

Book VI. Consequences of the Principles of Different Governments with Respect to the Simplicity of Civil and Criminal Laws, the Form of Judgments, and the Inflicting of Punishments

1. Of the Simplicity of Civil Laws in different Governments. Monarchies do not permit of so great a simplicity of laws as despotic governments. For in monarchies there must be courts of judicature; these must give their decisions; the decisions must be preserved and learned, that we may judge in the same manner to-day as yesterday, and that the lives and property of the citizens may be as certain and fixed as the very constitution of the state.

In monarchies, the administration of justice, which decides not only in whatever belongs to life and property, but likewise to honour, demands very scrupulous inquiries. The delicacy of the judge increases in proportion to the increase of his trust, and of the importance of the interests on which he determines.

We must not, therefore, be surprised to find so many rules, restrictions, and extensions in the laws of those countries -- rules that multiply the particular cases, and seem to make of reason itself an art.

The difference of rank, birth, and condition established in monarchical governments is frequently attended with distinctions in the nature of property; and the laws relating to the constitution of this government may augment the number of these distinctions. Hence, among us goods are divided into real estates, purchases, dowries, paraphernalia, paternal and maternal inheritances; movables of different kinds; estates held in fee-simple, or in tail; acquired by descent or conveyance; allodial, or held by soccage; ground rents; or annuities. Each sort of goods is subject to particular rules, which must be complied with in the disposal of them. These things must needs diminish the simplicity of the laws.

In our governments the fiefs have become hereditary. It was necessary that the nobility should have a fixed property, that is, the fief should have a certain consistency, to the end that the proprietor might be always in a capacity of serving the prince. This must have been productive of great varieties; for instance, there are countries where fiefs could not be divided among the brothers; in others, the younger brothers may be allowed a more generous subsistence.

The monarch who knows each of his provinces may establish different laws, or tolerate different customs. But as the despotic prince knows nothing, and can attend to nothing, he must take general measures, and govern by a rigid and inflexible will, which throughout his whole dominions produces the same effect; in short, everything bends under his feet.

In proportion as the decisions of the courts of judicature are multiplied in monarchies, the law is loaded with decrees that sometimes contradict one another; either because succeeding judges are of a different way of thinking, or because the same causes are sometimes well, and at other times ill, defended; or, in fine, by reason of an infinite number of abuses, to which all human regulations are liable. This is a necessary evil, which the legislator redresses from time to time, as contrary even to the spirit of moderate governments. For when people are obliged to have recourse to courts of judicature, this should come from the nature of the constitution, and not from the contradiction or uncertainty of the law.

In governments where there are necessary distinctions of persons, there must likewise be privileges. This also diminishes the simplicity, and creates a thousand exceptions.

One of the privileges least burdensome to society, and especially to him who confers it, is that of pleading in one court in preference to another. Here new difficulties arise, when it becomes a question before

which court we shall plead.

Far different is the case of the people under despotic governments. In those countries I can see nothing that the legislator is able to decree, or the magistrate to judge. As the lands belong to the prince, it follows that there are scarcely any civil laws in regard to landed property. From the right the sovereign has to successions, it follows, likewise, that there are none relating to inheritances. The monopolies established by the prince for himself in some countries render all sorts of commercial laws quite useless. The marriages which they usually contract with female slaves are the cause that there are scarcely any civil laws relating to dowries, or to the particular advantage of married women. From the prodigious multitude of slaves, it follows, likewise, that there are very few who have any such thing as a will of their own, and of course are answerable for their conduct before a judge. Most moral actions that are only in consequence of a father's, a husband's, or a master's will, are regulated by them, and not by the magistrates.

I forgot to observe that as what we call honour is a thing hardly known in those countries, the several difficulties relating to this article, though of such importance with us, are with them quite out of the question. Despotic power is self-sufficient; round it there is an absolute vacuum. Hence it is that when travellers favour us with the description of countries where arbitrary sway prevails, they seldom make mention of civil laws.[1]

All occasions, therefore, of wrangling and law-suits are here removed. And to this in part is it owing that litigious people in those countries are so roughly handled. As the injustice of their demand is neither screened, palliated, nor protected by an infinite number of laws, of course it is immediately discovered.

2. Of the Simplicity of Criminal Laws in different Governments. We hear

it generally said, that justice ought to be administered with us as in Turkey. Is it possible, then, that the most ignorant of all nations should be the most clear-sighted on a point which it most behoves mankind to know?

If we examine the set forms of justice with respect to the trouble the subject undergoes in recovering his property, or in obtaining satisfaction for an injury or affront, we shall find them doubtless too numerous: but if we consider them in the relation they bear to the liberty and security of every individual, we shall often find them too few; and be convinced that the trouble, expense, delays, and even the very dangers of our judiciary proceedings, are the price that each subject pays for his liberty.

In Turkey, where little regard is shown to the honour, life, or estate of the subject, all causes are speedily decided. The method of determining them is a matter of indifference, provided they be determined. The pasha, after a quick hearing, orders which party he pleases to be bastinadoed, and then sends them about their business.

Here it would be dangerous to be of a litigious disposition; this supposes a strong desire of obtaining justice, a settled aversion, an active mind, and a steadiness in pursuing one's point. All this should be avoided in a government where fear ought to be the only prevailing sentiment, and in which popular disturbances are frequently attended with sudden and unforeseen revolutions. Here every man ought to know that the magistrate must not hear his name mentioned, and that his security depends entirely on his being reduced to a kind of annihilation.

But in moderate governments, where the life of the meanest subject is deemed precious, no man is stripped of his honour or property until after a long inquiry; and no man is bereft of life till his very country has attacked him -- an attack that is never made without leaving him all

possible means of making his defence.

Hence it is that when a person renders himself absolute, [2] he immediately thinks of reducing the number of laws. In a government thus constituted they are more affected with particular inconveniences than with the liberty of the subject, which is very little minded.

In republics, it is plain that as many formalities at least are necessary as in monarchies. In both governments they increase in proportion to the value which is set on the honour, fortune, liberty, and life of the subject.

In republican governments, men are all equal; equal they are also in despotic governments: in the former, because they are everything; in the latter, because they are nothing.

3. In what Governments and in what Cases the Judges ought to determine according to the express Letter of the Law. The nearer a government approaches towards a republic, the more the manner of judging becomes settled and fixed; hence it was a fault in the republic of Sparta for the Ephori to pass such arbitrary judgments without having any laws to direct them. The first consuls at Rome pronounced sentence in the same manner as the Ephori; but the inconvenience of this proceeding was soon felt, and they were obliged to have recourse to express and determinate laws.

In despotic governments there are no laws; the judge himself is his own rule. There are laws in monarchies; and where these are explicit, the judge conforms to them; where they are otherwise, he endeavours to investigate their spirit. In republics, the very nature of the constitution requires the judges to follow the letter of the law; otherwise the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life is concerned.

At Rome the judges had no more to do than to declare that the persons accused were guilty of a particular crime, and then the punishment was found in the laws, as may be seen in divers laws still extant. In England the jury give their verdict whether the fact brought under their cognisance be proved or not; if it be proved, the judge pronounces the punishment inflicted by the law, and for this he needs only to open his eyes.

4. Of the Manner of passing Judgment. Hence arise the different modes of passing judgment. In monarchies the judges choose the method of arbitration; they deliberate together, they communicate their sentiments for the sake of unanimity; they moderate their opinions, in order to render them conformable to those of others: and the lesser number are obliged to give way to the majority. But this is not agreeable to the nature of a republic. At Rome, and in the cities of Greece, the judges never entered into a consultation; each gave his opinion in one of these three ways: "I absolve," "I condemn," "It does not appear clear to me";[3] this was because the people judged, or were supposed to judge. But the people are far from being civilians; all these restrictions and methods of arbitration are above their reach; they must have only one object and one single fact set before them; and then they have only to see whether they ought to condemn, to acquit, or to suspend their judgment.

The Romans introduced set forms of actions,[4] after the example of the Greeks, and established a rule that each cause should be directed by its proper action. This was necessary in their manner of judging; it was necessary to fix the state of the question, that the people might have it always before their eyes. Otherwise, in a long process, this state of the question would continually change, and be no longer distinguished.

Hence it followed that the Roman judges granted only the simple demand, without making any addition, deduction, or limitation. But the prætors devised other forms of actions, which were called *ex bona fide*, in which

the method of pronouncing sentence was left to the disposition of the judge. This was more agreeable to the spirit of monarchy. Hence it is a saying among the French lawyers, that in France[5] all actions are ex bona fide.

5. In what Governments the Sovereign may be Judge. Machiavel[6] attributes the loss of the liberty of Florence to the people's not judging in a body in cases of high treason against themselves, as was customary at Rome. For this purpose they had eight judges: "but the few," says Machiavel, "are corrupted by a few." I should willingly adopt the maxim of this great man. But as in those cases the political interest prevails in some measure over the civil (for it is always an inconvenience that the people should be judges in their own cause), in order to remedy this evil, the laws must provide as much as possible for the security of individuals.

With this view the Roman legislators did two things: they gave the persons accused permission to banish themselves[7] before sentence was pronounced;[8] and they ordained that the goods of those who were condemned should be sacred, to prevent their being confiscated to the people. We shall see in Book XI the other limitations that were set to the judicatory power residing in the people.

Solon knew how to prevent the abuse which the people might make of their power in criminal judgments. He ordained that the Court of Areopagus should re-examine the affair; that if they believed the party accused was unjustly acquitted[9] they should impeach him again before the people; that if they believed him unjustly condemned[10] they should prevent the execution of the sentence, and make them rejudge the proceeding -- an admirable law, that subjected the people to the censure of the magistracy which they most revered, and even to their own!

In affairs of this kind it is always proper to throw in some delays, especially when the party accused is under confinement; to the end that

the people may grow calm and give their judgment coolly.

In despotic governments, the prince himself may be judge. But in monarchies this cannot be; the constitution by such means would be subverted, and the dependent intermediate powers annihilated; all set forms of judgment would cease; fear would take possession of the people's minds, and paleness spread itself over every countenance: the more confidence, honour, affection, and security in the subject, the more extended is the power of the monarch.

We shall give here a few more reflections on this point. In monarchies, the prince is the party that prosecutes the person accused, and causes him to be punished or acquitted. Now, were he himself to sit upon the trial, he would be both judge and party.

In this government the prince has frequently the benefit of confiscation, so that here again, by determining criminal causes, he would be both judge and party.

Further, by this method he would deprive himself of the most glorious attribute of sovereignty, namely, that of granting pardon, [11] for it would be quite ridiculous of him to make and unmake his decisions; surely he would not choose to contradict himself.

Besides, this would be confounding all ideas; it would be impossible to tell whether a man was acquitted, or received his pardon.

Louis XIII being desirous to sit in judgment upon the trial of the Duke de la Valette, [12] sent for some members of the parliament and of the privy council, to debate the matter; upon their being ordered by the king to give their opinion concerning the warrant for his arrest, the president, De Believre, said "that he found it very strange that a prince should pass sentence upon a subject; that kings had reserved to themselves the power of pardoning, and left that of condemning to their

officers; that his majesty wanted to see before him at the bar a person who, by his decision, was to be hurried away into the other world! That the prince's countenance should inspire with hopes, and not confound with fears; that his presence alone removed ecclesiastic censures; and that subjects ought not to go away dissatisfied from the sovereign." When sentence was passed, the same magistrate declared, "This is an unprecedented judgment to see, contrary to the example of past ages -- a king of France, in the quality of a judge, condemning a gentleman to death." [13]

Again, sentences passed by the prince would be an inexhaustible source of injustice and abuse; the courtiers by their importunity would always be able to extort his decisions. Some Roman emperors were so mad as to sit as judges themselves; the consequence was that no reigns ever so surprised the world with oppression and injustice.

"Claudius," says Tacitus, [14] "having appropriated to himself the determination of lawsuits, and the function of magistrates, gave occasion to all manner of rapine." But Nero, upon coming to the empire after Claudius, endeavoured to conciliate the minds of the people by declaring "that he would take care not to be judge himself in private causes, that the parties might not be exposed within the walls of a palace to the iniquitous influence of a few freedmen." [15]

"Under the reign of Arcadius," says Zozimus, [16] "a swarm of calumniators spread themselves on every side, and infested the court. Upon a person's decease, it was immediately supposed he had left no children; [17] and, in consequence of this, his property was given away by a rescript. For as the prince was surprisingly stupid, and the empress excessively enterprising, she was a slave to the insatiable avarice of her domestics and confidants; insomuch that to an honest man nothing could be more desirable than death."

"Formerly," says Procopius [18] "there used to be very few people at

court; but in Justinian's reign, as the judges had no longer the liberty of administering justice, their tribunals were deserted, while the prince's palace resounded with the litigious clamours of the several parties." Everybody knows what a prostitution there was of public judgments, and even of the very laws themselves, at that emperor's court.

The laws are the eye of the prince; by them he sees what would otherwise escape his observation. Should he attempt the function of a judge, he would not then labour for himself, but for impostors, whose aim is to deceive him.

6. That in Monarchies Ministers ought not to sit as Judges. It is likewise a very great inconvenience in monarchies for the ministers of the prince to sit as judges. We have still instances of states where there are a great number of judges to decide exchequer causes, and where the ministers nevertheless (a thing most incredible!) would fain determine them. Many are the reflections that here arise; but this single one will suffice for my purpose.

There is in the very nature of things a kind of contrast between a prince's council and his courts of judicature. The king's council ought to be composed of a few persons, and the courts of judicature of a great many. The reason is, in the former, things should be undertaken and conducted with a kind of warmth and passion, which can hardly be expected but from four or five men who make it their sole business. On the contrary, in courts of judicature a certain coolness is requisite, and an indifference, in some measure, to all manner of affairs.

7. Of a single Magistrate. A magistracy of this kind cannot take place but in a despotic government. We have an instance in the Roman history how far a single magistrate may abuse his power. Might it not be very well expected that Appius on his tribunal should contemn all laws, after having violated that of his own enacting?[19] Livy has given us the

iniquitous distinction of the Decemvir. He had suborned a man to reclaim Virginia in his presence as his slave; Virginia's relatives insisted that by virtue of his own law she should be consigned to them, till the definitive judgment was passed. Upon which he declared that his law had been enacted only in favour of the father, and that as Virginius was absent, no application could be made of it to the present case.[20]

8. Of Accusation in different Governments. At Rome[21] it was lawful for one citizen to accuse another. This was agreeable to the spirit of a republic, where each citizen ought to have an unlimited zeal for the public good, and is supposed to hold all the rights of his country in his own hands. Under the emperors, the republican maxims were still pursued; and instantly appeared a pernicious tribe, a swarm of informers. Crafty, wicked men, who could stoop to any indignity to serve the purposes of their ambition, were sure to busy themselves in the search of criminals whose condemnation might be agreeable to the prince; this was the road to honour and preferment,[22] but luckily we are strangers to it in our country.

We have at present an admirable law, namely, that by which the prince, who is established for the execution of the laws, appoints an officer in each court of judicature to prosecute all sorts of crimes in his name; hence the profession of informers is a thing unknown to us, for if this public avenger were suspected to abuse his office, he would soon be obliged to mention his author.

By Plato's Laws[23] those who neglect to inform or to assist the magistrates are liable to punishment. This would not be so proper in our days. The public prosecutor watches for the safety of the citizens; he proceeds in his office while they enjoy their quiet and ease.

9. Of the Severity of Punishments in different Governments. The severity of punishments is fitter for despotic governments, whose principle is terror, than for a monarchy or a republic, whose spring is honour and

virtue.

In moderate governments, the love of one's country, shame, and the fear of blame are restraining motives, capable of preventing a multitude of crimes. Here the greatest punishment of a bad action is conviction. The civil laws have therefore a softer way of correcting, and do not require so much force and severity.

In those states a good legislator is less bent upon punishing than preventing crimes; he is more attentive to inspire good morals than to inflict penalties.

It is a constant remark of the Chinese authors[24] that the more the penal laws were increased in their empire, the nearer they drew towards a revolution. This is because punishments were augmented in proportion as the public morals were corrupted.

It would be an easy matter to prove that in all, or almost all, the governments of Europe, penalties have increased or diminished in proportion as those governments favoured or discouraged liberty.

In despotic governments, people are so unhappy as to have a greater dread of death than regret for the loss of life; consequently their punishments ought to be more severe. In moderate states they are more afraid of losing their lives than apprehensive of the pain of dying; those punishments, therefore, which deprive them simply of life are sufficient.

Men in excess of happiness or misery are equally inclinable to severity; witness conquerors and monks. It is mediocrity alone, and a mixture of prosperous and adverse fortune, that inspires us with lenity and pity.

What we see practised by individuals is equally observable in regard to nations. In countries inhabited by savages who lead a very hard life,

and in despotic governments, where there is only one person on whom fortune lavishes her favours, while the miserable subjects lie exposed to her insults, people are equally cruel. Lenity reigns in moderate governments.

When in reading history we observe the cruelty of the sultans in administration of justice, we shudder at the very thought of the miseries of human nature.

In moderate governments, a good legislator may make use of everything by way of punishment. Is it not very extraordinary that one of the chief penalties at Sparta was to deprive a person of the power of lending out his wife, or of receiving the wife of another man, and to oblige him to have no company at home but virgins? In short, whatever the law calls a punishment is such effectively.

10. Of the ancient French Laws. In the ancient French laws we find the true spirit of monarchy. In cases relating to pecuniary mulcts, the common people are less severely punished than the nobility.[25] But in criminal[26] cases it is quite the reverse; the nobleman loses his honour and his voice in court, while the peasant, who has no honour to lose, undergoes a corporal punishment.

11. That when People are virtuous few Punishments are necessary. The people of Rome had some share of probity. Such was the force of this probity that the legislator had frequently no further occasion than to point out the right road, and they were sure to follow it; one would imagine that instead of precepts it was sufficient to give them counsels.

The punishments of the regal laws, and those of the Twelve Tables, were almost all abolished in the time of the republic, in consequence either of the Valerian[27] or of the Porcian law.[28] It was never observed that this step did any manner of prejudice to the civil administration.

This Valerian law, which restrained the magistrates from using violent methods against a citizen that had appealed to the people, inflicted no other punishment on the person who infringed it than that of being reputed a dishonest man.[29]

12. Of the Power of Punishments. Experience shows that in countries remarkable for the lenity of their laws the spirit of the inhabitants is as much affected by slight penalties as in other countries by severer punishments.

If an inconvenience or abuse arises in the state, a violent government endeavours suddenly to redress it; and instead of putting the old laws in execution, it establishes some cruel punishment, which instantly puts a stop to the evil. But the spring of government hereby loses its elasticity; the imagination grows accustomed to the severe as well as the milder punishment; and as the fear of the latter diminishes, they are soon obliged in every case to have recourse to the former. Robberies on the highway became common in some countries; in order to remedy this evil, they invented the punishment of breaking upon the wheel, the terror of which put a stop for a while to this mischievous practice. But soon after robberies on the highways became as common as ever.

Desertion in our days has grown to a very great height; in consequence of which it was judged proper to punish those delinquents with death; and yet their number did not diminish. The reason is very natural; a soldier, accustomed to venture his life, despises, or affects to despise, the danger of losing it. He is habituated to the fear of shame; it would have been therefore much better to have continued a punishment[30] which branded him with infamy for life; the penalty was pretended to be increased, while it really diminished.

Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has given us to conduct them. If we inquire into the cause of all human corruptions, we shall find that

they proceed from the impunity of criminals, and not from the moderation of punishments.

Let us follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be the infamy attending it.

But if there be some countries where shame is not a consequence of punishment, this must be owing to tyranny, which has inflicted the same penalties on villains and honest men.

And if there are others where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has used such penalties for slight transgressions.

It often happens that a legislator, desirous of remedying an abuse, thinks of nothing else; his eyes are open only to this object, and shut to its inconveniences. When the abuse is redressed, you see only the severity of the legislator; yet there remains an evil in the state that has sprung from this severity; the minds of the people are corrupted, and become habituated to despotism.

Lysander[31] having obtained a victory over the Athenians, the prisoners were ordered to be tried, in consequence of an accusation brought against that nation of having thrown all the captives of two galleys down a precipice, and of having resolved in full assembly to cut off the hands of those whom they should chance to make prisoners. The Athenians were therefore all massacred, except Adymantes, who had opposed this decree. Lysander reproached Phylocles, before he was put to death, with having depraved the people's minds, and given lessons of cruelty to all Greece.

"The Argives," says Plutarch, [32] "having put fifteen hundred of their citizens to death, the Athenians ordered sacrifices of expiation, that

it might please the gods to turn the hearts of the Athenians from so cruel a thought."

There are two sorts of corruptions -- one when the people do not observe the laws; the other when they are corrupted by the laws: an incurable evil, because it is in the very remedy itself.

13. Insufficiency of the Laws of Japan. Excessive punishments may even corrupt a despotic government; of this we have an instance in Japan.

Here almost all crimes are punished with death, [33] because disobedience to so great an emperor as that of Japan is reckoned an enormous crime. The question is not so much to correct the delinquent as to vindicate the authority of the prince. These notions are derived from servitude, and are owing especially to this, that as the emperor is universal proprietor, almost all crimes are directly against his interests.

They punish with death lies spoken before the magistrate; [34] a proceeding contrary to natural defence.

Even things which have not the appearance of a crime are severely punished; for instance, a man that ventures his money at play is put to death.

True it is that the character of this people, so amazingly obstinate, capricious, and resolute as to defy all dangers and calamities, seems to absolve their legislators from the imputation of cruelty, notwithstanding the severity of their laws. But are men who have a natural contempt for death, and who rip open their bellies for the least fancy -- are such men, I say, mended or deterred, or rather are they not hardened, by the continual prospect of punishments?

The relations of travellers inform us, with respect to the education of the Japanese, that children must be treated there with mildness, because

they become hardened to punishment; that their slaves must not be too roughly used, because they immediately stand upon their defence. Would not one imagine that they might easily have judged of the spirit which ought to reign in their political and civil government from that which should prevail in their domestic concerns?

A wise legislator would have endeavoured to reclaim people by a just temperature of punishments and rewards; by maxims of philosophy, morality, and religion, adapted to those characters; by a proper application of the rules of honour, and by the enjoyment of ease and tranquillity of life. And should he have entertained any apprehension that their minds, being inured to the cruelty of punishments, would no longer be restrained by those of a milder nature, he would have conducted himself[35] in another manner, and gained his point by degrees, in particular cases that admitted of any indulgence, he would have mitigated the punishment, till he should have been able to extend this mitigation to all cases.

But these are springs to which despotic power is a stranger; it may abuse itself, and that is all it can do: in Japan it has made its utmost effort, and has surpassed even itself in cruelty.

As the minds of the people grew wild and intractable, they were obliged to have recourse to the most horrid severity.

This is the origin, this the spirit, of the laws of Japan. They had more fury, however, than force. They succeeded the extirpation of Christianity; but such unaccountable efforts are a proof of their insufficiency. They wanted to establish a good policy, and they have shown greater marks of their weakness.

We have only to read the relation of the interview between the Emperor and the Deyro at Meaco.[36] The number of those who were suffocated or murdered in that city by ruffians is incredible; young maids and boys

were carried off by force, and found afterwards exposed in public places, at unseasonable hours, quite naked, and sewn in linen bags, to prevent their knowing which way they had passed; robberies were committed in all parts; the bellies of horses were ripped open, to bring their riders to the ground; and coaches were overturned, in order to strip the ladies. The Dutch, who were told they could not pass the night on the scaffolds without exposing themselves to the danger of being assassinated, came down, &c.

I shall here give one instance more from the same nation. The Emperor having abandoned himself to infamous pleasures, lived unmarried, and was consequently in danger of dying without issue. The Deyro sent him two beautiful damsels; one he married out of respect, but would not meddle with her. His nurse caused the finest women of the empire to be sent for, but all to no purpose. At length, an armourer's daughter having pleased his fancy, [37] he determined to espouse her, and had a son. The ladies belonging to the court, enraged to see a person of such mean extraction preferred to themselves, stifled the child. The crime was concealed from the Emperor; for he would have deluged the land with blood. The excessive severity of the laws hinders, therefore, their execution: when the punishment surpasses all measure, they are frequently obliged to prefer impunity to it.

14. Of the Spirit of the Roman Senate. Under the consulate of Acilius Glabrio and Piso, the Asilian law [38] was made to prevent the intriguing for places. Dio says [39] that the senate engaged the consuls to propose it, by reason that C. Cornelius, the tribune, had resolved to cause more severe punishments to be established against this crime; to which the people seemed greatly inclined. The senate rightly judged that immoderate punishments would strike, indeed, a terror into people's minds, but must have also this effect, that there would be nobody afterwards to accuse or condemn; whereas, by proposing moderate penalties, there would be always judges and accusers.

15. Of the Roman Laws in respect to Punishments. I am strongly confirmed in my sentiments upon finding the Romans on my side; and I think that punishments are connected with the nature of governments when I behold this great people changing in this respect their civil laws, in proportion as they altered their form of government.

The regal laws, made for fugitives, slaves, and vagabonds, were very severe. The spirit of a republic would have required that the decemvirs should not have inserted those laws in their Twelve Tables; but men who aimed at tyranny were far from conforming to a republican spirit.

Livy says, [40] in relation to the punishment of Metius Suffetius, dictator of Alba, who was condemned by Tullius Hostilius to be fastened to two chariots drawn by horses, and torn asunder, that this was the first and last punishment in which the remembrance of humanity seemed to have been lost. He is mistaken; the Twelve Tables are full of very cruel laws. [41]

The design of the decemvirs appears more conspicuous in the capital punishment pronounced against libellers and poets. This is not agreeable to the genius of a republic, where the people like to see the great men humbled. But persons who aimed at the subversion of liberty were afraid of writings that might revive its spirit. [42]

After the expulsion of the decemvirs, almost all the penal laws were abolished. It is true they were not expressly repealed; but as the Porcian law had ordained that no citizen of Rome should be put to death, they were of no further use.

This is exactly the time to which we may refer what Livy says [43] of the Romans, that no people were ever fonder of moderation in punishments.

But if to the lenity of penal laws we add the right which the party accused had of withdrawing before judgment was pronounced, we shall find

that the Romans followed the spirit which I have observed to be natural to a republic.

Sulla, who confounded tyranny, anarchy, and liberty, made the Cornelian laws. He seemed to have contrived regulations merely with a view to create new crimes. Thus distinguishing an infinite number of actions by the name of murder, he found murderers in all parts; and by a practice too much followed, he laid snares, sowed thorns, and opened precipices, wheresoever the citizens set their feet.

Almost all Sulla's laws contained only the interdiction of fire and water. To this Cæsar added the confiscation of goods[44] because the rich, by preserving their estates in exile, became bolder in the perpetration of crimes.

The emperors, having established a military government, soon found that it was as terrible to the prince as to the subject; they endeavoured therefore to temper it, and with this view had recourse to dignities, and to the respect with which those dignities were attended.

The government thus drew nearer a little to monarchy, and punishments were divided into three classes:[45] those which related to the principal persons in the state,[46] which were very mild: those which were inflicted on persons of an inferior rank,[47] and were more severe; and, in fine, such as concerned only persons of the lowest condition,[48] which were the most rigorous.

Maximinus, that fierce and stupid prince, increased the rigour of the military government which he ought to have softened. The senate were informed, says Capitolinus,[49] that some had been crucified, others exposed to wild beasts, or sewn up in the skins of beasts lately killed, without any manner of regard to their dignity. It seemed as if he wanted to exercise the military discipline, on the model of which he pretended to regulate the civil administration.

In The Consideration on the Rise and Declension of the Roman Grandeur[50] we find in what manner Constantine changed the military despotism into a military and civil government, and drew nearer to monarchy. There we may trace the different revolutions of this state, and see how they fell from rigour to indolence, and from indolence to impunity.

16. Of the just Proportion between Punishments and Crimes. It is an essential point, that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller, and that which is more pernicious to society rather than that which is less.

"An impostor,[51] who called himself Constantine Ducas, raised a great insurrection at Constantinople. He was taken and condemned to be whipped; but upon informing against several persons of distinction, he was sentenced to be burned as a calumniator." It is very extraordinary that they should thus proportion the punishments between the crime of high treason and that of calumny.

This puts me in mind of a saying of Charles II, King of Great Britain. He saw a man one day standing in the pillory; upon which he asked what crime the man had committed. He was answered, "Please your Majesty, he has written a libel against your ministers." "The fool!" said the King, "why did he not write against me? They would have done nothing to him."

"Seventy persons having conspired against the Emperor Basil, he ordered them to be whipped, and the hair of their heads and beards to be burned. A stag, one day, having taken hold of him by the girdle with his horn, one of his retinue drew his sword, cut the girdle, and saved him; upon which he ordered that person's head to be cut off, for having," said he, "drawn his sword against his sovereign." [52] Who could imagine that the same prince could ever have passed two such different judgments?

It is a great abuse amongst us to condemn to the same punishment a person that only robs on the highway and another who robs and murders. Surely, for the public security, some difference should be made in the punishment.

In China, those who add murder to robbery are cut in pieces:[53] but not so the others; to this difference it is owing that though they rob in that country they never murder.

In Russia, where the punishment of robbery and murder is the same, they always murder.[54] The dead, say they, tell no tales.

Where there is no difference in the penalty, there should be some in the expectation of pardon. In England they never murder on the highway, because robbers have some hopes of transportation, which is not the case in respect to those that commit murder.

Letters of grace are of excellent use in moderate governments. This power which the prince has of pardoning, exercised with prudence, is capable of producing admirable effects. The principle of despotic government, which neither grants nor receives any pardon, deprives it of these advantages.

17. Of the Rack. The wickedness of mankind makes it necessary for the law to suppose them better than they really are. Hence the deposition of two witnesses is sufficient in the punishment of all crimes. The law believes them, as if they spoke by the mouth of truth. Thus we judge that every child conceived in wedlock is legitimate; the law having a confidence in the mother, as if she were chastity itself. But the use of the rack against criminals cannot be defended on a like plea of necessity.

We have before us the example of a nation blessed with an excellent civil government,[55] where without any inconvenience the practice of

racking criminals is rejected. It is not, therefore, in its own nature necessary.[56]

So many men of learning and genius have written against the custom of torturing criminals, that after them I dare not presume to meddle with the subject. I was going to say that it might suit despotic states, where whatever inspires fear is the fittest spring of government. I was going to say that the slaves among the Greeks and Romans -- but nature cries out aloud, and asserts her rights.

18. Of pecuniary and corporal Punishments. Our ancestors, the Germans, admitted of none but pecuniary punishments. Those free and warlike people were of opinion that their blood ought not to be spilled but with sword in hand. On the contrary, these punishments are rejected by the Japanese,[57] under pretence that the rich might elude them. But are not the rich afraid of being stripped of their property? And might not pecuniary penalties be proportioned to people's fortunes? And, in fine, might not infamy be added to those punishments?

A good legislator takes a just medium; he ordains neither always pecuniary, nor always corporal punishments.

19. Of the Law of Retaliation. The use of the law of retaliation[58] is very frequent in despotic countries, where they are fond of simple laws. Moderate governments admit of it sometimes; but with this difference, that the former exercise it in full rigour, whereas among the latter it ever receives some kind of limitation.

The law of the Twelve Tables admitted two: first, it never condemned to retaliation, but when the plaintiff could not be satisfied in any other manner.[59] Secondly, after condemnation they might pay damages and interest,[60] and then the corporal was changed into a pecuniary punishment.[61]

20. Of the Punishment of Fathers for the Crimes of their Children. In China, fathers are punished for the crimes of their children. This was likewise the custom of Peru[62] -- a custom derived from the notion of despotic power. Little does it signify to say that in China the father is punished for not having exerted that paternal authority which nature has established, and the laws themselves have improved. This still supposes that there is no honour among the Chinese. Amongst us, parents whose children are condemned by the laws of their country, and children[63] whose parents have undergone the like fate, are as severely punished by shame, as they would be in China by the loss of their lives.

21. Of the Clemency of the Prince. Clemency is the characteristic of monarchs. In republics, whose principle is virtue, it is not so necessary. In despotic governments, where fear predominates, it is less customary, because the great men are to be restrained by examples of severity. It is more necessary in monarchies, where they are governed by honour, which frequently requires what the very law forbids. Disgrace is here equivalent to chastisement; and even the forms of justice are punishments. This is because particular kinds of penalty are formed by shame, which on every side invades the delinquent.

The great men in monarchies are so heavily punished by disgrace, by the loss (though often imaginary) of their fortune, credit, acquaintances, and pleasures, that rigour in respect to them is needless. It can tend only to divest the subject of the affection he has for the person of his prince, and of the respect he ought to have for public posts and employments.

As the instability of the great is natural to a despotic government, so their security is interwoven with the nature of monarchy.

So many are the advantages which monarchs gain by clemency, so greatly does it raise their fame, and endear them to their subjects, that it is generally happy for them to have an opportunity of displaying it; which

in this part of the world is seldom wanting.

Some branch, perhaps, of their authority, but never hardly the whole, will be disputed; and if they sometimes fight for their crown, they do not fight for their life.

But some may ask when it is proper to punish, and when to pardon. This is a point more easily felt than prescribed. When there is danger in the exercise of clemency, it is visible; nothing so easy as to distinguish it from that imbecility which exposes princes to contempt and to the very incapacity of punishing.

The Emperor Maurice made a resolution never to spill the blood of his subjects. Anastasius[64] punished no crimes at all. Isaac Angelus took an oath that no one should be put to death during his reign. Those Greek emperors forgot that it was not for nothing they were entrusted with the sword.

1. In Mazulipatam it could never be found out that there was such a thing as a written law. See the Collection of Voyages that Contributed to the Establishment of the East India Company, iv., part I, p. 391. The Indians are regulated in their decisions by certain customs. The Vedas and such books do not contain civil laws, but religious precepts. See Edifying Letters, coll. xiv.

2. Cæsar, Cromwell, and many others.

3. Non liquet.

4. Quas actiones ne populus prout vellet institueret, certas solemnesque esse voluerunt -- Dig. de Orig. Jur., ii, § 6.

5. In France a person, though sued for more than he owes, loses his costs if he has not offered to pay the exact debt.
6. Discourse on the first decade of Livy, i. 7.
7. This is well explained in Cicero's oration Pro Cæcina, towards the end, 100.
8. This was the law at Athens, as appears by Demosthenes. Socrates refused to make use of it.
9. Demosthenes, Pro Corona, p. 494, Frankfort, 1604.
10. See Philostratus, Lives of the Sophists, i. Life of Æschines.
11. Plato does not think it right that kings, who, as he says, are priests, should preside at trials where people are condemned to death, to exile, or to imprisonment.
12. See the account of the trial of the Duke de la Valette. It is printed in the Memoirs of Montresor, ii, p. 62.
13. It was afterwards revoked. See the same account, ii. p. 236. It was ordinarily a right of the peerage that a peer criminally accused should be judged by the king, as Francis II in the trial of the Prince of Condé, and Charles VII in the case of the Duc d'Alençon. To-day, the presence of the king at the trial of a peer, in order to condemn him would seem an act of tyranny. -- Voltaire.
14. Annals, xi. 5.
15. Ibid., xiii. 4.
16. Histories, v.

17. The same disorder happened under Theodosius the younger.
18. Secret History.
19. See Leg. 2, § 24, Dig. ff. de orig. jur.
20. Quod pater puellae abesset, locum injuria esse ratus. -- Livy, dec. I, iii. 44.
21. And in a great many other cities.
22. See in Tacitus the rewards given to those informers. -- Annals, i. 30.
23. Book ix.
24. I shall show hereafter that China is, in this respect, in the same case as a republic or a monarchy.
25. Suppose, for instance, to prevent the execution of a decree, the common people paid a fine of forty sous, and the nobility of sixty livres. -- Somme Rurale, ii, p. 198, ed. Goth. 1512; and Beaumanoir, 61, p. 309.
26. See the Council of Peter Defontaines, 13, especially art. 22.
27. It was made by Valerius Publicola soon after the expulsion of the kings, and was twice renewed, both times by magistrates of the same family. As Livy observes, x, 9, the question was not to give it a greater force, but to render its injunctions more perfect. "Diligentius sanctum," says Livy, *ibid.*
28. Lex Porcia pro tergo civium lata. It was made in the 454th year of the foundation of Rome.

29. Nihil ultra quam improbe factum adjecet -- Livy, loc. cit.
30. They slit his nose or cut off his ears.
31. Xenophon, Hist., iii. 8, §§ 20-22.
32. Of Those Who Are Intrusted with the Direction of the State Affairs,
14.
33. See Kempfer.
34. Collection of Voyages that Contributed to the Establishment of the
East India Company, iii, part I, p. 428.
35. Let this be observed as a maxim in practice, with regard to cases
where the minds of people have been depraved by too great a severity of
punishments.
36. Collection of Voyages that Contributed to the Establishment of the
East India Company, v, p. 2.
37. Ibid.
38. The guilty were condemned to a fine; they could not be admitted into
the rank of senators, nor nominated to any public office. -- Dio, xxxvi.
21.
39. Ibid.
40. Book i. 28.
41. We find there the punishment of fire, and generally capital
punishments, theft punished with death, &c.

42. Sulla, animated with the same spirit as the decemvirs, followed their example in augmenting the penal laws against satirical writers.

43. Book i, 28.

44. Poenas facinorum auxit, cum locupletes eo facilius scelere se obligarent, quod integris patrimoniis exularent. -- Suetonius in Life of Julius Cæsar, 162.

45. See the Leg. 3, § legis, ad leg. Cornel, de sicariis, and a vast number of others in the Digest and in the Codex.

46. Sublimiores.

47. Medios.

48. Infirnos. Leg. 3, § legis, ad leg. Cornel, de sicariis.

49. Jul. Cap., Maximini duo, 8.

50. Chapter 17.

51. Hist. of Nicephorus, patriarch of Constantinople.

52. In Nicephorus' History.

53. Father Du Halde, i, p. 6.

54. Present State of Russia, Perry.

55. The English.

56. The citizens of Athens could not be put to the rack (Lysias, Orat. contra Agorat.) unless it was for high treason. The torture was used

within thirty days after condemnation. (Curius Fortunatus. Rhetor, scol., ii.) There was no preparatory torture. In regard to the Romans, the Leg. 3, 4, ad leg. Jul. majest., show that birth, dignity, and the military profession exempted people from the rack, except in cases of high treason. See the prudent restrictions of this practice made by the laws of the Visigoths.

57. See Kempfer.

58. It is established in the Koran. See the chapter, Of the Cow.

59. Si membrum rupit, ni cum eo pacit, talio esto. Aulus Gellius, xx. i.

60. Ibid.

61. See also the Law of the Visigoths, vi, tit. 4, §§ 3, 5.

62. See Garcilasso, History of the Civil Wars of the Spaniards in the West Indies.

63. "Instead of punishing them," says Plato, "they ought to be commended for not having followed their fathers' example." -- Laws, ix.

64. Fragment of Suidas, in Constantine Porphyrogenitus.