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Des peines en général in the French *Code pénal* of 1791

Abstract: The publication is a continuation of the author's studies on the history of judicial law of revolutionary France, with the author seeking to shed light on the sometimes underestimated first French criminal codification, adopted by the National Assembly in 1791. The researcher's interests focus on the regulations determining the system of penalties adopted in the codification. Although the author's dominant research method is exegesis of the normative text in the formal-dogmatic convention, the instruments of comparative legal studies have been used as well. Confronting the provisions of the code with the doctrinal assumptions and demands of the Enlightenment, the author seeks to show the complexity of multifaceted issues and specificity of the realities of revolutionary legislators, which necessitated compromises that are controversial for some researchers. Regardless of the critical remarks that have often been made about the French legislators, it is impossible to underestimate the crucial importance of the Code for the development of a European legal culture, which the author has tried to demonstrate by emphasising the pioneering nature of the law from the point of view of the development of new legal institutions.

Keywords: history of law, judicial law, criminal law, comparative legal studies, legal culture.

Introduction: The Assemblée Constituante Act as a piece of legislation of the Age of Enlightenment at the dawn of the Great Revolution

The French *Code pénal* of 1791¹ is a piece of legislation that certainly deserves the attention of historians of law for many reasons. Along with the Leopoldina, issued by Grand Duke Leopold Habsburg of Tuscany in 1786,² and Emperor Joseph II's Josephine of 1787,³ the act is widely considered one of the three great eighteenth-century European criminal codes.

Like the other two codifications, the French law undoubtedly draws directly on the achievements of the codification thought of the European Enlightenment, including (although in a limited or unique way) many of the demands of the humanitarian school, the icon of which was the Milanese marquis Cesare Beccaria, author of the famous 1764 treatise *Dei delitti e delle pene*.⁴ Without questioning what is widely regarded in scholarship almost as an axiom, it is worth pointing to,

¹ Code pénal Du 25 septembre — 6 octobre 1791 (Texte intégral original), hereinafter FKK 1791. I have used the digital version of the normative text available at: http://ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/code_penal_25_09_1791.htm (accessed: 17.09.2022).

² Riforma della legislazione criminale toscana del dì 30 novembre 1786. Normative text available at: https://books.google.pl/books?id=kiphAAAACAAJ&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (accessed: 28.11.2022). More extensively, see e.g. S. Salmonowicz, *Prawo karne oświeconego absolutyzmu: z dziejów kodyfikacji karnych przelomu XVIII/XIX w.*, Toruń 1966, pp. 168–190; H. Schlosser, *Die »Leopoldina«. Toskanisches Strafgesetzbuch vom 30. November 1786*, Berlin 2010.

³ Allgemeines Gesetz über Verbrechen und derselben Bestrafung 1787. Normative text available at: https://books.google.pl/books?id=4r1CAAAACAAJ&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (accessed: 27.11.2022); Joseph des Zweyten, Römischen Kaisers, Gesetze und Verfassungen im Justitz-Fache für Böhmen, Mähren, Schlesien, Österreich ob und unter der Enns, Steyermark, Kärnthen, Krain, Görz, Gradisca, Triest, Tyrol und die Vorlande in dem sechsten Jahre seiner Regierung; Jahrgang von 1786 bis 1787, available at: <https://alex.onb.ac.at/cgi-content/alex?aid=jgs&datum=1004&page=96&size=45> (accessed: 28.11.2022). See E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, Göttingen 1951; S. Salmonowicz, *Prawo karne oświeconego absolutyzmu*, pp. 78–161.

⁴ The work of the Milanese marquis was first published anonymously in Livorno in 1774. See [C. Beccaria], *Dei delitti e delle pene*, Livorno 1774, available at: https://books.google.pl/books?id=Qc2w2id9DXIC&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (accessed: 30.11.2022). Beccaria was said to have been inspired by Pietro Verri, regarded as the co-author of the original draft of the work. Two years later, a French-language edition of the treatise was published in Paris, having been edited by André Morrellet, who is credited with disseminating Beccaria's work to a wide readership, initially mainly the most prominent representatives of eighteenth-century European Enlightenment. See also: M. Quarti, "Cesare Beccaria, 'Dei delitti e delle pene': riassunto e idee principali", WeSchool, available at: <https://library.weschool.com/lezione/riassunto-dei-delitti-delle-pene-struttura-pena-di-morte-cesare-beccaria-10754.html> (accessed: 30.11.2022); "Vèrri, Pietro", [entry in:] *Enciclopedia Treccani*, available at: <https://www.treccani.it/enciclopedia/pietro-verri> (accessed: 30.11.2022).

however, a unique feature of the French legislation. The feature is, in my opinion, the fact that French legislation draws on domestic elements far more than the Habsburg codes, in terms of both legal tradition and Enlightenment thought. A spectacular example of this is the presence of the guillotine in the catalogue of punishments and in the doctrinal sphere — the groundbreaking views advocated by, for example, Jean-Paul Marat, who in 1780 published his *Plan of Criminal Legislation (Plan de législation criminelle)*,⁵ a comprehensive work that took the form of a complete draft of the criminal code,⁶ Maximilien de Robespierre, whose *Memorandum Concerning the Prejudice Whereby the Consequences of a Dishonouring Punishment Extend to the Family of the Perpetrator (Mémoire sur le préjugé qui étend à la famille du coupable la honte des peines infamantes)* was awarded the prestigious distinction of the Academy of Metz in 1784,⁷ or, finally, perhaps the greatest of them all, Jacques Brissot, author of the fundamental *Theory of Criminal Law (Théorie des lois criminelles)* of 1781.⁸

However, whenever the first criminal code of revolutionary France is mentioned, the man referred to as its author is Louis-Michel Lepeletier de Saint-Fargeau. He is a mysterious figure to the extent that his only complete biography to date is a work devoted to him by his brother, Felix Lepeletier, and published in Brussels in 1826.⁹ This seems rather strange, since he became a well-known fig-

⁵ Jean-Paul Marat, *Plan de législation criminelle*, Neuchâtel 1780, available at: <http://www.jpmarat.de/francais/marat/plan1.html> (accessed: 27.11.2022).

⁶ What cannot be denied when it comes to Marat's draft is its staunch radicalism. Whether it is a virtue in itself is questionable, however. We can naturally marvel at the "social sensitivity" of the young physician with a thorough education, but it is nevertheless appropriate for a learned scholar to keep at least some distance. Marat's draft was not widely applauded by his contemporaries, and it was certainly no coincidence that the work, which originated as early as in 1771, was not shortlisted as an entry in a competition launched by the Berne Economic Society. However, it is hard to find Emil Stanisław Rappaport's counterarguments convincing in this context; see E.S. Rappaport, "Marat — pionier ludowego ustawodawstwa karnego (Plan J.P. Marata 1771–1780–1790)", *Państwo i Prawo* 1954, no. 5, pp. 867–870.

⁷ See M. Robespierre, *Discours couronné par la Société Royale des Arts et des Sciences de Metz, sur les Questions suivantes, proposées pour sujet du Prix de l'année 1784. 1° Quelle est l'origine de l'opinion qui étend sur tous les Individus d'une même famille, une partie de la honte attachée aux peines infamantes que subit un coupable? 2° Cette opinion est-elle plus nuisible qu'utile? 3° Et dans le cas où l'on se décideroit pour l'affirmative, quels seraient les moyens de parer aux inconvénients, qui en résultent?*, Amsterdam 1785; P.L. Lacrosette, *Discours sur le préjugé des peines infamantes, Couronnés à l'Académie de Metz. Lettre sur la Réparation qui seroit due aux Accusés jugés Innocens. Dissertation sur le Ministère Public. Réflexions sur la Réforme de la Justice Criminelle*, Paris 1784, available at: https://books.google.pl/books?id=VK5XAAAACAAJ&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (accessed: 27.11.2022).

⁸ J.P. Brissot de Warville, *Théorie des lois criminelles*, vol. 2, Paris 1781, available at: <https://archive.org/details/thoriedesloixcri00bris/page/n3/mode/2up?ref=ol&view=theater>.

⁹ F.M. Lepeletier de Saint-Fargeau, *Oeuvres de Michel Lepeletier Saint-Fargeau: député aux assemblées constituante et conventionnelle, assassiné le 20 janvier 1793, par Paris, garde du roi; précédées de sa vie*, Bruxelles 1826.

ure already in pre-revolutionary France. He was president of the chamber of the Parlement of Paris and an ardent advocate of its resolution refusing consent to new taxes and pointing to the need to convene the Estates General for the purpose. It was he who at the session of the Estates on 23 May 1791 presented the draft code along with an extensive statements of reasons behind it in the form of a summary of professional accomplishments.¹⁰

Systematics of the Act

The structure of the code seems well thought out and relatively consistent, although I would not describe it as transparent. It is divided into two parts, which can be considered to be the equivalents of the general and special parts of modern criminal codes. Each is divided into titled chapters (*titres*). In the second part the chapters are further divided into sections, which also have titles. Chapters (in the first part) and sections (in the second part) are ultimately divided into numbered articles (the total number of which is over 220). What is a rather baffling and, above all — as a consequence — unclear systematisation solution is that each chapter or section has a separate article numbering. For a better perception, it would have been far more preferable, if continuous numbering had been adopted, as in the Napoleonic *Code pénal* of 1810. The provisions making up the catalogue of punishments and defining the basic rules for their application are grouped generally in the first thirty-five articles of the Act, that is in the first part entitled Convictions (“Des condamnations”), in the first chapter entitled Sanctions in general (“Des peines en général”).

The first provisions of the French code enumerate punishments that can only be imposed on the basis of a jury verdict, that is, when the guilt of the perpetrator is decided by jurors. The sanctions are the following: death penalty (*peine de mort*), shackling/chains (*fers*), deprivation of liberty (*réclusion dans la maison de force*), solitary confinement (*gêne*), detention (*détention*), with features of arrest, deportation (*déportation*), civil degradation (*dégradation civique*) and safety collar (*carcan*).¹¹ The remaining provisions of this chapter specify the methods of serving and enforcing the sanctions listed in Article 1 of the Code.

¹⁰ S. Pławski, “Kodeks Karny Rewolucji Francuskiej 1791 r.,” *Czasopismo Prawno-Historyczne* 17, 1965, no. 1, p. 178.

¹¹ FKK 1791, Partie première: “Des condamnations” [hereinafter: P.1], Titre première: “Des peines en général” [hereinafter: T.1], Art. 1.

La peine de mort

The French legislator ultimately decided to leave the death penalty (*peine de mort*)¹² in the catalogue of criminal sanctions despite widespread criticism of this institution in the literature of the period. It may have been the reality of the revolution and the atmosphere of growing conflict that led the lawmakers to adopt such a solution. In this context telling words were spoken by one of the Assembly's better known deputies, Joseph Prugnon, who ranted during a debate on the death penalty on 30 May 1791: "When is it that you want to abolish the death penalty? During a period of anarchy." Significantly, a Parisian lawyer, Maximilien Marie Isidore de Robespierre, who participated in the debate on the same day, delivered a fiery tirade against the death penalty, in a style popular at the time and drawing on the rhetorical trappings of classical antiquity.¹³

The final decision to include the death penalty in the catalogue of penal sanctions of the Code did not correspond to the demands of the Enlightenment philosophers, who called for its removal from legal systems.¹⁴ But should we thus infer

¹² The first campaign to abolish the death penalty began on 30 May 1791, but on 6 October that year the National Assembly refused to pass a law abolishing the death penalty. However, torture was abolished and a declaration was made that there would now be only one method of execution: "Tout condamné à mort aura la tête tranchée" [All those condemned to death will be beheaded]. In 1789 a physician, Joseph-Ignace Guillotin, proposed that all executions be carried out by a simple and painless mechanism, which led to the development and eventual adoption of the guillotine. Beheadings were previously reserved only for the nobility and carried out by means of executioners' axes and swords; ordinary people were usually hanged or subjected to more brutal methods. That is why the adoption of the guillotine for all perpetrators regardless of their social status not only made executions more efficient and less painful, but also completely eliminated estate divisions in capital punishment. Consequently, many believed that the device made the death penalty more humane and egalitarian. The guillotine was first used on Nicolas Jacques Pelletier on 25 April 1792. The use of the guillotine subsequently spread to other countries such as Germany (where it was used before the revolution), Italy, Sweden (used in one execution) and the French colonies in Africa, French Guiana and French Indochina. Although other governments used the device, France sentenced more people to the guillotine than any other country. See "Capital punishment in France", [entry in:] Wikipedia [EN], available at: https://en.wikipedia.org/wiki/Capital_punishment_in_France (accessed: 24.11.2022).

¹³ See "Maximilien de Robespierre et l'abolition de la peine de mort", L'ARBR: Amis de Robespierre pour le Bicentenaire de la Révolution, 12.10.2021, available at: <https://www.amis-robspierre.org/Maximilien-de-Robespierre-et-l> (accessed: 27.12.2022).

¹⁴ Their position was by no means monolithic. Montesquieu, for example, although undoubtedly a great proponent of lenient punishments, nevertheless did not call for the complete abolition of the death penalty, considering it unfortunately indispensable to the public good. A similar stance was adopted by Voltaire, who, like Montesquieu, considered this punishment necessary, at least in the case of the most serious crimes against lawful authority, national interest or public order, crimes like regicide or patricide. The compromise-seeking stance of the French was not shared by the Milanese Beccaria, who, distancing himself from the logic of national interest and the protection of the majesty of government, was one of the first Enlightenment philosophers and jurists to publicly demand its complete abolition, M. Mosakowski, J. Ślęzak, *Od procesów inkwizycyjnych do hu-*

that the first criminal code of revolutionary France did not respect the ideas of the great Enlightenment thinkers? This would definitely be a hasty and unwarranted conclusion. After all, the core principle of humanitarianism that they espoused was the opposition to the cruelty of the criminal sanctions used. Their criticism concerned not only the taking of human life with the full sanction of the law, but also the manner in which this was done, including especially the brutal circumstances surrounding the enforcement of the so-called qualified death penalties.¹⁵ If we look at the subject matter from this broader perspective, a far less clear-cut picture emerges.

The Code stipulates explicitly that the death penalty will consist of simple deprivation of life, without the condemned individuals being tortured in any way.¹⁶ In the following provision it states that every condemned individual will be beheaded,¹⁷ which can also be viewed as the legislator's nod to the demands of the humanitarians. How does it manifest itself in this context? The answer can be reduced to one word: guillotine.¹⁸ In the popular perception (except, perhaps, for cigar aficionados) the guillotine brings to mind the worst possible associations, as a sym-

manitaryzacji prawa karnego w dobie Oświecenia, Gdańsk 2017, pp. 77, 85; E. Wenzel, *La torture judiciaire dans la France de l'Ancien Régime: Lumières sur la Question*, Dijon 2011, pp. 113, 115; F. Lormant, "La Révolution du Droit pénal (1791–1810)", pp. 6–7, Archive ouverte de l'Université de Lorraine, 1.07.2019, available at: <https://hal.univ-lorraine.fr/hal-02170201> (accessed: 20.02.2023). See also F. Lormant, *Droit, histoire et société. Mélanges en l'honneur de Christian Dugas de la Boissonny*, Nancy 2009, pp. 145–168.

¹⁵ It is no coincidence that the issue was given so much attention and expression by Montesquieu, Voltaire, Diderot, and other French encyclopaedists, passionately denouncing the cruelty of the executions. In pre-revolutionary France punishment was equated with an execution carried out with the full sanction of the law and with all its public ceremonial. It had to include a large dose of physical pain, measurable, regulated by law, and gradable; cf. M. Mosakowski, J. Ślęzak, *Od procesów inkwizycyjnych do humanitaryzacji prawa karnego w dobie Oświecenia*, pp. 47–48. It was not a simple act of one-off and quick deprivation of life. Rather, it provided an opportunity to apply a precisely calculated sequence and gradation of suffering that prolonged the painful agony of the condemned as much as possible. It was a kind of art of exquisite agony, a punitive liturgy, the image of which should never fade in the memory of the witnesses to public executions; M. Foucault, *Surveiller et punir: Naissance de la prison*, Paris 1975, pp. 43–44.

¹⁶ FKK 1791, P.1, T.1, Art. 2 ("La peine de mort consistera dans la simple privation de la vie, sans qu'il puisse jamais être exercé aucune torture envers les condamnés").

¹⁷ FKK 1791, P.1, T.1, Art. 3 ("Tout condamné aura la tête tranchée").

¹⁸ The symbol of the terror of revolutionary France is commonly linked to with the Parisian surgeon Joseph Guillotin, though a doubt emerges already at this point — which one? The man usually indicated in this context is Joseph Ignace Guillotin, who apparently convinced a majority of members of the French Constituent Assembly to adopt his idea. However, he had a cousin, Joseph Guillotin, also an active physician and, moreover, a prison doctor, who visited prisons in England and Scotland, where he must have encountered similar devices, such as those dating back to the traditions of the Middle Ages: the so-called Irish axe, the Halifax Gibbet, or the slightly later "Scottish Maiden" from Edinburgh. This absolutely does not close the list of contenders for the authorship of the invention. This is because the device was originally called "Luisette" after Dr Louis, one of the members of the Academy of Surgery, who was said to have inspired Joseph Ignace Guillotin;

bol of the terror of the French Revolution. However, it was originally conceived as a more humane method of carrying out the death penalty. In pre-revolutionary France, when beheadings were carried out with an axe or sword, it sometimes took several cuts to chop off the head. The most important innovation in the guillotine, which distinguished it from other solutions of this kind, was the angled blade, which made cutting swift and virtually 100 per cent fail-safe.

The application of an invention named after the Parisian surgeon Joseph Ignace Guillotin is not the only example of legislators accepting the demands of Enlightenment humanitarians. Another is the clearly expressed necessity to apply only the punishments provided for in the law and only as strictly specified in it,¹⁹ in which the Criminal Law Act closely corresponds to the provisions of the 1789 Declaration of the Rights of Man and of the Citizen.²⁰

The Code also defines in some detail the circumstances under which an execution was to take place. It should be conducted in public, in the central square of a city, before a jury convened for the purpose.²¹ The Code further specifies that any perpetrator convicted of murder, arson or poisoning should be brought to the execution site wearing a red shirt.²² In addition, parricides²³ are to have their heads and faces covered by black cloth, which must be removed only at the moment of execution.²⁴

K. Farrington, *Historia kar i tortur. Ciemna strona wymiaru sprawiedliwości*, transl. T. Gardocka, Warszawa 1997, pp. 134–137.

¹⁹ FKK 1791, P.1, T.1, Art. 35 (“Toutes les peines actuellement usitées, autres que celles qui sont établies ci-dessus, sont abrogées”); FKK 1791, P.1, T.1, Art. 8 (“La peine des fers ne pourra en aucun cas être perpétuelle”); FKK 1791, P.1, T.1, Art. 19 in conjunction with Arts. 14–18 (“Cette peine [la réclusion dans la maison de force, la gêne, la détention] ne pourra en aucun cas être perpétuelle”).

²⁰ Déclaration des droits de l’homme et du citoyen 1789, Art. VII (“Nul homme ne peut être accusé, arrêté, ni détenu que dans les cas déterminés par la loi, et selon les formes qu’elle a prescrites”), Art. VIII (“La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu’en vertu d’une loi établie et promulguée antérieurement au délit, et légalement appliquée”). See Déclaration des droits de l’homme et du citoyen 1789, available at: <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789> (accessed: 19.09.2022).

²¹ FKK 1791, P.1, T.1, Art. 5 (“L’exécution des condamnés à mort se fera dans la place publique de la ville où le jury d’accusation aura été convoqué”).

²² FKK 1791, P.1, T.1, Art. 4 [first sentence] (“Quiconque aura été condamné à mort pour crime d’assassinat, d’incendie ou de poison, sera conduit au lieu de l’exécution revêtu d’une chemise rouge”).

²³ In a broad sense, referring to its Roman provenance, the term denotes the murder of a loved one, primarily the father, possibly the mother or, even more broadly, more distant relatives in the direct or collateral line. In France, however, parricide was commonly equated with patricide, a crime with a strong symbolic charge. The legislation of early modern France placed this crime at the top of the criminal pyramid, recognising patricide as a crime that threatened the entire social order and deserved an exemplary sentence, see “Parricide”, [entry in:] Wikipedia [FR], available at: <https://fr.wikipedia.org/wiki/Parricide> (accessed: 22.02.2023).

²⁴ FKK 1791, P.1, T.1, Art. 4 [in fine] (“Le parricide aura la tête et le visage voilés d’une étoffe noire; il ne sera découvert qu’au moment de l’exécution”).

Other penal measures

Deprivation of liberty was regulated in the French Code in an undoubtedly innovative way, by being placed among the first tier of measures of response to crime. Practically until the nineteenth century, with a few exceptions from earlier centuries, prisons tended to be associated with dungeons, cellars and towers, as places of torture, of holding perpetrators until their sentence was pronounced or the death penalty or other punishments were carried out. Imprisonment was preventive rather than repressive, even if the imprisoned person happened to spend the rest of their life this way.²⁵

The French Act knows three forms of this sanction: long-term imprisonment (*réclusion dans la maison de force*),²⁶ detention (*détention*)²⁷ and solitary confinement (*gêne*).²⁸ Long-term imprisonment and detention differ in the period for which individuals are deprived of their liberty. In the case of detention, it is no more than six years, if it is to last longer — it thus becomes a long-term prison sentence. In this case the law does not specify the maximum length of the sentence, but explicitly stipulates that it must be precisely defined and not be for life.

The third form of deprivation of liberty, as defined by the Act, that is solitary confinement (*gêne*),²⁹ has more specific features. L.M. Le Pelletier de Saint-Fargeau presented *la gêne* as a new penal sanction hitherto unknown to French law.³⁰ In his report to the Assembly of 23 May 1791 he described it as a punishment that is both harsh (like a dungeon and prison) and infamous (like civic degradation for a man and a straitjacket for a woman). The person sentenced to it should remain confined alone in a lit place, but without chains (shackles), and during the sentence period was not allowed to contact other convicts or outsiders. In addition, the prisoner's food could consist only of bread and water. In this the author of the draft law pointed to the comprehensive and, at the same time, humanitarian nature of the proposed criminal sanction. In particular, he stressed that the condemned individual would be imprisoned and thus be de facto deprived of liberty; solitary

²⁵ T. Kalisz, "Kara pozbawienia wolności w perspektywie ewolucji systemów penitencjarnych oraz zmian w zakresie koncepcji penologicznych", [in:] *Zgromadzenia stanowe i organy przedstawicielskie w dziejach. Księga jubileuszowa dedykowana Profesorowi Marianowi Józefowi Ptakowi*, eds. J. Koredczuk, P. Wiązek, Wrocław 2020.

²⁶ Custodial sentence associated with the inmate's obligation to work.

²⁷ Arrest; short-term custodial sentence.

²⁸ Translating the term as "embarrassment" seems bizarre and unfortunate.

²⁹ Jacques-Guy Petit defines it as a punishment consisting of incarceration in solitary confinement, without the rigours of prison, in a lit room, and associated with the possibility of choosing a job from among those indicated by the administration of the place of confinement; J.G. Petit, *Ces peines obscures. La prison pénale en France (1780–1875)*, Paris 1990, p. 56. It appeared in the 1791 *Code pénal* and was maintained by the 1795 *Code des délits et des peines* (Art. 603). However, it was abandoned in the Napoleonic era, as the 1810 *Code pénal* no longer had it.

³⁰ An analogous position is that of Jacques-Guy Petit (J.G. Petit, *Ces peines obscures*).

confinement would be an additional nuisance. In addition, the convict would wear an iron belt around the body (he would be bound by a chain), but unlike other forms of imprisonment, he would not wear shackles on his legs or arms. The place where he would be detained would be lit, which was supposed to make this punishment fundamentally different from the traditional dungeon. The convict would be able to work while serving his sentence, but would not be forced to do so. Part of the income earned from that work would be used to enrich the prison food, generally reduced to only bread and water (should the convict choose not to work).³¹

A characteristic and notable feature of the legislative solutions adopted is the close link between deprivation of liberty and forced labour of prisoners. It is provided for all prisoners sentenced to imprisonment. Under the Code, men and women were to work in separate locations and separate rooms. At the same time the Code does not determine the type of forced labour; in the case of both the prisoners' place of confinement and the type of their work the legislator speaks rather vaguely and by means of examples, pointing to ports, arsenals, ore mining and swamp draining, among others. When it comes to the details, the legislator refers to implementing acts. The prisoners are left with some limited choice of the work to be done by them, namely from among jobs presented to them by the prison authorities. The Act also stipulates how the prisoners' forced labour income is to be used, specifying that a third of it should be used for their subsistence needs at the place of confinement, while the remainder should constitute the state's income and the prisoners' earnings, paid to them when they leave the place of confinement after serving their sentence.

The custodial sentence provided for in the Code was not a stand-alone measure of punishment, as it was imposed cumulatively with shackling referred to in the Act by the term *les fers* (literally — irons, although here it means chains/fetters).³² The Act specifies that those handed down such a sentence will drag with them an iron ball, chained to one of their feet. The only exception in this context is solitary confinement, which the convict should serve without the additional aggravation of being put in fetters.

³¹ “Abolition de la peine de mort. Le débat de 1791 à l'Assemblée nationale constituante. Rapport sur le projet du Code pénal, présenté à l'Assemblée nationale, au nom des comités de Constitution et de législation criminelle, par M. Le Pelletier de Saint-Fargeau (Imprimé par ordre de l'Assemblée nationale). Annexe a la séance de l'Assemblée nationale du lundi 23 mai 1791”, available at: https://www.assemblee-nationale.fr/histoire/peinedemort/rapport_le-pelletier-de-saint-fargeau_1791.asp (accessed: 21.01.2023).

³² It was intended to replace the galley punishment previously used in French law. It was kept in the *Code des délits et des peines* (Art. 603), but was abandoned in the Napoleonic *Code pénal* of 1810. For more on this subject, see L.H. de Brétignères de Courteilles, *Les condamnés et les prisons, ou Réforme morale, criminelle et pénitentiaire*, Paris 1838, p. 416.

Another element associated with imprisonment is *carcan*, that is the punishment of the collar/ring³³ with chains and — an additional sanction for those sentenced to imprisonment — the punishment of the pillory. Although an additional punishment, the pillory was applied obligatorily with regard to prisoners as a dishonourable punitive measure preceding the main punishment. In order for it to be executed, the convict was to be brought to a public square, before a jury, whose presence was mandatory. Next they were to be tied to a pole placed on a scaffolding and displayed for all the people to see. Above their head there should be placed a plaque with an inscription, in large print, giving their name, occupation, place of residence, the reason for their conviction and the sentence passed against them. Those sentenced to long-term imprisonment were to remain pilloried for six hours, detainees — four hours, while those against whom solitary confinement was passed — two hours.

The French legislator included among penal sanctions civic degradation (*degradation civique*),³⁴ which consisted in deprivation of the status of French citizen and the consequent loss of all political rights. The Act makes no mention of other effects of its imposition (for example, in the sphere of private law). The provisions included in it and relating to this punishment concern the manner and circumstances of its imposition, designed to give it a dishonouring character. Like in the case of those sentenced to imprisonment, the accused was to be brought to a public square, before the court, where its secretary was to announce the sentence, using the following statutory formula: “Your country has proved your disgraceful conduct: the law and the court hereby deprive you of your status as a French citizen.” For the following two hours the convicted person was to remain in public view with a plaque containing the perpetrator’s personal information (name,

³³ An iron ring (collar) put around the neck of a convict, which was attached to a post (pillory) or wall from the back of the head, usually in a busy public place, in most cases in the central square of a city or settlement, in front of a courthouse. For more on its use, see J. Hillairet, *Gibets pistoris et cachots du vieux Paris*, Paris 1956. It is referred to by J. de Étienne, *L’hermite de la Chaussée-d’Antin; ou, Observations sur les moeurs et les usages parisiens au commencement du 19e siècle*, vol. 3, Paris 1813, p. 305. Andre Gide describes it vividly in *Si Le Grain Ne Meurt*, Paris 1924, p. 405. It was not abandoned in the *Code pénal* in the First Empire period, with the Code recognising *le carcan* as one of the three *peines infamantes* listed in the Act (Art. 8) and subsequently devoting to it a separate provision (Art. 22), see Code pénal de 1810 (promulgué le 22 février), available at: https://www.ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/code_penal_1810/code_penal_1810_1.htm (accessed: 29.11.2022). In France it remained in force in its original form until the Napoleonic penal codifications were amended in 1832, see Loi du 28 avril 1832 contenant des modifications au code pénal et au code d’instruction criminelle, available at: <https://criminocorpus.org/fr/reperes/legislation/textes-juridiques-lois-decre/textes-juridiques-relatifs-la-recidive/28-avril-1832-loi-tenant-des-modifications-au-code-penal-et-au-code-dinstruction-criminelle/> (accessed: 29.11.2022).

³⁴ In French law *la degradation civique* was a criminal punishment, dishonouring, amounting to deprivation of civil and political rights as well as certain civil rights. It appeared with the 1791 *Code pénal*, becoming an enduring legal institution of revolutionary France. It was maintained by both the 1795 *Code des délits et des peines* (Art. 602) and the Napoleonic *Code pénal* of 1810 (Art. 8).

occupation and place of residence) and specifying the crime committed and the content of the sentence. In addition, the law stipulated that the *carcan*³⁵ be used in such a case.

The punishment to which the least attention is devoted in the Code is deportation (*déportation*).³⁶ The 1791 law was explicitly limited to statutory delegation, stating that places of exile would be determined by a separate decree.³⁷ In its detailed provisions the law tied deportation to reoffending,³⁸ once again referring to implementing legislation to be issued in this matter.³⁹ The laconic nature of the *Code pénal* was soon more than compensated for by the regulations of the revolutionary legislature.⁴⁰

Final remarks

Authors of the contemporary, mainly French, literature on the subject draw attention to the unfair disharmony in the assessment of the legislative output of the Assemblée Constituante. While constitutional legislation (*Déclaration des droits*

³⁵ FKK 1791, P.1, T.1, Art. 32 (“Dans les cas où la loi prononce la peine de la dégradation civique, si c’est une femme ou une fille, un étranger, ou un repris de justice, qui est convaincu de s’être rendu coupable desdits crimes, le jugement portera : « Tel, ou telle... est condamnée à la peine du carcan »”).

³⁶ Among other sanctions in the Code deportation is certainly distinguished by its presence in the French legal system for several centuries. Its origins date back to the sixteenth century, when in 1557 Henry II issued an edict providing for the transfer of certain prisoners to Corsica. In Louis XIV’s times it became a punishment applied with regard to vagrants and irreligious people. Under the royal declaration of 12 March 1719, it was to be used instead of the existing punishment of galleys, a decision motivated by the needs of the colonies (especially Canada). See “Déportation en droit français”, [entry in:] Wikipedia [FR], available at: https://fr.wikipedia.org/wiki/D%C3%A9portation_en_droit_fran%C3%A7ais (accessed: 22.02.2023).

³⁷ FKK 1791, P.1, T.1, Art. 29 (“La peine de la déportation aura lieu dans le cas et dans les formes qui seront déterminées ci-après”).

³⁸ FKK 1791, P.1, T.2 — “De la récidive”, Art. 1 (“Quiconque aura été repris de justice pour crime, s’il est convaincu d’avoir, postérieurement à la première condamnation, commis un second crime emportant l’une des peines des fers, de la réclusion dans la maison de force, de la gêne, de la détention, de la dégradation civique ou du carcan, sera condamné à la peine prononcée par la loi contre ledit crime ; et, après l’avoir subie, il sera transféré, pour le reste de sa vie, au lieu fixé pour la déportation des malfaiteurs”).

³⁹ FKK 1791, P.1, T.4 — “Des effets des condamnations”, Art. 8 (“Les effets résultants de la déportation seront déterminés lors du règlement qui sera fait pour la formation de l’établissement destiné à recevoir les malfaiteurs qui auront été déportés”).

⁴⁰ As early as on 26 August 1792 a law was passed to deport insubordinate priests to Guiana. On 28 March 1793 a law on emigrants was promulgated, also providing for deportation (Arts. 78 and 79 of Title I, Section XII). On 15 October 1793 regulations were adopted to deport reoffending beggars to Madagascar. From the early nineteenth century until 1848 it was not applied in practice, although it was kept in the Napoleonic *Code pénal* of 1810 (Arts. 7 and 17).

and *Constitution de 1791*⁴¹) has been given due attention and recognition, the Assembly's legislative achievements in judicial law still seem to be underestimated and rather neglected. Unjustly, or, to be frank — wrongly. A.J. Arnaud seems to demonstrate the illusory nature of the dialectical perspective for viewing the legislative output of the French Constituent Assembly, seeing it *en bloc* in terms of systemic cohesion determined by the coherence of the spheres of private and public law.⁴² A favourable assessment of the maturity of the legislature in this case is based on the acknowledgement of the legislature's awareness of the comprehensive guarantee function of the law, which cannot be achieved without the necessary correlation of provisions protecting the person and property.⁴³ This convention corresponds to the methodological proposals of A. Soboul, who, viewing the legislative achievements of the Constituent Assembly (especially in the sphere of criminal legislation) with regard to the *droit public*–*droit privé* relation from the perspective of the *Déclaration des droits* and the *Constitution de 1791*, proposes the term *catéchisme révolutionnaire*.⁴⁴

To sum up, we should acknowledge the innovative and experimental nature of French legislation. Irrespective of the decision to retain the death penalty (in a new formula, after all), it is worth emphasising in particular the humanitarian guiding principle of the Code and the proposed penal system, the objective of which is to eventually eliminate torture and corporal punishment bringing to mind the abhorrent image of a human being beating their neighbour. However, it is necessary to bear in mind the pressure of the confrontational positions represented at the dawn of the revolution and the inevitable compromise between the radicalism of hitherto disadvantaged social groups, the humanism of Enlightenment ideas, and the multiplicity of divergent interests of the numerous political factions. All these elements and probably many other ones as well determined the final form of the first criminal code of revolutionary France. It undoubtedly started a new phase of the debate: “Prison, a purgatory of the lost or hell of the condemned.” The debate still far from over⁴⁵.

⁴¹ Constitution française du 3 septembre 1791, available at: <https://mjp.univ-perp.fr/france/co1791.htm> (accessed: 30.11.2022).

⁴² P. Lascoumes, “Le verso oublié du « catéchisme révolutionnaire » : le code pénal du 6 octobre 1791”, *Cahiers de recherche sociologique* 13, 1989, p. 31, available at: <https://www.erudit.org/en/journals/crs/1989-n13-crs1516316/1002074ar/> (accessed: 22.01.2023).

⁴³ See A.J. Arnaud, *Essai d'analyse structurale du Code civil français*, Paris 1973.

⁴⁴ See A. Soboul, *La Révolution française*, Paris 1984, pp. 183–201.

⁴⁵ For more on this topic, see especially P. Lascoumes, P. Poncela, P. Lenoël, *Au nom de l'ordre: une histoire politique du code pénal*, Paris 1989.

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