Scientific Research Publishing

Beijing Law Review, 2024, 15, 1998-2017
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Voltaire's Thought in the Search for Penal Freedom: Contemporary Reflections on Brazilian Criminal Law Based on "The Price of Justice"

Celeste Maria Vásquez Dan Lins, Marcio Souza da Silva, Marco Aurelio Gomes de Almeida, Matheus Leão Alves da Silva

Law Faculty, Pontifical Catholic University of Sao Paulo, Sao Paulo, Brazil
Email: celestedanadvogada@gmail.com

How to cite this paper: Lins, C. M. V. D., da Silva, M. S., de Almeida, M. A. G., & da Silva, M. L. A. (2024). Voltaire's Thought in the Search for Penal Freedom: Contemporary Reflections on Brazilian Criminal Law Based on "The Price of Justice". *Beijing Law Review, 15*, 1998-2017.
https://doi.org/10.4236/blr.2024.154112

Received: September 7, 2024
Accepted: November 30, 2024
Published: December 3, 2024

Abstract

Throughout this article, the reader will find specific reflections on the need for security in criminal matters (curbing the vulgarization of criminal law), and how Voltaire develops a theorem to safeguard and legitimize the usefulness of the penal system. Returning to the time when Voltaire wrote, Western Europe was under the surveillance of monarchical absolutism, so there was no de facto criminal justice, but rather criminal repression, there was no idea of criminal law, no guarantees and no criminal principles that are extremely valued in Brazilian ideals in current criminal law, the methods that were used at the time were irrational methods that added nothing to society, on the contrary, they stimulated terrorist and massacring violence. The topic extensively studied and developed in this article, which was produced using the logical-deductive method, and above all based on bibliographical reviews of national and international authors, refers to Voltaire's ideology on the work *The Price of Justice*. These are contemporary reflections on his philosophical approaches to the subject, and his reflections in terms of freedom.

Keywords

François-Marie Arouet, Voltaire, Price of Justice, European Enlightenment, Brazilian Criminal Law, Human Dignity, Freedom, Tolerance, Enlightenment Philosophy, Medieval Ages, Medieval Times, Torture, Floggings, Humanist Reflections, Contemporary Reflections, Historical Evolution, Philosophy of Law

1. Introduction

In the work of the author—François-Marie Arouet—Voltaire seeks to instigate, not only the reader, but the entire population of post-medieval Europe, to reflect on the limits of the state on the freedom of the individual, especially when such inflictions deal with the purest right that anyone can have, life.

Nonetheless, Voltaire—already more mature and senile—after learning about all the misery, death and atrocities that the state could inflict on individuals throughout his wanderings, and instigated by the contest of the Gazette de Berne, in Switzerland, in 1777, decided to submit (there are voices that deny this intention) a complete and detailed plan on the making of possible penal legislation, free of prejudice, mysticism and open to science and tolerance, and which, above all, respected—embryonically, in fact—human dignity, questioning the usefulness of certain crimes and their methods of prosecution, based on Enlightenment ideals.

The main objective of this article is to show that the reflections made in the 18th century are chronologically distant but in fact current, because even though there are individual guarantees for the defendant in the Brazilian criminal process, the mass of the population has a very strong discourse of revenge.

This is why we have countless principled instruments applied academically, guarantees that exist and are present in the Brazilian federal constitution, but which are not very effective. When we look at the mentality of the majority of Brazilian citizens, they see that the application of these guarantees and principles, as well as due process of law, demonstrate discourses of impunity, since once a person commits a crime they should be massacred and tortured to the end.

In this respect, the reflections brought up in the work analyzed demonstrate why there are guarantees for criminal law and why it is important that they are applied.

For scholars of Brazilian criminal law, with all the philosophical thinking, knowledge of the right to human dignity, the right to life and the view that the prison environment should be an environment of resocialization, they do not agree with the vengeful look at those who are being punished by the law.

From now on, despite being almost 250 years after its publication, it is essentially current and necessary; it seems to us that Voltaire's reflections work very well in the current context of intolerance, in the face of the current concept of freedom, and the spurious need for revenge.

Throughout this article, the reader will find specific reflections on the need for security in criminal matters (curbing the vulgarization of criminal law), and how Voltaire develops a theorem to safeguard and legitimize the usefulness of the criminal justice system.

We must first contextualize the period in which the work was written, so as not to incur in any real anachronism.

The methodological approaches that will be used in this article consist mainly of literal or grammatical interpretation and historical interpretation.

The article is divided into five chapters. The first deals with the history of crimes

and their penalties in the Middle Ages. The second deals with the chronology of events in the life of the author of the work—The Price of Justice. The third justifies the reasons that led the author to produce this work; the fourth chapter deals with the notions of justice that Voltaire idealizes; and the fifth chapter deals with the detailed analysis of the author's suggestions of crimes and penalties in twenty-eight articles. At the end of the work, it was possible to arrive at a premise after replicating Voltaire's theorem.

From now on, it was determined that some dangerous speeches should be combated with reason, scientificity and proportionality; and that some thoughts of a quick and ideal "solution" are nothing more than speeches of intolerance and aversion to the freedom of others.

2. Historical Evolution of Penal Ideals in Brazil and Their Penalties

In ancient history, long before the basic features of civilization, groups were preceded by the idea of *divine revenge*, based on the worship of deities—*Totems*.

These totemic infractions, consisting of divine vengeance, influenced religion too much, stemmed from the dissatisfaction of the deities, for certain tribes, gods, who were offended by a certain behavior of an individual from that tribe, whose conduct caused harm to the entire tribe, this harm was called a totem. And such deviant behavior provoked retaliation from the deities, who unleashed natural disasters against the entire tribe, as obstacles to agricultural production. In order to avoid and alleviate such catastrophes, the tribes punished the deviant agent who had caused the divine revolt through the totemic infraction. In fact, it didn't matter what type of infraction, even if it was very minor, the penalty would be considered by the criterion of veneration of the deity, and there is not even any evidence of the existence of the principle in question (Araújo, 2018).

After that, the natives and aborigines adopted the idea of private revenge. In the early days, punishment was in fact vengeance. There was no thought of proportion, justice, etc. The concern of the "offended" was to fatally retaliate against the aggression suffered (blood revenge). Private revenge postulated that reaction to aggression should be the rule. At first, by the individual against the individual (private revenge), then by everyone in his group against his group. In fact, as soon as these real "bloodbaths" were stopped, groups became extinct or, at the very least, weakened. A continuous historical act gave rise to the first manifestation of proportionality—still embryonic, it must be said—with the Talion (Magalhães Noronha, 1976).

A common feature of primitive civilizations, without any idea of proportionality, and based mainly on mysticism. It was known as "blood revenge"; there was no place to serve the sentence, only a place to bury *cara data vermibus*, which lasted until the High Middle.

However, from the point of view of the group's efficiency, revenge was limited, largely due to the fact that one needed fullness to wage war.

Certainly, the subsequent application of "*oculum por oculum, dentem pro dente*" was a breakthrough (the only remote law of antiquity devoid of religious or sacred precepts). The perspective of that historical period is essential, so as not to incur anachronism. In this sense, the social context was one of maximum retaliation, and Giovanni Papini's explanation and reflection in History of Christ is necessary:

In this sense, the social context was one of maximum retaliation, making it necessary for Giovanni Papini to explain and reflect on the History of Christ, when he states that—The Men who were poorly tamed, poorly yoked to the Law, as we see in the Mahabharata and the Iliad, in the Poem of Izdubar and in the Books of the Wars of Jehovah, would have been even more ferocious and unleashed without the terror of the Gods' punishments. In those times when for an eye you asked for a head, for a finger an arm, and for a life a hundred and twenty, the Law of Talion, which asked only for an eye for an eye and a life for a life, was a remarkable victory for generosity and justice, although today, after Jesus, it seems dreadful to us.

Moving forward in history, considering the need to live together in society, after all, man has a gregarious nature—he grants part of his rights to an entity other than "himself", the figure of the State; after all, in metaphorical terms, Robin Crusoe, during his peregrination, shipwrecked on his island for more than 20 years, did not claim the right.

In this period, very much under the mantle of "reason of state", vengeance was institutionalized through the so-called public vengeance, where the state, mainly institutionalized by monarchical and ecclesiastical absolutism, avowed itself as legitimized to apply penalties, and create crimes that suited it, always with the aim of strengthening and enriching itself—even though it was not set up for this purpose, but as a "third party conflict resolver". It was during this sober era that the "dark ages" emerged.

About the legal treatment of homicide (and other serious crimes), we have no shortage of famous cases. There are countless examples and punishments in Evolutionism, Creationism, etc. In some cases, such as in biblical times, the punishment was the same in others, the punishment was even more severe: *subjectio ad bestias* or *vivicrematio for humiliores; and decapitatio for honestiores.* It should be noted that in primitive legislation, there were countless forms of cruel punishment, not limited only to the guilty party, but also applied to their entire family (Alimena, 2007). Ideals of proportionality and personhood (in transcendence) were far beyond the primitive understanding of peoples.

At the time of the murderer's death, "civilization" knew the most atrocious ways of ending someone's life, such as: immolated on the cross; fire; torture; stoning; boiling; dismemberment; drowning; cruelty; ferocious animals; martyrdom with thorns; falling from precipices; arrows; torture via the cradle of Judas, torture on the wheel (preferred in the French medieval period), etc.

It's worth noting that, although the severity of the punishments was at its peak in retribution for murder, it was not unusual for them to be applied to other—

rather ordinary—crimes, such as theft, sorcery, sacrilege and heresy. All of these found their purpose in the same place, the scaffold.

In this nefarious era, the Inquisition took over the *summa imperii* and tyranny proliferated. Under the distorted argument of an ecclesiastical *ratio*, punishments were meted out with extreme severity, and ordinaries (guided by irritating evidence) were the means that "legitimized" them, on the grounds, above all, of heretical acts.

It is important to note that, in the period of "darkness", of "terror", the apogee of the state's power to punish was none other than atonement itself—an end in itself. The state machine was used precisely in order to demonstrate the power of servitude, of torture (tools always at the King's behest). It was therefore the very ceremonial of justice—tying up the unfortunate and martyring them in order to hear and revel in their groans—the "glory" of power.

Characteristics of this era are: the restoration of the Courts of the Holy Office; the *Ex Officio* jury; arbitrary trials; the absence of the presumption of innocence—hence the constraints without the right to answer the trial in freedom; the amalgamation of the judicial functions of accusing, judging and defending; secrecy in the trial (secret trials); appanages in the execution of the sentence (for some, of course); diabolical trials; the atrocities of the ordeals with the so-called: "preparatory questions".

These tenebrous events were the driving force behind the need for a new cycle, the humanitarian one. From this time onwards, Voltaire—one of the great coryphaeus of the Enlightenment—modified his thoughts, challenging the blatant abasement of human rights. It should be noted that it was in this dark century that knowledge was monopolized by the Church, and philosophy, in particular, only found shelter if it was in its bosom.

3. Chronology of Voltaire

François-Marie Arouet was born in Paris, France, on November 22, 1694. In 1704, he began his studies at the *Louis-le-Grand* college; in 1711, he went to study law, in accordance with the wishes of his father, *François Arouet*, a king's counselor and former notary of the *Châtelet*, but soon after 1713, he dropped out.

In 1716-1717, in *Sully-sur-Loire*, he satirizes the ruler with a poem inducing an incestuous relationship with his daughter, and is sent to Bastille, where he stays for eleven months, devoting this time to improving his reading and writing.

In 1718, the tragedy Oedipus, which he had dedicated to the Regent, was a resounding success. And for this success, he received a bonus from the Regent. Making a name for himself as a poet, now: Voltaire, the explanation for the pseudonym is nebulous. There are voices that support a metaphor with the Tuscan Volterra. Others allude to rebellion/revelation.

Four years later, he got to know Holland (The Hague) and was impressed by its tolerance and prosperity but was eventually expelled because of a scandal with a French Protestant, forcing him to return to France.

In 1726, Voltaire was sent back to the Bastille after an argument with the Chevalier de Rohan. He went on to learn the values of tolerance, freedom and the philosophy of the "Enlightenment". In 1750-1753, Frederick II persuaded him to move to Prussia, but he soon became disillusioned with the disagreements and subsequent persecutions. He moved to Geneva/Switzerland but returned to France. In March 1762, shaken by the unjust death of Jean Calas, he wrote his main work: Treatise on Tolerance.

In 1777, he wrote "The Price of Justice" (*Prix de la justice et de l'humanité*), in response to the competition in Bern/Switzerland for humanist works. He died on May 30, 1778, in Paris.

4. The Reason Over Voltaire

Appreciating all these atrocities in the dangerous era of the Middle Ages, François-Marie Arouet, to reflect on the barbarities of that time, when the price of a life was trivial, and torture the eligible means (some believing the call of the Gazette de Berne, no. XIV, of February 15, 1777), and makes his work—Prix de la justice et de l'humanité).

Acríscio Tôrres, in charge of presenting Voltaire's work in Portuguese, mentions that: Voltaire took as his theme a notice in the Gazette de Berne, no. XIV, of February 15, 1777: A friend of humanity… moved by the inconveniences that arise from the imperfection of the criminal laws of the majority of the States of Europe, has presented the economic society of this city with a prize of fifty lire for the dissertation that the society deems best on a complete and detailed plan of legislation on criminal matters (Arouet, 2021).

In this, he does not elevate human nature itself to the status of *sacratus* worthy of "reward", but rather the "most sensitive human soul, which has added the maximum amount of justice to this virtue, as the essence of humanity.

5. What Is Fair and What Is Unfair?

As we enter the ontic debate, we need to address the aspects of justice of philosophers who preceded *Voltaire* and may have influenced him in his worldview of justice.

Conceptualizing justice is one of the most arduous tasks—in fact, Kelsen, for example, in his great work "What is Justice", comes to the arduous conclusion that he does not have a global and accurate concept of justice, but he outlines intangible values of justice, such as freedom, peace, democracy and tolerance (Kelsen, 2001).

One of the oldest aphorisms on justice is to give each his own (*suum cuique*), which originated in ancient Greek, from Homer to Plato, without forgetting Upiano. It is worth remembering that this formula ends up denoting its incompleteness, to the exact extent that it requires, in order to know what yours is actually, an *ex ante factor*, i.e. a previous decision to establish what is or is not yours; opening up room for the subjectivism of any social order.

For Aristotle—forgetting the concepts of distributive and corrective justice—justice would be the virtue to be sought—*virtus in medium est*; the idea of equality would guide the technical concept of justice for Aristotle (seen as a virtue), as well explained in one of his most classic works (Aristóteles, 2003).

Thomas Hobbs—in: Leviathan—reflects on equality. If we were in fact equal, why would we be willing to put a larger entity in charge of governing everyone? The answer is interwoven in the eminent work, and alludes to the need for a social pact, where everyone gives up a portion of their rights; and without these pacts, rights become empty, not delegitimizing conflicts and wars.

His reason is philosophical-deductive: where there is no pact, no rights are transferred, and therefore everyone has the right to everything, and in the end, all actions become lawful. If all actions are lawful, there is no room for unlawfulness, and everyone can do anything.

The definition of injustice, according to Hobbs, is rather the breach of the pact that people have entered into. It is therefore necessary for everyone to give up part of their rights in order for there to be harmonious social coexistence. Order would become the driving force behind justice in Hobbs' view, and the person responsible for overseeing it would be this mythical being: Leviathan—a kind of metaphor for the figure of the State (Hobbs, 2003).

Regarding these notions, Voltaire, in his opening chapter, alludes that it would be better to help your neighbor in need than to beg them, using rational criteria to distinguish between honesty and dishonesty. Obviously, his ideals permeate the idea that punishment is inefficient when the least incisive route is not taken first (a general rehearsal of the consecration of criminal justice in the last *ratio*).

The author recognizes that intolerance and misinterpretation of actions often come from human misinterpretation. He points out that it wasn't Jesus Christ who built metaphysical dogmas, nor instituted inquisitors, but that God gave us the knowledge of what is just and what is unjust, notwithstanding the granting of free will.

He wisely alludes to a passage from the laws of Zoroaster in Sader, with the maxim: "If you do not know for sure whether a proposed action is just or unjust, abstain". In other words, *in dubio*, incautious inaction is better than action with good intentions, but fraught with perniciousness—the problem: who will protect us from the goodness of the good?

Voltaire doesn't expressly conceptualize justice, but instead uses mediated concepts. But he recognizes that *summus jus*, *summa injuria*. In other words, although he doesn't lay down any guidelines for just behavior, he makes a point of demonstrating the injustice—and a contrary sensu, his ideology of justice—experienced by Jean Calas, who was tortured and unjustly killed on the charge of killing his own son, using vague presumptions to legitimize the abominable. After all, as we can see, "the history of criminal procedure is the history of judicial error and how to deal with it, curb it and avoid it" (Prado, 2024).

To know the price of justice, Voltaire shows us the price of injustice. Once you

know injustice, you will know the real value of justice, and why you shouldn't measure your efforts in its mythical pursuit, and as he demonstrates in his work, "it's not with one demon that you cast out another".

6. Voltaire's Theorem for a Just Criminal Law

Over the course of twenty-eight articles, the author constructs a detailed project on crimes, penalties and the procedure for applying them. He separates the first article to deal with proportionality. From the second to the twenty-first article, it focuses on crimes in kind. From the twenty-second to the twenty-seventh, it focuses on methods of proof; the "actors" in the criminal process itself; the defense of the defendant; arrests and captures; and the secondary effects of conviction.

Finally, in the twenty-eighth section, he focuses on a particular case and concludes the book. So let's analyze the articles—only the most relevant ones, in order to curb prolixity, this essay will be seen as a memorial, an inventory—of the work in honor, The Price of Justice.

A) Article I—Crimes and proportionate penalties

In the inaugural article, Voltaire recognizes the selective way in which laws are made, to serve the interests of the powerful, and "in order to crush the weak". In fact, this was how ecclesiastical absolutist power worked, with attention only being paid to the interests of the "elite".

The preference for sophists only made it more difficult to apply the laws. Misinterpretation, then, works wonders for society, for the just and the unjust, the guilty and the innocent. It is said that it would be better to abstain than to have them.

The author also reflects on the minds of jurists who are contaminated by vanity, loaded with egos and solipsism. He therefore prefers to be judged by simple people, even if they haven't studied, but who are exorcised of pride and prejudice, and who use the humanitarian bias as their decision-making guide.

He then says: "If a lawsuit is brought against you on which your life depends, and the compilations of the Bartholomew, Cujas, etc., are on one side, and on the other you are presented with twenty judges who are not very learned, but who, being elders free from the passions of the heart, are above your needs and fond of business and on the other side you are presented with twenty judges who are not very learned but who, being elders free from the passions that corrupt the heart, are above the needs that debase it and are fond of business, whose habit almost always rectifies the understanding, tell me: by whom would you choose to be judged, by that mob of proud talkers, as self-interested as they are unintelligent, or by the twenty respectable ignoramuses?"

Therefore, for a good penal code, the equidistance between indulgence and draconian is essential, so the middle ground—or Aristotelian virtue—is sought.

He goes on to outline a rational path to be followed, that of crime prevention. This utilitarian notion has been adopted internationally as an effective way of dealing with a large proportion of crime. The most rational way to combat crime,

according to Voltaire, would be to think of prevention before punishment

A contemporary theme, with the search for a correlated and effective form of crime prevention, is the subject of controversy among numerous scholars on the subject. The utilitarian theory was developed a posteriori as a ratio to legitimize a penalty, ignoring—to a certain extent—the repressive purpose of the penalty stemming from the absolutist theory of punishment that prevailed until then. What's more, crime prevention is also the target of studies aimed at various criminal policies, including public security.

And to solidify prevention, he proposes the discouragement of crime through "rewards" to society—Norberto Bobbio alludes exactly to the function of the conduct resolution technique and the promotional and rewarding function of the desired conduct, ex ante and ex post, respectively. These rewards are known to be aimed at showing that crime "doesn't pay", discouraging the source of *iter criminis,* cogitation.

To this end, he begins his theorem of virtues with the crime of theft, which he believes is the most common crime in a Europe lived by appearances, where the commoner tends to become poorer and the monarch wealthier.

B) Article II—Theft

The author recognizes that vagrancy, is one of the vectors that feed thefts and robberies in society, largely due to socio-economic disparity.

The crime of larceny has been punished by civilized groups since the beginning, and furtum has therefore always been the property crime par excellence, or also known as the property crime of principal.

Eugenio Cuello Calón discusses historical data on theft in Ancient Rome, more precisely in the Law of the XII Tablets, which distinguished between *furtum manifestum* (the active subject was surprised committing the illicit act) and the criminal was in *flagrante delicto*, carrying out the act or in the place of the crime—*quod eo loco deprehenditur ubi fit*) of *furtum nec manifestum* (the agent was not surprised when committing the crime).

He also points out that, about the former, its penalties were primarily corporal, such as: the whip; the servitude of the free man; even death. The latter would be punished with a fine (a pecuniary penalty) stipulated on the value of the stolen property, which could be doubled or tripled.

He argues that we must be energetic, not in leading them to the gallows, but in eradicating "begging" itself. A good alternative would be to provide them with food and decent work. These are, therefore, rehearsals of ideals aimed at—as alluded to above—public safety.

It should be noted that the penalty for theft was death by hanging (ditto when the theft resulted in murder); in Germany and France, people were killed by the "wheel". Not to be outdone, "domestic robbery"—today, in Brazilian criminal law, would be classified as famulato., a doctrinal classification of the crime of Qualified Theft by abuse of trust provided for in Art. 155, § 4, II, Brazilian Penal Code. It should be noted that the principle of insignificance and the state of necessity were

inapplicable to delegitimize punishment for frivolous acts.

The "spectacle" of the executions became scenes of horror; despite the population's fear of following the same end, "everyone would want to stone the barbarian who put them to death".

Voltaire reflects on the severe punishment for the crime of theft, in the most rational way possible, when he alludes that the effect of this inhuman law is none other than—[…] multiply the thefts. For which master will dare to renounce all feelings of honor and piety to the point of handing over his servant, guilty of such a small error, so that he can be hanged on his doorstep? Almost everyone just throws him out: and he goes on to steal allures, often turning into a murderous bandit. And the law will have made him that way; she is guilty of all his crimes.

He also points out that, in some places in Europe, the smallest possible amount of money stolen from a royal house is punishable by death. The author asks whether this is to "repair" the damage suffered by the king, considering that he is certainly the least impoverished (among other victims) if robbed.

Thus, the application of a law that is too severe causes impunity—or the feeling of anomie—while, for crimes of minor importance, society itself, fearing its end in the scaffold, is condescending and applies another penalty, "banishment". But this indulgence has an impact on the feeling of impunity, which leads to the proliferation of other crimes. It would be better, as Voltaire rightly points out, to have a proportional law, which considers the seriousness of the crime and all its circumstances, so as not to fail to apply it. Punish ultimately, and not "blindly".

C) Article III—Murder

Despite the information provided in the previous section, we must recall the considerations that Voltaire alludes to.

From the outset, the author ratifies his religious beliefs by stating that life itself was given by God, and for what reason would anyone think it credible to take it away?

He also makes the historical point that wars, permeated all over the planet, would legitimize killing for some—even honorably—although he recognizes that in some societies (e.g. Brahmins) it is vehemently condemned for numerous reasons, and that it would be rational to avoid it, and therefore "refrain from killing". In this vein, we paraphrase Nelson Hungria's reflections on suicide, which are easily understood as just reasons to delegitimize the "right to die". To put it very succinctly, a person's life does not belong exclusively to them—an end in itself—but rather to the social whole. "You can only renounce what you possess, not what you are. The right to live is not a right over life, but to life […] we cannot renounce the right to life, because each person's life is related to the very existence of society and represents a social function (Hungria, 1942).

Although, in our moments of anger, we wish death on some people, for countless reasons—many in retaliation for the injustice practiced by those who brandish them—the reflection that is used is that the application of Talion is not, in essence, restorative, it is to say: "you will not have the eye you lost by cutting off that of

your tormentor, nor will you have back the son killed by immolating the murderer".

Voltaire ponders, as he does throughout his theorem, the usefulness of punishments—the rational advance of the Enlightenment leads to this. Usefulness would be transmuted into a kind of *compositium,* and into the "*obligation*" of the condemned to "serve" the victims—In truth, Voltaire wants the guilty party—and here we will take into account the extrinsic factors of the time—to become a "slave" so that they can be useful to society as a whole, not just to the victim or their family, and that the reflection of their servitude will improve the guilty party's own nature. In order to safeguard historical interpretation, it is said that "slavery represented, for the historical moment, the softening of the punishments applied, such was the degree of its severity (Araújo, 2018).

It recognizes Russian legislation as a paradigm to be followed—unlike the decadent laws of the Roman Empire and Charlemagne. This gives criminals who harm their homeland a useful sentence, imposing servitude "forever" as a penalty, thus curbing barbarism.

The need to punish the murderer by killing him is an ideological one, and it is not a *conditio sine qua no*n to consider encouraging impunity, but, we repeat, rationality. A noteworthy reflection that the author makes is on the need to dissuade society that murder is abominable, but he falls into demagogic rhetoric when he legitimizes judges, through the state apparatus, to demand it. On the contrary, a dead murderer is of no use to society, after all: "dead people don't produce".

It should be noted that philosophical questions are about usefulness, not severity. Thus, even though in temporal terms the penalty may appear to be greatly increased, a different view of its purpose is required, that of prevention for all (general prevention), curbing the old conception of absolutist retribution—that the penalty is exhausted in itself, much to the foundation of KANT's theory that man can never be a means. And as Voltaire points out: The great objective, as we have said, is to serve the public; and, without a doubt, a man who devotes every day of his life to preserving a region from flooding by means of dykes, or to opening canals that facilitate trade, or to draining infested swamps, does more service to the State than a skeleton dangling from a gallows on an iron chain, or torn to pieces on a cart wheel.

D) Article V—Suicide

After his reflections on the crime against life par excellence, Voltaire turns his attention to another crime against life, but one committed against oneself.

In England, for example, in the event of a suicide, the body of the deceased would suffer severe infamy, and in other nations, the body would be hanged, notwithstanding the confiscation of property. it is worth remembering that it was in France itself that the so-called principle of saisine—consistent with the assets left by the deceased—was developed. These are transmitted immediately to the legitimate heirs, according to the precepts of civil law.

One can see the extreme and complete lack of scientificity in the old codes, especially in the application of penalties to corpses and the like and the transfer of the effects of the sentence to their successors, without any notion of the now abhorred intranscedence of the sentence (see Art. 5, item XLV, of the Brazilian federal constitution of 1988), erected as a principle in democratic legislations all over the globe.

On this subject, a curious historical fact, even before the French Revolution, was that it was possible to prosecute corpses and the corporal punishment was carried out on them or on their effigy.

In Roman law, however, death extinguished the penalty, although at other times the people were not unaware of the penalty for the dead. Manzini recalls that the suicide of the accused was seen as a confession and the deceased was condemned.

On the subject, Hélio Bastos Tornaghi gives a real historical lesson on the death penalty for the corpse. The late author emanates that "in the Middle Ages there were countless trials against the dead and executions on corpses, usually amputation of body parts. In principle, it was recognized that *morte crimina extinguuntur*.

A sentence passed on a defendant whom the judge assumed to be alive but who was already dead was null and void: *sententia lata* contra *mortuos est ipso iure nulla*. But there were many exceptions, especially in crimes of lese majesty. The defendant's memory was condemned, and the execution was carried out in effigy. Execution on corpses lasted until very late. Remember what happened to our Brazilian activist Tiradentes".

Their reason, as the author rightly points out, is permeated by ecclesiastical customs, even classified as sacred laws: "the Church shared with the feudal lord, be he king or baron, the money, land and movable property of the man who had become disgusted with life. He was seen as a slave who had run away from his master, and his savings were taken from him" (Arouet, 2021).

In another vein, Voltaire disputes this deep-rooted link between suicide and the worthy sin of "spending time on the threshold of hell". Quoting Virgil, Voltaire says that it is deplorable, but not condemnable.

His final reflection is noteworthy. Regardless of the reasons that led the person to die—leaving aside the ethical and religious fields—it is clear that one cannot want to demean their honor and punish their family twice.

Marquis de Beccaria, also a forerunner of humanist philosophy in the face of the penal dogmas of the time, prays that "if the penalty is applied to the innocent family, it is odious and tyrannical, because there is no longer freedom when penalties are not purely personal" (Beccaria, 2005).

E) Article VIII—Heresy

We move on to heresy—the greatest of crimes—which, according to the late author, can be classified as "an opinion that differs from the dogma accepted in a given place", i.e., any behavior that disagrees with the ecclesiastical "truism" of that place will not be tolerated; on the contrary, it will be criminalized as heretical. There is no room for the development of different cultures, because they do not

come from the same divine source, and taboos are therefore created.

The penalty for heretical practices—technically called a crime against God with the utmost gravity—was none other than death by fire—vivicrematio.

As mentioned above, the debate between crime and sin became more evident in this crime, as there was no technical division between a criminal offense and a religious offense, largely due to the Christian theological influence.

François-Marie Arouet reminds us that doctors, priests and seculars are not excluded from being subject to this crime. Misinterpreted opinion was dangerous, and especially so when it did not elevate the predominant religion to the category of sacred, as he rightly points out: Constantine raised the Christian religion to the throne and saw it tear itself apart with disputes over problems that the human spirit could not solve. He punished the Church that he himself had enthroned and exiled the followers of Athanasius and Arius.

In the meantime, severe and disproportionate laws were created. Take the case of the edict of 1699 in France, which punished the accomplice more than the heretic author himself, in which the death penalty was applied in the former, and life imprisonment in the latter, without any apparent dogma.

Prosecution and punishment were simplified for innocent farmers, e.g. it was enough for two witnesses to point a finger at them and pronounce them a heretic. It was enough, therefore, for people of "consideration" to credit this mere illusion, conjecture and underhanded trickery for an innocent person to lose everything and be demeaned in his greatest freedom, life.

Voltaire reflects that, for the "scoundrel" (sic.) masses, immolation is a spectacle—he recognizes in advance that the population growth of bad people is greater than that of good, thinking people—but he observes that, although change is a long way off, there are traces of hope in Europe, as seen in the proclamation in 1767 of a law issued by the Empress of all the Russias, abhorring intolerance. This, then, is exactly the issue in question: (in)tolerance is at the heart of the conflicts between peoples of different cultures. The path of tolerance is civilizing and liberating.

F) Article IX—Sorcerers

Sorcery is closely related to heresy, after all, it has a genus and species relationship. Even after the great movement of rational ideas, the idea of "witch hunting" was still propagated in Europe in the Enlightenment. The punishment? Bonfire!

The dogmatic criticism is that, in this pseudo-crime, the idea of a "should-be" is abolished by a "being" criminal, i.e., the old Brazilian criminal law conception of the author, punished for what he is—a sorcerer—and not necessarily for what he has done.

The mystique surrounding the subject has hovered around every corner of the planet for over a thousand years, especially in "diabolical" codes. Voltaire cites countless cases of injustice, e.g., the case of an individual with clear mental problems (Jesuit Girard), who was branded a witch and executed after "confessing" through torture; the case of the endless torture of Cure Grandier, who had his

marrow ripped out after the incisive intrusion of the "instruments of truth" into his legs; the "infernal theater" overshadowed by the "dementia of superstition" in the town of Salem in the United States, in which a pervert "imagined" that everyone possessed was there, victimizing women, the elderly and children, in detail: the town had become deserted and had to be repopulated.

These horrors were spread all over the globe, especially in the lands of the Roman Communion, and their evils stemmed from religious fanaticism. The author in question makes a reservation in the sense that, beforehand, he should make sure that there really was such a crime, and not suddenly execute the sentence—which, it must be said, is impossible to reconsider.

What's more, Voltaire comes to a credible conclusion when he points out the exponential growth of sorcery despite the severe punishment: The more the courts condemned them, the more they multiplied. This spread is natural: the unfortunates who had heard all their lives about the immense power of Satan, his devotees traveling through the air and exercising dominion over the whole of nature, must have thought that nothing could be truer, because certain judges, considered to be very wise and enlightened spirits, did not doubt the power of this Satan or the graces he lavished on his favorites. […] and he was entitled to all the treasures and all the beauties of the earth. There was no indigent person who could resist such flattering seductions. What those wretches imagined was also imagined by judges. And the case, instead of being discussed in insane asylums or Bedlam hospitals, was examined in dungeons or torture rooms, and ended in flames (Arouet, 2021).

He therefore realized that wisdom—once called magic—was intertwined at both ends of the religious spectrum. It was seen as an article of faith—sorcery. But what was once good was no longer so in the Middle Ages, times changed and the world was divided into those who were devoted to it and those who abhorred it. However, after the extinction of death to sorcerers, they disappeared from the earth, and it would not be unreasonable to credit their disappearance to scientific advances.

It is worth remembering that, in Brazil, there has long been no punishment for the act of defiling one's religion; on the contrary, it is punishable to mock the religion of others, since the "freedom of conscience and belief, the free exercise of religious cults being guaranteed and the protection of places of worship and their liturgies being guaranteed, in the form of the law" (Brazilian Federal Costitution, Art. 5, item VI).

G) Article X—Sacrilege

Sacrilege is the debasement of objects and things sacred to a people; it is profanation, blasphemy. It was classified as a crime against God, and is also included in the genus and species of heresy and sorcery. Its penalty was mainly death-suicide, the atrocious corporal punishment par excellence, or the "art of retaining life in suffering, subdividing it into 'a thousand deaths'".

Voltaire cites cases which, for various reasons, have been unjustly branded as sacrilege. The case of the Roman who killed a cat consecrated to the Egyptian

people, who suffered a massacre; the case of the great lama, who, if a certain object had been sent to an emperor in China, would surely have deposited it elsewhere. What the author wants to show is that different faiths and cultures are treated differently, and what unites them is tolerance.

He also recognizes cases where naive children from another village had rehearsed an ancient and unknown song next to a kind of wooden "totem", which, after hearing the songs, was enough for them to be classified as a crime of divine lese majesty with the utmost gravity, and condemned to all kinds of torture, amputation of the fist and tongue, and in the end, burned alive.

Criticism is also leveled at the trial system, which was devoid of any guarantees—in fact, one of the judges was openly an enemy of the family—and the mismatch with justice, where a few votes too many could lead to the life of a human being being being put on hold. Voltaire recalls that in England—which was little more civilized than the rest of Europe—all the jurors had to agree. Would it be too much to demand such attention to a trial subject to such a draconian penalty?

What's more, the fragility of the accusations, the dubious interpretations, generated an immeasurable fear of freedom for anyone in the dreadful Middle Ages. The difficulty in knowing what this crime was, led Voltaire to conjecture that it was denying the existence of God. Finally, he reiterated the need to make citizens useful and to refrain from burning them through intolerance.

H) Article XI—Criminal proceedings for school disputes

At the time of the Enlightenment, it was very difficult for philosophers to propagate their freedom of professorship, largely due to intentional monarchical censorship, such as the case in 1624 when a "sentence forbade, on pain of death, having an opinion contrary to that of Aristotle".

A specific passage on English legislation in The Price of Justice is worth mentioning, above all, because it ratifies François-Marie's commitment to a nuanced tolerance, in which one should not simply give up punishing, in support of abolitionism, but rather the "equidistance between rigor and indulgence":

I) Article XII—Bigamy and adultery

Many laws of the time punished infidelity and disrespect for monogamy with the death penalty, e.g. the Carolina Law instituted by King Charles V.

The author points out the differences in understanding and culture between legislation in countries that authorized it (Turkey) and others that didn't (Italy, Germany, France and Spain), and suggests making a distinction between local duties (monogamy and fidelity) and universal duties (respect, solidarity, etc.). It is therefore the similarity already mentioned in the treatment of sin and crime.

It is in this context that the ratio essendi establishes these crimes, which in truth see women as property, an asset, a trump card. The reflection left by Voltaire is partly contemporary—with the exception of undue anachromism in the ipsis litteris interpretation—because it rejects the need to recognize as criminal such ephemeral facts in the interests of criminal legislation, in attention to respect for their intimacies, and the usefulness that they may have for the State, which there

certainly won't be if this austere penalty is applied.

J) Article XIII—Marriages between people of different faiths

Once again, the crux of his criticism is tolerance. He recognizes that many laws of the time severely punished marriages between people who professed different religions.

The reflection that must be made is: Wouldn't it really be interesting for the development of a nation to unite people from different worlds, precisely in order to embrace diverse cultures with the aim of populating the nation with tolerant and thinking minds?

K) Article XIV—Incest

The reflection proposed by François-Marie Arouet on incest—which is sexual intercourse between relatives—is, to a certain extent, like that proposed in Sorcery, especially in the radical change of understanding of what was once considered commonplace, and which, at that time, no longer was.

Certainly, for the very preservation of the human species, at the beginning of time incestuous relationships between close relatives became necessary, in fact, a duty.

Although many nations at the time did not have legislation prohibiting incestuous relationships, in France, for example, some courts punished incestuous relationships with the death penalty, based on their own authority, tearing apart the legal reserve (part of the principle of legality), it is worth noting that the precept was highly respected in a neighboring nation (England). There, the punishment would be for judges who applied a penalty outside the law. A true tyrannical injustice.

L) Article XV—Rape

From the outset, we must stress that the average morality of society has changed over the centuries. What used to be seen as frivolous is no longer so today, and vice versa. We excuse ourselves from undue anachronisms, but it is good to portray how prejudiced and sexist the conception of the (in)violability of women's bodies was at the time.

The metaphor Voltaire uses about the "skillful" (sic.) way of invalidating the consummation of a rape by an example taken from a speech by the queen and her sword is, to say the least, anecdotal. It is said that the sword would not be able to put itself in the scabbard if it were moving out of sync.

However, there is hope. The author mentions that in France there has been a breakthrough in using the medical examination as a means of proof. A principle, a genesis of change capable of safeguarding a better application of justice.

M) Article XXII—The nature and strength of evidence and presumptions

We now come to Voltaire's comments on the need to pay attention to the process of investigating a crime. There is no point in having a fair criminal law if the process—not the mere instrumentalization advocated by the vanguard, but rather the application of the law with the proper guarantees and limits so that it is legitimate to curb individual freedom in the end—of investigation is unfair, devoid of

the minimum guarantees.

In this sense, the author reflected his ideas on a fair criminal process, with the need for evidence free of taboos.

§ I—Flagrante delicto

It should be clarified that his reflections are useful and valid to this day. The author says that flagrante delicto proves the fact, and not the crime. Here, there is the ardor of the infraction that can unbalance the correct interpretation of the facts, which may have different substrates. In dogmatic terms, the fact would be an indication of a crime—*ratio cognoscendi*.

§ II—Witnesses

Witness evidence is certainly very important to the case. But would it be credible, for a rigorous conviction, for two people to testify, taking into account all the issues that cloud their senses (e.g. false memories, cognitive dissonance, political or religious ideologies)? These were the questions Voltaire asked in order to question the legitimacy of testimony.

He went on to cite countless cases of the problems of "sanctifying" testimonies, such as the case of Sirven's daughter, who was found dead with water in her stomach; the conclusion was that he had killed his offspring, without even asking if the unfortunate girl had drowned. However, the paradigmatic case was in fact the "murder" of La Pivardière. Who subsequently reappeared like a phoenix. The real "scoundrels" were those who accused his wife—Madame de Chauvelin—of ordering his death by sicarios.

When the author says that La Pivardière's incredible but public adventure still needs to be told. Mrs. de Chauvelin, married to him by second marriage, was accused of trying to kill him in her castle. Two maids witnessed the crime. The daughter herself heard her father's screams and last words: "My God, have mercy on me!". One of the maids, who was ill and in danger of dying, invoked God, receiving the sacraments of his Church, to affirm that her mistress saw her master being killed. Several other witnesses saw the bloodstained clothes; many heard the gunshot that started the murder. His death was taken for granted. However, no shots were fired, no blood was spilled, and no one was murdered. The rest is even more extraordinary. La Pivardière returns home; he presents himself to the provincial judges, who are trying to make amends for his death. The judges didn't want to drop the proceedings; they told him that he was dead, that he was an impostor for saying that he was still alive, that he should be punished for lying to the courts like that, that the records were more reliable than he was. This criminal process lasts eighteen months before the poor man manages to get the sentence certifying that he is alive".

In this sense, Voltaire's exhortations are necessary: "If you don't know for sure whether a proposed action is just or unjust, abstain".

On another note, idem, the complete absence of evidence in self-serving convictions by the court is criticized, i.e., without someone to accuse them, or even evidence and clues (e.g., Montbailli and his wife case). Voltaire alludes that "it

seems to be a pleasure to put two citizens to death in the midst of torment", but his pointed reflection, in fact, was: "We would then be tempted to wish that all laws were abolished [laws that are too severe and do not meet a scientific minimum for the production of evidence], and that there were no other laws than the conscience and good sense of the magistrates. But who can guarantee that this conscience and good sense won't go astray? Is there no other recourse but to raise our eyes to heaven and mourn human nature?

In this respect, it is abhorrent to see the old-fashioned immoralities of judges in the correct and fair (in)use of evidence, misrepresenting the functions of criminal proceedings, as mentioned above. This avant-garde view—of the process as an instrument for applying substantive law—is gradually being overcome, because one cannot conceive of a process as an instrument of coercion where that is the end in itself. To legitimize a penalty, it is necessary to observe fundamental rights and guarantees that are anchored to the state's limits.

N) Article XXIV—Torture

Despite the millennia-old use of torture, Neros and Caligula did not dare to use "questions"—means of torture in the act of interrogation to obtain a confession—against Roman citizens. Ditto in the Russian Empire and in England.

However, the territories that applied the Carolina Law used a veritable "menu of questions": preparatory question, provisional question, extraordinary question, etc. Their ratio is based on the Sophists' understanding that torture purged infamy.

In fact, the penalty—especially for Christianity—as mentioned above, was seen as an atonement. In this sense, the unfortunate person had to be convinced of the evil he had done and repent; however, in the pay of the State, all useful means could be used to make him understand and "purify" himself, even though such services.

We had the same impression as Voltaire. It seems to us that such a law was written by that sadist for torture and fearful of losing his job, the Executioner.

In this way, we can see the preference for the practical, however atrocious this "practicality" may be. It's easier to torture someone than to order new evidence, information, etc. In short, the most practical thing is not always the right thing.

This animalistic means of "discovering" the truth is billed as an ordeal, a true trial by fire, originating in Germanic law, but it has a clear distinction, and this is perhaps the greatest proof that it is completely useless. Torture will only prove the crime if the defendant wants (or is willing or unable) to confess, whereas fire-proofing leaves a tangible mark, which was considered proof of the crime—true irritant evidence.

The argument that torture is a skillful means is nothing more than sadistic rhetoric, since it doesn't guarantee the credibility of a confession, even if it can only be ascertained while the defendant is not being tormented: "If you don't confirm now what you have confessed, I will torment you again". The baiting of the strong guilty party is favored, and the weak innocent party is doubly harmed, rendering the confession useless. Not so bad however, at the very moment when the victim doesn't resist and reports (or invents) the co-participation of others, he

is punished—after all, he adhered to the conduct—and the torture of the accused is perpetuated, and the cycle continues.

Modulating this reasoning to modern times, we find that torture, in addition to being a crime, is expressly prohibited by the Constitution as a means of punishment or evidence (Brazilian Federal Constitution, Art. 5, III). However, can we conclude that some arbitrary arrests, restrictions on property, rights, forcing denunciations, etc., cannot be considered 21st century neo-torture? What would be their usefulness, would the ends justify the means employed?

Voltaire did, however, legitimize the torture of the regicide Ravailac to a certain extent. We use the same reasoning that he once used. All dangerous speech must be combated, and this exception is one of them. But he concludes, like Mr. Beccaria, that torture does not serve to discover the truth, "but rather to cause, uselessly, a longer and more painful death".

7. Conclusion

It is clear from the extensive number of comments and reflections alluded to by Voltaire at this time that it was generally forbidden to express oneself, especially against the "system", and that these reflections can be imported into modern times without any major complexities. We live in a time of constant intolerance: religious, political, sexual, etc. Times in which it is professed loud and clear that the death of the "evildoer" should always be applauded, prima ratio. "Be aware of the mistakes of the past so as not to repeat them in the future", an apocryphal phrase that fits in perfectly with François-Marie Arouet's courageous comments, valuing humanity, freedom of speech, thought, manifestations, creeds and beliefs.

Such considerations are a true testament to the dearly held principles of fundamental rights, which, if only respected, legitimize the state's punitive power. It is no wonder that legality, the prohibition of the retroactivity of harsher laws, proportionality, a broad defense, the adversarial process, the right to appeal, due process of law, the guarantee of being judged by one's peers in crimes against life, etc. are so important and are the fruit of the Enlightenment thinking exposed here.

In the twenty-eighth and last article of his work, he mentions his pleased thoughts on Louis XVI's decisions regarding the desertion of soldiers who, in another era, would have been punished with death, but the King, motivated by compassion and rationality, ordered them to make reparation for their faults by means other than punishment—advances in the preventive purpose of punishments. Tolerance makes punishments more rational, less cruel and more shameful in the sense of readjusting morality to the path of solidarity.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

Alimena, B. (2007). *Introdução ao direito penal brasileiro* [*Principios de derecho penal*].

(Tradução M. F. Bottallo). Editora Rideel.

Araújo, F. R. (2018). *Curso de Direito penal brasileiro—Parte Geral.* Juspodivm.

Aristóteles (2003). *Ética à Nicômaco*. Editora Martins Claret.

Arouet, F. M. (2021). *Voltaire. O preço da justiça: Du juste et de l'injuste; prix de la justice et de l'humanité* (Tradução I. C. Benedetti). Editora MediaFashion.

Beccaria, C. (2015). *Dos delitos e das Penas* (2ª ed., Tradução D. P. M. Oliveira). Editora Edipro.

Hobbs, T. (2003). *Leviatã.* Editora Martins Fontes.

Hungria, N. (1942). *Comentário ao Código Penal* (Vol. V). Editora Forense.

Kelsen, H. (2001). *O que é justiça*. Editora Martins Fontes.

Magalhães Noronha, E. (1976). *Direito penal brasileiro. Introdução e Parte Geral. Vol. I* (12ª ed.). Editora Saraiva.

Prado, G. (2024). *Curso de Processo Penal: Tomo I—Fundamentos e sistema.* Editora Marcial Pons.