

## Chapter XLIV: Idea Of The Roman Jurisprudence.--Part VIII.

A new spirit of legislation, respectable even in its error, arose in the empire with the religion of Constantine. [197] The laws of Moses were received as the divine original of justice, and the Christian princes adapted their penal statutes to the degrees of moral and religious turpitude. Adultery was first declared to be a capital offence: the frailty of the sexes was assimilated to poison or assassination, to sorcery or parricide; the same penalties were inflicted on the passive and active guilt of paederasty; and all criminals of free or servile condition were either drowned or beheaded, or cast alive into the avenging flames. The adulterers were spared by the common sympathy of mankind; but the lovers of their own sex were pursued by general and pious indignation: the impure manners of Greece still prevailed in the cities of Asia, and every vice was fomented by the celibacy of the monks and clergy. Justinian relaxed the punishment at least of female infidelity: the guilty spouse was only condemned to solitude and penance, and at the end of two years she might be recalled to the arms of a forgiving husband. But the same emperor declared himself the implacable enemy of unmanly lust, and the cruelty of his persecution can scarcely be excused by the purity of his motives. [198] In defiance of every principle of justice, he stretched to past as well as future offences the operations of his edicts, with the previous allowance of a short respite for confession and pardon. A painful death was inflicted by the amputation of the sinful instrument, or the insertion of sharp reeds into the pores and tubes of most exquisite sensibility; and

Justinian defended the propriety of the execution, since the criminals would have lost their hands, had they been convicted of sacrilege. In this state of disgrace and agony, two bishops, Isaiah of Rhodes and Alexander of Diospolis, were dragged through the streets of Constantinople, while their brethren were admonished, by the voice of a crier, to observe this awful lesson, and not to pollute the sanctity of their character. Perhaps these prelates were innocent. A sentence of death and infamy was often founded on the slight and suspicious evidence of a child or a servant: the guilt of the green faction, of the rich, and of the enemies of Theodora, was presumed by the judges, and paederasty became the crime of those to whom no crime could be imputed. A French philosopher [199] has dared to remark that whatever is secret must be doubtful, and that our natural horror of vice may be abused as an engine of tyranny. But the favorable persuasion of the same writer, that a legislator may confide in the taste and reason of mankind, is impeached by the unwelcome discovery of the antiquity and extent of the disease. [200]

[Footnote 197: See the laws of Constantine and his successors against adultery, sodomy &c., in the Theodosian, (l. ix. tit. vii. leg. 7, l. xi. tit. xxxvi leg. 1, 4) and Justinian Codes, (l. ix. tit. ix. leg. 30, 31.) These princes speak the language of passion as well as of justice, and fraudulently ascribe their own severity to the first Caesars.]

[Footnote 198: Justinian, Novel. lxxvii. cxxxiv. cxli. Procopius in Anecdote. c. 11, 16, with the notes of Alemannus. Theophanes, p. 151.

Cedrenus. p. 688. Zonaras, l. xiv. p. 64.]

[Footnote 199: Montesquieu, *Esprit des Loix*, l. xii. c. 6. That eloquent philosopher conciliates the rights of liberty and of nature, which should never be placed in opposition to each other.]

[Footnote 200: For the corruption of Palestine, 2000 years before the Christian aera, see the history and laws of Moses. Ancient Gaul is stigmatized by Diodorus Siculus, (tom. i. l. v. p. 356,) China by the Mahometar and Christian travellers, (*Ancient Relations of India and China*, p. 34 translated by Renaudot, and his bitter critic the Pere Premare, *Lettres Edifiantes*, tom. xix. p. 435,) and native America by the Spanish historians, (Garcilasso de la Vega, l. iii. c. 13, Rycaut's translation; and *Dictionnaire de Bayle*, tom. iii. p. 88.) I believe, and hope, that the negroes, in their own country, were exempt from this moral pestilence.]

The free citizens of Athens and Rome enjoyed, in all criminal cases, the invaluable privilege of being tried by their country. [201] 1. The administration of justice is the most ancient office of a prince: it was exercised by the Roman kings, and abused by Tarquin; who alone, without law or council, pronounced his arbitrary judgments. The first consuls succeeded to this regal prerogative; but the sacred right of appeal soon abolished the jurisdiction of the magistrates, and all public causes were decided by the supreme tribunal of the people. But a wild democracy, superior to the forms, too often disdains the essential

principles, of justice: the pride of despotism was envenomed by plebeian envy, and the heroes of Athens might sometimes applaud the happiness of the Persian, whose fate depended on the caprice of a single tyrant. Some salutary restraints, imposed by the people or their own passions, were at once the cause and effect of the gravity and temperance of the Romans. The right of accusation was confined to the magistrates.

A vote of the thirty five tribes could inflict a fine; but the cognizance of all capital crimes was reserved by a fundamental law to the assembly of the centuries, in which the weight of influence and property was sure to preponderate. Repeated proclamations and adjournments were interposed, to allow time for prejudice and resentment to subside: the whole proceeding might be annulled by a seasonable omen, or the opposition of a tribune; and such popular trials were commonly less formidable to innocence than they were favorable to guilt. But this union of the judicial and legislative powers left it doubtful whether the accused party was pardoned or acquitted; and, in the defence of an illustrious client, the orators of Rome and Athens address their arguments to the policy and benevolence, as well as to the justice, of their sovereign. 2. The task of convening the citizens for the trial of each offender became more difficult, as the citizens and the offenders continually multiplied; and the ready expedient was adopted of delegating the jurisdiction of the people to the ordinary magistrates, or to extraordinary inquisitors. In the first ages these questions were rare and occasional. In the beginning of the seventh century of Rome they were made perpetual: four praetors were annually empowered to sit

in judgment on the state offences of treason, extortion, peculation, and bribery; and Sylla added new praetors and new questions for those crimes which more directly injure the safety of individuals. By these inquisitors the trial was prepared and directed; but they could only pronounce the sentence of the majority of judges, who with some truth, and more prejudice, have been compared to the English juries. [202] To discharge this important, though burdensome office, an annual list of ancient and respectable citizens was formed by the praetor. After many constitutional struggles, they were chosen in equal numbers from the senate, the equestrian order, and the people; four hundred and fifty were appointed for single questions; and the various rolls or decuries of judges must have contained the names of some thousand Romans, who represented the judicial authority of the state. In each particular cause, a sufficient number was drawn from the urn; their integrity was guarded by an oath; the mode of ballot secured their independence; the suspicion of partiality was removed by the mutual challenges of the accuser and defendant; and the judges of Milo, by the retrenchment of fifteen on each side, were reduced to fifty-one voices or tablets, of acquittal, of condemnation, or of favorable doubt. [203] 3. In his civil jurisdiction, the praetor of the city was truly a judge, and almost a legislator; but, as soon as he had prescribed the action of law, he often referred to a delegate the determination of the fact. With the increase of legal proceedings, the tribunal of the centumvirs, in which he presided, acquired more weight and reputation. But whether he acted alone, or with the advice of his council, the most absolute powers might be trusted to a magistrate who was annually chosen by the votes of

the people. The rules and precautions of freedom have required some explanation; the order of despotism is simple and inanimate. Before the age of Justinian, or perhaps of Diocletian, the decuries of Roman judges had sunk to an empty title: the humble advice of the assessors might be accepted or despised; and in each tribunal the civil and criminal jurisdiction was administered by a single magistrate, who was raised and disgraced by the will of the emperor. [Footnote 201: The important subject of the public questions and judgments at Rome, is explained with much learning, and in a classic style, by Charles Sigonius, (l. iii. de Judiciis, in Opp. tom. iii. p. 679--864;) and a good abridgment may be found in the *Republique Romaine* of Beaufort, (tom. ii. l. v. p. 1--121.) Those who wish for more abstruse law may study Noodt, (*de Jurisdictione et Imperio Libri duo*, tom. i. p. 93--134,) Heineccius, (*ad Pandect. l. i. et ii. ad Institut. l. iv. tit. xvii Element. ad Antiquitat.*) and Gravina (*Opp. 230--251.*)]

[Footnote 202: The office, both at Rome and in England, must be considered as an occasional duty, and not a magistracy, or profession. But the obligation of a unanimous verdict is peculiar to our laws, which condemn the jurymen to undergo the torture from whence they have exempted the criminal.]

[Footnote 203: We are indebted for this interesting fact to a fragment of Asconius Pedianus, who flourished under the reign of Tiberius. The loss of his Commentaries on the Orations of Cicero has deprived us of a valuable fund of historical and legal knowledge.]

A Roman accused of any capital crime might prevent the sentence of the law by voluntary exile, or death. Till his guilt had been legally proved, his innocence was presumed, and his person was free: till the votes of the last century had been counted and declared, he might peaceably secede to any of the allied cities of Italy, or Greece, or Asia. [204] His fame and fortunes were preserved, at least to his children, by this civil death; and he might still be happy in every rational and sensual enjoyment, if a mind accustomed to the ambitious tumult of Rome could support the uniformity and silence of Rhodes or Athens. A bolder effort was required to escape from the tyranny of the Caesars; but this effort was rendered familiar by the maxims of the stoics, the example of the bravest Romans, and the legal encouragements of suicide. The bodies of condemned criminals were exposed to public ignominy, and their children, a more serious evil, were reduced to poverty by the confiscation of their fortunes. But, if the victims of Tiberius and Nero anticipated the decree of the prince or senate, their courage and despatch were recompensed by the applause of the public, the decent honors of burial, and the validity of their testaments. [205] The exquisite avarice and cruelty of Domitian appear to have deprived the unfortunate of this last consolation, and it was still denied even by the clemency of the Antonines. A voluntary death, which, in the case of a capital offence, intervened between the accusation and the sentence, was admitted as a confession of guilt, and the spoils of the deceased were seized by the inhuman claims of the treasury. [206] Yet the civilians have always respected the natural right of a citizen to

dispose of his life; and the posthumous disgrace invented by Tarquin, [207] to check the despair of his subjects, was never revived or imitated by succeeding tyrants. The powers of this world have indeed lost their dominion over him who is resolved on death; and his arm can only be restrained by the religious apprehension of a future state. Suicides are enumerated by Virgil among the unfortunate, rather than the guilty; [208] and the poetical fables of the infernal shades could not seriously influence the faith or practice of mankind. But the precepts of the gospel, or the church, have at length imposed a pious servitude on the minds of Christians, and condemn them to expect, without a murmur, the last stroke of disease or the executioner. [Footnote 204: Polyb. 1. vi. p. 643. The extension of the empire and city of Rome obliged the exile to seek a more distant place of retirement.]

[Footnote 205: Qui de se statuebant, humabanta corpora, manebant testamenta; pretium festinandi. Tacit. Annal. vi. 25, with the Notes of Lipsius.]

[Footnote 206: Julius Paulus, (Sentent. Recept. 1. v. tit. xii. p. 476,) the Pandects, (xlviii. tit. xxi.,) the Code, (l. ix. tit. 1.,) Bynkershoek, (tom. i. p. 59, Observat. J. C. R. iv. 4,) and Montesquieu, (Esprit des Loix, l. xxix. c. ix.,) define the civil limitations of the liberty and privileges of suicide. The criminal penalties are the production of a later and darker age.]

[Footnote 207: Plin. Hist. Natur. xxxvi. 24. When he fatigued his



subjects in building the Capitol, many of the laborers were provoked to despatch themselves: he nailed their dead bodies to crosses.]

[Footnote 208: The sole resemblance of a violent and premature death has engaged Virgil (*Aeneid*, vi. 434--439) to confound suicides with infants, lovers, and persons unjustly condemned. Heyne, the best of his editors, is at a loss to deduce the idea, or ascertain the jurisprudence, of the Roman poet.]

The penal statutes form a very small proportion of the sixty-two books of the Code and Pandects; and in all judicial proceedings, the life or death of a citizen is determined with less caution or delay than the most ordinary question of covenant or inheritance. This singular distinction, though something may be allowed for the urgent necessity of defending the peace of society, is derived from the nature of criminal and civil jurisprudence. Our duties to the state are simple and uniform: the law by which he is condemned is inscribed not only on brass or marble, but on the conscience of the offender, and his guilt is commonly proved by the testimony of a single fact. But our relations to each other are various and infinite; our obligations are created, annulled, and modified, by injuries, benefits, and promises; and the interpretation of voluntary contracts and testaments, which are often dictated by fraud or ignorance, affords a long and laborious exercise to the sagacity of the judge. The business of life is multiplied by the extent of commerce and dominion, and the residence of the parties in the distant provinces of an empire is productive of doubt, delay, and

inevitable appeals from the local to the supreme magistrate. Justinian, the Greek emperor of Constantinople and the East, was the legal successor of the Latin shepherd who had planted a colony on the banks of the Tyber. In a period of thirteen hundred years, the laws had reluctantly followed the changes of government and manners; and the laudable desire of conciliating ancient names with recent institutions destroyed the harmony, and swelled the magnitude, of the obscure and irregular system. The laws which excuse, on any occasions, the ignorance of their subjects, confess their own imperfections: the civil jurisprudence, as it was abridged by Justinian, still continued a mysterious science, and a profitable trade, and the innate perplexity of the study was involved in tenfold darkness by the private industry of the practitioners. The expense of the pursuit sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants. Such costly justice might tend to abate the spirit of litigation, but the unequal pressure serves only to increase the influence of the rich, and to aggravate the misery of the poor. By these dilatory and expensive proceedings, the wealthy pleader obtains a more certain advantage than he could hope from the accidental corruption of his judge. The experience of an abuse, from which our own age and country are not perfectly exempt, may sometimes provoke a generous indignation, and extort the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decrees of a Turkish cadhi. Our calmer reflection will suggest, that such forms and delays are necessary to guard the person and property of the citizen; that the discretion of the judge is the first engine of tyranny; and that the

laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry. But the government of Justinian united the evils of liberty and servitude; and the Romans were oppressed at the same time by the multiplicity of their laws and the arbitrary will of their master.