffer the dangers of permanent conflict; dependent on unregulated powers, men suffer the evils of subjection to arbitrariness. The principle of legality makes it possible to avoid the unhappiness of both conditions: "from the throne to the hovel", the obligation to obey the laws binds "equally to the most elevated and humblest of men".[17]

(3) Where the legal system is not made up of legal, general, knowable and understandable rules for those to whom it is addressed, the lords of the law, whose discretionary power is incompatible with liberty, enjoy their full force: this is the basic conviction that articulates Beccaria's devastating critique of the doctrinal, jurisprudential and traditional matrix of law. In contrast to the eulogy of Roman law as *ratio scripta*, *On Crimes* offers the reader the demystifying image of an ancient collection of normative debris alien to the civility of modern Europe; to the self-legitimisation of jurists as priests of justice, he opposes the derision of the "obscure academic interpreters" who in "rambling volumes" pass off doctrinal opinions as laws[18]; in contrast to the juridical and political ideology of the jurists, he asserts a model of jurisdiction as a cognitive activity of individualising and specifying legal norms by means of deductive reasoning.[19] The device of demolition and re-foundation of the legal order is clearly identified in the codification.[20]

This summary characterisation of some fundamental profiles of Beccaria's ideology allows us an initial framing of the figure of liberty that prevails in his design of law in agreement to reason. Now it must be brought into focus, defining its contours and colours. To this end, we will proceed to a connotation by contrast, re-establishing the connections between the aspects that have just been distinguished above. Indeed, it is precisely in the determination of the relationship with the legal order that Beccaria's ideal is formed and substantiated: by differentiating itself, on the one hand, from the conception of liberty as the power to give oneself the law, and on the other hand, from the conception of liberty as power in the absence of the law.

That liberty consists in participating in the decisions that govern our actions is a regulative idea that has its roots and finds nourishment in classical republicanism; that in medieval and modern times accompanies the successes and resists the defeats of representative institutions; that in 18th-century Europe warms the hearts and conquers the minds of writers and political actors. Beccaria does not belong to this camp. In his axiology, liberty does not mean autonomy. Unlike Rousseau,

[16] In the English translation of the Cambridge edition, used in this paper, the word "dependence" does not appear in the cited passage.

[17] Beccaria [1764], (2012), III, 12. The translator of the Cambridge edition chooses "palace" instead of "throne".

[18] Beccaria [1764], (2012), To the Reader, 3.

[19] Beccaria [1764], (2012), IV, 14.

[20] Beccaria [1764], (2012), IV, 15.

he does not demand that laws be deliberated by the body politic in its entirety and he does not think of citizens as joint holders of sovereignty.[21] From his point of view, the condition of individual liberty does not consist in belonging to the popular assembly that exercises the power to legislate: the heteronomy of the legal prescriptions of a monocratic authority or of an elitist college does not entail the degradation of its subjects to the condition of serfs.[22] When Beccaria speaks of political liberty, he is not referring to the right of the citizen to participate in the production of the norms that he must obey. Following Montesquieu's lexicon,[23] he calls political liberty the subjective condition which later – up to the present day – will be known as civil liberty (a locution which is not found in *On Crimes*, although it is not foreign to the language of the time).

Far from the Rousseauian ideal of liberty as autonomy, Beccaria's conception is at the antipodes of the Hobbesian idea of liberty as the absence of laws (later recovered and remodelled by Bentham).[24] Removed from the apex of political values, in the doctrine of *Leviathan*, liberty is outlined in two specific ways (distinct, but conceptually homologous). In the state of nature, it is the right of everyone to act according to his own will, pursuing his own interest, in every circumstance.[25] In the civil state, it is the power of the subject to decide how to act in the residual space of conduct not disciplined by the sovereign.[26] Thus, the legal norm is contrasted with individual liberty: where the former exists, the latter disappears. The subject is free when the legislator is silent.

Beccaria, on the contrary, plants the tree of liberty in the field of positive legality. His civil philosophy has as its axis and operates with the doctrinal paradigm–exemplarily renewed by Montesquieu–of liberty through law. In the "universal power over all things",[27] which can be experienced where subjective force is unregulated, Beccaria does not see a right of nature, but a fact: a brute reality incompatible with liberty. The aspiration of men to be free can only be realised through the reciprocal commitment to renounce the "liberty to do harm to others",[28] through the common acceptance of the observance of the rules necessary for coexistence. In this perspective, it is precisely the existence of state law that makes it possible to enjoy liberty.

Indeed, in the absence of law, liberty was "useless by the uncertainty of retaining it".[29] What is the point of having the power to do whatever we want, if everyone in our environment can act as they wish? Who can feel master of their own destiny in the face of the permanent risk of any interference? How can we think of projecting tomorrow–looking beyond the present–when every action is exposed to the risk

[21] See Rousseau [1762], (2002), I, 6, 163–164.

[22] See Ippolito (2014b).

[23] See Ippolito (2019), 17–25.

[24] See Barberis (1999), 69–73.

[25] See Hobbes [1651], (1998), I, 14, 86–87.

[26] See Hobbes [1651], (1998), II, 21, 139–147.

[27] Beccaria [1764], (2012), VIII, 25.

[28] Beccaria [1764], (2012), XLII, p. 105. The translator of the Cambridge edition opts for the word "freedom" in all the places where Beccaria speaks of "libertà".

[29] Beccaria [1764], (2012), I, p. 9.

of collision? In the deregulation of intersubjective relations, people experience the unhappiness of an "unending state of war".[30] Their existence is conditioned by the fear of violence. It is true that they do not know the "torment of heteronomy"[31]: but can they call themselves free?

It is significant that Beccaria, revising the text of *On Crimes* for the third edition, chose to change an adjective in the paragraph in which he represented the human condition before the social pact: the "free men" of the original version became "independent men".[32] "One must put oneself in mind of what independence is and what liberty is",[33] Montesquieu prescribed in *The Spirit of the Laws*. Beyond the linguistic oscillations, Beccaria draws a clear boundary between the two. If, in the sentimental disorder of the poor delinquent who rebels against the law, the "natural state of independence"[34] is an attractive hypostasis of desire, the rational man is perfectly aware that this "useless liberty"[35] harms him: it deprives him of the control over his life; it locks him in an invisible cage of constrictions and unforeseeable impediments. It is clear that liberty lies elsewhere (and is something else). It is a conquest of reason, of the weighing of costs and benefits: if we eliminate from the set of our natural liberties the subset of powers whose exercise entails harm to others, all that remains–a large part of the original set–will eventually be the object of effective and full enjoyment. Such is the calculus of individual interest that underlies the social contract. To be sure of being free we must establish a system of rules of conduct; we must conform our actions to the limits and bonds imposed by the authority that decides the law on the basis of the pact.

Beccaria borrows from Montesquieu's notion of political liberty because, like Montesquieu, he thinks of liberty as an artifice of politics: as a product of the civil order shaped by laws. In the implicit definitions of liberty found in *On Crimes*, the semantic stipulations of *The Spirit of the Laws* always stand out clearly. Unattainable where everything is permitted to all, liberty is outlined as the legal situation of those who are sure of being able to act within the sphere of what is not forbidden and not bound, without suffering illicit interference from private individuals or organs of the state. This is how the form of law becomes an essential matter in the construction of the political space suitable for free living. Where the addressees of legal norms are not clear about the boundary between what is lawful and what is unlawful, liberty is only the name of a frustrated aspiration. The certainty of law is a necessary condition for its realisation: attainable, according to Beccaria, only through the instrument of codification and the subjection of judges to the law. When the relationship between the authority and the individual is regulated by the principle of legality, the aspiration to be free can become real. But it is not certain that this will happen, because these conditions of the legal system–although indispensable–are

[30] Beccaria [1764], (2012), I, p. 9.

[31] Kelsen (1920), 4.

[32] See Audegean (2021), 171.

[33] Montesquieu [1748] (1989), XI, 3, 155.

[34] Beccaria [1764], (2012), XXVIII, 68.

[35] Beccaria [1764], (2012), XLII, 105.

insufficient. In the crucible of law, power can very well pour the lead of tyrannical oppression. In particular, it can invade and occupy the space of free living by multiplying prohibitions and threats of punishment. Thus, criminal law is the normative sphere on which the vigilance of the civil philosopher must be projected.

3 Liberty and Criminal Law

What is criminal law? If we put the question to a jurist, we might hear him answer that it is a set of prohibitive and punitive rules. A political scientist might explain that it is a way of governing society. From a sociologist we might learn that it is a device for consolidating the dominant morality. But, if we assume the point of view of the individual that Beccaria places at the centre of the political universe, the accent of the answer will fall on another profile of reality.

In the *fictio mentis* of the state of nature, we are–so we know–independent. No one has the right to condition the way we act. Yet, as a matter of fact, everyone can condition it: at any time, by any means. We are independent but tired of independence. We want to free ourselves from the fear of conditioning and from the conditioning of fear. We want to put an end to war and enjoy liberty in "security and calm".[36] We therefore stipulate a kind of peace treaty: we commit ourselves to mutual inoffensiveness and to common obedience to an authority to which we entrust the power to regulate our coexistence. But the experience of the world has made us aware of the vices of humankind. The commitment to observe the laws dictated by authority is not enough to curb the violent contrast of interests. It is necessary to increase and strengthen the interest in observing them. Their infringement must be followed by an institutional reaction capable of making non-observance less advantageous than obedience; a reaction of a functional punitive nature to discourage the performance of the prohibited actions. In this way, by means of the admonition and imposition of sanctions on transgressors, we will guarantee the effectiveness of the laws that ensure our liberty. Punishment, therefore, is a necessity for our purposes.

We have now ceased to be independent. In order to remove ourselves from the domination of the strongest, which endangered us in the state of nature, we have agreed to exclude force from private relations, to manage it as a public monopoly, to regulate its legitimate use. Fleeing from an existence made precarious by conflict, we have recognised the need for criminal law as a way of containing violence. But our reason, trained in distrust, immediately warns us of a new danger. For criminal law carries with it the very evil that it remedies. It contains violence in the twofold sense that it limits it and incorporates it: it limits it as it incorporates it. If it is true that we cannot do without it, neither can we be under any illusions: prohibitions and sanctions are decisions taken by humans, humans endowed with power. Who can assure us that this power will be exercised for the purpose for which it was created? And is there anything that has a greater impact on the sphere of immunities and

[36] Beccaria [1764], (2012), I, 9.

faculties in which our liberty consists than the power to decide how, when and why to punish? It is a direct, profound impact: an impact that can be painful. The gravity of the risk we face is therefore clear. We have to tame the artificial beast to which we have entrusted the guardianship of our person and our property (otherwise it could destroy us). We therefore need a system of limits and bonds to protect us from the ferocity and voracity of the punitive power.

It is against the background of this awareness that the reflection upon *civitas* unveils the issue of crime and punishment as a problem.[37] Beccaria, showing his debt to Montesquieu, led the philosophy of the Enlightenment to concern itself with the legal-political guarantees of individual liberty and to worry about the despotic degeneration of power, which manifested itself in the form of exorbitant prohibitions, vexatious inquisitions, arbitrary imprisonment, secret accusations, unfounded decisions and excessive punishments. In a very acute reading of *On Crimes*, Philippe Audegean has recently highlighted the civil value of this penal doctrine: if in the chapter that opens Beccaria's work he presents punishment as a necessary instrument for the defence against "private usurpations",[38] the discourse that follows is all focused on the "principles […] aimed at defending the citizen […] from the criminal magistrate […] and from the sovereign legislator".[39] This precise observation is followed by a comment and an acknowledgement: "It is a revolutionary turn, on whose intimate, profound coherence Luigi Ferrajoli has brilliantly illuminated. If the penal system has the function of reducing violence, it must *in primis* coherently reduce its own violence, that of its instruments of regulation and coercion".[40]

Each of these instruments clashes with liberty in any of its dimensions. The instrument of criminal prohibition stigmatises as crimes a catalogue of acts within the exercise of our faculties. The instrument of criminal prosecution constrains us to defend ourselves against the power to accuse and subjects us to the decisions of the judiciary. The instrument of criminal sanction comes to impinge on our fundamental immunities. The fearsome effects of these inevitable impacts cannot be underestimated. Legal interdictions are undoubtedly necessary for civil coexistence, but their extension may well exceed the criterion of necessity. Legal proceedings are obviously the only way to determine responsibility for crimes but their organisation can easily deprive the innocent of confidence in his "own security".[41] The threat of punishment can also reassure us about the respect of rules: but how can we ignore the possibility of some undeserved imposition or its very nature as institutionalised violence?

Admitting the necessity of punitive power, Beccaria is confronted with the terribleness of its coercive apparatus. Firmly believing in the axiological primacy of the person, he draws from the utilitarian postulates of his anthropology and from

[37] See Costa (1999), I, 434–440.

[38] Beccaria [1764], (2012), I, 9.

[39] Audegean (2021), 172 (translation mine).

[40] Audegean (2021), 172 (translation mine).

[41] Beccaria [1764], (2012), XXIX, 73.

the contractualist theses of his political doctrine the principles and the rules of a new science of criminal law. With his epistemic approach and his nomothetic impetus, the young *philosophe* inverts the dogmas of legal knowledge. He develops a discourse of *iure condendo*, which confronts the *ius conditum* and prefigures its overcoming. Through the critique of criminal reason, he elucidates the canons of legal policy that should guide legislative action. Reversing the usual viewpoint in the traditional genre of the *speculum principis*, it proposes a demanding *speculum legislatoris*, in which the potestative functions of the state and the rules of social coexistence are considered (justified or delegitimised) *ex parte civium*.

Beccaria redefines criminal law as a system of safeguards for the expectations of non-injury on which the security of liberty rests. His doctrine of crime aims at a drastic narrowing of the domain of prohibitions, conditioning their legitimacy on the strict need to deter the commission of socially harmful acts: an action that does not materially offend collective or individual interests "cannot be called a *crime*, nor be punished as such".[42] His doctrine of punishment seeks to reduce the affliction of sanctions to the minimum necessary for deterrence and to free individuals from the threat of excessive penal violence: "the severity of the punishment and the consequence of a crime ought to be as effective as possible on others and as lenient as possible on him who undergoes it, because a society cannot be called legitimate where it is not an unfailing principle that men should be subjected to the fewest possible ills".[43] His doctrine of the process aims at ensuring the right of defence of the accused, protecting his personal liberty against undue restrictions, immunising his body and conscience against oppressive coercion, and founding criminal jurisdiction on the principle of the presumption of innocence: "No man be called guilty before the judge has reached his verdict".[44]

In the genealogy of penal garantism,[45] Beccaria's work represents a fundamental step: not only for its theoretical contribution, but also for its extraordinary cultural impact. Quickly translated into French (1765), English (1767), Swedish (1770), Polish (1772), Spanish (1774) and German (1778), the "miraculous little book"[46] contributed decisively to spreading the awareness that the composition of the sphere of individual immunities and faculties protected by law depends on the physiognomy of punitive power.

Drawing inspiration from a famous essay by Pocock,[47] Michel Porret has designated as the "Beccaria moment"[48] the era of the re-foundation of criminal law that matured around the international circulation of *On Crimes*. Recently, the evocative expression has inspired the title of a rich set of studies published by Philippe Audegean and Luigi Delia–*Le Moment Beccaria. Naissance du droit penal moderne*.[49] If

42 Beccaria [1764], (2012), VI, 20.
43 Beccaria [1764], (2012), XIX, 48.
44 Beccaria, [1764], (2012), XVI, 39.
45 See Ferrajoli (2014a); Ippolito and Sandro (2023).
46 Calamandrei [1948] (2019).
47 See Pocock (1975).
48 See Porret (2003).
49 Audegean and Delia (2018).

Beccaria's name serves well to symbolise a constellation of debates and civil struggles, of polemics and operative proposals, of reflections and achievements that have characterised an era of "creative destruction",[50] it is because *On Crimes* stimulated those debates and fuelled those struggles, strengthened the contestation of the existing order and inspired projects of radical reform, encouraged reflection on legislation and guided the action of legislators. Consider, for example, the constitutional documents born of the great revolutions of the late eighteenth century: by examining their prescriptive content, it is easy to see that all the fundamental rules on the limits of punitive power are closely linked to the Enlightenment doctrines of criminal law.[51] Now, at the centre of that intense and fertile activity of doctrinal elaboration stands, indisputably, Beccaria's pamphlet.[52]

Judith Shklar wrote that the innovative understanding of the relationship between individual liberty and criminal law proposed by Montesquieu makes him "one of the greatest liberal thinkers".[53] This judgement, although not unanimous, is widely shared. If it were to be extended to Beccaria, because of his decisive contribution to that crucial political problem, there would certainly be more disagreement. "Liberal" is a polysemous term, strongly equivocal, anachronistic for many, if it refers to the ideological horizon of an 18th-century reformer. It is therefore advisable to avoid incongruous classifications and controversial objectivisations, so as not to get entangled in purely linguistic disputes and ephemeral stipulative definitions. Let us refrain, then, from speaking of liberal liberty in relation to Beccaria. That which he certainly advocates for is a liberating liberty.

4 Liberty and the Social Contract

In that jewel of critical and historiographical intelligence which is Alberto Burgio's introduction to his beautiful edition of *On Crimes*, we read: "Beccaria, it is true, makes mention of a social contract. His time required it, and his essential sources – not only Rousseau but Helvétius himself – seemed to suggest the need for it. He speaks of 'pacts', 'conventions', 'obligations': that is, of the forms that design the rational structure of a society. But make no mistake. It is something else that legitimises and moves or shakes and tears apart such forms. It is man's nature, an invincible force to be favoured and imitated".[54]

To understand Beccaria's political and legal philosophy, it is certainly necessary to scrutinise his anthropology. However, to degrade the doctrine of the social contract to a "mention", explaining its presence as the effect of the reception of ideas that were influential but not intimately operative in Beccaria's thought, seems to me

[50] Here, I reproduce the effective formula by Schumpeter [1942], (1975), 83, changing its empirical reference.

[51] See Bessler (2014).

[52] See Ippolito (2014a).

[53] Shklar (1987), 89.

[54] Burgio (1991), 17 (translation mine).

an unpersuasive reading key.[55] We can certainly agree with Gianni Francioni that "the underlying philosophical framework" of *On Crimes* "is the utilitarian theory of Helvétius".[56] Yet it is Francioni himself who emphasises that the "thematic […] of the work", taken from Montesquieu, is connected to a "fundamentally Lockean contractualism", crossed by "suggestions and images coming from Grotius, Hobbes and Rousseau".[57] If one examines the contributions of other leading scholars, such as Audegean,[58] Costa,[59] Birocchi,[60] Porret[61] etc., one will observe that, beyond the interpretative divergences, they all take seriously the doctrine of contract with which Beccaria presents himself to the reader at the threshold of his work. Were they fooled by the appearances of a cowl worn for the sake of fashion?

Actually, it is debatable whether fashion would impose it. Not marginal, in the second half of the eighteenth century, was the voice of philosophers who, in reflecting upon the genesis and foundation of the state, rejected the triadic scheme "state of nature / social pact / civil society", recovering and re-elaborating the old Aristotelian paradigm. Structurally open to encompassing and ordering every evolutionary process of social organisation, such a model allows for that conjunction of political philosophy and philosophical history in which the Enlightenment attempt to understand and control the mechanisms of transformation of reality takes shape.[62]

Moreover, Montesquieu's "*prolem sine matre creatam*"[63] can certainly be said to be foreign to the lineage of contractualism. And it is undeniable that it is precisely the *Esprit des lois* that is Beccaria's main guide in criticising the hypertrophy of punitive power. The fact that the author of that guide also fails to prove the usefulness of the contractualist *viaticum* weakens, in my opinion, the explanatory power of Burgio's thesis. Beccaria's contractualism must be taken seriously – in its ideological value and in its normative vigour. It is a form of rationality; an intellectual attitude; a philosophical point of view on *civitas*. It is not the following of an intellectual fashion or the outward adherence to the ideas of some master. Actually, conformism is certainly not a *penchant* of Beccaria: his portrait could very well illustrate the "intellectual autonomy" section of an encyclopaedia.[64]

The contractualist ideology is the scheme of thought that allows Beccaria to thematise the centrality of individuals in the organisation of society; to imagine them as the architects of the public sphere and to valorise them as an end in themselves; to consecrate their will to be free as the objective of law and the criterion of legitimacy

[55] Matt Matravers, whose reading of Beccaria is certainly distant from the one proposed here, also argues that "it is a mistake to dismiss the contract argument" (Matravers (2022), 51).

[56] Francioni (1990), p. 69 (translation mine).

[57] Francioni (1990), p. 69 (translation mine). That Beccaria's contractualism is fundamentally Lockean is disputable. See, in this regards, Audegean (2019).

[58] See Audegean 2010.

[59] See Costa (2014, 2015).

[60] See Birocchi (2002).

[61] See Porret (2003).

[62] See Ippolito (2008), 77–80.

[63] See Coppieters (1993), 107–120.

[64] See Ippolito (2022b).

of power.[65] It is enough to consider the importance of the normative corollaries that Beccaria deduces from the contractualist postulate, to grasp the function (not susceptible to underestimation) that this philosophical component plays in the logic of *On Crimes*.[66] I will limit myself to a summary list of them, without considering the expository order of the text:

(A) The principle of separation of powers, which prescribes the attribution of the functions of production and application of legal rules to different bodies;[67]
(b) The principle of legality of criminal offences, by virtue of which no action can be considered a crime if it is not prohibited as such by the legislator, and no penalty can be imposed by the judge if it is not previously imposed by law;[68]
(c) The principle of legal equality, which prohibits privileges and discrimination in the position of the subjects with regard to the force of the prohibitions and the typology of the penalties;[69]
(d) The principle of impartiality of the judge, which prohibits the association between prosecuting and judging;[70]
(e) The principle of literal interpretation of penal laws, which excludes the judge from the sphere of normative creativity;[71]
(f) The principle of penal economy, which requires the minimisation of repressive violence and implies the prohibition of cruel punishments;[72]
(g) The principle of the protection of life, which excludes the right of the state to kill in order to punish.[73]

In their coherent whole, such principles – aimed at organising, limiting and binding power – serve to configure a legal system functional to the objective of the political artifice: the security of liberty. As Antje du Bois-Pedain wrote in a lucid and insightful essay, "[t]hrough the notion of the 'social contract' Beccaria articulates, in the language of his time, a constitutionalised conception of the relations between rulers and ruled".[74] In other words, his "contractualism should be interpreted as a form of constitutionalism".[75]

[65] See Du Bois-Pedain and Eldar (2002), 5: "It is his concern with individual freedom that guides Beccaria to his specific articulation of contractarianism.".

[66] In the light of this nomogenetic and constructive function, I do not share the view that "Beccaria uses the language of social contract in the main in a negative form of the above: to capture the wrongness or lack of justification of principles and practices and to indicate what arrangements and practices are beyond consent for the members of society" (Matravers (2022), 40).

[67] See Beccaria, [1764], (2012), I-III, 9–12.

[68] See Beccaria, [1764], (2012), III, 12; VIII, 25.

[69] See Beccaria, [1764] (2012), III, 12; XXI, 51–52.

[70] See Beccaria, [1764] (2012), III, 12–13; XVII, 45–46.

[71] See Beccaria, [1764] (2012), IV, 14–16.

[72] See Beccaria, [1764] (2012), III, 13; XIX, 48; XXVII, 63–65.

[73] See Beccaria, [1764] (2012), XXVIII, 66–72.

[74] Du Bois-Pedain (2022), 90.

[75] Du Bois-Pedain (2022), 91.

The ethical and political implications of this form of constitutionalism make the immediate and aggressive reaction of the guardians of the *status quo* to the success of *On Crimes* historically understandable.[76] With his depiction of the conventional and consensual origin of civil society, Beccaria shakes up the system of values and beliefs in which the social and institutional authorities of the *ancien régime* find ideological support.[77] Beccaria's contractualism–a fully secularised vision of politics–is a political heresy.[78] If the state is a human construct–an instrument forged by individuals to make possible the realisation of individual ends–, then there is nothing natural in the social order; and nothing sacred in power. As a doctrine of the artificiality of law, Beccaria's political discourse rejects the authority of religion and breaks the bonds of tradition; it contradicts the rhetorics of organicism and abandons the commonplaces of natural law theory.[79]

No moral personification of the body politic, no tribute to the transcendent reasons of a common self or to the infallible will of a superior entity: Beccaria–as Salvatorelli observes well–"denies any concept of an interest, of a state value distinct and superior to the interest and value of the individuals making up the social aggregate".[80] Fleeing pain and seeking pleasure, the Beccarian man founds the society of individuals because he wants to be sure of being free. The legal order that makes liberty possible is the fruit of the concordant will of the consociates, and does not reflect a paradigm of natural or supernatural justice.[81] The social pact stipulates that everyone abstains from offensive actions–it does not oblige anyone to abide by the edifying precepts of a morality or the saving commandments of a religion. Political power has only one form of normativity at its disposal–the positive law, the coerciveness of which is bound and limited by the goal of subjective protection underlying the pact.[82] Therefore, any sanction attached to a prohibition that exceeds those purposes is an illegitimate compression of liberty: an act of tyranny.[83]

This heteropoietic conception of the state, in which contractualism is emancipated from the natural law doctrine and criminal law is configured as a system of guarantees for the individual in the face of the power to punish, qualifies Beccaria as a philosopher of liberty: of liberty as a legal artifice.

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[76] See Imbruglia (2006); Ippolito (2022c).

[77] The monk Ferdinando Facchinei denounced the author of *On Crimes* as an opponent of "everything that right reason, sane politics and true religion deem necessary and teach for the good regulation of mankind" (Facchinei (1765), 3). He reiterates the accusation: "This book, despite its small size, is nevertheless full of long, useless invectives against legislators and princes, both ecclesiastical and secular, and especially against the sacred tribunal of the Inquisition; and it contains all the most enormous and seditious blasphemies pronounced so far against sovereignty and the Christian religion, by all the most impious heretics and all the ancient and modern irreligious" (Facchinei 1765, 186–187, translation mine).

[78] See Ippolito 2021.

[79] See Ippolito 2022a.

[80] Salvatorelli (1942), 34.

[81] "Beccaria's idea of the political order is very modern. The political order is purely immanent and law within it is a matter of social fact" (Zucca (2022), 28).

[82] See Ferrajoli (2014b).

[83] See Beccaria, [1764] (2012), II, 10.

Acknowledgements This paper builds on work published as "La libertad como artificio jurídico. Sobre la filosofía de Beccaria", *Jueces para la democracia*, March 2022.

Funding Open access funding provided by Università degli Studi Roma Tre within the CRUI-CARE Agreement.

Declarations

Conflict of interest I declare I have no competing interest. No funding has been received for this article.

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References

Albertini, Mario, [1962] 2007. "Il federalismo", in Id., *Tutti gli scritti*, ed. by N. Mosconi. Bologna: Il Mulino, vol. IV, pp. 231–259.

Audegean, Philippe, 2023. *Violenza e giustizia. Beccaria e la questione penale*, trans. by D. Ippolito. Bologna: Il Mulino.

Audegean, Philippe, 2021. "Utilitarismo e umanitarismo in Cesare Beccaria", in G. Cospito and E. Mazza (eds.), *Nell'officina dei Lumi. Studi in onore di Gianni Francioni*. Como-Pavia: Ibis, pp. 163–178.

Audegean, Philippe, 2019. "Droit naturel et droit à la vie: Beccaria lecteur de Hobbes". *Diciottesimo secolo* 4: 33-45.

Audegean, Philippe, 2014. "*Dei delitti e delle pene*: significato e genesi di un pamphlet giuspolitico", in D. Ippolito (ed.), *La libertà attraverso il diritto. Illuminismo giuridico e questione penale*. Napoli: Editoriale Scientifica, pp. 71–92.

Audegean, Philippe, 2010. *La philosophie de Beccaria. Savoir punir, savoir écrire, savoir produire*. Paris: Vrin.

Audegean, Philippe, and Delia, Luigi (eds.), 2018. *Le Moment Beccaria. Naissance du droit pénal moderne* (1764-1810). Oxford: Oxford University Studies in the Enlightenment.

Barberis, Mauro, 1999. *Libertà*. Bologna: Il Mulino.

Beccaria, Cesare, [1764] 2012. *On Crimes and Punishments*, in Id., *On Crimes and Punishments and Other Writings*, ed. by R. Bellamy, trans. by R. Davies. Cambridge: Cambridge University Press.

Beccaria, Cesare, [1764] 1984. *Dei delitti e delle pene*, ed. by G. Francioni, in *Edizione nazionale delle opere di Cesare Beccaria*, ed. by L. Firpo. Milano: Mediobanca, vol. 1.

Bessler, John D., 2014. *The Birth of American Law: An Italian Philosopher and the American Revolution*. Durham NC: Carolina Academic Press.

Birocchi, Italo, 2002. *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*. Torino: Giappichelli, pp. 444–458.

Bobbio, Norberto, 1989. *Thomas Hobbes*. Torino: Einaudi.

Bobbio, Norberto, 1965. *Giusnaturalismo e positivismo giuridico*. Milano: Edizioni di Comunità.

Bobbio, Norberto, 1963. *Locke e il diritto naturale*. Torino: Giappichelli.

Burgio, Alberto, 1991. "Introduzione", in C. Beccaria, *Dei delitti e delle pene*. Milano: Feltrinelli, pp. 13–28.

Calamandrei, Piero, [1948] 2019. *Inchiesta sulle carceri e la tortura* (dal resoconto dei discorsi pronunciati alla Camera dei deputati della Repubblica italiana nella seduta del 27 ottobre 1948), in P. Gonnella and D. Ippolito (eds.), *Bisogna aver visto. Il carcere nella riflessione degli antifascisti*, Roma: Edizioni dell'Asino, pp. 204–218.

Calvino, Italo, [1981] 2011. *Why Read the Classics?*, in Id. *The Literature Machine*, trans. by P. Creagh. London: Vintage Books.

Calvino, Italo, [1981] 1991. *Perché leggere i classici*. Milano: Mondadori.

Costa, Pietro, 2015. "Lo 'ius vitae ac necis' alla prova: Cesare Beccaria e la tradizione contrattualistica". *Quaderni Fiorentini* 44: 917-895.

Costa, Pietro, 2014. "Beccaria e la filosofia della pena", in R. Davis and P. Tincani (eds.), *Un fortunato libriccino. L'attualità di Cesare Beccaria*. Milano: Edizioni L'Ornitorinco, pp. 33–50.

Costa, Pietro, 1999. *Civitas. Storia della cittadinanza in Europa.* Vol. 1. *Dalla civiltà comunale al Settecento*. Roma-Bari: Laterza.

Costa, Pietro, 1986. *Lo Stato immaginario. Metafore e paradigmi nella cultura giuridica italiana fra Ottocento e Novecento*. Milano: Giuffrè.

Costa, Pietro, 1974. *Il progetto giuridico. Ricerche sulla giurisprudenza del liberalismo classico*. Milano: Giuffrè.

Costa, Pietro, 1969. *Iurisdictio. Semantica del potere politico nella pubblicistica medievale*. Milano: Giuffrè.

Coppieters, Buno, 1993. "*Prolem sine matre creatam*. The Epigraph of Montesquieu's *The Spirit of the Laws*", in *B.* Coppieters (ed.), *The World of the Enlightenment – Die Welt der Aufklärung*. Brussels: VubPress, pp. 107-120.

Du Bois-Pedain, Antje, 2022. "Crime, Punishment and the Social Contract: Towards the Constitutionalisation of Criminal Law", in A. du Bois-Pedain and Sh. Eldar (eds.), *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic.* Oxford: Hart Publishing, pp. 73-92.

Du Bois-Pedain, Antje, and Eldar, Schachar, 2022. "Introduction", in A. du Bois-Pedain and Sh. Eldar (eds.), *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic.* Oxford: Hart Publishing, pp. 1-18.

Ferrajoli, Luigi, [1989] 2018. *Diritto e ragione. Teoria del garantismo penale*. Roma-Bari: Laterza.

Ferrajoli, Luigi, 2014a. *Il paradigma garantista. Filosofia e critica del diritto penale*. Napoli: Editoriale Scientifica.

Ferrajoli, Luigi, 2014b. "Two Hundred and Fifty Years since the Publication of On Crimes and Punishments: The Currency of Cesare Beccaria's Thought". *Punishment & Society* 16: 501-519.

Francioni, Gianni, 2016. "Ius e potestas. Beccaria e la pena di morte". *Beccaria. Revue d'histoire du droit de punir* 2: 13-49.

Francioni, Gianni, 1990. "Beccaria filosofo utilitarista", in *Cesare Beccaria tra Milano e l'Europa*. Milano-Roma-Bari: Cariplo-Laterza, pp. 69–87.

Hobbes, Thomas, [1651] 1998. *Leviathan*, ed. with an introduction and notes by J.C.A. Gaskin. Oxford: Oxford University Press.

Imbruglia, Girolamo, 2006. "Illuminismo e religione. Il 'Dei delitti e delle pene' e la difesa dei Verri dinanzi alla censura inquisitoriale". *Studi settecenteschi* 25-26: 119-161.

Ippolito, Dario, and Sandro, Paolo, 2023. "Garantism", in M. Sellers and S. Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*. Dordrecht: Springer. https://doi.org/10.1007/978-94-007-6730-0_109-1

Ippolito, Dario, 2022a. "Cosa punire? Scopi e limiti delle proibizioni penali nella filosofia di Beccaria". *Diritto & Questioni pubbliche* 2: 85-109.

Ippolito, Dario, 2022b. "La società degli individui. Beccaria filosofo contrattualista". *Diritto & Questioni pubbliche* 1: 103-117.

Ippolito, Dario, Dario, 2022c. "Antinomie filosofiche e paradigmi di giustizia. Facchinei censore di Beccaria". *Beccaria. Revue d'histoire du droit de punir* VII: 91–105.

Ippolito, Dario, 2021. "Prohibitions pénales e laïcité du droit. Adultère, homosexualité e infanticide chez Beccaria". *Dix-Huitième siècle* 53: 673-698.

Ippolito, Dario, 2019. *L'esprit des droits. Montesquieu et le pouvoir de punir*, trans. by Ph. Audegean. Lyon: École Normale Supérieure Éditions.

Ippolito, Dario (ed.), 2014a. *La libertà attraverso il diritto. Illuminismo giuridico e questione penale*. Napoli: Editoriale Scientifica.

Ippolito, Dario, 2014b. "Contratto sociale e pena capitale. Beccaria vs. Rousseau". *Rivista internazionale di filosofia del diritto* 4: 589-620.

Ippolito, Dario, 2008. *Mario Pagano. Il pensiero giuspolitico di un illuminista*. Torino: Giappichelli.

Kelsen, Hans, 1920. *Vom Wesen und Wert der Demokratie*. Tübingen: Mohr Siebeck.

Matravers, Matt, 2022. “Reconstructing Beccaria’s Social Contract”, in A. du Bois-Pedain and Sh. Eldar (eds.), *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic.* Oxford: Hart Publishing, pp. 39-52.

Montesquieu, C.-L. de Secondat de, [1748] 1989. *The Spirit of the Laws*, ed. by A.M Cohler, B.C. Miller and H.S. Stone. Cambridge: Cambridge University Press.

Pocock, John G.A., 1975. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. Princeton: Princeton University Press.

Porret, Michel, 2003. *Beccaria. Le droit de punir*. Paris: Michalon.

Rousseau, Jean-Jacques, [1762] 2002. *The Social Contract*, in Id., *The Social Contract and The First and Second Discourses*, ed. with an introduction by S. Dunn. New Haven and London: Yale University Press.

Salvatorelli, Luigi, 1942. *Il pensiero politico italiano. Dal 1700 al 1870*. Torini: Einaudi.

Schumpeter, Joseph A., [1942] 1975. *Capitalism, Socialism and Democracy*. New York: Harper.

Shklar, Judith N., 1987. *Montesquieu*. Oxford: Oxford University Press.

Silvestrini, Gabriella, 2021. “Cesare Beccaria: ‘Il Rousseau degli Italiani’? Tradizioni e appropriazini”, in G. Cospito and E. Mazza (eds.), *Nell’officina dei Lumi. Studi in onore di Gianni Francioni*. Como-Pavia: Ibis, pp. 179–194.

Zucca, Lorenzo, 2022. “Beccaria’s Political Theory of Criminal Justice”, in A. du Bois-Pedain and Sh. Eldar (eds.), *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic.* Oxford: Hart Publishing, pp. 21-38.

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