

# **Penal Philosophy in 18<sup>th</sup> Century Italy:**

## *A Historical Enquiry into the Ideas of Francesco Mario Pagano.*

**Master Thesis in the History of Ideas**

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Penal Philosophy in 18<sup>th</sup> Century Italy: A Historical Enquiry into the Ideas of Francesco  
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# 1 Introduction

## 1.1 Introductory remarks

Quentin Skinner compares the role of the intellectual historian to that of an archeologist; the intellectual historian brings forth "buried intellectual treasures back to the surface, dusting it down and enabling us to reconsider what we think of it."<sup>1</sup> This master thesis is likewise an attempt to bring forth, dust off and shed some light on the Italian, and especially the Neapolitan enlightenment which have mostly been neglected by posterity, by studying a few works of the Italian enlightenment philosopher Francesco Mario Pagano (1748-1799).

Francesco Mario Pagano was born in Brienza in 1748. He moved to Naples at a young age and would go on to hold several positions of importance in politics, teaching and as a juror during the course of his life. He was given the chair of ethics in the year of 1770 at the age of twenty-one, and was given the chair of law a few years later, both at the University of Naples. He was also one of the main architects of the short-lived Neapolitan republic, drafting its constitution, which was heavily influenced by the French constitution of 1793. The Neapolitan enlightenment has largely been neglected by enlightenment scholars. Pagano for instance had a substantial authorship which has been little studied. He wrote about a wide range of topics, but he is perhaps best known for his writings on politics and criminal law.

The main focus of this thesis is the relatively unexplored reflections and ideas of Pagano on criminal law. The purpose of this thesis is to give a presentation of Pagano's ideas and reflections on criminal law and to place him in the landscape of other enlightenment philosophers concerned with the same subject matters. Pagano had a sizeable authorship, and among the most notable of his works were his *Considerazioni Sul Processo Criminale* (1787) and *Saggi Politici* (1783-1785). This thesis will explore Pagano's reflections on criminal law in *Considerazioni Sul Processo Criminale*, along with the posthumously published *Principj del Codice Penale* and *Logica de' probabili*.

A secondary or rather peripheral focus of this thesis, will also be the Italian enlightenment from roughly the 1740s and onwards as a contextual background for Pagano's work. In this regard, the Milanese intellectuals behind the periodical *il Caffè* and the intellectuals that came out of the Neapolitan school of Antonio Genovesi will be of special interest. The school of Genovesi and the intellectuals behind *Il Caffè*, one could argue, were

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<sup>1</sup> Quentin Skinner, *Liberty Before Liberalism*, (Cambridge: Cambridge University Press, 1998), 112.

the two main intellectual hubs in 18<sup>th</sup> century Italy. These two Italian ‘schools’ of thought had an immense influence on Pagano.

## 1.2 Mario Pagano’s works on criminal Law

Pagano had a productive life and wrote at least over ten different works during the span of his life. His *Saggi Politici*, written between 1783-85 provides a historical and philosophical account of Naples and is considered his magnum opus. His second major work was his *Considerazioni Sul Processo Criminale* published in 1787, which was especially well received in France.<sup>2</sup> Among his final works were the posthumously published *Principj del Codice Penale*, (1801) *Logica de’ probabili*, (1807), also on the subject of law, written sometime before his *Considerazioni Sul Processo Criminale*. The focus of this thesis will be on Pagano’s *Principj del Codice Penale*, *Logica de’ probabili* and his *Considerazioni sul Processo Criminale*. Pagano’s works, and the Neapolitan enlightenment for that matter, are relatively untouched, and are sparingly mentioned if at all in scholarly works about the enlightenment in English language scholarly works. There are however a few Italian scholars, who have touched upon Pagano’s works and his philosophy, such as Dario Ippolito and Nunzio Campagna. Most of the research on Pagano however seek to paint a general picture of his philosophy and political activity. In other words, the research done on Pagano does not extensively focus on any particular part of his authorship or his philosophy.

*Principj del Codice penale* (1801) was a series of lectures given by Pagano at the university of Naples which were then posthumously published after his death. Pagano’s *Principj* attempts to deal with the fundamentals of law. He seeks to study crime and punishment at their most basic levels, in order to present the principles that the criminal justice system should be built upon. At the core of Pagano’s penal philosophy is the concept of *lex talionis*, which makes him somewhat unique in the enlightenment. As will be evident during the course of this text, most of the enlightenment thinkers based their philosophies on criminal law around principles of proportionality, on utility, and the necessity of punishment. Although, Pagano’s own conceptualization of criminal justice system results in adopting principles of proportionality, he bases his principles of proportionality on retribution rather than necessity and utility like Charles Montesquieu (1689-1755) and Cesare Beccaria (1738-1794) did. Where Beccaria and most of the French philosophers who spoke on the issue were

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<sup>2</sup> Dario Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, (Torino: G. Giappichelli editore, 2008), XI.

more concerned with making punishment as lenient as possible and still retaining its effect as a means to prevent crime, Pagano's concern was ensuring a rule of law through retributive justice. However, he was not preoccupied with retributive punishment in a corporal limb for a limb sense, but in a loss of a right for the violation of a right sense.

The second of Pagano's posthumously published works on crime was *Logica de' Probabili* (1807). While his *Principj* mostly seeks to clarify the basics of criminal law, his *Logica* primarily deals with the epistemological side of criminal law, meaning how one can gather reliable and accurate jurisdictional knowledge. His work mostly deals with how criminal proceedings should be, how one gathers evidence, depositions and witnesses. Both his *Logica* and *Principj*, one could argue, are more thorough elaborations on themes already explored by Pagano's intellectual predecessors.

The last work to be written but the first and only out of the three to be published during his own lifetime, *Considerazioni Sul Processo Criminale* (1787) is perhaps the work in which Pagano's own views are most clearly expressed. While his *Principj* and *Logica* explored the fundamentals of law, his *Considerazioni* is a series of reflections on criminal law in a historical perspective as well as on criminal law in his own time. He tries to give a historical reconstruction of criminal law in order to explain how and why it degenerated. At its core, *Considerazioni* is a work that criticizes the justice system of Pagano's times, and seeks to make concrete suggestions on how to reform or at least improve the system.

### **1.3 Delimitation of the subject**

The 18<sup>th</sup> century presented a turning point in criminal law. Up until the mid-18<sup>th</sup> century, brutal, inhumane downright bestial punishments were the norm. Foucault in his *Discipline and Punish* gives several examples of how brutal and corporal punishments were used to punish criminals. However, by the end of the 18<sup>th</sup> century, Foucault says that the use of extreme punishments and torture became progressively less and less common.<sup>3</sup> As will be evident during the course of this thesis, the 18<sup>th</sup> century saw a restructuring of how criminal law was perceived. Philosophers such as Beccaria and Pagano and others, all either openly or indirectly argued that the criminal justice system had to be secular. Furthermore, the criminal justice system had to be predictable, and it had to follow a set of rules and guiding principles. The rule of law, and not the arbitrary will of jurors or judges was to decide the fate of

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<sup>3</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Translation by Alan Sheridan, (London: Penguin Books 1977), 7.

criminals. Not only that, punishment had to have a function. Some heavily focused on the utility and necessity of punishment, in other words, how punishment could benefit society at large and prevent further crimes. Pagano on the other hand was more concerned with penal law as a way to safeguard the liberty of citizens, in other words, still as something that could benefit society but not so much focus on crime prevention as others had. Another important characteristic of the enlightenment thought on criminal law was its more or less universal condemnation of torture. Torture, the enlightenment thinkers including Pagano argued was a useless and inhumane device which had no real benefits. What makes Pagano interesting is that he attempts to make criminal law a science and actually (albeit temporarily) succeeded in giving life to his principles of criminal law during the Neapolitan revolution of 1799.

My study of Pagano's *Logica de' probabili per servire di teoria alle prouve ne Giudizj Criminale*, *Principj del Codice Penale* and *Considerazioni Sul Processo Criminale* in this thesis aims to demonstrate that Mario Pagano's reflections on criminal law distinguishes him from his contemporaries. There are a few questions I seek to discuss in this thesis. What are the main characteristics of Pagano's penal philosophy? Who contributed to the formation of his thoughts? In what sense is Pagano an expression of 18<sup>th</sup> century enlightenment thought? What does he have in common with his contemporaries and what is it that sets him apart from them?

In order to fully grasp his reflections and writings it is important to compare Pagano's ideas to some of the philosophers who influenced his intellectual formation. Chief among Pagano's influences in addition to Beccaria and Montesquieu were thinkers such as Antonio Genovesi (1713-1769), Gaetano Filangieri (1752-1788) and Claude Adrien Helvétius (1715-1771). Pagano differentiates himself in several ways from many of the enlightenment thinkers. He believed that one should create a science out of criminal law, and he wanted the judicial system to be built on said science.

I have chosen to limit my focus to the Neapolitan and Milan branches of the Italian enlightenment when trying to establish the contextual background for Pagano's works. This is because Pagano has mostly been influenced by Neapolitan and Milanese intellectuals. This does not however mean that the rest of Italy was devoid of enlightenment impulses. Other cities and states such as Rome, Siena and Venice to mention a few also had thriving Universities and enlightenment milieus, but the most important centers of the Italian enlightenment were Milan and Naples, and the intellectuals who were based in said places were the more prolific and more renowned ones.

It is important to remember that this thesis is not meant to be a presentation of the Neapolitan and Milan enlightenments in their entirety, the philosophers presented are almost all from what can be seen as the second wave of enlightenment thinkers in Italy, meaning mostly the 1760s (with the exception of Genovesi) and onwards. This thesis only makes mention of a handful of the enlightenment thinkers in Naples and Milan. This means that reputable philosophers from the 18<sup>th</sup> century in Italy such as Giambattista Vico will be mentioned sparingly, if at all. The overarching goal here is to outline a few aspects of the Neapolitan enlightenment from the 1740's and to a lesser degree, the Milanese enlightenment from the 1760s and onwards, in order to have the necessary contextual background needed to understand Pagano. In order to avoid an excessive amount of name dropping and digressions, only the most important thinkers and enlightenment streams within Italy will be mentioned.

The second chapter of this thesis will be a general presentation of the Italian enlightenment and introduction to the Italian *illuministi* as a supplement to understanding the Neapolitan enlightenment. I have chosen to highlight and present the intellectuals behind the periodical *Il Caffè* in Milan, meaning the Verri brothers and Beccaria. Furthermore, as the Italian enlightenment is sometimes described as a moderate enlightenment, I will be seeking to outline what differentiated the Italian 'moderate' enlightenment from the more 'radical' enlightenment of France.

Chapter three will be concerned with the Neapolitan enlightenment. My focus will be limited to Antonio Genovesi, Gaetano Filangieri and the Neapolitan revolution. This chapter will be an attempt to map out the Neapolitan environment in which Pagano came up in and elucidate his role in the ongoing debates in the emerging public sphere. In this regard, I will highlight Pagano's role in the Neapolitan revolution of 1799, and demonstrate that he could be viewed as the culmination of the Neapolitan enlightenment and that his death perhaps symbolically signified the end of the Italian enlightenment experience.

The fourth chapter will be dedicated to Pagano's *Principj Del Codice Penale*, in which Pagano attempts to conceptualize crime and punishment. This chapter deals with the fundamentals of criminal law as Pagano sees them, namely what constitutes a criminal act, what punishment is, and how one can categorize different types of crimes and punishments. Chapter five will be about Pagano's *Logica de' probabili per servire di teoria alle prouve ne Giudizj Criminale*, in which he seeks to analyze how one gathers knowledge and information in criminal proceedings. He discusses and analyses at great length the credibility of evidence, testimonies and witnesses.

In chapter six, Pagano's *Considerazioni Sul Processo Criminale* is explored. *Considerazioni* is his most clear cut critique of the criminal justice system of his own time, and he seeks to clarify how and why the criminal justice system deteriorated to its current state. At its core, it is a work that critiques the *inquisitorial* justice system and argues for the merits of an *accusatorial* system, the former being secretive and closed, the latter transparent and open. I will be comparing his ideas and his reflections in chapter four, five and six to those of other enlightenment philosophers in order to place him in the landscape of philosophers who wrote on the subject of law, before concluding my thesis in chapter seven.

#### **1.4 Contemporary research on the Italian enlightenment**

Most scholars who study the enlightenment seem to agree that France was the epicenter of the enlightenment movement, and it is hard not to agree with this. It is, however, important to note that the enlightenment was by no means an exclusively French phenomenon. The central role France had in the 18<sup>th</sup> century as Europe's intellectual hub is undeniable, but it has perhaps overshadowed the contribution of other European countries.<sup>4</sup> The intellectual endeavors of enlightenment thinkers in other countries have no doubt been neglected. The Italian enlightenment has mainly been a subject of study in Italy and not so much outside of it (Beccaria and Vico being exceptions to the rule). Finding extensive works on the Italian enlightenment has been a challenging task. Most of the literature on the Italian enlightenment is in Italian, and a lot of the existing literature builds upon the work of Franco Venturi who was arguably one of the most prominent enlightenment historians of the 20<sup>th</sup> century not only in Italy but in Europe.

The most reputable of the enlightenment historians I have been using as a secondary source on the Italian enlightenment is without a doubt the Italian scholar Franco Venturi. He is one of the most referenced Italian enlightenment scholars of the 20<sup>th</sup> century, and almost all secondary literature found on the Italian enlightenment after his publications have in some way commented his works, and of special importance is his *Settecento riformatore: 1: Da Muratori a Beccaria* (1969) and his *Italy and the Enlightenment: studies in a cosmopolitan century* (1972). Venturi published several works on the Italian enlightenment available both in English and in Italian. His studies on the Italian enlightenment seem to pay special attention to Milan and Naples and I have chosen to do the same when writing about the more

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<sup>4</sup> Spencer Di Scala, *Italy: from revolution to republic: 1700 to the present*, 2nd edition. (Boulder, Colorado: Westview Press, 1998), 3.

general enlightenment tendencies in Italy. He pays particular attention to Antonio Genovesi when it comes to the Neapolitan enlightenment, consistently describing him as an architect of sorts of the Neapolitan enlightenment. In Milan, he mostly focuses on the intellectuals behind the periodical *Il Caffè* which ran from 1764-1766. Of special importance is Pietro Verri who he calls the leader of the Milan based intellectuals, his younger brother Alessandro Verri and their friend Cesare Beccaria.<sup>5</sup> However, despite his comprehensive studies on the Italian enlightenment, Venturi only mentions Pagano sparingly in his works.

Other scholars who make up the backbone of my thesis are Jonathan Israel and his *Radical Enlightenment* (2001), *Enlightenment Contested* (2006) and his *Democratic Enlightenment* (2011) for more general observations on the enlightenment in its entirety. Dario Ippolito and his *Mario Pagano: Il pensiero giuspolitico di un illuminista* (2008) when it comes to Pagano and the Neapolitan enlightenment, and to a lesser degree, Eugenio Leucci, Nunzio Campagna and Elio Palombi. Finally, I have used John Robertson's book *The Case for the Enlightenment: Scotland and Naples 1680-1760* (2005) and an article titled *Enlightenment and Revolution: Naples 1799* (1999) when it comes to the more general aspects of the Neapolitan enlightenment and especially the Neapolitan revolution.

## 1.5 Quotes and translations

To my knowledge, the works of Pagano have as of yet not been translated in to any other languages. The only exception is his *Considerazioni Sul Processo Criminale* which was translated into French in 1789. I have personally translated all of the quotes I present from Pagano's works. I have opted to use free translations, and not direct translations of the quotes so as to best convey their meaning, because the aim of this work is to present his ideas on criminal law and his contribution to the enlightenment discourse. This thesis is in no way a literary study or a study of the Italian language, which is why free translations are best suited to my purposes. When quoting other works by Italian authors where an English version is available, I have opted for using an English version instead of an Italian one for the sake of linguistic fluidity in the text.

I'd also like to point out that the editions of *Considerazioni Sul Processo Criminale* and *Principj del Codice penale* and *Logica de' probabili per servire di teoria alle prouve ne Giudizj Criminale* which I have used in this thesis are almost completely unabridged. This

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<sup>5</sup> Franco Venturi, *Settecento riformatore: I: Da Muratori a Beccaria*. Torino: Einaudi, 1969. He has a chapter titled La Milano del Caffè and La Napoli Di Antonio Genovesi, which clearly shows the importance he placed upon the intellectuals of *Il Caffè* in Milan and on Genovesi and his role in Naples.

means that the Italian in these works might at times differ from modern Italian in certain areas. If the original versions of the quotations seem to be misspelled, be assured that it is done on purpose. An example that repeats itself is the consistent use of the letter J instead of a double I. This is especially seen in *Principj del Codice Penale* and *Logica de' probabili per servire di teoria alle prouve ne Giudizj Criminale*. I have also opted to retain Pagano's own titles of *Principj and Logica* and not the title given to them in modern reprints for the sake of consistency.

When I refer to thinkers from specific parts of Italy, such as Milan, I have sometimes opted for using the Italian versions of names, such as *stato Milanese* instead of the state of Milan, or the *Milanese* intellectuals instead of Milan based intellectuals for the sake of fluidity.



## 2 What is Enlightenment?

### 2.1 Enlightenment: A definition

The title of this chapter is hardly original, but it is none the less necessary to outline a few aspects of what defined the enlightenment as an epoch, what enlightenment means, and what characterizes the Italian portion of the movement. The enlightenment era was a time period in which a certain set of ideas and values were given special importance. It was a cultural and philosophical movement which arguably began in the seventeenth century and reached its pinnacle in the eighteenth century. The heart of the enlightenment movement is generally taken to be France, but it was nevertheless a movement that went far beyond the borders of France, and perhaps even beyond Europe.<sup>6</sup> The main goal of this chapter will be to explore the Italian enlightenment movement mainly from the 1740s and onwards, and my main focus will be on the Neapolitan and the Milanese branches of the movement. Milan and Naples one could argue constituted the two main intellectual hubs of 18<sup>th</sup> century Italy. Of chief importance were the intellectuals behind the Milan based periodical, *Il Caffè*, and the thinkers who came from the Neapolitan school of Antonio Genovesi. Pagano is in many ways a culmination of the Italian enlightenment, and in order to fully grasp his ideas, and his reflections on the subject of law, it is necessary to establish an admittedly brief conceptual and contextual background.

Before delving into the Italian enlightenment there is an important question which needs to be confronted. What is enlightenment? This is a question that has been put fourth continuously since the enlightenment era itself, and it has had numerous answers ever since. One answer to this question was given by the Prussian born enlightenment philosopher Immanuel Kant (1724-1804), in his now widely known essay; *An Answer to the Question: What Is Enlightenment?* in 1784. Kant begins his essay by saying that:

Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of the enlightenment is therefore: *Sapere aude!* [Dare to be wise!]<sup>7</sup>

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<sup>6</sup> Dorinda Outram, *The Enlightenment*, (Cambridge: Cambridge University Press, 2005), 4.

<sup>7</sup> Immanuel Kant, *An Answer to the Question: What is Enlightenment* (New York: Penguin Books, 2009) s 1.

As the French philosopher Michel Foucault once pointed out, Kant gives a definition of enlightenment which is negative.<sup>8</sup> Kant is talking about overcoming what he calls this self-imposed immaturity, overcoming perhaps self-imposed obstacles and to use one's own capability of understanding. It's about freeing yourself from these obstacles and shackles, and the goal is to use your own capabilities and to no longer rely on the authority of someone else. This need, or desire to break with authority is something that sets the enlightenment apart from preceding time periods. While the medieval times and the renaissance both in their own way had a nostalgic relationship with antiquity, the enlightenment period represents a departure from this nostalgia. You no longer have this strong nostalgic relationship to a preceding time period and its authorities.

Kant's essay expresses a desire to be rid of the excessive influence of others. He puts emphasis on this issue repeatedly: "If I have a book to have understanding in place of me, a spiritual adviser to have a conscience for me, a doctor to judge my diet for me, and so on, I need not make any efforts at all."<sup>9</sup> Kant's essay is in other words trying to map out why and how one should rely on one's own faculties, the overall theme being that man has to, or rather should think for himself. Foucault describes Kant's answer to the question of what enlightenment is as inadequate and unsatisfactory as a description of the changes that took place at the end of the 18<sup>th</sup> century.<sup>10</sup> I'm inclined to agree. Kant's essay does not give an extensive account of the enlightenment era and the values it placed importance on.

Although Kant is a good reference point as his text highlights some characteristics of the enlightenment era in its entirety, such as breaking with authorities, past and present which was a major theme among the Neapolitan enlightenment thinkers, the 18<sup>th</sup> century philosopher perhaps best suited to use as a point of departure would be the French Philosopher Charles-Louis de Secondat Montesquieu. Montesquieu has by some been described as the most influential author of the 18<sup>th</sup> century because of his *The Spirit of the Laws*.<sup>11</sup> He is also known for his *Persian letters*. In his *The Spirit of the Laws*, Montesquieu attempted to describe the characteristics of different societies by looking at their climate, topography, habits, mentality and agricultural conditions. He further sought to explain how all these different aspects of a society were related to its religion, economic and political system. Another important and

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<sup>8</sup> Ryan Patrick Hanley, Darrin M McMahon, *The Enlightenment: Critical Concepts in Historical Studies: 1: Definitions*, Michel Foucault, "What is Enlightenment" (New York: Routledge, 2010), 89.

<sup>9</sup> Kant, *An Answer to the Question: What is Enlightenment*, 1.

<sup>10</sup> Foucault, "What is Enlightenment", 92.

<sup>11</sup> Peter Gay, *The Enlightenment: An Interpretation: 2: The Science of Freedom*, (London: Weidenfeld and Nicolson, 1970), 325.

perhaps more interesting aspect of Montesquieu's ideas is his somewhat suspicious outlook on the concentration of power in government in all of its different forms. It was this skepticism towards a concentration of power that led Montesquieu to articulate his separation of powers theory. These are all expressions of a tendency in the enlightenment era that had its root in the 1600s; namely that politics should be based on science.<sup>12</sup> Montesquieu's systematic and analytical approach to politics and by extension the legal system is perhaps his biggest contribution to the Neapolitan enlightenment thinkers. One of the overarching goals of the Italian penal philosophers were to make a science out of the legal system. Filangieri and Pagano who were two of the most prominent enlightenment thinkers in 18<sup>th</sup> century Naples were both trying to make a science out of law. Filangieri's major work on criminal law was even titled *Scienza Della Legislazione* meaning the science of legislation.

The Italian philosophers of law had a strong emphasis on the rule of law, which they no doubt adopted from Montesquieu. Montesquieu himself highlights the importance of the rule of law in his *Persian letters*, in which Usbek, a Persian traveler notes;

The practices of some rulers of putting to death, for the slightest offence, all those who displease them reverses the proportion which should exist between the offence and the penalty, a proportion that gives a state its soul, an empire its harmony; Christian princes, who scrupulously preserve this proportion, hold an infinite advantage over our sultans.<sup>13</sup>

Montesquieu's argument here is that the rule of law must be the basis for punishment and not the arbitrary will of kings. Furthermore, the severity of the crime and the severity of the punishment for said crime has to be proportionate.<sup>14</sup> Montesquieu is a good point of departure as his text highlights several important characteristics of the enlightenment era, such as a strong emphasis on the rule of law, and criticism of state power (albeit a careful and guarded one), both which were major themes amongst the Neapolitan enlightenment thinkers.

## 2.2 The Italian enlightenment

The dominant position France holds in studies done of the 18<sup>th</sup> century has no doubt cast a shadow on the intellectual endeavors of enlightenment thinkers in other countries, such as Italy. Italy produced a host of intellectuals such as the Milan based Verri brothers and Cesare

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<sup>12</sup> Espen Schaanning, *Lykkens politikk: Fransk opplysningstid og synet på menneske og straff hos Helvetius*, (Oslo: Akademika forlag, 2013), 194-195.

<sup>13</sup> Charles Montesquieu, *Persian Letters*, Translation by Margaret Mauldon, (New York: Oxford University Press, 2008), 136.

<sup>14</sup> Schaanning, *Lykkens politikk*, 185.

Beccaria who ran the periodical *Il Caffè* from 1764-1766, Giambattista Vico and Antonio Genovesi, two of the most influential philosophers of the Neapolitan enlightenment.

The Italy of the 18<sup>th</sup> century was not the Italy of proceeding centuries. Gone were the powerful city states that had been the cultural and economic centers of Europe in the renaissance. Italy still retained some importance but it was no longer the economic or cultural power it had been. For the most part, the 1700s were a relatively peaceful time for Italy, but at the same time it was a century of foreign domination and influence. Northern parts of Italy such as Lombardy and Tuscany were either under direct control of, or under the influence of Austria, with Piedmont as one of very few independent states in Italy. Naples, Sicily and Parma all managed to become independent states though under significant Spanish influence through bourbon rulers.<sup>15</sup>

The 1730-1740s could be said represent an important turning point for Italy. Not only had certain of the Italian territories changed hands or gained independence, but the election of Pope Benedict XIV who was Pope from 1740-1758 meant that mainstream enlightenment finally managed to find a widespread acceptance in Italy. The new pope supported scholarship and the arts to a much larger degree than his predecessors and an intellectual renewal took place, with many Universities getting chairs in new fields such as law, natural philosophy and botany. Even more interestingly, Newtonianism was adopted, and the papal state went so far as to state that no work by Newton was ever to be placed on the index again and, and Newtonian ideas were now gaining acceptance despite the heliocentric ideas they espoused.<sup>16</sup>

As a result of the papacy's reformist tendencies, the inquisition in Italy began to curb its activities with the Neapolitan seat of the Roman inquisition even being abolished, which was at the time, the first and only branch to be dissolved. Additionally, Newtonianism was much more openly accepted and discussed. In addition to Newton, Locke proved to be another Englishman of immense popularity in Italy, with the pair of Lock and Newton essentially forming the Ideological framework for the Italian enlightenment.<sup>17</sup>

Cities such as Florence, Naples and Milan are often described as the main centers of the Italian enlightenment. The overarching goals of the philosophers were to reform, or rather transform the structures of the Italian states. This included modernizing the states, strengthening the secular institutions in society (such as the legislative ones as will be evident

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<sup>15</sup> Di Scala, *Italy: from revolution to republic*, 5.

<sup>16</sup> Jonathan I. Israel, *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man, 1670-1752*, (Oxford: Oxford University Press, 2006.), 513.

<sup>17</sup> Israel, *Enlightenment Contested*, 513.

later on) cultivating economic growth and working towards a more equal and as a consequence more stable society. The strength of the Italian enlightenment came from what is described as a dichotomy of convergences and of contrasts, in other words of dialogue and conflict between the intellectuals and the rulers. On the one hand important progress was made towards achieving legal equality between citizens, but on the other hand the heavy increase in poverty meant that more and more people were unable to reap any of the benefits of their improved legal status because of their poor financial situation. Another important aspect of the Italian enlightenment was what is by some described as the radical weakening of the church.<sup>18</sup>

Enlightenment ideas didn't really gain much traction in Italy until the 1740s and onwards. The success of several reform oriented governments in the 1750s and 60s was what finally gathered the Italian intellectual's attention. After this, Italian intellectuals started getting positions within the state, positions which they would use to work as reformers. The years following the 1760s saw a lot of interaction and collaboration between intellectuals and ministers with both sides being interested in reforms and in working together.<sup>19</sup> There seemed to be a sense of careful optimism perhaps best expressed with the words of Pietro Verri (1728-1797); "The writings of the philosophers remain uncompensated, but not fruitless."<sup>20</sup> These words came from Pietro Verri after having had a polemical victory against the governors attempting to manipulate exchange rates.<sup>21</sup> The Italian *illuministi* were in other words in a position where they were successfully exerting influence upon the rulers of the state and their voices were not only being heard but contributing to change.

The Italian enlightenment can easily be described as a moderate type of enlightenment.<sup>22</sup> One of the biggest differences between France and Italy for instance was that the widespread public debates which took place in France were more or less nonexistent in Italy. The Verris and Beccaria for instance would meet in a private group called *Societa Dei Pugni*. The Neapolitans too preferred meeting in private societies, with masonic lodges often being used as meeting places by Filangieri and Pagano. One obvious reason for this is the Italian intellectual's heavy involvement with the state administrations. The Italian

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<sup>18</sup> Ruggiero Romano, Corrado Vivanti, *Storia d'Italia: 3: Dal Primo Settecento all'Unità*, (Torino: Einaudi, 1973), 80-81.

<sup>19</sup> Romano, Vivanti, *Storia d'Italia: 3*, 82.

<sup>20</sup> Venturi, *Settecento riformatore: 1: Da Muratori a Beccaria*, 702. "Gli scritti de' filosofi restano senza ricompensa, ma non sempre senza frutto."

<sup>21</sup> Romano, Vivanti, *Storia d'Italia: 3*, 82.

<sup>22</sup> Jonathan I. Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750-1790*, (Oxford: Oxford University Press, 2011), 350.

intellectuals were in an awkward position. Open criticism of the state would also entail criticizing a system they were actively a part of. The collaboration with state administrations and the state rulers was never easy and this alliance between the intellectuals and rulers was often characterized as unsatisfactory, full of tension, not to mention personal animosity between intellectual figures and statesmen.<sup>23</sup>

A lack of public debates did not however mean a lack of controversy in Italy. *Di una riforma d'Italia*, a book authored by Carlantonio Pilati da Tassulo (1733-1802) who was a professor of law proved very controversial. The book came out in 1767 and was almost immediately forbidden and placed on the church's index. Beccaria and the Verris, who will be presented more thoroughly later on, had an extensive program for reform. However, when compared to the suggestions of Tassulo, who was highly critical of the current state of affairs, Beccaria and the Verris' ideas simply paled. Tassulo claimed that everything was in need of a total transformation. Tassulo advocated a complete revamping of the legal, political and educational institutions of Italy. Additionally, he also felt that the moral and religious framework of Italy had to undergo some serious transformations. While his ideas weren't necessarily new, but were repeating sentiments expressed by other thinkers' decades before, Tassulo differed from those before him in that he went further than all the others before him, and his criticism was far more direct and uncompromising. Most of the enlightenment thinkers in Italy up until that point had been moderates.<sup>24</sup> The aggressive criticism that was forwarded by Tassulo did not however immediately embolden the Italian enlightenment thinkers. Pagano for instance who was active nearly two decades later, and the Neapolitan enlightenment thinkers of his generation for that matter were nowhere as radical or aggressive as Tassulo had been.

### **2.3 France - Radical enlightenment**

France has always been the model case when it comes to studies of the enlightenment. The French philosophers were some of the most important driving forces behind the enlightenment movement in Europe. The Milanese and Neapolitan intellectuals were all in some form influenced by the French *philosophes* both by radicals like Helvétius and moderates like Montesquieu, and it is therefore necessary with a few words on these 'two forms' of enlightenment. This will not however be an attempt at presenting the radical or

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<sup>23</sup> Romano, Vivanti, *Storia d'Italia*: 3, 83.

<sup>24</sup> Israel, *Democratic Enlightenment*, 351.

moderate enlightenments in their entirety. My focus will be limited to singling out certain aspects of both movements and pointing to the differences between them.

According to Jonathan Israel, moderate enlightenment was supported by governments and different factions in the church. The ideological framework of the moderate enlightenment was found in Newton and Locke. Perhaps the biggest difference between the radical and moderate enlightenment is that on the one hand, the moderate enlightenment sought to reconcile the new with the old where it was possible, while still making progress and enlightening man (by means of education, rejecting superstition, getting rid of ignorance etc.), while the radical enlightenment on the other hand was more uncompromising seeking to cut all ties with the past, rejecting the Judeo-Christian tradition and strongly criticizing religious authorities. The radicals were also characterized by their great admiration of science and mathematics coupled with "unmistakably republican, even democratic tendencies."<sup>25</sup> The moderates of course were caught in the middle having to fend off both traditionalist on one side and radicals on the other. Furthermore, the moderate enlightenment was itself fragmented and consisted of different groups.<sup>26</sup>

One of the key aspects of the moderate enlightenment was its support of enlightened despotism. Jonathan Israel, mentions Voltaire (1694-1778) and Beccaria (two of several intellectuals) as supporters of enlightened despotism as a way to bring about social and legal reforms. On the other side of the spectrum you had those intellectuals who were critical of the concept of an enlightened despot as they often favored republicanism. Helvétius was among the most radical critics of enlightened despotism. According to Israel, Helvétius argued that a despotic form of government would eventually corrupt "everyone and everything."<sup>27</sup> The supposed reformers, Helvétius argued were either promoting self-interests or they were deceivers. Voltaire made use of Peter of Russia to make his case that enlightened despotism could work. Russia was presented as an example of how a single legislator (namely Peter the great) had managed to bring Russia in to the age of enlightenment all by himself. However, Voltaire's positive account of Russia as a successful example of enlightened despotism might not have been accurate. The Italian Poet Alfieri would experience an entirely different Russia upon his arrival in 1770 than the one recounted by Voltaire. Alfieri is described as being almost distraught at the level of servitude which had arisen after Catherine had become ruler.

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<sup>25</sup> Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750*, (Oxford: Oxford University Press, 2001), 12.

<sup>26</sup> Israel, *Radical Enlightenment*, 12.

<sup>27</sup> Israel, *Democratic Enlightenment*, 270.

Alferi sees only a tyrant and not an enlightened despot. During the 1760s French intellectuals such as Diderot (in addition to the already mentioned Helvétius) came to have a rather negative stance on enlightened despotism. They characterized it as illegitimate and contrary to the general will.<sup>28</sup>

Montesquieu, is along with Beccaria, two of a very few number enlightenment thinkers that Pagano specifically mentions by name and whose works he comments either directly or indirectly in his own writings on penal law. Montesquieu's *Spirit of the laws* is referred to as "a landmark of moderate enlightenment thought" by modern scholars.<sup>29</sup> Somewhat paradoxically though, Montesquieu was heavily criticized by those who meant that his book was espousing Spinozian and deistic ideas when it first came out. The reason for this criticism was that Montesquieu argued that morals and laws were made by man. Montesquieu tried to fend off the criticism by arguing that Spinozism and deism were mutually exclusive. Furthermore, the radicals had republican, borderline democratic tendencies.<sup>30</sup> Montesquieu however was more interested in having a balance of power. Montesquieu wasn't actually proposing a partitioning of power in which the people would have any say. What he had in mind was that the king and aristocracy should both partake in executive and legislative power. The goal here was to have the aristocracy and the king in a monarchy working together in order to balance each other out, preventing the concentration of too much power in one place.<sup>31</sup>

## 2.4 The enlightenment in Milan

The 1750s and 60s in Milan saw the rise of a new group of nobles and young intellectuals spearheaded by Pietro Verri. This Milan based enlightenment clique went by the name *Societa dei Pugni*. They were a group of intellectuals who refuted the overly formal character of the academies and what they perceived as the superstitious rituals of the masonic lodges. They were influenced by the French encyclopedists but had a less formal character than other intellectual groups preferring to meet in a more casual mode. Beccaria described their group as such: "We are not a society based on a fixed and determined plan, we're a clique."<sup>32</sup> Meaning that their group was not meant to be something rigid and overly formal but it was to

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<sup>28</sup> Israel, *Democratic Enlightenment*, 271.

<sup>29</sup> Israel, *Radical Enlightenment*, 12.

<sup>30</sup> Israel, *Radical Enlightenment*, 12.

<sup>31</sup> Schaanning, *Lykkens politikk*, 196.

<sup>32</sup> Venturi, *Settecento riformatore: 1: Da Muratori a Beccaria*, 683. "Nous ne formons pas une société établie sur un plan fixe et déterminé, mais une coterie."



function as a casual meeting place for people who shared a common goal.<sup>33</sup>

Part of Milan's most important contribution to the enlightenment movement arguably came from the brothers Pietro and Alessandro Verri (1741-1816) and their friend, Cesare Beccaria. These three Milan based philosophers were the creative forces behind the Milan based periodical *Il Caffè* which ran from 1764-1766. *Il Caffè* was in fact the second Milan based periodical to see the light of day in the span of eight years. An earlier periodical which bore the name; *Raccolta Milanese* ran from 1756-1757 which was to serve as a role model of sorts for *Il Caffè*. Both periodicals consisted of four pages with articles being written in a two column format followed by letters and discussions.<sup>34</sup>

The periodical criticized academics, trends and movements current and past, attacking those it felt was impeding the furthering of Italian culture and did not mince its words, beginning with what they perceived as extremely conformist authors and the dictionary published by La Crusca.<sup>35</sup> Not surprisingly, one of the most pressing debates in Italy at the time was in fact the debate on the Italian language. There were several different sides to the debate, the traditionalists, and those who advocated a modernization of the language. Even among the intellectuals who advocated a modernization, there were disagreements. There were those who advocated a purification of the Italian language, placing importance on the 'italianità' of the language. Others however argued that one should look to foreign languages in order to make the Italian language more accessible and functional. Pietro Verri and the intellectuals behind *Il Caffè* were perhaps among the most radical voices for renewal and the some of the most vocal critics of traditional Italian. They claimed that the Tuscan purist form of Italian (the language of Dante) was long past its Peak. The language of Dante had according to Verri's camp been old and already outdated by the times of Machiavelli. Verri's group argued that the Italian language should use the form of the French language as a model. The Italian language they claimed should be constructed with words from a familiar language, in other words, the language should be made up of the Italian used and understood by educated men from the region of Calabria to the alps.<sup>36</sup> The debate on the Italian language is a good demonstration of how the enlightenment was far from being a unified movement, even within Italy. As mentioned earlier, the enlightenment saw calls for renewal and breaking with the past. The radicals for instance advocated a complete break with the past while moderates

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<sup>33</sup> Romano, Vivanti, *Storia d'Italia: 3.*, 86.

<sup>34</sup> Venturi, *Settecento riformatori*, 645.

<sup>35</sup> La Crusca or, Accademia della Crusca, is known in English as the Academy of the Language.

<sup>36</sup> Pierre Milza, *Storia d'Italia: dalla preistoria ai giorni nostri*, (Milano, Corbaccio, 2006), 537-538.

sought to reconcile the new with the old. Likewise, the debate on the Italian saw those who wanted to reconcile the new aspects of the language with the old and those who sought a complete renewal. This debate was in other words an extension of the bigger debates taking place at the 18<sup>th</sup> century.

Pietro Verri is often mentioned as the leader of the ‘Milanese’ enlightenment and for good reason. Born and raised in Milan, Verri greatly admired the French encyclopedists and was familiar with the works of Montesquieu, Diderot, Helvétius and Rousseau. The Italian portion of the enlightenment always had a more moderate character than that of France, mainly because of the strong presence of the papal state in Italy. Verri’s ideas mostly centered on reform, advocating a more effectively run government and economic growth. In other words, they sought to remove the obstacles on the path to a more modern *stato Milanese*, obstacles such as feudal rights, removal of taxes and other more general obstacles to a free market. Verri published two works whose titles adequately reflect his goals; *Memorie Storiche sull'economia dello stato di Milano* (exact date unknown) and *Meditazioni sull'economia Politica* (1771) both reflecting his desire to work for a renewal of the *stato Milanese*, and a desire to introduce considerable economic reforms.<sup>37</sup>

The contribution of the Verri family to the Milan enlightenment came not only from Pietro Verri, but also from his younger brother, Alessandro Verri. Alessandro was preoccupied by the same themes and issues as his older brother Pietro and Beccaria. Alessandro was one of the biggest contributors to the periodical *Il Caffè* having written around thirty articles on subjects such as law and language, some of which supported radical reforms in both the judicial system and in the Italian language, both themes which Beccaria and his older Pietro also wrote about. What makes the radical and almost revolutionary views of the Verri brothers interesting to look at is that it could be taken to be rebellious in a dual sense - their own father, Gabriele Verri was a conservative and was a magistrate in the *stato Milanese*, and among the very forces the brothers were critical of.<sup>38</sup>

Of all the enlightenment philosophers to come out of Italy, Cesare Beccaria was undoubtedly one of – if not the best known. His *On Crimes and Punishment* published in 1764 was one of the most influential works of the century on law. Such was the interest in and popularity of Beccaria’s treaty that once it was published it was almost immediately translated into several different languages, with the French version being published with an afterword by

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<sup>37</sup> Milza, *Storia d'Italia*, 539.

<sup>38</sup> <http://www.treccani.it/enciclopedia/gabriele-verri/> (Accessed 01.02.16).

the French philosopher Voltaire.<sup>39</sup>

Beccaria's work presented one of the first arguments against capital punishment. In the chapter on capital punishment in his *On Crimes and Punishment*, Beccaria describes capital punishment as a useless form of punishment which has never contributed to the bettering of man. He also interestingly questions the right to use the death penalty; asking "Who has ever willingly given up to others the authority to kill him? How on earth can the minimum sacrifice of each individual's freedom involve handing over the greatest of all goods, life itself?"<sup>40</sup> The weight of Beccaria's arguments lay not only in that he questions the usefulness of capital punishment, but he also questions the legitimacy of using such a punishment, before concluding that it has no legitimate basis, as no man would willingly want to give anyone else the right to kill him. The beginning of his argument echoes the Genevan born philosopher Jean-Jacques Rousseau's arguments, with both arguing that man enters a social contract in order to safeguard their own interests and escape a state chaos, war and uncertainty where their freedom is of no value.

What sets Beccaria apart from social contract theorists such as Thomas Hobbes from the preceding century, or his own contemporary, Rousseau, is that while Hobbes for instance claims that the contract means a complete transferal of rights and power to a sovereign that is more or less untouchable by its subject and has the right to execute its members,<sup>41</sup> and Rousseau who similarly advocates a complete transferal of power to the general will and also accords its sovereign the right to use capital punishment,<sup>42</sup> Beccaria claims that man "wearied by living in an unending state of war and by a freedom rendered useless by the uncertainty of retaining it, they sacrifice [my emphasis] *a part* of that freedom in order to enjoy what remains in security and calm."<sup>43</sup> Beccaria as we see claims that that they give up *a part* of their freedom, they do not agree to transfer *all* of their liberty, or rights, and this is what sets Beccaria apart. For Beccaria, the scope of the contract is different. While Rousseau and Hobbes advocate a complete transfer, Beccaria claims that one is required to give up only a *portion* of one's rights and liberties, hence drawing him to conclude that the greatest right of all, the right to life is not among them and thereby strongly questioning the right and necessity

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<sup>39</sup> Cesare Beccaria, *On Crimes and Punishment and Other Writings*, Edited by Richard Bellamy, (New York: Cambridge University Press, 1995), xxix.

<sup>40</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 66.

<sup>41</sup> Thomas Hobbes, *Leviathan*, (New York: Press Syndicate of the University of Cambridge, 1996), 121.

<sup>42</sup> Jean-Jacques Rousseau, *The Social Contract*, translated by Christopher Betts, (New York: Oxford University Press Inc, 2008), 55, 71.

<sup>43</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 9.

of using capital punishment under normal circumstances.

Some of the essentials of Beccaria's penal philosophy were his ideas of a secular justice system and of punishment as a deterrent. Morality and religion had to be separated. Beccaria's ideas weren't necessarily anything new. He was heavily influenced by Montesquieu and by other French intellectuals.<sup>44</sup> Montesquieu as noted earlier wrote about laws as something man-made, a principle which Beccaria transfers to his own ideas. At the heart of Beccaria's penal thought is the idea of equality before the law without any exceptions. This meant that no one was to have more rights than others. Additionally, he also argues that one should be innocent till proven guilty, meaning that someone accused of a crime was not to be punished until after having been found guilty. Furthermore, Beccaria also denounces the use of torture both before someone has been found guilty as well as after. What Beccaria wanted, was a criminal justice system in which utility and necessity were the guiding principles.<sup>45</sup>

Beccaria argued that if one examined human nature, one would find that man was driven by a want for pleasure and comfort, and a wish to avoid pain and discomfort. Man's natural inclination towards avoiding pain had to be made use of. Beccaria argued that punishment was a way to deter people from committing crimes. Punishment had to be proportionate to the crime, it had to match the crime and be of such a measure that it dissuaded others from wanting to choose to commit acts of crime. Beccaria's stance on punishment is summed up as follows by Philippe Audegean; "The principle of the list amount of pain as the basis of criminal law."<sup>46</sup> The threat of punishment, in other words, of pain and discomfort was to be used to keep people from committing crimes.<sup>47</sup>

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<sup>44</sup> Schaanning, *Lykkens politikk*, 194.

<sup>45</sup> Audegean Philippe, *Cesare Beccaria, filosofo europeo*, translation by Barbara Carnevali, (Roma: Carocci Editore, 2014), 109-110.

<sup>46</sup> Philippe, *Cesare Beccaria, filosofo europeo*, "Il principio del minor male possibile come fondamento del dritto penale", 113.

<sup>47</sup> Espen Schaanning, *Menneskelaboratoriet: Botsfengslets historie*, (Oslo: Spartacus, 2007), 195-196.

## 3 Neapolitan Enlightenment

### 3.1 The Neapolitan enlightenment

The year 1734 represented a turning point for Naples. It marked the end of Austrian rule, the commencement of Bourbon rule over Naples, and more importantly, Naples was now an independent kingdom, if still under Spanish influence.<sup>48</sup> Roughly speaking, the Neapolitan enlightenment can be divided into two parts, the early Neapolitan enlightenment movement which was spearheaded by the great Giambattista Vico (1668-1744), and the second and final enlightenment movement which began with Antonio Genovesi.<sup>49</sup> Genovesi's role in this second wave of the Neapolitan enlightenment cannot be overstated. According to the Italian enlightenment historian Franco Venturi, the philosophers of the 1760s and onwards were mostly products of Genovesi's school of thought, with Genovesi having influenced several important Neapolitan thinkers such as Longano, Filangieri, Galanti, and Pagano, either directly or indirectly.<sup>50</sup>

Naples was one of the biggest metropolitan areas in Europe in the 1700s and the biggest city in Italy by far, at least population wise.<sup>51</sup> In Europe only cities like Paris and London were bigger than Naples. It was also unfortunately one of the least developed, and most backward parts of not only Europe but also Italy.<sup>52</sup> One gets the impression that everything about Naples was outdated, the way its government was run, its economic policies, and its agriculture. Despite the precarious state Neapolitan society found itself, Naples saw the rise of several intellectuals dedicated to bettering society, and chief among these was Antonio Genovesi who will be given a thorough presentation later in this chapter.

The Neapolitan intellectuals were mostly reformers, and they could be divided into two groups, namely *économistes* and legal reformers.<sup>53</sup> The *économistes* as the name implies were more concerned with economic issues and chief amongst them was Genovesi. The other group, the legal reformers consisted of philosophers such as Filangieri and Pagano. Most of Genovesi's camp were of the opinion that the kingdom of Naples was one of the European

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<sup>48</sup> Franco Venturi, *Italy and the Enlightenment: studies in a cosmopolitan century*, (London: Longman, 1972), 198.

<sup>49</sup> Venturi, *Italy and the Enlightenment*, 200.

<sup>50</sup> Venturi, *Settecento riformatori*, 586.

<sup>51</sup> Giuliano Procacci, *Storia degli Italiani: 2*, (Bari: Laterza, 1972), 263.

<sup>52</sup> Girolamo Imbruglia, *Naples in the Eighteenth Century: The birth and death of a Nation State*, (New York: Cambridge University Press, 2000), 2.

<sup>53</sup> Israel, *Democratic Enlightenment*, 368.

states that had stagnated the most. Naples was without a doubt one of the states that struggled most with the problem of privilege.<sup>54</sup> The disparity between the majority of the people on the one side, and the nobles and ecclesiastics on the other was significant, and the political tools for bringing about any serious changes were lacking. The conditions were ripe for change and the ideas of the French philosophers were started to gain traction starting with Genovesi.

The kingdom of Naples' abysmal state of affairs owed to its legislative, moral and social structures, at least according to Neapolitan philosophers such as Genovesi, Filangieri and Pagano. Virtually all of the land belonged to either the church or the nobles with the former in control of a third and the nobles of the rest. In addition, illiteracy is noted by Jonathan Israel to have been almost universal in the kingdom. Israel also notes that this gross inequity in the kingdom of Naples meant that despite its ideal climate and fertile lands, its agriculture remained horribly backwards; the farmers were unwilling to work for the profit of ungrateful land owners. A lot of the *illuministi* such as Genovesi, Giuseppe Maria Galanti, and other prominent figures within the intellectual circles in Naples mainly wrote about "economic and administrative problems".<sup>55</sup> The *économistes* sought to rejuvenate the economy by means of reform, and wanted to transform the horribly outdated economic system and remove obstacles to commerce.

### **3.2 The Neapolitan republic**

The Neapolitan enlightenment endeavor culminated with the 1799 revolution in which Pagano was one of the main figures. 1796-1799 is often referred to as the republican or revolutionary triennium.<sup>56</sup> It was a three-year period, which saw the rise of several short-lived republics in Italy, all of which were inspired by the French revolution of 1789. In the year of 1799, the kingdom of Naples briefly became the republic of Naples. On January 22nd 1799, French armed forces entered the city of Naples and backed the Neapolitan patriots who had been behind the Neapolitan revolution a day prior. A group of Neapolitans had taken over the Castel Sant'Elmo and proclaimed the Republic of Naples. According to John Robertson, the Neapolitan Revolution can be seen as the last of the revolutions inspired by the French revolution of 1789.<sup>57</sup> It was the last revolution in Italy among a flurry of revolutions to be backed by French military forces. Similar to the other revolutions that had taken place in Italy

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<sup>54</sup> Imbruglia, *Naples in the Eighteenth Century*, 2.

<sup>55</sup> Israel, *Democratic Enlightenment*, 365.

<sup>56</sup> The 1796-1799 triennium is commonly referred to as the *trienno rivoluzionario*, *repubblicano* or *giacobino*.

<sup>57</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 17.

and elsewhere, the revolutionary forces of Naples were almost completely reliant on French military forces in order to gain, and keep power. As soon as the French left Naples, the Neapolitan republic started to crumble.

The Neapolitan republic of 1799 was the result of a power vacuum. During the course of 1798-1799, the members of the Neapolitan government all fled to Palermo. The bourbon king of Naples, Ferdinando IV withdrew huge amounts of gold from the Neapolitan banks and fled to Palermo in the December of 1798 along with more or less all of his ministers. Marchese Francesco Pignate was then appointed vicar, and was to rule in place of the king in his absence. He too fled only a month later in 1799. The reason for this government exodus was that in 1798, the bourbon king had attempted to march on Rome. The bourbon king had been encouraged to march on Rome by the British and the Austrians, but it proved to be an unsustainable endeavor and a clear overexertion of Neapolitan power, and it left the state in a precarious state hence pushing them to flee to Palermo.<sup>58</sup>

The French commander Jean Étienne Championnet (1762-1800) was in charge of the French forces that took control over Naples, and he gave his full endorsement to the Neapolitan revolutionaries. According to Robertson, he supported the creation of a provisional government, "and facilitated its actions". The Neapolitan revolutionaries however provided the ideological framework of the republic, its institutions and program. The Neapolitan republic saw the implementation of numerous reforms. The form of government was restructured, the judicial system was reformed, and laws hindering commerce were abolished. The judicial reforms entailed changes such as the abolition of torture and the implementation of public trials.<sup>59</sup> The Neapolitan revolution of 1799 has unavoidably drawn many comparisons to the 1789 French revolution with some even calling it an imported phenomenon.<sup>60</sup> It did however differentiate itself in several ways. Firstly, the Neapolitan revolution was not a bloody revolution. The old power apparatus more or less vacated Naples leaving the republican bid for power unopposed. Secondly, as Robertson points out, the Neapolitan revolution never saw a reign of terror and mass executions of the style, which was seen in other places, and the revolutionaries were all devoted to a rule based on laws from which they never strayed.<sup>61</sup>

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<sup>58</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 17

<sup>59</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 18.

<sup>60</sup> Guido Santato, *Il giacobinismo italiano: Utopia e realtà fra Rivoluzione e Restaurazione*, (Padova: Piccin Nuova Libreria S.p.A, 1990), 26-27.

<sup>61</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 19.

The Neapolitan republic was not built to last. It did perhaps have a solid leadership, and a host of reputable intellectuals within its midst, but it was nowhere strong enough militarily or economically to survive without external help. During the almost six-month long period Naples was a republic, it was under severe pressure. The republic was the object of a conspiracy from within the city seeking to overthrow the republic and under threat from British warships. On top of that, as soon as the French military forces vacated Naples, forces loyal to the Bourbon king began to make advances in southern Italy, and they eventually reached Naples. By June 1799, the Neapolitan republicans had capitulated and accepted defeat.<sup>62</sup>

The Neapolitan revolution and the short-lived republic it gave birth to (which were direct consequences of events in France), were heavily criticized by the Italian writer Vincenzo Cuoco (1770-1823) in the immediate aftermath of the revolutions. He wrote the *Saggio storico sulla rivoluzione napoletana del 1799* in which he attacked the Neapolitan revolution and Mario Pagano who authored its constitution. Cuoco had been in Naples during the revolution and was exiled after the kingdom was restored. He criticized the Neapolitan revolution for being what he called a *passive* revolution, meaning that it did not have popular support.<sup>63</sup> Critics of the Neapolitan revolution argued that the Neapolitan uprising was an imported phenomenon and that it was in no way an inherently Italian and autonomous movement. Furthermore, it is claimed that the changes in the Italian socio-political landscape of the 1700s were mere consequences of foreign actors, even by some modern scholars.<sup>64</sup> It is perhaps true that the 18<sup>th</sup> century was a century of foreign domination in Italy, but according to scholars such as Robertson, the Neapolitan revolutionaries were well aware of the fact that they needed popular support in order to be successful.<sup>65</sup> They knew that what they needed was an *active* revolution. The Neapolitan patriots were influenced by the French, as evident by Pagano's use of the French constitution of 1793 as a model, this much is clear.<sup>66</sup> They were indeed trying to use the French revolution as an inspiration, but they weren't attempting to recreate an exact copy of the French republic. The Neapolitans did make efforts to change the French ideological framework so that it would be more suited to the Neapolitan situation.<sup>67</sup>

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<sup>62</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 18-19.

<sup>63</sup> Santato, *Il giacobinismo italiano: Utopia e realtà fra Rivoluzione e Restaurazione*, 25.

<sup>64</sup> Santato, *Il giacobinismo italiano: Utopia e realtà fra Rivoluzione e Restaurazione*, 25-26.

<sup>65</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 22-23.

<sup>66</sup> Mario Battaglini, *Mario Pagano e il Progetto Di Costituzione della Repubblica Napoletana*, (Roma: Archivio Guido Izzi, 1994), 32.

<sup>67</sup> Robertson, "Enlightenment and Revolution: Naples 1799", 23.



That the Italian enlightenment, and that the Neapolitan revolution were inspired by those of France is undebatable. However, attributing the revolution of Naples solely to outside intervention and influence is ignoring Italy's own history. The Neapolitan republic was not the first state in Italy to become a republic, and Montesquieu and Rousseau, whom the Italians indubitably were influenced by, were far from being the only theorists to articulate republican ideas, and they were certainly not the first to do so. One only needs to look to Niccolò Machiavelli's *Discorsi sopra la prima deca di Tito Livio* to find republican ideas in Italy, which predate the French thinkers by over two hundred years. It was Filangieri, who authored the book *Scienza Della Legizlazione*, that Neapolitans commemorated as the spiritual father of their republic, not the French theorists.<sup>68</sup> Filangieri, and Pagano for that matter, both articulated ideas one could consider republican in their works, and one could argue that a republican tradition did exist in Italy, even if foreign thinkers did have some influence. A revolution did take place in Naples, and its ideological framework was not a mere foreign import. In other words, the grounds for a revolution existed in Italy itself, even if outside actors did influence, or rather inspired events in Italy.

### 3.3 Antonio Genovesi

Antonio Genovesi was one of the earliest of the *économistes* in Naples. Born in 1713 in Castiglione, a small town outside of Salerno, Genovesi studied the classics, rhetoric, then studied Cartesian and scholastic philosophy, before once again studying the classics. Genovesi was influenced by the French philosopher Montesquieu and his work *The Spirit of the Laws*, advocating a gradual process of change instead of a quick one. Indeed, not only had Genovesi read Montesquieu, but an Italian version of Montesquieu's *Spirit of the laws* was published in 1777 containing notes by Genovesi.<sup>69</sup> His ideas of what the Neapolitan kingdom should look like began to take shape in the 1750s, and Genovesi was quick to understand that what Naples was in need of wasn't "metaphysics but rather merchants", meaning what the Neapolitan kingdom was in dire need of, was economic reforms.<sup>70</sup>

The Naples of the 1700s was in a poor situation economically, politically and culturally. Remnants of old feudalism still cast a shadow over Naples. Genovesi was facing a monumental task, trying to work as a force of modernization in a Neapolitan kingdom that

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<sup>68</sup> Vincenzo Ferrone, "L'Illuminismo italiano e la rivoluzione napoletana del '99" *Studi Storici*, Anno 40, No. 4, (Fondazione Istituto Gramsci, 1999), 1003.

<sup>69</sup> Israel, *Democratic Enlightenment*, 332.

<sup>70</sup> Imbruglia, *Naples in the Eighteenth Century*, 74.

was horribly backward.<sup>71</sup> Southern Italy was poor and its infrastructure was lacking to say the least. It did however have fertile lands and so reformers mostly agreed that the economy had to be built around its agriculture. Genovesi's goal shortly summed up was to enable Naples to enter into the European world of commerce. Drawing on Montesquieu who had claimed that the conditions of agriculture in a given country resulted not from how fertile the land was, but its political form, Genovesi was convinced that what lied at the core of the Neapolitan kingdoms problem were its forms of social structure, its government, and its laws.<sup>72</sup>

Genovesi's first major work *Metaphysical Elements* came out in 1743 followed by his *Elements of the Art of critical logic* in 1745. Genovesi who would later go on to become one of the *économistes* was a moderate philosopher. Genovesi had a vast knowledge on metaphysics, and his work comments on Cartesianism which he admires for completely rebuking scholasticism but ultimately rejects, arguing that it has some serious deficiencies. Genovesi also admired Newton and Locke but they too he rejected for their inadequacy in establishing the grounds for the concurrence of faith and reason. His fiercest criticism however is reserved for Spinoza, but at the same time, Genovesi admits that he simply is unable to philosophically defeat the Spinozian stance. None of the metaphysical streams Genovesi studied provided a satisfactory system which could "make sense of the world" and Genovesi ultimately ends up rejecting metaphysics altogether in favor of focusing on the more technical aspects of society. According to Jonathan Israel, Genovesi's overarching goal was to provide a philosophical program influenced by more moderate enlightenment streams that could stand up the ideas espoused by the radicals.<sup>73</sup> It is feasible to claim that Genovesi was the most influential Neapolitan thinker of the 1740s and onwards. His shift from metaphysics to politics, economy and law had a major impact in Naples – he more or less singlehandedly shifted the focus of Neapolitan philosophers from metaphysics to legislative and economic issues. That is not to say that metaphysics were no longer a subject of study, only that legislative and economic matters were being given more attention. More or less all of the Neapolitan philosophers after Genovesi could be divided into *économistes* (those concerned with economy) or legal philosophers such as Filangieri and Pagano.

Genovesi's later years as mentioned were not dedicated to the metaphysical studies he had earlier devoted time to. Genovesi's *Discorso* which came out in 1754 as the preface to Ubaldo Montelatici's *Ragionamento sopra I mezzi più necessari per far fiorire l'agricoltura*

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<sup>71</sup> Imbruglia, *Naples in the Eighteenth Century*, 74.

<sup>72</sup> Imbruglia, *Naples in the Eighteenth Century*, 75.

<sup>73</sup> Israel, *Radical Enlightenment*, 56.

is by Franco Venturi called the work that best expresses the Spirit of Genovesi.<sup>74</sup> Genovesi had as mentioned until at least 1751 been preoccupied with metaphysics. From the 1750s and onwards Genovesi's main concern was political economy. Genovesi's *Discorso* is in a way, an elaboration on his claim that Naples needed merchant's and not metaphysics. His *Discorso* asserts the importance of a culture that corresponds to the needs of civil and economic progress. Genovesi argued that metaphysics with its abstract nature was useless and that theology, judicial studies and literary formalism had no direct link with the concrete needs of human life.<sup>75</sup> Genovesi was particularly influenced by Diderot's Encyclopedia. Like the encyclopedists, Genovesi sought to educate and inform the people and to transform their way of thinking, and he was above all interested in an economic awakening of Neapolitan society. Of special importance to Genovesi was the *Elémens du commerce* written by Francois Véron de Forbonnois in 1754, coincidentally the same year Genovesi was granted the chair of political economy.<sup>76</sup> One of the central issues in Genovesi's economic thought was *il problema della popolazione*, in other words the population. The population was one of the most important aspects of society. Genovesi considered a large population as a source of economic and military power. Power represented for Genovesi the means to achieve both individual and collective happiness.<sup>77</sup>

Economic reform was for Genovesi a way to drive society forward, and one of the signs of the new growing economy in Europe was that it was lifting people out of poverty;

It raises up that part of the human race which is suffering because of the pressure from other part, which is above it. It ruins the great and old families, and raises new ones. Nature cannot be tricked for too long. Luxury comes because the rich return to the poor that which they had taken from them over and above the common patrimony and because slaves return to freedom, and free people become slaves.<sup>78</sup>

In other words, what Genovesi thought necessary was reducing poverty and stimulating economic growth not just among the rich but also among the lower classes. Genovesi was not after the unachievable goal of getting rid of the aristocracy. What he was advocating, was the

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<sup>74</sup> Venturi, *Settecento riformatore: 1: Da Muratori a Beccaria*, 528, 529. 560,

<sup>75</sup> Rosario Villari, "Antonio Genovesi e la ricerca delle forze motrici dello sviluppo sociale" *Studi Storici*, Anno 11, No. 1 (Fondazione Istituto Gramsci, 1970), 28.

<sup>76</sup> Venturi, *Settecento riformatore: 1: Da Muratori a Beccaria*, 567.

<sup>77</sup> Michele Troisi, "Teoria e Politica Della Popolazione Secondo Antonio Genovesi" *Rivista Internazionale di Scienze Sociali*, Serie III, Vol. 11 (Anno 48), Fasc. 2 (Vita e Pensiero – Pubblicazioni dell'Università Cattolica del Sacro Cuore, 1940), 194.

<sup>78</sup> Imbruglia, *Naples in the Eighteenth Century*, 75. (Quoted from: Antonio Genovesi, *Lezioni di Commercio*. (Bassano, 1782), 190.

establishment of a middle class.<sup>79</sup> His desire for the creation of a middle-class was because he viewed it as the only way of producing true and lasting wealth. Genovesi's philosophical project was not only one aimed at economic reform, it was also aimed at educating the public, trying to understand the social forces and to push them in the right direction.<sup>80</sup>

Genovesi's ideas eventually started influencing the rulers of Naples and of special importance is Bernardo Tanucci (1698-1783). Tanucci served as secretary of state, member of the council of state and of the regency. Tanucci was an ardent supporter of Neapolitan sovereignty and spearheaded a reform program which sought to ensure the kingdoms sovereignty and to limit the power and influence of the church, the nobility and interestingly, the government of Naples. Tanucci advocated a reform program which wanted a decentralization of power and of the courts, he believed that Naples was exploiting the provinces and that the central government was just another expression of the nobility's power. The reason why Tanucci was critical of the nobility, the church and the central power in Naples was that he believed they were safeguarding private interests instead of promoting the common good and the interest of the general public. The central power claimed to be representing the interests of the entire kingdom, even the provinces, but Tanucci disagreed, claiming that they represented private interests. A political struggle ensued between Tanucci (and his supporters) and the nobility which ended with the downfall of Tanucci after a successful masonic conspiracy.<sup>81</sup>

One of the most noteworthy aspects of the Neapolitan enlightenment after Genovesi is its fluctuating ties to the masonic lodges. Genovesi himself was not a part of the freemasons nor was he positively instilled towards them, citing their private nature as "contrary to good laws". The same can be said for Tanucci who was Genovesi's occasional ally in matters of reform. Tanucci made several active attempts to suppress the freemasons in Naples before his death.<sup>82</sup> Ironically, Pagano and Filangieri along with a host of other Neapolitan thinkers who had studied under Genovesi would go on to form a group during the 1780s who were all actively meeting in masonic lodges.<sup>83</sup> The popularity of the masonic lodges among the Neapolitan intellectuals can be interpreted as a lack of, or perhaps the difficulty of

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<sup>79</sup> Imbruglia, *Naples in the Eighteenth Century*, 75.

<sup>80</sup> Imbruglia, *Naples in the Eighteenth Century*, 75-77.

<sup>81</sup> Imbruglia, *Naples in the Eighteenth Century*, 13-15.

<sup>82</sup> John Robertson, "Enlightenment and Revolution: Naples 1799." *Transactions of the Royal Historical Society*, Vol. 10 (Cambridge University Press: 2000), 29, 34.

<sup>83</sup> Venturi, *Italy and the Enlightenment*, 214

establishing an open public sphere in Naples.<sup>84</sup> The masonic gatherings of the Neapolitan thinkers did not last long as Filangieri's death in 1788 marked the groups end with the philosophers all pursuing different endeavors.<sup>85</sup>

Robertson points out the somewhat contradictory aspect of the Neapolitan thinkers' use of the masonic lodges as meeting places.<sup>86</sup> The masonic society is described as a secretive and closed world, but at the same time, somewhat paradoxically, Neapolitan intellectuals such as Filangieri and Pagano were building on Genovesi's reflections and articulating ideas that advocated the cultivation of a public sphere.

The lodges were mostly to be considered a safe meeting place for intellectuals rather than secret conspiracy lairs. Robertson suggests that the lodges provided a framework for the Jacobins in the 1790s.<sup>87</sup> Venturi on the other hand notes that thinkers such as Pagano, Galanti et al disbanded their masonic group shortly after Filangieri's death in the late 1780s.<sup>88</sup> It is therefore hard to establish what kind of a role the masonic lodge did or did not play in the years preceding the Neapolitan revolution of 1799, as the intellectual elite of Naples no longer seemed to be using it as a meeting place. Pagano for instance who in 1799 authored the Neapolitan republics constitution was no longer an active freemason.

### 3.4 Gaetano Filangieri

Another one of the Neapolitan enlightenment's most notable thinkers was Gaetano Filangieri. Filangieri is by some described as Naples foremost political thinker. He was influenced by thinkers such as Vico, Montesquieu and Beccaria. Like his friend Pagano, Filangieri had also studied under Genovesi at the University of Naples. In what Venturi calls, "the high summer of the Neapolitan enlightenment" Filangieri published the first parts of his *Scienza Della Legislazione* (1780).<sup>89</sup> The work came out in five volumes, with the last one appearing in 1791. It was however planned to appear in seven volumes.<sup>90</sup> Filangieri's work examines natural right from the perspective of public opinion. His work "draws on a constitutional reconstruction" of the Neapolitan kingdom's history, before echoing a classic enlightenment

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<sup>84</sup> Robertson points to the lack of a public sphere as a reason for the intellectuals flocking to the lodges.

Robertson, *Enlightenment and Revolution: Naples 1799*, 34.

<sup>85</sup> Venturi, *Italy and the Enlightenment*, 214.

<sup>86</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 34

<sup>87</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 34.

<sup>88</sup> Venturi, *Italy and the Enlightenment*, 214.

<sup>89</sup> Venturi, *Italy and the Enlightenment*, 214.

<sup>90</sup> Israel, *Democratic Enlightenment*, 368.

sentiment; that civil society should be the basis of reform.<sup>91</sup>

Like so many others before him, Filangieri adopts the theory of the state of nature. Filangieri describes the state of nature as a "union, where no other inequality than the inequality from force or strength existed; no laws but those of nature; no restrictions, those excepted which sprung from friendship, necessity, parental affection, and filial attachment."<sup>92</sup> Man eventually exited this state of nature for the sake of a better life. Filangieri notes that there was no inequality between men but the rule of power in the state of nature. Whoever was the most capable physically, could dominate others. The solution to this disparity between men was to create a public force which would be strong enough to dominate private interests and secure its members the equality and tranquility they couldn't have experienced in the state of nature. This, Filangieri claims was the original intent of civil society and laws.<sup>93</sup> Though civil society and laws were meant to safeguard man, it had obviously swayed as Filangieri criticizes the current state of affairs.

In his *Scienza della Legislazione*, Filangieri voices his opinion that extensive legal reforms were needed. He argues that there should be "equality before the law."<sup>94</sup> He further advocated the removal of privilege.<sup>95</sup> He also encouraged a secularization of education, and freedom of press among other things. Filangieri had a rather negative stance on religion, implicitly rejecting Christianity and denounced the church's wealth. Because of his critical stance on religion and his criticism of the Catholic Church, his book ended up being banned by the pope in 1784. It wasn't only the church Filangieri aimed his criticism at; he was also critical of Montesquieu as he believed that Montesquieu had been too descriptive in his *Spirit of the Laws*. Italy, Filangieri felt, wasn't in need of explanations of how things were, but how things should be. Both Filangieri, and Pagano for that matter, were more attracted to Helvétius and his universalist anti-relativism. Montesquieu never urged for the removal of the nobles. Filangieri on the other hand wanted the complete destruction of privilege and authority of the barons and magistrates.<sup>96</sup>

Another point which Filangieri takes issue with is Montesquieu's partitioning of power theory. Filangieri notes that "In an aristocracy, the sovereign authority resides in the

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<sup>91</sup> Imbruglia, *Naples in the Eighteenth Century*, 88.

<sup>92</sup> Gaetano Filangieri, *The Science of Legislation, Vol 1*. (London: Emery and Adams, Bristol, 1806), 5.

<sup>93</sup> Filangieri, *The Science of Legislation*, 5-9.

<sup>94</sup> Israel, *Democratic Enlightenment*, 368.

<sup>95</sup> Filangieri wanted to remove privilege from society, period. He wasn't going after specific privileges but the concept of privilege in its entirety.

<sup>96</sup> Israel, *Democratic Enlightenment*, 369.

hands of a certain number of persons. This body of the principal citizens or nobles is that which makes the laws and executes them."<sup>97</sup> Filangieri then follows this up by saying that "The rest of the people, Montesquieu observes, has the same relation to the nobles as the subjects to the sovereign in a monarchy, but the great author's observation is not here correct."<sup>98</sup> Filangieri argues that on one hand, executive authority is left to the people by the sovereign in a monarchy. But on the other hand, in an aristocracy, the division of power is among the nobles alone. Executive, judicial and legislative power he says is exclusive to the elites. The people are left emptyhanded. In other words, Montesquieu's claim that the subjects within a state ruled by aristocrats and one ruled by a monarch are equal, are incorrect according to Filangieri. He criticizes Montesquieu for leaving the public out. Filangieri feels that in Montesquieu's theory, the people are incapable of becoming nobles and therefore incapable of ever part-taking in power. In Filangieri's opinion, Montesquieu fails to take the public into account as a force within civil society.

Filangieri considered public opinion to be a social force. Public opinion he believed could be influenced or manipulated by other forces. Somewhat reminiscent of Genovesi, Filangieri believes that public opinion is a factor one should try to influence, guide and nudge in the correct direction. Public opinion in Filangieri's eyes is a power that is stronger than that of the state, and this is why it had to be controlled and guided. He describes public opinion as a tribunal, as a force that is continuously acting, more powerful than the political institutions, such as the laws, or the leaders of the state. Public opinion had to be recognized for several reasons, the sheer scope of its strength for one, and the fact that public opinion could be perverted depending on the laws of a country or bad leaders. Filangieri sums up his argument by affirming that public opinion is where sovereignty lies, perhaps somewhat similar to Rousseau's arguments about the general will and the sovereign.<sup>99</sup>

Filangieri's (and Pagano's) goal was to make a science out of criminal law, and Filangieri makes his intent clear from the very beginning; the title of his magnum opus is *Scienza Della Legislazione*. Like Genovesi, one of the biggest issues Filangieri had to tackle was the problem of feudalism. Feudalism was the biggest obstacle to legislative, political and economic reforms in 18<sup>th</sup> century Naples. One of the chief issues Naples faced was the gross inequity between landowners and those without property. Even among those who were lucky enough to own property Filangieri notes that there was a great disparity, and on top of that,

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<sup>97</sup> Filangieri, *The Science of Legislation*, 82.

<sup>98</sup> Filangieri, *The Science of Legislation*, 82.

<sup>99</sup> Imbruglia, *Naples in the Eighteenth Century*, 89.

the church was in control of two thirds of all property.<sup>100</sup> Filangieri's remedy for Naples' less than stellar economic and political situation was a series of economic and legislative reforms. His economic reform included the removal of tolls on trade within the kingdom, and the abolition of feudal rights. In sum, these economic reforms were meant to lead to the establishment of private property in Neapolitan society. However, as Robertson notes, Filangieri does not clearly explain how he envisaged it. The basis for reform had to be legislation. While Montesquieu had presented the idea of a legal change which was deemed tolerable by the European rulers, Filangieri goes even further and advocates legislative changes which would reshape social structures. These legislative changes not only had to have the support of public opinion, "the arguments for change" should have their roots within the public opinion.<sup>101</sup>

One of the most important aspects of Filangieri's ideas was his desire to if not remove at least lessen the gross financial and legal disparities that existed between people. Filangieri might not have been an outright republican, but he does seem to in some way support a republican type of government or at least speaks positively about it as he says; "The law therefore which gives to all the people in a democracy an equal right to offices and employments, is one of the most necessary laws to protect, encourage and direct the principles of government."<sup>102</sup> As mentioned earlier, Filangieri criticized Montesquieu for having made suggestions which contributed to shutting the people out of public offices. Here, Filangieri suggest that laws that give people in a democracy equal opportunities to assume office and employment are to be encouraged. When it came to public office, and positions of power, Filangieri quickly notes that they are prone to corruption.<sup>103</sup> His solution is that the "first appointment [to office] be a probationary one, and a trial of the merit and qualifications necessary for the succeeding one."<sup>104</sup> He follows this up by saying that if someone in offices is chosen for another position, there should be an interval between the first and second term they serve. Filangieri argues that the reason for this interval is so that citizens make accusations toward the magistrate in question in open courts. This is presented as a way to hinder the abuse of power and to keep people with power accountable. One of the biggest

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<sup>100</sup> It seems as if my sources disagree on how much of the land the church in fact controlled. Jonathan Israel claims the church controlled roughly 1/3 of the lands while John Robertson here claims the church controlled as much as 2/3s. I haven't been able to corroborate either side here.

<sup>101</sup> John Robertson, *The Case for the Enlightenment: Scotland and Naples 1680-1760*, (New York: Cambridge University Press, 2005), 386.

<sup>102</sup> Filangieri, *The Science of Legislation*, 152.

<sup>103</sup> Filangieri, *The Science of Legislation*, 152-153.

<sup>104</sup> Filangieri, *The Science of Legislation*, 154.



weakness of the criminal justice system in Naples as will be evident later on was the problem of accountability. People could easily escape punishment as it was dependent on the arbitrary will of judges and not necessarily on laws.

To sum up, Genovesi and Filangieri's philosophy is one that has a skeptical outlook on political, judicial, intellectual and religious authorities and that sought extensive economic reforms. One could argue that they were the two most influential thinkers of the second part of the Neapolitan enlightenment. While Genovesi for instance could be described as a moderate enlightenment thinker who advocated gradual socio-political and economic changes, Filangieri is slightly more difficult to categorize. Filangieri criticized feudal rights and the nobles much more directly than Genovesi had ever done, and wanted the people to be included to a much larger degree than say Montesquieu who he criticized, or Genovesi. Another aspect that separated Genovesi from Filangieri was the former's focus on economy and the latter's focus on law. Both of them did however, attribute a great deal of importance to public opinion and the people as a force in civil society. While the pair of them could conceivably be described as moderate enlightenment thinkers, it is worth noting that Filangieri was always much more aggressive, while Genovesi was more guarded in his criticism.

### **3.5 The end of the Italian enlightenment experience**

Phrases such as end of the enlightenment, or phrases generally seeking to describe the end of an era are never really fitting to use. It is more useful to talk about transitional phases rather than the end of specific eras when writing about a time-period. With that being said, the death of Pagano, who authored one of the first democratic and republican constitutions was symbolic. It signified the end of the Neapolitan Republic, and his death can perhaps, also be seen as the conclusion of the enlightenment experience in Italy. The Neapolitan revolution ended in complete tragedy for its participants. Almost all of the revolutionaries were either prosecuted and punished, exiled or executed. Around eight thousand people were either convicted and punished, or exiled from the Neapolitan kingdom. Weekly executions at the Piazza Del Mercato became something of a ritual.<sup>105</sup> The restoration of the bourbons was not only the end of the Neapolitan republic, but it also represented the end of the reform efforts that had begun with Genovesi.

Even though Pagano did author a constitution, which later interpreters have called

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<sup>105</sup> Ferrone, *L'Illuminismo italiano e la rivoluzione napoletana del '99*, 993.

democratic and republican, defining the Neapolitan enlightenment thinkers as democratic republicans is somewhat problematic and perhaps not entirely accurate. Thinkers such as Genovesi, Filangieri, Pagano and the rest of the Neapolitan intellectuals of the 1750s and onwards were mainly reformers. They did not seem interested in changing the form of government. They were rather supporters of illuminated despotism. They were seeking to arouse a civil awakening of society, but within the confines of a monarchy.<sup>106</sup> The 1740s and onwards as mentioned in the previous chapter, signaled new times in Italy. With the new Pope and the bourbons, the enlightenment finally seemed to be getting a widespread acceptance in Italy. The expectations of reform were high in Naples. As Robertson notes, when the bourbons took over the Neapolitan Kingdom, they did so at a time when the Neapolitans had grown to have expectations of reforms, and the Neapolitan school of Genovesi can be seen as an expression of this.<sup>107</sup> The Neapolitan thinkers were pushing for social, judicial and economic reforms. Their efforts were not as politically charged, as they would eventually get in the 1790s.

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<sup>106</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, XI.

<sup>107</sup> Robertson, *Enlightenment and Revolution: Naples 1799*, 24-25.

## 4 Pagano and the Principles of Criminal Law

### 4.1 Francesco Mario Pagano

Francesco Mario Pagano can be viewed as one of the driving forces behind the last stage of the Neapolitan enlightenment. Pagano was born in Brienza on December 8, 1748, coincidentally the same year Montesquieu's *Spirit of the Laws* was published, a book that as already mentioned had a significant influence on the Neapolitan thinkers. Pagano moved to Naples at the age of twelve where he began to study the classics under the guidance of a priest by the name of Gherardo Degli Angeli and eventually went on to study jurisprudence. Pagano was also a student of Genovesi, a man who would turn out to have a substantial impact on him. He later struck up a friendship with Filangieri, who as mentioned earlier had also studied under Genovesi. At the age of twenty-one, the young Pagano was given the chair of ethics at University of Naples in 1770, followed by the chair of criminal law in 1785.<sup>108</sup>

Pagano's academic career began at the young age of 21. In 1769, he published his first work; *Disegno del Sistema della scienza degli Uffizi*. Not much is known about this work as it is all but impossible to get a hold of. He also wrote tragedies, and in 1782, he published his *Gli Esuli Tebani* which he dedicated to Filangieri.<sup>109</sup> Pagano had a very productive career. He authored at least ten different works. Among his most notable works is his *Saggi Politici* published in several volumes from 1783-1785, which can be considered his magnum opus. His *Saggi Politici* was a philosophical and historical account of the Neapolitan kingdom. A second edition of his *Saggi Politici* was published in the early 1790s. Other important works of Pagano were *Considerazioni Sul Processo Criminale* which was published in 1787, and *Principj del codice penale*, and *Logica de' probabili*, both works which echo the sentiments of Filangieri and Beccaria. There is a strong focus on solid laws, and arguments against the use of torture.<sup>110</sup>

One of the thinkers who influenced Pagano the most is Giambattista Vico. Vico's main argument, superficially summed up, was that it was impossible to have knowledge about the natural and physical world. Vico calls science an illusion of the human mind that is

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<sup>108</sup> Francesco Mario Pagano, *Considerazioni Sul Processo Criminale*, introduction by Marco Stefenelli, (Bologna: Il Mulino, 2010), 13.

<sup>109</sup> Elio Palombi, *Mario Pagano e la scienza penalistica del secolo XIX*, (Napoli: Edizioni Scientifiche Italiane, 1989), 157.

<sup>110</sup> Pagano gave a series of lectures after taking the chair of criminal law in 1785. These lectures were posthumously published as *Principj del codice penale*, and *Logica de' probabile* in 1803 and 1807. <http://www.treccani.it/enciclopedia/francesco-mario-pagano/> (Accessed 11.12.15).

ignorant to its own limits, and he argues that it is only possible to seriously study that which is made by man such as civil society. Vico's *The New Science* is described as a work that went against contemporary academic streams. Pagano in his *Saggi Politici* believes that the new science was born as the result of a conjunction between philosophy and philology, and that it is the development of the human spirit. According to Dario Ippolito, though Pagano and Vico share a common point of departure, they represent two opposing theories when it comes to knowledge about the world. Contrary to Vico, Pagano admired the progress that natural science had made. Vico on the one hand differentiated between the "pseudo natural sciences" and the science of man, while Pagano on the other hand sought to find an epistemological paradigm for historicism within the natural sciences. Pagano's attempt at finding a model in the natural sciences for the study of man is a typical aspect of the philosophers in the enlightenment.<sup>111</sup>

Pagano was an instrumental part of the Neapolitan republic. He returned to Naples on February 1st after previously having been exiled from the kingdom. He had been accused of being an anti-monarchic and a "seducer and adviser of the Jacobins".<sup>112</sup> He eventually fled to Milan where he sought refuge. Pagano's request for asylum in Milan was rejected, and he was to be deported from Milan. Pagano made a vivid appeal to the judiciary council of the city in his own defense, and the appeal is a good summary of Pagano's role in the Neapolitan enlightenment:

Citizens of the legislation! I am forced to ask you for that right to protection and asylum, which your constitution grants me, and which has been denied me. [...] Twenty years at the University of Naples at the chair of public law, during the course of which I tried to instill the theories and sentiments of liberty into the minds and hearts of the young; *Saggi Politici* published seventeen years ago in which I developed the principles of democracy and of the rights of man: *Considerazioni Sul Processo Criminale* which was translated in to French and presented to the constitutional assembly and mentioned honorably in the verbal process of august, 1789[...] Twenty nine months of suffering in prison in Naples for the cause of liberty [...] It seems to me that these are enough reasons to not feel torn in having sought asylum here.<sup>113</sup>

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<sup>111</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 13.

<sup>112</sup> Pagano, *Considerazioni sul processo Criminale*, 14.

<sup>113</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, XI. : "Cittadini Legislatori! Sono costretto a chiedervi quel diritto d'asilo e di protezione che la vostra costituzione mi accorda e che mi vedo negato[...]. Venti anni di cattedra di diritto pubblico in Napoli, nel corso dei quali ho procurato d'istillare le teorie e i sentimenti della libertà nella mente e nel cuore dei giovanetti; I saggi Politici, pubblicati sedici anni fa, nei quali sviluppai i principi della democrazia e dei diritti dell'uomo; il Processo criminale tradotto in francese e presentato all'assemblea costituente che ne ordino menzione onorevole nel processo verbale in agosto del 1789 [...] ventinove mesi di carcere sofferto in Napoli per la cause della libertà da me sposata; la carica di magistrato e la

What makes this appeal interesting to look at is that it in many ways summarizes the ideas in his own scholarly productions over the years. Most of Pagano's works were either about political or jurisprudential issues, and when he sought asylum and protection in Milan, he does so referring to the constitution of the state of Milan by saying that his request for asylum should be granted because the constitution of Milan gives him such a right. The Neapolitan republic Pagano would go on to be a part of also had a strong emphasis on the rule of law. He mentions his *Saggi Politici* in which he tried to articulate principles of civil rights and democracy, again focusing on rights. The recurring theme seems to be a focus on sound laws. He again mentions one of his books on the subject of law when making his case, the second work being *Considerazioni Sul Processo Criminale*. Pagano's goal with this appeal is to make use of a right he says the constitution gave to people. His plea is not arbitrary, and the foundation of his argument and the case he is making, are in accordance with the laws of Milan, which guarantees protection and asylum.

But what exactly does Pagano mean when he makes use of words such as liberty and the rights of man? Pagano's concept of liberty can be divided into a civil and a political liberty. The difference between these two kinds of liberties corresponds to that of society and the state, civil liberties being connected to society and political liberty to the state. More precisely, civil liberties are about man and his relation to the natural world, meaning his growth, his self-preservation and his existence among others. Political liberty however is about man's relationship to the state meaning man's duties such as respecting the laws, or in the form of having rights, such as the possibility to part take in and exercise power.<sup>114</sup> Pagano's concepts of liberty and the rights of man are closely intertwined. Liberty is presented as the opportunity to exercise your rights be it in a natural sense or a political sense.

Pagano's concept of democracy is indubitably influenced by Filangieri's interpretation of Montesquieu's separation of power theory. As mentioned earlier, Montesquieu wanted to divide the legislative, judiciary and executive powers while Filangieri criticized him for leaving the people out. While Filangieri wanted the people to be more active or at least receive a sort of compensation if they were to be kept out of power, Pagano on the other hand says that "every citizen being a member of sovereignty must carry the burden of the three

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mia considerevole fortuna sacrificata a questa gran cause; [...] mi sembravano titoli bastevoli per non essere turbato nell'asilo che aveva io cercato in questo suolo"

<sup>114</sup> Nunzio Campagna, *Potere legalità libertà: Il pensiero di F.M. Pagano*. 2<sup>nd</sup> edition, (Rome: CalicEditori, 2004), 169.

sovereigns, namely that of the legislative body, judicial body and executive bodies."<sup>115</sup>

Pagano leaves no ambiguity here; the people are clearly to be counted as a part of the sovereign and should have the ability to part-take in power. In other words, Pagano's concept of democracy would seem to imply a form of rule where the people are heavily involved with the different sovereigns. And it was these ideas that were meant to be the foundations of the Neapolitan Republic.

Cuoco and some modern interpreters of the revolution however, seem to reject Pagano and the revolution because they believed it was a passive revolution which lacked the support of the people. However, the Neapolitan philosophers were very concerned with the people. Genovesi and Filangieri wrote about public opinion as one of the most important factors in society. Filangieri even called it the strongest part of the state as noted in the previous chapter. Genovesi and Filangieri heavily influenced Pagano, and he too was concerned with public opinion. When Pagano was given his death sentence, the following exchange of words supposedly took place between Pagano and the judge who sentenced him; "Everything is futile, the leaders [of the republic] are to die, the court abhors you, and the people want it." and to this Pagano replied: " The people are now lost, but I would die happy if the people had a will that they could impose on their magistrates."<sup>116</sup> The judge is saying that the court abhors him and that the people *want* his death. Pagano responds that the people have been misled, and that he would die a happy man if the people actually had a will, and could impose this on its magistrates. Pagano is here not only aware of public opinion as a force, he actually embraces public opinion as a legitimate force, even in the face of death recognizing that it is a factor. He even encourages the people to be active. His sentiment about the people having been misled echoes Genovesi and Filangieri's reflections on public opinion, namely that public opinion can be perverted or misguided, which Pagano clearly feels has happened in this instance.

While one could conceivably describe Genovesi and Filangieri as supporters of an enlightened absolutism, the case is a bit more complicated with Pagano.<sup>117</sup> Genovesi and

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<sup>115</sup> Pagano, *Considerazioni Sul Processo Criminale*, 131. "Ogni cittadino essendo membro della sovranità, dee portare il peso nelle tre cariche sovrane, cioè della legislazione, de' giudizi e della esecuzione."

<sup>116</sup> Benedetto Croce, *La Rivoluzione Napoletana del 1799*, Intro by Cinzia Cassani. (Napoli: Bibliopolis, 1998), 379. The judge's comment to Pagano; "Tout est inutile: ta tête est dévouée à la mort; la cour t'abhorre, et le peuple la veut". Pagano's Reply; "Le peuple est maintenant égaré; mais je mourrais content si ce peuple avait une volonté, qui pût en imposer à ses magistrats."

<sup>117</sup> Filangieri might have called for the destruction of the Nobility and had clearly republican ideas expressed at one point, but he never directly challenged the bourbons the way Pagano would go on to do as a part of the Neapolitan revolution.

Filangieri were long dead before the 1799 revolution. Neither of them lived long enough to even see the French revolution with Genovesi passing away in 1769 and Filangieri in 1788, a year shy of the French revolution. Genovesi and Filangieri both wrote about the public sphere, and though they both rank it as the most important factor in a state, they do feel like it should be guided as it can be corrupted, and they were still speaking about a public sphere within a monarchic frame. It seems that they were more interested in educating the public rather than an actual rule of the people.

Pagano's exchange of words with the judge who sentenced him indicates that he had a similar view, even though he had just briefly experienced living in a republic. He does say that the people have been led astray and that the people lack a will. It seems that like Genovesi and Filangieri, Pagano was more concerned about educating the public than activating them as citizens. Even though Pagano did write a constitution that was republican and democratic in nature, he did feel like the public opinion in Naples still had to be educated. Nevertheless, the fact that the constitution is described as modern and democratic for its time does imply that the end goal for Pagano might indeed have been a rule of the people.

#### **4.2 What is criminal law?**

Before delving into Pagano's *Principj* it is necessary with a few words on what criminal law meant to the enlightenment thinkers. The political nature of criminal law is undeniable. Criminal law has its roots in traditional power structures. The enlightenment era saw the rise of man as the rational craftsman of the political world. The natural rights of man were declared inalienable and those rights were the source of legitimate power. One of the many focal points of the enlightenment was indeed criminal law and its place in politics. The enlightenment philosophers considered criminal law as an important tool which could be used to limit power. The power of the state and its use of repressive punishment were perhaps the biggest threats to individual rights and liberty. Without a proper criminal justice system, the security and liberty of the subjects of a state could not be guaranteed. Criminal law is in other words the instrument by which one builds a protective barrier which safeguarded the liberty of the citizens.<sup>118</sup>

The second part of the 18<sup>th</sup> century was one of the time periods that saw the most intense debates on criminal law. The enlightenment philosophers of the 18<sup>th</sup> century were concerned with several questions when it came to Penal law; Firstly, did the *right* to punish

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<sup>118</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 159.

even exist, and secondly, if so, *who* did this right to punish belong to? Thirdly, even if it is agreed upon who it is that possesses the right to punish, who can you exercise this right upon? Fourthly, even if one has established who has the right to punish, and who they may punish, what kinds of punishment are to be allowed and which ones aren't? And fifthly, is there or rather should there be a relation between the crime committed and the punishment given?<sup>119</sup> These were among the questions that not only Pagano, but most philosophers concerned with law were attempting to answer in the 18<sup>th</sup> century.

The importance of solid criminal laws is best expressed by Montesquieu who in his *Spirits of the Laws* notes; "the citizen's liberty depends principally on the goodness of the criminal laws."<sup>120</sup> As will be evident, most of the Italian enlightenment philosophers, especially Beccaria and Pagano felt that the penal legislation up until the 18<sup>th</sup> century had failed in this respect. It failed in both of its chief purposes which were to maintain security something it failed because it did not properly restrain criminal activity, and securing liberty which it also failed to uphold as the penal laws were used to trample rather than defend the people's liberty.<sup>121</sup> Beccaria nicely sums up the current state of affairs in the introduction of his *On Crimes and Punishment* when he notes, "if we open our history books we shall see that the laws, for all that they are or should be contracts amongst free men, have rarely been anything but the tools of the passions of a few men."<sup>122</sup> Beccaria laments the current criminal justice system, and argues that it is flawed. This is a justice system where the legal system is exploited and used in order "to punish crimes unproven or illusory."<sup>123</sup> As with Montesquieu, Beccaria is highlighting the importance of good laws.

Pagano argued for universal criminal laws that were to be the same everywhere and for everyone. In other words, Pagano rejects the relativism of Filangieri and Montesquieu (two of his most important influences) who argued that the political and moral circumstances of the people should be used in order to determine what laws would be adequate for that society. Pagano's rejection of Filangieri's relativism, who was influenced by Montesquieu in this matter, somewhat aligns Pagano to Beccaria who had similar sentiments.<sup>124</sup> Beccaria had indeed a few decades earlier argued that "punishments ought to be the same for the highest as

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<sup>119</sup> Giovanni Tarello, *Storia della cultura giuridica moderna*, (Bologna: Il Mulino, 1976), 383.

<sup>120</sup> Charles Montesquieu, *The Spirit of the Laws*, Edited by Anne M. Cohler, Basia C. Miller and Harold S. Stone. (Cambridge: Cambridge University Press, 1989), 188.

<sup>121</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 160.

<sup>122</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 7.

<sup>123</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 8.

<sup>124</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 166.



they are for the lowest of citizens"<sup>125</sup> and Pagano echoed the same types of universalist sentiments. Filangieri on the other hand took as already mentioned a relativist approach, meaning that even when dealing out punishments, he argued that the social background of the criminal should play a role. The reason for this was that he felt that the same punishment would not be experienced in the same way by all criminals and therefore had to be adjusted according to the person being punished. However, in the bigger picture, Pagano's approach to criminal law is still closer to that of Filangieri than Beccaria. They were similar in that they both advocated a much more systematic criminal justice system and both of them criticized earlier enlightenment thinkers for what they perceived to be deficiencies and the lack of a complete project when it came to criminal law.<sup>126</sup>

Pagano furthermore observes that even though Montesquieu and Beccaria espoused coherent philosophies centered on values of "umanità", neither of them demonstrated any serious knowledge on the laws or the courts. A flurry of writers followed in the footsteps of Beccaria and Montesquieu. But they all had an analysis of criminal law that lacked depth, and Pagano furthermore claims their analysis was far from exact.<sup>127</sup> In Pagano's own words, none of the other writers on penal law "have this far tried to reduce to constant and proven principles the different and sparsely touched theories [of criminal law], nor find the links between them, I say that no one has attempted to make a science out of this. No one has compared the laws and the tribunals with the theories of reason."<sup>128</sup> Pagano's overarching goal is in other words to concretize criminal law. Indeed, Pagano and perhaps Filangieri had a much stronger focus on how things were *and* how things should be. The core of their argument could be summed up as follows; If the criminal justice system is to be changed, one has to know how it actually currently functions. Without actual knowledge on the current state of the criminal justice system, one is not in the position to implement the changes one so desires. To change the criminal justice system, you have to be knowledgeable on the criminal justice system.

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<sup>125</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 51.

<sup>126</sup> Ippolito, *Mario Pagano: Il pensiero giurpolitico di un illuminista*, 167.

<sup>127</sup> Palombi, *Mario Pagano e la scienza penalistica del secolo XIX*, 27.

<sup>128</sup> Francesco Mario Pagano, *Giustizia Criminale e Libertà Civile*, Introduction by Roberto Racinaro, (Rome: Editori Riuniti, 2000), 58. "ha tentato finora di ridurre a costanti e dimostrati principii le diverse teorie, sparsamente toccate, né concatenate tra di loro; niuno, dico ha tentato di fare una scienza di questo importante diritto. Niuno ha paragonato le leggi e gli usi del foro con le teorie della ragione in tutta la loro estensione."

### 4.3 Crimes and punishment – A definition

Pagano's works on criminal law can be divided into three different parts. One part is preoccupied with identifying the general principles of criminal law and defining what crimes and punishments are. The second object of criminal law is to gather the necessary evidence to prove the crime or crimes in question actually took place. Finally, it has to look at what a trial, or criminal prosecution is and how it should be. *Principj del codice penale* deals with the first part, *Logica de' probabili* with the second, and *Considerazioni sul processo Criminale* with the third aspect.<sup>129</sup> The first two parts of this threefold are concerned with laying the foundations of criminal law. They're a presentation of what principles and rules the justice system should be built upon and how knowledge and information are to be gathered and handled in criminal proceedings. The first two works could at the same time also be viewed as a commentary on the existing criminal justice system as there are references to concrete laws in Naples. However, it is important to remember that the principles presented in his *Principj* and *Logica* are his own views and not a presentation of actual Neapolitan law. The last work in this threefold however is more normative and philosophical in nature. Pagano's own views and voice is much clearer in his *Considerazioni* than in his first two works. This chapter will be focusing on the first part of this threefold, *Principj Del Codice Penale*, which will henceforth be referred to as *Principj*.

*Principj* was the first of Pagano's posthumously published works, being published in 1803 by the Milanese editor, Agnello Nobile.<sup>130</sup> Pagano starts his *Principj* at a very fundamental level. He begins by giving an answer to two important questions within criminal law; what constitutes a criminal act, and what is punishment? He begins by saying that:

A crime is the violation of either a natural or civil right of man: or, it is the failure to fulfill a natural, or civil commitment. It is committing an act one should not do, or, it is the omission of something one is obligated to do. Punishment on the other hand is the loss of a right either for the violation of a right, or for omitting to do something which one is obligated to do. It is the loss of a right based on laws, executed by the magistrates.<sup>131</sup>

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<sup>129</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 25.

<sup>130</sup> Ippolito, *Mario Pagano: Il pensiero giurpolitico di un illuminista*, XXII.

<sup>131</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 59. "Il delitto è la violazione di un dritto, o naturale, o civile dell'uomo: ovvero una mancanza dell'adempimento dell'obbligazione o naturale, o civile. Esso è una commissione di ciò che non dovesi fare, o l'omissione di ciò che convien fare. La pena per l'opposto è la Perdita di un dritto per un dritto violato, o per un doveri omesso. Perdita di un dritto che toglie al reo la legge, e per essa i magistrati suoi esecutori."

In other words, a criminal act is committing an act that goes against the law, or, it is the failure to live up to one's duties and obligations. Punishment on the other hand is the loss of a right because of the violation of another's right. Pagano's more 'scientific' approach is clear from the very beginning when compared to Beccaria. Beccaria merely describes man as prone to breaking the law and punishment as a means to deter criminals.<sup>132</sup> Beccaria does not give any conceptual definition of what crimes and punishments are in the same way Pagano does.

Pagano then goes on to differentiate between natural and civil laws. A crime can be the violation of either a civil right, or a natural right. Civil laws are according to Pagano laws that are born with society. Natural laws on the other hand are laws that proceed the creation of society. In addition, Pagano divides crimes into the following four categories: Firstly, you have crimes that infringe upon essential public or private rights. Secondly, you have crimes that affect the corporal body of society or that of an individual. Thirdly, you have crimes, which hinder the exercising of our rights. The fourth and final type of crime is that which violates either public or private property. Moreover, a criminal act that affects the public is considered more serious than that which affects a private party.<sup>133</sup> Pagano is here in line with the earlier thoughts of Beccaria who indeed expresses similar views when he claims that crimes against society as a whole are more serious and damaging than those affecting private parties.<sup>134</sup>

Pagano says that "crimes aren't the only violations of the rights of others, but they are the intentional violation of the right of another."<sup>135</sup> This can be interpreted in the following way; that there are different grades to breaking the law. *Delitto*, which can be translated to the word crime, is according to Pagano the malicious, or deliberate violation of the rights of others. Pagano goes on to say that a criminal act is the coming together of two qualities; *l'animo* meaning the soul, and *l'effetto*, which can in this instance be taken to mean intent and not effect. The presence of *l'animo* and *l'effetto*, in other words means that the crime which takes place, is being committed with malice. This means that the seriousness of a criminal act has to be measured according to the following two criterions; first, one has to look at the damage that has been caused. Second, one has to determine if the criminal committed the crime with intent or not. The graveness of a crime also depends on if it was a crime against

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<sup>132</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 9.

<sup>133</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 60-61.

<sup>134</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 25.

<sup>135</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 61. "Delitto non è la sola, ma bensì la dolosa violazione de' diritti altrui."

the public as a whole, or if it was a crime against a private individual.<sup>136</sup>

Punishment on the other hand is as Pagano mentioned the loss of a right, either for having neglected to do one's legal obligation, or for having infringed upon the rights of someone else. Pagano seems to support the principle of *lex talionis*, meaning *retributive justice*. However, he has a broader understanding of *lex talionis*, in a legal sense, meaning that you lose that right which you have violated in others, and by no means a corporal form of *lex talionis*. In Pagano's own words: "That right which has been violated, has to be lost, and the extent of the loss of that right has to correspond to the extent of the violation."<sup>137</sup> The right that is to be taken away has to correspond to the right, which has been infringed upon, meaning that the punishment has to be proportionate. In other words, you are to lose that which you have taken from someone else. This retributive form of justice sets Pagano somewhat apart from other enlightenment thinkers. Montesquieu for instance expresses a clear distaste for the law of retaliation and asserts that it is despotic states who make use of it because of its simplicity.<sup>138</sup> Pagano's preference for retributive justice is something that clearly sets him apart from his influences.

Pagano continues his advocacy of retributive punishment and goes on to quote an unnamed poet who writes that "he who suffers that [evil] which he has inflicted upon others, he pleases the saint of justice."<sup>139</sup> Justice is here once more described in a retributive manner, someone suffering the same evil he or she has inflicted on others is described as just. Does this mean that Pagano does support a literal use of *lex talionis*, meaning a limb for a limb after all? The short answer to that would be no. Pagano comments the use of talion law in what he calls the barbaric nations, which he says were closer to nature, and notes that these uncivilized or barbaric nations used to strictly observe *lex talionis*.<sup>140</sup> He calls their use of *lex talionis* an uneducated and rough use which doesn't take the different aspects of crime into account. Whether or not a criminal act was carried out with intent seems to be of no importance to the barbaric nations. He goes on to call their practice an affront to justice. The punishment in these societies could be the severing of limbs or body parts, corresponding to the limbs of the victims, literally punishing people an eye for an eye. Pagano says that they are more or less

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<sup>136</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 61.

<sup>137</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 92. "Quel dritto, il quale siasi violato, debbasi perdere; e tanto di quell dritto, quanto se ne sia violato negli altri."

<sup>138</sup> Montesquieu, *The Spirit of the Laws*, 93.

<sup>139</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 93. "Chi soffre quel, che altrui soffrire ha fatto, Alla santa giustizia ha soddisfatto."

<sup>140</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 93.

offering a disgusting spectacle to society.<sup>141</sup> Pagano frequently repeats that punishment is the loss of a right for the infringement of a right, and it is in this sense that he supports a talion law.

The penal philosophy of the 18<sup>th</sup> century could be described as being more inclined towards the utility and necessity of a punishment. In other words, the guiding principle is that only those actions which are useful to punish in order to keep and preserve public peace should be punished.<sup>142</sup> One could make a case that while Beccaria's penal philosophy is heavily centered on the utility of punishment, Pagano adopts a more retributive stance. They both advocate proportionate types of punishment, but where Beccaria says that "the severity of a punishment and the consequences of crime ought to be as effective as possible on others and as lenient as possible on him who undergoes it"<sup>143</sup> meaning that he focuses on how useful it is, Pagano on the other hand as noted above advocates a purer form of proportionality. That is not to say that Pagano's penal philosophy is devoid of utility, it just isn't his main concern. Montesquieu for instance notes that in "moderate states, [...] a good legislator will insist less on punishing crimes than on preventing them."<sup>144</sup> One could argue that Pagano insist more on punishing crimes first and preventing them second. The general tendency among the enlightenment thinkers, if one looks at Montesquieu and Beccaria as representatives, was more on prevention and utility and less so on the punishment itself. Pagano with his retributive stance is in direct opposition to the utilitarian and preventive tendency.

#### **4.4 The different subcategories of crime**

The categorization Pagano makes between different types of crimes is another aspect of what sets him most apart from Beccaria, Filangieri and his French influences. Neither one of them made the same kind of in-depth analysis he does. Pagano sought to study every aspect of culpability. Unlike Beccaria or Montesquieu who mainly focused on how a crime affected society or private parties, the severity of a crime, utility and necessity and how one could prevent punishment, and how impunity posed an obstacle, Pagano goes a step further and tries to study the culprits themselves thoroughly. Some significant rhetorical questions Pagano seeks to answer are; should someone who has committed a crime always be punished? Are there instances where one should have impunity? Could one punish the same crime differently

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<sup>141</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 93.

<sup>142</sup> Tarello, *Storia della cultura giuridica moderna*, 387-388.

<sup>143</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 48.

<sup>144</sup> Montesquieu, *The Spirit of the Laws*, 83.

depending on who committed it? In other words, are there variables that should affect how accountable a criminal is held? Granted, Beccaria and Montesquieu do raise these same questions, the (much more in-depth) answers that Pagano gives to these questions is what sets him apart.

Pagano distinguishes between several different types of crime. The first type of crime he describes is *delitti casuali* meaning unintentional criminal acts. What Pagano means with an unintentional crime is that the person committing the crime is unaware that what he or she is doing is against the law. Crimes committed by someone who is unaware that what they're doing is illegal are not to be punished and Pagano says; "Acts committed in complete ignorance are as mentioned involuntary, they are therefore not committed with intent and are not to be punished."<sup>145</sup> In other words, a person that commits an act which happens to be against the law, but is oblivious to it being a crime, is not to be punished because the person in question isn't intentionally trying to break the law. It is therefore to be viewed as an unintentional criminal act. Pagano calls these acts the results of physical movements, which are not directed by the head. He compares it to involuntary acts done when sleeping; a person that commits a crime while sleeping is not to be punished either. Similar to a person committing an unintentional crime, the sleeping person's actions are the results of physical movement. They are not consciously committed acts of crime and therefore not punishable.<sup>146</sup> Pagano gives further examples of unintentional criminals. A child for instance is to be regarded as incapable of intentionally committing a crime. The moral capabilities of a child do not begin to take shape before puberty and so a child cannot be held responsible. Others who are incapable of committing crimes with intent because they lack reason is someone who is crazy, stupid, or an imbecile.<sup>147</sup>

The second category of crimes are those Pagano calls *Delitti Colposi*, by which he means criminal negligence. Pagano does as mentioned state that unintentional crimes, or crimes which were committed in ignorance to the law, are not to be punished. He does however, state that not all crimes done out of ignorance are to be excused, such as acts of criminal negligence;

Not every mistake or case of ignorance, is to excuse one from responsibility, because if man uses his mental faculties and pays sufficient time and attention to his actions, he will be able to understand

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<sup>145</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 68. "Le azioni fatte nella piena ignoranza, sono come si è detto involontarie, e però esenti di dolo, ed immuni di pena."

<sup>146</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 68.

<sup>147</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 69.

whether what he's doing is in accordance with the law or not and if it has consequences, and if he still commits the act, he should surely be held accountable.<sup>148</sup>

In other words, there are instances where one should be able to deduce that an action is against the law. You should use your mental faculties and reflect upon what you are doing, and if you believe that what you are about to do will have consequences then you should reconsider what you are doing. Ignorance does not absolve a person from responsibility in cases where it is obvious that the person accused of a crime should have known better. Pagano does however note that there are those who have not cultivated their mental faculties enough to understand that what they're doing is wrong, and that you also have those who are not accustomed to experiencing the consequences of committing crimes. Those ignorant to the laws may be excused if they have lived in circumstances which have prevented them from cultivating a sense of reason. Pagano then states that *delitti colposi* in most cases are the result of a voluntary state of ignorance. This means that this state of ignorance is to be regarded as self-imposed. It is a form of willful blindness where the culprit chooses not see the error in their way.<sup>149</sup>

A third type of crimes are those Pagano calls *delitti dolosi*. *Delitti dolosi* can be interpreted as crimes committed by a person who is fully aware that what they are doing is against the law. In these instances, there is no doubt that the person who committed a crime did so with malice, in other words they are intentionally committing a criminal act. *Delitti dolosi* also have different shades and aspects to them. You have those who seek to indirectly do harm upon others (*dolo indiretto*), and you have those who seek to do so directly (*dolo diretto*). What differentiates *dolo diretto* from *dolo indiretto* is that in the former, the criminals' intentions are distinguished and clearly visible in the criminal, while in the latter the criminal intent is implied but not explicit. Another distinction Pagano seeks to make is that between *delitti colposi* and *delitti dolosi*. He calls them both actions that are illegal but that in instance the outcome is accidental and not necessarily intentional.<sup>150</sup> He gives two examples, one of what a *delitto colposo* is and one of what a *delitto doloso* is;

If someone cuts a tree and it falls in the middle of the street, killing a man that happens to be passing by, the murdering of this passerby on this street takes place by accident due to an external force. But if

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<sup>148</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 71. "Non qualsiasi ignoranza, e qualsiasi errore assolve dal delitto; perciocchè se l'uomo aguzzando l'acume della sua mente, ed adoperando la debita attenzione ed i tempo convenevole, possa intendere appieno le conseguenze ed il rapporto dell'azione colla legge, e pur nol faccia, il delitto se gli deve per certo imputare."

<sup>149</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 70-72.

<sup>150</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 75.

someone wants to hurt someone by beating them up and kills them, that death is the immediate effect of the want to hurt him or of beating him.<sup>151</sup>

The case with the man killing a passerby by cutting down a tree is a good example of criminal negligence. The man cutting the tree might not have intended to kill anyone, but the man cutting the tree should have known better, and made sure that no one was passing by at that point. In the second case, the death of the victim was the immediate result of the murderer beating the man, and though the murderer might not have intended to beat the victim to death, the outcome was none the less the result of an intentional act. In the first case, the man cutting the tree kills a man by affecting an external force. The tree-cutter is not the force killing the man, the tree is, but he is the first mover that causes an external force to kill the passerby. In the second instance however, the murderer himself is the force that causes the death of another person. The man cutting the tree did not intend to harm anyone while the man in the second example was clearly out to cause harm.

Pagano also comments on the issue of criminal offenders that are minors. He says that; "when the offender is a minor, the laws leave it to the judge to take in to consideration if the punishment should be more tempered."<sup>152</sup> His reasoning for a tempering of reactions towards younger law offenders is that the mental faculties and the sense of reason within young ones aren't fully developed. Consequently, there is less malice and intent in a crime committed by a minor. He compares the cases of minors with imbeciles and the stupid and argues that none of the aforementioned groups are capable of fully intentional criminal acts.<sup>153</sup>

A final type of crimes Pagano examines are crimes of passion. Pagano begins by saying that:

Ignorance and mistakes are not the only things which suspend freedom and exclude malice; but also the human affections, or passions; for the disturbances which adversely in body and mind suspend the use of reason [...] Passion and reason are two opposing forces in the soul of man, as one grows, the other decreases.<sup>154</sup>

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<sup>151</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 75-76. "Se qualcuno diramando un albero in sulla strada, uccide un uomo che passi per quella, l'omicidio nasce dall'esterno accidente del passaggio di quell'uomo per quella strada. Ma se taluno volendo ferire soltanto bastonare il suo nemico l'uccida, quella morte è l'immediato effetto dalla ferita, o della bastonatura."

<sup>152</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 76. "La leggi lasciano nell'arbitrio de' Giudici di aver conto della minor età nel temperar le pene."

<sup>153</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 76-77.

<sup>154</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 78. "Non solo l'ignoranza, e l'errore sospendono la libertà, ed escludono il dolo; ma benanche gli umani affetti, o siano passioni; avvegnanchè il turbamento, che arrecano nel spirito e nel corpo, sospende l'uso della ragione, [...] La passione, e la ragione sono due opposte forze dell'animo umano, e quantopiù l'una cresce, l'altra si minora."



In other words, when the passions rage, human reason subsides and vice versa. Passions he says are born due to external influences or causes. Reason on the other hand is an intrinsic part of the soul. The passions are passive and affected by external causes while reason is something voluntary and active. As these two are opposing forces, Pagano notes, "The one destroys the other."<sup>155</sup> What Pagano is trying to convey is that ignorance and mistakes are not the only causes where intent and malice might be non-existent, crimes of passion might also be viewed as cases where there is no true malice. What crimes of ignorance and crimes of passion have in common is that there is a lack of reason. The criminals aren't making use of their reason hence leading them to commit the crimes. In crimes of passion, the passions defeat reason, which leads to the crimes, while in crimes of ignorance reason is simply absent from the accused.

In order to explain why crimes of passion happen, Pagano tries to give a short analysis of the human spirit. He begins by saying that "This internal principle, which is called the spirit and the soul, has the power to feel."<sup>156</sup> He continues by saying that when it comes to sensation, or to feeling, one has to distinguish between the two different types of sensation which are either pleasant, or painful. The perception of every idea affects the spirit or rather modifies it, and it is either pleasant, or, it is painful. In Pagano's own words: "Pleasure and pain are therefore two modifications of our spirit."<sup>157</sup> Pleasure he says is the sentiment of existing or conservation, or of improvement; pain on the other hand he calls a sentiment which expresses a lack of existence. You have corporal pleasure or pain, which is affected by external forces acting on the body. If the impressions these external forces make on the body help preserve it, then they are pleasant. If the impressions made upon the body by the external forces are violent, then they are painful. Internal forces on the other hand affect spiritual pain and pleasure. When the spirit feels that its faculties and actions are slow, dull, or inordinate, it experiences pain. However, when it is reflecting and is conscious of happiness, truth, and has a righteousness in its will, it feels pleasure. Pagano sums up pleasure as the soul feeling the energy of its existence in its faculties and in its actions.<sup>158</sup>

What is interesting here, is that Pagano's argument more or less echoes that of Beccaria who similarly claims that "pleasure and pain are the motive forces of all sentient

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<sup>155</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 78. "L'una dunque l'altra distrugge."

<sup>156</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 78. "Questo interno principio che dicesi spirit ed anima, ha la forza di sentire."

<sup>157</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 79. "Il piacere dunque, ed eil dolore sono due modificazioni del nostro spirito."

<sup>158</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 80.

beings."<sup>159</sup> Beccaria argues that man is driven by pain and pleasure and that the only way to keep man in check would be by threats of punishment.<sup>160</sup> However, Beccaria shows a much stronger focus on the preventive function of punishment than Pagano does. Beccaria more or less argues that man is guided by pleasure and pain and that the criminal justice system should make use of this in order to prevent crimes. Pagano, however makes no such argument and is not so much focused with punishment as a way to prevent crimes as with its function as a protector of liberty, which he explains more thoroughly in his *Considerazioni*.

#### 4.5 On punishment

One of the important aspects of enlightenment thought when it came to criminal law was its focus on secularizing the criminal justice system. What sets Pagano somewhat apart when he in his works writes about punishment is the complete absence of what kinds of offences one should *not* punish. Thinkers such as Beccaria, Montesquieu, and Filangieri also had a focus on how certain crimes shouldn't actually be considered as offences. Punishments for sodomy, magic and heresy were some of the things Montesquieu, Beccaria and Filangieri ridiculed, the latter most vigorously of all. What sets Pagano apart from them is that Pagano never in any of his three works on criminal law once dedicates any space to refuting punishments against magic, heresy and so on. All of Pagano's influences argued against what they viewed as fanaticism and superstitions in the justice system. This certainly does not mean that Pagano disagreed with his influences on the matters, merely that he was more concerned with what crimes should be punished.<sup>161</sup> Pagano follows the secular line of thinking most of the enlightenment thinkers did and explicitly criticizes the church later on in his *Considerazioni*.

When talking about punishment, in Pagano's view you are talking about a part of what he calls atonement. Punishment as mentioned earlier is:

The loss of a right for the violation of a right, it is clear that that the punishment is just because it corresponds to the crime, both in quality, and in quantity, in other words; that that right which is violated has to be lost, and the scope of the right which is to be lost has to correspond to the scope of the right violated in others.<sup>162</sup>

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<sup>159</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 21.

<sup>160</sup> Schaanning, *Menneskelaboratoriet*, 195-196.

<sup>161</sup> Ippolito, *Mario Pagano: Il pensiero giurpolitico di un illuminista*, 170.

<sup>162</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 92. "Or essendo la pena la Perdita di un dritto per un dritto violato, egli è palese, che la pena perchè sia giusta, corrisponder debba al delitto, sia per la qualità, come per la quantità: vale a dire, che quell dritto, il quale siasi violato, debbasi perdere; e tanto di quell dritto, quanto se ne sia violato negli altri."

Pagano has a strong focus on a legal system which dishes out punishments that are proportionate to the crime and the influence of Beccaria and Helvétius is evident. Helvétius for instance argued that lesser crimes merited lesser punishments while greater crimes deserved greater punishments.<sup>163</sup> The scope of the punishment has to correspond to the scope of the crime. However, the foundation of Pagano's proportionality does not come from the same principles that Beccaria and Helvétius' does. As we've seen, Pagano builds his principle of proportionality on retributive justice. The right that is lost has to correspond to the right of the victim the criminal violated. He also once again states that this punishment has to be rooted in the laws and that the executors of this have to be the magistrates. These same sentiments were also expressed by Beccaria a few decades earlier who notes that the "punishments should be consistent with proportionality."<sup>164</sup> Punishment Pagano says can be divided into different species, some more serious, and some less so, and the effects the different types of punishments produce, and the circumstances surrounding them are different. What's interesting however, is that while Beccaria (and Helvétius for that matter) focused on the overall utility of punishment for society at large, Pagano on the other hand focuses on punishment as a means to defend individual liberty. Both the innocent and the guilty he says are to be protected by the law. The law is meant to protect the rights of the innocent and ensure the guilty have access to a just treatment.<sup>165</sup> Pagano is in other words perhaps more concerned with upholding a certain set of legal principles, and the utility and necessity of punishment as a crime preventing measure can perhaps be said to be of secondary importance to him.

Pagano divides punishment in to several different genres. He says that the principle genres of punishment are the following; those punishments that take the essential rights of man, that is, either his natural or civil life. Then you have those that take away the use of liberty, or those that affect the person, or those that take away their esteem through infamy. Finally, you have punishments which affect the property or goods of the criminals either by fining them. or by confiscating their assets. These punishments are divided into two main branches; that is capital punishments and non-capital punishments. Capital punishments are those that deprive the condemned of either their natural or civil existence. The non-capital ones are those that leave their civil and natural lives unharmed.<sup>166</sup>

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<sup>163</sup> Schaanning, *Lykkens politikk*, 499.

<sup>164</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 31.

<sup>165</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 197.

<sup>166</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 94.

The first concrete type of punishment Pagano addresses is capital punishment. He begins by mentioning methods of execution that have been abolished; cremation, being fed to wild beasts, and crucifixion he says have all been abolished. He mentions that the wheel used frequently in the northern countries has never been well known in Italy, even though a decree permitting its use existed. Capital punishment was still in use and the gallows were used as a form of punishment for more atrocious crimes. Cutting the head off he says is the mildest form of execution as it is quick. Pagano then notes that any type of death ought to be done with the least amount of torment to the criminal and that the purpose of punishing crimes is to curb illegal acts by the use of examples of what would happen and fear, not of tormenting the criminal.<sup>167</sup> This is one of the few times Pagano puts an emphasis on the necessity and utility of punishment as a way to scare others from committing crimes, and his arguments are more or less identical to those of Beccaria.

Pagano then discusses the loss of liberty. Proportionality plays an important role when it comes to the loss of liberty. The scope of the loss of freedom as a form of punishment is dependent on whether the restrictions that are to be imposed on the criminal are minor or more severe which of course depends on the crime the criminal committed. It also depends on if the criminal is to be forced to do light labor or hard labor. Loss of freedom can be very severe as it can be; "The loss of freedom for the rest of your life which is a big restriction, and a labor that shortens your life span is the highest degree of this type of punishment."<sup>168</sup> Pagano also states that the loss of freedom in this way can be viewed as capital punishment in a civil sense. Your civil life ends when the punishment is the loss of freedom for the remainder of your life. When it comes to labor, Pagano also makes note of how the Romans would condemn people to working in mines for the rest of their lives. Being condemned to work in a mine Pagano says still happens (and it is viewed as hard labor) but not all people are to be sentenced into working in mines. Some people are to do public work instead, which like mining is to be done perpetually till the criminal dies. However, public work is described by Pagano as being much milder. Another form of punishment in addition to being forced to do labor for the rest of your life is being exiled or imprisoned in a castle for instance. What all the crimes described thus far have in common is that they are all to be viewed as capital punishments. They all deprive the condemned of his freedom and his citizenship

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<sup>167</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 95.

<sup>168</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 95-95. "La perdita della libertà per l'intera vita, una restrizione maggiore, un travaglio che abbrevia la vita è il massimo grado di tal Pena."

permanently.<sup>169</sup>

The non-capital punishments are sentence in which you have to do public work *ad tempus* meaning being forced to labor or do community service temporarily. Another type is being constrained to an island. You may also be temporarily incarcerated or have something confiscated. The reason that these aren't capital punishments is that none of them result in the permanent loss of citizenship. After the sentence has been served, the criminal goes back to being a normal citizen.<sup>170</sup>

Once a criminal has faced his punishment he is no longer a criminal because; "The punishment wholly deletes and extinguishes the crime, and the criminal who has suffered it returns to being innocent."<sup>171</sup> When the criminal commits a crime, Pagano says that the criminal crosses a line, and when the criminal is punished, he steps back behind the metaphorical line and things go back to being in order. Once the criminal has been punished for his crime, he may not be punished again for the same incident. Once the lawbreaker has served for his crime, he is once again a normal citizen. This doesn't hold true in all situations though. A criminal that faces capital punishment (either in a natural or civil sense) or one who faces infamy cannot go back to being a normal citizen because of the nature of the punishment.<sup>172</sup>

#### **4.6 Accusation and settlements**

One of the last topics Pagano touches on is settlements and the legitimacy of an accusation. In order for someone to be tried as a criminal in a court of law, the accusation has to be legitimate. Because "If the accusation is not legitimate, or if the accuser doesn't have the right to accuse, the trial is cancelled."<sup>173</sup> An accusation that is illegitimate or an accuser who doesn't have the right to accuse someone ends with the trial being cancelled. People who are incapable of malice or intent (in other words people who are in some way mentally challenged) are also disqualified from accusing others. Those who are incapable of intent can however be accused of a crime and punished though the extent will often differ from normal cases.<sup>174</sup>

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<sup>169</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 96.

<sup>170</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 96-97.

<sup>171</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 100.

<sup>172</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 100.

<sup>173</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 115. "Se dunque legittima non sia l'accusa, nè l'accusatore abbia dritto di accusare, si annulla il giudizio."

<sup>174</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 116.

A settlement may suspend or altogether end up dropping an accusation. Pagano describes a settlement as an agreement between the accused and the accuser in which they try to avoid going to court so as to avoid an uncertain result. An example is when the offender agrees to pay reparations to the accuser. Once this is done, the case is settled and the offender can no longer be accused of the same crime. However, if the criminal act has offended several parties, parties outside of this settlement can still accuse the offender in a court of law. Out of court settlements are also only legal in certain cases. Pagano doesn't give any examples, but states that if one tries to reach out of court settlements in cases where it is not allowed by law, the accuser also faces legal repercussions, such as losing the right to accuse for life.<sup>175</sup>

#### **4.7 Criminal law as a science**

An important aspect of the in-depth dive Pagano makes into the fundamentals of criminal law is how systematic he seeks to be. Pagano's *Principj*, and his *Logica* for that matter are attempts at laying down the groundwork for criminal law as a science. He attempts to explore every conceivable aspect of criminal law he can and is building on Filangieri's idea of criminal law as a science. In his *Scienza Della Legislazione*, Filangieri argued that most fields and sciences had rules and principles they followed. "Is the science of legislation to form the single exception to general rules, and is it the only science in which these principles are not applicable? That the sole will of the legislator is the only rule of legislation, has been the language of tyranny and despotism."<sup>176</sup> In other words, what Filangieri and Pagano are seeking to accomplish, is reducing legislation to a set of constants, a set of principles and rules to be followed. They both sought to get rid of the arbitrariness present in criminal law in order to have a more stable and predictable criminal justice system.

*Principj* could be said to be Pagano's attempt at establishing the foundations of criminal law. It could be viewed as an elaboration on ideas put forth by Pagano's intellectual predecessors. He's trying to systematically map out when and why someone should be punished. He seeks to define and clarify what punishment and crimes are and to subcategorize the different types of crimes a criminal can commit and their subsequent punishments. His *Logica* seeks to do the same with the knowledge and information required in criminal proceedings in order to make judgements.

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<sup>175</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 107.

<sup>176</sup> Filangieri, *The Science of Legislation*, 12-13.

## 5 Logic and Evidence

### 5.1 Truth, certainty and probability

*Logica de' probabili per servire di teoria alle pruove nei Giudizij Criminali*, or *Logica* as it will be referred to during the rest of the text was the second of Pagano's posthumously published lectures, the first being *Principj*. The same editor who published *Principj*, namely Agnello Nobile published *Logica* in 1806 under the title *Logica de' probabili applicate a' giudizj criminali*. The Neapolitan publisher Sangiacomo also published a version of *Principj* and *Logica*, which were based on a different manuscript and the title of the *Logica* was slightly different from that of Nobile's version. Sangiacomo published the two works together calling them *Principj del codice penale e Logica de' Probabili per servire di teoria delle pruove nei Giudizj Criminale*.<sup>177</sup> *Logica* is the second part of Pagano's three works on the subject of law. While the first work dealt with the principles of criminal law, and sought to explain what criminal acts and punishment were, this part of Pagano's threefold deals with the nature of evidence, testimonies and confessions. The object is to show how one gathers the required knowledge and evidence in order to prove or disprove someone's guilt.

As with the better part of Pagano's ideas, his *Logica* can be seen as an elaboration of earlier enlightenment thought. Beccaria for instance also writes about the certainty or probability of evidence, though not nearly in as much detail as Pagano does. According to Beccaria, one can differentiate between two types of evidence. In one instance the different evidences are interdependent meaning that if one turns out to be false the rest also turn out to be untrue. Interdependent evidence Beccaria argues never give much credence to something as they don't independently confirm anything. Independent evidence on the other hand, meaning evidence that aren't reliant on another piece of evidence to be true are much more reliable. When all the pieces are independent, if one piece of evidence turns out to be false, that doesn't necessarily mean that the others are false too, and so different evidences which independently confirm the same thing are much more reliable and worthy of credence than those who are interdependent. Beccaria also briefly mentions that there are perfect and imperfect types of evidence. The former is evidence which makes it easy to convict someone. Imperfect evidence however makes it more difficult, and one needs ample amounts of imperfect evidence to convict someone. In other words, it's the difference between quality

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<sup>177</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, XXII.

and quantity.<sup>178</sup> Pagano's *Logica* can in some ways be described as an attempt to elaborate on these issues. On what types of evidence deserve credence, how they're connected with each other and how one obtains them.

Pagano begins by saying: "evidence in criminal trials is the demonstration of a dubious or controversial fact contained in a proposition which includes the accusation; and an inquisition is the search for such proofs."<sup>179</sup> In other words, evidence is used to demonstrate that the crime in question took place and is a way to substantiate the accusation. In order to fully understand what evidence and inquisitions are, Pagano notes that it is necessary to explore the nature of truth, of our own knowledge, and the different states of the soul which follow separate ways of understanding, meaning different kinds of certainty and probability. Our ideas are representations, they are images of objects and their quality, and judgement is the perception of convenience of an idea to the object and its quality. Truth is in other words the conformity of an idea to its original, namely the resemblance of a judgment to the object. When the quality and property which is attributed by the mind to an object, is in fact present in said object, our judgement is true.<sup>180</sup>

What about ideas such as mathematics, morals, or metaphysics? These are examples of objects that have no physical form, yet we know that they exist. You cannot see or touch metaphysics or morals, but they do exist if only in our collective minds. These are ideas, which are completely abstract. In the previous paragraph truth could be confirmed by something external and physical. But when it comes to finding out what truth is when the subject matters are completely abstract, Pagano says that "in these cases the truth is the convenience of two abstract ideas, or their distinction. When the mind perceives that an idea converges with another then it is an expression of truth, and if it does not converge, it is false."<sup>181</sup> Truth is in other words two different ideas corresponding. Now, when it comes to truth Pagano differentiates between truth of reason as Leibniz calls it (physical subjects) and eternal truths (abstract subjects) like Locke calls it.<sup>182</sup> In all instances, truth is described as the correspondence of different ideas.

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<sup>178</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 34.

<sup>179</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 123. La prova nei giudizj criminali è la dimostrazione morale di un fatto dubbio, e controverso, contenuto nella proposizione, che rachidue l'accusa; e l'inquisizione è la ricerca di cosifatte prove.

<sup>180</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 123-125.

<sup>181</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 126. "In tali proposizioni la verità, è la percezione della convenienza di due idee astratte, ovvero della loro distinzione. Quando la mente percepisce, che una idea conviene all'altra, ovvero disconviene; e di fatti conviene, o è distinta, allora esiste la verità, e per contrario."

<sup>182</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 126.



Certainty is according to Pagano knowing that something is true without having any doubts, because certainty "leaves no further desire to know, and forces the soul to accept the perceived truth."<sup>183</sup> In other words, certainty is when all doubts regarding the truth of something is removed. There are two different forms of certainty Pagano notes, one is intuitive certainty and the other is certainty by demonstration. Certainty by demonstration can be divided into two different types. Firstly, you have an actual demonstration which makes you become certain on the truth or falsity of a fact. Secondly, you have memory or the recollection of a demonstration already done in the past. Of these two types of certainty, Pagano notes that the second, the recollection of a demonstration is the weakest one. The reason for this is that our memory is prone to remembering things erroneously.<sup>184</sup>

Lastly, Pagano's epistemology deals with probability. Probability is something that borders certainty but is still something distinct from certainty. Pagano references Locke and says that according to him, probability is to understand the convenience or inconvenience between two different ideas on the same grounds where the link between these two different ideas are uncertain and changeable. Another way Pagano describes probability is trying to look at two different ideas which don't correspond and trying to judge whether something is true or false, by looking at these ideas. It is trying to find a common ground for two inherently different things.<sup>185</sup> These descriptions of truth, certainty and probability are expressions of some important enlightenment values, namely the use of reason in order to ascertain the truth or falsity of something. Another important aspect here is that Pagano's desire to find common ground for inherently different things can also be seen as an expression of moderate enlightenment. The moderates as mentioned earlier sought to reconcile the old with the new (in other words different things), and Pagano is likewise after reconciling inherently different things.

## 5.2 Indications - Indizio

A big portion of Pagano's *Logica* deals with what he calls *indizio*. English equivalents of the word *indizio* would be, clue or indication. For the sake of fluidity, I will be using the term indication and *indizio* interchangeably in the remainder of the text (*Indizio* and indication are to be taken as synonyms in this text). Pagano defines *indizio* or indications, as "a known fact

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<sup>183</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 127. "Non lascia ulteriore desiderio di conoscere, e forza l'anima ad acconsentire alla percepita verità"

<sup>184</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 127.

<sup>185</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 131-133.

that shows that which is unknown."<sup>186</sup> In other words an indication is something that illuminates and possibly uncovers something unknown. Pagano uses the terms indication and evidence somewhat loosely in the text sometimes and the boundaries between them are fluid. He does however, eventually make a clear differentiation between indication and evidence, noting that proven indications of guilt can be taken as evidence, meaning that indications are only something pointing to a fact, while evidence are actual testaments to a fact. He also highlights the difference between evidence and indications, with the former always being directly related to the crime, such as documents or objects attesting to the crime in question, and indications on the other hand which have no physical or direct connection to the crime in question such as witness statements, and speculations around a potential guilty person's motives.<sup>187</sup>

There are several different types of *indizio* or indications, and the first type is what Pagano calls *indizio necessario* (certain indication) and the second he calls *indizio probabile* (probable indication).<sup>188</sup> An example of *indizio necessario* is that Caja, has given birth to a child, therefore she must have slept with a man. This is an instance where the effect, being the birth of a child could only have been produced by a single cause; namely intercourse between Caja and a man. In Pagano's own words; "when an effect could be produced by a single cause, certain indication is formed."<sup>189</sup> *Indizio probabile* on the other hand is cases where the cause of an effect is much more uncertain. Pagano gives two examples. Antonio is found by the body of Tizio with a bloody knife, therefore he committed the murder. This Pagano calls *indizio probabile*, because the indication strongly points to Antonio having killed Tizio, but that doesn't exclude the off chance that the murder *might* have been committed by someone else and that Antonio simply found Tizio and the knife afterwards. Another example could be someone holding stolen goods. That doesn't mean that the person currently in possession of the stolen items was the one who stole them. There is a possibility that the person holding the items was given them by someone else who stole it from a third person. In this case, the stolen items could have gotten to the one holding them in a number of different ways. It would seem like the person in possession of the stolen items did in fact steal them, but in this instance as opposed to the case with the lady giving birth to a child, the effect produced could have had

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<sup>186</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 136. "L'indizio è un fatto noto, che ne dimostra l'ignoto."

<sup>187</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 136-139.

<sup>188</sup> I have chosen to translate *Indizio necessario* to certain evidence and not to necessary evidence. This is because it is used by Pagano to mean clues or indications that point to the effect of something having a singular cause and the evidence being certain.

<sup>189</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 137.

several potential causes. He either received it from someone else, or he stole it himself. These are two examples of what Pagano calls *indizio probabile*, where the effect that has been produced has several different potential causes.<sup>190</sup>

Another distinction Pagano makes is the one between what he calls *indizj prossimi* and *indizj remoti*, meaning indication in close proximity and remote indication.<sup>191</sup> Pagano says that "close indications are operations that have taken place in the time and place where a man is killed."<sup>192</sup> Close indication literally means, clues that are in close proximity to the crime. The murder weapon being at the scene of the crime is an example of an *indizio prossimo*. On the other hand, "Remote indications are those that don't have an immediate connection with the facts, but are linked to other indications which point to facts."<sup>193</sup> This means evidence which have no immediate connection with the criminal act itself but those that may have an indirect or unclear connection to the crime. Enmity between an accused killer and a victim is an example of an *indizio remoto*.<sup>194</sup>

Pagano also speaks of what he calls strong, very strong, weak, and vague indications. Weak and vague indications he says can be related to too many things, and they point equally to different things in a given situation. The strong types of indications however normally point to something specific as opposed to the vague and weak ones. The final type of indications he speaks of is intrinsic and extrinsic indications. Intrinsic indications are those that are indications directly connected the crime such as evidence or facts found at the scene of the crime. Extrinsic evidence on the other hand are not directly connected to the crime such as confessions and testimonies.<sup>195</sup>

### 5.3 Witnesses and statements

Witnesses and testimonies play an important role in criminal justice. Pagano defines a witness in the following way: "anyone who talks about a fact which we ourselves haven't heard, or seen, is a witness."<sup>196</sup> In other words, a witness is someone who brings fourth information

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<sup>190</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 137-138.

<sup>191</sup> *Indizj prossimi*, can be translated to mean evidence in proximity of the scene of a crime while *indizj remoti* can be taken to mean evidence not directly linked with the scene of the crime but something still connecting the victim to an accused killer, such as motive or enmity between the two.

<sup>192</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 139. "Prossimi *indizj* sono le operezioni nel luogo, e nel tempo, in cui un uomo fu ucciso."

<sup>193</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 139. "Indizi remoti chiamansi quelli, che non immediatamente col fatto, ma con gli indizi al fatto connessi sono aggiunti."

<sup>194</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 139.

<sup>195</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 140-141.

<sup>196</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 153. "Qualunque ci narri un fatto non veduto, nè sentito da noi, è un testimone."

which has not been seen by other parties in a given case. He then reiterates that "you should show as much trust to the facts[information], as you would the witness."<sup>197</sup> The witness, and the information the witness brings forth has to be looked at critically and not accepted without preconditions. If a witness gives information which supports other witness statements and indications of guilt or wrongdoing, and is independent of the other indications, then that new witness statement gives more credence to what actually took place in a given case. Pagano's presentation and analysis of witnesses and witness statements one could argue builds on those given by Montesquieu and Beccaria. He does however give a more thorough presentation and elaborates on their ideas. Montesquieu merely notes that one needs at least two witnesses and says little more on the subject.<sup>198</sup> Beccaria and Pagano however go further and elaborate on what disqualifies and qualifies someone to be a witness and discuss how one should approach witness statements so as to ascertain whether something is true or not.

How many witnesses do we require? Pagano asks rhetorically. He once again points to the Roman legal customs and says that at least two witnesses are required in order to punish anyone accused of a crime. He then refers to Montesquieu as to why two witnesses are required: " Montesquieu alleges that one witness isn't proof, for the witness is balanced out by the accused who may deny it. The accused who denies [the crime] is the equivalent to the witness who confirms it."<sup>199</sup> Indeed in his *Spirit of the Laws* Montesquieu asserts that "the deposition of two witnesses is enough in the punishment of two crimes"<sup>200</sup> In more simple terms, Pagano explains that if you only have one witness then it's the word of the witness against that of the accused, meaning there isn't a third party to corroborate or disprove either side of the story. A second independent witness however solves this problem. The truth or falsity of a witness statement can be best ascertained by comparing it to the statement of a second witness.<sup>201</sup> Beccaria too made the same arguments that there is a need for a third person to corroborate either side of the story. Perhaps even more interestingly, Beccaria states that women too should be accepted as witnesses. He argues that there isn't any feasible reason for their exclusion. This inclusion of women as viable witnesses in criminal cases is

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<sup>197</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 153. "Tanta fede perciò merita il fatto, quanta se ne deve al testimone accordare."

<sup>198</sup> Montesquieu, *The Spirit of the Laws*, 92.

<sup>199</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 154. "Montesquieu, si adduce; cioè a dire, che un testimone non faccia pruova, avvegnanche il suo detto venga bilanciato da quello dell'accusato, che niega. L'accusato che niega, equivale al testimone che afferma."

<sup>200</sup> Montesquieu, *The Spirit of the Laws*, 92.

<sup>201</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 155.

something that Montesquieu and Pagano make no mention of.<sup>202</sup> All three of them agree that a person is qualified to witness as long as he has a genuine interest in telling the truth and has a neutral relationship to the accused.

The quality of the witness statements and witnesses is also paid due attention by Pagano. There are several conditions he says must be met for a witness to be of good quality, and on the other hand there are several qualities that may disqualify someone from being a witness. There are however general principles Pagano says when it comes to witnesses. The account that the witness gives of an event has to be believable and plausible, and they have to know what they're attesting to and more importantly, they have to be sincerely interested in sharing what they know. In Pagano's own words; "Verisimilitude, science, and integrity of testimony are the qualities of truthful testimonies."<sup>203</sup> There is a strong focus on the witness giving an account of the events that is plausible. If something seems impossible then it is unlikely that it is true. Every fact is dependent on another fact to confirm it. A narration is probable when the facts in the narration are plausibly connected with each other. He then gives examples; a man wouldn't without reason offend another citizen, a father wouldn't leave his family out of the blue, and a loving father wouldn't disinherit his son without good reason. In other words, the account the witness gives must make sense in the bigger picture.<sup>204</sup>

Verisimilitude he says is the first indication that something is true. However, Pagano references Aristotle and says that things that may seem unbelievable to us, could still be true and happen. Nature works in extraordinary ways sometimes and we don't always understand the chain of nature. A subcategory of verisimilitude which points to something being true is convenience. When the witness account presents facts that are interlinked with facts that are known, they deserve more credence. Generally speaking, Pagano writes that theories and hypotheses that converge with natural phenomenon are more credible and greater forms of proof.<sup>205</sup>

While Montesquieu and Beccaria write about who is qualified to be a witness, Pagano also writes about those who are unfit to be used as witnesses. Pagano argues that some people, such as imbeciles, deaf and blind people are automatically disqualified from being witnesses. Moreover, those who are easily deceived, either due to a weak sense of reason or due to weak

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<sup>202</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 32.

<sup>203</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 157. Verisimiglianza, scienza, ed integrità de' testimonj sono li caratteri delle veridiche testimonianze.

<sup>204</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 158.

<sup>205</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 159-160.

mental faculties don't merit our full faith. Additionally, "those that the law declares to be infamous, vicious and without integrity are forbidden from testifying in public trials."<sup>206</sup> There is a strong emphasis on the witnesses being reliable and trustworthy. Pagano continues by noting that criminals for instance are not to be trusted as they have violated the law. But even honest men must be regarded with suspicion, if a man has an interest in lying in a criminal trial, he too should be ignored. To sum up, anyone who proves to be unreliable should almost automatically be disqualified from being able to stand as a witness.<sup>207</sup>

#### 5.4 Confessions

Pagano notes that the Romans had a legal maxim: "A criminal who has confessed is convicted,"<sup>208</sup> meaning that a man who confesses is as good as convicted. However, convicting a criminal is not as simple as the Roman maxim makes it out to be. Convictions require several different legal conditions to be fulfilled. Firstly, Pagano says "The confession must be supported with proof of the crime."<sup>209</sup> A confession he says, has to be either preceded or followed by proof of the criminal act. Confessions are to be viewed as indications, and not as actual proof. The value and accuracy of a confession has to be supported by other things be it evidence or more indications. A criminal that confesses is to be considered a witness who is testifying against himself and as mentioned earlier is an indication of guilt, not actual proof of guilt.<sup>210</sup> Furthermore, the confession that is procured from a criminal should not be achieved out of fear or hope. Confessions should be gotten without the use of seduction, extortion or torture; in other words, a criminal who confesses should do so voluntarily and not under threats or false promises.<sup>211</sup>

What is interesting is that both Filangieri and Pagano note that someone who confesses is contributing to their own destruction.<sup>212</sup> Beccaria too almost automatically discusses confessions when he writes about torture.<sup>213</sup> There seems to be a consensus that confessions contribute to the destruction of the confessor. Confessions are presented as the result of an illegitimate way of extracting information because confessions are mostly

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<sup>206</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 163. "Quelli che la legge dichiara infami, dichiara viziosi, e privi di probità; [...] vietasi loro di testimoniare ne' pubblici giuidizj."

<sup>207</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 160, 163."

<sup>208</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 169. "Il reo confesso è convinto."

<sup>209</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 169. "La confessione deve essere sostenuta dalla prouva del delitto"

<sup>210</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 173.

<sup>211</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 169

<sup>212</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 213-215.

<sup>213</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 39.

associated with torture. There is however one important point where Pagano's opinion diverges from that of Filangieri and perhaps Beccaria who associate confessions and torture with each other. Filangieri asserts that anyone who willingly confesses is insane. Confessing means acting against your own self-interest, and no sane man would do that. Therefore, Filangieri concludes that confessions are without value. Pagano on the other hand takes another important factor into account which Filangieri clearly overlooks; namely a bad conscience.<sup>214</sup> In Pagano's own words; a "divine and internal sense of justice"<sup>215</sup> might also lead someone to make a confession. Confessions might therefore also be the result of a guilty conscience and not necessarily as Filangieri wrongly asserts only the result of a mad man's desire to self-destruct.<sup>216</sup> What is interesting here is that Pagano paints a picture of man as a moral being and not purely as a sentient being. As mentioned earlier, Beccaria described man as a sentient being guided by pain and pleasure. Man while to a degree guided by pleasure and pain is also according to Pagano a morally conscious being.

Torture was one of the parts of contemporary penal practices that Pagano criticized the most. He writes that "torture, this tyrant of humanity was the offspring of barbarism and superstitious errors."<sup>217</sup> Pagano had a very critical outlook on the use of torture as a means to extract confessions from accused criminals for several different reasons. He viewed it as the leftovers of superstitions and the centuries of barbaric rule in Europe. He argues that if a confession is extracted with the use of torture and ferocity, what you end up with is lies and inaccuracies and not only that, he views it as a violation of human nature. Pagano states that these confessions are not the expressions of truth but of malice. He then rhetorically asks "what relation does malice have with the truth? The faculty of sensation with that of logic?"<sup>218</sup> A confession extracted with torture, he says, is only a demonstration of the weakness of the body and of the souls' intolerance to pain. Criminals who are robust may be able to take the pain and not confess and an innocent person may end up confessing to crimes he or she has never committed out of intolerance to pain.<sup>219</sup> Beccaria argues more or less in the exact same way in his *On Crimes and Punishment*.<sup>220</sup> There seems to be a consensus among the enlightenment thinkers that torture is unreliable because it doesn't necessarily produce the

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<sup>214</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 214.

<sup>215</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 172.

<sup>216</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 215.

<sup>217</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 174. "La tortura, questa tiranna dell'umanità, fu la parole della barbarie de' secoli, e de' superstitiosi errori."

<sup>218</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 177.

<sup>219</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 177.

<sup>220</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 39-40.

truth, it demonstrates the weakness, or robustness of the accused criminal's body.

To sum up with Pagano's own words: "If an extorted confession doesn't prove guilt, likewise, perseverance in the face of torture doesn't prove innocence either."<sup>221</sup> In other words, confessions gotten with the use of torture do not guarantee that the innocent are cleared of charges and it doesn't make sure that the guilty face justice. Pagano's criticism of torture was aimed at specific laws which permitted the use of torture. He sees them as useless when it comes to finding out the truth and an affront to human nature. He calls them atrocious spectacles that destroys and violates people.<sup>222</sup>

## 5.5 Proving a crime

In order to prove a crime, Pagano says; "Three things must be proven in a criminal trial. First, the commission of a criminal act, second, the author [of the criminal act] and thirdly, the circumstances around the act."<sup>223</sup> The commission of the crime and the details around it have to be proven and established. Then the question of who did the deed has to be satisfyingly answered and lastly, the circumstances surrounding the crime have to be illuminated. There are different kinds of proofs which we have to distinguish between. According to Pagano, one has to differentiate between, written depositions by witnesses that haven't yet been tested (and in general evidence and indications which can be taken to be conditional), and papers and documents which are remnants of a given crime, remnants which can be used to assert guilt (meaning unconditional evidence which can be used with certainty). Witness statements are dependent on their reliability while papers and documents are subsisting evidence.<sup>224</sup>

Pagano sums up his *Logica* by pointing to different circumstances and indications that someone might be guilty. He argues that the previous quality of their life, customs and characters can give an indication. Other factors to look at is whether someone might have believed they could have impunity from crimes or whether there is an opportunity and easy chance of committing the crime. Someone who thinks they might get away with their misdeed without any repercussions, is accustomed to being a criminal, has motive, and finds committing the crime to be opportune and profitable, is probably guilty in a given situation. These indications of guilt he calls *a priori*, meaning making assumptions or guesses before

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<sup>221</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 177. Se la confessione estorta dal dolore non pruova il delitto, la costanza ne' tormenti non dimostra l'innocenza.

<sup>222</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 177-178.

<sup>223</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 191. Tre cose occorre di provare ne' criminali Giudizij. Prima, la commissione di un fatto criminoso; secondo chi siasi stato l'autore; terzo le circostanze del fatto

<sup>224</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 187, 191.



having the facts in hand.<sup>225</sup> Pagano doesn't explicitly use the term *a posteriori* in his text, but his use of the term *a priori*, would imply that he does differentiate between making judgements *a priori* and *a posteriori*, with the latter meaning making a judgement after having gathered facts and evidence.

*Logica* one could argue was Pagano's attempt at establishing an epistemological framework for criminal law. For a criminal to be convicted, one had to be certain that the crime took place and the person being accused was indeed the culprit. In order for a criminal to be convicted one needs evidence. *Logica* sought to map out how one gathers information and how one establishes whether a piece of evidence or a testimony is trustworthy or not, and truth, Pagano claimed was the correspondence of different ideas. He then makes an attempt at presenting the different degrees of validity a given piece of evidence or testimony might have.

He then, counters both Beccaria, who claimed man was guided by pleasure and pain and Filangieri who claimed that to confess was to be a madman trying to self-destruct by arguing that man was a morally conscious being, not solely a being guided by pleasure and pain. To sum up, Pagano's *Logica* is an attempt at describing exactly what kind of evidence and testimonies one needs, how one can be sure of their validity, and how one acquires these in order to convict a criminal, and to assert that man is also a morally conscious being, not merely a being driven by pain and pleasure.

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<sup>225</sup> Pagano, *Giustizia Criminale e Libertà Civile*, 198.

## 6 Considerations on the Criminal Process

### 6.1 Criminal legislation

*Considerazioni Sul Processo Criminale* (*Considerazioni*, henceforth), was the last of Pagano's three works on the subject of law. It was the only one of the three works to be published during his own lifetime and is along with *Saggi Politici* one of his more known works. While his other two works, *Principj* and *Logica* were more concerned with defining the foundations of criminal law and commenting on penal law and the gathering of evidence, clues and information, the aim of his *Considerazioni* is to cast a critical look on not only the judicial process of his own time, but also further explaining and reflecting on what he says in his *Logica* and *Principj*; namely why we need good laws, and what needs to be improved upon. The form of all of his works on criminal law are somewhat reminiscent of Beccaria's *On Crimes and Punishment*, all three being made up of short chapters. None of the works are however as much of a philosophical treaty as that of Beccaria. Pagano's *Considerazioni*, is more a series of reflections and comments on the judicial systems, not only in his own time, but also in a historic perspective, that seeks to give concrete suggestions on how to change the criminal justice system, by trying to understand why the criminal justice system is in its current state and how it in his opinion decayed over the preceding centuries.

According to Pagano, criminal legislation, or any legislation for that matter, is the offspring of society. Without society, there would be no criminal laws. Pagano explains that the formation of society took place out of necessity. He invokes what may seem like the state of nature argument and says that man exists in the state of nature in order to live in tranquility, security, more opulence, and in order to actualize a greater awakening of the heart and the soul. These he says are the overarching goals of society. "Whoever says society, is also saying laws, because without laws, no society would ever exist."<sup>226</sup> Society is in other words living under the rule of law. The formation of society was the result of necessity. Criminal legislation, makes man tranquil and secure, makes him more opulent and comfortable financially, and science and the arts cultivate the spirit. Criminal law is in other words a way to safeguard the liberty and security of the citizens and to awaken them spiritually.<sup>227</sup> However, Pagano does set himself apart from other enlightenment thinkers in

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<sup>226</sup> Pagano, *Considerazioni Sul Processo Criminale*, 41. "Chi dice società, dice altresì legge, senza della quale non puo veruna società giammai sussistere."

<sup>227</sup> Pagano, *Considerazioni Sul Processo Criminale*, 39, 41.

one important aspect. Though he says that legislation is the result of society, Pagano is not a contractarian. The grounds for legislation are not man-made laws but natural laws which are eternal and unalienable. Both Beccaria and Filangieri, two of Pagano's strongest influences credit the social contract with the establishment of penal law.<sup>228</sup>

However, the difference between Pagano and Filangieri isn't as significant as it might seem at first, both Pagano and Filangieri speak of civil society as something bound to happen from nature. Even though Ippolito points out that Filangieri was a contractarian when it came to criminal law, Filangieri only reluctantly accepts the state of nature argument and claims that the supposed state of nature is merely an imaginary one. He argues that man was created for social intercourse and rejects that man exited the state of nature purely out of necessity. He argues that it must have been providence rather than a desire to escape a violent natural state that led to the formation of society. This is not to say that he denies that the hypothetical state of nature was riddled with violence and insecurity, he merely argues that man naturally being a social being was destined to live in society and so refuses to credit the creation of civil society solely down to a desire for self-preservation.<sup>229</sup> Despite his disagreements with Filangieri regarding the contractarian approach to civil society, Pagano does however draw a logical conclusion from Filangieri's arguments that providence rather than necessity guided man out of the state of nature. Pagano is of the opinion that it wasn't necessity and a desire for security that formed civil society and thereby criminal law.<sup>230</sup> The logical conclusion would perhaps be that the foundation of civil society, according to Pagano, was not necessarily made by man. In other words, they come from nature in the form of natural laws and precede man and the rise of civil society.

Trials and the judicial process in general are the most important safe keepers of the liberty and security of citizens. Pagano argues that "Where impunity triumphs, the citizen is not free, nor tranquil"<sup>231</sup> The first part of this quote is somewhat reminiscent of Helvétius who similarly claims that impunity can encourage the committing of more crimes. Impunity might indeed multiply crime as people could be led to believe that they can get away with committing crimes.<sup>232</sup> Helvétius furthermore argues that the "certainty of punishment is

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<sup>228</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 165-166.

<sup>229</sup> Filangieri, *The Science of Legislation*, 2-3, 5-7.

<sup>230</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 165-166.

<sup>231</sup> Pagano, *Considerazioni Sul Processo Criminale*, 45. "ove trionfa l'impunita, il cittadino non è né libero, né tranquillo."

<sup>232</sup> Claude Adrien Helvétius, *De L'esprit, or, Essays on the Mind, and Its Several Faculties*, (London: Vernor, Hood, and Sharpe, 1810), 58.

absolutely necessary to preserve order in any nation"<sup>233</sup> and the reason for this he argues is that if crimes go unpunished it will not only encourage more crimes, it will also be viewed as unjust. In other words, impunity can be viewed as the lack of a force that safeguards liberty. Without a force to ensure the upholding of the laws, such as a criminal justice system, liberty remains something abstract without any meaning.<sup>234</sup> This is one of the instances in which one could argue that utility is one of the guiding factors in Pagano's penal thought. Without the threat of punishment, people won't be dissuaded from committing crimes. Punishment is here presented as something useful which can protect society as a whole, and Pagano's argument here clearly builds on those made by Helvétius and Beccaria.

Pagano immediately follows up his words on impunity with this, that "a prompt and exact punishment of criminals is what forms public safety."<sup>235</sup> Pagano's words find a close parallel in Beccaria's *On Crimes and Punishment*; "The swifter and closer to the crime a punishment is, the juster and more useful it will be."<sup>236</sup> Their arguments and reasoning for why crimes should be dealt with swiftly after it has been committed are more or less the same. Beccaria argues that the reason why punishment should promptly follow the crime is because in that way, you help make an association between crime and punishments in the minds of people. If someone associates crime with punishment, then they're more likely to avoid committing criminal acts.<sup>237</sup> Additionally, both of them argue that an excessive use of punishments and power, and not respecting the laws when dealing with a criminal has the opposite of our desired effect; instead of securing freedom and safety, it does the exact opposite.<sup>238</sup> Beccaria and Pagano (both influenced by Helvétius) highlight the importance of swift and just punishments. Impunity has to be avoided at all costs, but restraint must be shown when dealing out punishment. Pagano is here once again talking about the penal system as something useful. Punishment is presented as something that can prevent the commission of crimes and as a way to protect civil society, in other words, he is speaking of the utility of having a penal system. Though Pagano's main focus is always a rule of law and man as a morally conscious being, he also seeks to present penal law as something useful, and one could argue that these arguments build on Beccaria's principles of utility.

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<sup>233</sup> Helvétius, *De L'esprit*, 58.

<sup>234</sup> Eugenio Leucci, *I diritti e i doveri dell'uomo, del cittadino e del popolo nel pensiero di Francesco Mario Pagano*, (Florence: Firenze Atheneum, 2010), 66.

<sup>235</sup> Pagano, *Considerazioni Sul Processo Criminale*, 45. "Che un pronto ed esatto gastigo de' rei forma la pubblica sicurezza."

<sup>236</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 48.

<sup>237</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 49.

<sup>238</sup> Pagano, *Considerazioni Sul Processo Criminale*, 45.

## 6.2 Capital punishment and torture

Commentators often cite Pagano as a continuation of the work initiated by Beccaria. Both were enlightenment thinkers who advocated a more systematic and less arbitrary judicial system. The enlightenment thinkers more or less unanimously condemned the use of torture, and Pagano does the same, and here he follows in the footsteps of Montesquieu and Beccaria. There are, however, more than a few differences between Beccaria's reflections on law and Pagano's. The most notable point where these two thinkers' opinions diverge is on the subject of capital punishment. Beccaria strongly opposed the use of the death penalty, arguing that it had no place in the judicial system of any functioning state. Beccaria begins his chapter on capital punishment by saying that "I am prompted by this futile excess of punishments, which have never made men better, to enquire whether the death penalty is really useful and just in a well-organized state."<sup>239</sup> Beccaria's stance on capital punishment is evident from the very beginning, he begins by arguing that he seeks to investigate the use of excessive forms of punishment, in other words, he is calling the death penalty an excessive form of punishment from the first sentence in his chapter on capital punishment. He later states that capital punishment has no basis in the sovereign or in the laws. This futile punishment has never lead to the improvement of man he argues.<sup>240</sup>

In his book *Discipline and Punish: The Birth of the Prison*, the French Philosopher Foucault gives a historical account of punishment in Europe from the 1700s and onwards. On the first page of his book, Foucault presents the reader with an account of the punishment of Damiens, a man who was to publicly confess to the crime of having attempted regicide, and who was to finally be executed:

"On 2 March 1757 Damiens the regicide was condemned 'to make the amende honorable before the main door of the Church of Paris', where he was to be taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds'; then, in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with Sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and Sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds."<sup>241</sup>

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<sup>239</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 66.

<sup>240</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 66.

<sup>241</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 3.

Foucault's presentation of the execution of Damiens is horrifying. The punishment that is dealt out to Damiens is horrendous to say the least, but according to Foucault, by the end of the 18<sup>th</sup> century, punishments like this became progressively less common. The reason for this, Foucault says, was that several European states started reforming their legal systems after numerous scandals. Prison sentences eventually took the place of corporal punishments.<sup>242</sup> This account sheds light on some important aspects of the penal system in Europe in the middle of the 18<sup>th</sup> century. It highlights the almost perverse love for gory and flashy executions, and the use of torture, not only as a way to extract a confession from a presumably guilty criminal, but also as a means to punish criminals. It is in the light of these kinds of punishments and methods for extracting confessions that Pagano and other Italian philosophers' views on criminal law and their opposition to the use of torture should be examined.

Pagano did not have a favorable outlook on the use of torture as mentioned earlier in his *Logica*. "What relation could malice ever have with the truth?"<sup>243</sup> he asks rhetorically in his *Considerazioni*, drawing on what he said in his *Logica*. The truth he says only has a relation to intellect, and not to malice. The reasons for why torture is a useless practice was extensively explained in Pagano's *Logica*. Torture was an unreliable way of acquiring the truth and therefore useless. In his *Considerazioni*, he continues to build on his opposition to torture by rehashing some of the same arguments. Pagano is even more clear in his opposition in his *Considerazioni* and exclaims that "by now every illuminated man agrees that torture should be banned from the tribunals, and in times of liberty."<sup>244</sup> His opposition to torture follows a general trend in the 18<sup>th</sup> century. Beccaria was the one of the first major thinkers in Italy to question its use and Pagano follows the same line of argument questioning its usefulness. It is worth mentioning that Pagano and Beccaria's negative stance on the use of torture isn't necessarily because it is inhumane, (though they claim that it is) but because the information one retrieves through it may not be reliable and it hinders justice from being served.

Pagano is far from alone in his opposition to torture. In his *Spirit of the laws* Montesquieu briefly voices his opposition to torture. He argues that most "well policed nations reject" its use because they view it as unnecessary. Montesquieu ends his very short

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<sup>242</sup> Foucault, *Discipline and Punish*, 7-8.

<sup>243</sup> Pagano, *Considerazioni Sul Processo Criminale*, 143. "Che rapporto può mai avere il dolore colla verità?"

<sup>244</sup> Pagano, *Considerazioni Sul Processo Criminale*, 143. "Convien ormai ogni uomo illuminato, che la tortura si dovrebbe bandire da' tribunali, asili della giustizia e tempi della libertà."

chapter on the subject by saying that even when he tries to argue for its merit in despotic governments he ends up hearing "the voice of nature crying out against me". Though Montesquieu rejects the use of torture, he does argue that the use of corporal punishment could be deemed acceptable as long as it is done within reason to punish someone who is guilty. Montesquieu makes a differentiation between torture as a tool for extracting confessions or information and corporal punishment as a means to punish an offense.<sup>245</sup> The closest thing Pagano comes to accepting corporal punishment seems to be when he writes about being sentenced to do labor. Neither Montesquieu nor Pagano reject corporal punishments entirely though they both demonstrate an outright rejection of torture. As touched upon earlier, Pagano argued against the use of torture, not only because he deemed it a tyrannical form of punishment, but because it was used as an unreliable way of extracting confessions. Beccaria's stance against torture is perhaps a bit more vigorous. He claims that the use of torture as a way to extract a confession is to punish someone before their guilt has been ascertained. He makes the same claim Pagano would go on to make, namely that torture would enable people who weren't guilty to escape punishment granted that they were strong enough to not buckle under pressure while innocent men might give in to the pain and admit to having done crimes they never committed in the first place.<sup>246</sup> Pagano's stance on torture is in other words more or less the same as the rest of the enlightenment thinkers as he unconditionally condemns torture under normal circumstances.

When it came to capital punishment, Pagano had a more ambivalent view on its use. The issue is never really properly addressed in his *Principj, Logica* or in his *Considerazioni*, granted he does describe what capital punishments in civic and natural (meaning death) senses are, but he doesn't take a clear stance on whether he condones it or not. However, according to Elio Palombi, an Italian enlightenment scholar, Pagano can be said to have had a favorable outlook on the use of capital punishment. This would not be too surprising as Beccaria's negative stance on its use was quite radical for its time, and it did not gain immediate support among the intellectuals of the time. Beccaria's stance on capital punishment might have had the backing of the Verri brothers, but none of the Neapolitan enlightenment thinkers explicitly challenged the use of capital punishment the same way Beccaria did, and it would therefore not be too farfetched to assume that Pagano did in some form support the use of the death penalty. Indeed, not even Montesquieu or the other French

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<sup>245</sup> Montesquieu, *The Spirit of the Laws*, 92-93.

<sup>246</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 39.

Philosophers explicitly challenged the legitimacy and utility of capital punishment in the same way Beccaria did.

Eugenio Leucci however, argues that for Pagano, sentencing someone to death was a way to ensure the certainty of the laws and the integrity of the social body. Capital punishment was in other words a way to defend society as a whole. Another important reason Leucci point to is that while Beccaria views the social contract as the basis for the criminal justice system Pagano does not as he is an anti-contractarian who argues that the criminal justice system should be based on natural laws.<sup>247</sup> As mentioned in chapter two, Beccaria argued that the reason the death penalty lacked legitimacy was that the social contract that was forged never included capital punishment.<sup>248</sup> He argued that no one had ever willingly given another person the right to take their life and so Beccaria argues that capital punishment isn't legitimate because it isn't grounded in the social contract. Pagano rejection of the contractarian origins of criminal law however means that the way Beccaria problematizes and critiques the use of capital punishment simply would not fit into Pagano's theory of criminal law.

Filangieri who was active around the same time as Pagano likewise also believed that capital punishment still had a function. Capital punishment from Filangieri's point of view can be seen as a form of punishment that would serve to dissuade others from committing crimes. However, at the same time, Filangieri and Beccaria for that matter, and the more rebellious streams of the enlightenment challenged the clearly arbitrary use and abuse of the death penalty.<sup>249</sup> It is unlikely that Pagano was completely uninfluenced by his peers. Most of Pagano's reflections on law criticize the arbitrariness and the randomness of the judicial system at his time. This makes it likely that he, while not going so far as to reject it outright, would at least be somewhat critical of its use, as it was mostly used arbitrarily. Pagano's accepting stance on capital punishment in no way meant that he supported state violation of individual people's rights.<sup>250</sup>

### **6.3 A comparative look at the judicial process**

In his *Considerazioni*, Pagano writes several chapters about the judicial processes of other time periods and nations. He takes a special look at the judicial process of the Roman

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<sup>247</sup> Leucci, *I diritti e i doveri dell'uomo*, 70.

<sup>248</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 66.

<sup>249</sup> Palombi, *Mario Pagano e la scienza penalistica del secolo*, 103.

<sup>250</sup> Leucci, *I diritti e i doveri dell'uomo*, 71.



republic, the Roman Empire, the Normans, Germans, the barbarians, and that of England. During the early times of the Roman republic, power and weapons were the means by which disputes were settled. Eventually he says the Romans became more civilized, got a constitution and a somewhat partitioning of power with legislative power getting in to the hands of the people, and the executive and judiciary powers remaining in the hands of consuls and praetors respectively.<sup>251</sup> These chapters one could argue is an attempt from Pagano's side to reconstruct the history of the criminal justice system. At the center of these chapters is perhaps a desire to show an ideal justice system, that of republican Rome, and to investigate how the justice system, not only in Naples but in Europe, fell into a state of decay during the centuries or rather the millennium after the fall of Rome. This historical reconstruction of criminal law makes Pagano stand out in comparison to other philosophers on the subject. Though Montesquieu for instance mentions Rome a few times and looks at certain practices in Japan and China, he does not give an in-depth analysis of criminal law in a historical or present day sense the same way Pagano does.<sup>252</sup> Likewise, Beccaria is not particularly concerned with investigating criminal law in a historic perspective. He mentions Rome and the Romans very sparsely and doesn't pay any serious attention to the state of criminal law in different states.

Pagano's historical and comparative look at criminal law was influenced by the German Philosopher Christian Thomasius (1655-1728). Both of them sought to study the origin of the inquisitorial process. At its core, all of Pagano's works on criminal law were in some form concerned with how criminal proceedings went from accusatory to inquisitorial and secretive, and his works could be viewed as one big argument in favor of an accusatory system over an inquisitorial one. What sets Pagano apart from Thomasius however is that while Thomasius blames the pontificate, and specifically Pope Innocenzo III (who was pope from 1198 till 1216) with rise of the inquisitorial system, Pagano attributes it to the Roman empire.<sup>253</sup> In other words, Pagano argues that the inquisitorial system has its beginnings much earlier than the 12<sup>th</sup> century. The inquisitorial system is secretive and shadowy while the accusatory one is open and transparent, with Pagano clearly favoring the latter and criticizing the former. Pagano's historical and comparative analysis is a way for him to find out why, and how criminal law decayed. It is also at the same time a source of Pagano's suggestions for improvement. In other words, the source of Pagano's criticism and suggestions for

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<sup>251</sup> Pagano, *Considerazioni Sul Processo Criminale*, 59-60.

<sup>252</sup> Montesquieu, *The Spirit of the Laws*, 86, 88-89, 91, 94.

<sup>253</sup> Ippolito, *Mario Pagano: Il pensiero giuspolitico di un illuminista*, 186-187.

improvement stem from his historical and comparative analysis of criminal law.

A judicial process mainly consisted of two opposing parties (not counting other magistrates, legislative and executive powers), namely the accused, and the accuser.

According to Pagano;

In the roman republic, the accuser was perceived as a public person, that is, as a magistrate of the state [...] However, the accused party had the right to appoint an inspector, an attendant of sorts to monitor the accuser in order to avoid corruption when it came to testimonies or to prevent any sort of fraud that might be committed during an inquisition.<sup>254</sup>

The accuser he says was looked upon as a public person, meaning that the accusations he was putting forth was on behalf of the state, because a crime was to be viewed as an attack on the state's authority. On the other hand, the accuser being viewed as a person acting on behalf of the public did not mean that he couldn't be prone to a lapse of judgement or to corruption. Therefore, Pagano notes that in the Roman republic, the accused could appoint an attendant to oversee the conduct of the accuser in order to prevent fraud. On the day of the trial, both the accuser and the accused would be summoned. If the accused did not appear, he would lose by default and face further consequences. If the accuser didn't show up to the trial, he would be punished. Both sides would bring fourth their testimonies and documents under the trial. Lawyers would then subject it all to a thorough examination. Lawyers from both sides would also interrogate the witnesses trying to see if they could get a contrary statement in order to forward their own side of the case.<sup>255</sup> A trial would have two phases Pagano notes. The first part would be more consumed with accusing the supposed criminal, and the second part would be more of a defense on the part of the criminal.<sup>256</sup>

Pagano then diverts his attention to the English process. The English judicial process he says is the one system in present day Europe (meaning the 18<sup>th</sup> century) that is most similar to that of ancient Rome. Pagano gives a short and precise summary of how a criminal is presented before the court of law;

In England, the criminal is brought before the judge [...] if the selfsame judge recognizes the accused to be innocent, the accused remains free. But if it is then assessed that there are strong concurring and strong presumptions against the accused, and the crime which he is accused normally results in capital

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<sup>254</sup> Pagano, *Considerazioni Sul Processo Criminale*, 63. "L'accusa presso I romani era una pubblica persona, cioè come magistrato della patria [...] Avea il reo però il dritto di apporre un ispettore, un custode all'accusatore, onde si evitasse la corruzione de' testimony, ed ogni frode nell'inquisizione che si potesse mai fare."

<sup>255</sup> The interrogation of witnesses during the roman republic Pagano notes was called testium percuntatio.

<sup>256</sup> Pagano, *Considerazioni Sul Processo Criminale*, 63-64.

punishment, then he is imprisoned. However, if the crime doesn't result in capital punishment, the criminal is released in exchange for a guarantee.<sup>257</sup>

The underlying reason for not holding someone imprisoned (the exception being in severe cases) he says is the famous law of *Habeas Corpus*, which he says is the basis of liberty in Britain. Shortly summed up, *Habeas Corpus* means that a person may take recourse against an unlawful imprisonment. After the accused had been either imprisoned or for the moment left free, grand jurors would review the accusation and see if it had been done according to the law, and they would go through the witness statements and discuss the evidence. If the accusations were irregular or proved to be groundless, the accusation would be pronounced false and the case would be dismissed and the prisoner freed. On the other hand, if the accusations proved to be valid and true, the accused would be given a copy of the accusation and testimonies. If he didn't confess, he would be given a warning, and afterwards the accused would begin his defense. He would then be judged by a group of his peers chosen from the county in which the crime was committed. The assembly of peers gathered to judge him could however be challenged by the defendant. If the sheriff or any of the jurors in a case were proven to have any relation to the accuser, the accused criminal could make a challenge to the array.<sup>258</sup> If the accused was declared to be a criminal by the juror consisting of his peers (provided that there were no problems with the jury of the types mentioned earlier), the criminal would be sentenced and punished accordingly.<sup>259</sup>

Pagano then turns his attention back to Rome, this time to the Roman Empire. He seeks to examine the changes in the judicial process from ancient Rome to his own time and to "finally show the present day inquisitorial system which is more or less the same in all of Europe."<sup>260</sup> When the Roman Republic fell, the form of the judicial system changed. And in Pagano's view, the changes that took place were not good, because; " In the free republic, the zeal for public good encouraged citizens to make accusations. Under the emperors however, accusations were easily turned into instruments of tyranny."<sup>261</sup> Pagano notes that by the end of

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<sup>257</sup> Pagano, *Considerazioni Sul Processo Criminale*, 65. Il reo vien nell'inghilterra condotto dinanzi al giudice, [...] Se l'anzidetto giudice conosce l'innocenza dell'accusato, lo rimanda libero. Ma se poi stima che contro di lui concorrano delle forti presunzioni, l'imprigiona, quando però sia capitale la pena del delitto, del quale ei viene accusato. Ma se la pena non sia capitale, si rilascia il reo con malleveria.

<sup>258</sup> Pagano mentions a way of challenging an assembly of jurors which he calls to te array (misspelling by Pagano). He most likely means the practice of "Challenge to the array" which meant an entire assembly of jurors could be disqualified.

<sup>259</sup> Pagano, *Considerazioni Sul Processo Criminale*, 65.

<sup>260</sup> Pagano, *Considerazioni Sul Processo Criminale*, 69.

<sup>261</sup> Pagano, *Considerazioni Sul Processo Criminale*, 70. "Nella libera replica il zelo del pubblico bene animava I cittadino all'accusa. Sotto gl'imperadori, l'accusa a ciascuno permessa l'istrumento della tirannia divenne."

the republic, accusations were being made in secret and brings up the case of Catalina-Cicero from the final decades of the Roman Republic. He writes that Cicero proceeded in silence with his case, gathering evidence and making enquiries without letting the people he was going to accuse have any knowledge of it. Pagano then makes a reference to Brutus (and his conspiracy to overthrow Caesar) as another case where someone acts in secrecy. The judicial process began to become more secretive by the end of the Roman republic. Earlier in the republic, both the accuser and the accused had to be aware of the ongoing case. This secret way of gathering evidence and testimonies in secret and then having people arrested Pagano calls the inquisitorial process, and he states that it got a strong foothold in Rome with the first emperors of the Roman Empire. The judicial process went from being public and open in nature to more secretive and unpredictable.<sup>262</sup>

After examining the changes in the legal system of Rome, Pagano takes a look at the system of the barbarians, by which he means those nations that conquered the provinces of the Roman empire after Rome fell. Pagano's description of the barbarian's brand of justice is riddled with contempt. When the barbarians came, everything Roman was almost entirely obliterated. The arts, sciences, laws and judicial system of the Romans were all but gone as a result of the northern tribe's conquests of the empire. "Duels, oaths, boiling water, fiery iron, and other divine experiments were the adopted means. No longer could you hear the eloquence of Tullio, for the elegance of the sword was what convinced."<sup>263</sup> In other words, there wasn't much of a legal system left after the barbarian conquests of Rome. Might makes right would be a suitable way to describe how legal matters were settled after Rome fell. However, despite the almost complete destruction of the Roman judicial system, Pagano does note that a shadow of it still remained. Witnesses and testimonial evidence still retained a place within the new states. Though he paints a very bleak picture at first, he does reiterate that "under the Lombards we find an established judicial system."<sup>264</sup> Under the Lombard rule, the accusations were public, and the process was vocal. Pagano describes it as a severely watered down version of the Roman judicial system but notes that there was at least a system to it and that it was somewhat stable.

Lastly, he takes a quick look at the judicial system under the Normans and Germans.

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<sup>262</sup> Pagano, *Considerazioni Sul Processo Criminale*, 70.

<sup>263</sup> Pagano, *Considerazioni Sul Processo Criminale*, 75. "Il duello, il giuramento, l'acqua bollente, il ferro infuocato, e gli altri divini esperimenti erano i mezzi allora adoperati, [...] Non udivasi nel foro l'eloquenza de' Tulli, ma nel campo convinceva la fecondia della spada."

<sup>264</sup> Pagano, *Considerazioni Sul Processo Criminale*, 76. "sotto i longobardi ritroviamo già un Sistema de' giudizi stabilito."

He doesn't go in to great detail, but compares aspects of it to the judicial system of the Lombards, noting that it has a similar form, simple, speedy, and a not so formal character. After an accusation had been made by someone, the lawyer of the high court (the courts were called high courts) was to be informed, who would then carry out the inquisition. Lawyers would act as the accusers on behalf of the high court. After the lawyer had been notified, the accused would then be given notice and the case would be sent to the high court to properly begin. If the accused did not appear, the court would consider it a show of contempt for the court. Consequently, the accused would have his or her goods confiscated and would additionally face the death penalty. The lawyer acted only as the accuser on behalf of the court and had nothing to do with the actual incarceration or sentencing of the accused. The judicial processes were not open and public affairs, and Pagano specifically points to a constitution within the Norman kingdom which bore the name, *Hi qui per inquisitiones* in which the worst criminals wouldn't even know they were being prosecuted. Pagano calls this constitution the introduction to the fatal, arcane and deadly monster that was the flawed judicial system of the medieval ages, and a precursor to the system of Pagano's own time. He then rhetorically asks what seed was it that introduced this barbarous insidious monster into the temple of justice?<sup>265</sup>

Pagano tries to give a short summary of what he calls, the origins of the secret, and mysterious judicial proceedings. He says that;

It is noted by everyone that during the time of the free republic, the fate, life and liberty of citizens were judged and decided in the middle of a large forum with numerous spectators, and under the emperors, in the narrow walls of remote palaces with only the different parties to the trial participating, while a few decided the fate of the accused.<sup>266</sup>

There is a repeat emphasis on the fact that during the Roman republic, trials and legal conflicts were settled in a very public manner. It is also noteworthy that Pagano repeatedly calls the Roman Republic, *the free republic* emphasizing that the republic had a better and more just system. Rome under the emperors however took a step back from the good legal practices that the republic had, and the ignorant barbarians Pagano claims misinterpreted the Roman laws almost entirely. Pagano then interestingly makes a direct reference to

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<sup>265</sup> Pagano, *Considerazioni Sul Processo Criminale*, 79-80.

<sup>266</sup> Pagano, *Considerazioni Sul Processo Criminale*, 83. "Egli è noto a ciascuno che in tempo della libera repubblica, della sorte, della vita e della libertà de' cittadini giudicavasi nell'ampie foro, nel mezzo di un numeroso popolo spettatore, e sotto gli imperatori nell'anguste mura di remoti palagi, coll'intervento dei soli litiganti e pochi curiosi stabilivasi la morte, o la vita dell'accusata gente."

Montesquieu. Pagano writes; "the famous author of the spirit of the laws assigns a different origin to the mysterious proceedings."<sup>267</sup> In his *Spirit of the Laws*, Montesquieu writes that duels had been introduced as "a form of public proceedings"<sup>268</sup> and argues furthermore that in France at least, the trials were held in a public "form scarcely different from the public judgements of the Romans."<sup>269</sup> Eventually however, secret proceedings were introduced and everything that had been done public became secret. The reason for this Montesquieu claims is the use of writing in criminal proceedings coupled with the decline of duels as a means to settle disputes. Consequently, as battle gages eventually went out of use, proceedings became more secretive.<sup>270</sup>

Pagano himself doesn't take a particular stance on what Montesquieu says other than offering it up as an alternative origin of the current criminal process. Montesquieu's passage on the origins of the more secretive criminal process is however somewhat short and centered mostly on the introduction of writing and the decline of duels. Pagano on the other hand brings up the emperor of The Holy Roman Empire, Fredrick II (1194-1250) and says that he; "adopted the inquisitorial system of the ancient Romans (under the emperors), but not with the methods of the ancients, but with the terrible and ferocious methods introduced by the ecclesiastics."<sup>271</sup> What's interesting about this passage is that Pagano takes a clear stab at the church's control and influence over the legal system. He repeatedly calls it the fatal right of the clergy's and also argues that the "paternal zeal which inspired our holy religion"<sup>272</sup> has degenerated. In other words, he places some of the blame for the degeneration of the judicial system on the inability of the barbarian conquerors of Rome in interpreting the ancient Roman laws, and partially blames the church for the continued secrecy and flawed character of the criminal process.

The historical and comparative presentation Pagano gives of the criminal justice system is a way for him to substantiate his criticism of the legal system of his own times. He seeks to show when, how and why criminal law deteriorated. One of Pagano's main issues with criminal law was that no one had tried to thoroughly investigate when it had begun to deteriorate, how it deteriorated, and why. As will be evident in the next two parts of chapter

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<sup>267</sup> Pagano, *Considerazioni Sul Processo Criminale*, 83.

<sup>268</sup> Montesquieu, *The Spirit of the Laws*, 584.

<sup>269</sup> Montesquieu, *The Spirit of the Laws*, 584.

<sup>270</sup> Montesquieu, *The Spirit of the Laws*, 584-584.

<sup>271</sup> Pagano, *Considerazioni Sul Processo Criminale*, 84. "Federico II adottò da' Romani l'antico Sistema dell'inquisizione colla costituzione inquisitions generals, ma non col metodo degli antichi, se ne valse; ma bensì con quell terribile e feroce introdotto dagli ecclesiastici."

<sup>272</sup> Pagano, *Considerazioni Sul Processo Criminale*, 84

six, Pagano consistently makes use of history not only in his criticisms of the legal system, but he also finds his suggestions for improvement in the history of criminal law.

#### **6.4 Pagano's criticism**

That Pagano was critical of the legal system of his time should by now be clear. Pagano dedicates a chapter to the analysis of what he sees as the flaws of the present and inquisitorial system. He pays particular attention to three flaws in the current system. The first flaw he points out is that the ardor for public good no longer exists as it used to. Under the Roman republic, or even the Roman emperors, or in England, the judicial system was committed to its function and it denounced any wrongdoing he claims. In the present day however, the enthusiasm and zeal that used to exist is gone. Pagano argues that when there is nobody to accuse, or anyone of proper valor, or when evidence hardly ever sees the light of day, or if people follow misleading traces in criminal cases, then the guards of the magistracy have deviated from the truth. Another thing that Pagano takes issue with is the fact that the criminal activities of the rich are often hidden from the public. In summary, the first big flaw he finds in the current system is its lack of zeal, meaning that there is no real dedication to public good and by extension a well-functioning and just judicial system.<sup>273</sup> Beccaria too was critical of the secretive nature of criminal proceedings.<sup>274</sup> One could however argue that Pagano's criticism is much more on point as he specifically singles out the inquisitorial justice system and points out exactly how it has corrupted the justice system. In other words, where Beccaria and the other enlightenment philosophers often argue and discuss how things should be, Pagano also tries to describe how things actually are as well.

The second big flaw has to do with slander and false accusations. Pagano writes that; "The Second flaw: calumnies are not automatically punished nor condemned in our courts by the selfsame court which absolves someone innocent who has wrongly been accused."<sup>275</sup> He takes issue with the fact that the court may find someone innocent but won't automatically punish an accuser who forwards false accusations against an innocent person. He argues that a false and potentially calumnious accusation of an innocent person isn't condemned or punished. He then once again points to the judicial system of the Romans and claims that the Romans would always react to false accusations by punishing them. Pagano also claims that

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<sup>273</sup> Pagano, *Considerazioni Sul Processo Criminale*, 98.

<sup>274</sup> Beccaria, *On Crimes and Punishment and Other Writings*, 37.

<sup>275</sup> Pagano, *Considerazioni Sul Processo Criminale*, 98. "Secondo difetto: non obbligandosi gli accusatory all pena di calunnia, nè presso di noi condannandosi nell'istesso giudizio, che s'assolve l'accusato innocente."

one could not simply walk away from the trial, without facing a punishment, implying that even if the accuser retracted his false accusations he would nevertheless still have to face punishment.

The third and final flaw Pagano criticizes is the fact that the accuser and the accused do not stand on equal grounds. Pagano brings up the third flaw and says the following;

Information trials based on fact are the accusatory process, meanwhile accusers have the privilege of impartial information. Testimonies are produced by accusers. Greater faith is placed upon the testimonies produced by the accuser while no faith or very little is given to the offender. The condition of the accuser and accused should be equal.<sup>276</sup>

Here Pagano highlights an important issue; namely that the word of the accuser is given more weight than that of the accused. Having demonstrated that false accusations do happen, the word of the accused having less value poses a problem. Pagano complains that the current state of affairs gives the accuser a firm advantage over the accused. He further argues that the accuser is in a prime position to oppress the accused and can if he wants to go so far as to entrap the accused, because the accuser being the one who in Pagano's words administers and finds the proofs can weave a web of lies in which the accused can become entrapped with fatal consequences. The accused has a clear disadvantage in a criminal process, because the accused is lent less credence and this in turn could easily lead to innocent people being punished for crimes they never committed.<sup>277</sup>

Although Pagano repeatedly expresses his almost fierce dislike of the inquisitorial process and inquisitors, he does however concede that he would support a "just and impartial inquisitor, not a venal subordinate"<sup>278</sup> which means that if the inquisitor actually was trustworthy and didn't favor one side over the other and was genuinely interested in upholding the law, then an inquisitor would be a good thing. Pagano further argues that the problem with the inquisitorial process is corruption, which has fatal consequences for people who are potentially innocent. The problem seems to be that once someone is accused; they find themselves in a situation which is difficult to get out of, no matter what they do.<sup>279</sup>

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<sup>276</sup> Pagano, *Considerazioni Sul Processo Criminale*, 99. "Terzo difetto: L'informativo fiscal di fatti è il processo accusatorio, e de' privilegio intanto gode una imparziale informazione. I testimoni sono dagli accusatory prodotti. Intanto a' testimony fiscali si accorda la fede maggiore, o niuna, o poca a' testimony del reo. La condizione dell'accusatore dell'accusato deve esser uguale. Queste prescrivono le leggi, dice il grand'oratore di Atene, questo esige il giuramento de' giudici."

<sup>277</sup> Pagano, *Considerazioni Sul Processo Criminale*, 99-100.

<sup>278</sup> Pagano, *Considerazioni Sul Processo Criminale*, 101. "Un giusto ed imparziale inquisitore, non già un venale subalterno"

<sup>279</sup> *Conserdazioni*, 101-102.



## 6.5 Reforms and change

Toward the end of his *Considerazioni*, Pagano has a chapter titled *Reform of the criminal process*, in which he forwards several concrete suggestions on how to improve the criminal justice system. As mentioned earlier, Pagano criticized both Montesquieu and Beccaria for what he perceived to be the lack of a complete project. Some scholars seem to be of the opinion that Pagano was indeed one of the first to come forth with a complete vision of how criminal law ought to be and how it could be implemented.<sup>280</sup> As has been amply demonstrated, Pagano was concerned not only with how the existing judicial system ought to be, but with what concrete changes one could feasibly implement in the same system.

Pagano had a favorable view of the judicial system of the ancient Romans, in particular republican Rome. Though he clearly preferred the system of the Roman republic, he says that; "My method is in fact that of a monarchical constitution, [a constitution like] that of the Roman empire should be adopted, that is to say a constitution to our conformity. Light and small corrections do not change the substance."<sup>281</sup> What is interesting about this is that Pagano suggest a constitution which would be reminiscent of Rome under the emperors and not under the republic. Pagano was as mentioned in chapter three, one of the main architects of the of the short-lived Neapolitan republic of 1799, authoring its constitution. Though this is mere speculation on my part (though an essentially accurate one I dare say), Pagano's preference for a monarchic constitution to be adopted rather than a republican one, despite having voiced his admiration for the Roman republic numerous times in his work could be due to self-preservation. Pagano's *Considerazioni* did after all come out in 1787, and Naples was at that time still a kingdom under the firm rule of the bourbons. His predilection for a monarchical constitution as a solution rather than a republican one after having heaped an ample amount of praise on the Roman republic seems somewhat odd. Pagano's decision to rather offer up a constitutional monarchy as a solution to bettering the defects of the judicial system is probably because he wanted to avoid undue attention from the bourbon rulers of Naples.

One of Pagano's more interesting and most original reform suggestions was his idea of a supreme court. It is reasonable to believe that Pagano was one of the first people (if not the first) to bring up the idea of a supreme court. None of the legal philosophers who influenced

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<sup>280</sup> Tarello, *Storia della cultura giuridica moderna*, 379.

<sup>281</sup> Pagano, *Considerazioni Sul Processo Criminale*, 152. "Il mio metodo si è quello appunto, che in una monarchica costituzione sotto gl'imperadori romani si adoperò, cioè a dire in una costituzione alla nostra conforme. Lieve e picciola correzione non ne cangia le sostanza."

Pagano such as Beccaria or Filangieri make use of the term supreme court (tribunale supremo), not even in Montesquieu's *Spirit of the Laws* is the term supreme court anywhere to be found. In simple terms, Pagano suggests having a supreme court consisting of 14 judges divided in to two different groups. The supreme court would be the ones handling appeals meaning that they essentially would have the final say in a criminal case.<sup>282</sup> Pagano sums up the importance of the supreme court when he says that; "Free objections guarantee civil liberty, and appeals to the supreme court, reassure it fully."<sup>283</sup> The phrase *libera ricusa* which I have in the above quote translated to *free objections* merits a short explanation. The phrase can be understood to mean making an objection or a refusal. As touched upon earlier, the parties that are supposed to be neutral could be subject to objections and even disqualified from participating in a criminal case and *free objections* is this ability to protest if one feels that someone should be disqualified from making a judgment. This is what in Pagano's view would safeguard and guarantee civil liberty. And the supreme court acts not only as the highest judicial authority in cases where the criminal would make an appeal, but it would also serve as a guarantor of civil liberties. It is worth noting that Pagano's *Considerazioni* was published in 1787 which means that Pagano's concept of a supreme court pre-dates the establishment of supreme courts in countries such as the United States, France and Italy.

It is in the last chapters that Pagano demonstrates that he is perhaps first and foremost a jurist and a philosopher second. While Beccaria for instance made more philosophical arguments, arguing for the merits of a secular criminal justice system, and questioning the use of torture and capital punishment, Pagano on the other hand gives concrete examples of what sort of changes he would like to see. In other words, Pagano tries to look at the system as it is and base his proposals around how the system is as opposed to Beccaria whom he earlier accused of not knowing the criminal justice system well enough. Without going in to too much technical details, Pagano suggests having more inquisitorial posts with one lawyer acting as their boss. Adding a supreme court, and shortening the physical distances between different judicial institutions.<sup>284</sup> Local governors for instance, Pagano says, would have the same role as the ancient defenders of the municipalities, that of apprehending the suspect and

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<sup>282</sup> Pagano, *Considerazioni Sul Processo Criminale*, 152.

<sup>283</sup> Pagano, *Considerazioni Sul Processo Criminale*, 155. "La libera ricusa garantisce la libertà civile; e l'appello al tribunale supremo della provincia la rassicura appieno."

<sup>284</sup> He doesn't directly explain why, but he does mention the importance of a more swift justice system where cases elsewhere in his writings in where cases were decided quickly, and one way to assure that would be to have the different judicial institutions be in close proximity.

securing proofs of the deed and holding the prisoner till the time of his criminal hearing.<sup>285</sup>

The next point Pagano touches upon is the criminal trial itself. When the criminal is present in the criminal trial, he is to be informed that he is being accused and subsequently interrogated on the crime of which he is being charged with. Both the accused and the accuser have the option of freely rejecting two judges, but there always has to be at least three judges in a case, meaning replacements would have to be found. His inspiration for this is once again Rome. He then says that the idea isn't favoring a system like that of the British, which also included the possibility of rejecting two judges in a criminal trial, but rather that of liberty and of avoiding lengthy criminal trials. After this phase in the criminal trial has been completed, an appropriate amount of time would be given to the accused so that he could prepare his defense. Then, on a predetermined day, the accusers or the lawyer representing the accusers would bring forth all of their testimonies and witnesses, then have them testify again in the presence of the accused. At the same time, the accused and his lawyers would bring forth their witnesses and testimonies, and they would debate and confront each other's testimonies (Pagano notes that this was how the ancients did it) and then says that this would with full certainty lead to the truth. "Without the harassment of witnesses [used] in the present method, even from the mouth of those resisting and manipulated, one could in this manner obtain the hidden truth."<sup>286</sup> Pagano here takes another shot at the use of torture and puts forth his view that the truth could better be obtained by use of intellect than of malice. After the discussions, the depositions would be registered and a few days after a decision would be made. Pagano claims that by simplifying and shortening the criminal process, you had a surer way of getting the truth, and of ensuring civil liberties.<sup>287</sup>

The last chapter in Pagano's *Considerazioni* is titled *Corrections on the present process*. He begins the chapter by conceding that great reforms could be problematic and says that; "since great reforms encounter great obstacles or the prejudice of rulers [...] we propose in this chapter a correction of the current process that does not depart much from the method in use, and which will pave the way [for the reforms] proposed above."<sup>288</sup> Pagano knows that the reform suggestions he put forth would be hard to actually execute and so proposes to

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<sup>285</sup> Pagano, *Considerazioni Sul Processo Criminale*, 152-153.

<sup>286</sup> Pagano, *Considerazioni Sul Processo Criminale*, 154. "Senza la vessazione de' testimony nel presente metodo necessaria, anche dalla bocca de' renitenti e sedotti si potrà in tal maniera estorquere la nascosa verità."

<sup>287</sup> Pagano, *Considerazioni Sul Processo Criminale*, 155.

<sup>288</sup> Pagano, *Considerazioni Sul Processo Criminale*, 157. "Ma poichè le grandi riforme incontrano dei grandi ostacoli o ne' regnanti pregiudizi, [...] noi proporremo in questo capitolo una tal correzione del presento processo, la quale non dipartendosi molto dal metodo usato, spiani la via a quello di sopra proposto."

make minor adjustments and corrections to the judicial system instead. He also claims that this would eventually pave the way for the reforms he suggested anyway, the difference being that by going about it in a slower manner, the changes would be more sustainable than if they were more comprehensive and sudden.<sup>289</sup> The influence of Genovesi is evident in this matter as Pagano like his mentor (as mentioned in chapter three) seems to prefer gradual change over a quick and unpredictable one.

One of the first points Pagano brings up in the last chapter of *Considerazioni* is the necessity of an exact penal code formed by professionals. A proper penal code he says is important as it would allow the proposed system to be better executed and it would make the punishments dependent on laws and not subject to the will of individual judges. This is completely in line with what Filangieri had said earlier, namely that the will of judges and jurors shouldn't be what decided cases, a solid legislation should be the basis of judgements. This didn't mean that there was no penal code at all in Naples though, Pagano merely highlights that the current penal code was somewhat incomplete as a lot of crimes didn't have a fixed consequence but mostly depended on the will of the judges overseeing the case. He does however highlight certain positive aspects of the current system too, and says that in certain cases, the court would summon both parties at the same time. The court would then hear both sides of the case and form an opinion afterwards. In other words, the secretiveness of the criminal process wasn't consistent. Sometimes the court would genuinely try to make an informed decision by having both parties present, have them present their sides and then look at the case from different angles while other times it wouldn't. He praises and encourages these positive types of conducts.<sup>290</sup>

Most of the suggestions Pagano makes in his last chapter were watered down versions of the ideas he puts forward in penultimate chapter which was about reforms, namely greater simplicity and transparency in the criminal process. He argues that care and time should always be taken to find the truth in all criminal cases. He also argues that the punishment should fit the crime in his usual retributive spirit: "Atrocious crimes, merit atrocious punishment."<sup>291</sup> This sentence is a great summary of Pagano's core principle; namely that punishment ought to be proportionate, built on a system of retribution. Though as mentioned earlier, not in a corporal sense but in a legal sense. His statement is however somewhat ambivalent. He never clarifies what he intends with atrocious punishment. It would be

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<sup>289</sup> Pagano, *Considerazioni Sul Processo Criminale*, 157.

<sup>290</sup> Pagano, *Considerazioni Sul Processo Criminale*, 157.

<sup>291</sup> Pagano, *Considerazioni Sul Processo Criminale*, 160. "I delitti atroci meritano atroce pena."

unlikely that he would mean atrocious corporal punishment as he earlier clearly rejects its use. Then again his last chapter is about making adjustments and not completely abolishing negative aspects of the system or reforming the judicial system in its entirety and Pagano might simply not think it possible to make significant changes to the punishments criminals received. He was after all somewhat more concerned with making sure that the criminal process actually went after people genuinely guilty than lessening the use of excessive punishments when he speaks about making corrections to the current system. Another point he brings up, somewhat reminiscent of his suggestions in his reform chapter, is that of having depositions and witness statements in the presence of the accused and to subsequently interrogate the accused. Most of his suggestions are different ways of encouraging and promoting more transparency and consistency in the criminal process.<sup>292</sup>

After having put forth his suggestions on how to improve instead of reform the current system, Pagano delivers the following lines in the penultimate paragraph of his *Considerazioni*; "These are the best laws, of which the current circumstances are capable of."<sup>293</sup> Pagano is here conceding that his suggestions may not be the best ones, but points out that the times they are living in have their limitations and that the adjustments he is suggesting are taking these limits into account. While they may not objectively be the best laws, they are however the best the current times allow. Pagano finishes up his *Considerazioni* with saying that he would be happy if he could inspire sovereigns to make use of his reflections. The good of society is in the hands of the sovereign he says, and he encourages the sovereign to value and make use of the reflections of an obscure philosopher, referring to himself.<sup>294</sup>

Pagano's *Considerazioni* is the book in which Pagano's critique of the criminal justice system is most clearly expressed. It builds on and elaborates the arguments he presents in his *Logica* and *Principj*. He shows his fierce opposition to the use of torture and the arbitrariness of the criminal justice system and argues for a more systematic and scientific-like legal system. He also presents the origins of the inquisitorial and secretive system which he claims replaced the transparent and accusatory one. This he does by studying the systems of the ancient Romans and the barbarian conquerors of Rome. Pagano then argues in favor of the criminal justice system under republican Rome, and most of the suggestions he makes he takes directly from the legal system of republican Rome. Pagano attempts to delve into the origins of the legal system of the 1700s, in order to show when, how and why it deteriorated

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<sup>292</sup> Pagano, *Considerazioni Sul Processo Criminale*, 158-159.

<sup>293</sup> Pagano, *Considerazioni Sul Processo Criminale*, 160.

<sup>294</sup> Pagano, *Considerazioni Sul Processo Criminale*, 161.

to its current state. He wants to understand the current system and its flaws in order to improve it. Most of his suggestions were about making the legal system more transparent, public, systematic and predictable. And most important of all, criminal law he claimed had to be built on a set of principles and follow a certain set of rules from which it should never deviate. In other words, criminal law had to be based on a rule of law.

## 7 Conclusion

### 7.1 Pagano's penal philosophy

Pagano is perhaps one of the enlightenment intellectuals who has been neglected most by posterity, but that does not mean that he failed to make an impact. If one considers the French *philosophes* and Beccaria as the ideologues of criminal law, one could credit Filangieri and Pagano for having concretized and systematized those ideas into a more coherent system. Not only that, the only one of the philosophers on criminal law mentioned in this thesis who actually succeeded (albeit only for the briefest of times) in setting their ideas into life was Pagano. The constitution he was the main author of, gave him the opportunity to set some of his ideas into motion, something none of the others ever properly managed to do during their own lifetimes. Another important aspect is that Pagano never approached criminal law purely as a philosopher. Pagano was a jurist by profession and had studied law and indeed actively practiced as a jurist and lawyer during his life.

Most of Pagano's thought on criminal law built on the works of earlier enlightenment thinkers, particularly the works of Montesquieu, Beccaria and Filangieri. His focus however was slightly more on the rule of law and guaranteeing the liberty of the citizens and in upholding the law, while Montesquieu and especially Beccaria heavily focused on utility and necessity. Pagano's approach was much more that of a jurist than Beccaria and Montesquieu. Though a lot of Pagano's ideas are influenced by the aforementioned enlightenment intellectuals, he does stand out in that he advocated a retributive justice system which was in direct contrast to Montesquieu, Beccaria and most other enlightenment thinkers. Pagano's principle of proportionality when punishing builds on retribution and not so much on necessity and utility as his influences did. But perhaps his most original contribution to criminal law was his concept of a supreme court, where a court of judges would have the final say in a given case.

*Principj*, the first of Pagano's works which I discussed and analyzed was an attempt at defining and concretizing the basics of criminal law. He sought to give conceptual definitions of the terms, crime and punishment. He then writes about how he believes the justice system should be functioning, and advocates a criminal justice system built upon retributive justice. Retributive justice for Pagano meant that the violation of a right had to be punished with the loss of the same right the criminal had violated. His retributive justice shared Beccaria's principle of proportionality in that the punishment had to correspond to the crime and not be

excessive, though Pagano argued for it on different grounds. Pagano further sought to explain what kind of different crimes there were, how they were to be punished and if there were some culprits who should be treated differently. He made a clear distinction between crimes done with malice, unintentional criminal acts and crimes done by culprits who lacked the mental capacity to understand what they were doing and what consequences their actions had. Pagano's *Principj* was an attempt to set out a clear set of rules for what constituted crimes, and how these were to be punished depending on the circumstances around the crimes. To summarize, *Principj* tried reducing the basics of criminal law into a science.

Pagano's *Logica* is the continuation of this attempt to make a science out of criminal law. While *Principj* wanted to clarify what characterized crimes and punishments, *Logica* seeks to explain and present how one proves that the crimes one seeks to punish actually took place. *Logica* is perhaps where the jurist in Pagano comes forward most clearly. He seeks to explain that evidence and testimonies are the grounds for proving or disproving someone's guilt, and that the probability or certainty of a given witness statement of evidence is not necessarily always the same. He elaborates on what Beccaria had said earlier, namely that the quality and quantity of evidence may make or break a case. Independent pieces of evidence or testimonies were better suited to get a conviction than cases where the evidence and testimonies that turned up were co-dependent, meaning that if one part proved to be false, then they were all false. In other words, there were different kinds of evidence, testimonies and indications.

Lastly, Pagano's *Considerazioni* sought to reflect upon criminal law as a whole. Some rhetorical questions Pagano sought to answer were, how did criminal law deteriorate? When and where did the secretive and inquisitorial system begin and how did it come to replace the accusatory system of the Roman republic, and most importantly, how could the system be fixed? Pagano argued that the secretive and inquisitorial system had its roots in the Roman empire and that the criminal justice system progressively became more and more secretive and declined further following the rise of the church. He argued that the proceedings went from being public to secretive and that this made them much less reliable. One of the big qualms Pagano and indeed, most, if not all of the enlightenment thinkers had with the criminal justice system at the time was its lack of transparency. The justice system was secretive, and the result of cases were always dependent on the arbitrary rule of the persons judging and not on the rule of law. There wasn't a sudden shift towards the inquisitorial system Pagano argued, its rise was due to the fall of the Roman republic followed by rulers



who misunderstood and misinterpreted the roman laws in the proceeding centuries. Pagano was acutely aware that repairing the criminal justice system was far from easy. Most of his criticism and indeed those of his peers were that the church had too much influence, and that there was no real desire for justice among those who ruled. Pagano argued that in order to change the system, gradual changes had to be implemented. One needed sound laws which were to be followed. Laws, and not the will of the judges were to decide the fate of the accused. The judges were to be interpreters of the laws meaning that they had to be guided by them and make decisions based on laws.

One could summarize Pagano's criminal law as follows; criminal law had to follow a set of rules and laws and be built on solid principles. It had to be like a science. Judges were to use this 'science' when making judgements. And these principles of law were to be based on secular principles, meaning that the churches influence was to be eradicated if possible. Criminal proceedings, most enlightenment thinkers including Pagano argued should be public and transparent. Perhaps most importantly, the use of torture it was argued had to be abandoned completely as it was deemed a useless and inhumane form of punishment. Malice, Pagano argued, had no relation to truth.

## 7.2 Further studies

Mario Pagano and most of the Neapolitan enlightenment thinkers have been little studied. Pagano had a considerable authorship, most of which have been superficially studied at best. Though Pagano was a jurist and held the chair of law at the university of Naples, his work on criminal law and on legislation only represent a part of his intellectual endeavors. His *Saggi Politici* for instance deals with a wide range of topics not properly touched upon in any of his three works on criminal law, dealing with metaphysics, the state of nature, civil society and more notably provides an interpretation of Giambattista Vico's ideas.<sup>295</sup> Pagano also wrote plays and other works worth exploring.

The Neapolitan enlightenment, or the Italian enlightenment as a whole for that matter, have not been as extensively studied as they perhaps deserve. More or less all of the Italian *illuministi* have been little studied despite the fact that they have had an ample amount of publications. Genovesi for instance had a considerable authorship which is worth exploring ranging from topics such as metaphysics to economy and criminal law. Filangieri who wrote the *Scienza della Legislazione*, which is by some mentioned as the second greatest work

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<sup>295</sup> Campagna, *Potere legalità libertà*, 31.

produced by a Mediterranean philosopher after Vico has been little studied.<sup>296</sup> In fact, the newest translations of his works stem from the early 19<sup>th</sup> century, and Filangieri has been sparsely studied outside of Italy.

Additionally, there were numerous periodicals in at least Naples and Milan in circulation during the 18<sup>th</sup> century which would be interesting to look at as representations of the public sphere in those respective cities. Milan as already mentioned had *Il Caffè* during the 1760s, and Naples too, had several short lived periodicals during the course of the 1700s.

Finally, and perhaps most interestingly, the Neapolitan republic of 1799 which I touched upon in this thesis is a subject that deserves a much fuller treatment than I have been able to give here. The Neapolitan revolution is perhaps one of the best examples of how active and thriving the Italian enlightenment was. Though the revolution ended in misery after five months, it does demonstrate that a public sphere had been cultivated in Naples. As mentioned, the Neapolitan revolutionaries revised the French constitution of 1793 before implementing it as their own, in other words, the Neapolitans repeatedly showed that they had intimate familiarity with French political and intellectual life in addition to being active themselves.

### **7.3 Conclusive remarks**

The goal of this thesis has been to present Pagano's reflections on criminal law and to compare them to other enlightenment intellectuals. Pagano as shown, did not necessarily present a groundbreaking and completely new interpretation of criminal law. It is safe to say that his ideas continue to build upon other enlightenment intellectuals. He does however repeatedly demonstrate that he isn't merely rehashing the same arguments and principles already established by the French *philosophes* and the Italian *illuministi*. Unlike the French *philosophes* and the Italian *illuministi* who influenced him, Pagano's principle of proportionality for instance built upon a retributive form of justice and not so much on principles of utility and necessity. That is not to say that he pays no attention to necessity and utility, because at its core, Pagano views criminal law as a way to safeguard and protect citizens and their freedom from oppression, and in this he follows the path of most other enlightenment philosophers. His goal was to clarify what criminal law was, how the criminal justice system worked, and how the truth or falsity of something could be established. He wanted to make a science out of criminal law and to use that science to implement changes in

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<sup>296</sup> Israel, *Democratic Enlightenment*, 368.

the criminal justice system of his time.

In addition to exploring the ideas and reflections of Pagano, a secondary purpose of this thesis has been to show that the Italian peninsula, despite having been somewhat neglected by enlightenment scholars did have thriving and active intellectual milieus. The intellectuals active in both Milan and Naples as amply demonstrated in this thesis were well versed in a wide range of topics ranging from metaphysics, economy, political philosophy and law. They also demonstrated their intimate familiarity with the works of their French counterparts with Genovesi for instance having read and written a preface to an Italian version of Montesquieu's *Spirit of the laws*. Another example of the Italian *illuministi* and their interaction with the outside world was Beccaria's *On Crimes and Punishment* which as mentioned earlier was published in French with an afterword by the French philosopher Voltaire, not to mention that Beccaria and the Verri brothers were familiar with the encyclopedists. Even Pagano found some recognition outside of Italy, with the constitutional assembly of France in 1789 showing admiration for his *Considerazioni*.

Additionally, Genovesi and Filangieri not to mention Pagano all in some way contributed to the growth of a public sphere in Naples, trying to cultivate change and a move forward socially, politically, judicially as well as economically for the kingdom of Naples. Thanks to Genovesi's efforts, an intellectual milieu eventually rose up in Naples which one could argue culminated with the advents of Pagano and the 1799 revolution in Naples. At the same time Milan also saw the rise of a number of intellectuals most notably those behind the periodical *Il Café* as mentioned earlier. In other words, Italy's reputation as the backwaters of 18<sup>th</sup> century Europe is perhaps not as deserved as one might think.



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## **1.6 Abbreviations**

*Abbreviations:*

*Principj* - Principj Del Codice Penale

*Logica* - Logica de' probabili per servire di teoria alle prouve ne Giudizj Criminale

*Considerazioni* – Considerazioni Sul Processo Criminale

