RIVISTA DI
DIRITTI COMPARATI

A lesson still to be learned. The lasting modernity of Cesare Beccaria for the Italian and European legal orders*

Donatella Morana

Contents: 1. How legal systems received the thought of a "non jurist". – 2. The pillars of Beccaria's thought: a quick overview. – 3. The Italian legal order put to Beccaria's test: some problematic cases. – 4. The enforcement of guarantees by the European jurisdictions (with a number of failures).

1. How legal systems received the thought of a "non jurist"

Most of the thinkers that have built the backbones of the rule of law cannot be defined as "jurists" in the strict sense of the term. Or, more to the point, to apply this definition to them is extremely limiting, if not completely wrong, in consideration of the extent of their reflections and interests.

John Locke, Montesquieu, Thomas Jefferson, John Stuart Mill (and many others), even though many of them not "technicians of law", forged some of the theoretical instruments that are indispensable even now to those engaged in constitutional law (from a technical point of view).

Cesare Beccaria can certainly be included among these figures. His work – as noted by Arturo Carlo Jemolo – "is not the work of a jurist, but that of a sharp observer, a man who abhors blood and violence"[1]. Nevertheless, it is unthinkable for a jurist today to claim to be a scholar of criminal law, while neglecting the key points set out by Marquis Beccaria some 250 years ago. In short, these basic ideas have, in time, taken on a strictly juridical dimension. They belong to law, and not to

* L'articolo è stato sottoposto, in conformità al regolamento della Rivista, a *double-blind peer review*.

[1] A.C. Jemolo, *Introduzione* to C. Beccaria, *Dei delitti e delle pene*, Rizzoli, Milano, 1994, 7.

"affected humanitarian sentimentalism", as (contemptuously) claimed by Immanuel Kant in his *Metaphysics of Morals* of 1797[2].

The modernity of Beccaria's thought must be interpreted in a twofold sense. First of all, it is evident that if those principles are current ones, this means that they continue to represent a milestone, a term of comparison whereby to measure the degree of evolution and acceptability of the overall punitive system of a state. At the same time, their modernity means that they cannot be considered as acquired once and for all. If a medical treatment is up-to-date, that means that the illness itself is up-to-date.

After all, the epigraph at the beginning of his *Dei Delitti* (a passage taken from the *Sermones fideles* by Sir Francis Bacon[3]) makes clear that Beccaria himself was aware that those ideas would have taken time to be accepted. The point is not that these ideas are not shared theoretically, but that they are not easily translated in juridical norms. Not enough time has passed to consider all of Beccaria's theses as universal *jus receptum*. Surprisingly enough, this is also true for the legal systems of the so-called "western world", which now includes the eminent Italian scholar in its cultural pantheon.

This does not mean that, after the advent of the constitutional State, the western legal systems have been reluctant to include the main lines of Beccaria's thought among their fundamental principles (with regard to criminal law). Quite the opposite.

The works by John D. Bessler have shown the influence of Beccaria's thought on the American Constitution very accurately[4]. The

[2] I. Kant, *Metafisica dei costumi* (1797), Laterza, Bari, 2001,168: "Tutti coloro che hanno commesso un assassinio o che l'hanno ordinato o che vi hanno cooperato, debbono, per quanti siano, subire la pena di morte [...] Invece il marchese Beccaria, per un affettato sentimentalismo umanitario, sostiene di contro a ciò la illegalità di ogni pena di morte".

[3] "In rebus quibuscumque difficilioribus non expectandum, ut quis simul, et serat, et metat, sed praeparatione opus est, ut per gradus maturescant" (XLV dei *Sermones fideles sive Interiora rerum*, also known as *Saggi*, 1625 "In everything, and above all in most difficutl ones, it is not possible to seed and reap in the same time, it is on the contrary necessary a slow preparation, for them to ripen gradually".

[4] See J.D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, in *Northwestern Journal of Law & Social Policy*, vol. 4, 2009; J.D. Bessler, *The Birth of American Law: an Italian Philosopher*

same can be said for the Italian Constitution of 1947. Piero Calamandrei, member of the Italian Constituent Assembly, highlighted the direct link between Beccaria's ideas and some articles of the Constitution: "art. 25, No punishment may be inflicted except by virtue of a law in force at the time the offence was committed; art. 13, The law shall establish the maximum duration of pre-trial detention; art. 27, A defendant shall be considered not guilty until a final sentence has been passed; art. 13, 4, Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished; art. 27, 4, which prohibits the death penalty"[5].

Nevertheless, in the reality of many constitutional States, sporadic or structural aspects remain, which demonstrate how Beccaria's lesson has not been completely learned; for this reason we must insist on its up-to-dateness, rather than simply collocating it among the noble relics of the history of thought.

2. The pillars of Beccaria's thought: a quick overview.

The questions tackled by Beccaria in his small book are many. Next to his universally known standpoint against torture and the death penalty, other issues are dealt with, which are equally central for criminal law in the constitutional State. Here is a short list of them.

The quality and entity of the punishments must be fixed by the law and the judge should not be able to change them of his own will[6]; it is an independent judge who must apply the punishment prescribed in a

and the American Revolution, Durham, 2014; J.D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, in *Mitchell Hamline Law Journal of Public Policy and Practice*, vol. 37, 2016.

[5] P. Calamandrei, *Avvertenza* in C. Beccaria, *Dei delitti e delle pene*, Le Monnier, Firenze, 1950.

[6] § III *Conseguenze*: "Le sole leggi possono decretar le pene su i delitti, e quest'autorità non può risedere che presso il legislatore, che rappresenta tutta la società unita per un contratto sociale; nessun magistrato (che è parte di società) può con giustizia infligger pene contro ad un altro membro della società medesima. Ma una pena accresciuta al di là dal limite fissato dalle leggi è la pena giusta più un'altra pena; dunque non può un magistrato, sotto qualunque pretesto di zelo o di ben pubblico, accrescere la pena stabilita ad un delinquente cittadino".

general way by the law, not the power that approved the law[7]; the judge's task consists in ascertaining whether or not a certain fact has been committed by the defendant[8]; laws must be formulated clearly and comprehensibly for all those who must respect them[9]; one must resort to criminal law only when a public good worthy of protection is damaged; the punishment ought to be graded in proportion to the gravity of the offence[10]; a person must be punished for whatever crime she has committed and not for her intentions[11]; the prosecution must be public so that the accused may defend himself[12]; punishment must be the same for

[7] § III *Conseguenze*: "Il sovrano, che rappresenta la società medesima, non può formare che leggi generali che obblighino tutti i membri, ma non già giudicare che uno abbia violato il contratto sociale, poiché allora la nazione si dividerebbe in due parti, una rappresentata dal sovrano, che asserisce la violazione del contratto, e l'altra dall'accusato, che la nega. Egli è dunque necessario che un terzo giudichi della verità del fatto".

[8] § IV *Interpretazione delle leggi*: "In ogni delitto si deve fare dal giudice un sillogismo perfetto: la maggiore dev'essere la legge generale, la minore l'azione conforme o no alla legge, la conseguenza la libertà o la pena. Quando il giudice sia costretto, o voglia fare anche soli due sillogismi, si apre la porta all'incertezza".

[9] § V *Oscurità delle leggi*: "Quanto maggiore sarà il numero di quelli che intenderanno e avranno fralle mani il sacro codice delle leggi, tanto men frequenti saranno i delitti, perché non v'ha dubbio che l'ignoranza e l'incertezza delle pene aiutino l'eloquenza delle passioni".

[10] § VI *Proporzione fra i delitti e le pene*: "Vi deve essere una proporzione fra i delitti e le pene. [...] Data la necessità della riunione degli uomini, dati i patti, che necessariamente risultano dalla opposizione medesima degl'interessi privati, trovasi una scala di disordini, dei quali il primo grado consiste in quelli che distruggono immediatamente la società, e l'ultimo nella minima ingiustizia possibile fatta ai privati membri di essa. Tra questi estremi sono comprese tutte le azioni opposte al ben pubblico, che chiamansi delitti, e tutte vanno, per gradi insensibili, decrescendo dal più sublime al più infimo. [...] Qualunque azione non compresa tra i due sovraccennati limiti non può essere chiamata delitto, o punita come tale, se non da coloro che vi trovano il loro interesse nel così chiamarla".

[11] § VII *Errori nelle misure delle pene*: "Le precedenti riflessioni mi danno il diritto di asserire che l'unica e vera misura dei delitti è il danno fatto alla nazione, e però errarono coloro che credettero vera misura dei delitti l'intenzione di chi gli commette".

[12] § XV *Accuse segrete*: "Chi può difendersi dalla calunnia quand'ella è armata dal più forte scudo della tirannia, il segreto? Qual sorta di governo è mai quella ove chi regge sospetta in ogni suo suddito un nemico ed è costretto per il pubblico riposo di toglierlo a ciascuno?".

aristocrats and other people[13]; cruel punishment are useless: on the contrary, one must guaranteed that sentences, even if milder, are actually served[14].

The above is just a short, incomplete list of the theses defended in *Dei delitti e delle pene*. No one denies that these points are fundamental for the constitutional State. But despite this overall sharing of opinion which is always formally reiterated, one can come across circumstances that show how the temptation to distance oneself from Beccaria's thought has not been completely eradicated. Details, perhaps, which are nevertheless sufficient to understand that the dialectic between the inalienable guarantees of the individual and the exercise of public authority – which is the essence of Beccaria's thought – cannot (yet) be considered (and may never be considered) superfluous or stale. Not even in the legal systems that lay claim, and rightly so, to their conformity to the rule of law.

It may be useful to mention a number of episodes that recently concerned both the Italian legal order and the broader European order in the domain of the protection of rights.

3. The Italian legal order put to Beccaria's test: some problematic cases.

The first case concerns the Italian legal order and is related to torture. It is a well known fact that Beccaria fought vigorously against torture as a procedural instrument to obtain the confession from a defendant of a crime for which he is being investigated (the revealing of other still unknown crimes or the reporting of possible accomplices).

[13] § XXI *Pene dei nobili*: "Io mi ristringerò alle sole pene dovute a questo rango, asserendo che esser debbono le medesime pel primo e per l'ultimo cittadino".

[14] § XXVII *Dolcezza delle pene*: "Uno dei più gran freni dei delitti non è la crudeltà delle pene, ma l'infallibilità di esse, e per conseguenza la vigilanza dei magistrati, e quella severità di un giudice inesorabile, che, per essere un'utile virtù, dev'essere accompagnata da una dolce legislazione. La certezza di un castigo, benché moderato, farà sempre una maggiore impressione che non il timore di un altro più terribile, unito colla speranza dell'impunità; perché i mali, anche minimi, quando son certi, spaventano sempre gli animi umani, e la speranza, dono celeste, che sovente ci tien luogo di tutto, ne allontana sempre l'idea dei maggiori".

However, the *logic* underlying his reasoning is more general and just as evident, and emerges from the entire work: the repudiation of any form of torture and violence on persons who, condemned according to the law, are serving their sentence.

In the Italian republican legal order the use of torture has always been excluded as an instrument to obtain the defendant's confession.

The Constitution however – as I said previously – goes beyond this: it considers illicit any form of physical and moral violence on persons who, deprived of their freedom, are under State control and entrusted to its officers. The Constitution is certainly not an obstacle to introducing a specific offence for public officers who use violence on people under their supervision. And yet for many decades there was a lack of this type of norm in the Italian legal system. This is all the more surprising if one considers that in 1988 the Italian Republic ratified the *Convention against torture and other cruel*, *inhuman or degrading treatment or punishment* drafted by the UN in 1984.

Meanwhile, ECHR's case-law contributed to raise political awareness about the necessity of a specific criminal regulation of torture: I refer to (i) the case *Cestaro v. Italy* (2015), where the Court of Strasbourg gave its interpretation of the controversial facts happened during the G8 meeting of Genova in 2001. The violence committed by the police, already condemned by internal Courts, were defined as torture by the European Court[15]; and to (ii) the case *Nasr e Ghali c. Italia* (2016), where the Court of Strasbourg confirmed, even in respect to Italy, that the extraordinary rendition implies, among other breaches, a violation of the ban on torture expressed in the Convention (art. 3)[16].

Only in July of this year did the Italian Parliament finally approve a bill on torture[17], introducing the relative offence into the penal code. Nonetheless, contrary to what is laid down in the UN Convention (and to what derives from the tradition going back to Beccaria), torture has not been represented as a crime typical of public officials: in fact, the norm punishes the conduct of "anyone" who, with violence or serious threats or acting with cruelty, causes physical suffering or a verifiable mental

[15] ECtHR, *Centaro v. Italy*, 7 April 2015 (6884/11).

[16] ECtHR, *Nasr e Ghali c. Italia*, 23 February 2016 (44883/09).

[17] Act n. 110/2017 (see, among others, G. Serges, *Il diritto a non subire tortura. Ovvero: il diritto di libertà dalla tortura*, in M. Ruotolo – M. Talini (a cura di), *I diritti dei detenuti nel sistema costituzionale*, Es, Napoli, 2017.

trauma to a person deprived of personal freedom", provided that "this is committed by means of different types of conduct".

What is puzzling about this provision is above all the omission on the part of the legislator to stress the particular nature of torture as a crime of "public authority", crime typical of those working as representatives of the State: being a public official, in fact, is only an aggravating factor which entails a small increase of the punishment (two years).

Furthermore, it is not clear for what reason the conduct can only constitute a crime if it is repeated, almost as if torture could not be the product of one single act. Moreover, the provision is further watered down by the ambiguous specification that the aggravating factor is not applied "if the suffering from torture derives solely from the execution of legitimate privative or restrictive measures of rights".

Without going into detail, the long delay to act and the ambiguity of the outcome show how also the Italian legal system, which is definitely a rule of law, has had too many doubts with respect to a real "*pièce de résistance*" of Beccaria's thought.

A second important case concerns the statute of limitations in the Italian legal order. This is an issue that has also been the subject of a recent intervention by Parliament, which last June extended the period with regard to crimes linked to corruption, bringing them to a maximum of 18 years.

The statute of limitations to crimes is actually an argument that in the last twenty years has often been at the centre of public and parliamentary debate. It is moreover a question that is strictly linked to that of the duration of trials. The time required to reach a final criminal verdict in Italy is on average very long: more than 5 years from the start of the proceedings[18]; and of course the period separating the moment of the alleged offence from that in which the final verdict is given can be longer, as there could be a significant lapse of time between the alleged crime and the start of the proceeding.

The lengthening of the limitation periods thus often meets the objective of avoiding certain crimes being unpunished. However, the scope of the statute of limitations, above all if combined with the excessive duration of the trial, collides head-on with Beccaria's

[18] Precisely, 1.932 days, based on the *Relazione del Primo Presidente della Corte di cassazione – Inaugurazione anno giudiziario 2016* (available at cortedicassazione.it).

observations relative to the need for a sufficiently short time between crime and punishment so as to be able to consider the second as the immediate consequence of the first; instead the longer this time becomes, the more the punishment becomes ineffective and, ultimately, of little use[19]. The limitation period can be long – he adds – only in relation to more serious crimes (the horrific crimes, such as murder); for the others, "with the diminishing of the harm of impunity, the limitation period must decrease"[20]. Thus, from this point of view too, Beccaria's assimilation into the Italian legal order still seems to be incomplete.

4. The enforcement of guarantees by the European jurisdictions (with a number of failures)

The problem of the excessive duration of trials in Italy is certainly not recent.

In the last decades they have been even longer, and in the 1980s and 90s this led to a high number of condemnations of the Italian Republic by the European Court of Human Rights (the so-called Court of Strasbourg), the jurisdictional organ set up by the European Convention on Human Rights of 1950 (CEDU), of which Italy is a signatory[21]. A trial of unreasonable duration breaches art. 6 of the Convention. In an attempt to remedy, a law was introduced at the beginning of 2000 (Act No. 89/2001, the so-called "Pinto law") which prescribes a fair compensation for those who have sustained damage from an unreasonably long trial; furthermore, even before this, with a constitutional review (Const. Act No. 2/1999) the principle of reasonable duration of the trial was introduced into the Constitution in art. 111. There is no doubt that compensation represents a form of solace, but alone cannot certainly eliminate the problem, which in recent years has slightly improved but is far from being resolved.

---

[19] § XIX *Prontezza della pena*.

[20] § XXX *Processi e prescrizione*.

[21] In the rulings on the cases *A.P.*, *Di Mauro*, *Ferrari*, *Bottazzi* of 28th July 1999, the ECHR said that lengthiness in criminal trials were a usual practice, stating that such a practice should be considered as incompatible with the Convention.

The same Court of Strasbourg has recently condemned Italy again owing to the violation of a further principle that stems from Beccaria's work and which finds its consecration in the Convention as well as in the Italian Constitution: the principle which prohibits punishment contrary to the sense of humanity[22]. The violation of the principle consisted in repeated cases of prison overcrowding. The Court held that the overcrowding of the living environment of prisoners can cause unacceptable suffering, such as to be in conflict with art. 3 of the Convention, according to which "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*". According to the Court, imprisonment cannot be considered tolerable when living space is under 3 sqm per person. Also in this case, the problem of prison overcrowding improved slightly after the rulings but still remains unsolved.

In our last case, protagonist is the European Court of Justice (also known as Court of Luxembourg), the highest jurisdictional body of the European Union. This is the so-called "Taricco case".

Without going into details, the Taricco ruling concerns a case of tax fraud damaging the European Union. The Court of Justice basically asked an Italian criminal judge not to apply the limitation period regime, which is prescribed by the Italian law for this type of crime, as such application bars the inflicting of effective and dissuading sanctions in a "considerable number of cases" of serious fraud that affect the financial interests of the European Union (see art. 325 TFEU). In a nutshell, one can say that the Court asked the judge to apply norms that were different from those established by the Italian criminal law for cases of that type. In the perspective of Italian criminal law tradition, statutory limitations are essential elements of the criminal provision, therefore they must be applied respecting the principle of non-retroactivity; whereas for EU law, as well as for the majority of member States' law, statutory limitations must be considered as mere procedural norms, therefore without limit to their retroactive effect.

The ruling stirred the reaction of the Italian Constitutional Court, under an *incidenter* appeal raised by the Court of Cassazione. In a preliminary reference, the Italian Constitutional Court asked the Court of

[22] It is the case of the rulings in *Sulejmanovic* (16th July 2009) and *Torreggiani* (8th January 2013).

Justice to specify the contents of its ruling in more detail[23]. The Constitutional Court furthermore let the interpreters understand that if the ruling of the Court of Justice were confirmed, it could not be carried out insofar it violates an overriding principle of the Italian constitutional order.

At the moment we are still waiting to know the answer of the European Union's judge. The matter is however revealing and shows that the European courts would also benefit from rereading *On crimes and punishments*. The Court in fact is on collision course with Beccaria's principle whereby the criminal judge must not implement rules on penalty that are different from those set down by the law[24].

Abstract: *Most of the thinkers that have built the backbones of the rule of law cannot be defined as "jurists" in the strict sense of the term. Or, more to the point, to apply this definition to them is extremely limiting, if not completely wrong, in consideration of the extent of their reflections and interests. John Locke, Montesquieu, Thomas Jefferson, John Stuart Mill (and many others), even though many of them not "technicians of law", forged some of the theoretical instruments that are indispensable even now to those engaged in constitutional law (from a technical point of view). Cesare Beccaria can certainly be included among these figures.After the advent of the constitutional State, western legal systems have been keen to include the main lines of Beccaria's thought among their fundamental principles (with regard to criminal law). Nevertheless, in the reality of many constitutional States, sporadic or structural aspects remain, which demonstrate how Beccaria's lesson has not been completely learned; for this reason we must insist on its up-to-dateness, rather than simply collocating it among the noble relics of the history of thought.*

Keywords: Cesare Beccaria; rule of law; criminal law; constitutional state.

[23] Ordinance n. 24/2017.

[24] ECJ, 8th September 2015 (C-105/14, *Taricco*). On the "Taricco case" and its legal implications, see A. Bernardi, C. Cupelli (a cura di), *Il caso* Taricco *e il dialogo tra le Corti*, Jovene, Napoli, 2017

Donatella Morana, Full Professor of Constitutional Law at the University of Rome "Tor Vergata", morana@uniroma2.it

Paper presented at the Conference *"Constitution Day"*, Pittsburgh, 15.9.2017.