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XII.4 That freedom is favored by the nature of punishments and their proportion

- The Spirit of Law - Book XII. On laws that constitute political liberty in its relation to the citizen -

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XII.4 That freedom is favored by the nature of punishments and their proportion

It is the triumph of liberty when the criminal laws derive every punishment from the particular nature of the crime. All arbitrariness ceases ; the punishment is handed down not by the legislator's whim, but by the nature of the thing ; and it is not man committing violence against man.

There are four sorts of crimes. Those of the first kind violate religion ; those of the second kind, morality ; those of the third, tranquility ; those of the fourth, the security of the citizens. The punishments inflicted should derive from the nature of each of these kinds.

In the category of crimes involving religion I place only those which attack it directly, like all simple sacrileges. For crimes which interfere with its exercise are of the same nature as those that offend the tranquillity of the citizens or their security, and must be referred to those categories.

In order for the punishment of simple sacrileges to be derived from the nature of the thing, [1] it must consist in the deprivation of all the advantages that religion provides : expulsion from the temples, deprivation of the fellowship of the faithful for a time or forever, flight from their presence, execrations, shunnings, and exorcisms. [2]

In matters that disrupt the tranquility or the security of the state, hidden acts fall in the jurisdiction of human justice. But in those that offend the deity, where there is no public act, there is no substance of crime ; everything takes place between man and God, who knows the measure and the time of his vengeance. But if, confusing things, we also pursue the hidden sacrilege, we bring an inquisition to bear on a kind of act which does not require it, we destroy the freedom of citizens by arming against them the zeal of timid consciences and that of bold ones.

The harm has issued from the notion that we must avenge the deity. But we must honor the deity and never avenge him. Indeed, if we acted on this last notion, where would retributions end ? If the laws of men must avenge an infinite being, they will be gauged by his infinity, and not by the frailty, the ignorance, and the impulses of humankind.

An historian of Provence relates a fact that depicts very well for us the effect this idea of avenging the deity can have on feeble minds. [3] A Jew accused of blasphemy against the Holy Virgin was sentenced to be flayed. Some masked knights, knives in hand, mounted the gallows and dispatched the executioner so they could themselves avenge the Holy Virgin's honor... I abstain from anticipating the reader's reflections.

The second class is crimes that are against morals, such as the violation of public or private decency, in other words, of restrictions on the manner in which one is to enjoy the pleasures attached to the use of the senses and the union of bodies. The penalties for these crimes must again be derived from the nature of the thing : deprivation of the advantages which society has attached to the purity of morals : fines, shame, having to hide, public humiliation, expulsion from the city and from society : in sum, all the penalties which correctional jurisdiction has at its disposal suffice to repress the effrontery of the two sexes. Indeed these things are less based on malice than on lack of control or self-esteem.

At issue here are only crimes solely involving morals, not those that also threaten public safety, such as abduction and rape, which are of the fourth kind.

Crimes of the third category are those that compromise the citizens' tranquility, and their penalties must be derived from the nature of the thing, and relate to that tranquility, such as prison, exile, corrections, and other penalties that reclaim turbulent spirits and return them to the established order.

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I limit crimes against tranquility to things that contain a simple breach of public order ; for those which, by disturbing tranquility, threaten security at the same time, must be placed in the fourth category.

The penalties for these last crimes are what are called corporal punishments. They are a kind of retaliation, by which society refuses security to a citizen who has deprived or attempted to deprive another of it. This penalty is derived from the nature of the thing, drawn from reason and the sources of good and evil. A citizen deserves death when he has violated security to the point of taking a life or attempting to do so. This death penalty is like the remedy of the sick society. When security is violated with respect to property, there can be reasons why the punishment should be capital ; but it would perhaps be preferable, and it would be more in their nature, for crimes against the security of property to be punished by loss of property ; and that should be so if the fortunes were common or equal. But as it is those who possess nothing who are more likely to endanger the property of others, corporal punishment has had to substitute for the pecuniary kind.

All that I am saying is drawn from nature, and is most favorable to the citizen's freedom.

[1] St. Louis made laws so exaggerated against those who swore that the pope felt himself obliged to tell him so. The prince moderated his zeal, and attenuated his laws. See his Ordinances.

[2] ["*Conjuration, in ecclesiastical matters, means exorcism*" (Furetière).]

[3] Father Bougerel. [I.e., Joseph Bougerel, *Mémoires pour servir à l'histoire de plusieurs hommes illustres de Provence*.]