

The Constitutional Acknowledgment of the French Declaration on Human and Civic Rights of 1789*

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I. Introduction

In 1789 the French Revolution ended the relative political and social stability of the "Ancien Régime". This, and the earlier American Revolution, led to political and social changes that swept through Western civilization in the nineteenth and twentieth centuries.

Although the causes of the French Revolution are deep and controversial, most agree it was precipitated by financial problems that led the King Louis XVI to call a meeting of an old representative institution, the Estates General, in 1789.

The Third Estate in almost all the "cahiers de doléances" asked for the acknowledgment of rights included in one declaration.

Marquis de Lafayette, who previously participated in the American Revolution,

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drafted the French declaration of 1789, inspired by the Declaration of Independence of the United-States¹⁾

As the vice-president of the National Assembly, he proposed the text of the declaration. Different versions presented by Mounier, Sieyes or Condorcet for instance²⁾ were disputed, text which has been voted and adopted by the National Assembly.

To draw up the Declaration of the Rights of Man and Citizen in August 1789, the French revolutionaries have been inspired by previous fundamental legal guarantees of rights from the Anglo-american tradition starting with the Magna Carta of 1215. The Magna Carta was a Charter which included very few stipulations protecting ordinary citizens³⁾. In 1628 the English Parliament drew up a Habeas Corpus Act 1679 to define and strengthen the ancient prerogative called habeas corpus, whereby persons unlawfully detained can be ordered to be prosecuted before a court of law. That text has been extended in the English Bill of Rights of 1689, statement of certain positive rights that citizens and/or residents of a constitutional monarchy ought to have. It asserts the Subject's right to petition the Monarch and the Subject's right to bear arms for defence. It also restates constitutional requirements where the actions of the Crown require the consent of the governed as represented in Parliament.

The English Bill of Rights includes protections of such traditional rights of Englishmen as trial by jury, the prohibition against cruel and unusual punishments, and the right to keep arms for personal defence. It contains many of the ideas about rights and government that were later included in the American Declaration of Independence, Constitution, and Bill of Rights.

The Declaration of Independence of the United States of 1776 and constitutions of certain North American states, such as Virginia and New Hampshire will modelled the French Declaration of human rights.⁴⁾

1) Thomas Jefferson, the third President of the United States (1801-1809), was the principal author of the Declaration of Independence. of 1776.

2) More than thirty projects were proposed by members of the Assembly, some personalities out of the Assembly made propositions too.

3) Later it became a famous constitutional document..

It has to be noticed that this declaration reflects Enlightenment philosophy, which will inspire the French revolutionaries too. They aimed to establish new institutions based on the principles of the philosophical movement of Enlightenment from the eighteenth century.

France had been one of the pioneering nations in the field of human rights and the French Declaration of the Rights of Man and of Citizens of 1789 had been a source of inspiration in the drafting of many constitutions all over the world.

To understand that phenomenon we have to examine the nature of the rights proclaimed in the Declaration of 1789 and the legal and political context at that time and the other rights affirmed in the Constitution following the Declaration of 1789.

Then, we will study the role of the organ of judicial review in the affirmation of the constitutional value of the Declaration of 1789 and how this acknowledgment could have transformed and developed the French judicial review itself.

II. The proclamation of human and civic rights in the Declaration of 1789

The Declaration of 1789 was inspired by the American Declaration of Independence but with different goals and aspirations. Whereas, the American Declaration is primarily an expression of the determination to decolonise and for national independence, the French Declaration of 1789 includes a more universal dimension since it proposes not only to affirm rights for the French

4) In the 19th century, modern public law was emerging from a crucible where the ways of thinking about government associated with the American and French revolutions were transforming older, royal, bureaucratic traditions. To varying degrees, in different parts of the world, American, English and French ideas about equality, democracy, representative government, the separation of powers, and natural rights to life, liberty and property were helping to shape systems of public law [...].", in *"Comparative legal traditions"*, M.A. Glendon, M.W. Gordon, C. Osakwe, West publishing 2^o ed., 1994..

people, but more generally to liberate the human being himself from all servitude.

In that context, we will have to determine why the Declaration of 1789 had a so considerable impact all over the world and what kind of continuity this Declaration had on following constitutional texts.

1. The Declaration of 1789 : A symbol for France

The slogan of the French Revolution was "Liberty, equality, fraternity, or death!" which survived until now as the French motto as "Liberty, Equality, and Fraternity", affirmed in the article 2 of the present Constitution.

The Declaration of the Rights of Man and of the Citizen came to be, as was recognized by the 19th-century French historian Jules Michelet, "the credo of the new age."

That declaration was intended as part of a transition from an absolute to a constitutional monarchy. Many of the principles laid down in the declaration directly oppose the institutions and usages of the *ancien régime* of pre-revolutionary France monarchical regime.

Equality before the law was to replace the system of privileges that characterized the old regime. Judicial procedures were insisted upon to prevent abuses by the king or his administration, such as the *lettre de cachet*, a private communication from the king, often used to give summary notice of imprisonment.

The effect of the Enlightenment on the French Revolution has created a debate which will not soon be resolved. Because the philosophers of the Enlightenment attacked the established order together with authority of any kind, their ideas helped to produce what can only be called a revolutionary mentality.

The debate raised several questions: should the declaration be short and limited to general principles or should it rather include a long explanation of

the significance of each article; should the declaration include a list of duties or only rights; and what precisely were "the natural, inalienable, and sacred rights of man"?

After several days of debate and voting, the deputies decided to suspend their deliberations on the declaration, having agreed on seventeen articles. These laid out a new vision of government, in which protection of natural rights replaced the will of the King as the justification for authority. The debates started with the proposition that the essence of the declaration was in three principal ideas : liberty as protection, liberty as participation and equality.

The debates were short because the Assembly was in a hurry to establish the new Constitution. The philosophers of the Enlightenment influenced directly the writing of the Declaration. The notion of the separation of powers came from Montesquieu, the doctrine of natural rights from the authors of the *Encyclopédie* and John Locke, and the theory of the general will and of the Sovereignty of the nation from Jean-Jacques Rousseau. From Voltaire came the idea that the individual must be safeguarded against arbitrary police or judicial action.

Boutmy, the creator of the School of Political Sciences in Paris insisted on the influence of the Social contract of Rousseau. In his view, the Declaration of 1789 gave quintessential expression to the thinking of an entire century. He saw it as the "essential offspring of the Enlightenment". "Toleration was the child of the Enlightenment, which finally dared in the name of the reason to free humanity from the scourge of religious passions". The signature of the Declaration of the rights of Man was that of "the whole eighteenth century, destroyer of all tradition, creator of natural right"⁵⁾.

5) Emile Boutmy, in K. M. Baker, *The idea of a Declaration of rights*, in *"The French idea of freedom: the old regime and the declaration of rights of 1789"*, Stanford, 1994, p. 156..

The first sentence of the Declaration confirms the role of the National Assembly : "The representatives of the French People, formed into a National Assembly". This is the acknowledgement of the rights of the Nation and detailed in the article 3 : "The principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it".

The articles 1 to 4 are referring to the Republican order: the principle of equality (referred to a great number of times in the constitutional texts), lists the freedoms and gives a definition of freedoms and their limits.

The articles 5 to 9 are giving a definition of the law and its application in criminal matters, and the protection against the arbitrary. Following the ideas of Rousseau, "The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes".

The articles 10 to 17 are expressing the fundamental principles: Freedom of opinion, freedom of religion, freedom of the press, no taxation without representation, elimination of excessive punishments, and various safeguards against arbitrary administration.

Those constitutional principles are nowadays acknowledged in almost all the European constitutions, constitutional law of European countries has been strongly influenced by the Declaration of 1789.

2. Continuity of the rights of the Declaration in constitutional texts

The National Convention drew up this new declaration of rights to attach to the republican constitution of 1793. The constitution was ratified in a referendum, but never put into operation.

After the fall of Robespierre, the National Convention drafted yet another republican constitution. The new constitution was also approved in a referendum and put into effect 26 October 1795. It remained until Napoleon

came to power in November 1799. This declaration links duties with rights. It also drops the references to welfare and public assistance and emphasizes family obligations (Art. 4 among duties) for the first time. This declaration also makes clear that "men" refers to males only.

In the Constitution of 1848, first elements of social law will be added. But almost all the Constitutions did not proclaimed any declaration or reference to any principle.

The constitution of October 1946 was the Constitution of the Fourth French republic. The principles contained in the Preamble of that Constitution are reaffirmed in the Preamble of the 1958 Constitution. This Preamble solemnly reaffirmed the rights and freedoms of man and the citizen laid down in the 1789 Declaration of Rights and the basic principles recognised by the laws of the Republic.

This Preamble came in the context of the end of the Second World War. The significant first paragraph provides:

"In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights".

It was written after the attempt to draft a new Declaration of Rights had been rejected by the referendum of May 1946. It proclaims as being especially necessary to our time, political, economic and social principles (equality of rights between men and women, right to strike, equal access to education, vocational training and culture). The rights affirmed in the Preamble are very general: for instance the paragraph 5 provides "Every individual has the duty to work and the right to employment".

The Preamble of 1946 itself suggested that its own statements of rights were complementary to those of 1789, and the Council construes them in that way.

The "fundamental principles acknowledged in the laws of the Republic" are referred to in the first paragraph of the Preamble of 1946. The purpose of that notion was to designate such principles without having to present an exhaustive list. These have formed the basis of numerous decisions of the Constitutional Council: the category of those fundamental rights is open-ended and has settled by decisions of the Council (the principle of freedom of association, freedom of education, independence of the administrative jurisdiction for example).

If the Declaration of 1789 was used as a reference but the judge of the administration, it started to be acknowledged by the constitutional judge only with the constitution of the Fifth Republic.

III. The French Declaration of 1789: a text having constitutional value

Before the Fifth Republic, the French had the idea that no judicial body should be given the power to review the conformity statutes with a supposed higher law. The legislature, therefore, as the voice of popular sovereignty, was seen as the best guarantor of fundamental rights. From the standpoint of the development of constitutional review in continental Europe, France has always been against the notion that the acts of superior bodies and especially of parliamentary assemblies, as representatives of national sovereignty, might be subjected to review by the judiciary.

With the Fifth Republic, this is the introduction of limits on the omnipotence of the legislative power (strengthening the executive vis-à-vis the legislature) the creation of a supervisory body that can make binding decisions concerning the validity of the Parliament's legislation.

1. A creation of the Constitutional Council, judge of the Constitution

The latest Constitution of the Fifth Republic, adopted in 1958 is not an exhaustive statement of constitutional provisions. The legal writings, under the person of Professors Favoreu (1936-2004) and Philip, began to talk about the "block of constitutional provisions" to designate the totality of the constitutional principles. Now, all the French constitutionalists have adopted this theory but the Constitutional Council usually refers to "principles having constitutional status".

The Constitution of 1958 mainly contains rules on the competence and functioning of the organs of the government (President, Government, and Parliament) the enactment of legislation and guarantees for the independence of the judiciary.

The 1958 Constitution affirms few fundamental values. These are not exhaustive since the Preamble to the 1958 Constitution confirms France's adherence to the principles laid down by the Declaration of the Human and civic Rights of 1789 and by the preamble to the Fourth's republic Constitution of 1946.

The classical attitude towards the protection of freedom has been expressed by Barthélemy "most often declarations of rights are no more than solemn proclamation of principles, rules for the conduct of the State, pure maxims of political morality, promises whose forces lies solely in public opinion and whose solemn inscription alone is made by the Constitution, without the possibility for individual to enforce their observance or their practical realization."

But a famous decision of 1971 has been the starting-point of a new development of fundamental liberties law in France. That decision confirmed a traditional decision of the Conseil d'Etat first set out under the Constitution of 1946, then confirmed at the beginning of the Fifth Republic by the decision *Société Eky*⁶⁾.

6) Ass. 12 février 1960, *Société Eky*, p. 101..

Actually, in the decision n° 71-44 DC (July, 16, 1971) *Associations law*, the Constitutional council recognised for the first time a constitutional value to the Preamble of the 1958 Constitution itself. In the same time, it was a way to give to the Declaration of Human and civic rights of 1789 and to Preamble of the 1946 Constitution this value too.

This decision concerned the freedom to form an association without prior approval of a public official.

In this case the Government had banned a left-wing organization as subversive. Simone de Beauvoir and other left-wing intellectuals formed an association "*Les amis de la cause du peuple*" (Friends of the people's cause), in support of the ban organization and in protest at the Government's action. The prefect of Paris refused to register the association, claiming that it had an illegal purpose but this decision was quashed by the Conseil d'Etat as an unlawful prior restraint. The Government then promoted a bill that empowered prefects to refuse to register an association whose objects appeared to be unlawful. This was passed despite the opposition of the Senate, and was referred to the President of the Senate to the constitutional Council. The constitutional Council declared the provision unconstitutional by reference to the freedom of association.

And in cascade, the "fundamental principles acknowledged in the laws of the Republic" and contained in the Preamble of the 1946 Constitution were used and recognised as constitutional principles.

So until this decision, the Constitutional council decides to refer not only to the text of the Constitution but also to these different principles.

This decision was confirmed later by the decision n° 74-54 DC January, 15, 1975 with the citation of the article 2 of the Declaration of the rights of Man and of the citizen and the Preamble of the 1946 Constitution.

The block of constitutional norms is composed by:

- The Declaration of the Human and civic Rights of 1789
- The preamble of the 1946 Constitution

- The preamble of the 1958 Constitution
- The text of the Constitution itself (article 1 to article 89)

And the constitutionality of the law is controlled in regard with these different elements of constitutional texts.

2. The Constitutional council, protector of human rights and freedoms

With the acknowledgement of the Declaration of the rights of Man and of the citizen of 1789, the nature of judicial review by the Constitutional council has been transformed. This development in case law establishes the role of the Council as the guarantor of rights and freedoms.

In the constitution of 1958, the role of the legislature has been reinforced in the context of fundamental freedoms. The article 34 provides: "Statutes shall determine the rules concerning: civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties".

But the decision of 1971 changed the role of the Constitutional Council which started to give legal force to the fundamental freedoms proclaimed in the Declaration of 1789, the Preamble of 1946 and the fundamental principles recognized by the law of the Republic.

The Declaration of 1789 became a fundamental source of French constitutional law because of the number of dispositions it contains the number of decisions the Constitutional Council based on that text. Those dispositions concern almost all the rights and freedoms of the individual and are the expression of a special conception of the "public matter".

The Declaration of 1789 is an old text but as it has been written in very general terms it is still relevant for the development of constitutional law in the area of freedoms.

The Constitutional Council pertinently gives an interpretation appropriate to the evolution of the law and of the society. It has developed its own theory

of rights and freedoms became progressively the "guardian of rights and civil liberties".

The important system of protection of rights and freedoms built by the Constitutional Council over the years follows a logical pattern. The Council attaches more importance to the rights and freedoms⁷⁾ that are protected in the Declaration of 1789 than those protected in the Preamble of 1946. It seems that some rights or freedoms have more weight than others⁸⁾.

The Constitutional council built an organization of rights and freedoms around a core of fundamental rights and freedoms, with first, the affirmation of classical rights and freedoms as expressed in the Declaration of 1789 and the expression of these fundamental freedoms in a collective or societal context⁹⁾.

In that organization we can distinguish roughly between individual freedoms and freedom of thought.

The conception of individual freedom is understood in a broad sense by the Constitutional council taking into account the tension between freedom and public order which remains a recurrent issue in civil liberties. For instance anything which will unduly hamper the physical movement of an individual can be regarded as unconstitutional.

The Council decided that control of identities in public places must be strictly limited in order to be constitutional; a similar decision *Vehicles Search* in 1977 was based on the article 2 of the Declaration of 1789. This article was used as a justification for restricting the actions of the State in relation to individuals in the main issues about individual freedoms.

7) F. Goguel, «*Objet et portée de la protection des droits fondamentaux*», in *Cours constitutionnelles européennes et droits fondamentaux*, Paris 1982, p. 236.

8) On this question, see D. Rousseau, *Droit du contentieux constitutionnel*, Paris 1995, p. 107-113.

9) J. Bell, S. Boyron, S. Whittaker, *Principles of French law*, Oxford University Press 1998, p. 157.

The protection of personal liberty extends to all aspects of private life. The Council developed a new conception of individual freedom based on a new perception, a larger definition of the individual.

In that way the council interpreted widely the ideas of the *commissaire du gouvernement* Corneille in his conclusion about the decision Baldy, 1917:

"Police powers are always restrictions on the liberties of individuals, and the starting-point of our public law is the body of freedoms of the citizen. The Declaration of the Rights of Man is explicitly or implicitly in the frontispiece of republican constitutions, and any controversy of public law, must in order to base itself on general principles, start from the point of view that freedom is the rule, and restriction by police, the exception"¹⁰).

The case law developed by the Constitutional Council constitutes in itself a part of the "block of constitutional provisions": it constructs, interprets, and defines the principles to be opposed as well to the legislative power, the executive power or the judiciary. This case law will be later integrated in legislation, administrative regulation and decision of the judicial power.

The freedoms of thought (freedom of opinion, freedom of expression, freedom of conscience, freedom of education, freedom of communication) have been constantly protected by constitutional texts and recognized in a number of decisions of the Constitutional council. It had to adapt a body of rules and principles to the new requirements of modern life. For instance in a decision about the Press Law of 1984, the right of publishers to publish contained in article 11 of the Declaration of 1789 becomes, by the interpretation of the Constitutional Council, the right of the audience to receive information. This right must be protected as a "principle of constitutional value" even in balance against the principle of the freedom of enterprise.

The constitutional case law gives an interpretation of the constitutional provisions and that interpretation binds all the authorities of the State.

10) Conseil d'Etat, 10 August 1917, *Baldy*, Lebon 637.

With the judicial review of the legislation, the constitutional case law decides the meaning to be given to provisions of the law in order for them to be in accordance with the Constitution.

And the constitutional council creates "principles having constitutional values" which are not enounced as principles in constitutional provisions. It is a way to form into a hierarchy or to conciliate between constitutional principles having equal value.

The fundamental rights and freedoms have been constitutionalized by the Constitutional Council. That movement shows that the protection of those rights and freedoms are mainly under the competence of the constitutional court, European courts are playing a role following the principle of subsidiarity¹¹⁾.

One of the authors of the Universal Declaration of Human Rights of 1948, René Cassin has been directly inspired by the Declaration of 1789, whose most universal principles (liberty, equality, and fraternity) were to be, retained in the first article of the 1948 text: «All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.» The French Revolutionary tradition also helped inspire the European Convention on Human Rights signed of 1950, European Convention which can be apply directly in national law by the French judge.

Key Words : Human Rights, Constitutional Court, French Declaration of 1789, Constitutional Value, Constitutional Law

11) Decision Maastricht II, 9 April 1992, J.O. 3 September 1992, p. 12.

[국문초록]

1789년 프랑스 인권선언의 헌법적 승인

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프랑스 인권선언은 전 세계의 헌법을 기초하는 근본적 원천이 되었고, 프랑스 국민의 권리를 확인하게 되었으며, 특히 인간을 모든 구속으로부터 해방하려는 데 목적이 있다는 것이다.

1789년의 프랑스 인권선언서는 헌법적 기구의 탄생, 그 역할로 인권과 자유의 보호자가 되는 이론적 근거를 제시함으로써 인권선언서의 권리의 성질을 일반적·포괄적 해석하였고, 개인의 자유와 사상에 대한 헌법개념을 확립하는 계기가 되었다.

또한 1948년 세계인권선언의 중요한 원칙을 확립하고, 1950년 인권에 관한 유럽협정등에 영향을 주기도 하였다.

이러한 현상을 이해하기 위해서는 1789년 선언서에 규정된 권리의 성질과 그 당시의 법적, 정치적 배경, 그리고 1789년 선언 이후의 헌법에 확인된 다른 권리들을 조사해야 한다.

그리고 나서, 1789년 선언서의 헌법적 가치를 확인하는 사법심사 기관의 역할과 이 승인이 어떻게 프랑스 사법심사 자체를 발전시킬 수 있었는지를 연구해야 할 것이다.

주제어 : 인권, 헌법재판소, 1789년의 프랑스 선언, 헌법적 가치, 헌법