

Klassikeren

Retfærd startede med Kaarlo Tuoris artikel i nr. 77 en serie, som vi har valgt at kalde "klassikeren". Her vil vi give Retfærds læsere mulighed for at stifte bekendtskab med (rets)kulturens personligheder. I dette nummer fortsættes serien med et yderligere bidrag. Vi vil samtidig opfordre andre skribenter til at bidrage til serien ved at præsentere en forfatter eller en tekst, som har haft særlig betydning for vedkommendes eget værk eller liv.

PER STIG MØLLER

Adam Smith, "Lectures on Jurisprudence", "The Glasgow Edition of the Works and Correspondance of Adam Smith", bind 5, 1978, side 126-133.

Adam Smith er først og fremmest kendt for sin liberale, økonomiske teori, der udkom som "Wealth of Nations", 1776. Men han var og betragtede sig først og fremmest som moralfilosof. Hans økonomiske teori var en konsekvens af hans moral- og samfundsopfattelse, der igen hang sammen med hans religionsopfattelse.

Smith blev professor i logik ved Glasgow University i 1751, men overflyttedes allerede i 1752 til professoratet i moralfilosofi. I denne egenskab holdt han en forelæsningsrække, der begyndte med metafysikken, gik videre til morallæren og derfra til retsvidenskaben, hvorefter han endte med økonomien. På baggrund af disse forelæsninger udgav han i 1759 "The Theory of Moral Sentiments", der blev en europæisk succes og blandt andre optog franskmændene meget. Den fik betydning for deres udvikling af sensibilibismen i litteraturen. I Storbritannien følte både Hume og Burke sig i overensstemmelse med bogens sympati-lære, som gik ud på, at menneskene ikke var drevet af fjendskab i forhold til hinanden, men af tiltrækning af hinanden. Derfor betragtede de dét som gode handlinger, der fremmede den almene velfærd. Denne følelse af medmenneskelighed eller "fellow-feeling" var

indlagt i mennesket af Gud, hvormed den første forelæsningsrække drejede sig. Han havde indrettet menneskene og verden med henblik på at fremme den størst mulige lykke for alle.

Det grundmenneskelige ønske om at bidrage til fælles fremgang og velfærd, så alle kunne blive lykkelige i overensstemmelse med Guds plan med menneskene, havde samfundet imidlertid opstillet en række forhindringer for. Og det er disse forhindringer, Smith argumenterer for fjernelsen af i "Wealth of Nations". Hvis de er væk, vil menneskene uden at ville det af sig selv fremme den fælles velfærd, som Gud ville. Derfor vil de i kraft af deres forskellige evner og interesser optræde, som styredes de af "en usynlig hånd". Og denne hånd leder ligeledes mennesket på den rette, moralske vej i moralfilosofien, fordi vi altid handler, så den indre "upartiske iagttager" vil finde handlingen acceptabel. Det er derfor vi ikke eller kun sjældent bevidst vil skade hinanden, og når det sker straffer denne iagttager os med anger.

Det kan dog ske, at dette ikke er nok til at afholde os fra umoralske handlinger. Da disse ikke kan tillades, fordi den nødvendige forudsætning for en fredelig samfundsudvikling lig-

ger i den gensidige sympati og tillid, må der være en retsorden. Det frie marked med den frie økonomi fungerer således kun, hvis der er en retsstat. Det er denne retslære, Smith beskrev og kommenterede i sine forelæsninger om retsvidenskaben, som han holdt i 1763. De ansås længe for lige så forsvundne som forelæsningerne om metafysikken, men blev fundet i 1895 og udgivet i 1896.

I det følgende kan læses et beskedent uddrag fra forelæsningen den 3. februar 1763. Heri man bemærker, at Adam Smith fandt datidens dødsstraffe for tyveri overdrevne og heller ikke kunne tilslutte sig datidens strenge dom over ægteskabelig utroskab. Til gengæld er det karakteristisk, at Smith vil slå hårdt ned på økonomisk kriminalitet, fordi denne svigter hele forudsætningen for en fri økonomi, som just må bestå i tillid. Hans økonomiske frihed skulle jo ikke baseres på umoral, men på moral. Derfor ønskede han f.eks. i den at indføre regler for bankvirksomhed, så de mindre kloge ikke kunne udnyttes af de mere kloge. Overfor indvendingen om, at han herved indskrænkede den økonomiske frihed, svarede han, at man også er forpligtet til at sætte brandmure op. Der må være spilleregler, og retssamfundet skal beskytte de svage. Derfor vendte han sig ligeledes imod forbuddet mod fagforeninger, fordi der ikke fandtes noget forbud mod, at arbejdsgiverne kunne aftale at trykke lønniveauet.

I uddraget bemærker man desuden, at Smith ser retsvidenskabens udvikling i sammenhæng med samfundsudviklingen og betoner, at samfundet har overtaget retten til at straffe i løbet af denne udvikling. Denne sammenhæng mellem lovene og samfundssystemet havde Montesquieu allerede påpeget i "l'Esprit des lois", 1748, som Smith havde været en opmærksom læser af. Ifølge Monte-

squieu bliver sæderne som lovgivningen vil, hvilket blev udgangspunktet for oplysningens krav til lovgiverne, stærkest formuleret af Helvétius i "De l'Esprit", 1758, som Smith ligeledes havde læst. Det er karakteristisk for tidens filosoffer, at de søger "en naturlig orden". De finder grundlaget for den forskellige steder, men hos Smith findes den i Guds plan med menneskeheden, som Han vil bringe frem til lykke og velfærd gennem frihed. Men friheden kan misbruges. Derfor må der love til, men vel at mærke love, som ikke modarbejder, men fremmer planen. Derfor skal friheden beskyttes. Da ingen af os alligevel kan begribe Guds plan og overtage Hans planlægning er det bedst at lade menneskene handle frit, fordi de derved ubevidst ledes af Gud til at opfylde planen. Hvor friheden indskrænkes, tiltager menneskene sig en magt over udviklingen, de ikke kan have. Derfor må man gennem retten forhindre menneskene i at tage friheden fra hinanden og gennem skattepolitikken give staten de økonomiske midler til at beskytte samfundet mod at blive erobret og borgerne mod at miste deres personlige frihed og ejendom.

Smiths forelæsninger om retsvidenskaben var et bidrag til den liberal-konservative oplysningsfilosofi, hvis økonomiske teori kulminerede med hans "Wealth of Nations" med den tro på menneskets naturlige "fellow-feeling" og gensidige sympati, der var indlagt i os af Gud, og som lovene og retsvidenskaben skulle beskytte. Hans retslære er derfor en kombination af konservatisme og liberalisme, hvilket fremgår af dette beskedne uddrag.

Forfatteroplysninger:

Per Stig Møller er dr.phil, formand for Det Konservative Folkeparti og medlem af Folketinget.

Thursday Febr'y 3^d 1763

The only injuries which can be done to a man as a man which have not been already considered are those which injure one in his estate.^d {This may be done either by injuring him in his real or his personall estate. 145 First, of the injuries done to one in his real estate.} These may | be of two sorts, for they may either 1st injure him in his immoveable or 2^{dly} in his moveable possessions. Again one may be injured in his immoveable possessions either by burning and destroying his house, which by the English law is called arson; or by being forcibly dispossessed of his estate. — Fire raising, incendium or arson, when a fire is raised wilfully in an others house, is punished capitally by the Roman, English, and Scots law. The setting ones own house on fire, if it be done with design to raise fire in the adjoining, has also been thought liable to be capitally punished. It is also punishable in a less degree if it be done with intention to hurt any one or his goods who may be in it. {But the burning of a house thro negligence is not punishable.} The dispossessing one of his estate is in all cases punishable; and the dispossesser is obliged to restore the estate to the person who was turned out, by a very short and expeditious process. And in this case the civil constitution extends considerably farther than reason 146 and | nature dictate. For naturally any one who is turned out of what he justly poss(ess)es would think himself intitled to reinstate himself in the^e possession of his property by force. But this civil governments do not allow, as dissagreeable to the peace and order of society. Insomuch that one (who) violently takes possession of what he knows he has a right (to) is, as well as any other who turns one out of what he possesses, liable to be sued by an action on that head, which by a very summary process obliges him to give up the estate. And this process requires no more than the proof of the force used to dispossess him, whereas the proof of ones right to the estate is always tedious and often very doubtfull. When one has been thus reinstated in the estate he possessed, the other may then bring the proofs of his right; but violence is at all times prohibited in the taking possession of an estate. 147 It is to be observed however, that if one | who has thus violently taken possession of an estate be allowed to possess it peaceably for the space of

^c 'other' deleted

^d Replaces 'property'

^e Possibly deleted

ii.149]

Report of 1762-3

127

two years,⁹² he can not afterwards be sued on the plea of violence, but must be allowed to continue in the possession of it untill the other make out his rights, which (is) as was said a much more doubtfull and tedious process.— It is to be observed also that tho it be unlawfull to take possession of ones own by violence, yet it is not unlawfull to keep^f ones possessions by force, as that is no more than acting in his own defence.

In the moveable part of ones estate the injury may be of thre(e) sorts, either 1st, theft, that is, the clandestinely conveying away anothers goods with design to apply them to his own use; 2^d, robbery; and 3^d, piracy, which differs from the other as the one is committed by land and the other at sea.

148 | Theft appears naturally not to merit a very high punishment; it is a despicable crime and such as raises our contempt rather than any high resentment.— It is however punished capitally in most countries of Europe, and has been so since the ⁹³ century. In England all theft which amounts to above the value of 12^d is accounted grand larceny and is punish'd by death without the benefit of clergy. Thefts to a less amount than 12^d are punishd by banishment, a fine, or whipping. The English law and the Scots also accounted, till the time of George 2^d, no theft capitall unless the thing stole was the property of some certain person.⁹⁴ Thus it is not theft punishable to convey away pigeons at a distance from the pigeon house, nor geese or ducks when they have strayed far from the house; {nor is it theft for one who has no title to shoot wild fowl of any sort.} tho it is theft to convey them from the house or the nests. In the same manner, till a statute of George the 2^d, it was not theft to kill a deer in a forest or chase, tho it was in a park or inclosure, unless the theft was committed in the night time by persons whose faces were blacked.⁹⁵ But 149 by that | statute the killing of a deer by a person who has no right to it is punishable with death. In Scotland all sorts of theft are punishable by death, but the amount of the theft must be considerably greater than it is in England. Thefts of smaller value are punished by banishment. But there is one case wherein thefts of the smallest value are punished with death both by the Scots and English law, that is, where a house is broken open in the commission of it. The security of the individualls requires here a severer and more exact punishment than in the other cases. Burglary

^f Replaces 'defend'

⁹² In fact three years: 31 Elizabeth I, c. 11 (1589); Hawkins, I.64.8,14.

⁹³ Blank in MS. Probably 'twelfth' was intended; cf. the reference to Frederick I on p. 129 below.

⁹⁴ Hawkins, I.33.24-6 (English); M'Douali, II.3.12 (Scots). The reference is probably to statutes for the better protection of game by higher penalties for poaching, e.g. 10 George II, c. 32 (1737) (England) and 24 George II, c. 34 (1751) (Scotland).

⁹⁵ 9 George I, c. 22 (1722), made perpetual by 31 George II, c. 42 (1758); Hawkins, I.49.

therefore is always capitally punished. The punishment which is commonly inflicted on theft is certainly not at all proportionable to the crime. It is greatly too severe, and such as the resentment of the injured person would not require. Theft appears to be rather contemptible and despicable than fit to excite our resentment. The origin of this severe punishment arose
 150 | from the nature of the allodial and feudal governments and the confusions which were then so frequent. Each allodial lord was as it were an independent prince, who made war and peace as he inclined. Each of these lords was commonly at war or at least in enmity with all his nei(gh)bours, and all his vassalls were in like manner seperate from those of the other lords and would always endeavour to carry off plunder from the lands of their neighbours. The punishment of theft was at first some pecuniary fine, or compensation. {Amongst the Romans theft was punished with the restitution of double of the thing stolen, with this distinction, that if the thief was caught with the thing stolen about him he was to restore fould,⁹⁶ and two fold if he was not caught in the fact: in the fang or not in the fang (as it is expressed in the Scots law()), and in the Latin writers fur manifestus et nec manifestus. It will be proper to take the more notice of this, as the reason of it does not appear to be very evident, and that which is alledged by Montesquieu,⁹⁷ tho very ingenious, does not appear to me to be the true one. He says that this law was borrowed from the Lacedemonians, who, as they traird their youth chiefly to the military art, encouraged them in theft, as it was imagined this might sharpen their wit [v.150] and skill in the stratagems of war. Theft therefore was as they suppose not (<?at) all discouraged amongst them, but rather honoured if it was not discovered before it was finished; but when the thief was discovered it was looked on as a disgrace, as being not cleverly performed. From this custom of the Lacedemonians, the Romans, says he, borrowed their law; which though it was proper enough in the Lacedemonian government was very unfit in the Roman. But this does not appear probable in any part. For in the 1st place there is no good ground for imagining that the Lacedemonians encouraged theft. This is conjectured from some passages⁹⁸ of particularly one where he tells that there was a table kept at the publick charge for the old men of the city, but none for the younger men. They however were encouraged to pourloin for themselves what they could from the table, for the reason above assigned. This however is very different from what is properly denominated theft, which was not at all encouraged. 2^{dly}, we do not see that theft was ever encouraged by the Romans, for the

⁹ Reading doubtful

⁹⁶ *Sic.* Probably 'four fold' was intended. *Inst.* 4.1.3,5.

⁹⁷ XXIX.13.

⁹⁸ Blank in MS. Plutarch, *Life of Lycurgus*, 17-18.

ii.152]

Report of 1762-3

129

fur nec manifestus was punished as well as the fur [nec] manifestus; though not so severely. The reas[v.151]on was this. Punishment is always adapted originally to the resentment of the injured person; now the resentment of a person against the thief when he is caught in the fact (>is greater) than when he is only discovered afterwards and the theft must be proved against him, which gives the persons resentment time to cool. The satisfaction he requires is much greater in the former than in the latter case. We see too that there was the same odds made in the punishment of other crimes. The murderer who was caught *rubro manu* was punished much more severely than he against whom the murder was afterwards proven.} But to prevent the abovementioned disorders the Emperor the ⁹⁹ made a law that theft should be punished with death. From this law of his, capitall punishment first was inflicted on those who were guilty of theft; this took place at first in Germany and Italy and spread afterwards over the whole of Europe. The great facility of committing any crime, and the
 151 continuall danger that thereby | arises to the individualls, always enhance the punishment. Theft was in this state of government very easily and securely committed and therefore was punished in a very severe manner.—The Scots law some time ago inflicted a punishment still more severe than on any others on those landed gentlemen who were guilty of theft. This would appear very odd at this time, but naturally followed from the manners of the times. Every clan was at enmity with all its neighbours, and each chieftan was the chief abettor and receipt of all the thefts, robberies, and
^h that were committed. They were the grand receipt and the chief spring of all those irregularities; it was therefore necessary that their punishment should be the more severe. It was therefore not only a capitall punishment, but this crime was also attended with forfeiture of goods, an incapacity of inheriting, and all other parts of the punishment of petty
 152 treason.¹ But tho a capitall | punishment might be in some respects proper in those times, yet it is by no means a suitable one at this time. Ignominy, fine, and imprisonment would be a far more adequate punishment.

The progress of government and the punishment of crimes is always much the same with that of society, or at least is greatly dependent on it. In the first stages of society, when government is very weak, no crimes are punished; the society has not sufficient strength to embolden it to intermeddle greatly in the affairs of individualls. The only thing they can venture upon, then, is to bring about a reconciliation and obtain some

^h Illegible word

⁹⁹ Blanks in MS. Frederick I: *Lib. Feudorum*, II.27.8, and Gothofredus' note thereto.

¹ Sir G. Mackenzie, *Laws and Customs of Scotland in Matters Criminal* (1678), I.19.12, citing Act, 1587, c. 50 (A.P.S. III.451, c. 34):

compensation from the offender to the offended. But when the society gathers greater strength, theyⁱ not only exact a compensation but change it into a punishment. The punishment(s) in this stage of society are always the most severe imaginable. It is not the injuries done to individualls that a society which has lately obtaind strength sufficient to punish crimes will first take into its consideration. These it can only enter into by sympathy, 153 by putting | itself in the state of the person injured. Those which immediately affect the state are those which will first be the objects of punishment. These the whole society can enter into as they affect the whole equally. Of this sort are treason; all conspiracies against the state; and deserting the ranks in the field of battle, and all such cowardice. Tacitus² tells us that cowardice and treasonable practises were the only crimes punishable amongst the antient Germans, {and all such crimes were capitally punished.} When therefore the state came to take under its consideration the injuries done to particular persons, it was rather as injuries to the state than as injuries to the individualls; the punishments therefore for all crimes were in this stage of society,^j immediately after compensation had been thrown aside, the most bloody of any and often far from being proportionable to the injuries.^k When society made a still greater progress and the peace and good order of the community were provided for, and tranquillity firmly established, these punishments would again be mitigated 154 | and by degrees brought to bear a just proportion to the severall crimes. History affords us many instances of this. The laws of the 12 Tables, which were made about the time of the declension of compensation, punished many of the slighter crimes with death. A libell, as we observed,³ was capitally punished. But afterwards the praetors changed these punishments into milder ones, more suited to naturall equity. In the same manner the first laws that the Athenians had after the method of compensation had been laid aside were those of Draco, the most bloody ones imaginable. Death was the punishment of the smallest as well as of the greatest crimes; so that ⁴ says he punished in the same manner the stealing of a cabbage as he did sacrilege or murder. These were afterwards succeeded by the mild and equitable laws of Solon. In the same manner also in Britain allmost all crimes of moment were considered as treasonable; the killing of any person, at first^l and afterwards the husband or the wifes killing 155 the other, robbery, and theft in some cases, as that | before mentioned, even the non payment of a debt, were considered as treasonable, and punishd accordingly. We already observed that this has been in some measure

ⁱ Replaces 'and has' ^j 'when' deleted ^k Illegible word deleted ^l Numbers written above the last five words indicate that they were intended to read 'at first of any person'

² *Germania*, xii.

³ 143 above.

⁴ Blank in MS. Plutarch, *Life of Solon*, 17.

ii.157]

Report of 1762-3

131

taken away as with regard to theft. That regarding debt has been altogether taken away in Scotland, and is laid aside in the practise of the English law. These treasons were in generall taken away at the union of the kingdoms in Queen Annes times.⁵ The first punishments after compensation is laid aside are always the most severe and are gradually mitigated to the proper pitch in the advances of society.

The 2^d manner in which a man may be injured in his moveable estate is by robbery. Though theft does not excite our resentment to any great pitch, yet robbery, which forcibly takes our goods from us, will step up our resentment very much. Robbery has therefore been generally punished with death in all countries when compositions were laid aside, which was the first thing that was provided for in all criminall cases. Not only the
156 forcible carrying off ones goods by putting him in fear of his person but | all extortions by means of fear are accounted robbery. Thus if one should either make one give him a summ of money for a commodity of no value, an expedient often try'd by robbers to evade the law, or if he should make one sell his goods at a great disadvantage, all such extortions are accounted robbery and are punished with death. But if one should oblige another to sell him his goods for a price considerably higher than what he could reasonably expect, this would not be accounted robbery as the person was not deprivd of any part of his price, but would rather be attributed to whim and caprice.⁶

Piracy is another species of robbery which likewise requires a severe punishment, and that not only from the resentment which all robberies excite in us but also from the great opportunities there are of committing it and^m the great loss which may be sustained by it, as a great part of a mans property may be at once exposed, render a very high punishment absolutely necessary; and this as I said is generally a capitall one.⁷

157 | We come now to those injuries which may be done one in his personall estate. These are either, first, by fraud, whereby one cheats another out of his property in his personall estate; or 3^{dly}, by perjury; or 2^{dly}, by forgery.

The lesser frauds are generally obliged to be recompensed by the deceiver and are besides punished with a fine. There are however two species of fraud which are more severely punished; the 1st is with regard to bankruptcy. By the statute of bankruptcy in England, the debtor, on giving up all his substance to his creditors, is freed from all farther distress; but if he embezzles above 20£, besides his and his wifes wearing apparel, he is punished with death.⁸ This law was made in the time of George 2^d, and many have been since executed upon it; and with great justice. For

^m 'also' deleted

⁵ 7 Anne, c. 21 (1708).

⁷ Hawkins, I.37.

⁶ Hawkins, I.34.7.

⁸ 5 George II, c. 30 (1732); Hawkins, I.57.

though the resentment of the injured would not perhaps require so great a punishment yet there are severall circumstances which make it necessary.

158 The great benefit the person bankrupt receives | from this statute is no small agravation of his crime. But besides this, there is no fraud which is more easily committed without being discovered; one may take 1000 ways to conceal his effects; and the loss of the creditors may by this means be very great, as the best part of the effects may in this manner be very great.ⁿ The temptation also the debtor is under to commit this fraud and save some part of his effects make a high punishment necessary. For where ever the temptation and the opportunity are increased, the punishment must also be increased.— {For this reason, tho theft amongst the Romans was punished in most cases with the restitution of double, one half for the thing stolen and the other for retaliation, yet the stealing any of the utensils of husbandry, as plows or harrow, was punished with death; and they were deemed sacred to Ceres.⁹} The 2^d sort of fraud to be here observed is one with regard to insurance. The insurance,¹⁰ on the masters giving in an account of the value of the ship and cargo, insure her for that summ. There is an Act of Parliament¹¹ however which makes it death for one to give in an (account) of this sort above the real value. For by that means the master, having insured his ship above the value, might take an opportunity
159 of wrecking her on some place where he might easily save | himself and crew; and by this means enrich himself to the great loss of the insurers. And as the detection of all such transactions is very difficult, and great profits might be made by it, the temptation to commit such a fraud is very great and consequently the punishment must be high.— — —

Forgery is the next thing we are to consider. Whenever written obligations came to be binding, it became absolutely necessary that all frauds of this sort should be prohibited. For otherwise one by forging an obligation might extort any sum he pleased. Forgery therefore is both by the English and Scots law [is] capitally punished; with this difference, that by the Scots law all sort of forgery whatever, without regard to the nature of the obligation, is punished with death. By the English law only those forgeries are liable to a capitall punishment which are done in the manner of those papers which draw immediate payment, as bills, India bonds, banks bonds,
160 bank notes, and all others payable at a certain time.¹² ° But | bonds, properly so called, conveyances of land estates, and such as do not exact any immediate payment, are not punished with death but with pillory, fine,

ⁿ Sic ° Blank in MS.

⁹ The Twelve Tables, VIII.9, penalized the nocturnal cutting of and the pasturing of animals on another's crops by death and sacrifice to Ceres.

¹⁰ Sic. Probably 'insurers' was intended.

¹¹ 4 George I, c. 12 (1717); Hawkins, I.48.

¹² 5 Elizabeth I, c. 14 (1563); Hawkins, I.70.

ii.162]

Report of 1762-3

133

and imprisonment. The reason here is the same as that of insurance and bankruptcy. For here the payment of the money being to be made immediately, the discovery of the person or the recovery of the money is very precarious. Whereas in bonds and conveyances the danger can not be so great, as the subjects are not so perishable and there is longer time to examine the title.

Perjury is a crime no less dangerous.¹³ For by it one may be deprived of his estate, or his life itself. The false oath of a witness may bring all that about; but this crime is not punished with death but with a very ignominious punished,¹⁴ the loss of both his ears which are nailed to the pillory, his nose, and a fine and imprisonment. There are indeed some cases where one may (be) executed from perjury, but then that is not as a perjurer but as a murderer, having by his false oath been the occasion of a mans suffering
 161 innocently, | and this extends to the subborner as well as other cases of perjury. Some authors inde(e)d affirm that there have been instances of persons hanged on account of perjury, but these have probably been of the sort above mentiond. Sir George M^cKenzie and Forbes¹⁵ also alledge that women guilty of adultery have been hanged on the statute of perjury; but if there were any such instances it was a very wrong extention of that Act; for we are to observe that it is only affirmative perjury that is thus punishable. A promissory oath (tho it adds greatly to the solemnity of the obligation),^p tho it may be very sincerely made, does not appear when broke to make on(e) guilty^q (of) so heinous a crime as one who willingly and knowingly affirmd what he then knew to be false. The breach of such oaths is rather to be attributed to weakness and frailty than to any malice or ill will, and this is the case with regard to adultery.—