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STATUTE AND JUDGE IN ROMAN CRIMINAL LAW*

ERNST LEVY†

When a judge tries a criminal case, his power to punish may be determined, and has been determined in various ages and countries, in different ways. At the one extreme the judge has an unlimited discretion as to whether and in what way he may punish an offender. At the other extreme the judge cannot pronounce any punishment, unless it is provided for in the given case by the law. When, for example, the statute prescribes an "absolute" penalty (like death, or permanent banishment), the judge has strictly to adhere to this penalty, with no freedom to mitigate or to intensify the sentence. In other words, the extremes are: full discretion or strict restraint of the judge.

Both extremes do appear in history, but more often the solution lies somewhere between them. Especially today there is hardly any civilized country which does not follow an intermediate course. As far as the democratic type of government is concerned, this intermediate form may be summed up in two principles.

1. The first principle is that which the American Constitution puts this way: "No person shall be . . . deprived of life, liberty or property without due process of law."¹ The Constitution states further that no "*ex post facto* law shall be passed."² On the European Continent, this principle is mainly expressed by the phrase: *nulla poena sine lege*. It means, speaking in more modern terms: no person shall be punished except in accordance with a statute which fixes a penalty for his behavior. Both the punishability of an action in general and the amount of punishment in particular must have been determined by a certain law, before that action may be punished. The purpose is to protect the indi-

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†Professor of History, Law and Political Science, University of Washington, Seattle, Washington. Formerly Professor of Law, University of Heidelberg, Germany.

¹Fifth amendment.

²Article I, § 9, clause 3; § 10, clause 1.

vidual from arbitrary inroads on the part of the government.

2. Contemporary statutes seldom go so far as to prescribe penalties in an absolute way. With respect to most crimes, the policy of the law is rather to fix a maximum penalty, sometimes joined with a minimum penalty. So it is left to the discretion of the judge to take into full account all particularities, both of the individual accused and of the given case. It is entirely up to the judge to move within the limits of the law and to determine whether the punishment shall be the maximum or the minimum, or lie possibly between the extremes.

The result of both principles is a balance between fixation and elasticity of punishment, between the safeguard of the citizen and the discretion of the judge. This balance is typical of democratic countries, while autocratically governed states generally exhibit more or less far-reaching modifications in favor of a larger discretion of the courts or the police.

Do we meet anything like that in ancient Roman Law? To find the answer we must not dwell on the Latin version of such phrases as *ex post facto* or *nulla poena sine lege*. These phrases do not appear earlier than the eighteenth or the nineteenth centuries, when they were coined to serve as convenient expressions of the modern rule. But apart from this, the Roman sources furnish sufficient material concerning that problem. They are abundant rather than scarce. How to judge them, however, seems not equally easy. The opinions of modern writers are definitely divided. Theodor Mommsen, whose "Roman Criminal Law", published forty years ago, is still the starting point for every investigation in this field, makes the statement that, from the early Roman Republic, there was no crime except as defined by a statute, no criminal procedure except as regulated by a law, no punishment except as prescribed by a statutory provision.^{2a} It is true that he restricts this assertion immediately by adding that a considerable number of cases were still left for the magistrate to handle at his discretion. But, as a principle, he clings to that rule. Speaking of the Roman Empire, he again makes the point that a criminal statute binds the court, so that the judge may inflict neither a greater nor a lesser punishment than provided for by the law. Consequently, when the sources regard a certain offense as a crime without mentioning a pertinent statute, Mommsen is often inclined to presume the existence of such a statute. He has been followed by several writers. Other writers, especially in very recent years, move in the opposite direction. They consider as the fundamental truth the unhampered discretion of the Roman judge to decide freely on whether and

^{2a}THEODOR MOMMSEN, ROEMISCHES STRAFRECHT 57 (1899).

how a given act was punishable. These authors do not deny that, under certain circumstances, this punitive power was subject to such limits as were expressly set up by statutes, but they look upon those statutes as mere exceptions.

What, then, was the leading principle, restraint or discretion of the judge? The Roman jurists themselves seem to give sufficient support to either of the two conclusions offered above. On the one hand, they often expressly state that an act is to be punished under the Cornelian law on forgery, under the Julian law on adultery, and so on, or that it is punishable by death, by deportation, or by a fixed fine. There are, moreover, general utterances in favor of legal fixation. They come from both Ulpian and Paulus, *i. e.*, those classical jurists whose fragments have supplied more than half of all Justinian's Digest. Both are contrasting actual criminal punishment and mere administrative fine. Both put it in a similar way. Paulus³ writes:

“Fixed penalties correspond to the respective offenses; but this is not the case with fines, as the judge has power to impose any fine he pleases.” (The remainder of the text is not classical.)

Ulpian⁴ writes:

“A fine is left to the discretion of that man who passes sentence; a penalty, however, is not inflicted, unless it is imposed by the statute.” (The remainder again is not classical.)

Indeed this does not seem to be far removed from the rule: *nulla poena sine lege*.

On the other hand, there are hundreds of passages which emphasize the elasticity or complete liberty of the judge in inflicting penalties. Some of them, for instance, enumerate two or three penalties side by side for choice. Others state that this or that penalty is usually imposed. Others again confine themselves to an indication that a criminal of such and such a type must be punished severely or particularly severely, while another offender may get off more easily. Numerous texts state only that an act is to be punished according to the degree of guilt, the quality of the crime, and so on. We find the same approach when asking what punishment was decided for a particular crime. We possess, for instance, more than thirty passages telling explicitly how a *crimen falsi* was to be punished. In those passages, we meet nearly all the types of punishment which the Romans ever knew: from an aggravated penalty of death to a mere castigation or removal from an office or profession, and this although the Cornelian law on

³Digest 50-16-244 i. f.

⁴Digest 50-16-131-1.

forgery provided, in an absolute manner, for deportation when the forger belonged to the higher classes, for hard labor in mines when he belonged to the lower classes. Only with an understanding of such a free discretion of the judge may the fact be accounted for that Claudius Saturninus, another classical jurist, sets himself the task of explaining the principles by which the amount of punishment may be determined in a given case. He enumerates, as matters to be considered:⁵ the cause of the offense, the person, the place, the time, the quality, the quantity, and the result. Ulpian, the same writer whom I have just quoted for the opposite opinion, writes in the same way:⁶

“When anyone renders judgment on a crime in an extraordinary way (which was, as a matter of fact, the almost exclusive way in Ulpian’s age), it is lawful, at present, to inflict any sentence which he may desire, either a more severe or a lighter one.” (Again the remaining words do not belong to Ulpian.)

What may be the path out of this jungle? Which texts are the correct ones, those on legal punishment or those on discretionary punishment? To a practitioner who would seek for an immediately applicable rule, the situation might seem to be desperate. To the legal historian, however, an antinomy of this kind is quite familiar, in fact almost typical of the Roman sources. How should it be otherwise, in view of the fact that ancient Roman law, as it lies before us, covers no less than one thousand years and that the traces, which are visible in Justinian’s compilation of Roman Criminal Law alone, include more than six centuries? In this case, as in others, one may have an opportunity of ascertaining the truth, or something which may not be far from it, only by utilizing those refined methods of research which have been developed in the course of the last sixty years, *i. e.*, by inquiring into the age, the background and the given context of each passage, by examining the authenticity of its present wording, by exploiting whatever has been handed down to us from antiquity, whether or not it comes from legal sources.

Considering this, it goes without saying that we have to distinguish some stages in that millenary development. A division into four periods will best serve our purposes:

- I. The older Republic.
- II. The last century of the Republic. (149-31 B. C.)
- III. The Principate or the limited monarchy from Augustus to the third century.
- IV. The Dominate or the absolute monarchy from Diocletian to Justinian. (284-534 A. D.)

⁵Digest 48-19-16-1.

⁶Digest 48-19-13.

I

Disregarding the essentially prehistoric period of the kings, the Roman Republic often has been praised for its unenacted constitution which provided for a balance between the monarchic element (the magistrates), the aristocratic element (the Senate) and the democratic element (the popular assemblies). It should, however, be noted that the *imperium* of the magistrates might move at will, unless it was habitually or expressly restricted by the law. So, in the older republic, it is a rule that the magistrate, within the field of his competence, commanded and the citizen (not to speak of the alien) had to obey. That situation is clearly reflected by the criminal law. The magisterial *imperium* included criminal jurisdiction of every kind, with no limit, no civic safeguard whatsoever. This is the starting point. The tendency which marks the further development is towards relaxing that principle; it goes on, however, at a slow and conservative pace, corresponding to the Roman character.

The first conclusive step, probably taken even earlier than the Twelve Tables (about 450 B. C.), consisted in the introduction of an appeal from the magistrate's decision: *provocatio ad populum*. Yet, both as to the persons and as to the cases involved, this appeal was exceedingly restricted, and it was not an appeal at all in our modern connotation. It took place only when male Roman citizens had been sentenced, and, roughly speaking, only when a sentence of death or of too heavy a fine had been passed. It was brought not before a court, but before the *comitia*, the organs of legislation and election of the magistrates, *i. e.*, the bodies established, composed and qualified for political resolutions only. The rules of procedure were, on the whole, exactly those which were applied in all meetings of the *comitia*. The decision of the assembled citizens was determined less by a legal than by a political point of view, upholding or rejecting the magistrate's sentence for reasons of expediency or of passionate party spirit. It was not up to them to pronounce any punishment. The only question was regarding the effect, whether or not they approved of the magistrate's decision. The answer was "ay" or "nay". The "nay" meant often an act of grace; the "ay" was only an authorization for the magistrate to kill the culprit. He was not, however, forced to go so far. Nor did the assembly decide at all, when the magistrate, from the first, had released the delinquent or let him off without a death sentence or with a lighter fine. As far as the death sentence is concerned, the core of the whole reform comes out very properly from the underlying statute itself, which simply forbids any magis-

trate to kill a Roman citizen without granting him an appeal to the people. Speaking from the point of view of political thought, this rule was the first breach in the pure authoritarian system: apart from some exceptional cases, the individual, if a male Roman citizen, had won a safeguard at least from being executed by a mere act of the government. Considered from the point of legal technique, the whole machinery appears very crude and inadequate. To be sure, in the course of centuries, certain crimes were distinguished, others were added, but clear definitions were lacking (*e. g.*, as to whether a certain behavior was treason, murder and so on). Only sporadic statutes were passed, while the bulk of the substantive law was left to the unenacted practice of the magistrates. That is why Roman criminal law did not succeed in developing that structure of precise conceptions which constitutes the unique feature of Roman private law.

II

A new development did not begin until the middle of the second century B. C., when, first for the investigation of extortions committed by governors of Roman provinces (*repetundae*), a special court was set up by a statute which was passed by the people in the ordinary way. The new court was staffed with a presiding magistrate and a number of jurors. It served as a permanent court for *repetundae* (*quaestio perpetua*). This sort of procedure met with approval and gained ground beyond the *repetundae*. It was, above all, Sulla, the dictator of the eighties B. C., who induced the popular assembly to establish a number of similar courts, each having jurisdiction over a certain crime. More crimes were transferred to such jury courts in succeeding decades, the last ones by Augustus, the first Roman emperor. The final outcome was that nearly all grave offenses were tried by a court in which the magistrate sat together with the jurors. Only when this court had arrived at a verdict against the accused, could the magistrate inflict a punishment. Gradually, the punishment itself was also exactly determined by law, either immediately by the statute introducing the respective court, or by its constant interpretation. As a result, in the course of a century and a half, the situation was almost completely reversed: an absolute legal penalty was largely substituted for the discretion of the magistrate.

To produce such a far-reaching effect had not been the original motive of the reform and certainly not the purpose of Sulla. As in all his policies, he had merely endeavored to restore the rule of the aristocracy and to fight both popular assemblies and tribunes, as the exponents of a democracy which, in his view, was

nothing but the sway of the mob of the capital. His desire was plainly to destroy the jurisdiction of the popular assemblies. But it would have been dangerous, if not impossible, to repeal bluntly that age-old law which gave every citizen the appeal to the people. Hence he proceeded more cautiously, making the people itself transfer by statutes the trials to those jury courts. This gave the courts the appearance of rendering judgment as mere committees of the people and thus no appeal could lie to the people again. It was for this reason that a judicial organization first developed in Roman criminal law. The courts could not act without being directed as to the details of their proceedings; thus, as a consequence, criminal procedure also was born. Finally, since each of those statutes introducing a jury court for a particular crime constituted an exception to the old law of appeal, it had to determine the case in which the exception should take place, *i. e.*, it had to define exactly the operative facts of the respective crime. Consequently, a law now defined the elements of the punishable act, a law determined the kind and amount of the punishment, and a law regulated both the organization and the procedure of the competent court.

With that, in truth, a point was reached representing largely what we call today the principle of legal punishment. Largely, not entirely. First, the Romans did not exclude an expansion of the statute to such facts as were similar to those described in it. Second, minor offenses for which no court was established could be punished, especially by fine, now as before, by the magistrate who acted upon his *imperium*. This contrast between the legal foundation of the criminal punishment and free magisterial discretion in fining is quite the same that we met before in those utterances of Paulus and Ulpian which I quoted earlier. Did not the jurists writing these passages have in mind that legal situation which obtained during the age of the jury courts? It is true, when they were writing, the jury courts, for the most part, had fallen into disuse. But, fortunately, either text offers by itself some particularities which indicate the fact that their original context really must have dealt with the procedure before these courts.

So we may determine that period in which, indeed, something like the principle of *nulla poena sine lege* was approximately carried into effect. It starts with the close of the Roman Republic, and this fits perfectly with the liberal spirit of Cicero's age. It seems as if at that time the liberty of the citizen (not of the human being) was coming to prevail over the authority of the state. It might well be that this development would have gone still further, had it been allowed to take an undisturbed course. But the political events were to interrupt it.

III

Augustus seized the power. The legal character of his rule is one of the most discussed subjects in Roman history. But it is clear that while maintaining, as far as possible, the external forms of the old republican constitution, Augustus exercised the supreme power in the state without any factual restriction. This double game, which was played in a masterly way and, in the long run, beneficially to the country, also makes its appearance in the field of criminal law. On the one hand, as I mentioned, he followed the line of Sulla, *i. e.*, to enact laws in the popular assembly, concerning the establishment of jury courts for the trial of several additional crimes. On the other hand, he claimed to be the supreme judge, never feeling bound by the laws, not even by those which he had enacted himself. His *imperium*, towering immensely over all *imperia*, hitherto existing, proved superior to any statute. Of course, he had neither time nor inclination to sit as a judge in trivial matters. Yet when he sat, he decided entirely at his discretion as to whether or how to punish. The succeeding emperors, as well as the Senate, when it acted as a tribunal, took the same course. Though neither the emperors nor the Senate wished to infringe upon the statutes, still they considered them applicable only to the ordinary jurisdiction, *i. e.*, the jury courts and their chairmen to whom these laws were expressly addressed. For everything that transpired within their own extraordinary jurisdiction, legal procedure and legal penalties had the mere value of a noteworthy guide, not of a binding rule.

This change would not have been of momentous weight, if it had been restricted to emperor and Senate. But, gradually, criminal jurisdiction came to be entrusted to high imperial officials who, acting in the name of the ruler and representing him, claimed the same privileges as he did. It was a slow movement, going on in the full light of history, *i. e.*, during those very centuries which made up the era of the classical jurists. The movement was supported by the "authority" of the First man (*princeps*) of the state and was thus irresistibly on the rise. It started in the provinces, where the governors, from the first, were in a position to choose whether to assign a trial to the jury courts or to decide authoritatively themselves. In Italy, emancipation from legal courts and legal punishment took much more time. The right of the citizen not to be punished for a grave crime, without an underlying law, was not easily ignored. As late as a century after Augustus, free judicial discretion was limited to emperor and Senate. A hundred years later still, we see the *quaestiones* at work, at least occasion-

ally. Yet, by and large, they could no longer stand the powerful competition of the imperial judges. The second century A. D. marks the turn of the tide. Significantly, it also marks the other change showing the punishment being fixed not so much under the statute as at the judge's free discretion. This becomes the feature of everyday practice, at the latest, under Marcus Aurelius. At the same time, numerous offenses were beginning to be punished without any statutory basis at all. At the close of the classical age, in the first third of the third century A. D., judicial liberty has definitely won its victory. It is this situation which is reflected by those hundreds of passages in the *Corpus Juris*, while the divergent texts, speaking of legal punishment, refer to bygone times.

One group among those divergent texts requires our particular attention. As I have pointed out already, we often find the jurists saying or the emperors proclaiming that a certain offender is guilty of the *crimen falsi* or is punishable under the Cornelian law on murder and so on. In the late classical period, this does not mean the same as in the first century. On the one hand, neither the judicial organization nor the criminal procedure, as provided for in the Cornelian or Julian laws, was applied when an imperial judge was sitting. On the other hand, quite a few accessory consequences actually survived, especially disqualifications following on conviction under some of these laws, as incompetence to act as witness, to lodge an accusation, to marry, to serve in the army, and other disabilities. The penalties, however, as the statutes had put them, underwent an intermediate treatment. They did not cease to be valid, but were no longer absolute. They still held some authority and were usually inflicted, where the given case did not offer anything particular. But the judge now possessed the liberty as well as the duty to take his own course, when he saw fit. Sometimes the legal punishment was not even able to remain the normal consequence of the offense. A murderer, for instance, under the Law Cornelia, should be exiled, but, when he belonged to the lower classes, he was, at least from Hadrian on, normally put to death. In cases like this, the outcome is a threefold one: the *poena legis* was applicable only in some accessory points, a new normal penalty was developed by the practice, but in the given case the judge was entirely free to depart from it.

It may be asked why there was this gradual revival of the judge's almost unlimited discretion in determining the punishment. That revival took its start with the establishment of the imperial power. But the change in the form of government is not likely to be the only cause. The supremacy of emperor and Senate was not necessarily to entail the emancipation of the lower courts. Nor was

Italy, the motherland of Roman citizenship and freedom, compelled to follow the example of the provinces which were accustomed to the large power of their governors. The point was, in my opinion, the number of shortcomings involved in the procedure before the *quaestiones*. There were many formalities and terms, there was the requirement of a private accuser, possibly being unreliable and open to graft, there was the incapability of each court to hear any types of cases other than those for which it had been set up expressly by law. There was, most of all, the very principle of the one penalty absolutely fixed by the law. It did not permit any special circumstances to be taken into consideration and left no room between the verdict of acquittal and the punishment stereotyped in advance. In the long run, it was unfortunate that the jury courts owed their existence more to political motives than to a dispassionate will for legal reform. In all the points mentioned, the jurisdiction of the imperial official, not bound to such technicalities and proceeding in a rather administrative manner, proved to be highly superior. Yet this advantage was obtainable only at the cost of the safeguards of the citizen. That is the reason why, during the whole first century A. D., the jury courts in Italy, in spite of their weaknesses, largely held their ground. But gradually the weaknesses overbalanced the advantages. Qualified jurors were no longer available in a sufficient number, their independence often was dubious, the assimilation of Roman citizens to provincial subjects made headway in every respect. So the great emperors of the second century were no longer minded to put up with the drawbacks of those courts. Even then they did not repeal them, but let things go, admitting a competing jurisdiction on the part of their officials. There was hardly any uncertainty about which side would win.

Now the emperors faced the inevitable question whether or not to give their delegated judges definite directions fixing for a certain crime either an absolute or a maximum or a minimum penalty. It is plain that they did not do the first. Nor did they do the second or the third. The only limit was that the judge's leniency was not allowed to go so far as to release entirely the culprit from being punished: for to pardon was the prerogative of emperor and Senate. Apart from that, the rulers of this age evidently took care to frame their instructions in an elastic manner. The body of standing instructions contained the simple admonition⁷ "not to impose a sentence which is either more severe or more indulgent than the case demands" (mark: the case, not the law). Accordingly, when consulted about the punishability of a certain offense.

⁷Paulus, Digest 47-9-4-1 i. f.; Marcianus, Digest 48-19-11 pr.

the emperors are accustomed to answer in words, the content of which obviously makes plain that they wish to give a recommendation rather than an order and to leave the judge room enough for his discretion. Such a rescript or a decree through which the emperor himself sentenced an individual offender was not meaningless. It had authority as to whether and under what circumstances an offense was punishable at all. It also supplied a clue for the approximate amount of the appropriate punishment in such cases. But it avoided directing the judge to pronounce a fixed penalty, obviously on the ground that one case never is exactly like another.

Plenty of material is presented by the sources for the wide discretion of the judge, who tries the case, and for the caution of the emperor in advising him. Let me give at least one example concerning a provincial case at the outset of the second century, and, moreover, famous because of the subject matter with which it deals. Pliny, the younger,⁸ then governor of the province of Bithynia, asks the Emperor Trajan how to treat the Christians. The emperor's answer⁹ is, as is well known, the earliest authoritative utterance in the history of the persecutions of Christians. Pliny writes:

“Having never been present at any trials of the Christians, I am unacquainted with the method and limits to be observed either in examining or punishing them.”

Each word is significant. Pliny is uneasy, not because he is unfamiliar with any statute relating to Christians, but because he has not yet had experience with the usage of the courts. Hence he did not know what was the nature of their crime and how it was punished. He goes on explaining the points upon which he was particularly doubtful. But all these doubts did not prevent him from taking very decisive measures. He ordered the execution of those people who confessed, and persisted in confessing, that they were Christians, because he felt that, at any rate, their inflexible obstinacy deserved chastisement. Trajan, however, replies that the method as pursued by Pliny had been entirely proper. The conclusion is evident. The governor has proceeded responsibly, but very severely, without resting on any special law whatsoever. The emperor, however, one of the best Rome ever had, approves of this method completely. He expressly declares that he is in no position to lay down any general rule. “When they are . . . found guilty, they must be punished,” he adds. Neither the offense

⁸*Ad Traj.* 96.

⁹*Ibid.* 97.

nor the penalty is stated precisely. All is left to the governor's *imperium*, as was before.

Thus the pendulum again had swung to the other extreme, namely, from the legal and absolute penalty to the fully discretionary penalty. We are not told exactly why the emperors did not take an intermediate course. Certainly they were impressed by and profited from the failure of the fixed penalty in the ordinary procedure; certainly they did not muse very much on civic liberties. They thought less of an elaborate system than of the right selection of able and dependable judges. In their hands, they hoped, the principle of the state's unlimited authority would work in a moderate way—and it worked.

It worked, as long as the political structure of the empire stood firm and the high magistracy was reliably trained, ready to assume responsibility and, if necessary, counseled by jurists who were second to none in the world's history. During the third century A. D., however, one of these requirements after another ceased to exist. In this age of constant civil and foreign wars, the abilities of the governors and judges gradually diminished. Appointed under a merely political aspect, they often proceeded arbitrarily, unchecked in their affection and aversion. Besides, with the new and disruptive conditions of life, penalties tended to grow severe beyond all reason. The blessing of the judicial liberty became a curse. This should have been the given moment to put limits to that liberty. Yet those short-lived emperors were too weak to take any definite initiative. The only necessity which required speedy measures, to protect the very foundation of the empire, was the persecution of the Christians. Here first made its appearance what later on was to become the general feature: the strict and fixed penalty.

Apart from this case, officially everything remained untouched. We may notice the change that was going on only by watching the post-classical legal writers of this century, as they appear in anonymous compilations or glosses. They mention not only penalties as normal ones which are often much harsher than before. But they show also a significant tendency to suggest a more moderate exercise of the judge's punitive power, stating, here and there, that, with respect to a certain crime a fixed maximum should not be exceeded. As to the minimum, they do not imply anything and generally they still presuppose the full liberty of the judge as existed in the classical age. They attempt merely to influence him, not to indulge in a boundless severity.

IV

But only the emperor could bring about a definite solution. Diocletian, the first markedly absolute ruler, would have been strong enough to cope with the problem. Yet his conservative spirit induced him to maintain as far as possible the law of the great past. Only where he was determined to introduce a particular innovation, *e. g.*, by rendering an offense punishable when it had not been, or stating a more severe punishment, does he reveal the new trend, fixing an absolute penalty with no discretion allowed to the judge who tries the case.

This absolute penalty becomes definitely the controlling principle from Constantine, Diocletian's successor, up to the close of ancient legal history. It is true that even then there were minor offenses with respect to which the judge might follow his personal view. But almost all major crimes were put under strict penalties, fixed by imperial decrees. The judge was not permitted to disregard them, neither in favor of, nor in discrimination against the delinquent. "The infliction of the punishment is not left to the judge's will, but is reserved for the authority of the law," says an interpolated passage of the Digest.¹⁰ This rule now underlies the writings of both legal and non-legal authors of the fourth to the sixth centuries, including the fathers of the Church. An example will be useful. In 384 A. D. a young warrior had brought a rash accusation of violence (*violentia*). According to the law of this time, violence was to be punished by death, and so was a calumnious accusation on this charge. As the case was relatively harmless, Symmachus, as *praefectus urbi*, wished to avoid the execution. But the only expedient he saw was a petition for the exercise of the emperor's mercy.¹¹ If we compare this letter of the chief justice of the capital with the other letter which less than three centuries before Pliny, a mere provincial judge, had sent to his prince, we may grasp the fundamental change in all its extent.

V

Looking back over the millennium of Roman criminal law, the relation between judge and statute is characterized by a marked shift between judicial discretion and judicial restraint. Each principle took its turn twice during the centuries. Legal punishment, as supplanting discretionary punishment, was the ultimate tendency of the Roman Republic as well as of the Roman Empire. But

¹⁰48-16-1-4 i. f.

¹¹Symmach. ep. 10-49.

viewed from the political background, it meant in the two cases something diametrically opposed. In the one case, it expressed a growth towards liberalism. In the other case it put a seal on absolute despotism. In the Republic, legal punishment presented itself as contrary to the individual magistrate's judgment; in the Empire, it constituted the very contents of this judgment. In the Republic, legal punishment was enacted by the people as the law to be applied in the jury courts; in the Empire, the autocrat prescribed it to his subordinate officials. In the Republic, legal punishment served to safeguard the citizen from inroads by the government; in the Empire, the monarch used it as a means to prevent the threatening anarchy and disruption of the state.

We may derive the conclusion that *nulla poena sine lege* is not in itself a high test and bulwark of civic liberties. It is only such when that law proceeds from a power in the state which is not subject to, or changeable at, the will of an absolute ruler.