

reign in their political and civil government from that which should prevail in their domestic concerns?

A wise legislator would have endeavored 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 honor, 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 ^l 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 polity, 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.^w 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, etc.

I shall here give one instance more from the same nation.

^l 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.

^w "Collection of Voyages that contributed to the establishment of the East India Company," tom. v. p. 2.

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 armorers' daughter having pleased his fancy,ⁿ 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 ^o was made to prevent the intriguing for places. Dio says ^p 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

ⁿ "Collection of Voyages that contributed to the establishment of the East India Company," tom. v. p. 2.

^o The guilty were condemned to a

fine; they could not be admitted into the rank of senators, nor nominated to any public office.—Dio, book XXXVI.

^p Book XXXVI.

Twelve Tables; but men who aimed at tyranny were far from conforming to a republican spirit.

Livy says,^a 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.^b

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.^c

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^d 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.

Sylla, 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 Sylla's laws contained only the interdiction of fire and water. To this Cæsar added the confiscation of goods,^e because the rich, by preserving their estates in exile, became bolder in the perpetration of crimes.

^a Lib. I.
^b We find there the punishment of fire, and generally capital punishments, theft punished with death, etc.
^c Sylla, animated with the same spirit as the Decemvirs, followed their exam-

ple in augmenting the penal laws against satirical writers.

^d Book I.
^e "Pœnas facinorum auxit, cum locupletes eo facilius scelere se obligarent, quod integris patrimoniis exularent."—Suet. in "Jul. Cæsare."

The emperors, having established a military government, soon found that it was as terrible to the prince as to the subject; they endeavored therefore to temper it, and with his 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:^f those which related to the principal persons in the state,^g which were very mild; those which were inflicted on persons of an inferior rank,^h and were more severe; and, in fine, such as concerned only persons of the lowest condition,ⁱ which were the most rigorous.

Maximinus, that fierce and stupid prince, increased the rigor of the military government which he ought to have softened. The Senate were informed, says Capitolinus,^j 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,"^k 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 rigor 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,^l who called himself Constantine Ducas, raised a great insurrection at Constantinople. He was taken and condemned to be whipped; but upon informing against

^f See the 3d law, sec. legis ad leg. Cornel. "de Sicariis," and a vast number of others in the Digest and in the Codex.
^g Sublimiores.
^h Medios.

ⁱ Infimos. Leg. 3, sec. legis ad leg. Cornel. "de Sicariis."
^j Jul. Cap., Maximini duo.
^k Chap. xvii.
^l "History of Nicephorus, Patriarch of Constantinople."

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.'" ^m 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:ⁿ 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.^o The dead, they say, 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 ef-

^m In Nicephorus's history.
ⁿ Du Halde, tom. i. p. 6.

^o "Present State of Russia," by Perry.

fects. 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,^p where without any inconvenience the practice of racking criminals is rejected. It is not, therefore, in its own nature necessary.^q

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,^r 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?

^p The English.

^q The citizens of Athens could not be put to the rack (Lysias, "Orat. in Agor. rat.") unless it was for high treason. The torture was used within thirty days after condemnation. (Curius Fortunatus, "Rhetor. Schol." lib. II.) There was no preparatory torture. In regard to the

Romans, the 3d and 4th laws, "ad leg. Juliam 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.

^r See Kempfer.

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 *s* 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 rigor, 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.^t Secondly, after condemnation they might pay damages and interest,^u and then the corporal was changed into a pecuniary punishment.^v

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 *w*—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 honor among the Chinese. Amongst us, parents whose children are condemned by the laws of their country, and children *x* 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

^s It is established in the Koran. See the chapter of the Cow.

^t "Si membrum rupit, ni cum eo pacit, talio esto."—Aulus Gellius, lib. XX, cap. i.

^u Ibid.

^v See also the law of the Visigoths, book VI. tit. iv. secs. 3 and 5.

^w See Garcilaso, "History of the Civil Wars of the Spaniards."

^x "Instead of punishing them," says Plato, "they ought to be commended for not having followed their fathers' example."—Book IX. of Laws.

severity. It is more necessary in monarchies, where they are governed by honor, 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 rigor 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 *y* made a resolution never to spill the blood of his subjects. Anastasius *z* 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 intrusted with the sword.

^y Evagr. Hist.

^z Frag. of Suidas, in Constantine Porphyrogenitus.