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## CESARE BECCARIA'S CONTRACTUAL THEORY OF CRIMINAL LAW AND ITS RESONANCE IN ABSOLUTIST RUSSIA

Grazie alla filosofia e a quegli spiriti illuminati che, ad onta de' pregiudizzi, del fanatismo, del dispotismo e delle barbare leggi sanno ed'anno il coraggio d'insegnare agli uomini la via della giustizia, della dolcezza e dell'umanità!

(G. Angiolini)

### I.

The spirit of the eighteenth century was focused on the individual happiness. That happiness corresponds to the demand that was put forward by most Enlightenment philosophers to humanize the criminal code in order to advocate the greatest possible mildness in penal punishment. This humanisation of the penal system was conceivable, and conceptually attractive, during the Enlightenment, because formerly every alleviation of the prevail punishments, with which the highest being, God was attacked by the delict, was a matter to reconcile. That would have meant the human intervention into the penal power of God, and effectively, a weakening of God's rule. Important changes in the area of criminal law came to fruition only through the cooperation of philosophers and rulers and the corresponding secularisation of many social and political areas by enlightened rulers such as Friedrich II, Joseph II and Catharine II<sup>1</sup>.

One cannot overestimate the close connections between Enlighteners and individual monarchs. It is striking, according to the historian Karl Otmar von Aretin, that enlightened rulers like Catharine II surrounded themselves with enlightened philosophers, and not only from vanity, but also '*weil sie dem neuen Denken einen breiten Raum bei der Neugestaltung ihrer Staaten einräumen wollten*'<sup>2</sup>. The argument of

<sup>1</sup> C. Dippel, *Politischer Reformismus und begrifflicher Wandel*, Tübingen 1976, p. 175.

<sup>2</sup> K.O.F. von Aretin, "Der Aufgeklärte Absolutismus als europäisches Problem", [in:] K.O.F. von Aretin (ed.), *Der Aufgeklärte Absolutismus*, Cologne 1974, p. 13.

the physiocrats for the enlightened despot, that '*nur ein sich über die historischen Hindernisse und andere Vorkommnisse hinwegsetzender Despot in der Lage sei, die Voraussetzungen für den rationalen, aufgeklärten Staat zu schaffen*'<sup>3</sup>, was also followed by the thinkers from Milan. Many philosophers, particularly from north Italy, joined with pleasure the so-called "*despotismo illuminato*" or "*despotisme éclairé*" of the physiocrats. The precisely meaning of "*vero despota*" was also discussed in detail. Unlike in the contemporary German debate, it concerned a positively occupied concept<sup>4</sup>. Pietro Verri and Cesare Beccaria went further and characterised enlightened despotism as *the* ideal government form, and dismissed the old-style of absolutism as an arbitrary form of government<sup>5</sup>. The inspirations for *Dei delitti e delle pene* (1764) were not only the ideas of philosophers – above all French and English – famous across the continent, such as Montesquieu or Voltaire<sup>6</sup>, but also the intensive discussions within Italy, in the *Accademia dei pugni* and the authors of *Il Caffè*<sup>7</sup> in Milan. The knowledge of the penal administration of justice of the Brothers Verri was particularly significant<sup>8</sup>.

The aim of this article is – besides demonstrating how the idea of penal law was changed by the social contract theory offered by Beccaria in his *Dei delitti e delle pene*<sup>9</sup> – is to show the influence this work exerted on the criminal law philosophy of Catharine the Great, and her subsequent penal law reforms. The influence of Beccaria's ideas on Catharine's legislative agenda will show that the pursuit of law

<sup>3</sup> Aretin, p. 20.

<sup>4</sup> Ch. Dipper, *Naturrecht und politische Reformen in Italien 1750-1850*, [in:] D. Klippel, (ed.): *Naturrecht und Staat. Politische Funktionen des europäischen Naturrechts (17.-19. Jahrhundert)*, München 2006, pp. 171-198.

<sup>5</sup> F. Valsecchi, *Der Aufgeklärte Absolutismus (Italien)*, [in:] K.O. Freiherr von Aretin (ed.): *Der Aufgeklärte Absolutismus*, Köln 1974, p. 208.

<sup>6</sup> Letter to Morellet on 26.1.1766, [in:] *Cesare Beccaria, dei delitti e delle pene. Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna nell'europa del Settecento*, a cura di F. Venturi, Torino 1978.

<sup>7</sup> The Melanese's group of the *Il Caffè* is relatively well editorially documented and investigated. The journal itself is given in a new, from Gianni Francioni and Sergio Romagnoli published critical edition from 1993/1998. The most important works of the leading representatives of the Milan Enlightenment, Cesare Beccaria, Pietro and Alessandro Verri are available in newer issues. The writings of Beccaria are given in an already far advanced and for the philosophically relevant texts soon concluded critical *Edizione nazionale* (from 1984) which is published by Luigi Firpo and afterwards by Gianni Francioni.

However, also in Italy an all-embracing biographical representation of Beccaria is absent up to now. Nevertheless there is a huge number of the articles from which most anthologised resulted in the different Beccaria jubilees have appeared: for instance, *Cesare Beccaria fra Milano e l'Europa* published from Sergio Romagnoli.

<sup>8</sup> W. Rother, *La maggiore felicità possibile. Untersuchungen zur Philosophie der Aufklärung in Nord- und Mittelitalien*, Basel 2005, p. 230.

<sup>9</sup> C. Beccaria, *Edizione nazionale delle opere, diretta da Luigi Firpo e Gianni Francioni, I-XVII*, Milano 1984, p. 135-199.

through the framework of the social contract removed power from the absolutist ruler, even if only partially. Beccaria, who was not terribly original and only sprinkled his own ideas within frameworks taken from other seventeenth and eighteenth century thinkers, figured as a contemporary idea-transferring force.

Franco Venturi's critical edition of *Dei delitti e delle pene* (1766), *Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna dell'Europa del Settecento* is that which has been used in this present study. Additionally, Wilhelm Alff's German translation, including his preface 'Über verbrechen und Strafen'<sup>10</sup> has been consulted. Both Venturi and Alff used the edition of 1766, which was the last revision Beccaria was engaged in<sup>11</sup>. This consented revision occurred after the complete transformation of the text's structure by the French translator Morellet<sup>12</sup>.

The greatest source for gauging the transfer of Beccaria's criminal theories into Russia during the reign of Cathrine II include: the Russian original *Nakaz* (instruction): *Императрица Екатерина II (Imperatrix Ekaterina II), 'О величии России' (O velichii Rossii), Москва/Moskwa: 2003, 'Антология мысли' (Antologija mysli): Наказ Коммиссии о составлении проекта нового уложения (Nakaz Kommissii o sostavlenii proekta novogo ulozhenija)<sup>13</sup>; and the German translation printed in Riga-Mitau in 1769, the *Katharina der Zweiten Kaiserin und Gesetzgeberin von Russland: Instruktion für die zu Verfertigung des Entwurfs zu einem neuen Gesetzbuche verordnete Kommission*<sup>14</sup>.*

The idea of the *contrat social* as the origin of the state – with Rousseau as its most important advocate – was raised in Italy by many philosophers regarding the question of common property. Above all Beccaria, who, without due cause, has been

<sup>10</sup> W. Alff, *Zur Einführung in Beccarias Leben und Denken*, [in:] Cesare Beccaria, *Über Verbrechen und Strafen. Nach der Ausgabe von 1766*, translated and edited by W. Alff, Frankfurt a. M. 1998.

<sup>11</sup> Venturi, p. VIII f.

<sup>12</sup> Letter from Beccaria to Morellet, 26. January 1766: "Io devo ringraziarvi, o signore, con tutto lo spirito del dono che mi avete fatto della vostra eccellente traduzione e della delicatezza vostra del soddisfare con tanta prontezza alla mia curiosità. Io l'ho letta con un indicibile piacere ed ho trovato che voi avete abbellito l'originale. Vi protesto con ogni sincerità che l'ordine che avete giudicato a proposito di fare all'opera è più naturale e perciò preferibile al mio e mi rincresce che sia già quasi tutta compiuta la nuova edizione italiana, perché io mi sarei conformato in tutto, o quasi tutto vostro piano". Edited by F. Venturi, p. 362.

<sup>13</sup> Императрица Екатерина II, «О величии России», серия «Антология мысли»: Наказ Коммиссии о составлении проекта нового уложения, Москва: ЭКСМО, 2003.

<sup>14</sup> *Katharina der Zweiten Kaiserin und Gesetzgeberin von Russland: Instruktion für die zu Verfertigung des Entwurfs zu einem neuen Gesetzbuche verordnete Kommission*, Riga – Mitau 1769. In following the quotes will be presented in the Russian original, the German translation is returned in the footnote.

called '*Rousseau degli Italiani*'<sup>15</sup>, took over the social contract as a springboard for his penal law considerations. Beccaria affirmed the idea of the inherent equality of the people and state's purpose being the assurance of the well-being of its individual members. Consequently the sovereign is no longer to be accepted simply as being ordained by God as the patron of the people, but as the representative of the people, to protect their interest<sup>16</sup>. Beccaria's criminal theory is also based on that principle. The sovereigns who were ready to reform discovered these possibilities offered in his work. Beccaria was not only a decisively follower of the ideas of the Enlightenment, but moreover he pushed the old directives based on the tradition of criminal law aside and looked at the juridical problems through a new perspective. That yielded a new, rational, and lasting examination of values in the area of the criminal law<sup>17</sup>.

It was the *disordine* of the laws, which Beccaria had arranged to attend to the *pubblica felicità*<sup>18</sup>. His revision is directed at the punishment and the criminal trial that had been neglected by the legislation until then<sup>19</sup>. That is why he felt compelled to '*inspirare quel dolce fremito con cui le anime sensibili rispondono a chi sostiene gl'interessi della umanità*'<sup>20</sup>.

## II.

Italy, bounded to Europe both politically and economically, also took part in the cultural movement of the Enlightenment<sup>21</sup>: '*vi vogliono molti lumi e molta filosofia*', wrote Alessandro Verri in his observations on the philosophy of morality<sup>22</sup>. In the second half of the 18th century the cult of reason and science grew in Italy, above all concerning the great prizing of independent mental achievement<sup>23</sup>. The origin of

<sup>15</sup> Though Beccaria had adopted the idea of the social contract, indeed, he was less radical than Rousseau. Besides, he connected also lines of thought of other philosophers in his theory of the social contract. Actually Beccaria declared him the name "Il Rousseau degli italiani": F. Facchinei, *Dalle Note ed osservazioni sul libro intitolato Dei delitti e delle pene*, [in:] F. Venturi, *Cesare Beccaria, Dei delitti e delle pene. Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna dell'Europa del Settecento*, Einaudi 1978, p. 164-186; here: p. 173.

<sup>16</sup> Beccaria, *Introduzione*, [in:] F. Venturi, *Cesare Beccaria, Dei delitti e delle pene. Con una raccolta...*, p. 9-11.

<sup>17</sup> Valsecchi, *op. cit.*, p. 224.

<sup>18</sup> Venturi, *Introduzione*, [in:] *Cesare Beccaria, dei delitti e delle pene. Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna dell'Europa del Settecento*, a cura di Franco Venturi, Torino 1978, p. VII; W. Alff, *Zur einföhrung in Beccarias Leben und Denken*, [in:] Cesare Beccaria, *Über Verbrechen und Strafen. Nach der Ausgabe von 1766*, translated and edited by W. Alff, Frankfurt a. M. 1998, p. 9, 18; W. Rother, p. 231.

<sup>19</sup> Beccaria, *Introduzione*, p. 10.

<sup>20</sup> *Ibidem*, p. 11.

<sup>21</sup> Procacci, *Storia degli Italiani*, Roma 1978, p. 192.

<sup>22</sup> A. Verri, *Alcune idee sulla filosofia morale (1765/66)*, p. 685.

<sup>23</sup> A. Noyer-Weidner, *Die Aufklärung in Oberitalien*, München 1957, p. 103.



a public sphere featuring the apparatus of modern journalism and the beginning of the public-monarchic cooperation were other signs of this change. The result was that the Italian Enlightenment gained the character of a reform movement<sup>24</sup>.

For Beccaria, this reform movement and his affiliation to a circle of friends and discussions supportive of it, known as the '*Accademia dei Pugni*', were decisive. In the everyday discussions of this society Beccaria got to know the ideas and main works of the English, Scottish, German and French Enlightenment<sup>25</sup>. His work resulted neither from an immediate confrontation with crime nor with the penal procedure associated with the execution of capital punishments<sup>26</sup>. There is no documentation supporting a notion that Beccaria would have looked extensively into concrete cases concerning the convicted. There is also no evidence showing his playing any role in the creation of the prison and working house in Milan, the *Casa di Correzione* which was established in the beginning of the 1770s.<sup>27</sup>

Questioning the legality of torture and capital punishment had already occurred in the end of the seventeenth century, arising out of the spiritual complications associated with applying natural legal frameworks to these practices. Such questioning continued into the Enlightenment period, though with a notably different character. Arguments concerning capital punishment in the Enlightenment epoch were stamped with the critique of the irrational metaphysical thinking of the Middle Ages, with the emancipation attempts towards all overcome religious-theological ideas, and by the slowly growing faith in pure reason as the sole guider of all thinking<sup>28</sup>. In the introduction to *Dei delitti e delle pene*, '*A chi legge*', Beccaria presents his view of the problem of the existing criminal code<sup>29</sup>, which he called '*uno scolo de' secoli più barbari*'<sup>30</sup>. Through a discussion of the theory of the social contract Beccaria demanded the abolition of torture, of capital punishment, the condemnation of judicial arbitrariness, and a new education for citizens with which help the ideological tolerance could be generated and bent forward the crime.

<sup>24</sup> F. Valsecchi, p. 222 ff.

<sup>25</sup> Letter on Morellet on 26.1.1766.

<sup>26</sup> Esselborn, *Einleitung*, [in:] Cesare Beccaria: *Über Verbrechen und Strafen*, übers., mit biographischer Einleitung und Anmerkungen von Karl Esselborn; Leipzig 1905, p. 190.

<sup>27</sup> G. Deimling, *Cesare Beccaria: Werk und Wirkung*, [in:] Gerhard Deimling (ed.), *Cesare Beccaria. Die Anfänge moderner Strafrechtspflege in Europa*, Heidelberg 1989, p. 30.

<sup>28</sup> Unfortunately, the frame of the work does not admit a closer consideration of the criminal abuses; therefore, it is up expelled: R. van Dülmen, *Theater des Schreckens, Gerichtspraxis und Strafrituale in der Frühen Neuzeit*, München 1988, p. 121-144.

<sup>29</sup> H. Hattenhauer, *Europäische Rechtsgeschichte*, Heidelberg 1994<sup>2</sup>, p. 287-302: „Before the begin of Enlightenment the absolute state, carried by the theory of the ruler takes up as a deputy of God on earth, the right at the possession about life and death of his subjects as something natural for itself. The state right to the torture and capital punishment in the penal system was founded in his legality as well as in his usefulness purely theokratisch, was affirmed that is as the will of God accordingly fully”.

<sup>30</sup> Beccaria, *Dei delitti e delle leggi*, *A chi legge*, p. 3.

## III.

'*Sapere aude! Habe Mut, dich deines eigenen Verstandes zu bedienen!*'<sup>31</sup> is the central and significant achievement of the Enlightenment – that is the emphasis on the power of human reason and the corresponding heightened position of the individual<sup>32</sup>. In a theocracy, however, the consideration of individually-suited punishment was not conceivable. The judicial frame was subject to the divine regulation. The theological justification of capital punishment, for instance the treatment of suicide which was looked as an offence against the fifth bid, confirmed this: the self-murderer wasn't allowed to end his life through his will, because it had been trusted to him by God and was defeated only by God's possession power. The penal execution as a sort of religious service excluded the consideration of the individual. The references to such theologically-impressed legal understandings have not lost their meanings completely today, because certain religious convictions have maintained their efficacy. In the eyes of the law the Enlightenment turn means that the individual can no longer assign responsibility for his actions upon religious authority or convictions, but must rather defend himself according to Reason<sup>33</sup>.

God became, according to the deism possessed by many thinkers, the transcendent God who had created the mechanisms of the world but had not played a direct role in its progressive development. God therefore constricted individual human freedom to a limited extent<sup>34</sup>. Law derived therefore not through divine revelation, but rather through human history and bounded through the social contract to the individual<sup>35</sup>. Criminal law was discussed in a manner only narrowly connected with the theory of State. In this case political philosophy effected a decisive influence upon penal jurisprudence. The central concept of Reason was understood not only as a discovery of everlasting truth existing before the individual's own eyes, but also the process itself of the acquisition of this truth. Since Reason '*ist nicht das Ärar, nicht die Schatzkammer des Geistes, in der die Wahrheit, gleich einer geprägten Münze, wohlverwahrt liegt; sie ist vielmehr die geistige Grund- und Urkraft, die zur Entdeckung der Wahrheit und zu ihrer Bestimmung und Sicherung hinführt*'<sup>36</sup>.

<sup>31</sup> E. Kant, *Beantwortung der Frage: Was ist Aufklärung?*, [in:] E. Bahr (ed.), Kant, Erhard, Haman, Herder, Lessing, Mendelssohn, Riem, Schiller, Wieland: *Was ist Aufklärung? Thesen und Definitionen*, Stuttgart: 2008, p. 9.

<sup>32</sup> H. Hattenhauer, *Die Geistesgeschichtlichen Grundlagen des deutschen Rechts*, Heidelberg: 1996<sup>3</sup>, p. 44 ff.

<sup>33</sup> G. Oestrich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriß*, Berlin 1978<sup>2</sup>, p. 35.

<sup>34</sup> K. Wuchterl, *Einführung in die Philosophiegeschichte*, Bern 2000, p. 129-133.

<sup>35</sup> H. Hattenhauer, *op. cit.*, p. 47.

<sup>36</sup> E. Cassirer, *Die Philosophie der Aufklärung*, Nachdruck der Ausgaben Tübingen: 1932 and 1973 with a new introduction by Gerhard Hartung, Hamburg 1998, p. 16.

The doctrine of natural law furthermore exerted a huge influence upon the development of legal understanding. The freedom of the natural state and the original equality of people lead to the fact that the departure of the natural state can take place to the state only on contractual basis<sup>37</sup>. Everyone has a social-contractual right to observance of the contract established borders; the crime becomes the injury of the subjective rights which arise from the *Contract social*<sup>38</sup> – the reference point of the legal understanding<sup>39</sup> of many enlightened philosophers.

Because Right is explained rationally and in connection with the acceptance that Reason is inherent in all people, it excludes people privileged access to Right. Basically, every person has the ability because of his reason to attain examination into Right. And the established reason of right presents the basis of the equality of all people as legal persons<sup>40</sup>.

The secularisation process of right and state caused by the natural law is also one of the significant features of the enlightenment epoch<sup>41</sup>. As a result political theory broke radically with prevailing traditional views that the state after its origin and function is not founded theocratical any more. But the state receives its legitimacy from the natural state according to a meeting of all members in the social contract. This damage of the justification based on theological concepts led to the search for reasonable explanation by the characteristic rationalising impulse of the Enlightenment concerning Right and State<sup>42</sup>. The only legal argument, and also the only rational reason of the formation of the state, is the social contract which has been closed by independent individuals when crossing from the natural state (*status naturalis*) to the civilised existence (*status civilis*)<sup>43</sup>. To take up the thoughts of preceding philosophers and thinkers, to develop independently and to demonstrate them in an efficacious form, was then Beccaria's work. As a representative of the contract theory of state he also explained the state penal authorisation by means of a social contract.

Beccaria was not only influenced by Montesquieu, who was an early proponent of the division of powers as well as the separation of the medieval mixtures of Right and religion and Bible and penal law<sup>44</sup>, but also by Rousseau<sup>45</sup>. Beccaria also deve-

<sup>37</sup> D.V. Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts*, Paderborn 1976.

<sup>38</sup> K. Amelung, *Rechtsgüterschutz und Schutz der Gesellschaft*, Frankfurt a. M. 1972, p. 19 f.

<sup>39</sup> H. Welzel, *Naturrecht und materiale Gerechtigkeit*, Göttingen 1990<sup>2</sup>, p. 113.

<sup>40</sup> M. Forschner, *Mensch und Gesellschaft, Grundbegriffe der Sozialphilosophie*, Darmstadt 1989, p. 14 f.

<sup>41</sup> Ch. Dipper, *Naturrecht und politische Reformen in Italien*, p. 186 f.

<sup>42</sup> E. Cassirer, *op. cit.*, p. 323.

<sup>43</sup> Ch. Dipper, *op. cit.*, p. 179 ff.

<sup>44</sup> Montesquieu, *Charles-Louis de Secondat, Baron de la Brède, Vom Geist der Gesetze*, Stuttgart: 2003, book XXVI, chapter 2.

loped the understanding of crime according to a derivation model which leads from the natural state to society and state to the subsequent need for criminal law. With Hobbes Beccaria shares the pessimistic view of man. Human nature in this case was seen negatively<sup>46</sup>, with the natural state characterised by as a constant state of war<sup>47</sup>. However, in explicit contrast to Hobbes he maintains: '*sarebbe un errore a chi, parlando di stato di guerra prima dello stato di società, lo prendesse nel senso hobbesiano, cioè di nessun dovere e di nessuna obbligazione anteriore, in vece di prenderlo per un fatto nato dalla corruzione della natura umana e dalla mancanza di una sanzione espressa*'<sup>48</sup>. In this state of war people are insecure and in order to achieve security they resolve to sacrifice a part of their freedom '*per goderne il restante con sicurezza e tranquillità. La somma di tutte queste porzioni di libertà sacrificate al bene di ciascheduno forma la sovranità di una nazione, ed il sovrano è il legittimo depositario ed amministratore di quelle*'<sup>49</sup>. At this point Beccaria diverges from Hobbes's submission contract<sup>50</sup>, but also from the characteristics of Rousseau's social contract. While Rousseau affirmed that the entire rising of individual freedom in the connection of society end of the social contract<sup>51</sup>, Beccaria makes an effort of a restriction of the state power<sup>52</sup>.

Because everyone sacrifices only a part – namely the least possible part – of his private freedom to the sovereign, the rest of his freedom remains at his own disposal and neither society nor the state can have any claim in usurping it. This is a pragmatic conclusion, which is motivated from the consideration that the achieving of the state's purposes do need require further restriction of freedom. Rather than impossibility or popular opposition, the missing imperative is the reason why the state does not pursue the complete transference of individual rights<sup>53</sup>.

According to Beccaria, criminal law is based on the acceptance of '*dispotico animo di ciascun uomo*' – and that thus the observance of the social contract remains dangerous<sup>54</sup>. It is not enough to furnish the administration of '*somma di minime*

<sup>45</sup> W. Alff, *Zur Einführung...*, p. 11.

<sup>46</sup> Beccaria, *Dei delitti e delle pene*, *A chi legge*, p. 5.

<sup>47</sup> *Idem*, *Dei delitti e delle pene*, p. 49.

<sup>48</sup> *Idem*, *A chi legge*, p. 5.

<sup>49</sup> *Idem*, *Dei delitti e delle pene*, § I, p. 11.

<sup>50</sup> In the state of nature predominates a „war of every man against every man, which makes the life of the people cheerless and dangerous (Hobbes, *Leviathan*, 13th chapter), hence, the need of a social contract.

<sup>51</sup> J.-J. Rousseau, *Vom Gesellschaftsvertrag oder Grundsätze des Staatsrechts*, Stuttgart 2008, Book I, chapter 6.

<sup>52</sup> C. Beccaria, *Dei delitti e delle pene*, § XXVIII, p. 62 ff.

<sup>53</sup> M.A. Attaneo, *Menschenwürde und Strafrechtsphilosophie der Aufklärung*, [in:] R. Brandt (Hrsg.), *Rechtsphilosophie der Aufklärung*. Symposium Wolfenbüttel 1981, Berlin u.a. 1982, p. 322 f.; Critically to this perception: E. Weis, *Cesare Beccaria (1738-1794), Mailänder Aufklärer und Anreger der Strafrechtsreformen in Europa*, München 1992.

<sup>54</sup> C. Beccaria, *Dei delitti e delle pene*, § I.

*porzioni della privata libertà di ciascuno* with the sovereign, but it should be keeping to '*difendere dalle private usurpazioni di ciascun uomo in particolare*'<sup>55</sup>. The right to punish results from the need, to use it as means of protecting from private presumption<sup>56</sup>. The individual citizen is not only injured by unfair assumption of his freedom, but rather the society as whole and the public welfare<sup>57</sup>.

Beccaria bases the legitimacy of Right upon the utilitarian greatest happiness principle, that is, the greatest good for the greatest number of people. Further, he demands making punishment proportionate to the crime and the near-abolition of capital punishment<sup>58</sup>. Such demands to calculate punishments for offences in proportion to their social harm were put forward already by Montesquieu, who stressed that the crimes increase as more they attacked the society<sup>59</sup>. Beccaria differs from Montesquieu in this respect, as he stresses the exclusivity with which he represents his thesis that '*l'unica è vera misura dei delitti è il danno fatto alla nazione*'<sup>60</sup>. Other elements of legal judgement, such as the '*intenzione*' of the criminal or his '*dignità*', were correspondingly totally rejected<sup>61</sup>.

The right to punish is also strictly contractually regulated: The legislator is the representative of the people of the contract-founded society. By extension, he is also the representative of the sovereign<sup>62</sup>. That conception requires the separation of power into legislative, executive and judicial branches, which had already been discussed in depth by Montesquieu<sup>63</sup>. The decisive factor is that this principle of the division of power also forbids the interpretation of the penal laws by the judges. The function of the judge, according to Beccaria, only consists in proving the actions of the culprit and in judging whether they agree with the written law<sup>64</sup>. No interpretation or other arbitrary interpretations of the laws by the judges; and also no changes in the text and therefore no restatements by the judges, but exclusively by the legislator are conceded<sup>65</sup>.

<sup>55</sup> *Ibidem*, p. 11.

<sup>56</sup> *Ibidem*, p. 12 f.

<sup>57</sup> The concepts/terms "Society" and "public welfare" are used synonymously by Beccaria; C. Beccaria, §§ VI, VIII.

<sup>58</sup> *Idem*, *Dei delitti e delle pene*, § VI, p. 19 ff.

<sup>59</sup> Montesquieu, *Vom Geist der Gesetze*, Bd. VI, p. 16.

<sup>60</sup> C. Beccaria, *Dei delitti e delle pene*, § VII, p. 22.

<sup>61</sup> *Ibidem*, p. 22 f.

<sup>62</sup> *Ibidem*, p. 13 f.

<sup>63</sup> Montesquieu, *Charles-Louis de Secondat, Baron de la Brède, Vom Geist der Gesetze*, Stuttgart 2003, Bd. VI.

<sup>64</sup> This approach is reflected in the reforms of Josephinism in the second half of the 18th century; in addition more Reinalter, *Josephinismus als aufgeklärter Absolutismus*, p. 125 ff.

<sup>65</sup> C. Beccaria, *Dei delitti e delle pene*, § V, p. 18 f.

Beccaria formulates a prevention-utilitarian<sup>66</sup> draught of the punishment connected to the demand for humanity and brings him to a formula which is based on the differentiation of mental and physical impressions: on the one hand, the punishments should have a deterrent effect, and on the other hand they should spare the body of the delinquent<sup>67</sup>. He pleads for milder punishments which are aimed, however, at the psychic state of the person: *'Non è l'intensione della pena che fa il maggior effetto sull'animo umano, ma l'estensione di essa; perché la nostra sensibilità è più facilmente e stabilmente mossa da minime ma replicate impressioni che da un forte ma passeggero movimento'*<sup>68</sup>. Indeed, he remains loyal, also to his utilitarian and contractual draught and claims, for instance, instead of the physical crippled persons or even the capital punishment, a lifelong imprisonment, because *'la pena sia giusta non deve avere che quei soli gradi d'intensione che bastano a rimuovere gli uomini dai delitti; ora non vi è alcuno che, riflettendovi, scieglier possa la totale e perpetua perdita della propria libertà per quanto vantaggi oso possa essere un delitto: dunque l'intensione della pena di schiavitù perpetua'*<sup>69</sup> *sostituita alla pena di morte ha ciò che basta per rimuovere qualunque animo determinato; [...]*<sup>70</sup>. His consequent thought is that a punishment posses deterrent enough effect when that punishment outbalances the advantage expected from the crime<sup>71</sup>. Although he falls back on one of the best known punishment ideas of the premodern judicial systems, the deterrence method, he modifies them from physical for the psychic deterrence. The argumentation of Beccaria suggests the supposition that he was an absolute opponent of the capital punishment. However, at least even if in a hypothetical form, the possibility of the capital punishment becomes for two kinds of crime considered. The first one concerns the high treason. However, this reason is qualified straight away by the consideration that under a quiet rule of the laws no such need can arise. The second reason which could justify the capital punishment would be the situation that the death of a delinquent would be the only possibility to hold other people from crime<sup>72</sup>. Both the legal and the criminal exceptional case can be affiliated argumentatively to the social contract, because in both cases the use of the capital punishment sought to serve the maintenance of the state and with it of the laws.

<sup>66</sup> W. Rother, *La maggiore felicità possibile. Untersuchungen zur Philosophie der Aufklärung in Nord- und Mittelitalien*, Basel 2005, p. 244.

<sup>67</sup> C. Beccaria, *Dei delitti e delle pene*, § XVI, p. 38 ff.

<sup>68</sup> *Ibidem*, p. 63.

<sup>69</sup> What means the forced labour.

<sup>70</sup> C. Beccaria, *Dei delitti e delle pene*, § XVIII, p. 64 f.

<sup>71</sup> *Ibidem*.

<sup>72</sup> *Ibidem*, p. 62 f.

The stress of the individual in the Enlightenment had apparently big consequences for the resulted criminal law theory with Beccaria, namely in the restriction on the minimally necessary restriction of the rights. And the secularisation of the right led to a stronger emphasis of the society instead of religious interests.

#### IV.

A striking feature of the Russian Enlightenment was the almost complete absence of middle-class representatives amongst the national supporters of Enlightenment. The bourgeoisie, which could act as a counterbalance and challenger to the nobility in western scene, was not present for this role in Russia<sup>73</sup>. The bourgeoisie – except for in the Baltic provinces – was involved only extremely marginally in Russian public discussion during the age of the Enlightenment. This reflected the failure of the municipal ordinance of Catharine II to yield a western-style bourgeoisie. Additionally, there were not enough broadly educated theologians to yield a sort of cloistered Enlightenment, as occurred in the Baltic provinces or in other European countries. Nor was there a sufficiently developed print culture to encourage a national Enlightenment. This also that Russia meant lacked a crucial media form for national Enlightenment<sup>74</sup>.

Such an absence is interesting, given that Enlightenment requires a public sphere. This public and the formation of non-state social élites frame the oppositional opinion, the rise of a countervailing force of power to the state. However, Enlightenment assumes a public. The public and the origin of non-state social élites form the function of oppositional opinion and the rise to a power factor considered by the state. This non-state intellectual élite was absent in the "early Enlightenment" in Russia<sup>75</sup>.

Peter's reforms<sup>76</sup> were part of a modernisation process aimed above all at the state – and without the transfer of West European early-enlightened ideas the re-

<sup>73</sup> An overview above the research state to the Russian town history, see: M. Hildermeier, *Bürgertum und Stadt in Russland 1760-1870. Rechtliche Lage und soziale Struktur*, Köln 1986, pp. 1-31.

<sup>74</sup> G. Robel, *Zur Aufklärung in Adelsgesellschaften: Russland und Polen*, [in:] S. Jüttmer, J. Schlobach (Hrsg.), *Europäische Aufklärungen*, Hamburg 1992, p.p 152-171.

<sup>75</sup> A.B. Западов, *Русская журналистика XVII века*, Москва 1964, [A.V. Zapadov, *Russkaja žurnalistika XVII veka*], p. 20-34, p. 57-66: Often as periodical quoted *Ведомости* (Vedomosti) or from the Russian academy of the sciences newspaper published Saint Petersburg had were, however, instrumental used by the state for the opinion education.

<sup>76</sup> E. Winter, *Frühauflklärung. Der Kampf gegen den Konfessionalismus in Mittel- und Osteuropa und die deutsch-slawischen Beziehungen*, Berlin 1966; Winter claims for an early Russian Enlightenment at the beginning of the 18th century; or: J. Lotman, *Die Frühauflklärung und die Entwicklung des gesellschaftlichen Denkens in Russland*, [in:] *Studien zur Geschichte der russischen Literatur im 18. Jahrhundert*, Berlin 1968, Bd. 3, p. 93-119.



forms of Catharine II would likely not have been possible. It concerned here the state-controlled Enlightenment<sup>77</sup>, because it was about a pursued transformation process initiated by the state of the society which had the rise of the military, economic and administrative efficiency for the purpose of an increase of the state power and in which the society was an object of state measures and not an acting force<sup>78</sup>. The nobility was to comply the career in state service made by the state in the course of the educational reforms. To follow them, became, finally, a question of the social prestige and the self-confidence of the élite. The firstly enforced acceptance of the state demands developed to the mentality change by which the self-determined appropriation of the educational property and, finally, the participation in the questions of the time belonged increasingly to the self-image of the social élite<sup>79</sup>.

The development of the Russian Enlightenment was very closely twinned with the person and the rule of Catharine II<sup>80</sup>. She not only filed her diaries with reflections upon enlightened ideas and proposals for enlightened reforms, but actively sought to render these in actual governance<sup>81</sup>. In her enlightened endeavours she built upon the developments connected with the tradition of the state Enlightenment. The founding of Russia's first journals, including Gerhard Friedrich Müller 'Ежемесячныя сочинения' (1755) (*Ežemesjačnyja sočinenija*) and Aleksandr P. Sumarokovs 'Трудолюбивая пчела' (1759) (*Trudoljubivaja pčela*), should also be seen as linked with Catharine II<sup>82</sup>.

The Tsarina's own will to enlighten as well as the growing self-confidence of the nobility<sup>83</sup> created a disursive space that, although devoid of a significant bourgeois public, at least facilitated the emergence of social criticism. Within this space followed the development of journalistic media for the purposes of social critique. By the end of the 1760s, magazines appeared which offered a public space for the discussion of the social problems, such as that of Nicholai Novikov<sup>84</sup>.

<sup>77</sup> Robel, p. 157; or: A. Каменский, *Российская империя в XVIII веке: традиции и модернизация*, Москва 1999 [A. Kamenskij, *Rossijskaja imperija v XVIII veke: tradicija modernizacija*], p. 85-133.

<sup>78</sup> A. Kamenskij, *op.cit.*, p. 130 ff.

<sup>79</sup> *Ibidem*, p. 131 ff.

<sup>80</sup> *Ibidem*, p. 220 f.

<sup>81</sup> *Ibidem*, p. 258 f; G. Sacke, however, described her confession of the Enlightenment as a bare ruling instrument. This thesis, the enlightened absolutism only wanted to deceive the world, will represent in particular in the Marxist historiography; see: G. Sacke, *Die Gesetzgebende Kommission Katharinas II. Ein Beitrag zur Geschichte des Absolutismus in Rußland*, Breslau 1940, p. 35 ff.

<sup>82</sup> A. Kamenskij, *op. cit.*, p. 253 ff.

<sup>83</sup> M. Raeff, *Staatsdienst, Außenpolitik und Ideologien*, [in:] *Jahrbücher für Geschichte Osteuropas*. NF 7, 1959, p. 161 ff.

<sup>84</sup> Н. Макогоненко, *Николай Новиков и русское просвещение XVIII века*, Москва 1951 [N. Makogonenko, *Nikolaj Novikov i russkoe prosvješćenie XVIII veka*].

Catharine II devoted herself with great zeal to the study of the main works of the western European enlightened literature even whilst only a prospective successor to the throne<sup>85</sup>. It was not therefore terribly surprising that when the Tsarina ascended to the throne in 1762, she possessed the first Russian edition of Beccaria's *Dei delitti e delle pene*. By the end of 1765 priest André Morellet (1727-1819) had published the first French translation of the work *Dei delitti e delle pene*, of which Catherine acquired a copy by the middle of 1766 at the latest<sup>86</sup>. It is probable that Catherine II received the copy from her correspondence with D'Alembert<sup>87</sup>.

Before inviting Beccaria to her court in autumn of 1766, Cathrine II conducted investigations about Beccaria with her confidential secretary Ivan P. Elagin. In a letter to Elagin in 1766 she wrote, with a bit of uncertainty: '*On dit l'auteur d'un livre italien: Traité des délits et des peines, [...] un abbé, ou non abbé, Beccaria*'. Nevertheless, she seemed to dispose of some information '*Son livre a paru en 1765 et six mois après il y en avoit en Italie déjà trois éditions. [...] C'est un crime nouveau, mais il seroit à souhaiter qu'on suivit les maximes de Mr. Beccaria, qui n'a pas osé mettre son nom à la tête de son ouvrage*'<sup>88</sup>. Thereafter the Italian ballet master Gasparo Angiolini, who was then active at the Russian court, was asked to inform Beccaria of the respect of Her Majesty and simultaneously to invite him to the Russian court. Gasparo wrote to Beccaria repeatedly that '*questa Sovrana [Katharina II.] à letto di già il Suo [Beccaria], e che il suo cuore si è compiaciuto dell'umanità che V.S. Ill.ma con tanta forza scrive e sostiene*'<sup>89</sup>.

Beccaria rejected the offer of the Tsarina to come to court and take part in the elaboration of a new penal code<sup>90</sup>. His negative reply had however scarcely any impact upon the Tsarina's esteem for his book. On the 14th of December, 1766, the empress announced through a manifesto the founding of a commission for to devise legislation inspired by the work. She compiled the *Nakaz*<sup>91</sup> (instruction) which referred to Beccaria's book<sup>92</sup>. It was published, in Russian and in German in 1767, in French, in Italian and in Dutch in 1769, and was spread and discussed throughout

<sup>85</sup> E. Boehme, (ed.), *Katharina II. in ihren Memoiren*, Frankfurt a. M. 1972, p. 145.

<sup>86</sup> The French translation exists since 1765: *Traté des délits et des peines*, Paris 1765.

<sup>87</sup> T. Čizova, *Beccaria in Russia*, „Slavonic and East European Review”, 40, 1962, p. 392.

<sup>88</sup> Letter Katharina II to I.P. Elagin in 1766, published in: F. Venturi, *op. cit.*, p. 630; the Russian translations from French original in: *Сборник русского исторического общества*, [Sbornik istoričeskogo obščestva] St. Petersburg 1872, Bd. X, p. 183 f.

<sup>89</sup> G. Letter, Angiolini to Beccaria in 18. 11. 1768, published in: F. Venturi, *op. cit.*, p. 632.

<sup>90</sup> T. Čizova, *op. cit.*, p. 391.

<sup>91</sup> Императрица Екатерина II, «О величии России», М.: «ЭКМО», 2003, серия «Антология мысли»: Наказ Комиссии о составлении проекта нового уложения. Afterwards as *Наказ/Nakaz* labeled.

<sup>92</sup> *Katharina der Zweiten Kaiserin und Gesetzgeberin von Russland: Instruktion für die zu Verfertigung des Entwurfs zu einem neuen Gesetzbuche verordnete Kommission*, Riga – Mitau 1769. Afterwards as *Instruktion/Nakaz* labeled.

Europe. The *Nakaz* which has contained a new law code for the Russian public, civil and embarrassing right and also the court order was worked out by Catharine II in 1764 and was handed over to a commission in 1766<sup>93</sup>. It was a sort of catalogue of directives by which the commission could orientate itself<sup>94</sup>. Catharine II also formulated – completely in the mode of Beccaria – a preventative-utilitarian draught of penal punishment connected with for the imperatives of humanity and better Enlightenment. The latter particularly attests to her own great interest in the topic of education – in this case, the creation of an effective deterrence through the education of people to understand the law. The people's compliance with legislation could then be effected through better understanding of the legislative itself. Albeit her basis for regulating the right to punish is also contractual, however, the view of some other aspects is different: The social contract consists of the laws which everybody must obey according to the freedom consists in doing this what is permitted according to the laws and *'nebyt' prinuždenu delat' to, čego chotet' ne dolžno*<sup>95</sup>. The legislator is not the representative of the people, but he or she takes over the full power of an absolute ruler who, for the purpose of the enlightened despot, recognizes him- or herself as a signpost of the society<sup>96</sup> – not only as a guardian of the laws: *'I tak kogda zakon estestvennyjpovelevaet nam po sile našej o blagopolučii vseh ljudej peščisja, to objazany MY sostojanie i sich podvlastnych oblegčat', skol'ko zdравoe rassuždenie dozvoljaet'*<sup>97</sup>.

The *Nakaz* is composed of a total of 526 sections by which more than a hundred are almost literally taken from Beccaria's work and more than four taken from Montesquieu's *Esprit des Lois*. Although the Tsarina's own written contribution to the *Nakaz* was very low, but her own mental achievement was not of pertinence in this case. She justified this to D'Alembert with the argument that Beccaria and Montesquieu would certainly have excused her plagiarism, given that it would practically apply their work suggestions to people of 20 million<sup>98</sup>.

<sup>93</sup> F. Andreae, *Beiträge zur Geschichte Katharinas II. Die Instruktion vom Jahre 1767 für die Kommission zur Abfassung eines neuen Gesetzbuches*, Berlin 1912, p. 95.

<sup>94</sup> W. Alff, *Zur Einführung...*, *op. cit.*, p. 30.

<sup>95</sup> *Nakaz*, §§ 37, 38: „[...] und nicht gezwungen zu seyn, dasjenige zu thun, was man nicht wollen soll". Instruktion, p. 10.

<sup>96</sup> *Ibidem*, § 9: Самодержавие, also die Vereinigung aller Macht in einer Person, ist für Katharina II, die einzige vernünftige Regierungsform in einem großen Staat wie Russland.

<sup>97</sup> *Ibidem*, § 252: „Wenn also das natürliche Recht uns befiehlt, für alle Menschen Wolergehen nach unserm Vermögen Sorge zu tragen: so sind WIR verbunden, das Schicksal auch dieser Untergebenen, so viel es die gesunde Vernunft zuläßt, zu erleichtern". § 251: И сие есть начало всякого рода покорности. Сия бывает больше или меньше облегчительна, смотря на состояние служащих. (dt.: „dies ist der Ursprung aller Arten der Untertänigkeit, welche größer oder geringer ist, nach Beschaffenheit der Untertanen", Instruktion, p. 74.

<sup>98</sup> R. Steinberg, *Die Beccaria-Rezeption in Rußland während der Regierungszeit Katharinas II*, [in: G. Deimling (ed.), *Cesare Beccaria. Die Anfänge moderner Strafrechtspflege in Europa*, Heidelberg 1989, p. 127-137, here: p. 132.

It is hardly surprising that Beccaria's criminal law ideas met with great approval from Catharine II given that she was long-standing opponent of the inhuman methods of conventional Russian court procedure, participating intensely in Russian criminal law discussions even whilst a grand duchess<sup>99</sup>. Above all she opposed the practice of torture then typical in Russian criminal trials. She repeated the words of Beccaria almost literally when she asked whether '*pytka ne narushaet li spravedlivosti, i privodit li ona k koncu, namerevaemomu zakonomi*'<sup>100</sup> and answered that the use of the torture is nothing more than just a cruelty which has any other use<sup>101</sup> and that '*upotreblenie pytki prrroootivno zdravomu estestvennomu rassuždeniju*'<sup>102</sup> Catharine II completely adopts Beccaria's argumentation against torture. She is persuaded as much as he is of the fact that one may not declare anybody guilty with the help of the torture, as long as the guilt has not been proved judicially<sup>103</sup>. If guilt is certain, '*to ne dolžno prestupnika nakazyvat' inako, kak položennym v zakone nakazaniem*'<sup>104</sup> torture is superfluous. Additionally she develops upon the critique of torture according to the example of section XVI of *Dei delitti e delle pene*. After she has condemned torture – like Beccaria – as cruel and inhumane, she also adopts his argumentation against the usual justifications for applying torture<sup>105</sup>: '*Pytku ešče upotrebljajut nad obvinjaemym dlja ob-jasnenija, kak govorjat, protivorečij, kotorymi on sputalsja v doprose, emu učinennom: [...]*'<sup>106</sup> to differentiate itself from these.

<sup>99</sup> F. Andreae, *op. cit.*, p. 29.

<sup>100</sup> Nakaz § 192: „wird durch die Peinigung die Gerechtigkeit nicht beleidigt, und führt sie zu demjenigen Endzwecke, auf den die Gesetze zielen?“, Instruktion, p. 52.

<sup>101</sup> *Ibidem*, § 193.

<sup>102</sup> *Ibidem*, § 123: „Der Gebrauch der Tortur ist der gesunden Vernunft zuwider“. Instruktion, p. 31.

<sup>103</sup> *Ibidem*, § 194. 1.

<sup>104</sup> *Ibidem*, § 194. 1: „[...] , so muß der Verbrecher mit keiner andern Strafe belegt werden, als mit derjenigen, die durch die Gesetze über das Verbrechen verhängt ist. [...]“, Instruktion, p. 53.

<sup>105</sup> His argumentation against the torture Beccaria tried to oppose to the usual justifications for applying the torture, which included arguments like a forced confession, involving in contradictions, forced information about coculprits and even a metaphysical and incomprehensible cleaning of disgrace. To these justifications he opposed his argumentation. A person cannot be guilty and be tormented as such, as long his guilt to have injured the contracts of the society would not be proved. He opened for pleading against the torture with the question: „*Quale è dunque quel diritto, se non quello della forza, che dia la podestà ad un giudice di dare una pena ad un cittadino, mentre si dubita se sia reo o innocente?*“ The use of the torture for the purpose of the enforcement of a confession leads, according to Beccaria, in bad contradictions: If the crime is proved, the punishment must be covered consequently – the torture is useless, therefore. If the guilt is not proved, in such a way „*non devesi tormentare un innocente*“. He emphasises that the pain cannot be valid as a touchstone of the truth, because thus the torture leads to „*assolvere i robusti scellerati e di condannare i deboli innocenti*“. (Beccaria, *Dei delitti e delle pene*, § XVI, p. 38 ff.) The argument that a person whose mind is in a certain excitement, can involve in contradictions, point to the innocence of a person in case of the contradictory statements. The torture, according to Beccaria, leaves no freedom to the vexed to say the truth, but only the freedom, to avoid the torture (Beccaria, *Dei delitti e delle pene*, § XVI, p. 39 f).

The contradictions that could derive from a violent forcing of confession are only a sign of the confusion of mind after intense pain<sup>107</sup>, because *‘protivorečija, stol’ obyknovennye čeloveku, vo spokojnom ducheprebывajuščemu, ne dolžny um-nožat’sja pri vostrevoženii duši, vsej v tech mysljach, pogružennoj, kak by sebja stasti ot nastupajuščej bedy*<sup>108</sup>. She concludes that the argument, that a person, whose mind is in a certain excitement because of the torture, can be involved in contradictions refers to the innocence of this person in case of the contradictory statements. Moreover, according to Tsarina, torture condemns a weak yet innocent person and frees the strong yet guilty person<sup>109</sup>. She also decries the problem of arbitrariness amongst judges: *‘kogda otvetčik osuždajetsja, to ne sudii nalagajut na nego nakazanie, no zakon*<sup>110</sup>.

Like Beccaria she divides laws into steps, a sort of gradation-series for the definition of punishment – and here the thought of proportionality between the crime and the punishment comes into centre-stage. There are four steps: crimes against laws and religion, against ethics and morality, against the general peace and, finally, against the public security<sup>111</sup>. This last type of crime, according to the Tsarina, deserve, *‘graždanin [...] smerti, kogda on narušajet bezopasnost’ daže do togo, čto otnjal u kogo žizn’ ili predprinjal otnjat’*<sup>112</sup>. But capital punishment applies not only to the injury of the highest of all goods, that is, the life of another, but also, as with Beccaria, on state sedition.

A new law codex that would have corresponded with the images of the Tsarina was not to be expected from the commission. They were insufficiently powerful to overcome the opposition of the rich nobility. Catharine additionally stood rather alone with her conviction in the use of human criminal law principles<sup>113</sup>. Many

<sup>106</sup> Nakaz, § 195. 2: „Man gebraucht ferner die Peinigung, um, wie man sagt, die Widersprüche, worin der Beklagte bei dem Verhör sich verwickelt hat, zu erläutern“. Instruktion, p. 54.

<sup>107</sup> *Ibidem*, § 195. 2.

<sup>108</sup> *Ibidem*, § 195. 2: „Als ob die Furcht vor der Todesstrafe die Ungewissheit, die Verwirrung des Verstandes, und selbst die Unwissenheit, nicht eben sowohl bei einem furchtbaren unschuldigen, als bei einem Verbrecher, der sein Verbrechen zu verhelen sucht, Widersprüche erzeugen könnten. Man sollte in Betrachtung ziehen, daß Widersprüche auch bei einem Menschen von ruhigem Gemüte nicht ungewöhnlich sind. Wie viel mer müssen sie sich da finden, wo die Seele von der größten Unruhe gequält wird, und sich gänzlich in den Gedanken, wie sie der Gefahr entgehen möge, vertieft“. Instruktion, p. 54.

<sup>109</sup> *Ibidem*, § 194. 1.

<sup>110</sup> *Ibidem*, § 128: „Wenn der Beklagte verurteilt wird, so sind es nicht die Richter, die ihm die Strafe auferlegen, sondern das Gesetz.“ Instruktion, p. 32.

<sup>111</sup> *Ibidem*, §§ 68-72.

<sup>112</sup> *Ibidem*, § 79: „Ein Bürger verdient den Tod, wenn er bei Verletzung der Sicherheit so weit gegangen, daß er einem das Leben genommen, oder es ihm zu nehmen sich unterfangen hat.“ Instruktion, p. 19.

<sup>113</sup> F. Andreae, p. 42.

commission members permitted torture because they were convinced that without torture there could be no safe moment in life. Some to the direct contrary of Catharine's reform plan even suggested that harsher punishments, should be adopted than those already in place<sup>114</sup>.

With this failure of reform in mind, historians dispute the earnestness of Catharine's reform attempts: on the one hand, some consider the Tsarina's criminal-law reform attempts as mainly deceptive and the main function of the *Nakaz* being a way to gain popularity in within the enlightened world. On the other hand the instrumentalization of the *Nakaz* as the document directed against the claims for more power of the nobility<sup>115</sup>. It is evident that, unlike Beccaria, she did not conceive of a basic change in contemporary political and social relation as a means towards a successful victory over crime and its social prevention. Nor, indeed, could she advocate the abolishment of absolute monarchy. A new republican or enlightened constitutional monarchic legal system and state order was not discussible.

The reception of Beccaria in Russia began with Catharine II. She also determined the course of his works' following reception and adoption. It became matter exclusive to the sphere of landed gentlemen, government representatives, and commission representatives. As a result *Dei delitti e delle pene* did not feature in Russian public discussions until the beginning of the nineteenth century. However, some Russian philosophers were noticeably influenced by the book, as can be attested by their referencing of its ideas in their own books. Michail M. Ščerbatov and Aleksandr N. Radiščev were deeply affected by Beccaria and advocated the reduction the level of cruelty of Russian criminal law, including questioning the use of capital punishment. They were both heavily censored, Some philosophers, such as the Radiščev, were even sent to exile in Siberia<sup>116</sup>.

It is astonishing that Catharine II, who permitted the printing of more than 170 foreign works between 1768 and 1777, did not permit the imprimatur for Beccaria's work at any time during her reign<sup>117</sup>. Only in 1803, two years after the first Russian publication of Montesquieu's *Esprit des lois*, the first Russian translation of *Dei delitti e delle pene* was published.

<sup>114</sup> R. Steinberg, *op. cit.*, p. 132 f.

<sup>115</sup> G. Sacke, *Zur Charakteristik der gesetzgebenden Kommission Katharinas II. von Rußland*, [in:] *Archiv für Kulturgeschichte*, (eds.) W. Goetz/G. Steinhausen, 21 Bd., Leipzig: 1931, p. 166-191, here: p. 173; also: Steinberg, *op. cit.*, p. 133.

<sup>116</sup> F. Venturi, *Beccaria in Russia*, [in:] *Il Ponte* IX, Firenze 1953, p. 165.

<sup>117</sup> T. Čizova, *op. cit.*, p. 398.



## V.

Beccaria focused not on the potential delinquent, but on the sovereign, specifically, as his or her role as the legitimate, true, and sovereign national governor whose most distinguished occupation was to realise '*la massima felicità divisa nel maggior numero*'<sup>118</sup>. The sovereign who would fight crime at its roots must understand the true causes of the rights founded in human nature. He or she should possess the knowledge necessary for clever legislation to be conceived and to work with foresight. Only who disposes of the necessary knowledge, can become active also preventive. Therefore, successful crime prevention requires a fundamental change of political and social relations on the basis of anthropological premises and critical social study as well as the removal of despotism and the establishment of a republican or enlightened constitutional-monarchical legal system and state order<sup>119</sup>.

With the help of natural law and enlightened philosophy, secularisation and rationality were imported into the concept of criminal law. This meant that in criminal law, the purely rational, the adequacy, and the so-called utility theory predominated. This development occurred not only regarding the basis of the legality of state criminal law, or of capital punishment, but also concerning the effectiveness of capital punishment. The justification for legal practice was no longer to be found in an order from above, nor on a single idea, such as retaliation or God's redemption, but rather based on the purpose of state, that is, the *pubblica felicità*. This argument against torture and above all against capital punishment, based on the social contract, is indeed very significant. Capital punishment is violence against the state citizen, but no right, because in the slightest part of the sacrifice of the freedom the greatest sacrifice, namely those of the life, cannot be enclosed. This was the conclusion of Beccaria's contractual thinking.

Monarchical power was no longer legitimised solely through the tradition of divine right, but rather, also through the teachings of the new philosophy and its understanding<sup>120</sup>. As opposed to the absolutist sovereign, epitomised by Louis XIV, the enlightened ruler was very strongly dependent upon the reforming spirit of the time, which directly influenced his own reform agenda. The leading concepts of 'nature', 'reason' and 'the empirical science' were used to overcome of the old ruling system and authority. Enlightened rulers followed on the determined opposition against the traditional values for at least some of the time. Reason was considered the leader and judge of all things. These principles found use in almost all areas. In this context the reformation of the state started, especially its relation to the indivi-

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<sup>118</sup> C. Beccaria, *op. cit.*, p. 12 f.

<sup>119</sup> G. Deimling, *op. cit.*, p. 171.

<sup>120</sup> Aretin you can see in the footnote n. 2..



dual. The traditional conception of the rights of the individual was that the sovereign lent privileges to the individual subject, rather than respecting rights which were entitled to the individual from nature<sup>121</sup>. This latter conception was developed by Enlightenment thinkers, leading to the discourse of 'inalienable rights' natural to all people of any state. Since then the individual was understood as a basis of the political and social order.

The present study has shown that Beccaria's contractualist views of socio-political and legal conditions had an enormous influence on the reforming thought of Catherine II. Even if she could not be convinced that the death penalty needed to be abolished, this influence is a testament to the influence of the Milanese Enlightenment. Catharine's ideas in the *Nakaz* were founded upon the Enlightenment process of secularization and her advocacy for a practice of the death penalty was no longer borne out of religious conceptions.

We can better understand the goal of this work, which was deeply inspired by a faith in the cause of humanity, through the channels of what was sometimes a very controversial dispute where ideas developed dynamically and were appropriated for the use of opposed sides in complex ways. The goal of abolition itself will not be completed while torture remains in use anywhere in this world, and where even constitutionally democratic states maintain the death penalty.

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<sup>121</sup> F. Valsecchi, *op. cit.*, p. 206 f.