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## ► To cite this version:

Philippe Audegean. Cesare Beccaria's On Crimes and Punishments: the meaning and genesis of a jurispolitical pamphlet. *History of European Ideas*, 2017, 43 (8), pp.884-897. 10.1080/01916599.2016.1256591 . hal-03931244

**HAL Id: hal-03931244**

**<https://hal.science/hal-03931244>**

Submitted on 13 Feb 2023

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# Cesare Beccaria's *On Crimes and Punishments*: The Meaning and Genesis of a Jurispolitical Pamphlet

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## Abstract

At the heart of the criminal reform proposed in Cesare Beccaria's 1764 *Dei delitti e delle pene* ('On Crimes and Punishments') are the principles of penal parsimony derived from a precise interpretation of the social contract. According to this theory, the objective of this contract is liberty in the form of spiritual tranquillity, with man consenting to the fewest possible evils in order to reach it. Punishment, being no more than a necessary evil devoid of any intrinsic virtue, must therefore serve no more than a preventative function to the smallest possible extent; its application strictly bound by the principle of legality.

Beccaria's criminal philosophy therefore attempts to drastically reduce the power of the penal institution. After recounting its principal aspects, this article seeks to propose a new interpretation of Beccaria's theory from the perspective of its historical context. The Italian Enlightenment philosopher did not so much express an indignation against the barbarism of the Milanese penal system, but rather instigate a rebellion against the political dominance of its patriciate, whose power had long been validated by its juridical functions. In this respect, Beccaria sought to combat the political hegemony of the jurists, concluding his treatise by excluding juridical thought from, and thus removing the intellectual foundations of, the practice of criminal law.

**Keywords:** legal history; criminal theory; Italian Enlightenment; political philosophy; utilitarianism; social contract.

## Acknowledgements

I would like to thank Fabio Antonini for his translation of this article (original title: '*Dei delitti e delle pene*: significato e genesi di un pamphlet giuspolitico', in Dario Ippolito (ed.), *La libertà attraverso il diritto. Illuminismo giuridico e questione penale* (Napoli, Editoriale Scientifica, 2014), 71-92), as well as Dario Ippolito for his permission to publish a version of this text in English.

## 1. Introduction

The question of crime and punishment has never been as heavily debated as it was during the late eighteenth century, with both the proliferation of treatises and the intensity of discussion on the subject being unrivalled in any other period of history. At the origins of this unprecedented period of intellectual development, concerning itself with the scope and limits of the punitive powers of the state, lay a short pamphlet by the Milanese philosopher Cesare Beccaria entitled *Dei delitti e delle pene* ('On Crimes and Punishments'), first published in Livorno in 1764. The impact and significance of this pamphlet was such that the historian Michel Porret has recently described the period between its publication and the onset of the French Revolution as a 'Beccarian moment',<sup>2</sup> in which his text served as both the trigger and enduring focal point for a new perception of criminal law as one of the central and decisive aspects of government.

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<sup>2</sup> Michel Porret, *Beccaria. Le droit de punir* (Paris, Michalon, 2003), 116.

Driven, he claimed, as much towards the humaneness as the efficiency of the law, Beccaria's main intention in writing *On Crimes and Punishments* was to denounce the cruel severity of criminal justice in its present form, and to propose instead a punitive system which was at once less violent and applied to fewer transgressions. With these convictions in mind, the author was able to develop the first coherent case against the death penalty,<sup>3</sup> dismantle the juridical language and principles of the *ancien régime*, and establish in its place the fundamental tenets of the modern penal code.

Beccaria's short pamphlet was an unexpected and extraordinary success. After being sold in over five hundred copies in Italy between July and August 1764 alone, *On Crimes and Punishments* soon became one of the best-sellers of the Enlightenment upon its first translation into French in December 1765 (dated 1766). Its growing popularity was evident in a succession of new editions – some of which were produced without proper licence by those looking for a source of easy revenue – as well as a series of translations across the continent: English in 1767, Swedish in 1770, Polish in 1772, Spanish in 1774, German in 1778, Danish in 1796, and Greek in 1797-98.<sup>4</sup>

The rapid dissemination of Beccaria's pamphlet indicated that his work had satisfied a growing demand across the continent: for a comprehensive synthesis of the reflections on criminal law which had been gradually developing during the previous two centuries through authors such as Grotius, Hobbes, Pufendorf, Thomasius, and Montesquieu. In it, Beccaria theorised with remarkable clarity upon the nature of punishment as a deterrent, whose sole purpose was the prevention of future transgressions. His text established a clear distinction between the notions of crime and sin, and argued that the sovereign could punish only those actions which would lead to harmful consequences within the wider community. Following the example set by Montesquieu, he noted that it was the efficiency rather than the cruelty of a punishment which truly served to counter the threat of criminality. Moreover, by taking a broader sociological perspective on societal customs and their history, his pamphlet vehemently denounced the vicious circle which had seen criminal violence driven by the practices of the state prosecutors.

As I will endeavour to illustrate in this article, at the philosophical core of Beccaria's arguments was a new conception of punishment, as a necessary evil with no intrinsic virtue, which had been developing within Milan's Enlightenment milieu. This conception had been fostered within the unique political climate of the city itself, and was intended to diminish the power of contemporary magistrates by discrediting the legal culture which granted them legitimacy. By examining the immediate political context in which Beccaria's pamphlet was born, I intend to demonstrate that we must place his project – and his attempt to eradicate the arbitrary and excessive powers of the criminal courts – within a wider culture of criticism towards the juridical systems of the day. From the *meaning* to the *genesis* of *On Crimes and Punishments*: this is the course which I intend to follow.

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<sup>3</sup> See also Giuseppe Pelli, *Contro la pena di morte*, ed. Philippe Audegean (Padova, CLEUP, 2014): a text dating from 1760-61, but which had remained unedited until 2014.

<sup>4</sup> Cf. Porret, *Beccaria*, chap. I.

## 2. 'Un diritto penale minimo'<sup>5</sup>

### 2.1. Punishment and prevention

In his *On Crimes and Punishments*, Beccaria defines punishment as a legal form of violence which, as such, can only be justified in negative terms; legitimate only if it reduces the overall rate of violence in society at large. This negative justification of criminal law stood in sharp contrast to the more positive interpretation typically proposed by the *ancien régime*. From Beccaria's perspective, the law does not bestow virtue upon any form of violence: a legally administered punishment is neither a form of penitence, nor a restoration of any sense of the original 'order' disturbed by the culprit. Instead, punishment is always a form of evil, one which is forcibly inflicted upon a person and is only rendered legitimate by the need to prevent future transgression. It is, therefore, nothing more than a *necessary evil*, a notion which is best expressed in the recent writings of Luigi Ferrajoli:

The rational justification [for punishment] resides in its capacity to reduce, or else to minimize, the quantity and severity of violence in society: not only that perpetrated by criminals, but also that of the reprisals which they may face at the hands of their victims and those connected to them in either a public or private capacity. In short, it is therefore legitimised if, and only if, it serves as the *law of the weaker*, rather than *the law of the stronger* which would be enacted in its place; the weaker, that is, being the injured party at the time of the offence, the accused at the time of the trial, and the condemned at the moment of execution.<sup>6</sup>

In order to reach such a conclusion, Beccaria's thesis begins with the philosophical notion of the social contract. Human beings are, by their very nature, diverse, rivalling, equal, and free, and thus cannot be impeded by norms and limitations which are contrary to their will. Only consensus – one which is ideally constructed through reason rather than empirical certainties – can bestow legitimacy upon one's power over another. Yet Beccaria's notion of the social contract conflicted with the idea of natural law: that all men, blinded by their passions, are unable to keep their own private and immediate interests at bay. From this perspective, it cannot be said that man has freely consented to the interests of the 'common good' on moral grounds alone. Rather, we must consider the social contract itself as a product of these passions; a pact which arose from the violence of an all-out war which, if it did not necessarily endanger the survival of humanity itself, certainly weakened its resolve to the point of renouncing its inherent liberties. In this respect, the law is a rational expression of this moral fatigue, the primitive voice of these tired passions.

This bleak description of human nature as myopic and egotistical does not however, as it had done in Hobbes, justify absolutism as the only means by which to stem the disruptive forces of individual interests. Far from necessitating, and thus legitimising, absolute power and authority, Beccaria's pessimistic approach to humanity prescribed instead

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<sup>5</sup> This phrase, coined by Luigi Ferrajoli in 1985, roughly translates as 'a minimum penal law'. For a more detailed account of Beccaria's writings on criminal law, see Philippe Audegean, *La Philosophie de Beccaria. Savoir punir, savoir écrire, savoir produire* (Paris, Vrin, 2010), 37-170.

<sup>6</sup> Luigi Ferrajoli, introduction to *Beccaria/Dei/delitti e delle/pene/con/note*, ed. Raffaele Sbardella (Napoli, La città del sole, 2005), 19-20.

a drastic reduction of its reach. If the act of drawing up a social contract were not a free and rational definition of the common good, but a forced surrender and compromise driven by fear and the desire to avoid a war of all against all – in essence, if man had surrendered himself to the authority of the sovereign to the detriment of his very being – then it had surely been intended with the least possible sacrifice or concession: ‘Thus it was necessity’, he stated, ‘which compelled men to give up a part of their freedom; and it is therefore certain that none wished to surrender to the public repository more than the smallest possible portion.’<sup>7</sup>

If, in other words, man has consented only to the smallest and most truly necessary concessions, then he has consented to punishment not in order to better himself, in the sense of attaining perfection or redemption, but with the sole intention of avoiding violence against him. The only true purpose of punishment must therefore be the prevention of further crime itself. There is no inherent virtue in this evil: not only do tortuous methods fail to purge vice and passions from the world, but such punishments do not even necessarily lead to the remedy or rehabilitation of either the offender or the condemned. Instead, its justification lies in deterrence. Punitive suffering must not be inflicted in the futile hope of penitence, as the fulfilment of a vendetta or to restore the troubled balance of social order – itself an exercise in retrospective reasoning – but must be enacted solely with a view towards the future, the only thing which can in fact be modified.<sup>8</sup> Beccaria’s thus places his notion of the social contract beyond any moral conception inherited from the various doctrines of natural law. Man has doubtless consented to punishment for that which he has done, but not in the sense of personal retribution, rather in the name of that which will be done by others in the future; as a means, that is, of public security. Punishment does not render one evil for another, but serves to prevent its proliferation in the future.

## ***2.2. How to punish and when to prohibit***

Beccaria’s concept of punishment draws upon an important principle of penal parsimony: that a criminal justice system is justified if and only if it results in the least possible evil. In essence, if the punishment inflicted upon the offender is no more than a necessary evil, free of any intrinsic virtue, then its sufferings and restrictions must be applied to the smallest possible extent. This relates to a fundamental notion derived from the terms of the social contract itself: ‘a society cannot be called legitimate where it is not an unfailing principle that men should be subjected to the fewest possible ills.’<sup>9</sup> The basis of the civil life is predicated on the happiness which it promotes and facilitates. Such happiness, however, is itself devoid of any positive characteristics; instead, it should be considered as the lowest level of pain, and the highest degree of liberty, conferred upon an individual in order for them to proceed in their own personal affairs.

If punitive sanctions are strictly necessary in order to halt society’s descent into chaos, it does not follow that the more severe the punishment, the lower the rate of criminality. In this respect, Beccaria admonishes the entire *ancien régime* for having been based upon this

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<sup>7</sup> Cesare Beccaria, *On Crimes and Punishments*, ed. Richard Bellamy, trans. Richard Davies (Cambridge, Cambridge University Press, 1995), chap. 2, 11.

<sup>8</sup> *Ibid.*, chap. 12, 31.

<sup>9</sup> *Ibid.*, chap. 19, 48.

fundamental error: that the strength of a punitive deterrent was directly proportional to the suffering inflicted upon the transgressor. Instead, the author's utilitarian approach sought to dissuade the greatest number of people from crime not through subjecting the greatest suffering, but the lowest. 'Therefore, punishments and the means adopted for their infliction should, consistent with proportionality,<sup>10</sup> be selected so as to make the most efficacious and lasting impression on the minds of men through the least possible torment to the body of the condemned.'<sup>11</sup>

Beccaria's rule relies upon two distinct conditions: the greatest possible impact upon the minds of the innocent, and the lowest possible violence upon the person of the condemned. It is a rule which reverses the proportional relationship between an action upon the body and its effect upon the spirit, and which constantly challenges the legislator to reflect upon how to lessen the violence of a punishment without diminishing its dissuasive efficacy. The legislator must always strive to substitute violent for moderate punishment, as reason shows it to be at least as effective as a deterrent (if for no other reason than it is more likely to actually be implemented), and to further lessen the more moderate punishments when experience shows that it is possible to do so without increasing the risk of criminality, as current societal mores dictate.<sup>12</sup>

From this call for clemency – a typical expression of the Enlightenment bond between reason and sensibility – Beccaria produced the longest and most celebrated chapter of his book (number XXVIII), which illustrated both the injustice and the inefficiency of the death penalty. After setting out a brief but definitive *de jure* argument based upon the terms of the social contract, the chapter proceeds to give a long *de facto* argument which makes clear that man is not compelled in this regard to choose between what is just and what is useful. The empiricist philosophy serves to confirm the arguments previously set out by Montesquieu: that the infallibility of mild yet consistent punishment succeeds far more as a deterrent than the fleeting intensity of violent sentences.

The principle of penal parsimony also requires the sovereign to lessen the scope of criminal prohibitions. For Beccaria, one may only prohibit an action if it places the wider society in peril, rather than for reasons of morality or religion: 'the one true measure of criminality is the damage done to the nation.'<sup>13</sup> Once again, this rule is derived from the

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<sup>10</sup> It is worth noting that the principle of proportionality between crime and punishment is argued by Beccaria in purely utilitarian terms, without any concession to the traditionally retributive approach to the idea: cf. *ibid.*, chap. 6, 19-21.

<sup>11</sup> *Ibid.*, chap. 12, 31. Following the example of Montesquieu (*The Spirit of the Laws*, trans. Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (Cambridge, Cambridge University Press, 1989), bk. VI, chap. 12), Beccaria dramatically reversed the commonly held belief that the degree of pain inflicted was proportionate to its dissuasive impact on others, a notion defined by Leon Radzinowicz as 'the doctrine of maximum severity' (*A History of English Criminal Law and Its Administration from 1750*, vol. 1, *The Movement for Reform* (London, Stevens and Sons, 1948), chap. 8). This belief was only able to avoid the 'bad infinity' of deterrence through the necessities of the retribution itself: the more one punishes, the more one dissuades, but one mustn't punish beyond the extent of that which the criminal deserves.

<sup>12</sup> Beccaria, *On Crimes and Punishments*, chap. 27-28, 63-72; see also chap. 47, 113: 'I conclude with a final reflection that the severity of punishments ought to be relative to the state of the nation itself. Stronger and more easily felt impressions have to be made on a people only just out of the savage state. A lightning strike is needed to stop a fierce lion who is provoked by a gunshot. But as souls become softened by society, sensitivity grows. And as it does so, the severity of punishments ought to diminish, if the relation between the object and the sensation is to remain constant.'

<sup>13</sup> *Ibid.*, chap. 7, 22.

terms of the social contract: mankind, driven only by its own interests and the pursuit of pleasure, has not consented to be punished for their vices and sins, but for the unjust privileges which they claim when they satisfy their own desires at the expense of others. The ends of a society are entirely alien to the spiritual concept of redemption, and bear no relation to the salvation of the soul. It is wishful thinking, and a notion more suited to romance literature than historical narrative, to believe that man – interested only in the pursuit of temporal pleasure – would have sacrificed part of his liberty in the name of moral or religious scruples: ‘No one has made a gift of part of his freedom with the common good in mind; that kind of fantasy exists only in novels. If it were possible, each one of us would wish that the contracts which bind others did not bind us. Every man makes himself the centre of all the world’s affairs.’<sup>14</sup>

The objective of all human action is gain, which consists of the pursuit of pleasure and the avoidance of pain: ‘the idea of common utility [...] is the foundation of human justice.’<sup>15</sup> This founding principle of society thus assigns a purely civic and humanistic function to the practice of criminal law: one cannot prohibit an action if it does not produce any manifest or observable harm. This materialistic approach, in which a crime may only be considered as a physically external action rather than a thought or intention alone, represents the legal equivalent of the wider philosophy of contemporary secularism.<sup>16</sup> Through it, a wide variety of actions once considered to be crimes by the *ancien régime* suddenly fall beyond the realm of criminal law.

For an action to be considered as a crime, moreover, it is not enough to simply argue that its absence would benefit the wellbeing of others. Instead, given that every punishment is a form of wrongdoing, one must also demonstrate that such a benefit would also compensate for the negative impact of the prohibition itself. Amongst the most negative impacts are the reduction of personal liberty, the social tensions resulting from an attempt to ostracise the transgressors, the discrediting of the legislator when such laws are difficult to implement and instead foster a culture of resistance, the costs and damages involved in a judicial process, the disruptive influence of witness testimony, and above all the sufferings caused by the punishment itself and the criminal tendencies cultivated by life in prison.

To punish is a necessary evil, one which must be tolerated only in cases of absolute necessity. A society worthy of the name punishes only begrudgingly and as rarely as possible; where the same result can be achieved through different means, such a solution must always be preferred. Criminal law can be legitimately imposed only when no other peaceful method has succeeded in impeding or reducing the actions which it intends to prohibit: ‘one cannot say that a punishment for a crime is exactly just (meaning necessary) until the law has instituted the best possible means in a given nation’s circumstances for preventing such a crime.’<sup>17</sup>

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<sup>14</sup> Ibid., chap. 2, 10.

<sup>15</sup> Ibid., chap. 7, 22.

<sup>16</sup> Franco Venturi, *Settecento riformatore*, vol. 1, *Da Muratori a Beccaria* (Torino, Einaudi, 1969), 705-6: ‘Criminal law emerged desacralized from [Beccaria’s] hands. At the heart of its reasoning, the author had placed a distinction – between that which was a crime and that which was a sin – which stood opposed to a millennia-long legal tradition.’

<sup>17</sup> Beccaria, *On Crimes and Punishments*, chap. 31, 82. In this chapter, Beccaria promotes the decriminalisation of adultery, male homosexuality and abortion for these same preventative concerns.

Punitive measures are thus illegitimate not only when they result in damaging consequences, such as an increase in the rate of criminality, or else when they make no impact upon the rate either way, but also when they prove effective yet unnecessary – that is, if the same results could be achieved through more cost effective or implementable measures. It is for this reason, Beccaria argues, that an effective theory of criminal justice cannot reside solely within the sphere of jurisprudence, nor limit itself to a discussion of the criminal justice system (when and how to punish) alone. Instead, it must draw upon all the relevant institutional and cultural factors of the society to which it pertains (such as its public education, economic circumstances and issues of policing), each of which are capable of lessening the threat of violence within.<sup>18</sup>

### **2.3. The principle of legality**

The criminal theory of *On Crimes and Punishments* sought to invert the wider societal tendency towards an ever-increasing range of punishments, a trend which Beccaria attributed to five distinct factors:

- a) The violence suffered by a victim of crime invokes further rage and a desire for vengeance which disrupts any rational reflection upon the nature of the punishment itself.<sup>19</sup> Such reactions are not themselves deplorable, but it is the role of the governors to contain their potential consequences.
- b) Christian religion had fostered an irrational belief in the redemptive value of pain and suffering.<sup>20</sup>
- c) Over time, customs and habits weaken the perceived division between minor and major punishments, a factor which Beccaria uses to illustrate the ineffectiveness of violent punishment: ‘after a hundred years of cruel tortures, the wheel only causes as much fear as prison had before it.’<sup>21</sup> In addition, such habits weaken not only the sense of dread surrounding some major punishments over others, but also the sense of satisfaction experienced by the public at large, who thus proceed to clamour for ever greater punitive measures.
- d) Every crime precipitates a sense of fear and anxiety within society, which in turn instils a renewed desire to demonstrate the force of law.<sup>22</sup>
- e) Penal law, created and administered by magistrates serving the interests of the powerful, tends to exaggerate the seriousness of those crimes committed by the poorer members of society, such as theft, unpaid debt and other crimes against another’s patrimony.<sup>23</sup>

In order to break this cycle of escalating violence, the mechanisms of criminal law must include a series of checks and balances, insisting above all upon the rigid implementation of the principle of legality, so much so that even the magistrate is restricted

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<sup>18</sup> For a more recent expression of this argument, see John Braithwaite and Philip Pettit, *Not Just Deserts. A Republican Theory of Criminal Justice* (Oxford, Clarendon Press, 1990), chap. 2.

<sup>19</sup> Beccaria, *On Crimes and Punishments*, chap. 12, 31.

<sup>20</sup> Ibid., chap. 16, 40-41.

<sup>21</sup> Ibid., chap. 27, 63-64.

<sup>22</sup> Ibid., chap. 12, 31.

<sup>23</sup> Ibid., chap. 28, 69-71; chap. 34, 89.

from applying their own interpretation of the penal code. One cannot stem the repressive tendencies of the individual magistrate without imposing a single law through which a punishment is 'decreed'.<sup>24</sup> In addition, the presumption of innocence must protect the accused from any violence prior to the sentencing itself.<sup>25</sup> Without the certainty and rigidity of a single rule of law, the threat of arbitrary violence upon every citizen creates a climate of fear, destroys the notion of political liberty, and ultimately jeopardises the entire legal system itself.

It is worth noting that in Beccaria's work, the author's emphasis on the deterrent nature of punishment is often accompanied, by virtue of its tendencies towards civil libertarianism, by the notion of punishment as an individual entity, one which should never impact upon anyone other than the culprit themselves – irrespective of its intimidating effect upon others: 'man's political freedom presupposes that punishment be directed only at the actual culprit of a crime [*suppone necessariamente che le pene sieno meramente personali*],'<sup>26</sup> Beccaria argues, as 'a punishment is just not simply because it produces some good, but because it is necessary. Even a useful injustice cannot be tolerated by a lawgiver who wishes to shut out the ever-vigilant tyranny.'<sup>27</sup>

In effect, it is liberty which serves as the fundamental objective of the civil state, as we are taught by the model of the social contract from which Beccaria draws his reflections. What did those who drew up this contract actually hope to gain from it? The answer appears somewhat contradictory at first glance, inasmuch as it is doubly paradoxical: individuals have been granted more freedom than they will ever be, but have asked for nothing other than to be free, and to this end are driven to diminishing such liberty by renouncing one of its parts. In practice, however, this contradiction is non-existent, whilst the paradox can be explained by the very nature of human liberty itself, a fragile flower which cannot grow without protection.

In its natural state, free from any restraint or impediment, one's liberty is 'rendered useless by the uncertainty of retaining it,'<sup>28</sup> as concerns over the liberty of others leads to the restriction of every single action. To become truly free involves a form of liberty which is practicably useful: abandoning the uncertainty of the natural order and instead preserving liberty through the peace and security of a civil state by tying human action to the confines of the law. In this respect, true liberty is not that which occurs naturally, but within a civil environment: that which can be defined as a partial reduction of the former through a free and conscious concession. Freedom does not equate to acting without limits; rather it is the ability to act within a set of consistent and universally recognised restrictions, such that all may be capable of foreseeing the consequences of their own actions.

The principal objective of the civil state is liberty. Yet such liberty – as Montesquieu, the only authority to be directly cited in *On Crimes and Punishments* (a total of three times), teaches us – consists primarily of security, or better yet the 'sense [*opinione*] of one's security.'<sup>29</sup> It does not, therefore, relate to a form of action (that which can be free from

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<sup>24</sup> Ibid., chap. 3, 12.

<sup>25</sup> Ibid., chap. 16, 39.

<sup>26</sup> Ibid., chap. 32, 83.

<sup>27</sup> Ibid., chap. 25, 58.

<sup>28</sup> Ibid., chap. 1, 9.

<sup>29</sup> Ibid., chap. 29, 73. See Montesquieu, *The Spirit of the Laws*, bk. XI, chap. 6, 157: 'The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this

restrictions), but a state of mind: liberty is nothing more than the serene and unwavering confidence of those who know that they are free to act lawfully without intervention from the arbitrary will of others, whilst also being fully aware of the consequences which would befall them if they were to act illegally themselves:

Every citizen ought to believe himself able to do anything [*L'opinione che ciaschedun cittadino deve avere di poter fare*] which is not against the law without fearing any other consequence than what follows from the action itself. This is the political creed which ought to be received by the people and preached by magistrates scrupulously upholding the law. This is a sacred creed, without which there cannot be a legitimate society.<sup>30</sup>

Man cannot be free to act as he wants when he fears that his actions may be arbitrarily impeded by others. In this respect, liberty stands as the truly fundamental objective of the civil life; placed above the notion of utility not by some abstract hierarchical value, but for the rational reason that it in fact relies upon the former as its very premise and means of realisation. It is therefore not enough that the law simply impedes those few actions which cause harm to the state; rather, it is necessary that these laws are publically declared and rigorously applied without exception.

The systems of criminal justice risk threatening the security of its citizens if its magistrates are not held accountable. If a judge is able to dispense punishment through his own personal interpretation of the resulting benefits to society, then the citizens are tormented by the same sense of uncertainty which the penal system itself was intended to diminish. Replicating the Aristotelian notion of equity which had long legitimised the judicial prerogatives of the *ancien régime*, Beccaria states that any judge who takes it upon himself to interpret the law – even in response to a specific set of circumstances – becomes *ipso facto* a legislator, thus breaking the fundamental principle of the separation of powers. The unforeseeable and arbitrary will of a single man replaces the public voice and the consistency of the law, and political liberty is therefore shattered.

Beccaria's principle of legality also points towards a more political goal: to overthrow 'the intermediary despotism'<sup>31</sup> of the magistrates also includes that of the so-called 'intermediate bodies' which had been previously celebrated in the divisive philosophy of Montesquieu. With this particular piece of polemic, we arrive at the historical significance of *On Crimes and Punishments*, or better yet the political objective of this work in its historical context, and thus turn to the question of its political significance and intellectual genesis.

### **3. Beccaria's critique of legal reason**

#### ***3.1. A political conflict***

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liberty, it is requisite the government be constituted so as one man need not be afraid of another'; XII, 2: 'Political liberty consists in security, or, at least, in the opinion that we enjoy security.' Other authors are cited, albeit polemically, in the preface '*A chi legge*', a text which was not authored by Beccaria himself, but most likely by Pietro Verri.

<sup>30</sup> Beccaria, *On Crimes and Punishments*, chap. 8, 25.

<sup>31</sup> *Ibid.*, chap. 28, 72.

In order to appreciate the true historical significance of Beccaria's magnum opus, we must first turn to the political context in which it was conceived: eighteenth century Milan, the capital of Lombard society and Habsburg Imperial province whose history provides an important point of reference to our understanding of *On Crimes and Punishments*.

Our first point of consideration in this regard is the formation of the 'regional states' across the Italian peninsula as a whole, a process which first reached fruition during the sixteenth century and involved the gradual assimilation of independent city-states, feudal enclaves, and free rural communities under the rule of a single lord. The account of one recent historian, Domenico Sella, gives us a useful assessment of the mechanisms of this crucial political process:

The process had involved, besides sheer military conquest, a good deal of negotiations leading to well-defined terms of surrender (*patti di dedizione*) that embodied a compromise between the conquering *signore* and the conquered communities and resulted in the recognition by the former of the institutional identity, legal traditions and administrative autonomy of the latter.<sup>32</sup>

Even in the case of territories subjected to the rule of a foreign power – such as the Duchy of Milan and the Kingdom of Naples, both of which were subsumed into the Spanish Empire – the conqueror had allowed existing legal traditions and institutional structures to survive, conceding to its subjects a consistent degree of self-governance, particularly in the areas of judicial and fiscal administration.<sup>33</sup>

In effect, the Spanish Habsburgs never truly arrived at a full process of political and administrative centralisation, not least because of the vast expanse of territories under their dominion. Instead, the imperial rulers embarked upon the more stable and economic strategy of contractual relations and mutual compromise. In Milan, this political and institutional arrangement was particularly favourable to the patrician class, the highest echelons of the city's aristocracy, whose claims to privilege and pre-eminence under the Habsburgs was founded upon their ancient position within the city as rulers of the municipal government.<sup>34</sup> The Spanish were happy to defer to the administrative and jurisdictional experience of this powerful ruling elite, who in turn were granted free control over the governance of the urban centres in exchange for their fealty to the crown.

Patrician status within the city had already been reserved to only a select number of families, who soon busied themselves with consolidating their monopoly of municipal offices, further establishing their position through an ever more restrictive set of criteria for entering their ranks.<sup>35</sup> By exercising their power in such an exclusive manner, the Milanese

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<sup>32</sup> Domenico Sella, *Italy in the Seventeenth Century*, London-New York, Longman, 1997, 16-17. I will follow the excellent synthesis given in this monograph for the remainder of the paragraph.

<sup>33</sup> Ibid., 17: 'The Spanish monarchs from Charles V on made it a point to respect and preserve the identity and the autonomy of their Italian possessions and, in a deliberate effort at winning the loyalty and the cooperation of their Italian subjects, left the day-to-day administration of the country to existing local elites, and dealt with each component of their dominions as a distinct entity with its own set of privileges and obligations.'

<sup>34</sup> Ibid., 52-55

<sup>35</sup> One of the principal criteria was having been born into a family of distinct and elevated status within Milanese society – a position which was deeply rooted in the history of the city and with a legacy of public

patriciate reinforced its sense of identity and political influence, subsequently fostering a rigid climate of social immobility. This situation was unlikely to be overturned, given that its principal beneficiaries were the ruling classes themselves: ‘a fact’, says Sella, ‘of which eighteenth-century reformers were keenly aware and which led them to view all those ‘intermediate bodies’ (orders, city councils, fiefs, guilds) as the greatest obstacle to change.’<sup>36</sup> A similar awareness had in fact reached the very top of the imperial government itself once the Austrian Habsburgs had driven out the Spanish from the dominion of the Duchy of Milan during the 1710s; that they too needed to directly confront the city’s patricians in order to implement political reform. Sensing that their socio-political privileges were under threat, the Milanese patriciate responded with an arrogance befitting their exalted status, stubbornly defending the prerogatives and immunities which they had enjoyed throughout previous centuries.

It was against this backdrop of bitter political and institutional conflict that Cesare Beccaria was born and raised. The conception of his *On Crimes and Punishments*, moreover, neatly coincided with a decisive moment in this ongoing conflict between the Austrian monarchy and the Milanese patriciate.

### **3.2. A generational conflict**

The first-born child of the Marquis of Gualdrasco and Villareggio, Beccaria was made a doctor of law in 1758. After his father’s admission into the restricted ranks of the Milanese patriciate in 1759, the door was open for Beccaria to enter into the governance of the city itself, had it not been for two particular youthful encounters which distracted the young doctor from his destined career.

Towards the end of 1760, Beccaria fell in love with Teresa Blasco, the daughter of a Sicilian official, of little wealth and minor nobility. Cesare’s decision to marry Teresa, against his father’s wishes to arrange a marriage which would consolidate the growing status of their family, shattered his ties with his parents, and resulted in the loss of his financial stability. This isolated domestic incident coincided with the city’s wider political history, when in 1761 Beccaria began to visit Pietro Verri, a rebellious child of one of the highest magistrates in Milan;<sup>37</sup> a friendship which was to change the course of the young doctor’s life. The family quarrel which had erupted in the Beccaria household was in fact a reflection of a wider generational conflict, in which a group of restless and anti-traditional young aristocrats had gathered around Verri in staunch opposition to the social circumstances and oligarchic milieu into which they had been born.

In turn, this generational conflict was itself an expression of the political crisis which I have previously discussed.<sup>38</sup> By the mid-1750s, an accelerated process of political reform,

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office – alongside a guarantee that no member had participated in ‘ignoble practices or manual professions’ in the last two or three generations. Beccaria’s father had in fact needed to falsify his genealogy in order to finally be accepted into the patriciate in 1759.

<sup>36</sup> Sella, *Italy in the Seventeenth Century*, 24.

<sup>37</sup> For details concerning Gabriele Verri (1695-1782), who had entered the Milanese Senate in 1749, and the turbulent relationship with his sons, see: Venturi, *Settecento riformatore*, vol. I, 648-59; Carlo Capra, *I progressi della ragione. Vita di Pietro Verri* (Bologna, Il Mulino, 2002), 39-63.

<sup>38</sup> For further details, I refer to the excellent and copious account written by Carlo Capra, *Il Settecento*, in Domenico Sella and Carlo Capra (eds.), *Il Ducato di Milano 1535-1796* (Torino, UTET, [1984] 2010), chap. III,

designed to weaken the traditional municipal power structures in preparation for a full imposition of sovereign authority, had created a sense of stubborn resistance within the Milanese patriciate. These had opposed the imperial project to impose a functional administration under the rule of law by citing their own historical role as the lynchpin of social order within the territories. Setting themselves against the centralist policies of Vienna, they continued to claim their own autonomy as the guardians of a legal tradition which had guaranteed the liberty of their municipal institutions.

Within this turbulent political climate, a number of the rebellious younger patricians suddenly found themselves in direct opposition to the stance taken by their own social class. Pietro Verri, for one, had been driven by a combination of ambition and conviction to offer his services to his Austrian masters, whilst his charisma and energy had encouraged many other young aristocrats towards finding new social, cultural, and sentimental identities of their own, in opposition to the beliefs and values of the families to which they belonged. In the midst of this nonconformist fraternity, Beccaria soon discovered his own affinity for the illuminating power of philosophy and the romance of dissent.

The rebellious youth of the Lombard Enlightenment, driven towards a formidable conflict against the forces of superstition, ignorance, and fanaticism, opted to completely reshape their consciousness and ideology from top to bottom. Above all, they turned towards the teachings of the wider European Enlightenment – exploring, reading, and discussing works emanating from intellectual centres such as France and England. Beccaria, for instance, was particularly influenced by the works of Montesquieu, Helvétius, and Rousseau, from which he drew the fundamental elements of his coherent and innovative philosophical discourse: a theory of history as a civilising process and a notion of political liberty as individual security derived from the subjective certainty of protection against unlawful interference (Montesquieu); a vision of happiness as no more than temporal wellbeing and a theory of public utility as the greatest compatibility and convergence of individual interests (Helvétius); and an egalitarian and republican doctrine of the social contract (Rousseau).

Newly armed with this sizeable intellectual and ideological arsenal, the friends of Pietro Verri decided to exhibit their political aims and competencies through the publication of a series of pamphlets, books and treatises. Their aim was to attract the attention of the sovereign and present themselves as ideal candidates for the new government offices which had been created in an attempt to erode the power of the traditional ruling class. To the eyes of the sovereigns at Vienna, these aristocratic *enfants terribles* suddenly appeared as an unexpected Trojan horse, capable of eradicating the oligarchic power which currently dominated the Lombard provinces of the Empire.

### **3.3. A conflict of understandings**

Beccaria's masterpiece, born out of his relationship with Pietro Verri, was one of the pamphlets produced during this turbulent period.<sup>39</sup> Having examined the work's historical context, we must now reconsider the question of the author's principal motives: not, as is it

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*La svolta degli anni sessanta*, 329-431 (see also Idem., *La Lombardia nell'età delle riforme (1706-1796)* (Torino, UTET, 1987), 179-281).

<sup>39</sup> For a reconstruction of the context and complicated genesis of the *Dei delitti e delle pene*, see: Philippe Audegean, introduction to Cesare Beccaria, *Dei delitti e delle pene. Des délits et des peines*, ed. Gianni Francioni, trans. Philippe Audegean (Lyon, ENS Éditions, 2009), 7-60.

traditionally viewed, as an expression of indignation towards the judiciaries of the *ancien régime*, but as an active contribution towards a rebellion against the established power structures and privileges of his social class. In order to effectively challenge the power of the patricians, Beccaria needed to discredit the legal understanding which had thus far bestowed upon them their legitimacy. For Beccaria and his friends, this was above all a battle against the political prerogatives which had previously been assumed through the guise of legal scholarship. In order to oppose the patrician values of their parents' generation, they would need to combat the political and cultural hegemony of the *doctores juris* themselves.

The political supremacy of the Milanese patriciate had long been justified by their knowledge of the law. As far as Beccaria and Verri were concerned, such a proposition was surely an anachronism: how could the ancient tenets of legal scholarship possibly resolve the political issues of their own day? For a contemporary government, grappling primarily with the infrastructural and economic problems of finance, agriculture, sanitation and manufacturing, jurisprudence was incapable of providing solutions, managing civic life and instructing future governors. In this regard, the new science of political economy would need to replace the traditional *scientia juris*. As Verri himself wrote in 1764: 'all the affairs of Milan are entrusted to the Doctors, and yet the questions of commerce, finance and economics do not appear to me to be addressed in the works of the jurists.'<sup>40</sup> He continues:

In Milan, there are no forms of understanding beyond the practices of the jurists. Minting, crop production, sanitation, manufacturing, and commerce, all reside in the hands of the Doctors. Yet these, steeped in the writings of the Middle Ages, have no concept of the political economy, or else their idea of it is such that it would be better if they did not have any at all.<sup>41</sup>

These passages perfectly embody the disciplinary conflict raging at this time, with Verri proposing the modern and practical science of economics as a counterpoint to the ancient and scholastic *scientia juris*, which was bound almost ritualistically to tradition and was thus irrelevant to the conduct of contemporary politics. It is no coincidence that Beccaria's very first assignment in their burgeoning relationship was to compile a pamphlet on the currency of the Duchy of Milan.<sup>42</sup> Verri had asked his young friend to exercise his abilities not as a jurist, but as a mathematician (Beccaria's renown in this discipline during his studies had earned him the nickname 'little Newton'), and to intellectually engage on questions of economics rather than law.

In the following year, Verri once again turned to Beccaria for his critical reflections, this time inviting him to consider the question of Lombardy's criminal justice system. This new *libello*, drafted in just a few short months before undergoing editing and revision by Verri himself (and to a lesser extent his brother Alessandro), was given the final title of *Dei*

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<sup>40</sup> Pietro Verri, *Memorie sincere del modo col quale servii nel militare e dei miei primi progressi nel servizio politico* [ms. compiled between 1764 and 1775 from counterfeit letters predicated by a number of years], letter dated 24 January 1760, in Idem., *Scritti di argomento familiare e autobiografico*, ed. Gennaro Barbarisi, *Edizione nazionale delle opere di Pietro Verri*, vol. V (Roma, Edizioni di storia e letteratura, 2003), 89.

<sup>41</sup> Ibid., letter dated 20 December 1760, 104.

<sup>42</sup> Cesare Beccaria, *Del disordine e de' rimedi delle monete nello stato di Milano nell'anno 1762* (Lucca, 1762). This treatise proposes a mathematical method for rectifying the deformities in the local monetary system.

*delitti e delle pene*.<sup>43</sup> Under the veil of anonymity, Beccaria denounced the deficiencies of contemporary jurisprudence and the errors of forensic practices with respect to the universal principles of the right to punish. Through the lucid and scathing prose of his incessant diatribe, the criminal justice systems of his day, with all their violent and irrational tendencies, were exposed as barbaric relics of a feudal past. The impact of Beccaria's pamphlet was such that it spread far beyond its local context, subjecting instead the penal culture of the continent as a whole to the exact same scrutiny.

### **3.4. Crime, punishment and legal culture**

Although primarily concerned with the question of criminal law, *On Crimes and Punishments* can in fact be traced back to this same epistemological conflict. Through his writings, Beccaria set out the basis of a penal code which was entirely removed from the dominant legal understanding – a form of power-through-knowledge based upon a sophisticated hermeneutic and constructed around a vast array of legislative, jurisprudential, doctrinal, and customary sources which formed the complex legal structures of the *ancien régime*. The foundation of this new penal code, by contrast, had been reduced to only a single source, the law itself, established and consolidated by the sovereign alone. It is no coincidence, for instance, that the forty-seven paragraphs of the pamphlet's final edition both open and close with the word 'laws'. The entire edifice of the criminal justice system was thus reformulated around the singular rule of law: trials were to be limited solely to the application, rather than interpretation, of the law, whilst the *doctores juris* themselves were to be stripped of all authority. Within this new legislative order, moreover, there was to be no place for the notion of 'natural law', not even the *ratio scripta* of Roman law which had served the ideology of the jurists. Over time, the entire notion of customary law was to be eradicated and consigned to the aberrations of history.

In writing this text, Beccaria had not only drastically reshaped the landscape of legal understanding but – at least in the field of criminal law – had wholly transformed its epistemological foundations. Rather than relying on their own dispensation and prudence, those involved in the practice and study of criminal law were to be concerned solely with the knowledge and understanding the letter of the law. The ancient discipline of *scientia juris*, a study of cases, circumstances, interpretations and contingencies, was now devoid of any use or purpose; only an understanding of the law itself was required. For the legislator too, traditional legal culture was shown to be of no value: the implementation of penal norms and provisions did not require knowledge of current laws or the study of past practices, rather an understanding of the environment which both precedes and sustains the rule of law, that of the human mind and the history of civilization; an understanding to which Beccaria gives the name philosophy, or science of man.<sup>44</sup>

According to one of the principal teachings of this new science, the criminal is not to be considered a dreadful manifestation of avarice and selfishness, characterised by immoral and abnormal tendencies towards their own interests. In the first instance, such interests –

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<sup>43</sup> For an accurate and exemplary account of the genesis of the pamphlet, see: Gianni Francioni, *Nota al testo*, in Cesare Beccaria, *Dei delitti e delle pene*, ed. Gianni Francioni, *Edizione nazionale delle opere di Cesare Beccaria*, vol. I (Milano, Mediobanca, 1984), 217-335.

<sup>44</sup> Cf. Audegean, *La Philosophie de Beccaria*, 11-36.

broadly defined as the pursuit of pleasure and avoidance of harm – are the driving force behind all human endeavour, both legal and illegal. Moreover, this common strive towards happiness is in no way deplorable itself, as there is no evil in following one's own interests. A crime is predicated upon a range of interests which collectively govern the affairs of the human race, and is the product of a precise calculation in the mind of the perpetrator involving the expected gain, fear of punishment and likelihood of discovery resulting from one's actions. The criminal cannot be considered a deviant, but a regular person, and thus the legislator cannot take any account of social abnormality in his reflections. The criminal is no more than a calculating and egotistical individual; in other words, a man like any other. Rather than desiring all, he in fact has nothing, and therefore nothing to lose: it is a lack of perspective and the hope of impunity which disturbs and distorts his calculations.

It is not the role of the sovereign to attempt to transform human nature itself, but simply to alter the parameters of this calculation by placing the observance of the law within the best interests of the citizens. This had not been achieved within the legal structures of the *ancien régime*, which had combined the defence of traditional privilege<sup>45</sup> with the disproportionate, ineffective and unjust imposition of penalties. Such punishments, often failing to be administered at all due to their excessive severity, fostered a sense of resentment amongst the socially subordinate and economically disadvantaged, even to the extent of encouraging further criminal activity as a result.<sup>46</sup> A large proportion of crimes, Beccaria argued, were in fact attributable to the anti-egalitarian structures and punitive measures of the society in which they had been committed.

In stark contrast to the logic of penal 'terrorism', the reasoned legislator must not make provisions for those punishments which sit beyond the realm of normal human experience, but those which draw upon the sufferings of everyday life, such as the pains which stem from the labours of work. A lifetime sentence of forced labour, for instance, would lie at the furthest extreme of this new legal order, whilst torture and the death penalty – punishments which often go unenforced as they are too far removed from the norms of human experience to be executed consistently – would be abolished altogether. No crime, whether in terms of their consequences (the punishment) or their causes (interests and motives), can thus be categorised as an exception. They must not result in either extreme violence or a state of war: instead, the normal standards of civil life must remain sacrosanct, the delinquent a citizen, and his rights – especially that of his life – respected.

Beccaria adds to this attempted reform of criminal law his own particular choice of language, deliberately set against that of the jurists before him. With the curt, Attican *style coupé* of modern philosophical writings, Beccaria sought to construct a drier, more rational, transparent, and unambiguous juridical lexicon following the model of axiomatic geometry.

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<sup>45</sup> Beccaria, *On Crimes and Punishments*, chap. 21, 51: '[...] the nobility, whose privileges make up a large part of the laws of nations'; chap. 41, 103: 'The majority of the laws are mere privileges, that is to say, a tribute from everyone for the comfort of the few.'

<sup>46</sup> This argument is illustrated in two extraordinary prosopopeia, in which Beccaria speaks through a pauper driven into criminality by the death penalty: in the midst of his rational discourse the philosopher adopts the voice of an individual led astray by the violence of the State, dissuaded from respecting the law as he does not feel respected by it. Having seen how these same laws precipitate the same violence which they condemn, and 'that to deter citizens from murder, they should decree a public murder' (*ibid.*, chap. 28, 70), the pauper arrives at a loss of respect for life itself, its value having been openly debased by the State.

Indeed, the very brevity and functional language within *On Crimes and Punishments* is presented as a new literary model for future criminal law, whose clarity and simplicity nullify the interpretative powers of the individual magistrate.

#### 4. Conclusion

The objective of Beccaria's pamphlet, in short, was to divorce legal knowledge and understanding – now stripped of all value and utility – from the realm of criminal law. Beccaria's professorship in political economics, held between 1769 and 1771, provided a crucial framework for the author's polemic against the dominant legal culture of the day. This was a discipline which supplanted the traditional and anachronistic *scientia juris*, as it alone was able to provide the conceptual tools and practical understanding necessary for contemporary politics.

It is here that Beccaria's final government office serves as an appropriate point of conclusion, as during the final twenty-three years of his life the author of *On Crimes and Punishments* was entrusted with enacting the very same reforms designed to place the development of the law squarely in the hands of the sovereign legislator. By assuming these responsibilities in the guise of an Enlightenment administrator, Beccaria had completely excluded the old legal culture from the political sphere, as these responsibilities incorporated the cases, exceptions, and circumstances to which the jurists had traditionally been assigned. Legislative activity was thus entirely taken away from the jurists, as the application of the law would not require juridical training in any traditional sense, but rather a working knowledge of its norms, whilst its exceptions and particularities are to be handled by the administrators alone. The jurists – in their traditional form – had lost their voice in contemporary politics.<sup>47</sup>

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<sup>47</sup> This process can also be considered as part of the wider context of the history of political thought, but not, contrary to what it may seem, as part of the Aristotelian turn which occurred in the age of the *ragion di stato*. Two particular factors distinguish this particular development from Beccaria's criticisms of the traditional *scientia juris* (as well as those of numerous other Enlightenment authors): *a)* The aim of the political theorists was simply that of expelling legal culture from the science of government. The writers of the sixteenth and seventeenth centuries had intended to emphasize the yawning chasm which separated one from the other: the sovereign and his ministers were required to understand the art of governance, rather than the minutiae of the law. Beccaria, by contrast, expressed a fuller and more general denunciation of legal scholarship, inasmuch as he considered them of no use even in the case of criminal disputes (although not in the case of civil tribunals). *b)* It was by means of a prudential model that this prevailing school of thought had sought to discredit the *scientia juris* during the sixteenth and seventeenth centuries. However, this in turn became the very same polemical target of Beccaria's criticism, as he had always considered juridical culture as a prudential art and science. Instead, it was from a philosophical perspective that Beccaria sought to establish a legislative science with no connection whatsoever to juridical understanding, and a science of exceptions driven by political rather than juridical thought. From Beccaria's point of view, the prudential model developed during the age of the *ragion di stato* was very much a continuation of the traditional legal cultures; the Aristotelian turn had taken place *within* this culture rather than without.