

The Making of the Declaration of 1789

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In these two talks, today and on December 1 in Warsaw, I shall discuss the Declaration of the Rights of Man and the Citizen that was adopted by the French Constituent Assembly on August 26 1789, and with minor changes inserted into the Constitution of 1791. Today I have two main topics: the historical context of the debates that preceded the adoption of the Declaration and the internal structure of the document. Next week in Warsaw I shall address three other issues: the controversies over the Declaration, the relation of the Declaration to the many similar Declaration of rights or Bill of Rights that have been adopted since 1789, and the normative status of the document.

You have the text of the Declaration in front of you. Even though it will be familiar to many of you, I urge you to take a minute to read it. The English translation captures quite well the spirit of the French text, which is succinct and relatively unburdened by metaphysical abstractions. There are brief references to the notoriously obscure ideas of "natural rights" (§2), "sacred rights" (§17) and the "general will" (§6), but in the main the document simply spells out the most important positive rights. It is a document written by lawyers, not by philosophers.

This is not to deny that the document has origins in philosophical sources. Locke and Rousseau are frequently cited as being among the main inspirations. Yet the connections are indirect and elusive. One might imagine, for instance, that the right to resistance cited in Article 3 was directly inspired by Locke. Yet Mirabeau reported that when he proposed to include the right of individuals to keep and bear arms, his colleagues on the drafting committee dissuaded him. As for Rousseau, the reference in the Declaration to the general will is too general to have any specific content. Similarly, the references to "public utility" (§1) or to "society" (§4) should not necessarily be read in a utilitarian spirit.

The connections between the Declaration and earlier documents of the same kind, notably in America, are also hard to trace with precision. There is a direct historical link, in that one of the earliest proposals of a declaration by Lafayette was both inspired by American documents and based on a draft that had been corrected by Thomas Jefferson. Those of Lafayette's formulations that survived in the final text are not, however, particularly close to the American documents. Let me cite two examples. The very influential Bill of Rights of Virginia asserts that "men are by nature equally free". Lafayette's proposal, which is close to the language of the 1989 Declaration, was that men were by nature "free and equal". The two phrases – equally free and free and equal are by no means synonymous. Conversely, the very American "right to the pursuit of happiness" proposed by Lafayette did not find its way into the Declaration.

I am not asserting that these historical connections were unimportant, only that they are elusive and, in the final analysis, less decisive than the political context of the framers. In discussing this context I shall first discuss the longstanding concerns that evolved over the second half of the eighteenth century and then the questions that were triggered by the incredibly rapid train of events in the summer of 1789.

The words "equal" and "free" in Art. 1 had very specific antonyms for the contemporaries. Inequality meant privilege, and privilege in turn meant mainly two things: unequal taxation and unequal access to civil and military office. The nobility and many other corporate groups enjoyed various forms of tax exemption that were widely seen as unfair. Although the nobles had originally been exempt as compensation for their duty to raise regiments for the King, their retention of that privilege when the duty was abolished was widely resented. Art. 13 is directed against this particular inequality. Unequal access to civil office was not strictly speaking based on privilege, since anyone with enough money could buy a position that the King put up for sale. The crucial fact, however, was that merit had little to do with the matter. By contrast, military office was a strict noble privilege. In fact, contrary to the general trend of the century access to higher military office became more

difficult for non-nobles around 1780. The second half of Art. 6 states a meritocratic principle that is inconsistent with access to office based on either wealth or privilege.

Being unfree meant being subject to arbitrary interventions and restrictions. For the contemporaries, four practices especially embodied this lack of freedom. Art. 7 is clearly directed against the infamous lettres de cachet by which the King might send a person to jail without due process and even without informing him about the reason. Second, the equally infamous cabinet noir of the King, which provided him by information about the kingdom by opening and reading private letters. Although some drafts of the Declaration specifically banned this practice, the final document does not. The practice of retroactive punishment is outlawed in Art. 8. Finally, the ban on torture stated in Art. 9 may also be seen as expressing a freedom-right.

As we can see from other Articles in the Declaration, these were not the only concerns of the framers of the Declaration, but they were the most burning ones. Protection of property is stated in Art. 2 and further elaborated in Art. 17. Freedom of worship and freedom of expression are stated in Art. 10 and 11. Violations of these rights occurred routinely in the ancien régime, but they did not generate equally violent feelings as those I discussed previously.

These were some of the background conditions for the adoption of the Declaration. I now turn to the more immediate triggers. A series of events from June to October of 1789 shaped the Declaration in at least three ways. First, and probably most important, they raised the general political temperature to a point where a radical statement became possible. Second, they may have shaped specific articles in the Declaration. Third, the events forced the King's reluctant acceptance of the Declaration.

This is not the occasion to present even a thumbnail sketch of the opening stages of the French Revolution. I shall have to take many things for granted, and simply mention a few events that seem especially important from my perspective here. The first were the defeats of the King on June 23 and especially on July 14 that must have contributed immensely to the self-confidence of the deputies in the Constituent Assembly. The humiliation of the King could be the source

of the insistence in Art. 3 that "no individual" can exercise an authority that does not come from "the nation". It is hard, however, to trace these links with any precision.

The events on the night of August 4th, when the Assembly "abolished the feudal regime", have a more direct relevance. What was destroyed on that occasion was partly all the innumerable forms of privilege and particularism in the ancien régime and partly a number of forms of exploitation of the peasantry. These decrees remind us of the fact that the "ancien régime" had many facets. First, there was the vertical relation between the royal administration and the subjects. Second, there was another vertical relation between the individual seigneur and the peasants over whom he exercised various forms of power. This relation was at the origin of the decrees following the night of August 4th – they were actually adopted on August 11 – since these were largely countermeasures to attacks by the peasants on the castles of the nobles. Third, there were a number of horizontal differences grounded in privilege. In addition to the tax exemptions for the nobles I referred to earlier, many cities, provinces and corporations had obtained privileges in one form or another. Whereas the vertical relations generated hatred, the horizontal ones caused envy. Both emotions were at work in these events.

To some extent, the decrees following the night of August 4th overlap with the Declaration that was voted on August 26. In fact, it has been claimed that the initiative to the decrees voted on August 11 was due to a desire to preempt the Declaration, which would be too abstract and general to satisfy the urgent demands of the people. The details are complex, and it would take up too much time to go into them all. I want only to mention one item, which shows the evolution of the minds in the two weeks separating the two votes. In Art. XI of the decrees of August 11 it is stated that "All citizens, without any distinction as to birth, can be admitted to all civil, ecclesiastic and military positions, with no derogation for any useful profession". The last clause refers to the principle of the Old Regime that nobles were not admitted to positions in trade or industry. In Art. 6 of the Declaration this touching concern for the rights of nobles has disappeared. The new formulation has an entirely abstract and general character.

Many of the drafts of Art. 6 that were proposed in the Assembly did contain the phrase “without any distinction as to birth” (sans distinction de naissance). The deputy Adrian Duquesnoy, who kept a vividly written journal during the debates, observed acutely that in using the phrase the opponents of privilege in fact consecrated the prejudice in favor of birth. Imagine that today one were to state in the Hungarian bill of rights the principle that “All citizens are admissible to public office, even those whose parents were members of the Communist party”. By affirming the irrelevance of ancestry, one would indirectly be affirming its relevance. This is an instance of what Paul Grice called “implicature”.

I shall cite two other examples of how the drafters of the Declaration tried to liberate themselves from language that would indirectly contradict it, in one case successfully, in another case not. On August 22, when the Assembly debated what was to become Art.10, on freedom of religion, one deputy asserted that “tolerance is the sentiment that ought to animate all of us in this moment”. To this statement Mirabeau replied vigorously that “I am not here to preach tolerance. The most unlimited freedom of religion is in my eyes such a sacred right that the word tolerance, which attempts to express it, seems to me to be tyrannical by itself, since the existence of an authority which has the power to tolerate is a violation of the freedom of thought by the very fact that it tolerate and hence might not tolerate.” The word does not occur in the Declaration.

Art. 14 of the Declaration states that the citizens have a right to “consent” to taxation. When the Declaration came up for a final debate before being incorporated in the 1791 constitution, Dupont de Nemours spoke out against this language, when he urged the assembly to “drop these expressions which still smack of despotism. ‘All citizens have the right to regulate and determine taxation’ – that is how it is and that it is how it ought to be said.” At this late stage, however, the members of the Assembly were reluctant to change their handiwork. Dupont was obviously right, however, in that the language of consent is intrinsically inappropriate. It suggests an up-or-down vote instead of the freedom of the assembly to adopt whatever level of taxation it deems best.

The adoption of the Declaration by the Assembly did not imply that it took effect immediately. Before it could do so, the King had to give his sanction. At this stage – August and September – it was still unclear whether he could refuse to do so. It was agreed that he would have a veto over ordinary legislation in the constitution, but not whether he had a veto over the constitution itself, including the Declaration and the decrees of August 11. He claimed that since he had called the assembly into being, he had the right to veto its decisions. The assembly claimed that as the King was to be part of the machinery of the constitution he could not be judge in his own cause. The conflict was resolved by violence. When rumors of counterrevolution combined with lack of grain led to a march on Versailles, the King capitulated and gave his unconditional assent to the Declaration. Needless to say, the story is more complicated, but this will have to do for my purposes.

In some of my other work I have tried to explain the interaction between “arguing ” and “bargaining” in the making of the first French constitution. The adoption of unicameralism and the decision to give the King a suspensive rather than an absolute veto, for instance, relied on both mechanisms. By contrast, the debates over the Declaration seem to have been chemically free of logrolling, threats and other bargaining devices. Nor did the particular interests of the three estates play a major role. The interests of the nobility would suffer, but not beyond what they had already accepted on August 11. The deputies from the clergy did on two occasions try to promote a religious perspective. First, some of them wanted to have the Declaration include duties, notably duties to God, and not merely rights. I shall say more about this shortly. Second, in the debates that led to the adoption of Art. 10 some deputies from the clergy wanted an explicit statement to the effect that religion was the basis for social life. Neither of these attempts led anywhere.

One might argue that in asserting the “sacred and inviolable ” right to property (§17) the Assembly was defending the interests of the third estate. This, I believe, would be a mistake. The interest in the protection of property was common to all three estates. Moreover, the Declaration seems to exclude the use of property as a

criterion for access to “public dignities, places, and employments” (§ 6). We shall see shortly, however, that matters are more complex. It remains true, nevertheless, that group interest played a very marginal role in the debates.

The debates were at times incredibly chaotic. Tocqueville writes that “The assembly passed two weeks, during which all of France was lost in the most fearsome anarchy and the public coffers were empty, losing itself in the detour of political metaphysics, in the midst of an indescribably confused discussion.” While true enough, the statement is a bit misleading. Many of the deputies were fully conscious that from a purely pragmatic point of view, other tasks were more urgent. Yet in retrospect their deliberate neglect of pragmatic concerns is part of what makes them so admirable. Also, there is a strong contrast, which Tocqueville does not highlight, between the language of the debates and that of the Declaration. The reason it has endured is that the deputies were able to ignore the clouds of verbal confusion and agree on simple, clear and strong statements.

This being said, I would like to add one observation. It is often said that a constitution is a chain or a tie imposed by Peter when sober on Peter when drunk. In a calm and reflective moment, framers can bind their successors to prevent them from yielding to the impulses of the moment. The same would presumably hold for a Declaration of rights, which enjoys at least constitutional status. It takes very little knowledge of the Constituent Assembly to see that this is a highly inaccurate picture. The members of the Constituent Assembly were passionate to the highest possible degree. They may have in fact have been drunk – “drunk with disinterestedness” as a biographer of one of them has written. Their emotions had the double effect of inspiring noble goals and of clouding their thinking about how best to realize them. It is impossible, I believe, to understand the debates in the Assembly without keeping these facts in mind.

I shall now turn to the substance of the Declaration. First, we may try to determine the subjects of the rights that are announced. The very name of the document, rights of man and of the citizen, suggests two different subjects. I shall

return to this shortly. First, however, we may note that Art. 15 also seems to suggest a collective subject, "society". This is probably a mere appearance. For "society", we should substitute the words of Art. 14, "all the citizens or their representatives". There was one point in the debates, however, at which the idea of a collective subject of rights was seriously debated. In an influential early draft by Sieyès he proposed, as the last article of the Declaration, the right of a people to revise its constitution at periodic intervals. The most commonly cited reason why in the end this proposal was not accepted is that the Assembly thought a clause of this kind belonged to the constitution itself. It is also possible, however, that the deputies wanted to retain a strictly individualistic conception of rights.

The relation between the Declaration and the constitution was certainly an important issue in the debates. In several cases there was disagreement whether a given clause belonged in the one or in the other, just as there was often disagreement whether a given proposal ought to be adopted as an ordinary law or as part of the constitution. There was also a sharp early disagreement between those who argued that as the basis for the constitution the Declaration should be adopted first and those who thought it ought to be adopted after the constitution. Among the latter, Malouet argued that an abstract Declaration of rights might create expectations that could not be satisfied. Could one tell people, he asked rhetorically, that they were free to dispose of their persons as long as compulsory military service was not abolished, or tell the poor that they had a right to public assistance before any law to that effect was in place? More generally, he said, "it is necessary that in a large empire those who are in a situation of dependence should perceive the just limits on natural liberty rather than its extension".

In his work The Socialist History of the French Revolution Jean Jaurès gave the classical Marxist response to Malouet's argument. He characterizes Malouet's prudence as "fruitless and even dangerous, for if the revolutionary bourgeoisie, out of fear of provoking the sleeping and passive proletariat, had hesitated to invoke the rights of man and to merge its own rights with those of humanity, it would have lost the strength it needed to fight against the

ancien régime." This claim, however, ignores the difference between teleology and explanation. Maybe a radical Declaration was necessary to move history forward, but to cite Marx, why might the bourgeoisie not "prefer to compromise with the vanishing opponent rather than to strengthen the arising enemy"? There may be a good answer to this question, but it is not found in historical necessity.

In a remarkable intervention on August 17 Mirabeau pursued an argument which was similar to Malouet's but more penetrating, when he distinguished between two different perspectives on the Declaration: "Truth commands us to say everything as it is, and wisdom suggests that we temporize. On the one hand, the force of justice pushes us to overcome timid considerations of prudence; on the other hand, the fear of exciting a dangerous fermentation alarms those who do not want to buy the good of posterity at the expense of the unhappiness of the present generation." He went on to warn that if one offered abstract rights to the people the risk was that "in a sudden onset of drunkenness it would go into a rage, turn the rights against itself, and then reject them with as much remorse as fright". It may or may not be too fanciful to see in these remarks a prescient anticipation of the Terror and the subsequent reaction, together with a recognition of the long-term value of the Declaration.

Let me return to the subjects of the declaration – man and the citizen. In this context, "man" meant "men and women". As we shall see, though, "citizen" did not mean "citoyen and citoyenne". I mention in passing a farcical "Déclaration des droits des citoyennes" from August 1789, which contains as one article the right for any woman to sell or give herself to whomever pleases her most or pays her the most. A more serious yet partly sarcastic "Déclaration des droits de la femme et de la citoyenne" was proposed by Olympe de Gouges in 1791, just before the adoption of the constitution. In the text, which was dedicated to Marie Antoinette, she presciently asserted the right of women to go the scaffold. These proposals had no impact, however, on the Declaration as we know it.

In the Declaration, it is hard to find any systematic distinction between the rights that are to be enjoyed by all human beings and those that are restricted to the citizens.

There are five articles in the Declaration that specify rights and, in two cases, duties in terms of citizens. If these were a strict subclass of human beings, it would follow that non-citizens do not enjoy the freedom of expression (§11), that they do not have to obey the law (§7), that they do not have to pay taxes (§13), that they do not enjoy the right to verify the necessity of taxes (§14), and finally that they cannot vote or be elected to public office (§6).

If all these implications were intended, the class of non-citizens would have to coincide with the class of minors, the mentally retarded and the insane. If the deputies wanted to deny the status of citizen to women - a question I shall discuss in a moment - the implications cannot have been intended. It would be absurd to exempt women from the duty to obey the law and strange to deny them freedom of expression. We must conclude that the members of the Assembly did not know exactly what they were declaring. The Declaration was adopted in a hurried and piece-wise manner, with little regard for terminological consistency.

In the draft he presented on July 21, Sieyès proposed for the first time in public a distinction that would become famous, between active and passive citizens. The latter, he writes, include "women, at least in the present state of affairs, children, and those who do not contribute anything to the upholding of the public establishment". When the category of active citizens was defined in the constitution of 1791, it was not even mentioned that they had to be male. That went without saying. By contrast, the constitution spells out in some detail the idea of "contributing to the public establishment". I shall return to this question. Here I only want to note that when the Assembly adopted Art. 6 and Art. 14, the deputies probably had in mind active citizens rather than all citizens. The reference to citizens in Art. 13 is somewhat ironic, since in fact the payment of taxes came to be used as one of the defining criteria for being an active citizen.

I have alluded briefly to the decision not to have the Declaration include or be supplemented by a declaration of duties. In the debates it was said over and over again that the Declaration itself implicitly contained the duty to respect the rights of others. Art. 4 in fact comes close to asserting this idea. Although it was also sometimes said that nothing

more was needed, the Declaration does in fact also refer to the duty to obey the law and the duty to pay taxes. Although the word "duty" is not used, the substance is clear enough. In the debates, nobody proposed other substantive duties, such as the duty to do military service, to do jury service, to accept elective office, or to vote. All of these are found in various modern political systems. The framers of 1789 believed for the most part that duties belonged in the constitution rather than in a preliminary declaration.

The triad of the French Revolution was "equality, liberty, fraternity" . There are no traces, however, of fraternity in the Declaration. In his drafts Sieyes also proposed to include a "right to assistance". In the most elaborate formulation he writes that "Each citizen who is unable to satisfy his needs or who cannot find work, has a right to the assistance of society, while subjecting himself to its orders". It has been suggested, however, that the motivation behind this proposal was not to promote fraternity, but rather to protect property, which might be endangered by a class of poor and unemployed individuals. We do not know for sure why the Assembly did not retain this idea. Perhaps the deputies agreed with Malouet that it would be dangerous to declare a welfare right of this kind without specifying a welfare-provider.

The Declaration has several things to say about the limits on rights. In Art. 4 it is said that the only limit to the exercise of rights is the enjoyment of the same rights by others. This formulation raises at least two problems. If Art. 4 is read in conjunction with Art.5, a third difficulty appears.

First, the relation between the exercise of a right and the enjoyment of the right is more complex than suggested by Art. 4. Consider the right of all New Yorkers to walk in Central Park. Simultaneous attempts by everybody to exercise this right are not compatible. Yet all New Yorkers can be said to have the right because, as a matter of fact, only a few of them will exercise it at any given time. To take a different example, the right to leave one's country could in theory be exercised simultaneously by all, although the result would be disastrous. One reason why people do not use the right is that they have it. A country that denied its

citizens the right to go abroad would be so repulsive that people would want to leave it.

Second, the statement that rights are limited only by the need to protect the same rights for others seems too narrow. If I want to smoke I have to go outdoors if my right to smoke is limited by the right of others to enjoy clean air. In a railway compartment, the rights of smokers are trumped by the rights of those who dislike smoke-filled air. I assume here that the right of smokers is limited by the specific and perceptible harm they inflict on specific individuals, who have the right not to suffer that harm. I shall consider a different case in a moment.

Finally, consider in conjunction the last sentence of Art. 4 and the first sentence of Art.5. Together, these imply that the set of actions that impede the rights of others are identically the same as those that are injurious to "society". I take the idea of harm to society to mean a loss in overall welfare. Consider in this perspective the harms caused by passive smoking. Except for people who live together, the problem is not that one smoker might cause a specific non-smoker to develop lung cancer, rather, each smoker causes a minuscule and imperceptible increase in the risk of cancer in others, and each non-smoker is the target of many such increases caused by smokers in her environment. In my opinion, the language of rights is not the best medium for understanding this problem. An act that harms others when and only when many people act in the same way is not a rights-violation. If I am right, the Declaration was wrong in identifying rights-violations and harm to society.

Some of you may disagree, on the basis that individuals have rights to certain goods and not merely the right to be protected from the harmful behavior of others. This idea is stated, for instance, in Art. 18 in the Hungarian constitution, according to which individuals have the right to a healthy environment. This article could certainly be used to justify a ban on smoking in indoor public settings. Even if this argument is accepted, however, the act of smoking a single cigarette would still not violate anyone's rights, if we disregard the discomfort of the smoke itself.

In Article 10, the exercise of freedom of religion is said to be limited by "the public order". No speaker in the debates specified how the manifestation of the freedom of religion

could “upset the public order”. Many found the phrase dangerously vague. It is relevant here that the Assembly debated this Article on August 22 and 23, just before the anniversary of the massacre of Saint Bartholomew on August 24 1572. Several speakers claimed to find an ominous coincidence in this fact, and reminded the assembly that the Spanish inquisition was established by law.

The limits on the freedom of expression stated in Art. 1 may simply be those that follow from Articles 4 and 5, especially if we ignore the restriction in Art.4 to the “same” rights. In the drafts of the Declaration proposed by Lafayette and Mounier, individuals were said to have a right to “protect their honor”. This right might obviously limit the freedom of expression. The fact that the final Declaration asserts the right to property but not the right to one’s reputation is significant. In Montesquieu’s phrase, honor is the principle of monarchies. Although he certainly did not assert that property is the principle of republics, this Marxist commonplace may, in this particular case, have some foundation.

The Declaration does, however however, also state some limits to economic rights. These may, for convenience, be separated into the rights of economic enterprise and the right to property. Several drafts of the Declaration, notably those of Sieyes, make eloquent statements of the principles of the free market economy, including bans on the guilds and similar associations. Anyone can make or sell anything he wants. In the final Declaration these ideas have been distilled down to their canonical form in Art.4. and Art. 5. Yet these articles are stated at a level of generality that makes it hard to understand exactly what might justify limits on the right of enterprise. The debates throw some light on this issue. Referring to some variant of the drafts proposed by Sieyes, the deputy Demeunier explained as follows why the “general interest” might justify “modifications” of the general economic freedoms: “Apart from the fact that the guilds will have to be abolished gradually [...], you will perhaps agree that inventors in the Arts ought to be given an exclusive privilege for a limited time. This privilege, which has no disadvantage, is an incentive [aiguillon] for industry. This example shows that

the general theory of the freedom to manufacture can suffer a limitation that is useful to industry itself." This important text misstates the issue, however. It is not a question of limiting economic freedom, but of creating intellectual property rights.

The limits to property rights are stated in Art. 17, which was a last-minute addition to the Declaration. As in Demeunier's argument, the idea is not that the exercise of the right might do harm, but that it might prevent good. Even the "sacred" right of property can be overridden by "public necessity", on condition of payment of a "just and prior indemnity". In the background of this article lurked the white-hot issues of compensation for the loss of feudal rights and for the foreseeable confiscation of church goods.

Let me mention two specific aspects of the question of the limit on rights. In the debates over the freedom of religion, the main question were the freedom of worship and the freedom from being disturbed on account of one's religious opinions. The background question were the rights of Protestant and of Jews vis a vis the dominant Catholic religion. In the debates nobody defended the rights of agnostics and atheists. Implicitly, perhaps, the deputies had in mind an idea that Tocqueville was to formulate as follows: what matters for society is that the citizens practice some religion, not a particular religion or the same religion. In this perspective, the right to deny the existence of God would not violate anyone's rights, but it would constitute a harm to society. But these are speculations on my part.

The question has been asked whether Art.4 authorizes suicide. Read in isolation, it might seem to do so. We might ask, nevertheless, whether Art. 5 points in a different direction. The question is linked to the question whether the Declaration ought to include duties that traditionally fell in three categories: duties towards God, towards others, and towards oneself. As Kant argued, suicide might be seen as a violation of the last duty. To my knowledge no Declaration or Bill of Rights affirms the right to suicide.

In this talk I have tried to explain the historical background for the Declaration and to unravel its analytical structure. In the talk I shall give in Warsaw next week I shall begin by discussing the criticism by Bentham of the Declaration as a form of higher nonsense. I shall then discuss the charge

made by Mirabeau and Robespierre that the Assembly was guilty of massive hypocrisy when it proceeded to ignore the implications of the Declaration for the issues of slavery and poverty. Furthermore, I shall compare the Declaration with some later documents, beginning with the American Bill of Rights and ending with the new constitutions that were adopted in Eastern Europe after 1989. Finally, I shall make some general comments on the Declaration from a normative perspective.