‘Public Enemy’? Difficulties in Rousseau’s Theory of Punishment

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Abstract

This article focuses on references to the issue of punishment disseminated in the *Social Contract*. Through the analysis and contextualization of these references, it aims primarily to frame Rousseau’s theory of punishment within the broader context of his political theory. It focuses in particular on the apparent tension between conceiving the criminal as a citizen on the one hand, and as a public enemy, external to the State and to the legal guarantees reserved to its members, on the other. Finally, it attempts to highlight the underlying coherence of Rousseau’s discussion by showing that not just any criminal is a ‘public enemy’, but only the political criminal, that is, the usurper or the despot.

Punishment is certainly a peripheral subject in the *Social Contract*; it is very quickly discussed in just two contexts and does not reappear except in passing in a handful of passages. Its marginality, however, does not prevent it from challenging some fundamental elements of Rousseau’s theory. In fact, Rousseau’s treatment of the right/duty to punish raises questions both for the central problem of the essence of the State and for the problem, no less crucial, of the codependence of the apparently opposed elements of force and law, obedience and freedom, general and particular will, legislative and executive power. Moreover, considering the moral presuppositions of punishment reveals both the friction between two potentially conflicting conceptions of it – one of a legal-moral nature, the other of a so-called ‘political’ nature – and the tension between the absoluteness of sovereign power and the legitimacy of resistance. To test the significance and coherence of Rousseau’s discussion of punishment, it may then be useful to start from a passage taken from the concluding chapter of Book II, in which different types of laws are defined.

Leaving aside custom, which Rousseau calls the ‘most important of all’ kinds of law, there are three types of law listed in the *Contract*: political laws, which ‘constitute the form of government’; ‘civil laws’, which regulate the relations of citizens with each other and with the State; and ‘criminal laws’, which regulate the relations between ‘disobedience and penalty’, and therefore

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represent 'not so much a particular type of law as a sanction for all others', that is, the sanction of political laws and civil laws.[1] There is something enigmatic about this definition of criminal law.[2] What kind of law could by definition not be 'a particular kind of law'? The enigma deepens as soon as we consider that these laws are meant to regulate the relationship between 'disobedience and punishment', whereas for Rousseau 'the essence of the body politic lies in the harmony of obedience and freedom'.[3] The opposition both between obedience and disobedience and between freedom and punishment allows us to perceive an invisible link between the essence of the State and punishment, but it does not yet allow us to clarify the nature of this link. Certainly, one can suppose that if disobedience is opposed to obedience, then punishment, as a repression of disobedience, fulfils the function of safeguarding the integrity of the State, of promoting the obedience which constitutes its essence. But how could punishment consisting in repression at the same time preserve that freedom which should also constitute the State's essence, that is, how could it enforce obedience without damaging at least the freedom of the criminal, and possibly the freedom of those who obey only from fear?

In order to clarify the first aspect of the enigmatic definition of criminal law, it is necessary to focus on the role of force. As is well known, for Rousseau the general will expressed in the laws is not necessarily the 'will of all': 'indeed, every individual can, as a man, have a private will contrary to or differing from the general will he has as a citizen', because 'his private interest can speak to him quite differently from the common interest', 'his absolute and naturally independent existence can bring him to view what he owes to the common cause as a free contribution'.[4] If the establishment of society is made 'necessary' by the 'opposition of private interests' and possible by the 'agreement of these same interests', then it is also true that man is not erased by the citizen. Particular wills and interests are not eliminated by the general will and interest, nor is conflict eliminated by commonality and agreement.[5] In the framework of this codependence of apparent opposites, between general and particular,

[1] J.J. Rousseau, *Du contrat social ou principes du droit politiques*, texte établi et annoté par R. Derathé, in Id, *Euvres complètes*, sous la diréction de B.B. Gagnebin et M.M. Raymond (Paris: Gallimard, 1959-1995), III, 1964, II, 12; English translation, *Social Contract*, in *The Collected Writings of Rousseau* (Hanover-London: University Press of New England, 1990-2010, 1994), IV, 164-165.

[2] B. Bernardi, 'Le droit de vie et de mort selon Rousseau: une question mal posée?' *Revue de Métaphysique et de Morale*, 89, no 97 (2003), rightly observes that criminal laws are not a subject of frontal examination in the *Contract*. This observation is intended to indicate, again rightly, the secondary role played by the question of punishment in his reading of CS II, 5. This does not mean, however, that the question of punishment in general and the death penalty specifically did not interest Rousseau during the writing of the *Contract*.

[3] J.J. Rousseau, n 1 above, III, 13, 190.

[4] ibid II, 3 and I, 7, 147, 140-141.

[5] ibid II, 1, 145. The common interest 'is formed by opposition to that of each person', which in turn opposes it (ibid II, no 3, 147).

between identity and difference, between agreement and conflict, the particular interests that, on the one hand, contain the general and are therefore able to find in the law a point of mediation and convergence are the same that, on the other hand, continue to disturb the unity of the political body by opposing themselves to one another and to the general interest expressed in the law. Each individual is indeed received as an 'indivisible part of the whole' by a body politic which acquires 'absolute power over all its members', yet at the same time it continues to exist as a 'perfect and solitary whole', endowed with an 'absolute and naturally independent existence', with instincts, appetites, and a 'private will (which) tends by its nature towards preferences'; as such, it cannot have any 'lasting and unchanging' agreement with the general will.[6] In this framework, it seems that the political body can exist as a 'union of its members' only to the extent that the gap between particular and general will is filled by the intervention of a 'repressive force' capable of unifying, if not the first will to the second, at least the external conduct of citizens to the obligations imposed by law.[7] This hint of a force 'that can prevail over the resistance'[8] seems to offer a solution to the problem of the status of criminal law. The 'public force' is the 'guarantee' of the solidity of the political body, because it represents a means to ensure that citizens 'fulfil (their) duties' and 'to be assured of their fidelity'.[9] As Rousseau explains,

> in order for the social compact not to be an ineffectual formula, it tacitly includes the following engagement, which alone can give force to the others: that whoever refuses to obey the general will shall be constrained to do so by the whole body.[10]

Even if Rousseau does not establish any explicit connection between punishment and force, it is reasonable to assume that punishment constitutes an essential expression of force.[11] 'Just as nature gives each man absolute power over all his

[6] ibid I, 6, II, 4, II, 7, I, 7, II, 1, 139, 148, 155, 141, 145.
[7] ibid II, 4 and III, 1, 148 and 168.
[8] ibid I, 6, 138.
[9] ibid II, 4 and I, 7, 150 and 140-141.
[10] ibid I, 7, 141.
[11] This connection is suggested, among others, by G. Silvestrini, 'Fra diritto di guerra e potere di punire: il diritto di vita o di morte nel *Contratto sociale*' *Rivista di Storia della Filosofia*, 125-142 (2015). Silvestrini connects the right to punish with the ability of the legitimate State force to 'compel to be free'. However, a clarification is needed. The right to compel is not in fact identical to the right to punish: it is one thing to say 'the law prescribes X, therefore the sovereign has the right to force citizens to do X', and another to say 'the law prescribes X, therefore the sovereign has the right to punish citizens who do not do X'. Whoever is punished is not forced to obey the violated law: he is forced to suffer what the criminal law prescribes. Thus, I believe an intermediate step is required to connect the right to punish with the right to coerce: the threat of punishment forces those exposed to it to obey the law. When Rousseau speaks of coercion to be free, then, he has obedience in mind, and not disobedience: coercion makes one free because it reconciles the particular will with the general will expressed in the law. In order to understand whether the

members, the social compact gives the body politic absolute power over all its members', but for this purpose 'it must have universal, compulsory force to move and arrange each part in the most convenient way to the whole', and this coercive force seems to be closely connected with the capacity to punish citizens for violating the law.[12] If criminal law is not a 'particular kind of law' but the sanction of all laws, this is because there is no law that is not either applied by citizens or enforced by the executive power. But just as enforcement by citizens finds a decisive motivation in the threat of punishment, so too enforcement by the executive recognizes punishment as its essential expression. Though, criminal law merely regulates the punishment of political or civil crimes, it is at the same time the condition under which all other laws can be more than a vain 'collection of formulas'.

The solution to the first difficulty raised by the definition of the criminal law brings up the second aspect of the enigma. The 'coercive force' of punishment promotes obedience, but is obedience ensured by the threat or exercise of force compatible with freedom? Does it not jeopardize the combination of obedience and freedom which constitutes the essence of the State? 'The right of the strongest', says Rousseau, is at most a 'right (…) taken ironically', because 'force is a physical power' whose effects are devoid of any morality.[13] 'Yielding to force', obeying, is in fact 'an act of necessity, not of will', and therefore neither free nor obligatory, because where there is no freedom there are no duties.[14] One is certainly 'obliged to obey legitimate powers', but since 'force does not make right' it has no legitimacy.[15] Indeed, 'if it is necessary to obey by force', Rousseau writes, 'one need not obey by duty and, and if one is no longer forced to obey, one is no longer obliged to do so', to the point that 'as soon as one can disobey without punishment, one can do so legitimately'.[16] If those with sufficient strength can escape punishment, the body politic can exercise its essential right to punish only with a force capable of overcoming all resistance. But the only relationship that force can establish is that between servant and master, that is, the opposite of a political relationship, in which obedience cannot be separated from freedom. Wherever there are 'master and slaves' there can be an aggregate, never a society, a 'body politic': 'the moment there is a master (…) the political body is destroyed', because the 'people (…) is (in) no way obligated toward (their) master'.[17] From this it seems that we are at an impasse with no

coercion carried out by means of punishment can represent a form of liberation of the criminal, it will therefore be necessary to ask whether it can be desired by the criminal himself. As we shall see, it can be the subject of the criminal's will because it is governed by a law which the criminal himself, as a citizen, has approved.

[12] J.J. Rousseau, n 1 above, II, 4, 148.

[13] ibid I, 3, 133.

[14] ibid

[15] ibid I, 3, 134.

[16] ibid I, 3 and 4, 133-134.

[17] ibid I, 3, II, 1, I, 4, 137, 145.

way forward. On the one hand, the State cannot exist without the capacity of exercising force sufficient to ensure that laws and punishments be maintained all possible resistance, but on the other hand, it must cease to exist as soon as it resorts to that force, thereby actualizing the converse of a political relationship. To save the distinction between political power and tyrannical or despotic power, it is necessary to indicate the conditions under which the 'coercive force' of punishment can be compatible with freedom in a republican State. How can punishment guarantee the legitimate interests and freedom of all citizens, including evildoers?

The challenge of the *Contract* is to reconcile security and legitimacy, interest and law, utility and justice. The necessity of these alliances is revealed by general anthropological assumptions. On the one hand, the nature of man requires him 'to attend to his own preservation' and 'his first cares' are those 'he owes himself'.[18] On the other hand, 'to renounce one's freedom is to renounce one's status as a man' and is thus 'incompatible with the nature of man'.[19] The duality of interest and freedom, therefore, can only be apparent: 'common freedom' – that is, being 'master of oneself' – consists precisely in being the only 'judge of the proper means of preserving (one)self', that is, of one's own interest.[20] The theory of punishment is called to fit into the framework outlined by these assumptions. The link between punishment and the general interest can be grasped by paying attention to the utilitarian aspect of Rousseau's theory. The 'collaboration of many' carried out by the political institution represents, for each individual, the only way to preserve himself.[21] As a 'sum of forces' capable of getting the upper hand over both internal and external threats to the security of citizens, it embodies 'a form of association that defends and protects the person and the goods of each associate with all the common force'.[22] 'Since all are born equal and free, they only alienate their freedom for their own utility', but this utility is paradoxically implicit in the totality of alienation itself:

> since each one gives his entire self, the condition is equal for everyone, and since the condition is equal for everyone, no one has an interest in making it burdensome for the others.[23]

Through the laws 'everyone necessarily submits himself to the conditions he imposes on others', and this equal submission is enough to ensure 'an admirable agreement of interest and justice'.[24] 'Formed solely by the private individuals

[18] ibid I, 2, 132.
[19] ibid I, 4, 135.
[20] ibid I, 2, 132.
[21] ibid I, 6,
[22] ibid.
[23] ibid I, 2 and I, 6, 132 and 138.
[24] ibid II, 4, 149.

composing it', in other words, the sovereign 'does not and cannot have interests contrary to theirs': the sovereign may therefore need 'guarantees' from his subjects, but they have no need of 'guarantees' on his part.[25] Every sovereign decision, that is, every law, is not only 'equitable, because it is common to all', but also 'useful, because it can have no other object than the general good'.[26] Inasmuch as it is governed by a law, then, punishment can and indeed must be imposed in the interests of citizens: it is precisely by means of it that the State carries out its mission of protecting their person, their security and their rights. The link between punishment and freedom understood as 'perfect independence' of 'each citizen (...) from all others' is made clear by Rousseau when he argues that 'only the force of the State creates the freedom of its members', because the only guarantee against the arbitrariness and violence of their fellow men is represented by the 'full vigour' of the laws, and among these in particular by the strength of the criminal laws that fix the 'sanction' without which 'the laws of justice are ineffectual among men'.[27] As Rousseau states in a note that rephrases an anecdote already discussed by Hobbes,

> in Genoa we read on the entrance of prisons and on the irons of convicts this word, *Libertas*. This application (...) is beautiful and right. In fact, in every State it is only the evildoers who prevent the citizen from being free. In a country where all these people were in prison, they would enjoy perfect freedom.[28]

Yet this explanation of the link between punishment and freedom, understood as independence or protection of private individuals from the violence of their peers, still leaves some questions open.[29] It is still unclear how the same individual who will face punishment can commit his own strength and freedom by giving the sovereign the right to punish him, and this 'without harming himself and without neglecting the cares he owes to himself'.[30] It is also unclear how Rousseau can avoid the conclusion that respectable citizens pay for their protection from the violence of their equals by sacrificing not only of the

[25] ibid I, 7, 140.
[26] ibid II, 4, 150.
[27] ibid II, 12 and IV, 7, 164, 215 and 152.
[28] ibid, note to IV, 2, 200-201.
[29] It is this first meaning of freedom that Frederick Neuhouser has in mind when he states that 'universal compliance with the general will effectively safeguards citizens from personal dependence and that this protection from dependence is so bound up with their freedom that obedience to the general will be said to make them free, even when their obedience is not voluntary in the ordinary sense of the term': universal compliance with the general will, ie obedience to the law, is a necessary and sufficient condition of a kind of freedom defined as independence from personal ties, and the fact that this obedience is not 'voluntary in the ordinary sense of the term' means that it can be imposed on those who have committed or would like to commit a crime by force or threat of force. See F. Neuhouser, *Foundations of Hegel's Social Theory* (Cambridge: Harvard UP, 2000), 63
[30] J.J. Rousseau, n 1 above, I, 6, 138.

freedom of the evildoer, but also, after all, their own freedom before the State. Speaking of total alienation, did not Rousseau really go further than Hobbes, who at the very least excluded the right of resisting the violence of punishment from the rights ceded by his subjects to the sovereign?

These doubts can be clarified by focusing on the marginal but exemplary case of the criminal: the reasons why punishment is compatible with the interests and freedom of the criminal are the same as those which, a fortiori, it is compatible with the interests and freedom of the innocent. The sense in which the penalty may be in the interest of the same person who will be punished as a criminal is clarified by analogy. Citizens protected by the State may find themselves risking their own lives in order to defend it in war, and in doing so they 'give back to the State what they have received from it': 'whoever wants to preserve his life at the expense of others should also give it up for them when necessary', and accepting this risk does not involve renouncing life at all, but merely putting it at stake 'to preserve it'.[31] Similarly, says Rousseau, 'in order not to be the victim of a murderer' one can agree 'to die if he becomes one', and in so doing he does not dispose of his life, but 'only thinks of guaranteeing it'.[32] Even the death penalty, therefore, can be considered useful to all citizens, including those who will suffer it, because it does not contradict the primacy of care due to one's own preservation but rather constitutes a tool to exercise this care. The law that establishes the death penalty is, in fact, the very law that allows citizens to live in safety, at least until they violate the laws for which it provides the sanction. Reconciling punishment with the freedom of the criminal is a more complex matter. For Rousseau, the social pact constitutes 'the most voluntary act in the world', because 'by its nature (it) requires unanimous consent', and its validity also depends on the fact that every citizen, 'uniting with all', continues to obey 'only himself' and to remain 'as free as before'.[33] Since he

[31] ibid II, 4 and 5, 150-151.

[32] ibid II, 5, 151. On the whole Chapter V of Book II of the *Contract* see B. Bernardi, n 2 above. Bernardi clarifies the meaning of the chapter starting first of all from its genesis: he begins from a manuscript annotation that discusses the difference between *péril*, *danger* and *risqué*; he follows the first draft presented in the *Geneva Manuscript*; he explains the most significant variations introduced by the *Contract* and makes explicit the close relationship with the problem of the limits of sovereign power dealt with in Chapter IV. In particular, Bernardi shows that the unity of the Chapter does not lie in the discussion of the right to punish or the death penalty but in the discussion of the right to life or death of the legitimate State with respect to its citizens, and underlines the difference between the logic of risk, according to which one can put one's life on the line to guarantee one's security and freedom, and the logic of sacrifice, in which one meets certain death for an interest greater than one's own.

[33] J.J. Rousseau, n 1 above, IV, 2 and I, 6, 200 and 138. The freedom that marks the constitution of the sovereign people, that is 'the act by which a people is a people', continues to characterize political and civil life. The 'natural freedom', which for the individual consists in 'unlimited freedom to everything that tempts him' and therefore has no other 'limit than (his) forces', must certainly be distinguished from 'moral freedom' or 'civil freedom', which consists in 'obedience to the only law one has given oneself' and is limited instead by 'general will' and the law.

violates in others the rights that he hopes others will continue to respect in him, the criminal puts his own particular interest before the general one, denying the reciprocity that constitutes the heart of the social pact and thus committing 'an injustice whose spread would cause the ruin of the body politic',[34] that is to say, of the instrument that he himself had created by signing the social pact as a guarantee of his own security and freedom. Within this framework, in which Rousseau re-elaborates the Hobbesian theory of injustice as a self-contradiction of the will,[35] it makes no sense to ask 'how one is free yet subject to the laws', including criminal laws, 'since they merely record our wills', nor 'how (…) a man (can) be free and forced to conform to wills that are not his own', such as laws to which he is opposed, because in reality 'the Citizen consents to all the laws, even to those passed in spite of him'.[36] 'As long as subjects are subordinated only to such conventions', 'even to those that punish (them) when (they dare) to violate one of them', they 'do not obey anyone, but solely their own will': they obey only 'the general will which is theirs', that is, 'the general will (they have) as citizen(s)'.[37] Therefore, 'to ask how far the respective rights of the Sovereign and of Citizens extend is to ask how far the latter can engage themselves', where of course no one can be unjust toward themselves.[38] Slaves can lose everything once they are in chains, even the desire to break free of them, in which case they love 'their servitude as the companions of Ulysses loved their brutishness'.[39] But the citizen who gives himself laws capable of forcing him into obedience and

The civil liberty won in the instant of the pact represents not only and not so much the denial of natural liberty, but its realization on a different level. See ibid, I, 6 and I, 8.

[34] ibid I, 7, 141.

[35] See L. Foisneau, 'Punishment Not War: Limits of a Paradigm' in this issue.

[36] ibid II, 6 and IV, 2, 153 and 200. C. Brettschneider, 'Rights within the Social Contract: Rousseau on Punishment', in A. Sarat et al eds, *Law as Punishment/Law as Regulation* (Stanford: Stanford UP, 2011), 50-76 rightly observes that in Rousseauian theory the legitimacy of a State act depends on the unanimous consent to which it is subject, and questions the sense in which the subject can allow his own punishment. It seems to me that Rousseau's position is greatly weakened by the reduction of this consensus to the 'hypothetical consensus' that in a kind of thought experiment any citizen could have given at the time of the pact, and by the consequent assimilation of Rousseau's theory to contemporary theories such as that of Rawls. Rousseau's aim is not to build an ideal standard, but to highlight the internal logic of law: the consent is real, and not hypothetical, insofar as it is implicit not in a hypothetical pact, but in the consensus given to the laws and in the daily recognition of oneself as a citizen of a State. For a discussion of the claim that every citizen also allows laws that pass against his vote, along with the difficulties it faces, see C. Brooke, 'Aux limites de la volonté générale: Silence, exil, ruse et désobéissance dans la pensée politique de Rousseau' *Les Études Philosophiques*, 425-444 (2007).

[37] J.J. Rousseau, n 1 above, II, 4, IV, 2 and I, 7, 150, 200 and 140.

[38] ibid II, 4, 150. The most intriguing problem posed by these passages is that of personal identity in relation to time. Only on the condition that the two are considered the same man can the Socrates who approves the social pact or law commit himself for the Socrates who then, having violated them, finds himself suffering the punishment. The will of the 'second' Socrates is not really 'his own', because the only will which really is Socrates' own is the one he expressed responsibly beforehand, depriving himself of the possibility of expressing a contrary one afterwards.

[39] ibid I, 2, 133.

punishing him if he violates them is comparable to Ulysses, who, as *Emile* reminds us, asks his companions to chain him to the mast to force him to resist the sirens' song.[40] The laws, like the bonds that hold Ulysses back from disaster, are of course forms of coercion, but of a legitimate coercion precisely because freely chosen.[41] The social compact, Rousseau says in a rightly famous chapter, 'tacitly includes the following engagement, which alone can give force to the others: that whoever refuses to obey the general will shall be constrained to do so by the entire body; which means only that he will be forced to be free'[42]. This reconciliation of freedom with force and coercion shows that, beyond any logic of sacrifice, punishment can and must be understood for Rousseau as a guarantee of the security and freedom of all citizens, including the evildoer: both punishment and the threat of it can enforce obedience, yet just like the chains that prevent Ulysses from yielding to the charm of the sirens, this coercion is not a denial, but a realization of freedom.[43]

Rousseau's argument is certainly disconcerting, at least for the contemporary reader. Just think of the following famous statement: 'When the Prince has said

[40] J.J. Rousseau, *Émile, ou de l'éducation*, texte établi par C. Wirz et annoté par Burgelin, in Id, *Euvres complètes* n 1 above, IV, 1969, English translation *Emile or on Education*, introduction, translation and notes by A. Bloom (New York: Basic Books, 1979), 326.

[41] It should be remembered here that the famous incipit of the *Contract* does not merely state that 'man was born free, and is everywhere in chains' (J.J. Rousseau, n 1 above, I, 1, 131), but also identifies the purpose of the work as explaining what can make *this* change legitimate. In a sense, the theme of punishment is at the heart of the entire work, because punishment is precisely the form by which chains are transformed from a symbol of slavery to an instrument of freedom.

[42] ibid I, 7, 141. J.F. Spitz, 'Rousseau et la tradition révolutionnaire française: une énigme pour les républicains' *Les Études Philosophiques*, 445-461 (2007), proposes an alternative reading of this constraint to be free and its relationship with punishment, aimed at safeguarding Rousseaus's discourse from the totalitarian implications attributed to it by the 20th century liberal tradition since Isaiah Berlin. On Spitz' view, conceiving the freedom to which one can be forced through punishment as the freedom that would result from adherence to the general will conceived as one's true will actually lends itself to liberal criticism. Indeed, Spitz argues that individual freedom should be understood here above all as the condition in which all others have a duty to respect in him the same rights that he respects in them. From this point of view, in the very act of violating the rights of others the individual deprives himself of all freedom, because by violating his duties to others he frees them from their duties to him. Punishment would restore the criminal's freedom because it obliges him to respect the rights of others and, in so doing, gives him back the rights that others are obliged to respect, and so the freedom he was deprived of. This reading is to some extent clarifying, but it does not seem to me an alternative to the one on which freedom is conceived as obedience to a law which is in turn the expression of the general will, and therefore of one's own will. Rights are fixed by law, and the passages Spitz draws on show well that according to Rousseau even the criminal, who puts his particular interest before the general interest, wants to enjoy rights, that is, he wants the law or the general will to be respected.

[43] R. Dérathé, 'Jean-Jacques Rousseau et le progrès des idées humanitaires du XVIe au XVIII siècle' *Revue internationale de la Croix Rouge*, 523-543 (1958), states that freedom, like life, is an essential gift of nature of which no one may be deprived except by law, as a punishment for a crime. It can be said that punishment limits or denies the 'natural freedom' of the condemned criminal, but not his 'civil' or 'moral' freedom, which, if anything, it helps to achieve. In this sense, the penalty is an essential element in the transition, described in Chapter VIII of Book I, from the state of nature to civil state: from instinct or physical drive to morality and justice.

to him: 'it is expedient for the State that you should die', as in the case of the death penalty given to the murderer, then the citizen simply 'ought to die' because 'his life is no longer merely a favor of nature, but a conditional gift of the State'.[44] The concept of 'total alienation' allows the *Contract* to transform that consideration of life as a conditional gift of the sovereign, which the second *Discourse* still denounced as an unfounded claim of despotism,[45] into an established truth. But the ruthless face of justice must not make us forget the theoretical framework that gives meaning to punishment in general and circumscribes its legitimacy. In the first place, the legitimacy of punishment is bound to the criterion of public utility and subordination to the general interest. 'The Sovereign', in fact, 'cannot impose on the subjects any burden that is useless to the community. It cannot even will to do so'.[46] In this sense Rousseau immediately corrects the provocative formulation according to which the citizen must die whenever the State wants, and affirms that 'one only has the right to put to death, even as an example, someone who cannot be preserved without danger'.[47] Bearing in mind that 'there is no such thing as a wicked man who could not be made good for something',[48] it is perhaps not so absurd to say that the logic of the argument inclines Rousseau towards a view on which the re-educational value of punishment is in fact combined with a rejection of the death penalty. With the statement that 'in a well-governed State there are few punishments' and 'frequent (…) punishment' is therefore 'always a sign of weakness or laziness in the Government', he seems to favor a process of prevention and decriminalization.[49] Secondly, the legitimacy of punishment is subordinate to an apparently paradoxical criterion of self-determination or legality. The retribution of any crime with a penalty, including the death penalty, is conceivable only in accordance with a universal law, equal for all, approved by the citizens in view of the protection of their common interest and common freedom.

[44] J.J. Rousseau, *Du contrat social* n 1 above, II, 5, 151.

[45] In the *Discourse* Rousseau admits that it is still 'with wisdom' that the 'advantages of a political constitution' were identified, and that they are therefore 'wise' to understand that it was necessary to sacrifice 'one part of their freedom' for the preservation 'of the other'. See J.J. Rousseau, *Discours sur l'origine et les fondemens de l'inégalité parmi les hommes*, texte établi et annoté par J. Starobinski, in Id, *Euvres complètes*, n 1 above, III, 1964, English translation in Id, *The* Discourses *and Other Political Writings*, edited by V. Gourevitch (Oxford: Oxford University Press, 1997), 173. The partial character of this 'sacrifice' is a consequence of the fact that life and freedom appear in this work as 'essential gifts of nature' which the individual is not allowed to divest himself at will (ibid 179). The theory according to which individuals can alienate these essential rights is the ideological support of despotic power, its claim to be the absolute master of its subjects and all their possessions, a master who 'dispenses justice when he despoils them' and a 'grace' or 'favor' whenever he does not deprive them of life or goods (ibid 178). The challenge of the *Contract* is precisely that of transforming these 'essential gifts of nature' into 'conditional gifts of the State' without contradicting the central assumption of the *Discourse*, that is, without making life and freedom something that the individual can 'dispose of'.

[46] J.J. Rousseau, *Du contrat social* n 1 above, II, 4, 148.

[47] ibid II, 5, 151.

[48] ibid.

[49] ibid II 5, 151-152.

> The social treaty has the preservation of the contracting parties as its end. Whoever wants the end also wants the means and these means are inseparable from some risks, even from some losses,[50]

but the only arbiter of these means is and remains the sovereign people, composed of the totality of citizens, and therefore also of the future criminal: preventive consent and compliance with the law transform punishment into a choice, prisons into the place of the liberation of the prisoners from the heteronomous inclinations that led them to betray in the first place themselves, death into a kind of suicide. Thirdly, the exclusion of any violence as a sanction of a crime other than that provided for by law tends to 'exempt a guilty man'[51] from any possible arbitrariness on the part of the authority in charge of judgement and its execution. We know that executive power is no less essential than legislative power. Just as in man

> every free action has two causes that combine to produce it: one moral, namely the will that determines the act, the other physical, namely the power that executes it,

so in the State one can distinguish between 'force and will (…), the latter under the name *legislative power* and the former under the name of *executive power*', and 'nothing is or should be done without their cooperation'.[52] If 'the legislative power is the heart of the State', 'the principle of political life' in the absence of which the political body is 'dead', the executive constitutes 'its brain, giving movement to all its parts', and doing 'for the public person what the union of the soul and the body does in man'.[53] The essentiality of the executive – and therefore of that form of execution which is realized in the trial and in the administration of justice – does not, however, remove its structural subordination to the legislative. The 'trustees of the executive power', including of the power that today we would call judicial, 'are not the masters of the people, but its officers', and 'the people can establish and depose them when it pleases'.[54] Their power can never be exerted 'except by virtue of status and the laws'.[55] Their will 'is not or should not be anything except the general will or the law'.[56] The assignment and execution of punishment can reconcile the criminal with that general will which is his or her own no less than of all the other members of the State, and

[50] ibid II, 5, 151.
[51] ibid.
[52] ibid III, 1, 167.
[53] ibid III, 11 and III, 1, 188 and 166. On the relationship between legislator and executive, and in particular the metaphors mentioned, see B. Bachofen, 'La notion d'exécution chez Rousseau. Une psychopathologie du corps politique' *Revue Française d'Histoire des Idées Politiques*, 275-298 (2011).
[54] J.J. Rousseau, *Du contrat social* n 1 above, III, 18, 196.
[55] ibid II, 11, 162.
[56] ibid III, 1, 169.

therefore with the whole of which he or she is a part, only to the extent that the executor is reduced to a mere 'officer', 'commissioner', 'employee' of the sovereign people, and the execution to a merely technical event.

As I mentioned, Rousseau's discussion of punishment is not free of difficulties. Let's begin with an anecdote which although apparently insignificant is actually useful to explain some general premises. One day, the anecdote has it, 'certain drunkards of Samos defiled the Tribunal of the Ephors' and 'the following day, a public edict gave the Samians permission to be filthy'. Commenting on this episode, Rousseau states that 'a real punishment would have been less severe than such impunity'.[57] Setting aside of the spirit of provocation typical of Rousseau's prose, what is evoked in this episode is the ghost of a real desire to be punished, a desire to flee public scorn and to reconcile themselves through punishment both with themselves and with the political community. This desire makes a first difficulty visible, because while it expresses that radical conformity of the particular will to the general will which is the very definition of perfect virtue, this conformity depends on various assumptions. The first assumption is of a cognitive order.

> As long as several men together consider themselves to be a single body, they have only a single will, which relates to their common preservation and the general welfare.[58]

To affirm that the will is 'one', however, means to presuppose a clear elision of the plurality of particular wills and of the conflict between them. The conformity also relies on an assumption of a practical order, namely that institutions promote concern for public affairs and the related eclipse of particularistic concerns. In a well-ordered State, in fact, 'public service' is the 'main business of the citizens', and not only do 'public affairs dominate private ones in the minds of the citizens', but more generally 'there is less private business': 'common happiness' provides 'a larger portion of each individual's happiness', and 'the individual has less to seek through private efforts'.[59] At the limit, one can imagine a State in which public affairs are the *sole* concern of citizens and 'common happiness' replaces individual happiness completely. This elimination of particular wills, which no longer have any space outside of public affairs to develop, is reflected in all areas of civil and political life. Thanks to it

> all the mechanisms of the State are vigorous and simple, its maxims are clear and luminous, it has no tangled, contradictory interests; the common good is clearly apparent everywhere, and requires only good

[57] ibid IV, 7, 215.
[58] ibid IV, 1, 198.
[59] ibid III, 15, 191-192.

sense to be perceived.[60]

First, the virtue of citizens as members of the sovereign body makes the very few laws that are needed an expression of general interest and will, and their 'necessity (…) universally seen'.[61] Second, the virtue of citizens as public officials makes it impossible for the judiciary to abuse the laws: in Republican Rome, for example, morals 'made many precautions superfluous that would have been necessary in other times'.[62] Finally, the virtue of the citizens is embodied in the 'love of the law' which makes for a State with 'few criminals' and 'few punishments'.[63]

When he poses the problem of the practical and cognitive presuppositions of a virtue able to reign over all spheres of civil life, Rousseau seems to find the solution in a double *deus ex machina*: the civil religion and the Legislator. First of all, it is the civil religion that is called to make 'each citizen (…) love his duties', and to promote with its cult 'the love of laws (…), making the fatherland the object of citizens' adoration' and teaching that 'to die for one's country is to be martyred, to violate the laws to be impious'.[64] Thus, it is religion that can dispose the citizen to that acceptance of the risk of death, if not of certain death, which was at the centre of the discussion of the right to punish. It is not by chance, moreover, that the creation of religions appears in the *Contract*, like customs and opinions, as a 'part unknown to our political thinkers, but on which the success of all the others depends', and 'to which the great legislator', like Moses or Mohammed, 'attends in secret'.[65] The task of the semi-divine figure of the legislator, as is known, is to lay the very foundations of civil life:

> one who dares to undertake the founding of a people should feel that he is capable of changing human nature, so to speak; of transforming each individual (…) into a part of a larger whole from which this individual receives, in a sense, his life and his being; (...) of substituting a partial and moral existence for the physical and independent existence that we have all received from nature;

of obliging individuals 'to conform the will to reason and (the public) to know what it wants'.[66] This idyll, in which we better understand what Rousseau meant when he redefined life as a 'conditional gift of the State' and he substituted the State for God, makes manifest an internal tension in his theory of punishment which we must now face. Punishment presupposes not only the divergence of the will of individuals from the general will expressed in the law, without which

[60] ibid IV, 1, 198.
[61] ibid.
[62] ibid IV, 6, 213.
[63] ibid IV, 8 and II, 5, 219 and 152.
[64] ibid IV, 8, 222, 219-220.
[65] ibid II, 12, 165.
[66] ibid II, 7 and II, 6, 154-155.

there would be no crime, but also the conformity of the former with the latter, without which the law could not be just, the executive power would be autonomous by usurping the legislative one, and the evildoer would not be ready to accept the punishment as an act of justice. This conformity of the particular will to the general will and the 'social spirit' in which it is embodied are, however, at once the 'cause' and the 'effect', the premise and the 'result' of the institution, of the patient and invisible work of the legislator.[67] But if this is right, then what can we say about punishment in imperfect States, where the work of building a free and virtuous people has not been completed and the prerequisites of civil life have not been adequately laid down? What is the rationale of punishment when citizens present particular wills which differ from the general will, do not recognize laws as an expression of their will and do not love them, and therefore do not wish to be punished when they violate them? It is in the light of this question that we can fully grasp a seemingly dissonant element of Rousseau's discourse.

Consider the following passages. The first is taken from a chapter we have already encountered:

> Every offender who attacks the social right becomes through his crimes a rebel and a traitor to his fatherland; he ceases to be one of its members by violating its laws and he even wages war against it. Then, the State's preservation is incompatible with his own, so one of the two must perish; and when the guilty man is put to death, it is less as a citizen than as an enemy. The proceedings and judgment are the proofs and declaration that he has broken the social treaty, and consequently is no longer a member of the State. Now, as he had acknowledged himself to be such, at the very least by his residence, he ought to be removed from it by exile as a violator of the compact or by death as a public enemy. For such an enemy is not a moral person but a man, and in this case the right of war is to kill the vanquished.[68]

The second passage is taken from the final chapter of the whole work dedicated to civil religion, whose importance we have already seen. After arguing that there is 'a purely civil profession of faith, the articles of which are for the Sovereign to establish, not exactly as religious dogmas, but as sentiments of sociability without which it is impossible to be a good citizen or a faithful subject', Rousseau continues in these terms:

> Without being able to obligate anyone to believe them, the sovereign can banish from the State anyone who does not believe them. The sovereign can banish him not for being impious, but for being unsociable; for being incapable of sincerely loving the laws, justice, and of giving his life, if need

[67] ibid II, 7, 156.
[68] ibid II, 5, 151.

> be, for his duty. If someone who has publicly acknowledged these same dogmas behaves as if he does not believe them, he should be punished with death. He has committed the greatest of crimes: he lied before the law.[69]

These passages present several noteworthy elements. Consistent with the idea that the citizen does not need 'guarantees' against the State, the sovereign's judgment is not based on evidence but is itself evidence. Moreover, it seems here that not only murder but every crime must be punished by death, as every evildoer assaults 'social law' or, if one prefers, acts 'as if he does not (…) believe' those articles of faith without close adherence to which good citizens and the maintenance of the social pact would be impossible. To act against the law means in any case to have contravened the covenant and 'lied against the law', and the fact that this lie constitutes 'the greatest of all crimes' nullifies any distinction between one crime and another, and so any proportionality of punishment. What is required of the citizen, after all, is not simply to observe but to 'sincerely love' law and justice, to be willing no longer simply to risk but to 'sacrifice' one's own interests and even one's life at the altar of the general interest. Exteriority of conduct is a consequence of interiority of conviction and affections, and the reference to sincerity, not by chance, calls into question the 'heart of the citizens' on which is engraved that fourth type of law, consisting of opinions and customs, which is the legislator's main object in his secret dealings with religion: the type of law which makes

> the genuine constitution of the State; (…) which, when other laws age or die out, revives or replaces them, preserves a people in the spirit of its institution.[70]

Beyond these elements there is a particularly problematic knot: the idea that the evildoer would be punished not as a citizen, but as a 'public enemy' and therefore in the name of the right of war. The problematic nature of this thesis lies less in its apparent conflict with Rousseau's theory of war, previously defined as a relationship that can only happen between States,[71] than in the friction between

[69] ibid IV, 8, 222-223.

[70] ibid II, 12, 164.

[71] This first difficulty was noted by R. Dérathé in J.J. Rousseau, *Oeuvres complètes* n 1 above, III, 1460 (n 377), and following him by all those who have dealt with the subject of punishment in Rousseau. Though she accepts the majority reading, which sees a 'strident contradiction' between the foundation of the right to punish on the right of war and the conception of war as war between States, G. Silvestrini, n 11 above, 138, notes how the limitations of the right of war introduced in the *Contract* echo in Rousseau's discussion of the right to life or death. This observation places the Silvestrini in the paradoxical situation of having to implicitly admit that Rousseau, in dealing with the death penalty, was well aware of what he had already said about the right of war but ended up forgetting precisely the decisive point of that discussion. This paradox is not insurmountable, however, and it is precisely by overcoming it that the contradiction so widely denounced by readers can be resolved. In one context, Rousseau states that when the prince finds himself making a

this interpretation of the 'offender' as an enemy and the rest of his theory.[72] So far we have seen how the legitimacy of punishment lies in its ability to protect the interests and freedoms not only of the injured parties but of the evildoer himself, reconciling him with that general will which is also his own and with the totality of which he is, as a citizen, an indivisible part. If the relationship between the evildoer and the State is one of war, however, then political power comes perilously close to the master-slave relationship, because in such a case punishment becomes mere force, a coercion to which it may be necessary, but

particularistic use 'of the public force of the State' there are, 'so to speak, two sovereigns, one by right, the other in fact' and instantly 'social union (vanishes) and the political body (is) dissolved' (J.J. Rousseau, n 1 above, III, 1, 169). In another context we read that 'wherever the clergy constitutes a body, (...) it is master and legislator in its domain. There are, therefore, two powers, two sovereigns' (CS IV, 8, 218). As we shall see better shortly, that of the prince who exceeds the limits set by law and that of religious sedition are the main cases of political crime taken into consideration by Rousseau. What is interesting, here, is that this reference to the 'two sovereigns', which re-actualizes the Hobbesian reading of the civil war as the effect of factions operating each as a 'State within the State', Rousseau can consider the conflict opened by political crime, with all its specificities, as a real war, which unlike duels consists in opposition not between individuals but between collective entities. The contradiction that is usually attributed to Rousseau is thus overcome. As a member of the State, in fact, the political criminal continues to be a citizen, but as long as he takes up arms against the State, he is for all intents and purposes a 'public enemy'. Moreover, 'the act of declaring war' (CS II, 2, 146) is not an act of sovereignty, because it is not a law, but is the responsibility of the executive power in accordance with the law, and for precisely this reason, the death penalty falls under the limits imposed by the laws and – as Silvestrini pointed out – to those internal to the logic of the law of war. This overcoming seems to me to find a strong confirmation in the case of the repression of the Catilina's sedition by Cicero. First of all, it should be taken into account that the conclusion of CS, II, 5 on grace in general and its exercise in Republican Rome suggests that in speaking of the death penalty Rousseau had in mind precisely the case of Catiline, in which the theme of grace is essential in a twofold sense. On the one hand, Cicero is rightly condemned because he would have deprived the conspirators of their right, guaranteed by the law, to the *provocatio ad populum*, to request the grace; on the other hand Cicero's salvation is the only case of grace to which Rousseau makes explicit reference. Now, it is true that the conspirators are political criminals, that the salvation of the homeland depends on their repression, and that they are therefore condemned to death as public enemies. But it is also true that Cicero's just condemnation can be read in light of the limits which, as we have seen, are placed on punishment not only by the principle of legality, which prevents penalties from being imposed against the law, but also by the subordination of the right to punish to the internal logic of the right to war. If it is true that it is possible to win a war 'without killing even one' of the enemies, as Rousseau's discussion of the right of war hypothesizes, it is also true that 'one only has the right to put to death, even as an example, someone who cannot be preserved without danger', as outlined in the chapter on the right to life or death, and Rousseau suggests that Cicero could have spared the 'blood of citizens' (CS II, 5 and IV, 151 and 214). On Rousseau's treatment of the right to war, in relation to that of previous or contemporary theorists such as Suarez, Vitoria or Vattel, see R. Dérathé, n 43 above. On the tensions between this rootedness of the right to punish in the law of war and the previous treatment of this same right, see S. Labrusse, 'Le droit de vie et de mort selon J.J. Rousseau ou la politique de l'homme infaillible' *Annales J.-J. Rousseau*, 122-123 (2001). On Hobbes' conception of political factions as a 'State within a State', see F. Toto, 'Fazioni e sedizioni. Aspetti della teoria hobbesiana dei sistemi' *Studi Filosofici*, 49-70 (2018).

[72] The tension between the effort to reintegrate the criminal into civil society and his punishment as an external enemy of that society has been observed several times. See eg S. Labrusse, n 71 above, 127-128.

never obligatory, to submit. Unlike the citizen, in fact, the enemy is

> outside of the State,

and what is expressed in the law and manifested in the judgment is 'a will that is foreign for (him)', and not that general will which is his own will:

> 'a relationship between the whole and its parts is formed which makes of them two separate beings, one of which is the part and the other is the whole minus that part. But the whole minus a part is not the whole, and for as long as this relationship lasts, there is no whole, but rather two unequal parts'.[73]

By grounding the right to punish in the right of war, do we not risk depriving punishment of all its essential features and thus eliminating the distinction between what should be an act of justice and naked violence?[74] Furthermore, and bearing in mind that power relations are not moral relations and exclude any obligation or duty, do we not risk by authorizing the killing of the criminal in the name of the right of war – the right of the strongest – the concomitant authorization of the killing of the State by the offender? Can we account for the punishment of the public enemy consistently with the rest of Rousseau's discourse without denying its importance?[75] In order to answer these questions, it is necessary to more precisely identify the profile of the public enemy that Rousseau had in mind, and to return to the question we previously left open: what happens in imperfect States, when particular wills make their voice heard at various moments of civil life?

The detachment of particular wills from the general will tends first and foremost to affect the legislative process, and with it the very heart of the State. Indeed, when 'the private interests start to make themselves felt', then

> the common interest changes and is faced with opponents, (...) the

[73] J.J. Rousseau, *Du contrat social* n 1 above, II, 6, 152-153.

[74] This passage has produced multiple difficulties for interpreters. Rousseau states that 'quand on fait mourir le coupable, c'est moins comme citoyen que comme ennemi'. In this statement, 'citizen' and 'enemy' can be read both as incompatible properties and as properties that one and the same subject can possess to different degrees. Curiously enough, G. Coqui, 'Le 'droit de vie et de mort' est-il un droit de punir?' (Sur Rousseau, *Du contrat social* II, V)' *Corpus*, 156-176 (2012), states in one place that Rousseau justifies at least certain punishments as 'acts of war' and, in another, that the deatrh penalty is not a punishment because it aims at the suppression of the enemy and does not address the citizen (ibid 166, 172).

[75] Such denial can be found in C. Brettschneider, n 36 above, 61, who rightly highlights the limits that the criminal's rights impose on the State right to punish, but who concludes, in patent contradiction with the text, that 'even those guilty of the worst crimes, for Rousseau, are not regarded as exiles from the social contract; rather, they are still considered citizens within the contract'. Rousseau's reference to the public enemy presupposes precisely this relationship of reciprocal exteriority. On these limitations see also S. Labrusse, n 71 above, 110-112.

> general will is no longer the will of all; contradictions and debates arise and the best advice is not accepted without disputes,

so that 'the social tie begins to slacken and the State grow weak'.[76] At the end of this process, when everyone is 'guided by secret motives' and 'the State close to its ruin continues to subsist only in an illusory and ineffectual form', the general will 'becomes mute', and 'iniquitous decrees whose goal is the private interest are falsely passed under the name of laws'.[77] That is, when the general will ceases to animate the decisions of the majority and the laws 'cease', because the 'decrees' that take their place are like them only in 'name', 'there is no longer any freedom regardless of the side one takes'.[78] In addition to the problems regarding the production of laws, the particularism of interests tends to undermine the transparency of their application. 'Just as the private will acts incessantly against the general will', says Rousseau, 'so the government makes a continuous effort against Sovereignty'.[79] But when the 'dominant will of the Prince' ceases to be 'the general will or the law', and under the pressure of his particular will makes use of the 'public force concentrated in him' to 'produce some absolute and independent act', one ends up with 'two Sovereigns, one in law and the other in fact': 'the bond tying the whole together begins to loosen' and in the long run 'the social union would vanish and the body politic would be dissolved'.[80] Finally, the multiplication of conflicting interests poses a threat to the very tenacity of what we might call public order: 'when the State declines', as happens when the content or execution of laws become unfair, the 'high number of crimes guarantees their impunity'.[81] My hypothesis is that the rootedness of the right to punish in the law of war assumes full significance only within this framework of social collapse – that the coincidence of the punishment with what Hobbes would have called an 'act of hostility' is premised on a context in which the law and judgment are no longer the expression of the general will, the social bond is dissolved, and the union of the political totality gives way to fragmentation.[82] To be sure, this hypothesis faces

[76] J.J. Rousseau, *Du contrat social* n 1 above, IV, 1 198.

[77] ibid IV, 1, 198-199. The problem of these decrees that are law in name only is noted by C. Brooke, n 36 above, but in his review of possible responses to this institutional degeneration (exile, cunning, civil disobedience) he never considers the possibility of a violent and legitimate revolt.

[78] J.J. Rousseau, n 1 above, IV, 2, 201.

[79] ibid III, 10, 186.

[80] ibid III, 1, 169.

[81] ibid II, 5, 152.

[82] One often tends to oppose Rousseau to Hobbes, even on the subject of punishment. The essential divergence between the two would lie in the fact that in Hobbes the rights of individuals precede the covenant and no one can give someone the right to life and death over himself, while in Rousseau the rights derive from a covenant of total alienation. It is worth remembering, however, that although in Chapters XXVII and XXVIII of *Leviathan* the right to punish seems to be entirely based on the right of war, punishment, which proceeds from public authority, is distinguished from an act of hostility. Acts of hostility proceed from usurped power, are inflicted in the absence of a law

major difficulty: in the *Contract*, the assimilation of crime to a reactivation of war, to a laceration of the social fabric, appears to be formulated in the most general terms, and so seems to be valid for every type of crime that may occur both in a failed State and in a well-ordered one.[83] Nevertheless, it is perhaps not insignificant that in its only other occurrence, the concept of 'public enemy' is referred to the prince who prevents the periodic meeting of the popular assemblies, and who, in the very act of doing so, openly declares himself a 'violator of the laws and enemy of the State'.[84] In fact, the full title of Rousseau's work is *The Social Contract, or Principles of Political Law*, and it is entirely consistent with the program explained in the subtitle that after having reviewed the four species of laws Rousseau warns the reader that 'among these various classes, political laws (…) are the only ones relevant to my subject'.[85] Finally, it is no coincidence that the crimes mentioned in the *Contract* are all political crimes. These three features of the text seem to suggest a more precise profile of the enemy, and to mobilize with it a meaning of punishment that is no longer simply legalistic-moralistic, but more harshly political. It seems to suggest, that is, that not every evildoer must be punished as a public enemy, but only the one who becomes in the strict sense 'rebel and traitor of the homeland': he who 'makes war on it' and whose 'preservation is incompatible' with the preservation of the

prohibiting the crime or of a previous public condemnation, do not take into account the possibility of inducing the criminal or others to obey the laws, and exceed the penalties provided for by the law. It is equally curious to note that, although for Hobbes the right to punish coincides with the original *jus in omnia* which the subjects leave to the sovereign, Hobbes alludes in various contexts to the consent of the subject to his own punishment: he affirms that he who performs an action accepts all the known consequences, and that the power to punish, like any other power of the sovereign, was granted to him by the consent of each of his subjects in order to be protected. In this sense, punishment can be imposed as such only to the extent that the subject accepts it. Not recognising the punishment prescribed by law means knowingly and deliberately denying the authority of the State. The right to punish derives from the original right to war, but only those who carry out acts of hostility against the current structure of the State, traitors who in one way or another stains the *crimen lesae majestatis,* are punished as enemies of the State. Uncovering in Hobbes a possible source of Rousseau's reflection on the right to punish and its limitations helps to illuminate the problem of punishment of the 'public enemy': the fact that in Rousseau, as in Hobbes, he is not just any criminal, but one who rejects public authority.

[83] In this regard, it is necessary to note a certain discrepancy between the French text of Rousseau's work and its translations. Rousseau's French states that 'tout malfaiteur attaquant le droit social devient par ses forfaits rebelle et traître à la patrie'. One might be tempted to translate it this way: 'every evildoer, attacking social law, becomes, with his misdeeds, a rebel and a traitor to the homeland'. The same passage, however, could also be translated as follows: 'every evildoer who attacks social law becomes rebel and traitor to the fatherland through his misdeeds'. Unlike the first translation, this translation leaves open the possibility that not 'every evildoer' attacks 'social law' and therefore becomes a 'traitor and rebel' – that public enemies are only those who frontally oppose the social pact,, which for Rousseau is the basis of that 'social order' which is a 'sacred right, serving as a basis for all others', and whose violation leaves everyone their original natural freedom, which coincides with the right to war.

[84] J.J. Rousseau, *Du contrat social* n 1 above, III, 18, 197.

[85] ibid II, 12, 165.

State.[86] In other words, the punishment concerns one whose suppression is for the State a matter of life or death:[87] not the assassin but the usurper, he who silences the general will, promulgating unfair decrees under the name of 'law' and applying them arbitrarily.

In order to prove that what we are inclined to consider a general theory of punishment is better understood as a theory of the repression of political crime, of the violation not of any law but of the political laws that 'constitute the form of government', we can review the examples of political crime scattered in the text and try to grasp the latent thesis that offers a unified key to Rousseau's whole discourse. In a first passage, Rousseau targets the detractors of the people, stating that though one can well smile imagining 'all the nonsense of which a clever swindler or an insinuating talker could persuade the people of Paris or London', one must not forget that

> Cromwell would have been condemned to hard labor by the people of Bern and the Duc de Beaufort sentenced to the reformatory by the Genevans.[88]

With this reference to Cromwell, this first passage, which stages the failure of the ambitious, recalls a second, which instead evokes the success of the skilful impostor and his deception. Rousseau here imagines that, unfortunately, in a hypothetical society of good Christians there appears 'a single ambitious man, a single hypocrite – a Catiline, for example, or a Cromwell', and concludes inexorably that 'these will certainly get the better of his pious compatriots':

> Christian charity makes it hard to think ill of one's neighbor. As soon as he has learned the art of how to trick them through some ruse and seize part of the public authority for himself, he will be a man of constituted dignity; it is God's will to respect him. Soon he is powerful: it is God's will to obey him. Does the depository of this power abuse it? It is the rod with which God punishes his children. It would be against conscience to chase

[86] ibid II, 5, 151.

[87] B. Bernardi, n 2 above, notes with acuity the tension that generated in the *Contract* between two requirements: that of protecting the security and freedom of all citizens, including criminals, and that of preserving the State itself, a requirement that in case of conflict takes precedence over the first to the extent that the preservation of the State constitutes the condition of the possibility of protecting citizens. With the same acuity, he notes that the discussion of the death penalty must be read against the background of this tension: that the criminal is not put to death because of his guilt, but because of the danger he represents for the community. At the same time, Bernardi does not note that although the murderer is the only example explicitly taken into account in CS II, 5, all the points he highlights apply much more clearly to the political criminal, and in particular to the Prince who ceases to confine himself to applying the law and attempts to direct public force against the State itself. This is an eminent case in which the conservation of the criminal or his freedom is incompatible with that of the State.

[88] J.J. Rousseau, *Du contrat social* n 1 above, IV, 1, 198.

> out the usurper: it would be necessary to disturb the public tranquillity, use violence, shed blood. All of that is inconsistent with the gentleness of a Christian. And after all, what is the importance of being free or serf in this vale of tears? The essential thing is to go to heaven, and resignation is but an additional means of doing so.[89]

For its reference on the one hand to Catiline and on the other to Christianity, this passage recalls two others. If Cromwell's controversial figure is brought up only in counterfactual reasonings, as an example of the ambitious against which a well-ordered society such as that of Geneva – but not a society of true Christians – would be endowed with sufficient protection, Catiline also appears in a context in which Rousseau reasons in more historical terms. Rousseau recalls here that a dictator with unlimited authority would have easily thwarted Catiline's conspiracy, but Cicero lacked such authority, and, 'in order to act effectively, (he) was constrained to exceed' the power conferred on him 'in a crucial respect', so that 'the first explosions of joy gave approval to his conduct', but 'later on he was justly called to account for the blood of the citizens spilled against the laws'.[90] Finally, the last citation I would like to consider is that in which Rousseau unmasks Christianity as a 'religion of the priest'.[91] Rousseau comes here almost to approve of the persecutions of the first Christians. The pagans, in fact,

> always regarded the Christians as true rebels who, beneath a hypocritical submissiveness, were only awaiting the moment to become independent and masters, and to usurp adroitly the authority they pretended to respect out of weakness.[92]

Even if Rousseau cautiously attributes this image of Christians to the Romans, strategically distancing himself from it, it is clear that it should not have appeared too far from reality: the philosopher himself, in fact, admits that early Christianity was transformed over the centuries, with the papacy, into 'the most violent despotism in this world'.[93]

The general sense of this game of references becomes clearer if we consider the differential treatment that Rousseau gives to different cases. Even taking into account the more nuanced approach reserved for the case of Cicero, who on the one hand loves his glory 'more than his land' but whose violation of the law, on the other hand, succeeds in 'saving the State',[94] it is clear that all the figures portrayed in these passages are figures of usurpers (or aspiring usurpers). Equally

[89] ibid IV, 8, 221.
[90] J.J. Rousseau, *Du contrat social* n 1 above, IV, 6, 214.
[91] ibid IV, 8, 219.
[92] ibid IV, 8, 217.
[93] ibid IV, 8, 218.
[94] ibid IV, 6, 214.

clear is that these individual figures emerge in contexts of institutional and moral degeneration. Cromwell's England is not only the same England in which kings have only nominally assumed the role of heads of the church, actualizing the nightmare of divided sovereignty, it is also the England in which 'the (…) people (…) think it is free', but 'it greatly deceives itself'.[95] The country is free, in fact, 'only during the election of the members of parliament; as soon as they are elected, it is a slave, it is nothing'.[96] Similarly, late-Republican Rome is not only the Rome in which the division between patricians and plebeians has already generated the 'abuse of the aristocracy'[97] and civil wars, but also the Rome in which customs and virtue begin to lose their vigour, and desires – as witnessed by Cicero's lust for glory – begin to focus on particularistic goals. Finally, Imperial Rome, in which early Christianity exerted all its subversive force, is an exemplary case of the tendency of governments to degenerate: territorial expansion brought about not only the widening of the gap between custom and law, the intensification of repression and the concentration of power in one set of hands, but also to the degeneration of law itself from the legitimate monarchical form that was still proper to Augustus to the despotic form that it acquired with Tiberius. It is precisely within this context of degeneration of the institutional and moral framework that the theme of political crime and the rootedness of its punishment in the right of war assumes all its weight. As is easy to see, the theme of punishment circulates in all the passages we have read. Rousseau believes that Cicero was rightly punished and imagines both Cromwell and the Duke of Beaufort punished as well – one in a prison and the other in a house of correction. In the same way, one can suppose the violence and bloodshed that Rousseau wished to see as a reward for usurpation can be understood as a case of death penalty. It is equally easy, however, to see that all the passages focus on examples of civil war, rebellion or seditious movements. The threat to the institutions can come from above (as in the case of Cromwell, Beaufort, etc) or from below (as in the case of Catiline, false Christians, etc.). The usurper can be content to extend the public authority of which he is already the depositary beyond the limits drawn by the law (as in Cicero's case) or go so far as to act as a kind of punctual reversal of the figure of the 'great Legislator'.[98]

[95] ibid III, 15, 192.

[96] ibid.

[97] ibid III, 10, 187.

[98] A semi-divine figure endowed with an extraordinary intelligence, the Legislator should see all the passions of men without feeling any of them, enjoy a happiness that does not depend on men, but nevertheless desire to take care of them by protecting them from the seductions of particular wills and taking care of religion as an instrument capable of conforming wills to reason. By contrast, the diabolical figure of the usurper is endowed with an extraordinary intelligence, which is not, however, free of the passions, but enslaved to ambition; he does not enjoy any happiness independently of others, and precisely for this reason he must not enlighten them, but deceive them, seduce them using religion as a useful instrument to camouflage his particular interest and enslave everyone to his own whims.

The assault on public authority, finally, can be either unsuccessful (as in the cases of Catiline and of the rebellion of the first Christian communities) or victorious (as perhaps in the case of Cromwell, or of the hypocrite who takes power in an imaginary Christian republic). In the laceration of the social and institutional fabric inflicted by war, in any case, the only punishment that appears as an act of justice is that of Cicero, who continues to recognize himself as a citizen in the not yet completely degenerated context of late Republican Rome. In all other cases the punishment goes beyond the legal framework to take the form of the elimination of an internal enemy. In this sense, the case of the impostor who takes over public authority in an ideal Christian republic is paradigmatic. As long as one remains captured within the theological-political imagination mobilized by the usurper (or the would-be usurper), one can believe that he really manages to conquer public authority, and thus that resistance constitutes a criminal form of disturbing the public peace, and that repression constitutes punishment in the strict sense of the word. In reality, however, the exact opposite occurs. The usurper silences the laws at the very moment he claims to apply them: the relationship between general will and particular will degenerates into a naked relationship of forces, and what is presented as punishment is in reality nothing more than an act of war. Now, it is quite possible that the usurper will meet no resistance, as happens in the case of the republic composed of true Christians. For Rousseau, however, the people who hypothetically evade the despot's abuses and shed his blood (such as those who put Cromwell or the Duke of Beaufort in prison or in a house of correction) would do so rightly. This consideration allows us to see the deeper coherence in Rousseau's apparently ambivalent treatment of Christianity. On the one hand, true Christians are criticized precisely for their indifference in the face of abuse and usurpation of public power, for their resignation in the face of slavery and the misery into which usurpers throw entire peoples, and for the gentleness that prevents them from responding to violence with violence – the violence of prison, that of bloodshed, and if necessary that of persecution. On the other hand, the first Christians are not without reason persecuted as rebels because they wish to seize the power to dictate law and aspire to the establishment of the worst of despotism, representing an exemplary case of the violation of public faith that, as he makes clear in the chapter on civil religion, Rousseau hopes will be punished by death. The greatest of crimes, we have seen, is *lying* before the law, being incapable of *sincerely* loving the laws, but the deference to law of Christians was just a 'hypocritical submission' by which they waited for an opportunity to seize the authority they 'pretended to respect'.

The treatment of this range of different cases finally gives rise to a clear thesis. The case of failed usurpation is the simplest one: while Cicero is tried as a citizen, because his violation of the law does not constitute a real usurpation and does not endanger the life of the State, Catiline and the first Christians can

be put to death as public enemies in the name of the right to war, because by ceasing to recognize themselves in the institutions and to consider themselves as parts of the whole they break the social pact, they stop being members of the State. In short, they come to represent an 'outside' that undermines the State from the inside. The case of successful usurpation is certainly more problematic. Of course, in a well-ordered State Cromwell and Beaufort would be imprisoned. But what happens in a context of institutional degeneration in which Cromwell or the priests succeed, as in fact happened in revolutionary England or Christian Europe? Rousseau carefully avoids getting into the complications posed by concrete examples (although a passage in which he states that very few States have laws and are therefore legitimate political formations allows us to understand what his thinking was).[99] On a more theoretical level, however, the move made by Rousseau is clear and unambiguous, and consists in recasting the apparently successful usurpation as a kind of failed usurpation: the despot and the tyrant can never seize authority, but only exert force. If we remember how 'the act of declaring war' is not an act of sovereignty,

> since each of these acts is not a law but merely an application of the law, a particular act which determines the case of the law,

we can conclude that the death sentence of the political criminal, the criminal who attacks the social rights by becoming 'a rebel and a traitor', and in particular of the despot and the tyrant, is precisely an application of those political laws that can tentatively be labelled 'fundamental laws'.[100] What will resurface, in its potentially terrible form, is therefore that original democracy which is for Rousseau the source of all other power, and in the face of which all constituted powers vanish like a puff of smoke. Popular sovereignty is reaffirmed in its absoluteness through the terrible punishment and the revolt against the spectre of the State, its so-called laws, and the arbitrariness of the powerful. It is true that 'the established government should never be touched until it becomes incompatible with the public good', and that

> it is impossible to be too careful about observing all the requisite formalities, in order to distinguish a regular, legitimate act from a seditious tumult and the will of an entire people from the clamours of one faction.[101]

It is also true, however, that when power becomes 'incompatible with the public good' the formalities disappear, and what the illegitimate power calls a riot is stated by force as a 'regular (and) legitimate act'. Certainly, 'when civil machinery is worn out' seditions can destroy the State without revolutions being able to restore it,

[99] J.J. Rousseau, *Du contrat social* n 1 above, III, 15, 193.
[100] ibid II, 2 and II, 12, 146 and 164.
[101] ibid III, 18, 196.

because 'freedom can be acquired but can never be recovered'[102]. There are, however, 'violent periods' in which

> revolutions have the same effect on peoples as do certain crises on individuals; the horror of the past is equivalent to amnesia, and the State, set afire by civil wars, is so to speak reborn from its ashes and resumes the vigour of youth by escaping from death's clutches.[103]

It is precisely here, against the background of this civil war in which those who would be entrusted with its protection reveal themselves to be 'enemies of the State', that the sense of punishment of the criminal as a 'public enemy' is manifested: a sense that goes beyond that the simply juridical-moral because what Rousseau presents as the restoration of the juridical-moral order broken by crime is not so much the confirmation of the established order, which in reality has plunged into disorder, but the institution of a new order that reduces even the memory of the old one to ashes. In this case it is not a question of guaranteeing the interest and freedom of the criminal, of making him or her good for something, of reconciling him or her with the whole of which he or she is a part, thus recomposing the tear introduced by crime into civil life. 'Everything that destroys social unity', says Rousseau, 'is worth nothing'.[104] Each citizen, in the same way, 'is nothing'[105] outside the bond of solidarity with others. The usurper who stops conceiving himself as 'part of a greater whole' to try to become its master and lord is precisely this very dangerous nothing, in the relationship with which no mediation or reconciliation is possible, but only victory or slavery. That's why he must be punished not as a citizen, but as a public enemy.

[102] ibid II, 8, 158.
[103] ibid.
[104] ibid IV, 8, 219.
[105] ibid II, 7, 155.