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REFORMING PRISON?

A SECOND LOOK AT THE NEW PRACTICES OF PUNISHMENT DEVELOPED AT THE FIRST FRENCH NATIONAL ASSEMBLY (JUNE 17, 1789 – SEPTEMBER 30, 1791)

The storming of the Bastille has endowed prison with symbolic meaning. However, while the French historian Jules Michelet has celebrated the French Revolution as a major break, he has also remarked: "*And yet, what was the Bastille to them? The lowest orders seldom or never entered it. […] There were many other prisons.*" (1)

For the revolutionaries, prison was not directly at stake in the reform of the practice of punishment. Their elaboration of the penal system and modalities of confinement was achieved through various divergent approaches: thoughts on mendicancy, on adopting a more humane approach to crime repression by abolishing the death penalty, on recourse to confinement for lesser breaches of the peace (misdemeanors). Representatives expressed their ideas at different levels, and propositions were made in committees made up of a few members intent on reform. One such committee was the Committee on Mendicancy, which continued the great social debate of the last third of the eighteenth century, without

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dissociating poverty-related crime from the issue of poverty, and also addressed the issue of prisons. It was headed by La Rochefoucauld-Liancourt. Some propositions were lodged for debate by the Assembly and eventually passed into law. Yet there is widespread acceptance by historians that the revolutionaries proposed new practices of punishment (2) and a progressive approach to sentencing that introduced the rehabilitating function of punishment along with its traditional punitive function.

This deserves attention: far from shedding light on the present, it occludes some "knots" [noeuds] (3) of the period and of our thought from us.

REFORM OF CRIMINAL PENALTIES: COMMUTABLE, NON-LIFE PRISON SENTENCES

Our study focuses on a few lines of a report by Michel Lepeletier in the name of the Criminal Legislation Committee. The committee was in charge of writing a new penal code and underwent various restructurings during the lifetime of the Assembly (4). According to several commentators, Lepeletier is the sole author of the report.

Lepeletier, who held one of the highest posts of the magistracy inherited from the Old Regime, became a hero after his assassination on January 20, 1792, for having voted the King's death. In the absence of a biography, he has been the object of projections. He also authored a more ambitious but more totalitarian report which was not lodged for debate, "Plan d'éducation nationale" ["National Education Project"], which leads one to conclude that the penal field was not at the core of social institutions.

Lepeletier lists the features of an ideal punishment, then states the following on his moral purpose: "*Could we not conceive of a penal system which would have the double effect of punishing and making the offender a better person?*" In his eyes, all forms of imprisonment constitute the ideal and unique sentence.

He only briefly elaborates on how to make the offender a "*better person.*" If poverty

(1) Jules Michelet, History of the French Revolution, trans. Charles Cocks (London: H.G. Bohn, 1847), 145 .

(2) Robert Badinter, Une autre justice, 1789-1799 (Paris: Fayard, 1989).

(3) The term is borrowed from Sophie Wahnich's unpublished afterword "Les noeuds de l'histoire."

(4) Quotations are excerpts from this report, published in an annex to the May 23, 1791 session, Archives parlementaires (Paris: Librairie administrative de Paul Dupont), vol. 25, https://frda.stanford.edu/fr/ap (retrieved November 7, 2016).

is the most common cause of crime, the offender, that is, the thief, will "*become a better person*" if "*put to work.*" When comparing the features of the death penalty and imprisonment, he reaches a more open interpretation: prison gives the offender "*the time and opportunity of, as well as the interest in, becoming a better person.*" Lepeletier's proposition is surprising, even if he does nothing more than reiterate the harshest custodial sentences of the Old Regime. Indeed, philanthropists were haunted by the questions: What does it mean to humanize punishment? What is doing justice? While they viewed the use of dungeons, particularly dark dungeons used since the Middle Ages, shackles and solitude as forms of cruelty exceeding the right to punish, Lepeletier proposed to add these very same deprivations to the loss of liberty.

He was aware that "*what we have just described would be worse than the cruelest death if nothing mitigated its harshness*." Progressive softening would allow for a reversal of the sentence from "*harsh*" to "*humane*" because the sentence was now temporary. Presented as being devoid of power relationships between inmates and their guards and as a place where hope alone would wipe away the scars of confinement, this prison negates the prisoner's experience; it is abstract, fictitious.

What were the issues forming the backbone of the complex debate of May-June 1791 over the death penalty (5), in which the notion of humaneness was handled and reworked? The organizing question of the reformers' thinking was the public utility of the sentence – the primary purpose of laws being to achieve peace and order. These principles, drawn from leading figures of the Age of Enlightenment such as Beccaria (6) and Montesquieu (7), were shared by deputies of all tendencies. However, the reform of the penal system was only undertaken following the adoption of a jury in criminal trials – which itself was reached by default; the issue then became to establish fixed penalties in order to leave no discretion to jurors. The first item dealt with the abolition of the death penalty; one can see that strong rhetoric was necessary for a victory over the humanization issue. Except for Robespierre, whose argument was solely based on natural law, abolitionists got mired in a debate over which of the death or prison penalty was harsher.

They used a puzzling set of adjectives, deeming prison sentences "*less atrocious*" but "*more repressive and stronger*," or "*stronger and less cruel.*" In their eyes, prison was "*harsher than death,*" comprised "*long suffering,*" and was a "*sharp*

(5) Quotations are excerpts from this debate. Sessions of May 30-31 and June 1, 3-4, 1791, Archives parlementaires, vol. 25.

(6) Father Morellet's French translation-interpretation of Cesare Beccaria's text acquired international notoriety for transforming a philosophical essay into a treatise on criminal law and an instrument of struggle in the context of legal reform. Des délits et des peines [Treatise on Crimes and Penalties], 1765.

(7) Montesquieu, L'Esprit des lois, 1777, vol. 6, chapter 9, "De la sévérité des peines dans les divers gouvernements."

and lasting torture." The humaneness argument took a different twist as doubts were voiced as to whether our laws were made "*more humane by refining torment through deprivation of light for twenty years.*" (8)

The philanthropists' approach and keen observations on incarceration were ignored. Aware of the harshness of the mere loss of liberty, the Committee on Mendicancy called for it to be "*softened*" and accompanied by "*compensations,*" particularly in the case of longer prison sentences. This approach was restated in Year II, when natural law allowed to rethink human relationships: prison actors assessed the institution according to the means it disposed of and the effects it produced; leaning on the principles of equality and justice, they reinvented the place to be given to the poor, thieves, beggars and criminals in the public space, before, during, and after the sentence.

On the other hand, reformers of the Penal Code stood aloof from both inmate suffering and the spectators' painful emotions. In their eyes, feeling sympathy for the offender and stopping loving the law would be a major risk. Other avenues were also ignored, as one lawyer noted: is penalizing all offenses with imprisonment a way to tailor sentences to fit the crime?

In this context, speaking of "*correctional prison*" can be misleading. The right side of the Assembly leaned on their knowledge of detention and shared observations to describe prison as corrupting and did not even envisage the possibility of reforming it. On the abolitionists' side, we only note a paragraph and a few words – *correction/ to correct, rehabilitation/to rehabilitate, repentance, hope*.

Through these terms, the abolitionists voiced their opposition to the reduction of a man's identity to what he did, or, in Lepeletier's words, to "*irrevocably enchaining him to crime.*" Robespierre expressed this perfectly: "*To deny a man the possibility to expiate his crime by repentance or virtuous deeds, pitilessly to shut him off from any return to virtue and self-esteem, to hasten to force him into his tomb while he is freshly stained by his crime; all this is to my mind the most horrible refinement of cruelty.*" (9) Pétion, another major figure among reformers, developed the idea that authorizing the death penalty went hand in hand with the representation of the offender as one of those "*monstrous evildoers who dishonor the human race.*" We then "*remove them from the list of men*" through one form of exclusion or another.

The reformers did not exclude the fact that the offender may become "*ill, emotionally corrupted by a vitiated organism.*" They addressed this case with the repeat

(8) These words were used by Barère at the session of June 1, 1789, Archives parlementaires, vol. 26, p. 686.

(9) Translation borrowed from Marc Estrin, The Good Doctor Guillotin (Lakewood, Unbridled Books, 2009), 25.

offender category and deportation. The corresponding measure for "*incorrigible*" beggars, as defined by the Committee on Mendicancy, was deportation.

Even the champions of the death penalty took hold of the reformers' interpretation: "*Your punishments aim to do humans the honor of not despairing of them.*" Admitting the principle also meant refusing whole-life imprisonment. In his sole pronouncement during the debate on the Penal Code, La Rochefoucauld-Liancourt deplored the fact that the "*important question of rehabilitation and reintegration of the citizen into society*" had not been clearly posed. For the Assembly had voted in favor of maintaining capital punishment, and non-life sentences were to be handled on a case-by-case basis.

The main proposition was not rehabilitation, which involved treatment, but a commutable sentence making reentry possible and imposing non-life imprisonment.

"CORRECTIONAL" PRISONS: RECOURSE TO IMPRISONMENT AND THE AMBIGUOUS VALUES OF PRISON LABOR

Imprisonment for misdemeanors was from the start called "*correctional.*" (10) Yet the deputies opted for imprisonment without debate, thus perpetuating the penal status quo of preceding centuries. In addition, they did not give precisions as to how workhouses were to be run and perpetuated an unequal system whereby richer offenders could buy more comfortable conditions of detention. "*Correctional*" venues in which beggars were to be detained and work continued the tradition of the beggars' prisons [dépôts de mendicité] of the last third of the eighteenth century, before their principle was renewed in May 1790.

Reflections on the class character of penal legislation – such as those engaged by Dufourny or Marat, for example (11) – were evaded. Both men thought that the right to punish law violators could only be applied after society had fulfilled its obligations to all its members and, above all, ensured the subsistence of each and every one. The right to life had precedence over that of property.

"*Correctional*" prisons owed their appellation to the fact that inmates were put to work. Various opposite values were attached to prison labor. Lepeletier elaborated on the value of labor as beneficial for inmates: "*Labor is used as a means to amend*

(10) Law of July 19-22, 1791 (Code of Municipal Police and Correctional Police).

(11) Louis Pierre Dufourny de Villiers, Cahiers du quatrième ordre (1789; reprint, Paris: EDHIS, 1967); Jean Paul Marat, Plan de législation criminelle (n.p.:Rochette, 1790).

the offender's moral disposition, to soften the harshness of detention, and provide a post-release source of income." According to his vision, inmates could choose an on-the-job training from a selection of useful labor types he had defined. La Rochefoucauld-Liancourt asked that beggars be paid their full earnings.

However, the labor issue favored the emergence of a highly different penal doctrine and sharp criticism on the right side of the Assembly that came in the way of these new principles. It also caused a split among reformers when forced labor as a fundamental provision of the Code was proposed for adoption. Punishment clearly rested on labor.

In addition, economics was at the center of the debate; a good example of this is the project authored by a member of the Committee on Mendicancy proposing to house the "*useless to the world*" within one institution for the benefit of businesses. The argumentation is reminiscent of that used in the debate on colonies; prison was a labor pool, "*particularly in times of worker shortage or when workers' wages are too high.*" Two arguments regularly surfaced without advancing the debate – the idea that detention conditions of paupers must not be more favorable than free paupers' living conditions and the idea that some people are poor because they are reluctant to work.

Few were those who appealed to common sense, stating that a five-penny income could not be divided into three equal parts and maintained the poor in slavery, and that an imprisoned pauper was bound to be released a beggar. Their opinions were not heard by the Assembly.

Thus, labor stood at the center of numerous issues. Each and every debate involving it – whether it concerned beggars (June 6, 1790), lesser offenders (July 7, 1791) or criminals (June 2-3, 1791) – was stalled by the multiplicity and lack of definition of purposes.

This impasse is related to the analysis of the causes of crime, and particularly, to the relationship between poverty and prison. In spite of the debates going on since the last third of the eighteenth century, the question was reconsidered in terms of "*social utility*" (concerning crimes) and "*public quiet*" (concerning misdemeanors) and not as resting on a principle of justice.

HUMANIZATION OF THE SENTENCE: ISSUES IN NEED OF A SECOND LOOK

The way in which the history and historiography of prisons have created the myth of correctional or "*reintegrative*" prison could be the subject of another narrative. The preceding notes suffice to break up our assumptions. They highlight one of the historic dimensions of the "anthropology of punishment" that Didier Fassin has called for. Rereading the revolutionaries' thought in order to revive their innovations and study what they missed, allows us to expose these questions in a new light, that of humanization.

The relationship between prison and society is not a feature of revolutionary times. The place and adequate institutions that principles of justice require for the "*useless to the world*" remain to be invented. The reformers' project permits to reopen the prison option, envisioned as a temporary punishment, and whose invention was meant to maintain everyone's place within society. However, their contradictions and debates highlight the fact that the use of imprisonment to humanize punishment is a complex matter.

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