

<http://dx.doi.org/10.16926/fil.2016.13.03>

Dawid DZIURKOWSKI
Jan Długosz University in Częstochowa

Cesare Beccaria: Utilitarianism and the Capital Punishment

Summary

Cesare Beccaria initiated a new outlook on penal law, including the death penalty. In his opinion, deprivation of human life by state authorities during the reign of peace should be prohibited because it does not produce any utility. He admitted, however, two exceptions from the above rule. A sentence to death can be justified 1) if an individual, even when deprived of his liberty, still has enough power and connections to endanger the security of the nation, but even in this case it is only necessary when a nation is on the verge of recovering or losing its liberty and 2) in the situation of anarchy. Moreover, the Italian philosopher advocated just punishment, which can be such only if it does not exceed the degree of severity that is sufficient to deter others from committing crimes. It is evident that the Italian lawyer and political writer grounded his whole philosophy of repressive sanctions on the utilitarian conception of penal law, redefining at the same time a justice-based (retributive, compensatory) approach to criminal punishment, retaining within it a limited function of guilt.

Beccaria represented a clearly defined standpoint. Considering, however, the conception of utilitarianism itself in terms of its attitude to the death penalty, we come to the conclusion that our approval or disapproval of capital punishment depends on the answer to the question whether an execution of any particular criminal will be useful, indifferent or criminogenic for other individuals.

Keywords: capital punishment, utilitarianism, life, law, Beccaria.

It is not by mere coincidence that this paper is published in *Zeszyty Filozofów*, since the approval or disapproval of the death penalty, from the utilitarian perspective, falls within the scope of the philosophy of law. The term ‘utilitarian’ is etymologically derived from the Latin word *utilis*, meaning “useful” and this is how it should be understood. It is also sometimes defined as a synonym of the word ‘proper’. Anetta Breczko defines the notion of utilitarianism as: “a set of beliefs (presented within the framework of normative ethics) de-

fining the principles of correct conduct based on the thesis that they encompass other people, or more broadly, all creatures capable of suffering (*sentient beings*)” (Breczko 2008, 72).

The most famous representative of utilitarianism in modern history, openly disapproving of capital punishment, was Cesare Beccaria (1738–1794), an 18th century Italian lawyer and political writer¹. This paper will examine Cesare Beccaria’s views of the death penalty in terms of utilitarianism. Beccaria advocated his ideas at a significant period in the history of our continent, a time when many trends and schools of thought were emerging, demanding profound reform towards the functioning of the state. Some voices emphasized the need for liberalization of the penal law, which subsequently led to the appearance of the first serious abolitionist movements, whose “father”, is considered to be Beccaria².

Beccaria’s views on capital punishment have been repeatedly described; each time the analysis has been based on the theses explained in his famous book *On Crimes and Punishments*. It is not intended to repeat here the theses which directly express the attitude of the Italian philosopher towards the death penalty, but rather to draw attention to the plane on which he based his ideas. This paper therefore will deal only with the philosophical justification of Beccaria’s condemnation of the death penalty from the perspective of utilitarianism.

Throughout his work, Beccaria developed his position by appealing to the philosophical theory of a social contract. In the introduction to his most known treatise Beccaria wrote: “Laws are the terms by which independent and isolated [«osamieni» - in the first Polish translation, meaning ‘lone’] men united to form a society once they had tired of living in a perpetual state of war, where the enjoyment of liberty was rendered useless by the uncertainty of its preservation. They sacrificed a portion of this liberty so that they could enjoy the remainder in security and peace” (Beccaria 1959, 54–55). It is clear at first glance that this is a strictly utilitarian idea (cf. Włoch 2014, 77). Mankind waived a part of its freedom solely in order to be able to enjoy the remaining part in security and peace. According to Beccaria, people made this choice only because such a solution seemed more viable and rewarding.

Issues of security and freedom have been a matter for dispute in European cultural circles for centuries and has generally been understood as the absence of

¹ Cesare Beccaria, also known as Cesare Bonesana, Marquis of Beccaria, marchese di Beccaria. Born Milan is known mainly for his disapproval of the existing system of penal law. Moreover, he advocated many legal principles, progressive for his times, such as: “no crime without a law (nullum crimen sine lege)”, “no penalty without a law (nulla poena sine lege)” etc. (See: Chojnicka, Olszewski 2004, 121).

² Bronisław Bartusiak defines Beccaria’s views as moderate abolitionism (cf. Bartusiak 2011, 58). One cannot disagree with this statement, but only if Beccaria’s philosophy is considered from the contemporary point of view however, judging from the 18th century perspective, Beccaria was a bold opponent of capital punishment.

threat and danger. Already in the 18th century, security was seen as a value that, in Beccaria's opinion, was favoured by societies over freedom, which – according to this writer – was understood by the Italian philosopher as an unlimited right to decide upon one's own actions. It can be implied that Beccaria's ideas applied to the population within the confines of the Latin civilization.

According to Beccaria, life is the most valuable good for a human being. Laws, however, are a measure of human liberty given up for the sake of a greater security. Therefore, Beccaria maintains that in sacrificing the least possible portion of its liberty, mankind does not give up its greatest good of all – life itself. Life of an incomparably greater value than freedom and security. Moreover, Beccaria adds that man is not the master of his own life; he therefore cannot surrender it up to another person or to the whole society (Beccaria 1959, 142–143).

The argument itself that human life is the greatest good is a matter of controversy. Based on this assumption, doubts should be cast on the wordings of many past and present military oaths which explicitly state that there are values for which, if necessary, soldiers are obliged to give up their lives for.

Beccaria's theory on the death penalty was extremely eccentric in the 18th century. It cannot be denied that he did formulate many interesting ideas, but his utilitarian justification for the condemnation of the death penalty can certainly be called into question, mainly from the logical point of view. Beccaria disagrees with the legal status of the death penalty but, on the other hand, in the same paragraph justifies the administration of this penalty in two exceptional cases (Beccaria 1959, 143–144). Let us adopt for a moment his assumption that capital punishment is not a law. The question immediately arises, whether something that is not a law can be applied at all (even in exceptional cases) by state authorities? The answer is obvious. Anything that is not a law but is applied by state authorities towards its citizens – is lawlessness. Breach of rules cannot be approved by anyone in civilised societies. Exceptions to the strict adherence to established norms may be those actions undertaken for the state and thus serving a higher necessity, however such actions are countertypes and fall within the limits of legal conduct. People living in an organised state should obey its laws, anarchy otherwise may prevail, which has no utility at all, either for an individual or the whole society.

Stanisław Salmonowicz claims that with great reluctance Beccaria accepted the death penalty, considering capital punishment as justified solely in two exceptional cases. The first situation, when a sentence to death can be justified, according to Beccaria, is when an individual, even when deprived of his liberty, still has enough power and connections to endanger the security of the nation, but even in this case it is only necessary when a nation is on the verge of recovering of losing its liberty. Moreover, Beccaria admitted the possibility of using the death penalty under the conditions of anarchy, which also provokes controversy. Beccaria argues that the reason for the admissibility of the death penalty,

while with state of anarchy, is justified due to the society's reversion to the state before the social contract, where interpersonal relationships can be described with by the Latin sentence: *homo homini lupus est* (Salmonowicz 1995, 15). For a proper analysis of Beccaria's utilitarian concept of the relationship between the political system of the state versus penal law, it is necessary to understand the term "anarchy" and to imagine the consequences of imposing and implementing the death penalty during the state of anarchy.

The word *anarchy* comes from the ancient Greek ἀναρχία, which is translated as "lack of a leader". The state of anarchy can, therefore, be defined as a lack of formal authority in a particular territory. Considering that a state cannot exist without law, but law can exist without a state, it should be inferred that the death penalty could be implemented according to customary law. Historical experience shows, however, that it would be extremely dangerous and quite often very unjust. Hence, Beccaria's disapproval of the death penalty within the existing structures of the state and the belief that the most severe sanction could exist only in societies where anarchy prevails is particularly dangerous.

In his book *On Crimes and Punishments* Beccaria wrote: "The punishment of death is pernicious to society, from the example of barbarity it affords. If the passions, or the necessity of war, have taught men to shed the blood of their fellow creatures, the laws, which are intended to moderate the ferocity of mankind, should not increase it by examples of barbarity, the more horrible as this punishment is usually attended with formal pageantry" (Beccaria 1959, 151). It can be inferred from the above quotation that the Italian lawyer believed that the death penalty not only fails to deter potential criminals, but it is also criminogenic. If Beccaria is right, then it should be stated that the death penalty is non-utilitarian in respect of its general preventive function. The Italian lawyer probably based his knowledge to a large extent on intuition and not with the derivation from scientific research into capital punishment, for in the 18th century simply no such research had been conducted.

The criminogenic uselessness of the existence of the death penalty includes also its harmful effect on society, as this repressive sanction instead of reducing the number of crimes, increases that number. It is an extremely controversial view, as logic tells us that implementation of other penalties (e.g. a fine or deprivation of liberty) by the state would also increase the number of offences. Opponents of Beccaria's utilitarian philosophy and other similar utilitarian ideas point out that the reasoning should rather start from the correct understanding of a criminal penalty. They maintain that such a penalty is always a reaction, and hence always a consequence of a prohibited act. Therefore, it is not intended to give an example to follow, but to administer justice understood as a particular hardship, without excluding any of its significant and immanent preventive aspects (resocialisation, isolation, deterrence etc.).

The aims of compensatory acts of justice and utility of a criminal penalty are closely related but not the same. One can imagine a repressive sanction which is an aim per se, objectively compensating for the harm done. On the other hand, utility of a punishment can be achieved by its excessive severity e.g. by effectively deterring potential offenders. Such a disproportion between the punishment and the crime committed makes from a repressive sanction – an unjust punishment in terms of its compensatory effect.

Wojciech Włoch concludes that Beccaria combines the principle of maximisation of happiness with individualisation of the punishment. The argumentation is based on the fact that a double system of punishment should exist in the state. The first is related to the legislator that defines the recipients, dispositions and sanctions while, the other is related to the role of the courts whose task it is to establish whether a person committed a prohibited act. The legislator should adopt the principle of utilitarianism (utility) as a criterion of its activity, whereas the courts – the principle of guilt, i.e. responsibility of the individual for the committed illegal act (Włoch 2014, 80).

Włoch adopts the strong assumption that Beccaria rejected the death penalty because he regarded deprivation of life as an evil in itself (Włoch 2014, 87). According to this writer, the Italian lawyer disapproved of capital punishment mainly out of utilitarian considerations and any justice-related issues (retribution, compensation) were only complementary and a consequence of the prevailing utilitarian philosophy.

Tomasz Tabaszewski rightly points out that Beccaria's views are dominated by the approval of the individual preventive aim of criminal punishment, with the emphasis on a limited function of guilt, maintaining the proportionality of the severity of punishment to the committed crime. Furthermore, Tabaszewski believes that an important element in Beccaria's philosophy is the general preventive effect of criminal punishment in line with the utilitarian construction based on anthropological assumptions taken from Jeremy Bentham's philosophy (Tabaszewski 2012, 126).

On the other hand, Marek Kulik argues that Beccaria points out the social origins of crime, seeing inter alia that breaking social norms is not always the result of the perpetrator's ill will but can have other causes e.g. social conditions (Kulik 2011, 50). The Italian lawyer was in a sense a forerunner of the sociological school of penal law, which explicitly emphasizes various social factors, positively correlated with an increase in the number of committed prohibited acts. Departure from fundamental assumptions of the classical school of penal law results – according to this writer – in a gradual decrease in the use of the death penalty. Although Beccaria condemned the death penalty at many levels and his beliefs were exceptional in those days, the fact that he pointed out social factors which can have an influence on the commission of crimes is a direct way of diminishing an individual's guilt and responsibility for the committed prohibited

act. In such a situation state authorities are obliged to gradually to give up criminal punishment in favour of preventive measures.

The next issue concerns the possibility of the sacrifice of part of one's own liberty for the sake of security. The modern right to freedom is one of universal, inherent and inalienable human rights, just as is the right to life, however, with one difference: guaranteeing the right to life is a *sine qua non* condition of the guarantee of other human rights. The right to life is not, therefore, equal to the right to freedom, especially if we consider it in the context of the death penalty (cf. Dziurkowski 2015, 189–198). Advocating his idea of the voluntary sacrifice of a portion of human liberty, Beccaria probably meant legal and actual limitation of individual freedom for the sake of guaranteeing security by the state, with mutual consent. That social contract was concluded by way of evolution.

The above issue will always remain a matter of dispute between liberals and proponents of greater intervention of the state into the life of individual citizens. However, a vast majority of the society will agree that the system of penal law and hence the issue of regulating or abolition of the death penalty is an obligation of every state. Even if we adopt anarchist assumptions, the issue of punishment by the death penalty will still remain to be resolved.

Beccaria was an abolitionist but not all utilitarians showed disapproval of the ultimate punishment. Some, for instance John Stuart Mill or Gary Stanley Becker, were clearly in favour of maintaining capital punishment in the legal systems of the states in which they lived.

The Polish philosopher, Piotr Bartula, argues that the utilitarian doctrine can also be used to advocate the maintenance of the death penalty. The execution of a murderer brings a benefit to the society by finally excluding the possibility of his further relapse into crime. Bartula writes in addition, that the above argument can however, be regarded as inappropriate because it is certain that not all murderers will commit their crime again. The Polish philosopher adds that in order to prevent any relapse into crime by some criminals, all of them should be executed, which would in turn be a barbarian act (Bartula 2007, 22).

The dispute among utilitarians over the possibility of imposing and implementing the death penalty does not seem to lead to any final resolution. All discussions boils down to an attempt to answer the question whether an execution of a particular criminal would be useful, indifferent or criminogenic to other individuals?

Bibliography

- Bartula P. (2007), *Kara śmierci. Powracający dylemat*, Wydawnictwo ARCANA, Kraków.
- Bartusiak B. (2011), *Kara śmierci w świetle sporu o racjonalizację kary*, Wydawnictwo C.H. Beck, Warszawa.
- Beccaria C. (1959), *O przestępstwach i karach*, przeł. E.S. Rappaport, Wydawnictwo Prawnicze, Warszawa.
- Breczko A. (2008), *Świeckie ujęcia relacji między autonomią jednostki a granicami ingerencji państwa w warunkach postępu biotechnologicznego*, [w:] *Jednostka a państwo. Na przestrzeni wieków*, J. Radwanowicz-Wanczewska, P. Niczyporuk, K. Kuźmich (red.), Wydawnictwo Temida 2, Białystok, 64–82.
- Chojnicka K., Olszewski H. (2004), *Historia doktryn politycznych i prawnych*, Ars boni et aequi, Poznań.
- Dziurkowski D. (2015), *Prawno-filozoficzny problem możliwości wykonywania kary śmierci w kontekście prawa do życia w świetle współczesnych dokumentów międzynarodowych*, [w:] R. Miszczyński (red.), „Prace Naukowe Akademii im. Jana Długosza w Częstochowie. Filozofia” 12, Wydawnictwo im. Stanisława Podobińskiego Akademii im. Jana Długosza w Częstochowie, Częstochowa, 189–198; <http://dx.doi.org/10.16926/fil.2015.12.12>.
- Kulik M. (2011), *Historyczny rozwój prawa karnego*, [w:] M. Mozgawa (red. nauk.), *Prawo karne materialne. Część ogólna*, 3 wydanie, Wolters Kluwer bussiness, Warszawa, 46–60.
- Salmonowicz S. (1995), *Cesare Beccaria (1738–1794). Sylwetka i dzieło*, „Analecta” 2/4(8), 6–27.
- Tabaszewski T. (2012), *Kara śmierci. Problem etycznej dopuszczalności sankcji głównej za morderstwo*, Wydawnictwo C.H. Beck, Warszawa.
- Włoch W. (2014), *Problem kary śmierci jako elementu sprawiedliwego ustroju w doktrynie Cesare Beccari*, [w:] Z. Witkowski, A. Bień-Kacała (red.), *Toruńskie studia polsko-włoskie X – Studipolacco-italiani di Toruń X*, Uniwersytet Mikołaja Kopernika, Toruń, 75–88; <http://dx.doi.org/10.12775/TSP-W.2014.004>.

Cesare Beccaria: utylitaryzm a kara śmierci

Streszczenie

Cesare Beccaria zapoczątkował nowy sposób patrzenia na prawo karne, w tym i karę śmierci. Jego zdaniem, pozbawianie ludzi życia przez organy władzy państwowej w warunkach niezakłóconego spokoju powinno być zabronione, ponieważ nie przynosi żadnego pożytku. Niemniej jednak dopuszczał dwa wyjątki od powyższej reguły. Skazanie na śmierć człowieka można usprawiedliwić: 1) kiedy dana jednostka po pozbawieniu jej wolności nadal posiada znaczące wpływy za-

grożące bezpieczeństwu państwa lub wtedy, gdy naród traci albo odzyskuje wolność, oraz 2) w sytuacji, gdy mamy do czynienia ze stanem anarchii. Ponadto opowiadał się za sprawiedliwą karą, która może taką być wyłącznie, gdy nie będzie przekraczała miary surowości odpowiedniej do powstrzymania ludzi od popełniania przestępstw. Widać wyraźnie, że włoski prawnik i pisarz polityczny całą swoją filozofię sankcji represyjnych opierał na utylitarystycznej koncepcji prawa karnego, przy jednoczesnym redefiniowaniu sprawiedliwościowego (retrybucyjnego, wyrównawczego) ujęcia kary kryminalnej, zachowując w niej limitowaną funkcję winy.

Beccaria prezentował jasno zadeklarowane stanowisko. Niemniej jednak, rozpatrując samą koncepcję utylitaryzmu pod kątem jej relacji do kwestii karania śmiercią, dochodzimy do wniosku, że nasza aprobata bądź dezaprobata względem kary głównej zależy od odpowiedzi na pytanie, czy stracenie danego zbrodniarza będzie dla innych jednostek użyteczne, indyferentne, czy kryminogenne?

Słowa kluczowe: kara śmierci, utylitaryzm, życie, prawo, Beccaria.