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THE INFLUENCE OF CHRISTIANITY ON ROMAN CRIMINAL LAW

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REASONABLE methods of suppressing crime are probably an almost unerring index of a high order of civilization, but the reverse proposition cannot be accepted without reservations. It would, for instance, be unfair to judge eighteenth-century England by the unreasonableness of its criminal law. The toleration of bad laws that are old has obviously a different significance from the introduction of new laws that are bad. But when we find a disposition to create new categories of crime and to increase the severity of punishments, we may fairly take these tendencies as an indication of a real retrogression.

In the Roman Empire both these tendencies are marked. They appear with Augustus; they are conspicuous under Constantine and his successors. It need hardly be said that by making punishments more cruel the legislators did not make men better or happier. The works of John Chrysostom, who was well acquainted with the life of two populous capitals in the latter years of the fourth century, show that the morality of his age differed little from that which had been satirized by Juvenal. The history of criminal law under the Empire is, indeed, an illustration of the cynical reflections which Thucydides put into the mouth of Diodotus when he pleaded with the Athenians to show mercy to Mytilene:—

> All men, both in public and in private life, are naturally prone to err, and there is no law which will deter them. For men have exhausted the whole list of penalties, ever adding something if perhaps they might suffer less from wrongdoers. And it is natural that long ago the punishments inflicted for the greatest crimes should have been milder, but as time went on and there were still transgressions they now in most cases go as far as death. And, nevertheless, transgressions are still committed. Something more terrible still has yet to be invented, if crime is to cease, for it must be admitted that death is no check (iii, c. 45).

The employment of capital punishment in the case of ordinary crimes would possibly have disappeared in the Roman State if the tendencies that prevailed in the last period of the Republic had continued. But the policy of Augustus prevented such a development, and throughout the early Empire the system of criminal law embodied in the laws of Sulla, Pompey, and Augustus remained

unchanged. Yet, although the list of crimes and the estimate of their comparative gravity remained the same, the punishments for large sections of the population became far more severe. A difference was drawn between different classes of freemen. Judged by modern ideas, this is, perhaps, the greatest blot on the law both in the early Empire and in the later Empire (up to the eighth century). Hitherto there had been one law for freemen, another for slaves. Now there was one law for the crimes of the rich, another for those of the poor. A distinction was recognized between the honourable or reputable and the humble or plebeian classes, and the punishment meted out to the criminal depended on the class to which he belonged. The privileged class (which included persons of senatorial and equestrian rank, soldiers and veterans, decurions and their children) was in general exempt from degrading punishments. The guiding principle was the assimilation of the proletariat to slaves, and punishments hitherto servile were extended to poor freemen. Under the Republic no freeman could be legally tortured, but under the Empire men of the lower classes were submitted to the question. The severest penalty next to death was servitude in the mines; this horrible fate was never inflicted on members of the better classes, who would be deported to an island or an oasis for the same crime which sent a humble Roman to a living death.[1] If the Christian Church, when it rose to power, had exerted itself to put an end to this injustice, it would have performed an action which would weigh heavily in its favour.

The most notable innovation of Augustus in criminal law was his elevation of the adultery of a wife to the rank of a public offence. Hitherto it had been regarded, as we regard it, as a private matter, though in dealing with it the injured husband had a free hand, and could indulge with impunity his primitive instincts for revenge. Augustus imposed on the guilty parties the penalty of deportation to two separate islands, and a husband who allowed the adulterer to go free or compounded with him for the wrong was liable to the same penalty. It is not likely that this measure had any influence as a deterrent. But it was an important and sinister extension of the field of crime.

The legislation of the Christian Emperors, beginning with Constantine, was marked by (1) further extension of the field; (2) greater severity in the penalties; and (3) the introduction of unusual kinds of punishment.

(1) The early Christian Emperors added two new items to the catalogue of criminal offences—heresy and seduction. The persecution of opinion is a subject in itself, and I will not speak of it here,

[1] A full table of crimes and the penalties to which the different classes were liable will be found at the end of Mommsen's *Römisches Strafrecht*, the standard book on the subject.

except to point out that, though the extreme penalty was enacted for certain kinds of heresy, it was seldom inflicted, and the loss of civil rights was what religious dissidents had really to fear.

The abduction of a female for immoral purposes, if no violence was offered, had been regarded by Roman law as a private injury which entitled the father or husband to bring an action. Constantine made the abduction of women a public crime and one of the most heinous, to be punished by a painful death. The woman, if she consented, was liable to the same penalty as her seducer; if she attempted to resist, she was only disqualified from inheriting property. A nurse who was in charge of a girl and encouraged her to yield was doomed by the law of this humane ruler to have moulten lead poured down her throat to close the aperture through which the wicked suggestions had emanated. This legislation, with slight mitigations, remained in force.[1]

Unnatural vice was pursued by the Christian Emperors with extraordinary rigour. Constantine imposed the capital penalty on both culprits,[2] and Theodosius the Great enacted that death should be inflicted by fire. In the sixth century Justinian refers in his laws to "those who formerly lived in Sodom," and, inspired by the chastisement which they suffered, he was particularly active and cruel in dealing with this form of immorality. He declared that it was the immediate cause of such public disasters as famines, plagues, and earthquakes. In his laws he imposed simply death, but in practice he resorted to unusual punishments. Here no distinction of class was drawn. Senators and bishops were shamefully mutilated or exquisitely tortured before execution.

There can be no doubt that the appalling disproportion and cruelty which mark the legislation of the Christian Emperors on sexual crime were due to ecclesiastical influence and the prevalence of extravagant ascetic ideals. It is worth while to refer to the amazing code of law which was said to have been drawn up in the sixth century by a missionary bishop, named Gregentius, for the benefit of the Himyarites of Southern Arabia. There are, indeed, many difficulties in connection with the mission of Gregentius; and even if we do not go so far in our scepticism as Monsignor Duchesne, who rejects the whole story of his activities in Arabia, we may well doubt whether these laws were ever in operation. But the code, whether genuine or not, exhibits an ecclesiastical ideal of what good criminal legislation would be.[3] A disproportionate part of the

[1] It is to be noted that Julian the Apostate reduced the penalty for seduction to banishment.

[2] In the third century the seduction of a boy under age (*puer prætextatus*) was punished by death. The Emperor Philip took measures to discourage the vice, but we do not know what they were.

[3] It will be found in Migne, *Patrologia Græco-Latina*, vol. lxxxvi.

laws is concerned with sexual offences. Fornication in general is punished by one hundred stripes, amputation of the left ear, and confiscation of property. If the woman is dependent on a man (in his *potestas*), she is to lose her left breast, and the partner of her guilt is to be emasculated. Similar, but rather severer, is the punishment for adultery. Procuring is punished by amputation of the tongue.

(2) Constantine revived the old barbarous penalty for parricide, and enacted that the criminal should be sewed up in a sack in the society of snakes and drowned. He made death the penalty of adultery; Justinian relaxed this so far as to condemn the guilty female to be immured in a nunnery. Deportation had been the punishment of incest. Constantine imposed death for marriage with a niece, and extended the forbidden degrees to a deceased wife's sister and a deceased husband's brother. Theodosius the Great extended it to first cousins, and punished such a connection, or any other of those which were forbidden, by a fiery death and confiscation of property. But there were limits to public patience. Theodosius was not long in his grave (he died in A.D. 395) when his son Arcadius cancelled these atrocities, and some years later he removed the prohibition of the marriage of first cousins. The opinion of ecclesiastics may be inferred from the remark of Augustine in the *City of God*[1]: "Who can question that the prohibition of the marriage of cousins in our time is a progress in virtue?"

In regard to those crimes which we consider to be the most important—such as murder and theft—there was little alteration.

(3) In the early Empire the normal way of execution was decapitation by the sword. The other forms of death were the stake, the gallows, and exposure to wild beasts. Sorcerers were burned alive; deserters might be burned or hanged. In some cases the more painful deaths were inflicted only on persons of the lower class, just as for some crimes plebeians were liable to death, while their betters were only deported. And the privileged people were never thrown to wild beasts—a mode of execution which was an alternative to fire and the gallows, and could be practised only when an approaching public spectacle supplied the opportunity.

During this period mutilation was not a legal punishment, though it may have sometimes been inflicted by the express command of an emperor. Constantine, who, as we saw, introduced some unusual forms of execution, also introduced mutilation into the Code. He enacted that the tongue of an informer should be torn out by the roots. In the fifth century we find the Emperor Leo I condemning persons implicated in the murder of a Patriarch of Alexandria to excision of the tongue. In the sixth century mutilations were

[1] xv, chap. xvi.

common. Justinian's laws recognize amputation of the hands as a legal penalty, incurred, for instance, by tax-gatherers who falsified their accounts, or by persons who made copies of the books of Monophysite heretics. These penalties seem to have been partly regulated by the idea that the guilty part should suffer.

As time went on, mutilation became more and more a feature of the criminal code, and, as it tended to replace the penalty of death, it might so far claim to represent a growth of humane feeling. In the legislation of the eighth century we find only three crimes punishable by death—murder, high treason, and pæderasty. The perjurer is liable to excision of the tongue, the thief (for the second offence) to amputation of a hand. The penalties for various cases of fornication are carefully discriminated. If the transgressors are within the forbidden degrees, both lose their hands. If the woman is married or a nun, both lose their noses; and the same penalty is inflicted on a ravisher. In the case of a maiden, if the man is penniless and cannot make good the offence by marrying her, he is to be whipped, tonsured, and banished; if she is betrothed to another, he is condemned to amputation of the nose. In the case of a married man and an unmarried woman, the penalty is a whipping; in the case of two unmarried persons, a lighter whipping. It is to be noticed that a distinction between privileged classes and the proletariat is no longer drawn.

The tendency to avoid capital punishment is unmistakable, and in the reign of John Comnenus in the twelfth century it is said that the death penalty was not once inflicted. It is very probable that this development was partly due to the influence of the Christian doctrine of repentance. The mutilated sinner had ample time to make his peace with heaven. The Church was ready to extend protection to criminals, and was able to do so by the rights of asylum in churches which the secular government conceded to her. Justinian had excluded murderers, ravishers, and adulterers from the advantage of this privilege; but in the eighth century these exceptions have disappeared.

Mutilation was an ordinary practice among ourselves in the seventeenth century. It is now universally considered barbarous, and no one in any civilized country would propose to introduce it as a substitute for the capital penalty. I cannot remember having ever seen a reasoned discussion of the subject. It seems probable that the majority of criminals sentenced to death would elect, if the choice were allowed them, to lose their hands or noses rather than their lives. If this is true, can it be maintained that mutilation is less humane than the rope or the guillotine? And if humane punishments are a sign of higher civilization, has not a society which tends to substitute mutilation for death an advantage over one which rejects such mitigations? The question is not affected

by the consideration that mutilation would prove less efficacious as a deterrent. This may or may not be true; it could be decided only by experiment; but if it is true, it is a good reason for rejecting mutilation, but not for stigmatizing it as a more barbarous practice than capital punishment. If it could be proved that mutilation is as powerful a deterrent as death, it seems difficult to contend that it would not be a justifiable practice.

The barbarity of the criminal law of the later Empire lies not in the fact that particular punishments were employed, but in the disproportion of the punishments to the offences. This is a feature which it shares with English criminal law before its reform in the nineteenth century, and with the codes of modern Europe in general before the ideas of Beccaria bore fruit. The broad fact is that the whole treatment of crime in Europe has been one of the most repugnant features in the history of Christian societies. The legal genius of Rome, which created her wonderful system of civil jurisprudence, was not exhibited in her treatment of crime. When the Christian Church began to make its power felt in legislation, it could not make any serious breaches in the body of the civil law, which was protected by the logical cohesion of its principles and by the powerful influence of the jurists. But the criminal law did not form an articulate system, depending on any reasoned theory of crime and punishment, and here Christianity had an opportunity to inflict its own theories on mankind. The catalogue of crimes was increased, and the lawgivers paid homage to the extravagant ascetic ideals of the Church by adopting a new and revolutionary view of the gravity of sexual irregularities.

Apologists who desire to prove that the social effects of Christianity were beneficial will, so far as criminal law is concerned, be well advised to attempt to justify mutilation. That, however, would probably seem to them a precarious line of defence; and the privileges of asylum which the Church secured for some of its sanctuaries will hardly help them much. For the right of asylum is an uncivilized custom, which, if it sometimes secures protection for the innocent, may as often enable the guilty to escape. In the eyes of Rationalists, of course, Christianity, being simply a social product at a particular stage of human development, had, like all social conceptions and institutions, bad as well as good effects. In emphasizing or stigmatizing the evils caused by Christian theology and the influence of the Church, the purpose of the Rationalist is to show that, judged by its fruits, Christianity is not justified in its pretensions to a privileged position as a phenomenon of other than human origin. For the happiness which it has brought to many hearts, as for the untold sufferings which it has inflicted upon others, man, and man alone, is responsible.