

THE LEGISLATOR AND THE EXECUTIONER : DEBATES ON THE DEATH PENALTY (1870-1985)

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Capital punishment was abrogated in France on October 9, 1981, thus putting an end to close to two centuries of recurrent controversy and aborted attempts at abolition. Whereas the event, hailed as historic, was widely commented, with speeches lyrically acclaiming it as a return to Reason and Freedom, and given extensive media coverage, the subject remains paradoxical. There has been much polemic, criminological, legal and historical writing on the abolition of the guillotine, but no research on what elapsed beforehand, no analysis of the conditions governing the transition to abolition, of how the bill was generated, the various logics presiding over its drafting, the different groups of actors involved (including their interests, resources and strategies), the legislative process and the scenes – the administration, the mass media, parliament, official and unofficial committees – on which it was played out.

The abrogation of the death penalty has always had powerful political and ideological connotations, more so than any other legislation. Capital punishment, the highest rung on the scale of sanctions, is a direct expression of the power of the State, formerly glorified through the spectacular, ritualized theatricals of executions, until these were closed to the public in 1939. Today, the restructuring of the economy of punishment, the considerable extension of the range of sanctions and the lengthening of mandatory periods of detention¹, following the criminal reforms voted in 1986 (the thirty-year sentence), 1992 and 1994 (the criminal code reforms) in particular, lead us to reconsider these mutations in contemporary society, and more specifically, the forms taken by the State's pretension to the monopoly of legitimate violence since 1981, and perhaps even the possible perverse effects of abolition. We are far from having exhausted the subject, then, with its complexity and numerous stakes, illustrated by the history of abolition, despite the fact that it no longer seems topical.

As early as 1791, abolition was one of the proposed criminal justice reforms. It was defended by an elite group of philosophers and lawyers, allied with the most enlightened fraction of the highest magistrates of the regional high courts (*Parlements*) and the liberal, philanthropic nobility of the *Ancien Régime*. Whereas many aspects of the project developed by the committees for the Constitution and Criminal legislation were accepted (such as the introduction and generalization of criminal imprisonment and the elimination of torture), abolition was not, owing to the threats weighing on the Revolution, the declining influence of Dupont, one of its main supporters, along with disagreement about what should replace capital punishment.

From then on there were fluctuations, in one direction or the other, with the last major overall debate on the issue during the 3rd Republic. It was somewhat successful, since capital punishment came very close to being abolished at

the time. Why, then, when there was every indication that the death penalty could be abrogated in 1906, did we have to await 1981 for the abolitionist project to succeed? What were the real stakes, over and beyond the claims of the most authorized official speeches? Who defended it? Why did the turn occur so late, especially given the 1908 episode? The latter, although too often overlooked, was definitely crucial in accounting for both the break represented by the successful abrogation in 1981, and the genesis of the socialist project to achieve it, which developed in direct continuity with the radical party program during the 3rd Republic. As France is commemorating the 20th anniversary of what was presented at the time as an important event and a great symbol of the Spring 1981 socialist victory, we felt it was important to call upon the past to shed some light on a recent chapter in our history, by taking a look at the process by which the project became a legislative reality at long last, and also to contribute to the analysis of the origins and development of penal law-making.

I - The lost opportunity for abolition under the 3rd Republic (1906-1908)

Toward the end of the Second Empire, a radical opposition developed, with the gradual rise of a new generation of men, who penetrated the public sphere to the point where the *radicals* (the moderate left) came to power in 1906. The Belleville program, supported by the radical party in the 1869 elections, reflected the revolutionary ideological heritage of 1789: it called for restriction of the powers of the State, through administrative and judicial reforms. Whereas the radicals demanded the immediate enforcement of this program, the *opportunists* (conservative republicans) who headed the government until the turn of the century, favored more gradual reform. The radical party, composed of representatives of the "middle classes", was backed by the petite bourgeoisie, the middle classes and the professionals. The upper bracket of barristers, who played a dominant role under the 3rd Republic, again brought up, and championed, the abolition of capital punishment in 1906. In a political and social context wracked with strikes spurred by the CGT² and the SFIO³, the radicals worked at achieving unity in their ranks around a *program of defense of the Republic*, by reactivating a highly ideological project: the abrogation of the death penalty.

Abolition, like several other liberty-friendly reforms on the radical platform, was rejected, despite the device used by the socialists, who submitted a bill to the Chamber of Deputies in 1905 that would cut off funding for execution-

² The *Confédération Générale du Travail* (CGT), created in 1902 and growing rapidly, called for a proletarian syndicalism and claimed to be in the forefront of the revolutionary struggle.

³ The French section of the International Worker's Association, founded on April 26 1905. It marked the unification of the various socialist currents in France.

¹ During which no form of release may be granted.

ers. However, the decision of the Minister of Justice, in 1906, to avoid any *de facto* abolition, and to prefer complete, *de jure* abolition, was a prelude to the project's failure in 1908.

The issue of the abolition of capital punishment was raised at a time of increasing campaigning for greater public safety in an atmosphere of rampant political controversy. The considerable rise in criminality, and in recidivism for petty offenses in particular, a real obsession since the late 19th century, evidenced by the official statistics, along with the exploitation of a dramatic news story, the rape and murder of a child in 1907, offered an opportunity for opponents to tax the government with laxity in fighting crime. Pushed by some magistrates with little taste for the Republic and supported by local notabilities opposed to the radicals, some jurors took action. These jurors, often shopkeepers and craftspeople, sensitive to appeals to their fear of crime, launched campaigns petitioning the Ministry of Justice and repeatedly handed down death sentences to demonstrate their disapproval of the policy of systematic pardon inaugurated in 1906 by Armand Fallières, then President of the Republic. They were joined by influential doctors, highly upwardly mobile at the time but strongly committed to a hygienist conception of punishment and rivaling with the barristers in power, as well as by a widely read opposition-run popular daily, *Le Petit Parisien*, for which a large-scale press campaign against the project of the radical government was good for business as well as a fruitful political operation. The death of the Minister of Justice, the restructuring of the Bill-drafting Commission and its subsequent change of heart, along with splits in the ranks of the abolitionists over alternative punishment, were factors in reversing the balance of power in favor of the *réactionnistes* (the "maintainers")⁴ in 1907, when mobilization was at its height, followed by the rejection of the Clémenceau project by the Chamber of Deputies in 1908.

Close scrutiny of this episode shows that we are a long way from the myth of the "3rd Republic, Golden Age of Freedom". Not only were liberal reforms dropped or incompletely implemented, but some very unliberal legislation was passed (against prostitution and vagrancy, for instance). Little remained of the ambitious plan for institutional liberalization defended by the republicans in the early years of the regime, and there is reason to doubt that the radicals were determined to make any major reforms, with the rise in recidivism supposedly endangering public safety. Far from desiring an overly liberal system, the radicals were intent on being efficient, as shown by the 1869 Belleville program, in which Gambetta promised to eliminate the guillotine, all the better to rid voters of recidivism through banishment⁵, or again, by the creation, in 1907, of the first investigating police flying squads, in the context of controversy over insecurity in the countryside and the questionable efficiency of the police and *gendarmérie*. But they went even farther : at a regional conference in Lyons in July 1907, when "maintainer" activity was at its height, the radicals reasserted the need to consolidate the weapons for punishing recidivists through application of the "dry guillotine"⁶ and the death sentence. Whereas the projected

abrogation of the death penalty had cemented their political cohesion when they came into power in 1906, it was no longer an asset in the specific 1907-1908 juncture, when the radical party was challenged from within and abolitionists were divided on the question of alternative punishment. Although the fight for abrogation did continue, and even gained some popularity, especially in the sixties, when some international organizations flourished, it was not until the socialists won the 1981 elections and Robert Badinter reintroduced the radical party program that parliament finally voted the abolition of capital punishment.

II - Victory of the socialists and success of the 1981 project : gestation (1976-1980) and development (1981-1985)

The project had been in preparation since the mid 1970s (phase 1), at which time the debate took a new turn, with those protagonists who were to play a dominating role in the 1981 decision (phase 2). Once the project was voted, the history of the guillotine continued until 1985, when France adopted the 6th protocol of the European Convention on Human Rights (phase 3).

1) The issue returns to the forefront in the latter 1970s (1976-1980)

In the 1976-1980 period, when the controversy arose, the political and judicial climate in Europe was favorable. The abolitionist cause had progressed in the Western world, with the abrogation of capital punishment in Canada (1976), Spain (1978) and Norway (1979). Only four European countries still authorized it, nominally or in practice : Belgium, Greece (where it was mentioned in the criminal code but no longer enforced), France and Turkey. The evolution of legislation in other countries could also serve the abolitionist cause, and would be used in 1978-1979 by the right-wing government as a model for its plan to overhaul the scale of criminal sanctions, projected as a means of neutralizing the growing abolitionist mobilization and consolidating the ranks of the majority, divided on the issue of the death penalty. The French government took its inspiration from England and Canada, both of which had undertaken reforms aimed at experimenting the effects of temporary abolition, while accompanying it by prison sentences carrying mandatory periods of detention in replacement of the death penalty. Moreover, the international organizations were putting pressure on the "maintainer" countries in the Council of Europe. But in France it was a series of judicial cases, soon turned into spectacular news events that punctuated the period, that triggered both a vigorous campaign based on fear of crime and controversy over the death penalty.

Trade unions – representing the police (left-wing), magistrates and barristers –, scholarly associations, human rights organizations and experts entered the fray. The opinions of the Ad hoc committee on Violence and the Commission for the reform of the criminal code, as well as the mobilization of specialists in law in 1977, were the high point in the abolitionist offensive. Whereas the Minister of Justice, Alain Peyrefitte, refused to have the issue discussed, abolitionist pressure forced the government to take position on the subject, which was no longer simply a topical question but had turned into a real political problem.

Several factors preceded the Minister of Justice's announcement of a position-defining debate. There was joint action

⁴ That is, the anti-abolitionists.

⁵ Banishment, prescribed in an 1885 act, was a form of penal transportation.

⁶ Penal transportation and hard labor.

by human rights organizations, an intense polemic in the mass media, a number of parliamentary initiatives and even pressure within the Ministry of Justice itself. Not only was there a polarization of public actors, but the controversy became politicized and entered Parliament in 1978.

The abolitionist offensive achieved the publication of a parliamentary report, the Séguin report, but could not go any further, mainly for political reasons. Indeed, governmental inertia, legitimated by polls showing that public opinion was against the suppression of the only sanction believed to be deterrent, in a context of *rising crime* and *growing fear of crime*, combined with the stalling tactics of the Minister of Justice, prevented a discussion of the subject to come to any conclusion. After much beating about the bush and a position-defining debate with no vote, the only solution was to set up a pseudo-reform that would abolish the death penalty in those cases where it was no longer enforced, or even pronounced, while actually strengthening repression overall, to clearly evidence how anxious the government was to fight crime.

Having simply touched up the criminal code, V. Giscard d'Estaing's seven-year presidency ended with the *Loi Sécurité et Libertés*, prescribing harsher punishment for violent offenses, designed to reassure *public opinion* and to make sure the President was reelected. In spite of the adoption of the international pact on civil and political rights (February 4, 1981) and the abrogation of capital punishment for juveniles (June 21, 1980), the government blocked any debate on abolition.

2) Power changes hands and the 1981 project is voted

The abolition of the death penalty was written into the *Programme commun de la gauche* (1972) and reactivated in the *Charte des libertés* (1976), then in the *Programme socialiste pour la France des années quatre-vingt* (1980). It was one of Mitterrand's 101 electoral campaign proposals. The presidential elections took place against a background of economic and social crisis. The winning issue was no longer crime, but unemployment. The failure of the Giscard d'Estaing government policies brought the left to power. Now that they had the upper hand, and were receiving encouragement from the European Parliament and Council of Europe initiatives, the champions of abolition went to work on turning what was primarily a political project into a legislative one.

In 1981, as in 1906, some well-known barristers played a major role. The new President, F. Mitterrand, is said to have inspired the project, while his Minister of Justice, R. Badinter, to have been its spokesman. The two men had similar backgrounds, including legal training, expertise and professional ties, but more than anything else, they shared a same type of political socialization. Both F. Mitterrand and R. Badinter had been socialized in circles close to the radical party ideology, and both were anxious to reassert their allegiance to the republican heritage by erasing the party's failure in 1908. The abrogation of the guillotine was voted in the "state of grace" that ensued from the socialist victory in Spring 1981, just when the number of death sentences was constantly declining and none had been enforced since 1977. It contributed to the image that the socialists, after considerable time as the opposition party, wished to project, of their administration as perme-

ated with republican values.

Only a handful of actors, mostly legal professionals, were mobilized by abolition. The legislative process went very quickly, up to the voting of the bill, for several reasons: the "maintainer" camp was quite demobilized, its citizens groups and unions did nothing, and its advocates were divided. This was combined with a dynamic that transcended right/left polarization, as well as with the lack of any real opposition at each phase of the legislative process. However, it was the adoption, in 1985, of the 6th additional protocol to the European Convention on Human Rights, that put an end to the history of abolition in France.

3) Perfecting abolition : the adoption of the 6th additional protocol to the European Convention of Human Rights (1982-1985)

As opposed to the 1981 episode, there was more consistent mobilization, especially within the ministerial bureaucracies and in Parliament, around the stakes represented by the adoption of the 6th additional protocol to the European Convention on Human Rights. This slowed down the process, but did not prevent the protocol from being voted in 1985.

Aside from the short-term political stakes (the 1986 elections to the legislature), the abolitionists' reasons for perpetuating the abrogation of capital punishment by having it sanctioned by a higher legal norm that would be compelling (including on the political level) for the member States of the Council of Europe were that it would check any attempt to return to the *statu quo ante* in case the right returned to power.

The staunchly abolitionist stance of the Ministry of Justice contrasted with the compromising attitude of the Ministries of Defense and Foreign Affairs, which preferred that abolition be restricted to peacetime only.

In defense of their restrictive definition of the field to which abolition would apply, the latter ministries engaged in a legal quarrel, mediated by specialists, on a key paragraph of the bill. The law was considerably instrumentalized, through use of the hierarchy between the various categories of norms, to create a conflict in norms between the bill's more controversial provisions, the parent Convention and the Constitution, as well as through submission to the supreme court, the *Conseil Constitutionnel*, and to the most authorized institutional actors (the Prime Minister, the President of the Republic). In the last analysis, the Ministry of Justice came to accept the restrictive definition, and therefore to accept the eventuality of reinstating the death penalty in wartime.

This was because on the one hand, the abolitionists within the Council of Europe were pressing for an acceleration of the process, while on the other hand, the socialists had seriously fallen out of the state of grace thanks to which they had abrogated capital punishment in 1981. The majority was under attack for its economic policy and its "laxism" in the face of terrorism, weakened by many electoral setbacks (in the 1982 partial legislative and district (cantonal) elections) and divided over the *Sécurité et Libertés* reform. Simultaneously, the right was gaining ground again, especially in the Senate, the stronghold of the parliamentary opposition. In this context, with the debate launched on whether to restore the death penalty, further

stimulated, in 1984, by campaigns for harsher security measures again using the pretext of child murder cases, the simple threat of recourse to the *Conseil Constitutionnel* helped to make the abolitionists retreat. Whereas the majority used the strategy of shifting government priorities to more ideologically tinged projects, the opposition focused its attacks on the government's inefficiency and on the *Badinter program*. However, the "maintainer" attacks on the lack of alternative punishment and the Senate's attempts at obstruction were unable to block ratification of the protocol in 1985.

Twenty years later, one can but note the lasting success of the abolitionist strategy, since the issue, henceforth devoid of stakes of any sort, seems to have been taken off the po-

litical agenda once and for all, despite occasional attempts to bring it up again.

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