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**ESCAPING THE GUILLOTINE: THE GAP BETWEEN
THE CRIMES PUNISHABLE BY DEATH
AND THE EFFECTIVE DEATH SENTENCES
(FRANCE, 20TH CENTURY)**

From 1906 to 1908, after the general election brought a huge majority of left-wing parties to power, a great parliamentary debate took place in France on whether to abolish the death penalty¹. The abolition was supposed to be the emblematic reform of the new Chamber, as the Law of Separation of the State and the Church had been for the former one². One of the arguments used by the abolitionists was the existing gap between the law as it was written and the actual legal practice in the criminal courts. The French Penal Code of 1810, which was still in place during the 20th century, provided that some types of aggravated murders (especially those committed with premeditation or against public officers), poisonings, arsons of houses, as well as complicity in such crimes and attempting to commit them, were punishable by death. The decapitation by guillotine was the way to end the life of the criminals sentenced to death by the criminal courts. Executions were held in public until 1939 – although some dispositions were enforced to limit the view people could have of this infamous death³. The number of death sentences and executions had gone down during the 19th century, especially since the law of 1832 which introduced the concept of mitigating circumstances⁴.

¹ I would like to thank Paola Avignon for helping me to improve this article.

² J. Le Quang Sang, *La loi et le bourreau. La peine de mort en débats, 1870-1985*, „Logiques sociales”, Paris 2001, esp. pp. 39-46.

³ E. Taïeb, *La Guillotine au secret. Les exécutions publiques en France 1870-1939*, „Socio-histoires”, Paris 2011.

⁴ T. Geoffroy, *Les assassinats commis dans les départements de Seine-et-Oise et des Yvelines de 1811 à 1995*, Ph.D. Thesis in History of Law, Université Paris II Panthéon-Assas 1997. The author compiled the statistical data for the 19th and the 20th century for the département of Seine-et-Oise (the area around the town of Versailles). It shows that only 21% of the murderers sentenced by the criminal court of Versailles were punished by death, or by hard labour for life.

In 1906, the Minister of Justice Guyot-Dessaigne decided to launch a statistical analysis on the years 1888-1907 in order to show, on the one hand, the residual place of the death penalty, and, on the other hand, its inefficiency in preventing

	1897.	1899.	1900.	1901.	1902.	1903.	1904.	1905.	1906.	1907.	
AFFAIRES JUGÉES CONTRADICTOIREMENT.											
Meurtres ..	{ Simples	110	103	128	99	108	140	147	160	203	237
	{ Spéciaux, passibles de la peine de mort ..	73	61	99	64	78	70	83	114	68	74
Assassinats	168	173	157	150	140	157	180	169	183	181	
Parricides	12	9	10	9	10	7	5	12	11	17	
Empoisonnements	8	9	5	5	6	7	4	3	6	5	
TOTAUX	371	355	399	327	342	393	419	458	671	514	
AFFAIRES ABANDONNÉES. (CLASSEMENTS, ORDONNANCES DE NON-LIEU, ARRÊTS DE NON-LIEU.)											
Meurtres ..	{ Simples	263	220	200	221	270	268	326	502	401	471
	{ Spéciaux, passibles de la peine de mort ..	82	51	92	80	81	93	93	93	116	100
Assassinats	171	184	154	194	152	150	205	190	182	210	
Parricides	9	5	4	5	6	3	11	2	5	8	
Empoisonnements	135	110	109	116	134	109	118	168	101	133	
TOTAUX	660	600	619	616	613	623	753	855	805	922	
TOTAL DES AFFAIRES JUGÉES ET DES AFFAIRES ABANDONNÉES.											
Meurtres ..	{ Simples	373	323	388	320	378	414	473	562	604	708
	{ Spéciaux, passibles de la peine de mort ..	155	142	191	144	159	169	176	207	184	174
Assassinats	339	357	311	344	292	307	385	359	365	391	
Parricides	21	14	14	14	16	10	16	14	16	25	
Empoisonnements	143	119	114	121	140	116	122	171	107	138	
TOTAUX	1,031	955	1,018	943	983	1,016	1,172	1,313	1,276	1,436	
AFFAIRES JUGÉES PAR CONTUMACE.											
Meurtres ..	{ Simples	5	5	7	14	9	7	17	12	7	10
	{ Spéciaux, passibles de la peine de mort ..	#	#	#	2	1	2	4	#	#	1
Assassinats	21	13	10	14	9	8	19	7	4	5	
Parricides	#	#	#	#	1	#	#	#	#	#	
Empoisonnements	#	#	#	#	#	#	#	#	#	#	
TOTAUX	26	18	17	30	20	17	40	19	11	16	
TOTAUX GÉNÉRAUX	1,057	973	1,035	973	1,005	1,033	1,212	1,332	1,287	1,452	
Récapitulation des homicides passibles de la peine de mort.	Meurtres spéciaux	155	142	191	146	160	171	180	207	184	175
	Assassinats	360	370	321	358	301	315	404	366	369	396
	Parricides	21	14	14	14	17	10	16	14	16	25
	Empoisonnements	143	119	114	121	140	116	122	171	107	138
TOTAUX	679	645	640	639	618	612	722	758	676	734	
Condamnations à mort.	Exécutions	10	6	1	3	1	2	1	4	#	#
	Condamnations	9	14	10	17	8	14	15	14	29	41
TOTAUX	19	20	11	20	9	16	16	18	29	41	

Fig. 1. Number of cases in a contradictory trial, dropped cases and cases *in absentia*

crime⁵. This analysis was included in the *Compte général de la justice criminelle*, an annual report that measured the repressive activity of the French criminal courts⁶. This report made it possible to look at the place of the capital punishment in the repression of the crimes punishable by death.

In this report (cf. Figure 1), three tables presented the number of cases in a contradictory trial, the dropped cases and the cases *in absentia*. The last table established the summing up of the crimes punishable by death and was concluded by the number of death sentences and effective executions. In 1907, the result was of 41 death sentences for 734 homicides punishable by death, and not a single execution. The lowest level was in 1902, with only 9 death sentences for 618 homicides punishable by death, and one execution. This report took into account only the sentences pronounced in the mainland criminal courts and let aside the colonial ones, which could have showed different conclusions. Such a statistical attempt was finally abandoned when the abolition bill was rejected in 1908⁷. The number of death sentences and executions began to rise again, before and after the World War I, with two peaks during the afterwar periods, as can be seen on Figure 2. This new cycle of the death penalty only came to an end during the 1950s, when this number became residual.

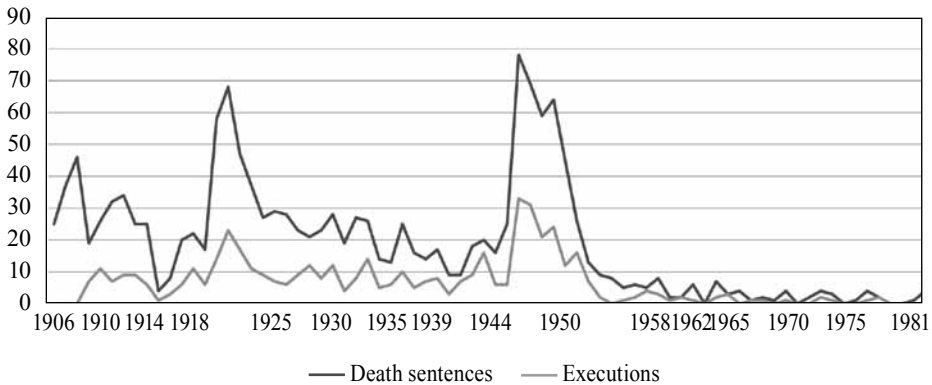


Fig. 2. Death sentences and executions

⁵ *Compte général de l'administration de la justice criminelle*, 1906, p. XV and p. XVII for the following illustration.

⁶ On the establishment of this annual report see M. Perrot, P. Robert, *Préface. Compte général de l'administration de la justice criminelle en France pendant l'année 1880 et rapport relatif aux années 1826 à 1880*, Genève, Paris 1989, pp. 1-30 ; see also R. Martinage, *Le compte général de l'administration de la justice criminelle, son rôle depuis 1825*, (in:) I. Martinez, Ch. Pochet (ed.), *Mesure(s)*, Collection "Histoire, gestion, organisations", Toulouse 2004, pp. 215-234.

⁷ On the failure of this parliamentary debate see J. Le Quang Sang, *La loi...*, pp. 91-113; and on the particular criminal case which caused this failure, *ibidem*, pp. 64-73. See also J.-M. Berlière, *Le Crime de Soleilland, 1907. Les journalistes et l'assassin*, Paris 2003.

Even with this renewal of the use of the guillotine, the quality of the *Compte général* declined after the World War I, since the statistical study of criminality wasn't a political priority anymore. This report didn't present the exact same data throughout time and complete series couldn't be produced. Another limit is that actual crimes and mere attempts were not always distinguished. However, the amount of data is sufficient to evaluate how the enforcement of the effective death penalty differed from its potential targets.

This paper has then three purposes:

- 1) to make a statistical comparison of the "crimes punishable by death" and the death sentences with other periods of the 20th century.
- 2) to understand the judicial mechanisms (especially the use of the mitigating circumstances and the use of pardon) which, in a large measure, allowed the avoidance of the enforcement of the death penalty.
- 3) to consider whether the death penalty was replaced by another penalty, especially the hard labour for life.

ON THE DIFFERENT CATEGORIES OF CRIMES PUNISHABLE BY DEATH AND THE ACTUAL DEATH SENTENCES

The graph on Figure 3 is constructed based on the data collected in the *Compte général*. Each category of crime is represented separately. Percentages were calculated by 4 years periods – some crimes, such as poisoning, are too scarce to be significant on shorter periods of time. This data doesn't distinguish between actual crimes and mere attempts, which is a bias, of course, because the attempts were usually less severely punished than the crimes themselves, even if the law provided the same penalty for both⁸.

Jurists, as well as public opinion, often considered premeditated murders as the worst kind of crimes, revealing the cruelty and the coldness of the criminal monster⁹. However, at least 80% of the murderers with premeditation escaped the death penalty. A lot of these crimes had no chance of leading to the guillotine – when for example, when a wife had premeditated the murder of her unfaithful

⁸ In the following graph, I didn't represent the murders of public officers, because this category lacks more data than the other categories.

⁹ On the character of the "cold" monster see A.-E. Demartini, *Le crime, le monstre et l'imaginaire social. L'affaire Lacenaire*, (in:) A. Caiozzo, A.-E. Demartini, *Monstre et imaginaire social*, Paris 2008, p. 312. On the premeditation, cf. A.-C. Ambroise-Rendu, F. Chauvaud (ed.), *Machination, intrigue et résolution. Une histoire plurielle de la préméditation*, Limoges 2017.

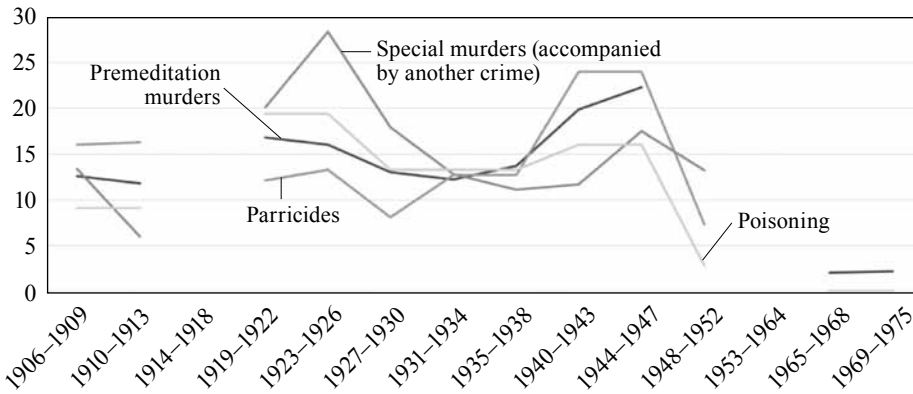


Fig. 3. Percentage of death sentences for different categories of crimes

husband. It could still be considered as a crime of passion and thus benefitted of a certain leniency¹⁰. The percentage of death sentences for such crimes was lower than 15% before the World War I. After a peek in 1920-1921, this number came down again and came up to 13% during the 1930s. It is thus a less severe crime than some other categories, such as murders accompanied by another crime. But premeditation was more severely punished after the World War II, becoming the most punishable crime, together with the parricide.

Murders accompanied by another crime were particularly punished after the World War I. It could be associated with the huge social condemnation of the acts linked to sexual aggression and to theft, which were maybe more predominant than the issue of premeditation. The graph on Figure 4 presents an evaluation of the repartition between the sexual crimes and theft-linked crimes by the study in the connected charges for the prosecutions of murders (all kinds of murders included).

Most of these crimes were murders accompanied by theft; the criminal thief, who acts with coldness and calculation, was already considered as particularly dangerous during the 19th century. It is likely that, in the 1920s and the 1930s, he still seemed worse than the sexual criminal, this one being more passionate, impulsive, and therefore less responsible for his acts¹¹.

¹⁰ On an historical approach to the “crime of passion” see J. Guillaud, *La Chair de l'autre. Le crime passionnel au XIX^e siècle*, Paris 1986; and B. Garnot, *Une histoire du crime passionnel. Mythe et archives*, Paris 2014.

¹¹ About the history of the thieves see F. Chauvaud, A.-D. Houte (ed.), *Au voleur! Images et représentations du vol dans la France contemporaine*, Paris 2014, esp. A.-D. Houte, *Mort aux voleurs? Autour de la condamnation morale du vol dans la France du XIX^e siècle*, pp. 163-174. On the history of the rape see G. Vigarelo, *Histoire du viol, XVI^e-XX^e siècle*, “Points”, Paris 2000.

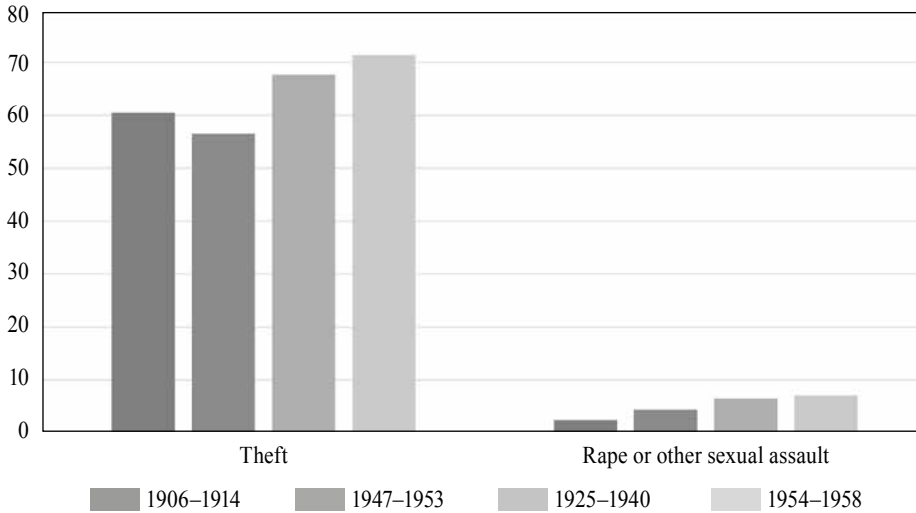


Fig. 4. Distribution between sexual crimes and theft-linked crimes

Parricides, poisoners and arsonists represent a few dozen cases. According to the Penal Code, parricides were the worst of criminals. The Penal Code of 1810 provided that the executioner should cut the fist (that had caused the death) before the decapitation. This disposition was removed in 1832 but up until the abolition of 1981, there was still a specific ritual for the execution of a parricide, with a black veil covering his face¹². However, if at the beginning of the 20th century parricide was the most severely punished crime, with 16% of the parricides sentenced to death, this crime was more leniently judged than all the other categories during the 1920s and the 1930s. This change was probably the result of a growing pathologization of these cases and of the evolution of the representation of the victims of parricides as “domestic tyrants”¹³. The persons who were guilty of parricides were also more frequently considered as more or less mad¹⁴, and there was the common opinion that an insane person shouldn’t be sent to the guillotine – even if this rule wasn’t always enforced¹⁵. Parricide became once again the “worst crime” after the World War II, but there were then less cases than ever.

¹² G. Trimaille, *La sanction des parricides du droit romain au Code pénal napoléonien*, “Droit et cultures” 2012, issue 63, pp. 203-211. See also S. Lapalus, *La Mort du vieux. Une histoire du parricide au XIX^e siècle*, Paris 2004.

¹³ S. Lapalus, *Du père immolé au tyran domestique. Les victimes de parricide au XIX^e siècle*, (in:) B. Garnot (ed.), *Les Victimes, des oubliées de l’histoire?* “Actes du colloque de Dijon”, 7 & 8 octobre 1999, Rennes 2000, p. 289-301.

¹⁴ F. Gouttefangeas, *Du parricide. Etude critique*, Med. Thesis, Université Paris 6, 1982.

¹⁵ N. Picard, *Guillotiner les simples d’esprit et les “demi-fous”? Atténuation de la responsabilité pénale et application de la peine de mort (France, IV^e République)*, “Criminocorpus. Revue

Poisoners didn't benefit from the same change in public opinion, and were quite harshly punished, although there were a lot of women among these criminals, and the "male" justice system was traditionally more lenient with women. There was a change after the World War II, maybe also due in part to a pathologization of these cases, but also because of several great toxicological battles in front of the courts – the doubt was stronger than before¹⁶.

The law has always provided specific protection for public officers and all the jobs of public enforcement, who were particularly exposed. Hurting one of them could send you to the guillotine, even if the injuries were not serious. At the beginning of the 20th century, in spite of all the dangers surrounding the policemen who were targeted by the illegalist anarchists, in spite also of the huge emotion that their violent deaths could generate¹⁷, their murders were not punished as harshly as the other aggravated murders. However, in the 1930s courts were extremely harsh with these murderers: around 50% of them were then sentenced to death.

The different kinds of crimes and criminals were not equal before the guillotine, and some of them could generate more horror and less pity than others. However, the percentages of the criminals "punishable by death" actually sentenced to the death penalty were always less than 50%, and more often less than 25%. Only a small minority of them had to go to death row, and thanks to a large use of pardons, an even smaller one was led to the instrument of death.

ON THE ISSUE OF MITIGATING CIRCUMSTANCES

The appearance of the concept of mitigating circumstances explains this gap. This was the main issue in the trials when the death penalty was at stake – more than a fight about the legitimacy of the capital punishment. All the criminal and judicial narratives were legal and social constructs of the "facts", translated into legal terms – and this translation could be open to discussion by several protagonists, each with their own interpretations. The principle of mitigating circum-

d'Histoire de la justice, des crimes et des peines", 8 Septembre 2014, Actes du colloque, *Savoirs, politiques et pratiques de l'exécution des peines en France au XX^e siècle*.

¹⁶ Especially with the case of Marie Besnard. See J.-M. Augustin, *Les destins croisés de Marie Lafarge et Marie Besnard: empoisonneuses ou innocentes?*, (in:) L. Bodiou, F. Chauvaud, M. Soria (ed.), *Les Vénéneuses. Figures d'empoisonneuses de l'Antiquité à nos jours*, Rennes 2015, pp. 245-258.

¹⁷ Ch. Chevandier, *Policiers dans la ville. Une histoire des gardiens de la paix*, "Folio", Paris 2012, p. 381-390.

stances allowed most of the accused to avoid a death sentence, by pulling down at least one level of penalty. Theoretically, juries in the criminal courts had to decide only on the facts, and the professional judges were there to supervise the debates and to pronounce the penalty according to the Penal Code. However, the juries knew very well that if they decided to introduce a statement of “mitigating circumstances”, the criminal would be saved from the guillotine. They didn’t have to motivate this statement, or to clarify what they understood by the term “mitigating circumstances”. It could be circumstances linked to the social past of the criminal, or to his mental stability, or an unwillingness to send a man to death.

Members of these juries were reputed to represent the democratic element of the people, chosen randomly; but in fact, until a 1980 reform, they were picked from the lists compiled by the mayors and the attorneys¹⁸. They were mostly representative of the social elites and their sensitivities. Their emotional connection with death, pity and the ideas on justice influenced the effective use of death sentences more than their legal knowledge. This situation opened the way to rhetorical tactics to the lawyers, which were often quite distant from arguments on legal points¹⁹.

Sometimes, mitigating circumstances were proposed by the prosecuting attorneys themselves. The punishments claimed in the pleadings of the accusation were left to their appreciation, which could evolve through the debates. The number of prosecutions asking for the death penalty is a missing indicator in this study. They were not reported in any archival document (except sometimes in the press) and were not collected as data. Without this information, it’s complicated and even impossible to establish a trend of these prosecutions. Such a trend would show some interesting elements on the evolution of the repressive will of the magistrates²⁰.

But most of the time, the mitigating circumstances were presented by the defense. During the first half of the 20th century, most of the arguments of the defense to obtain mitigating circumstances focused on sociological or hereditary etiological considerations. For example, a childhood full of abuse could be an argument for a lesser level of penalty. Since the end of the 19th century, psychiat-

¹⁸ B. Schnapper, *Le jury criminel, un mythe démocratique (1791-1980)*, “Histoire de la Justice” 1988, No. 1, pp. 9-17.

¹⁹ For a new approach to the importance of rhetoric in front of courts see C. Denys, N. Seriu, *L’argumentation au cœur du processus judiciaire*, “Clio@Themis. Revue électronique d’histoire du droit”, No. 8, January 2015, <http://www.cliothemis.com/L-argumentation-au-coeur-du> (visited May 17, 2019).

²⁰ The careers of the magistrates in France make them move from positions of prosecution to positions of immovable judges of courts: the two bodies of magistrates are of the same origin. See A. Bancaud, *La Haute magistrature judiciaire entre politique et sacerdoce ou Le culte des vertus moyennes*, “Droit et société”, Paris 1993.

ric appraisals became more and more important in the global examination of the criminal²¹. This examination brought together school reports, military opinions, inquiries collected in the neighborhood or in the professional environment of the accused, and other pieces of information collected by different administrations²². The idea was to have the most precise biography possible of the criminal, in order to understand his acts, and to establish if he could benefit from some excuses.

Some categories of accused people could generate specific defenses, such as women, young people, or foreigners. For each of them, the idea was to find in their nature or culture an explanation for their atrocious acts. Young people benefitted from the representation of youth as a “period of half-madness and sexual hysteria which unbalanced [their] bodies”²³. Women were defended with some “chivalrous” pleadings²⁴, such as this one: “a woman is sacred because she embodies weakness; a woman should always have the right to our pity”²⁵. Foreigners were more likely to be sentenced to death than other categories, however, their lawyers could try to show that their national origins explained their brutality. A lawyer suggested in 1930 that her client “should be judged as a Spaniard, taking into account this lack of thought which is characteristic of his compatriots”²⁶. Paternalistic, homophobic or racist *clichés* could consequently be mobilized for the best cause, to help a man or a woman to minimize his or her responsibility, in order to save his or her head.

However, some arguments were more directly abolitionist. Indeed, although the judges kept telling the lawyers that the law provided the death penalty in some cases and that the court wasn't the place to challenge it, the defense speeches were often used to question this idea. The description of the horror of any capital execu-

²¹ F. Chauvaud, *Les Experts du crime. La médecine légale en France au XIX^e siècle*, “Collection historique”, Paris 2000, esp. pp. 113-166.

²² These elements were also brought together in the pardon files. N. Picard, *Des guillotines de papiers: les archives gracieuses du Conseil Supérieur de la Magistrature sous la IV^e République*, Page 19, “Bulletin des doctorants et des jeunes chercheurs du Centre d'histoire du XIX^e siècle”, printemps 2014, No. 2, pp. 113-127.

²³ Defence speech of Henri Millevoye: “(...) cette crise de demi-folie et d'hystérie sexuelle qui déséquilibre les corps de seize ans”. *Affaire Tissier et Demarest. L'assassinat d'un garçon de recettes par deux jeunes garçons*, (in:) *Revue des grands procès contemporains*, 1911, p. 268. The translation is mine.

²⁴ C. Parent, *La protection chevaleresque ou les représentations masculines du traitement des femmes dans la justice pénale*, “Déviance et société” 1986, Vol. 10, pp. 147-175.

²⁵ Defence speech of Raymond Hubert: “Une femme est sacrée parce qu'elle personnifie la faiblesse. Une femme doit toujours avoir droit à notre pitié”. A. Gatti, *La mort pour Andrée Farré*, “Le Parisien Libéré” 9-10, November 1950, p. 4. The translation is mine.

²⁶ Defence speech of Lucile Tinayre: “(...) il fallait juger Perez comme un Espagnol et faire la part de cette absence de réflexion qui caractérise ses compatriotes”. M. Hamburger, *La Défense. Nos grands avocats*, “La Revue Française”, Paris 1930, pp. 185-186.

tion, especially by guillotine, could appeal to the pity on behalf of the criminal. A famous lawyer, Christian Bonnenfant, explained that

what impressed the members of the jury, was the fate of the people sentenced to death in their cells, before the execution, with a light which never shuts down. It was atrocious, for the one who was sentenced to death, to wait for the day... it was terrible. I used to plead this and it made a very strong impression²⁷.

Another famous lawyer, the father of the abolition of the death penalty in France, Robert Badinter, used the words “a man cut in two” during the trial of Patrick Henry, who was saved from the death penalty²⁸. The argument of inefficiency of the death penalty to fight crimes was often hastily explained, because this kind of argument included the raw statistical data which could not move the members of the juries. The argument of “civilization” was more efficient, because it introduced a sort of competition with other countries who had already abolished death penalty, hurting the national pride. France was the last country of Western Europe to abolish the death penalty. Another way to move the members of the jury was to bring them to a full consciousness of their moral responsibility, to crush them under the weight of their decision – sentencing another man to die. The defense lawyers tried to prevent the members of the jury from laying the responsibility of the execution at the door of other people, such as the judges of cassation, the magistrates of the commission of pardons, or the President of the Republic, who could always grant a pardon²⁹.

In any case, emotional arguments and *clichés* were always preferred to more rational and legal ones in order to convince the members of the juries³⁰. There was no system of appeal in France for the criminal justice (the Court of Appeal applied only for the verdicts of the magistrate’s courts in charges of lesser offences). The Court of Cassation could throw out a sentence on a technicality but didn’t consider the case itself, so a verdict of death was rarely quashed. But France was characterized by a large use of the presidential pardon.

²⁷ Interview with Christian Bonnenfant, 20 May 2016: “(...) ce qui impressionnait les jurés, c’était le sort qui était réservé aux condamnés à mort dans leur cellule avant l’exécution, avec une lampe qui ne s’éteint jamais, etc., etc. C’était atroce, pour celui qui était condamné à mort, attendre le jour... C’était terrible. Ça, je le plaçais et ça secouait quand même”. The translation is mine.

²⁸ R. Badinter, *L’Abolition*, Paris 2000, p. 85.

²⁹ See Robert Badinter and his account of his pleading in the Patrick Henry case. R. Badinter, *L’Abolition...*, pp. 116-118.

³⁰ On the importance of the emotions in the criminal courts see F. Chauvaud, *Pleurs, effroi et rires dans les prétoires. Le triomphe de l’émotion en cours d’assises (1880-1940)*, “Clio@Themis. Revue électronique d’histoire du droit”, No. 8, January 2015, <http://www.cliothemis.com/Pleurs-effroi-et-rires-dans-les> (visited May 17, 2019).

ON THE USE OF PARDONS

During the 20th century two thirds of the persons sentenced to death were finally pardoned. The graph on Figure 5 shows the evolution of pardons compared to the executions.

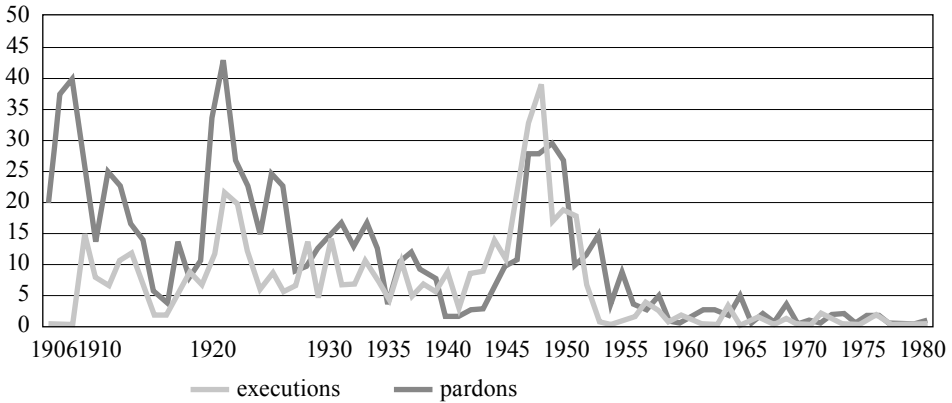


Fig. 5. Pardons and executions

Theoretically, the president of the Republic was the only one with the authority to grant a pardon. However, in a large amount of cases, the decision was already taken during the trial. After having sentenced the criminal to death, members of the jury often signed a petition to introduce a demand of pardon. The President of the Republic never went against their will. Even without this kind of petition, a person sentenced to death could still save his head.

The Ministry of Justice proceeded to a new examination of the facts and circumstances. The procedure of pardon remained mostly unchanged during the whole 20th century. One of the services of the ministry of Justice opened automatically a request of pardon and filled it with a summary of the judicial case file, the advices of the president of the court and the attorneys, sometimes a memorandum of the lawyers and remarks from the penitentiary administration on the behavior of the convict after the condemnation. The civil servants and officials in charge of these cases were magistrates assigned to the Ministry. They reproduced in their reports and opinions the same process of decision they had used when they passed sentences. This process was only written but could be compared to a “second trial”, focusing on the sole issue of mitigating circumstances.

The Commission of Pardons was established to advise the Minister and the President. During the Third Republic, this commission was made up of the chiefs of different boards of the Ministry (Civil Affairs, Criminal Affairs and Pardons, Staff, Penitentiary Administration) and heard the reports of the Board of

Criminal Affairs and Pardons. During the Fourth and the Fifth Republics the Commission of Pardons was integrated in a new body, the Supreme Council of the Magistrates (*Conseil Supérieur de la Magistrature*) which was established to guarantee a better independence of the judicial power from the executive one. In both cases, this commission could only give advice, which didn't bind the President. After the meeting of the Commission of Pardons, the President used to summon the criminal's lawyer to the presidential Palace of Élysée to hear his last arguments in favor of his or her client. He took his decision alone and gave no explanation. The decision of the President was often more lenient than the recommendations of the commission, which were already more lenient than the recommendations of the president and attorneys of the criminal court: there was a "slope towards leniency" from the beginning of the pardon process until its end³¹. That explains how two thirds of the convicts sentenced to death finally saved their heads.

WHICH REPLACEMENT FOR THE DEATH PENALTY?

To explain the gap between the death sentences and the crimes punishable by death, the hypothesis could be formulated upon examining the issue of the importance of the substitute penalty. G. Mickeler demonstrated in his thesis how the 19th century went from a period where the death penalty was more enforced than hard labor for life, to a period where hard labor for life tends to become a substitute for the death penalty, as if they were communicating vessels³². But the graph for the 20th century, presented on Figure 6, shows that the curve of hard labor for life (replaced in the 1970s by the prison for "perpetuity") followed, to some extent, the curve of the death sentences.

For this period no compensation, no communicating vessels existed. There were merely more repressive periods characterized by harsher penalties, sometimes in a dynamic of "penal populism"³³. When the abolition occurred, the issue of a new substitute penalty was discussed, but was finally let aside³⁴.

³¹ On the pardon process, see my own book, N. Picard, *Le Châtiment suprême. L'application de la peine de mort en France (1906-1981)*, Paris 2018, pp. 305-347.

³² G. Mickeler, *La peine de mort et les travaux forcés à perpétuité devant la cour d'assises d'Eure-et-Loir (1811-1900)*, Ph.D. Thesis in Law, Université de Paris-Val-de-Marne, Faculté de Droit de Saint-Maur 1999, pp. 3, 47-50.

³³ "It is a concept with a short history", J. Pratt, *Penal Populism*, London, New York 2007, p. 2. This term has been originally coined to describe the contemporary trend towards the use of the politics of crime by some politicians. However, this term could be applied on some occasions to more ancient times, as I showed in my work N. Picard, *Le Châtiment suprême...*, p. 19.

³⁴ J.-Y. Le Naour, *Histoire de l'abolition de la peine de mort. Deux cents ans de combats*, Paris 2011, pp. 346-347.

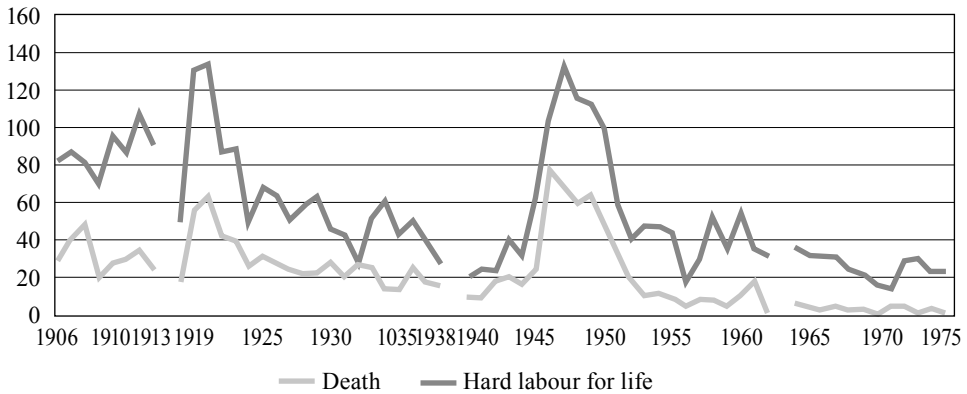


Fig. 6. Death sentences and hard labour for life sentences

Mitigating circumstances and pardons allowed to avoid the death penalty, but the substitute penalty was also very harsh: hard labour for life (more exactly, for “perpetuity”) meant until 1938 the deportation to the penitentiaries (“*bagne*”) of French Guyana, also called the “dry guillotine” because of their high levels of mortality³⁵. Very few convicts could then expect to benefit from successive pardons and a hypothetical liberation. The “*bagne*” was abolished in 1938³⁶ and replaced by a softer imprisonment in the penitentiaries of mainland France – even if this penalty provided forced labour until the 1970s. However, the “perpetual” hard labour after the World War II was not conceived as being actually perpetual. A study on the convicts sentenced to death and pardoned, published in 1982, showed that 121 of them were freed between 1961 and 1980, with an average period of imprisonment of 18 years³⁷. 30 of them were even less than 40 years old. These liberations were the consequences of the growth of the policy of conditional liberation³⁸ and of successive pardons. There was no specific relentlessness

³⁵ The French Guyana *bagne* is the object of a large bibliography. See among others J.-C. Michelot, *La Guillotine sèche. Histoire du bagne de Cayenne*, Paris 1981; and M. Pierre, *Le Temps des bagnes. 1748-1953*, Paris 2017.

³⁶ D. Donet-Vincent, *La Fin du bagne. 1923-1953*, Collection “Université”, Rennes, Ouest-France 1992. However, the convicts already in Guyane continued to serve their sentence there. The last ones were repatriated in 1953.

³⁷ For a comparison, the convicts originally sentenced to a perpetual imprisonment served an average period of 17 years of imprisonment. See M.-D. Barré, P. Tournier, *Érosion des peines perpétuelles. Analyse des cohortes des condamnés à mort graciés et des condamnés à une peine perpétuelle libérés entre le 1^{er} janvier 1961 et le 31 décembre 1980*, Direction de l’Administration Pénitentiaire 1982, pp. 2, 18.

³⁸ See A. Besançon, *La libération conditionnelle depuis le Code de Procédure pénale*, Ph.D. Thesis in Law, Université de Dijon 1968.

of the penitentiary administration and of the judges of probation and liberation against the former convicts sentenced to death during the 1960s and the 1970s.

CONCLUSION

The death penalty was not often applied during the 20th century. Even if the law-in-the-books was harsh, the members of the juries often felt pity for the criminals and avoided sending them to actual death, with the mitigating circumstances, or with a demand of pardon. The part of the death penalty was very small in the whole repressive activity, at least in time of peace and for the common law criminals³⁹. It became negligible from the 1950s until the abolition, whereas the issue gained more and more place in the press. Under the double influence of the collapse of the death sentences and the use of pardons, the death penalty almost fell into abeyance before the abolition, whereas paradoxically, the fight for the abolition was very passionate in France, and the issue still discussed afterwards and nowadays.

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³⁹ I have let aside the case of the military and political defendants in the war and after-war period. They represented a huge number: for example, the military courts sentenced to death at least 2400 during the World War I (600 were executed) – more than the 1375 people sentenced to death by criminal courts between 1906 and 1981. A. Bach, *Fusillés pour l'exemple. 1914-1915*, Paris 2003, p. 9.

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Summary

A statistical report of 1906 evaluated the place of death sentences in the judicial system, with the main purpose of supporting the bill of abolition of the death penalty (finally rejected). This report showed the negligible role of the capital punishment in the penal repression – as if the guillotine had already fallen into abeyance. According to the Penal Code of 1810, aggravated murders (premeditated murders, murders accompanied

by another crime, murders of a public officer), parricides, poisonings, arsons of houses, as well as complicity in and attempt of such crimes, were all punishable by the guillotine. However, a large implementation of the principle of mitigating circumstances allowed to avoid the enforcement of death penalty. Moreover, two thirds of the people sentenced to death were pardoned, often with the support of the juries. The substitute penalty was a perpetual imprisonment, but this “perpetuity” became shorter and shorter after 1945.

KEYWORDS

death penalty, France, 20th century, mitigating circumstances, pardon

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kara śmierci, Francja, XX wiek, okoliczności łagodzące, ułaskawienie