

THE ABSTRACT NATURE OF THE REFORMS  
OF THE CONSTITUENT ASSEMBLY:  
A NEW LOOK AT THE LANGUAGE  
OF CRIMINAL LAW IN REVOLUTIONARY FRANCE

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A well-established commonplace consigns the legislative production of the two-year period 1789-1791 to the conceptual category of « enlightened abstraction » and, from this premise, derives the proposition that the entire normative structure erected by the Constituent Assembly was inevitably doomed. Of course, some justifications are allowed the Legislators. The parliamentary inexperience of a haphazard representative body leads the list. The assembly was further constantly concerned with ordering the institutional transition from the Old to the New Régime as meticulously as possible providing specific, legal, indications for each step. Finally there was the objective difficulty of making laws with serene impartiality in a period of historical conflict full of unimaginable institutional « *coups de théâtre* ».

With the Philadelphia Convention in mind, it has been said that twenty-four months are perhaps too long to draw up a Constitution<sup>1</sup>; and this may have been one of the reasons why a progressive weariness seemed to dominate the last months of the constitutional legislature, when the imminent passage of power to the Legislative Assembly (together with the ban on re-election which cut short many a promising career) necessarily made the official political scene seem uncertain or unwilling.

But I have the impression that this reading of events is dated in that it is to some extent influenced by biased sources. In fact, this is the view we find present, with growing intensity, in some clear-cut pamphleteer circles and in those expressions of the revolutionary press which are, in this moment, stepping up a campaign to de-legitimize the Constituent Assembly itself.

If, leaving aside for the moment the semi-official *Moniteur*, we leaf through some issues of the *Actes des Apôtres*, *l'Ami du Peuple* or the *Révolutions de Paris*, we cannot avoid being struck by the constant attempts

<sup>1</sup> In this sense cf. Edna Hindie Lemay, *Valeurs nouvelles et leur pratique dans le discours des députés juristes à l'Assemblée Constituante*, in *La Révolution et l'ordre juridique privé. Rationalité ou scandale?*, Actes du Colloque d'Orléans 11-13 septembre 1986, P.U.F., Paris 1988, vol. 1, p. 221.

to minimize reforms of the National Assembly. The jokes and amusing parodies of Peltier's and Rivarol's groups were counterpointed by the censorious articles of Prudhomme and the violent diatribes of Marat. Of the latter it should further be said that his pen did not spare the Assembly leaders even when the reform of the entire criminal law system was passed on principles not very different from those proposed in his own *Plan de législation criminelle*<sup>2</sup>. This was possible because the confrontation was not on the merits of the actual contents of single reforms, but concentrated essentially on attacking the institutional model in formation, which the Jacobin centre-left group (feuillant from July 1791) contested *per se*.

It is those who read Assembly proceedings without interpretive filters, dominated by the brilliant fresco of parliamentary activity depicted by Étienne Dumont in his *Souvenirs*<sup>3</sup> who insist upon the abstract nature of the reforms and the consequent impossibility to significantly effect real situations. Dumont's is a lively and persuasive account; it « sounds good » and has solid links to the institutional reality which emerges from the printed minutes and the *Moniteur's* summaries<sup>4</sup>.

One thousand two hundred shouting, inexperienced deputies, all demanding to voice their opinions on the most disparate subjects, afflicted the assembly with mile-long speeches, written out and then read in a monotonous tone from the tribune<sup>5</sup>. With great difficulty, regulations were passed to curb the most undisciplined orators<sup>6</sup>. The proposal to adopt the rules of the House of Commons seemed a crime of almost *lèse-nation* proportions; Mirabeau, who had just benefitted from a reading of Sir Samuel Romilly<sup>7</sup>, was to pay the cost for this suggestion. When a five-minute limit to speeches was put forward, there was a general revolt.

Some corrective measures were, however, accepted. The first, of a formal nature, divided the deputies who indicated the intention of speaking on a given occasion into two separate lists, according to whether they were for or against the motion under discussion. The President would then call the orators to the tribune in order alternating from one list to the other<sup>8</sup>. With

<sup>2</sup> This work was published at Neuchâtel in 1780; it was later reissued by Brissot in his *Bibliothèque philosophique du législateur du politique, du jurisconsulte*, Berlin (but Neuchâtel), 1782-1785, vol. 10 (Marat's work appears in vol. V); it re-appeared in Paris in 1790.

<sup>3</sup> Étienne Dumont, *Souvenirs sur Mirabeau et sur les deux premières Assemblées législatives*, Paris, 1832; republished C.U.F., 1951, pp. VII-320 by J. Bénétruy.

<sup>4</sup> In this paper we have used the *Réimpression de l'Ancien Moniteur Seule histoire authentique et inaltérée de la Révolution Française depuis la réunion des Etats-Généraux jusqu'au Consulat*, Plon, Paris, 1863, vol. 32, hereafter quoted as *Moniteur, réimpression*, followed by volume and page numbers.

<sup>5</sup> See Etienne Dumont, *Souvenirs sur Mirabeau*, op. cit., p. 151.

<sup>6</sup> Cf. *Moniteur, réimpression*, op. cit., vol. I, pp. 115, 117, 232, 236, 238.

<sup>7</sup> E. Dumont, *Souvenirs sur Mirabeau*, op. cit., p. 164. Dumont takes up the subject again in *Discours Préliminaire*, preface to the Belgian edition of the *Tactique des Assemblées politiques*, in *Oeuvres de Bentham*, Louis Hauman, Brussels, 1829, I, p. 372.

<sup>8</sup> Pétion's proposal had been adopted by the Constituent Assembly after a short discussion, *Séance du lundi*, 3.VIII, 1789, *Moniteur, Réimpression*, op. cit., I, p. 266.

this arrangement, the debate could have continued forever, but there was the possibility of calling for the closure of the general discussion and passing to the vote.

But even so, what actually came about was a mere semblance of discussion, since the pre-written speeches could not take into account new elements arising during the proceedings; the speakers overlapped without answering each other, as Dumont was again to point out.

This assembly, though limited by the speaker's taste for the public reading of his own speeches, (a form of baptism of a new literary genre, in the style of the provincial Assemblies) was able to create instruments which enabled it to get out of this *impasse*. The office of president expired every two weeks, the deputies were grouped in thirty *bureaux* and Committees were set up. The latter, (though not all to the same extent), were the keystone of the reform project, thanks to their ability to make their language intelligible to the Constituent Assembly, modifying it with flexibility to circumstances.

The twenty-nine Committees of the National Assembly were essentially working structures, often open to occasional external consultants<sup>9</sup>, within which it was possible to find technical meeting points which could smooth out political contrasts.

A compact group of men stood out from the mass of deputies, men who had studied legal texts, and were exponents at various levels of professional responsibility and social achievement. With its three hundred and seventy-two representatives, this group made up slightly more than 25 % of the total. It comprised eleven notaries, a hundred and ninety lawyers and a hundred and seventy-one magistrates<sup>10</sup>. But an even more important fact is that the deputies who were legal experts (especially those with parliamentary experience) were able to enter key-organisms such as the Committees on the Constitution, on criminal law, on the *lettres de cachet* etc., in a measure totally disproportionate to their numerical ratio.

It will be said that the group I have referred to were essentially in working groups made up of specialists selected on the basis of distinct professional skills, and this is an undeniable fact. Even Sieyès could not find a better

<sup>9</sup> Brissot was invited to the meetings of the *Comité de Constitution* although he was not a deputy, cf. *Mémoires de Brissot... sur ses contemporains, et la Révolution française*, Ladvocat, Paris, 1830, III, p. 136; Thouret, for his part, was to declare: « we have had the advantage of having talks with some of the foremost legal advisers of England, who have spent some time in this capital » (*Séance du mardi 28.XII 1790, Moniteur, réimpression*, op. cit. VI, p. 747). A month later we read that « M. Grover, an Englishman, was recently presented to the Comité de Constitution, to whom he gave very interesting details on trial by jury established in England: he explained its advantages, and several members of the Assemblée Nationale, (...) are disposed to adopt them, particularly those who have at heart our prisoners' protection (...) », *Moniteur, réimpression*, op. cit., VIII, p. 232.

<sup>10</sup> The disaggregation of relative data on this last category reveals interesting aspects: besides two councillors of state and a hundred and forty-eight representatives of the lower juridic orders, there were twenty-one members of parliament, (nine councillors, six *présidents à mortier*, two attorney generals, three presidents).

solution when it came to reforming the *Comité de Constitution* after the defeat of Mounier and his supporters<sup>11</sup>. Of the eight committee members, three were ecclesiastics (Sieyès himself, Talleyrand and Rabaut Saint-Etienne), four lawyers (Le Chapelier, Thouret, Target, Tronchet) and one a man of letters, Desmeuniers, whose legal background was demonstrated in a weighty section of the *Encyclopédie Méthodique*.

Starting with Montesquieu<sup>12</sup>, Enlightened criticism had essentially taken over the French criminal trial system, undermining the bases of its enquiry procedure and its rigid defence of the secrecy of preliminary investigation<sup>13</sup>. Beccaria had opened a breach in the field of penal law; the traditional inefficiency of the state apparatus under the Old Régime had allowed survival of a number of generally anachronistic penalties such as exile, as well as many of dubious utility (such as the death penalty) or morally reprehensible (torture).

Along with the convocation of the Estates General there was an explosion of reforming political journalism which, although it sank with Brissot and Marat to the boring repetition of Beccaria, rose to a literary dignity with the Voltairian Dupaty.

The terms of the issue are too well-known to be repeated here; I shall therefore focus on certain essential points. In the Old Régime system, the question of criminal law had been essentially seen as one of trial law, and procedure was based on a two-fold supremacy; first and foremost that of the investigating magistrate, which reflected onto the accused and the fellow members of the criminal court. Secondly, there was the supremacy of written language over the spoken language. Every micro-phase of the criminal investigation proceedings was separately recorded in minutes which would in turn lead to successive minutes. This complex mechanism, made rigid by the extensive use of oath taking, completely removed any flexibility from trial procedure. In fact, if a witness in good faith realised during the cross-examination of the accused that he had made a mistake in his statement, he would rarely retract his version of the facts, for fear of being incriminated for false testimony.

But the supremacy of the written language had other implications. In a State as yet without unity in its spoken language, where educated classes with their mastery of refined linguistic expression found counterpoint in the *patois* of the people, this linguistic discrepancy risked serious consequences

<sup>11</sup> Following votes expressed by the Constituent Assembly on two-party system (*Séance du jeudi*, 10.IX.1789, *Moniteur réimpression*, op. cit., I, p. 453) and on the royal veto (*Séance du vendredi*, 11.IX.1789, *Moniteur, réimpression*, op. cit., I, p. 456).

<sup>12</sup> Cf. Antonio Padoa Schioppa, « I filosofi e la giuria penale », in *Nuova rivista storica*, 1986, LXX, p. 107on.

<sup>13</sup> I have analysed more fully the investigatory trial in a forthcoming publication: *Il modulo inquisitorio nelle « Ordonnances » francesi da Colbert alla Costituente* (paper presented to the international meeting on *La « Leopoldina »*. *Criminalità e giustizia criminale nelle riforme del Settecento europeo*, Siena, 3-6 December 1986).

ording to Dupaty there was a risk that the examining magistrate and the accused (who was not entitled to a council for the defence) might not understand each other, giving rise to a comedy of ambiguity in which the weaker man had everything to lose. And if the Clerk of the Court in his minutes gave new interpretations to the defendant's replies, by re-writing them in a more acceptable French, then the accused would be bound by oath to statements which were no longer the immediate expression of his intentions<sup>14</sup>.

In order to defuse this explosive situation, it seemed imperative to reduce the role of the judge, by binding him to a literal reporting of the interrogations. The abolition of the oath, the setting up of a technical defence, public hearings and a direct relation between crimes and punishments were measures designed to contribute to a fairer criminal procedure. On the eve of the opening of the Estates General, these were the requests of the *Cahiers de doléances*, whose intellectual posture, unlike that of the *philosophes*, still wavered on the threshold of mistrust towards court and judge and did not go so far as to propose the setting up of popular juries.

The passing of articles VII, VIII and IX of the *Déclaration des droits de l'homme et du citoyen*, laying down the principle of due process in criminal law questions, was preceded by a debate which was less abstract than one might imagine and more conditioned by recent North American constitutional experience than is shown by the few mannered quotations available from our sources<sup>15</sup>.

The United States were a reference point not only for those who had fought beside Washington and now sat on the benches of the National Assembly. Indeed, with the outstanding exception of the Lameths<sup>16</sup>, the contribution of men like Montmorency and La Fayette was of slight importance. I think I may argue that the wave of sympathy for the affable and skilful Franklin and the intellectual fascination of Thomas Jefferson was fed by writers who supplied an increasingly interested public with the translations of books and political documents from America, which joined the not always reliable works of other, sometimes even famous, authors<sup>17</sup> desirous of building up their intellectual reputation around a fashionable issue. Brissot was a typical example of these writers. From a *bohème littéraire* background and scraping together a living on the edges of the law<sup>18</sup>, after a passing interest in the reform of criminal law which led him to pay court

<sup>14</sup> See the eloquent comments of Jean-Baptiste Mercier-Dupaty, *Mémoire justificatif pour trois hommes condamnés à la roue*, Paris, 1786, p. 139.

<sup>15</sup> Cf *Moniteur, réimpression*, op. cit., I, pp. 211-385.

<sup>16</sup> The brothers Charles and Alexandre Mameth, who had been officers in the expeditionary corps commanded by Rochambeau, with Barnave and Du Port were leading figure in the Constituent Assembly.

<sup>17</sup> This was true of the abbés Raynal and Mably and of the academic Chastellux.

<sup>18</sup> Cf. Robert Darnton, « The Grub-Street Style of Revolution: J.P. Brissot, Police Spy », in *Journal of Modern History*, 40 (1968), pp. 301-327, republished under the title « Bohème

in a criminal investigation procedure constructed on sequential levels. Ac-to Dupaty<sup>19</sup>, he became dazzled by American affairs. Many Frenchmen fought in the lines of the Rebels, but Brissot was an intellectual and had other plans. With Clavière and Bergasse he founded the *Société Gallo-Américaine* for the improvement of Franco-American relations<sup>20</sup>, then published a *Traité des rapports entre la France et les États-Unis*<sup>21</sup>, and was finally drawn into plans for commercial speculation which ran aground on the eve of the convocation of the Estates General.

Apart from this type of publication, there were also essays of a different calibre, written by Paine<sup>22</sup>, Jefferson<sup>23</sup>, Mazzei<sup>24</sup> and by the mysterious cultivator from New Jersey, whom the majority wrongly identified with the Governor, Livingstone<sup>25</sup>, without counting the numerous translations of the American Constitutional Charters. The work of Jean-Nicolas Desmeuniers,

littéraire et Révolution: Jaques Pierre Brissot de Warville espion de police » in the volume *Bohème littéraire et Révolution. Le monde des livres au XVIII siècle*, Gallimard, Paris, 1983, pp. 43-69.

<sup>19</sup> Cf. J.P. Brissot, *Mémoires*, op. cit., II, pp. 30-38.

<sup>20</sup> Cf. J.P. Brissot, *Correspondance et papiers, précédés d'un Avertissement et d'une Notice sur sa Vie*, par Cl. Perroud, Paris, Librairie Alphonse Picard & fils (undated but 1911), pp. 105-136; also, S. D'Huart, *Brissot, La Gironde au pouvoir*, Robert Laffont, Paris, 1986, p. 94.

<sup>21</sup> The work, also signed by the Genevan Etienne Clavière, was published in 1787.

<sup>22</sup> The works of Thomas Paine were translated into French; before the Revolution appeared a confutation of the theses of Abbé Raynal: *Remarques sur les erreurs de l'histoire philosophique et politique de Mr. Guillaume Thomas Raynal, par rapport aux affaires de l'Amérique Septentrionale & c.* par M. Thomas Paine Maire ez-Arts de l'Université de Pennsylvanie, Auteur des diverses Brochures publiées sous le titre de *Sens Commun (...)*. Traduites de l'anglais & augmentées d'une préface par A.M. Cerisier, A. Amsterdam, chez F.A. Cra-fenschot, 1783, pp. XVI-126 (Bibliothèque Nationale de Paris cat. G. 27397); a version with a slightly different, abbreviated title circulated also (*Lettre adressée à...*, Mx B.N.Pb.213.A.), but with no substantial changes in the contents.

<sup>23</sup> Thomas Jefferson, *Observations sur la Virginie, par M.J. Traduites de l'anglais*, A Paris, chez Barrois l'aîné, 1786, pp. VIII-290 (B.N. 8 Pb. 1537); editing the non-authorized translation of the *Notes on the State of Virginia*, the abbé Morellet took the liberty (among others) of omitting Jefferson's Constitution Bill of 1783; see R.R. Palmer, *The Age of the Democratic Revolution*, Princeton University Press, 1959.

<sup>24</sup> Filippo Mazzei, *Recherches historiques et politiques sur le Etats-Unis de l'Amérique Septentrionale, où l'on trait des établissements des treize Colonies, de leurs rapports & de leurs gouvernements avant & après la révolution, &c. Par un citoyen de Virginie. Avec quatre Lettres d'un Bourgeois de New-Heaven sur l'unité de la législation*, A. Colle et se trouve a Paris, chez Froulle, 1788, voll. 4. On the figure of Mazzei (to whom Palmer, op. cit., and Franco Venturi, *Settecento riformatore*. IV. *La caduta dell'Antico Regime (1776-1789)*. *I grandi stati dell'Occidente*, Einaudi, Torino, 1984, *passim*, but especially, pp. 83-96, 117-139, have dedicated important sections) see also Eduardo Tortarolo, *Illuminismo e Rivoluzioni. Biografia politica di Filippo Mazzei*, Franco Angeli, Milano, 1986.

<sup>25</sup> *Examen du Gouvernement de l'Angleterre, comparé aux Constitutions des Etats-Unis d'Amérique, & dans celui de M. Delolme, intitulé: De la Constitution d'Angleterre. Par un cultivateur de New Jersey. Ouvrage traduit de l'Anglois, & accompagné de Notes*, Paris, chez Froullé, 1789, pp. VIII-291; this work which influenced the French Constitutional debate, was not written by Robert A. Livingstone but by John Stevens, cfr. on this point R.R. Palmer, op. cit., pp. 309-310, and F. Venturi, *Settecento riformatore*, IV.1; op. cit., p. 141.

the editor of the section on *Economie Politique* in the *Encyclopédie Méthodique* edited by Pancoucke<sup>26</sup>, deserves a special mention in this context. His fourteen essays dedicated to the single States and to the Confederation are still of some interest today, although Jefferson's critical observations warn us to view their reliability with caution. In any case, we are not interested here in means of furthering our understanding of United States institutions at the end of the 18th century, but rather we can consider them as an « image of confederation »; Desmeuniers' interpretation proposed in a great work aimed at reordering systematically late 18th century thinking on public law. Even admitting he was a translator of Morellet, his writings are still a source of no little importance. They put forward a new French version of the American Declaration of Rights and the Constitutions, giving those interested in norms not a theoretical model but a reference guide based on a series of legal texts of easy access. Desmeuniers, moreover, was not only the esteemed editor of the *Encyclopédie Méthodique*, or the intellectual friend of Jefferson and Mazzei, but soon after, as a deputy in the Estates General, he was to take part in the third Comité de Constitution set up after the defeat of the *Monarchiens*.

With the drawing up of a new Constitution in first place on their agenda, the French Assembly was inevitably led to take the American constitutional experience into account, to consider those solutions as a possible alternative to the Old Régime system. In the eyes of those deputies taking part in the August debates, the American Declaration established a system of public freedom, the key to which lay in its criminal laws, and especially in its trial system. Let us examine some of these texts briefly: those voted by the Assemblies of the Republics of Maryland, Massachusetts, Pennsylvania and Virginia.

On the substantive level, the principle that penal laws may not be retroactive<sup>27</sup> and moderation of penalties<sup>28</sup> were accepted. On the trial level, some important guarantees were made constitutional. For example, the limitation of personal freedom through the issue of warrants is authorized only if there are specific charges corroborated by a solemn oath or statement; if not, the use of warrants is considered unjust and vexatious. General warrants for search in suspected dwellings or for arrest on suspicion are forbid-

<sup>26</sup> The above mentioned works of Palmer and Venturi are full of references to Pancoucke's publishing activity, but for further details, see Suzanne Tucco-Chala, *Charles-Joseph Panckoucke & la librairie française, 1736-1798*, Editions Marrimpouey jeune, Pau, 1977, pp. 558 (pp. 323-344 are dedicated to the *Méthodique*); the fascinating book by Robert Darnton is also of outstanding interest: *The Business of Enlightenment. A Publishing History of the Encyclopédie 1775-1800*, Harvard University Press, 1979 (French trans. by Marie-Alyx Revellat: *L'aventure de l'Encyclopédie 1775-1800. Un best-seller au siècle des Lumières*, Librairie Académique Perrin, Paris, 1982, pp. 445); Darnton dedicates pp. 295-341 to the *Méthodique* (French trans.).

<sup>27</sup> Maryland, art. XV; Massachusetts, art. XXIV; Virginia, art. IX.

<sup>28</sup> Maryland, art. XIV; Massachusetts, art. XXIV; Virginia, art. IX.

den unless the places and persons are specifically indicated and described<sup>29</sup>. The Declarations lastly state that in public criminal trials<sup>30</sup>, the accused is to be informed of the charge against him and receive notification of the evidence against him within a reasonable time limit; is entitled to cross-examine the witnesses for the prosecution; is assisted by a defence council; can produce witnesses for the defence; is judged by unanimous verdict of an impartial jury; and cannot be forced to produce evidence against himself<sup>31</sup>.

Since these terms were taken as reference points for the French debate on the reform of the criminal law system of the Old Régime, we might have expected a subsequent easing off both of the cautious requests put forward by the *Cahiers de doléances* and of the innovative thrust of the principles ratified by the *Déclaration des droits de l'homme et du citoyen*.

In fact, although Articles VII, VIII and IX of the French text founded the principle of legality in criminal matters on explicit precept, they would seem to stop short of their American counterparts, omitting any reference to the administration of justice and, in particular, to the jury. But the whole picture changes if we abandon the Procrustean bed of synoptic comparison limited to the *Déclaration* alone, and examine the entire field of reform invested by the Constituent Assembly from August 1789 to September 1791.

The widening of our time range shows us that the August constitutional text was the legitimating point of departure for a process of legislative innovation whose successive stages may be summarized as follows:

- a) a search for compromise between the criminal court of enquiry model and the prosecution model of Anglo-American derivation<sup>32</sup>;
- b) adoption of a tendentially prosecution-oriented model centred on the criminal court jury<sup>33</sup>;
- c) modification of mechanisms of punishment, through the adoption of fixed penalties<sup>34</sup>.

In this more general setting, the criminal code orientations in the American Declarations become a systematic legislative referent for a pressure group which was almost insensibly taking shape in the Constituent Assembly. The minutes of parliamentary sessions and the revolutionary press

<sup>29</sup> Maryland, art. XXIII; Massachusetts, art. XIV (this Declaration makes no reference to the general warrant but clearly indicates that persons and objects must be mentioned; it also establishes that the warrant may be issued only in the cases and manners laid down by the law); Pennsylvania, art. X (the same considerations apply as for Mass., art. XIV); Virginia, art. XII.

<sup>30</sup> Publicity was only mentioned expressly in art. IX of the Pennsylvania Declaration.

<sup>31</sup> Maryland, art. XIX, XX, XXI; Massachusetts, art. XII; Pennsylvania, art. IX; Virginia, art. X.

<sup>32</sup> The Beaumetz reform 8-9 October 1789, cfr. *infra* par. 8.

<sup>33</sup> The Act on Juries of 16th September, 1791, cfr. *infra* par. 9.

<sup>34</sup> Criminal Code Act of 25th September 1791, cfr. *infra* par. 12.

itself show us a sort of « criminal reform party »<sup>35</sup> cutting across the various political alignments. It legitimates itself by putting forward a plan of legislative action which was built around the centrality of the criminal law issue, viewed as a central constitutional problem, according to the teachings of American Charters.

In the debate on the *Déclaration des droits* we can see the first signs of a presence which would make itself increasingly felt as the legislature wore on, enabling those deputies who were jurists to make themselves a reference point for their fellow members. This was especially true when the complexity of the question at hand suggested the partial abandoning of rhetorical abstractions in favour of greater attention to the problems of drawing up the actual text.

At times long speeches tended to disorientate a bored audience, and so intelligent instruments of parliamentary technique, such as amendments or motions, helped to overcome the *impasse*, proposing at the same time solutions technically more appropriate. This was the path chosen by the jurist Barrère, who in an articulated motion following step-by-step arguments, succeeded in guiding the debate on juridical reform, enabling the National Assembly to overcome the lack of leadership caused by the crisis of the *Comité de Constitution*<sup>36</sup>.

In August '89 it was still widespread opinion that the Assembly should concern itself solely with the Constitution, leaving the rest (including criminal law) to the regular legislator<sup>37</sup>. At the same time, there was a tendency toward a weakening of the *Déclaration des droits* by favouring a version whose vagueness would not put future legislations under obligation<sup>38</sup>; on the other hand, members like Ranaut, concerned with avoiding a servile imitation of American models, took as their reference point the bombastic text of Sieyès, whose form of compilation rendered it of very little use judicially. Yet, thanks to a timely interplay of amendments, the jurists Target and Du Port<sup>39</sup> succeeded in filling the bill presented by the VI *bureau* of the National Assembly with binding contents, giving the articles VII, VIII and IX the form that we know. By borrowing the essential elements of the contents of the American system, the whole field of criminal law was

<sup>35</sup> Cfr. Roberto Martucci, *Le « parti de la Réforme criminelle » à la Constituante*, in *La Révolution et l'ordre juridique privé. Rationalité ou scandale?* Actes du Colloque d'Orléans 11-13 septembre 1986, R.U.F., Paris, 1988, vol. I, pp. 229-239.

<sup>36</sup> I will refer to a previous work of mine: Roberto Martucci, *La Costituente ed il problema penale in Francia (1789-1791). 1. Alle origini del processo accusatorio: i decreti Beaumetz*, Giuffrè, Milan, 1984, pp. 211-221. The decisional incapacity of the *Comité de Constitution* is also mentioned by Étienne Dumont, *Souvenirs sur Mirabeau*, op. cit., p. 159.

<sup>37</sup> The rapporteur Bergasse had made statements of this nature in his report of 17th August 1789, cfr. *Moniteur, réimpression*, op. cit., I, pp. 340-347.

<sup>38</sup> *Séance du Vendredi 21 août au matin*, Mounier's speech, *Moniteur, réimpression*, cit., I, p. 368.

<sup>39</sup> *Moniteur, réimpression*, cit., I, p. 370; *Le Point du Jour*, III, p. 193.

brought within the area of constitutional guarantee, thanks to the inclusion of the principles of due process and non-retroaction.

The critical problem of the prisons, which a rising tide of arrests had increasingly filled after the 14th July<sup>40</sup>, led the Paris City Council to appeal for swift approval of at least provisional reform of the trial system<sup>41</sup>, on the lines already set out in the *Cahiers*. It was clearly a matter for the *Comité de Constitution* which since August (see the Bergasse report) had been working on an autonomous study of the jury, proposing the adoption in principle of a prosecution model on Anglo-American lines. The expectations of those of the Committee who would perhaps have preferred autonomous reforms were dashed with a few simple sentences, as can be seen from Bergasses's report:

...it may easily be seen that all of the provisions of which we are speaking here were furnished by laws adopted in England or in Free America, for the pursuit and punishment of crimes: in fact, this is the only model of jurisprudence (...) which is humane; this is the only system deeply associated with liberty: we can do no better in this field, than to adopt it quickly, improve on it at least in some details, improve if possible this sublime institution of juries which renders it so advisable to all men accustomed to reflect on the object of legislation and the political and moral principles which must govern us<sup>42</sup>.

But the request of the City Council, formalized in a resolution of the 8th September, caught the *Comité de Constitution* in the moment of greatest friction over the royal veto and the definitive organisation of legislative power. In consequence, the criminal law question ran the risk of never being put on the agenda. A motion by Beaumetz<sup>43</sup> suggested a way out by means of an *ad hoc* organism: the *Comité de Jurisprudence criminelle* was born.

In order to operate efficiently without being affected by the backlash of the imminent political crisis this working structure was obliged to draw on persons of clear professional competence. A very select group of specialists was therefore chosen, made up of high-court magistrates and lawyers<sup>44</sup> who developed a team work of thinking in common and a general solidarity which enabled them to resist conflicts and the desire of individuals to dominate proceedings.

In reality what had been created was a workshop of political legislation

<sup>40</sup> Checked by the systematic count of the *Moniteur* in the semester from 1st July/31st December 1789.

<sup>41</sup> Cfr. *Le Point du Jour*, cit., LXXVIII, pp. 359-360.

<sup>42</sup> *Moniteur, réimpression*, cit., I, p. 344.

<sup>43</sup> Cfr. *Le Point du Jour*, cit., LXXVIII, p. 360.

<sup>44</sup> The deputies Bon-Albert Briois de Beaumetz (first President of the Upper Council of Artois), André-Jacques-Hyacinthe le Berthon (first President of the Bordeaux Parliament), Emmanuel-Marie-Michel-Philippe Fréteau de Saint-Just, were from the Bench. The lawyers Guy-Jean-Baptiste Target, Jacques-Guillaume Thouret and François-Denis Tronchet had a forensic background.

which counteracted (in well-defined sectors) the paralysis of the *Comité de Constitution*, since it could even take on the role of institutional counterweight. It was no coincidence that a leader of the status of Adrian Du Port chose to be elected here; he was perfectly aware of the room for manoeuvre open to him through judicious development of a technical organ<sup>45</sup>.

To this workshop of political initiative, grouping together legal experts of both parliamentary and forensic origin, we owe the most important contributions to the criminal law debate. This debate developed around the reports and decree proposals which, as general political conditions changed, these men offered as stable reference points, building up a new trial system around the principle of due process.

The reports of the *Comité de Jurisprudence criminelle* should be read very attentively to avoid reductive interpretation along the lines we find in authors like Aulard<sup>46</sup>. To do this, we must first of all ask ourselves what directions characterized the « criminal reform demand » put forward by the crowds and some *clubs*.

The documents at our disposal (first and foremost the revolutionary press) highlight the following points:

a) *lèse-nation* is increasingly invoked as an autonomous form of incrimination (and homogenisation), for a range of criminal behaviour (or presumed criminal behaviour);

b) mistrust in the old juridic structures grew (in part fed by certain parliamentary initiatives);

c) the increase in arrests was accompanied by the demand for a special court to try *lèse-nation* crimes<sup>47</sup>.

As we can see, the platform proposed revisions which would largely reduce the civil guarantees requested by the *Cahiers* and the *Déclaration des droits*. For its part, the *Comité de Jurisprudence criminelle*, without encouraging these tendencies to involution, initiated a series of wide-ranging reforms which would have led the Constituent Assembly to the threshold of the abolition of the death penalty.

The effectiveness of the Committee's activity called for the constant presence of its members, almost requiring them to be demagogues. Adrian Du Port was an outstanding example of this, overwhelming his audience

<sup>45</sup> In January 1790, on their new appointments to the *Comité de Constitution*, Thouret, Target and Tronchet had to be replaced. As a result, Beaumetz and Fréteau, the only members left of the old *Comité de Jurisprudence*, were joined by the magistrates Adrien Du Port (councillor to the Paris Parliament), Louis-Michel Le Peletier de Saint-Fargeau (*président à mortier* in the Paris Parliament), François de Chabrol (criminal deputy at Riom), the lawyer Dinocheau and the Duke Louis-Alexandre de la Rochefoucauld d'Enville.

<sup>46</sup> François-Victor-Alphonse Aulard, *L'éloquence parlementaire pendant la Révolution française. Les orateurs de l'Assemblée Constituante*, Hachette, Paris, 1882, especially pp. 444 (Beaumetz) and 452 (Barrère).

<sup>47</sup> *Suite du procès-verbal de l'Assemblée Nationale. Du mercredi 25 novembre 1789*, pp. 11-12; cfr. also *Moniteur, réimpression*, cit., I, pp. 197-198; II, pp. 78-79, 238; VII, 138, 554.

with his continual speeches. But not all his fellow-members followed on the tribune, taking the floor mainly to illustrate official reports. This was true of Beaumetz, of the distant and reserved Le Peletier de Saint-Fargeau, and the austere Fréteau.

The language of criminal law reform was essentially articulated on three levels: that of the reports, that of the legislative texts and that of the speeches in the chamber. Since in-depth analyses are not possible in this paper, I shall concentrate on certain aspects and, in particular, on the reports, which were the official expression of the Committee's work. But they were not simply official expressions. In reality, they may also be considered as a new literary genre accompanying the first steps of the new-born continental parliamentarism, giving the body of deputies the opportunity for a systematic approach to the matters in question. Although they reflect the emotional tensions of the *in camera* discussions<sup>48</sup> of a Committee, they can, as written documents, be attributed to the single deputy whose task it was to illustrate the contents of that debate to the Assembly. We know, in fact, that the organisation of committee work assigned the responsibility of writing reports to the member who had shown most competence or the strongest convictions. As a result, and document was in the end the product of the culture and mentality of a specific committee spokesman, because he decided its general approach and technical cut.

The passage of time also had its effect on the development of the ways in which legislative activity was carried out. The timid procedural anarchy of the early months soon gave way to a more confident attitude on the part of the Committee members, who became a forceful presence in guiding the debate during the final phase of the Assembly. Beaumetz (September 1789) presents his theme in a low key, and though revolutionising the inquisitory trial system, opens his report with a profession of subordination to the *Comité de Constitution*<sup>49</sup>. Thouret (March 1790), after some initial hesitation, and once Sieyès' opposition had been contained, was able to guide the debate on the reform of the establishment of the judiciary so efficiently as to secure the freedom of justice from pecuniary considerations and the election of judges. Du Port (November 1790) and Le Peletier (May 1791), the *spokesmen* of the *Comité de Jurisprudence criminelle*, are also the directors of discussion organized around the major issues of the reform (the role of the justices of peace, procedures regarding evidence, the death penalty, etc.) in such a way as to prevent the debate from wandering into by-ways.

From the considerable mass of documents, I have selected a few of these reports: the following considerations refer to Beaumetz, Thouret, Du Port and Le Peletier.

<sup>48</sup> The expression should not be taken literally; cfr. n. 19.

<sup>49</sup> *Rapport du Comité chargé de proposer à l'Assemblée Nationale un Projet de déclaration sur quelques changements provisoires dans l'Ordonnance criminelle. Par M.de Beaumetz. Séance du 29 septembre 1789, A Paris, chez Baudouin (undated but 1789), pp. 2, 4.*

With the Beaumetz report (29.IX.1789) the «criminal reform party» launched its manifesto. A deliberately subdued tone concealed the clearly innovative nature of its contents, which dismantled the trial system of the Old Régime.

The report achieved this aim by starting from the assumption that the trial relationship was based on opposing interests with no common denominator. Lucidly discerning that the interest of the State lies in preventing the corruption of the evidence by providing very strict secrecy for initial investigative proceedings, Beaumetz also underlined the very different interests of the accused in a public trial which guarantees him a professional defence. The need for compromise led the Committee to devise a model of mixed trial procedure, where the initial enquiry phase (which was secret but controlled by *Adjoints* appointed by the City Council) ended with the issue of an arrest warrant, and every subsequent act must be publicly recorded and subject to contestation by the interested party.

These not insignificant modifications were presented in a brief text of only sixteen pages of calm and reassuring tone offered during the course of a single session. If we did not know the context of trial procedure under the Old Régime, and the massive chain of effects the reform implies, we might take Beaumetz' words literally and think an opportunity had been lost. Even the provision instituting a control of initial investigative proceedings by the City Council might be seen as a poor substitute for the jury, since that institution could not yet be introduced, and the introduction of *warrants* was still in the realm of the dream of an over-all systematic legislative operation. But perhaps it was the very sober style of the report which led to a rapid vote by the Constituent Assembly in the wake of the personal success of the *spokesman*<sup>50</sup>.

Thouret was a key-figure in legislative history; the *trait-d'union* between the Constitution and Criminal law Committees. An outstanding figure in forensic circles, his task was the judicature. Inverting normal practice, whereby the explanatory committee report was presented before the subsequent distribution of the proposed legislative text, the bill was read two months before the *spokesman* took the floor<sup>51</sup>. A general discussion would have engaged the Assembly for five months and there was the very real risk that unwise guidance would let the debate get out of hand and lead to its break-up. We might therefore have expected a long report to cover the complexity of the subject matter of the bill. Instead, in the place of an introductory report, we find a simple preliminary speech, which might seem of slight importance if it did not reflect the tensions which had exploded within the *Comité de Constitution* due to the Abbé Sieyès' desire to dominate

<sup>50</sup> Also affirmed by Barrère, cfr. *Le Point du Jour*, cit., XCV, p. 16.

<sup>51</sup> The bill was read in two stages in the sittings of 22nd December 1789 and 2nd February 1790; the introductory speech by Thouret mentioned in the text was given at the tribune on 24th March 1790.

proceedings<sup>52</sup>. A general report would have given a unifying structure to the whole discussion, provided that the spokesman had a mandate of confidence from the Committee, allowing him to assume the direction of the debate. This did not happen, and the lack of coordination of legislative work seemed to make the chance or reform more remote: the way was open to interventions of principle which once more put everything up for discussion. In fact, the Committee spokesman's speech, although it did illustrate some themes (essentially the eligibility of judges and the free administration of justice), omitted in its sobriety any reference to what, from Bergasse (and in the December bill) onwards, had seemed the key to the secularisation of the judicial apparatus: the introduction of a popular jury.

This absence reduces Thouret's contribution, even if, on the whole, the six speeches he made in a few short months on specific aspects of the reform remain so many milestones on the long legislative road of the Constituent Assembly. To rediscover the tight logic, capable of convincing a puzzled audience, we will have to wait for 6th April and his very detailed speech on juries, which the National Assembly considered so highly as to publish it<sup>53</sup>. But on that occasion, Thouret seemed to be speaking for himself and not as committee spokesman, and was only given the opportunity to expound his legal knowledge because Adrien Du Port, making up for the inertia of the *Comité de Constitution*, had made the question one of central importance.

Spokesman of a minority tendency, indeed, at the beginning, a marginal one, Adrien Du Pont could not afford discretion. In order to manipulate the agenda, he had to adopt an aggressive strategy which did not spare his interlocutors, turning them into adversaries. The civil and criminal court jury was the hub of his legal system; it occupied that central position it had previously held in the bills put forward by the *Comité de Constitution*. But now it seemed there was no longer room for this institution with its vaguely utopian outline, based on the democratic selection of a body « without toga », a college of laymen. In the middle of the Revolution, in the eyes of some jurists, this innovation seemed decidedly inopportune. Not unreasonably<sup>54</sup>, the idea spread that it was better to postpone the enforcement of a still imperfectly defined reform.

<sup>52</sup> In September 1789, after the defeat of the *Monarchiens*, Sieyès had presented to the *Comité de Constitution* a reform bill which had not been taken into account for the probable speech by Thouret; 19th March 1790 (that is, only five days before the opening of the debate) the abbé had had printed and distributed to the assembly *l'Apperçu d'une nouvelle organisation de la Justice et de la Police en France* (A Paris, de l'Imprimerie Nationale, mars 1790); 8th April 1790 the deputies Le Chapelier and Rabaut Saint-Etienne made the dissensus official by informing the Assembly that half of the members of the *Comité de Constitution* had held it their duty to propose the adoption of the Sieyès bill. The whole issue is dealt with in my book on *La Constituante e il problema penale*.

<sup>53</sup> *Second discours de M. Thouret à l'Assemblée Nationale, sur l'organisation du Pouvoir Judiciaire*, Imprimé par ordre de l'Assemblée. Séance du 6 avril 1790, *Discussion sur l'établissement des jurès*, A Paris, de l'Imprimerie Nationale (undated but 1790).

<sup>54</sup> It was thought that the introduction of the jury would have reposed the difficulties which had arisen over the intervention of the *Adjoints* set forth in the Beaumetz bill; the problem was raised by Tronchet.

The approach of Le Chapelier, Desmeuniers, Tronchet and others seems to have been more pragmatic; but even they did not take into account the fact that, in the turbulent political situation, the existing courts were becoming increasingly delegitimized. How long would the substitution of the magistrates of the Old Régime with a new hierarchy of judges (even if elected) be accepted by a more and more politically-minded public?

Once the electoral operations were over, every frustrated ambition might become the vehicle of unrest, multiplying the problems of the new judicial apparatus. The experience of the Besenval trial, moreover, showed the strength of the hostile tendency to the guarantee of fair trial for the enemies of the Revolution. The delegitimization of the juridic structures might lead to prison « reform » carried out directly by the crowd; a similar outcome would have compromised the Jacobin Triumvirate's programme of liberal stabilisation.

Only a high-profile reform hypothesis, based on the involvement of the patriotic public opinion of thousands of sworn jurymen, could prevent this from happening. In the spring of 1790, a pragmatic stance could mean moving in this direction.

Taking the initiative by raising the stakes, Adrien Du Pont confirmed his qualities of leadership by guiding the debate in a direction which had not been chosen by the *Comité de Constitution*. Since the contents of Thouret's speech for the Committee had been minimalist, Du Pont designed his speech as a virtual counter-proposal, ending with the proposal of a decree. This reading of his speech occupied two sessions among signs of impatience and requests for adjournment which let us imagine the gradual loss of attention on the part of an exhausted assembly.

Du Pont crushed the assembly twice: first with the length of his speech and then with its tone, which was unsuitable for a long reading. A text of 114 pages developing complex arguments was the ideal medium for discussion in a limited sitting, if there had been the opportunity for a direct examination without the mediation of a public reading.

The *Principes et Plan*<sup>55</sup> were carefully drawn up with the structure of a scientific paper and had, indeed, been approved by mathematicians of the calibre of Borda and Condorcet<sup>56</sup>. And in fact a large section of the first part is dedicated to illustrating « Borda's paradox »<sup>57</sup>. Here Du Port showed the necessity of preventing the same panel of judges from deciding whether a crime had been committed and passing sentence on it, given the difficulty of bringing a large number of heterogeneous propositions under a binary scheme (acquittal/sentencing). « Borda's paradox » called for a written

<sup>55</sup> *Principes et Plan sur l'établissement de l'Ordre Judiciaire*. Par M. Du Port, Député de Paris. Imprimé par ordre de l'Assemblée Nationale, chez Baudoin, Paris, 1790.

<sup>56</sup> *Ibidem*, p. 17, n. 1.

<sup>57</sup> On « Borda's paradox » see Catherine Kintzler, *Condorcet. L'instruction publique et la naissance du citoyen* (S; 1). Le sycomore, 1984, p. 296.

demonstration and Du Pont's exposition was not free of devious complicated passages which were difficult to follow, as can be seen from the quotation below:

*Peter* lodges a complaint for offensive language against *Paul*. He brings evidence. This evidence will have been called for by the first judges. There are 15 judges: out of the fifteen, nine agree that the evidence is conclusive; but, out of the nine, five think that the facts do not constitute a real offence; the other six find that the offence is such, but there is no proof that the words were actually said. *Peter* therefore has for him nine judges out of six for the fact of the offence having been committed, on his right ten judges against five: however the five who saw no offence, although they accepted its evidence, and the six who saw the offence but not the evidence are counted together; so that makes eleven against four; he loses his case<sup>58</sup>.

The rest of the paper went into the details of the counterbill. The philosophy behind it was based on the two-fold need to involve citizens in the administration of justice and to set up itinerant judges of a monocratic character to prevent the rebirth of intermediary judiciary bodies (tribunals) which in their turn would be the bearers of antinomic interests as opposed to those guaranteed by the Constitution.

The only concession to the times was the formulation of two proposals which were clearly inspired by the climate of the Enlightenment: the simplification of the laws would eliminate the need for legal literature while the simplification of procedure would reduce litigiousness. It is difficult not to smile at such ideas today, yet (although they were attacked in the debate) they appear marginal in an overall view focused on the details of reform, and put forward the candidature of the Criminal Law Committee for the drawing up of the new trial legislation<sup>59</sup>.

The impact of Du Port's *Principes* on the Constituent Assembly was outstanding, and engaged it for a month in heated debate, where many pamphlets circulated and highly qualified opinions were expressed on the legal nature of its contents<sup>60</sup>. The solution of compromise adopted – adoption of the jury for criminal court alone – lay open the way for the permanent cooperation of two organs which had not previously been considered on an equal level, the *Comité de Constitution* and the *Comité de Jurisprudence criminelle*. The joint committees were entrusted with a very important legislative task, drawing up the laws on juries and the criminal code.

<sup>58</sup> *Principes et Plan*, cit., p. 17.

<sup>59</sup> *Ibidem*, p. 100.

<sup>60</sup> The entire debate is accurately reconstructed in two recently published important papers by Antonio Padoa Schioppa: « Le jury d'Adrien Du Port », in *La Révolution et l'ordre juridique privé. Rationalité ou scandale?* Actes du colloque d'Orléans 11-13 septembre 1986, P.U.F., Paris, 1988, II, pp. 609-622; « La giuria all'Assemblea Costituente francese », in the volume *The Trial Jury in England, France, Germany 1700-1900*, Duncker and Humblot, Berlin, 1967, pp. 75-163.

The two reforms were introduced by reports which are still noteworthy today for the precision of their argumentation and their overall fidelity to Enlightenment principles as regards criminal law in its two-fold dimension as at once utilitarian and humanitarian.

The official report presented by Adrien Du Port on 27th November 1790 clearly shows the spokesman has consolidated his ideas<sup>61</sup>. If his taste for polemics and the need to influence the assembly's agenda had affected the style of his counter-bill of March, now that the choice had been made and the Constituent Assembly had adopted the jury principle, the triumvir gave way to the statesman. He held the tribune of the National Assembly at length, reading a text of considerable interest, where the contingent element of the parliamentary report took on wider dimensions. Adrien Du Port's presentation is a lesson on the theory and practice of criminal trial law based on strictly utilitarian premises, which makes the prospect of punishment the main deterrent for crime (*punitur ne peccetur*). Much emphasis was placed on the ideas of « *balancement des penchants criminels* », of the unavoidableness of penalties and the shortening of trial duration. It is not necessary for us to read the whole report, sufficient to recall that the definitive text of the Act essentially bears out the outline of trial procedure laid down by the Committees.

The new public criminal trial, after a phase of preliminary enquiry carried out by the justice of the peace assisted by the *gerdarmierie*, passes into the hands of two distinct bodies, the *jury d'accusation* (which judges the charge for procedability) and the *jury de jugement*. Public debate takes place before this last jury and is based on the opposition of the parts. Mistrust of the changes involved in the transcription of spoken language – already indicated by Dupaty and again by Beaumetz – brought the Constituent Assembly to prohibit the recording of the debate in minutes, in a strict interpretation of oral procedure. Lastly, the need to neutralise « Borda's paradox » by avoiding inconsistent casting of votes, led to the multiplication of problems set to the juries, and the setting up of a complex mechanism of voting<sup>62</sup>. To operate properly, this system would have called for an impossibly long trial period, which was inconsistent with the development of revolutionary dynamics.

The Assembly debates on the Committee reports were strongly influenced by the style of the latter. The accounts of these debates clearly demonstrate the importance of contributions of a technical nature. This was true of the

<sup>61</sup> *Rapport fait au nom des Comités de Constitution et de Jurisprudence criminelle de la loi sur la police de sûreté, la jurisprudence criminelle et l'institution des Jurés, Par Adrien Du Port, Député de Paris*. Imprimé par ordre de l'Assemblée Nationale, A Paris de l'Imprimerie Nationale, 1790, pp. 79.

<sup>62</sup> Cfr. A. Padoa Schioppa, *La giuria*, cit., pp. 143-145.

three emblematic moments of debate, in the discussion on juries, on the probation system and capital punishment. Emphatic speeches seem of less importance as they were more difficult to translate into binding legislative proposals. There is however the impression that the real issue of debate was not between opposing political groups, but between different groups of reformers of homologous intellectual standpoints, which had grown up within the same cultural background and were influenced by similar readings.

Speakers who were not of this formation, seem marginal even when they occupy the tribune for some length of time and circulate their written opinions. The National Assembly seemed to react to this weak argumentation by treating non-pertinent speeches with inattentiveness, while rewarding incisive contributions by printing them.

But appreciation of a thesis did not automatically mean it would be translated into legislative form, for at times opportuneness took precedence over innovation. Le Peletier de Saint-Fargeau's report on the criminal code bill, presented by the Committees a month before Varennes, was to suffer this fate<sup>63</sup>. This report is outstanding in its solemn introduction, the scale of values guaranteed by the law, the new theory on penalties and the long analysis demonstrating the uselessness of the death penalty as a deterrent. The Constituent Assembly, however did not agree with this last point, and although it appreciated the report in general, voted for the maintenance of capital punishment<sup>64</sup>. This was perhaps a wasted opportunity for reform, but was more likely to have been a pragmatic approach to the question, along lines similar to those attending the contrasted introduction of the criminal court jury.

We have said that the new legislation had somehow to take into account the « popular demand for punishment », for attitudes coming under the heading of « lèse-Nation », and arising from the crowd's mistrust of the patriotic allegiance of the juridic apparatus. The criminal court jury could have been justified as a substitute for popular justice by paying the price of stronger penalties. Yet Le Peletier had played down the importance of *lèse-Nation* in his long *crimes contre la chose publique*, which was divided up in a way which is now usual in codes of laws, by substituting the death penalties of the Old Régime (the wheel, gallows and beheading) with a system of detention sentences that varied in length and kind and did not exclude the possibility of re-introducing criminals into society through early release. But these measures were not strong enough for revolutionary fervour.

The new trial system had been able to combine popular justice with the guarantee of defence (at least up to the break of 10th August), but the alternative penalties put forward by the Committees ran the risk of seeming

<sup>63</sup> *Rapport sur le projet du Code Penal, présenté à l'Assemblée Nationale au nom des Comités de Constitution & de Legislation criminelle*; imprimé par ordre de l'Assemblée Nationale, A Paris, de l'Imprimerie Nationale, 1791, pp. 121 (pp. 51-121 describe the bill).

<sup>64</sup> *Séance du Mercredi 1<sup>er</sup> juin 1791, Moniteur, réimpression, cit., VIII, p. 561.*

paltry; the sinister fascination of the gallows was stronger than that of the pedagogic jail theorised by Le Peletier de Saint-Fargeau.

On the shoals of the political difficulties of abolition and the inadequacy of the alternative prison, the abolitionist thesis of the Committees fell apart. This was the moment which marked the peak of the penal code thinking of the Constituent Assembly, and also the beginning of the backslide of reform.

On the other hand, this new trial of political realism was not new to those norms of pragmatism and flexibility which from the beginning of the legislature has conditioned the development of the Constituent Assembly's initiatives of criminal law policy. There had been no abstract notion of unconditional acceptance of the reforming theories of the *philosophes*. Yet these theories had constituted a solid cultural background for the jurist deputies, called upon to operate in a revolutionary context, continually bringing up institutional problems already taken as resolved, and frustrating those solutions of strictly doctrinal derivation.

In this situation, the innovations made were neither those of content or terminology, as the criminal law of the Revolution was not affected by any lexical upheaval comparable to that which occurred in the case of the revolutionary Calendar. We can measure the change in the new style of collegial work and the Committee spokesman – Assembly dialectic; the progressive rejection of speeches of generic content; the increasingly stronger connection between the technical background of a Bill, its articulation through debate and argumentation and the incisiveness and practicability of the solutions put forward.

The achieved objective led to the codification of the principle of due process in the area of criminal accusation and punishment, already laid down in the *Declaration des Droits*, which is still today the keystone of the criminal laws of liberal democratic States.

But in the short run, the legislative results of this effort at collective elaboration had an ephemeral existence; it was involved in the '91 fall of the Constitution and in the crisis of a State which after the 10th August was to undergo new forms of revolutionary legislative expression.