

The French Revolution and the organization of justice

Adrien Duport

FUNDAMENTAL PRINCIPLES OF POLICING AND JUSTICE, SUBMITTED ON BEHALF OF THE COMMITTEE ON THE CONSTITUTION

22 December 1789

At the point where the joint Committees on the Constitution and the Criminal Law are about to submit to the National Assembly the plan for the organization of the police and the criminal justice system, I thought it might be useful to offer in advance the essential foundations of our work for the reflection of those who will be attending to these important subjects. It is a disadvantage for the members of the National Assembly that, because they are forced to move quickly from one subject to another, they do not always arrive prepared by reflection upon the subjects being considered. This disadvantage would be most disastrous for the present subject, since simple errors can produce the most unpleasant consequences for the honour, liberty and life of the citizens.

Art. 1. The police and justice, like all other institutions of society, are established solely for the common benefit of the members of society; their purpose is to ensure that every member can exercise his natural and civil rights and to guarantee that every member may enjoy these rights free from the interference that might be caused by other individuals.

Art. 2. Since all men have, by nature, an equal right to life, honour and liberty, anyone who kills, injures, abuses or illegally detains a man, violates the natural rights of that man.

Art. 3. Since all men have, as members of society, an equal right to their security and their property, anyone who steals, destroys or unjustly detains the property of an individual violates the civil rights of that individual.

Art. 4. The only means that society has of guaranteeing for all the exercise and enjoyment of their natural and civil rights consists in giving everyone sufficient incentives to force him to respect the rights of others.

Art. 5. The first and most important of these incentives is that the laws are just, equal for all, made and directed solely to the happiness of all; that everyone may see in the respect in which his rights are held the respect that he must show for the rights of others.

Art. 6. Without this condition, the peace of society is not even desirable; it is merely a compulsory order and the motivation is no longer justice but fear. Society does not have the right to impose the enforcement of such laws, because what right would it have to require that an individual observe justice when society itself failed to observe it in respect of that individual?

Art. 7. The second of these reasons is the establishment of punishments. If the laws are just and wise, if they ensure for everyone the enjoyment of his rights, then only the law can impose punishments on those who tend to break the laws or, what is the same thing, to disturb the exercise of the natural and civil rights of individuals.

Art. 8. With respect to punishment, the minimum sentence is required by humanity and counselled by policy. Whenever the purpose of the law can be achieved by a particular punishment, it is a barbarity and a crime on the part of the legislature to impose a harsher one. Furthermore, this weakens a powerful motivator of public order and justice.

Art. 9. In an arbitrary and illegitimate government, people are forced to prescribe very harsh punishments to force men to obey laws that are unjust and contrary to their happiness; in a free and legitimate polity, on the other hand, since the main motivator must be justice, equality and the wisdom of the laws, punishments must be moderate.

Art. 10. It is not because the law prohibits an action that it becomes a crime, but the law must prohibit an action in order to have the right to punish it.¹ Thus, a man is unjustly punished (1) when the action he commits is not prohibited by a specific law; (2) when the punishment that is imposed on him is not precisely indicated; (3) when society has not taken the steps to make the man familiar with these two laws.

¹ Otherwise, who would have this right?

Art. 11. In order for the reasoning behind punishments to impact uniformly on every individual, punishments must be proportionate: (1) to the sensibility of everyone; and (2) to the extent to which the action in question was immoral.

Art. 12. The extreme difficulty of determining this measure, and the danger of leaving its application to judges, has led to the adoption of the contrary maxim: that punishments for the same crimes must be equal for all citizens.

Art. 13. Society does not have the right to establish any punishment, the spectacle of which may lead men to be cruel and diminish their respect for the dignity of the human race.

Art. 14. It is primarily to the prevention of crime that social institutions must be directed. What must be done in this regard out of humanity is still a good policy. It is easier, simpler and safer to keep the peace than to restore it once it has been disturbed.

Art. 15. Reason and experience have proved that men were restrained more by the certainty of punishment than by the intensity of the penalty. Society must therefore take the most specific precautions to ensure that all guilty persons are punished.

Art. 16. Society owes security and peace to all and justice to everyone. It is necessary therefore that all citizens be able to complain without hindrance, that a man may be arrested on mere suspicions, but that judgment may be rendered only on complete conviction. Policing that is exact without inquisition, justice that is humane and public, sentences that are moderate but inevitable: that is the system of free countries.

Art. 17. Two separate institutions contain the means to guarantee property, honour and life for men. These two institutions are the police and justice.

Art. 18. Everything relating to the means of preventing crime, restoring order quickly, seizing and detaining those who have disturbed the peace, is within the purview of the police. Everything relating to the means of checking the facts that lead to a prosecution and thereby enforcing the law belongs essentially to the justice system.

Art. 19. It is necessary to accurately observe this distinction,² because each of these institutions has a different character and their approaches are almost opposites. Justice must proceed with a great deal of reflection and with very strict forms; it must be determined only by the highest possible degree of certainty. The police, on the other hand, are forced to act more expeditiously and must often rely solely on clues.³

Art. 20. One of the most certain means of preventing crime is to prohibit begging and arrest beggars. If this is done, individual liberty is not violated, because while every individual has the right to require society to provide him with work, or assistance if he is infirm, society, for its part, has the right to require that every valid citizen work for his living.

Art. 21. All citizens have a duty to assist in restoring order, not merely through their own moderation but also by endeavouring to restrict those who disturb the peace and to arrest them, if that should be necessary; because all citizens are, so to speak, jointly responsible in the eyes of the law for ensuring compliance with order and justice.

Art. 22. It is also the duty of every citizen to obey the police, and if a citizen refuses, he must be forced to do so. However, society has a duty to every citizen: (1) not to detain a man as soon as he is able to present sufficient security to answer for the act he is alleged to have committed; (2) when it is necessary to temporarily deprive a man of his liberty, not to add any penalty to this deprivation; (3) when a man is arrested, to watch over his fate and his existence more carefully and to protect him more particularly since he is no longer under the eyes of his fellow citizens and lacks the means to ensure his preservation on his own.

Art. 23. Thus, (1) for an offence that deserves only a financial punishment, a civil remedy or even a sentence involving loss of civil rights, a monetary security must be sufficient; and thus, (2) society does not have the right to place a citizen in unhealthy or uncomfortable prisons, because a man who is accused or even charged is always presumed to be innocent.

Art. 24. In order to ensure that the right to arrest a man before he is convicted does not violate individual liberty, two things are required: the first, that this power be entrusted to men chosen by the people who have

² The confusion between the police and the justice system was a major defect of our laws and the cause of a great deal of abuse.

³ It can be said that in the police the rights of society in respect of individuals are considered, and in the justice system the rights of the individual against society are considered.

integrity and are humane and that it be organized in the best manner possible to prevent abuse; the second, that a man who is arrested should be brought before a judge at once.⁴

Art. 25. When these conditions are met, the preventive custody of an individual is no more a violation of his individual liberty than the punishment of a convicted person is a violation of his security. It is an essential condition of the contract they have made with society.

Art. 26. Any man who refuses to appear for trial and hides from justice loses any right to the protection of the law; he shall be denied any resort to the courts and any legal action, because in order to enjoy the benefits of society, a man must fulfil the obligations that society imposes.

Art. 27. Since the imperfection of men and the means they use to determine the truth always make it possible for errors of justice to arise and, on the other hand, since a man who is arrested may be deprived of his liberty for a long time while his trial proceeds, it follows that precautions must be taken to prevent a man from being subject to court proceedings out of malice or lack of consideration. The best of all these precautions is the situation where a number of honest citizens decide whether a man who is charged with a crime must or must not be tried.⁵

Art. 28. When a man appears before the courts, it is the task of society or of the person who complains to prove that he is guilty; otherwise, he must be declared to be innocent, regardless of what his defence might be.

Art. 29. All defences must be allowed to the accused. Nothing written against the accused may be relied on without it being disclosed to him. Any means of enlightening the justice system and limiting the judges to the strict fulfilment of their duties must be established by society. Thus, (1) the proceedings must be public, as well as the pretrial investigation; (2) there must be an authority that can compel the judges to act in accordance with the law.

Art. 30. The law and the forms it prescribes are, especially in criminal matters, the most precious of public property, and it is necessary for society to delegate a man with special responsibility for ensuring that the law is complied with.

⁴ We are not talking here of *habeas corpus*, an institution on which it is still possible for us to do better than the English.

⁵ The grand jury.

Art. 31. When a man is brought before the courts, it is necessary to examine whether the act alleged against him was truly committed by him and then whether it is prohibited by law. A man may be convicted only when these two factors are present.

Art. 32. Since the testimony of men is the most common item of evidence in court, it must be capable of effecting the *deep-seated* conviction of a number of honest and disinterested men. They must not therefore be deprived of any of the circumstances capable of ensuring or undermining the truth thereof. It is accordingly necessary for witnesses to explain themselves *viva voce* and not in writing. Furthermore, witnesses must not be placed in a position where they are forced to cause an innocent to perish or to perish themselves. Thus, far from being highly favourable to an accused, written depositions on the basis of which a witness may be prosecuted for bearing false testimony if he retracts his statements are a very harmful institution for an accused because they force a man, out of concern for his own life, to support a false proposition that can lead to the conviction of the accused.

Art. 33. Society should only allow a man to be convicted when his act has been confirmed in the manner and by the means capable of creating the highest possible degree of certainty.⁶

Art. 34. When the act is verified, the judge may impose a sentence only when there is a positive law decreeing such a sentence, and this law must be referred to in the judgment.

Art. 35. In order for an action to be punishable, it is necessary for its perpetrator to have intended the action. Where there is no intent, there cannot be a crime. Thus, the action of a child or a madman cannot be regarded as punishable in the eyes of the law. The same is not true of drunkenness, because a person who engages therein knows beforehand that he is placing himself in a situation where he may commit punishable acts.

Art. 36. As long as a man is accused, he has the right not only to the indulgence but even to the respect and protection of society, because he is defending his life and his honour against men at liberty who are attacking him. He must also be able to use in his defence all the means given to men to determine the truth. He must be permitted to use his friends or counsel in this situation.

⁶ The trial jury.

Art. 37. If a man has been found innocent, society must provide him with compensation because he has suffered alone for the security of all.

Art. 38. If he is found guilty, he loses all or part of his rights as a citizen while he serves his sentence. However, he retains his human rights at all times. Insulting or mistreating him is an act of cowardice and a punishable offence.

These are the foundations on which the police and justice should be based. These two institutions serve to preserve liberty, order and peace among men. These are the means of firmly establishing this general and reciprocal guarantee of all the rights of man, the principle according to which they join together in society. Finally, this is the way to reach the solution for this major social problem. To find out how, with the smallest possible inconvenience to each individual, it is possible to ensure that all can enjoy their abilities, their resources and their rights to the fullest possible degree.

Note

This text is a translation from the French. The French version comes from the record of the parliamentary debates of the time:

Archives parlementaires de 1787 à 1860,
Première série (1787 à 1789), Tome X, du 12 novembre 1789 au 24 décembre 1789,
Paris, Librairie administrative de Paul Dupont, 1878, pages 744 to 746.